BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
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WESTERN RIVER EXPEDITIONS, Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1773-98-S NOTICE OF DECISION: 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

In June 1989, the Arizona Court of Appeals ruled that gross revenues from river rafting expeditions are taxable under the amusement classification.[1] *Department of Rev. v. Moki Mac River Expeditions*, 160 Ariz. 369, 773 P.2d 474 (App. 1989). During the period April 1993 through May 1995 (the "Refund Period"), Western River Expeditions ("Appellant") conducted guided river rafting expeditions through the Grand Canyon National Park. Each customer paid Appellant a single fee for the raft trip. When Appellant billed its customers, it separately stated transaction privilege tax charges on the invoices. Thus, Appellant passed the cost of the tax on to its customers.

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[1] A.R.S. § 42 - 5073 (formerly A.R.S. § 42-1310.13).

During the Refund Period, Appellant properly reported its taxable income and remitted the appropriate tax to the Arizona Department of Revenue (the "Department"). The amounts remitted to the Department equal the amounts Appellant itemized on the invoices. There is no question that Appellant remitted all money that it charged and received from its customers as tax.

In June 1995, the Arizona Supreme Court partially overruled *Moki Mac* and held that river rafting is not taxable under the amusement classification. *Wilderness World v. Department of Rev.*, 182 Ariz. 196, 895 P.2d 108 (1995). Thereafter, Appellant filed a claim for refund for the period at issue. The Department refused to grant the refund unless and to the extent the sums were retumed to Appellant's customers. Appellant protested the refund denial to an Administrative Law Judge ("ALJ"), who ruled in favor of Appellant. The Department's Director subsequently reversed the ALJ's decision. Appellant now timely appeals to this Board.

DISCUSSION

The issue before the Board is whether Appellant is entitled to the refund claimed.

Under Arizona's transaction privilege tax, the seller -- not the purchaser -- is liable for the tax. *See State Tax Comm'n v. Howard P. Foley Co.*, 13 Ariz. App. 85, 474 P.2d (1970). The tax is imposed on the seller for the privilege of doing business in the State. A.R.S. § 42-5008 (formerly A.R.S. § 42-1306). The seller may pass the tax on to the purchaser, but the legal liability for the tax remains the obligation of the seller. *State Tax Comm'n v. Quebedeaux Chevrolet*, 71 Ariz. 280, 284-285, 226 P.2d 549 (1951). Accordingly, it is the seller who, as the taxpayer, generally receives any refund of tax.

A.R.S. § 42-1118 (formerly A.R.S. § 42-129), entitled "Refunds, credits, offsets and abatements" provides that "[i]f the department determines that any amount of tax . . . has been paid in excess of the amount actually due, the department shall credit the excess amount against any tax administered pursuant to this article . . . ." The statute further provides that if the amount cannot be credited against a tax or installment of taxes due from the taxpayer, the Department may refund the tax in its entirety, issue a credit for future use by the taxpayer or do a combination of the above. In any event, the statute does not impose any limitations on a taxpayer's right to recover overpayments of transaction privilege tax.

The Department argues a taxpayer that, like Appellant, provides a separate line item in its charges for transaction privilege tax must return the tax refunded to their customers. If a taxpayer does

not separately itemize tax -- even if a charge is added to cover the precise amount of the tax and is passed on to the customer -- the Department does not require the taxpayer to return the refund to the customer. The Department bases its position on the final sentence of A.R.S. § 42-5002(A)(1) (formerly A.R.S. § 42-1302(A)(1)), which states as follows:

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

The Department contends that its interpretation is supported by the decision in *State Tax Comm'n v. Garrett Corp.*, 79 Ariz. 389, 291 P.2d 208 (1955).

The Board finds that there is no significant practical difference between a taxpayer who itemizes the tax and a taxpayer who "factors" the tax into the purchase price, and that the Department's position is not supported by either A.R.S. § 42-5002(A)(1) or *Garrett.*

A.R.S. § 42-5002(A)(1), entitled "Exclusions from gross income, receipts or proceeds," deals with just that -- exclusions from income, not refunds. Further, the language of the last sentence addresses only the *remittance* of money to the Department, not refunds. Finally, the Board has previously determined that *Garrett* has no application to this controversy because the pertinent portions of *Garrett* pertain to *fraudulent* profiting, arising from situations in which businesses were intentionally misstating their tax liability and keeping the difference. *Phoenix Photo Type, Inc. v. Arizona Dep't of Rev.*, No. 640-88-S (BTA 1989). In this case, Appellant collected only the amount the Department required and for which Appellant reasonably believed it was liable, and Appellant remitted the full amount of tax collected to the Department. At no time did Appellant attempt to intentionally and fraudulently profit under the guise of a compulsory tax.

The legislature has, in certain instances, specifically included language requiring taxpayers to provide assurance that refunds would be returned to customers. *See* Laws 1994, Chapter 312, §§ 3-5 (creating a retroactive exemption under the commercial lease classification for leases to nursing homes and requiring the taxpayers receiving the refunds to prove that the money would be returned to the nursing home residents). The refund statute at issue does not include similar language. Without such statutory authority, the Department cannot impose conditions on Appellant's refund. Therefore, Appellant is unconditionally entitled to the refund at issue.

CONCLUSIONS OF LAW

Appellant is unconditionally entitled to the refund at issue. *See* A.R.S. § 42-1118; *Phoenix Photo Type, Inc. v. Arizona Dep't of Rev.*, No. 640-88-S (BTA 1989).

ORDER

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

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 (formerly A.R.S. § 42-124).

DATED this 29th day of March, 1999.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman

SPL:AW
CERTIFIED

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