BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
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Phoenix, Arizona 85007
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CATER FRESH ARIZONA, LLC, Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1989-10-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

Cater Fresh Arizona, LLC ("Appellant") operates a commissary that sells food items exclusively to mobile food units ("food trucks"). Both Appellant and the food truck operators ("operators") must be approved by and operate in compliance with the requirements of the Maricopa County Environmental Service Department.

The Arizona Department of Revenue ("Department") audited Appellant for the period of September 2002 through May 2006. The Department determined that some of the operators with whom Appellant conducted business held the required permits from Maricopa County to conduct their food truck businesses but did not have transaction privilege tax licenses. The Department further determined that Appellant had not obtained tax exemption certificates from these operators.

In February 2008, the Department issued an assessment against Appellant disallowing a sampled-percentage of Appellant's claimed "sale for resale" deductions, resulting in additional transaction privilege tax due under the retail classification. The assessment also included tax assessed on various fees Appellant charged the operators such as route fees and parking fees, as well as late filing penalties.

Appellant protested the assessment to the Department's Hearing Officer who denied the protest. Appellant now timely appeals to this Board.

DISCUSSION

The issue in this appeal is whether Appellant is liable for the tax assessed.

Arizona imposes a transaction privilege tax under the retail classification on "the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business." A.R.S. § 42-5061(A). "Selling at retail" is defined as "a sale for any purpose ***other than for resale in the regular course of business***." A.R.S. § 42-5061(V)(3) (emphasis added). A Department regulation similarly establishes that sales for resale "are not subject to tax under the retail classification." Arizona Administrative Code ("A.C.C.") R15-5-101.

A.R.S. § 42-5009 provides as follows:

> A. A person who conducts any business classified under . . . this chapter may establish entitlement to the allowable deductions from the tax base of that business by both:
>
> 1. Marking the invoice for the transaction to indicate that the gross proceeds of sales or gross income derived from the transaction was deducted from the tax base.
>
> 2. Obtaining a certificate executed by the purchaser indicating the name and address of the purchaser, the precise nature of the business of the purchaser, the purpose for which the purchase was made, the necessary facts to establish the appropriate deduction and the tax license number of the purchaser to the extent the deduction depends on the purchaser conducting business classified under article 2 of this chapter and a certification that the person executing the certificate is authorized to do so on behalf of the purchaser. The certificate may be disregarded if the seller has reason to believe that the information contained in the certificate is not accurate or complete.

The Department argues that Appellant cannot establish any "sale for resale" exemptions under A.R.S. § 42-5009(A) because it did not obtain exemption certificates from the food truck operators. And, in any event, it could not have obtained the transaction privilege tax license numbers required for the certificates because the operators at issue had none.

Appellant contends that, notwithstanding the absence of exemption certificates, its sales to the food truck operators are not taxable sales at retail. The Board agrees. The law is clear that the operators do not have to possess a sales tax license number to effectuate the seller's resale exemption, but

Appellant bears the burden of proving its right to the deduction.

Subsection (B) of A.R.S. § 42-5009 states that "[a] person who does not comply with subsection A of this section may establish entitlement to the deduction by presenting facts necessary to support the entitlement, but the burden of proof is on that person." A.R.S. § 42-5022 further specifies that

> "[t]he burden of proving that a sale of tangible personal property was not a sale at retail shall be upon the person who made it, ***unless*** such person has taken from the purchaser a certificate signed by and bearing the name and address of the purchaser that the property was purchased for resale in the ordinary course of business and that he has a valid license, with the number thereof, to sell the kind of property purchased.

(Emphasis added.)

In a prior case before the Board involving the sales of bingo paper to licensees who operated bingo games, the Board considered the nature of the business when considering the "sale for resale" exemption. *See, Warren and Ann Daniel, Bingo West, Inc.*, No. 988-92-S (July 13, 1993). In that case, the Department argued that the bingo licensees did not sell bingo paper at retail but used it in the course of their amusement business. Under the Department's analysis, the bingo licensees were the final consumers of the bingo paper, and Appellants' sale of the paper to the licensees was a retail sale subject to transaction privilege tax. The Board held that transaction between the bingo licensees and the bingo players was a sale at retail under *Shamrock Foods Co. v. City of Phoenix, 157* Ariz. 286, 757 P.2d 90 (1988).

In *Shamrock,* the taxpayer sold disposable paper and plastic products, such as napkins and straws, to restaurants and similar food service businesses. The restaurants and food service businesses, in turn, provided the disposable products to their customers with the meals that were sold. The court found that

> "[t]he relevant factor . . . is whether the product was transferred or possessed by the . . . customer for a consideration. So long as . . . the products are transferred to or possessed by the . . . customer for consideration, a sale has occurred.

Id at 288-289.

The very nature of Appellant's business clearly establishes that the food it sells to the food truck operators is transferred to and possessed by customers of the food truck operators. Accordingly, the

Board finds that Appellants sales to the food truck operators are sales for resale that fall outside the scope of the retail classification. Therefore, Appellants are not liable for the tax on these transactions.

The Department also assessed transaction privilege tax on ancillary fees including those identified as parking fees, route fees, promo/commissions, propane commissions, and vending revenue charges. Despite the exempt sales for resale to food truck operators, Appellant acknowledges it is engaged in business and pays transaction privilege tax under the retail classification. "The tax base for the retail classification is the . . . gross income derived from the business . . . ." A.R.S. § 42-5061. "Gross income" is broadly defined as "the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property or service, or both . . . ." A.R.S. § 42-5001(3). "[I]t is presumed that all . . . gross income derived be a person from business activity classified under a taxable business classification comprise the tax base for the business until the contrary is established." A.R.S. § 42-5023.

Having reviewed the evidence, the Board finds that Appellant has not established that the incidental fees associated with its business activities are not taxable. Therefore, Appellant is liable for the tax, interest and penalties assessed on income from these items.

CONCLUSIONS OF LAW

1. Appellant is not liable for transaction privilege tax on sales of food to food truck operators.

2. Appellant is liable for tax, penalties and interest assessed on gross income derived from incidental fees associated with its business.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is granted in part and denied in part, and the final order of the Department is modified.

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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 22nd day of May, 2012.

STATE BOARD OF TAX APPEALS

Amy W. Fellner, Chairperson

AWF:ALW

CERTIFIED

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