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

IN THE MATTER OF THE PROTEST OF
J. W. JONES MECHANICAL CONTRACTORS, INC. **No. 02-18**
ID NO. 01-134848-00-8
ASSESSMENT NO. 2589543

DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 12, 2002, before Margaret B. Alcock, Hearing Officer. J. W. Jones Mechanical Contractors, Inc. ("Taxpayer") was represented by Gary Jones, one of its owners. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in business in New Mexico and is registered with the Department for payment of gross receipts, compensating and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").

2. The Taxpayer performs mechanical, heating and plumbing services on construction projects. The Taxpayer generally works as a subcontractor and obtains a nontaxable transaction certificate from the general contractor, which allows the Taxpayer to deduct its receipts for purposes of the New Mexico gross receipts tax.

3. On March 3, 1998, the Department began a field audit of the Taxpayer. On the same day, the auditor delivered a "60-day letter" to Genevieve Jones, the company's secretary/treasurer and the contact person for the audit.

4. The letter notified the Taxpayer that it had 60 days to obtain possession of nontaxable transaction certificates ("NTTCs") needed to support its deductions and further stated: "If the above listed required documentation is not in your possession within 60 days from the date of this notice, deductions previously claimed relating to that documentation will be disallowed. **Such disallowance may result in a substantial tax liability which will include penalty and interest**" (emphasis in the original).

5. As of May 3, 1998, the expiration of the 60-day period, the Taxpayer still had not provided the auditor with NTTCs to support its deduction of receipts from several general contractors, including ESA Construction, Ray Ward & Sons, Leprino, D&S Construction, Waide Construction, Chaparral Builders and Village Hall.

6. In October and November 1998, several months after the 60-day deadline, the auditor received NTTCs from ESA Construction and Ray Ward & Sons. Based on the sequential numbering of the NTTCs, the auditor determined that the two companies had backdated the NTTCs to the date the Taxpayer's work was performed, rather than the date the NTTC was issued.

7. Because the NTTCs from ESA and Ray Ward were not in the Taxpayer's possession within the 60-day period required by statute, the auditor refused to accept the NTTCs to support the Taxpayer's deductions.

8. The Taxpayer's work for Leprino and D&S Construction was performed on construction projects for the City of Roswell and the federal government. The two general contractors told the Taxpayer that these projects were not subject to gross receipts tax and refused to either pay the gross receipts tax charged by the Taxpayer or provide the Taxpayer with an appropriate NTTC.

9. The Taxpayer never consulted with an attorney or an accountant to determine whether the advice received from the general contractors was correct or to insure that the Taxpayer was properly reporting its gross receipts taxes to the state.

10. At the administrative hearing, the Taxpayer provided evidence that the project listed as "Village Hall" in the auditor's workpapers was actually work done for Greer Construction, a contractor for which the Taxpayer did have a timely NTTC.

11. The Taxpayer did not provide any explanation for its failure to produce NTTCs to support the remaining disallowed deductions, including its deduction of receipts from Waide Construction and Chaparral Builders.

12. On October 21, 2000, the Department issued Assessment No. 2589543 to the Taxpayer in the total amount of $530,011.49, representing gross receipts tax, penalty and interest for the period January 1994 through August 1997.

13. On October 24, 2000, the Taxpayer filed a written protest to the assessment.

DISCUSSION

In general, the Taxpayer does not dispute the correctness of the Department's audit findings or the fact that it did not demonstrate timely possession of NTTCs needed to support certain deductions taken during the audit period. Nonetheless, the Taxpayer believes that there are extenuating circumstances and that it should not be required to pay gross receipts taxes it never collected from its customers, particularly when its actions were due to a lack of knowledge and not to any intent to defraud the state.

Section 7-1-17(C) NMSA 1978 states 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). When a taxpayer claiming a deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988). Based on these principles, it is the Taxpayer's burden to come forward with evidence and legal argument to show that it is entitled to the deductions it claims and that the Department's assessment is incorrect.

The Gross Receipts and Compensating Tax Act provides several deductions for taxpayers who meet the statutory requirements set by the legislature. In this case, the Taxpayer claims the following deduction provided in Section 7-9-52 NMSA 1978:

> A. Receipts from selling a construction service may be deducted from gross receipts *if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate* to the person performing the construction service. (emphasis added)

This statute allows the Taxpayer to deduct its receipts from performing services as a subcontractor if the general contractor provides the Taxpayer with an NTTC. As quoted above, the requirements of Section 7-9-52 NMSA 1978 are very specific. If the subcontractor fails to obtain an NTTC from the general contractor, there is no basis for a deduction.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. At the time of the audit, this section provided, in pertinent part:

> A. All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor

> that require delivery of these nontaxable transaction certificates shall be disallowed....

The language of the statute is mandatory and provides no exceptions. If a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed"* (emphasis added).

Deduction of Receipts from ESA Construction, Inc. and Ray Ward & Sons. In this case, the auditor gave the Taxpayer a 60-day notice on March 3, 1998, and the Taxpayer was required to have all NTTCs in its possession by May 3, 1998. Although the Taxpayer later provided the auditor with NTTCs from ESA Construction, Inc. and Ray Ward & Sons, these NTTCs were not issued to the Taxpayer by the general contractors until October and November 1998, well after the 60-day deadline. For this reason, the Taxpayer is foreclosed from deducting its receipts from these contractors.

Deduction of Receipts from Waide Construction and Chaparral Builders, Inc. At the administrative hearing, Gary Jones, one of the Taxpayer's owners, testified that the Taxpayer had NTTCs from Waide Construction and Chaparral Builders, Inc. in its possession at the time the audit began. Unfortunately, Mr. Jones never mentioned this to the field auditor or to the Department's protest auditor. Nor did he bring the NTTCs with him to the administrative hearing. Having failed to produce copies of the NTTCs at issue, the Taxpayer has not met its burden of proving that the NTTCs were in its possession within the time limits set by Section 7-9-43 NMSA 1978, and the Taxpayer is not entitled to deduct its receipts from these contractors.

Deduction of Receipts from Leprino and D&S Construction. The Taxpayer does not dispute its failure to obtain NTTCs from Leprino and D&S Construction, but maintains that it was misled by these

contractors and should not be required to pay gross receipts taxes that it was never able to collect. The problem with this argument is that, unlike other states, New Mexico does not have a sales tax that is charged to and collected from the buyer. New Mexico has a gross receipts tax that is imposed directly on the seller of goods and services. In effect, the gross receipts tax is part of the seller's cost of doing business. Although it is common practice for a seller to pass the gross receipts tax on to the buyer, the seller's ability to separately charge or obtain reimbursement of the tax does not affect its legal obligation to report and pay gross receipts tax to the state.

New Mexico has a self-reporting tax system, and all taxpayers have a duty to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). If a taxpayer does not have adequate knowledge or information concerning the tax laws, the taxpayer has an obligation to consult with a qualified accountant or attorney. In *Tiffany Construction, supra*, the court held that a taxpayer's mere belief that taxes are not owed, without further investigation, constitutes negligence. The court further held that a taxpayer's failure to consult with an expert as to its tax liability may constitute negligence. *See also*, Department Regulation 3.1.11.11 NMAC.

In this case, Gary Jones had reservations concerning Leprino's assertions that no gross receipts tax was due on the construction project for the City of Roswell, as evidenced by the fact that the Taxpayer continued to include the tax on its invoices to Leprino. Despite these reservations, the Taxpayer never consulted with an attorney or an accountant concerning the advice it received from Leprino. Nor did the taxpayer consult with a tax advisor when D&S Construction told the Taxpayer that federal projects were not subject to tax. The Taxpayer's lack of knowledge and its failure to take the steps necessary to accurately determine its gross receipts tax liability comes within the definition of

negligence and does not warrant an abatement of the tax, interest or penalty assessed on these transactions.

Deduction of Receipts from Greer Construction. At the administrative hearing, the Taxpayer provided evidence that the construction project listed as "Village Hall" in the auditor's workpapers was actually work done for Greer Construction, a contractor for which the Taxpayer did have a timely NTTC. Accordingly, the Taxpayer is entitled to an abatement of the tax, penalty and interest assessed on its receipts from this project.

Other Disallowed Deductions. The Taxpayer conceded that it did not have any explanation for its failure to pay gross receipts tax on the remaining disallowed deductions listed in the auditor's workpapers.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2589543, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer had a timely NTTC from Greer Construction to support the disallowed deduction listed in the auditor's workpapers as "Village Hall."

3. The Taxpayer did not have timely possession of the NTTCs required to support its deduction of the remaining receipts at issue in this case.

4. With the exception of tax on the Village Hall project, the Taxpayer has failed to meet its burden of proving that the Department's assessment of tax, penalty and interest was incorrect.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the tax principal, penalty and interest related to the Village Hall construction project. The Taxpayer remains liable for the balance of tax, penalty and interest due under Assessment No. 2589543.

DATED August 15, 2002.