

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
ROSWELL LUMBER CO.
ID NO. 02-144747-00-0
ASSESSMENT NO. 2550044**

No. 00-33

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 31, 2000, before Margaret B. Alcock, Hearing Officer. Roswell Lumber Co. ("Taxpayer") was represented by Bruce W. Ellis, its president. The Taxation and Revenue Department ("Department") was represented by Lewis Terr, Esq. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer operates retail businesses in Roswell and Artesia, New Mexico, selling building materials, lumber, plumbing and electrical supplies, tools, and similar items.
2. The Taxpayer's customers include large contractors, commercial businesses, government agencies, nonprofit organizations, and individuals purchasing items for personal use.
3. The Taxpayer maintains a file of nontaxable transaction certificates ("NTTCs") provided by its customers on a hard drive that is tied to the Taxpayer's computer system.
4. When a customer has an account with the Taxpayer, the certificate type and certificate number of any NTTC on file are automatically recorded on the account and no gross receipts tax is charged on the value of the products purchased.

5. When a customer does not have an account with the Taxpayer, the customer must tell the salesperson there is an NTTC on file and the salesperson will then check the Taxpayer's records.

If the records indicate an NTTC is on file, no gross receipts tax is charged to the customer.

6. The Taxpayer has a number of Type 9 NTTCs on file for various government agencies and nonprofit organizations.

7. Type 9 NTTCs may be executed by government agencies and nonprofit organizations for the purchase of tangible personal property, but may not be used for the purchase of construction materials to be incorporated into construction projects. This information is contained in the CRS-1 Filer's Kit the Department provides to all taxpayers registered for payment of gross receipts, compensating and withholding taxes.

8. On several occasions when the Taxpayer charged gross receipts tax on sales to government agencies and nonprofit organizations, those entities deducted the tax from their payments to the taxpayer, stating they were tax exempt.

9. In February 2000, the Department conducted a field audit of the Taxpayer's books and records for the period January 1997 through December 1999.

10. The auditor found no exceptions in the Taxpayer's reporting of compensating tax, withholding tax or income tax.

11. The only gross receipts tax exceptions found by the auditor related to the Taxpayer's acceptance of Type 9 NTTCs; the Department disallowed the Taxpayer's deduction of receipts from the sale of construction materials to government agencies and nonprofit organizations that had provided Type 9 NTTCs to the Taxpayer.

12. On June 30, 2000, the Department issued Assessment No. 2550044 to the Taxpayer in the total amount of \$5,234.36, representing gross receipts tax, penalty and interest for the period January 1997 through December 1999.

13. On July 18, 2000, the Taxpayer filed a written protest to the Department's assessment.

DISCUSSION

The Taxpayer protests the Department's disallowance of deductions taken on sales of construction materials to government agencies and nonprofit organizations that provided Type 9 NTTCs to the Taxpayer. The Taxpayer raises the following arguments in support of its protest: (1) the Taxpayer was entitled to accept Type 9 NTTCs on sales of construction materials because the materials could be used for repairs as well as for new construction; (2) the Taxpayer was entitled to accept Type 9 NTTCs as conclusive proof that it was entitled to the deductions taken; and (3) requiring the Taxpayer to refuse Type 9 NTTCs on sales of construction materials would create a hardship on the Taxpayer because government and nonprofit entities do not understand the law and believe that all of their purchases are tax exempt.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Accordingly, it is the Taxpayer's burden to come forward with evidence to show that it is entitled to the deductions claimed and the Department's assessment is incorrect.

Applicable Statutes. There are two statutes at issue in this case: Section 7-9-54 NMSA 1978 and Section 7-9-60 NMSA 1978. The pertinent provisions of Section 7-9-54 NMSA 1978 in effect during the audit period read as follows:

A. *Except as provided otherwise in Subsection C of this section, receipts from selling tangible personal property to the United States or New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof may be deducted from gross receipts or from governmental gross receipts.*

...

C. *Unless contrary to federal law, the deduction provided by this section does not apply to... (3) receipts from selling tangible personal property that will become an ingredient or component part of a construction project; ... (emphasis added)*

The pertinent provisions of Section 7-9-60 NMSA 1978 reads as follows:

A. *Except as provided otherwise in Subsection B of this section, receipts from selling tangible personal property to organizations that have been granted exemption from the federal income tax by the United States commissioner of internal revenue as organizations described in Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended or renumbered, may be deducted from gross receipts or from governmental gross receipts if the sale is made to an organization that delivers a nontaxable transaction certificate to the seller....*

B. *The deduction provided by this section does not apply to receipts from selling tangible personal property that will become an ingredient or component part of a construction project or from selling metalliferous mineral ore. (emphasis added)*

These two statutes provide a general deduction for sales of tangible personal property to government agencies and nonprofit organizations, but specifically disallow the deduction on sales of tangible personal property that will become an ingredient or component part of a construction project.

Acceptance of Type 9 NTTCs on Sales of Construction Materials that Could be Used for Repairs. At the hearing, the Taxpayer expressed his belief that repair work did not come within the meaning of the term “construction project” and so the Taxpayer was entitled to accept Type 9

NTTCs on sales of materials that could be used for repairs. This same argument was raised—and rejected—in *Arco Materials, Inc. v. New Mexico Taxation and Revenue Department*, 118 N.M. 12, 14-15, 878 P.2d 330, 332-333 (Ct. App.), *rev'd on other grounds*, 118 N.M. 647, 884 P.2d 803 (1994):

In rejecting Taxpayer's argument, we rely primarily on the legislative definition of "construction" contained in NMSA 1978, Section 7-9-3(C) (Repl. Pamp. 1993). This definition includes, among other things, "building, altering, repairing or demolishing" any road, highway, bridge, parking area, or related project; building or other structure; airport; park, trail, athletic field, golf course, or similar facility; sewage or water treatment facility; pipeline; transmission line; storage tank; or similar work. *Id.* It also includes leveling or clearing land, excavating earth, and similar work. *Id.* Given this broad definition of "construction," which encompasses a wide variety of construction activities, including repairs and projects, we are not persuaded by Taxpayer's argument that the legislature intended to distinguish "construction project" from construction activities generally.

The court's decision is conclusive on this issue. The deduction provided in Section 7-9-54 NMSA 1978 and, by extension, in Section 7-9-60 NMSA 1978, does not apply to receipts from the sale of materials that can be used in building, repairing, altering or demolishing any building or other structure listed in the definition of "construction" set out in Section 7-9-3(C) NMSA 1978.

Effect of a Customer's Tender of a Type 9 NTTC. The Taxpayer argues that it should not be required to determine whether a Type 9 NTTC tendered by a government agency or nonprofit organization actually covers the sale at issue, but should be able to accept the NTTC as conclusive proof that receipts from the transaction are deductible. This argument, too, was raised—and rejected—in the *Arco Materials* case, where the court found that taxpayers have a continuing duty to assess the validity of deductions made in reliance on NTTCs. 118 N.M. at 15, 878 P.2d at 333. In making its decision, the court relied on the following language in Regulation 3 NMAC 2.43.1.14 (formerly GR 43:9):

Acceptance of nontaxable transaction certificates (NTTCs) in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time the certificates are initially accepted. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered thereafter are of the type covered by the certificate.

The court concluded that Type 9 NTTCs do not cover receipts from sales of construction materials to government entities “regardless of what the NTTCs represented on their face.” *See also, McKinley Ambulance Serv. v. Bureau of Revenue*, 92 N.M. 599, 601, 592 P.2d 515, 517 (Ct. App. 1979) (conclusive evidence provision only applies if the certificate covers the receipts in question). The decision in *Arco Materials* applies equally to the facts of this case. Based on the clear language of Sections 7-9-54 and 7-9-60 NMSA 1978, the Taxpayer may not rely on Type 9 NTTCs to deduct receipts from selling construction materials to government and nonprofit entities.

Customers’ Misunderstanding of the Law. Finally, the Taxpayer argues that it will suffer a hardship if it cannot accept Type 9 NTTCs because the Taxpayer is unable to collect gross receipts tax on sales to government and nonprofit entities. At the hearing, Mr. Ellis testified that when the Taxpayer attempts to charge tax to these entities, they deduct the tax from their payments, insisting they are tax exempt. He predicted that government and nonprofit customers required to pay the tax will simply take their business to another vendor. Mr. Ellis also questioned why the Department allows these entities to give Type 9 NTTCs to businesses that sell construction materials.

While it may be true that some government and nonprofit entities do not understand that purchases of construction materials are subject to gross receipts tax, this does not provide a basis for ignoring the law. As discussed above, the language of the statutes on this issue is quite clear. In addition, the instructions contained in the Department’s CRS-1 Filer’s Kit specifically state that “neither governmental agencies nor 501(c)(3) organizations may use these [Type 9] certificates to

purchase construction materials to be used in construction projects.” The only way for the Department to obtain compliance is to enforce the tax laws as written. If Mr. Ellis believes other vendors are not complying with the law and thereby have a competitive advantage over the Taxpayer, he is welcome to forward those names to the Department for audit.

In answer to Mr. Ellis’s question as to why government agencies and nonprofit organizations are allowed to give Type 9 NTTCs to building supply companies, there are certain construction-related items to which a Type 9 NTTC properly applies. For example, a Type 9 NTTC may be accepted for the sale of work gloves, tools, construction equipment and other items of tangible personal property that are used in building or repairing a structure, but do not become an ingredient or component part of the structure itself. Only sales of tangible personal property designed or intended to become part of the construction project, including doors, ceiling panels, counter tops, drywall, studs, etc., are excluded from the deductions provided in Sections 7-9-54 and 7-9-60 NMSA 1978. It is up to the Taxpayer to educate its employees as to which items are covered by Type 9 NTTCs and which items are subject to gross receipts tax.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2550044, and jurisdiction lies over the parties and the subject matter of this protest.
2. The deductions provided in Sections 7-9-54 and 7-9-60 NMSA 1978 do not apply to sales of construction materials to government agencies and nonprofit organizations, and the Taxpayer is subject to gross receipts tax on these transactions.
3. The Taxpayer is not entitled to accept or rely on Type 9 NTTCs to support a deduction of receipts from sales of construction materials to government agencies and nonprofit organizations.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED November 21, 2000.