

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

IN THE MATTER OF THE PROTEST OF
PROFESSIONAL LAND SURVEYING
ID. NO. 01-867989-00 7, PROTEST TO
ASSESSMENT NO. 1958341

NO. 98-55

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer on September 22, 1998. Professional Land Surveying, hereinafter, "Taxpayer", was represented by Ralph Scheuer, Esq. 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 is a small business owned and operated by Mr. Robert Benavidez, a registered surveyor.
2. The Taxpayer primarily does surveying for highway and road construction projects throughout New Mexico.
3. The Taxpayer has between one and three surveying crews performing surveying services around the state at any given time and Mr. Benavidez spends the vast majority of his time out of the office overseeing the work of his various crews.
4. The Taxpayer's office staff consists of one part-time bookkeeper, who handles payroll, paying bills, etc.

5. The Taxpayer was audited by the Department. As a result of the audit, on September 7, 1995 the Department issued Assessment No. 1958341 to the Taxpayer, assessing \$110,572.67 in gross receipts tax, \$11,057.29 in penalty and \$56,679.88 in interest for reporting periods from January, 1989 through March of 1995. .

6. On October 6, 1995, the Taxpayer filed a timely, written protest of Assessment No. 1958341.

7. As a result of discussions between the Taxpayer and the Department, the Department agreed to adjust substantial portions of the assessment and the Taxpayer conceded that it owed taxes on some transactions. The parties estimated that the tax principal portion of the assessment had been reduced to approximately \$59,500 at the time of the hearing.

8. The only matter remaining in dispute at the time of the hearing was the Department's denial of deductions claimed by the Taxpayer for its receipts from transactions with Corn Construction Company and Leedshill Herkenhoff, Inc. subsequent to July 1, 1992.

9. Corn Construction Company and Leedshill Herkenhoff, Inc. were the Taxpayer's two largest customers. They are highway and road construction contractors. The Taxpayer had a nontaxable transaction certificate from Corn Construction Company to support the deductibility of its receipts pursuant to Section 7-9-52 NMSA 1978 for periods prior to July 1, 1992.

10. Effective July 1, 1992, the Legislature amended Section 7-9-43 concerning nontaxable transaction certificates. Among the changes were that the old nontaxable transaction certificates would no longer be valid for transactions occurring after December 31, 1991. A new "1992 series" nontaxable transaction certificate would be required to support a deduction from gross receipts tax. Additionally, sellers relying upon nontaxable transaction certificates to

support a claim of deduction from tax were mandated to have the new type of nontaxable transaction certificate in their possession at the time their tax return claiming the deduction was due in order to claim a deduction for transactions after July 1, 1992. Finally, upon audit, taxpayers were required to demonstrate possession of nontaxable transaction certificates at the commencement of an audit, or they could be given sixty days to demonstrate that they had a certificate at the time their tax return was due claiming a deduction, but if either of those conditions was not met, the taxpayer's claimed deduction would be denied by the Department.

11. It was not clear what date the audit of the Taxpayer commenced in this case. In any event, on May 22, 1995, the Department gave notice to the Taxpayer that it must demonstrate possession of all nontaxable transaction certificates supporting its claimed deductions within sixty days, and with respect to transactions occurring on or after July 1, 1992, the Taxpayer must demonstrate that it had the nontaxable transaction certificates in its possession at the time each transaction generating gross receipts was required to be reported.

12. After receiving the Department's sixty day letter on May 22, 1995, the Taxpayer obtained nontaxable transaction certificates of the "1992 Series" from both Corn Construction Company and Leedshill Herkenhoff, Inc. and presented them to the Department. The certificate from Corn Construction Company indicates it was issued to the Taxpayer on June 6, 1995. The certificate from Leedshill Herkenhoff, Inc. was issued on July 3, 1995. Because neither certificate was in the Taxpayer's possession at the time it claimed deductions for its receipts from either customer for periods after July 1, 1992, the Department denied the Taxpayer's claims for deduction for its receipts from Corn Construction Company and Leedshill Herkenhoff, Inc. for periods after July 1, 1992. Because the law applicable to transactions prior to July 1, 1992 merely required that a taxpayer demonstrate possession of a nontaxable transaction certificate

within sixty days of notice requiring possession of a certificate, the Department accepted the Leedshill Herkenhoff certificate to support the Taxpayer's claimed deductions from that customer for periods prior to July 1, 1992.

DISCUSSION

The sole issue to be determined is whether the Department properly denied the deductions claimed by the Taxpayer for its receipts from Corn Construction Company and Leedshill Herkenhoff, Inc. for transactions occurring after July 1, 1992. The Department based its denial of the deductions upon the Taxpayer's failure to demonstrate that it had a 1992 series nontaxable transaction certificate from those customers in its possession either at the commencement of the Department's audit, or at the time it claimed the deductions on its reports to the Department.

The Taxpayer argues that because the statutory requirements concerning the possession of nontaxable transaction certificates changed so often and these changes were so confusing, that it was essentially impossible for small taxpayers to keep up and comply with the changes in the law without the assistance of "a phalanx of accountants and lawyers." Section 7-9-43(A) is the provision governing the necessity of nontaxable transaction certificates to support claims of deduction and the consequences of failure to demonstrate possession of such certificates.

Excerpted below are the pertinent provisions of the version in effect at the commencement of the audit period:

All nontaxable transaction certificates executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the nontaxable transactions occur. If the seller or lessor is not in possession of these nontaxable transaction certificates within sixty days from the date notice requiring the possession of these nontaxable transaction certificates is given the seller or lessor by the director or his delegate, deductions claimed by the seller or lessor which require

delivery of these nontaxable transaction certificates shall be disallowed.

Section 7-9-43(A) NMSA 1978 (1988 Repl. Pamp.) As written, taxpayers claiming deductions from tax which require a nontaxable transaction certificate “should” have the certificate in their possession at the time the transaction generating taxable gross receipts occurred, but, as long as a taxpayer could obtain a certificate within sixty days of notice from the director of the Department, or his delegate, to acquire possession of such a certificate, the deduction would be allowed, assuming the transaction otherwise qualified for whatever statutory deduction was claimed. Only if a taxpayer failed to obtain the necessary certificates within sixty days of notice that they needed to demonstrate possession of such certificates did the statute mandate that the deduction “shall be disallowed.”

In 1991, the legislature amended § 7-9-43 to add a new subsection D. It provided that after January 1, 1992, any nontaxable transaction certificates issued prior to that date would be void. It also provided for the Department to issue new nontaxable transaction certificates, hereinafter referred to as “1992 series” certificates, to buyers or lessees who apply to the Department for the new certificates and pay a \$100 fee. These certificates were to be good for four years from the date of the application for these certificates and could be renewed for an additional four years if the issuer applies for renewal. *See*, Laws 1991, ch. 9, § 29.

In 1992, the Legislature again amended § 7-9-43, substantially changing the requirements as to when nontaxable transaction certificates must be in the possession of taxpayers who claim deductions from tax which require such certificates. In pertinent part, subsection A was amended to read:

The provisions of this subsection apply to transactions occurring on or after July 1, 1992. All nontaxable transaction certificates of

the appropriate series executed by buyers or lessees shall be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor does not demonstrate possession of any required nontaxable transaction certificates to the Department at the commencement of an audit or demonstrate within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the Department that the seller or lessor was in possession of such certificates at the time receipts from the transactions were required to be reported, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

Section 7-9-43(A) NMSA 1978 (1992 Supp.) This amendment changed the language of the former provision which had stated that taxpayers “should” have the certificates in their possession at the time the nontaxable transaction occurs to a mandate that taxpayers “shall” have the certificates in their possession at the time the tax return reporting the tax on the nontaxable transaction occurs. It also changed the standards a taxpayer must meet for proving possession of the certificates upon audit. Instead of merely being required to demonstrate possession of the certificate within sixty days of notice from the Department, taxpayers must demonstrate possession of the certificates at the commencement of an audit, or, within 60 days of notice from the Department, they must demonstrate that they had possession of the certificate at the time the tax return claiming the deduction was due. Thus, even if a taxpayer obtains a certificate from a customer, the certificate must indicate it was issued to a taxpayer at the time it filed a return claiming a deduction from tax.

In addition to these changes, Subsection D was amended to change the period of time that the new 1992 series certificates would be effective from four years, renewable for an additional

four years to a flat ten year period. The language about the \$100 fee for the new certificates was moved to a new subsection E. *See*, Laws 1992, ch. 39, § 3.

In 1993, only minor changes, not pertinent to the issue in this case were made to § 7-9-43. *See*, Laws 1993, ch. 31, § 9. In 1994, the Legislature repealed the \$100 fee for certificates. *See*, Laws 1994, ch. 94, § 1.

Ultimately, and after the audit period at issue, the Legislature scrapped its revisions to Section 7-9-43 which had made possession of the new type of certificates a requirement at the time the tax return claiming a deduction was due. Instead, the requirements for possession of nontaxable transaction certificates were made essentially the same as they were prior to the 1992 revisions of § 7-9-43. Taxpayers “should” have the certificates in their possession at the time they claim the deduction, but they are given sixty days to produce them after notice from the Department, and taxpayers need not demonstrate possession of the certificates at the time the deduction was claimed, so long as they produce them within the sixty days. *See*, Laws 1997, ch. 72, § 1.

The changes outlined above demonstrate that the legal requirements for substantiating deductions which require the possession of nontaxable transaction certificates changed substantially during the past ten years. It also demonstrates that had the 1997 changes been in effect at the time the Taxpayer was audited, that it would have been entitled to claim the deductions for its transactions with both Corn Construction Company and Leedshill Herkenhoff, Inc., since it obtained nontaxable transaction certificates from them within sixty days of receiving notice from the Department to produce the certificates. The Taxpayer argues that the statutory requirements in effect at the time they were audited amount to taxation by “I gotcha”, rather than any reasonable policy which looks at the facts of the transactions themselves to determine

whether they would qualify for deduction except for the absence of the nontaxable transaction certificate at the required point of time.

I share the Taxpayer's concerns about the confusion and burdens placed upon Taxpayers by the statutory changes which occurred with respect to the requirements for claiming deductions which require nontaxable transaction certificates. Nonetheless, this forum is not empowered to establish tax policy contrary to that established by the Legislature. It is that body which writes the statutes. This forum is not entitled to substitute its judgment for that of the Legislature where the language of the statutes is clear and free from ambiguity. Unfortunately for the Taxpayer, that is the situation here. Even though the statutory requirements fluctuated over time, and even though the statutory requirements elevate form over substance, it is well established that every taxpayer is charged with the reasonable duty to understand the tax consequences of his actions. *Tiffany Construction Company v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). That duty includes keeping abreast of statutory changes affecting the manner in which taxes must be reported and deductions claimed. Because the Taxpayer was not able to demonstrate compliance with the statutory requirements applicable during portions of the audit period with respect to its claim of deduction for its receipts from Corn Construction Company and Leedshill Herkenhoff, Inc., those deductions must be denied.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1958341 pursuant to § 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Department properly denied the Taxpayer's claim for deduction for its receipts from Corn Construction Company and Leedshill Herkenhoff, Inc. pursuant to Section 7-9-52 NMSA 1978 subsequent to July 1, 1992 because the Taxpayer failed to demonstrate that it possessed 1992 series nontaxable transaction certificates from those customers at the time it filed reports with the Department claiming deductions for its receipts from those customers as required by § 7-9-43(A) NMSA 1978 (1992 Supp.), (1993 Repl. Pamp.) and (1994 Supp.).

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

DONE, this 22nd day of October, 1998.