

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

IN THE MATTER OF THE PROTEST
OF LARRY LENE d/b/a
CSI MOBILE HOME SET UP
ID. NO. 02-229749-00 0
ASSESSMENT NO. 2284621

00-05

DECISION AND ORDER

This matter was heard on January 31, 2000, before Margaret B. Alcock, Hearing Officer.

Larry Lene represented himself. Bridget A. Jacober, Special Assistant Attorney General, represented the Taxation and Revenue Department ("Department"). Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In July 1995, Larry Lene began a business in Las Cruces, New Mexico, under the name CSI Mobile Home Set Up.
2. During 1995, Mr. Lene performed on-site set up services as an independent contractor for two mobile home dealers: QVS Mobile Homes and America's Choice Mobile Homes.
3. Sometime in late 1995 or early 1996, Mr. Lene consulted his accountant concerning the use of New Mexico nontaxable transaction certificates (NTTCs).
4. The accountant told Mr. Lene he should obtain Type 5 NTTCs from the dealers for whom he performed services in order to deduct his receipts for gross receipts tax purposes.
5. Mr. Lene asked the accountant to obtain the NTTCs for him and she agreed to do so.

6. Mr. Lene did not pay attention to the paperwork side of the business, but relied on his accountant to make sure all required NTTCs were on hand and all required tax returns were filed.

7. The 1995 federal income tax return prepared by his accountant reported the income Mr. Lene earned from his mobile home set up services on Schedule C (Profit or Loss From Business) to federal Form 1040.

8. Although Mr. Lene remembers signing various documents prepared by his accountant, he does not know whether these documents included the quarterly CRS-1 returns he was required to file with the Department to report gross receipts and compensating tax.

9. In February 1996, Mr. Lene relocated his business to Albuquerque, New Mexico.

10. On June 10, 1998, as a result of information obtained from the IRS, the Department mailed Mr. Lene a notice of limited scope audit based on his failure to report and pay New Mexico gross receipts tax on the business income reported to the IRS on Schedule C of his 1995 federal income tax return.

11. The June 10, 1998 notice advised Mr. Lene that, pursuant to Section 7-9-43 NMSA 1978, he must be in possession of all required NTTCs within 60 days from the date of the notice or any deductions relating to the NTTCs would be disallowed. The 60-day period expired August 9, 1998.

12. After receiving the notice, Mr. Lene contacted his Las Cruces accountant concerning the NTTCs he needed to support a deduction of his 1995 receipts from performing services for QVS Mobile Homes and America's Choice Mobile Homes.

13. The accountant told Mr. Lene she was "pretty sure" she had obtained the required NTTCs and said they would have been in the envelope of papers she gave him when he relocated to Albuquerque in 1996.

14. The box containing Mr. Lene's tax papers was lost or misplaced during his move from Las Cruces to Albuquerque, and he was unable to locate any NTTCs from QVS Mobile Homes or America's Choice Mobile Homes.

15. Mr. Lene asked his accountant to obtain duplicate NTTCs from the Las Cruces mobile home dealers. When she attempted to do so, she discovered that both dealers had gone out of business.

16. Due to the above circumstances, Mr. Lene was unable to provide the Department with NTTCs to support a deduction of his 1995 gross receipts.

17. On August 16, 1998, the Department issued Assessment No. 2284621 to Mr. Lene for reporting periods January through December 1995 in the amount of \$7,223.08, representing gross receipts tax, penalty and interest due on his receipts from performing mobile home set up services during 1995.

18. On September 5, 1998, Mr. Lene filed a written protest to the Department's assessment.

DISCUSSION

The sole issue presented is whether Mr. Lene's failure to produce NTTCs from QVS Mobile Homes and America's Choice Mobile Homes bars him from claiming a gross receipts tax deduction for receipts from performing services for those companies during 1995.

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. Mr. Lene claims the deduction provided in Section 7-9-48 NMSA 1978, which states:

Receipts from selling a service for resale may be deducted from gross receipts
... if the sale is made to a person who delivers a nontaxable transaction certificate to the seller (emphasis added)

The fact that a taxpayer sells his services for resale is not sufficient to support a deduction under Section 7-9-48 NMSA 1978; the buyer must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. The version of the statute in effect at the time the Department's audit reads as follows:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should 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 is not in possession of the required nontaxable transaction certificates 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, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

The language of the statute is mandatory: if a taxpayer is not "in possession" of NTTCs within 60 days from the date of the Department's notice, deductions requiring delivery of these NTTCs "shall be disallowed."

Mr. Lene maintains that he did have timely possession of the required NTTCs but they were lost or misplaced during his move from Las Cruces to Albuquerque. Mr. Lene acknowledges he did not personally obtain the NTTCs from the two mobile home dealers. Instead, he delegated the task to his accountant.¹ The only evidence to show the accountant followed through on her assignment is her statement to Mr. Lene that she was "pretty sure" she had obtained the NTTCs and that they would have been included with the papers she gave Mr. Lene when he moved to Albuquerque. Unfortunately, Mr.

¹ This delegation did not relieve Mr. Lene of his personal responsibility to insure he met all the requirements of New Mexico's tax laws. As stated by the court in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989): "We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters."

Lene's tax papers were lost or misplaced in the move and there was no way for him to confirm the existence of the NTTCs or provide copies to the Department. Because QVS Mobile Homes and America's Choice Mobile Homes had both gone out of business, Mr. Lene was unable to obtain new NTTCs within the required 60-day period.

Section 7-9-5 NMSA 1978 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the 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*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Where a party claiming a right to a tax deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), cert. denied, 107 N.M. 308, 756 P.2d 1203 (1988).

In this case, Mr. Lene was not able to show timely possession of the NTTCs required to support his deduction of receipts from performing services for QVS Mobile Homes and America's Choice Mobile Homes. It is far from clear that Mr. Lene's accountant ever obtained the NTTCs in the first place. What is clear is that the NTTCs were not in Mr. Lene's possession within the 60-day period provided in NMSA 1978 Section 7-9-43. Accordingly, the Department had no choice but to disallow the deduction.

CONCLUSIONS OF LAW

1. Mr. Lene filed a timely, written protest to Assessment No. 2284621, and jurisdiction lies over the parties and the subject matter of this protest.

2. Mr. Lene is not entitled to a gross receipts tax deduction for receipts from selling services to mobile home dealers during 1995.

IT IS THEREFORE ORDERED that the taxpayer's protest is denied.

Dated February 4, 2000.