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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In Re
EUROFRESH, INC.,

Debtor.

EUROFRESH, INC.,
Plaintiff,

v.
GRAHAM COUNTY TREASURER,
Defendant.

Chapter 11 Proceedings

Case No. 09-7970-PHX-CGC

Adv. No. 09-694

**UNDER ADVISEMENT DECISION
RE MOTIONS FOR SUMMARY
JUDGMENT**

I. Introduction

Are greenhouses real property or personal property? These fifteen syllables have caused a multi-year dispute costing Graham County and the Debtor untold man hours and attorneys fees. The issue directly bears upon taxes owed by the Debtor to the County.

The answer to the question is not as simple as the question itself. The Debtor argues that a plain reading of Arizona statutes leads to the conclusion that greenhouses are personal property. On the other hand, Graham County argues that under Arizona statutes, administrative guidelines, and case law greenhouses are real property. The Debtor counters that even if the Court does rely on more than just the statutes, the conclusion is the same – greenhouses are personal property. The outcome will either cost the Debtor thousands of dollars in increased taxes or will cost Graham County thousands of dollars in lost revenues.

1 After considering the positions of the parties and the facts of the case, the Court grants
2 Graham County's motion for summary judgment and denies Eurofresh's motion for summary
3 judgment.¹

4 **II. Facts**

5 The essential facts are undisputed.

6 The Debtor grows tomatoes hydroponically in six greenhouses it owns near Willcox,
7 Arizona ("Greenhouses"). The Greenhouses are not small backyard greenhouses or even the
8 larger greenhouses found at your local nursery. Instead, the Greenhouses are industrial in
9 scope, taking up 222 acres on 755 acres of land; on average, each greenhouse is 37 acres in
10 size. The Greenhouses are constructed of a galvanized steel frame, covered by aluminum
11 and glass, and bolted to concrete footings. There are concrete walkways inside the
12 Greenhouses. The roofs have automated vents that open and close to control the climate.
13 Located throughout the Greenhouses are exhaust fans, irrigation systems, and electrical
14 systems. Greenhouse components are shipped from Europe and assembled by hand on site.
15 The Greenhouses can be disassembled and moved. While there is a some market for used
16 industrial sized greenhouses, the Debtor can cite only four domestic sales by another entity
17 in the past ten years.

18 The parties have been fighting over the designation of the Greenhouses for over a
19 decade. They originally reached a compromise regarding taxation in 1998 that they followed
20 for several years, but eventually Graham County brought suit to extricate itself from the
21 compromise. The Arizona Tax Court allowed Graham County to avoid the agreement
22 beginning in 2006. Graham County chose to void the compromise in 2007.

23 **III. Position of the Parties**

24 *A. Eurofresh*

25 The Debtor takes a two pronged approach in defining the Greenhouses as personal
26

27 ¹At the request of the parties, the ruling on this motion was put on hold pending settlement
28 discussions. The court has been informed that a settlement has not been reached and therefore issues
this decision.

1 property: 1) A plain reading of Arizona statutes; and 2) Application of *Arizona Dept. of Rev.*
2 *v. Arizona Outdoor Advertisers, Inc.*, 41 P.3d 631 (Ariz.App.Div. 1, 2002).

3 1. Statutes

4 According to the Debtor, Arizona defines personal property broadly under A.R.S. §
5 42-11001(10): “‘Personal Property’ includes property of every kind, both tangible and
6 intangible, not included in the term real estate”; whereas, Arizona defines real estate
7 narrowly under A.R.S. § 42-11001(13): “‘Real Estate’ includes the ownership of, claim to,
8 possession of or right of possession to lands or patented mines.” The Debtor argues that it
9 is undisputed that the Greenhouses are neither “land” nor “patented mines”; therefore they
10 are not included in the term real estate as defined in § 42-11001(13); and when read in
11 conjunction with §42-11001(10) it becomes clear that the Greenhouses must be defined as
12 personal property.

13 The Debtor also argues that clean rooms are legislatively treated as personal property
14 and that the definition of clean rooms in A.R.S. §42-13355² – in which temperature,
15 humidity, etc. are carefully controlled – is similar to greenhouses. Thus, concludes the
16 Debtor, the Arizona legislature has shown an intent to treat structures that control climate
17 as personal property. Moreover, the Greenhouses are less permanent than clean rooms and
18 can readily be removed from the land, again broadly suggesting that they are personal
19 property.

21 ²A.R.S. §42-13355 reads:

22 A. Clean rooms that are used for manufacturing, processing, fabrication or research and development
23 of semiconductor products shall be valued and assessed as tangible personal property.

24 B. For the purposes of this section:

25 1. “Clean room” means all property that comprises or creates an environment where
26 humidity, temperature, particulate matter and contamination are precisely controlled within specified
27 parameters, without regard to whether the property is actually contained within that environment or
28 whether any of the property is affixed to or incorporated into real property.

2. Clean rooms include the integrated systems, fixtures, piping, movable partitions, lighting
and all property that is necessary or adapted to reduce contamination or to control airflow,
temperature, humidity, chemical purity, or other environmental conditions or manufacturing
tolerances, as well as the productions machinery and equipment operating in conjunction with the
clean room environment.

1 2. Case Law

2 Even if the Court were to disagree with the Debtor’s statutory interpretation, the
3 Debtor argues that, under standards adopted by the court of appeals in *Arizona Outdoor*, it
4 still prevails. In *Arizona Outdoor*, an owner of billboards fought the real property
5 designation by the Arizona Department of Revenue claiming that disputed billboards were
6 personal property because they were modular in nature, installed in concrete footers and
7 could be removed from the property and moved to a new location. The court agreed and
8 acknowledged the following factors are traditionally used to determine if the property is real
9 property:

- 10 (1) Actual or constructive annexation of the personalty to the realty;
11 (2) The personalty is adapted to the purpose for which the realty is used; and
12 (3) The party annexing the personalty intended at the time of the annexation
 to make it a permanent part of the realty.

13 *Arizona Outdoor* at 633-34. However, the court rejected strict adherence to the traditional
14 test and instead adopted a reasonable person standard.

15 The Debtors contend that the facts here are similar to *Arizona Outdoor* because: the
16 Greenhouses are manufactured in a modular fashion and the components are bolted together
17 on site; the Greenhouses can easily be disassembled and moved to other property without
18 damaging them or the property; and there is a market for used Greenhouses separate from
19 real estate. Thus, urges the Debtor, if this Court applies the reasonable person standard, it
20 should conclude that the Greenhouses are personal property.

21 Finally, the Debtor contends that the Greenhouses are elaborate machines to control
22 the growth of tomatoes. In a Tax Code context, the Ninth Circuit held that greenhouses are
23 not “buildings” for tax credit purposes. *See Thirup v. Commissioner of Internal Revenue*, 508
24 F.2d 915 (9th Cir. 1974). Thus, according to the Debtor, there is Ninth Circuit precedent
25 regarding the definition of greenhouses.

26 *B. Graham County*

27 Graham County contends that Eurofresh must establish by competent evidence that
28 the county assessor incorrectly taxed its commercial greenhouses as real property. *Golder*

1 *v. Dep't of Revenue, State Bd. Of Tax Appeals*, 599 P.2d 216 (Ariz. 1979). Graham County
2 argues that the Debtor has failed to meet its burden of proof and the Court should find in its
3 favor under Arizona statutes and case law.

4 1. Statutes

5 According to Graham County, Arizona's definition of "real property" as "coextensive
6 with lands, tenements and hereditaments" under A.R.S. § 1-215(34) is far more expansive
7 than the definition advanced by the Debtor. This conclusion, argues Graham County, is
8 supported by *Benedict v. Hydro Conduit Corp.* which held, "an assessment of real estate may
9 and should include fixtures, structures, and improvements on the realty." 511 P.2d 185, 187
10 (Ariz.App. 1973) (citing 84 C.J.S. Taxation s 404(c)). Further, Graham County claims that
11 the definitions of "real estate," "real property," and "personal property" have remained
12 essentially unchanged from those applicable in *Benedict*. Citing to *McMurrin v. Duncan*,
13 155 P. 306, 307 (Ariz. 1916); *Bradford v. Morrison*, 86 P. 6, 7 (Ariz. Terr. 1906); *Waller v.*
14 *Hughes*, 11 P. 122, 123-24 (Ariz. Terr. 1886).

15 Graham County also cites to the Arizona Department of Revenue Personal Property
16 Manual ("Manual") which states, "Real property, also called real estate, refers to the rights
17 to land and any improvements to or on the land." *Id.* at 1.2. According to Graham County,
18 the Greenhouses are improvements and therefore real property. Eurorfresh dismisses the use
19 of the Manual claiming that the legislative definition controls.

20 2. Case Law

21 Graham County argues that though the Greenhouses could be moved, this does not
22 mean that they are personal property. In support of its position, Graham County relies on
23 *Murray v. Zerbel*, a case that rests on the traditional fixture test in determining that a mobile
24 home is not personalty simply because it could be moved. 764 P.2d 1158, 1161 (Ariz. 1988).
25 *Murray* determined that although the mobile home was moveable, it would take a substantial
26 amount of work to remove it; there would be "some" damage to the land to remove it; and
27 because there was no subjective intent based on an agreement between the parties, the
28 objective intent of the party that annexed it was to make the mobile home a permanent part

1 of the realty. *Id.* at 1161-62.

2 Here, argues Graham County, the outcome should be the same as *Murray* because the
3 Greenhouses: 1) have not been removed from the land since they were first placed on it in
4 1992; 2) were constructed on realty that the Debtor owns, thus supporting a presumption to
5 make them a permanent part of its land for use in its commercial business; 3) are of
6 substantial size, covering more than 222 acres; 4) have metal and steel frames that are affixed
7 to a concrete foundation; 5) have concrete walkways inside; and 6) include components such
8 as irrigation, electrical and heating systems that are necessary for them to function as
9 greenhouses. Placing all the facts together, concludes Graham County, provides objective
10 evidence that the Greenhouses are real property.

11 Graham County contends that Eurofresh’s subjective assertions that the Greenhouses
12 are personal property are “self-serving statements created after the fact to gain some
13 advantage.” *Arizona Outdoor* at 639. Thus, Graham County concludes that the Debtor fails
14 the reasonable person standard because unlike the billboards in *Arizona Outdoor*, a
15 reasonable person would conclude that Eurofresh, having never removed the Greenhouses
16 nor previously disclosed any intention of disassembling and moving them, cannot credibly
17 assert today that it ever had a subjective intent that they were personal property.

18 **IV. Analysis**

19 The burden of proof initially rests on the Debtor. Under A.R.S. §42-16212(B), “both
20 parties may present evidence of any matters that relate to the classification or to the full cash
21 value of the property in question as of the date of its assessment. The valuation or
22 classification as approved by the appropriate state or county authority is presumed to be
23 correct and lawful.” *See also Arizona Corporation Commission v. Reliable Transportation*
24 *Company*, 346 P.2d 1091 (1959). *Sherrill and La Follette v. Mohave County* gives guidance
25 to the Court on how to apply the burden of proof under Section 42-16212 stating that the
26 plaintiff “presented evidence contradicting this presumption and the presumption
27 disappeared. The taxing authorities then presented their evidence. The trial court then had
28 to weigh the evidence and make findings of fact.” 529 P.2d 1200, 1202 (Ariz.App. 1975).

1 “The taxpayer may overcome this presumption by presenting competent evidence that the
2 taxing authority's valuation is excessive.” *Eurofresh, Inc. v. Graham County*, 187 P.3d 530,
3 534 (Ariz.App.Div.1 2007). Moreover, ““Generally, it is presumed that where the owner of
4 the merchandise is also the owner of the realty, permanent accession to the freehold is
5 intended.”” *Murray v. Zerbel* (quoting *Energy Control Services v. Arizona Department of*
6 *Economic Security*, 135 Ariz. 20, 23, 658 P.2d 820, 823 (App.1982)).

7 *A. Statute*

8 The Court disagrees with the Debtor’s statutory interpretation. Pursuant to A.R.S. §
9 42-11054, the legislature directed the department of revenue to prepare a manual “consistent
10 with this section, reflecting the standard methods and techniques to perpetuate a current
11 inventory of taxable property and the valuation of that property.” § 42-11054(A)(2).
12 Further, the department must, and did, submit the proposed manual to the joint legislative
13 oversight committee on property tax assessment and appeals for its review and comments.
14 A.R.S. § 42-11054(B). The department of revenue prepared the Manual at the direction of
15 the legislature which retained authority to oversee its content. Accordingly, this Court adopts
16 the definition of real property found in the Manual as including the term real estate and the
17 “rights to land and any improvements to or on the land.” *Id.* at 1.2.

18 Further, the Debtor’s definition taken to its logical conclusion leads to illogical results.
19 Under the Debtor’s definition, in addition to the Greenhouses, homes and office buildings
20 would not be real property; only the land on which they rest. While the Debtor’s argument
21 might be appealing on a law school exam, the real world and over a century of Arizona case
22 law instructs the Court to reject the Debtor’s definition.

23 The Court is also unpersuaded by the Debtor’s reference to the definition of clean
24 rooms under A.R.S. §42-13355. If a clean room is personal property under the general
25 statutes, why is there a need to specifically define it as personal property? If anything, the
26 lack of a specific provision for greenhouses supports the conclusion that they are real
27 property under the general statutes.

28

1 *B. Case Law*

2 Both sides claim that Arizona case law – *Arizona Outdoor* and *Murray* – is
3 dispositive. The Court has little problem reading these cases together. *Murray*, an Arizona
4 Supreme Court decision, applies the following factors to determine whether property is a
5 fixture:

- 6 • There must be an annexation to the realty or something appurtenant
 thereto;
- 7 • The chattel must have adaptability or application as affixed to the use
 for which the real estate is appropriated; and
- 8 • There must be an intention of the party to make the chattel a permanent
 accession to the freehold.

9 *Id.* at 1160 (quoting *Fish v. Valley National Bank*, 167 P.2d 107, 111 (1946)). According to
10 *Arizona Outdoor*, an appellate court decision, these traditional factors first were espoused in
11 *Teaff v. Hewitt*, 1 Ohio St. 511 (1853) and have been widely adopted. *Arizona Outdoor* at
12 634-35. In the end, *Arizona Outdoor* departs from a strict application of *Teaff* and instead
13 adopts the following reasonable person test, “Would a reasonable person, after considering
14 all the relevant circumstances, assume that the item in question belongs to and is a part of the
15 real estate on which it is located?” *Outdoor Advertisers* at 638-39. Even though the court
16 adopted a reasonable standard approach, it did not reject *Teaff*’s jurisprudence stating:

17 While *Teaff*’s three factors will no longer limit the inquiry, they will continue
18 to play a major role. In fact, annexation will probably continue as the
19 triggering event for most fixtures inquiries. In addition, the century and a half
20 of *Teaff* case applications remain available as source material on which to
 draw for specific relevant circumstances that can easily be integrated into a
 reasonable person inquiry.

21 *Id.* at 638. As stated in *Murray*, “Of the three parts, the most important is ‘the intention of
22 the parties as respects the use and adaptability.’” *Id.* at 1160 (quoting *Voight v. Ott*, 341 P.2d
23 923, 927 (1959)). Reading the cases together, the Court concludes that using the traditional
24 factors of annexation, adaption, and intent is the appropriate approach in this matter.

25 As to annexation, the Court concludes that the Greenhouses are not as moveable as
26 the billboards in *Arizona Outdoor*. Yes, much like the billboards, the Greenhouses are
27 modular in nature, conceptually can be dissembled and shipped elsewhere, and are bolted to
28 cement footings that are smaller than the footings in *Arizona Outdoor*. However, the sheer

1 size of the Greenhouses clearly distinguishes them from the billboard. The court in *Herman*
2 *Holtkamp Greenhouses, Inc. v. Metro. Nashville and Davidson County*, 2010 WL 366697
3 (Tenn.Ct.App Feb. 2, 2010) (Slip Copy) looked to the amount of square footage covered by
4 greenhouses as one of several factors in determining whether the owner intended to move it.
5 It concluded that a 436,000 square foot greenhouse on a 31 acre tract of land was enormous
6 and was therefore a factor showing that the greenhouse was affixed to the land. Here, on
7 average, the Greenhouses themselves are larger than the entire tract of land in *Herman*
8 *Holtkamp Greenhouses*.

9 Further, even if the Greenhouses are not permanently attached they are considered
10 annexed to the real property if they are:

- 11 1. A necessary, integral, or working part of the real property.
- 12 2. Designed or committed for use with real property.
- 13 3. So essential to the real property that the real property cannot perform its
14 desired function without the nonattached item.

14 Manual at 1.10. Here, the Court concludes that they squarely meet these criteria.
15 Eurofresh's business is completely dependent on the Greenhouses and there is no evidence
16 before the Court showing how the land would be used by Eurofresh without the
17 Greenhouses. The Court concludes that the Greenhouses have been annexed.

18 "The adaptation requirement for an object to constitute a fixture is met when the
19 particular object is clearly adapted to the use to which the realty is devoted." American
20 Jurisprudence (Second) Fixtures §11. The record is clear that the Greenhouses are adapted
21 to be used on the realty.

22 "[I]f there is a right of removal, the reasonable person would conclude that ownership
23 of the item did not pass to the landowner and the item is therefore not a fixture." *Arizona*
24 *Outdoor* at 639. However, the owner of the billboard in *Arizona Outdoor* could show the
25 right of removal via their lease because they did not own the land on which the billboard was
26 located. Here, Eurofresh owns the land on which the Greenhouses sit. "Generally, it is
27 presumed that where the owner of the merchandise is also the owner of the realty, permanent
28 accession to the freehold is intended." *Murray* at 1160 (quoting *Energy Control Services v.*

1 *Arizona Department of Economic Security*, 135 Ariz. 20, 23, 658 P.2d 820, 823 (App.1982)).
2 When read together, *Arizona Outdoor* and *Murray* stand for the proposition that when the
3 landowner and the property owner are the same; intent to permanent accession is presumed.
4 Here, Eurofresh has not overcome the presumption.

5 Though it claims that it would sell the Greenhouses if warranted, Eurofresh presents
6 no evidence that it has sold a greenhouse in the past 18 years. Moreover, there is no
7 indication that Eurofresh plans to move the Greenhouses in the near or distant future. Using
8 a reasonable person standard, as discussed above, the Court concludes there was no intent
9 to treat these as personal property. Instead, the Court sees Eurofresh's claim that it intended
10 the Greenhouses as personal property as, "self-serving statements created after the fact to
11 gain some advantage." *Arizona Outdoor* at 639.

12 **V. Conclusion**

13 For the foregoing reasons, the Court concludes that summary judgment is warranted
14 for Graham County because there are no genuine issues of material fact and the County is
15 entitled to judgment as a matter of law.

16 Counsel for Graham County is to upload a form of order.

17 So ordered.

18 DATED: November 17, 2010

19 
20 CHARLES G. CASE II
21 UNITED STATES BANKRUPTCY JUDGE

22 **COPY** of the foregoing mailed by the BNC and/or
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