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

IN THE MATTER OF THE PROTEST OF
EXERPLAY, Inc.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1951517440. **No. 11-28**

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 29, 2011, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Patrick Preston, Special Assistant Attorney General. Exerplay, Inc., ("Taxpayer") was represented by its attorney, Mr. Ben Roybal. In addition to the documents contained in the Administrative File articulated during the beginning of the hearing, Taxpayer Exhibits 1-3, Department Exhibits 1-3, Agreed Stipulation of Facts-Statement of Disputed Issues and joint Exhibits A –C are admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a New Mexico corporation based in Cedar Crest, New Mexico. Joint Stip. #1.

2. In March, 2005, the Department initiated a field audit of Taxpayer for gross receipts tax. Joint Stip. #14.

3. The Department completed the audit in November, 2006, and issued an assessment on November 20, 2006, for gross receipts tax in the amount of $357,140.30 in principal and $203,781.72 in interest for a total of $560,922.02 for the tax period of January 31, 1999 through February 28, 2005. No penalty was assessed. Joint Stip. #15, Department Exhibit #3.

4. Taxpayer received the Assessment in January, 2007. Joint Stip. #18.

5. On January 18, 2007, Taxpayer requested a retroactive extension to protest the assessment. The Department granted the extension request on January 25, 2007, pursuant to NMSA 1978, §7-1-24 B (1993). Joint Stip. #19 and #20.

6. On February 2, 2007, Taxpayer timely filed a written protest to the assessment and on July 20, 2009, amended its protest. Joint Stip. #21.

7. On July 6, 2009, the Department requested a hearing and the Notice of Administrative Hearing and Scheduling Order was issued on August 4, 2009 setting the formal hearing for February 9, 2010.

8. On September 1, 2009, Taxpayer requested that the Scheduling Order be amended. On September 30, 2009, an Amended Scheduling Order was issued, vacating the hearing for February 10, 2010 and rescheduling the hearing for May 24, 2010 and May 25, 2010.

9. On March 10, 2010, Taxpayer requested that the Scheduling Order be amended. The Scheduling Order was amended as requested.

10. On September 10, 2010, a joint motion was filed requesting that the Scheduling Order be amended. On September 16, 2010, the Secretary Designate appointed a contract Hearing Officer to conduct the hearing. On September 21, 2010, the Scheduling Order was amended as requested, and the formal hearing was scheduled for January 26, 2011.

11. On December 18, 2010, Taxpayer requested that the Scheduling Order be amended. The Scheduling Order was amended as requested, and after a hearing an Order Amending Scheduling Order was issued on December 22, 2010, scheduling the hearing for February 23, and February 24, 2011.

12. On March 23, 2011, a Notice of Administrative hearing was filed rescheduling the

hearing for May 24, 2011, with this Hearing Officer.

13. On April 5, 2011, Taxpayer filed a Motion to Vacate and Reschedule Formal Hearing. The hearing was vacated and rescheduled for June 29, 2011, as requested.

14. Taxpayer sells park, playground, other equipment and other tangible personal property to federal and state agencies, departments and political subdivisions ("Government Agencies") and organizations classified as Section 501 (c)(3) organizations under the Internal Revenue Code of 1986 ("Exempt Organizations"). Joint Stip. #2.

15. During the audit period, January 31, 1999, through February 28, 2005, Taxpayer sold equipment to Governmental Agencies and Exempt Organizations. Joint Stip. #7, Department Exhibit #3

16. The Department disallowed certain deductions for sales of equipment to Governmental Agencies and Exempt Organizations.

17. The majority of the sales was for equipment that is attached with footers and concrete or concrete slabs and is buried in the ground.

18. Only one sale, the skate park items, was intended to be movable and not buried or set in the ground.

19. For most of its sales, Taxpayer employed a sales person who, after meeting with the prospective purchaser, designed and proposed the sale of equipment customized to the needs and particular uses of the purchaser.

20. If the sale involved new construction, the Government Agencies require a bid process, including a request for proposal (RFP)

21. For some sales, Taxpayer acted as a sales agent of manufacturer's equipment, not taking title of the equipment but marketing and selling it. For some sales, Taxpayer acted as a

distributor for manufacturer's equipment purchasing and reselling the equipment.

22. Taxpayer constructed and installed the equipment at the purchaser's site.

23. Many of Taxpayer's sales of equipment to Government Agencies were to make parks and playgrounds ADA accessible.

24. For many of the sales, Taxpayer removed old playground equipment and installed new playground equipment in the same general vicinity.

25. The playground equipment which was removed included "old steel" structures that were affixed to the ground, including swings, jungle gyms and slides.

26. The playground equipment purchased and installed included custom play shapers composed of decks, slides, roofs, shelters, seesaws, stationary cycles, climbers and many play panels.

27. Taxpayer also sold and installed poured-in-place rubber ground surfacing. Taxpayer's installation process included removing or moving aside the sand, compacting crushed stone in place for drainage, and then pouring rubber granules with urethane on top to create the surfacing affixed to the ground. A cure time of approximately one day was necessary prior to use.

28. If Taxpayer installed the equipment it sold, Taxpayer also provided all necessary material for the installation.

29. A few sales of equipment did not include any installation.

30. Taxpayer paid gross receipts tax on the actual installation portion of the sales.

31. Anita Kelly, a certified public accountant and a certified fraud examiner, testified that the Department had previously taken the position that the sale and installation of equipment was deductible. Ms. Kelly represented that at least five different taxpayers were allowed

deductions for similar sales of tangible personal property, pursuant to the Industrial Revenue Bond ("IRB") regulation, 3.2.212.22 NMAC (02/22/95, as amended through 05/31/2001), for non-IRB sales.

32. Ms. Kelly also testified that the Department entered into closing agreements with various taxpayers in situations similar to Taxpayer's situation. Taxpayer Exhibits #2 and #3.

33. Ms. Kelly, a former Department employee, testified that one closing agreement was negotiated between herself and a former Department attorney, and the other was negotiated between herself and a current Department attorney. Taxpayer Exhibits #2 and #3.

34. The cost of the items of equipment sold by Taxpayer to Governmental Agencies, in Joint Exhibit B, does not increase the basis of a structure or other facility included in the definition of construction within the meaning of Regulation 3.2.212.22(B)(1) NMAC (5/31/01). Joint Stip. #27.

35. The items of equipment sold by Taxpayer to Governmental Agencies, in Joint Exhibit B are not included in or similar to the list of structures and facilities itemized in the definition of construction within the meaning of Regulation 3.2.212.22(B)(2)(a) NMAC (5/31/01). Joint Stip. #28.

36. The items of equipment sold by Taxpayer to Governmental Agencies in Joint Exhibit B are classified as 3,5,7,10 or 15 year property under §168 of the Internal Revenue Code (as amended) in accordance with Regulation 3.2.212.22 B(2)(6) NMAC (5/31/01) and Regulation 3.2.1.11K NMAC (12/30/03). Joint Stip. #29 and #33.

37. The items of equipment sold by Taxpayer to Exempt Organizations in Joint Exhibit C are classified as 3,5,7,10 or 15 year property under §168 of the Internal Revenue Code (as amended) in accordance with Regulation 3.2.1.11K NMAC (12/30/03). Joint Stip. #34.

38. Taxpayer constructed and installed playground structures at schools and parks that are not movable and that are permanently affixed to the ground with footers and concrete.

39. The Department made a number of adjustments to the audit. The amount in dispute after adjustments were made for deductions allowed pursuant to NMSA 1978, Section 7-9-54 (1995) and NMSA 1978, Section 7-9-60 (1995) includes gross receipts tax in the amount of $212,869.37 in principal and accrued interest.

DISCUSSION

The primary issue to be decided is whether Taxpayer is entitled to deductions from gross receipt tax for sales of tangible personal property to Government Agencies and Exempt Organizations pursuant to NMSA 1978, §7-9-54 and NMSA 1978, §7-9-60. A secondary issue is whether Taxpayer was provided written assurances that the property was not construction material or part of a construction project.

BURDEN OF PROOF

NMSA 1978, § 7-9-5(1) (1966) provides a statutory presumption that all receipts are taxable. A taxpayer claiming the receipts are not taxable must carry the burden of proving the assertion. *TPL, Inc. v. Taxation & Revenue Dept.*, 2000-NMCA-083, ¶8, 129 N.M. 539, 10 P.3d 863. Additionally, NMSA 1978, Section 7-1-17(C) (1992) provides that any assessment of taxes made by the Department is presumed to be correct. 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 Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to

abatement, in full or in part, of the assessment issued against it. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't,* 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308.

APPLICABLE STATUTES

The two statutes primarily at issue in this matter are NMSA 1978, §7-9-54 and NMSA 1978, §7-9-60. During the tax years in question, there was a renumbering of the paragraphs in these statutes. Since there was no substantive change in the meaning of the statutes, for purposes of this decision, the Hearing Officer uses NMSA 1978, §7-9-54 (1995). Section 7-9-54 reads as follows:

> A. Except as provided otherwise in Subsection C of this section, receipts from selling tangible personal property to the United States or New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof may be deducted from gross Receipts or from governmental gross receipts.
>
> C. Unless contrary to federal law, the deduction provided by this section does not apply to: … (3) receipts from selling tangible personal property that will become an ingredient or component part of a construction project.

The pertinent provisions of NMSA 1978, §7-9-60 (1995) reads as follows:

> A. Except as provided otherwise in Subsection B of this section, receipts from selling tangible personal property to organizations that have been granted exemption from the federal income tax by the United States commissioner of internal revenue as organizations described in Section 501 (c) (3) of the United States Internal Revenue Code of 1986, as amended or renumbered, may be deducted from gross receipts or from governmental gross receipts if the sale is made to an organization that delivers a nontaxable transaction certificate to the seller…
>
> B. The deduction provided by this section does not apply to receipts from selling tangible personal property that will become an ingredient or component part of a construction project.

The elements necessary to allow Taxpayer to deduct receipts under Section 7-9-54 are: (1) that Taxpayer sold tangible personal property to Government Agencies; and (2) that the tangible person property did not become an ingredient or component part of a construction project. Additionally, under Section 7-9-60, Taxpayer needed to establish the following elements to allow the receipts to be deductible: (1) that it was selling tangible personal property to 501 (c)(3) organizations; (2) that the receipts were not from selling construction material or that the sales did not become an ingredient or component part of a construction project, (3) the buyers delivered NTTCs to the seller and (4) the buyer is using the tangible personal property pursuant to what is allowed in section 501 (c)(3).

These two statutes provide a general deduction for sales of tangible personal property to Government Agencies and Exempt Organizations but specifically disallow the deduction on sales of tangible personal property that are receipts that become an ingredient or component part of a construction project. Construction projects are generally taxable as a service. See NMSA 1978, §7-9-3 (M) (2007). Receipts from the sale of tangible personal property to Government Agencies and Exempt Organizations are generally deductible. Therefore if the receipts from the sales of tangible personal property to Government Agencies and Exempt Organizations do not become an ingredient or component part of a construction project, as Taxpayer contends, then the deduction is allowable, assuming also that the requirements for obtaining the NTTC's are met.

INGREDIENT OR COMPONENT PART

Pursuant to NMSA 1978, Section 7-9-3 (M), "service" includes "construction activities and all tangible personal property that will become an ingredient or component part of a

construction project." "Service", includes that tangible personal property which becomes incorporated into a construction project, retaining its character as tangible personal property until it is installed as an ingredient or component part of a construction project whereupon its becomes part of the construction service. Therefore, in order for the sales at issue to be taxable, the sale of the equipment and poured in place flooring, on an installed basis, must either qualify as construction, or the equipment and flooring must, when installed, become an ingredient or component part of a construction project.

There was not testimony concerning each and every invoice which was disallowed under the audit. There was no evidence that any of the sales discussed involved new construction as the evidence did not reflect a "bid process" required for new construction. Many of Taxpayer's sales of equipment to Government Agencies were to make parks and playgrounds ADA accessible. For the sales addressed during the hearing, Taxpayer removed old playground equipment and installed new playground equipment in the same general area with all structures being permanently affixed to the ground. For the poured- in- place rubber ground surfacing, the majority of the sales involved moving aside sand, compacting crushed stone in place, and pouring in rubber granules with urethane to create the permanent ground surfacing. The issue is whether the service removal of the old equipment/ground cover and the installation of the new equipment and ground surfacing, was the sale of tangible personal property which was not part of an overall construction project or part of a construction service.

CONSTRUCTION PROJECT

There is no per se definition of "construction project". However a construction project requires the "building, altering, repairing or demolishing" of a park, athletic field or similar facility. The evidence introduced was that, as a contractor, Taxpayer was installing new

equipment. Taxpayer sold, installed or replaced playground and park equipment at parks and school yards. While Taxpayer did not build the original park or school yard where the equipment was installed, it did remove and install playground and park equipment that became permanently affixed to the park or school playground. Therefore, as to those invoices that pertain to installing equipment that became permanently affixed to the ground, the equipment sold became part of an overall construction service provided by Taxpayer and part of a construction project.

The evidence established that, other than the movable skate park items, all the equipment installed by Taxpayer was installed by attaching footers to concrete or concrete slabs that were buried and permanently affixed to the ground. Taxpayer designed and proposed placement of the customized play structures at buyer's site. Taxpayer, in the ordinary course of its business, removed the old playground equipment/flooring, prepared the site for the new equipment and constructed and installed the new equipment.

The process to install the new equipment included first removing the old playground equipment. The old equipment included "old steel" structures comprised of swings, jungle gyms and slides. The new equipment included custom play shapers composed of decks, slides, roofs, shelters, seesaws, climbers, many play panels, park benches, tables, poured-in-place surfacing, urethane, concrete and footers. If a swing set was also purchased it was added independent of the play shaper at an additional cost. Taxpayer transported the equipment to the site. The old playground equipment was disassembled and removed by Taxpayer's employees. Taxpayer's employees prepared the ground and installed at the site the new equipment and/or the poured-in-place surfacing.

Taxpayer's installation process for the poured-in-place surfacing included removing or

moving aside the sand, compacting crushed stone in place for drainage, and then pouring rubber granules with urethane on top to create the affixed to the ground surfacing. A cure time of approximately one day was necessary prior to the surfacing being ready for use. All the equipment was installed and permanently affixed to the ground with concrete poured into the ground and footers set into the concrete such that the equipment would not be movable ("installation process"). The structures included structure as simple as a basketball pole and backboard, requiring few parts, to as complex as play structures as described above requiring many varied parts. The evidence established that the structures, once installed, are meant to be permanent structures, not movable and permanently affixed to the ground. There was no evidence that the structures or surfacing would be moved at any time.

The facts in this matter are similar to *Arco Materials, Inc. v. New Mexico Taxation and Revenue Department*, 118 NM 12, 14-15, 878 P.2d 332-333 (Ct. App.) *rev'd on other grounds,* 118 NM 647, 884 P.2d 803 (1994). The court determined that the deductions provided in NMSA 1978, §7-9-54 (2003) and by extension, in NMSA 1978, §7-9-60 (2001), do not apply to receipts from the sale of construction materials that can be used in building, repairing, altering or demolishing in the ordinary course of business of the locations set out in NMSA 1978, §7-9-3.4 A (2003). The locations defined in NMSA 1978, §7-9-3.4 A (2003) include a building, stadium, other structure, a park, trail, athletic field, golf course or similar facility. The *Arco* court determined that the Section 7-9-54 "was intended to make sales of construction materials to governmental entities taxable when the materials are to be incorporated into construction projects" and that construction projects include a wide variety of activities listed in Section7-9-3

(C)[1]. In *Arco*, the taxpayer attempted to avoid taxation after the statute was amended to preclude deductibility of items that were part of a construction service. The court held that if the individual materials are part of a larger construction project, then the tangible personal property sold to the Government Agencies becomes an ingredient or component part of an overall project and taxable.

Taxpayer presented evidence that it does not manufacture the pieces of playground and park equipment. Taxpayer also presented evidence that it sells customized playground structures, delivers the pieces to the purchaser's site, constructs and installs them into the ground by use of concrete and footers. Taxpayer designs for each particular seller customized structures, based on the buyer's particular needs, the location and cost and installs the equipment as explained above. The fact that the materials are separately reflected in the invoices does not alter the fact that what Taxpayer is providing its purchasers is the finished product of a play or park structure fully constructed at purchaser's location. This appears to fit within the definition of construction, as it is building or altering, in the ordinary course of business, a park, athletic field or similar structure. A school playground fits within the definition of a "similar structure". Taxpayer's evidence was insufficient to rebut the presumption of correctness that attaches to an assessment of tax by the Department, with respect to the deductions claimed for the sale of tangible personal property.

FIXTURE

The concept that "construction" involves a permanent improvement of real property draws support from Regulation 3.2.209.22 NMAC (05/31/01) which provides as follows:

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[1] Renumbered in 2003 as NMSA 1978, §7-9-3.4.

> In determining whether tangible personal property will become an ingredient of component party of a construction project, the department will use the following criteria but not exclusively:
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> A. Did the tangible personal property become "fixtures" as defined under subsection I of Section 3.2.1.11. NMAC?[2]

Regulation 3.2.1.11 (I) NMAC (12/30/03) in explaining "fixtures" states:

> (1) Construction includes the sale and installation of "fixtures" such as kitchen equipment, library equipment, science equipment and other miscellaneous equipment installed so that it **becomes firmly attached to the realty.** Fixtures are considered to be items of tangible personal property which are necessary or essential to the intended use of a construction project **and which are so firmly attached to the realty as to constitute a part of the construction project. [**emphasis added**]**
>
> (2) Receipts from the sale of furniture, kitchen equipment, library shelves and other furniture or equipment sold on an assembled basis that does not become a "fixture" is a sale of tangible personal property and not construction. (emphasis added).

The regulation clearly explains that, if the tangible personal property does not become permanently attached to real estate, it is not construction and therefore not included in construction service. In this case the evidence clearly established that the equipment sold by Taxpayer became permanently affixed to the real estate. Therefore the evidence established that the equipment sold by Taxpayer could be considered part of a construction service as an ingredient or component part of a construction project. The testimony revealed that, as to each sale discussed, the playground equipment was permanently affixed to the ground with concrete and intended to not be moved. Even the park benches were permanently affixed to the ground with concrete. Other than the skate park, the equipment which was sold, was neither intended to be nor was it ultimately movable. The poured-in-place surfacing was also permanently affixed

to the ground and was not intended to be moveable.

In reviewing the Internal Revenue Code to determine if Taxpayer's sales are tangible personal property or sales of buildings and its structural components, §1245 property is tangible personal property with a shorter depreciation period. According to the IRS, [Cost Segregation Audit Techniques – Chapter 2], §1250 buildings and structural components have substantially longer depreciable lives than personal property. The IRS has recognized that a building shell will have a longer depreciable life than the wiring, plumbing, etc. Chapter 2 states,

> the primary test for determining whether an asset is §1245 property eligible for ITC [investment tax credit] is to determine whether or not it is a structural component of a building. In other words, if an asset is not a structural component of a building, then it can be considered to be §1245 property. The structural component determination hinges on what constitutes an inherently permanent structure and how permanently the asset is attached to such a structure. Clearly, this is a factually intensive determination and explains the lack of bright-line tests for segregating property into §1245 and §1250 classifications.

While the investment tax credit is no longer available, it is clear that the factors to determine whether an asset is a fixture or tangible personal property hinges on whether the asset is inherently permanent and how permanently it is attached. If it is not a structural component of a building then it is covered under §1245, having a shorter depreciation period, and is tangible personal property. Oppositely, §1250 property, permanently attached, with a longer depreciation period, would be deemed to be a fixture.

In *Whiteco Industries v. Commissioner*, 65 T.C. 664, 672-673 (1975), the Tax Court created six questions to determine whether an asset qualifies as tangible personal property:

1. Can the property be moved and has it been moved?

2. Is the property designed or constructed to remain permanently in place?

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[2] Formerly Regulation 3.2.51.22 NMAC (11/15/96).

3. Are there circumstances that show that the property may or will have to be moved?

4. Is the property readily movable?

5. How much damage will the property sustain when it is removed?

6. How is the property affixed to land?

In this case, the equipment has been installed into the ground by use of concrete. The equipment has not been moved from the site. The equipment was constructed to remain permanently at the site. There was no evidence that the equipment would be moved at any time. There was no evidence to show that the equipment will have to be moved. There was no evidence that the equipment was readily movable although it certainly could be moved by separating it from the concrete in the ground. There was no evidence to determine the amount of damage that would be caused in the process of removal of the equipment. The evidence established that the equipment is affixed to the ground by use of concrete to ensure it is not movable. The intended use of the construction project is playground and park facilities.

In *L.L. Bean, Inc. V. Commissioner*, T.C. Memo. 1997-175 affirmed, 145 F.3d 53 (1st Cir. 1998), the court determined that even though a structure could be moved, if it was designed to remain permanently in place, it was determined to be an inherently permanent structure. In IRS, Chapter 6.4, Cost Segregation Audit Techniques, relevant court cases are noted including a list of the assets discussed in each case and whether or not the particular assets listed have been determined to be a Section 1245 personal property or a Section 1250 structural component. Noting that Chapter 7.2 in reference to cost segregation deals with restaurants, it does include an allocation for "concrete foundations and footings stating, "foundations or footings for signs, light poles, canopies and other land improvements (except buildings)", which are classified as Section 1250 - structural components of a building, having a fifteen-year life.

Recognizing that a private letter ruling does not have value as legal precedent, but that it may have persuasive value, PLR 8848039 discusses IRS code § 168 and specifically discusses playground equipment as "outdoor improvements added to the land". The ruling lists several pieces of equipment similar to Taxpayer's sales and concludes that playground equipment is fifteen-year depreciable property. Additionally, in *Le Petite Academy v. United States,* 95-1 USTC ¶ 50, 193 (W.D. Mo. 1995), *aff'd in unpublished opinion,* 72 F. 3d 133 (6th Cir. 1995), discusses the definition of tangible personal property to include "tangible property except land and improvements thereto, such as buildings or other inherently permanent structures (including any items which are structural components of such buildings or structures." Treasury Reg. § 1.48-1(c) (as amended in 1983). The court determined that the classification of property as either "personal" or "inherently permanent" should be "made on the basis of the manner of attachment to the land" and "how permanently the property is designed to remain in place." The evidence established that the equipment sold and installed by Taxpayer was permanently affixed to the ground by use of concrete or, in the case of the poured-in-place surfacing, permanently affixed by means of the installation of the product into the ground. The parties stipulated that the equipment sold was 3, 5, 7, 10 or 15 year depreciable property. The Internal Revenue Code designates the property as 15 year depreciable property.

While there was no specific mention of playground equipment in *La Petite,* the court was asked to determine whether playground fencing was personal property or inherently permanent. The taxpayer argued that the fences were accessorial to its business of caring for children, that the fences were used solely to segregate children for safety purposes, and that the fences had historically been moved to accommodate taxpayer's needs with the fences being re-used. The

court reasoned, "all the fence posts are set in solid concrete to a point below the frost line indicates that the fences were designed and constructed to remain permanent" and therefore determined that the playground fences are structural components "ineligible for investment tax credit treatment." Further in *McManus v. United States,* 700 F. Supp. 995 (W.D. Wisc.1987), while considering the investment tax credit and what is an "inherently permanent structure," the court noted that the structure at issue rested on footings made of concrete that had been poured into the ground and refused to extent the elements of *Whiteco* applicable to a structure that could be taken apart and moved, stating, "The mere fact that a structure can be disassembled and moved does not disqualify it as a building."

The determining factors for federal tax purposes appear to be whether the equipment is permanently affixed to the ground and whether it was intended that it should be permanently remain affixed to the ground and not moved. In this case, all equipment was permanently affixed to the ground by use of concrete and footers, with the evidence establishing that the parties intended that the equipment remain where it was installed. Taxpayer failed to show that the equipment was movable, that it could be removable and/or that the intent was to have it be moved at any time. Therefore, according to the Internal Revenue Code playground equipment would be deemed to be a structural component of a building having a longer depreciation period. A longer depreciable life would indicate a fixture.

This case presents a unique situation in that the equipment at issue is not affixed to a building itself. In most instances where the courts have considered the definition of "fixture," the determination is in light of a building and additions to that building. In this case, Taxpayer's sales are not per se attachments in any physical way to a building but rather are equipment affixed to the ground. The installation process included the preparation and affixing to the

ground by digging holes, putting footers in the ground with concrete and attaching the structures to the footers. Some of the footers were 20 feet long. The structures were installed in parks and playgrounds which physically created or changed the land or other facility indicating that the actions by Taxpayer were construction and part of a construction project. *See* Regulation 3.2.1.11 A (1) NMAC. Additionally, Regulation 3.2.1.11 G (1) titled "Construction materials and services; landscaping" indicates that items "that are an integral part of the construction project are construction materials."

Since Taxpayer's business focused on parks and playgrounds, Taxpayer in its ordinary course of business was building, altering and demolishing parks and similar recreational facilities. The evidence established that the tangible personal property sold by Taxpayer was, in all instances other than the skate park, affixed to the ground so that it could no longer be moved. The structures sold by Taxpayer were an integral part of the construction project. Additionally, Taxpayer's work on some of these projects physically altered the landscape by rearranging playground sand and installing the poured-in-place surfacing. Taxpayer's work on other projects physically created a new structure as part of a construction project by affixing to the ground the footers in concrete to install the park and playground equipment.[3] Therefore Taxpayer's sales of tangible personal property to Government Agencies and Exempt Organizations were sales of construction

[3] Revenue Ruling 405-00-2, effective April 19, 2000. The question was asked as to whether a taxpayer, X, may deduct its receipts from selling a portable building to a school. "Specifically excluded from the deduction provided in Section 7-9-54 (A) NMSA 1978 are receipts from the sale of tangible personal property that will become an ingredient or component part of a construction project. When a portable building is affixed to a permanent foundation so the building can no longer be moved, it becomes part of a construction project. *See* Regulation 3.2.1.11I NMAC. Accordingly, X may not deduct receipts from selling a portable building to a school district that intends to place the building on a permanent foundation. Because X is the person responsible for payment of gross receipts tax, it is X's duty to inquire as to the use of the buildings it sells. In order to insure its receipts are deductible under Section 7-9-54 (A) NMSA 1978, X should obtain a written statement from the school district stating that the portable building being

materials which became or were intended to become an ingredient or component part of a construction project. As Taxpayer's sales are deemed to be sales of construction materials, the sales are not entitled to the deductions available pursuant to NMSA 1978, §7-9-54 (2003) and NMSA 1978, §7-9-60 (2001). *See* Regulation 3.2.54.10.1 NMAC (11/15/96), renumbered as 3.2.212.10 (A) NMAC (05/31/01). The fixtures, as installed by Taxpayer, are items of tangible personal property which are essential to the intended use of the construction project and are so firmly attached to the realty, not meant to be movable, as to constitute a part of a construction service as an ingredient or component part of a construction project. Therefore the fixture regulation, 3.2.209.22 NMAC[4] does apply to Taxpayer's sales of tangible personal property.

BUILDING

Taxpayer argues that the building regulation, Regulation 3.2.1.11.11 NMAC (11/15/96), renumbered as 3. 2.1.11(K) (1) NMAC (12/30/03), should be determinative as to Taxpayer's sales and therefore the deductions should be allowed. For this regulation to govern Taxpayer's transactions, Taxpayer must establish that the sales applied to a roofed and walled structure, the components were integral to the building, that the components were necessary to the operation of the building, and that the items were 3, 5, 7, 10 or 15-year property under Section 168 of the IRS code. While the evidence established the limitations of the depreciation period, the evidence did not establish that any of Taxpayer's sales were part of a roofed and walled structure. Therefore the building regulation does not apply to Taxpayer's sales of tangible personal property.

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purchased will not be placed on a permanent foundation."

[4] Formerly 3.2.1.11.9.1 NMAC

INDUSTRIAL REVENUE BOND

Taxpayer additionally argues that the industrial revenue bond ("IRB") regulation should be determinative as to Taxpayer's sales and therefore the deductions should be allowed. Regulation 3.2.54.22 NMAC (11/15/96), renumbered as 3.2.212.22 NMAC (05/31/01) titled, "Tangible personal property in projects financed by Industrial revenue or similar bonds" provides in pertinent part:

> 1. For the purposes of this section, a "bond project" is an arrangement entered into under the authority of the Industrial Revenue Bond Act… or similar act in which a private persons agrees (i) to arrange for the constructing and equipping of a facility for a state or local government by acting as agent for the government in procuring construction services, other services, tangible personal property which becomes an ingredient or component part of a construction project and other tangible personal property necessary for constructing and equipping the facility; (ii) to lease the completed facility from the government and (iii) to buy the facility from upon repayment of the bonds….
>
> 2. Receipts from the sale of tangible personal property to the private person who is acting as agent for the government with respect to the bond project are deductible under Section 7-9-54 NMSA 1978 if the tangible personal property is not an ingredient or component part of a construction project. To be deductible, the bond projects tangible personal property must meet all of the following criteria:
>
> (1) the cost of the tangible personal property does not increase the basis, as determined under the provisions of Section 1011 of the Internal Revenue Code [26 U.S.C. §1011], in effect on the date of the bond project commences, of the structure or other facility included in the definition of construction; and
>
> (2) the tangible personal property is:
>
> (a) not included in or similar to the list of structures and facilities specifically itemized in the definition of construction at Subsection C of Section 7-9-3 NMSA 1978, and
>
> (b) classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property by Section 168 of the Internal Revenue Code [26 U.S.C. §168] in effect on the date the bond project commences…

While the evidence established many of the factors necessary under this regulation, the

evidence was clear that the sales of equipment to Government Agencies did not involve industrial revenue bonds and were not made to a private person who agreed to arrange for the constructing and equipping of a facility for the government by acting as an agent for the government in procuring the tangible personal property. Additionally, the IRB regulation is available only to Section 7-9-54 transactions. Therefore the IRB regulations cannot be utilized for any of Taxpayer's sales to Exempt Organizations. Taxpayer is a private, for profit, company selling equipment to government agencies. The IRB regulation, 3.2.212.22 NMAC does not apply to Taxpayer's sales of tangible personal property.

ESTOPPEL

Taxpayer argued that estoppel should be applied against the Department. As a general rule, courts are reluctant to apply the doctrine of estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). Estoppel is applied against the state in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and just demand it." *Wisznia v. State of New Mexico Human Service Department,* 1998-NMSC-11, ¶17, 125 N.M. 140, 958 P.2d 98.

STATUTORY ESTOPPEL

Taxpayer claims that, pursuant to NMSA 1978, §7-1-60 (1993), the Department has stipulated to the facts which allow for the deductions under the building regulation or the IRB regulation so that the Department must grant the relief. Taxpayer maintains that the deduction from gross receipts tax was made in accordance with the IRB regulation based on the Department having allowed the deduction previously to similarly situated taxpayers when not all the statutory elements were present. Based on its reliance of the prior Departmental actions,

Taxpayer concludes that the Department must allow the deductions pursuant to Section 7-9-54 and Section 7-9-60. An examination of the stipulated facts reveals that the Department stipulated only to certain facts in regard to the requirements of both the building regulation and the IRB regulation. The parties did not stipulate to certain other facts that are critical to allowing the deductions pursuant to both regulations.

Section 7-1-60 is very specific as to when the Department shall be estopped from obtaining or withholding the relief requested by a taxpayer. The statute provides for estoppel against the Department when a taxpayer can show that the taxpayer's

> Action or inaction, complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary…

Therefore the Department will be estopped only when the evidence establishes that the taxpayer was acting according to a regulation or when the taxpayer was acting according to a revenue ruling in writing from the Secretary and specifically addressed to Taxpayer.

In this matter, the building regulation, the IRB regulation and the fixture regulation were in effect during the time the tax liability arose. The evidence does not support application of either the IRB or the building regulation to Taxpayer's situation. Therefore the non-application of either of these regulations does not provide the reasoning to estop the Department from assessing unpaid gross receipts tax. Additionally, there was no evidence that Taxpayer received a written revenue ruling from the secretary. Clearly, estoppel cannot be applied against the Department under Section 7-1-60. Acknowledging the inability of the Hearing Officer to grant equitable relief, even were such available, there is no statutory or regulatory basis to estop the Department from enforcing its assessment of gross receipts tax against Taxpayer.

FIXTURE REGULATION SHOULD BE DECLARED VOID

Taxpayer contends that the fixture regulation goes beyond the legislative intent of the statute as the legislature did not intend for there to be different regulations depending on whether the construction project was a building, an industrial revenue bond, or a fixture. Taxpayer argues that the fixture regulation should be declared VOID as the IRB regulation and/or the building regulation both could be utilized to provide Taxpayer the deductions it seeks citing *Rainbow Baking Co. of El Paso, Texas v. Commissioner of Revenue*, 84 N.M. 303. 502 P.2d 406 (NM App. 1972).

There is no authority for a Hearing Officer to declare a regulation VOID. That authority lies with the appellate courts. However, considering Taxpayer's argument, it is acknowledged that the secretary of the Department has the authority to issue regulations and rulings necessary to implement provisions of law that the Department is charged with enforcing, including the use and possession of NTTCs. NMSA 1978, §9-11.6.2 (1995). The statute enumerates certain departmental requirements that must be adhered to in order for the regulation to be effective. [Subsection C and D]. *See Grogan v. New Mexico Taxation and Revenue Dept.*, 133 N.M. 354, 62 P.3d 1236 (NM App 2002) *and Hawthorne v. Taxation and Revenue Dept.* 94 N.M. 480, 481, 612 P.2d 710, 711 (Ct. App. 1980) ("The construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute….").

While the parties stipulated to Taxpayer's sales being tangible personal property, it is not evident from the statute as to the meaning of "an ingredient or component part of a construction project" *Rainbo Baking* enunciates that an administrative agency cannot enlarge its authority as provided in statutes by promulgation of rules and regulations. *Chalamidas v. Environmental*

Improvement Division (*In re Proposed Revocation of Food and Rink Purveyor's Permit*), 102 N.M. 63, 67, 691 P.2d 64 (Ct. App. 1984), explains the court's position on when a regulation would be determined to be void. In this instance Taxpayer's sales of tangible personal property do not fit within the confines of either the building regulation or the IRB regulation. The evidence established that Taxpayer's sale of tangible personal property to Government Agencies and Exempt Organizations does conform to the requirements of the fixture regulation. Taxpayer's argument is not persuasive.

DUTY OF FAIRNESS AND CONSISTENCY

Taxpayer claimed that it was unfairly taxed when others in similar situations, including its competitors, were not taxed. Taxpayer provided two different closing agreements and testimony by Ms. Kelly, who represented different taxpayers, who were allowed the deductions for gross receipts pursuant to the IRB regulation for non-IRB transactions. Based on the federally declared duty of consistency, as determined in *International Business Machines v. United States,* 343 F. 2d 914 (Ct. Claims 1965), ("IBM") Taxpayer argued that the Department and this Hearing Officer were bound by the treatment as was provided the taxpayers in Taxpayer Exhibits #2 and #3.

Since *IBM* was decided, subsequent courts dealing with this issue have severely limited the application of *IBM* to cases in which there are only two competitors, both seeking a ruling from the IRS on an identical issue, with one receiving guidance from the IRS with an initial ruling favorable to the party which was later shown to be incorrect. *See Peerless Corp. v. United States,* 185 F. 3d 922, 929 (8th Cir. 1999) and *Vons Cos. v. United States*, 51 Fed. Cl 1, 10 (2001). In *Vons* the court rejected the consistency argument rather deciding that the position taken by the IRS does not require the court to apply a mistaken view of the law to a taxpayer

even if that view was applied to another taxpayer.

There is no current federal or New Mexico statute that requires a general consistency by either the IRS or the New Mexico Taxation and Revenue Department. Therefore any determination as to this requirement is based on the interpretation of federal or state common law. The Federal courts have held that other parties cannot demand identical terms to those on which the government agreed to in settling other similar cases. *See Bunce v. United States,* 28 Fed Cl. 500, 510-511 (1993) and *Fears v. Comm'r,* 97 T.C.M 1317, 1319 (CCH, 2009). While there are no New Mexico cases directly on point as to application of this test the courts have determined that "lack of uniform enforcement will not in itself violate a defendant's equal protection rights. *State v. Cochran,* 112 N.M. 190, 192, 812 P.2d 1338, 1341 (Ct. App. 1991)

The courts have also considered whether being consistent in decision making should be the paramount consideration when a prior decision has been determined to be incorrect. Uniformly the courts have determined that the proper course is to correct the error in subsequent decisions rather than continue an error in the name of consistency. *See Haley Bros. Construction Corp., v. Commissioner,* 87 T.C. 498 (1986), *Commissioner v. Schleier,* 515 U.S. 323 (1995), *and United States v. Craft,* 535 U.S. 274 (2002).

New Mexico law holds that "a taxpayer who is not assessed more than the law provides has no cause for complaint in the courts in the absence of some well-defined and established scheme of discrimination or some fraudulent action." *Skinner v. New Mexico State Tax Commission,* 66 N.M. 221, 223, 345 P.2d 750, 752 (1959) and *Appelman v. Beach,* 94 N.M. 237, 239, 608 P. 2d 1119, 1121 (1980).

In *Campos de Suenos. Ltd v. County of Bernalillo,* 2001-NMCA-043, P.34, 130 N.M. 563, 572, 29 P.3d 1104, 1113, *cert denied,* 130 N.M. 484, 27 P.3d 476 (2001), the Court of

Appeals quoted the following passage from the United States Supreme Court's decision in *Snowden v. Hughes,* 321 U.S. 1, 8,64 S. Ct. 397, 88 L. Ed. 497 (1944)

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

The Court of Appeals further noted that there must be a showing of "clear and intentional" discrimination. The plaintiff must prove more than mere non-enforcement against other violators. *id.*

Assuming for argument's sake, that Taxpayer clearly established unequal treatment in allowance of the IRB deduction, there was no evidence presented that the Department's unequal allowance of the deduction per the IRB regulation resulted from an improper motive. The fact that Taxpayer was audited does not establish purposeful discrimination. Also, even had the Department erroneously allowed the deductions previously under the IRB regulation, legally neither the IRB regulation nor the building regulation are appropriate for the deduction sought. Given the facts, the statutes and the applicable regulations, there is no legal basis for abating the assessment against Taxpayer based on a consistency argument.

DEPARTMENT'S MANIPULATION OF THE REGULATIONS

Taxpayer claimed that the Department is allowed to manipulate the system and pick and choose which taxpayers are subject to which definition of "ingredient or component part of a construction project". Taxpayer based this claim on the fixture regulation's allowing the Department to utilize certain criteria in making the determination but also allows the Department to utilize additional but not defined criteria by including a non-exclusivity clause in the regulation. Based on the review of the evidence and the law, there is no clear evidence of such

manipulation.

REPLACEMENT FIXTURE

Taxpayer also claimed that, even if it were determined that the sales of the tangible personal property were fixtures and arguably taxable pursuant to the fixture regulation, the sales were specifically excluded as construction materials under NMSA 1978, §7-9-3.4 (B), because the majority of the sales to government agencies were replacement fixtures. Section 7-9-3.4 B states, "construction material" does not include a replacement fixture when the replacement fixture is "not construction or a replacement part for a fixture".

Taxpayer contends that the term "replacement fixture" encompasses taking out all old items that were at purchaser's sites for placement of the new items and installing all new items of tangible personal property that Taxpayer sold to Government Agencies and Exempt Organizations at or near that same location. The Department argued that to be a replacement fixture, in line with the statute, the replacement must be similar to what it was replacing. For example, a swing set could replace a swing set, but a customized play structure would not replace a swing set.

"Replacement" is not defined in the Gross Receipts and Compensating Tax Act, §7-9-1 e*t seq.* nor is it explained in NMSA 1978, §7-9-3.4 (2003). In *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994), the New Mexico Supreme Court explained, "If the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices." *See also State ex rel. Coll v. Johnson,* 1999-NMSC-036, 990 P.2d 1277 (it is not the province of the court to question the wisdom, policy or justness of legislation enacted by the legislature).

Giving "replacement" its ordinary meaning, a replacement means putting something in

place of, or to provide a substitute for, something. A "fixture" has been defined as "items of tangible personal property which are necessary or essential to the intended use of a construction project and which are so firmly attached to the realty as to constitute a part of a construction project." Regulation 3.2.1.11 I (1) NMAC (12/30/03). Therefore a replacement fixture is substituting an item of tangible personal property essential to the intended use of a construction project being firmly attached to the reality so as to be part of the construction project. "Replacement fixture" is not "construction material" so long as it is not construction or so long as it is merely replacing a part of a fixture and not repairing, building, altering or demolishing a park or similar facility. Therefore if the items are not construction then, where Taxpayer was able to establish that items were merely replacing fixtures, the deduction should be allowed. If the replacement fixtures are construction then the deduction is not allowed.[5]

The evidence revealed that the sales and installation of the tangible personal property were not "replacing a part of a fixture". Taxpayer's president specifically testified as to several projects of which he was either personally involved or of which he knew specifically what was removed and what was installed in its place. Mr. Gardner testified as to specific instances where a swing set replaced a swing set or basketball pole and backboard replaced a basketball pole and backboard. As explained previously, NMSA 1978, Section 7-9-3.4 (A) defines construction as building, altering, repairing or demolishing any of the items listed in subsection A. Therefore

[5] Rev. Rul. 407-97-1 issued September 10, 1997 involves a 501 (c) (3) organization who purchased replacement sliding doors to soundproof its classrooms. The organization wanted to execute a Type 9 NTTC for the purchase. The seller refused to accept the NTTC determining the doors were construction materials. The ruling explained that Section 7-9-60 does not allow the deduction if the receipts from the selling of the tangible personal property will become an ingredient or component part of a construction project. Considering that the definition of construction at Section 7-9-3 (c) includes "building, altering, repairing or demolishing in the ordinary course of business any…building, stadium or other structure…" the replacing of wood doors with sliding doors is construction as it is altering or repairing a building. The ruling declared, "the deduction for sales of tangible personal property to a 501(c) (3) organization does not apply and [purchaser] may not execute a Type 9 NTTC to purchase the sliding doors."

Taxpayer replacing items that are the same would fit within the exception set forth in Section 7-9-3.4 (B)'s for replacement fixture. Oppositely, installing an item of tangible personal property that was replacing something additional, dissimilar or unknown would be deemed to be construction, as it is building or altering what was there before and is therefore construction material. Mr. Gardner testified as to replacing tiles with poured in place surfacing and replacing old steel play structures with customized play structures. The deduction would not be available for such sales.

If Taxpayer replaced a basketball pole and backboard with a new basketball pole and backboard even if it is a new updated version it could still be deemed a replacement fixture as it is not building something new, it is not altering what was there, and it is not repairing the item. The evidence established that the following items were replacement fixtures replacing items with new versions of the same items but not different items.

Doc No.	Invoice No.	Amount	
1000260	3933	826.65	replace basketball equipment
1000291	4079	5039.00	replace basketball eq. benches
1000305	4182	768.55	replace basketball equipment
1000336	4250	10533.56	replace running track
1000377	4374	10025.00	replace picnic tables and benches
1000389	4389	2545.80	replace tetherball equip & bench
1000433	4516	720.00	replace tetherball outfit
1000455	4525	4238.36	replace swing set with swing set
1000469	4602	2158.15	replace basketball equipment
1000514	4720	2040.55	replace basketball equipment
1000521	4730	1769.65	replace basketball/volleyball equip.
1000543	4835	2582.00	replace swing set with swing set
1000554	4818	1023.96	replace bike racks
1000571	4852	6047.30	replace basketball equipment
1000590	4985	809.75	replace basketball equipment
1000595	4906	4725.20	replace swing set

Additionally, Document No. 1000232, Invoice No. 3841, in the amount of $7294.40 is deductible as the evidence established that the skate park items were movable and therefore not part of a construction project.

The evidence established that the remainder of the sales testified to were sales of construction material. In the case of those sales not testified to, the evidence was insufficient to overcome the presumption of correctness of the assessment. Ultimately, while there are deductions available to taxpayers pursuant to Section 7-9-54 and Section 7-9-60 for receipts for selling tangible personal property to Government Agencies and Exempt Organizations, the remaining deductions are not allowed based on the evidence presented. This is because the activities of selling the tangible personal property is deemed to be "construction" as defined in NMSA 1978, 7-9-3.4 and is the sale of "construction materials" as defined in 7-9-3.4 (B). The construction materials became, or were to become part of, a construction project sold to the government agencies and exempt organizations. The only deduction allowable are the sales listed above, which are determined to be replacement fixtures and therefore are not construction materials. Taxpayer is subject to gross receipts tax on the remainder of its receipts from the sales of tangible personal property to Government Agencies and Exempt Organizations.

GOOD FAITH

Taxpayer argues that, even if the sales of the tangible personal property are deemed to be construction materials, Taxpayer should still be allowed the deductions based on its good faith acceptance of the NTTCs provided to it by the Government Agencies and the Exempt Organizations.

A taxpayer engaged in business in New Mexico may be able to deduct certain gross receipts when provided with NTTCs from the buyers. NMSA 1978, §7-9-43 (2005). An NTTC

must be in the proper form, of the proper type, accepted in good faith and in seller's timely possession. NMSA 1978, §7-9-43 and Regulation 3.2.201.8 (D) NMAC (05/31/01)[6]. The seller has the burden to clearly establish the right to the deduction. NMSA 1978, Section 7-9-43(B) confirms that the right to the deduction arises "when the seller accepts these documents within the required time and in good faith that the buyer will employ the property or service transferred in a nontaxable manner…." Until delivery and acceptance of documents required supporting the deductions, the seller's receipts are presumed to be taxable. NMSA 1978, Section 7-9-5 (1995).

In this case, the Department claimed that the NTTCs were not obtained in good faith, because Taxpayer had a continuing obligation to assess the validity of the deductions claimed in reliance on the NTTCs to ensure that the goods delivered to buyer would be used in a non-taxable manner. Taxpayer claimed that, having timely obtained the NTTCs, reliance was appropriate because its timely receipt expressly indicated it was obtained in good faith. Taxpayer claimed it should be able to accept the NTTCs on face value, and the receipt should be conclusive proof that receipts from the transaction are deductible.

NMSA 1978, §7-9-43 provides a safe harbor to sellers who accept an NTTC in good faith that the buyer "will employ the property or service transferred in a nontaxable manner." The purpose of this provision is to protect a seller who has no way of verifying whether a customer's subsequent use of goods or services purchased with a valid NTTC complies with the requirements of that certificate. Taxpayer provided an example of a Lowe's employee having to ask each customer what they would be doing with each nail, hammer or screwdriver they sold. The Department argued that there was no such requirement but rather Taxpayer had a duty,

[6] Previously numbered as 3.2.43.1.8.4 NMAC (11/15/96)

based on the nature of the items its sells, to determine whether or not the items became or would become a component part of a construction project.

New Mexico law provides that taxpayers have a continuing duty to assess the validity of deductions taken in reliance on NTTCs. *See Arco Materials Inc. v. New Mexico Taxation and Revenue,* 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App.1994) (*overruled on other grounds by Blaze Constr. Co. Inc. v. Taxation & Revenue Dep't,* 118 NM 647, 884 P.2d 802 (1994). The court in *Arco* relied on the language in Regulation GR 43:9[7], the exact language in current Regulation 3.2.201.14 A NMAC (2001) which states:

> Acceptance of nontaxable transaction certificates (NTTCs) in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time the certificates are initially accepted. The taxpayer claiming the protection of the certificate continues to be responsible that the goods delivered thereafter are of the type covered by the certificate.

Unless the NTTC covers the transaction at issue, the seller is not entitled to a deduction. *Gas Co. v. O'Cheskey,* 94 N.M. 630, 632, 614 P.2d 547, 549 (Ct. App. 1980) (issuance of NTTC does not transform an otherwise taxable transaction into a non taxable one). The court in *Arco* concluded that Type 9 NTTCs do not cover receipts from sales of construction materials to government entities "regardless of what the NTTCs represented on its face."

Taxpayer's argument that it should be able to accept the timely received NTTCs at face value was raised and rejected in *Arco Materials* where the court found that taxpayers have a continuing duty to assess the validity of deductions made in reliance on NTTCs. 118 NM at 15, 878 P.2d at 333. Based on the clear language of Section 7-9-54 and Section 7-9-60, Taxpayer

[7] Revised as 3.2.43.1.14.1 NMAC (09/30/98) changing "at the time the certificates are initially accepted" to "at the time of each transaction." The regulation was subsequently renumbered as 3.2.201.14 (A) NMAC (05/31/01). This modification does not affect the issue of good faith addressed in this matter.

may not rely on Type 9 NTTCs to deduct receipts from selling construction materials to Government Agencies and Exempt Organizations.

Taxpayer claimed customers refused to pay the gross receipts tax and that it lost customers as a result. With regard to the sale of construction material to state entities, NMSA 1978, §7-9-54 (C) offers the taxpayer some protection if the entity refuses to pay taxes allowing a taxpayer to protect itself from New Mexico counties, municipalities and state agencies that refuse to pay gross receipts tax by obtaining the buyer's written statement that the particular items being purchased do not qualify as construction material because those items will not become an ingredient or component part of a construction project.[8] While the Department could assess the government agency for compensating tax if its written statement is found to be erroneous, the Department could not assess the taxpayer for gross receipts tax.

The evidence established not only that nearly all the items sold by Taxpayer are permanently affixed to the ground by use of concrete and footers but also the items of equipment sold and not installed by Taxpayer would also have to be affixed to the ground by use of concrete and footers. The evidence established that Taxpayer's representatives often inspected the locations subsequent to the transactions being finalized. The evidence established that the regulations were all in place at time of transactions, that Taxpayer had a continuing duty to assess the correctness of NTTCs and that obtaining a NTTC in light of the equipment it sold and installed does not support the conclusion that Taxpayer accepted the NTTCs tendered by Government Agencies and Exempt Organizations in good faith. Taxpayer did not provide any evidence of having received written assurances from purchasers. Therefore Taxpayer is not

[8] Revenue Ruling 405-00-2, effective April 19, 2000

entitled to the safe harbor that the NTTCs would otherwise afford and therefore is not entitled to claim the deductions provided in Section 7-9-54 and Section 7-9-60 based on its obtaining NTTCs from the government agencies and exempt organizations in good faith.

Taxpayer failed to meet its burden to show that the majority of its sales of tangible personal property to government agencies and exempt organizations were deductible based on Section 7-9-54 and Section 8-9-60 as the evidence established that the sales were sales of construction materials. As listed above, Taxpayer did meet its burden to establish that the items listed as replacement fixtures and movable equipment were sales of tangible personal property and not construction. Taxpayer failed to meet its burden to establish that it is entitled to the safe harbor of the timely possession of Type 9 NTTCs and therefore able to claim the deductions for the remainder of the sales of the tangible personal property to government agencies and exempt organizations. Therefore the taxes and interest are due on all of the sales of the tangible personal property except those sales listed above.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment of gross receipts tax and interest issued under Letter ID No. L1951517440, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayers established that the sales of tangible personal property, as indicated above on pages 29 and 30, were replacement fixtures/movable equipment which are not construction materials and therefore entitled to the deduction allowed in Section 7-9-54.

C. The deductions provided in NMSA 1978, Section 7-9-54 and Section 7-9-60 do not apply to the remaining sales of the equipment sold by Taxpayer as the sales are construction materials sold to government agencies and exempt organizations. Taxpayer is therefore subject

to gross receipts tax on these transactions.

D. Taxpayer is not entitled to rely on Type 9 NTTCs to support deductions of receipts from the sales of construction materials to government agencies and exempt organizations.

E. Taxpayer is responsible for the interest due on the sales of tangible personal property that are determined to be construction materials. Interest is due and continues to be applied until the principal tax is paid in full.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART: the Department is ordered to abate the principal payment of gross receipts tax due for the sale of replacement fixtures as noted in this decision.

DATED: November 17, 2011.