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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA PUBLIC SERVICE COMPANY, *Plaintiff/Appellee*,

v.

CITY OF SAN LUIS, *Defendant/Appellant*.

No. 1 CA-TX 16-0009
FILED 8-3-2017

Appeal from the Superior Court in Maricopa County
Nos. TX2014-000005
TX2014-000404 (Consolidated)
The Honorable Christopher T. Whitten, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Donn Kessler[1] delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kenton D. Jones joined.

K E S S L E R, Judge:

¶1 Appellant City of San Luis ("City") appeals the summary judgment in favor of Appellee Arizona Public Service ("APS"). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In December 2007, the City passed Ordinance No. 253 with an effective date of April 1, 2008. Ordinance No. 253 amended the City's tax code by increasing the tax rate on most activities from 3.5% to 4% and by adopting Model City Tax Code ("MCTC") Model Option 13. MCTC Model Option 13 repealed a tax credit offset for franchise fees paid by public utilities under the old tax code. APS is the only taxpayer affected by the City's adoption of Model Option 13 and the repeal of the franchise fee offset. The City did not send notice to either the League of Arizona Cities and Towns ("League")[2] or the Municipal Tax Code Commission ("Commission")[3] of its adoption of Ordinance No. 253.

¶3 The City conducted a sales tax audit of APS for the period of October 1, 2008 through July 31, 2012 ("Audit Period"). As a result of the audit, the City determined APS had calculated its utility services tax

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[1] The Honorable Donn Kessler, Retired Judge of the Arizona Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] The League is a voluntary membership organization of incorporated municipalities in Arizona. *League of Arizona Cities and Towns*, http://www.azleague.org/index.aspx?NID=27 (last visited July 28, 2017).

[3] The Commission reviews and comments on proposed amendments and modifications to the MCTC. *See* Ariz. Rev. Stat. §§ 42-6052, 42-6053 (2014).

liability using the repealed franchise fee tax credits; continued to use the repealed governmental transaction exception; and did not collect tax on utility sales to customers in areas that had been annexed to the City. The City issued a Summary of Sales Tax Audit ("Assessment") to APS and found APS liable for additional sales taxes, penalties, and interest in the amount of $1,283,391.91. APS timely protested the Assessment. The Assessment did not include the tax increase from 3.5% to 4% because APS had already paid that amount.

¶4 The Municipal Tax Hearing Office ("MTHO") granted in part and denied in part APS's protest of the Assessment. The MTHO found that Arizona Revised Statutes ("A.R.S.") section 42-6053 (2014)[4] did not require the City to notify either the Commission or the League of its adoption of MCTC Model Option 13 because the adoption of a Model Option is not a rate change within the meaning of the statute. Additionally, the MTHO held that APS's reliance on the League's version of the tax code did not give rise to equitable estoppel as to the City. However, the MTHO also found the City did not make its estimates of APS's tax liability for the newly-annexed areas on a reasonable basis and accordingly abated the portions of the Assessment relating to sales in newly-annexed areas. Finally, the MTHO held that APS showed reasonable cause for its failure to pay the privilege tax to the City and waived the penalty against APS.

¶5 Following the MTHO decision, APS lobbied the Arizona Legislature to amend A.R.S. § 42-6053 to retroactively impose notice requirements. The Legislature passed Senate Bill 1331, 51st Leg., 2nd Reg.

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[4] We cite the current version of statutes unless changes material to this decision have since occurred.

Sess. (Ariz. 2014) ("SB 1331"), which would have invalidated Ordinance No. 253.[5]

¶6 APS and the City filed separate complaints in the tax court, which were consolidated. APS's complaint appealed the MTHO decision as to the franchise tax credit and asked the tax court to reverse the MTHO on the credit issue and abate the Assessment in full. The City's complaint appealed the MTHO decision to the extent it had reduced the Assessment of APS for unpaid taxes. The parties later settled all issues other than the repeal of the franchise fee tax credit.

¶7 On motions for partial summary judgment, the tax court held that the Assessment was not barred by SB 1331. The court found that the bill's retroactive application of the amendments to A.R.S. § 42-6053 created an unconstitutional special law because it applied to an inelastic closed class of municipalities that had failed in the past to satisfy the statutory requirements. The court stated that it was irrelevant whether the City was the only member of this class, as "[i]t is the closed nature of the class, not its population, which renders the class inelastic."

¶8 The tax court then ruled for APS on a second set of summary judgment motions, holding the City violated APS's due process rights by applying Model Option 13 to APS.[6] The court found the City's tax code on file with the City Clerk through April 2013 included the franchise fee credit. It also found the League's master version of the MCTC, and

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[5] SB 1331 required changes to the MCTC to be reflected in the official copy on file with the Arizona Department of Revenue ("ADOR") within ten days of the Commission's approval. 2014 Ariz. Sess. Laws, ch. 121, § 1 (2nd Reg. Sess.). It also required cities and towns imposing a new or different tax rate to notify the Commission and ADOR. *Id.* Failure to include the changes in the official copy on file with ADOR made any changes void as did failures to notify the Commission and ADOR. *Id.* The Legislature made SB 1331 retroactive to July 1, 1988. *Id.* at § 3. The City then passed a new ordinance readopting the 2007 changes and provided notice to ADOR, the Commission, the Model City Tax Commission, and the League in June 2014.

[6] The court did not invalidate the tax rate increase from 3.5% to 4% adopted in Ordinance No. 253 because it was reflected in the tax code.

ADOR's official copy of the MCTC included the franchise fee credit.[7] The court rejected the City's arguments that its procedure for updating the tax code was simply to attach copies of ordinances to the back of the code and that taxpayers "bore the burden of reviewing those additional ordinances even if they conflicted with the language in the body of the tax code itself." It noted that the 2011 edition of the tax code did not have ordinances attached at the end, reflected the 4% tax rate adopted by Ordinance No. 253, and reflected later changes to the code, but still contained the franchise fee credit. As the tax court explained, the City violated due process because while Arizona law does not require ordinances to be formally published before going into effect, their "existence must at least be made reasonably knowable. Under no circumstances may a city officially publish an incorrect version of its tax code and then attempt to punish a taxpayer for following that code." Accordingly, the court granted summary judgment for APS on the franchise fee credit issue. As the due process issue completely resolved the case, the court denied both motions on equitable estoppel as moot. The court awarded APS a tax credit or offset for "all franchise fees paid by [APS] to the City . . . , and the tax credit or offset results in the abatement of the City['s] assessment of transaction privilege taxes and interest for that audit period."

¶9 The City timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-170(C) and 12-2101(A)(1).

DISCUSSION

¶10 On appeal, the City argues the tax court erred in holding that the repeal of the tax credit violated due process. APS did not file a notice of cross-appeal, but attempts to argue as a cross-issue that the tax court erred in holding the retroactivity provisions of SB 1331 constituted a special law. APS also has affirmatively waived equitable estoppel as an alternative ground for affirmance. Because we affirm the tax court's ruling on due process grounds, we need not and do not decide whether APS properly preserved the question of whether the tax court erred in holding SB 1331 unconstitutional.

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[7] The court found the City did not report Ordinance No. 253's passage to either the League or the Commission, and the MCTC thus continued to reflect that the City allowed the franchise fee credit.

¶11 We review a grant of summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the non-prevailing party. *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 350, ¶ 8 (2016) (citations omitted). "We must determine whether there is a genuine issue of material fact, and if not, whether the trial court correctly applied the substantive law." *HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 363, ¶ 7 (App. 2001) (citation omitted).

¶12 It is undisputed that the 2011 version of the City's tax code sent to APS by the City Clerk and maintained by the City Clerk during the Audit Period does not reflect the repeal of the franchise fee credit. It is also undisputed that, during the Audit Period, the versions of the MCTC maintained by the League and by ADOR did not indicate the City had repealed the franchise fee credit or adopted Model Option 13. The City admitted it did not notify the League or the Commission it had repealed the franchise fee credit. Thus, all three publicly available versions of the City's tax code during the Audit Period showed that, while the City had increased the tax rate with Ordinance No. 253, the franchise fee credit was still in effect. Moreover, the text of the ordinance was not available on the City's website until June 2009, eight months into the Audit Period and eighteen months after the ordinance's adoption. When APS requested a copy of the tax code from the City Clerk in 2013, during this litigation, the tax code it received from the clerk still contained the franchise fee credit and the ordinance was not attached.[8]

¶13 "It is both a long-standing rule and a fundamental principle of our system of government that all people of sound mind are presumed to know the law." *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 143, ¶ 29 (App. 2011) (citations omitted). However, based on the unique facts presented by this case, we do not presume that the public will know what the law provides when the publicly available source of the law is incorrect. Such a holding would require the public to exercise a level of caution well beyond due diligence, in violation of due process principles.

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[8] The day after the City Clerk sent APS the tax code still reflecting the franchise fee credit, the City Attorney sent APS a copy of the ordinance, but not the tax code, reflecting repeal of the credit. As the superior court found, however, the email from the City Attorney does not support the City's suggestion that the City Clerk "had previously sent APS the wrong code or that the City Clerk maintained another version of the City Tax Code."

> Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

Bldg. Officials & Code Adm'rs. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980). Consistent with this principle that the law be generally available for the public to examine, the court in *Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145-46 (N.D. Ok. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), held an act of Congress violated due process for lack of notice. The court explained that the act was never codified in the United States Code except for a mention in a footnote, did not appear in the United States Code Annotated, and could only be discovered by reading the United States Congressional Record or by contacting the Solicitor of the Department of Interior. These same factors are present here.

¶14 The City's reliance on *Texaco, Inc. v. Short*, 454 U.S. 516, 531-33 (1982) is misplaced. In *Texaco*, Indiana had passed a statute which provided that a mineral interest that had not been used for twenty years would be deemed abandoned unless the mineral rights owner filed a notice of claim within two years of the passage of the statute. *Id*. at 518. The Court rejected the argument that the statute violated due process because a "legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id*. at 532. As the Court continued, "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Id.* The problem with the City's argument is that under the facts of this case, the City did not publish the law and afford APS a reasonable opportunity to familiarize itself with its terms. Rather, the City's tax code continued to reflect the franchise tax credit and the City did not attach copies of Ordinance No. 253 to the tax code so that taxpayers reviewing the official record maintained by the City Clerk could familiarize themselves with the ordinance's terms. Moreover, affording the public a reasonable opportunity to familiarize itself with a change in the law presumes that the law provided to the public is an accurate representation of the laws enacted. *Armstrong*, 436 F. Supp. at 1145-46; *cf. Romanski v.*

Detroit Entm't, L.L.C., 265 F. Supp. 2d 835, 845-46 (E.D. Mich. 2003) (holding that to justify seizure of plaintiff for stealing, casino security officers could not rely on unpublished casino rule contrary to Michigan law that a token found lying in a tray of an abandoned slot machine belongs to the casino).

¶15 For this same reason, *Torres v. Immigration & Naturalization Service*, 144 F.3d 472 (7th Cir. 1998) is distinguishable. In *Torres*, the court addressed amendatory legislation reducing the time to appeal from a final deportation order from ninety to thirty days. *Id*. at 473-74. Congress "published" the acts by printing them and making them available for distribution on the date of enactment. *Id.* However, West Publishing Company had not yet published the acts in or as a supplement to the United States Code Annotated when the thirty days had expired in Torres's case. *Id.* at 474. The acts did appear on computerized databases, but the titles did not indicate that the time to appeal had changed and Torres's lawyers had not known about the amendments when they filed an appeal more than thirty days after the order. *Id.* The court noted that the "idea of secret laws is repugnant [because] [p]eople cannot comply with laws the existence of which is concealed." *Id.* However, the court rejected a due process challenge, holding there was no constitutional duty to index a new statute or determine a rule of law to defer its effective date to enable the contents to be widely distributed. *Id*. Indeed, the court in *Torres* noted an exception to its holding for statutes which were not officially published by Congress, citing to *Armstrong*, 436 F. Supp. at 1145-46. *Torres*, 114 F.3d at 475-76. In contrast, here the City did not "publish" Ordinance No. 253 because it continued to hold out the old tax code as current and did not include the repeal of the franchise credit in that code or even attach a copy of the ordinance to the tax code. Thus, this case is more like *Armstrong* than *Torres.* For this same reason, we find the City's reliance on a number of other cases misplaced. *See Atkins v. Parker*, 472 U.S. 115, 131 (1985) (holding that mailing written notice of change in food stamp program, but not the precise impact of the change on each individual recipient, to all food stamp recipients did not violate due process); *Slaughter v. Levine*, 855 F.2d 553, 554 (8th Cir. 1988) (holding that changes in benefits to Aid to Families with Dependent Children did not require advance notice to become effective).

¶16 Nor do we find *State v. Soltero*, 205 Ariz. 378 (App. 2003) of assistance. In *Soltero*, the defendant had been charged and convicted of extreme DUI pursuant to a law passed and made effective under an emergency clause approximately one month before his violation that reduced the level of blood alcohol concentration for extreme DUI. *Id.* at

371-72, ¶¶ 2, 6. Soltero argued the immediate effective date of the amendment violated due process because it failed to provide adequate notice of its enactment. *Id.* at 372, ¶ 6. We rejected this argument, holding that there is no due process requirement that the government give notice of the enactment of legislation because promulgation of a law is deemed to constitute adequate notice to all. *Id*. at ¶ 7 (citing *Torres*, 144 F.3d at 474). There was no indication, however, that the Legislature had failed to "publish" the amendment or that, like here, it had affirmatively represented the law to be unchanged. Like *Torres*, the argument was simply that the legislative body had a duty to delay the effective date of the amendment until it could be widely distributed. However, unlike in *Soltero*, here the City affirmatively represented the franchise credit to be in full force and effect in the tax code and failed to attach a copy of the ordinance to its tax code or even to put the ordinance on its website or file it with other bodies until well into the Audit Period.

¶17 The City asserts APS had notice because Ordinance No. 253 was adopted in a public meeting in December 2007 and the City posted the text of the ordinance on its website in June 2009. However, it is unreasonable and violates taxpayers' due process rights for a taxing authority to play hide-and-seek with taxpayers by publishing an incorrect version of a tax code, not attaching amendatory ordinances, and then penalizing taxpayers when they abide by the published code, simply because the taxpayer did not compare the official tax code against city council minutes and government websites. *See Pease v. Peck*, 59 U.S. 595, 597 (1855) ("Yet, as the people who are governed by the laws, and the courts who administer them, practically know the law only from the authorized publication of them, the propriety of recurring to ancient, altered, and erased manuscripts, for the purpose of changing their construction . . . may well be doubted."); *Armstrong,* 436 F. Supp. at 1145-46 (stating statute violated due process because Congress did not include it in the United States Code and relied on persons seeking the change to review the Congressional Record).

¶18 Based on the unique facts of this case in which the City did not amend the tax code on file with the City Clerk to reflect the repeal of the franchise credit, did not attach copies of Ordinance No. 253 to the tax code, and did not file an amended tax code reflecting the repeal of the franchise credit with the Commission, ADOR, or the League, we conclude that APS as a taxpayer cannot be penalized by following the terms of the published tax code and utilizing the franchise fee credit.

CONCLUSION

¶19 For the foregoing reasons, we affirm the tax court's grant of summary judgment for APS on due process grounds. We grant APS its attorneys' fees on appeal under A.R.S. § 12-348(B)(1) upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA