BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
100 North 15th Avenue - Suite 140
Phoenix, Arizona 85007
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BERNARD A. and CANDICE M. ZEPER, Appellants, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	)	Docket No. 2007-12-I NOTICE OF DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Bernard A. and Candice Zeper ("Appellants") timely filed an Arizona individual income tax return for tax year 2006 claiming a subtraction of $5,000.00 for the sale of an energy efficient residence. The Arizona Department of Revenue ("Department") reviewed the return, disallowed the subtraction and, on January 20, 1912, issued a proposed assessment of additional tax, plus interest against Appellants.

Appellants protested the assessment to a Hearing Officer, who upheld the assessment. Appellants then protested to the Director of the Department, who affirmed the Hearing Officer's decision. Appellants now timely appeal to this Board.

DISCUSSION

The issue before the Board is whether Appellants are liable for the tax and interest assessed. The presumption is that an assessment of additional income tax is correct. Arizona State Tax Comm'n v. Kieckhefer, 67. 102, 191 P.2d 729 (1948). The burden is on the taxpayer to show he is entitled to a deduction or exemption from tax. *See Ebasco Servs., Inc. v. Ariz. State Tax Comm'n*, 105 Ariz. 94, 99, 459 P. 2d 719, 724 (1969).

A.R.S. § 43-1031 (A) provides that a taxpayer may subtract five per cent of the sales price, with certain exclusions, of one or more new single family residences, that are sold by the taxpayer and that

exceed the 1995 model energy code by fifty per cent or more as determined by an approved rating program, provided that the amount of the subtraction does not exceed five thousand dollars with respect to each new single family residence. A.R.S. § 43-1031 and the Department's instructions clearly state that the subtraction is for the sale of a *new* energy efficient single family residence. A residence built in 1983 does not qualify as a "new" residence in tax year 2006.[1]

Nevertheless, Appellants argue that, under A.R.S. § 43-563, the Department is precluded from collecting any tax or interest. The statute, titled "Recovery of erroneous refunds" provides, in pertinent part, that

> The department of revenue may recover any refund or credit or any portion which is erroneously made or allowed, together with interest at the rate determined pursuant to section 42-1123 from the date the refund was made or allowed, in an action brought within two years after the refund or credit was made in a court of competent jurisdiction in Maricopa county in the name of the department of revenue.

This statute refers to "any erroneous refund or credit." A.R.S. 42-1118 provides that the Department may allow a credit or issue a refund if it determines that any amount of tax, penalty or interest has been paid in excess of the amount actually due. If the Department erroneously allows a refund or credit *of taxes previously paid*, A.R.S. § 43-563 provides a means for the Department to recover the erroneous refund or credit. A.R.S. § 43-563 does not refer to the collection of a tax liability resulting from the disallowance of an improper *subtraction* claimed by a taxpayer.[2]

Under A.R.S. § 42-1104(A), the Department may issue an assessment within four years after a taxpayer filed the return or within four years after the due date of the return, whichever period is later. It is an undisputed fact that the assessment was filed within this four year time frame. Therefore, Appellants are liable for the tax assessed.

A.R.S. § 42-1123(C) provides that if the tax "or any portion of the tax is not paid" when due "the department shall collect, as a part of the tax, interest on the unpaid amount" until the tax has been paid."

. . .

[1] Instructions further refer Appellants to Income Tax Procedure ITP 02-1 for additional information on qualifying residences.
[2] Both the statute and the instructions identify A.R.S. § 43-1031 (A) as a subtraction.

1 CONCLUSIONS OF LAW

2 1) Appellants are liable for the tax assessed. *See Arizona State Tax Comm'n v. Kieckhefer*, 67
3 Ariz. 102, 105, 191 P. 2d 729 (1948); *see, also Ebasco Servs., Inc. v. Ariz. State Tax Comm'n*, 105 Ariz.
4 94, 99, 459 P.2d 719, 724 (1969); A.R.S. § 42-1105(D).

5 2) Appellants are liable for the interest assessed. *See* A.R.S. § 42-1123(C).

6 ORDER

7 THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the
8 Department is affirmed.

9 This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer,
10 unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.

11 DATED this 11th day of March, 2014.

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STATE BOARD OF TAX APPEALS

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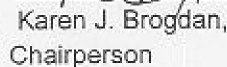

14 Karen J. Brogdan,
Chairperson

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KJB:ALW

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CERTIFIED

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