

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

IN THE MATTER OF THE PROTEST OF
CLAUDE BURGER LATH & PLASTER
ID NO. 01-133148-00 8, PROTEST
TO ASSESSMENT NO. 2057422

No. 97-08

DECISION AND ORDER

This matter came on for hearing on February 7, 1997, before Ellen Pinnes, Hearing Officer. Claude Burger Lath & Plaster ("the Taxpayer") was represented by its owner, Claude Burger. The Taxation and Revenue Department ("the Department") was represented by Margaret B. Alcock, Special Assistant, Attorney General.

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

FINDINGS OF FACT

1) The Taxpayer, which is based in Clovis, New Mexico, is in the business of selling construction services, including services provided as a subcontractor on construction projects.

2) The assessment at issue, No. 2057422, is for gross receipts taxes due on sales of construction services for resale.

3) The assessment was issued pursuant to an audit of the Taxpayer's tax records. The audit began on February 21, 1996, and covered the period from January, 1992, through December, 1995.

4) The Taxpayer was given advance notice of the audit by a letter dated January 22, 1996, from the Department's Audit and Compliance Division (Ex. 1, p. 1). That letter notified the Taxpayer that an audit would be performed and specifically advised the Taxpayer of the need to have nontaxable transaction certificates (NTTCs) in its possession to support deductions taken

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from gross receipts.

5) At the commencement of the audit on February 21, 1996, the Department's auditor gave the Taxpayer a letter of introduction, identifying the auditor who would be performing the audit, stating the date on which the audit was deemed to have started for purposes of §7-9-43 NMSA 1978, and reiterating requirements relating to possession of NTTCs (Ex. 1, p. 2). Also, on February 21, 1996, the auditor gave the Taxpayer a second letter which set out the requirements regarding NTTCs in greater detail (Ex. 1, p. 3).

6) The auditor identified a number of deductions taken by the Taxpayer during the audit period for which the Taxpayer did not have proper NTTCs to support the deduction. The total amount of gross receipts determined to be subject to tax and on which gross receipts tax had not been paid was \$385,988.67. (See Ex. 2, p. 3.)

7) The Taxpayer did not produce NTTCs to support these deductions, either at the time of the audit or within sixty days of the audit.

8) Assessment No. 2057422 was issued by the Department on August 11, 1996, for \$22,920.68 in gross receipts taxes plus penalty and interest.¹

9) The Taxpayer filed a timely protest of the assessment.

10) After the assessment was issued and the protest filed, the Taxpayer, by letter dated October 28, 1996, submitted to the Department copies of NTTCs relating to the disallowed deductions (Ex. 3).

11) Each NTTC issued by the Department shows, in the "date issued" block on the left

¹ The Department also issued a second assessment on August 11, 1996 for corporate income tax due for 1993, plus penalty and interest. That assessment is not at issue here.

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side of the certificate, the date on which it was issued to the person authorized to give it to a seller of goods or services. On the right side of the certificate is a separate "date" block which should show the date on which the certificate is delivered to the seller by the purchaser.

12) Two of the certificates in Exhibit 3, those from Chaparral Builders, Inc., and Midcon, Inc., stated that the certificates were presented to the Taxpayer on January 1, 1992. However, these certificates were not issued by the Department until July, 1995, and November, 1994, respectively. They therefore could not have been given to the Taxpayer in January, 1992. It appears that the parties presenting these certificates to the Taxpayer backdated them in an attempt to assist the Taxpayer in establishing the propriety of deductions taken in connection with sales to these parties. There is no allegation by the Department that the Taxpayer was responsible for the backdating of the certificates.

13) No transactions involving Midcon, Inc., are involved in the assessment at issue here. (See Ex. 2, p. 3.)

14) The transactions involving Chaparral Builders that are involved in Assessment No. 2057422, took place between April, 1994, and April, 1995. The NTTC given to the Taxpayer by Chaparral Builders was not issued by the Department until July, 1995.

15) Chaparral Builders paid applicable gross receipts tax on its own receipts from projects incorporating work by the Taxpayer. (See Ex. A.)

16) Two of the certificates in Exhibit 3, those from Inca Construction Co., Inc., and Cheyenne Building Contractors, state on their faces that they were presented to the Taxpayer in July, 1996, several months after the Department's audit.

17) No transactions involving Cheyenne Building Contractors are involved in the

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assessment at issue.

18) The transactions involving Inca Construction Co. that underlie part of the assessment here took place in January, February and April of 1993. The certificate given to the Taxpayer by Inca Construction was issued by the Department in May, 1993.

19) One of the certificates in Exhibit 3, from J.M. Brook Corp., was issued by the Department on June 6, 1994, and given to the Taxpayer on November 1, 1995. A single transaction with J.M. Brook is involved in the assessment here; that transaction took place in December, 1995.

20) The final certificate in Exhibit 3, from A&M Building Systems, Inc., was issued by the Department on November 26, 1991, and delivered to the Taxpayer on January 30, 1992. A&M Building Systems apparently was the purchaser in transactions listed in Exhibit 2 under the name "Landmark Title" as well as a transaction under the A&M name. These three transactions took place in March, April and May of 1992.

21) For transactions in the first half of 1992, it appears that the Taxpayer had a proper NTTC in its possession at the time of the transactions. However, it did not make the NTTC available for inspection by the Department within sixty days of notice by the department requiring that the NTTCs be in the Taxpayer's possession.

22) For transactions occurring after July 1, 1992, the Taxpayer did not demonstrate to the Department within sixty days of the commencement of the audit that it had NTTCs in its possession at the time the return for receipts from the transactions were due. In some cases, the Taxpayer did not have NTTCs for those transactions at the time the returns were due; in others, the Taxpayer may have had the NTTC at the time the returns were due, but did not demonstrate

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that possession to the Department within the applicable time period.

23) The only excuse offered by the Taxpayer for failing to have NTTCs in its possession at the required times, or to so demonstrate to the Department, was that it was unaware of the legal requirements regarding NTTCs.

DISCUSSION

Gross receipts taxes; requirement of nontaxable transaction certificates

The New Mexico Gross Receipts and Compensating Tax Act requires that, in order for a taxpayer to claim a deduction for receipts from transactions occurring on or after July 1, 1992, appropriate NTTCs must be in the taxpayer's possession at the time the return is due for receipts from the transactions. §7-9-43(A) NMSA, 1978. If the taxpayer does not demonstrate timely possession of the certificates at the commencement of an audit, it has sixty days from the date of notice from the Department to show that it was in fact in possession of the certificates at the time the return was due. If these requirements are not met, deductions claimed by the taxpayer and requiring a certificate to support the deduction will be disallowed. Id.

The requirements for transactions occurring prior to July 1, 1992, are slightly different. For these earlier transactions, taxpayers must have had applicable NTTCs in their possession at the time of the transaction, rather than when the return was due. There is still a requirement that certificates be available for inspection by the Department within sixty days of notice requiring possession. TRD Regulation GR 43:1(A).

For most of the transactions underlying the assessment here, Claude Burger Lath & Plaster did not have proper NTTCs in its possession at the applicable time. Included in the assessment are eight transactions with Chaparral Builders, occurring from April, 1994, through

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April, 1995. Returns for taxes on these receipts were due in May, 1995, and earlier. §7-90-11 NMSA 1978. The NTTC given to the Taxpayer by Chaparral was not issued by the Department until July, 1995, and thus could not have been in the Taxpayer's possession at the time the returns were due. Similarly, transactions with Inca Construction Company took place in the first half of 1993. The NTTC was not presented to the Taxpayer by Inca until July, 1996, well after returns were due for receipts from the 1993 transactions. NTTCs for transactions with J.M. Brook Corp. and A&M Building Systems were given to the Taxpayer by these purchasers prior to the dates of the transactions and thus may have been in the Taxpayer's possession at the required times.

However, the Taxpayer was required not only to have the certificates in its possession at the appropriate times, but to demonstrate such possession within sixty days of notice from the Department. The Taxpayer did not demonstrate possession of NTTCs pertaining to these transactions until October, 1996, more than eight months after notice was given by the Department.

Because the Taxpayer did not demonstrate possession of required NTTCs within the time frame set out in the Gross Receipts and Compensating Tax Act and accompanying regulations, deductions for receipts from these transactions were properly disallowed as provided in §7-9-43(A) NMSA 1978. The Department's assessment for gross receipts taxes on these receipts was therefore proper.

Interest

The New Mexico Tax Administration Act, §7-1-67 NMSA, 1978, provides for the imposition of interest on tax deficiencies:

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- A. If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid to the state on such amount* from the first day following the day on which the tax becomes due ... until it is paid... .
- B. Interest due to the state under Subsection A ... *shall be at the rate of fifteen percent a year...* . (Emphasis added.)

It is a well settled rule of statutory construction that the word "shall" is mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. State v. Lujan, 90 N.M. 103, 560 P.2d 167 (1977). The New Mexico Legislature has expressly reiterated this general rule in §12-2-2(I) NMSA 1978 (in construing statutory provisions, the words "shall" and "must" are to be construed as mandatory unless this would be inconsistent with manifest legislative intent or repugnant to the context of the statute).

Section 7-1-67 requires that interest, at the rate of 15% per year, be imposed on the amount of any unpaid taxes. No exceptions to this rule are provided for. Interest is intended to compensate the state for the time-value of money which was not paid when it was due. While it may be unpleasant to pay interest on monies owed, interest is not a penalty for late payment. It is, rather, a means of making a creditor whole through reimbursement for not having had the use of the money during the time it remained unpaid. While the interest rate imposed here may seem high, that rate has been set by the Legislature in the statute, and both the Department and the hearing officer lack the authority to reduce it.

Penalty

The Tax Administration Act provides that a penalty will be imposed in certain circumstances when a taxpayer does not pay tax at the time it is due. The penalty is not based

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simply on failure to make payment on time. Rather, such failure must be due to negligence or disregard of rules and regulations. §7-1-69(A) NMSA 1978.

Here, the only reason given by the Taxpayer to excuse its failure to pay gross receipts tax on the transactions at issue was ignorance of the legal requirements pertaining to the use of NTTCs and the taking of deductions from gross receipts. This is insufficient grounds on which to base a finding that the Taxpayer is not liable for penalty. The Taxpayer had a reasonable duty to be aware of the requirements imposed on its operations by the tax laws of this state. See Tiffany Construction Company, Inc. v. Bureau of Revenue, 90 N.M. 16, 558 P.2d 1155 (Ct.App. 1976), cert. den. 90 N.M. 255, 561 P.2d 1348 (1977). Its failure to familiarize itself with the requirements pertaining to the use of NTTCs and the taking of deductions from gross receipts constituted negligence and/or disregard of rules and regulations, and the penalty authorized by §7-1-69(A) was properly imposed by the Department.

CONCLUSIONS OF LAW

1) The Taxpayer filed a timely protest of Assessment No. 2057422. Jurisdiction thus lies over the parties and the subject matter of this protest.

2) The Taxpayer improperly deducted certain receipts from gross receipts and failed to pay applicable gross receipts tax thereon, and the Department's assessment for such unpaid tax is proper.

3) Because the Taxpayer did not pay the tax owed at the time it was due, interest was properly imposed on the deficiency at the statutory rate.

4) The Taxpayer's failure to pay the tax was due to negligence and/or disregard of

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applicable rules and regulations, and penalties were properly imposed on the unpaid amounts.

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

DONE, this 7th day of March, 1997.