

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
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4 SOUTHWESTERN DAKOTA INC.,)
5 Appellant,) Docket No. 1872-02-S
6 vs.)
7 ARIZONA DEPARTMENT OF REVENUE,) NOTICE OF DECISION:
8 Appellee.) FINDINGS OF FACT AND
9) CONCLUSIONS OF LAW
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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

Southwestern Dakotah, Inc. ("Appellant") engages in the business of prime contracting in Arizona. The Arizona Department of Revenue (the "Department") audited Appellant and assessed additional transaction privilege tax under the prime contracting classification, A.R.S. § 42-5075, for the period January 1997 through September 2000 (the "Audit Period"). The assessment includes interest and penalties for late payment. Appellant protested the assessment to the Office of Administrative Hearings ("OAH") which denied the protest. Appellant then protested to the Director of the Department who affirmed the OAH decision. 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 Commission v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948).

1 A.R.S. § 42-5075 imposes a transaction privilege tax on those engaged in the business of prime
2 contracting. Appellant does not dispute the fact that it engaged in prime contracting during the Audit
3 Period but argues that the federal government is liable for the tax assessed.

4 In 1997, Appellant entered into a contract with the federal government to perform construction
5 work at an Indian hospital. The contract contained a deviation clause that required Appellant to exclude
6 Arizona transaction privilege tax in its bid. The contract further provided, however, that the federal
7 government would adjust the contract price to cover Appellant's tax liability and costs if the Department
8 successfully pursued Appellant for the tax.

9 When Appellant entered into the contract in question, there was a dispute as to whether Arizona
10 tax applied. In 1997, the Arizona Court of Appeals ruled that Arizona could not tax a federal contractor's
11 receipts for certain on-reservation activities performed for the benefit of the Indians. *State v. Blaze Const.*
12 *Co., Inc.*, 190 Ariz. 262, 947 P.2d 836 (App. 1997). The United States Supreme Court resolved the
13 dispute, reversing the *Blaze* decision and holding that the state may tax federal contractors regardless of
14 whether the activity takes place on Indian reservations. *Arizona Dep't of Revenue v. Blaze Const. Co.,*
15 *Inc.*, 526 U.S. 32 (1999).

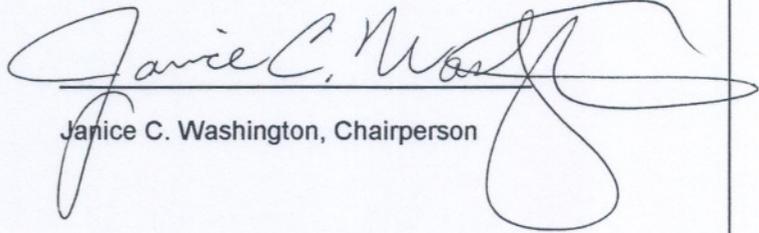
16 Nevertheless, Appellant claims that the deviation clause in the contract for the hospital
17 construction job transfers the tax burden to the federal government for the Audit Period. There is no
18 evidence that any other receipts during the Audit Period were attributable to contracts containing similar
19 clauses. In any event, a contractual agreement to transfer the economic burden of the tax does not
20 change the nature of the tax. *Arizona State Tax Comm'n v. Garrett Corp.*, 79 Ariz. 389, 393, 291 P.2d
21 208, 210 (1955).

22 In *Garrett*, the taxpayer argued that because the tax statutes allowed the taxpayer (in that case, a
23 retailer) to pass the tax on to the purchaser, the statutes actually imposed the tax on the purchaser. *Id* at
24 391. The court disagreed, declaring that the liability for the tax remains the personal liability of the
25 retailer, regardless of whether the retailer (or in this case, a prime contractor) chooses to add a charge to
the purchaser for the tax on its invoices. *Id* at 393.

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

3 DATED this 29th day of October, 2002.

4 STATE BOARD OF TAX APPEALS

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6
7 Janice C. Washington, Chairperson

8 JCW:ALW

9 CERTIFIED

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