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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2014-000129 06/01/2015

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
A. Quintana
Deputy

SOLARCITY CORPORATION, et al.

PAUL J MOONEY

v.

ARIZONA DEPARTMENT OF REVENUE

KENNETH J LOVE

COURT S RICH
BARRY C SCHNEIDER

UNDER ADVISEMENT RULING

The Plaintiffs' Motion for Summary Judgment and the Defendant's Cross-Motion for Summary Judgment are both pending and fully briefed. The Court benefited from oral argument on April 29, 2015.

Solar energy equipment, if taxable, has been placed by the legislature in one of two categories. If it satisfies the requirements of A.R.S. § 42-14151(B), then it is treated as an electric generation facility and is centrally assessed by the Department under A.R.S. § 42-14155(B). Otherwise, it is ordinary property assessed by the county assessors pursuant to A.R.S. § 42-13051(A).

Section 14151(B) defines "generation of electricity" as "the process of taking a source of energy … and converting the energy into electricity to be delivered to customers through a transmission and distribution system." The logic required to apply this definition to Plaintiffs, or to the individual lessees or owners, is tortured. Even if the utility is considered the "customer" for the electricity, the system owners do not deliver it to the utility *through* the transmission and distribution network; instead, they transfer the electricity to the meter, where the utility receives it and begins to deliver it to its customers through its own transmission and distribution network. Thus, these solar devices are not within the category of "solar generation facility" to be centrally valued by the Department. They are general property to be valued in the usual course by the county assessors.

The above analysis presupposes that solar devices are taxable. There is no constitutional or statutory provision exempting solar devices, or any subclass of them, from otherwise applicable taxes. Plaintiffs cite A.R.S. § 42-11054(C)(2) in support of their argument. But that statute creates no classification. It is a *valuation* statute. Valuation is distinct from classification, and is normally left to the department and the county assessors. *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291 ¶ 8 (2004); *Berge Ford, Inc. v. Maricopa County*, 172 Ariz. 483, 485 (Tax 1992). For the legislature to intervene in valuation determinations is highly unusual.

In its original form, A.R.S. § 42-11054(C)(2) overrode the customary definition of "standard appraisal methods and techniques" with respect to devices "designed for the production of solar energy for on-site consumption," declaring that such devices "add no value to the property" to which they are attached. This was problematic enough. The legislature may choose not to tax certain kinds of property, but may not exempt otherwise taxable property from taxation. *Airport Properties v. Maricopa County*, 195 Ariz. 89, 101 ¶ 43 (App. 1999). The distinction is that an exemption "implies a discrete exception to the general rule of taxation, carved out of a category or categories that would otherwise be subject to uniform taxation." *Id.*, ¶ 42. Section 11054(C)(2) accomplishes its result, not by directly excluding the value added by qualified solar devices from taxation, but by declaring such value to be zero. This is a distinction without a difference: whether no tax is assessed or a tax is assessed on a value of zero, the result is zero tax. The very existence of § 11054(C)(2) presupposes the legislature's understanding that, but for it, the increased value would be taxable under either § 14155 or the general taxation statutes. It therefore constitutes a prohibited exemption.

In 2009, the legislature made two amendments to § 11054(C)(2). First, a value of zero was assigned not only to the increase in value of the property on which solar devices were installed, but to the devices themselves. Second, the word "primarily" was inserted before "on-site consumption," opening the door to the production and sale of excess capacity from retail users. In the process, the legislature breached the non-exemption clause even more egregiously, exempting not just a hypothetical increase in the market value of the property, but equipment with a present market value.

As amended, A.R.S. § 11054(C)(2) also violated the uniformity clause in two ways. The legislature has the power to classify property, subject to the constitutional requirement of uniformity. *In re America West Airlines, Inc.*, 179 Ariz. 528, 531 (1994). The uniformity clause requires two things. Classifications must be based on some real difference in the nature, use, utility, or productivity of the property. *Id.* at 535. Similar property used in the same industry for the same purpose may not be taxed differently based on characteristics of its owner such as his size, wealth, or location. *Id.* In addition, once property is classified, the rate must be uniform

upon all property of the same class. *Apache County v. Atchison, Topeka & Santa Fe R. Co.*, 106 Ariz. 356, 359 (1970). As a corollary, the government may not systematically and intentionally use different rules for valuing property of the same class if great inequality results. *Pima County v. American Smelting & Refining Co.*, 115 Ariz. 175, 177 (App. 1977). The legislature therefore may not enact special rules to value certain properties within a class at zero while taxing other similar property.

Section 14155(C)(3), enacted alongside the original version of § 11054, distinguishes between renewable (including solar) energy equipment producing electricity not intended for self-consumption, taxed at twenty percent of its depreciated cost, and equipment producing electricity for self-consumption, which is not made subject to that tax or any other. Whether or not the distinction is constitutional, the Court has already determined that § 14155 does not apply to equipment leased by Plaintiffs. Furthermore, § 14155 does not track the amended version of § 11054(C)(2), which distinguishes between equipment producing electricity "primarily" intended for self-consumption and other equipment. As a result, within § 14155's class of equipment producing electricity not for self-consumption, there are effectively two tax rates: zero for equipment meeting the "primarily" standard and twenty percent of depreciated cost for other equipment, clearly a great inequality. This violates the uniformity clause.

To illustrate an additional problem created by the amendment which inserted the word "primarily," consider three houses, similar in every material way, each with solar equipment produced by Plaintiffs. Houses A and B have identical solar devices installed, each producing 120 kWh. The average consumption of house A is 100 kWh; since the 120 kWh output of the system is no more than 125% of that figure[1], the system qualifies for § 11054(C)(2) treatment. House B is thriftier, using only 80 kWh; but since 120 kWh is 150% of its consumption, house B does not qualify, even though the equipment is absolutely identical to and produces exactly the same amount of power as that on house A. House C has a system comprising two of the devices used on the other houses, producing 240 kWh, but it consumes 200 kWh. Because the system output is no more than 125% of consumption, it qualifies for § 11054(C)(2) and has a value of zero, even though it is twice as costly as House B's system and sends exactly the same amount of power, 40 kWh, to the grid. Thus, systems with the same nature, use, utility, and productivity are taxed at different rates solely because the buildings on which their owners have placed them use different amounts of electricity. This is not an isolated flaw. It is inherent in the legislative decision in amended § 11054(C)(2) to exclude a device from taxation based on the amount of electricity used by the building on which the device is installed.

[1] The 125% figure is the one currently used, based on the Corporation Commission's interpretation of "primarily." The illustration would be equally valid using any arbitrary number.

It might be argued that § 11054(C)(2) implicitly creates its own classification, consisting of property meeting its requirements. But *America West Airlines, supra* at 534, categorically forbids the courts from inferring classifications the legislature has not expressed. Moreover, while there may be a permissible distinction between systems producing electricity solely for self-consumption and systems producing more than that quantity (a distinction made in § 14155), no rational distinction can be drawn between systems producing electricity for resale whose total output does not exceed 125% (or any percentage greater than 100%) of average use by the buildings on which they are installed and identical systems producing electricity for resale in greater quantities. The amount of electricity used by a building is a factor completely independent of the solar devices installed on it, and so cannot be the basis of a classification.

The Court therefore finds for Plaintiffs, that A.R.S. § 42-14151 *et seq*. do not apply to Plaintiffs, and finds for Defendant, that A.R.S. § 42-11054(C)(2) violates the Arizona Constitution.

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