Chris DeRose, Clerk of Court
*** Electronically Filed ***
08/02/2018 8:00 AM

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

TX 2017-000663 07/18/2018

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
T. Cooley
Deputy

HAROLD VANGILDER, et al. TIMOTHY SANDEFUR

v.

ARIZONA DEPARTMENT OF REVENUE, et al. SCOT G TEASDALE

JOSEPH KANEFIELD
MARK S KOKANOVICH
JUDGE WHITTEN

MINUTE ENTRY

Courtroom 201-OCH

9:54 a.m. This is the time set for Oral Argument re: Motion for Issuance of Declaratory Judgment and Cross Motion for Summary Judgment. Plaintiffs are represented by counsel, Timothy Sandefur and Paul J. Mooney. Defendants, Pinal County and Pinal Regional Transportation Authority are represented by counsel, Joseph A. Kanefield and Mark S. Kovanovich.

A record of the proceedings is made digitally in lieu of a court reporter.

IT IS ORDERED denying the Motion to Strike.

Oral argument is presented.

Based upon matters presented to the Court,

IT IS ORDERED taking this matter under advisement.

10:40 a.m. Matter concludes.

LATER:

First, as a technical matter, the Court doubts that Mr. Vangilder is properly a party in this action. It is well established in Arizona law that the incidence of a transaction privilege tax falls on the business conducting the taxed transaction, and that purchasers lack standing to recover it. *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 115-17 ¶ 11 (App. 2007). Mr. Vangilder is apparently no more than a consumer of goods purchased in taxable transactions, who has not himself paid TPT. It appears, however, that one or more of the other Plaintiffs have standing. The Court therefore need not explore the limits of the suggestion in *Kerr v. Waddell*, 183 Ariz. 1, 8 (App. 1994), that, a state law challenge to the validity of a tax statute may, like a federal law challenge, be heard without payment and exhaustion of administrative remedies (which would be unnecessary here, since the issue is a pure question of law for which a factual record is of no use).

The Court does not need to reach the constitutional arguments. Nor need it address election law. It assumes that the voters of the county understood what they were voting for. The critical issue is instead whether what they voted for conforms to the enabling statute - A.R.S. § 42-6106.

Article IV, Part 1, § 1(3) of the Arizona Constitution authorizes the legislature (and by extension inferior legislative bodies empowered by the legislature) to "order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the legislature." A legislative body is without power to refer a measure that has not been enacted. *Respect the Promise in Opposition to R-14-02--Neighbors for a Better Glendale v. Hanna*, 238 Ariz. 296, 299-300 ¶ 12 (App. 2015). The Court must therefore look to what the Authority or the Board of Supervisors enacted for submission to the voters. That was the text approved in Resolution 2017-01. Whatever the voters might have wanted to vote for, what they did vote for, the only thing they possibly could vote for, was that.

A.R.S. § 42-6106(B)(1) requires that the transportation excise tax be levied on and collected from "each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title," i.e., the business categories declared taxable by § 42-5010.

Proposition 417's express reach extends only to "every person engaging or continuing in the business of selling tangible personal property at retail."

The Authority argues that, by adding the word "including," they expanded its scope to coincide with the statute. That attempt was insufficient. "[I]nasmuch as a taxing statute must be strictly construed, we cannot extend its application to include something not specifically covered

by the language thereof." *Corporation Comm. v. Equitable Life Assurance Soc. of U.S.*, 73 Ariz. 171, 178 (1951). Plainly, the proposition does not specifically cover any category except retail sales.

"Things may be brought under a tax if they are of the same kind or nature as the ones enumerated." *Wilderness World, Inc. v. Dept. of Revenue State of Arizona*, 182 Ariz. 196, 199 (1995). But the remaining taxable categories of Section 5010 are not "of the same kind or nature" as retail sales, the only enumerated category. Persons in those categories therefore do not pay the tax, and thus the proposition failed to include "each person" engaging in a taxable business, as required by the authorizing statute.

The Authority, citing *Sherman v. City of Tempe*, 202 Ariz. 339, 342 (2002), argues that this action had to be filed before the election, and so must be dismissed for untimeliness. But this case, unlike *Sherman*, is a challenge not to the procedure used to put the proposition on the ballot, but to the substantive validity of the proposition as law. "As a true reflection of democratic principles, Arizona citizens are not precluded from legislating on any issue, even though the legislation might conflict with the Arizona Constitution or state law. The constitutionality of such a measure will only be tested *after* it becomes law." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (App. 1997) (emphasis in original; internal citation omitted). Only when final legislation emerged from the vote could its legality be contested.

ACCORDINGLY, Plaintiffs' Motion for Issuance of Declaratory Judgment is granted. Defendants Pinal County and Pinal Regional Transportation Authority's Cross-Motion for Summary Judgment is denied.