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

DUNBAR STONE CO., INC. Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1650-97-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

The Arizona Department of Revenue (the "Department") initially audited Dunbar Stone Co., Inc. ("Appellant") for the period November 1, 1986 through July 31, 1990. Appellant had been paying transaction privilege tax under the retail classification. As a result of the audit, the Department assessed Appellant additional transaction privilege tax under the mining classification. Appellant did not protest the audit and paid the additional assessment in full.

Thereafter, Appellant reported its tax liability under both the mining and retail classifications. The Department subsequently audited Appellant for the period December 1, 1990 through September 30, 1994. The Department determined that Appellant was properly reporting and paying tax under the retail classification but was underreporting tax due under the mining classification. A.R.S. § 42-1310.12. The tax base under the mining classification is calculated on the gross receipts of sales or gross income derived from the business less available deductions. The resulting tax base is then multiplied by the applicable tax rate to determine the amount of tax due.

Appellant used a fixed rate of $25, which was the labor cost to extract the flagstone, to calculate the value of the mined stone for tax purposes. Appellant multiplied the number of tons sold by $25 to

arrive at the tax base. Appellant then multiplied the tax base less deductions by the tax rate to arrive at the tax due.

Based on information supplied by Appellant during the audit, the Department determined that the actual sales price of the stone averaged $100 per ton. Thus, Appellant underreported the sales of flagstone by $75.00 a ton under the mining classification. Therefore, the Department assessed additional tax, interest and penalties.

Appellant timely protested the assessment to the Department's Hearing Officer who upheld the assessment. Appellant then protested the Hearing Officer's decision to the Department's Director who abated the penalties but otherwise affirmed the Hearing Officer's decision. Appellant now timely appeals to this Board.

DISCUSSION

The issue before the Board is whether Appellant is liable for the tax and interest assessed. Appellant bears the burden of proof as to all issues of fact. A.A.C. R16-3-118.

The mining classification consists of "the business of mining, quarrying or producing for sale, profit or commercial use, any nonmetalliferous mineral product." A.R.S. § 42-5072(A) (formerly A.R.S. § 42-1310.12(A)). Nonmetalliferous mineral product means oil, natural gas, limestone, sand, gravel or any other nonmetalliferous mineral product compound or combination thereof. A.R.S. § 42-5072(C).

Prior to August 1993, Appellant employed independent contractors to mine the flagstone on its mineral claims. Appellant argues that these independent contractors and not Appellant engaged in mining, quarrying or producing the flagstone for sale. The Board disagrees.

Appellant operates quarries in the Coconino National Forest, stone yards in Prescott, Tucson and Ash Fork and a redi-mix plant in Paulden. Appellant either leases mineral rights from private third parties or purchases the mineral material through sales contracts with the federal government. The evidence shows that Appellant retained the rights and title to the flagstone during all phases of the process, directed where, what and how much was extracted by either independent contractors or traditional employees, then processed the stone and sold it to a variety of customers. Appellant is, therefore, engaged in mining within the statutory definition.

Even if Appellant is engaged in mining, Appellant argues that the Department is estopped from collecting the tax at issue because it received erroneous oral advice from a Department auditor during its initial audit.

Estoppel is essentially an equitable remedy that may lie against the Department only under limited circumstances. The Arizona Court of Appeals has held that estoppel will apply only to prior incorrect representations related solely to procedural matters. *Tucson Elec. Power Co. v. Arizona Dep't of Rev.*, 174 Ariz. 507, 515, 851 P.2d 132, 141 (App. 1993). Generally, the State will not be estopped in the collection of revenues by the unauthorized actions of its employees. *Crane Co. v. Arizona State Tax Comm'n*, 63 Ariz. 426, 441, 163 P.2d 656, 662 (1945); *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 281, 179 P.2d 252, 260 (1947).

In order for estoppel to apply against the Department, Appellant must show, first and foremost, that the Department committed affirmative acts inconsistent with a position later relied on. Appellant must also show that it actually and reasonably relied on the Department's actions and that its reliance resulted in substantial detriment. *Valencia Energy v. Arizona Dep't of Rev.*, 154 Ariz. 539, 577, 744 P2d. 451, (App. 1987). Appellant has not established the requisite elements for estoppel.

Appellant argues that it calculated its tax liability using the fixed rate of $25 per ton pursuant to oral instructions from the Department's auditor during the initial audit. However, the evidence indicates that a fixed rate of $25 (or the cost of extracting the stone) was not used in either the initial or current audit in determining Appellant's transaction privilege tax liability. The difference between the figure used in the initial audit and the figure used in the current audit apparently results from the fact that Appellant was entitled to receive credit for amounts paid for stone purchased from the Hualapai Nation during the initial audit. It no longer does business with the Hualapai Nation or receives the applicable credit. This reflects a change in Appellant's business and not a change in the methodology used by the Department in computing the tax. Accordingly, the Department is not estopped from collecting the tax due.

Because the interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute, it may not be abated. *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

1. Appellant is engaged in a business of mining, quarrying or producing for sale, profit or commercial use, any nonmetalliferous mineral product." A.R.S. § 42-5072(A).

2. The Department is not estopped from collecting the tax at issue. *Tucson Elec. Power Co. v. Arizona Dep't of Rev.*, 174 Ariz. 507, 515, 851 P.2d 132, 141 (App. 1993); *Valencia Energy v. Arizona Dep't of Rev.*, 154 Ariz. 539, 577, 744 P2d. 451, (App. 1987).

3. Because the interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute, it may not be abated. *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.

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 20th day of February, 2001.

STATE BOARD OF TAX APPEALS

Janice C. Washington, Chairperson

JCW:AW
CERTIFIED

Copies of the foregoing
mailed or delivered to:

James A. Jutry
DeConcini McDonald Brammer
Yetwin & Lacy, P.C.
2525 East Broadway Blvd., Suite #200
Tucson, Arizona 85716-5303

Lisa Neuville
Assistant Attorney General
Civil Division, Tax Section
1275 West Washington Street
Phoenix, Arizona 85007