

STATE OF ARIZONA

Department of Revenue
Office of the Director
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Janice K. Brewer
Governor

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Director

CERTIFIED MAIL [redacted]

The Director's Review of the Decision)
of the Administrative Law Judge Regarding:)
[redacted])
ID No. [redacted])

O R D E R
Case No. 201300197-S

On May 15, 2014, the Administrative Law Judge ("ALJ") issued a decision regarding the protest of [redacted] ("Taxpayer"), d.b.a. [redacted]. The Taxpayer appealed this decision on June 13, 2014. As the appeal was timely, the Director of the Department of Revenue ("Department") issued a notice of intent to review the decision.

In accordance with the notice given the parties, the Director has reviewed the ALJ's decision and now issues this order.

STATEMENT OF CASE

The Transaction Privilege and Use Tax Section in the Audit Division ("Division") of the Department audited Taxpayer for the period of June 1, 2006 through August 31, 2011 ("Audit Period") and determined that Taxpayer had not reported transaction privilege tax on income from prime contracting. The Division assessed additional transaction privilege tax plus penalties and interest ("Assessment"). Taxpayer protested and the matter went to hearing. The ALJ denied Taxpayer's protest except with regard to certain fuel tender activity and otherwise upheld the Division's Assessment.

On appeal, Taxpayer argues that it is a firefighter and not a prime contractor. The Division argues that Taxpayer is responsible for the tax liability as assessed.

FINDINGS OF FACT

The Director adopts from the findings of fact in the decision of the ALJ and makes additional findings of fact based on the record as set forth below:

1. Taxpayer is in the business of providing bulldozing equipment and personnel to clear forest land and thereby suppress wildfires.
2. Taxpayer contracted with the United States government to perform excavation and forest clearing work at various Arizona locations. Taxpayer would dispatch his bulldozer equipment and personnel to the respective sites and, under the direction of federal employees or contracted persons, clear fire lines along a directed path. Pursuant to one fire-suppression contract, Taxpayer also provided and transported fuel for equipment used at the site (“fuel tender.”)
3. Taxpayer also contracted with the Bureau of Indian Affairs to perform a road construction project on an Arizona Indian reservation. That project included grading, draining, constructing curbs, gutters and culverts, and hot asphalt concrete pavement and pavement markings.
4. The Division audited Taxpayer for the period of June 1, 2006 through August 31, 2011 (“Audit Period”).
5. During the Audit Period, Taxpayer did not file or pay Arizona transaction privilege tax.
6. The Division determined that Taxpayer was taxable on its receipts from all contracts under the prime contracting classification.
7. The Division issued the proposed Assessment, dated June 7, 2012, of additional transaction privilege tax in an amount of [redacted] plus interest. No penalties were assessed. Taxpayer protested the Assessment.
8. The ALJ concluded that Taxpayer is taxable under the prime contracting classification for all receipts except those from fuel tender activities, without

determining the amount of nontaxable fuel tender receipts, that Taxpayer's equipment purchases were not exempt, and that no additional exemptions apply.

CONCLUSIONS OF LAW

The Director adopts from the conclusions of law in the decision of the ALJ and makes additional conclusions of law as follows:

1. A.R.S. § 42-1255 concerning the burden of proof regarding factual issues does not apply to the question whether Taxpayer's activities fall within the prime contracting classification.
2. Taxpayer is taxable under the prime contracting classification of A.R.S. § 42-5075 on its receipts from excavation, forest clearing and road construction work.

DECISION

Taxpayer appealed the ALJ's decision and argues that its responsibility to drive a bulldozer was not that of a prime contractor but was work performed under the direction of others, that it was not contracting but firefighting, and that the ALJ erroneously shifted the burden of proof to Taxpayer. The Division argues that Taxpayer made improvements to land and did not work for a taxable prime contractor, and that it is a prime contractor. The Division also argues that Taxpayer cannot deduct its revenue from fuel sales.

The ALJ concluded that A.R.S. § 42-1255 concerning the burden of proof in any administrative or judicial proceeding did not apply. A.R.S. § 42-1255 provides that the Department, under certain conditions, has the burden of proof "regarding any factual issue" relevant to ascertaining a taxpayer's tax liability. Here, the issue is whether Taxpayer's activities fall within and are taxable under the prime contracting classification. That is not a factual but a legal issue. The nature or description of the activities, and whether or not Taxpayer performed them, is not at issue. The ALJ, therefore, correctly concluded that A.R.S. § 42-1255 does not apply.

The prime contracting classification of A.R.S. § 42-5075 imposes transaction privilege tax on the business of prime contracting. A.R.S. § 42-5075(P) provides the following definitions:

For the purposes of this section:

1. "Contracting" means engaging in business as a contractor.
2. "Contractor" is synonymous with the term "builder" and means any person or organization that undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does personally or by or through others, modify any building, highway, road, railroad, excavation, manufactured 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, and includes subcontractors and specialty contractors. For all purposes of taxation or deduction, this definition shall govern without regard to whether or not such contractor is acting in fulfillment of a contract.
5. "Modification" means construction, alteration, repair, addition, subtraction, improvement, movement, wreckage or demolition.
6. "Modify" means to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish.
7. "Prime contracting" means engaging in business as a prime contractor.
8. "Prime contractor" means a contractor who supervises, performs or coordinates the modification of any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement including the contracting, if any, with any subcontractors or specialty contractors and who is responsible for the completion of the contract. Except as provided in subsections E and O of this section, a person who owns real property, who engages one or more contractors to modify that real property and who does not itself modify that real property is not a prime contractor within the meaning of this paragraph regardless of the existence of a contract for sale or the subsequent sale of that real property.

Taxpayer performed excavation and forest clearing work and a road construction project. Excavation and road building are specifically included within the definition of a "contractor" in A.R.S. § 42-5075(P)(2). Clearing trees and brush alters the land and thereby modifies it

[redacted]

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within the definitions in A.R.S. § 42-5075(P). The Division cites *Granite Const. Co. v. State ex rel. Arizona Dept. of Revenue*, 168 Ariz. 93, 811 P.2d 345 (Ariz. App. 1990) in support of its position that Taxpayer is a contractor. In *Granite*, reclamation work at former mining sites, which included recontouring, surface grading, resspreading of topsoil, and seeding, revegetating and fencing reclaimed land. The court concluded that these activities constituted “altering,” “repairing” and “adding to” an “excavation or other ... project” within ordinary English usage, and therefore constituted “contracting.” 168 Ariz. at 99, 811 P.2d at 351. Taxpayer’s forest clearing, as well as its excavation and road building activities, alter, add to or subtract from, and improve the respective projects and are contracting as defined in A.R.S. § 42-5075(P).

Taxpayer entered into contracts with the United States government to perform its contracting activities. The United States government does not act as a prime contractor, and the federal government’s “contracting responsibility” mentioned in *Arizona Dept. of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32, 38, 119 S.Ct. 957, 961 (1999), which Taxpayer cites to support its argument, was the responsibility to contract with a prime contractor and not as a prime contractor. Taxpayer acted as a prime contractor when it performed forest clearing and road construction under federal contracts, and it has not shown that it worked for another prime contractor. Taxpayer is therefore a taxable prime contractor.

The ALJ concluded that Taxpayer’s fuel tender activity, consisting of supplying fuel to a fire site and dispensing it to equipment operators, did not fall within Taxpayer’s contracting activity as defined in A.R.S. § 42-5075. Without determining any particular receipts amount to be removed from the Assessment, the ALJ denied Taxpayer’s protest except as determined for the fuel tender receipts. The Division did not appeal the ALJ’s decision. Whether Taxpayer can deduct its revenue from fuel tender activity is therefore not at issue here, and any fuel tender receipts for which Taxpayer can provide invoices such as the examples shown in Taxpayer’s Hearing Exhibit 5 must be deducted from the Assessment per the ALJ’s exception to its denial of Taxpayer’s protest.

ORDER

The ALJ's decision is affirmed.

This Decision is the final order of the Department of Revenue. Taxpayers may contest the final order of the Department in one of two manners. Taxpayers may file an appeal to the State Board of Tax Appeals, 100 North 15th Avenue, Suite 140, Phoenix, AZ 85007 or may bring an action in Tax Court (125 West Washington, Phoenix, Arizona 85003) within sixty (60) days of the receipt of this order. For appeal forms and other information from the Board of Tax Appeals, call (602) 364-1102. For information from the Tax Court, call (602) 506-8297.

Dated this day of December 2014.

ARIZONA DEPARTMENT OF REVENUE

David Raber
Director

Certified original of the foregoing
mailed to:

[redacted]

Copy of the foregoing mailed to:

[redacted]

c: Transaction Privilege Tax Appeals Section
 Audit Division
 Transaction Privilege and Use Tax Section
 Office of Administrative Hearings