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IN THE SUPERIOR COURT OF ARIZONA
IN THE ARIZONA TAX COURT

HAROLD VANGILDER; DAN NEIDIG; and ARIZONA RESTAURANT ASSOCIATION Plaintiffs, vs. ARIZONA DEPARTMENT OF REVENUE; PINAL COUNTY; PINAL COUNTY REGIONAL TRANSPORTATION AUTHORITY, Defendants.	Case No. TX2017-000663 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ISSUANCE OF DECLARATORY JUDGMENT** (The Honorable Christopher Whitten)

The Department of Revenue ("DOR") waives its objections to the issuance of declaratory judgment in this case, by stating that it "will not object to the validity or general scope of the tax being adjudicated" in this motion. DOR's Response to Motion for Declaratory Judgment ("DOR Resp.") at 5. The County did not file an opposition, and therefore should be deemed not to oppose the motion. Ariz. R. Civ. P. 7.1(b)(2).

DOR agrees with the plaintiff that this case does not "concern a disputed assessment or [a] disputed denied refund claim," and therefore that the exhaustion-by-refund procedure is inapplicable. *Id.* at 6. That is significant because there is no *jurisdictional* barrier to declaratory relief in this case. Although in cases that seek to resolve an *assessment* or *refund claim*, this court would lack jurisdiction to issue declaratory relief until a taxpayer exhausts administrative remedies, no such exhaustion

requirement is applicable in a case like this, which does *not* involve a disputed assessment or refund claim. *Kerr v. Waddell*, 183 Ariz. 1, 7–11, 899 P.2d 162, 168–72 (App. 1994); *Estate of Bohn v. Scott*, 185 Ariz. 284, 290–91, 915 P.2d 1239, 1245–46 (App. 1996).[1] As the Court of Appeals has explained, those who seek refunds must "resort to the administrative process," but plaintiffs who are "injured by the administration of an unconstitutional tax scheme" are *not* required to—they may "seek redress in the first instance" through declaratory relief. *Kerr*, 183 Ariz at 10, 899 P.2d at 171. *See also State Tax Comm'n v. Wallapai Brick & Clay Prods., Inc.*, 85 Ariz. 23, 29, 330 P.2d 988, 992 (1958). Nor is there any statutory barrier to declaratory relief. A.R.S. § 42-11006 applies only to property taxes.

DOR also agrees with Plaintiffs that the Proposition 417 tax violates Arizona statutes. DOR Resp. at 10. Although Plaintiffs believe Proposition 417 does, in substance, attempt to create a new tax classification—retail sales of items below $10,000—for the reasons explained in Plaintiffs' motion, it is unnecessary for this Court to resolve that matter, since DOR and Plaintiffs agree that the $10,000 cutoff is unlawful and renders the tax void for violating A.R.S. § 42-6106.

Given this agreement, it is unnecessary for this Court to address Plaintiffs' constitutional claims. This Court can declare the measure invalid based solely on the points of agreement discussed above. However, to briefly respond to DOR's constitutional arguments:

Although the tailoring of tax laws to ensure maximum efficient revenue collection may be a rational basis, the tailoring of tax laws to favor particular groups of the population for political reasons is not. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016). Here, the $10,000 cutoff is not tailored to ensure the collection of revenue, but to provide a special tax benefit to in-county interest groups—specifically, sellers of retail items that individually cost more than $10,000—in order to prevent those interest groups from opposing the Proposition as a political matter.

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[1] The DOR cites *Estate of Bohn* for the proposition that taxpayers must exhaust administrative remedies before seeking declaratory relief even if they are *not* seeking a refund or challenging a particular assessment. But that is not correct. *Estate of Bohn* plainly held that the taxpayers were required to exhaust administrative remedies *because they were seeking refunds*. The court acknowledged that where no refund is sought or assessment challenged, declaratory relief *can be* "an appropriate remedy for testing the validity of an administrative tax regulation of general application." *Id.* at 290, 915 P.2d at 1245. That is the case here. DOR also cites *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz County*, 233 Ariz. 460, 314 P.3d 806 (App. 2013), but that case—unlike this one—challenged an *assessed* tax.

The record is clear on this point. The testimony to the state legislature cited in Plaintiffs' motion demonstrates that the County was seeking to avoid a political clash with auto dealers and sellers of farm equipment rather than to ensure against consumers "fleeing." Mot. at 7. This is proven by the fact that the $10,000 cutoff applies only when a *single item* exceeds $10,000, and not when sales of multiple items to a single customer exceed that amount. Thus the buyer of a new Ford F-150 is exempt, but the buyer of two $5,000 industrial refrigeration units is not exempt. The $10,000 cutoff is therefore designed "to favor economically certain constituents at the expense of others similarly situated," which fails the rational basis test. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008)

The DOR also claims that the law satisfies the Special Law Clause—under which the Court must apply a higher degree of scrutiny than mere rational basis, *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 149, 800 P.2d 1251, 1257 (1990)—because that Clause only forbids the government from "discriminat[ing] *in favor of* a person or class by granting them a special or exclusive immunity, privilege, or franchise." DOR Resp. at 8 (quoting *Town of Surprise*, 166 Ariz. at 148 (emphasis supplied by DOR)). But as *Town of Surprise*, *supra*, *State v. Levy's*, 119 Ariz. 191, 580 P.2d 329 (1978), and *Tucson Electric Power Co. v. Apache Cnty.*, 185 Ariz. 5, 912 P.2d 9 (App. 1995), make clear, a tax law that exempts specific groups violates the Special Law Clause just as much as any special franchise. The DOR says these cases are not on point … but it never explains why.

It is true, of course, that "all retailers selling a single item over $10,000 are treated equally," DOR Resp. at 8, but that begs the question. The class who benefit from the special law are those selling single items over $10,000. It can always be said that all those who benefit from the special favor benefit equally from that special favor. The question is whether disparate treatment constitutes a special favor to that class. Here it does: sellers of expensive goods are treated one way, and others are treated differently. That is unconstitutional.

As to what DOR calls "election law issues," Plaintiffs agree that if Proposition 417 is unlawful, then it should be invalidated regardless of whether the Ballot version, or the Pamphlet version controls. DOR Resp. at 9. However, to address these issues: the DOR is incorrect to refer to them as "election law issues." As explained in Plaintiffs' Reply in Support for Preliminary Injunction at 5–6, Plaintiffs do not claim that voters were misled, or that there was any procedural irregularity regarding the election.

Instead, Plaintiffs contend that what voters actually approved—what actually was made into law by Proposition 417—violates A.R.S. § 42-6106, and is therefore void. It is the County, *not* Plaintiffs, who claim that voters were confused, and that the language in the *Pamphlet*, which voters never voted on, should be deemed to be the law. Plaintiffs are relying *solely* on the language of the initiative on which voters cast their ballots, and are arguing that *it* violates state law. That is not an "election law" dispute—it is an ordinary case over the validity of a County ordinance *vis-à-vis* state law.

That, too, is unnecessary to revolve, however, because Plaintiffs agree again with the DOR that voters likely would not have approved of the measure absent the invalid and unlawful $10,000 cutoff. As a result, this Court should declare the entire measure invalid.

CONCLUSION

Plaintiffs' motion should be granted.

RESPECTFULLY SUBMITTED this 21st day of May, 2018,

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CERTIFICATE OF SERVICE

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