

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

**IN THE MATTER OF THE PROTEST OF
DAVID MONTOYA
ID NO. 02-398922-00-0
ASSESSMENT NO. 2375867**

No. 00-36

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 26, 2000 before Margaret B. Alcock, Hearing Officer. David Montoya ("Taxpayer") was not present, but was represented by Siegfried G. Montano, Jr., CPA. The Taxation and Revenue Department ("Department") was represented by Gail MacQuesten, Special Assistant Attorney General. During the course of the hearing, it became clear that Mr. Montano would need the testimony of the Taxpayer in order to properly present the Taxpayer's case. Upon agreement of the parties, the hearing was continued to December 1, 2000, at which the time the Taxpayer appeared with Mr. Montano and the Department appeared through its counsel, Gail MacQuesten. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1995, the Taxpayer performed construction services as a subcontractor for Robert Paiz Construction. Although most of the Taxpayer's 1995 income came from this contract, he also received some income from performing services for other customers.
2. The Taxpayer did not know that his receipts from performing services as a subcontractor or independent contractor were subject to New Mexico gross receipts tax and did not report or pay gross receipts tax on this income.

3. The Taxpayer did not have possession of a nontaxable transaction certificate (“NTTC”) from Robert Paiz Construction or any of his other customers in 1995.
4. In 1996, the Taxpayer engaged the services of Siegfried G. Montano, Jr., CPA, to prepare his 1995 state and federal income tax returns.
5. Mr. Montano prepared the Taxpayer’s 1995 income tax returns, reporting the income from his construction services as business income on Schedule C to federal Form 1040.
6. The Taxpayer did not ask Mr. Montano whether the Taxpayer owed any other type of tax on his 1995 income, nor did Mr. Montano volunteer any information concerning the Taxpayer’s liability for New Mexico gross receipts tax on this income.
7. The Department maintains what is known as the “C-Span Unit” within its Audit and Compliance Division. This unit compares information received from the IRS with information in the Department’s data base to determine whether taxpayers who have reported business income on Schedule C of their federal income tax returns have also reported gross receipts tax on that income.
8. The Department stores information on reporting discrepancies on a computer located in Albuquerque and uses this data base to select taxpayers for audit.
9. Letters notifying taxpayers that they have been selected for a limited scope audit based on a discrepancy between their state and federal reporting are generated in batches of 100. The letters also advise taxpayers that they have 60 days within which to obtain NTTCs and other documentation needed to support any deductions claimed.
10. The Department assigns a specific employee to each batch of letters mailed out, and the employee’s name appears as the contact person on all notices in that batch.
11. The letters are manually stuffed into window envelopes by employees of the C-Span Unit and mailed, first class mail, from the Albuquerque office.

12. Each letter is tracked by the Department employee to which it is assigned. In each batch, the majority of cases are resolved when the taxpayer provides information that satisfactorily explains the reason for the discrepancy in business income reported to the state and federal governments or substantiates the taxpayer's right to deduct those receipts. When no response is received, or the information provided is insufficient to establish that the taxpayer's receipts are nontaxable, an assessment is issued to the taxpayer.

13. Sometime prior to February 1999, the Department received information from the IRS concerning the business income reported on the Taxpayer's 1995 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department in 1995 and had never paid gross receipts tax on this income.

14. On February 8, 1999, the Department's C-Span program generated a letter notifying the Taxpayer that he had been selected for a limited scope audit. The letter also informed the Taxpayer that he had 60 days within which to obtain possession of NTTCs and other documents required to support deductions from gross receipts.

15. The letter was mailed from the Albuquerque office along with the 99 other letters in the Taxpayer's batch of C-Span letters.

16. The address on the February 8, 1999 letter mailed to the Taxpayer was 509 Regina Pl. NW, Albuquerque, NM 87105, which was the last address shown on the Department's records for the Taxpayer. The Taxpayer has lived at this address since 1995 and still resides there.

17. The Department was not having any problems with its C-Span program in February 1999, nor is the Department aware of any problems related to the mailing or delivery by the Post Office of the batch of letters that included the February 8, 1999 letter to the Taxpayer.

18. The Taxpayer did not respond to the Department's February 8, 1999 letter, nor did the Taxpayer obtain possession of an NTTC from Robert Paiz Construction or any of his other customers during the 60-day period referenced in the letter.

19. On May 8, 1999, the Department issued Assessment No 2375867 to the Taxpayer for reporting periods January through December 1995 in the amount of \$6,958.88, representing \$4,170.12 gross receipts tax, \$417.00 penalty and \$2,371.76 interest.

20. When he received the assessment, the Taxpayer took it to his accountant, Mr. Montano, who advised the Taxpayer to obtain an NTTC from Robert Paiz Construction.

21. Mr. Montano also helped the Taxpayer prepare a written protest to the Department's assessment, which was filed June 8, 1999. The protest was initially denied as untimely, but was subsequently accepted after the Department granted the Taxpayer's June 16, 1999 request for a retroactive extension of time to file the protest.

22. The May 8, 1999 assessment was the first document the Taxpayer took to Mr. Montano concerning the Taxpayer's liability for gross receipts tax on his 1995 business income.

23. Although the Taxpayer usually takes all notices and letters he receives from the Department to Mr. Montano, there were at least three letters mailed to the Taxpayer by the Department that the Taxpayer did not give to Mr. Montano: the February 8, 1999 letter notifying the Taxpayer of the limited scope audit; an August 10, 1999 letter notifying the Taxpayer of the state's tax amnesty program; and a March 1, 2000 letter notifying the Taxpayer that his protest was being forwarded to the Department's legal bureau.

24. On November 16, 1999, Margie Gurule, an auditor in the Department's protest office, sent the Taxpayer a letter asking him to provide a copy of his 1995 federal income tax return, his 1995 Form 1099, any NTTCs in his possession, and any other information related to his protest.

25. On December 10, 1999, Mr. Montano responded to Ms. Gurule's letter and provided copies of the documents requested, including an NTTC issued to the Taxpayer by Robert Paiz Construction.

26. Although the NTTC indicates that it was issued to the Taxpayer on December 1, 1994, the Taxpayer did not obtain possession of this NTTC from Robert Paiz Construction until sometime after the Department's assessment was issued in May 1999.

DISCUSSION

The Taxpayer protests the Department's refusal to accept the NTTC from Robert Paiz Construction as proof that the Taxpayer is entitled to deduct his 1995 receipts from performing services as a construction subcontractor. The Taxpayer raises the following arguments in support of his protest: (1) the Taxpayer substantially complied with the requirements of Section 7-9-52 NMSA 1978 and is entitled to the deduction provided in that section; (2) because the Taxpayer never received the Department's original 60-day letter, the Taxpayer's later production of an NTTC from Robert Paiz Construction was timely; and (3) imposing tax on the Taxpayer's receipts results in double taxation.

Substantial Compliance. 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 7-9-52(A) NMSA 1978:

A. Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. During 1995, when the Taxpayer was performing services for Robert Paiz Construction, the statute provided, in pertinent part:

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....

The Taxpayer did not have an NTTC from Robert Paiz Construction in his possession at the time his 1995 gross receipts tax returns were due. Accordingly, he did not meet the statutory requirements of Section 7-9-43 NMSA 1978 then in effect and was not entitled to claim a deduction under Section 7-9-52 NMSA 1978.

In 1997, the legislature amended Section 7-9-43 to allow taxpayers additional time within which to obtain required NTTCs. Laws 1997, Chapter 72, Section 1. This version of the statute, effective July 1, 1997, provides:

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.

The amendment gave taxpayers audited after its effective date a second chance to obtain NTTCs that should have been in their possession at the time their deductions from gross receipts tax were taken. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they do not obtain required NTTCs within the 60-day grace period provided by the legislature.

The Taxpayer argues that since he *could* have obtained an NTTC from Robert Paiz Construction at any time, the fact he did not have actual possession of the NTTC until after expiration of the 60 days should not disqualify him from taking the deductions claimed. The Taxpayer misreads the language of Section 7-9-43 NMSA 1978, which states that if a seller is not in possession of required

NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (Emphasis added).

The legislature's use of the word "shall" indicates that the provisions of the statute are mandatory and not discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Because the Taxpayer failed to obtain an NTTC from Robert Paiz Construction within the 60-day period provided in Section 7-9-43 NMSA 1978, the Department had no choice but to disallow his deductions.

The Taxpayer's argument concerning substantial compliance also ignores settled principles of New Mexico tax law. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Where a party claiming a right to a tax deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto—a showing of "substantial compliance" is not sufficient. *See, Proficient Food Co. 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) (affirming the Department's refusal to honor an NTTC not in official form). By failing to obtain possession of required NTTCs within the time provided in the statute, the Taxpayer waived his right to claim a deduction under Section 7-9-52 NMSA 1978.

Mailing of 60-Day Letter. As discussed above, Section 7-9-43 NMSA 1978 provides that taxpayers must be in possession of NTTCs "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." The Taxpayer maintains he never received the Department's February 8, 1999 letter notifying him of

the 60-day requirement and that the November 16, 1999 letter from Margie Gurule was the first time the Department asked the Taxpayer to provide copies of NTTCs. Accordingly, the Taxpayer argues that the NTTC Mr. Montano sent the Department on December 10, 1999 was timely.

The evidence on this issue is conflicting. Although the Taxpayer testified that he did not remember receiving the Department's February 8, 1999 letter, he also testified that he did not read all of the letters and notices the Department sent him. The Taxpayer is unsophisticated in tax matters and acknowledged that he did not pay much attention to this aspect of his business. Given this testimony, the Taxpayer's lack of memory concerning the February 8, 1999 letter has little probative value in determining whether the letter was actually received.

The Taxpayer also testified that he turned all notices and correspondence from the Department over to Mr. Montano. If this were the Taxpayer's consistent practice, the fact that he did not give Mr. Montano the Department's February 8, 1999 letter would lend support to the Taxpayer's contention that he never received the letter. The evidence shows, however, that the Department sent the Taxpayer at least two other letters that never reached Mr. Montano. One was an August 10, 1999 letter from Margie Gurule notifying the Taxpayer of the state's tax amnesty program. The other was a March 1, 2000 letter from Andrick Tsabetsaye, another auditor in the protest office, informing the Taxpayer that his case was being forwarded to the Department's legal bureau. The Taxpayer testified that he did not remember receiving the August 10, 1999 letter, but did recall the March 1, 2000 letter. Neither letter was given to Mr. Montano.

Evaluating all of the evidence, I believe it is more likely than not that the Taxpayer did receive the Department's February 8, 1999 letter, that he intended to take the letter to Mr. Montano, but was sidetracked with other business matters. In any event, the statutes do not require the Department to prove the Taxpayer actually received the 60-day notice. Pursuant to Sections 7-9-

43(C) and 7-1-9(A) NMSA 1978, the 60-day notice is effective “if mailed...to the taxpayer or person at the last address shown on his registration certificate or other record of the department.” At the hearing, the Department presented evidence of the C-Span Unit’s routine practice of creating and mailing the combined audit notice and 60-day letter. The letters are generated by the Department’s computer program and printed in batches of 100. Once printed, the letters are manually stuffed into window envelopes by employees of the C-Span Unit and mailed, first class mail, from the Albuquerque office. Each letter is tracked by the Department employee to which it is assigned.

On February 8, 1999, the Department’s C-Span program generated a letter notifying the Taxpayer that he had been selected for a limited scope audit and notifying him that he had 60 days within which to obtain possession of all NTTCs required to support his deductions. The address on the letter was 509 Regina Pl. NW, Albuquerque, NM 87105, which was the last address shown on the Department’s records for the Taxpayer. At the hearing, the Taxpayer testified that he has lived at that address since 1995. The Department was not having any problems with its C-Span program in February 1999, nor is the Department aware of any problems related to the mailing or delivery by the Post Office of the batch of letters that included the February 8, 1999 letter to the Taxpayer.

The foregoing evidence is sufficient to establish that the Department mailed a 60-day notice to the Taxpayer on February 8, 1999 in accordance with the requirements of Sections 7-9-43(C) and 7-1-9(A) NMSA 1978. The notice was effective on the date of mailing and required the Taxpayer to obtain possession of NTTCs needed to support his deductions no later than April 9, 1999. Because the Taxpayer did not obtain an NTTC from Robert Paiz Construction until sometime after May 8, 1999, all deductions taken in reliance on this NTTC were properly disallowed by the Department.

Double Taxation. The Taxpayer argues that requiring him to pay gross receipts tax on receipts from performing services as a subcontractor will result in double taxation since the general contractor

charges tax when he resells those services to the final consumer. Although it is a popular misconception that double taxation is illegal or unconstitutional, New Mexico courts have held, on numerous occasions, that there is no constitutional prohibition against double taxation. *New Mexico State Board of Public Accountancy v. Grant*, 61 N.M. 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. v. Gallegos*, 44 N.M. 120, 99 P.2d 447 (1940); *State ex rel. Attorney General v. Tittmann*, 42 N.M. 76, 75 P.2d 701 (1938).

In construing the Gross Receipts and Compensating Tax Act, New Mexico courts have also held that there is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. *See, e.g., House of Carpets, Inc. v. Bureau of Revenue*, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); *New Mexico Sheriffs & Police Association v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973). That is the case here. The Taxpayer and Robert Paiz Construction are separate taxpayers, each of which is engaged in business in New Mexico. The gross receipts tax is imposed—once—on the Taxpayer’s receipts from selling construction services to Robert Paiz Construction. The gross receipts tax is also imposed—once—on the general contractor’s sale of construction services, including the resale the Taxpayer’s services, to the final consumer. Under the facts of this case, the Taxpayer is required to pay gross receipts tax on his receipts only once. There is no “double taxation”.

Even though taxing successive transactions is not 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. One of these deductions is the deduction provided in Section 7-9-52 NMSA 1978 for receipts from selling construction services to a person in the construction business. This deduction would have been available to the Taxpayer if he had obtained an NTTC from Robert Paiz Construction at the time the work was performed or within 60 days after mailing of the Department’s

February 8, 1999 notice. Because the Taxpayer failed to obtain the NTTC until after the statutory deadline, he is not entitled to claim the deduction and is liable for gross receipts tax on his 1995 receipts from performing construction services for Robert Paiz Construction, as well as his receipts from other customers.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2375867, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer is not entitled to the deduction from gross receipts provided in Section 7-9-52 NMSA 1978 because the Taxpayer did not have timely possession of an NTTC as required by Sections 7-9-52 and 7-9-43 NMSA 1978.
3. There is no prohibition against double taxation; in addition, the assessment of gross receipts tax against the Taxpayer does not constitute double taxation.

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

DATED December 6, 2000.