ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

South Point Energy Center LLC v. Arizona Department of Revenue,
CV-21-0130-PR

PARTIES:

Petitioner: Arizona Department of Revenue ("**ADOR**") and Mohave County

Respondent: South Point Energy Center LLC ("**South Point**")

FACTS:

In 1999, the Fort Mohave Indian Tribe (the "**Tribe**") entered into a fifty-year ground lease with a construction company to permit it to construct and operate an electric power plant (the "**Plant**") on land held in trust for the Tribe by the U.S. Department of the Interior.

After the Plant was built, the construction company sued ADOR and Mohave County in Arizona Tax Court seeking to obtain a refund of taxes paid on the Plant that it argued had been illegally collected. A major issue was who owned the physical improvements and the personal property that make up the Plant. Eventually the tax court determined that the construction company owned them and that the construction company could be required to pay Arizona property tax on the improvements and personal property. This ruling was affirmed on appeal.

South Point eventually bought the Plant. South Point then filed a lawsuit arguing that the assessment of property taxes against the Plant's improvements and personal property was impermissible because federal law preempts state and local taxation of the Plant. Specifically, South Point argued that section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, prohibited state and local taxation of the Plant because it was located on Tribal land. Section § 5108 provides, in relevant part, that the Secretary of the Interior may "acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 5108.

The tax court determined that the Plant was not a permanent improvement under § 5108 because the Tribe's ground lease with South Point requires South Point to remove those improvements when the lease concludes. And, the tax court held that under *White Mountain Apache Tribe v. Bracker* ("***Bracker***"), 448 U.S. 136, 151 (1980), "tribal sovereignty does not preempt taxation of the Facility." *S. Point Energy Center v. Ariz. Dept' of Revenue*, 251 Ariz. 263, 265 ¶ 4 (App. 2021). The tax court thus granted summary judgment to ADOR.

On appeal, South Point argued that the tax court had erred and that four cases established that under federal law the Plant was a permanent improvement that was part of the "land" under § 5108 that must be exempt from state and local taxation. Those cases are: *United States v.*

Rickert ("***Rickert***"), 188 U.S. 432 (1903), *Mescalero Apache Tribe v. Jones* ("***Mescalero***"), 411 U.S. 145 (1973), *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization* ("***Chehalis***"), 724 F.3d 1153 (9th Cir. 2013), and *Seminole Tribe of Florida v. Stranburg* ("***Stranburg***"), 799 F.3d 1324 (11th Cir. 2015). The court of appeals agreed with South Point and concluded that under "the reasoning of the several federal cases" applying section 5108, "that a tax on any permanent improvements subject to the Lease is effectively a tax on one of the privileges of the Tribe's ownership of trust land, and therefore is barred by § 5108." *S. Point*, 251 Ariz. at 267 ¶ 19.

The court of appeals also held that it need not address ADOR's argument that "whether the tax is preempted is controlled not by § 5108 but instead by *Bracker*" and by a Bureau of Indian Affairs rule found in 25 C.F.R. § 162.017. *Id.* at 267–68 ¶¶ 20, 21. Because the court of appeals held that the Plant was "categorically exempt[]" from taxation under § 5108, the court stated that it "need not determine whether taxes imposed on those permanent improvements also would be barred under a *Bracker* analysis." *Id.* at 268 ¶ 24.

The court of appeals also reversed the tax court's conclusion that the Plant "was entirely personal property." *Id.* at 269 ¶ 27. The court of appeals held that the tax court must analyze whether the Plant was a permanent improvement or personal property based on the six factors in *Whiteco Industries Inc. v. Commissioner*, 65 T.C. 664 (1975). It thus remanded the case "to the tax court to conduct a *Whiteco* analysis to determine which, if any, of the assets that make up the Facility are permanent improvements that therefore are exempt from taxation under § 5108." *Id.* ¶ 30. The court of appeals also stated that the tax court "should consider whether property taxes on the assets that are not permanent improvements are preempted under *Bracker*." *Id.*

ADOR then timely petitioned for review, raising the issue below.

ISSUE:

Whether section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, preempts state and local taxes on permanent improvements on tribal lands when they are owned by non-Indians.