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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2013-000017 12/12/2013

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

JONES OUTDOOR ADVERTISING INC — JAMES M SUSA

v.

ARIZONA DEPARTMENT OF REVENUE — JERRY A FRIES

HADAR LEE AVRAHAM
BENJAMIN H UPDIKE

UNDER ADVISEMENT RULING

The Court took Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment under advisement following oral argument on December 5, 2013. Upon further consideration, the Court finds as follows.

A.R.S. § 42-5071(A) subjects to tax revenue from "the business of leasing or renting tangible personal property for a consideration." The statute enumerates eight categories to which the tax does not apply; neither billboards specifically nor advertising in general can be found in that list. Section 5071 was originally enacted (under a different number) in 1988, after the repeal of the tax on advertising in 1986, and reenacted as part of the recodification of Title 42 in 1997; this statute must be considered the most current expression of legislative intent. The grant of a tax exemption is construed strictly against the exemption. *Brink Elec. Const. Co. v. Arizona Dept. of Revenue*, 184 Ariz. 354, 358 (App. 1995). Where the statutory language itself confers no exemption, the Court must not find one by a mere implication, especially a decades-old one. Thus, if Plaintiff's business constitutes leasing or renting tangible personal property (it acknowledges that it does receive consideration), it is subject to tax notwithstanding the 1986 repeal of the specific tax on advertising.

Arizona Dept. of Revenue v. Arizona Outdoor Advertisers, Inc., 202 Ariz. 93 (App. 2002), while generally instructive, does not address the primary question presented here, which is the nature of the transaction between the billboard owner and the advertiser. Other Arizona

case law applies the concept of leasing or renting to washing machines and tanning beds. Arguing whether a billboard is more like one or the other risks degenerating into theater of the absurd; plainly, it resembles neither of them, either in physical appearance or in function. But the Court believes that the relationship between Plaintiff and the advertisers with respect to the billboards can be fairly described as leasing or renting, as defined by *State Tax Comm. v. Peck*, 106 Ariz. 394, 396 (1970). It may be true that the advertisers are prohibited from setting foot on the billboards. Physical occupancy by a human being, however, is not what is leased; what is leased is the surface for display of the advertiser's message. *Peck* involved a similarly, if somewhat less, limited rental: while the customer would necessarily have to have been granted access to enough of the property to insert his clothes into the washing machine, he was not free to remove the washing machine and occupy the floor space for a purpose other than doing laundry. There may also be some degree of vetting by Plaintiff of an advertiser's message. But plainly, the message as approved by Plaintiff must still satisfy the advertiser, else he would not have the message erected at all (or, more likely, would have his original message erected by someone less demanding); the message is in no sense Plaintiff's. In *Peck*, the Supreme Court found it determinative that "customers have an exclusive use of the equipment for a fixed period of time and for payment of a fixed amount of money," *id*. Replace "equipment" with "display surface," and the situation here is identical. Once Plaintiff has attached the vinyl (or installed the washing machine), the advertiser has exclusive use of the surface (washing machine) for the duration of the lease period. *Accord*, *Arizona Outdoor Advertisers*, *supra* at 94 ¶ 2 (describing billboard as "leased" by advertiser). This is in contrast to the tanning beds addressed in *Energy Squared, Inc. v. Arizona Dept. of Revenue*, 203 Ariz. 507 (App. 2002). There, the Court of Appeals found that the level of control exercised directly over the customer's use of the equipment at the time of use – whether a tanning session could be commenced at all, how long it could last, and "significantly" which particular tanning device was appropriate – negated the "exclusive use and control" by the customer necessary to fall under the statute. *Id*. at 510 ¶ 22. Such a level of control is not present for a billboard. Plaintiff might make suggestions as to which available locations would be most effective, but those would be no more than suggestions, and once the vinyl is attached, it normally sits there unacted-upon until time to remove it.

Turning to the billboards located on land owned by Plaintiff, here *Arizona Outdoor Advertisers* is on point, but does not resolve the question. (Plaintiff appears to acknowledge that billboards located on land owned by others is personalty.) To determine whether those billboards are realty or personalty, the Court would have to employ a reasonable person test, *id*, at 100 ¶ 38. However, it is apparently not necessary to reach that issue. At oral argument, Plaintiff's counsel acknowledged that the billboards on owned land constitute only an incidental, indeed the least profitable, part of its core business, the billboards on leased land. *See City of Phoenix v. Arizona Rent-A-Car Systems, Inc.*, 182 Ariz. 75 (App. 1995).

IT IS ORDERED Plaintiff's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED Defendant's Cross-Motion for Summary Judgment is granted.

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 (if applicable) by January 17, 2014.