

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2007-000307

04/27/2010

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

VAL-PAK EAST VALLEY INC

PAUL J MOONEY

v.

ARIZONA STATE DEPARTMENT OF
REVENUE

SCOT G TEASDALE

MINUTE ENTRY

Following oral argument on February 26, 2010, the Court took under advisement the State's Motion for Summary Judgment Re Discrimination Count. Following additional consideration of the motion, the subsequent briefing on the motion, and the oral argument, the Court rules as follows.

The uncontested facts are that in the past the State taxed all direct-mail advertisers evenhandedly. Val-Pak and the others protested, and the State withdrew all the assessments pending further review. It issued new Use Tax Ruling 02-1and, pursuant to it, filed this action against Val-Pak. It thus appears that this is the "test case" of this issue. The State has submitted the affidavit of Mr. Perez stating that it is not acting in a discriminatory manner; Val-Pak has not suggested that evidence exists of deliberate discrimination or animus against it, or of a policy not to impose use taxes against any other direct-mail advertiser.

Val-Pak's selection seems to have been fortuitous: someone had to be first, to determine whether the State's new legal theory would stand up, and Val-Pak drew the short straw. The Court perceives no requirement that the State file claims under the new theory simultaneously against all direct-mail advertisers. The State has the discretion to expend its scarce resources with "some degree of selectivity." *Tucson Mechanical Contracting, Inc. v. Arizona Dept. of Revenue*, 175 Ariz. 176, 181 (App. 1992). It strikes the Court that, in the event that the new

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theory is struck down, it would promote economy for the judicial system, the Department of Revenue, and the direct-mail advertisers (except unlucky Val-Pak) to have the matter resolved in a single suit instead of many duplicative ones. And the Court has been given no reason to believe that, if it is upheld, the State will not apply its approach throughout the direct-mail advertising industry.

The Court does not find that Val-Pak has demonstrated a genuine issue of material fact that would preclude the granting of summary judgment on the discrimination claim. Further, while Plaintiff's counsel made references to Rule 56(f), Plaintiff did not comply with the requirements of that rule, and therefore, is not eligible for the relief available under that rule. Thus, and for the reasons set forth above,

IT IS HEREBY ORDERED granting the State's Motion for Summary Judgment Re Discrimination Count filed August 31, 2009.

THE COURT NOTES that it does not intend to issue a final, signed judgment regarding this motion, until such time as the pending Motion for Reconsideration of Judge Dunevant's ruling as to Count One is resolved. Additionally, the Court, having read the Motion for Reconsideration, the Response and the Reply, believes that oral argument on the Motion for Reconsideration would be of assistance in resolving the motion. Therefore,

IT IS FURTHER ORDERED setting oral argument on **June 28, 2010 at 3:00 p.m. (1 hour)**. **NOTE: As of June 9, 2010, Judge Fink's division will be located at: Old Courthouse, 125 W. Washington, Suite 202, Phoenix, AZ 85003.** At the oral argument, counsel should be prepared to address not only the specific issues raised by the motion for reconsideration, but also the merits of the underlying motion for summary judgment that Judge Dunevant previously granted in this matter.