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

SPAN CONSTRUCTION & ENGINEERING, INC., Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1885-02-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

The Arizona Department of Revenue (the "Department") audited Span Construction & Engineering, Inc. ("Appellant") on behalf of the State of Arizona and the towns of Gilbert, Marana and Tolleson for the period August 1997 through May 2001. Subsequently, the Department issued an assessment of transaction privilege tax and penalties under the State's prime contracting classification (A.R.S. § 42-5075) and the construction contracting classification of the Model City Tax Code (section 415). Appellant timely protested the assessment. The Department abated the penalties, but otherwise upheld the assessment.

Appellant acknowledges that it failed to pay the transaction privilege tax but notes that it was erroneously advised by its accountants that its Arizona tax liability would be satisfied by the payment of tax to vendors and subcontractors for construction materials and construction fees. During its protest to the Department, Appellant requested, in writing, that it be granted a credit for tax it had mistakenly paid to

the vendors and subcontractors. The Department denied the request. 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 an assessment of additional . . . tax is correct. *See Arizona State Tax Comm'n v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948). Appellant has paid the tax at issue but argues that it is entitled, under the doctrine of equitable recoupment, to a credit or other offset for the tax it erroneously paid to vendors and subcontractors.

The U.S. Supreme Court first applied the doctrine of equitable recoupment. *See Bull v. United States*, 295 U.S 247 (1935). In *Bull*, the Internal Revenue Service ("IRS") had categorized a partnership distribution made after a taxpayer's death as part of the taxpayer's gross estate. Four years later it reclassified the distribution as estate income. The IRS refused to allow the new assessment to be offset by the estate's earlier payment because any action on that claim was barred by the statute of limitations.

The Court held that it would be improper to allow the IRS to collect and retain inconsistent taxes for the same transaction. Therefore, it applied the doctrine of equitable recoupment and permitted the estate to apply its earlier overpayment of tax to the IRS's second assessment.

In this case, the Department is not taking an inconsistent position regarding taxes paid to it by a taxpayer on the same transaction. Appellant is seeking to reduce an original assessment by applying credit for amounts – amounts that were not tax -- that it paid to others, not the Department. Although, Appellant argues that the amounts paid to the vendors and subcontractors (amounts Appellant presumes were forwarded to the Department) belong to Appellant and are available to reduce its tax liability, this argument is not consistent with the Arizona transaction privilege tax law.

The fact that the transaction privilege tax is on the vendor is not altered by the vendor shifting the economic burden of the tax to the buyer, or even by the buyer's express assumption of the obligation to pay the tax. *City of Tempe v. Del E. Webb Corp.*, 13 Ariz.App. 597, 480 P2d 18 (1971). Retailers and others liable for privilege tax are not tax collectors, and amounts that they pass on as privilege tax are a part of the price and are paid solely to get the goods. *State Tax Comm'n v. Quebedeaux Chevrolet*, 71

Ariz. 280, 226 P.2d 549 (1951). A purchaser may not treat as tax an amount passed on to it. *Cohn v. Tucson Elec. Power Co.*, 138 Ariz. 136, 673 P.2d 334 (App. 1983). Accordingly, amounts that may have been passed on as transaction privilege tax to Appellant by suppliers and subcontractors are not amounts that belong to Appellant or that the Department can credit to it.

Even if the amounts mistakenly paid to suppliers and subcontractors constituted tax, equitable recoupment would not apply in this case. The payments and Appellant's transaction privilege tax obligation do not arise out of the same transaction. *See Rothensies v. Electric Battery Storage Company*, 329 U.S. 296 (1946).

In *Rothensies,* the taxpayer mistakenly overpaid an excise tax for the years 1919 through 1926. After discovering the mistake in 1935, the taxpayer requested and received a refund for the years that were not barred by the statute of limitations, i.e., 1922 through 1926. The taxpayer was subsequently assessed additional income tax for 1935 as a result of the refund. The taxpayer claimed that, under the doctrine of equitable recoupment, the 1935 assessment should be offset with the barred refunds from the years 1919 through 1921.

The Court rejected this claim, holding that the purpose of the doctrine is not to "allow one transaction to be offset against another, but only to permit a transaction . . . to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole." 329 U.S. at 299. The Court emphasized the importance of the "same transaction" requirement, which does not allow a party to apply the doctrine to two separate transactions.

In *Rothensies*, the overpayment of excise tax to the IRS and the additional income tax owing to the IRS as a result of the refund of part of the excise tax were not the same transaction. Similarly, Appellant's mistaken payments to vendors and subcontractors and its transaction privilege tax obligation do not arise out of the same transaction.

For the foregoing reasons, the Board finds that Appellant is liable for the tax assessed and is not entitled to a credit or other offset of the tax.

CONCLUSIONS OF LAW

Appellant is liable for the tax assessed and is not entitled to a credit or other offset. *See* A.R.S. § 42-5075); *Rothensies v. Electric Battery Storage Company*, 329 U.S. 296 (1946); *City of Tempe v. Del E.*

E. Webb Corp., 13 Ariz.App. 597, 480 P2d 18 (1971); *State Tax Comm'n v. Quebedeaux Chevrolet*, 71 Ariz. 280, 226 P.2d 549 (1951); *Cohn v. Tucson Elec. Power Co.*, 138 Ariz. 136, 673 P.2d 334 (App. 1983).

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 6th day of May, 2003.

STATE BOARD OF TAX APPEALS

William L. Raby, Chairperson

WLR:ALW

CERTIFIED

Copies of the foregoing
Mailed or delivered to:

Stephen C. Newmark
Brown & Bain, PA
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400

Michael P. Worley
Assistant Attorney General
Civil Division, Tax Section
1275 West Washington Street
Phoenix, Arizona 85007-1298