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

IN THE MATTER OF THE PROTEST OF
MOUNTAIN STATES CONTRACTING, INC.,
I.D. NO. 02-067325-00 6, PROTEST
TO DENIAL OF CLAIM FOR REFUND. No. 96-04

DECISION AND ORDER

This matter came on for formal hearing on December 6, 1995, before Gerald B. Richardson, Hearing Officer. Mountain States Contracting, Inc. (hereinafter "Taxpayer") was represented by Paul D. Barber, Esq. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel. The parties have graciously granted an additional three weeks to render the decision herein.

Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is an Arizona corporation whose sole business is the construction and repair and reconstruction of railroad tracks and roadbeds.

2. A railroad roadbed means what trains run on and includes everything from the ballast upon which the ties and track are laid on, to the ties, rails, spikes and other components of a rail line upon which trains run.

3. In 1993, the Taxpayer entered into a contract with Chino Mines Company to replace approximately 1,680 feet of mainline railroad track and railroad bed as well as two railroad turnouts located near the Chino Mines Company smelter at Hurley, New Mexico.

4. The contract was a fixed price contract which contained a "Schedule of Charges" which specified the price for the mainline track reconstruction on the basis of $1,675 track/feet at

$94 per track/foot and specified the price for the turnout reconstruction at $18,250 per turnout. The contract specified the quality of rail, joint bars, tie plates and rail anchors; specified that new track bolts and track spikes be used; specified that new pressure treated creosote crossties of a specified dimension be used and that new crushed rock ballast be used in the project. The contract also specified certain work such as the removal and disassembly of existing trackage and the hauling of this material to a designated area, the excavation of the track area to a suitable subgrade and the bringing in of new crushed rock ballast to raise the track to the proper grade and alignment and the tamping of a minimum of 6" of ballast below the ties of the reconstructed railroad track.

5. The contract specified that on the tenth day of each month, the Taxpayer would render to Chino Mines Company a statement for "all Work performed during the previous month" which would be based upon the Schedule of Charges and which would be supported by such vouchers or other evidence as Chino may require.

6. During the month of September, 1993, the Taxpayer invoiced Chino Mines Company, in four separate statements, a total of $134,940 for labor and $134,760 for materials, pursuant to its contract with Chino Mines Company. Although the materials were listed by the various materials used in the work, there was no breakdown of the expense for each type of material used in the project, only a total for all materials. Similarly, the labor was invoiced as merely a total charge and was not broken down into more detail.

7. It was the Taxpayer's practice with all of its customers to separately state its charges for labor and materials when it invoiced its customers.

8. The Taxpayer charged Chino Mines Company gross receipts tax upon both the materials and labor portions of the amounts it invoiced Chino Mines Company. It also reported and paid gross receipts to the Department for the September, 1993 reporting period, upon its receipts from the Chino Mines Company for the materials and labor involved in its contract with

Chino.

9. On February 25, 1994, the Taxpayer submitted to the Department a claim for refund, requesting a refund in the amount of $12,032.35 in gross receipts tax, representing the gross receipts taxes it believed that it paid for the September, 1993 reporting period on the materials portion of its receipts from Chino Mines Company for that reporting period.

10. On May 6, 1994, the Department denied the Taxpayer's claim for refund.

11. On May 16, 1994, the Taxpayer protested the Department's denial of its claim for refund.

12. The Department's original basis for denying the Taxpayer's refund claim, the issuance of an improper type of non-taxable transaction certificate, was admittedly incorrect, and this matter was clarified through correspondence between the Taxpayer and the Department. By letter dated December 28, 1994, the Department then proposed to grant the refund claim based upon the deduction found at Section 7-9-51.1 NMSA 1978, upon receiving a new application for refund, an amended return and a protest withdrawal form for the Taxpayer's pending protest. The Department wrote the Taxpayer again, on January 5, 1995, informing the Taxpayer that it had erroneously concluded that the deduction found at Section 7-9-51.1 NMSA applied to the Taxpayer's circumstances and it offered an explanation of why the deduction claimed was not available.

13. The Taxpayer agreed that it had not calculated the amount of its original claim for refund correctly and that the correct amount of its refund claim should be $7,411.80.

DISCUSSION

This case presents a matter of first impression, the operation of the deduction found at Section 7-9-51.1 NMSA 1978 (1995 Repl.Pamp.). This deduction was enacted by the 1993 Legislature[1] and provides as follows:

[1] Laws 1993, ch. 31, §14

Receipts from the sale of materials necessary for the construction or reconstruction of railway roadbeds may be deducted from gross receipts.

While there is no doubt that the materials at issue qualify as materials necessary for the construction or reconstruction of railway roadbeds, the availability of the deduction claimed by the Taxpayer also requires us to examine how that deduction interacts with other provisions of the Gross Receipts and Compensating Tax Act, specifically the definitions of "service" and "construction" found at Section 7-9-3(C) and (K), NMSA 1978 (1993 Repl.Pamp.), respectively.

Section 7-9-3(K) defines "service" in pertinent part as follows:

> "service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling of leasing property . . . . *"Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project.* Such tangible personal property retains its character as tangible personal property *until it is installed as an ingredient or component part of a construction project in New Mexico*. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property; . . . . (emphasis added)

This provision makes clear that if tangible personal property is sold to persons engaged in the construction business, it retains its character as tangible personal property only until it is actually installed as an ingredient or component part of a construction project. At that point it becomes part of the construction service being sold by the contractor engaged in the construction business. The last two sentences of this definition, which establish that the construction materials do not make this transformation into being part of the construction service until it is incorporated into the construction project are designed to correspond to the deduction provided at Section 7-9-51 NMSA 1978, which allows sellers of tangible personal property to persons engaged in the construction business to deduct their receipts if the purchaser delivers a non-taxable transaction certificate which certifies that the purchaser will incorporate the materials into a construction

project that will be subject to gross receipts tax upon its completion or sale.[2]

Section 7-9-3(C) NMSA 1978 (1993 Repl. Pamp.) sets out the definition of "construction". In pertinent part it provides:

"construction" means building, altering, repairing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project;

. . .

(11) shaft, tunnel or other mining appurtenance; or

(13) similar work; . . .

Although railway roadbeds are not specifically mentioned, they can be considered similar work to roads and highways, or possibly a mining appurtenance, since cars operated on rails have been commonly used to move mined materials out of mines and from mine sites to processing facilities, such as the copper smelter involved in this case. If there is any question that the railroad roadbed project was a construction project reference to the deduction claimed by the Taxpayer, Section 7-9-51.1, which refers to "materials necessary for the *construction or reconstruction* of railway roadbeds" (emphasis added) should remove that doubt.

With this statutory background in mind, we can now review the arguments of the parties. The Taxpayer argues that it is entitled to the deduction at Section 7-9-51.1 because it falls squarely within the clear and unambiguous language of the provision which provides a deduction for receipts from the sale of materials used in railway roadbed construction or reconstruction. It cited to the evidence that the materials used in the project for Chino Mines Company were separately stated on the invoices to support its argument that it was selling materials to Chino which fall clearly within the provisions of the deduction. It further argues that even if Sections

[2] This Taxpayer benefitted from this deduction with respect to its purchase of the ballast used in this project. It purchased the ballast from Southwest Transit Mix in Silver City. Because the Taxpayer had delivered a non-taxable transaction certificate to Southwest Transit Mix, Southwest was able to claim the deduction provided at Section 7-9-51 and no gross receipts tax was charged to the Taxpayer upon this purchase.

7-9-3 (C) and (K) are taken into consideration, they are general provisions which apply to construction in general, but Section 7-9-51.1 is a specific deduction which applies to the facts of this case and under the well established rule of statutory construction that specific statutory provisions govern over more general provisions, it is entitled to the deduction claimed. The Taxpayer also cites to the specific reference in the deduction to "construction or reconstruction of railway roadbeds" as evidence that the legislature was aware that these materials would be used in railway roadbed construction when it enacted the deduction as a further grounds for applying the specific deduction over the general provisions concerning construction materials.

The Department argues that the availability of the deduction turns upon what is being sold, whether it is construction services or only construction materials. In this case, it is clear from the contract between the Taxpayer and Chino Mines that Chino has contracted for the construction of railway roadbed. Since Section 7-9-3(K) clearly establishes that all materials which will become an ingredient or component part of a construction project are a service and not a tangible, the deduction is not available since the Taxpayer's receipts are from the sale of a service and not from the sale of materials.

Although the Taxpayer's argument has an immediate facial appeal, I am persuaded that the Department is correct in its analysis of the operation of the statutes at issue. The fact that the materials are separately reflected in the Taxpayer's invoices does not alter the fact that what it is providing to Chino is the service of constructing the railway roadbed. Chino is not just purchasing the materials for its railway roadbed, it has contracted to receive reconstructed and serviceable rail line and turnouts.

The Taxpayer argues that if the Department's construction is accepted, it will lead to a discriminatory result, since it would allow the large railroads who have their own railway repair and reconstruction crews to buy the materials for those projects free of gross receipts tax but a minor railway roadbed owner, such as Chino Mines who contracts out the reconstruction work

would not be able to acquire the materials without the cost of the gross receipts tax, which presumably, the contractor would include in its contract cost, since the deduction would not be available.

Although there would be disparate treatment in the situation outlined above, this does not establish that it would amount to illegal discrimination. With respect to claims of illegal discrimination in tax statutes, the New Mexico Supreme Court has adopted the United States Supreme Court's highly deferential test announced in ***Madden v. Kentucky,*** 309 U.S. 83 (1940):

> In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such as a violation of the Fourteenth Amendment places the burden on the one attacking to negative every conceivable basis which might support the classification.

Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969). Thus, as noted by the court of appeals in ***C & D Trailer Sales v. Taxation and Revenue Department,*** 93 N.M. 697, 699, 604 P.2d 835 (Ct. App. 1979):

> Where the State seeks to raise revenue through its exercise of the taxing power, reviewing courts have no right to determine the propriety or the wisdom of the classifications drawn, but only if any rational basis can be found to support it.

In this case the Taxpayer merely alleged that if the deduction were to be construed as the Department does, that it would amount to an arbitrary discrimination, but it has failed to carry its burden of proving that there can be no rational basis to support the differential treatment resulting from the differential treatment which would result. It could well be that the legislature was quite aware of the ongoing track repair required by the larger railroads operating in New Mexico and specifically had in mind providing the deduction to benefit those railroads operating in New Mexico even though smaller operations with only a small amount of track might not receive the same benefit. There would be nothing illegal about the legislature drawing such a distinction.

There are other rules of statutory construction which are also relevant to the determination of the issue at hand. It is presumed that the legislature is well informed as to existing statutory

and common law and did not intend to enact any law inconsistent with existing law. ***Gonzales v. Middle Rio Grande Conservancy District***, 106 N.M. 426, 744 P.2d 554 (Ct. App. 1987). The provisions defining construction materials as part of a construction service are a longstanding fixture of the Gross Receipts and Compensating Tax Act, dating back to its original enactment in 1966. *See,* Laws 1966, Ch. 47 §3. Thus, the operation of the gross receipts tax with respect to materials to be incorporated into construction projects should not have been a mystery to the legislature.

Additionally, statutes relating to the same subject matter are to be construed so as to give effect to every provision of each statute where possible. ***First National Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.***, 684 P.2d 517, 101 N.M. 431 (1984). Sections 7-9-3 (C) and (K) defining "construction" and "service" and the deduction at issue for materials used in railway roadbed construction, Section 7-9-51.1 can be construed and harmonized with no damage to the operation of any of them. It merely means that the deduction is available only when materials used for the construction or reconstruction of railroad roadbeds are purchased independently of any services involved in incorporating those materials into the construction of such railway roadbeds. Although this construction does not benefit the Taxpayer in the circumstances of this case, the statute providing the deduction would not be meaningless. The deduction would still operate to provide a benefit to railroads who perform their own railroad construction and reconstruction work. As noted above, the legislature would have been well within its power in enacting such a provision and it appears to be the proper construction of the deduction at issue herein.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of its claim for refund, and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer's activities in reconstructing railway roadbed pursuant to its contract

with Chino Mines Company was "construction" as defined in Section 7-9-3(C) NMSA 1978.

3. The Taxpayer was selling construction services to Chino Mines Company which included the materials which it incorporated into the railroad roadbed reconstruction project which it did for Chino Mines.

4. The Taxpayer was not selling railroad construction materials to Chino Mines Company under its contract to reconstruct certain rail line and turnouts and therefore the Taxpayer was not entitled to claim the deduction found at Section 7-9-51.1 with respect to the materials incorporated in its railroad roadbed reconstruction project for Chino Mines Company. 5.

The Department properly denied the Taxpayer's claim for refund.

For the foregoing reasons, the Taxpayer's protest is hereby denied.

Done, this 23rd day of January, 1996.