

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
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5 WILMINGTON TRUST COMPANY and
6 WILLIAM J. WADE,
as Owner Trustee and Cotrustee,

7 Appellant,

8 vs.

9 ARIZONA DEPARTMENT OF REVENUE,

10 Appellee.

) Docket No. 1706-97-S
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) NOTICE OF DECISION:
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
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11 The State Board of Tax Appeals, having considered all evidence and arguments presented, and
12 having taken the matter under advisement, finds and concludes as follows:

13 FINDINGS OF FACT

14 Wilmington Trust Company and William J. Wade, in their capacities as owner trustee and
15 cotrustee (collectively, "Appellant"), hold title to Unit Four of the Irvington Generating Station ("Unit
16 Four"), which is an electric power plant operated by Tucson Electric Power Company ("TEP"). Unit Four
17 generates electricity by burning coal.

18 TEP originally owned Unit Four, which burned oil and gas to produce electricity. Between 1982
19 and 1987, TEP converted Unit Four to burn coal. TEP financed the conversion through the sale of bonds
20 issued by the Industrial Development Authority of Pima County (the "IDA").

21 In 1987, TEP decided to refinance the conversion through a sale-leaseback transaction. TEP
22 solicited investors for the refinancing, and the Ford Motor Credit Company ("Ford") was the successful
23 bidder. To facilitate the refinancing and preserve certain bond and tax advantages, Ford did not
24 purchase and leaseback Unit Four directly. Instead, Ford formed a revocable trust entity with itself as
25 the sole settlor and sole beneficiary, and Appellant as the trustee. Appellant purchased Unit Four from
26 TEP for the total consideration of approximately \$152 million. Appellant borrowed \$121.4 million from
27 the IDA. This amount was used to redeem the bonds. The remaining amount was paid directly to TEP.
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1 Appellant argues that it is not taxable because it is not engaged in the business of leasing for a
2 consideration the use or occupancy of real property. Appellant bears the burden of proof. See *State Tax*
3 *Comm'n v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948); A.A.C. R16-3-118.

4 First, Appellant contends that it is not engaged in business. Business is defined in A.R.S. § 42-
5 5001(1) (formerly A.R.S. § 42-1301(1)) to include "all activities or acts, personal or corporate, engaged in
6 or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, *but*
7 *not casual activities or sales.*" Appellant argues that its activities are casual *but for* the language of
8 A.R.S. § 42-5069(B). According to Appellant, the language in subsection (B) creates an unconstitutional
9 irrebuttable presumption. "[A]n irrebuttable presumption attempts by legislative fiat to enact into
10 existence a fact that does not exist in actuality, and cannot be upheld." *Hecla Mining Co. v. Arizona*
11 *Dep't of Rev.*, 130 Ariz. 83, 634 P.2d 10 (Ct. App. 1981).

12 The Board may not declare a statute unconstitutional, but it may consider the constitutionality of
13 a statute as it applies to Appellant. *Valley Vendors Corp. v. City of Phoenix*, 126 Ariz. 491, 616 P.2d 951
14 (Ct. App. 1980). In this case, the pertinent statute does not attempt to enact into existence a fact that
15 does not exist in actuality. To facilitate the refinancing and preserve certain bond and tax advantages,
16 Appellant was formed to purchase Unit Four and lease it back to TEP. It engages in these activities with
17 the object of "gain, benefit or advantage." A.R.S. § 42-5001(1). Therefore, Appellant is engaged in
18 business.

19 Appellant next argues that the transaction at issue is not a lease, but merely a nontaxable
20 refinancing mechanism. The Board disagrees. Appellant characterized the transaction as a lease for
21 federal income tax purposes. Further, the pertinent document is identified as a "Lease Agreement." It
22 names Appellant as the lessor and TEP as the lessee and is replete with references to the "lease,"
23 "lessor" and "lessee." That the transaction was structured as a sales-leaseback is irrelevant because the
24 Board has found such a transaction to be a taxable lease. *Honeywell Bull, Inc.; CRA, Inc. v. Arizona*
25 *Dep't of Rev.*, No. 646-89-S (BTA Jan. 23., 1990).

26 Appellant argues that , even If the Board determines that the transaction is a lease, it is a lease
27 of personal property,² not real property. The Department concedes that items of personal property may

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29 ² Tangible personal property is defined as "personal property which may be seen, weighed, measured, felt, or
touched or is in any other manner perceptible to the senses." A.R.S. § 42-5001(16).

1 exist within a structure. However, the nature of the property indicates that the lease at issue is of the
2 facility as a whole and not of each individual item comprising Unit Four. Appellant points to a provision
3 of the lease that indicates that the parties intend that the facilities be considered personal property.
4 Although, Appellant and TEP may agree on how the property at issue will be treated as between
5 themselves, this determination is irrelevant for transaction privilege tax purposes. Appellant cannot bind
6 the Department to a contract to which it was not a party.³ See *Higgins v. Smith*, 60 S. Ct. 355 (1940).

7 For purposes of the commercial lease classification, "real property" is defined to include "any
8 improvements, rights or interest in such property." A.R.S. § 42-5069(E)(2). The term is typically defined
9 as "land" and generally whatever is erected or growing upon or affixed to land. Black's Law Dictionary
10 1096 (5th ed. 1979). The property at issue falls within these broad definitions.

11 In conclusion, the Board finds that the evidence indicates Appellant's lease to TEP is subject to
12 transaction privilege tax under A.R.S. § 42-5069.⁴ Further, the late filing and late payment penalties at
13 issue may not be abated because the facts of the case do not show reasonable cause existed in this
14 instance. A.R.S. § 42-1125(A) and (D) (formerly A.R.S. § 42-136(A) and (D)). The interest imposed
15 represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute;
16 therefore, it may not be abated. See A.R.S. § 42-1123(B) (formerly A.R.S. § 42-134(B)); see also *Biles*
17 *v. Robey*, 43 Ariz. 276, 30 P.2d 841 (1934).

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19 CONCLUSIONS OF LAW

20 1. Appellant has failed to prove that its lease to TEP is not subject to transaction privilege tax
21 under A.R.S. § 42-5069. *State Tax Comm'n v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948); A.A.C.
22 R16-3-118.

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26 ³ Because the Board has determined that the property at issue is not personal property, it is not necessary to
27 consider whether it is, as Appellant argues, exempt as personal property used directly in the production and
transmission of electrical power. ARS § 42-5061(B)(4).

28 ⁴ Appellant did not adequately address a final issue involving the classification of two vehicles as personal property
29 and, therefore, did not meet the burden of proof concerning this issue. *Kieckhefer*, 67 Ariz. 102 (1948); A.A.C.
R16-3-118.

