IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PEABODY WESTERN COAL COMPANY, a Delaware corporation, Plaintiff/Appellant, v. NORTHEAST ARIZONA TECHNOLOGICAL INSITUTE OF VOCATIONAL EDUCATION, an Arizona Joint Technological Education District; NAVAJO COUNTY; and APACHE COUNTY, Defendants/Appellees.	1 CA-TX 07-0015 DEPARTMENT T **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) **FILED 12-26-08**

Appeal from the Arizona Tax Court

Cause No. TX 2006-050027

The Honorable Thomas Dunevant, III, Judge

AFFIRMED

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H A L L , Judge

¶1 Peabody Western Coal Co. (Taxpayer) appeals from the grant of summary judgment upholding a valuation levy by Northeast Arizona Technological Institute of Vocational Education (NATIVE) for the 2005 tax year. Finding no genuine issue of material fact or error of law, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 Taxpayer operates two coal mines in Navajo County. It leases the underlying land from the Navajo Nation and the Hopi Tribe. Taxpayer pays property taxes pursuant to a valuation levy instituted on behalf of NATIVE, a Joint Technological Education District (JTED). NATIVE provides career services to students from Apache, Navajo, and Coconino County school districts.

¶3 Arizona law defines JTEDs as consisting of two or more school districts. Ariz. Rev. Stat. (A.R.S.) section 15-392(A) (2002). A plan for a JTED must be approved by the state board of education and subsequently by the qualified electors in each of the school districts. A.R.S. § 15-392(B). Once approved by the voters, the JTED is governed by a board comprised of members elected pursuant to A.R.S. § 15-393(A) (2005).

¶4 Voters approved NATIVE's establishment during the November 2002 general election. Materials provided to voters stated "at the time voters agree to allow their school district to

join the joint district, they agree to increase their property taxes by five cents per $100.00 of assessed value." For the 2002-03, 2003-04, and 2004-05 school years, the rate of property tax levied on NATIVE's behalf was $.05 per $100.00 assessed valuation.

¶5 JTEDs receive state equalization funding based on each district's Average Daily Membership (ADM), which was determined by multiplying the total number of students attending classes in the JTED by .25. When NATIVE formed, however, the Arizona Legislature capped the amount of equalization aid NATIVE could receive at the ADM level of 450.

¶6 In 2005, the Arizona Legislature froze state equalization aid for NATIVE at its 2004-05 level with the enactment of Senate Bill 1516. 2005 Ariz. Sess. Laws, ch. 329, § 13 (1st Reg. Sess.) Based on anticipated enrollment of about 4000 students, NATIVE projected that the actual ADM for the 2005-06 school year would be between 950 and 1000.

¶7 Facing a budget shortfall of $1,713,963.17 for 2005-06, NATIVE would have had to assess at $2.53 per $100.00 valuation during the 2005 tax year in order to obtain full funding. Instead, NATIVE sought to increase its tax rate to $1.25 per $100.00 assessed valuation, which when combined with available state aid, would provide NATIVE with 75% of the funding allowed under its revenue control limit. The Boards of Supervisors in Navajo and Apache Counties approved the levies on behalf of NATIVE at that rate. In the 2005 tax year, Taxpayer's taxes attributable to the NATIVE levy for one parcel increased from $5,200.00 to $145,187.50,

and from $2,446.88 to $58,281.25 for the other parcel, over the previous tax year.

¶8 At that time, A.R.S. § 15-947.01 (2002) contained a revenue control limit on the amount of taxes levied, but not the rate of tax. Effective June 30, 2006, the Arizona Legislature amended the JTED taxing statute to limit JTED tax levies to $.05 per $100.00 assessed valuation under House Bill 2700. 2006 Ariz. Sess. Laws, ch. 341, § 3 (2nd Reg. Sess.) The statute now provides that "a joint technological education district shall not levy a property tax pursuant to law that exceeds five cents per one hundred dollars assessed valuation except for bond monies pursuant to subsection D, paragraph 1 of this section." A.R.S. § 15-393(F) (Supp. 2008). NATIVE's 2006 tax levy accordingly dropped to $.05 per $100.00 assessed valuation.

¶9 Taxpayer filed suit for a refund of taxes it alleged were illegally collected for the 2005 tax year on January 13, 2006. NATIVE, Navajo County, and Apache County answered, and the parties filed cross-motions for summary judgment. The tax court granted summary judgment to NATIVE. Taxpayer appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. A.R.S. §§ 15-992 and -393(F) Support the Levy in Tax Year 2005.

¶10 This court reviews the tax court's grant of summary judgment de novo. *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). This standard also governs our construction of statutes. *Univ. Med. Ctr. Corp. v.*

Dep't of Revenue, 201 Ariz. 447, 450, ¶ 14, 36 P.3d 1217, 1220 (App. 2001).

¶11 In construing statutes, we attempt to find and give effect to legislative intent. *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). "Statutes are to be construed as a whole, and related provisions in pari materia are to be harmonized if possible[.]" *State ex rel. Church v. Ariz. Corp. Comm'n*, 94 Ariz. 107, 110-11, 382 P.2d 222, 224 (1963).

¶12 Section 15-393 contains two provisions defining a JTED's taxing authority. In A.R.S. § 15-393(C) (2005), the Arizona Legislature provides: "The joint technological education district shall be subject to the following provisions of this title: . . . chapter 9, articles 1, 6, and 7 . . . [and] sections 15-941, 15-943.01, 15-948, 15-952, 15-953 and 15-973." Prior to June 30, 2006, § 15-393(F) also provided:

> Taxes may be levied for the support of the joint district as prescribed in chapter 9, article 6 of this title. Except for the taxes levied pursuant to § 15-994, such taxes shall be obtained from a levy of taxes on the taxable property used for secondary tax purposes.

¶13 This provision authorized a levy of taxes as prescribed in chapter 9, article 6 against property used for secondary tax purposes for support of the JTED—except for county equalization assistance under A.R.S. § 15-994 (2005), which is levied as a primary property tax. Among the tax levies prescribed in chapter

9, article 6 of Title 15 is A.R.S. § 15-992 (2005). Section 15-992 provides in relevant part:

> A. The board of supervisors of each county shall annually, at the time of levying other taxes, levy school district taxes on the property in any school district in which additional amounts are required, which shall be at rates sufficient to provide the additional amounts. No delinquency factor for estimated uncollected taxes may be included in the computation of the primary tax rate for school district taxes. . . . The taxes shall be added to and collected in the same manner as other county taxes on the property within the school district. The amount of the school district taxes levied upon the property in a particular school district shall be paid into the school fund of such school district.
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> B. At the same time of levying taxes as provided in subsection A of this section, the county board of supervisors shall annually levy an additional tax in each school district that is not eligible for equalization assistance as provided in § 15-971 in an amount determined as follows:
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> 1. Determine the levy that would be produced by fifty per cent of the applicable qualifying tax rate, prescribed in § 15-971, subsection B, per one hundred dollars assessed valuation.
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> 2. Subtract the amount determined in § 15-971, subsection A from the levy determined in paragraph 1 of this subsection. This difference is the additional amount levied or collected as voluntary contributions pursuant to title 48, chapter 1, article 8, except that if the difference is zero or is a negative number, there shall be no levy.

Reading the statutes together, *see Church*, 94 Ariz. at 110-11, 382 P.2d at 224, the tax court found that NATIVE had authority to levy taxes (via the County Boards of Supervisors) under § 15-393(F), and to levy an additional school district tax under § 15-992 in support

of a JTED at an amount determined under A.R.S. § 15-991 (2005) to be sufficient to meet NATIVE's approved budget.

¶14 Taxpayer argues that the school district tax authorized by § 15-992(A) applies only to districts ineligible for equalization assistance. Because NATIVE was eligible to receive equalization funding, Taxpayer reasons that it could not obtain tax revenue under § 15-992(A). We disagree.

¶15 Both §§ 15-991 and -992 include specific provisions for districts that receive equalization assistance and for those that are ineligible for such assistance.[1] Section 15-992(A) addresses "school district taxes" for "any school district in which additional amounts are required" as determined by the county school superintendent under § 15-991.[2] Contrary to Taxpayer's argument, the levy mandated by § 15-992(A), which is paid into the district's school fund, is not limited to those districts ineligible to receive equalization funding. Section 15-992(B) requires the board of supervisors to impose a separate tax "in each school district that is not eligible for equalization assistance." The monies collected pursuant to subsection B are "transmitted to the state treasurer for deposit in the state general fund to aid in school

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[1] A school district is not eligible for equalization assistance if the applicable qualifying tax rate for the district generates a levy exceeding the equalization assistance for education computed pursuant to A.R.S. § 15-971(A) (2005). *See* A.R.S. § 15-971(B)(2)(c).

[2] The county school superintendent "shall estimate the additional amounts needed for each school district from the primary property tax and the secondary property tax and shall certify such

financial assistance." A.R.S. § 15-992(C). Accordingly, even though NATIVE was eligible for equalization funding, the boards were required to levy taxes pursuant to § 15-992(A) because NATIVE is a school district for which additional amounts were required as determined pursuant to § 15-991.

¶16 Alternatively, Taxpayer argues that the boards lacked authority to levy primary property taxes on behalf of a JTED. Taxpayer maintains that § 15-992 contemplates only primary property taxes. We disagree and find that the boards lawfully levied a secondary property tax under the authority of § 15-393(F).

¶17 Primary property taxes are "all ad valorem taxes except for secondary property taxes." A.R.S. § 42-11001(9) (2005). Secondary property taxes are:

> (a) Ad valorem taxes or special property assessments that are used to pay the principal of and the interest and redemption charges on bonded indebtedness or other lawful long-term obligations that are issued or incurred for a specific capital purpose by a municipality, county or taxing district.
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> (b) Ad valorem taxes or assessments levied by or for special taxing districts and assessment districts other than school districts and community college districts.
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> (c) Amounts levied pursuant to an election to exceed a budget, expenditure or tax limitation.

A.R.S. § 42-11001(13). Primary property taxes are subject to a constitutionally imposed levy limitation, whereas secondary taxes

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amounts to the board of supervisors in writing at the time of

are not. Ariz. Const. art. 9, § 19; *see Mountain States Legal Found. v. Apache County*, 146 Ariz. 479, 481, 706 P.2d 1246, 1248 (App. 1985).

¶18 In most school districts, taxes levied under § 15-992 would be considered to be a primary property tax. *See* A.R.S. § 42-11001(9), (13). For purposes of the 2005 tax year, however, § 15-393(F) specified that taxes could be levied for the support of a joint school district, as prescribed in chapter 9, article 6 of Title 15, and such taxes could be obtained "from a levy of taxes on the taxable property used for secondary tax purposes." A school district tax under § 15-992(A) qualifies as a tax "prescribed in chapter 9, article 6" of Title 15, A.R.S. § 15-393(F), and thus is for secondary tax purposes.

II. The Applicable Tax Rate Was Not Limited to $.05 Per $100.00 Valuation During the 2005 Tax Year.

¶19 Taxpayer further contends that Arizona law did not authorize the increase in tax rate to support NATIVE from the prior rate of $.05 of $100.00 assessed valuation. It argues that the qualifying tax rate described in § 15-971(B)(3) established a statutory limit on the levy rate for NATIVE in tax year 2005. The tax court correctly rejected this argument and concluded instead that a qualifying tax rate is the presumptive minimum tax rate used in a formula to determine a JTED's eligibility for and the amount of equalization assistance.

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filing the estimate." A.R.S. § 15-991(A)(5).

¶20 Under A.R.S. § 15-901(B)(23) (2005), the "qualifying tax rate" means "the qualifying tax rate specified in § 15-971 applied to the assessed valuation used for primary property taxes." Based on these terms, the tax court correctly determined that the $.05 per $100.00 assessed valuation figure specified in § 15-971 applies only to primary property taxes. *See Mountain States*, 146 Ariz. at 481-82, 706 P.2d at 1248-49 (concluding that the legislature intended a library tax to be a primary property tax based upon the statute's plain meaning). In § 15-393(F), the legislature specified that only county equalization assistance for the education tax under § 15-994 can be a primary property tax. Therefore, neither § 15-971 nor -393 nor -992(A) can be construed as a cap on the rate of secondary tax in support of NATIVE.

¶21 More fundamentally, Taxpayer simply misunderstands the nature and purpose of § 15-971. This statute contains a formula to determine eligibility for and the amount of equalization assistance a school district will receive from the state. After adding three figures measuring capital and support, the statute mandates the deduction of the amount that would be produced by levying the applicable qualifying tax rate, which, in the case of a JTED would be $.05 per $100.00 assessed valuation unless the legislature designates a lower rate by law. *See* A.R.S. § 15-971(B)(3).

¶22 The tax court read § 15-971(B)(3) in the context of related provisions on determination of equalization assistance payments, which provide in relevant part:

> B. From the total of the amounts determined in subsection A of this section subtract:

> 1. The amount that would be produced by levying the applicable qualifying tax rate determined pursuant to § 41-1276 for a high school district or a common school district within a high school district which does not offer instruction in high school subjects as provided in § 15-447.
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> 2. The amount that would be produced by levying the applicable qualifying tax rate determined pursuant to § 41-1276 for a unified school district, a common school district not within a high school district or a common school district within a high school district which offers instruction in high school subjects as provided in § 15-447.
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> . . . .
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> 3. The amount that would be produced by levying a qualifying tax rate in a joint vocational and technological education district, which shall be five cents per one hundred dollars assessed valuation unless the legislature sets a lower rate by law.
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> 4. The amount of government property lease excise tax monies that were distributed to the district pursuant to § 42-6205 during the preceding fiscal year.

A.R.S. § 15-971. For example, in § 15-971(B)(1), the statute directs subtraction from the sum calculated in § 15-971(A) of "[t]he amount that would be produced by levying the applicable qualifying tax rate determined pursuant to § 41-1276 for a high school district or a common school district within a high school district which does not offer instruction in high school subjects as provided in § 15-447." The tax court concluded that the legislature was employing the same method of deducting "the amount that would be produced by levying the applicable qualifying tax rate determined pursuant to A.R.S. § 41-1276" when calculating

equalization assistance for high school and common school districts.

¶23 The tax court observed that A.R.S. § 41-1276 (2005) instructs the Joint Legislative Budget Committee (JLBC) to employ the qualifying tax rate in computing equalization assistance. The statute does not set—or allow the JLBC to set—a tax rate. In the case of NATIVE, therefore, there is no reason to conclude that imputing a flat tax of $.05 per $100.00 as a qualifying tax rate in an analogous context was intended to fix the maximum tax rate that a district may assess, any more than the references in § 15-971(B)(1) and (2) were so intended.

¶24 This reasoning is persuasive. An opinion from the Arizona Attorney General further supports the tax court's analysis of the "qualifying tax rate" under a predecessor statute:

> The above figures are simply used as a formula for calculating state aid for school districts. The qualifying tax rates are not levies nor are any of the computations in A.R.S. § 15-1603.

Op. Ariz. Att'y Gen. I79-155.

¶25 This point is further buttressed by *Sanders v. Folsom*, 104 Ariz. 283, 451 P.2d 612 (1969). In *Sanders*, the school board complied with the procedural requirements under the predecessor of § 15-971, but the county board of supervisors set the tax levy for the school district below the "qualifying tax rate." *Id.* at 285, 451 P.2d at 614. As a result the district received no equalization aid. *Id.* The Arizona Supreme Court explained that the qualifying tax rate described the "minimum" tax rate that must be levied in

order for a district to qualify for equalization aid. *Id.* at 286, 451 P.2d at 615. Again, the qualifying tax rate describes a presumed minimum for purposes of determining state aid, and does not cap the tax levy for a district. *See id.*

III. The 2006 Revision Does Not Apply to this Case or Clarify the 2005 Law.

¶26 Taxpayer's final argument derives from the 2006 amendment to § 15-393(F). The amended version states:

> Taxes may be levied for the support of the joint district as prescribed in chapter 9, article 6 of this title, *except that a joint technological education district shall not levy a property tax pursuant to law that exceeds five cents per one hundred dollars assessed valuation except for bond monies pursuant to subsection D, paragraph 1 of this section*. Except for the taxes levied pursuant to § 15-994, such taxes shall be obtained from a levy of taxes on the taxable property used for secondary tax purposes.

A.R.S. § 15-393(F) (Supp. 2008) (emphasis added to portion added by amendment). *See* 2006 Ariz. Sess. Laws, ch. 341, § 3. According to Taxpayer, this statute worked a clarification of a previously ambiguous law and therefore the 2005 version of A.R.S. § 15-393(F) should be interpreted as limiting the levy to $.05 per $100.00.

¶27 A curative statute is "necessarily retrospective in nature" but must not "impair vested rights." *Cochise County v. Pioneer Nat'l Title Ins. Co.*, 115 Ariz. 381, 384, 565 P.2d 887, 890 (App. 1977). We ordinarily presume, however, that the legislature is aware of existing law, and that an amendment is intended to change the law. *See Brousseau v. Fitzgerald*, 138 Ariz. 453, 455,

675 P.2d 713, 715 (1984); *State v. Hamblin*, 217 Ariz. 481, 484, ¶ 11, 176 P.3d 49, 52 (App. 2008).

¶28 In this case, the legislature expressly declared that the amendment "applies retroactively to from and after June 30, 2006" and thus is effective as of the 2006 tax year. 2006 Ariz. Sess. Laws, ch. 341, § 12(A). Although curative statutes necessarily apply retrospectively because they clarify rather than change existing law, the circumstance that the legislature limited the retroactive effect of the legislation here to a date beginning after the 2005 tax year supports the tax court's conclusion that the 2006 amendment was a substantive change in the law that took effect on June 30, 2006 and does not apply here.

¶29 The retroactivity provision distinguishes this case from *State v. Sweet*, 143 Ariz. 266, 693 P.2d 921 (1985). In *Sweet*, the amendment to a criminal sentencing statute at issue contained no retroactivity provision, and the Arizona Supreme Court consequently relied upon an exception to the rule against retroactive application under which an amendment that "construes and clarifies a prior statute will be accepted as the legislative declaration of the original act." 143 Ariz. at 269, 693 P.2d at 924 (quoting *City of Mesa v. Killingsworth*, 96 Ariz. 290, 297, 394 P.2d 410, 414 (1964)).[3]

[3] Had the legislature wished to make the A.R.S. § 15-393(F) amendment retroactive to 2005, it could easily have packaged it with the amendment to § 15-393(O), which it made retroactive to July 31, 2005. 2006 Ariz. Sess. Laws, ch. 341, § 12(B).

¶30 Moreover, as NATIVE points out, the case for a clarification argument is further belied by the many substantive changes made by the legislation including the addition of definitions, changes to board member qualifications, and the addition of mandatory reporting duties. These extensive revisions support treating the amendment as a change and not a clarification or curative measure. *See San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 209-10, ¶ 31, 972 P.2d 179, 193-94 (1999) (treating the amendment as a change in light of the passage of time and significant additions to and departures from the previous law). That the amendment did not occur until sixteen years after the statute's enactment is another indication of an intent to change the statute. *O'Malley Lumber Co. v. Riley*, 126 Ariz. 167, 169, 613 P.2d 629, 631 (App. 1980) (An amendment making a "clear and distinct change" and enacted "after a considerable lapse of time" is more likely to represent a change.), *abrogated on other grounds by Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269 n.5, 872 P.2d 668, 673 n.5 (1994).

CONCLUSION

¶31 We affirm the grant of summary judgment in all respects. In addition, we deny Taxpayer's request for attorneys' fees incurred in the tax court and this appeal pursuant to A.R.S. § 12-348(B)(1) (2003).

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PHILIP HALL, Judge

CONCURRING:

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LAWRENCE F. WINTHROP, Presiding Judge

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PATRICK IRVINE, Judge