

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2014-000444

11/05/2019

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

B S I HOLDINGS L L C

CHRISTOPHER T RAPP

v.

ARIZONA DEPARTMENT OF
TRANSPORTATION, THE

BENJAMIN H UPDIKE

UNDER ADVISEMENT RULING

After remand from the Arizona Supreme Court, the parties competing motions for summary judgment are fully briefed and pending. The Court benefited from oral argument on the motions on October 17, 2019.

A.R.S. §28-8336 imposes a tax on nonresident aircraft owners equal to .1% of the fair market value of the airplane. To be subject to this tax, the aircraft must not be engaged in any intrastate commercial activity and must be “based in this state for more than ninety days but less than two hundred ten days.” At issue is the method of calculating how many days such an aircraft is based in Arizona.

The parties previously argued the meaning of the word “day” in A.R.S. §28-8336. This Court resolved that dispute in BSI’s favor. The Court of Appeals reversed, accepting ADOT’s definition of “day.” The Supreme Court recognized the relativity of the word “day,” and its dependence on the concept of being “based in” Arizona.

The Arizona Supreme Court vacated the Court of Appeals opinion, noting that:

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The context in which “day” is used is when an aircraft is “based in” Arizona. “Based in” is also statutorily undefined and nebulous, and neither the parties, the tax court, nor the court of appeals provided significant analysis of this phrase. Determining the meaning of the word “day” thus cannot dispose of the issue in this case because the statute cannot be meaningfully applied without also knowing what “based in” means.

BSI Holdings, LLC v. Ariz. Dept. of Transportation, 244 Ariz. 17, 21 ¶19 (2018).

The case was then remanded “to determine the meaning of the term “based in” under § 28–8336, and then to determine how many days the aircraft was based in Arizona for tax purposes for the relevant period.” *Id.* at ¶24. Justice Bolick noted:

If at the end of the day¹, having exhausted other statutory construction tools, the tax court determines the statute is still ambiguous, it should construe it in favor of the taxpayers ... (because) ... [t]ax statutes should provide clear notice of obligations so that taxpayers may comply and order their affairs accordingly. ... Although the legislature is best-positioned to define these terms, if the courts do so, we must as best we can make sense of the statutory scheme in its entirety before calling it a day.^{1”}

Id. at ¶25 (footnotes added and citations omitted).

“The primary rule of statutory construction is to find and give effect to legislative intent.” *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n of Ariz.*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). To determine that intent, we look first to the language of the statute, and we presume that the legislature has said what it means. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). Only if the legislative intent is not clear from the statute do we consider other factors such as the statute's context, subject matter, historical context, effects and consequences, and spirit and purpose. *Wyatt v. Wehmuller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991).

The intent of the legislature in using the terms “based in” and “days,” and how it intended that those terms work together, is not made either clear or unambiguous from a simple reading of the words in the statute, as demonstrated by the differing views on the meaning of the words by the ten judges who have written or concurred with the three opinions/orders in this case.

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Neither “day” nor “based in” are defined terms in the statutory scheme for taxing airplanes. Where terms are not defined in a statute, courts turn to their ordinary meaning, sometimes using dictionary definitions. *Rigel Corp. v. State*, 225 Ariz. 65, 69 ¶19 (App. 2010). As our Supreme Court pointed out, dictionary definitions of the word day do not make the legislative intent clear. *BSI*, 244 Ariz. at 21, ¶14.

Our Supreme Court discussed the dictionary definitions of “base” at some length:

“Base” is generally defined as “that on which something rests for support; foundation.” *Base*, Webster’s New International Dictionary 225 (2d ed. 1944); *see also Base*, Webster’s II New College Dictionary 92 (1995) (defining base as “a fortified center of operations”). Used as a verb in legal parlance, it means “[t]o take up or maintain one’s headquarters” or “to have one’s main place of work in a particular place.” *Base*, Black’s Law Dictionary (10th ed. 2014). Those definitions imply more of a domiciliary analysis rather than physical presence alone. *Cf. DeWitt v. McFarland*, 112 Ariz. 33, 33–34, 537 P.2d 20, 20–21 (1975) (establishing the domicile requirements for income tax purposes and that “one is never without a domicile somewhere”). Indeed A.R.S. § 28–8341(C), another aircraft tax statute, defines “maintenance aircraft” as one “that is not based in this state but that is present in this state solely for the purpose of maintenance, repair or servicing at a federal certified maintenance facility.” That language suggests that “based” has a more technical meaning that is different than, and more than, mere physical presence. However, because “base” may have a technical meaning in this statutory or factual context, on the record before us we cannot determine its meaning and therefore cannot fully resolve the case without further proceedings.

Id. at 21, ¶22.

The common dictionary definition of “base,” suggests “more of a domiciliary analysis rather than physical presence alone.” This does not leave the terms’ meaning any less nebulous. It might imply a “totality of the circumstances” standard, as urged by ADOT. The manner in which ADOT has historically applied such a standard, however, is neither clear nor consistent. It seems to have been a purely subjective decision made by very experienced auditors who apply standards which have not ever been reduced to writing or published.

The ambiguity of “based in” is further demonstrated by the different meanings ADOT itself has urged over the lifespan of this case. Originally, ADOT urged that an airplane was “based in” Arizona every single day in which it touched down within the state, even if only momentarily. On remand, it has abandoned that argument in favor of a multifaceted analysis which attempts to

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mirror the concept of domicile requirements for income tax purposes. If ADOT doesn't define "based in" in a consistent manner, how can a taxpayer have a clear notice of its obligations so that it may order its affairs accordingly.

The meaning of the terms is not made more clear by taking a ten-thousand-foot view of the statutory scheme in place for taxation of airplanes in Arizona.² A.R.S. §28-8324(A) requires payment of the license tax before the aircraft is registered, and A.R.S. §28-8330 imposes a lien, superior to all other non-tax liens, on unpaid license tax and penalties. From these statutes it seems that the legislature intended to bring within the scope of the tax a substantial percentage of potentially covered aircraft. On the other hand, A.R.S. §28-8322(B) allows a nonresident to base her aircraft in the state for up to ninety days per calendar year without paying tax. Where the legislature intended to draw the line - between taxing every airplane which touches down in Arizona for even a second and allowing aircraft to temporarily visit Arizona (and to allow its passengers to spend taxable income here) without danger of taxation on the aircraft - is not clear from the statutory scheme.

The Court sees no reason to assume that the legislature intended to ascribe some technical meaning to "based in." The statutory text does not identify any particular criteria an aircraft would have to meet to be considered based in, or not based in, Arizona. Legislative documents are not available for S.B. 1364, a lengthy collection of unrelated amendments and additions to Title 28 entitled simply "Transportation Code Revision."

Having applied every tool of statutory construction available to determine what the legislature intended when it used the terms "day" and "based in," and how it intended those concepts to interact, the Court must conclude that the terms are ambiguous. Having so determined, the Court follows the instruction of the Supreme Court and construes the terms in favor of the taxpayer.

ACCORDINGLY, BSI's Motion for Summary Judgment is **granted** and ADOT's Motion for Summary Judgment is **denied**.

² As the Supreme Court noted, "[t]he statutes' purpose of generating fees from users does not dictate a clear outcome."