

BEFORE THE STATE BOARD OF TAX APPEALS  
STATE OF ARIZONA  
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4 SOUTHWESTERN DAKOTAH 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

10 The State Board of Tax Appeals, having considered all evidence and arguments presented, and  
11 having taken the matter under advisement, finds and concludes as follows:

12 FINDINGS OF FACT

13 Southwestern Dakotah, Inc. ("Appellant") engages in the business of prime contracting in Arizona.  
14 The Arizona Department of Revenue (the "Department") audited Appellant and assessed additional  
15 transaction privilege tax under the prime contracting classification, A.R.S. § 42-5075, for the period  
16 January 1997 through September 2000 (the "Audit Period"). The assessment includes interest and  
17 penalties for late payment. Appellant protested the assessment to the Office of Administrative Hearings  
18 ("OAH") which denied the protest. Appellant then protested to the Director of the Department who  
19 affirmed the OAH decision. Appellant now timely appeals to this Board.

20 DISCUSSION

21 The issue before the Board is whether Appellant is liable for the tax assessed. The presumption  
22 is that an assessment of additional . . . tax is correct. See *Arizona State Tax Commission v. Kieckhefer*,  
23 67 Ariz. 102, 191 P.2d 729 (1948).  
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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 The United States Supreme Court has confirmed that a state may impose a non-discriminatory  
2 tax on those who contract with the federal government, specifically stating that "immunity may not be  
3 conferred simply because the tax has an effect on the United States, or even because the Federal  
4 Government shoulders the entire economic burden of the levy." *United States v. New Mexico*, 455 U.S.  
5 720, 734 (1982).

6 The deviation clause does not transfer Appellant's legal liability for the tax to the federal  
7 government. Accordingly, Appellant is liable for the tax assessed. Further, because Appellant has not  
8 shown that its failure to timely pay the tax due was attributable to reasonable cause, the penalties  
9 imposed may not be abated. A.R.S. § 42-1125(D). Finally, the interest at issue is made a part of the tax  
10 by statute and represents a reasonable interest rate on the tax due; therefore, it may not be abated.  
11 A.R.S. § 42-1123; *Biles v. Robey*, 43 Ariz. 276, 286, 30 P.2d 841 (1934).

12 CONCLUSIONS OF LAW

13 1. Appellant is liable for the tax assessed. See *United States v. New Mexico*, 455 U.S. 720  
14 (1982); *Arizona State Tax Comm'n v. Garrett Corp.*, 79 Ariz. 389, 291 P.2d 208(1955).

15 2. Appellant has not shown that its failure to timely pay the tax due was attributable to  
16 reasonable cause; therefore, the penalties imposed may not be abated. A.R.S. § 42-1125(D).

17 3. Because the interest at issue is made a part of the tax by statute and represents a reasonable  
18 interest rate on the tax due, it may not be abated. A.R.S. § 42-1123; *Biles v. Robey*, 43 Ariz. 276, 286, 30  
19 P.2d 841 (1934).

20 ORDER

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

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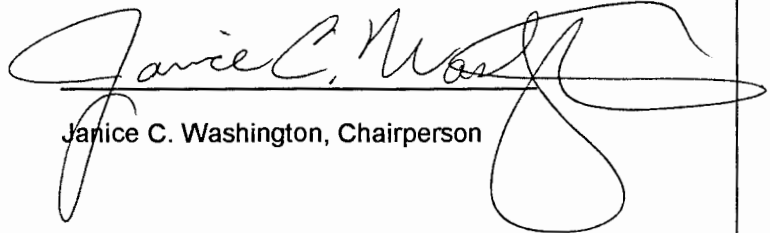
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1 This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer,  
2 unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.

3 DATED this 29<sup>th</sup> 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

10 Copies of the foregoing  
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