BEFORE THE STATE BOARD OF TAX APPEALS STATE OF ARIZONA

Bank of America Tower 101 North First Avenue - Suite 2340 Phoenix, Arizona 85003 602.528.3966

WILLIAM ANDERSON, dba SUN VALLEY LANDSCAPING; SUN DIAL MASONRY, INC.; WK ANDERSON ENTERPRISES, INC., dba SUN VALLEY LANDSCAPE; WK ANDERSON, INC.,	Docket No. 1819-99-S
dba J&J LANDSCAPING,	) NOTICE OF DECISION:
Appellants,	) FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)
ARIZONA DEPARTMENT OF REVENUE, Appellee.	)

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

William Anderson, dba Sun Valley Landscaping, Sun Dial Masonry, Inc., WK Anderson Enterprises, Inc., dba Sun Valley Landscape and WK Anderson, Inc., dba J&J Landscaping ("Appellants") are engaged in landscaping, masonry and rock businesses in Arizona. The Arizona Department of Revenue (the "Department") audited Appellants and issued assessments of Arizona transaction privilege tax. The Department audited Appellants for the period January 1, 1996 through March 31, 1997, except for William Anderson, dba Sun Valley Landscaping, which was audited for the period July 1, 1991 through March 31, 1997.

Appellants timely protested the entire amount of the assessment, including all additional tax, late filing and late payment penalties, and interest.

<sup>&</sup>lt;sup>1</sup> The assessments issued against William Anderson, dba Sun Valley Landscaping and WK Anderson Enterprises, Inc., dba Sun Valley Landscape include transaction privilege tax for the cities of Gilbert and Carefree in addition to the State tax.

3 4

## DISCUSSION

The issue before the Board is whether Appellants are liable for the tax, penalties and interest assessed. Appellants argue that they are not liable for the tax at issue because they were not prime contractors on work performed during the audit periods. Appellants bear the burden of proof as to all issues of fact. A.A.C. R16-3-118.

Arizona imposes transaction privilege tax on the business of prime contracting. A.R.S. § 42-5075(G)(1) (formerly A.R.S. § 42-1310.16). A contractor, or builder, is one who undertakes to "construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement, or to do any part of such a project . . . and includes subcontractors and specialty contractors." A.R.S. § 42-5075(G)(2). A "prime contractor" is the contractor "who is responsible for the completion of the contract." A.R.S. § 42-5075(G)(6).

All contractors are presumed to be prime contractors on a job and are taxable on their contracting receipts unless they can demonstrate that the job was within the control of a prime contractor who is liable for the tax on the gross receipts attributable to the job and from which the subcontractors or others were paid. A.R.S. § 42-5075(D). Under the statute, a contractor can escape taxation by obtaining a certificate stating that the person providing the certificate is a prime contractor on the projects at issue and is liable for the tax. A.R.S. § 42-5075(E).

Appellants failed to provide any certificates to the Board. Nevertheless, Appellants claim that they were not prime contractors during the audit period and that the developers on the projects are liable for the tax at issue under the owner builder classification.

This Board has repeatedly held that a developer is not a prime contractor. See, e.g., Quality Underground of Arizona, Inc. v. Arizona Dep't of Rev., No. 1437-95-S (1997), CCH AZ St. Tax Rep. ¶ 400-468; Roland, Webb & Roland Contractors v. Arizona Dep't of Rev., No. 1179-94-S (1996), CCH AZ St. Tax Rep. ¶ 400-393. Further, A.R.S. § 42-5076 (formerly A.R.S. § 42-1310.17) provides that "The owner builder sales classification, comprised of persons who sell real property as improved at any time on or before the expiration of twenty-four months after the improvement is substantially completed, meaning

Notice of Decision Docket No. 1819-99-S

suitable for the use or occupancy intended, shall be subject to tax under this classification for the purpose of taxing the sale of those improvements incorporated within that twenty-four month period." Thus, owner builders are potentially taxable only on the incorporated improvements, not on the entire project. In any event, Appellants have failed to provide proof that anyone else involved in the projects performed during the audit period is taxable as an owner builder or a prime contractor. Accordingly, Appellants are liable for the tax assessed.

The penalties imposed may not be abated because Appellants have not shown that their failure to timely file returns and pay tax was due to reasonable cause and not willful neglect. A.R.S. § 42-1125(A) and (D) (formerly A.R.S. § 42-136). Finally, the interest at issue is made a part of the tax by statute and represents a reasonable interest rate on the tax due, therefore, it may not be abated. A.R.S. § 42-1123 (formerly A.R.S. § 42-134); *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

## **CONCLUSIONS OF LAW**

- Appellants are liable for the tax assessed under the prime contracting classification. A.R.S.
   \$ 42-5075.
- 2. Appellants have not shown that their failure to file returns and pay the tax at issue is due to reasonable cause; therefore, the penalties may not be abated. A.R.S. § 42-1125(A) and (D).
- 3. The interest remaining at issue represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute; therefore, it may not be abated. A.R.S. § 42-1123; Biles v. Robey, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

## **ORDER**

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

Notice of Decision Docket No. 1819-99-S 1 2 3 DATED this lst 4 5 6 7 8 9 JCW:ALW 10 **CERTIFIED** 11 Copies of the foregoing 12 Mailed or delivered to: 13 Michael Lynch **GULINSON & LYNCH** 4141 East Raymond Street 14 Phoenix, Arizona 85040 15 Lisa A. Neuville **Assistant Attorney General** 16 Civil Division, Tax Section 1275 West Washington Street 17 Phoenix, Arizona 85007 18 19 20

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

DATED this lst day of May , 2001.

STATE BOARD OF TAX APPEALS

Janice C. Washington, Chairperson

\_\_\_

21

22

23

24

25