

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2012-000073

08/28/2014

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
A. Quintana
Deputy

KENNETH & SHARI MEYER TRUST, et al.

ERIC L JOHNSON

v.

ARIZONA DEPARTMENT OF REVENUE

SCOT G TEASDALE

UNDER ADVISEMENT RULING

Plaintiff's Motion for Summary Judgment, filed January 16, 2014 and Defendant's Cross-Motion for Summary Judgment, filed March 11, 2014, are both pending. The court heard and benefitted from oral argument on both motions on August 18, 2014.

At issue is whether a finding by an Administrative Law Judge that attorney's fees under A.R.S. §42-2064 were not appropriate, is erroneous. A.R.S. §42-2064 allows reimbursement of the attorney's fees incurred by a taxpayer in cases where "the department's position was not substantially justified."

The Court first disagrees with Plaintiffs' assertion that the Department acknowledged its action was not "substantially justified" by declining to appeal the ALJ's decision. That the losing party decides the game is no longer worth the candle does not render its position unjustified. While the Court is not aware of any appellate interpretation of "substantially justified" under this particular statute, the term arises and is defined in an identical context in A.R.S. § 12-349, which has been extensively analyzed. There, the party seeking fees must demonstrate that the opponent's position was groundless and not made in good faith. *See Barkhurst v. Kingsmen of Route 66, Inc.*, 234 Ariz. 470, ¶ 23 (App. 2014). The Court sees no reason to attach a different meaning to the term here. The Court finds nothing in the record to indicate either groundlessness or lack of good faith on the part of the Department.

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The Court also disagrees with Plaintiffs' position that the Department conceded the appropriateness of the fees by failing to deny their claim within thirty days. A.R.S. § 42-2064(C) states, "The taxpayer problem resolution officer shall determine the validity of the fees and other costs within thirty days after receiving the itemization." The statute says nothing about what happens if he does not issue a decision within that time. Presumably, mandamus relief would be available. But in a mandamus action, the courts are limited to ordering the responsible official to perform his legal duty; they cannot compel him to perform that duty in a certain way. *Arizona State Highway Comm. v. Superior Court*, 81 Ariz. 74, 77 (1956); *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465 ¶ 12 (App. 2007). Section 42-2064(D) requires that the Department pay within thirty days of demand "the fees and other costs awarded." But here, no fees or costs have been awarded. Certainly the Court deplors the delay plainly not envisaged by the statute. But it cannot impose a sanction that the law does not provide for.

Accordingly,

IT IS ORDERED denying Plaintiff's Motion for Summary Judgment, filed January 16, 2014 and granting Defendant's Cross-Motion for Summary Judgment, filed March 11, 2014.