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

IN THE MATTER OF THE PROTEST OF
SCOTT & REBECCA DOLE, D/B/A
SOUTHWEST FLOORING INSTALLATIONS **NO. 01-28**
ID. NO. 02-269529-00-0, PROTEST TO
ASSESSMENT NO. 253647

DECISION AND ORDER

This matter came on for formal hearing on September 28, 2001 before Gerald B. Richardson, Hearing Officer. Southwest Flooring Installations, hereinafter, "Taxpayer", was represented by Mr. Scott Dole. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, 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 in the business of providing carpet installation services to companies who sell carpet.

2. The Taxpayer commenced business in the last quarter of 1993. At first, the Taxpayer provided carpet installation services to one carpet business, Showcase Carpets. In subsequent years, the Taxpayer also provided carpet installation services to other carpet businesses.

3. When the Taxpayer started business, Mr. Dole went to the Department to find out what he needed to operate a business in this state. He learned that he needed to obtain non-taxable transaction certificates ("NTTCs") from his customers to support a claim of deduction for his receipts from selling carpet installation services.

4. Showcase Carpets provided the Taxpayer with a Type 2 NTTC. Home Furniture, Inc., provided the Taxpayer with a Type 5 NTTC.

5. Mr. Dole did not understand that there were different types of NTTCs for different types of deductible transactions and did not notice the difference in the types of NTTCs which his customers had provided him.

6. On March 7, 2000, the Department notified the Taxpayer that it was conducting a limited scope audit based upon a comparison of the $59,068 in gross receipts which had been reported by Mr. and Mrs. Dole on Schedule C of their 1996 federal income tax return and the $0 receipts reported to the Department according to the Department records. The March 7th letter (hereinafter, the "60-day letter") also informed the Taxpayer that it must deliver to the Department, within 60 days of the date of the letter, any NTTCs which it had to support any deductions from gross receipts which it may have claimed.

7. As it turns out, the Taxpayer had reported the entire $59,068 in gross receipts to the Department, and then claimed a deduction from gross receipts in the same amount. The Department, however, did not discover this when it selected the Taxpayer for its limited scope audit because the Department showed the Taxpayer's business in its registration records as a partnership rather than a proprietorship which would report its receipts on federal Schedule C.

8. The Department's registration records for the Taxpayer were based on the Taxpayer's application for registration which was filled out by Mrs. Dole. In filling out the registration form she checked the boxes for both a proprietorship and partnership/joint venture, and she signed the registration form, giving her title as "partner".

9. Upon receipt of the 60-day letter, Mr. Dole immediately contacted his customers, Showcase Carpets and Home Furniture, Inc., to secure copies of the NTTCs they had previously issued. Mr. Scott was unable to locate his originals because of several moves he had made.

10. Home Furniture, Inc., issued a new Type 5 NTTC to the Taxpayer which the Taxpayer provided to the Department within the time allowed by the Department's 60-day letter. Based upon the Taxpayer's possession of a proper and timely Type 5 NTTC from Home Furniture, Inc., the Department allowed the Taxpayer's claim for deduction for the $14,067.07 in gross receipts it received from Home Furniture, Inc.

11. Showcase Carpets provided a Type 2 NTTC to the Taxpayer which the Taxpayer provided to the Department within the time allowed by the Department's 60-day letter.

12. On the last day for presenting NTTC's under the Department's 60-day letter, a Department representative contacted Mr. Dole to inform him that the Department would not accept the NTTC issued by Showcase Carpets because a Type 2 NTTC did not apply to the Taxpayer's transactions with Showcase Carpets.

13. Mr. Dole was unable to secure a Type 5 NTTC from Showcase Carpets until June 26, 2000, which was after the time allowed by the Department's 60-dayletter. Showcase Carpets was not able to provide a Type 5 NTTC to Mr. Dole because they did not have any Type 5 NTTCs and did not secure any until after the 60-day letter had expired.

14. Showcase Carpets charged gross receipts tax to its customers on the carpet installation services the Taxpayer provided to Showcase Carpets for its customers.

15. In another matter involving another carpet installer, the Department accepted proof from Showcase Carpets that it charged gross receipts tax on the carpet installation charges of the other carpet installer as a basis for either abating or not assessing gross receipts tax on the gross

receipts of the other carpet installer even though the carpet installer was unable to produce a timely Type 5 NTTC from Showcase Carpets.

16. On June 9, 2000, the Department issued Assessment No. 2539647 to the Taxpayer, assessing $2,622.18 in gross receipts tax, $262.22 in penalty and $1,442.20 in interest based upon the Department's disallowance of the Taxpayer's claim for deduction for $42,378.82 of gross receipts from Showcase Carpets received during the 1996 tax year.

17. On June 28, 2000, the Taxpayer filed a protest to Assessment No. 2539647.

DISCUSSION

The Taxpayer challenges its liability for gross receipts tax, penalty and interest based upon the Department's denial of its claim of deduction for the Taxpayer's receipts from Showcase Carpets. First, the Taxpayer argues that the different types of Department NTTCs are practically indistinguishable and that it is confusing and difficult for taxpayers to understand the different types and the consequences of accepting the wrong type of NTTC.

Mr. Dole acknowledged that from the outset of starting his business, he understood that he could claim a deduction for his gross receipts because he was performing services only for carpet businesses who charged their customers gross receipts tax on his installation services when his services were resold to the carpet purchasers. Additionally, Mr. Dole acknowledged that he understood that he needed to have a NTTC from his customers (the carpet businesses) to support his claim for deduction and he obtained NTTCs from his customers. The problem arose because he did not keep track of his copies of the NTTCs through several moves and he did not understand that there were different types of NTTCs for different types of nontaxable transactions. When the Department notified him of the limited scope audit and provided him 60

days to produce the NTTCs to support his claimed deductions, he was not able to get a NTTC of the proper type from his largest customer in a timely manner.

Section 7-9-48 NMSA 1978 is the statute which authorizes the deduction from gross receipts tax for services which are resold. The statute requires that the seller of the services receive a NTTC from the purchaser, the purchaser is required to resell the services and those services be subject to the gross receipts tax upon their resale. Section 7-9-43 NMSA 1978 provides in pertinent part that:

> 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.)

It was under this provision that the Department disallowed the Taxpayer's deductions which had been claimed for the Taxpayer's receipts from Showcase Carpets. This statute requires that the department disallow deductions where a taxpayer is unable to produce the proper NTTC within sixty days. I agree that the different types of certificates are all printed on the same NTTC form with only a slight difference indicated where the type of certificate and a cryptic description of the type of transaction to which the certificate applies is noted on the certificate.[1] Nonetheless the back of the certificates contain a listing of the various types of certificates the Department issues and a fuller explanation of the transactions to which they apply. Additionally, the CRS-1 Filer's kits, which are mailed to all taxpayers who are registered with the Department for gross

[1] The Type 2 NTTC the Taxpayer originally obtained from Showcase Carpets has only the notation "02 RESALE" printed on it. The Type 5 NTTC the Taxpayer obtained from Home Furniture, Inc. has the notation "05 SERVICE FOR RESALE" on it. Otherwise, the certificate forms are identical.

receipts tax purposes, explain to taxpayers how to report and claim deductions from tax, the requirements for NTTCs, the various types of deductions available and the type of documentation (NTTCs) required to substantiate the claim of deduction. Admittedly, it is a somewhat complicated system, but it is the system which the legislature has provided and which the Department is required to administer and enforce. It is well settled that taxpayers are required to ascertain and understand the tax consequences of their actions. ***Tiffany Construction Co. v. Bureau of Revenue,*** 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied* 90 N.M. 255, 561 P.2d 1348 (1977). Thus, it is not a defense to an assessment of tax that the system is too complicated and confusing. These arguments must be taken up with the legislature.

The Taxpayer also raised an argument that another local carpet installer had been audited by the Department in an earlier year and that the Department allowed his claims of deduction for his receipts from Showcase Carpets based on a Type 2 NTTC and proof from Showcase Carpets that they charged their customers gross receipts tax on the carpet installation services.[2] In this case, the Taxpayer provided similar proof to the Department that Showcase Carpets charged its customers gross receipts tax on the Taxpayer's installation services. While it would have been improper for the Department to allow the deduction claimed by the other carpet installer, the errors or mistakes the Department makes with regard to the administration of the tax statutes with respect to other taxpayers does not provide a defense to the proper administration of the tax statutes with regard to the instant matter.

The Taxpayer also argues that to impose gross receipts tax on its receipts from installing carpet amounts to prohibited double taxation, since Showcase Carpets also charged its customers gross receipts tax upon the same installation services. It is a popular misconception that

[2] Although Mr. Dole did not provide more specifics about this incident, the Department also did not question that this occurred, so it will be assumed to be true.

there is something inherently illegal or unconstitutional with double taxation. Eighty years ago, in ***Ft. Smith Lumber Co. v. Arkansas,*** 251 U.S. 532 (1920), the United States Supreme Court summarily disposed of the plaintiff's argument that Arkansas had imposed a double tax on corporate stock in violation of the federal constitution. As stated by Justice Oliver Wendell Holmes, writing for the majority:

> The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax..."

251 U.S. at 533. New Mexico courts have also 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).

It should also be noted that in construing the New Mexico Gross Receipts and Compensating Tax Act, the New Mexico courts have 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. Gross receipts tax is imposed upon both the Taxpayer's receipts from selling carpet installation services and those of Showcase Carpets. The legislature did provide a means for avoiding this stacking of taxes, by providing the deduction for resale of services, but as explained above, the Taxpayer failed to comply with the requirements of a proper and timely NTTC to support its claim of deduction.

The Taxpayer tries to distinguish the cases cited above by arguing that even if there are separate transactions being taxed, in effect, the same money or charges for carpet installation are being taxed twice. The gross receipts tax is not imposed solely on money or charges. It is imposed upon transactions which generate gross receipts. "Gross receipts" is defined to mean:

> …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.

Section 7-9-3 (F) NMSA 1978. Thus, it is the type of transaction generating the gross receipts which determines whether a transaction is or is not subject to gross receipts tax.

Next, the Taxpayer argues that the assessment should be abated because although he filed his protest to the assessment on June 28, 2000, it was more than a year before his protest was heard. While § 7-1-24 (D) provides that, "upon timely receipt of a protest, the department or hearing officer shall promptly set a date for hearing and on that date hear the protest or claim", I need not determine whether a 14 month delay amounts to a "prompt" hearing. In ***Ranchers-Tufco Limestone Project Joint Venture v. Revenue Division, New Mexico Taxation and Revenue Department***, 100 N.M. 632, 674 P.2d 522, *cert. denied* 100 N.M. 505, 672 P.2d 1136 (1983), the court rejected the taxpayer's argument that the Department's failure to set a formal hearing "promptly" as required by § 7-1-24(D) NMSA 1978 should result in the abatement of the taxes assessed. Instead, the court reasoned that:

> [T]he general rule is that tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests. *State, ex rel. Dept. of Human Services v. Davis,* 99 N.M. 138, 654 P.2d 1038 (1982). The general rule is applicable in these cases unless Section 7-1-24 makes it inapplicable. Section 7-1-24 does not make the general rule inapplicable.

100 N.M. at 635, 674 P.2d at 525. Thus, even if it were determined that the Taxpayer was not given a prompt hearing, it is not a defense to an assessment of tax.

Finally, the Taxpayer questions the Department's authority to issue an assessment for taxes for tax periods occurring in 1996 when the assessment was not issued until June of 2000. Section 7-1-18 NMSA 1978 provides for the limitation periods with respect to the assessment of

tax. Although the normal assessment period is three years from the end of the calendar year in which payment of the tax was due, § 7-1-18(A), other sections of the statute provide longer periods, depending upon the circumstances. Pertinent to this matter is Subsection D, which provides:

> If a taxpayer in a return understates by more than twenty-five percent the amount of his liability for any tax for the period to which the return relates, appropriate assessments may be made by the department at any time within six years from the end of the calendar year in which payment of the tax was due.

Section 7-1-18(D) NMSA 1978. In this case, the Taxpayer filed returns claiming a deduction for all of his receipts based upon his claim of deduction under § 7-9-48 NMSA 1978. That statute requires that a taxpayer have a proper NTTC to support a claim of deduction. In this case, the Taxpayer had a proper NTTC from Home Furniture, Inc. to cover the $14,067.07 in receipts it received from Home Furniture during 1996, but it failed to have a proper NTTC to cover the $42,378.82 in receipts from Showcase Carpets. Because the Taxpayer's receipts from Showcase represented substantially more than 25% of its tax liability and the Taxpayer was not entitled to claim the deduction for those receipts under the circumstances of this case, the Taxpayer falls under the six year statute of limitations provided by § 7-1-18(D).

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2539647 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was not entitled to claim the deduction provided at § 7-9-48 NMSA 1978 for its receipts from Showcase Carpets for failure to possess a Type 5 NTTC within 60 days of March 7, 2000.

3. The delay in scheduling and hearing the Taxpayer's protest hearing is not a defense to Assessment No. 2539647.

4. The fact that Showcase Carpets was also subject to gross receipts tax on the resale of the Taxpayer's carpet installation services is not a defense to the imposition of gross receipts tax upon the Taxpayer for those same installation services.

5. Assessment No. 2539647 was issued within the statute of limitations pursuant to § 7-1-18(D) NMSA 1978.

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

DONE, this 29th day of October, 2001.