

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

**IN THE MATTER OF THE PROTEST OF
NEW MEXICO HEALTHY HOME BUILDERS, INC.
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L0343320704**

No. 09-04

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 18, 2009, before Sally Galanter, Hearing Officer. New Mexico Healthy Homebuilders was represented by Mark Casias, its President (“Taxpayer”). The Taxation and Revenue Department (“Department”) was represented by Tonya Noonan Herring, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a corporation organized in New Mexico, operates its business in Taos, New Mexico and is engaged in the business of residential and commercial construction and remodeling of existing residential structures. Taxpayer Exhibit 1.
2. Taxpayer’s president, Mark Casias, is certified with the State of New Mexico Regulation and Licensing Department, Construction Industries Division as a qualified party and Taxpayer is certified with the State of New Mexico Regulation and Licensing Division, Construction Industries Division as a contractor. Taxpayer Exhibit 2.
3. Taxpayer contracted in 2006 to complete a remodel of existing cabins into condominiums for resale with the project being known as the Shady Brook project.
4. Taxpayer purchased materials for the Shady Brook project paying the gross receipts taxes on the materials. All supplies ordered by Taxpayer for the Shady Brook project were billed

directly to Taxpayer or to the President of Taxpayer, Mark Casias. Vendors looked to Taxpayer and/or the president of Taxpayer for payment. Department Exhibits D, E and F.

5. Billing for material, supplies and equipment purchased by Taxpayer for the Shady Brook project indicated that the material, supplies and equipment were to be delivered to Shady Brook .

6. Some of the bills did not indicate a destination or a project designation.

7. All invoices and receipts for materials noted Taxpayer or its president as the responsible party for payment. The billing included in the record is representative of the billings that were submitted to Taxpayer from its vendors for the Shady Brook project. Department Exhibits D, E and F.

8. The vendors who sold supplies, equipment and services to Taxpayer included in their billing New Mexico gross receipts tax as part of the amounts charged to Taxpayer. Department Exhibits D, E, and F.

9. Some supplies and materials included in the billing information were purchased by Taxpayer's representative, President Mark Casias, for a separate project.

10. Mr. Casias testified that such were not included in the billing charged to the Shady Brook project.

11. Taxpayer invoiced Robert Pottroff referencing the Shady Brook Remodel Project for supplies, materials, equipment, services and labor for work completed on the project.

12. Taxpayer, in its billing added a twenty percent service fee to the cost of labor of employees, services and materials purchased from vendors.

13. The invoice sent to Mr. Pottroff for the Shady Brook project by Taxpayer which is included in the record is representative of the invoices that was submitted to Mr. Pottroff from Taxpayer for the Shady Brook project. Department Exhibit G.

14. Taxpayer subsequently billed and received reimbursement payments from Shady Brook for the costs of the materials, services, taxes paid on the materials, labor by its employees, the

service fees and gross receipts taxes on all items. All billing as invoiced by Taxpayer to Mr. Pottroff for the Shady Brook project was paid in full. Department Exhibit G.

15. Taxpayer submitted an unsigned statement dated January 10, 2006 from Robert Pottroff stating that Taxpayer is Skyscapes of Shady Brook, LLC's agent.

16. Taxpayer reported and paid gross receipts tax on its receipts from supplies, materials, labor and service fees when such amounts were received from Shady Brook as reimbursement for the costs of supplies, services and materials purchased from third party vendors.

17. Taxpayer reported its gross receipts and withholding taxes due monthly during 2006 and timely paid the tax due. Department Exhibit A.

18. On October 11, 2007, amended monthly tax reports were filed noting Taxpayer's CRS number but filed in the name of Taxpayer's President, Mark Casias. Department Exhibit B.

19. Based on the filing of amended monthly tax reports Taxpayer applied for refund of a portion of the taxes paid claiming that original taxable gross receipts amounts included reimbursement for materials.

20. Taxpayer testified that the gross receipts tax had already been paid on the materials that were reimbursed and therefore Taxpayer was requesting a refund of the overage paid for each of the twelve payments made in 2006. Taxpayer alternatively requested that the refund be credited toward taxes owed for other Taxpayer owned entities. Department Exhibit C.

21. Taxpayer testified that it was a disclosed agent for Shady Brook based on the vendor's ability to sue Shady Brook if the bills were not paid and based on its ownership interest in Skyscapes of Taos Canyon, LLC. Taxpayer Exhibits 4 and 5.

22. There were no contracts between Taxpayer and the owners of the Shady Brook Project and or Skyscapes of Taos Canyon LLC authorizing Taxpayer to bind the entities and/or owners for payment of items purchased from Taxpayer's vendors.

23. Skyscapes of Taos Canyon LLC was initially organized by Robert L. Pottroff and has as two of its members, Robert L. Pottroff and Taxpayer's president, Mark Casias. Taxpayer's president, one of three members of the LLC, has a 33.33% ownership interest in the LLC.

24. In response to the request for refund the Department sent Taxpayer a letter dated April 2, 2008 denying the request based on lack of evidence that Taxpayer was acting as a disclosed agent for Shady Brook. Department Exhibit H

25. On June 26, 2008 Taxpayer, through its Bookkeeper, filed a written protest with the Department objecting to the denial of refund and requesting a hearing on the matter. Department Exhibit I.

26. On September 8, 2008, Senior Auditor, Janet Sobien, mailed to Taxpayer an acknowledgement and receipt of the protest regarding the denial of refund and acknowledging Taxpayer's request for hearing. Department Exhibit J.

27. Taxpayer is requesting a refund in the amount of \$30,407.70.

ANALYSIS AND DISCUSSION

The issues to be decided are as follows: whether Taxpayer is entitled to a refund of gross receipts taxes it paid based on its claim that it was purchasing goods and services as an agent for its client, the Shady Brook project, and whether the Department receiving gross receipts taxes for the materials, supplies and services from two different entities amounted to double taxation.

Burden of Proof. A taxpayer's request for refund for an alleged overpayment of gross receipts taxes falls within NMSA 1978, § 7-1-26 (2007). NMSA 1978, §7-9-4 (1990) imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. There is a statutory presumption that all receipts of a persons/entity engaging in

business in New Mexico are subject to the gross receipts tax. NMSA 1978, §7-9-5 (2002).

The Taxpayer has the burden of overcoming the presumption. In *Wing Pawn Shop v.*

Taxation and Revenue Department, 111 NM 735, 740, 809 P.2d 649, 654 (Ct. App. 1991)

¶29 -32, the court explained,

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...taxation is the rule and the claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.

See also *Security Escrow Corp., v. Taxation and Revenue Department*, 107 NM 540, 543,

760 P.2d 1306, 130 (Ct. App. 1988) §18-20. The evidence submitted by Taxpayer was

insufficient to overcome the statutory presumption.

Tax on Reimbursed Expenses. Section §7-9-4 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. NMSA 1978, §7-9-3 (F) defines the term “gross receipts” to include receipts from selling property in New Mexico, leasing property employed in New Mexico or selling services performed in New Mexico. The term “gross receipts” does not include amounts received solely on behalf of another in a disclosed agency capacity. Regulation 3 NMAC 2.1.19 (C) explains the reimbursement of expenses that a taxpayer can incur on behalf of a client and not be responsible for gross receipts taxes on such reimbursement:

19 (C) REIMBURSED EXPENDITURES

19 (C) (1) The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by Section 7-9-3.5 NMSA 1979, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. An agency relationship exists if a person has the power to bind a principal in a contract with a third

party so that the third party can enforce the contractual obligation against the principal.

19 (C) (3) If these requirements are not met, the reimbursement of expenses are included in the agent's gross receipts.

Example or regulation 19 (C) (6) provides an example to assist in understanding this issue of an architect located in Santa Fe overseeing a project in Albuquerque who incurs long distance telephone charges. The architect charges the project owner for the telephone calls with the architect's gross receipts including the amounts collected for the calls. The determination is that no disclosed agency relationship exists which would enable the telephone company to hold the project owner liable for the long distance telephone charges incurred by the architect.

Taxpayer's representative testified that Taxpayer was acting in a disclosed agency capacity because if Taxpayer did not pay for the supplies and materials than the vendors would sue the Shady Brook project owners for payment by attaching the materials and supplies either at the remodeling site or by placing a lien on the real estate. While a vendor has legal authority to place a mechanic's lien on real estate when its materials, supplies and services have been made an integral part of the real estate such authority is not legally equivalent to the authority to bind a client to pay for materials, supplies and services without seeking payment from Taxpayer. When a vendor places a mechanic's lien on real estate, the vendor still has legal authority to pursue Taxpayer for payment but can additionally place a mechanic's lien on the property as its materials, supplies and services are now part of the real estate. That is not what is meant by disclosed agency but rather is a method to ensure that material suppliers have recourse when their supplies are not paid for and are made part of real

estate. The material suppliers have no legal authority to pursue the project owners for payment up front.

In this case, Taxpayer would be acting in a disclosed agency capacity if it were authorized to legally bind its client, the Shady Brook project owners, to the terms of any purchase agreements it entered into to purchase materials or supplies for the project. In that case, the project owners and not the taxpayer would be liable for the payment of the materials, supplies and services purchased and also responsible for the gross receipts taxes. Without evidence of such authority to bind the Shady Brook owners, Taxpayer could not be said to be acting in a disclosed agency capacity. If Taxpayer were acting in a disclosed agency capacity, it would have placed vendors on notice and been legally empowered to bind the project owners to pay each vendor for the materials, supplies and services. The vendors could then bill the Shady Brook project owners and collect the monies owed for the supplies, materials and services. For example, if Taxpayer were acting in a disclosed agency capacity, it would have the authority to have its suppliers including Cooks Hardware, Randall Lumber, Robert Medina & Sons, Lowe's, Home Depot bill the Shady Brook project owners directly for payment. While the remodeling project was titled "Shady Brook project" the evidence did not disclose an entity named Shady Brook to which Taxpayer could have been acting in a disclosed agency capacity.

The evidence established that Taxpayer was not acting in a disclosed agency capacity on behalf of Shady Brook in 2006. Taxpayer was purchasing materials, supplies and services in its name and either reselling the items to the project owners or using the purchased items to perform its own services on the Shady Brook project. Some of the vendors such as Home Depot, Lowe's, Walmart, Rio Grande Ace Hardware, and Phillips 66 would have not had knowledge as to the location or the owner of the property which ultimately their products

became a part of. Taxpayer's representative acknowledged that some of the vendors would not have had knowledge of Taxpayer's client or the project testifying that it was not common in the construction business to have contracts with suppliers. Often, materials and supplies were purchased in large quantities with no notation as to project or client. Those vendors would not be able to ascertain if all of the materials were attributable to one project or another. Some of the vendors were knowledgeable of the location for delivery of the materials, supplies and services but there was no evidence that the vendors actually knew who the owners of the project were or that they had no legal right to pursue the project owners directly for payment of the items if such had not been paid by Taxpayer. Therefore, the payments Taxpayer received as reimbursement for supplies, materials and services from Shady Brook were not received in a disclosed agency capacity and were gross receipts subject to tax.

The evidence established that there were no contracts between Taxpayer and its vendors such that Taxpayer could have bound the Shady Brook project and/or its owners for payment of Taxpayer's vendors. There was no evidence admitted during the hearing which established that the Shady Brook project and/or its owners contracted with Taxpayer providing Taxpayer authority to bind the Shady Brook project and/or its owners for payments of Taxpayer's vendors. Although Taxpayer's representative and president, Mark Casias is a member of Skyscapes of Taos Canyon LLC, such did not establish that Taxpayer had the authority to bind the Shady Brook project and/or its owners for payment of its vendors.

If it were established that Mr. Robert Pottroff were the owner of the Shady Brook project, that Skyscapes of New Mexico LLC was the owner of the Shady Brook project, that he as owner or member of the LLC had the authority to designate Taxpayer as an agent such still would not establish that Taxpayer was a disclosed agent for the Shady Brook project as

stating that Taxpayer can act on their behalf to complete the construction project such as ordering materials, renting equipment and hiring subcontractor crews does not established that the third party vendors who sold items to Taxpayer were put on notice that Taxpayer had the authority as a disclosed agent to bind the owners of the Shady Brook Project for payment of those items.

Double Taxation. Taxpayer argues that it has paid the taxes twice on the same material and that it is inherently wrong for the Department to collect taxes twice for the same material. Taxpayer argued that by it paying the taxes when the material was purchased from the vendors and again when it received reimbursement from Shady Brook that it was being doubly taxed and should be refunded the full amount that it paid resulting from the reimbursement.

The evidence established that Taxpayer paid for gross receipts taxes when it purchased the materials and supplies and then collected gross receipts taxes from Mr. Pottroff on the supplies, materials and services rendered by third parties as well as for the labor it performed on the project. The evidence also established that upon receiving reimbursement for the items that Taxpayer paid gross receipts tax on its taxable gross receipts. Therefore, Mr. Pottroff paid gross receipts on what it was billed and Taxpayer in turn paid gross receipts taxes the reimbursement it received for those items.

New Mexico courts have held that there is no prohibition against double taxation. See *New Mexico State Board of Public Accountancy v. Grant*, 61 NM 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. V. Gallegos*, 44 NM 120, 99 P.2d 447 (1940) and *State ex rel. Attorney General v. Tittmann*, 42 NM 76, 75 P.2d 702 (1938). See also *Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920). Further, New Mexico courts in construing the New Mexico Gross Receipts and Compensating Tax Act have held that there

is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. See House of Carpets, Inc. v. Bureau of Revenue, 87 NM 747, 507 P.2d 1078 (Ct. App. 1973) and New Mexico Sheriffs v. Police Association v. Bureau of Revenue, 85 NM 565, 514 P.2d 616 (Ct. App. 1973). In New Mexico Sheriffs the court determined that “if there were double taxation, such would not necessarily be arbitrary and capricious” and further that there was no double taxation as the tax was being paid by two different taxpayers not by one taxpayer paying tax twice on the same items.

When a vendor sells materials, supplies and services to Taxpayer, the vendor is the entity liable for the gross receipts tax on the sale-the Taxpayer has no obligation to report or pay tax on the vendor’s receipts. When the Taxpayer charges its clients, here the Shady Brook project, for the items purchased from the vendors, the Taxpayer is the entity liable for gross receipts on those transactions – neither the vendor nor the client has any obligation to report or pay tax on Taxpayer’s receipts. Although the practice is for a seller to pass the cost of the gross receipts tax to the buyer, it does not change the responsibility for the tax. If the gross receipts tax is not paid by the buyer on the products he/she purchases, the seller remains responsible to the state for payment of the tax.

Recognizing the responsibility and problems inherent in the taxing of transactions when ownership passes, the legislature has provided a number of statutory deductions from gross receipt tax. As acknowledged by Taxpayer’s representative, for purchases of materials and supplies for future projects Taxpayer will utilize nontaxable transaction certificates (NTTC’s) when purchasing tangible personal property for resale. NMSA 1978, §7-9-47.

NMSA 1978, §7-9-48 allows under certain prescribed conditions a deduction for the sale of services for resale. Taxpayer when purchasing goods and services for resale to client’s such as the Shady Brook project owners (as opposed to using the items in the performance of

its own services) is eligible to provide NTTCs to its vendors. Providing the NTTCs to the vendor would enable the vendors to deduct the receipts from the sale of goods and services to Taxpayer and eliminate the vendor's gross receipts on these sales. The legislature has provided the means for the tax to be assessed one time, namely but using nontaxable transaction certificates. By not having availed himself of the means for avoiding the tax in question, Taxpayer is left with the presumption of taxability.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the denial of refund issued under Letter Id No. L0343320704 and jurisdiction lies over the parties and the subject matter of this protest.

B. The reimbursement Taxpayer received from Shady Brook for materials, supplies and services purchased from third parties were not received on behalf of another in a disclosed agency capacity. The reimbursements were receipts from engaging in business and were subject to gross receipts tax.

C. The imposition of gross receipts tax on Taxpayer's reimbursed expenses does not constitute illegal or unconstitutional double taxation.

For the foregoing reasons, the protest of New Mexico Healthy Home Builders, Inc. IS DENIED.

Dated: October 14, 2009.