

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

IN THE MATTER OF THE PROTEST
OF *COMPLIANCE TECHNOLOGY*,
I.D. NO. 02-146329-00 8, PROTEST
TO ASSESSMENT NO. 1740452.

NO. 95-06

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on August 9, 1995. Compliance Technology (hereinafter "Taxpayer") was represented by its owner, Mr. Craig Fields. The Taxation and Revenue Department (hereinafter Department) was represented by Frank D. Katz, Chief Counsel.

Based upon the evidence and arguments presented, **IT IS DECIDED AND ORDERED** as follows:

FINDINGS OF FACT

1. The Taxpayer works as a consultant in the area of asbestos abatement. As a consultant, the Taxpayer writes specifications for asbestos abatement jobs, monitors the work of contractors who remove asbestos and does inspections for asbestos.
2. As a result of an audit, the Department issued Assessment No. 1740452 to the Taxpayer, assessing \$4591.53 in gross receipts tax, \$75.00 in compensating tax, \$466.66 in penalty and \$1,523.04 in interest for a total of \$6,656.23.
3. The assessment covered the reporting period of July 1, 1990 through December 31, 1992.
4. The assessment was mailed to the Taxpayer on December 28, 1993 and the Taxpayer filed a written protest to the assessment on January 28, 1994.
5. At the time of the hearing of the Taxpayer's protest the only issue remaining for determination is whether the Taxpayer is liable for gross receipts tax and interest upon \$17,290.27

of receipts it received as a contractor for the Bureau of Indian Affairs (BIA) for work performed on the Navajo reservation within New Mexico. The amount of gross receipts tax assessed upon the Taxpayer's receipts from the BIA amounts to \$1,037.42. The Department had already agreed that penalty should not be applied to the Taxpayer regarding the under reporting of taxes related to this issue.

6. The Taxpayer was informed by the BIA that it was not subject to gross receipts tax on its receipts from its contracts with the BIA. The Taxpayer claims to have received conflicting advice from Department personnel concerning the taxability of its receipts from the BIA but cannot say who or when he received such advice and never sought a written ruling from the Department on this matter. The Taxpayer never sought an opinion on taxability from a professional tax advisor, such as an accountant or an attorney.

DISCUSSION

In October, 1994, the New Mexico Supreme Court issued its opinion in *Blaze Construction Co. v. Taxation and Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994), which held that the Indian preemption doctrine did not apply to preclude the imposition of gross receipts tax on contractors performing work for the BIA upon Indian reservations in New Mexico. Instead, the court applied the standard federal preemption doctrine which provided that in the absence of a congressional enactment barring the imposition of state tax, states may impose non-discriminatory taxes upon contractors performing work for the United States. Prior to the issuance of this decision, there was no law directly on point on this issue and it would be safe to say that this issue of law was unsettled and the subject of dispute among tax practitioners, taxing authorities and the taxpaying public. The issue presented herein is whether the holding in *Blaze Construction* should be given retrospective effect and be applied to other taxpayers and for tax periods which antedate the issuance of the decision.

In determining whether a decision should be given retrospective effect, the following factors

must be considered:

- (1) whether the decision establishes a new principle of law, either by overruling clear precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
- (2) the inequity imposed by retrospective application; and
- (3) the merits and demerits of each case must be weighed by looking to the history of the rule in question, the rule's purpose and effect, and whether retrospective operation of the rule will further or retard its operation.

Kennecott Copper Corp. v. Chavez, 109 N.M. 439, 786 P.2d 53 (Ct. App. 1990).

With respect to the first issue, whether *Blaze* establishes a new principle of law, the Department argues that it did not, since the court was merely applying the preemption analysis applicable to contractors with the federal government which was established in *United States v. New Mexico*, 455 U.S. 720 (1982), thus clearly foreshadowing the ruling reached by the court. I have little doubt, however, that in issuing its decision in *Blaze*, that the New Mexico Supreme Court was deciding a matter of first impression. *Blaze* is the first case to determine whether the standard federal preemption analysis applied by the Court in *United States v. New Mexico* should be applied to contractors for a federal agency performing work on an Indian reservation to benefit an Indian tribe, or whether the Indian preemption analysis should be applied. The best evidence that the result of the *Blaze* decision was not clearly foreshadowed lies in the fact that the New Mexico Supreme Court reversed the two New Mexico Court of Appeals decisions rendered in the consolidated case before the court, which had determined that the Indian preemption analysis was applicable and that the tax was preempted under that analysis. Thus, the *Blaze* decision did establish a new principle of law and we may proceed further with the analysis of whether it should be retroactively applied.

The second issue to be examined is the inequity imposed by retroactive application of the decision. The Taxpayer contends that it is inequitable to require it to pay taxes under a principle

which was not clearly established at the time that the taxable events occurred. In analyzing this issue, however, it is important to consider the context of this dispute, which involves the issue of whether the state is entitled to receive public monies in the form of taxes. Section 7-9-5 of the Gross Receipts and Compensating Tax Act provides as follows:
To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax.

Thus, the stated public policy is a presumption of taxability, and to avoid the imposition of tax, a taxpayer must clearly establish its right to an exemption or deduction from tax. *Reed v. Jones*, 81 N.M. 481, 468 P.2d 882 (Ct.App. 1970). There is no applicable exemption or deduction from gross receipts tax which applied to the Taxpayer's activities at the time the Taxpayer received the receipts in question. Of course, if the imposition of tax was preempted by the operation of federal law, the state would be barred from imposing its tax, but there was no clearly established law upon which the Taxpayer could have relied to establish its exemption from tax under the circumstances of this case because no court had addressed the specific issue presented.

It is against this backdrop of a public policy in favor of taxation that we must judge the Taxpayer's argument of inequity. The Taxpayer's efforts to determine whether it was taxable prior to determining not to report and pay taxes are not particularly impressive. Although the Taxpayer claimed that it was informed by the BIA that it was not taxable, the Department should be considered a more reliable authority on the issue of the applicability of the laws which it is charged to administer. The Taxpayer claims it received conflicting advice from Department personnel on the issue of taxability, but the Taxpayer was unable to give any specifics as to who in the Department was asked, when they were asked, and what information was given to the Department employees upon which their opinion was based. Even viewing this testimony generously, at best, the Taxpayer received conflicting advice about taxability, which should have raised a serious question as to whether it could be held liable for tax. There is a procedure for taxpayers to follow

when they need to obtain a definitive answer as to taxability. They may request a ruling from the Secretary pursuant to Section 7-1-5 NMSA 1978. Rulings are required to be in writing and to be reviewed by the Attorney General or the legal counsel of the Department. Section 7-1-5(C) NMSA 1978. This ensures that with respect to important issues involving public revenues, that the determination of taxability is thoroughly reviewed by persons competent to determine difficult issues of tax law, rather than an employee who may not understand the nuances of the law in complex areas such as the one at issue herein. When a taxpayer receives such a ruling from the Department, the legislature has provided protection for the taxpayer in the form of estoppel against the state taking a different position from that stated in the ruling. Section 7-1-60 NMSA 1978.

If the Taxpayer did not wish to seek a written ruling from the Department, the Taxpayer could have also sought the advice of an attorney or an accountant to advise him on this matter. This was not done either.

Although it is admitted that the law in this area was not clearly established, given the presumption of taxability which exists, the Taxpayer's efforts to determine taxability were not sufficient to tip the scales of equity in its favor on this issue. It is simply too convenient to decide not to pay taxes if there is any question about it, and the law does not support the choice made by the Taxpayer under these circumstances. Although the Taxpayer was not aware of the litigation surrounding the issue herein, the Taxpayer was aware that there was substantial question as to the taxability of its activities, and by electing to not report or pay taxes without receiving any authoritative answer on this issue, the Taxpayer chose to take the risk that it could be held liable for taxes in the future on its activities.

The issue of the equities involved in retroactive enforcement should also be viewed in the context of the tax department's obligation to enforce tax laws in an even-handed manner. Public perception that the tax laws are administered fairly is essential to the functioning of a self-reporting tax system such as ours. Certainly, there is some inequity if the Blaze Construction Company is

held liable for taxes on its receipts from contracts with the BIA, but other taxpayers are allowed an exemption for the same time period prior to the finalization of the Blaze litigation. One must ask how equitable it is to exempt the Taxpayer in the instant case when there may well have been other BIA contractors operating at the same time who paid tax on their receipts from other BIA contracts?

The equities simply do not weigh in favor of protecting this Taxpayer from retroactive application of the rule announced in *Blaze*.

The final step in the retroactivity analysis is to look at the history of the rule in question, the rule's purpose and effect and whether retrospective operation of the rule will further or retard its operation. The rule which was applied by the court in *Blaze* is the general rule that with respect to the federal preemption of state tax upon federal contractors, that in the absence of some explicit federal enactment which prohibits the imposition of tax, there is no preemption. The Indian preemption rule is a limited exception to the general law about federal preemption, which implies preemption in the absence of an explicit federal enactment. The court in *Blaze* gave precedence to the general rule over the limited exception. The purpose and effect of the general rule is to strike an appropriate balance between state and federal governmental powers under our federal system and to provide certainty in the determination of whether federal preemption exists. Preemption can be readily determined under the general rule, because there is either an explicit federal enactment prohibiting state taxation, or there is not. The Indian preemption exception is much more difficult to ascertain because it involves the exercise of discretion and judgment in weighing the competing state, federal and tribal interests in determining whether preemption exists. The purpose of the general rule is furthered by the retroactive application of the *Blaze* decision because there were no explicit federal enactments barring the imposition of the tax in question and certainty in the area of taxation is furthered by the application of this general rule.

Based upon all of these considerations, it is determined that the *Blaze* decision is retroactively applicable to the Taxpayer.

With respect to the imposition of interest, Section 7-1-67 mandates that interest be imposed any time that tax is not paid when due. Since the underlying tax was not paid when it was due, interest is owing on the unpaid tax liability until it is paid.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1740452 and jurisdiction lies over the parties and the subject matter of this protest.

2. As determined in *Blaze Construction Co. v Taxation and Revenue Department*, the Taxpayer was subject to gross receipts tax upon its receipts from performing services for the Bureau of Indian Affairs on Indian reservation lands within New Mexico.

3. The ruling in *Blaze Construction Co. v. Taxation and Revenue Department* should be retroactively applied to the Taxpayer because it is not inequitable to do so and because the purposes of the rule about when federal preemption is applied are furthered by the application of the rule retrospectively.

4. Interest was properly assessed against the Taxpayer for failure to pay tax when it was due.

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

DONE, this 30th day of August, 1995.