

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

**IN THE MATTER OF THE PROTEST OF
CSW CONTRACTORS, INC.
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOS. L1882541008, L0137710544, L1211452368 and L0674581456**

No. 15-18

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 13, 2015, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, attorney for the Department. Tom Dillon, protest office supervisor, appeared for the Department. Alicia Muniz, corporate income tax auditor, appeared and testified for the Department. CSW Contractors, Inc. (“Taxpayer”) was represented by Marcus J. Mims, CPA, from CliftonLarsonAllen. Appearing as witnesses for Taxpayer were Paul Wilmot, technical engineer from Intrepid Potash-NM, and Rachel Sawyer, CPA, Director of Taxation from Intrepid Potash-NM. The Exhibits introduced into the record are Exhibits 1-8 and A-H. In addition to the pleadings and filings referred to in the Findings, the record contains the following: Notice of Telephonic Scheduling Conference issued on March 12, 2014; Scheduling Order and Notice Administrative Hearing issued on April 1, 2014; Notice of Reassignment of Hearing Officer for Administrative Hearing issued on November 12, 2014; Pre-Hearing Statement filed on November 24, 2014; Motion to Continue Formal Hearing filed on November 24, 2014; Response to Motion to Continue Formal Hearing filed on November 24, 2014; Continuance Order, Amended Scheduling Order, and Amended Notice of Administrative Hearing issued on November 26, 2014; Pre-Hearing Statement filed on April 15, 2015; Closing Statement by Taxpayer filed on

May 22, 2015; and Closing Response Statement filed by the Department on June 2, 2015. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 10, 2013, Taxpayer applied for a refund in the amount of \$516,750.46 for gross receipts taxes paid for tax periods May 1, 2012 through September 30, 2012.

2. The Department granted a partial refund to Taxpayer in the amount of \$64,804.64 on September 11, 2013.¹ [**Letter Id. No. L0484551120**].

3. The reasons provided by the Department for the partial denial of \$451,945.82 were that the rubber liners were used in a construction project and were construction material and some of the receipts were for construction services. [**Letter Id. No. L0484551120**].

4. Taxpayer filed a protest to the partial denial of the refund on January 29, 2014.

5. On March 6, 2014, the Department requested a hearing in this matter.

6. The Hearings Bureau set this matter originally for December 4, 2014 and upon Taxpayer's request, the hearing was continued to May 13, 2015.

7. Taxpayer was founded in Phoenix, Arizona in 1982 and is a solution provider for heavy civil construction projects. http://www.cswcontractors.com/about_us.asp.

8. Taxpayer is incorporated in the state of Arizona and is in good standing in the state of New Mexico.

[https://portal.sos.state.nm.us/corps/\(S\(4uajitzbaggmfu0xn5mlsnx3\)\)/Corplookup/Details.aspx?Nmscc=4385126](https://portal.sos.state.nm.us/corps/(S(4uajitzbaggmfu0xn5mlsnx3))/Corplookup/Details.aspx?Nmscc=4385126).

9. Intrepid Potash - New Mexico LLC ("Intrepid") is a wholly owned subsidiary of Intrepid Potash, Inc. <http://www.intrepid-hbproject.com/wp-content/uploads/2011/04/HB-Presentation-Website-4.8.11.pdf>.

¹ The protest letter incorrectly states that partial refund amount was \$64,304.64.

10. Intrepid mines for langbeinite or potash at its Carlsbad mine in Eddy County.

11. On or about July 22, 2010, Eddy County approved the issuance and sale of \$90 million in industrial revenue bonds issued for Intrepid's recovery project ("project").

<http://www.abqjournal.com/biz/222115448540biz07-22-10.htm>.

12. The recovery project or the HB Solar Solution Mine Project is a solar solution mine project to extract and produce potash remaining after completed conventional mining has occurred. <http://www.intrepid-hbproject.com/wp-content/uploads/2011/04/HB-Presentation-Website-4.8.11.pdf>; **[Exhibit 2]**.

13. The key project components were that it "Would use solution mining and solar evaporation to extract potash from previously mined areas; Environmentally friendly; 12 to 18-month construction phase including: Water supply wells and associated piping, 6 injection wells and 5 extraction wells with 37 miles of pipeline (primarily on public land), 520 acres of evaporation pods (on intrepid property), and A new flotation plant; and 28-year project lifespan." <http://www.intrepid-hbproject.com/wp-content/uploads/2011/04/HB-Presentation-Website-4.8.11.pdf>; **[Exhibit 1, pages 83-91]**.

14. On June 15, 2012, the Department issued a Type 6 nontaxable transaction certificate ("NTTC") to Field Lining Systems, Inc. ("Field"). **[Exhibit G]**.

15. Field sold and installed the pond liners to Taxpayer, who in turn sold the pond liners to Intrepid. **[CD 05-03-15 00:59-1:00]**.

16. The pond liners were manufactured in Houston and delivered to Intrepid in New Mexico. **[CD 05-03-15 1:03-1:04]**.

17. The pond liners were welded together at the Intrepid site in New Mexico. **[CD 05-03-15 1:03-1:04]**.

18. The pond liners are movable. **[CD 05-13-15 00:26]**.
19. Field executed a Type 6 NTTC to Taxpayer for sale of the pond liners. **[Exhibit G]**.
20. Taxpayer did not pay gross receipts tax to Field on the sale of the pond liners to Taxpayer.
21. Upon receiving the Type 6 NTTC from Field, Taxpayer agreed that the pond liners were construction material that would become an ingredient or component of a construction project that was either subject to gross receipt tax upon completion or the construction took place on Indian tribal territory. **[Exhibit A]**.
22. The contract amount for the pond liners was \$13,042,289.52. **[Exhibit B]**.
23. The total gross receipts tax charged on the pond liners was \$749,931.65. **[Exhibit B]**.
24. The amount of gross receipts tax charged on the pond liners is more than the amount of gross receipts tax claimed for refund. No explanation was provided as to the difference in the amount.
25. The Department asserted that Taxpayer deducted \$9,188,282.50, which represents the cost of the pond liners during the refund tax period. **[Exhibit H]**. Again, no explanation was provided as to the difference in the amounts, even though the Hearing Officer asked for an explanation.
26. On October 18, 2012, Intrepid executed a Type 9 NTTC to Taxpayer for the sale of the pond liners.
27. The pond liners were installed at Intrepid's site near Carlsbad, New Mexico.
28. Taxpayer does not dispute that the installation of the pond liners is a service and the

receipts from the sale of the service are taxable.

29. Intrepid funded the project with industrial revenue bonds.

<http://www.abqjournal.com/biz/222115448540biz07-22-10.htm>.

30. The pond liners were sold to a government agent, Intrepid, on behalf of Eddy County who issued the industrial revenue bonds.

31. Taxpayer charged and collected gross receipts taxes on the sale of the pond liners to Intrepid. **[Exhibit H]**.

32. The pond liners have a recovery period or are depreciated over a seven year period. **[Exhibit 3, page 2]**.

33. The pond liners are tangible personal property that became an ingredient or component part of a construction project.

34. The construction project was managed by Intrepid and called HB Solar Solution Mine Project.

35. The pond liners became part of a construction project when Field executed a Type 6 NTTC to Taxpayer for the purchase of the pond liners.

DISCUSSION

The sole issue to be determined is whether the receipts from the sale of tangible personal property or receipts from the sale of the pond liners to Intrepid are deductible under NMSA 1978, Section 7-9-54 (2003). The Department argued that because Field executed a Type 6 NTTC to Taxpayer, Taxpayer was foreclosed from then arguing that the pond liners were not part of the construction project. Taxpayer argued that because it qualified for a deduction under Section 7-9-54, that it was not relevant that it had been executed a Type 6 NTTC by Field.

Claim for Refund.

Generally speaking, a claim for refund must be filed within three years from the end of the calendar year in which the payment was originally due or the overpayment was made. NMSA 1978, §7-1-26 (D) (2007). The statute is fairly clear and states that: "...no credit or refund of any amount may be allowed or made to any person ... (1) within three years of the end of the calendar year in which: (a) the payment was originally due or the overpayment resulted from an assessment...". The alleged overpayments were made on July 31, 2012, August 31, 2012, and September 30, 2012. The claim for refund was therefore timely filed.

Burden of Proof.

Pursuant to regulation 3.1.8.10(A) NMAC, Taxpayer has the burden of proof in this matter. In addition thereto, it is presumed that "all receipts of a person engaging in business are subject to the gross receipts tax." NMSA 1978, §7-9-5 (2002). Therefore, Taxpayer's receipts from selling the pond liners to Intrepid are presumed to be gross receipts. The courts have held that "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, 1991-NMCA-024, ¶16, 111 N.M. 735.

Gross Receipts.

Generally speaking, goods sold or services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in Section 7-9-3.5(A)(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 service exchanged, “gross receipts” means the reasonable value of the property or services exchanged;

NMSA 1978, §7-9-3.5(A)(1) (2007). The term “construction” is defined extremely broadly and means the “building, altering, repairing or demolishing in the ordinary course of business any: (e) dam, reservoir, canal, ditch or similar facility.” NMSA 1978, §7-9-3.4(A)(1)(e) (2003). The term “construction material” means “tangible personal property that becomes or is intended to become an ingredient or component part of a construction project, but ‘construction material’ does not include a replacement fixture when the replacement is not construction or a replacement part for a fixture.” NMSA 1978, §7-9-3.4(B) (2003).

The applicable deduction is found in Section 7-9-54(A) which provides that

(r)ceipts from selling tangible personal property to the United States or New Mexico or any governmental until or subdivision, agency, department or instrumentality thereof may be deducted from gross receipts or from governmental gross receipts. Unless contrary to federal law, the deduction provided by this subsection does not apply to:

(3) receipts from selling construction material; or

No Gross Receipts Tax imposed on the Sale of the Pond Liners.

The first sale of the pond liners from Field to Taxpayer really determines, albeit unwittingly for Taxpayer, whether the pond liners are tangible personal property that is intended or is not intended to become an ingredient or component of a construction project. The pond liners may only be deducted by Taxpayer under Section 7-9-54 if they are *not* “construction material” that becomes an ingredient or component part of a construction project.

In this case, Field executed a Type 6 NTTC to Taxpayer for the purchase of the pond liners. Taxpayer paid no gross receipts tax to Field on the sale of the pond liners. A Type 6 NTTC is used for transactions deductible under NMSA 1978, Section 7-9-51(2001). Transactions

are deductible under Section 7-9-51(B) for purchases of construction material that is incorporated as “an ingredient or component part of a construction project.” Section 7-9-51(B) also provides that the construction project will be subject to “the gross receipts tax upon the upon its completion or upon the completion of the overall construction project of which it is a part.”

When Field executed the Type 6 NTTC to Taxpayer and Taxpayer accepted the NTTC, Taxpayer precluded the opportunity of asserting that the pond liners were not incorporated as an ingredient or component part of a construction project. If Taxpayer had not requested and if Field had not executed a Type 6 NTTC to Taxpayer for the purchase of the pond liners, Taxpayer may have had a more credible argument as to why the liners were not part of an overall construction project because they were not construction material. The pond liners are not deductible under Section 7-9-54 because Taxpayer utilized a Type 6 NTTC for their purchase.

Sale to a Government or a Government Agent.

Taxpayer argues that the pond liners are deductible because they meet the requirements of regulation NMAC 3.2.212.22. Regulation 3.2.212.22 interprets Section 7-9-54, and Section 7-9-54 is clear that receipts from selling construction material are ***not*** deductible. Taxpayer argues that it is immaterial that Taxpayer utilized a Type 6 NTTC on the first sale wherein, it was the buyer of the pond liners. Taxpayer argues that what matters is that Taxpayer meets the criteria for the deduction found in Section 7-9-54 and in regulation 3.2.212.22 NMAC. The main problem with Taxpayer’s argument is that it fails to take into account the statutory language found within Section 7-9-54 that provides that the deduction does not apply to receipts from selling construction material. In addition, regulation 3.2.212.22(B) provides that “(r)ceipts 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 if the tangible personal property is ***not*** an

ingredient or component part of a construction project.” (Emphasis added). By purchasing the pond liners using a Type 6 NTTC, Taxpayer did not pay gross receipts tax on the transaction because the pond liners were construction material whose intended use was an ingredient or component of a construction project. Therefore it seems clear that so long as Taxpayer used a Type 6 NTTC to purchase the pond liners, the intended use of the pond liners was to be an ingredient or component of a construction project.

Now as for Taxpayer’s argument that the pond liners meet the requirements found in regulation 3.2.212.22(B) NMAC for the exception to the definition of construction material; specifically, that (1) the cost of the tangible personal property does not increase the basis; (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 Section 7-9-3 NMSA 1978 (the correct citation is Section 7-9-3.4); and (b) the property is depreciated as 3-year, 5-year, 7-year, 10-year or 15 year property, the Hearing Officer agrees with Taxpayer that some of these requirements have been met but at least one requirement has not been met. The Hearing Officer does not agree with Taxpayer, however, that these requirements are exceptions to the definition of construction material.

The requirements that Taxpayer cites to found in regulation 3.2.212.22(B) NMAC are not exceptions to the definition of construction material, but are to be read assuming that the personal tangible property is not construction material. Taxpayer argued, and the Department’s witness, Alicia Muniz, confirmed that the Department had previously taken the position that so long as the property had a short recovery period, the tangible was deductible if sold to a government agent or the government regardless if the tangible personal property was construction material that became ingredient or component part of a construction project. **[CD 05-13-15 1:30-2:00]**. The

Department has since reversed this position on the sale of tangible personal property to a government agent or the government and now the Department will not allow a deduction for tangible personal property sold to a government agent or government if the property is construction material. The Department's current position is consistent with the Section 7-9-54 and regulation 3.2.212.22(B) NMAC.

As for whether the pond liners meet the requirements under 3.2.212.22(B) NMAC, there was no evidence presented at the hearing that the pond liners did not increase the basis of the property. (Mr. Mims stated in his opening that the pond liners did not increase the basis of the structure, but no witness testified to this fact. Ms. Rachel Sawyer, CPA testified only as to the recovery life of the pond liners. [CD 05-03-15 1:08-1:27]) The Hearing Officer agrees with Taxpayer that the liners are not listed on the list of structures or are similar to the list of structures found in Section 7-9-3.4. The requirement that the pond liners have a short depreciated or recovery life was met. Taxpayer submitted an opinion from the Hein & Associates LLP CPA firm that indicates that the pond liners are depreciated over a seven year period. [Exhibit 3, page 2; CD 05-03-15 1:16]. In addition the Department did not contest the depreciated or recovery life of the pond liners. [CD 05-03-15 00:14]. However, irrespective of the liners meeting most of these requirements found in regulation 3.2.212.22(B) NMAC, in the same regulation as the one cited by Taxpayer, the regulation clearly provides that the pond liners are not deductible if they the intended use of the pond liners was to be an ingredient or component of a construction project. See regulation 3.2.212.22(D) NMAC

Fixtures.

Taxpayer also makes the point that the pond liners are not only depreciated over a short recovery time, but they are also movable or not affixed to the property, and therefore are fixtures

that were never intended to become an ingredient or component part of construction project. It should be noted that fixtures tend have short depreciation lives. See I.R.C. §1245 property (shorter cost recovery period property, 5 or 7 years) or §1250 property (longer cost recovery period property, 39, 31.5 or 15 years). The most common example of §1245 property is depreciable personal property, such as equipment. The most common examples of §1250 property are buildings and building components, which generally are not §1245 property. Unfortunately, determining the depreciation or recovery life of property is not the approach utilized in the Gross Receipts and Compensating Tax Act for determining whether the deduction found in Section 7-9-54 applies. The legislative scheme for taxing tangible personal property that may or may not be construction material is to first determine whether the tangibles meet the definition of construction material and then determine whether the construction material will become an ingredient or component part of a construction project and therefore taxable on either the first transaction or the second transaction.

This notion of which fixtures are taxable when sold to a government agent can be unnecessarily tricky. Regulation 3.2.1.11(I)(1) NMAC provides that tangible personal property that is sold as a fixture that is necessary or essential to the intended use of a construction project and which is so firmly attached to the realty as to constitute a part of the construction project is taxable and *not* deductible pursuant to Section 7-9-54, but the sale of the fixtures may qualify for the deduction pursuant to Section 7-9-51. Regulation 3.2.1.11(I)(2) NMAC, then provides that fixtures that are assembled (the implication that they must be movable) are not construction material. This subparagraph of the regulation is in keeping with the distinction made in the same regulation under paragraph (F) between prefabricated and modular units. (There is no doubt that regulation 3.2.1.11(I) NMAC could be rewritten for better clarity.) Taxpayer was able to prove

that the pond liners were welded in New Mexico and were movable. [CD 05-03-15 00:26; 1:03-1:04]. However, these facts alone are insufficient to overcome the statutory requirement that the fixtures cannot be part of a construction project.

In this case, because Taxpayer purchased the pond liners from Field using a Type 6 NTTC, it is not material that the pond liners had a short depreciation or recovery life. By using a Type 6 NTTC for the purchase of the pond liners, Taxpayer was precluded from deducting the receipts from the sale of the pond liners to Intrepid under Section 7-9-54. Therefore the pond liners do not qualify for the deduction found under Section 7-9-54.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely claim for refund for gross receipts tax principal paid on the pond liners.
- B. Jurisdiction lies over the parties and the subject matter of this protest.
- C. The hearing was timely set as required by NMSA 1978, Section 7-1-24.1(A) (2013).
- D. It is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to the refund.
- E. Taxpayer utilized a Type 6 NTTC and paid no gross receipts tax on the purchase of the pond liners.
- F. The pond liners were resold to Intrepid and were taxable because the pond liners were construction material that became an ingredient or component part of a construction project.
- G. The pond liners do not meet the definition for deductible tangible personal property found in regulation 3.2.212.22(B) NMAC.
- H. The pond liners are not deductible pursuant to NSMA 1978, Section 7-9-54 (2003).
- I. The claim for refund is denied.

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

DATED: May 12, 2015

Monica Ontiveros

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