BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
101 North First Avenue - Suite 2340
Phoenix, Arizona 85003
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SURE HIT, INC.,

Appellant,

) Docket No. 1843-00-S
)

vs. )
ARIZONA DEPARTMENT OF REVENUE, )

Appellee.

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

Appellant is an Arizona corporation. Between January 1, 1995 and December 31, 1998 ("Audit Period"), Appellant engaged in the construction, maintenance and cleaning of stock ponds, stock tanks and farm sumps.

The Arizona Department of Revenue (the "Department") audited Appellant for this period and assessed Appellant transaction privilege tax under the prime contracting classification, plus interest and penalties for failure to timely file returns and pay tax. After unsuccessfully protesting the assessment to an administrative hearing officer, Appellant now appeals to this Board.

## DISCUSSION

Appellant previously conceded that its construction activities during the Audit Period are taxable under the prime contracting classification. At the hearing before the Board, Appellant further conceded that its maintenance activities are taxable. Because Appellant has not proven that its failure to timely file returns and pay tax on the taxable construction and maintenance activities was due to reasonable cause, the penalties at issue may not be waived. A.R.S. § 42-1125(A) and (D).

Only Appellant's cleaning activities remain at issue. Appellant argues that the cleaning of stock ponds, tanks and sump pumps is not taxable under the contracting classification. Appellant bears the burden of proof as to all issues of fact. A.A.C. R16-3-118.

Arizona imposes transaction privilege tax on the business of prime contracting. A.R.S. § 42-5075(G)(1). A contractor, or builder, is one who undertakes to "construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement, or to do any part of such a project . . . ."

A.R.S. § 42-5075(G)(2). A "prime contractor" is the contractor "who is responsible for the completion of the contract." A.R.S. § 42-5075(G)(6). Rule R15-5-612 of the Arizona Administrative Code ("A.C.C.") states that "(s)hovel and backhoe operations, when provided with an operator, are taxable as contracting activities."

Farm sumps and stock ponds are holes in the ground that are made of dirt. Stock ponds and tanks are typically constructed to slow water runoff on cattle ranches. They trap sediment and debris, creating cleaner water for livestock. Farm sumps are usually located at the end of a farm field for recycling irrigation water. Farm sumps fill up with sediment approximately once a year. The debris and sediment in the ponds, tanks and sumps consist of manure, leaves, sticks and heavy clay.

Appellant uses a rubber tire articulating front end loader to remove the debris from the ponds and sumps. The front end loader is similar to a backhoe but without the "digger" on the back. Appellant argues that a backhoe is designed to dig into the ground, or excavate, which is a listed contracting activity. A front end loader, according to Appellant, is designed to load and remove debris from the surface of the ground. Appellant collects the debris and sediment in a bucket on the front end loader and transfers it to a nearby pile.

A.A.C. R15-5-612 does not specifically list front end loaders. More importantly, the Board finds that Appellant's cleaning activities do not rise to the level of contracting.

The Department argues that Appellant's activities are similar to those found to be taxable in Granite Constr. Co. v. Dep't of Rev., 168 Ariz. 93, 811 P.2d 345 (App. 1990). However, the activities in Granite consisted of "reclamation activities included recontouring, surface grading, respreading of stored topsoil, and seeding, revegetating and fencing reclaimed land." Id. at 99, 811 P.2d 351. The activities Notice of Decision Docket No. 1843-00-S

performed in *Granite* to restore land that had been strip mined clearly exceed the scope of Appellant's cleaning activities.

The Board concludes that, essentially, removing leaves and dirt from a still usable and functioning pond or sump (similar to cleaning a pool) does not "alter," "repair," "add to," "subtract from," or "improve" an excavation or other structure, project, development or improvement. Therefore, Appellant's cleaning activities for tax years 1996, 1997 and 1998 are not taxable.<sup>1</sup>

## CONCLUSIONS OF LAW

- 1. Appellant has not shown that its failure to file returns and pay the tax on its taxable activities was due to reasonable cause; therefore, the penalties imposed may not be abated. A.R.S. § 42-1125(A) and (D).
- Appellant's cleaning activities are not taxable under the prime contracting classification.
   A.R.S. § 42-5075; Granite Constr. Co. v. Dep't of Rev., 168 Ariz. 93, 811 P.2d 345 (App. 1990).

## **ORDER**

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied in part and upheld in part, and the final order of the Department 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 26th day of June , 2001.

STATE BOARD OF TAX APPEALS

William L. Raby, Vice-Chairman

WLR:ALW

CERTIFIED

<sup>&</sup>lt;sup>1</sup> Appellant has been unable to produce invoices for 1995; therefore, it has failed to prove that any income from this year is attributable to nontaxable activities.

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