

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

IN THE MATTER OF THE PROTEST OF
NOVICK'S PAINTING, ID. NO.
02-016295-00 2, PROTEST TO
ASSESSMENT NO. 2084522

NO. 97-13

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on April 9, 1997. Novick's Painting, hereinafter, "Taxpayer", was represented by its owner, Mr. John D. Novick. 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 a painting contractor which engages in the business of house painting.
2. The Taxpayer has been in the housepainting business for approximately ten years.
3. Prior to 1992 the Department had issued type 6 nontaxable transaction certificates ("NTTCs") to the Taxpayer. By issuing a NTTC to a vendor of paint and painting supplies, the vendor was able to claim a deduction from gross receipts tax pursuant to NMSA 1978, § 7-9-51, for the sale of tangible personal property to be incorporated as an ingredient or component part of a construction project. Because the vendor could claim a deduction from gross receipts tax on such transactions, the Taxpayer was able to purchase the materials used in its business free of the cost of gross receipts taxes which would normally be passed on to the purchaser.
4. Effective January 1, 1992, the law changed with respect to NTTCs. The old, pre-1992 NTTCs became invalid and taxpayers wishing to obtain the new 1992 NTTCs were

Decision and Order

Novick's Painting

Page -2-

required to pay a \$100 fee to obtain NTTCs.

5. Mr. Novick applied to the Department for the new 1992 form NTTCs, but he felt it was wrong for the Department to charge a fee for NTTCs, so he refused to include the \$100 fee with his application for NTTCs.

6. The Department denied the Taxpayer's application for the new 1992 NTTC's based upon the Taxpayer's failure to pay the required fee.

7. The law concerning NTTC's was changed again, effective April 1, 1994, to repeal the requirement that an applicant for NTTC's pay a \$100 fee.

8. After the \$100 fee was repealed, the Taxpayer applied again with the Department for type 6 NTTCs. The application form for type 6 NTTCs requires that an applicant provide a contractor's license number or provide proof that a contractor's license is not required. Mr. Novick filled out the box requesting a contractor's license number with the notation, "none", and he failed to attach a letter or other information to demonstrate that a contractor's license is not required.

9. The Department denied the Taxpayer's application for NTTCs for failure to explain why a contractor's license is not needed to do housepainting.

10. The Taxpayer did not follow up on the denial of its application for NTTCs by providing information to the Department as to why it did not need a contractor's license, nor did the Taxpayer otherwise protest the Department's denial of its application for NTTCs.

11. When the Taxpayer was no longer able to purchase its materials free of the cost of gross receipts tax, the Taxpayer began deducting the cost of goods and materials from gross receipts upon which gross receipts tax was reported and paid.

Decision and Order

Novick's Painting

Page -3-

12. Pursuant to an information sharing agreement with the Internal Revenue Service, the Department receives information about taxpayers who file a Schedule C reporting income or loss from a business in New Mexico.

13. As a result of information the Department received from the Internal Revenue Service about the Taxpayer, on November 14, 1996, the Department issued Assessment No. 2084522 to the Taxpayer, assessing \$686.65 in gross receipts tax, \$68.67 in penalty and \$308.99 in interest, totalling \$1064.31 for the 1993 calendar year.

14. On November 19, 1997, the Taxpayer filed a timely, written protest to Assessment No. 2084522.

DISCUSSION

The Taxpayer disputes the assessment at issue on the basis that it amounts to double taxation, which the Taxpayer believes is prohibited. It is a popular misconception that there is something inherently illegal or unconstitutional with double taxation. As noted by Justice Oliver Wendell Holmes in *Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920), the U.S. Constitution "no more forbids double taxation than it does doubling the amount of a tax." Although there is nothing inherently illegal with double taxation, most tax policy makers, such as state legislatures and Congress, recognize that from a tax policy standpoint, double taxation is objectionable because it is perceived to be unfair. Since ultimately, the success of a tax system in raising the revenues needed to maintain government operations depends upon the willingness of the subjects of taxation to properly pay and report taxes, if the system is perceived to be unfair, the foundation of the tax system is eroded.

Decision and Order

Novick's Painting

Page -4-

Before discussing the particular facts of this case, it is instructive to understand the operation and imposition of New Mexico's gross receipts tax. The gross receipts tax is imposed upon the gross receipts of persons engaging in business in New Mexico. NMSA 1978, § 7-9-4.

"Gross receipts" is defined at NMSA 1978 § 7-9-3(F) as follows:

"gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico, from selling services performed outside New Mexico the product of which is initially used in New Mexico or from performing services in New Mexico.

Thus, the legal incidence of the gross receipts tax is upon the seller of goods or services and the lessor of property, not upon the purchaser or lessee. *United States v. New Mexico*, 581 F. 2d 803 (10th Cir. 1978).

In this case, the Taxpayer objects to what it perceives to be double taxation of the paint and other materials it uses in performing housepainting services. Because the Taxpayer did not have a NTTC to present to the paint supply company, the paint supply company could not claim a deduction from its gross receipts pursuant to NMSA 1978, § 7-9-51, which allows the seller of materials which will be incorporated into a construction project to claim a deduction when selling those materials to a purchaser who delivers a NTTC. The paint company thus sought to recoup that tax by passing on the cost of that tax to the Taxpayer when it made its purchases.

The Taxpayer is also liable for gross receipts tax upon its own gross receipts from performing painting services for its customers. When the Taxpayer bills its customers, it does not itemize the cost of the paint and supplies from its labor costs, but rather, it charges a fee for the painting job, inclusive of materials. The entire amount the Taxpayer receives for performing the painting job represents the Taxpayer's gross receipts which are subject to gross receipts tax.

Decision and Order

Novick's Painting

Page -5-

Because the Taxpayer has already paid the cost of passed-on gross receipts tax from its paint supplier, the Taxpayer believes that it is being subjected to double taxation.

Double taxation does not exist under the facts as outlined. There are two separate transactions, involving two separate taxpayers, each of which is subjected to gross receipts tax only once. There is the sale of the paint by the paint supply company, and there is the sale of a painting service, which service includes the paint used in performing the service, which is being sold by the Taxpayer to its customer. There is no double taxation. *See, House of Carpets v. Bureau of Revenue*, 84 N.M. 747, 507 P.2d 1078 (Ct. App. 1973).

Even though there is no double taxation, the New Mexico legislature has been careful to provide a number of statutory deductions to prevent the pyramiding or stacking of the gross receipts tax. Thus, it has provided a deduction for the sale of tangible personal property which will be resold, where the purchaser of the property provides the seller with a NTTC and represents that the property will be resold. *See*, NMSA 1978, § 7-9-48. Similarly, it has provided for a deduction, pursuant to § 7-9-51 for the sale of tangible personal property which will be incorporated into a construction project which will be subject to gross receipts tax upon its completion. This deduction would have been available to the Taxpayer's paint supplier if the Taxpayer had provided the supplier with a NTTC. Then the Taxpayer could have bought its paint free of the cost of passed-on gross receipts tax. This deduction was not available, however, because the Taxpayer did not have a NTTC to present to its supplier to support the deduction because the Taxpayer refused to pay the \$100 fee the legislature imposed to obtain NTTCs or because, after the fee was repealed, the Taxpayer failed to follow the instructions on the application for NTTCs which required that it provide an explanation as to why a contractor's

Decision and Order

Novick's Painting

Page -6-

license was not needed to perform the kind of construction services it performed. Instead of paying the \$100 fee, or instead of taking up the denial of its application of NTTCs with the Department by providing the necessary documentation or by filing a protest to the Department's denial of its application for NTTCs, the Taxpayer chose to create its own remedy by deducting from its receipts the total amount it paid for the materials it used in its painting jobs. The law does not allow this type of self-help. By creating a deduction not authorized by statute and in contravention of the definition of gross receipts, the Taxpayer has disregarded the statutes imposing gross receipts taxes and provided the basis for the Department's assessment of tax. Because there are no exemptions or deductions from gross receipts tax which would apply to any portion of the Taxpayer's gross receipts from performing painting services, the Department's assessment must be upheld.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2084522 pursuant to NMSA 1978, §7-1-24 and jurisdiction lies over both the parties and the subject matter of this protest.
2. There has been no illegal double taxation of the Taxpayer's receipts from performing housepainting services.
3. There is no applicable deduction or exemption which would apply to allow the Taxpayer to deduct the cost of materials used in performing housepainting services from its gross receipts subject to tax.

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

Decision and Order

Novick's Painting

Page -7-

DONE, this 18th day of April, 1997.