

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

IN THE MATTER OF THE PROTEST OF
ACTIONSIDE LATH AND PLASTER,
ID NO. 02-229516-00 0, PROTEST TO
ASSESSMENT NO. 2129624

NO. 98-54

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer on September 29, 1998. Actionside Lath and Plaster, hereinafter, "Taxpayer", was represented by Mr. Tim Trujillo, the owner. The Taxation and Revenue Department, hereinafter, "Department", was represented by Monica M. Ontiveros, Esq. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer engages in business as a construction contractor who performs stuccoing services, acting primarily as a subcontractor on most of its jobs.
2. In the fall of 1996, the Department informed the Taxpayer that it would be audited by the Department.
3. The Department's audit of the Taxpayer commenced on January 21, 1997.
4. The Taxpayer had not filed returns under the Department's Combined Reporting System (CRS) for reporting of gross receipts tax, withholding tax and compensating tax for reporting periods from July of 1995 through December of 1996.
5. On December 3, 1996, the Taxpayer tendered a cashier's check in the amount of \$15,000 to the Department in payment of taxes it might owe under the Combined Reporting

System. Although the Taxpayer attempted to tender the cashier's check, the Taxpayer did not prepare or present to the Department any tax returns along with the check to inform the Department as to which tax programs and reporting periods, and the amounts of such taxes which were being paid by the tender of the cashier's check.

6. Because the Department could not determine how to apply the payment tendered, it did not accept the cashier's check in payment of any taxes which the Taxpayer might owe at the time of tender.

7. As a result of the Department's audit, on April 23, 1997, the Department issued Assessment No. 2129624 to the Taxpayer, assessing \$21,659.27 in gross receipts taxes, \$1448.80 in penalty and \$1,676 in interest for the period of January, 1994 through December, 1996.

8. On April 28, 1997, the Taxpayer filed a timely, written protest to Assessment No. 2129624.

9. During 1994, the Taxpayer performed work for Omega Sunspaces and received compensation for this work in the amount of \$16,790 for which it claimed a deduction from gross receipts tax pursuant to Section 7-9-52. Although the Taxpayer received a non-taxable transaction certificate from Omega Sunspaces in support of its claim of deduction, neither the Taxpayer or Omega Sunspaces could locate a copy of the certificate, either at the time of the audit or at any time thereafter.

10. The Taxpayer was given a letter by the Department's auditor on January 21, 1997, at the commencement of the Department's audit requesting that all nontaxable transaction certificates relied upon by the Taxpayer in claiming deductions from tax be presented to the Department within sixty days of the service of the letter.

11. Omega Sunspaces included the cost of the work performed by the Taxpayer in its charges to its customers pursuant to its contracts with its customers and paid gross receipts tax to the Department upon its receipts from those contracts.

12. Because the Taxpayer was not able to produce a nontaxable transaction certificate to support its claim of deduction for its receipts from Omega Sunspaces within sixty days of January 21, 1997, the Department's audit denied the deduction and gross receipts taxes were assessed to the Taxpayer upon its receipts from Omega Sunspaces.

DISCUSSION

The Taxpayer's protest raises two issues, whether the Department properly assessed gross receipts tax on the Taxpayer's receipts from Omega Sunspaces, and whether the assessment of interest should be reduced to account for the Taxpayer's attempt to pay taxes by its tender of a cashier's check in December, 1996, prior to the commencement of the audit and the issuance of the assessment.

The Department's denial of the deduction claimed for the Taxpayer's receipts from Omega Sunspaces will be discussed first. The Taxpayer had claimed the deduction based upon the provisions of § 7-9-52 NMSA 1978 (1993 Repl. Pamp.) which provides as follows:

- 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.
- B. The buyer delivering the nontaxable transaction certificate must have the construction services performed upon:
 - (1) a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or
 - (2) a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

In this case, there is no dispute that the nature of the Taxpayer's work for Omega Sunspaces as a subcontractor would qualify for the deduction provided at § 7-9-52, provided that the Taxpayer was given a non-taxable transaction certificate by Omega Sunspaces. Mr. Trujillo stated that he had a non-taxable transaction certificate from Omega Sunspaces but he was not able to locate it at the time of the audit or within the sixty day deadline for presenting nontaxable transaction certificates after notice that he must do so. Thus, the issue is whether the Department properly denied the deduction upon audit for failure to possess the certificate.

The determination of this issue is governed by the provisions of § 7-9-43(A) NMSA 1978 (1993 Repl. Pamp.), which provides in pertinent part:

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 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.***

This provision makes clear that even if a seller had the nontaxable transaction certificate in his possession at the time the return was due for receipts from the transaction with the purchaser and the deduction was claimed, if the seller cannot produce the certificate upon audit or within the sixty day period allowed after notice is given requiring the possession of the certificates, the deduction "shall be disallowed."

The Taxpayer objects to the application of this provision, since Omega Sunspaces also remitted tax to the Department on its receipts from its customers which included the cost of the Taxpayer's services to Omega Sunspaces. While it is true that, in effect, tax is imposed twice upon the same activity, we have two separate businesses and two separate transactions generating gross receipts. While § 7-9-52 provides a mechanism to avoid the stacking of taxes on the two transactions, because the Taxpayer could not produce the nontaxable transaction certificate, the deduction must be disallowed upon audit. While this result is, indeed, harsh, the Legislature has mandated this result and this forum does not have the discretion to create exceptions to the mandate of the statute.

The next issue is whether the Department correctly computed the interest on the Taxpayer's assessed liability. Prior to the commencement of the audit, the Taxpayer attempted to tender a cashier's check in the amount of \$15,000 in payment of taxes owed. The Taxpayer had failed to report or pay gross receipts taxes to the Department from June of 1995 until the commencement of the audit in January of 1996. Presumably, because the Taxpayer knew taxes would be due, it attempted to make a payment towards those taxes. The problem, however, was that the Taxpayer did not submit returns indicating the Taxpayer's gross receipts, deductions, amount of taxes due and the tax periods for which taxes were being paid at the time payment was tendered. Because the Department did not have this information to determine how the tax payment should be applied, the Department would not accept the tender of payment. The Taxpayer argues that the amount of interest should be reduced because its tender of the cashier's check should be considered a payment, which would stop the accrual of interest on those taxes paid.

Section 7-1-67 NMSA 1978 (1995 Repl. Pamp.) provides for the imposition of interest on tax deficiencies, and states in pertinent part:

A. If any tax imposed is not paid on or before the day on which it becomes due, interest shall be paid to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid....

The statute imposes interest on unpaid taxes until they are “paid”. Thus, the question is whether the Taxpayer’s tender of a check in payment of taxes, without filing returns to inform the Department which taxes and for which periods the payment was to be applied constitutes a payment. This question was answered by the decision in *Amoco Production v. New Mexico Taxation and Revenue Department*, 118 N.M. 72, 878 P.2d 1021 (Ct. App. 1994). In that case, the taxpayer sought offsets, for purposes of calculating interest on tax underpayments, for other periods in which there were tax overpayments, but the Taxpayer had not filed amended returns indicating the tax overpayments and underpayments during the periods of time for which the taxpayer sought the offsets. The taxpayer argued that its overpayments should be considered payments of the taxes which were underpaid, even though the taxpayer had provided no information or amended returns to the Department to inform it of the underpayments of overpayments. The court rejected the Taxpayers argument, stating:

The entire statutory scheme indicates that a tax is not paid simply when monies are deposited with the State. Rather, the applicable statutes and Department instructions enacted pursuant to them indicate that, in most instances when taxes are paid, a taxpayer is required to provide the following information to the State: the taxpayer’s identity, the tax period to which the monies are to be applied and the tax program to which the monies are to be applied. (statutory citations omitted).

Thus, the mere tender of a payment without the information necessary to properly apply the tax payment did not amount to a payment of taxes in this instance so as to toll the imposition of interest.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2129624 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Department properly denied the Taxpayer's deduction of gross receipts paid by Omega Sunspaces based upon the Taxpayer's failure to provide a nontaxable transaction certificate to the Department within sixty days of the Department's notice to the Taxpayer pursuant to Section 7-9-43(A) NMSA 1978 (1993 Repl. Pamp.)

3. The Taxpayer's tender of a check which was not accompanied by returns showing the tax programs tax amounts and tax periods to which the payment should be applied did not constitute a payment of taxes for purposes of tolling the imposition of interest pursuant to Section 7-1-67 NMSA 1978 (1995 Repl. Pamp.)

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

DONE, this 15th day of October, 1998. _