

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
100 North 15th Avenue - Suite 140
Phoenix, Arizona 85007
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TEMP POWER SYSTEMS, INC.,)
Appellant,) Docket No. 1940-05-AF
vs.)
ARIZONA DEPARTMENT OF REVENUE,) NOTICE OF DECISION:
Appellee.) 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

Temp Power Systems, Inc., ("Appellant") is engaged in the business of providing electrical equipment to be used as a temporary source of power at construction sites. The Arizona Department of Revenue (the "Department") audited Appellant for the period January 1, 1998 through April 30, 2002 and subsequently assessed Appellant \$292,178.11 in additional transaction privilege tax under the personal property leasing classification and \$12,535 in additional tax under the prime contracting classification.

Appellant protested the assessment on the basis that it engaged in exempt subcontracting under the prime contracting classification. A.R.S. § 42-5075.¹ Appellant requested an informal conference and

¹ Under the statute, a "[c]ontractor" is defined as being "synonymous with the term 'builder' and means any person, firm, partnership, corporation, association or other organization . . . that offers to undertake to . . . or does personally or by or through others, construct, alter repair, add to, subtract from, improve, move, wreck or demolish any building . . . or other structure, project, development or improvement, or to do any part of such a project, including the erection of scaffolding or other structure or works in connection with such a project *Id*(K)(2).

A "[p]rime contractor is a contractor who supervises, performs and coordinates the construction, alteration, repair, addition, subtraction, improvement . . . and who is responsible for the completion of the contract." *Id*(K)(6).

Subcontractors or others who perform services are not subject to tax if they can demonstrate that the job was within the control of a prime contractor . . . [who] is liable for the tax on the gross income, gross proceeds of sales or gross receipts attributable to the job and from which the subcontractors or others were paid. *Id*(D).

1 additional time to gather documentation. The informal conference took place on July 23, 2003.
2 Appellant provided additional information, including invoices and exemption certificates², to the
3 Department. After reviewing the documentation, the Department modified the assessment to classify all
4 of Appellant's income under the personal property leasing classification. Appellant protested the
5 amended assessment and a hearing was scheduled for July 6, 2005 before the Office of Administrative
6 Hearings("OAH").

7 On August 30, 2005, the Arizona Court of Appeals issued an unpublished memorandum decision
8 in the matter of *Cabazon Cable of America v. Ariz. Dep't of Rev.*, (Aug. 5, 2002), No. TX2001-000229.
9 The decision dealt with the scope of the contracting classification and the significance of the decision in
10 *Arizona Dep't of Rev. v. Arizona Outdoor Advertising, Inc.*, 202 Ariz. 93, 41 P.3d 631 (App.2002) in
11 determining whether a taxpayer is engaged in contracting activity.

12 The taxpayer in *Cabazon* installed cable television services and performed service repairs. The
13 work typically required *Cabazon* to place its conduits with other utility lines in trenches that had been
14 previously excavated by contractors, pull cable through the conduits, set pedestal boxes for storing
15 electronics, and activating the electronics. *Cabazon's* work, at times, required it to dig trenches –
16 sometimes through sidewalks or asphalt.

17 *Cabazon* claimed it was not a contractor because its "manufacture of personal property" did not
18 qualify as an improvement under *Arizona Outdoor*.³ The Court concluded that *Cabazon's* activities fell
19 within those listed in the statutory definition of contractor. It further determined that the *Arizona Outdoor*
20 decision did not apply in determining whether activities constitute contracting.

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23 ² Amounts received by a contractor for a project are excluded from the contractor's gross proceeds of sales or gross income derived
24 from the business if the person who hired the contractor executes and provides a certificate to the contractor stating that the person
providing the certificate is a prime contractor and is liable for the tax *Id*(E).

25 ³ The court in *Arizona Outdoor Advertisers, Inc.* had to determine whether billboards were permanent improvements to real property
(i.e., "fixtures") that were taxable under the *commercial lease classification* for real property. See A.R.S. § 42-5069. "[R]eal
property," under that classification, "includes any improvements, rights or interest in such property."

1 basis in law and fact; therefore, it was not substantially justified, and Appellant is entitled to
2 reimbursement for the fees and costs associated with its appeal. The Board disagrees.

3 Providing temporary lighting to construction sites is not the same as "erecting scaffolding," or
4 laying cable, and reasonable people could disagree as to whether this activity constitutes prime
5 contracting or the leasing of personal property. This is especially true in light of the fact that Appellant's
6 own invoices included charges for equipment, and invoices for its less extensive projects designated
7 Appellant and its customers, respectively, as "Lessor" and "Lessee." Further, it was not unreasonable for
8 the Department, having concluded that Appellant was in the business of leasing personal property on the
9 smaller projects, to reason that the same kind of work performed on a more extensive scale could
10 likewise qualify as the leasing of personal property.

11 Additionally, there was an unsettled question of law. The discussion of the prime contracting
12 case, *Brink Elec. Constr., Co. v. Arizona Dep't of Rev.*, 184 Ariz. 354, 908 P.2d 421 (App. 1995)⁴ in
13 *Arizona Outdoor* led some taxpayers, including *Cabezon*, to conclude that the prime contracting
14 classification was limited to builders who enhance the value of or permanently improve real property. The
15 Department's position in this case was very similar to the incorrect, but not unjustified, argument that
16 taxpayers took in *Cabezon* and other cases.

17 Finally, even if the Department's position in *Cabezon* clearly conflicted with its position in
18 Appellant's case, the United States Tax Court has stated that while "[a] taxing authority may not take
19 inconsistent positions in cases involving different taxpayers without good reason . . .," it does "recognize
20 that . . . [the IRS] must take alternative or inconsistent positions at times to protect the revenue . . ."
21 *Powell v. Comm'r*, 91 T.C 673, 679 (Sept. 26, 1988). This reasoning could certainly be extended to the
22 Department as a taxing authority as well.

23 For the foregoing reasons, the Board finds that the Department's position was substantially
24 justified. Therefore, Appellant is not entitled to the reimbursement of fees and costs.

25 . . .

⁴ The issue in *Brink* was whether electrical transmission equipment was a *permanent* accession to realty and therefore taxable under the prime contracting classification, which includes the installation of machinery, equipment or other tangible personal property that becomes *permanently attached to real property*. A.R.S. § 42-5075(B)(7). The *Arizona Outdoor* decision cited *Brink* in its discussion on the permanency of fixtures.

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CONCLUSIONS OF LAW

Appellant is not entitled to the reimbursement of fees and costs under A.R.S. § 42-2064.

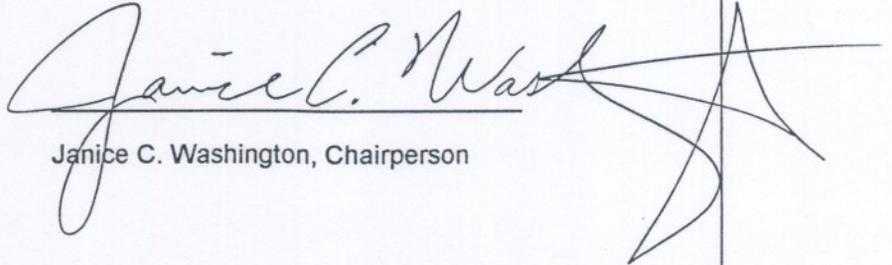
ORDER

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

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 20th day of June, 2006.

STATE BOARD OF TAX APPEALS


Janice C. Washington, Chairperson

WLR:ALW

CERTIFIED

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