

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

**IN THE MATTER OF THE PROTEST OF
CENTURY GLASS, INC.; ID NO. 01-186790-00-6
TO ASSESSMENT NOS. 4028219 through 4028254**

05-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 16, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Century Glass, Inc. ("Taxpayer") was represented by Anthony Polaco, its Vice President. After the Taxpayer presented its arguments, the hearing was continued to give the Taxpayer an opportunity to provide the Department with additional evidence to support the Taxpayer's position. The hearing was reconvened on April 5, 2005. Jeffrey W. Loubet entered his appearance for the Department; the Taxpayer failed to appear at the April 5, 2005 hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a corporation headquartered in Albuquerque, New Mexico.
2. The Taxpayer's business consists primarily of work performed as a subcontractor on commercial and residential construction jobs.
3. The Taxpayer also makes a small number of direct sales of glass to nonprofit organizations and other customers. At least some of these sales are made on an installed basis.

4. On July 23, 2001, the Department began a field audit of the Taxpayer. On the same day, the auditor delivered a “60-day letter” to the Taxpayer’s president, who acknowledged receipt by signing and dating the letter.

5. The July 23, 2001 letter notified the Taxpayer that it had 60 days to obtain possession of nontaxable transaction certificates (“NTTCs”) needed to support its deductions and further stated: “If the above listed required documentation is not in your possession and delivered or mailed to the auditor within 60 days from the date of this notice, deductions previously claimed relating to that documentation will be disallowed. **Such disallowance may result in a substantial tax liability which will include penalty and interest.**” (Emphasis in the original letter).

6. As of September 21, 2001, the expiration of the 60-day period, the Taxpayer had provided a few NTTCs to the auditor.

7. The auditor rejected two Type 9 NTTCs, which apply to the sale of tangible personal property to governmental and nonprofit organizations. The NTTCs were rejected because the subject transactions (one for \$44.00 and one for \$262.42) involved the sale of construction services rather than the sale of tangible personal property.

8. Almost one year after the expiration of the 60-day period, the Taxpayer presented the Department with NTTCs from the following customers: D Shutz & Co., Inc.; TNGT Construction Co.; Anu Antiques & Collectibles; and Sundaram Building, Inc. These NTTCs were rejected as untimely.

9. For the majority of transactions, the Taxpayer failed to provide the Department with any NTTCs to support its deductions.

10. Some of the general contractors for whom the Taxpayer had performed work refused to cooperate in providing the Taxpayer with NTTCs. One contractor had gone out of business, making it impossible for the Taxpayer to obtain an NTTC from that contractor.

11. On September 20, 2002, the Department issued Assessment Nos. 4028219 through 4028254 to the Taxpayer in the total amount of \$44,684.52, representing gross receipts tax, penalty, and interest for the period January 1998 through June 2001.

12. On December 17, 2002, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the assessments.

DISCUSSION

The issue to be decided in this protest is whether the Taxpayer's failure to produce timely NTTCs from the general contractors for whom it performed services bars the Taxpayer from deducting its receipts from those contractors.¹ NMSA 1978, § 7-1-17 states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Further, NMSA 1978, § 7-9-5 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or 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*

¹ At the original hearing held on February 16, 2005, the Taxpayer raised two additional issues: whether the Department improperly disallowed transactions supported by Type 9 NTTCs; and whether the Department double counted certain receipts. The hearing officer continued the hearing to April 5, 2005 to give the Taxpayer time to provide the Department with additional evidence to support its claims. The Taxpayer failed to provide such evidence and failed to appear when the hearing resumed on April 5, 2005. Accordingly, the Taxpayer's arguments on these two issues are deemed abandoned and will not be addressed in this decision.

Revenue Department, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Accordingly, it is the Taxpayer's burden to come forward with evidence and legal arguments to show that he is entitled to the deductions claimed and that the Department's assessment is incorrect.

The Gross Receipts and Compensating Tax Act provides several deductions for taxpayers who meet the statutory requirements set by the legislature. In this case, the Taxpayer claims the following deduction provided in NMSA 1978, § 7-9-52:

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. (emphasis added)

This statute allows a taxpayer to deduct its receipts from performing services as a subcontractor if—and only if—the general contractor provides the taxpayer with an NTTC. The requirements of NMSA 1978, § 7-9-52 are very specific: if the subcontractor fails to obtain an NTTC from the general contractor, there is no basis for a deduction.

The requirements for obtaining NTTCs are set out in NMSA 1978, § 7-9-43, which provides, in pertinent part:

All nontaxable transaction certificates...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....

While taxpayers “should” have possession of required NTTCs at the time of the transaction at issue, the statute gives taxpayers audited by the Department a second chance to obtain these NTTCs.

Taxpayers who rely on this provision must recognize, however, that they run the risk of having their

deductions disallowed if they are unable to meet the 60-day deadline set by the legislature. The reason why a taxpayer cannot obtain an NTTC is irrelevant. 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).

In this case, the Taxpayer argues that circumstances outside its control prevented it from obtaining the NTTCs required by § 7-9-52. Some of the general contractors for whom the Taxpayer performed work refused to give the Taxpayer NTTCs, and one contractor had gone out of business by the time the Taxpayer received the Department's 60-day letter. While this series of events is unfortunate, the Taxpayer's attempt to shift responsibility for documenting its gross receipts tax deductions to the buyer of its services is inconsistent with New Mexico's self-reporting tax system. Every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her 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). The incidence of the gross receipts tax is on the seller, and it was the responsibility of the Taxpayer—not its customers—to determine whether it had the documentation needed to support his deductions. The Taxpayer's failure to obtain NTTCs within the 60-day period provided in NMSA 1978, § 7-9-43 leaves the Department no choice but to disallow the Taxpayer's deductions.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 4028219 through 4028254, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is not entitled to deduct receipts from customers who did not provide the Taxpayer with a timely NTTC.

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

DATED April 6, 2005.