IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SWAT TRAINING FACILITIES LLC, *Plaintiff/Appellant*,

v.

ARIZONA DEPARTMENT OF REVENUE, *Defendant/Appellee*.

No. 1 CA-TX 20-0002
FILED 4-27-2021

Appeal from Arizona Tax Court
No. TX2018-000324
The Honorable Christopher Whitten, Judge

AFFIRMED

COUNSEL

Frazer, Ryan, Goldberg & Arnold, LLP, Phoenix
By Douglas S. John
Counsel for Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Benjamin H. Updike, Nancy K. Case
Counsel for Defendant/Appellee

OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Cynthia J. Bailey and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Appellant SWAT Training Facilities LLC ("SWAT") challenges the tax court's judgment affirming the Department of Revenue's (the "Department") classifications of its shooting-range revenues as amusements and its membership-program revenues as retail for transaction privilege tax purposes. We hold that a shooting range is a business subject to the transaction privilege tax under the amusement classification. We further hold that when a taxpayer fails to report separately revenues derived from different business classifications, the Department may treat those mixed revenues as if they were generated by the classification that yields the highest effective tax rate. We, therefore, affirm the tax court's judgment assessing tax on SWAT's shooting-range revenues under the amusement classification and membership revenues under the retail classification.

FACTS AND PROCEDURAL BACKGROUND

¶2 SWAT operates an indoor shooting range under the name "Shooter's World." The State and the City of Phoenix audited Shooter's World from January 1, 2010, through July 31, 2015. As relevant to this appeal, the audit determined a tax deficiency based on the unreported amusement classification receipts for shooting-range time and the underreported retail classification receipts. The Department issued a Notice of Proposed Assessment of additional amusement taxes under A.R.S. § 42-5073(A), retail taxes under A.R.S. § 42-5061(A), commercial leasing taxes, and use taxes totaling $509,707. That sum included $329,206 in state tax, $100,032 in municipal tax, and $80,468 in interest and penalties.

¶3 Shooter's World protested the combined assessment at an administrative hearing. The resulting administrative decision upheld the assessment.

¶4 Shooter's World appealed to the tax court under A.R.S. § 42-1254(C), arguing that its operation of an indoor shooting range does not fall within the amusement classification. It also argued that gross income attributable to its membership sales should not be taxed under the retail classification. The tax court entered summary judgment in favor of the Department. Shooter's World appealed, and we have jurisdiction under A.R.S. §§ 12-2101(A)(1) and 42-1254(D)(4).

DISCUSSION

¶5 We review the tax court's grant of summary judgment *de novo*. *Rigel Corp. v. State*, 225 Ariz. 65, 67, ¶ 11 (App. 2010). We review the facts in a light most favorable to Shooter's World, the losing party. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191 (App. 1994). A court should grant summary judgment only if it finds no genuine issues of material fact and that one party is entitled to judgment as a matter of law. *Grain Dealers Mut. Ins. v. James*, 118 Ariz. 116, 118 (1978). Summary judgment is inappropriate if the facts, even if undisputed, would allow reasonable minds to differ. *Nelson*, 181 Ariz. at 191.

A. Shooter's World's Range Operations Fall Within the Amusement Classification.

¶6 The transaction privilege tax is an excise tax on the privilege or right to engage in an occupation or business in Arizona. *CCI Europe, Inc. v. ADOR*, 237 Ariz. 50, 52, ¶ 9 (App. 2015). "It is not a sales tax, but a tax on the gross receipts of the [taxpayer's] business activities." *Id*. The tax is levied upon the business the taxpayer conducts, and "it is presumed that all gross proceeds of sales and gross income derived by a person from business activity classified under a taxable business classification comprise the tax base for the business until the contrary is established." A.R.S. § 42-5023; *see also* A.R.S. § 42-5008(A).[1] The Arizona transaction privilege tax is imposed on 16 different business classifications, including the "amusement" classification at issue here. A.R.S. §§ 42-5061 to -5076.

¶7 Shooter's World contends its range operations should not be classified as amusements because its range is not "of the same kind, class, or character" as the businesses listed in the statute establishing the classification, A.R.S. § 42-5073. That section provides that the amusement classification is comprised of the business of operating or conducting

> theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks,

---

[1] A.R.S. § 42-5008(A) reads: "There is levied and there shall be collected by the department, for the purpose of raising public money, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article and article 2 of this chapter."

> menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, public dances, dance halls, boxing and wrestling matches, skating rinks, tennis courts, except as provided in subsection B of this section, video games, pinball machines or sports events or any other business charging admission or user fees for exhibition, amusement or entertainment, including the operation or sponsorship of events by a tourism and sports authority under title 5, chapter 8.

A.R.S. § 42-5073(A). Under the Phoenix City Code, the amusement classification includes the following type or nature of businesses:

> theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, skating rinks, tennis courts, golf courses, video games, pinball machines, public dances, dance halls, sports events, jukeboxes, batting and driving ranges, animal rides, or any other business charging admission for exhibition, amusement, or entertainment.

Phoenix City Code ("P.C.C.") § 14-410(a)(1). Because "shooting ranges" do not appear in either provision, we must decide whether Shooter's World's range falls within "any other business charging admission or user fees for exhibition, amusement or entertainment." A.R.S. § 42-5073(A); P.C.C. § 14-410(a)(1).

¶8 When construing a tax statute, we give words their plain and ordinary meaning. *Wilderness World, Inc. v. ADOR*, 182 Ariz. 196, 198 (1995). If the statute is unambiguous, we apply it as written without further analysis. *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 238, ¶ 10 (2019). If ambiguities remain after applying the usual tools of statutory construction, we will resolve those ambiguities in the taxpayer's favor. *Wilderness World*, 182 Ariz. at 199 (citing *Ebasco Servs. Inc. v. Tax Comm'n*, 105 Ariz. 94, 97 (1969)). We construe city ordinances using the same principles we use to construe statutes. *Orbitz Worldwide*, 247 Ariz. at 238, ¶ 10 (quoting *Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978)). In considering the statute's meaning, we give great weight to a regulation promulgated by an agency at the legislature's instruction. *See Di Giacinto v. Ariz. State Ret. Sys.*, 242 Ariz. 283, 286, ¶ 9 (App. 2017). "But we make our own legal conclusions to determine whether the agency properly interpreted the law. An agency's interpretation is not infallible, and courts must remain the final

authority on critical questions of statutory construction." *Id.* (citation and quotations omitted). Further, "[r]egulations may not be applied inconsistent with or contrary to the statutes they implement." *Id.*

¶9 Our supreme court interpreted the "catch all" clause of what is now A.R.S. § 42-5073(A) in *Wilderness World*, a case involving river-rafting excursions. 182 Ariz. at 197–98. Applying the doctrine of *ejusdem generis*, the court held that unenumerated business "could be an 'amusement' under this statute if they were of the same kind or nature of activity as those specifically enumerated in the statute." *Id.* at 199; *see also Bilke v. State*, 206 Ariz. 462, 465, ¶ 13 (2003) (stating that *ejusdem generis* applies "where general words follow the enumeration of particular classes of things") (emphasis omitted) (quoting Black's Law Dictionary 517 (6th ed. 1990)). The court concluded that Wilderness World's river-rafting excursions were not of the same kind or nature as the activities offered by the enumerated businesses. The businesses listed in the statute provided "mainly spectator events of short duration or participatory activities requiring no supervision." *Wilderness World*, 182 Ariz. at 199. By contrast, each Wilderness World excursion was guided, typically lasted 12 days, and covered several hundred miles. *Id.* at 197, 199. Further, Wilderness World did not charge an "admission fee" like the businesses specified in the statute; its customers did not pay "to sit in the raft," but instead paid "for the skill, direction, and service provided by the guide, the food and equipment for the trip, and the transportation to and from the river." *Id.* at 198-99.

¶10 Shooter's World argues the supreme court's observation that the enumerated businesses offer "mainly spectator events of short duration or participatory activities requiring no supervision" created a test for determining what unenumerated businesses are subject to the tax under the statute. But the supreme court did not offer this characterization as a controlling test. In fact, several of the specifically enumerated businesses in the statute would fail such a test. For example, amusement parks and bowling alleys generally do not involve spectator events. Instead, they involve participatory activities requiring some supervision and would not qualify under Shooter's World's test.

¶11 Shooter's World concedes its shooting range is a "participatory activity" but contends it is not an amusement because "constant supervision and instruction are at the heart of the customer's experience." It also argues that the participatory businesses listed in A.R.S. § 42-5073(A)—billiard or pool parlors, public dances, dance halls, skating rinks, tennis courts, video games, and pinball machines—offer "games"

that do not provide "instruction and training for self-defense and for . . . law enforcement." The Department, on the other hand, argues Shooter's World's range is similar to bowling alleys, amusement parks, ice skating rinks, batting cages, and driving ranges because customers "pa[y] admission fees to participate in an activity at a specific facility" that has "employees at the facility to protect the business and its customers."

¶12 Shooter's World does not dispute that its customers buy range time in hourly increments or that it offers five-hour discounted range cards. Nor does it deny that most of its customers own their firearms and come in solely to use the range. As such, customers pay an admission or user fee to use the range. *See Wilderness World*, 182 Ariz. at 198.

¶13 To be sure, Shooter's World takes steps to ensure customer safety. Still, these safety precautions are a far cry from the guidance provided on *Wilderness World*'s 12-day, several-hundred-mile river expeditions. They are much more comparable to the supervision and safety measures present at any amusement park that operates rollercoasters or go-karts.

¶14 We hold that Shooter's World's shooting range offers the same type or nature of activity as those provided by the businesses specifically enumerated in A.R.S. § 42-5073 and P.C.C. § 14-410. Therefore, we conclude the tax court did not err by finding Shooter's World's range revenues subject to taxation under the amusement classification.

B. Because Shooter's World Did Not Maintain Records Separately Listing Its Membership Revenues Attributable to Amusement and Retail, Its Membership Revenues Are Subject to Tax as Retail.

¶15 For a monthly or yearly fee, Shooter's World offers memberships to its customers through which they receive benefits that include (1) lane reservation privileges, (2) unlimited range time, (3) free use of eye and ear protection, (4) a discount on private instruction, (5) discounts on ammunition, firearm sales, and firearm rentals, (6) free T-shirts, and (7) access to members-only sales. The audit classified all revenue from Shooter's World's membership program as retail.

¶16 "The retail classification is comprised of the business of selling tangible personal property at retail."[2] A.R.S. § 42-5061(A); *see also* P.C.C. § 14-460. "The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business." A.R.S. § 42-5061(A); P.C.C. § 14-460 (defining the tax base as "the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail.") The retail classification tax base includes gross income attributable to services that are *a part of* the business's retail sales. A.R.S. § 42-5001(7). But income attributable to services rendered *in addition to* the sales is expressly excluded. A.R.S. § 42-5061(A)(2); *see also* P.C.C. § 14-460.4. Income from business activity correctly included in any of the other 15 business classifications is excluded from the retail classification tax base. A.R.S. § 42-5061(A)(6).

¶17 As discussed above, A.R.S. § 42-5073 imposes the transaction privilege tax under the amusement classification. *See also* P.C.C. § 14-410(a). The amusement classification's tax base is the gross proceeds of sales or gross income derived from the business except for income subject to a statutory deduction. A.R.S. § 42-5073(B); *see also* P.C.C. § 14-410(b). Gross income is defined as the "gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property or service, or both, and without any deduction on account of losses." A.R.S. § 42-5001(4). Gross receipts from the sale of programs, souvenirs, or any other items of tangible personal property by a taxpayer operating an amusement business are included in the tax base under the retail classification. Ariz. Admin. Code ("A.A.C.") R15-5-404.

¶18 To allow for the proper administration of the transaction privilege tax and to prevent tax evasion, "it is presumed that all gross proceeds of sales and gross income derived by a person from business activity classified under a taxable business classification comprise the tax base for the business until the contrary is established." A.R.S. § 42-5023; *see*

---

[2] A "sale" is defined as including "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever . . . of tangible personal property . . . for a consideration." A.R.S. § 42-5001(18). And "tangible personal property" is defined as "personal property that may be seen, weighed, measured, felt or touched or that is in any other manner perceptible to the senses." A.R.S. § 42-5001(21).

also P.C.C. § 14-400(c). A taxpayer that engages in more than one type of business is required to maintain records so that the gross proceeds of sales or gross income of each taxable business classification is shown separately. A.A.C. R15-5-2004(C); *see also* P.C.C. § 14-362. A taxpayer that fails to separately account for sales and gross income of its various business activities is taxed at the highest rate applicable to a classification under which the taxpayer does business. A.A.C. R15-5-2004(G).

¶19 The Department argues Shooter's World's membership revenue is correctly classified as retail because members receive retail benefits like free merchandise, discounts, and access to members-only sales. The Department recognizes that some of the membership benefits, standing alone, would be appropriately included under the amusement classification. Shooter's World argues that the primary purpose of its membership program is to increase the use of its shooting range and that such revenues, if taxable at all, are taxable under the amusement classification rather than retail. But the classification of blended income derived from sales of separately classified business activities is not dictated by the taxpayer's primary purpose in making the sales.[3]

¶20 Because the operation of a shooting range is a taxable business activity under the amusement classification, we presume that any income Shooter's World derived from its shooting range—including membership revenue attributable to range use—is taxable under the amusement classification. A.R.S. § 42-5023; *see also* P.C.C. § 14-400(c). But, as the

---

[3] The Department suggests this case is controlled by our holding in *Walden Books Co. v. ADOR*, 198 Ariz. 584 (App. 2000). But there, we addressed a different question. *Walden Books* involved a taxpayer that operated a business that was taxable only under the retail classification. For a small annual fee, it sold memberships that provided retail discounts and convenience services but no tangible personal property. *See id.* at 585–86, ¶¶ 2, 5. Because services provided *in addition to* sales are expressly excluded from the retail tax base, A.R.S. § 42-5061(A)(2), we analyzed whether the services the taxpayer provided its members were in addition to or *as a part of* the taxpayer's retail sales. *Id.* at 587–88, ¶¶ 13, 18. However, no service exception applies to the amusement classification. *See* A.R.S. § 42-5073 (listing no exclusion or deduction for services); A.R.S. § 42-5001(4) (defining "gross income" to include "the value proceeding or accruing from the sale of tangible personal property or service, or both"). Therefore, to show that its membership sales are not taxable, Shooter's World must do more than distinguish this case from *Walden Books*.

Department correctly notes, Shooter's World also offered its members T-shirts, tangible personal property ordinarily subject to the retail transaction privilege tax. Because Shooter's World engages in more than one type of business, it must maintain records that separately show its gross proceeds of sales or gross income from each taxable business classification. A.A.C. R15-5-2004(C). Because it failed to do so here, its total gross receipts from membership sales are subject to "tax at the highest tax rate on gross proceeds of sales or gross income applicable to a classification under which the taxpayer is doing business." A.A.C. R15-5-2004(G). Although the same tax rate applies to revenues generated by retail and amusement businesses, revenues taxed as amusement are subject to deductions that result in a lower effective tax rate than revenues taxed as retail. For that reason, the Department effectively applied the highest rate applicable by using the retail classification tax rate to the membership revenue. The tax court did not err by upholding the assessment.[4]

[4] We note that the way income is classified affects more than just the tax rate. Certain deductions and exclusions are specific to the various classifications. For example, under A.R.S. § 42-5073(B)(1), a taxpayer can deduct income derived from memberships that provide for the use of a private recreational establishment for participatory purposes for 28 days or more. If Shooter's World seeks classification of its membership revenues as amusement activities in anticipation of claiming a deduction, it will be unable to do so if the revenue amounts attributable to those benefits remain unascertainable. When attempting to establish the right to a deduction, the burden of proof is on the taxpayer. A.R.S. § 42-5009(B) ("A person who does not comply with subsection A of this section may establish entitlement to the deduction by presenting facts necessary to support the entitlement, but the burden of proof is on that person."); *see also* P.C.C. § 14-362(d). "In Arizona, our policy is to construe tax statutes strictly against taxpayer deductions." *DaimlerChrysler Servs. N. Am., LLC v. ADOR*, 210 Ariz. 297, 304, ¶ 24 (App. 2005). And "tax deductions, subtractions, exemptions, and credits are to be strictly construed." *ADOR v. Raby*, 204 Ariz. 509, 511, ¶ 16 (App. 2003).

CONCLUSION

¶21 We affirm the tax court's judgment.

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