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

IN THE MATTER OF THE PROTEST OF
SILVERCREEK MATERIAL, LLC **No. 12-07**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1969842944

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 5, 2011, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Patrick Preston, Esq., attorney for the Department. Mr. Andrick Tsabetsaye, protest auditor, appeared as a witness for the Department. Silvercreek Material, LLC ("Taxpayer") appeared at the appointed time and was represented by counsel, R. Tracy Sprouls, Esq. This matter was presented on the Department's Motion for Summary Judgment and Taxpayer responded with a Memorandum in Opposition to Department's Motion for Summary Judgment.

Based on the Stipulation of Facts Reached by Parties (Prehearing Statement), a review of the Stipulated Exhibits (Prehearing Statement), a review of the Affidavit of Ronald R. Kneebone and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 26, 2006, the Department assessed Taxpayer in the principal amount of $173,309.22 in gross receipts principal, $17,330.97 in penalty and $56,250.16 in interest for tax years January 1, 2004 through September 30, 2005.

2. On January 25, 2007, Taxpayer filed a protest to the assessment.

3. The Department acknowledged the protest on February 6, 2007.

4. On May 11, 2010, the Department requested a hearing in this matter.

5. On June 14, 2010, the Hearings Bureau mailed a Notice of Administrative Hearing and Scheduling Order setting the hearing for January 11, 2011.

6. The Department filed its Preliminary Witness and Exhibit Lists on July 12, 2010.

7. On July 28, 2010, Taxpayer filed its Preliminary Witness and Exhibit Lists.

8. The Department filed its Motion for Summary Judgment on December 1, 2010.

9. On January 5, 2011, the parties submitted a Prehearing Statement.

10. On January 7, 2011, the Hearings Bureau issued an Amended Notice of Administrative Hearing setting the hearing for July 5, 2011.

11. Taxpayer submitted a Motion to Vacate the Hearing on June 24, 2011. The Department concurred in the Motion. The Motion was denied to allow oral argument on the Summary Judgment Motion and to allow the parties to stipulate to additional facts that were not set forth in the Department's Motion or in the Prehearing Statement.

12. At the hearing both parties stated on the record that Taxpayer is a non-Indian owned company.

13. Taxpayer performed construction services for the Department of the Army from 2004 through 2005 on the Pueblo of Santa Ana (Pueblo). Exhibit D, page 2. Taxpayer entered into a contract (Contract No. W912PP-04-C-0003, hereinafter referred to as "contract") with the Department of the Army to perform these services. Exhibit D, pages 1-2. The contract was executed on or about November 24, 2003. Exhibit D, page 2.

14. The construction services performed were for the project called the Riparian and Wetland Restoration Rio Grande Gradient Restoration Facilities, Exhibit D, page 3 of 127 of

W912PP-04-C-003. This project was comprised of the construction of two grade restoration facilities and a downstream bed sill in the main stem of the Rio Grande between the Jemez River confluence and the NM Highway 550 bridge. Exhibit F, Article I (B), page 2. The project was authorized by federal law, specifically Section 1135 of the Water Resources Development Act of 1986, Public Law 99-662, as amended.

15. The contract provided that the contract price would include "all applicable Federal, State, and local taxes and duties." Exhibit D, page 55 of 100, Section 52.229-3(b).

16. Under the terms of the contract, Taxpayer was required to perform the construction services and invoice the Department of the Army for payment. Exhibit D, pages 59-60 of 100, Section 52.232-27.

17. The Department of the Army paid Taxpayer for services performed under the terms of the contract. Exhibit D, pages 59-60 of 100, Section 52.232-27; Exhibit E, 2 pages.

18. Under the terms of the contract, Taxpayer was required to replace or correct work found by the Department of the Army not to conform to its specifications. Exhibit D, pages 77-78 of 100, Section 52.246-12.

19. Under the terms of the contract, Taxpayer was required to warrant its work free of any defect in equipment, material, or design furnished, or workmanship performed. Exhibit D, pages 78-79 of 100, Section 52.246-21.

20. Under the Special Contract Requirements, Taxpayer was required to "perform on the site, and with its own organization, work equivalent to at least forty five percent (45%) of the total amount of work to be performed under the contract." Taxpayer was required to replace or correct work found by the Department of the Army not to conform to its specifications. Exhibit D, paragraph 5, page 00800-4.

21. The Department of the Army and the Pueblo entered into a Project Cooperation Agreement (hereinafter referred to as "Agreement") for modification of the Jemez Canyon Dam and Cochiti Dam projects. The Agreement was executed on or about March 20, 2002. Exhibit F.

22. Under the terms of the Agreement, the Pueblo agreed "to contribute 25 percent of total projection modification costs" to the Department of the Army. Exhibit F, paragraph D, page 6. The contribution from the Pueblo included cash, lands, easements, rights-of-way, suitable borrow and dredged or excavated material disposal areas. Exhibit G, Affidavit of Ronald R. Kneebone; Exhibit F, paragraph D, pages 6-7.

23. Ronald R. Kneebone, an employee of the Department of the Army, attested that the Agreement entered into with the Pueblo was "undertaken with its costs to be shared" for the construction services provided by Taxpayer. Exhibit G, Affidavit of Ronald R. Kneebone.

24. The required contribution from the Pueblo was estimated to be $1,666,000.00. The working estimate for the total project costs was $6,651,611.47. Exhibit G, Affidavit of Ronald R. Kneebone. (This amount is different than the amount stipulated to in the Prehearing Statement.)

25. The Department audited Taxpayer beginning on November 28, 2005 and concluded on November 3, 2006. Exhibit A, page AN1.

26. Taxpayer is registered to do business in New Mexico as a limited liability company. Exhibit A, page AN1.

27. Taxpayer's receipts for construction services under the contract were $2,935,677.81 (net of tax). Exhibit A, page C2.1. (This amount is different than the amount

stipulated to by the parties in the Prehearing Statement; notwithstanding the tax included.) Taxpayer did not pay gross receipts tax on these receipts. Exhibit A, page C8.1.

28. The Hearing Officer left the record open for the Department to provide some additional information related to the exhibits. No further information was provided by the Department.

DISCUSSION

The sole issue to be determined is whether the State of New Mexico is preempted from taxing Taxpayer's receipts from performing construction services for the Department of the Army because of the Pueblo's cash and other in-kind contributions to the project.

Burden of Proof and Standard of Review.

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an 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; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

Summary Judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶10, 148 N.M. 713, 242 P.3d 280. In this case the Department moved for Summary Judgment and Taxpayer replied to the Motion for Summary Judgment. In reviewing the record, the Stipulated Facts and all the exhibits that were tendered in this matter, there is no issue as to any material fact and the issue presented is a question of law.

Application of Preemption Analysis

Generally speaking, services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in § 7-9-3.5(A)(1):

> (1) "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or services exchanged, "gross receipts" means the reasonable value of the property or services exchanged;"

NMSA 1978, Section 7-9-3.5(A)(1) (2003).

Taxpayer argues that the *Blaze Constr. Co. v. Taxation & Revenue Dep't,* 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied,* 514 U.S. 1016, 115 S. Ct., 1359, 131 L. Ed. 2d 216 (1995),case controls while the Department argues that the controlling case is *Arizona Department of Revenue v. Blaze Construction Co., Inc.* 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999). In *Blaze Constr. Co. v. Taxation & Revenue Dep't,* 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied,* 514 U.S. 1016, 115 S. Ct. 1359, 131 L. Ed. 2d 216 (1995), the court reiterated that the U.S. Supreme Court has only applied the Indian preemption doctrine in cases where the contract was made or business was conducted directly with Indian tribes or tribal members. The court cited to *Cotton Petroleum Corp v. New Mexico,* 490 U.S. 163, 166, 104 L. Ed. 2d 209, 109 S. Ct. 1698 (1989) (applying doctrine where state imposed severance taxes on production of oil and gas on reservation land); *Ramah Navajo Sch. Bd. v. Bureau of Revenue,* 458 U.S. 832, 834, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982) (applying doctrine where state imposed gross receipts tax on receipts that non-Indian construction company, hired to build reservation school, received from tribal school board); and *White Mountain Apache Tribe v.*

Bracker, 448 U.S. 136, 148, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) (applying doctrine where state attempted to impose motor carrier license and use fuel taxes to company engaged in commerce on Indian reservation).

Taxpayer concedes that the Pueblo was not a signatory of the contract between Taxpayer and the Department of the Army. Taxpayer's argument is that even though the Pueblo was not a signatory to the contract, it was a "financial partner" to the project and by virtue of this relationship, the doctrine of Indian preemption applies to Taxpayer's gross receipts. *But see*, *Laguna Industries, Inc. v. New Mexico Taxation & Revenue Department*, 114 N.M. 644, 845 P.2d 167 (Ct. App. 1992), *aff'd*, 115 N.M. 553, 855 P.2d 127 (1993) (federal trader statutes preempted state taxation of services rendered to tribal enterprise by non-Indian.)

In reviewing the facts of this case, the construction services that are being taxed by the Department are services required to be performed under a contract between the Department of the Army and Taxpayer. The Pueblo does not have privity of contract with Taxpayer. The parties to the contract are the Department of the Army and Taxpayer. Exhibit D, page 2. The constructions services Taxpayer was required to perform from 2004 through 2005 were for the Department of the Army. Exhibit D, page 2. Taxpayer entered into a contract with the Department of the Army, not the Pueblo, to perform these services on or about November 24, 2003. Exhibit D, pages 1-2. While the construction services were performed on Pueblo land and were for the project called the Riparian and Wetland Restoration Rio Grande Gradient Restoration Facilities, these services were for the government. Exhibit D, page 3 of 127 of W912PP-04-C-003. There were no amendments or modifications to the contract incorporating the Agreement between the Pueblo and the Department of the Army. The contract also did not

incorporate any other contracts or agreements, although there were some amendments to the contract. Exhibit D, page 2, see "Items Accepted."

Under the terms of the contract, the Department of the Army had full authority over the scope of work, the delivery of the work, the acceptance of the work, and the payment of the work. Taxpayer was required to perform the construction services and invoice the Department of the Army for payment. Exhibit D, pages 59-60 of 100, Section 52.232-27. The Department of the Army paid Taxpayer directly for services performed under the terms of the contract. Exhibit D, pages 59-60 of 100, Section 52.232-27; Exhibit E, 2 pages. Under the terms of the contract, Taxpayer was required to replace or correct work found by the Department of the Army not to conform to its specifications. Exhibit D, pages 77-78 of 100, Section 52.246-12. Under the terms of the contract, Taxpayer was required to warrant to the Department of the Army its work free of any defect in equipment, material, or design furnished, or workmanship performed. Exhibit D, pages 78-79 of 100, Section 52.246-21. Under the Special Contract Requirements, Taxpayer was required to "perform on the site, and with its own organization, work equivalent to at least forty five percent (45%) of the total amount of work to be performed under the contract." Taxpayer was required to replace or correct work found by the Department of the Army not to conform to its specifications. Exhibit D, paragraph 5, page 00800-4. In addition, the contract provided that the contract price would include "all applicable Federal, State, and local taxes and duties." Exhibit D, page 55 of 100, Section 52.229-3(b). All of the contractual requirements were between the Department of the Army and Taxpayer. There is no reference found in the contract with the Taxpayer that the Taxpayer owed any duties and responsibilities to the Pueblo.

Taxpayer argues that because pursuant to the Agreement between the Pueblo and the Department of the Army, the Pueblo was required to provide both cash and in kind contributions

to the project, that the Pueblo was "as much a party to the contract" with Taxpayer even though the Pueblo did not sign the physical contract. Taxpayer argues that it was a "financial partner" with the Pueblo and therefore the receipts from the construction project are not taxable under the Indian preemption doctrine. To support its position, Taxpayer argues that the Department of the Army and the Pueblo entered into an Agreement for modification of the Jemez Canyon Dam and Cochiti Dam projects on or about March 20, 2002. Exhibit F.

Under the terms of the Agreement, the Pueblo agreed "to contribute 25 percent of total projection modification costs" to the Department of the Army. Exhibit F, paragraph D, page 6. The contribution from the Pueblo included cash, lands, easements, rights-of-way, suitable borrow and dredged or excavated material disposal areas. Exhibit G, Affidavit of Ronald R. Kneebone; Exhibit F, paragraph D, pages 6-7. Ronald R. Kneebone, an employee of the Department of the Army, attested that the Agreement entered into with the Pueblo was "undertaken with its costs to be shared" for the construction services provided by Taxpayer. Exhibit G, Affidavit of Ronald R. Kneebone. The required contribution from the Pueblo was estimated to be $1,666,000.00. The working estimate for the total project costs was $6,651,611.47. Exhibit G, Affidavit of Ronald R. Kneebone. (This amount is different than the amount stipulated to in the Prehearing Statement.) None of this evidence is sufficient to overcome the substantial undisputed evidence in the record that contract was between the Department of the Army and Taxpayer.

Taxpayer argues that because the Pueblo was obligated to fund 25% of the cost of the project, that the Pueblo was a "partner" as set out in *Blaze Constr. Co. v. Taxation & Revenue Dep't,* 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, 514 U.S. 1016, 115 S. Ct., 1359, 131 L. Ed. 2d 216 (1995). In *Blaze Constr. Co*., the court rejected the notion that the BIA had a special

relationship with the Indian tribes or in essence was "a partner in the tribes" performance of …integral governmental functions". *Blaze Constr. Co*., 118 N.M. at 650. It is not clear from *Blaze Constr. Co*., other than this language, what is meant by "partner." There is sufficient evidence in the record to support the proposition that the Department of the Army exclusively controlled the project, and therefore the Pueblo was not a partner.

While it is true that the case cited by the Department, *Arizona Department of Revenue v. Blaze Construction Co., Inc.* 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999), requires the federal government to fully fund the project, there is no case which specifically allows the Indian preemption analysis to apply to a set of facts like in this case where you have two non-Indian parties contracting with each other to perform services on Pueblo lands, with a Pueblo contributing cash and in kind contributions to the project.

Taxpayer argues that the Hearing Officer must apply the *Bracker* "balancing of interests" test to determine whether the state has the authority to impose gross receipts tax on the receipts derived from the project. The "balancing of interests" test is articulated in several United States Supreme Court cases, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982); and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 104 L. Ed. 2d 209, 109 S. Ct. 1698 (1989). More recently, the United States Supreme Court has articulated a more bright line rule for when the *Bracker* balancing test is appropriate in taxation cases. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 100, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) (rule depends on the "who" and "where": who is taxed and where is the person is taxed); *Okla. Tax Comm's v. Chickasaw Nation*, 515 U.S. 450, 458-459, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (must first determine who the incidence of taxation falls on); *Cal. State Bd. of*

Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11, 106 S. Ct. 289, 88 L. Ed. 2d 9 (1985) (per curiam) (the legal incidence does not necessarily fall on the entity bearing the economic burden of the tax, instead; it is determined by who has the legal obligation to pay under "a fair interpretation of the taxing statute as written and applied."). The next inquiry is where the taxable event occurs. *Wagnon*, 546 U.S. at 107. If the taxing event occurs on the reservation and the incidence of taxation falls on a member of the tribe or the tribe, then the tax is invalid unless Congress has expressly given the State authority to tax. *Chickasaw Nation*, 515 U.S. at 459. If the legal incidence falls on a non-Indian person or entity and the taxable event occurs on the reservation, then the *Bracker* balancing of interests test applies, *Wagnon*, 546 U.S. at 112.

In this case, the incidence of taxation falls on Taxpayer pursuant to the NMSA 1978, Section 7-9-3.5(A)(1) (2003) and this duty and responsibility is reiterated in the contract. Section 7-9-3.5(A)(1) provides that pursuant to the contract, the contract provided that the contract price would include "all applicable Federal, State, and local taxes and duties." Exhibit D, page 55 of 100, Section 52.229-3(b). While it is true that the Pueblo contributed both cash and in kind contributions to the project, the cash and in kind contributions, the contract expressly provided that the incidence of taxation fell on Taxpayer and it was Taxpayer's responsibility to charge, collect and remit the applicable taxes. While the Agreement is not incorporated into the contract, it appears from the Agreement that the Pueblo had a certain amount of involvement with the contract and contract modifications with Taxpayer. Exhibit F, page 4, Article II, paragraph A, subparagraph 1. However, the Agreement states that "(t)he Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, issuance of change orders, resolution of contract claims and performance of all work on the Project Modification (the

project) (whether the work is performed under contract or by Government personnel), shall be *exclusively* within the control of the Government." (Emphasis added.) Exhibit F, page 4, Article II, paragraph A, subparagraph 1. The Hearing Officer takes notice that the execution of the Agreement predated the execution of the contract.

There is sufficient evidence in the record to find by a preponderance standard that Taxpayer contracted solely with the federal government and that the Taxpayer did not contract with the Pueblo. There is also sufficient evidence in the record to find by a preponderance standard that Taxpayer was not a financial partner with the Pueblo. The State of New Mexico is not preempted from taxing Taxpayer's receipts.

CONCLUSIONS OF LAW

1. Taxpayer filed timely written protest of the Notice of Assessment for January 1, 2004 through September 30, 2005 for gross receipts taxes, penalty, and interest issued under Letter No. # L1969842944 and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer was not a financial partner with the Pueblo.

3. Taxpayer contracted with the Department of the Army to provide construction services on the Pueblo of Santa Ana.

4. Taxpayer failed to prove by a preponderance of the evidence that its gross receipts for construction services were not taxable under the Indian preemption analysis.

5. Taxpayer's constructions services were performed in New Mexico and taxable under the Gross Receipts Tax Act.

6. Summary Judgment is granted in favor of the Department.

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

DATED: February 17, 2012

Monica Ontiveros
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 Taxpayers have 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.