

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

IN THE MATTER OF THE PROTEST OF
JOBE CONCRETE PRODUCTS, INC.
ID. NO. 01-199825-00 3
ASSESSMENT NO. 2128424

98-24

DECISION AND ORDER

This matter came on for formal hearing on April 8, 1998, before Margaret B. Alcock, Hearing Officer. Jobe Concrete Products, Inc. ("the Taxpayer") was represented by William L. Lutz, its attorney. The Taxation and Revenue Department ("the Department") was represented by Frank D. Katz, Chief Counsel. Based upon the parties' stipulation of facts and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a Texas corporation with its principal place of business in El Paso, Texas.
2. The Taxpayer sells concrete, sand, gravel, rock and asphalt to contractors and other businesses located in Texas and New Mexico.
3. During the period January 1993 through August 1996, the Taxpayer sold concrete, sand and gravel to Hydro Conduit, a company with its principal place of business in southern New Mexico, outside El Paso, Texas. The Taxpayer delivered the products to Hydro Conduit in New Mexico.
4. When the Taxpayer sold products to Hydro Conduit during the period January 1993 through August 1996, the Taxpayer had in its possession a pre-1992 nontaxable transaction certificate ("NTTC") from Hydro Conduit.

5. In August 1996, the Taxpayer was notified that the Department would be conducting an audit of the Taxpayer. The Department's audit began on October 16, 1996.

6. Between notification of the audit and commencement of the audit, the Taxpayer discovered that Hydro Conduit had not provided the Taxpayer with a current 1992 Series NTTC.

7. Hydro Conduit issued the Taxpayer a 1992 Series Type 1 Manufacturers NTTC on October 7, 1996. Exhibit 1.

8. This NTTC was not noted on the auditor's list of the NTTCs that the Taxpayer had on hand at the time the audit began on October 16, 1996. The Taxpayer does not know when it actually received the 1992 Series NTTC from Hydro Conduit.

9. The Taxpayer's receipts from sales to Hydro Conduit would have been eligible for a deduction from gross receipts if the Taxpayer's possession of the 1992 Series NTTC had met the statutory requirements of Section 7-9-43 NMSA 1978, as that section existed at the time of the Department's audit.

10. Based on the provisions of Section 7-9-43 NMSA 1978 then in effect, the Department disallowed the deductions taken by the Taxpayer because the Taxpayer did not demonstrate that it had the 1992 Series NTTC in its possession at the time of its sales to Hydro Conduit or at the time the Department's audit began on October 16, 1996.

11. On April 14, 1997, the Department issued Assessment No. 2128424 for the reporting periods January 1993 through August 1996, assessing the Taxpayer \$47,259.03 gross receipts tax, \$15,144.85 interest, and \$4,725.96 penalty, for a total assessment of \$67,129.84.

12. On May 1, 1997, The Taxpayer paid \$21,934 of tax principal and \$7,191 of interest. The Taxpayer protested the remaining principal and interest and all of the penalty, leaving a balance of \$41,089.06 in dispute.

DISCUSSION

The Taxpayer's protest raises two issues: (1) whether the New Mexico legislature intended its 1997 amendment to Section 7-9-43 NMSA 1978 to have retroactive effect; and (2) whether the Taxpayer was negligent for purposes of the penalty assessed under Section 7-1-69 NMSA 1978.

I. APPLICATION OF THE 1997 AMENDMENT TO SECTION 7-9-43 NMSA 1978.

The Department assessed the Taxpayer for gross receipts tax, interest and penalty on its receipts from sales made to Hydro Conduit during the period January 1993 through August 1996. The Department disallowed the Taxpayer's deduction of these receipts because the Taxpayer did not have timely possession of a 1992 Series NTTC as required by the version of Section 7-9-43 NMSA 1978 that was in effect between July 1, 1992 and July 1, 1997. The Taxpayer argues that it obtained a 1992 Series NTTC within the 60-day period allowed by a 1997 amendment to Section 7-9-43 and that the amendment should be applied retroactively to permit the Taxpayer to claim the deductions disallowed by the Department.¹

A *History of Section 7-9-43 NMSA 1978.*

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers having possession of NTTCs. In this case, the Taxpayer claims the deduction provided in Section 7-9-46:

Receipts from selling tangible personal property may be deducted from gross receipts...if the sale is made to a person engaged in the business of manufacturing *who delivers a nontaxable transaction certificate to the seller.* (Emphasis added).

The requirements for obtaining NTTCs to support deductions from gross receipts is governed by Section 7-9-43 NMSA 1978. Prior to 1991, the statute stated that a taxpayer "should" have the NTTC

required to support a particular deduction in the taxpayer's possession at the time of the transaction for which the deduction was claimed. The statute nonetheless allowed the taxpayer a 60-day period, beginning on the date the Department gave the taxpayer written notice requiring possession of NTTCs (commonly known as a "60-day letter"), to obtain and demonstrate possession of the NTTC. If the taxpayer could not demonstrate possession of the NTTC within the 60-day period, the deduction was disallowed.

In 1991, the legislature amended Section 7-9-43 to provide that "[a]fter January 1, 1992, any nontaxable transaction certificate issued prior to that date shall be void." Laws 1991, Chapter 9, Section 29. The amendment required buyers and lessees to apply to the Department to obtain new NTTCs, which became known as "1992 Series" NTTCs. The 1991 amendment did not change the provisions relating to the 60-day grace period for possession of NTTCs.

In 1992, the legislature amended Section 7-9-43 to change the time within which a taxpayer must be in possession of NTTCs required to support deductions from gross receipts. Laws 1992, Chapter 39, Section 3. The 1992 amendment substantially tightened the requirements with respect to NTTCs. The language providing that a taxpayer "should" have possession of the NTTC at the time of the nontaxable transaction was changed to state that the taxpayer "shall" have possession of the NTTC by the due date of the return reporting the taxpayer's receipts from the transaction. The taxpayer was required to demonstrate possession of all necessary NTTCs at the commencement of an audit or, in response to a 60-day letter from the Department, demonstrate that the NTTCs were in the taxpayer's possession at the time the receipts from each transaction were required to be reported. The effective date of the amendment was July 1, 1992.

¹ Although the parties stipulated that the Taxpayer did not know when it received the 1992 Series NTTC from Hydro Conduit, the Department has not contested the Taxpayer's argument that the NTTC was or could have been provided to the Department within 60 days after the commencement of the audit.

Five years later, the 1997 legislature amended Section 7-9-43 to again allow taxpayers a 60-day grace period within which to obtain NTTCs required to support deductions taken. Laws 1997, Chapter 72, Section 1. The effective date of this amendment was July 1, 1997. A comparison of the pertinent language in effect before and after the 1997 amendment appears below:

Prior Version, Laws 1992, Chapter 39, Section 3 (effective July 1, 1992):

A. The provisions of this 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 any 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).

Current Version, Laws 1997, Chapter 72, Section 1 (effective July 1, 1997):

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. (Emphasis added).

The Taxpayer does not dispute that under the version of Section 7-9-43 in effect when the Department's audit commenced, the Taxpayer did not meet the statutory requirements for timely possession of the 1992 Series NTTC needed to support the Taxpayer's deductions. The Taxpayer argues, however, that the 1997 amendment to Section 7-9-43 should be applied retroactively to allow

the NTTC Hydro Conduit executed to the Taxpayer in October 1996 to be accepted as timely because it was produced within the 60-day notice period.

B. Retroactive Application: Rules of Statutory Construction.

A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. *Howell v. Heim*, 118 N.M. 500, 506, 882 P.2d 541, 547 (1994); *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct. App. 1991), *cert. denied*, 113 N.M. 524, 828 P.2d 957 (1992). The Taxpayer maintains that the 1997 amendment to Section 7-9-43 did not change the taxable rights of the parties, but merely changed the paperwork requirements for establishing possession of NTTCs. The Taxpayer argues that applying the amendment to transactions and audits occurring prior to the amendment's effective date of July 1, 1997 would not result in a loss to either party since the Taxpayer's receipts from sales to Hydro Conduit were always deductible.

In fact, the Taxpayer's receipts were *not* deductible under the version of Section 7-9-43 in effect between July 1992 and July 1997 because the Taxpayer did not meet the statutory requirements for possession of a 1992 Series NTTC from Hydro Conduit. Where a party claiming a right to a tax exemption or 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). Here, the Department assessed the Taxpayer for unpaid gross receipts tax because the Taxpayer could not establish its right to the deductions taken. If the 1997 amendment to Section 7-9-43 were applied to allow the Taxpayer to claim deductions for which it did not qualify at the time the assessment was issued, there is no question

that this would impair the Department's vested right to collect taxes due and owing under prior law and result in a revenue loss to the state.

There is a presumption that statutes and rules apply prospectively absent a clear intention to the contrary. *Howell, supra; Gadsden Federation of Teachers v. Board of Education of Gadsden Independent School District*, 122 N.M. 98, 920 P.2d 1052 (Ct. App. 1996). There is no indication that the 1997 legislature intended to allow taxpayers correctly assessed under the prior version of Section 7-9-43 to have their tax liability abated or, in cases where the tax assessments have been paid, to receive a refund of those taxes. And yet, this would be the effect of granting the Taxpayer's protest in this case. If this Taxpayer were given the benefit of the relaxed "paperwork" requirements adopted by the 1997 legislature, the same benefit would have to be accorded to every other taxpayer audited by the Department during the five-year period July 1, 1992 and July 1, 1997.

This case raises many of the same issues discussed in *San Luis Power & Water Co. v. State*, 57 N.M. 734, 739, 263 P.2d 398, 401-402 (1953), where the New Mexico Supreme Court rejected the power and water company's attempt to have a change in the property tax law applied retroactively:

The question posed is whether the act is applicable to assessments made prior to its passage.... There is no prohibition against retroactive legislation impairing the rights of the states where there is a clear and manifest intent to do so, *Fulghum v. Madrid*, 33 N.M. 303, 265 P. 454, but from our study of the act, we find no such intent. The taxes became a lien on the property January 1, 1946, and the taxes became due and payable November 1, 1946. The first half became delinquent December 1, 1946 and the second half May 1, 1947. On those dates penalties and interest accrued. At the time of the passage of the act, state and county budgets had been made, values determined, certified tax rolls had been delivered to the county treasurers and notices given to taxpayers. Possibly, some of the landowners had paid their taxes in full. Did the lawmakers contemplate the undoing of all this? Were the tax rolls to be returned to the assessor to ascertain what lands were served by the appellant? Were values to be redetermined and new notices given to taxpayers? Was there to be an additional payment of taxes? The act contains no such directive and certainly none is implied. Its language is clear and unambiguous and there is no room to read in it an intent not expressed.

In this case, the 1997 legislature specified that the change in the requirements for possession of NTTCs would be effective July 1, 1997. There is no basis for reading into the amendment an intent to apply the new requirements retroactively, thereby reopening several years of completed audits and exposing the state to the cost of refunding tax revenues legitimately due to the state at the time of payment.

C. Retroactive Application: New Mexico Constitution.

The New Mexico Constitution, article IV, section 34, provides: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." A case is "pending" for purposes of this provision if the case is filed prior to the effective date of the new law. *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 539, 807 P.2d 234, 237 (Ct. App. 1991) (notice of enactment of a law is irrelevant under article IV, section 34; the effective date is the determining factor). *See also, State v. Baca*, 120 N.M. 383, 392, 902 P.2d 65, 74 (1995) (because case was filed and pending prior to the effective date of an amendment to the Rules of Evidence, the amendment did not apply).

The Department's assessment against the Taxpayer was issued April 14, 1997. The Taxpayer's protest to the assessment was filed May 1, 1997. At the time the 1997 amendment to Section 7-9-43 became effective on July 1, 1997, the Taxpayer had a pending case before the Department. *See, Phelps Dodge Corp. v. Revenue Division of the Taxation and Revenue Department*, 103 N.M. 20, 23, 702 P.2d 10, 13 (Ct. App.), *cert. denied*, 103 N.M. 62, 702 P.2d 1007 (1985) (article IV, section 34 applies to administrative tax refund proceeding); *Pineda, supra* (article IV, section 34 applies to adjudicative proceeding before the Workers' Compensation Division). The New Mexico Constitution therefore bars application of the 1997 amendment in a manner that would adversely affect the Department's right to collect tax due under the law in effect at the time the Taxpayer's protest was filed.

II PENALTY.

Section 7-1-69 NMSA 1978 (1995 Repl.Pamp.) governs the imposition of penalty during the period at issue in this protest. Subsection A imposes a penalty of two percent per month, up to a maximum of 10 percent:

[i]n the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid...

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation GR 69:3 (now 3 NMAC 1.11.10) as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

The Taxpayer argues that it was dependent on the actions of Hydro Conduit and should not be penalized for Hydro Conduit's negligence in failing to provide the Taxpayer with the required NTTC in a timely manner.² The Taxpayer's attempt to shift responsibility to its buyer is inconsistent with New Mexico's gross receipts tax scheme, which places the legal incidence of tax on the seller. It is the seller's responsibility to determine whether it has the NTTC needed to qualify for a deduction under the Gross Receipts and Compensating Tax Act. In the absence of an NTTC, the seller has no right to claim the deduction. In cases where the buyer fails or refuses to provide the seller with an NTTC, the seller has a clear remedy available, *i.e.*, the seller can include the tax in the price charged to the buyer.

² The Taxpayer is contesting the entire amount of penalty assessed. The Taxpayer did not, however, provide any explanation for its failure to pay the gross receipts tax that was assessed but not protested or make any argument as to why penalty should not be imposed on this amount.

Here, the Taxpayer was assessed gross receipts tax because it claimed deductions to which it was not entitled. The assessment resulted from the Taxpayer's inattention to the date on its pre-1992 NTTC from Hydro Conduit and the Taxpayer's failure to take action to obtain a new NTTC as required by the 1991 amendment to Section 7-9-43. It was not until the Taxpayer received the Department's notice of audit that the Taxpayer reviewed its records and realized it did not have a current NTTC from Hydro Conduit. The Taxpayer's inattention to changes in New Mexico's tax law and its failure to take action to obtain a 1992 Series NTTC within the time allowed by Section 7-9-43 constitute negligence for purposes of Section 7-1-69.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to Assessment No 2128424 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. The New Mexico Legislature did not intend its 1997 amendment to Section 7-9-43 NMSA 1978 to be applied retroactively.
3. The New Mexico Constitution, article IV, section 34, bars application of the 1997 amendment to Section 7-9-43 NMSA 1978 to the Taxpayer's protest.
4. The Taxpayer is not entitled to claim the deduction from gross receipts provided in Section 7-9-46 NMSA 1978 because the Taxpayer did not have timely possession of a 1992 Series NTTC as required by the version of Section 7-9-43 NMSA 1978 in effect between July 1, 1992 and July 1, 1997.
5. The Taxpayer was negligent in failing to obtain the NTTC required to support the deductions taken on its gross receipts tax returns.

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

DONE, this 23rd day of April 1998.