

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

IN THE MATTER OF THE PROTEST OF
DONALD L. OSCHWALD
ID NO. 01-747241-00 5
ASSESSMENT NO. 1963930

No. 99-03

DECISION AND ORDER

A formal hearing on the taxpayer's protest was held January 20, 1999 before Margaret B. Alcock, Hearing Officer. Donald L. Oswald ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Monica 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. Mr. Oswald is a licensed architect and building inspector.
2. In 1989, Mr. Oswald's wife became ill, leading him to close his office and retire from work as a full-time architect.
3. After closing his office, Mr. Oswald continued to work part-time as a roofing consultant to licensed contractors.
4. In the ordinary course of his work, Mr. Oswald travels to the site of a proposed roofing project, climbs onto the roof and then, using a special tool he invented, drills into the roof and removes a cross section for analysis.
5. It is necessary for Mr. Oswald to physically remove a section of the roof because building codes prohibit placing a third layer of roofing material on residential structures. If a roof already has two layers of roofing material, these must be removed before a new roof can be put

down. Only by removing a cross section of the roof can Mr. Oswald determine the condition and number of layers already on the roof.

6. After completing his analysis, Mr. Oswald replaces the cross section of the roof and repairs and seals the area where the hole was made. Based on Mr. Oswald's findings, the contractor determines the extent of the work that must be done to repair or replace the roof.

7. In late 1990 or early 1991, Mr. Oswald called the Department to ask whether his receipts from performing these services were subject to gross receipts tax.

8. Mr. Oswald's call was taken by Cindy Loretto, who worked in the Santa Fe District Office helping taxpayers who called or came into the office for advice.

9. Ms. Loretto recognized Mr. Oswald because she formerly worked as a secretary and office manager for one of the roofing companies for which Mr. Oswald performed services.

10. Ms. Loretto was familiar with the type of work Mr. Oswald did for contractors and believed he would be able to deduct his receipts from this work if the contractor provided him with a Type 7 nontaxable transaction certificate (NTTC).

11. Because she had not been working with the Department very long, Ms. Loretto consulted with two more senior Department employees who concurred that Mr. Oswald was performing construction services and could deduct his receipts from contractors who provided him with Type 7 NTTCs.

12. Mr. Oswald followed Ms. Loretto's advice and obtained a Type 7 NTTC from each contractor for whom Mr. Oswald performed services.

13. Mr. Oswald made an error in completing his gross receipts tax returns and simply excluded receipts for which he had Type 7 NTTCs, rather than reporting all of his receipts and then taking a deduction for receipts covered by the NTTCs.

14. In 1995, the Department discovered the discrepancy between the business income reported on Mr. Oswald's 1991 federal income tax return and the receipts reported on his New Mexico gross receipts tax returns for the same period.

15. Upon receiving the Department's notice of inquiry, Mr. Oswald explained that the discrepancy was attributable to the receipts he earned from contractors who provided him with Type 7 NTTCs.

16. The Department informed Mr. Oswald that it was disallowing his deductions because his services did not qualify as construction services and he was not entitled to accept Type 7 NTTCs from the contractors for whom he performed services.

17. On September 23, 1995, the Department issued Assessment No. 1963930 in the total amount of \$2,577.15, representing gross receipts tax of \$1,504.90, penalty of \$150.50 and interest of \$921.75.

18. On September 28, 1995, Mr. Oswald filed a protest to the assessment.

19. After Mr. Oswald established that his deductions were based on advice received from Department employees, the Department abated the penalty of \$150.50.

DISCUSSION

Mr. Oswald raises two arguments in support of his protest: (1) he is not liable for the gross receipts tax assessed by the Department because he is entitled to claim the deduction for receipts from the sale of construction services provided in Section 7-9-52 NMSA 1978; (2) the doctrine of equitable estoppel bars the Department from assessing gross receipts tax on receipts Mr. Oswald deducted on the advice of Department employees.

Mr. Oswald argues that he is entitled to deduct his receipts from his roofing services under the provisions of Section 7-9-52(A) NMSA 1978, which states:

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.

There are two prerequisites to taking the deduction: (1) the taxpayer must be selling a construction service, and (2) the taxpayer must obtain an NTTC from the buyer of his construction services. In this case, there is no dispute that Mr. Oswald had timely possession of the Type 7 NTTCs required under Section 7-9-52. The only matter at issue is whether the services performed by Mr. Oswald qualify as construction services. Subsection (C) of Section 7-9-3 NMSA 1978 defines "construction" to include:

building, altering, repairing or demolishing in the ordinary course of business any:

...

(2) building, stadium or other structure;...

Subsection (K) defines "service" to include "construction activities and all tangible personal property that will become an ingredient or component part of a construction project."

In the ordinary course of his work as a roofing consultant, Mr. Oswald uses a special tool he invented to drill into a customer's roof and remove a cross section of the roof itself. After evaluating the number of layers and condition of the roof, Mr. Oswald replaces the cross section and repairs the area where the hole has been drilled. The repair work includes patching the hole with membrane and sealing it with plastic roof sealer.

Fermin Aragon, General Construction Bureau Chief for the Construction Industries Division ("CID") testified at the hearing. Mr. Aragon gave his opinion that Mr. Oswald's work constitutes construction. Mr. Aragon stated that Mr. Oswald's roofing services can be performed only by a contractor licensed by CID or by someone who is performing the work in association with a properly

licensed contractor. Mr. Aragon's conclusion was based on CID's interpretation of Section 60-13-3(A)(2) NMSA 1978 of the Construction Industries Licensing Act, which states, in pertinent part:

Contracting includes but is not limited to constructing, altering, repairing, installing or demolishing any:

...

(2) building, stadium or other structure;...

The definition of contracting in Section 60-13-3 is virtually identical to the definition of construction in Section 7-9-3(C). Mr. Aragon testified that Mr. Oswald's physical hands-on alteration and repair of a roof qualifies his work as contracting under Section 60-13-3. The Department did not present any evidence to contradict Mr. Aragon's testimony or explain why Mr. Oswald's work did not constitute altering and repairing a structure for purposes of meeting the definition of construction under Section 7-9-3(C).

Based on the evidence presented, the Department's original advice to Mr. Oswald was correct. The work Mr. Oswald performs when he drills into a roof, removes a cross section of the roof and then repairs the damage resulting from that procedure qualifies as construction under Section 7-9-3(C). Mr. Oswald was entitled to deduct his receipts from performing such services for licensed contractors who provided him with Type 7 NTTCs.

My determination that Mr. Oswald is entitled to the deduction provided in Section 7-9-52 makes it unnecessary to reach the issue of equitable estoppel.

CONCLUSIONS OF LAW

1. Mr. Oswald filed a timely, written protest to Assessment No. 1963930, and jurisdiction lies over the parties and the subject matter of this protest.

2. The work Mr. Oswald performs when he drills into a roof, removes a cross section of the roof, and then repairs the damage resulting from that procedure qualifies as construction under Section 7-9-3(C).

3. During the assessment period at issue, Mr. Oswald was entitled to deduct his receipts from performing services for licensed contractors who provided him with Type 7 NTTCS.

For the foregoing reasons, the Taxpayer's protest is GRANTED. The Department is ordered to abate Assessment No. 1963930 in full.

Dated January 25, 1999.