



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF  
REVENUE v. PETER A. TUNKEY, et al.  
CV-22-0128-PR**

**PARTIES:**

*Petitioners:* Peter A. Tunkey and Carrie A. Carney (“the Tunkeys”)  
*Respondent:* State of Arizona, Department of Revenue (“ADOR”)

**FACTS:**

From 2005 through 2015, Peter Tunkey was a manager of KT McClintock, LLC (“KT”), which did business as Silver Mine Subs in Arizona. KT charged customers to cover its transaction privilege taxes (“TPT”) and reported the TPT to ADOR but failed to pay ADOR the amounts due. In 2019, ADOR filed a complaint in tax court against KT and the Tunkeys seeking judgment for the TPT liability, penalties and interest. ADOR claimed the Tunkeys were personally liable for the TPT pursuant to A.R.S. § 42-5028, although ADOR did not issue an assessment of the taxes against the Tunkeys prior to filing the complaint.

ADOR and the Tunkeys filed separate summary judgment motions, each asking the tax court to determine whether the Tunkeys were jointly and severally liable for the unpaid TPT. The tax court granted ADOR’s motion, finding that (1) ADOR was not required to separately obtain a formal deficiency assessment against the Tunkeys, and (2) the Tunkeys were jointly and severally liable as responsible parties for KT’s unpaid TPT. The court agreed that ADOR had ten years from the date the amount owed becomes final to bring an action and was not limited to the four-year statute of limitations for a notice of additional tax due, as the Tunkeys argued. The Tunkeys appealed.

The Court of Appeals affirmed summary judgment in favor of ADOR. The court found that under A.R.S. § 42-5028, an “additional charge” for which a person may be held liable is the total amount charged to a customer to cover TPT. Relying upon *Arizona Dep’t of Revenue v. Action Marine, Inc.*, 218 Ariz. 141 (2008), the court also found that a “person” within the scope of § 42-5028 includes corporate officers and directors, in addition to the taxpaying entity.

The Court of Appeals then addressed the Tunkeys’ argument that a deficiency assessment is required before ADOR initiates a collection action. The court noted that § 42-1114(A) imposes no such requirement. Furthermore, the notice of additional tax due that is required by § 42-1104(A) applies only to deficiency assessments or audits performed before ADOR determines whether to assess an additional tax liability. Here, an audit was unnecessary because KT self-assessed its tax liability and ADOR accepted that assessment. KT simply failed to pay the amount it admitted had been collected and was owed.

The Court of Appeals also rejected the Tunkeys’ argument that because *Action Marine* described liability under § 42-5028 as “non-derivative personal liability,” an action to recover TPT from them is a separate tax that requires an assessment. The court construed *Action Marine* to mean that § 42-5028 creates TPT liability for “persons” concurrent with the business entity’s liability,

rather than creating a separate tax. The court further found that *Action Marine* distinguished liability that is subject to additional penalties (the business entity's underlying TPT liability) from responsible party liability, which remains static even if the business entity's penalties increase. The Court of Appeals concluded that liability under § 42-5028 is not a separate tax and no separate assessment was required.

#### **ISSUE:**

Did the Court of Appeals err in holding that an action against an individual for liability under A.R.S. § 42-5028 is not subject to the four (4) year statute of limitations for notice of assessment?

#### **STATUTES:**

A.R.S. § 42-5028 states as follows:

A person who fails to remit any additional charge made to cover the tax or truthfully account for and pay over any such amount is, in addition to other penalties provided by law, personally liable for the total amount of the additional charge so made and not accounted for or paid over.

A.R.S. § 42-1114 states in pertinent part as follows:

A. The department may bring an action in the name of this state to recover the amount of any taxes, penalties, interest or other amounts owed by the taxpayer to the department that are due and unpaid. . . . In the action a certificate by the department of revenue showing the delinquency is prima facie evidence of the levy of the tax, of the delinquency and of the compliance by the department of revenue with all the provisions of law relating to the computation and levy of the tax.

. . . .

C. The action shall not commence more than ten years after the amount of taxes determined to be due becomes final unless the taxpayer and the department extend the ten year limitation or enforced collection has been stayed by operation of federal or state law. If enforced collection has been stayed, the period of limitations shall be extended by the period of time that the department was stayed from engaging in enforced collections.

A.R.S. § 42-1104 states in pertinent part as follows:

A. For the taxes to which this article applies, every notice of every additional tax due shall be prepared on forms prescribed by the department and mailed within four years after the report or return is required to be filed or within four years after the report or return is filed, whichever period expires later. For the purposes of this section, the requirement that the notice be mailed shall include methods allowed in lieu of mail under § 42-1108 or 42-1109.

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