

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

IN THE MATTER OF THE PROTEST OF
DAWSON SURVEYS, INC.,
ID. NO. 02-2-3199-00 5
PROTEST TO ASSESSMENT NO. 2040143

NO. 97-42

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on August 21, 1997. Dawson Surveys, Inc., hereinafter, "Taxpayer", was represented by Gary Dawson and Peter Smith, employees or officers of the Taxpayer. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer performs surveying services, which are performed to locate property boundaries by metes and bounds. These services may only be performed by persons holding a license as a surveyor.
2. The Taxpayer also performs construction staking services. Construction staking is different than boundary surveying in that it is done in order to accurately locate the site and to establish elevations of a construction project, such as a road, and to establish grades for various

aspects of a construction project, such as the depth to lay sewer lines. Persons performing construction staking are not required to be licensed surveyors.

3. The Taxpayer was engaged by three different construction contractors, K.R. Swerdferger, Romero Construction and Olmstead Building Services to perform construction staking in the Las Campanas subdivision in Santa Fe County, New Mexico. The three contractors, in turn, were engaged by Las Campanas to build and construct roads.

4. The three construction contractors referenced in finding three provided the Taxpayer with type 7 non-taxable transaction certificates ("NTTCs"). Accordingly, when billing the contractors for the construction staking services it provided, the Taxpayer did not seek to recover the cost of gross receipts taxes on the value of the services it performed. Additionally, the Taxpayer claimed a deduction from its gross receipts for its receipts from the three construction contractors when reporting its gross receipts taxes to the Department.

5. The Taxpayer was audited by the Department for the reporting period of October, 1993 through February, 1996. The Department's auditor disallowed the deductions claimed by the Taxpayer from the three construction contractors referenced in finding three and assessed gross receipts tax, penalty and interest upon the Taxpayer's receipts from the three contractors.

6. On June 21, 1996 the Department issued Assessment No. 2040143 to the Taxpayer, assessing \$16,247.73 in gross receipts tax, \$881.84 in compensating tax, \$1,670.28 in penalty and \$2,204.35 in interest.

7. On July 29, 1996 the Taxpayer requested an extension of time to file a protest to the Department's assessment and included a copy of the protest the Taxpayer wished to file.

8. On August 14, 1996 the Department granted the Taxpayer a retroactive extension of time to file its protest to the Department's assessment.

9. All issues other than the deductibility of the Taxpayer's receipts for performing construction staking services for the three contractors referenced in finding three have been resolved between the parties.

DISCUSSION

The sole issue to be determined is whether the Taxpayer was entitled to claim a deduction, pursuant to Section 7-9-52 NMSA 1978 for its receipts from performing construction staking services for three construction contractors who provided the Taxpayer with type 7 NTTCs in support of the deduction claimed by the Taxpayer.

Section 7-9-52(A) provides as follows:

Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

The type 7 NTTC is the type of certificate which the Department issues to contractors to issue to their subcontractors who perform construction services in order to prevent the pyramiding of gross receipts tax on construction projects. The contractor issuing the NTTC must have the construction services performed on a construction project which is subject to the gross receipts tax upon its completion or upon its sale in the ordinary course of business. Section 7-9-52(B).

The Department's auditors denied the deductions claimed by the Taxpayer for construction staking on the basis of the Department's position that surveying and related services are not included in the definition of construction under Section 7-9-3(C) NMSA 1978. Thus, the Department concluded that construction staking done by surveyors was not a construction service and the deduction provided at Section 7-9-52 would not apply.

Since the issuance of the assessment at issue, the Department has re-examined the issue of construction staking, which it distinguishes from surveying. On May 15, 1997 the Department filed Regulation 3 NMAC 2.52.23 which provides that, "[C]onstruction staking is a construction service." Additionally, on October 31, 1997 the Department filed an amendment to Regulation 3 NMAC 2.51.8.2, example one, to clarify that while surveying done for a contractor is not a construction service, construction staking is not included in its reference to surveying not being a construction service. *See*, New Mexico Register, Vol. VIII, No. 20, Oct. 31, 1997. The previous version of that example had included a reference to construction staking and characterized it as a service related to surveying and had included it the category of services it considered not to be construction services.

Because the Department has changed its position with respect to construction staking, the issue here is what is the effect of that change of position? The regulations which were changed or adopted apply prospectively, only, since there was no statement giving them retroactive effect. *See*, Section 9-11-6.2(H) NMSA 1978, 1997 Cum. Supp. Nonetheless, any regulation issued by the Department is presumed to be a proper implementation of the provisions of the laws that are charged to the Department. *See*, Section 9-11-6.2(G) NMSA 1978, 1997 Cum. Supp. The presumption of correctness which would normally apply to the Department's prior version of

example 1 of 3 NMAC 2.51.8.2, however, would no longer apply because the Department has shown by its actions and the statement of counsel that it no longer believes the prior interpretation to be a correct interpretation of the law. Since neither the definition of construction in Section 7-9-3(C) nor the terms of Section 7-9-52 were changed in any way between the commencement of the audit period and the adoption of the new or amended regulations, and the new and amended regulations also have a presumption of correctness, it must be concluded that they are a proper interpretation of the law, even prior to the effective date of the regulations. Since the Regulation 3 NMAC 2.52.23 establishes that construction staking is a construction service, the type 7 NTTCs which the Taxpayer had in support of its claim of deduction for its receipts from the three construction contractors for whom it performed construction services properly supported the Taxpayer's claim of deduction for the receipts in issue. Because the Department's assessment was based upon the denial of the claimed deductions, it was improper as a matter of law.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2040143 pursuant to Section 7-1-24 NMSA 1978.
2. Construction staking is a construction service pursuant to Section 7-9-3 NMSA 1978.
3. Because the Taxpayer was in possession of proper type 7 NTTCs issued by construction contractors for whom it performed construction staking services during the audit

period, the Department's disallowance of the deductions claimed by the Taxpayer pursuant to Section 7-9-52 NMSA 1978 was improper.

For the foregoing reasons, the Taxpayer's protest IS HEREBY GRANTED. The Department IS HEREBY ORDERED to abate that portion of Assessment No. 2040143 which assessed gross receipts tax, penalty and interest based upon the denial of the deductions claimed by the Taxpayer for its receipts from performing construction staking services which were supported by type 7 NTTCS .

DONE, this 12th day of November, 1997.