IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WILBUR-ELLIS COMPANY, et al., *Plaintiffs/Appellants*,

v.

ARIZONA DEPARTMENT OF REVENUE,
Defendant/Appellee.

No. 1 CA-TX 17-0003
FILED 1-22-2019

Appeal from the Arizona Tax Court
No. TX2016-000078
The Honorable Christopher T. Whitten, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

B E E N E, Judge:

¶1 Wilbur-Ellis Company and Wilbur-Ellis Company, LLC (collectively, "Wilbur-Ellis") appeal from the superior court's award of summary judgment in favor of the Arizona Department of Revenue ("Department"), concluding that fertilizers and pesticides are not "propagative material" and, therefore, are subject to transaction privilege tax. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Wilbur-Ellis is a California limited liability company that sells fertilizers and pesticides to Arizona farmers.[1] In 2014, Wilbur-Ellis filed a refund claim with the Department, asserting that it paid $8,312,145.51 in transaction privilege tax between 2010 and 2013 on sales of fertilizers, pesticides, and seeds that should have been exempt from the tax. Specifically, Wilbur-Ellis argued that the sales are exempt under Arizona Revised Statutes ("A.R.S.") section 42-5061(A)(33), which permits a taxpayer to deduct "[s]ales of seeds, seedlings, roots, bulbs, cuttings and other propagative material" from its tax base. A.R.S. § 42-5061(A)(33). Alternatively, Wilbur-Ellis argued that sales of fertilizers are exempt as "sales for resale" under Arizona Administrative Code ("A.A.C.") R15-5-101(A). The Department denied its refund claim.

¶3 After an unsuccessful administrative appeal, Wilbur-Ellis filed a complaint in the superior court. After answering the complaint, the Department filed a motion for judgment on the pleadings pursuant to Arizona Rule of Civil Procedure ("Rule") 12(c).[2] The Department attached

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[1] In 2016, Wilbur-Ellis converted from a corporation to a limited liability company.

[2] The Arizona Supreme Court amended the Arizona Rules of Civil Procedure in 2017. *See* Prefatory Cmt. to the 2017 Amendments. Effective

to its motion a definition of "propagation materials" adopted from the United States Department of Agriculture ("USDA") glossary published on USDA's National Agricultural Library electronic website.

¶4 Wilbur-Ellis responded by filing a response to the Department's motion for judgment on the pleadings combined with a Rule 56 cross-motion for summary judgment. It argued the superior court should treat the Department's motion as a motion for summary judgment because the Department had "attached materials outside the record and asserted extrinsic facts beyond the allegations in the Complaint," namely the USDA glossary definition of "propagation materials." Wilbur-Ellis attached to its response and cross-motion four appendices, which included an expert witness declaration interpreting the term "propagation materials" and 11 exhibits of scientific literature. In its reply, the Department argued that its motion should not be converted to a motion for summary judgment. Separately, the Department moved for Rule 56(f) relief and an expedited ruling on its motion for judgment on the pleadings, asking the court to rule before requiring the Department to respond to Wilbur-Ellis's cross-motion. *See* Ariz. R. Civ. P. 56(f).[3] Subsequently, Wilbur-Ellis filed a motion to close the record, arguing the Department's reply filed in support of its motion "addressed the facts and responded to the legal arguments presented in Wilbur-Ellis' [cross-motion for summary judgment]." The Department opposed the motion.

¶5 At a status conference, the superior court granted the Department's motion for Rule 56(f) relief and its request for an expedited ruling. The court indicated that it would "hold off on requiring a response" to Wilbur-Ellis's cross-motion for summary judgment until it decided the Department's motion for judgment on the pleadings.

¶6 Following oral argument, the superior court stated it did not review Wilbur-Ellis's cross-motion for summary judgment before it ruled on the Department's motion for judgment on the pleadings. The court, then, proceeded by expressly converting the Department's motion for judgment on the pleadings into a motion for summary judgment. In its ruling, the court rejected Wilbur-Ellis's expert witness's technical definition of "other propagative materials" and proceeded with its own statutory

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January 1, 2017, the language of Rule 12(c) was moved to Rule 12(d). *See* Ariz. R. Civ. P. 12(d) (2017).

[3] The language of Rule 56(f) is now found in Rule 56(d). *See* Ariz. R. Civ. P. 56(d) (2017).

interpretation. The court granted summary judgment in favor of the Department without affording additional time to the Department to submit a response to Wilbur-Ellis's cross-motion. Wilbur-Ellis timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -170(C).

DISCUSSION

I. The Conversion of the Department's Motion into a Motion for Summary Judgment Was Not Required.

¶7 Wilbur-Ellis requested that the superior court convert the Department's motion for judgment on the pleadings into a motion for summary judgment because the Department included a definition for "propagation materials" with its motion, a definition adopted from the USDA's electronic National Agricultural Library glossary.

¶8 As a matter of law, it was unnecessary for the superior court to convert the Department's motion for judgment on the pleadings into a motion for summary judgment. Rule 12(c) requires that a motion for judgment on the pleadings be converted into a motion for summary judgment "[i]f . . . *matters outside the pleadings* are presented to and not excluded by the court" for all parties to have "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Ariz. R. Civ. P. 12(c). However, "*public records* regarding matters referenced in a complaint[] are not outside the pleading, and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012) (emphasis added) (quotation omitted); *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 13 (App. 2010) ("[A] Rule 12(b)(6) motion that presents a document that is a matter of public record need not be treated as a motion for summary judgment."). "Whether a document is a public record under Arizona's public records law presents a question of law, which we review de novo." *Griffis v. Pinal County*, 215 Ariz. 1, 3, ¶ 7 (2007).

¶9 Wilbur-Ellis argued the definition for "propagation materials" attached to the Department's motion for judgment on the pleadings was "outside of the pleadings," requiring the court to convert the motion into one for summary judgment. Section 42-5061(A)(33), which includes the term "propagative material," was, however, at the core of Wilbur-Ellis's complaint. *See Coleman*, 230 Ariz. at 356, ¶ 9. Moreover, the USDA's definition is a matter of public record because it is published and publically available on the USDA website and is not of a personal nature,

but rather has a "'substantial nexus' with [the] government agency's activities." *Griffis*, 215 Ariz. at 4, ¶ 10 (quoting *Salt River Pima–Maricopa Indian Cmty. v. Rogers,* 168 Ariz. 531, 541 (1991)).[4] Additionally, it is proper for the superior court to take judicial notice of dictionary definitions when deciding motions for judgment on the pleadings. *See* Ariz. R. Evid. 201(B)(2). Though Wilbur-Ellis argues the USDA glossary was not properly authenticated, publications by the federal government are self-authenticating under Arizona Rule of Evidence 902(5). Thus, the Department's submission of the USDA glossary term did not require the court to convert the motion for judgment on the pleadings into a motion for summary judgment.

¶10 In reviewing a superior court's ruling on a motion for judgment on the pleadings, we "accept the allegations of the complaint as true, but review de novo the court's legal determinations." *Muscat by Berman v. Creative Innervisions LLC*, 244 Ariz. 194, 197, ¶ 7 (App. 2017). We review the superior court's grant of summary judgment *de novo*. *See Wilderness World, Inc. v. Ariz. Dep't of Revenue*, 182 Ariz. 196, 198 (1995). Because the court converted the motion into one for summary judgment, albeit unnecessarily, and because both standards of appellate review are *de novo*, we will review the court's summary judgment ruling and affirm "the court's disposition if it is correct for any reason." *Muscat by Berman*, 244

[4] The principles outlined in *Salt River*, 168 Ariz. at 535, apply to all public records disputes. *Griffis*, 215 Ariz. at 4 n.4, ¶ 8.

Ariz. at 197, ¶ 7 (quoting *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996)).[5]

II. Fertilizers and Pesticides Are Not Propagative Material as Enacted by A.R.S. § 42-5061(A)(33).

¶11 On appeal, Wilbur-Ellis argues that the superior court "failed to properly evaluate the scope, intent, and purpose of the 'propagative material' exemption" to the transaction privilege tax. It contends that the legislature enacted § 42-5061(A)(33) "to create a broad exemption for materials used in commercial agriculture."

¶12 We review issues of statutory interpretation *de novo*. *Home Depot USA, Inc. v. Ariz. Dep't of Revenue*, 230 Ariz. 498, 500, ¶ 7 (App. 2012). To determine a statute's meaning, we look first to its text. *State v. Holle*, 240 Ariz. 300, 302, ¶ 11 (2016). When the text is clear and unambiguous, we apply the plain meaning and our inquiry ends. *See Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017). If the statute's language is clear, we need not "resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute." *State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003).

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[5] By converting the Department's motion into a motion for summary judgment, the court accepted Wilbur-Ellis's submission of extrinsic evidence, a foundation for the merits of its case. Wilbur-Ellis now argues on appeal the court improperly ruled on the converted motion "[b]ecause the tax court opted to weigh the limited evidence rather than afford the parties an opportunity to complete discovery[.]" Upon conversion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Ariz. R. Civ. P. 12(c). At an oral argument before the superior court, however, counsel for Wilbur-Ellis was asked if his client had presented its "best arguments and best facts" when it "went outside the record in [its] response" to the Department's motion for judgment on the pleadings. Counsel responded affirmatively. By not objecting in the superior court, Wilbur-Ellis failed to preserve this procedural argument for appeal. *See Moretto v. Samaritan Health Sys*., 190 Ariz. 343, 346 (App. 1997) (noting that the plaintiff "had an opportunity to raise any procedural irregularity during oral argument or by motion for new trial, but he failed to do so"). Accordingly, we decline to reverse on this procedural basis.

¶13 Arizona imposes a transaction privilege tax on the privilege of conducting business within the state. *See Ariz. Dep't of Revenue v. Mountain States Tel. & Tel. Co.*, 113 Ariz. 467, 468 (1976). Under the retail classification, transaction privilege tax is imposed on the "gross proceeds of sales or gross income derived" from "the business of selling tangible personal property at retail." A.R.S. § 42-5061(A).

¶14 In this case, the language of § 42-5061(A)(33) is clear. It permits a taxpayer to deduct from its tax base "[s]ales 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." A.R.S. § 42-5061(A)(33) (emphasis added).[6] Because this provision establishes a tax deduction, we must construe it strictly. *See Ariz. Dep't of Revenue v. Raby*, 204 Ariz. 509, 511, ¶ 16 (App. 2003) ("[T]ax deductions, subtractions, exemptions, and credits are to be strictly construed.") (citation omitted); *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, ¶ 10 (2004) (explaining that tax exemptions should be strictly construed "because they violate the policy that all taxpayers should share the common burden of taxation").

¶15 Title 42 does not define "propagative material"; therefore, we look to dictionary definitions to determine the meaning. *See Rigel Corp. v. State*, 225 Ariz. 65, 69, ¶ 19 (App. 2010) ("When the legislature has not defined a word or phrase in a statute, we may consider the definitions of respected dictionaries."). The Oxford Dictionary defines "propagate" as to "[b]reed specimens of (a plant or animal) by natural processes from the parent stock," and to "reproduce by natural processes." *Propagate*, Oxford Dictionary, https://en.oxforddictionaries.com/definition/propagate (last visited January 10, 2019). The Merriam-Webster Dictionary defines "propagate" as "to cause to continue or increase by sexual or asexual reproduction" and "to multiply sexually or asexually." *Propagate*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/propagate (last visited January 10, 2019).

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[6] Black's Law Dictionary defines a "deduction" as "[a]n amount subtracted from gross income when calculating adjusted gross income, or from adjusted gross income when calculating taxable income." Black's Law Dictionary (10th ed. 2014). It defines an "exemption" as "[a]n amount allowed as a deduction from adjusted gross income, used to determine taxable income." *Id*. For purposes of this decision, we use the two words interchangeably.

¶16 Wilbur-Ellis argues the term "propagative material" has a "technical usage," and, therefore, the superior court "should have been guided by how the term is used and understood in the relevant industry." Section 1-213 provides that "[t]echnical words and phrases . . . shall be construed according to such peculiar and appropriate meaning." A.R.S. § 1-213. We refer to Black's Agricultural Dictionary for the technical meaning of "propagative material." That dictionary defines "propagation" as "[t]he reproduction of a species." Black's Agricultural Dictionary 294 (2d ed. 1985). The dictionary further explains that the term propagation "is used in horticulture to mean the artificial multiplication of plants by vegetative means, including the taking of cuttings, layering, budding, and grafting[.]" *Id*. (emphasis omitted). We also find instructive the USDA glossary attached to the Department's motion for judgment on the pleadings, which defines "propagation materials" as "[a] plant part such as a bud, tuber, root, or shoot used to reproduce (propagate) an individual plant vegetatively." *Propagation Material*, U.S. Dep't of Agric. Nat'l Agric. Library, https://agclass.nal.usda.gov/mtwdk.exe?k=glossary&l=60&w=10674&n=1&s=5&t=2 (last visited January 10, 2019). Although Wilbur-Ellis submitted their expert witness's interpretation of "propagative material" as part of its cross-motion for summary judgment, we conclude *de novo*, irrespective of whether we apply the ordinary meaning of "propagate" or the technical definition of "propagation," that fertilizers and pesticides are not "propagative material" as enacted by § 42-5061(A)(33). *See Muscat by Berman*, 244 Ariz. at 197, ¶ 7; *Wilderness World, Inc.*, 182 Ariz. at 198. Propagate means to reproduce or multiply a species of plant. Materials that reproduce or multiply species of plants are "propagative materials." Neither fertilizers nor pesticides reproduce or multiply plants. Unquestionably, these products make the process of propagating plants more efficient, but they do not "propagate" new plants and, therefore, are not "propagative materials."

¶17 Additionally, Wilbur-Ellis's proffered interpretation of the statute would expand the reach of the exemption beyond fertilizers and pesticides. Under Wilbur-Ellis's interpretation of the statute, there is virtually no limit to goods that are exempt under § 42-5061(A)(33) so long as the goods in question are tangentially related to growing crops. *See Capitol Castings, Inc.*, 207 Ariz. at 447, ¶ 10.

¶18 Because we find the text of § 42-5061(A)(33) clear and unambiguous, "we need not resort to other methods of statutory interpretation to discern the legislature's intent." *Holle*, 240 Ariz. at 302, ¶ 11. We find no genuine issue of material fact in dispute. Strictly applying the language of § 42-5061(A)(33), we conclude that fertilizers and pesticides

are not "propagative material," and, therefore, Wilbur-Ellis cannot deduct the sale of these items from its tax base.

III. The Sale of Fertilizers to Farmers Was Not a Sale for Resale.

¶19 Wilbur-Ellis alternatively argues that its sales of fertilizers are exempt from transaction privilege tax because they are sales for resale.[7] Wilbur-Ellis relies on A.A.C. R15-5-101(A), which provides that "[g]ross receipts from the sale of tangible personal property to be resold by the purchaser in the ordinary course of business are not subject to tax under the retail classification." The statutes define "sale" as "any transfer of title or possession, or both . . . of tangible personal property . . . ." A.R.S. § 42-5001(14).

¶20 In *Shamrock Foods Co. v. City of Phoenix*, 157 Ariz. 286 (1988), our supreme court addressed whether the sale of disposable paper and plastic products to a restaurant, including cups, napkins, straws, and plates, were "sales for resale." *Id*. at 287. Concluding that the restaurant customers took possession of the paper products as part of their meal, the court concluded that Shamrock Foods's sales to the restaurants were sales for resale. *See id.* at 289. More recently, in *Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue*, 242 Ariz. 85 (App. 2017), this Court held that the sales of coal and natural gas to a power company were *not* sales for resale because the power company used and consumed the coal and natural gas to generate electricity. *Id.* at 88, ¶ 12.

¶21 In this case, Wilbur-Ellis argues that its customers do not "use and consume the fertilizers in their farming operations," but rather convey "the nutrients in the fertilizers to their customers[.]" It argues that fertilizers contain "core nutrients, which ***are not metabolized***, but instead remain an identifiable and distinct element of the end product." We disagree.

¶22 The farmers do use the fertilizers in their farming operations to improve the efficiency and yield of their crops. Unlike the restaurant customers in *Shamrock Foods Co.*, who took possession of the paper and plastic products, the customers who purchase agricultural products from the farmers do not take possession of the fertilizers. Simply because some of the nutrients in the fertilizers end up in the crops does not mean the

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[7] Wilbur-Ellis does not apply this alternative argument to the sale of pesticides.

farmers purchased the fertilizers for resale. The farmers purchased the fertilizers for their own use in producing the agricultural products.[8]

¶23 Accordingly, the sale of fertilizers from Wilbur-Ellis to the farmers was not a "sale for resale" and is subject to transaction privilege tax.

CONCLUSION

¶24 For the foregoing reasons, we affirm the superior court's judgment. However, the record shows there is still a pending issue regarding the Department's denial of a tax refund for seeds that Wilbur-Ellis purchased. Though this issue was addressed in Wilbur-Ellis's statement of facts in support of its cross-motion for summary judgment, the superior court did not address this issue in its judgment. We remand to the superior court for further proceedings regarding the seeds issue.

¶25 We award costs to the Department upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA

[8] We are persuaded by the reasoning of the Utah Court of Appeals in *Gull Laboratories, Inc. v. Utah State Tax Commision, Auditing Division*, 936 P.2d 1082 (Utah Ct. App. 1997), in which the court addressed a sale for resale issue. The court explained that to determine whether a product is purchased for resale, the court should evaluate the purchaser's purpose in buying the product and its use of the product. *Id.* at 1086.