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

IN THE MATTER OF THE PROTEST OF
MAINTENANCE SERVICE SYSTEMS, INC., **NO. 99-02**
ID. NO. 01-858715-00 1, PROTEST TO
ASSESSMENT NO. 1936496

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on December 9, 1998. Maintenance Service Systems, Inc., hereinafter, "Taxpayer", was represented by Charles E. Anderson, Esq. 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 corporation which provides janitorial and maintenance services in commercial settings in New Mexico. These services include such things as vacuuming, sweeping, stripping, mopping and waxing of floors, dusting and cleaning of surfaces, cleaning of restrooms, etc. The Taxpayer also is a distributor of janitorial supplies and equipment, such as cleaning products, mops, mop handles and buckets. Finally, the Taxpayer also sells sanitary supplies such as paper towels, toilet paper and other products used in its customers restrooms.

2. Most of the Taxpayer's customers are customers for whom the Taxpayer provides janitorial services, but the Taxpayer also sells janitorial supplies and sanitary supplies to customers for whom it does not provide janitorial services.

3. The Taxpayer's clients include both private and governmental entities.

4. In 1994, the Department audited the Taxpayer.

5. As a result of the audit, on June 9, 1995, the Department issued and mailed Assessment No. 1936496 ("the assessment") to the Taxpayer. The assessment assessed $12,915.52 in gross receipts tax, $ 37,736.16 in compensating tax, $5,553. in penalty and $26,132.50 in interest.

6. The audit period for the compensating tax portion of the assessment was January 1, 1988 through January 31, 1994.

7. The audit period for the gross receipts tax portion of the assessment was January 1, 1991 through January 31, 1994.

8. On August 7, 1995, the Taxpayer wrote the Department and requested a retroactive sixty day extension of time in which to file a protest to the assessment. The Taxpayer's letter also protested the assessment.

9. On August 25, 1995, the Department granted the Taxpayer a retroactive extension of time in which to file its protest and acknowledged the Taxpayer's protest of August 7, 1995.

10. When the Taxpayer makes a sales call upon a prospective janitorial services customer, it works up a proposal for the monthly cost of such services. The proposal calculates the number of personnel, the classifications for such personnel, the days per week and hours per employee needed to perform the requested services and the hourly rate by employee to arrive at a monthly labor cost. It then calculates taxes and insurance costs at 30% of the labor cost. Cleaning supplies are calculated at 10% of labor cost, which is the standard for the industry. The cost of providing the cleaning equipment such as vacuum cleaners, mops and buckets is

calculated at 4.7% of labor cost. The total costs of labor, supplies, taxes and insurance and cleaning equipment are then totaled. General, administrative and supervision expenses are then calculated at 15.3% of total costs. A profit factor of 10% of total costs is then added. All of these costs are totaled to arrive at the monthly fee. The Taxpayer shows and explains this fee calculation to the prospective customer, using the fee calculation exercise to explain the services provided and demonstrate how the monthly charge is arrived at.

11. With the exception of the Taxpayer's governmental agency customers, whose business the Taxpayer obtained by responding to a request for proposals, the Taxpayer informs its janitorial services customers that the cleaning supplies provided by the Taxpayer belong to them. The customers are required to provide a location on their premises where the cleaning supplies can be stored. If a customer experiences excessive cleaning supply usage, (which may be due to products being taken home by employees or other misuse of supplies) the Taxpayer discusses the situation with the customer and the customer is informed that if the situation continues, that the charge for janitorial services will need to be adjusted. When a relationship with a janitorial services customer is terminated, the Taxpayer leaves all unused cleaning supplies with the customer.

12. Some customers choose to purchase and provide their own cleaning supplies. When that happens, the Taxpayer takes that into account in calculating the monthly service fee it charges such customers.

13. The Taxpayer also provides all of the cleaning equipment, such as vacuum cleaners, mop heads and handles, and mop buckets for its janitorial customers as well as the cleaning supplies. These are also stored at the customers premises and are left with the customer when the customer terminates its relationship with the Taxpayer.

14. With respect to customers who purchase sanitary and other restroom supplies from the Taxpayer, the Taxpayer calculated the monthly charge for these goods by using an industry standard of $2.71 per month per female employee and $1.35 per month per male employee.

15. The Taxpayer did not have a consistent practice with respect to whether its billings to its customers for janitorial services separately referenced the charge for cleaning supplies and/or sanitary supplies. Most customers did not want their invoices broken down by supplies and services and so the Taxpayer billed a single amount for both. When a customer wished a breakdown on the invoice, the Taxpayer did so.

16. During the audit period, the Taxpayer reported no compensating tax to the Department.

17. The gross receipts tax portion of the assessment was based upon the Department's denial of deductions claimed by the Taxpayer for its receipts from various customers who had given the Taxpayer nontaxable transaction certificates in order to avoid being charged passed on gross receipts tax. The Department also denied deductions claimed, pursuant to Section 7-9-54 for sales of tangible personal property to the United States government or its agencies. The Taxpayer's invoices to its governmental customers did not break down the Taxpayer's charges between janitorial services and cleaning and sanitary supplies provided under its contracts with the governmental customers to perform janitorial services. In the case of other deductions denied by the Department, the Department determined that the types of nontaxable transaction certificates delivered were not appropriate for the transactions in which the Taxpayer accepted them.

18. The compensating tax portion of the assessment was assessed on two types of transactions. Compensating tax was assessed upon the value of cleaning equipment, supplies and sanitary supplies purchased from out-of state vendors for use in the Taxpayer's business where the Taxpayer's records did not demonstrate that New Mexico gross receipts tax was charged at the time the Taxpayer purchased the property. Compensating tax was also assessed upon the value of cleaning equipment, cleaning supplies and sanitary supplies which the customer purchased free of gross receipts tax because it issued a type 2 nontaxable transaction certificate to the vendor affirming that the products would be resold to the Taxpayer's customers. In calculating the amount of compensating tax assessed, the Department's auditor and the Taxpayer's certified public accountant arrived at a methodology for estimating the amount of the assessment which would exclude from the calculation an amount representing the Taxpayer's costs of property which the Taxpayer could demonstrate were attributable to transactions where the Taxpayer separately stated the charge for the cleaning supplies and sanitary supplies on its invoices to its customers.

19. Although the Taxpayer's accountant periodically reviewed its monthly tax filings with the Department and advised the Taxpayer about how to file its state returns in general, the Taxpayer had no discussions with its accountant about the state tax consequences of failing to itemize its charges for cleaning supplies and sanitary supplies when it invoiced its customers, about the distinction between supplies which the Taxpayer used in performing janitorial services and sanitary supplies used by the Taxpayer's customers, or about any of the circumstances in which the Taxpayer might be liable for compensating tax.

DISCUSSION

Prior to discussing the taxes assessed in more detail, there are two key issues to the determination of this protest. The first is burden of proof. Section 7-1-17(C) NMSA 1978 provides that there is a presumption of correctness which attaches to any assessment of tax by the Department. Thus, it is incumbent upon a taxpayer to present evidence or legal arguments to demonstrate that the assessment is incorrect. ***Champion International Corp. v. Bureau of Revenue***, 88 N.M. 411, 540 P.2d 1300 (Ct. App. 1975). The second issue concerns how to treat the tangible personal property, in the form of cleaning supplies and equipment the Taxpayer provided to its customers and used when performing janitorial services and sanitary supplies, such as hand towels, toilet paper, etc. sold by the Taxpayer to its customers. The Taxpayer contends that it is selling these items of tangible personal property to its customers. The Department's auditor treated these transactions as sales of tangible personal property when the Taxpayer could demonstrate that it separately stated its charges for these things when it invoiced its customers, but otherwise, these were treated as being incidental to the janitorial services being provided to the customers and the whole transaction was treated as the sale of a service. Another way of phrasing this is that when the Taxpayer did not separately invoice its customers for these items of property, the Department considered them to be consumed by the Taxpayer in the performance of its janitorial services and were not treated as being resold by the Taxpayer to its customers. This determination had consequences for both the assessment of compensating tax and gross receipts tax as will be further discussed herein. Prior to doing so, the statutory provisions pertinent to this issue will be examined.

Service is defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978 at § 7-9-3(K), which provides:

> "service" means *all activities* engaged in for other persons for a consideration, *which activities involve predominantly the performance of a service as distinguished from selling or leasing property.* "Service" includes activities performed by a person for its members or shareholders. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling. "Service includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. Such tangible personal property retains its character as tangible personal property until it is installed as an ingredient or component part of a construction project in New Mexico. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property. (emphasis added).

The courts have construed this definition as focusing on the nature of the seller's activity, examining the relative investment of skills and abilities compared to the tangible materials which are utilized to determine whether a service or tangible property is being sold. ***EG&G, Inc. v. Director, Revenue Division, Taxation and Revenue Department,*** 94, N.M. 143, 607 P.2d 1161 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

The other pertinent statute is § 7-9-47 of the Gross Receipts and Compensating Tax Act. It provides:

> Receipts from selling tangible personal property may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must resell the tangible personal property either by itself or in combination with other tangible personal property in the ordinary course of business.

This statute allows a vendor of tangible personal property to claim a deduction from gross receipts if the purchaser delivers a type 2 nontaxable transaction certificate to the vendor. The purchaser must resell the tangible personal property in the ordinary course of business. The

Department has adopted a regulation under this section which describes how the Department treats the use of tangible personal property in the performance of a service. Regulation 3 NMAC 2.47.10.1.1 provides that:

> When a taxpayer uses tangible personal property in the performance of a service, the tangible personal property is acquired for use and not for sale in the ordinary course of business. Therefore a nontaxable transaction certificate may not be executed under Section 7-9-47 to acquire the tangible personal property.

A similar regulation was in effect for all periods relevant to this audit. Former regulation GR 47:3 provided:

> When a taxpayer uses tangible personal property in the performance of an activity which is primarily the sale of a service, he must compute his tax liability based on his total receipts. Such receipts include the charge for the performance of the service plus any other amounts such as the charge for material used in the performance of the service. Where the separate billing of material and labor is the trade practice, and the taxpayer bills separately, the taxpayer may give a nontaxable transaction certificate for the purchases of the material.

The Compensating Tax Assessment

Compensating tax is imposed under Section 7-9-7 NMSA 1978,[1] which provided in pertinent part:

> A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to four and three-fourths percent of the value of property that was:
>
> (1) manufactured by the person using the property in the state;
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> (2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or
>
> (3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by paragraph (2)

[1] Because compensating tax was assessed commencing with January, 1988, the version in the 1988 replacement pamphlet will be quoted. There were no changes in the statute material to any issues herein during the periods covered by the compensating tax assessment.

> of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by paragraph (2) of this subsection or the gross receipts tax.
> For the purpose of this subsection, value of property shall be determined as of the time of acquisition or introduction into this state or of conversion to use, whichever is later.
> B. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to four and three-fourths percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.
> C. The tax imposed by this section shall be referred to as the "compensating tax".

The Department assessed compensating tax under subsections A(2),A(3) and B, quoted above. The Department assessed compensating tax on the value of tangible personal property which the Taxpayer purchased outside of New Mexico under subsection A(2). The Taxpayer presented no evidence or argument to challenge this portion of the compensating tax assessed and thus that portion of the assessment is presumptively correct.

Compensating tax was also assessed under subsection B. This provision imposes compensating tax on the use of services when the purchase of those services was not initially subject to the gross receipts tax but which transaction should have been subject to gross receipts taxes because of the buyer's subsequent use of the services. The audit narrative reflects that the Taxpayer had issued type 5 nontaxable transaction certificates. Type 5 certificates support a claim of deduction under § 7-9-48 for the sale of services for resale. Purchasers issuing the certificate must resell the service in the ordinary course of business, the resale of the service must be subject to gross receipts tax and the purchaser must separately state the value of the service

purchased when it is resold. Presumably, the compensating tax was assessed because the Taxpayer could not demonstrate that it had satisfied one or more of the conditions for issuing type 5 certificates to its vendors, as set out in § 7-9-48, when the service was resold.[2] The Taxpayer presented no evidence or arguments to dispute this portion of the compensating tax assessment, so that portion of the assessment is also presumptively correct.

The significant portion of the compensating tax assessment was assessed under subsection A(3). Under its provisions, compensating tax is applied when property is acquired in a transaction which was not initially subject to the gross receipts tax but should have been because of the buyer's subsequent use of the property. According to the audit narrative, the Taxpayer had issued type 2 nontaxable transaction certificates to its vendors. Type 2 certificates are the type vendors must have to claim the deduction under § 7-9-47 for the sale of tangible personal property for resale. Purchasers issuing the certificate must resell the property in the ordinary course of business. The Taxpayer had purchased cleaning supplies and equipment and sanitary supplies using type 2 certificates, enabling its vendors to claim the deduction under § 7-9-47 and to sell the property to the Taxpayer free of the cost of passed on gross receipts taxes. The Department assessed compensating tax on the value of the supplies and equipment on the basis that the Taxpayer did not resell those items to its customers, but rather, it used those things in performing the janitorial services it was selling to its customers.

In computing the amount of compensating tax assessed, the Department's auditor applied GR Regulation 47:3 to exclude from the computation of tax the value of supplies and equipment which the Taxpayer could demonstrate were separately reflected on the Taxpayer's invoices to its customers. This is because the regulation provided that, "[W]here the separate billing of material

[2] The audit narrative does not provide sufficient information to determine which of the conditions of the statute

and labor is the trade practice, and the taxpayer bills separately, the taxpayer may give a nontaxable transaction certificate for the purchases". The Department's auditor and the Taxpayer's accountant agreed upon a methodology to estimate the amount which was excluded from the compensating tax assessment.

The Taxpayer disputes the assessment of compensating tax on the remainder of its purchases of supplies and equipment, arguing that it properly issued the type 2 nontaxable transaction certificate to its suppliers because it does resell the supplies and equipment. In support, the Taxpayer cites to the fact that when it makes a sales proposal to a new customer, it breaks down the cost of supplies and equipment. The Taxpayer's proposal estimates the cost of supplies at 10% of labor and equipment at 4.7% of labor. In fact, it provides a detailed breakdown of all of the Taxpayer's costs of providing janitorial services, including its general and administrative overhead and profit margin. This does not establish that it is selling supplies and equipment, however, any more than the breakout of its general and administrative costs and its profit margin would serve to establish that the Taxpayer is selling its customers its general and administrative overhead and profit margin. This degree of disclosure is a promotional tool the Taxpayer uses to establish rapport and trust between it and its customer. In fact, the small percentage of the total cost of providing the janitorial services represented by the supplies and equipment indicates that they are an incidental part of the overall janitorial services being provided by the Taxpayer, which supports the Department's position that the Taxpayer is selling a service as defined at § 7-9-3(K) rather than supplies and equipment.

The Taxpayer also relies upon the fact that it tells its customers that the supplies belong to them and can be used by the customer for cleaning between the Taxpayer's visits to the

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were not met by the Taxpayer.

customer's premises and the fact that when a customer account is terminated, the unused supplies and equipment are left with the customer. In discussing this item, however, Mr. Crismore, President of the Taxpayer, admitted that because the equipment wears out very quickly in his business that it would be of minimal value and that leaving the equipment and supplies is part of the Taxpayer's efforts to create customer goodwill and return business. Additionally, although Mr. Crismore testified that his customers are informed that the cleaning supplies belong to them, there was no evidence that the customers are similarly informed that they own and are responsible for the cleaning equipment. The best evidence which could demonstrate that cleaning supplies and equipment are resold to the Taxpayer's janitorial customers would be if the Taxpayer could demonstrate that those items were invoiced to the customers. It should be noted that the Department's auditor attempted to give credit against the assessment of compensating tax in all instances where the Taxpayer could demonstrate resale by separate stating on the invoice. This was not the Taxpayer's consistent practice however. In most instances, the Taxpayer simply billed its customers a flat rate for the janitorial services it was providing. While the Taxpayer's customers may have understood that the supplies were available for their own use between janitorial visits by the Taxpayer, the Taxpayer's customers no doubt understood that the cleaning supplies and equipment were also kept on their premises for the convenience and use by the Taxpayer's employees to perform the janitorial services the customers contracted for. Where the Taxpayer's invoices do not reflect the separate sale of supplies and equipment, but only the monthly charge for janitorial services, the Taxpayer's customers were purchasing janitorial services and the supplies and equipment the Taxpayer used in performing those services were incidental to those services and were not resold to the Taxpayer's customers. The assessment of compensating tax on the value of those supplies and equipment was proper.

The Gross Receipts Tax Assessment

The gross receipts tax assessed was assessed on two grounds. Apparently, the Taxpayer claimed a deduction, pursuant to § 7-9-54, for sales of tangible personal property to the United States. The Taxpayer did not dispute that its invoices to its governmental customers did not separately reflect a billing for supplies provided the government in the performance of the contracts and the Taxpayer did not dispute that the sales of services to the United States were not deductible under § 7-9-54. It is clear under the definition of service at § 7-9-3(K), that the predominant thing that the Taxpayer is selling to its janitorial service customers is janitorial services. Under GR Regulation 47:3, because the Taxpayer used the supplies and equipment in providing janitorial services to the government and they were not separately stated on the Taxpayer's invoices, the Taxpayer's entire gross receipts from its government contracts are receipts from performing janitorial services which are not deductible under § 7-9-54.

The other basis for assessing gross receipts tax were transactions where the Taxpayer had accepted type 2 and type 15 nontaxable transaction certificates, which are delivered by purchasers who are purchasing tangible personal property for resale in the ordinary course of business. Possession of the certificate enables a vendor of tangible personal property to claim the deduction at § 7-9-47. In this case, the Department disallowed the Taxpayer's claims of deduction because the Taxpayer could not demonstrate that its invoices to its customers were for anything other than janitorial services, which were not covered by the types of nontaxable transaction certificates the Taxpayer possessed. There was one exception. In one instance, the Taxpayer sold sanitary supplies to the Kirtland Federal Credit Union and the Taxpayer's invoices separately reflected the cost of the supplies sold. In that case, the Department's auditors allowed the claim of deduction for the supplies sold.

The Department properly denied the deductions claimed by the Taxpayer for the sale of tangible personal property. The Taxpayer was selling janitorial services, not property, to its customers. The service included the cleaning supplies and equipment used by the Taxpayer in providing janitorial services.

The Taxpayer argues that it is irrelevant that the supplies are considered to be incidental to the performance of janitorial service because the supplies are owned by the customers and are thus sold to them. The Gross Receipts and Compensating Tax does make it relevant, however, because the definition of service includes *all* activities engaged in for other persons for consideration in which the predominant activity is the performance of a service. This includes the activity of providing the tangible personal property used by the Taxpayer and which is incidental to the performance of the service. Section 7-9-3(K). The Department allows an exception, pursuant to Regulation GR 47:3, where it is the practice in an industry to separately state the tangibles. Then those in the industry are allowed to treat the sale of service and the sale of tangibles separately. The Department was liberal in applying this exception to the Taxpayer's favor. Based upon the record in this case, it does not appear that there was an industry practice to separately bill the supplies used by janitorial services. Certainly, the Taxpayer did not have a consistent practice in this regard, in the very least. Nonetheless, the Department gave the Taxpayer credit against the assessment of tax in every instance where the Taxpayer could demonstrate separate stating of the tangibles on its customer invoices. The Taxpayer argues that to impose tax where it does not separately state the supplies elevates form over substance. In matters of taxation, however, the form of a transaction is often controlling as to its taxability. In the circumstances of this case, the Department, by regulation did spell out the requirements of a transactional form in order to avoid the imposition of tax when tangibles are purchased and then

used by a taxpayer in performing services. The Taxpayer failed to follow that form and the assessment is proper.

Penalty

The Taxpayer also contests the imposition of penalty. The imposition of penalty is governed by the provisions of NMSA 1978, Section 7-1-69(A)(1995 Repl. Pamp.), which imposes a penalty of two percent per month, up to a maximum of ten percent:

> In 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 or to file by the date required a return regardless of whether any tax is due,....

This statute imposes penalty based upon negligence (as opposed to a willful or fraudulent intent) for failure to timely pay tax. Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by the Taxpayer to underreport taxes. What remains to be determined is whether the Taxpayer was negligent in failing to report its taxes properly. Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC 1.11.10 (formerly TA 69:3) 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 not negligent in failing to properly report taxes in this case because the laws are confusing. The Department has had a regulation on point, Regulation GR 47:3 during all times relevant to the assessments at issue herein which explains the Department's interpretation of the law, however. The Taxpayer made no showing that it consulted with the Department in order to determine how to properly handle the reporting of taxes as applied to its business. The Department recognizes that where a taxpayer consults with a tax expert, such as an accountant or a lawyer, to determine how to properly report taxes, and relies upon the advice given,

that this indicates that a taxpayer may not have been negligent in failing to properly report and pay taxes. Specifically, Regulation 3 NMAC 1.11.4 provides that lack of negligence may be indicated where:

> the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent;

The Taxpayer attempted to show that it qualified for abatement of penalty under this provision by presenting evidence that it had a long standing relationship with its accountant, its accountant was familiar with the Taxpayer's business and business practices and the accountant periodically reviewed its monthly tax reports to the Department which reported gross receipts taxes. This evidence does not establish that the Taxpayer actually received advice from its accountant about the issues which resulted in the tax assessment at issue, however. Mr. Crismore testified quite honestly and truthfully throughout his testimony. Under questioning by the Department, Mr. Crismore admitted that he could not recall talking with his accountant about the tax ramifications of not reflecting the supplies or equipment used in performing janitorial services upon its customer invoices. Nor could he recall any discussions with his accountant about any distinction for tax reporting purposes between supplies used in performing janitorial services and supplies, such as the restroom and sanitary supplies which are used by the customer. Finally, Mr. Crismore could not recall any discussions with his accountant about New Mexico's compensating taxes and the circumstances where they might apply to the taxpayer. This simply fails to establish that the Taxpayer received and relied upon the advice of a tax professional about the circumstances where gross receipts and compensating taxes were underreported. ***El Centro Villa v. Taxation and Revenue Department,*** 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). In that case, the taxpayer's

accountant not only reviewed the client's tax returns, but the accountant's staff actually prepared the monthly tax returns which failed to properly report and pay taxes on some very large and unusual payments received by the taxpayer. The Court of Appeals found that merely delegating the duty to prepare returns to an accountant, without making an inquiry about how these large and unusual transactions should be treated did not relieve the taxpayer of a negligence penalty. In other words, a taxpayer has a duty to actually inquire and receive advice from its accountant on a matter before the taxpayer is shielded from the imposition of penalty based upon reliance upon advice from an accountant or tax counsel. In this case, the Taxpayer did not establish that it sought and followed advice with respect to how it should report gross receipts and compensating taxes with respect to supplies and equipment it acquired and used in performing its janitorial services.

In this case there is no question that the Taxpayer was not trying in any way to avoid reporting and paying its taxes incorrectly. Mr. Crismore was completely truthful and credible in his testimony and it was apparent that he runs his business in a competent, business-like and ethical manner. Nonetheless, because we have a self-reporting tax system that requires taxpayers to self report and self assess taxes, every taxpayer has the reasonable duty to ascertain the possible tax consequences of his actions or inaction. In this case we have negligence based upon inadvertent mistakes the Taxpayer made in accepting the wrong types of nontaxable transaction certificates, in failing to report taxes on contracts from governmental customers, in failing to pay compensating tax on purchases made out of state, and in failing to inquire or consider whether there were any tax consequences to purchasing supplies and equipment with a nontaxable transaction certificate by which the purchaser affirms that it will be reselling the supplies and equipment, but its invoices to its customers only reflect the sale of janitorial services. Based upon this, the assessment of penalty was proper.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1936496 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The supplies and equipment used by the Taxpayer in the performance of janitorial services for its customers were incidental to and part of the janitorial service provided to its customers where the Taxpayer did not separately reflect the charges for the supplies and equipment from the charge for janitorial services on its customer invoices.

3. Because the Taxpayer did not resell supplies and equipment to its janitorial services customers when it did not separately reflect the charges for those items on its invoices, compensating tax was properly assessed upon the value of those items which were purchased by the Taxpayer using a type 2 nontaxable transaction certificate.

4. Because the Taxpayer was selling janitorial services and not supplies and equipment to its customers to whom it did not separately reflect a charge for the supplies and equipment on its invoices, the Taxpayer improperly claimed a deduction from gross receipts tax for the sale of tangible personal property which is to be resold.

5. The Taxpayer was negligent in failing to properly report and pay gross receipts tax and compensating tax under the circumstances of this case and penalty was properly assessed.

6. The Taxpayer failed to overcome the presumption of correctness of Assessment No. 1936496.

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

DONE, this 21st day of January, 1999.