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

TCR BUILDERS, INC.,

Appellant,

vs.

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

Docket No. 1836-00-S

NOTICE OF DECISION:
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Appellee.

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

TCR Builders, Inc. ("Appellant") is an Arizona corporation engaged in the general contracting business. On March 24, 1999, the Arizona Department of Revenue (the "Department") issued a proposed assessment of transaction privilege tax, including penalties and interest, against Appellant for the period August 1, 1994 through November 30, 1997 ("Audit Period"). The assessment was issued in conjunction with Appellant's construction of a multi-family housing project located at 44th and Oak Streets in Phoenix, Arizona ("Oak Street Project"). Appellant protested the assessment. The Department denied the protest. Appellant then filed a protest with the Office of Administrative Hearings, which upheld the Department's assessment. Appellant now timely appeals to this Board.

DISCUSSION

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

Appellant contends that it entered into a contract with the owner of the Oak Street Project for the cost of the work plus a contractor's fee, the sum of which was not to exceed a guaranteed maximum amount. According to Appellant, it established a single, separate money market account into which all and only the receipts associated with the Oak Street Project were deposited. Appellant claims that deposits to the money market account were less than the guaranteed maximum amount. Appellant

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argues that the Department erroneously based its assessment on the guaranteed maximum amount, even though Appellant did not receive these funds. Further, Appellant argues that some of the deposits into the money market account were reimbursement for nontaxable, non-contracting services and fees that Appellant paid on behalf of the owners.

A review of the evidence indicates that, during the Audit Period, Appellant maintained more than one account; more than one entity shared accounts; and, there were transfers between accounts. Further, there are inconsistencies and discrepancies in the records submitted by Appellant. Therefore, the Board concludes that Appellant has not sufficiently shown that the money market account at issue contained only and all the actual monies received for the Oak Street Project.

Next, Appellant argues that it is not liable for tax on monies attributable to reimbursement it received for third-party services, including fees for building permits, soil reports, municipal fees and architectural/engineering services. See State Tax Comm'n v. Holmes & Narver, Inc., 113 Ariz. 165, 548 P.2d 1162 (Ariz. 1976); State Tax Comm'n v. Ebasco Services, Inc., 105 Ariz. 94, 459 P.2d 719 (Ariz. 1969).

In Holmes & Narver and Ebasco, the taxpayers performed engineering/design services as well as contracting services. The Arizona Supreme Court held that "[w]here it can be readily ascertained without substantial difficulty which portion of the business is for non-taxable professional services . . ., [and] the amounts in relation to the company's total taxable Arizona business are not inconsequential, and those services cannot be said to be incidental to the contracting business, the professional services are not merged for tax purposes into the taxable contracting business and are not subject to taxation." 113 Ariz. 165 at 169. The Board finds that Appellant has not satisfied these requirements. Therefore, Appellant is taxable on monies attributable to reimbursement for third-party fees.

Finally, Appellant has not proven that its failure to pay the tax at issue was due to reasonable cause; therefore, the penalties may not be abated. A.R.S. § 42-1125. The interest imposed represents a reasonable rate on the tax due and owing and is made part of that tax by statute; therefore, it may not be abated. See A.R.S. § 42-1123; see also Biles v. Robey, 43 Ariz. 276, 30 P.2d 841 (1934).

¹The Board is cognizant of the fact that Appellant and the owners of the Oak Street Project are associated entities. The Board queries but cannot answer whether it should have been easier for Appellant to substantiate its claims given the nature of its relationship with the Oak Street Project owners.

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CONCLUSIONS OF LAW

- 1) Appellant is liable for the tax assessed. See State Tax Comm'n v. Holmes & Narver, Inc., 113
 Ariz. 165, 548 P.2d 1162 (Ariz. 1976); State Tax Comm'n v. Ebasco Services, Inc., 105 Ariz. 94, 459
 P.2d 719 (Ariz. 1969); A.A.C. R16-3-118.
- Appellant has not proven that its failure to pay the tax at issue was due to reasonable cause;
 therefore, the penalties may not be abated. A.R.S. § 42-1125.
- 3) The interest imposed represents a reasonable rate on the tax due and owing and is made part of that tax by statute; therefore, it may not be abated. See A.R.S. § 42-1123; see also Biles v. Robey, 43 Ariz. 276, 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 12th day of January , 2001.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman

SPL:ALW

CERTIFIED

Copies of the foregoing mailed or delivered to:

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