

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

IN THE MATTER OF THE PROTEST OF
BASIN ELECTRICAL SERVICES CO., INC.
I.D. NO. 02-197353-00 9 PROTEST TO
DENIAL OF CLAIM FOR REFUND.

No. 96-13

DECISION AND ORDER

This matter came on for formal hearing on April 16, 1996 before Gerald B. Richardson, Hearing Officer. Basin Electrical Services Co., Inc. (hereinafter "Taxpayer") was represented by Mr. Dudley Griffith, Office Manager for the Taxpayer. The Taxation and Revenue Department (hereinafter "Department") was represented by Gail MacQuesten, Special Assistant Attorney General.

Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is an electrical contractor and a small, family owned and operated corporation, which operated in Flora Vista New Mexico and was run by Mr. Walter "Tex" Barker.
2. In the spring of 1994, the Taxpayer bid for and was awarded two contracts to do electrical work as a subcontractor on two construction projects. One was with Bradbury and Stamm Construction Company and the other was with the Jaynes Corporation.
3. On May 30, 1994, Mr. Walter Barker died suddenly of a heart attack. Mr. Barker's widow and young son had to step in and run the business long enough to complete its contractual obligations with Bradbury and Stamm and the Jaynes Corporation.
4. The contract with the Jaynes Corporation was to perform certain specified electrical work on the Blanco Gym Renovation Project for the Bloomfield Municipal School District. The contract amount was \$20,513, plus change orders of \$1,074 for a total of \$21,587, paid to the

Taxpayer as follows:

October 28, 1994.....	\$ 1,451
August 12, 1994.....	\$ 2,597
July 15, 1994.....	\$17,539

5. The contract with the Jaynes Corporation specified that the contract amount was not to include gross receipts tax.

6. The Jaynes Corporation did not deliver a nontaxable transaction certificate ("NTTC") to the Taxpayer when it made payment of the amounts paid under its contract and the Taxpayer did not request a NTTC as Mr. Barker had handled the tax reporting and payment functions previously and the remaining personnel did not realize or understand that their receipts from performing subcontract electrical services could be deducted if a proper type of NTTC was received from the prime contractor. Accordingly, when the Taxpayer reported and paid gross receipts tax upon its receipts from the Jaynes corporation, the Taxpayer paid tax upon its total receipts and claimed no deduction from tax.

7. Although the Taxpayer did have in its possession a NTTC from Bradbury and Stamm Construction Company as a result of other subcontract electrical work it had previously done for them, the Taxpayer also reported and paid gross receipts tax on its receipts from Bradbury and Stamm. Subsequently, in discussions with someone from Bradbury and Stamm, Mr. Griffith learned that the Taxpayer was eligible to claim a deduction from gross receipts tax upon its receipts from performing subcontract electrical services for prime contractors when a NTTC has been delivered to the subcontractor from the prime contractor and the prime contractor pays gross receipts tax upon its receipts from the construction project.

8. As a result of these discussions, Mr. Griffith requested a NTTC from the Jaynes Corporation, which the Jaynes Corporation issued on January 30, 1995. On February 2, 1995, Mr. Griffith filed a claim for refund with the Department requesting a refund of \$13,188.39 of gross

receipts taxes paid on its receipts from the Jaynes Corporation, Bradbury and Stamm and Fesco Contracting Company and claiming a deduction for those receipts.

9. By letters dated February 13, 1995 and February 21, 1995, the Department partially denied the Taxpayer's refund claim in the amount of \$1,146.64, representing the amounts of gross receipts tax paid on the Taxpayer's receipts from the Jaynes Corporation. The basis for the Department's partial denial of the Taxpayer's refund claim was that the Taxpayer was not in possession of the NTTC from the Jaynes Corporation at the time its tax returns reporting and paying tax on its receipts from the Jaynes Corporation were due.

10. On May 11, 1995, the Taxpayer filed a written protest of the partial refund denial with the Department.

DISCUSSION

The issue presented herein is whether the Department properly denied the portion of the Taxpayer's claim for refund which was denied. The Department based its denial upon the fact that the Taxpayer was not in possession of the NTTC from the Jaynes Corporation at the time its tax return was due reporting its receipts from the Jaynes Corporation. The Department argues that possession of the NTTC at the time the tax return was due is required by the provisions of Section 7-9-43(A), which provides in pertinent part as follows:

The provisions of the subsection apply to transactions occurring on or after July 1, 1992.

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees *shall 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 does not demonstrate possession of required nontaxable transaction certificates to the department at the commencement of an audit or demonstrate 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 that the seller or lessor *was in possession of such certificates at the time receipts from the transactions were required to be reported, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed. . . .* (emphasis added).

This provision, which was substantially amended by the legislature in 1992, clearly and unambiguously requires that for taxpayers to claim a deduction requiring a NTTC, that the NTTC be in the possession of the seller at the time the return is due for receipts from the transaction, or in alternative language, at the time receipts from the transaction are required to be reported. There is no dispute herein that the deduction which the Taxpayer sought to avail itself, the deduction at Section 7-9-52 NMSA 1978 which allows a deduction for sellers of subcontracted construction services sold to prime contractors, requires a NTTC as part of the statutory requirements for claiming the deduction.

The Taxpayer does not dispute that Section 7-9-43 requires that the NTTC be in its possession at the time its tax returns reporting its receipts from the Jaynes Corporation were due,¹ nor does it dispute that it did not comply with that requirement. The Taxpayer, however, asks that the Department take into consideration the unfortunate circumstances which caused it to not be in compliance with the statutory requirements, the death of Mr. Barker, who had handled the tax matters previously and would have been aware of the NTTC requirement. The Taxpayer also asks that the Department take into consideration the fact that if the deduction is denied, the state will have collected tax twice on the same electrical work. Finally, the Taxpayer asks that consideration be given to the fact that the instructions to the filing kit given gross receipts tax filers only requires that taxpayers claiming deductions only have the NTTC in their possession "when claiming the deduction," and the Taxpayer points out that it did have the NTTC from Jaynes Corporation by the time it claimed the deduction by filing its refund claim in February of 1995.

In considering the issues raised by the Taxpayer, the changes made to Section 7-9-43 by the 1992 legislature (Laws 1992, Ch. 39), provide an informative backdrop. Section 7-9-43 had been written less stringently prior to the 1992 amendments. Although there was language which

¹ Section 7-9-11 NMSA 1978 requires that gross receipts taxes must be paid on or before the twenty-fifth day of the month in which the taxable event occurs. Since the Taxpayer's receipts from the Jaynes Corporation were received in July, August and October of 1994, its returns reporting those taxes were due in August, September and November of 1994, respectively. The Taxpayer did not have the NTTC from the Jaynes Corporation until January of 1995, however.

indicated that the seller should be in possession of the NTTC at the time the nontaxable transactions occur, the legislature chose to use the word, "should," rather than the mandatory term "shall," as is presently used. Additionally, a taxpayer's claimed deduction would only be disallowed if they failed to produce a NTTC within sixty days of the receipt of notice from the Department requiring their possession. There was no requirement, however, that the Taxpayer actually demonstrate possession at the time the return claiming the deduction is filed. Thus, the legislature substantially tightened the requirements for possessing NTTCs to substantiate claimed deductions. This is indicative of the fact that the legislature intended that the requirement to possess a NTTC to claim a deduction be strictly enforced. Thus, although Mr. Barker's death certainly provides a reasonable explanation for why statutory requirements were not strictly met, nonetheless, the allowance of the deduction is governed by the terms of the statute which the legislature intended to be strictly enforced. Additionally, the legislative changes indicate that the legislature was well aware that there would be circumstances where the failure to possess the NTTC at the time the tax deduction was claimed would result in the double taxation of a transaction, but the legislature still mandated that the deduction "shall be disallowed". Finally, although the Department's instructions are not inaccurate in their requirement that the NTTC be in the seller's possession "when claiming the deduction," the statutory language is more precise in defining what possession "when claiming the deduction" means. The Department has been charged with the responsibility to interpret, implement and enforce the various tax statutes. It is without authority, however, to interpret and implement a statute in a way which would conflict with the clear and unambiguous language in the statute, and in the event of a conflict between a statute and a departmental instruction, the statute would govern.

It should be noted that the Taxpayer in this case conducted its business operations in a totally honest and above-board manner with respect to the manner in which it reported and paid taxes. Unfortunately, this may not be taken into consideration with respect to the Department's

obligation to implement the statutes as the legislature has written them even where the circumstances affecting the Taxpayer's compliance with the strict letter of the law are quite understandable.

For these reasons, the Taxpayer's protest to the partial denial of its refund claim must be denied.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest, pursuant to Section 7-1-26 NMSA 1978, to the Department's partial denial of its claim for refund, and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was not in possession of a NTTC from the Jaynes Corporation at the time its returns were due to report its gross receipts from the Jaynes Corporation and therefore the Taxpayer was not entitled to claim a deduction for its receipts from the Jaynes Corporation pursuant to Section 7-9-43(A) NMSA 1978.

3. The Department properly denied the Taxpayer's claim for refund for the gross receipts taxes reported upon its receipts from the Jaynes Corporation.

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

DONE, this 22nd day of April, 1996.