

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

**IN THE MATTER OF THE PROTEST OF  
RICHARD SANCHEZ CONSTRUCTION  
CRS NO. 02-361127-00 8  
TO NOTICE OF ASSESSMENT OF TAXES  
ISSUED UNDER LETTER ID NO. L1829415936**

**No. 05-21**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on September 26, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Richard Sanchez Construction was represented by its owner, Richard Sanchez ("Taxpayer"). At the close of the hearing, the record was left open until October 11, 2005 to allow the submission of additional documentation. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. In March 1998, the Taxpayer registered his construction business with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
2. During 1998, 1999, and 2000, the Taxpayer either failed to file monthly CRS returns or filed returns reporting zero gross receipts. The Taxpayer's federal income tax returns reported business receipts in excess of \$700,000 for each of those years.
3. Beginning in March 2000 and continuing through April 2001, the Taxpayer filed CRS returns reporting withholding tax due.

4. The returns the Taxpayer filed for the months of February, March, and April 2001 also reported gross receipts in the total amount of \$214,150.32. No payment was included with those returns.

5. In June 2001, the Taxpayer filed an application for nontaxable transaction certificates (“NTTCs”) and received fifteen NTTCs from the Department.

6. In April 2002, the Department notified the Taxpayer that he had been selected for audit. The audit notice was mailed to the Taxpayer at 9405 Riverfront Drive, NW, Albuquerque, NM 87114, the address shown on his CRS registration with the Department and on the CRS returns the Taxpayer filed with the Department.

7. The auditor subsequently spoke to the Taxpayer’s wife, who provided the auditor with copies of the joint federal income tax returns the Taxpayer and his wife filed for tax years 1998 and 1999.

8. In May 2002, the Taxpayer filed a CRS return for April 2002 reporting no receipts and no tax due.

9. Because the Department’s audit was delayed, the Department issued provisional assessments to the Taxpayer at the end of 2002 for reporting periods March 1998 through December 2002. Because the Taxpayer had not reported any gross receipts for these periods, the amount of gross receipts tax assessed was based on average receipts for the construction industry.

10. In January 2003, the Taxpayer filed CRS returns for the months of May through December 2002. Each of those returns reported no receipts and no tax due.

11. In October 2003, the audit was reassigned to another auditor. On October 20, 2003, a second notice of audit was mailed by certified mail to the Taxpayer at the Riverfront Drive address shown on his registration certificate, together with a letter setting out the type of records the Taxpayer was required to produce for the Department's examination.

12. The audit notice and letter were returned to the Department by the United States Postal Service as unclaimed.

13. The auditor attempted to contact the Taxpayer by telephone, but no one returned the auditor's calls.

14. On June 12, 2003, the auditor drove to the Taxpayer's Riverfront Drive address, taking another Department employee with her as a witness. The auditor noted that a vehicle with a New Mexico license plate registered to the Taxpayer was in the driveway, but no one answered the door to the house. The auditor then pushed copies of the audit notice and letter concerning the records needed for the audit under the door.

15. The auditor did not receive any response from the Taxpayer and no records were ever produced for audit.

16. The auditor then proceeded to determine the Taxpayer's liability for CRS taxes based on the 1998 and 1999 federal income tax returns previously provided by the Taxpayer's wife and on third party records obtained from the Internal Revenue Service, including the Taxpayer's 2000 federal income tax return.

17. Because the Taxpayer did not file state or federal income tax returns for 2001 or 2002, gross receipts for those years were determined based on the average of receipts reported on the Taxpayer's income tax returns for the previous three years.

18. On May 26, 2004, the Taxpayer telephoned the Department and cancelled the CRS registration for his construction business.

19. On June 16, 2004, the Department issued an assessment under Letter ID L1829415936, assessing the Taxpayer for gross receipts, compensating, and withholding taxes for reporting periods March 1998 through May 2003. The total amount of the assessment, including interest, was \$369,047.46.

20. The assessment was mailed to the Riverfront Drive address and was returned to the Department by the United States Postal Service as unclaimed.

21. In July 2004, one of the Department's senior revenue agents called the Taxpayer concerning the provisional assessments the Department had issued in 2002. The agent noticed that an audit assessment had recently been issued for the same reporting periods and provided the Taxpayer with a copy of that assessment.

22. The Department subsequently abated the 2002 provisional assessments against the Taxpayer's construction business, which had been superceded by the 2004 audit assessment.

23. On July 13, 2004, the Department received the Taxpayer's written protest to the June 16, 2004 audit assessment.

## **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for the CRS taxes assessed against his construction business for the period March 1998 through May 2003. The Taxpayer argues first, that the figures the Department used as the basis for the assessment were only estimates and second, that he was no longer engaged in the construction business after 2000

and should not have been assessed for reporting periods after that date. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C). Accordingly, it is the Taxpayer's burden to establish that the Department's assessment is incorrect and should be abated in full or in part.

The Taxpayer objects to the Department's method of determining his CRS liability, arguing that it was based on estimates. While this was true of the provisional assessments issued in 2002—and later abated—the assessment at issue in this case was based on the business receipts reported on Schedule C to the Taxpayer's 1998, 1999, and 2000 federal income tax returns. At the administrative hearing, the Taxpayer acknowledged that the amounts reported on his federal returns are accurate to the best of his knowledge and that he did not have any basis for challenging the taxes assessed for reporting periods March 1998 through December 2000. Taxable receipts for reporting periods January 2001 through May 2003 were determined by averaging the receipts the Taxpayer reported for the prior three years. This was done because the Taxpayer failed to provide any records from which actual receipts could be determined.

NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." NMSA 1978, § 7-1-11(C) states that taxpayers "shall upon request make their records and books of account available for inspection at reasonable hours to the secretary or the secretary's delegate." At the administrative hearing, the Taxpayer claimed that he was unable to provide any records concerning his construction business because those records were lost as a result of his divorce and the foreclosure of his house on Riverfront Drive in Albuquerque. Upon questioning, the Taxpayer could not recall when he and his wife separated. Nor could he recall

when the foreclosure took place, first testifying that it was in 2002 and later stating that it occurred in 2003. The Taxpayer had no explanation for why a vehicle registered in his name was in the driveway when the Department's auditor visited the house on Riverfront Drive in June 2004.

Even if the Taxpayer's testimony concerning the lost records were accepted, he apparently made no attempt to reconstruct those records after he became aware of the Department's audit and assessment. At a minimum, the Taxpayer could have obtained copies of monthly bank statements from his bank that would have shown deposits for reporting periods after December 2000. The Taxpayer's assertions that he stopped doing business at the end of 2000 and had no business income after that date conflicts with other evidence in the record. In June 2001, the Taxpayer filed CRS returns for the months of January, February, March, and April 2001. The January return reported only withholding tax. The February, March, and April returns reported withholding tax and also reported gross receipts in the total amount of \$214,150.32. The information on those returns directly contradicts the Taxpayer's testimony that he had no income during 2001, as well as his statement that he was not required to file state and federal income tax returns for that year. The Taxpayer continued to file CRS returns for his construction business during 2002 and did not cancel his business registration with the Department until May 2004.

The record in this case establishes that the Taxpayer failed to report and pay CRS taxes due to the state. Much of the testimony the Taxpayer gave at the administrative hearing was not credible, either because it was inherently unbelievable or because it was contradicted by other evidence in the record. The Department's assessment of CRS taxes for reporting

periods March 1998 through December 2000 was not based on estimated receipts, but on the actual receipts reported as business income on the Taxpayer's federal income tax returns. Given the Taxpayer's failure to provide any records or credible evidence concerning his receipts for reporting periods January 2001 through May 2003, the Department's use of prior-year returns to estimate those receipts was reasonable. See, *Archuleta v. O'Cheskey*, 84 N.M. 428, 504 P.2d 638 (Ct. App. 1972); *Torridge Corp. v. Commissioner of Revenue*, 84 N.M. 610, 506 P.2d 354 (Ct. App. 1972), *cert. denied*, 84 N.M. 592, 506 P.2d 336 (1973).

### CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the Department's assessment of CRS taxes issued under Letter ID L1829415936, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer failed to meet his burden of proving that the Department's assessment was incorrect.

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

DATED October 12, 2005.

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MARGARET B. ALCOCK  
Hearing Officer  
Taxation & Revenue Department  
Post Office Box 630  
Santa Fe, NM 87504-0630

### NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the Taxpayer has the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. See, NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

### **CERTIFICATE OF SERVICE**

On October 12, 2005, a copy of the foregoing Decision and Order was mailed by certified mail # 7003 0500 0002 3966 6016 and by regular first class mail, to Richard Sanchez, 211 Montano Road, NW, Unit C, Albuquerque, NM 87107, and delivered by interoffice mail to Lewis J. Terr, Special Assistant Attorney General, Taxation and Revenue Department, Santa Fe, New Mexico.

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MARGARET B. ALCOCK