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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000518 10/19/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

CITY OF PHOENIX MICHAEL R SCHAFFERT

v.

ACTUATE CORPORATION DANIEL T GARRETT

MINUTE ENTRY

The Court took this matter under advisement following oral argument on September 20, 2011. The Court has considered Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment and finds as follows.

Section 14-100 of the Phoenix Tax Code defines terms "for the purposes of this Chapter," that is, Chapter 14. This section does not contain an exception along the lines of "unless otherwise stated"; thus, its definitions must apply throughout Chapter 14. "Sale" is defined relevantly as "any transfer of title or possession, or both," while "licensing for use" is defined as an "agreement [that] does not qualify as a sale." Neither of these definitions excludes computer software. If Reg. 14-115.1 does indeed require, as it appears to, that transfer of both title and possession must occur to constitute a sale of computer software, it conflicts with the Code section. An administrative regulation out of harmony with the statute it purports to apply cannot stand. *Fullen v. Industrial Comm.*, 122 Ariz. 425, 428 (1979). The City attempts to get around this by arguing that 14-115.1 is not an administrative regulation, but a legislative regulation enacted by the same City Council that enacted all the Chapter 14 Code sections. Under this theory, a legislative regulation is just an ordinance under another name, with the same rules of priority that apply to identically-labeled ordinances, including the rule that the specific prevails over the general.

This fails to explain why the City Council made the distinction at all. The Court must assume that, in enacting 14-115.1 as a "regulation," the City Council meant for it to be in some manner different from those provisions it enacted as "sections." The obvious conclusion is that it intended for it to be treated in the normal manner of regulations, subordinate to Code sections. This conclusion is strengthened by the fact that it has maintained the distinction in light of *City of Phoenix v. Paper Distributors of Arizona, Inc.*, 176 Ariz. 416, 419 (Tax 1993), *rev'd in part on other grounds*, 186 Ariz. 564 (App. 1996), which held that the Chapter 14 regulations are not on an equal footing with the Code sections. *Paper Distributors* was handed down nearly eighteen years ago, and this holding was not appealed. Yet the City Council, plainly on notice that 14-115.1 is treated by the courts as subordinate to conflicting Code sections, did not correct the situation as it very easily could have done by adopting it as a Code section of its own or otherwise specifying that it was to have the effect of a Code section; *compare Lincoln Property Co. v. City of Tucson*, 131 Ariz. 473, 476 (App. 1982). This inaction strongly indicates acquiescence, which, if not manifestly erroneous, will not be disturbed. *Long v. Dick*, 87 Ariz. 25, 29 (1959). The Court finds nothing manifestly erroneous in treating this "legislative regulation" as equivalent to any other regulation. It therefore must yield to the definition of "sale" contained in Section 14-100.

The Court is also concerned that the City has been at best indifferent to whether big-box retailers, also transferring possession but not title to software, report these transactions as "sales" or as "licensing for use." At oral argument, counsel for the City conceded that big-box transactions are indistinguishable from Actuate's in that in both only possession is transferred. But the City's position appears to be summed up by a heading in its reply, "It Makes no Difference How Most Software Is Sold," apparently because the big-box stores are subject to an equal tax under another section. If the transactions are identical, they must be taxed identically. That the big-box sellers are subject to tax however the transactions are treated does not mean the transactions can be treated as sales for them but as licensing for use for Actuate.

Because possession, though not title, transferred, the transactions in question are properly classified as "sales," and perforce are not "licensing for use."

Based on the foregoing, as well as the arguments of Defendant,

IT IS ORDERED denying the Motion for Summary Judgment of Plaintiff City of Phoenix, filed June 8, 2011.

IT IS FURTHER ORDERED granting Defendant's Cross-Motion for Summary Judgment filed July 13, 2011.

IT IS FURTHER ORDERED directing Defendant to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs within thirty (30) days of the filing date of this minute entry.

Arizona Tax Court
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