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Arizona Court Of Appeals Permits Utility To Seek Preemption Of State Property Taxes On Power Plant Located On Tribal Land.

On November 3, 2016, the Arizona Court of Appeals allowed South Point Energy Center, LLC ("South Point") to pursue challenges to the assessment of property taxes for tax years 2010 and 2011 and for 2012 and 2013 on its power plant on the Fort Mojave Indian Reservation. The appeals court reversed the decision of the Arizona Tax Court that granted summary judgment to the Arizona Department of Revenue and Mohave County. The Tax Court held that a prior unsuccessful challenge to property tax assessments levied against the plant for 2003 and 2004 barred South Point from pursuing the current challenges. The opinion, *South Point Energy Center, LLC v. ADOR/Mohave County*, Case Nos. 1 CA-TX 15-0005, 1 CA-TX 15-0006 (Consolidated), can be accessed on the Arizona Court of Appeals at the website here.

South Point filed its actions arguing that federal law preempted the assessments, making the assessments at issue erroneously assessed taxes (A.R.S. § 42-16524(G)), and that, under A.R.S. § 42-11005, it could lawfully seek to recover illegally collected taxes. The defendants argued that, because the plant's prior owner, Calpine, had unsuccessfully challenged assessments against the plant, South Point was precluded from seeking relief for the later tax years. Calpine had argued that, for Arizona property tax purposes, the plant should have been deemed to be owned by the Tribe and, therefore, not subject to Arizona property taxation. The tax court denied Calpine's challenge, ruling that, because Calpine owned the improvements on the land, the improvements were subject to taxation. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 246, 248-49, ¶¶ 1, 17-22 (App. 2009). The Arizona Supreme Court denied Calpine's petition for review.

In view of this history of challenges to property tax assessments against the plant, the Defendants argued that, because Calpine could have raised the preemption argument in the prior proceedings, South Point was collaterally estopped from raising the preemption and illegal tax arguments for later tax years. The Tax Court accepted this argument and entered summary judgment for the defendants. On appeal, South Point argued that collateral estoppel did not bar its pursuit of legal theories neither raised nor adjudicated in the prior litigation. The Court of Appeals accepted South Point's arguments. It held that, because Calpine did not litigate the question of preemption, "the fact that it could have been litigated is of no consequence here." South Point at ¶11 (emphasis in original). The Court further held that South Point could challenge whether the assessment was erroneous under the "error" correction statute, reasoning that, "[i]f the correct property tax rate is zero because of preemption, the imposition of any other tax rate is necessarily an illegal tax rate, and constitutes 'error' under the statute." South Point at ¶14. The court remanded the proceedings to Tax Court to resolve the preemption issues.

In sustaining South Point's appeal, the Court of Appeals did not resolve South Point's preemption argument. The court stated that "[w]e offer no opinion as to the merits of South Point's preemption theory. But because the issue was not previously litigated, issue preclusion cannot bar it." Id. at ¶11.

On remand, South Point will have the ability to litigate the preemption question. The owners of

power plants – and their successors in interest – will be well-served to be precise in the issues raised before the tax court and thus certain that Arizona law permits plant owners to bring later challenges on new legal theories that were both not raised and not resolved on the merits in earlier proceedings.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.