BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
100 North 15th Avenue - Suite 140
Phoenix, Arizona 85007
602.364.1102

BEST LAID FLOORS, L.L.C., Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1869-02-S 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

Best Laid Floors L.L.C., ("Appellant") engages in the business of carpet installation in Arizona. The Arizona Department of Revenue (the "Department") audited Appellant for the period May 1997 through December 2000 ("Audit Period"). The Department determined that Appellant had collected tax but had failed to file returns or remit tax for the latter part of the Audit Period (January, 1999 to December, 1999) and had further failed to pay tax on activities it designated as "labor" or "installation services" throughout the Audit Period. Subsequently, the Department assessed Appellant additional transaction privilege tax for the State of Arizona and for the City of Sedona under the prime contracting classification (A.R.S. § 42-5075). The assessment includes interest and penalties for failure to timely file returns and pay the tax due. Appellant protested the assessment to the Office of Administrative Hearings ("OAH"), which denied the protest. Appellant now timely appeals to this Board.

DISCUSSION

The issue before the Board is whether Appellant is liable for the tax assessed. The presumption is that the assessment is correct, and Appellant bears the burden of overcoming that presumption. *See Arizona State Tax Commission v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948).

Prime contracting activity is defined, in pertinent part, as undertaking to "[a]lter, repair, add to, subtract from, improve . . .any 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(J)(2). The rule R15-5-613 of the Arizona Administrative Code ("A.A.C.") further specifies that "[t]he sale and installation of all floor covering which is affixed to real property is subject to tax under the contracting activity."

Appellant argues that its business activities fall within the scope of the retail sales classification because it sells professional, personal services and that income attributable to the installation of carpet is exempt from tax under the retail classification.[1] A.R.S. § 42-5061. Appellant further contends it is not taxable under A.A.C. R15-5-613 because the rule imposes tax only on those who *sell and install* floor coverings. Because it only installs carpet and does not sell it, Appellant argues it is not taxable.

The Board acknowledges that Appellant does not *sell* carpeting. This is precisely the reason Appellant's activities do not fall within the scope of the retail classification, which is comprised of the business of *selling tangible personal property at retail*. *See* A.R.S. § 42-5061(A). Further, the Board has previously determined that while A.A.C. R15-5-613 clarifies that those who install the carpeting they sell may be taxable under the contracting, rather than the retail sales classification, there is nothing in either the rule or the pertinent statute that indicates the sale of floor covering is a prerequisite to taxation on the installation. *See Hohn v. Arizona Dep't of Rev.*, Docket No. 922-92-S (BOTA Feb. 22, 1994). Accordingly, Appellant is liable for the tax assessed on its installation services.

Next, while Appellant concedes that its services are taxable when performed as a subcontractor, it argues that the Department erroneously disregarded several valid exemptions certificates it provided

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[1] The retail classification exempts from tax the gross proceeds of sales or gross income from "[p]rofessional or personal service occupations or businesses which involve sales or transfers of tangible personal property only as inconsequential elements" and "[s]ervices rendered in addition to selling tangible personal property at retail." Id(A)(1)and (A)(2).

pursuant to A.R.S. § 42-5075(E). This subsection exempts from taxation income derived from contracting activities if the person who hired the contractor executes and provides the contractor with a certificate stating that the person is the prime contractor liable for the tax. The subsection further provides that the Department shall prescribe the form of the certificate. Additionally, Appellant contends that the Department erroneously assessed City of Sedona transaction privilege tax against Appellant for receipts earned outside the City of Sedona.

The Department counters that it accepted valid certificates that provided the required information and assessed City of Sedona tax on projects determined to be subject to the tax based on information provided by Appellant.

After the hearing before the Board, at the Board's request, the Department reviewed additional information provided by Appellant and, subsequently, revised the assessment to exclude certain amounts that had been erroneously included in taxable receipts under the prime contracting classification, and to exclude from the City of Sedona assessment certain amounts that had been erroneously included in taxable receipts from projects within that city. The Board finds that Appellant is liable for the assessment as modified.

The late filing and late payment penalties at issue may not be abated because Appellant has not shown that its failure to timely file returns and pay the tax due was attributable to reasonable cause. A.R.S. § 42-1125(A) and (D). 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; *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

1. Appellant is liable for the assessment as modified. *See* A.R.S. § 42-5075; *Hohn v. Arizona Dep't of Rev.*, Docket No. 922-92-S (BOTA Feb. 22, 1994).

2. Appellant has not shown that its failure to timely pay the tax due was attributable to reasonable cause; therefore, the penalties imposed may not be abated. A.R.S. § 42-1125(D).

3. Because the interest at issue is made a part of the tax by statute and represents a reasonable interest rate on the tax due, 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 granted in part and denied in part, and the final order of the Office of Administrative Hearings is modified.

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 11th day of March, 2003.

STATE BOARD OF TAX APPEALS

William L. Raby, Chairperson

WLR:ALW

CERTIFIED

Copies of the foregoing
Mailed or delivered to:

James R. Spear, CPA
49 Bell Rock Plaza
Sedona, Arizona 86351

Michael P. Worley
Assistant Attorney General
Civil Division, Tax Section
1275 West Washington Street
Phoenix, Arizona 85007