

STATE OF ARIZONA

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

David Raber
Acting Director

CERTIFIED MAIL [redacted]

**The Director's Review of the Decision
of the Administrative Law Judge Regarding:**

[redacted]

ID No. [redacted]

ORDER

Case No. 201200247-S

On May 20, 2013, the Administrative Law Judge ("ALJ") issued a decision ("Decision") regarding the protest of [redacted] ("Taxpayer"). The Taxpayer appealed this Decision on June 17, 2013. As the appeal was timely, the Director ("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 Division audited Taxpayer for the period of January 1, 2007 through December 31, 2010 ("Audit Period") and determined that Taxpayer had underreported transaction privilege and city tax on personal property rental income and use tax on out-of-state purchases. The Division assessed additional transaction privilege, city and use taxes plus penalties and interest ("Assessment"). Taxpayer protested and the matter went to hearing. The ALJ denied Taxpayer's protest and upheld the Division's Assessment.

On appeal, Taxpayer argues that it performs non-taxable services and is not engaged in any taxable business. The Division argues that the Assessment is proper under the circumstances.

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 corporation engaged in the business of providing, for a fee, the use of portable chemical toilets and waste removal services to customers in Arizona.
2. Taxpayer delivers portable toilet containers to customers' designated locations, provides maintenance services such as sanitation and waste collection for the containers and, after a specified period of time, removes the containers from the location.
3. Taxpayer collects fees consisting of "rental charges" and "service charges" for the containers, plus delivery and pick-up charges. Taxpayer kept some monthly ledgers, but did not provide backup documentation identifying the charges.
4. Taxpayer also provides septic tank waste removal and grease trap cleaning.
5. Taxpayer reported transaction privilege tax under the personal property rental classification and city tax for the Town of [redacted] on a portion of the container fees.
6. The Division audited Taxpayer for the Audit Period, determined that Taxpayer had underreported transaction privilege and city tax on its rental income and some unreported use tax, and issued the proposed Assessment dated October 5, 2011 of additional transaction privilege, city and use tax in an amount of [redacted], plus penalties and interest. Taxpayer protested the Assessment.
7. The Assessment treats the septic tank waste removal and grease trap cleaning as non-taxable services, but does not allow a deduction from gross rental income for the container "service charges" or for delivery and pick-up charges.
8. The ALJ upheld the Assessment.

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. Taxpayer's business of providing and servicing portable toilet containers is subject to transaction privilege tax under the personal property rental classification of A.R.S. § 42-5071 and to [redacted] city tax under City Tax Code Section -450.
2. Taxpayer is not entitled to any exemption or deduction from the tax under the personal property rental classification for servicing the toilet containers or for delivery and pick-up.
3. Taxpayer has not provided sufficient records to establish an exemption from [redacted] city tax for delivery, pick-up or maintenance charges.

DECISION

Taxpayer appealed the ALJ's Decision and argues that it is engaged in non-taxable waste collection services, that its customers do not have exclusive control over Taxpayer's portable toilet containers, and that the Arizona Legislature never intended to impose tax on human waste collection services. Taxpayer further argues that the Department did not treat the sanitation service industry as taxable until it issued TPR 12-1 and thereby changed its policy, and that the Assessment violates Taxpayer's equal protection rights. Taxpayer also argues that its charges for container delivery and waste collection services should be exempt from [redacted] city tax.

The Division argues that Taxpayer is in the business of renting portable toilets, that it is subject to tax under the personal property rental classification and to city tax, and that no exemptions apply.

The personal property rental classification of A.R.S. § 42-5071 provides:

- A. The personal property rental classification is comprised of the business of leasing or renting tangible personal property for a consideration. . . .

B. The tax base for the personal property rental classification is the gross proceeds of sales or gross income derived from the business.

Taxpayer contracts with customers to provide portable toilet containers for the customers' use at their chosen location. Taxpayer's customers may permit the use of the containers during the specified period of time, and they accept all responsibility in connection with their choice of location and for any damage or loss of the containers. Taxpayer's maintenance of the containers in accordance with any required waste collection licenses and permits does not interfere with the customers' exclusive and independent use of the containers. Such an exclusive use and control of property for a specific period of time and for payment of a fixed amount of money comes within the meaning of the term "renting" as used in the personal property rental classification. See *State Tax Commission v. Peck*, 106 Ariz. 394, 396, 476 P.2d 849, 851 (1970), *Energy Squared, Inc. v. Arizona Dep't of Revenue*, 203 Ariz. 507, 510, 56 P.3d 686, 689 (App. 2002).

All gross proceeds of sales and gross income derived by a person from business activity classified under a taxable business classification is presumed to comprise the tax base for the business until the contrary is established. A.R.S. § 42-5023. For the rental business, A.A.C. Rule 15-5-1502 provides:

A. Gross income derived from the rental of tangible personal property is included in the tax base under the personal property rental classification unless a specific statutory exemption, exclusion, or deduction applies. Examples of tangible personal property include: televisions, cars, trucks, lawnmowers, floor polishers, tuxedos, uniforms, furniture, towels, and linens.

...

D. Gross income from the rental of tangible personal property includes charges for installation, labor, insurance, maintenance, repairs, pick-up, delivery, assembly, set-up, personal property taxes, and penalty fees even if these charges are billed as separate items, unless a specific statutory exemption, exclusion, or deduction applies.

[redacted]

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Taxpayer's receipts from charges for the delivery, maintenance and pick-up of the containers fall within A.A.C. Rule 15-5-1502(D) and, in the absence of a specific exemption, exclusion or deduction, these charges are included in the gross income from the rental business even when separately billed. The Arizona Legislature did not provide any exemption or exclusion for waste management services that are related to rental transactions, and the Department's TPR 12-1 concerning the taxation of persons engaged in the business of renting and servicing portable toilets explains this for the toilet rental business. Taxpayer has not shown that the Department retroactively applied any new interpretation of the law to its rental business.

Taxpayer argues that the Department previously issued a decision and various assessments against other taxpayers that treated providers of human waste collection services as nontaxable, and that the Assessment violates Taxpayer's constitutional rights to equal protection. The non-availability of an exemption for waste management services that are related to the rental of portable toilets, or for receipts from the business of renting portable toilets, is not a matter of unequal enforcement of the laws. To establish a claim that the Division has denied Taxpayer equal protection, Taxpayer would have to show that the Division systematically and deliberately discriminated against it. See *Tucson Mechanical Contracting, Inc. v. Arizona Department of Revenue*, 175 Ariz. 176, 181, 854 P.2d 1162, 1167 (App. 1992). Taxpayer has not done so. The Assessment does therefore not violate Taxpayer's equal protection rights.

For city tax purposes, Taxpayer's portable toilet rental transactions fall within City Tax Code Section -450, which imposes tax on the gross income from the personal property rental business and provides an exemption in Subsection (c)(6) for "separately billed charges for delivery, installation, repair, and/or maintenance as provided by Regulation." City Tax Code Regulation -450.5 provides in relevant part:

(a) Delivery and installation charges in connection with the rental, leasing, and licensing of tangible personal property are exempt from the tax imposed by Section ___-450; provided that the provisions of Regulation ___-100.2 have been met.

(b) Gross income from the sale of a warranty, maintenance, or similar service contract in connection with the rental, leasing, and licensing of tangible personal property shall be exempt.

Regulation -100.2(a) defines “delivery charges” as follows:

"Delivery Charges" exist only when the total charges to the ultimate customer or consumer include, as separately charged to the ultimate customer, charges for delivery to the ultimate consumer, whether the place of delivery is within or without the City, and when the taxpayer's books and records show the separate delivery charges.

Regulation -100.2(e)(1) establishes the following record keeping requirements:

Any person who engages in transactions involving these services must:

(A) Separately bill, invoice, or charge the customer for such services in a manner by which the customer or consumer may readily identify the specific dollar amount of the service charge; and

(B) Maintain business books and records in a manner in which the separate charge for such services can be clearly identified, to the satisfaction of the Tax Collector.

Taxpayer provided handwritten ledgers to the Division's auditor that include monthly total amounts for short-term toilet container rentals and the related service charges, but Taxpayer did not provide the same information for monthly rentals. Taxpayer also did not provide backup documentation to support the ledger totals. A few customer invoices for short-term rentals and copies of ledger cards for monthly rental customers were provided, but they do not show a clear and consistent distinction between the charges for container rental, maintenance, delivery and pick-up, and Taxpayer has not shown how these records substantiate separate charges as required under the City Tax Code. The records are therefore not sufficient to establish an exemption from [redacted] city tax for delivery, pick-up or maintenance charges.

For the above reasons, Taxpayer is taxable under the personal property rental classification of A.R.S. § 42-5071 and under [redacted] City Tax Code Section -450, and no exemptions or deductions apply.

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 October 2013.

ARIZONA DEPARTMENT OF REVENUE

David Raber
Acting Director

Certified original of the foregoing
mailed to:

[redacted]

Copy of the foregoing mailed to:

[redacted]

[redacted]

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