ARIZONA SUPREME COURT

HAROLD VANGILDER, et al., Plaintiffs/Appellees/ Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellee, PINAL COUNTY, et al., Defendants/Appellants/ Cross-Appellees.	No. CV-20-0040-PR Court of Appeals No. 1 CA-TX 19-0001 Arizona Tax Court No. TX2017-000663

DEFENDANT/APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

On June 5, 2017, Defendant/Appellant/Cross-Appellees, Pinal Regional Transportation Authority ("RTA"), passed Resolution No. 2017-01 ("RTA Resolution") requesting that Defendant/Appellant/Cross-Appellees, Pinal County ("County"), schedule and conduct a countywide special election on November 7, 2017, for a vote on (1) a regional transportation plan and (2) a tax to fund it. (Electronic Index of Record ["IR"] 26 [Ex. 2].) The RTA Resolution requested that a countywide special election be conducted on (1) a regional transportation plan and (2) a tax to fund the plan, stating that

> on the issue of levying a transportation excise tax at a rate equal to one-half percent (0.005%) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail; provided that such rate shall become a variable or modified rate such that when applied in any case when the gross income from the sale of a single item of tangible personal property exceeds ten thousand dollars ($10,000), the one-half percent (0.005%) tax rate shall apply to the first ten thousand dollars ($10,000), and above ten thousand dollars ($10,000), the measure of tax shall be a rate of zero percent (0%), pursuant to 42-6106, needed to fund the Plan.

(*Id.* at 2.)

Upon receiving the RTA Resolution, the Pinal County Board of Supervisors ("County Board") prepared and distributed a publicity pamphlet ("Pamphlet"). Notwithstanding the fact that the RTA Resolution authorized a proposed tax only

on persons engaged "in the business of selling tangible personal property at retail" with the "zero rate" on certain proceeds, the Pamphlet stated that excise taxes would be levied as follows: (1) on *all* transaction privilege tax ("TPT") classifications set forth in A.R.S. Title 42, Chapter 5, Article 2 (A.R.S. §§ 42-5061 through -5076); (2) on jet fuel taxes under A.R.S. § 42-5352(A); (3) on the use or consumption of electricity or natural gas by customers in Pinal County who are subject to use tax under A.R.S. § 42-5155; and (4) the tax "rate" on the gross income from the sale of a single item of tangible personal property would be 0.5% on gross income amounts up to $10,000 for single items sold and 0% on amounts for single items over $10,000. (IR 26 [Ex. 3 at 14-15].) The full text of the measure and ballot question (hereafter, the "Ballot") for Proposition 417 stated as follows:

> PROPOSITION 417
> (Relating to County Transportation Excise (Sales) Taxes)
>
> Do you favor the levy of a transportation excise (sales) tax including at a rate equal to one-half percent (0.5%) of the gross income from the business activity upon every person engaging or continuing in the business of selling tangible personal property at retail; provided that such rate shall become a variable or modified rate such that when applied in any case when the gross income from the sale of a single item of tangible personal property exceeds ten thousand dollars ($10,000), the one-half percent (0.5%) tax rate shall apply to the first ten thousand dollars ($10,000), and above ten thousand dollars ($10,000), the measure of tax shall be a rate of zero percent (0.0%), in Pinal County for twenty (20)

> years to provide funding for the transportation elements contained in the Pinal Regional Transportation Plan?
>
> Do you favor the levy of a transaction privilege (sales) tax for regional transportation purposes, including at a variable or modified rate, in Pinal County?
>
> A "YES" vote has the effect of imposing a transaction privilege (sales) tax in Pinal County, including at a variable or modified rate, for twenty (20) years to provide funding for the transportation projects contained in the Regional Transportation Plan.
>
> A "NO" vote has the effect of rejecting the transaction privilege (sales) tax for transportation purposes in Pinal County.

(*Id*. [Ex. 5].) At the November 7 election, voters approved adopting the regional transportation plan (Proposition 416) and the tax (Proposition 417). (*Id*. [Ex. 6].)

The RTA passed Resolution 2018-01, which directed the RTA Executive Director to transmit a certified copy of the Resolution to Defendant/Appellee, the Arizona Department of Revenue (the "Department"), with a direction that the Department levy and collect the transportation excise tax on all classifications as set forth in the Pamphlet. (*Id*. [Ex. 7].) The County Board then passed Resolution No. 022818-RTATET endorsing the RTA's adopted actions and requesting that the Department implement and collect the transportation excise tax on all classifications that the Pamphlet described. (*Id*. [Ex. 8].) The Department complied with the demand by publishing tax rate tables for April 2018 consistent

with Resolution 2018-01, and accepted filings and payments that taxpayers have remitted that include the disputed tax. (IR 35.)

In administering TPT returns before the tax at issue, one combined state/county tax rate was applied to the taxable revenue for every TPT classification. (*Id*. ¶ 2.) No county had ever tried to tax only part of a TPT classification's taxable revenue. (*Id*. ¶ 4.) Instead, when adopting a TPT, every county simply adopted a rate that was then added to the state rate to be applied against the same taxable base. (*Id*. ¶ 2.) A "combined rate" was applied to the taxable revenue (gross less statutory deductions) for both the state and the county to determine the combined state/county tax for the period (typically one month). (*Id*; TPT-2 Transaction Privilege, Use and Severance Tax Return, https://azdor.gov/forms/tpt-forms/tpt-2-transaction-privilege-use-and-severance-tax-return-filing-periods-beginning-or.) This changed when the County's tax purported to exempt part of the retail tax base from the tax using the zero rate.

To administer this tax, the Department published a rate table in April 2018, requiring the formerly single tax base for the retail classification in Pinal County to be divided into two different reporting categories and to be reported using two different business codes. First, the longstanding retail classification business code (code 017) showing a 7.2% combined rate for retailers that did not have single-item sales with prices over $10,000, reflecting the 0.5% tax added to the retail

classification. (*Id*. ¶ 3.) Then, a new business code (code 367) for another part of the revenue that is part of the retail classification (Class 17), but that now has to be reported separately for "any retail single item portion over $10,000," which is taxed at a 6.7% combined rate, reflecting that this retail classification revenue is exempted from the 0.5% transportation excise tax. (*Id*.; IR 36.)

The Department began collecting the taxes at issue effective April 1, 2018, with the first returns due to the Department in May 2018. (IR 35, ¶ 6.) Administrative difficulties from dividing the retail classification into two categories became apparent. The Department determined that only one-third of taxpayers had correctly reported the tax at issue during the first two months after it became effective. (*Id*.) The problems included taxpayers who reported income in the new business code 367 that is only for revenues over $10,000 on a single item and reported little or no income in the traditional retail classification, class 17, which is supposed to include the first $10,000 of the transaction. (*Id*.) Because of this and other problems that the Department has identified, the Department expects that it will have to audit many Pinal County taxpayers to resolve errors in reporting and paying under this new tax structure. (*Id*. ¶¶ 6-7.)

In December 2017, Petitioners Harold Vangilder, Dan Neidig, and Arizona Restaurant Association (collectively "Vangilder"), filed a complaint in tax court seeking declaratory judgment and injunctive relief. (IR 1.)

In April 2018, Vangilder filed a motion for declaratory judgment. (IR 22.) The Department filed its response (IR 24), and County-Defendants filed their response and cross-motion for summary judgment (IR 28). The Department filed a response to the cross-motion. (IR 37.) The Department argued that the tax was unlawful because it exceeded the taxing authorization that A.R.S. § 42-6106(C) grants by excluding part of the tax base from the tax. (IR 24, 37.) The Department also agreed with Vangilder that if the tax applied only to the retail classification, not all TPT classifications, that was also unlawful. (*Id*.)

After briefing and oral argument, the tax court ruled in Vangilder's favor that the Pinal County transportation excise tax was unlawful because it was imposed only on businesses in the retail classification and not on all TPT classifications that A.R.S. § 42-6106(B) sets forth. (IR 41 at 2-3.) The tax court did not reach a conclusion as to whether exempting proceeds from the tax using the "zero rate" was lawful or as to whether the alleged discrepancies between the RTA Resolution, the Ballot, and the Pamphlet invalidated the tax. (IR 41.) The court entered final judgment under Arizona Rule of Civil Procedure 54(c) on November 15, 2018. (IR 56.) County-Defendants timely filed an appeal under Arizona Rule of Civil Appellate Procedure 8(a) (IR 63), and Vangilder timely filed a cross-appeal pursuant to Arizona Rule of Civil Appellate Procedure 8(b) (IR 64). On January 16, 2020, the court of appeals held that the tax as enacted applied to all

classifications and that the zero rate exemption of certain proceeds was allowable as a "modified" rate under A.R.S. § 42-6106(C), thus allowing multiple rates including "zero rate" exemptions to be created at the county level. (Opinion ¶ 2.) The Department and Vangilder separately petitioned for review, which this Court granted on September 17, 2020.

ARGUMENT

I. Counties Cannot Exempt Taxable Revenues from the Statutory Tax Base Using a Zero Rate Rubric When Adopting a Tax Under A.R.S. § 42-6106.

A. The County's Rights to Levy a Tax and to Establish the Scope of Such a Tax Are Wholly Dependent on the Statutory Authority that the Legislature Has Granted the County.

The power to tax rests exclusively with the Legislature except where the Legislature has expressly delegated that power to its political subdivisions. *City of Phoenix v. Ariz. Sash, Door & Glass Co.*, 80 Ariz. 100, 102, *amended on other grounds on reh'g*, 80 Ariz. 239 (1956). The Legislature has not delegated any power to the counties under A.R.S. § 42-6106 to exempt part of the State's defined tax base, to divide the classification into multiple parts with different rates, or to create any other structural changes to the existing TPT system.

B. The Zero Rate Applied to Part of the Tax Base Operates as an Unlawful County-Created Exemption and Is Not What Is Referred to by the Term "Modified Rate" in A.R.S. § 42-6106(C).

The County argues that A.R.S. § 42-6106(C)'s variable and modified rate language allows a county to adopt multiple rates on different parts of the tax base for a classification to be applied within the same month and to effectively exempt certain revenue that is part of the defined tax base from taxation by using a zero rate. (County-Defendants' Response to Petitions at 10-13.) This interpretation will allow any county using A.R.S. § 42-6106 to create exemptions in any TPT classification by using a "zero rate"—just as the County has here. Creating a zero rate, like creating a deduction or an exemption, constitutes a decision to exclude revenues from taxation, and it therefore cannot properly be understood as creating a "rate."[1] The Opinion seems to allow counties to exempt revenue based not only on the price of an item sold, but on the type of item sold (such as exempting revenue from retail car sales), while all revenue from such retail sales is clearly taxable under A.R.S. § 42-5061. And the Opinion can be applied in multiple classifications, in multiple counties. An interpretation of the terms "modified" and "variable" that allows this is wrong and conflicts with the TPT structure of which

[1] This could arguably be construed as a new classification, but since there was no attempt to create any other definitions or any tax structure, the Department thinks that it is best defined as an attempted tax base alteration using a "zero rate" rubric. As discussed in the facts, however, it acts like a new classification with separate reporting and a separate code and tax base apart from the Class 17 retail classification reporting.

A.R.S. § 42-6106 is a part. Words in a statute are construed in the context in which they are used, and in considering words in statutes, courts look to the statutory "subject or general purpose for guidance and to give effect to all provisions involved." *Ariz. Elec. Power Coop., Inc. v. State ex rel. Dep't of Revenue*, 243 Ariz. 264, 266, ¶ 8 (App. 2017), *as amended* (Jan. 28, 2019). The tax base for the retail classification is defined in A.R.S. § 42-5061(A) as "the gross proceeds of sales or gross income derived from the business." The allowed exemptions (deductions) for the retail classification are also stated in A.R.S. § 42-5061, and counties may not expand those exemptions by a zero rate rubric.

1. The Zero Rate Exemption Is Not a Variable or Modified Rate that A.R.S. § 42-6106 Allows.

In pertinent part and at all pertinent times,[2] A.R.S. § 42-6106 read as follows, with references to "rate" underlined:

> 42-6106. County transportation excise tax
>
> A. If approved by the qualified electors voting at a countywide election, the regional transportation authority in any county shall levy and the department shall collect a transportation excise tax up to the rate authorized by this section in addition to all other taxes.
>
> B. The tax shall be levied and collected:
>
> 1. At a rate of not more than ten per cent of the transaction privilege tax rate prescribed by section

[2] The Legislature amended the statute in 2019 to allow total transportation tax of 20% of the state rate. 2019 Ariz. Sess. Laws ch. 50 (1st Reg. Sess.).

> 42-5010, subsection A in effect on January 1, 1990 to each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title.
>
> 2. At a rate of not more than ten per cent of the rate prescribed by section 42-5352, subsection A.
>
> 3. On the use or consumption of electricity or natural gas by retail electric or natural gas customers in the county who are subject to use tax under section 42-5155, at a rate equal to the transaction privilege tax rate under paragraph 1 applying to persons engaging or continuing in the county in the utilities transaction privilege tax classification.
>
> C. Any subsequent reduction in the transaction privilege tax rate prescribed by chapter 5, article 1 of this title shall not reduce the tax that is approved and collected as prescribed in this section. The department shall collect the tax at a variable rate if the variable rate is specified in the ballot proposition. The department shall collect the tax at a modified rate if approved by a majority of the qualified electors voting.

A.R.S. § 42-6106(A)-(C) (underlining added).

Nothing in the statute permits a county to exempt part of the taxable revenue from an adopted tax rate by adopting two rates—one positive and one a "zero rate"—to exempt part of the revenue that is taxable under the TPT classification from the tax. In fact, nothing in the statute authorizes a situation in which (in a given month) there could be two or more positive rates applied to different parts of a business's taxable revenue, requiring separate reporting in two class codes for a single TPT classification. Every use of "rate" in the statute is singular in number,

using the articles "the" or "a" before "rate." No use of "rates" (plural) is found. The sentences in subsection C allowing adoption of a variable or modified rate mean that the following is allowed:

- The county can adopt a single rate for the tax's entire term (up to twenty years under subsection E); or
- The county can adopt a variable rate, with a percentage that varies over time during different periods of the term (e.g., starting lower and increasing over time); and
- The voters can modify an already-adopted rate in a subsequent election, raising or lowering it within statutory limits.

To "modify" a rate means that (1) an existing rate was already adopted and (2) voters can change that existing rate. If no rate was already adopted, there would not be a modification of a rate, but the adoption of a new rate. There is no reason to think that by allowing rates to be modified, the Legislature intended to authorize counties to adopt multiple rates for different parts of the tax base for a reporting period or to use a zero rate to exempt some of the tax base from the adopted rate. There is also no reason to think that the Legislature intended to authorize counties to adopt two or more rates applicable to different parts of the tax base of a classification and to sanction such a restructuring of the tax system by calling it a modified or variable rate.

The Opinion reasoned that "rate" in the singular includes the right to adopt multiple rates because under A.R.S. § 1-214(B), singular words "include the plural." (Opinion ¶ 27.) Section 1-214(B)'s singular/plural rule does not apply where the consequences "'would be inconsistent with the manifest intent of the legislature.'" *Homebuilders Ass'n of Cent. Ariz. v. City of Scottsdale*, 186 Ariz. 642, 649 (App. 1996) (quoting A.R.S. § 1-211). Counties have "only such powers as have been expressly or by necessary implication, delegated to them by the state legislature." *Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395 (1949). "Implied powers do not exist independently of the grant of express powers and the only function of an implied power is to aid in carrying into effect a power expressly granted." *Id*. As to counties, "the power to levy a tax is never implied, but must directly and specifically be granted." *Maricopa County v. S. Pac. Co.*, 63 Ariz. 342, 347 (1945). "Expediency does not, and cannot supply authority" to a county to levy a tax. *Id*. And "statutes creating taxes are strictly construed and are not extended by implication beyond the clear import of the language used." *Corp. Comm'n v. Equitable Life Assur. Soc'y of U.S.*, 73 Ariz. 171, 177 (1951). "The authority of municipalities to levy a tax must be made clearly to appear and doubts, if any, as to the power sought to be exercised must be resolved against the municipality . . . ." *Ariz. Sash, Door & Glass*, 80 Ariz. at 102. Lastly, one other state has rejected in the context of a different tax system applying the "singular

means plural" rule to construe "rate" to mean "rates." *Rosecroft Trotting & Pacing Ass'n, Inc. v. Prince George's County*, 471 A.2d 719, 726 (Md. 1984).

While holding that "rate" means "rates" under A.R.S. § 1-214(B), the Opinion also distinguished A.R.S. § 42-6106 from the following statutes, all of which also use "rate" in the singular:

> A.R.S. §§ 42-6103 (general excise tax), -6105 (transportation excise tax in counties with a population of 1.2 million persons or more), -6107 (transportation excise tax for roads), -6108 (hotel tax), -6109 (jail facilities excise tax), -6110 (electricity tax), -6111 (capital projects tax), -6112 (judgment bonds tax).

(Opinion ¶ 26.)

By distinguishing these other statutes from A.R.S. § 42-6106, the Opinion seems to tacitly acknowledge that "rate" does not include the plural form, and it must therefore be relying on the voters' right to "modify" a rate. This also is an incorrect interpretation of the statute.

While the Opinion incorrectly found that the zero rate exemption was a "modified rate," it would also be incorrect to call it a "variable rate," as the County argues. In the TPT tax structure, "variable" does not mean "various" or "multiple" rates during a given reporting month, but means that voters can adopt different rates to be applied in different time periods. In the broader TPT system of which A.R.S. § 42-6106 is a part, allowing voters to approve a variable rate does not mean that they can approve various rates so that in a given month, a county can tax

the first $1,000 of retail revenue at 2%, the next $1,000 at 3%, the next $1,000 at 4%, and so on. It also does not mean that a county can tax the first $10,000 and then not tax the rest of a business's revenue for selling a "single item" of tangible personal property. All of that revenue is taxable under A.R.S. § 42-5061. County-created exemptions are incompatible with the TPT's structure and administration, and each such change necessarily requires multiple reporting classes to be created out of the single classification.

Specifically, an interpretation of A.R.S. § 42-6106 allowing a zero rate exemption for part of the proceeds of sale of a single item is not compatible with the TPT tax structure. The TPT is not a tax on the individual sale, and the tax base is a business's gross revenue. "The transaction privilege tax is an excise tax on the privilege or right to engage in an occupation or business in the State of Arizona. It is not a tax upon the sale itself []or upon the property sold." *Ariz. Dep't of Revenue v. Mountain States Tel. & Tel. Co.*, 113 Ariz. 467, 468 (1976) (citations omitted). "The tax is not upon sales, as such, but upon the privilege or right to engage in business in the State, although measured by the gross volume of business activity conducted within the State." *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250 (1973). This is consistent with A.R.S. § 42-6106(B)(1), which provides that a transportation excise tax that electors have approved "shall be levied and collected . . . [a]t a rate" to be applied "to each *person engaging or continuing in*

the county in a business taxed under chapter 5, article 1 of this title." (Emphasis added.)

Dividing taxable revenue into two parts, one with and one without the tax applied using a zero rate or other exemption, is also inconsistent with all prior administrative practice for the state's TPT system of which county TPT is a part. The TPT generally has a monthly tax reporting period with returns and tax payments due the twentieth day of the month after the month in which the tax accrues. A.R.S. § 42-5014. On the returns, for each classification in which the business operates, the gross income for each business classification is reported, statutory deductions allowed are deducted therefrom, and the resultant taxable amount is multiplied by one combined state/county rate for the classification for each county. https://azdor.gov/forms/tpt-forms/tpt-2-transaction-privilege-use-and-severance-tax -return-filing-periods-beginning-or.

The County's zero rate exemption is historically unprecedented. Before the zero rate exemption, in each classification, for each county, there was one classification code, reported[3] on one line, with one reported gross income for the state and county,[4] one reported deduction amount,[5] one taxable amount,[6] and one

[3] Column D on TPT-2.
[4] Column F on TPT-2.
[5] Column G on TPT-2.
[6] Column H on TPT-2.

combined state/county rate[7] applied to yield a single combined state/county tax amount. (*Id*; IR 35, ¶ 2.) Historically, when counties adopted a TPT rate under *any* of the authorizations in A.R.S. §§ 42-6101 through -6112, this simply resulted in an increased combined state/county rate with nothing else changed. This simplified compliance for taxpayers and enforcement for the Department, both of which had only one classification, with one reporting line and one combined rate. (*Id.*) This was done because the county and state TPT systems are unified, with the only rights that counties have being to adopt rates that are applied as part of the rest of the state TPT system. But the County has arrogated to itself the right to divide the tax base for the retail classification into two parts and to exempt proceeds taxable in the retail classification using a zero rate. The Legislature never authorized counties to exercise such a power.

Under the County's interpretation of its rights, the tax base for a classification could be divided and subjected to as many rates as the County liked, including one exempting specified proceeds from tax using a zero rate. Or it could presumably have different positive rates on specific items sold at retail, essentially assuming the power to add to the exemptions found in A.R.S. § 42-5061. Or it could vary the rate so that different rates applied to different weeks of the month, requiring separate reporting for each week with a different rate. All of these

[7] Column I on TPT-2.

changes could be structured using "rates," but none would be consistent with the TPT system and all would require separate reporting for each change in the tax structure, magnifying compliance difficulties for taxpayers and administrative burdens for the Department. In essence, each county would be creating a unique TPT structure. To justify this absurdity, the County cites "common" dictionary definitions, stating as follows:

> The common use of the word "variable" means "something subject to change." *Variable*, Webster's New International Dictionary, Unabridged (2d ed. 1949) ("Webster's Dictionary"). The common use of the word "modified" means "[t]o change somewhat the form or qualities of" and "[t]o reduce in extent or degree[.]" *See Modify*, Webster's Dictionary.

(County-Defendants' Response to Petitions at 11.)

The County thus interprets "variable" as meaning "subject to change"—a definition that when taken out of the tax structure's context would seem to allow counties to restructure the tax system provided that "rates" were involved. In the County's interpretation, the ability to adopt a variable or modified rate encompasses the ability to change which retail revenues are taxed. But the Legislature has already defined what revenues are taxable. The County cites a definition of "modified" that conflicts with its use in A.R.S. § 42-6106(C), which only allows voters to change a prior adopted rate but does not give counties the right to "change somewhat the form or qualities of" the TPT structure to create

exemptions. The Opinion similarly errs, essentially citing broad definitions to allow counties to exempt whatever retail revenues they want to exempt. (Opinion ¶¶ 25-27.)

The Department is aware of no case from any jurisdiction that treats creating a "zero rate" as adopting a variable rate. Moreover, under the County's scheme, there is really only one actual rate ever applied, 0.5%. And if 0% is somehow construed to be a "rate" that is applied, that is still not the type of "variable rate" that A.R.S. § 42-6106 allows because the statute does not allow for multiple rates in the same tax period.

Exempting proceeds from the 0.5% tax rate via the over $10,000 exemption does not create a "variable" rate just because the effective rate varies on purchases over $10,000.[8] That is simply a mathematical artifact of exempting proceeds. Having marginal and effective rates that differ for different parts of the tax base is not consistent with the TPT structure, which applies a single combined state/county rate to all taxable revenues.

The County notes that A.R.S. § 42-6105, the transportation tax option for large population counties, does not authorize a variable or modified rate. Those counties cannot adopt a rate that changes during the term of the tax or "modify" an

[8] For example, the effective rate of the tax on a $20,000 item is 0.25%, since a 0.5% tax rate applies to the first $10,000 and a 0% tax rate applies to the next $10,000. The "effective rate" varies similarly regardless of whether this is stated as a rate or as a deduction or exemption.

adopted rate. The difference in language reflects the greater flexibility given to small counties to change tax rates over time to meet their circumstances. It has nothing to do with authorizing county-created exemptions in small counties.

That cities under the Model City Tax Code can exempt proceeds from their retail tax is irrelevant. If the Legislature chooses to allow counties the option to exempt proceeds, they may do so. But the Legislature has not chosen to do so.

C. Excluding Proceeds from the Tax Base on an Item-by-Item Basis Establishes that the Zero Rate Operates as an Exemption.

The zero rate operates like the deductions (exemptions) that A.R.S. § 42-5061 allows. While the TPT is not a tax on individual sales and the tax base is a business's gross revenue, deductions are often based on details specific to the item sold or the individual sale, such as an exempt "sale for resale" or a sale for a particular use that qualifies for an exemption (e.g., a bulldozer sold for use at a mine exempted under A.R.S. § 42-5061(B)(2)). That the "zero" rate is based on a per-item basis establishes that the zero rate operates as a deduction/exemption.

II. The Department Does Not Owe Vangilder's Attorney's Fees.

The only parts of Vangilder's case that the Department opposed were the now-abandoned constitutional claims and the request for an injunction at tax court. The Department has agreed with the core positions of all of Vangilder's other claims—that the "zero rate" exemption is unlawful and that applying the tax only to the retail classification is also unlawful. While the Department did change its

tax tables and accepted tax filings and payments that taxpayers submitted, this can hardly be said to be adversarial. Rather, it reflects the fact that the Department is not a court with authority to adjudicate such disputes and that this approach created the lowest risk for all concerned. If the tax were to be upheld, having refused to change tax tables or to accept payments would result in underpayments from taxpayers attempting to comply and would require audits of presumably every taxpayer who underpaid—likely almost all taxpayers in Pinal County. A failure to change the tax table could also leave many businesses paying "out of pocket" later, instead of passing on the tax to consumers. Conversely, if the tax were to be invalidated, those who paid can seek refunds. While Vangilder may have wished the Department to decide itself that the tax was invalid and to refuse to enforce it, it is not the Department's role to decide in advance the outcome of such contests.

CONCLUSION

For the foregoing reasons, the Department requests that the Court hold the tax at issue to be unlawful.

Respectfully submitted this 7th day of October, 2020.

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ARIZONA SUPREME COURT

HAROLD VANGILDER, et al., Plaintiffs/Appellees/ Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellee, PINAL COUNTY, et al., Defendants/Appellants/ Cross-Appellees.	No. CV-20-0040-PR Court of Appeals No. CA-TX 19-0001 Arizona Tax Court No. TX2017-000663 **CERTIFICATE OF COMPLIANCE**

I certify that the Supplemental Brief to which this certificate is attached uses proportionally spaced type of 14 points, is double-spaced using a roman font, and

that the argument set forth in the Supplemental Brief does not exceed twenty pages.

Dated this 7th day of October, 2020.

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ARIZONA SUPREME COURT

HAROLD VANGILDER, et al., Plaintiffs/Appellees/ Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellee, PINAL COUNTY, et al., Defendants/Appellants/ Cross-Appellees.	No. CV-20-0040-PR Court of Appeals No. CA-TX 19-0001 Arizona Tax Court No. TX2017-000663 **CERTIFICATE OF SERVICE**

On October 7, 2020, I electronically filed Defendant/Appellee's Supplemental Brief with the Clerk of the Arizona Supreme Court's Clerk using the

AZTurboCourt system. The same day, I e-served the Supplemental Brief through the AZTurboCourt system on Plaintiffs/Appellees/Cross-Appellants' attorneys and Defendants/Appellants/Cross-Appellees' attorneys as follows:

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