Michael K. Jeanes, Clerk of Court
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08/12/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2013-000006 08/07/2013

HONORABLE DEAN M. FINK

CLERK OF THE COURT
M. Nielsen
Deputy

SUNDEVIL POWER HOLDINGS L L C — DOMINGOS R SANTOS

v.

ARIZONA STATE DEPARTMENT OF REVENUE — KENNETH J LOVE

MINUTE ENTRY

Courtroom 202 – Old Courthouse

9:07 a.m. This is the time set for Oral Argument on Defendant's Motion to Dismiss, filed May 14, 2013 and Plaintiff's Motion for Leave to Amend Complaint, filed June 28, 2013. Plaintiff is represented by counsel, Sara K. Regan and Domingos R. Santos. Plaintiff Sundevil Power Holdings LLC is represented by Ray Wallender. Defendant is represented by counsel, Kenneth J. Love.

Court Reporter, Marylynn Lemoine, is present.

A record of the proceedings is made by audio and/or videotape.

Oral argument is held regarding this case.

9:45 a.m. Matter concludes.

LATER: The Court here expounds upon its ruling at oral argument.

As this Court has previously held, there are always two, and only two, necessary parties to a tax appeal: the Department and the county to which the taxes have been or will be paid (or,

if they will be paid to the State, the State). *Ellman Land Corp. v. State*, 169 Ariz. 13, 16 (Tax 1991), *affirmed in part, set aside in part*, 180 Ariz. 331 (App. 1994). *Citizens Telecommunications Co. of the White Mountains v. Arizona Dept. of Revenue*, 206 Ariz. 33 (App. 2003), is not to the contrary; it specifically warns that failure to name a county as required by the statute may affect the taxpayer's remedy as to that county, *id.* at 38 ¶ 17. The Court therefore agrees that Maricopa County is a necessary party to the appeal. While in theory the case might proceed as against the Department only, as a practical matter no remedy is possible without the entity that either has collected or will collect the disputed taxes. Thus, the Court reads *Citizens Telecommunications* to require that at least one county, or the State, be named as a party.

Turning to the motion to amend, to be entitled to relation-back under Rule 15(c), the plaintiff must show three things: that the party to be brought in received notice of the institution of the action so that it will not be prejudiced in maintaining a defense on the merits; that it knew or should have known that the plaintiff would have sued it but for a mistake, insuring that it knew its joinder was a distinct possibility; and that it received the required notice and knowledge within the original limitation period plus the time allowed for service of process. *Pargman v. Vickers*, 208 Ariz. 573, 578 ¶ 24-26 (App. 2004). It strikes the Court that the second and third requirements would follow naturally from the first, so amendment is permissible if, and only if, the County received notice. The Court does not believe that notice to the Department constitutes constructive notice to the County. Unlike the county assessor addressed in *Ellman Land Corp. v. State*, 180 Ariz. 331, 338 (App. 1994), the Department is not part of the county government. While no doubt it works closely with the fifteen county governments, it does not have an identity of interest with them. There remains the possibility that the County received actual notice. This is a fact question that must be resolved as such.

Accordingly, the Court will withhold ruling on the pending motions to allow the taxpayer to conduct discovery on the notice issue. The Court expects the Department to cooperate to expedite the discovery related to this issue, including a deposition on **August 16, 2013.**

IT IS ORDERED that the taxpayer may file a supplement to its motion to amend related to the notice issue no later than **September 15, 2013.**

IT IS FURTHER ORDERED granting the Motion for Expedited Consideration of Motion to Shorten Discovery Response Time, filed August 2, 2013.

IT IS FURTHER ORDERED granting, in part, as set forth above and on the record Plaintiff's Motion to Shorten Discovery Response Time, filed August 2, 2013.