Filed 11/22/06 Time Warner Cable v. City of Torrance CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TIME WARNER CABLE, INC., Plaintiff and Respondent, v. CITY OF TORRANCE, Defendant and Appellant.	B186220 (Los Angeles County Super. Ct. No. BC318252)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Rutan & Tucker, William M. Marticorena, Jeffrey T. Melching and Lona N. Laymon for Defendant and Appellant.

Rintala, Smoot, Jaenicke & Rees, Peter C. Smoot and J. Larson Jaenicke for Plaintiff and Respondent.

Defendant and appellant City of Torrance appeals from a judgment following an order granting summary judgment in favor of plaintiff and respondent Time Warner Cable Inc. (TWC)[1] in this action for declaratory relief regarding the collection of cable television users' taxes. The City contends: (1) the Torrance Municipal Code requires advertisers, home shopping networks, and cable television service users who are not charged by TWC for service to pay a users' tax that TWC failed to collect and remit to the City; and (2) the City's 2003 interpretation of the Torrance Municipal Code does not constitute the imposition of a new tax or the extension of a tax which must be submitted to voters for approval under Proposition 218. We conclude that the plain language of pertinent sections of the Torrance Municipal Code does not require TWC to collect and remit cable television users' taxes from advertisers, home shopping networks, or cable television users who are not charged for service by TWC. Summary judgment was properly granted, and we therefore affirm.

FACTS

The City enacted a cable television users' tax ordinance in 1976. In its current form, section 225.1.7 of Chapter 25 of the Torrance Municipal Code[2] provides: "a) There is hereby imposed a tax upon every person in the City using cable television service in the City. The tax imposed by this Section shall be at the rate of six (6) percent of the charges made for such service and shall be paid by the person paying for such service; provided, however, that effective July 1, 1991, the tax imposed in this Section shall be at the rate of six and one-half (6/12) percent of the charges made for such service

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[1] TWC is a successor to other cable companies, including Teleprompter of Southern California, Inc. All references to the cable company refer to either TWC or its predecessors.

[2] All further statutory references are to the Torrance Municipal Code, unless otherwise noted.

and shall be paid by the person paying for such service . . . . [¶] b) The tax imposed in this Section shall be collected from the service user by the service supplier. The amount of the tax collected in one (1) month shall be remitted to [the City's Director of Finance] on or before the 20th day of the following month."

The definition of "person" includes individuals, corporations and partnerships. (§ 225.1.1, subd. (a).) "Service user" means "a person required to pay a tax imposed by this Chapter." (§ 225.1.1, subd. (f).) A "service supplier" is "a person required to collect or self-impose and remit a tax imposed by this Chapter." (§ 225.1.1, subd. (e).)

Section 225.1.16 provides for the payment of users' taxes on cable television service that is provided to a tenant or other person without charge. Section 225.1.16 states in pertinent part: "a) All persons who are tenants, lessees, or who are the actual consumers of any telephone, electrical, gas, water or cable television service as defined in this Chapter but who have these services provided at no cost or in accordance with provisions of any lease or other agreement by another person shall be a service user for the purposes of this Chapter. [¶] b) Any person who provides any telephone, electrical, gas, water or cable television service to any person defined as a service user in subsection a) of this Section shall either collect the taxes as required by this Chapter from any such service user and remit the amounts collected to the service supplier or remit an equal amount to the service supplier in lieu of the collection of such taxes from the service user."

In 1982, the City granted a cable television franchise to TWC's predecessor-in-interest, Teleprompter of Southern California, Inc. The franchise agreement provided for the cable company to pay quarterly franchise fees to the City of five percent of "all gross revenues derived from the operation of the cable television system within the City during such quarter." " 'Gross Revenues' shall mean any and all compensation and other consideration in any form whatsoever and any contributing grant or subsidy received directly or indirectly by [Teleprompter] from (1) subscribers or users in payment for television or FM radio signals, reception or service received within the City, whether said

signals, reception or service is included within the term 'basic subscriber service' or if an additional or premium charge is collected for said signals, reception or services, including installation and line extension charges, (2) any fees or income received by [Teleprompter] for carrying advertising or commercial messages over the CATV facilities, and (3) from any other person or utilization of or connection to the property of [Teleprompter] to the extent that a franchise payment may be legally imposed on account thereof."

In 1986, an audit of the users' taxes was conducted by the City's internal auditor. The cable company met with the auditor to discuss the audit report. Following the meeting, the cable company sent a letter in 1987 to the auditor providing the amount of the local advertising revenue that the cable company had received and the amount of the franchise and access fees that were due. Parenthetically, the cable company noted that no users' tax would be collected or paid on advertising sales. In subsequent correspondence, the City did not dispute the cable company's position regarding the payment of users' tax on advertising sales.

In 1990, the City employed the accounting firm Coopers and Lybrand to conduct an audit of recent users' taxes. The accounting firm did not include advertising revenue, home shopping network revenue, or nonpaying subscribers in the amount of gross revenue that they used to calculate the users' tax due.

Section 225.1.7 was amended in 1991 to temporarily increase the tax imposed on cable television users. In 1993, section 225.1.7 was amended again to make the amount of the increase permanent.

The City's 1995 audit of the franchise fees expressly included advertising and home shopping network revenue in the calculations of gross revenues in accordance with the franchise agreement.

In 1998, the City employed a private firm, Municipal Resource Consultants, to audit the collection of users' tax. Although the accounting firm identified several areas in which errors had been made in tax calculations, the firm did not suggest that advertising

revenue, home shopping network revenue, or nonpaying subscribers should be included in the calculations of the users' tax.

In 2003, the City's internal finance department conducted an audit of the users' tax for the period commencing April 1, 1999, through December 31, 2001. The audit report concluded that the users' tax had been underpaid by $644,735, based on TWC's failure to collect and remit taxes from advertisers, home shopping networks, and nonpaying subscribers. The City assessed $913,072 in back taxes, including interest and penalties.

PROCEDURAL BACKGROUND

On July 9, 2004, TWC filed the instant action seeking a declaration that the users' tax does not apply to advertisers, home shopping networks, or nonpaying subscribers, and the tax is unconstitutional as applied by the City. After the City filed an answer, TWC and the City filed motions for summary judgment. The trial court ruled that the City's attempt to collect additional taxes was an unconstitutional imposition of a new tax without voter approval under Proposition 218. TWC's motion for summary judgment was granted; the City's motion for summary judgment was denied. Following entry of judgment in favor of TWC, the City filed a timely notice of appeal.

DISCUSSION

Standard of Review

The standard of review of an order granting summary judgment is well settled. The party moving for summary judgment always "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*), fn.

omitted.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*, fn. omitted.)

In other words, "[i]f a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment." (*Aguilar*, *supra*, 25 Cal.4th at p. 855.) " 'In determining the propriety of a summary judgment, the trial court is limited to facts shown by the evidentiary materials submitted, as well as those admitted and uncontested in the pleadings. [Citations.] The court must consider all evidence set forth in the parties' papers, and summary judgment is to be granted if all the papers submitted show there is no triable issue of material fact in the action, thereby entitling the moving party to judgment as a matter of law. [Citation.]' [Citation.] '[S]ummary judgment shall not be granted . . . based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.' [Citations.]" (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316.)

"On appeal, 'our review is de novo, and we independently review the record before the trial court.' [Citation.] 'The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale.' " (*Elcome v. Chin*, *supra*, 110 Cal.App.4th at p. 316, quoting *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) "Issues of law, including statutory construction and the application of that construction to a set of undisputed facts, are subject to this court's independent review. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417.)" (*Hill Brothers Chemical Co. v. Superior Court* (2005) 123 Cal.App.4th 1001, 1005.)

"Statutory construction is a question of law we decide de novo. [Citation.] Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. [Citation.] Intent is determined foremost by the plain meaning of the statutory language. If the language is clear and unambiguous, there is no need for judicial construction." (*City of Brentwood v. Central Valley Regional Water*

Quality Control Bd. (2004) 123 Cal.App.4th 714, 722.) If the statutory language is reasonably susceptible of more than one meaning, we may turn to other rules of interpretation and extrinsic aids in an effort to discern the intended meaning. (*Mason v. Retirement Board* (2003) 111 Cal.App.4th 1221, 1227; *City of Brentwood v. Central Valley Regional Water Quality Control Bd., supra,* 123 Cal.App.4th at p. 722.)

"Words used in a statute . . . should be given the meaning they bear in ordinary use." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "We are not prohibited 'from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [statute.]' [Citations.]" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.)

We construe statutes with reference to the entire statutory scheme of which they are a part and sections relating to the same subject must be read together and harmonized. (*Mason v. Retirement Board, supra,* 111 Cal.App.4th at p. 1229; *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 889.) "These rules also apply when interpreting local ordinances. [Citation.]" (*Valley Vista Services, Inc. v. City of Monterey Park, supra,* 118 Cal.App.4th at p. 889.)

Advertisers and Home Shopping Networks

The City contends that advertisers and home shopping networks use cable television service to broadcast programming, and therefore, they are cable television users subject to the tax pursuant to sections 225.1.1, subdivision (f), and 225.1.7. We conclude that although advertisers and home shopping networks may "use" cable television service in the broadest sense of the word, in the context of the ordinance, the

City Council did not intend for the users' tax to be imposed upon the activities of advertisers and home shopping networks.

The tax imposed by the ordinance on "every person in the City using cable television service" is based on "the charges made for such service" and imposed on "the person paying for such service." In other words, the users' tax is based on the cable company's charges for cable television service, not on charges for "use" of the service. The plain meaning of "the charges made for cable television service" is charges to transmit programming to a consumer.[3] The commonsense meaning of "the person paying for cable television service" refers to the person paying to receive the transmission of programming. Although advertisers and home shopping networks make use of the cable television system when they pay TWC to broadcast particular programming to consumers, they do not pay for cable television service in the ordinary meaning of the phrase. It would not be reasonable to construe the charges paid by advertisers and home shopping networks as charges for cable television service. The plain language of the ordinance indicates that the "users" on whom the City Council intended to impose a tax are persons charged by the cable company for cable television service. We conclude the ordinance was not intended to impose a users' tax on the activities of advertisers and home shopping networks.

There is no legislative intent to support a finding that the City contemplated applying the users' tax to advertisers or home shopping networks at the time the ordinance was enacted in 1976. Our conclusion that the plain meaning of the ordinance was merely to impose a consumer tax is bolstered by the fact that when the franchise was granted in 1982, the franchise agreement provided for a fee of five percent of "all gross revenues derived from operation of the cable television system," a fee that

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[3] We note that under federal law, "cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and [¶] (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service[.]" (47 U.S.C. § 522, subd. (6).)

unquestionably applies to revenue generated from advertisers and home shopping networks. The City's interpretation that the users' tax applies to advertisers and home shopping networks is simply not supported by the plain meaning of the ordinance, which has never identified advertisers and home shopping networks as being subject to the tax.

Our conclusion is supported by the fact that the City did not impose the users' tax on advertisers or home shopping networks during the course of more than 20 years of administering the tax. Courts give great weight to consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect. (*Mason v. Retirement Board, supra,* 111 Cal.App.4th at p. 1228.) Courts will generally not depart from such an interpretation, especially where there has been acquiescence by persons having an interest in the matter, unless the agency's interpretation is clearly erroneous or unauthorized. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, overruled on other grounds in *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.) The City was clearly aware of the revenue generated from advertisers and home shopping networks, because the City regularly collects franchise fees from the cable company based on this revenue. The cable company brought the users' tax issue to the City's attention in a letter by noting that advertising revenue would not be included in the calculation of the users' tax. The City's response did not dispute the cable company's position. Given the City's long standing tax collection practice, combined with the absence of any legislative intent to support the City's interpretation of the ordinance, we conclude the tax does not apply to the activities of advertisers and home shopping networks.

We also note that the cable television users' tax ordinance has been amended on two separate occasions without any attempt to alter the City's tax collection practice and impose the users' tax on advertisers, home shopping networks, or other entities that provide programming to the cable company for transmission. "[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision or the failure to substantially modify a provision, is a strong indication the

administrative practice was consistent with underlying legislative intent." (*DeYoung v. City of San Diego, supra,* 147 Cal.App.3d pp. 18-19, overruled on other grounds in *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.) The activities of advertisers and home shopping networks are not subject to the cable television users' tax, and therefore, summary judgment was properly granted.

Cable Television Service Provided Without Charge

The City contends that under section 225.1.16, users' taxes are owed based on cable television service that TWC provides certain customers without charge. We conclude the plain language of the ordinance is not susceptible to the City's interpretation.

Under the users' tax ordinance described above, the person paying for cable television service is required to pay a users' tax. However, in circumstances where the person paying for cable television service is not the actual consumer of the service, section 225.1.16 shifts responsibility for payment of the tax to the actual consumer and requires collection of the tax by the person who provides the service. The person who provides the service to the consumer must either collect the tax owed from the consumer and remit it to the service supplier, or remit an equal amount in lieu of collection. Section 225.1.16 does not, however, alter the calculation of the tax, which continues to be based on the charges made for service. Neither section 225.1.7 nor section 225.1.16 provide for the calculation and imposition of a users' tax in the event that no charges have been made for service. Section 225.1.16 clarifies the responsibility for payment and collection of a users' tax in situations where the person paying for cable television service is not the actual consumer of the service. Section 225.1.16 does not apply in circumstances where the service supplier does not charge for service.

Our interpretation of section 225.1.16 is also supported by the City's long-standing tax collection practice, which did not require users' taxes to be paid in

connection with cable television service that was provided by the cable company without charge. Summary judgment was properly granted in favor of TWC.

DISPOSITION

The judgment is affirmed. Respondent Time Warner Cable Inc. is awarded its costs on appeal.

KRIEGLER, J.

I concur:

ARMSTRONG, Acting P. J.

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MOSK, J., Concurring

I concur.

The majority states that if the ordinance has a plain meaning "'there is no need for judicial construction.'" (Citing *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 722.) The majority concludes that the ordinance has a plain meaning but then proceeds to employ other methods of judicial interpretation. The Supreme Court has done this. (See, e.g., *Stephens v. County of Tulare* (2006) 38 Cal.4th 793 [said "plain meaning" but also resorted to statutory history]; see also Carp, "Court Needs To Follow Its Own Rule Of Not Relying On Legislative History," Los Angeles Daily Journal, Nov. 15, 2006, p. 8.)

I am not so confident that the ordinance here is clear and unambiguous. I find more convincing the other interpretive devices used by the majority.

MOSK, J.