Michael K. Jeanes, Clerk of Court
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11/29/2016 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2016-000078 11/21/2016

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
T. Cooley
Deputy

WILBUR-ELLIS COMPANY, et al. BRIAN W LACORTE

v.

ARIZONA DEPARTMENT OF REVENUE BENJAMIN H UPDIKE

MINUTE ENTRY

Courtroom 201-OCH

9:16 a.m. This is the time set for Oral Argument re: Motion for Judgment on the Pleadings. Plaintiffs are represented by counsel, Brian W. Lacorte and James Busby. Defendant is represented by counsel, Scott Tesdale for Benjamin H. Updike.

Court Reporter, Barbara Stokford, is present, in lieu of a digitally recording.

Oral argument is presented.

Based upon matters presented to the Court,

IT IS ORDERED taking this matter under advisement.

9:50 a.m. Matter concludes.

LATER:

The Court has considered Defendant's Motion for Judgment on the Pleadings, filed August 15, 2016, Plaintiffs' Response to Defendant's Motion for Judgment on the Pleadings (but

not the Cross-Motion for Summary Judgment),[1] filed September 19, 2016, and Defendant's Reply to Response to Motion for Judgment on the Pleadings, filed October 3, 2016. The Court benefited from oral argument on the motion on November 21, 2016.

As the motion relies upon matters outside the record, the Plaintiffs ask that it be converted to a motion for summary judgment. Plaintiffs accordingly support their arguments with matters outside the record as well. Plaintiffs' request to treat the motion as a motion for summary judgment is granted.

The primary issue in resolving the viability of Plaintiffs' claim is the meaning of "other propagative materials" in A.R.S. § 42-5061(A)(33), which provides, in relevant part that "[t]he tax imposed on the retail classification does not apply to the gross proceeds of sales or gross income from… sales of seeds, seedlings, roots, bulbs, cuttings *and other propagative material* to persons who use those items to commercially produce agricultural, horticultural, viticultural or floricultural crops in this state" (emphasis added).

The statute defines the category as "the business of selling tangible personal property at retail," and imposes tax based on the gross proceeds or sales income from that business. Specified items, that otherwise would fall within the category, are carved away from it. They therefore must be treated as exemptions. Tax exemptions are narrowly construed against the taxpayer. State ex. rel. *ADOR v. Capital Castings, Inc.*, 207 Ariz. 445, 447 (2004).

"Other propagative material" is not specifically defined in the statute. Plaintiff's expert Dr. Rush proposes a technical definition that, as he acknowledges, subsumes essentially the whole of agriculture: "the entire growth process of a plant from inception to full maturity." But words are given their ordinary meaning unless there is an indication that the legislature has intended something else. *Dowling v. Stapley*, 218 Ariz. 80, 84-85 ¶ 11 (App. 2008). Plaintiff acknowledges that the ordinary meaning of "propagative" is limited to activities relating to reproduction.

The statutory language supports this interpretation. The *ejusdem generis* rule applies in Arizona where a general word like "other" is preceded by a list or series of specific but similar things, in which case the general word is construed as limited to things of the same kind or nature as the named ones. *Bilke v. State*, 206 Ariz. 462, 465 ¶13 (2003). Here, seeds, seedlings, roots, bulbs, and cuttings are all taken from or disseminated by living plants to create a new generation of like plants, and are essential for that purpose.

[1] On October 27, 2016 the Court stayed further briefing on the cross motion until this motion could be resolved.

Plaintiff argues that the list is all-encompassing, leaving nothing else of that nature to constitute "other propagative material" and thus invalidating the *ejusdem generis* rule. This is factually incorrect. For instance, fungi reproduce by means of spores, which are not named in the list. A mushroom grower must appeal to the "other propagative material" language to exclude spores from taxation.

Fertilizer is valuable, though not indispensable, to the profitability of crops. However, it cannot independently reproduce the plants it fertilizes, nor discriminate among them. This is quite different from the named items by which "other propagative material" must be interpreted.

The Court is not persuaded by the short list of cases from other jurisdictions supplied by Plaintiff. *See Call Bond & Mortgage Co. v. Sioux City*, 259 N.W. 33, 39 (Iowa 1935) (passing mention of manure "used in propagating the plants in a greenhouse"); *Rosenberger v. Livingston*, 200 P.2d 329, 330 (Kans. 1948) (reference in contract to "specially prepared soil, leaf mold, compost, and similarly prepared propagation materials").[2] If anything, it may be significant that Plaintiff can find so few casual dicta, and no holdings by any court, declaring fertilizer to be propagative.

The Court also does not find this to be an instance of sale for resale. That plants absorb the nutrients provided by fertilizer is not determinative. The calcium absorbed by a plant from the soil or fertilizer is the same calcium that enters a cow's body when it eats the plant and the same calcium that enriches its milk and the same calcium that eventually builds a child's bones. Playing trace-the-elements is not particularly helpful in determining whether a product is being sold for resale.

A.R.S. § 42-5001(14) defines "sale" as "any transfer of title or possession, or both … of tangible personal property." That some molecules migrated from the fertilizer through the soil and into the plant does not confer upon the buyer of the plant title or possession of the fertilizer.

This conclusion is supported by the lack of an agricultural equivalent to A.R.S. § 42-5061(A)(42)(b), which excludes from transaction privilege tax "[l]ivestock and poultry feed,

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[2] Even if *Gigous v. City of Greensboro*, 2003 WL 21498995 (N.C. App. 2003) (unpublished disposition), is considered despite its impermissibly early date, the characterization in the fact summary of the plaintiff's duties at a nursery as including "plant propagation activities such as pruning, weeding, and fertilizing" adds nothing; the nature of her work did not bear on the decision. Note that in both this case and Rosenberger, the list defining "propagative" excludes the seeds and similar items central to the Arizona statutory definition, and includes things of a very different nature than those in our list. This evident difference in the meaning they give the word weakens their persuasive effect even more. The Court can find nothing of relevance in *U.S. v. 154 Sacks of Oats*, 294 F. 340, 342 (W.D.Va. 1923), which mentions manure as a fertilizer (in that case of a weed), but does not use the key word "propagative."

salts, vitamins and other additives for livestock or poultry consumption that are sold to persons … for use or consumption in the businesses of farming, ranching and producing or feeding livestock, poultry, or livestock or poultry products." Having made special provision for animal food, it is significant that the legislature made no such exception for plant food.

Defendant's Motion for Judgment on the Pleadings, filed August 15, 2016, and treated as a motion for summary judgment, is granted.