

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2008-000312

08/09/2010

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA STATE DEPARTMENT OF
REVENUE

STEPHEN D BALL

v.

CLUB LEVEL L L C, et al.

MICHAEL G GALLOWAY

MINUTE ENTRY

The Court took this matter under advisement following oral argument on July 12, 2010. The Court has considered the parties' Motions for Summary Judgment.

At all relevant times, the TPT license was held by Club Level, LLC. However, the LLC was dissolved by its sole member, Mr. Wallace, in February 2002, the formal articles of termination being filed in April of that year. A new entity, Club Level, Inc., was formed at around the same time and apparently took over operation of the bar; however, the corporation did not obtain a new TPT license as required by A.R.S. § 42-5005(D), but continued to use the LLC's license. It is undisputed that no one paid the TPT on the bar's business. The State asserts that the LLC is (was) liable for the unpaid taxes during its life, and that upon its dissolution liability passed to its sole member, Mr. Wallace. Defendants do not contest the LLC's liability for the taxes incurred prior to its dissolution, but insist that the never-licensed corporation (a non-party), not Mr. Wallace, is liable for subsequent taxes. It appears to the Court that exhaustion of administrative remedies is thus a non-issue. The LLC, as taxpayer, failed to exhaust its administrative remedies. Its liability is therefore fixed. Mr. Wallace was not a party, so he had no administrative remedies to exhaust.

It has long been established that the requirement of licensure is to permit the taxing authority to know who is in business and is responsible for the tax. *City of Phoenix v. State ex rel. Conway*, 53 Ariz. 28, 31 (1938) (interpreting predecessor statute). Here, for all the State had

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been told, the LLC operated the bar for the entire period in question. Defendants are certainly correct that the State may, and frequently does, take action against businesses operating without a valid TPT license. That is not the question. The question is rather whether it may instead choose to pursue the license holder, the LLC, and Mr. Wallace. Again, the LLC failed to contest its liability administratively, so that is established; therefore, the argument on which Defendants place great weight, that a licenseholder is not liable for TPT if another entity is actually operating the business, has been waived (even were it not, there can be no question that the LLC had actual knowledge that the corporation was conducting business under its license, given that Mr. Wallace was behind both entities). The only question is whether Mr. Wallace can be found liable for the debts incurred under the LLC's license after its dissolution (and for that matter, for its debts incurred before dissolution, to the extent that they were not paid or provided for as required by A.R.S. § 29-782(B)(3)). There are two possible avenues. The first, which the State does not appear to allege, would be under A.R.S. § 42-5028, the "responsible person" statute. The other, which is outlined in the Reply (in response to the argument in the Response that Mr. Wallace cannot be held vicariously liable for TPT during the period of operation by the corporation), is under the limited liability company act. In view of the importance of this avenue, the Court believes that further briefing, should the State wish to urge it, is appropriate.

Defendants' argument that laches should bar the State from recovery is without merit. First, the rule in Arizona is that when, as here, the State is acting within its governmental or sovereign functions, laches will not lie against it. *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421 (1978). Moreover, Defendants have not shown or even argued that they relied on the State's delay and were injured as a result of that reliance. Liability for the TPT incurred was not conditioned on the State's prompt action to collect it, and mere delay in collection does not bar an action without a change in position induced by the delay. *Id.* The government is under no legal obligation to minimize the effect of tax liability on the taxpayer.

Therefore, IT IS ORDERED the State's Motion for Summary Judgment is granted with respect to the LLC and denied with respect to Mr. Wallace, without prejudice to reurge the issue of his personal liability.

IT IS FURTHER ORDERED Defendants' Cross Motion for Summary Judgment is denied.