

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2006-000240

08/16/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT  
S. Brown  
Deputy

HOME DEPOT USA INC

MICHAEL G GALLOWAY

v.

ARIZONA STATE DEPARTMENT OF  
REVENUE

KIMBERLY J CYGAN

MINUTE ENTRY

The Court took this matter under advisement following oral argument on July 18, 2011. The Court has considered Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment and finds as follows.

The issue presented is the effect on a unitary filing corporation of A.R.S. § 43-1122(4): "In computing Arizona taxable income for a corporation, the following amounts shall be subtracted from Arizona gross income: ... Dividends received from another corporation owned or controlled directly or indirectly by a recipient corporation. For the purposes of this paragraph, 'control' means direct or indirect ownership or control of fifty per cent or more of the voting stock of the payor corporation by the recipient corporation." Given that HDUSA concedes that Home Depot Holdings was unitary with HD Maryland for the tax years in question, was HD Maryland "another corporation" or simply part of the "recipient corporation"?

AAC R15-2D-401(B) states that "a unitary business may consist of part of a single corporation, one corporation, or many corporations." Unitary reporting does not subsume individual corporate identities into a unitary "super-corporation." There is no question that HD Maryland has a corporate identity distinct from HD Holdings which is not erased by the regulation. The Department points to A.R.S. § 43-942(A), which authorizes it to "distribute, apportion or allocate gross income, deductions, credits or allowances between or among

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[commonly-controlled] taxpayers, if it determines that such distributions, apportionment or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such taxpayer.” The Department’s interpretation here would permit it to override A.R.S. § 43-1122(4) in any, even in all, cases simply by choosing to treat the payor corporation and the recipient corporation as unitary. Although this reading makes the two statutes inconsistent, it does not place them in the direct, irreconcilable conflict required under *Sempre Ltd. Partnership v. Maricopa County*, 225 Ariz. 106, 110 ¶ 13 (App. 2010), for the specific to prevail over the general. Nonetheless, there is no indication that the legislature intended the specific rule of § 1122(4) to apply solely at the discretion of the Department.

Under the plain language of A.R.S. § 43-1122, the dividends received by HD Holdings from HD Maryland shall be subtracted from the Arizona gross income of HD Holdings. Counsel for Home Depot frankly admitted what also appears to the Court to be the case, that the statute results in a windfall for Home Depot and similarly situated businesses. However, the Court is constrained by the unambiguous statutory language. The remedy lies with the legislature.

Accordingly,

**IT IS ORDERED** granting Plaintiff’s Motion for Partial Summary Judgment.

**IT IS FURTHER ORDERED** denying Defendant’s Cross-Motion for Partial Summary Judgment.

**IT IS FURTHER ORDERED** setting this matter for a telephonic status conference on **September 9, 2011 at 9:00 a.m.** to discuss a schedule and procedure for resolving any issues that survive this ruling. Counsel for Plaintiff is requested to initiate the call to the Court at 602-506-3776.