

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. 200900113 - S

On February 22, 2010, the Administrative Law Judge ("ALJ") issued a decision ("Decision") regarding the protest of [redacted] ("Taxpayer"). The Transaction Privilege and Use Tax Section in the Audit Division ("Division") of the Department of Revenue ("Department") appealed this Decision on March 23, 2010. As the appeal was timely, the Director ("Director") of the 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

Taxpayer is a California resident who purchased a new fifth-wheel trailer in Iowa in 2008, without paying tax on the purchase of the trailer in Iowa or California. The Division determined that the trailer was stored and used in Arizona and billed Taxpayer for use tax, penalties and interest. Taxpayer protested the use tax billing, and the matter went to hearing. The ALJ granted the protest.

On appeal, the Division argues that the billing for use tax, penalties and interest was proper under the circumstances. Taxpayer has not replied to the Division's appeal, and the time for the submission of Taxpayer's written position has expired.

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 a resident of California.
2. In January 2008, Taxpayer agreed to purchase a new [redacted] fifth-wheel trailer (“Trailer”) from a recreational vehicle dealer in [redacted], Iowa, for the price of [redacted]. The purchase agreement and invoice is dated January 31, 2008, and it does not show any tax collected by the dealership on the purchase.
3. Taxpayer did not pay any tax in Iowa on the purchase of the Trailer.
4. Taxpayer picked up the Trailer at the Iowa dealership on February 12, 2008.
5. Taxpayer drove the Trailer from Iowa through Kansas, Oklahoma and New Mexico into Arizona. Taxpayer arrived in Arizona on February 17, 2008, and proceeded through [redacted] and [redacted] to his niece’s vacation home in [redacted], Arizona.
6. Taxpayer did not pay any tax on the use of the Trailer in any of the states through which he drove on his way from Iowa to Arizona.
7. In [redacted], Taxpayer parked the Trailer at his niece’s home.
8. By request dated May 12, 2008, Taxpayer requested a certificate of use tax clearance for the Trailer from the California Board of Equalization (“California Board”) to allow the completion of registration at the California Department of Motor Vehicles without payment of the California use tax. In the request, Taxpayer stated that the Trailer had remained outside California for a period of not less than ninety days after the purchase, and that the Trailer entered California when Taxpayer and his wife brought it home on May 11, 2008.
9. In his request to the California Board, Taxpayer further stated that, after purchasing the Trailer, he and his wife had left the Trailer in [redacted] so they could enjoy using

it during the winter months when the weather at [redacted] was nicer, and that “[t]hese trips included February 15th through the 19th, April 24th through the 27th and May 9th through May 11th”

10. Taxpayer submitted receipts to the California Board for fuel purchases in [redacted] on February 19, April 24, and May 11, 2008.
11. By letter to the California Board dated May 27, 2008, Taxpayer’s niece, [redacted], stated that Taxpayer had made arrangements with her to park the Trailer at her vacation home in [redacted], that he “arrived there late February 2008 and departed for California on or around the second week of May 2008.
12. After receiving information from the State of California, the Division issued a billing to Taxpayer on September 18, 2008, for tax of [redacted] plus penalties of [redacted] and interest of [redacted], for a total amount of [redacted].
13. Taxpayer protested the use tax billing by letter to the Division dated September 29, 2008.
14. By letter of October 21, 2008, the Division affirmed its use tax billing and updated the interest.
15. After a telephonic conference with the Division on October 27, 2008, Taxpayer requested a formal hearing by letter dated November 4, 2008.
16. With his hearing request, Taxpayer submitted receipts for fuel purchases made on his way from Iowa to Arizona in February 2008, and receipts from three campgrounds in Kansas, Oklahoma, and in [redacted], Arizona. Taxpayer spent the nights of February 13, 14 and 17, 2008 at those campgrounds.
17. In a letter to the Division of November 3, 2008, Taxpayer’s niece, [redacted], stated that Taxpayer had not stored the Trailer at her [redacted] vacation home, but that Taxpayer and his wife had left the Trailer there in February 2008 only long enough to check on their California property, and that they had then taken the Trailer on a

trip to New Mexico, Texas and Florida, returning to [redacted] “for a few days” in early May 2008 before leaving for their California home.

18. At the formal hearing, Taxpayer testified that he used the Trailer at the campgrounds in Kansas and Oklahoma where he stayed before he entered the state of Arizona.
19. Taxpayer pointed out that he chose a route from Iowa through Kansas to Arizona because his wife wanted to visit relatives in Kansas and to avoid bad weather along the more direct route through Colorado.
20. Taxpayer also testified that the statements he made to the California Board concerning the Trailer being left in [redacted] were incorrect, that he did not actually make the repeated trips from California to [redacted], that he knew at the time when he made the statements that they were incorrect, but that he made those statements because they were easier to explain than his actual travels.
21. Taxpayer stated that he had taken the Trailer into other states in the course of a trip to destinations in Texas and Florida between February and May 2008. Taxpayer did not provide any documents or receipts relating to those locations.
22. Taxpayer further testified that his “intent from the beginning” had been “to not have to pay tax,” and that he had “done this previously.”
23. Taxpayer explained that the receipt for the April 24 fuel purchase in [redacted], which he submitted to the California Board, was his niece’s credit card receipt.
24. In the Decision, the ALJ noted that the hearing record was “replete with inconsistencies,” but found that Taxpayer, as a nonresident temporarily within Arizona, brought the Trailer into Arizona for his personal use and subsequently took the Trailer with him when he left Arizona for California. The ALJ concluded that Taxpayer was entitled to the use tax exemption set forth in A.R.S. § 42-5159(A)(6) as interpreted within A.A.C. R15-5-2352(B).

25. After Taxpayer parked the Trailer in [redacted], Arizona in February 2008, he left the state at least once and did not take the Trailer with him. Thereafter, on May 11, 2008, he took the Trailer out of Arizona when he took it to his home in California.

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. Arizona imposes a tax on the storage, use or consumption in this state of tangible personal property purchased from a retailer. A.R.S. § 42-5155(A). Every person storing, using or consuming such property in Arizona is liable for the tax, and that liability is not extinguished until the tax has been paid. See A.R.S. § 42-5155(E).
2. “Storage” means keeping or retaining tangible personal property purchased from a retailer for any purpose except sale in the regular course of business or subsequent use solely outside Arizona. A.R.S. § 42-5151(20).
3. “Use or consumption” means the exercise of any right or power over the property incidental to owning the property. See A.R.S. § 42-5151(22).
4. The term “purchase” means a purchase *for* storage, use or consumption in Arizona. See A.A.C. R15-5-2301(2).
5. Arizona use tax generally applies to the use, storage, or consumption in Arizona of tangible personal property purchased from an out-of-state retailer. A.A.C. R15-5-2302(C).
6. Taxpayer purchased the Trailer from a retailer in Iowa and subsequently stored and used it in Arizona, per his arrangement with his niece in [redacted]. Taxpayer purchased the Trailer for temporary storage and use in Arizona.
7. Tangible personal property is presumed to be subject to use tax when the property was purchased outside Arizona and is then brought into Arizona for use, storage or

consumption. The purchaser bears the burden of proving that a purchase is *not* subject to the Arizona use tax. See A.A.C. R15-5-2304(B).

8. Departmental determinations are presumed correct and the burden is on the taxpayer to overcome this presumption. See *Arizona State Tax Commission v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948); A.A.C. R15-10-118.
9. Every person is presumed to know the law and its requirements, and a mistake as to such requirements is no excuse for failure to meet them. *Newman v. Fidelity Savings and Loan Association*, 14 Ariz. 354, 128 P. 53 (1912).
10. Exemptions from tax are to be narrowly construed. *Kitchell Contractors v. City of Phoenix*, 151 Ariz. 139, 144, 726 P.2d 236 (App. 1986).
11. Property brought into Arizona for use by a nonresident temporarily within Arizona is not subject to use tax if the property is for the personal use of the nonresident and is taken out of the state when the nonresident leaves Arizona. See A.A.C. R15-5-2352(B).
12. Taxpayer is a nonresident who was temporarily in Arizona when he brought the Trailer into Arizona on February 17, 2008.
13. Taxpayer parked the Trailer in [redacted], Arizona, and did not take the Trailer out of the state, pursuant to A.A.C. R15-5-2352(B), each time when he left Arizona during the period of February through May 2008.
14. Taxpayer has not shown that he took the Trailer out of Arizona prior to May 11, 2008, and he does not meet the requirements of A.A.C. R15-5-2352(B).
15. A purchaser is not subject to use tax if the purchaser establishes that the property is not used in conducting a business in Arizona and that the property was purchased for bona fide use outside Arizona. A purchase at least three months prior to the property's initial entry into Arizona is presumed to be bona fide use. See A.A.C. R15-2-2304(A)(1) and (2) and R15-5-2352(C)(1) and (2).

16. Taxpayer did not purchase the Trailer for bona fide use outside Arizona.
17. A nonresident purchaser is not subject to use tax if the purchaser establishes that the property is not used in conducting a business in Arizona and that the first actual use of the property occurred outside Arizona. See A.R.S. § 42-5159(A)(6), A.A.C. R15-2-2304(A)(3) and R15-5-2352(C)(3).
18. Taxpayer transported the Trailer from the dealership in Iowa to [redacted] in Arizona. Taxpayer's use of the Trailer during two nights at campgrounds in Kansas and Oklahoma was incidental to Taxpayer's transporting of the Trailer to Arizona, in preparation of the Trailer's use in [redacted], and does not constitute "first actual use" within the meaning of the nonresident exemption in A.R.S. § 42-5159(A)(6), A.A.C. R15-2-2304(A)(3) and R15-5-2352(C)(3).
19. Taxpayer has not shown that the Trailer's first use was outside Arizona.
20. Taxpayer is not entitled to an exemption from use tax for the storage and use of the Trailer in Arizona.
21. A.R.S. § 42-1125 requires assessment of penalties for late filing and late payment and allows abatement only if the failure to timely comply is due to reasonable cause and not due to willful neglect.
22. A.R.S. § 42-1125(W) defines "reasonable cause" as a reasonable basis for the taxpayer to believe that the tax did not apply to the business activity or the storage, use or consumption of the taxpayer's tangible personal property in Arizona.
23. Taxpayer has not shown that there was a reasonable basis to believe that Arizona use tax did not apply to his use and storage of the Trailer in [redacted].
24. A.R.S. § 42-1123 imposes interest on unpaid taxes from the date the taxes were due; such interest continues to accrue on unpaid tax until the time the tax is paid.

DISCUSSION

The Division is requesting that the ALJ's Decision be reversed. The Division argues that Taxpayer stored the Trailer in Arizona and did not take it with him every time he left the state. The Division further argues that Taxpayer's actions toward the Trailer while driving from Iowa to Arizona in February 2008 did not constitute "first actual use" within the meaning of A.R.S. § 42-5159(A)(6), A.A.C. R15-2-2304(A)(3) and R15-5-2352(C)(3), that Taxpayer has not provided satisfactory proof that the Trailer's first use was outside Arizona, and that the penalties should not be abated because Taxpayer's failure to pay use tax was not due to reasonable cause.

Taxpayer has not filed a response to the Division's appeal of the ALJ's Decision. In his letters to the Division and before the ALJ, Taxpayer argued that he did not know of the Arizona use tax, that his first use of the Trailer occurred outside Arizona because he used the Trailer during his overnight stays at campgrounds after taking delivery in Iowa and prior to entering Arizona, and that, contrary to his statements to the California Board, he did not keep the Trailer in [redacted] through May 2008, but instead took it on a trip to Texas and Florida.

The issue is whether Taxpayer is liable for Arizona use tax on the sales price of the Trailer. The use tax is imposed on the storage, use or consumption in Arizona of tangible personal property purchased from a retailer. See A.R.S. § 42-5155(A). The tax is calculated as a percentage of the sales price. A.R.S. § 42-5151(20) defines "storage" as follows:

[K]eeping or retaining tangible personal property purchased from a retailer for any purpose except sale in the regular course of business or subsequent use solely outside this state.

Pursuant to A.R.S. § 42-5151(22), "use or consumption" means:

[T]he exercise of any right or power over tangible personal property incidental to owning the property except holding for sale or selling the property in the regular course of business.

The term "purchases" for purposes of the use tax is defined in A.A.C. R15-5-2301(2) as "purchase for storage, use, or consumption in Arizona."

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Taxpayer purchased the Trailer from a retailer in Iowa. According to his niece's May 27, 2008 letter to the California Board, Taxpayer had made arrangements with his niece to park the Trailer at her vacation home in [redacted]. Per Taxpayer's testimony at the formal hearing, it was his intent that he would not have to pay tax in California on the purchase of the Trailer, and he did not take the Trailer to his residence in California until May 11, 2008. Taxpayer thus purchased the Trailer to keep and retain it in [redacted] until such time when he would take it to California without owing use tax there. Taxpayer stated to the California Board that he had left the Trailer in [redacted] so that he and his wife could enjoy using it there, and that they actually did use it in [redacted]. Based on those statements, Taxpayer purchased the Trailer for storage and use in Arizona.

Tangible personal property purchased outside Arizona and then brought into Arizona for use, storage or consumption is presumed to be subject to use tax, and the burden is on Taxpayer to prove that his purchase of the Trailer is *not* subject to the Arizona use tax. See A.A.C. R15-5-2304(B). Taxpayer's argument, that he did not know of the Arizona use tax, does not aid him because every person is presumed to know the law and its requirements, and a mistake as to such requirements is no excuse for failure to meet them. See *Newman v. Fidelity Savings and Loan Association*, 14 Ariz. 354, 128 P. 53 (1912).

The ALJ concluded that Taxpayer should be exempt from use tax because the ALJ found that Taxpayer brought the Trailer into Arizona for his personal use and subsequently took the Trailer with him "when he left Arizona for California." The ALJ's conclusion is based on Taxpayer's uncontested nonresident status and on the assumption, that Taxpayer took the Trailer out of Arizona when he left the state. With regard to nonresidents, A.A.C. R15-5-2352(B) provides:

Tangible personal property brought into Arizona for use by a nonresident temporarily within the state is not subject to the tax if the property is for the personal use of the nonresident and is taken out of the state when the nonresident leaves the state.

The ALJ's mentioning of Taxpayer taking the Trailer with him "when he left Arizona for California" appears to refer to Taxpayer's May 11, 2008 return to his California residence, and not to any of his one or more prior returns to his residence. In the Decision, the ALJ

noted that the hearing record was “replete with inconsistencies” and that, based on those inconsistencies, “one might reasonably conclude that the trailer was actually within Arizona until May 11, 2008.”¹

According to his statements to the California Board, Taxpayer returned to California in February 2008, and again after a trip to [redacted] in April 2008, each time without the Trailer. At the formal hearing, Taxpayer contradicted those statements and argued that he had instead made a trip to Texas and Florida, where he owns rental property. Taxpayer claimed that he had knowingly made false statements to the California Board. Even though Taxpayer has kept multiple receipts for fuel purchases and from campgrounds he used on his way from Iowa to Arizona, as well as fuel receipts from [redacted], he has not produced any such receipts from his claimed trip to Texas and Florida. Taxpayer has not shown that he actually took the Trailer on such a trip. Even his niece’s November 3, 2008 letter mentions a return to Taxpayer’s California residence in February 2008 without the Trailer. Taxpayer thus did not take the Trailer out of the state each time he left Arizona. Therefore, Taxpayer does not meet the requirements of A.A.C. R15-5-2352(B).

Taxpayer further argues that he should be exempt from the use tax because he used the Trailer prior to bringing it into Arizona. A purchaser is not subject to use tax if he establishes that the property was purchased “for bona fide use” outside Arizona and is not used in conducting a business in Arizona. See A.A.C. R15-2-2304(A)(1) and (2) (concerning purchasers in general) and R15-5-2352(C)(1) and (2) (concerning nonresident purchasers.) A purchase at least three months prior to the property’s initial entry into Arizona is presumed to be bona fide use. *Id.* For nonresidents only, A.R.S. § 42-5159(A)(6) provides an exemption for the following property:

Tangible personal property brought into this state by an individual who was a nonresident at the time the property was purchased for storage, use or consumption by the individual if the first actual use or consumption of the property was outside this state, unless the property is used in conducting a business in this state.

¹ Decision at 9, ¶11.

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See also A.A.C. R15-2-2304(A)(3) and R15-5-2352(C)(3). Neither “first actual use” nor “bona fide use” is defined in the respective provisions. The first question is whether the Trailer’s first actual use, within the meaning of A.R.S. § 42-5159(A)(6) and A.A.C. R15-2-2304(A)(3), 15-5-2352(C)(3), occurred outside Arizona.

Taxpayer’s receipts from two campgrounds in Kansas and Oklahoma show that he paid for a “full hook-up” of the Trailer for one night at each of those two locations. Although this indicates that Taxpayer made some use of the Trailer during those two nights, that use was also still a part of transporting the Trailer to [redacted], where Taxpayer intended to store and use the Trailer until such time when he planned to take it into California without paying tax there.

A use that is merely preparation of the property for its intended use has been held not sufficient to constitute “first use” for tax purposes where a single party engaged in the activities constituting “preparation for use” and “use.” See *Exxon Corp. v. Wyoming State Board of Equalization*, 783 P.2d 685 (Wyo.1989), cert. denied, 495 U.S. 910, 110 S. Ct. 1937 (1990), distinguished in *PCS, Inc. v. Arizona Department of Revenue*, 186 Ariz. 539, 925 P.2d 680 (Ariz. App. 1995). In *Exxon*, the taxpayer purchased pipe imported from Japan from a Texas company for the purpose of fabricating it into a pipeline in Wyoming. While the pipe was in Colorado en route to Wyoming, the taxpayer inspected it, blasted it, and coated it with epoxy. The Wyoming court held that the processing in Colorado was not the “first use” of the pipe, but was merely preparation for its intended use in Wyoming.

In *PCS*, the taxpayer encoded and stamped blank insurance identification cards in Arizona before shipping the cards to insurance plan sponsors outside Arizona. Pointing out that the taxpayer had paid no sales tax to any jurisdiction when it bought the blank cards from sources outside Arizona, the Arizona Court of Appeals concluded that the taxpayer had used, consumed and stored the blank cards in Arizona within the meaning of the use tax statute. The court explained:

What distinguishes *Exxon* and other similar decisions . . . is that in each of them only a single entity – the taxpayer – engaged in the activities constituting “preparation for use” and “use.” The

only question in each case concerned which of the two jurisdictions was the one where the “use” had occurred.

PCS, 186 Ariz. at 542, 925 P.2d at 683. The Arizona Court of Appeals thus did not question the distinction between “preparation for use” and “first use” made in the *Exxon* case.

Although Taxpayer’s use of the Trailer at the two campgrounds in Kansas and Oklahoma was not a different type of use as compared to the Trailer’s intended use as a travel shelter, it was incidental to Taxpayer’s transporting of the Trailer to his Arizona destination and occurred merely in preparation of the Trailer’s use in [redacted]. Taxpayer did not pay any sales or use tax for the Trailer to Kansas or Oklahoma, or to any other jurisdiction. Taxpayer’s two nights at campgrounds in Kansas and Oklahoma did not rise to the level of “first actual use” within the meaning of the nonresident exemption in A.R.S. § 42-5159(A)(6), A.A.C. R15-2-2304(A)(3) and R15-5-2352(C)(3).

The final issue to address is whether there was “bona fide” use outside Arizona. “Bona fide” means “in good faith.”² Taxpayer did not purchase the Trailer three months prior to its initial entry into Arizona, which would lead to the presumption of a purchase for bona fide use outside Arizona, and Taxpayer’s use of the Trailer prior to its use and temporary storage in Arizona was not substantial. In fact, Taxpayer told the California Board that he bought the Trailer with the intent to use it in Arizona for a period of time. Just as preparing or merely bringing the Trailer to Arizona does not rise to the level of “first actual use”, this activity does not qualify as a bone fide use outside Arizona.

Taxpayer does not qualify for an exemption from use tax for the storage and use of the Trailer in Arizona, and he is liable for the tax assessed. There is no reasonable cause to abate penalties.

² See *Black’s Law Dictionary* 199 (9th ed. 2009).

ORDER

The ALJ's Decision is reversed and the Division's billing for use tax, penalties and interest 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) 506-3763.

Dated this 18th day of August 2010.

ARIZONA DEPARTMENT OF REVENUE

Gale Garriott
Director

Certified original of the foregoing
mailed to:

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