

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SOUTHWESTERN DAKOTAH, INC., an Arizona) 1 CA-TX 01-0002
corporation,)
) DEPARTMENT T
Plaintiff-Appellant,)
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF REVENUE; and MARK) Rule 28, Arizona Rules
KILLIAN, in his official capacity as) of Civil Appellate
Director of the Arizona Department of) Procedure)
Revenue,)
)
Defendants-Appellees.)
) **FILED 10-18-01**

Appeal from the Arizona Tax Court

Cause No. TX 1997-000509

The Honorable Jeffrey S. Cates, Judge

AFFIRMED

Durazzo & Eckel, P.C. Tucson
by Neal A. Eckel
Attorneys for Plaintiff-Appellant

Janet Napolitano, Attorney General Phoenix
by Lisa A. Neuville, Assistant Attorney General
Attorneys for Defendants-Appellees

N O Y E S, Judge

¶1 Southwestern Dakotah, Inc. ("SDI") appeals from a judgment entered in favor of the Arizona Department of Revenue ("ADOR") after a trial to the tax court on SDI's claim to abate an

assessment of delinquent transaction privilege taxes under the prime contracting classification. See Arizona Revised Statutes ("A.R.S.") section 42-5075 (Supp. 2000).¹ The dispositive question is whether the tax court clearly erred in finding that SDI failed to introduce sufficient evidence to demonstrate that it qualified for the "subcontractor" exemption provided by A.R.S. § 42-5075(D). See *In re Estate of Pouser*, 193 Ariz. 574, 579-80, ¶¶ 12-13, 18, 975 P.2d 704, 709-10 (1999) (stating that an appellate court is bound by a trial court's findings if the record contains evidence that "would permit a reasonable person to reach the trial court's result"; fact questions "may be subject to presumptions which shift the burden of going forward with evidence"). We hold that the tax court committed no error, and therefore we affirm.

¶2 Section 42-5075 imposes transaction privilege taxes on the business of "prime contracting." A "prime contractor" is

a contractor who supervises, performs or coordinates the construction, . . . improvement, . . . or demolition of any 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.

A.R.S. § 42-5075(H)(6). However, § 42-5075(D) provides the following:

Subcontractors or others who perform services in respect to any . . . building . . . or other structure,

¹ Former A.R.S. § 42-1310.16 was amended and renumbered as § 42-5075, effective January 1, 1999. 1997 Ariz. Sess. Laws, ch. 150, §§ 87, 99.

project, development or improvement are not subject to tax if they can demonstrate that the job was within the control of a prime contractor or contractors . . . and that the prime contractor . . . is liable for the tax on the gross income . . . attributable to the job and from which the subcontractors or others were paid.

¶3 In *Granite Construction Co. v. State ex rel. Arizona Department of Revenue*, 168 Ariz. 93, 100-01, 811 P.2d 345, 352-53 (App. 1990), we interpreted the tax exemption in current A.R.S. § 42-5075(D) to require the taxpayer-contractor to prove (1) that the job on which it performed construction work was within the control of a "prime contractor" who was obligated under a contract with a third person to supervise, perform, or coordinate the construction project and who was responsible for completing the contract; and (2) that the prime contractor was liable for prime contracting taxes on the gross income attributable to the construction project and from which the taxpayer-contractor was paid.

¶4 Here, SDI argues that Hughes, the party with whom SDI contracted to construct improvements and install equipment, was the "prime contractor" because (1) Hughes contracted with SDI and supervised and coordinated SDI's construction work, (2) Hughes's notices awarding SDI the contracts stated that each project was being funded under a United States Government "prime contract," and (3) a writing issued by the Contracting Office of the United States Air Force referred to SDI's contract with Hughes as a "subcontract."

¶5 Citing testimony from a trial transcript that is not in the record, SDI further asserts that the government paid Hughes and Hughes paid SDI. SDI urges that we should therefore conclude as a matter of law that Hughes was responsible for prime contracting taxes on the money with which it paid SDI.

¶6 We cannot agree. Even if we accept as true SDI's assertions about what the trial transcript would show, the tax court could reasonably have determined that SDI failed to prove its entitlement to the subcontractor exemption under A.R.S. § 42-5075(D). SDI never offered into evidence the putative "prime contract" under which the government funded the Hughes-SDI construction contract. Additionally, SDI has failed to refer to or provide any trial testimony or other evidence concerning the provisions of the contract between the government and Hughes.

¶7 Consequently, SDI was unable to demonstrate that the putative "prime contract" between the government and Hughes imposed any obligation on Hughes to complete the construction project on which SDI worked. The contract between Hughes and the government could just as likely have obligated the government to provide funds to allow Hughes to procure construction work that Hughes needed to enable it to meet a contractual obligation to supply the government with goods or non-contracting services.

¶8 SDI failed to offer evidence that Hughes itself engaged in prime contracting activities that would have rendered it liable

for taxes under A.R.S. § 42-5075 on the funds it received from the government and used to pay SDI. SDI relies instead on speculative inferences for which it cites no evidentiary support in the record. The tax court did not err in concluding that SDI failed to demonstrate entitlement to the subcontractor exemption of A.R.S. § 42-5075(D).

¶9 The judgment is affirmed.

E. G. NOYES, JR., Judge

CONCURRING:

PHILIP HALL, Presiding Judge

WILLIAM F. GARBARINO, Judge