Clerk of the Superior Court
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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2019-000011 06/24/2019

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

STATE OF ARIZONA, et al.

BRUNN W ROYSDEN III

v.

ARIZONA BOARD OF REGENTS, et al.

PAUL F ECKSTEIN

JOSEPH S KIEFER
JUDGE WHITTEN

MINUTE ENTRY

The following five motions are fully briefed and pending before the Court:

1) Defendant Arizona Board of Regents' Motion to Dismiss Number 1 (Attorney General's Lack of Authority), filed March 8, 2019;

2) Defendant Arizona Board of Regents' Motion to Dismiss Number 2 (Failure to Exhaust Administrative Remedies), filed March 8, 2019;

3) Defendant Arizona Board of Regents' Motion to Dismiss Number 3 (Count I Unlawfully Requests That Tax-Exempt State Property be Taxed), filed March 8, 2019;

4) Defendant Arizona Board of Regents' Motion to Dismiss Number 4 (Counts II and III Present Non-Justiciable Political Questions), filed March 8, 2019; and

5) Defendant Arizona Board of Regents' Motion to Dismiss Number 5 (Count IV Fails to State a Claim upon which Relief Can be Granted and Fails to Join a Necessary Party), filed April 23, 2019.

The Court benefited greatly from very well written briefs and from oral argument on the first and fifth of these motions on June 11, 2019. Each is addressed separately below.

I. Motion to Dismiss #1 (Attorney General's Authority to Bring Counts I, II and III)

The Attorney General's ability to commence or initiate proceedings is limited to those instances where a statute specifically authorizes him to do so. *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 144 (1960). In this case, the Attorney General claims such authority under A.R.S. § 12-2041 (*quo warranto* statute) and A.R.S. § 42-1004 (tax enforcement statute).

A. *Quo Warranto* Statute - A.R.S. § 12-2041

The writ of *quo warranto*, one of the "extraordinary writs" enumerated in the Arizona Constitution, Art. VI § 5(1), is codified at A.R.S. § 12-2041.[1] Like the others, it was born as a writ of chancery, but has over the years become sufficiently distinct that it now sounds in law rather than equity. *Garcia v. Sedillo*, 70 Ariz. 192, 199-200 (1950); *see also* State Bar Committee Note, Rule 1, Rules of Procedure for Special Actions.

1. The Arizona Board of Regents is Not a "Franchise" Under A.R.S. § 12-2041.

Both A.R.S. § 12-2041 and -2042 describe the defendant in a *quo warranto* action as "any person who usurps, intrudes into or unlawfully holds or exercises any public office or any franchise within this state." The phrases "any public office" and "any franchise" are distinguished in A.R.S. § 12-2041(A), indicating that the exercise of a public office was not intended to be a franchise.

That a state agency is different than a franchise, for purpose of writ of *quo warranto*, makes sense. The legislature created the Arizona Board of Regents to manage the state universities, which it could theoretically do itself, but likely less effectively. Subject to standard separation of powers jurisprudence, it is the legislature's to govern as it pleases. To say that the state legislature granted a franchise to the Board is like saying the state granted a franchise to itself.

2. The Board of Regents is Authorized to Enter Leases Like the One in This Case.

[1] "An action may be brought … in the superior court of the county which has jurisdiction, against any person who usurps, intrudes into or unlawfully holds or exercises any public office or any franchise within this state." A.R.S. § 12-2041(A).

Even if the Attorney General's franchise theory is accepted, the application for *quo warranto* still fails. The law that is now A.R.S. § 15-1625 created the Arizona Board of Regents as a state administrative agency. Subsection (B)(4) of that statute authorizes the Board to:

> [p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property for the benefit of this state and for the use of the institutions under its jurisdiction.

The Omni Deal is a lease, and the Board is expressly empowered to enter into leases.[2] The Attorney General attempts to meet this response by incorporating "for the benefit of this state and for the use of the institutions under its jurisdiction" as some sort of condition upon the authority to enter into leases itself. This logic is dubious. Even, however, if this argument too is accepted, the Board's action still survives *quo warranto* analysis. The objection to the "use" clause is quickly answered. The Attorney General appears to argue that the Board may dedicate its property only to the physical use of one or more of the universities. But the authority to sell and to lease real property necessarily implies the authority to surrender use to the buyer or the lessee in exchange for cash or other value. As long as the proceeds are put to the use of the universities, that provision is satisfied. *Compare Foster v. Anable*, 199 Ariz. 489, 493-94 ¶ 18 (App. 2001) (purpose of education trust fund to produce revenue through sale and use of land to support public schools).

Without a definitive instruction from the legislature, whether a transaction is "for the benefit of this state" is a matter of discretion left to the body authorized to enter into the transaction, here, the Board of Regents.

As our Supreme Court held before statehood, the writ does not lie against an abuse of discretion. "[I]f the board of supervisors abused its discretion in this case by entering into this contract with Cameron upon a less favorable contract than it could have had with another responsible party, the remedy does not lie in *quo warranto* proceedings; that abuse of discretion has no bearing upon the validity of the law or of the franchise." *Duffield v. Ashurst*, 12 Ariz. 360, 368 (Ariz.Terr. 1909).

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[2] It has not always been so. In both the territorial Revised Statutes 1901, paragraph 3363, and the post-statehood Civil Code 1913, paragraph 4475, the Regents were given authority only to "purchase, receive and hold" property; thus, a century ago the Attorney General's position would have been well-founded. By Code 1939, § 54-1603, they had been given power to sell, but still not to lease. Not until the Arizona Revised Statutes, originally A.R.S. § 15-724, were they authorized to make leases. *See Board of Regents of Universities and State College v. City of Tempe*, 88 Ariz. 299, 304 (1960) (quoting statutory text). This authorization followed *Fox Riverside Theatre* by more than a decade, so the legislature would have known the effect of government land leases when it granted the Regents that authority.

For all of these reasons, A.R.S. § 12-2041 does not authorize the Attorney General to bring Counts I, II or III.

B. Tax Enforcement Statute - A.R.S. § 42-1004

The tax enforcement statute, A.R.S. § 42-1004, requires the Department of Revenue to administer and enforce taxation statutes. In subsection E it provides, in pertinent part, that "[t]he attorney general shall prosecute in the name of this state all actions necessary to enforce" the taxation statutes. There must, however, be a taxation statute at issue in order for the Attorney general to have the power to "prosecute."

1. The Subject Property is Exempt From Taxation

"There shall be exempt from taxation all federal, state, county and municipal property." A.R.S. Const. Art. IX § 2(1).[3]

Unlike other property exempted on condition that it be put to some charitable or educational use, government property is exempt simply by virtue of the government's title to it. *Arizona Land & Stock Co. v. Markus*, 37 Ariz. 530, 540 (1931). "The period of exemption begins on the date the property enters government ownership and ends on the date it leaves government ownership." *Hub Properties Trust v. Maricopa County*, 238 Ariz. 171, 173, ¶ 11 (App. 2015) (internal punctuation omitted). The purpose to which the land is put does not affect the exemption; there is no distinction between property held in a proprietary capacity and property held in a governmental capacity. *Clark v. City of Tucson*, 1 Ariz.App. 431, 433 (1965).

Under Arizona law, leasehold interests are not directly taxed to the lessee. *Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407, 413 (1941). Instead, they are taxed to the lessor as part of the undivided fee interest. *Recreation Centers of Sun City, Inc. v. Maricopa County*, 182 Ariz. 281, 288 (1989). Improvements to which the government holds title are exempt if the lease significantly restricts the lessee's authority to control and dispose of the improvements. *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485, 491 (App. 1997).

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[3] At pages 27-30 of the Consolidated Response, the Attorney General argues that, in transacting a lease for the benefit of a private party, the Board of Regents has forfeited its exemption from property taxes. The Board did not and could not forfeit its exemption. Forfeiture of the exemption is a legal impossibility. However well or poorly the Board is carrying out its obligations as an instrumentality of the state government, it is regardless an instrumentality of the state government. The constitutional exemption attaching to all state government property attaches to its property unconditionally.

Short of selling the fee interest outright to a non-exempt party, nothing the Board does with the land can affect its exemption. *Clark, supra*. The tax roll is therefore unaffected by the use to which the Board puts its property.

As a matter of law, the property on which the Attorney General seeks to collect tax is constitutionally exempt from taxation. There is thus no tax owing, and nothing for the Attorney General to enforce.

2. The Tax Enforcement Statute Does Not Give the Attorney General the Power to Commence Actions.

Additionally, the tax enforcement statute only gives the Attorney General the power to *prosecute* Arizona's tax laws. The power to "prosecute" is different from the power to "initiate" or "commence" and action. *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 145-46 (1960).

Even if he were attempting to enforce existing tax statutes or liabilities, which, as explained above, he is not, A.R.S. § 42-1004 does not authorize the Attorney General to initiate, commence or bring Counts I, II or III.

II. Motion to Dismiss # 5 (Gift Clause Claim - Count IV)

Unlike the motions to dismiss based on the Attorney General's lack of authority to bring the subject taxation-based claims, this motion challenges the timeliness of the gift clause claim. In considering such a motion, Arizona's notice pleading standard requires the Court to "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012). "Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id*. at 356.

A. The Applicable Statute of Limitation is One Year.

The applicable statute of limitations for bringing a Gift Clause Claim, or any claim against "any public entity or public employee" is one year from the date the cause of action accrues. A.R.S. § 12-821. This one-year period is triggered by the "accrual" of the action. The date the "gift" is irrelevant in determining if the claim is timely under A.R.S. § 12-821.

A.R.S. § 35-212(E)[4] imposes a statute of repose, which requires that all gift clause claims brought by the Attorney General "must be brought within five years after the date an illegal payment was ordered." This five-year period is triggered by the date of the offending payment. The Attorney General's knowledge of the existence of a claim is irrelevant in applying A.R.S. § 35-212(E).

A.R.S. § 35-212(E) does not expand the applicable one-year statute of limitations in A.R.S. § 12-821 to five years, as the Attorney General suggests. Instead, it bars actions which are brought more than five years after the date an illegal payment was ordered, even if that action is brought less than one year from the date the claim accrued.

B. The Accrual Date Is Sufficiently Pled to Allow the Claim to Go Forward

The Gift Clause claim accrued when the Attorney General "at least posses(ed) a minimum requisite of knowledge sufficient to identify that a wrong has occurred and caused injury." *Cruz v. City of Tucson*, 243 Ariz. 69 (App. 2017). When the Attorney General knew, or should have known, enough about the Omni Deal to put a reasonable person in his position on notice to investigate the claim, then the cause of action accrued.

The Attorney General first made a claim that the Omni Deal violates the Gift Clause in the First Amended Complaint, filed on April 3, 2019.[5] There, he alleges that it was only on 3/9/19, when certain details about the Omni Deal were revealed, that he knew, or could have known, that it violated the Gift Clause. For purposes of this motion, the Court must accept these allegations.

If discovery bears out the Defendant's position that the Gift Clause claim accrued more than one year before April 3, 2019, there is nothing preventing the Defendant from filing a motion for summary judgment at the appropriate time.

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[4] It is unclear whether the statute of repose in A.R.S. § 35-212 could be applied retroactively against the Defendants. The statute contained no limitations language at all until the 2018 amendment, which also imposed a host of new duties on public officials and prescribed new, severe penalties for their violation. Arizona courts have not specifically addressed whether such laws may be given retroactive effect. But the federal courts have consistently barred, as violating the due process clause, retrospective application of laws that "create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012), quoting *Society for Propagation of Gospel v. Wheeler*, 22 F.Cas.756, 767 (CCNH 1814). On this principle, it is clear that the great bulk of the amended § 35-212 might not be enforceable in this case.

[5] There is no way to relate the Gift Clause claim back to the date of the original Complaint, when only taxation claims were being made, as the two are so completely different that the later could not have put the Defendants on notice that they would face the former.

III. Conclusion

Neither A.R.S. § 12-2041 nor A.R.S. § 42-1004 give the Attorney General authority to bring Counts I, II or III of the Complaint or the First Amended Complaint.

The Plaintiff has sufficiently pled that Count IV accrued within one year of April 3, 2019.

ACCORDINGLY, IT IS ORDERED that the Defendants' Motion to Dismiss Number One is granted.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss Number Five is denied.

FINALLY, IT IS ORDERED setting a telephonic conference call on **7/10/19 at 9:30 a.m.** in order to determine which of the remaining Motions to Dismiss still need to be decided.