

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
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Phoenix, Arizona 85007
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4 KENNETH & SHARI MEYER TRUST,¹)
KENNETH & SHARI MEYER)
5 Appellants,) Docket No. 1987-10-F
6 vs.)
7 ARIZONA DEPARTMENT OF REVENUE,) NOTICE OF DECISION
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
8 Appellee.)

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

11 FINDINGS OF FACT

12 Retirees Kenneth and Shari Meyer ("Appellants") are California residents who own a vacation
13 home in Wickenburg, Arizona. Both Appellants are pilots and, on April 15, 2008, they purchased an
14 Eclipse EA500 aircraft ("airplane") in New Mexico from Eclipse Aviation Corporation. Appellants did not
15 pay any tax on the purchase to New Mexico.

16 Appellants took delivery of the airplane the day they purchased it. However, the airplane required
17 additional work and remained in New Mexico until their first flight on April 24, 2008, to Prescott, Arizona
18 for lunch. Appellants stopped on their way to Prescott at a small airport in Gallup, New Mexico to practice
19 "touch and go" landings for about 30 minutes.² From Prescott, Appellants flew to a smaller airport in
20 Yuma, Arizona where they practiced "radar" approaches before returning to Albuquerque.

21 On April 27, 2008, Appellants again flew to Wickenburg where the airplane stayed overnight in
22 Arizona for the first time. In 2008, the airplane was in Arizona for a total of 88 overnight stays and, in
23 2009, it was in Arizona for a total of 137 overnights.

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25 ¹ Kenneth and Shari Meyer are the Trustees, Settlers and Beneficiaries of the Kenneth & Shari Meyer Trust. The Trust is a fiction for tax purposes; therefore, Kenneth and Shari Meyer will be referenced as "Appellants" herein.

² "Touch and go" landings apparently involve an unbroken movement of the airplane, i.e. there is no stopping and "parking" of the airplane.

1 On the requisite Federal Aviation Administration ("FAA") paperwork relating to the sale of the
2 airplane, Appellants reported their address as Wickenburg, Arizona and used this address when they
3 applied to register the airplane in Arizona. Attached to the application was a form (notarized on August
4 14, 2008) in which Appellants contemporaneously applied for an exemption from the Arizona registration
5 and licensing fees. They indicated that they were nonresidents and that the airplane was projected to be
6 in Arizona less than 90 days in 2008.³

7 After receiving information from the Arizona Department of Transportation ("ADOT"), the Arizona
8 Department of Revenue ("Department"), determined that Appellants were potentially liable for Arizona use
9 tax on the purchase of the airplane. The Arizona use tax is imposed on the storage, use or consumption
10 in Arizona of tangible personal property purchased out-of-state from a retailer. A.R.S. § 42-5155.
11 Property purchased outside Arizona and then brought into Arizona for use, storage or consumption is
12 presumed to be subject to this tax. See Arizona Administrative Code ("A.C.C.") R15-5-2304(B).

13 The Department sent Appellants a questionnaire on November 11, 2008 concerning the purchase
14 of the airplane. Appellants completed and returned it shortly thereafter and included a letter contending
15 that they were exempt from the tax because the "first use" of the airplane comprised "touch and go"
16 landings practiced in New Mexico in route to Prescott, Arizona. See A.R.S. § 42-5159(A)(6).⁴ After
17 requesting and receiving additional information in December 2008, the Department rejected Appellants
18 contention that the first use of the airplane was in New Mexico and, on January 1, 2009, issued a
19 calculation of use tax due.⁵

20 On February 6, 2009, Appellants protested the calculation, again arguing that they were exempt
21 under A.R.S. § 42-5159(A)(6) and adding that they were also exempt from use tax because they were
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23 ³ At the subsequent hearing before the Office of Administrative Hearings, Appellants stated that the paperwork reflected the fact that
the airplane was based in both Arizona and California and that Appellants believed that the airplane had to be registered in Arizona
if it was based in the State more than 90 days out of the year, even though they were nonresidents.

24 ⁴ Under this statute, the use tax does not apply to "[t]angible personal property brought into this state by an individual who was a
25 nonresident at the time the property was purchased . . . if the first actual use . . . of the property was outside this state, unless the
property is used in conducting a business in this state.

⁵ The Department viewed the "touch and go landings" practiced in New Mexico while Appellants were flying their new airplane to
Arizona analogous to a minor detour taken by a person in a car purchased out of state on his drive to Arizona.

1 nonresidents and the airplane left Arizona whenever they did. See A.C.C. R15-5-2352(B).⁶ At that time,
2 Appellants requested a hearing before an administrative law judge. The Department issued a formal
3 Notice of Proposed Assessment that included use tax, penalties and interest on April 29, 2009.
4 Appellants protested the assessment on May 14, 2009.

5 In July 2009, the Department requested and received additional information from Appellants
6 regarding issues including their residency and requesting documentation that the airplane was hangered
7 outside of Arizona. On August 25, 2009, the Department issued a modified assessment naming the
8 Kenneth & Shari Meyer Trust as the Appellant in place of Kenneth and Shari Meyers as individuals.

9 The Department referred the matter to the Arizona Office of Administrative Hearings ("OAH") in
10 October 2009. On March 8, 2010, the OAH upheld Appellants' protest, finding that Appellants were
11 exempt from use tax because they took the airplane with them whenever they left Arizona. *Id.*⁷ The
12 Department did not appeal the OAH decision.

13 On March 24, 2010, Appellant applied to the Department for the reimbursement of attorney fees
14 and costs. The Department's Problem Resolution Officer denied the fee request, in a letter dated August
15 24, 2010, on the grounds that the Department's position was substantially justified. Appellant now timely
16 appeals the denial of the reimbursement of fees and costs to this Board.

17 DISCUSSION

18 The issue in this appeal is whether Appellant is entitled to the reimbursement of attorney fees and
19 costs to Appellants.

20 A.R.S. § 42-2064 provides the following:

21 A. A taxpayer who is a prevailing party may be reimbursed for reasonable fees and
22 other costs related to an administrative proceeding that is brought by or against the
23 department in connection with an assessment For purposes of this subsection, a
24 taxpayer is considered to be a prevailing party only if both of the following are true:

- 25 1. The department's position was not substantially justified.

⁶ This regulation provides that "[t]angible personal property brought into Arizona for use by a nonresident temporarily within the state is not subject to the tax if the property is for the personal use of the nonresident and is taken out of the state when the nonresident leaves the state."

⁷ This being the case, it was unnecessary for the OAH to address the "first use" argument.

2. The taxpayer prevails as to the most significant issue or set of issues.

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C. The taxpayer shall present an itemization of the reasonable fees and other costs to the taxpayer problem resolution officer within thirty days after the conclusion of the administrative proceedings. The taxpayer problem resolution officer shall determine the validity of the fees and other costs within thirty days after receiving the itemization. The taxpayer problem resolution officer's decision is considered the department's final decision or order and is subject to appeal to the state board of tax appeals

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Appellants first argue that they are entitled to the reimbursement of fees and costs because the Department failed to issue the reimbursement denial within the requisite 30 days. *Id*(C). Appellant submitted an itemization on March 26, 2010 with the request for reimbursement. The Department denied the request on August 30, 2010 – more than five months later. Nevertheless, the Board finds that the 30 day time provision of this statute is a procedural directive, and compliance is not mandatory. See, e.g., *Yarborough v. Arizona Dep't of Rev.*, No. 1430-95-I (B.T.A. Nov. 5, 1996; *Galindo v. Arizona Dep't of Rev.*, No. 1015-92-I (B.T.A. Sept. 13, 1994). This interpretation is supported by the fact that the statute does not provide a taxpayer with a remedy for the Department's noncompliance. Further, Appellants' rights have not been injured as the hearing before this Board provides them with the opportunity to present their case for reimbursement. See *id.*

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Appellants next argue that they are entitled to reimbursement because the Department's position was not substantially justified. The Board disagrees.

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Appellants initially claimed exemption from use tax under the "first use" statute. Not until February of 2009 did Appellants claim that they were not liable for the tax because they always took the airplane with them when they left Arizona. In any event, neither provision applies to Arizona residents; therefore, the Department had to preliminarily determine whether Appellants were Arizona residents. This was complicated by documentation that conflicted with their claim of nonresidency, including Appellants' use of a Wickenburg, Arizona address for their FAA registration and their statement that their airplane's "usual" base was in Wickenburg on their Arizona Registration Application.⁸ After reviewing all the evidence, the Department was eventually able to confirm that Appellants were out-of-state residents.

⁸ The phrase "and Chester, CA" was typed under "Wickenburg."

1 Although Appellants did ultimately prevail at the OAH under A.C.C. R15-5-2352(B), the hearing,
2 which Appellants requested, was necessitated by the fact that Appellants had failed to provide pertinent
3 evidence substantiating this claim prior to the hearing. Having reviewed all the evidence, the Board,
4 therefore, finds that the Department's position in this case was substantially justified, and Appellants are
5 not entitled to the reimbursement of the attorney fees and costs claimed.

6 CONCLUSIONS OF LAW

7 1. The 30 day time provision of A.R.S. § 42-2064(C) is a procedural directive, and compliance
8 is not mandatory. See, e.g., *Yarborough v. Arizona Dep't of Rev.*, No. 1430-95-1 (B.T.A. Nov. 5, 1996;
9 *Galindo v. Arizona Dep't of Rev.*, No. 1015-92-1 (B.T.A. Sept. 13, 1994).

10 2. The Department's position in this case was substantially justified; therefore, Appellants are
11 not entitled to the reimbursement of the attorney fees and costs claimed.

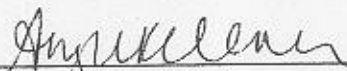
12 ORDER

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

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

17 DATED this 22nd day of May, 2012.

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19 STATE BOARD OF TAX APPEALS

20 
21 Amy W. Bellner, Chairperson

22 AWF:ALW

23 CERTIFIED

24 Copies of the foregoing
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