

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
101 North First Avenue - Suite 2340
Phoenix, Arizona 85003
(602) 528-3966

ARCADIA PLUMBING TRUST,)
Appellant,) Docket No. 1815-99-1
vs.)
ARIZONA DEPARTMENT OF REVENUE,) NOTICE OF DECISION:
Appellee.) 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

Arcadia Plumbing Trust ("Appellant") was established in 1987 by Richard and Charlotte Broderick (the "Brodericks"). In 1988, the Brodericks transferred real property, including rental property, their personal residence and the plumbing business property to Appellant. In January 1989, the Brodericks, as trustee of Appellant, transferred the properties into separate land trusts.

In 1992, the Internal Revenue Service (the "IRS") determined that Appellant was taxable as a corporation under Treasury Regulation § 301.7701-2.02.A.4 and, subsequently, modified Appellant's taxable income on its federal returns for tax years 1988 and 1989. After making these adjustments the IRS determined deficiencies and issued assessments.

Appellant protested the IRS assessments to the United States Tax Court ("Tax Court"), which affirmed that Appellant "is an association taxable as a corporation." *Arcadia Plumbing Trust v. Commissioner*, 68 TCM 699, 702, CCH Dec. 50,117 (M) T.C. Memo 1994-455.

Through an exchange of information agreement with the IRS, the Arizona Department of Revenue (the "Department") learned that Appellant was assessed federal corporate income tax for 1988 and 1989. Appellant did not file Arizona corporate income tax returns for these years. After Appellant failed to respond to the Department's demands that returns be filed, the Department issued assessments of tax, interest and penalties for negligence, late filing, and failure to file a return on notice

1 and demand. The Department later abated the penalties for negligence and failure to file on notice and
2 demand.

3 Appellant protested the assessment to the Department's Hearing Officer, who upheld the
4 assessment. Appellant then protested to the Director, who affirmed the Hearing Officer's decision.
5 Appellant now timely appeals to this Board.¹

6 DISCUSSION

7 The issue before the Board is whether Appellant is liable for the tax, interest and penalties
8 assessed. Appellant bears the burden of proof as to all issues of fact. A.A.C. R16-3-118.

9 Appellant maintains that it is a trust and that it is not taxable as a corporation. However, the
10 United States Tax Court has determined otherwise. Under federal law, to differentiate a trust from a
11 corporation, six characteristics are examined: 1) whether there are associates; 2) an objective to carry
12 on business and divide the gains therefrom; 3) continuity of life; 4) centralization of management;
13 5) liability for corporate debts limited to corporate property; and 6) free transferability of interests.

14 § 301.7701-2(a)(1), *Proced. & Admin. Regs.* The Tax Court determined that four of these characteristics
15 applied to Appellant. The Tax Court found that Appellant had associates because the profits of the
16 business were under the Brodericks' control and, along with Appellant's property, could be distributed to
17 themselves at any time. *Arcadia*, 68 TCM 699, 702, CCH Dec. 50,117 (M) T.C. Memo 1994-455.
18 Further, Appellant was established to carry on a plumbing business for profit (which could be distributed
19 to the Brodericks). *Id.* Appellant also has continuity of life because the terms of the trust provide that
20 bankruptcy, insolvency, or death of any certificate holder shall not, in any manner, affect the trust or its
21 operation or mode of business. While the terms governing Appellant do provide for a 25 year period of
22 life, the terms also provide that the trustees can extend the time period for up to 25 years any time prior
23

24 ¹ In 1998, the Legislature amended A.R.S. § 42-1253 (formerly A.R.S. § 42-172) to allow taxpayers, in cases involving less than
25 \$25,000, to be represented by CPAs, enrolled agents or other person authorized by the taxpayer under a Power of Attorney who
26 has been retained by the taxpayer for purposes other than representation in a hearing before the Board. The Arizona Supreme
27 Court, upon this Board's petition, amended Rule 31 of the Rules of the Supreme Court, prohibiting the unauthorized practice of
28 law, to allow attorneys serving as Board members or hearing officers to hear and decide appeals in which taxpayers are
represented by CPAs or enrolled agents. However, the Supreme Court did not amend Rule 31 to include the final class of
representation in which Appellant falls, i.e., a person authorized by the taxpayer under a Power of Attorney who has been
retained by the taxpayer for purposes other than representation in a hearing before the Board. Accordingly, the Chairman of the
Board, a licensed attorney, did not participate in this decision and the attorney hearing officer acted only as scrivener at the
direction of the remaining non-attorney Board members.

1 to the expiration of the original 25 year period. *Id.* Finally, there was centralization of management
2 because the Brodericks were managers for Appellant from the time of their appointment as co-trustees in
3 1987. Based on these findings, the Tax Court correctly found that Appellant is an association taxable as
4 a corporation.

5 The Arizona gross income of a corporation is equivalent to the federal taxable income of the
6 corporation for each year. A.R.S. § 43-1101(1). Appellant's federal taxable income was finally
7 determined by the Tax Court when it upheld the IRS assessments. The Tax Court determination is
8 binding on Appellant, and the Department may conform its findings to that of the Tax Court.

9 Notwithstanding this fact, Appellant claims that because the Department failed to rebut an
10 affidavit submitted by its former trustee, the facts of the affidavit, which supported Appellant's position,
11 must be accepted as true. Therefore, Appellant argues it has met its burden of proving it is not a taxable
12 corporation.

13 In support of this argument, Appellant cites two Arizona cases holding that facts set forth in a
14 Statement of Facts in Support of a Motion for Summary Judgment that are uncontroverted are presumed
15 true. *Tamsen v. Weber*, 166 Ariz. 364 (App. 1996); *Watts v. Hogan*, 111 Ariz. 536 (App. 1975). This
16 presumption does not apply to an affidavit submitted in an administrative hearing. Further, the affidavit
17 at issue was executed by an interested party and the Department and this Board are free to determine its
18 appropriate weight, particularly in light of the Tax Court's findings.

19 Another case cited by Appellant involved the application of the presumption of correctness.
20 *Portillo v. Commissioner*, 932 F.2d 1128 (1991). The issue was whether the IRS made a determination
21 of income when it merely matched the Appellant's Form 1099 and Form 1040 without attempting to
22 establish the reliability of the employer's 1099 filing. The court found that the IRS did not adequately link
23 the deficiency to the Appellant. The court noted that the "Commissioner would merely need to attempt to
24 substantiate the charge of unreported income by some other means." *Id.* at 1133.

25 The case before the Board does not involve unreported income. Appellant filed federal income
26 tax returns and litigated the federal assessments through the Tax Court. The Department has correctly
27 determined Appellant's Arizona gross income by using the federal taxable income figures as determined
28 by the IRS.

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