

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
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BESEDER, INC., dba RIMA FINE ARTS

Docket No. 1961-07-S

Appellant,

vs.

ARIZONA DEPARTMENT OF REVENUE,

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 follow:

FINDINGS OF FACT

Beseder, Inc. dba Rima Fine Arts ("Appellant") is an Arizona corporation that operates a fine art gallery in Scottsdale, Arizona. Appellant's business includes the taxable retail sale of art. The Arizona Department of Revenue ("Department") audited Appellant for the period June 2000 through August 2002 and determined that Appellant had underreported its taxable retail sales transactions pursuant to A.R.S. § 42-5061. Subsequently, the Department assessed Appellant additional transaction privilege tax, associated county tax and interest.

On May 13, 2003, Appellant protested the majority of the Department's assessment and the accrued interest. In December 2003, after an informal hearing, the Department amended the assessment, reducing the amount of tax due and recalculating the interest accordingly. Appellant protested the amended assessment to an administrative law judge who denied the protest. Appellant then protested to the Director of the Department who affirmed the decision. Appellant now timely appeals to this Board.

DISCUSSION

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2 The issue before the Board is whether Appellant is liable for the tax and interest assessed.
3 The Arizona Legislature has imposed a privilege tax on persons engaging in certain businesses in the
4 State measured by the gross proceeds of sales or gross income derived from the business activities.
5 A.R.S. § 42-5008. This includes persons engaged in the business of selling tangible personal property at
6 retail (A.R.S. § 42-5061). A "sale" for transaction privilege tax purposes is defined as any transfer of title
7 or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by
8 any means whatever, *including consignment transactions* and auctions, of tangible personal property
9 or other activities taxable under this chapter, for a consideration. A.R.S. § 42-5001(13) (emphasis
10 added). In regards to consignment sales, under the Arizona Administrative Code, a "[c]onsignee" is the
11 party which is in the business of selling tangible personal property belonging to a "consignor". A
12 "[c]onsignor" is the party with the legal right to contract the services of the consignee to sell tangible
13 personal property on behalf of the consignor. Gross receipts from consignment sales are subject to tax
14 under the retail classification." A.C.C. R15-5-111. "A sale is considered a retail sale unless it is for
15 resale in the ordinary course of business." A.R.S. 42-5061.V.3. The burden is on the retailer to show that
16 a sale was not a retail sale, unless the retailer has procured a proper resale exemption certificate. A.R.S.
17 § 42-5022.

18 Appellant argues that the transactions at issue constitute nontaxable investment arrangements,
19 not taxable retail transactions. Appellant describes the two-step transactions as follows: First, an
20 "investor" provides funds whereby Appellant can purchase art work from an artist to be sold in Appellant's
21 gallery. According to Appellant, the investor does not buy the art, only the intangible right to share in
22 profits (if any), minus Appellant's \$900 promotional fee, when it is eventually sold to the final consumer.
23 Thus, no sale occurs and no tax is due on this step-one portion of the transaction. Appellant contends
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1 that the step-two part of the transaction is a typical retail sale occurring when Appellant eventually sells
2 the art. Appellant pays transaction privilege tax on these sales.

3 Despite Appellant's characterization of the step-one transactions as investment arrangements,
4 the Board finds the two-step transactions actually involve *two taxable retail sales* – Appellant's sale of the
5 art work to the original buyer (i.e., "investor") and the consignment sale of that art by Appellant in its
6 gallery on behalf of the buyer to the final consumer. The pertinent documentation does not substantiate
7 the "investment arrangement" claimed by Appellant. Appellant recorded the transaction between itself
8 and the "investor"/buyer on a *sales receipt*. Even affidavits submitted by Appellant from "investors" fail to
9 corroborate Appellant's investment arrangement claim.¹ The fact that these step-one transactions are
10 taxable retail sales is confirmed further by the second sale of the art work. Appellant claims to be the
11 seller in these transactions. However, nowhere in the documentation is Appellant listed as the seller.
12 The transactions are recorded on Appellant's consignment forms, which designate the "investor"/buyer as
13 the "consignor," and provide that Appellant may return unsold items at its discretion. These are typical
14 terms of a consignment sale. In this consignment sale, the "investor"/buyer is the seller (and, thus, the
15 owner) of the art. Therefore, the Board finds that Appellant is liable for the tax assessed.

16 Finally, interest is a part of the tax and may not be abated unless the tax to which it relates is
17 found not to be due for whatever reason. A.R.S. § 42-1123(C). The tax in this case is due and the
18 associated interest cannot be abated.

19 CONCLUSIONS OF LAW

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21 1. Appellant is liable for the tax assessed. A.R.S. §§ 42-5061; 5001(13); 5022; A.C.C. R15-5-
22 111.

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24 ¹ The affidavits include the following statement: "Not being an accountant or an attorney, I am reluctant to characterize my financial
25 relationship with Rima as a purchase for resale, a partnership, an investment or a loan."

