

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

PATRICK and MARSHA BLUMM dba DESERT)
VOYAGER, WESTERN RIVER EXPEDITIONS)
and COLORADO RIVER AND TRAIL)
EXPEDITIONS, INC.,) Docket No. 1812-99-F
Appellants,)
vs.) NOTICE OF DECISION:
ARIZONA DEPARTMENT OF REVENUE,) FINDINGS OF FACT AND
Appellee.) 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

Patrick and Marsha Blumm dba Desert Voyager, Western River Expedition, and Colorado River and Trail Expeditions, Inc. ("Appellants") are engaged in the business of providing guided river rafting expeditions. Prior to 1995, the Arizona Department of Revenue (the "Department") collected transaction privilege tax on these activities under the amusement classification. Appellants charges to their customers for the cost of the expedition included separately delineated charges for tax.

In 1995, the Arizona Supreme Court held that commercial rafting income was not taxable under the amusement classification. *Wilderness World v. Department of Rev.*, 182 Ariz. 196, 895 P.2d 108 (1995). Thereafter, Appellants filed a claim for refund. The Department refused to grant the refund unless the sums were returned to Appellants' customers. Appellants protested the refund denial to an administrative law judge who ruled in favor of Appellants. The Department's Director then reversed the decision and Appellants appealed to this Board.

Subsequently, the Board held that the Appellants were entitled to the refund claimed and that the Department could not impose any conditions on the refund. *Western River Expeditions v. Arizona Dep't of Rev.*, No. 1773-98-S; *Colorado River and Trail Expeditions, Inc.*, No. 1774-98-S; *Blumm dba Desert Voyager v. Arizona Dep't of Rev.*, No. 1775-98-S (March 29, 1999).

1 Appellants now seek reimbursement of the attorney's fees and costs incurred in the proceedings
2 before the Board.

3 DISCUSSION

4 The issue is whether Appellants are entitled to reimbursement of the fees at issue.

5 A.R.S. § 42-139.14(A) allows for the reimbursement of a taxpayer who is a prevailing party for
6 amounts expended for reasonable fees and costs related to administrative proceedings if the
7 Department's position was not substantially justified and if the taxpayer prevails as to the most significant
8 issue or issues. Proceedings before the Department and the Board are administrative proceedings for
9 which reimbursement is allowed. See A.R.S. § 42-139.14(H)(1).

10 "Substantially justified" is not defined for purposes of A.R.S. § 42-139, but the Board finds that a
11 position is substantially justified if it has a "reasonable basis both in law and in fact." *Portillo v.*
12 *Commissioner*, 988 F.2d 27, 28 (5th Cir. 1993) (interpreting the federal standard for the recovery of
13 administrative and litigation costs from the Internal Revenue Service under § 7430(c)(4)(B) of the
14 Internal Revenue Code). See, e.g., *Arizona Outdoor Advertisers, Inc. v. Ariz. Dep't of Rev.*, No. 1738-98-
15 F (June 2, 1999). This necessarily requires a case-by-case analysis of the facts and circumstances.

16 The Department argues that Appellants are not entitled to the reimbursement claimed because
17 its position in this case was substantially justified. The Board agrees.

18 The Department based its position on A.R.S. § 42-5002(A)(formerly A.R.S. § 42-1302(A)) and
19 the Arizona Supreme Court's interpretation of this statute in *Arizona State Tax Comm'n v. Garrett Corp.*,
20 79 Ariz. 389, 291 P.2d 208 (1955). A.R.S. § 42-5002(A) provides, in part:

21 A person who imposes an added charge to cover the tax levied by this
22 article or which identified as being imposed to cover transaction
23 privilege tax shall not remit less than the amount so collected to the
Department.

24 The Arizona Supreme Court analyzed the purpose and effect of this statute in the *Garrett* case. The
25 Court concluded:

26 In the event the amount charged by the seller - if he adopts the practice
27 of adding the tax as a separate item in the sale price to the purchaser's
28 bill - is greater than [the statutory tax rate], then that amount is the
amount of the tax. (Emphasis added).

1
2 The legislative intent behind the statute was to discourage sellers from profiting by purposely
3 charging and retaining more tax than actually due. The Board determined that neither the statute nor
4 *Garrett* applied to this case and ultimately rejected the Department's position. However, the Board does
5 not find that the Department's position lacked a reasonable basis in law and in fact. Therefore,
6 Appellants are not entitled to a reimbursement of fees and costs.

7 CONCLUSIONS OF LAW

8 Appellants are not entitled to a reimbursement of fees and costs. See A.R.S. § 42-139.14.

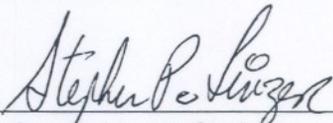
9 ORDER

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

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

14 DATED this 18th day of April, 2000.

15
16 STATE BOARD OF TAX APPEALS

17 
18 _____
19 Stephen P. Linzer, Chairman

20 SPL:AW
21 CERTIFIED

22 Copies of the foregoing
23 mailed or delivered to:

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