STATE OF ARIZONA

Department of Revenue
Office of the Director
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CERTIFIED MAIL:

Janet Napolitano
Governor

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Director

The Director's Review of the Decision of the Administrative Law Judge Regarding:	)	**O R D E R**
[TAXPAYER]	)	**Case No. 200200148-S**
ID No.	)	

On March 7, 2003 the Administrative Law Judge issued a decision regarding the protest of [REDACTED] ("Taxpayer"). The Transaction Privilege and Use Tax Division ("Division") appealed this decision on April 25, 2003. As the appeal was timely, the Director of the Department of Revenue ("Director") issued a notice of intent to review the decision.

In accordance with the notice given the parties, the Director has reviewed the Administrative Law Judge's decision and now issues this order.

Statement of Case

The Division issued a deficiency assessment to Taxpayer for the period of [REDACTED] through [REDACTED]. The Division amended the assessment and taxpayer protested the amended assessment. The Administrative Law Judge reversed the proposed amended assessment and dismissed the assessment including interest. On appeal, The Division argues that beer and wine labeled non-alcoholic, but which contain some alcohol, constitute alcoholic beverages that do not fall within the definition of food eligible to be sold by a qualified retailer exempt from the transaction privilege tax.

Findings of Fact

The Director hereby finds as follows:

1. Taxpayer is in the retail grocery business in Arizona. Taxpayer is eligible to participate in the federal food stamp program and is therefore an "eligible grocery business" as defined in A.R.S. § 42-5101 (1). Taxpayer is therefore a qualified retailer who may sell tax-exempt food pursuant to A.R.S. § 42-5102 (A)(1).

2. Taxpayer sells non-alcoholic beer and wine. Non-alcoholic beer and wine contain less than one-half of one percent alcohol content by volume.

3. The Department audited Taxpayer for the period of [REDACTED] through [REDACTED] ("the audit period"). After amending a first assessment, the Department assessed [REDACTED] in unpaid taxes and interest. The amended assessment imposed transaction privilege tax for gross income for sales of non-alcoholic beer and wine.

4. Taxpayer protested the assessment and requested an oral hearing for its protest. Taxpayer argued that gross income from sales of non-alcoholic beer and wine is not taxable under the tax-exempt food statutes.

5. Beverages that contain less than one-half of one percent alcohol content by volume have been specifically excluded from taxation or regulation by statutes such as the Arizona Luxury Tax (A.R.S. § 42-3001 (13)) and the Arizona Liquor Department (A.R.S. § 4-101 (29)) and by regulations, such as provisions relating to the National Minimum Drinking Age and Open Container laws (23 C.F.R. §§ 1208.3 and 1270.3), Alcoholic Beverage Warning Statements (27 C.F.R §§ 16.10) and the federal excise tax on the sale of beer (27 C.F.R. §§ 25.11).

6. The definitions applicable to the United States Department of Agriculture Food Stamp Program define "food" (7 U.S.C. § 2012 (g)) and "eligible foods" (7 C.F.R. § 271.2)) as excluding alcoholic beverages. These provisions do not differentiate between alcoholic beverages that contain less than one-half of one- percent alcohol content by volume and those that contain one-half of one percent or greater alcohol content by volume.

7. Under the Food Stamp Program guidelines, nonalcoholic beer and wine are not eligible to be purchased with food stamps.

8. A.R.S. § 42-5106 (C) provides that the department shall not include alcoholic beverages as food.

9. The department promulgated rules regarding the taxation of food in 1980. A.A.C. R15-5-1860 (7)(a) provides that food does not include alcoholic beverages.

10. Neither A.R.S. § 42-5106 (C) nor A.A.C. R15-5-1860 (7)(a) differentiate between alcoholic beverages that contain less than one-half of one percent alcohol content by volume and those that contain one-half of one percent or greater alcohol content by volume.

Conclusions of Law

Title 42, Ch. 5, Art 3 provides for a transaction privilege tax exemption for sales of food. Exemptions from tax are to be narrowly construed. *Kitchell Contractors* v. *City of Phoenix***,** 151 Ariz. 139, 144, 726 P.2d 236 (App. 1986).

The language of an unambiguous statute is conclusive unless the legislature clearly expresses intent to the contrary. *Mail Boxes, Etc., U.S.A. v. Industrial Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). Arizona courts will apply the rules of construction to vary from the plain meaning of a statute only if necessary to effectuate the legislature's clearly expressed contrary intent or to avoid an absurd result that the legislature could not in any event have intended. *See Resolution Trust Corp. v. Western Technologies, Inc.*, 179 Ariz. 195, 201, 877 P.2d 294, 300 (App. 1994); *Tittle v. State*, 169 Ariz. 8, 9, 816 P.2d 267, 268 (App. 1991).

In A.R.S. § 42-5107 (D) the legislature manifested its intent that the administration of the federal food stamp program be given strong consideration in the administration of the food tax exemption.

Statutory construction by the taxing authority will not be disturbed unless manifestly erroneous. *State ex rel. Department of Revenue* v. *Magma Copper***,** 136 Ariz. 322, 326, 674 P.2d 876 (App. 1983).

Statutory constructions are to be avoided that render a clause, sentence or word superfluous, void, contradictory or insignificant. *Continental Bank v. Department of Revenue*, 131 Ariz. 6, 638 P.2d 228 (App. 1981).

Discussion

In interpreting a statute, it is imperative to effectuate the legislative intent behind the statute. *Mail Boxes v. Industrial Comm'n,* 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best and most reliable indicator of that intent is the statute's own words. *See Zamora v. Reinstein,* 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996).

The legislature manifested its intent in two significant ways. First, the legislature instructed the Department to give strong consideration to the United States Department of Agriculture's administration of the federal food stamp program. Second, the legislature did not specifically limit the term "alcoholic beverages" to beverages with an alcohol content of one-half of one percent or greater by volume as it had in other areas. If it had been the legislature's intent to allow sales of beer and wine with alcohol content of less than one-half of one percent to be exempt from the transaction privilege tax, it could have easily conveyed that meaning by simply providing an exception as it did with respect to the Liquor Department and the definitions pertaining to the luxury tax. *See, State v. Short,* 192 Ariz. 322, 965 P.2d 56 (1998). The fact the legislature chooses not to do so must be considered. Taxpayer's interpretation would render the language in A.R.S. § 42-3001 (13) and A.R.S. § 4-101 (29) limiting their application to beverages with an alcohol content greater than one-half of one percent superfluous and insignificant. Such an interpretation should be avoided.

While the department did not promulgate amended or additional rules after July 1, 1981, that does not preclude the department from interpreting the term "alcoholic beverages" consistent with the determinations made by the United States Department of Agriculture. *See, Hamilton v. State,* 186 Ariz. 590, 925 P.2d 731 (1996); *General Motors Corporation v. Arizona Department of Revenue,* 189 Ariz. 86, 938 P.2d 481 (1997).

The food tax exemption provisions were reenacted by the legislature on numerous occasions, most recently in 1997. The legislature is presumed to know how an administrative department interprets the statutes it is responsible to administer. Therefore, it must be presumed that the legislature was aware of and intended the department's interpretation when it reenacted A.R.S. § 42-5106. *Hamilton v. State, supra.*

While an administrative agency's interpretation of a statute that it enforces does not bind the courts, a reviewing court generally accords "great weight" to the agency's construction. In addition, if the construction that an agency places on a statute it administers has been acquiesced in for a long period of time, a court will not disturb such interpretation unless it is manifestly erroneous. *Arizona Department of Revenue v. Raby*, 204 Ariz. 509, 65 P.3d 458 (2003).

The interpretation placed on the statutes relating to the exemption for the sale of food is not manifestly erroneous. The legislature has not clearly expressed a contrary intent and the Divisions interpretation does not lead to an absurd result that the legislature could not have intended. It is consistent with the legislature's expressed intent. Therefore the Division's assessment should have been upheld.

O R D E R

The Administrative Law Judge's decision that the sale of beer and wine with alcohol content of less than one-half of one percent by volume is exempt from the transaction privilege tax is vacated. The Division's assessment is upheld.

This decision is the final order of the Department of Revenue. Taxpayer may contest the final order of the Department in one of two manners. Taxpayer may file an appeal to the State Board of Tax Appeals, 100 North 15th Avenue, Suite 140 Phoenix, AZ 85007 or may bring an action in Tax Court (125 West Washington, Phoenix, Arizona 85003) within thirty (30) days of the receipt of this order. For appeal forms and other information from the Board of Tax Appeals, call (602) 364-1102. For information from the Tax Court, call (602) 506-3763.

Dated this 25th Day of August 2003.

ARIZONA DEPARTMENT OF REVENUE

J. Elliott Hibbs
Director

Certified original of the foregoing
mailed to:

[REDACTED]

Copy of the foregoing mailed to:

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JEH:lh

cc: Transaction Privilege Tax Division
Office of Administrative Hearings
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