

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

IN THE MATTER OF THE PROTESTS OF

AGUADULCE HOOF TRIMMERS

ID NO. 02-198377-00 1

ASSESSMENT 2260093

No. 00-07

DARRIN DOW

ASSESSMENTS 322042, 322043 & 322044

DECISION AND ORDER

A formal hearing on the above-referenced protests was held February 3, 2000, before Margaret B. Alcock, Hearing Officer. Darrin Dow, d/b/a Aguadulce Hoof Trimmers, was represented by R. "Trey" Arvizu, III, Arvizu Law Firm. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1993, Darrin Dow moved to Roswell, New Mexico, and opened a business known as "Aguadulce Hoof Trimmers."
2. Mr. Dow is engaged in the business of trimming the hoofs of dairy cows.
3. The average milk-producing life of a dairy cow is approximately three years, after which the cow is sold to a slaughterhouse.
4. A dairy generally sells and replaces one-third of its stock of dairy cows each year.
5. The hoofs of a dairy cow must be regularly trimmed to prevent "rot foot", warts, and other infections and diseases which prevent the dairy cow from being able to stand. If a dairy cow is unable to stand, it will not be able to eat and will not produce milk.

6. Mr. Dow's services are purchased by local dairies and serve to prolong the useful life of the dairy's cows.

7. Mr. Dow is not hired to trim the hoofs of dairy cows about to be sold for slaughter because, at that point, their useful life is over.

8. In order to trim a cow's hoofs, Mr. Dow first chases the cow into a chute, turns the cow over and ties its feet. Mr. Dow then trims the hoofs by hand.

9. Mr. Dow takes the hoof trimmings home for his dog to chew on, but does not sell the trimmings.

10. When Mr. Dow opened his business in 1993, he went to the Department's Roswell office to register for the payment of gross receipts, compensating and withholding taxes.

11. At the time he registered, Mr. Dow was given a pamphlet of forms and instructions explaining the application of the gross receipts tax.

12. Mr. Dow read in the pamphlet that receipts from handling livestock prior to sale are exempt from gross receipts tax under Section 7-9-19 NMSA 1978. Mr. Dow concluded that this exemption applied to him because he had to handle dairy cows in order to trim their hoofs.

13. Based on his belief that his receipts were exempt from tax, Mr. Dow filed quarterly gross receipts tax returns reporting his receipts as zero.

14. At some point, Mr. Dow had a discussion with a Department employee at the Roswell office, who agreed with Mr. Dow that his receipts were exempt. The employee told Mr. Dow it was not necessary for him to continue to file gross receipts tax reports.

15. On April 8, 1996, the Department sent Mr. Dow a letter notifying him that Aguadulce Hoof Trimmers had been selected for audit and assigned to auditor George Romero (Department Exhibit 2, page B9).

16. When Mr. Dow received the audit notice, he went to the Department's Roswell office. George Romero was out of the office, so Mr. Dow spoke with Allen Wesson, one of the other auditors.

17. Mr. Dow explained the nature of his business to Mr. Wesson and told him another Department employee had previously advised Mr. Dow his receipts were exempt.

18. Mr. Wesson checked with someone in the Santa Fe office and then told Mr. Dow his receipts were not exempt under Section 7-9-19 NMSA 1978, but might be deductible under Section 7-9-59 NMSA 1978.

19. Mr. Wesson wrote a note summarizing his conversation with Mr. Dow and gave the note to George Romero on June 12, 1996.

20. On November 28, 1997, Mr. Dow wrote a letter to the Department's Tax Information/Policy Office in Santa Fe requesting information on whether his receipts from performing hoof trimming services were subject to gross receipts tax.

21. On January 5, 1998, the Tax Information/Policy Office sent Mr. Dow a letter advising him that receipts from his hoof trimming services were neither exempt under Section 7-9-19 NMSA 1978 nor deductible under section 7-9-59 NMSA 1978 and were subject to gross receipts tax.

22. In March 1998, George Romero began the field audit of Mr. Dow's business.

23. During the audit, Mr. Dow provided Mr. Romero with computer worksheets listing his monthly receipts.

24. Mr. Dow was not familiar with all the functions of his computer and usually relied on his son, who lived in Arizona, to help him operate the computer. When Mr. Dow's son learned that

Mr. Dow had given the auditor the computer worksheets, he told his father the worksheets were not accurate because the computer program ran cumulative totals that counted receipts more than once.

25. When the auditor asked Mr. Dow why the receipts shown on Mr. Dow's work-sheets were higher than receipts reported on his federal and state income tax returns, Mr. Dow told the auditor the worksheets might not be accurate, but did not explain what caused the errors.

26. In the absence of a clear explanation as to why Mr. Dow's own worksheets would not accurately reflect his receipts, the auditor decided to use the higher income figures shown on the worksheets instead of the figures shown on Mr. Dow's income tax returns.

27. On May 29, 1998, the Department issued gross receipts tax assessment 2260093 to Aguadulce Hoof Trimmers in the total amount of \$46,650.20, representing gross receipts tax, penalty and interest for tax years 1993 through 1997.

28. On August 27, 1998, the Department issued the following assessments of personal income tax to Mr. Dow: Assessment No. 322042 for tax year 1994 in the amount of \$1,838.25; Assessment No. 322043 for tax year 1995 in the amount of \$3,673.80; and Assessment No. 322044 for tax year 1996 in the amount of \$2,471.43. The personal income tax assessments were based solely on the discrepancy between the receipts reported on Schedule C of Mr. Dow's federal income tax returns and the receipts shown on Mr. Dow's computer worksheets.

29. On August 16, 1998, pursuant to an extension of time granted by the Department, Mr. Dow filed a written protest to the Department's assessments.

30. At the formal hearing held February 3, 2000, the Department stated that it would abate the penalty assessed under Assessment No. 2260093. Accordingly, the issue of Mr. Dow's liability for this portion of the assessment is no longer before the hearing officer and will not be addressed in this decision.

31. At the formal hearing held February 3, 2000, the parties agreed to leave the record open until February 24, 2000, so Mr. Dow could provide additional information to establish that the computer worksheets he gave the Department's auditor were inaccurate and the income shown on Schedule C to Mr. Dow's federal income tax returns reflect his true income for the audit period.

32. On February 28, 2000, Department counsel notified the hearing officer the Department had accepted Mr. Dow's explanation concerning the inaccuracy of his worksheets. The Department stated that it would abate the three assessments of personal income tax and adjust Assessment No. 2260093 to reflect gross receipts tax and interest on the receipts shown on Mr. Dow's federal income tax returns, rather than the receipts shown on Mr. Dow's computer worksheets.

33. The only issue remaining in protest is whether Mr. Dow is liable for gross receipts tax and interest on his receipts, as reflected on Schedule C of his federal income tax returns, from hoof trimming services performed in New Mexico during the period January 1993 through December 1997.

DISCUSSION

Mr. Dow raises the following arguments in protest to the Department's assessment of gross receipts tax: (1) the receipts from his hoof trimming services are exempt from tax under Section 7-9-18 NMSA 1978; (2) the receipts from his hoof trimming services are exempt from tax under Section 7-9-19 NMSA 1978; and (3) the estoppel provisions of Section 7-1-60 NMSA 1978 bar the Department from assessing the tax against Mr. Dow.

EXEMPTIONS FROM TAX. Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App.

1972). Where an exemption from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption 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). Accordingly, it is Mr. Dow's burden to come forward with evidence and legal arguments to show he is entitled to the exemptions claimed.

Section 7-9-18 NMSA 1978 states:

Exempted from the gross receipts tax and from the governmental gross receipts tax are the receipts from selling livestock and receipts of growers, producers, trappers or nonprofit marketing associations from selling livestock, live poultry, unprocessed agricultural products, hides or pelts. Persons engaged in the business of buying and selling wool or mohair or of buying and selling livestock on their own account are producers for the purposes of this section.

Receipts from selling dairy products are not exempted from the gross receipts tax.

The exemption applies to receipts from selling the products enumerated. Mr. Dow is not entitled to this exemption because he is engaged in selling services, not products. Mr. Dow does not sell cows or other livestock; he does not sell unprocessed agricultural products; he does not sell the hides or pelts of cows or other animals, nor does he sell wool or mohair. Although Mr. Dow testified that he often takes hoof trimmings home for his dog, he also acknowledged that he does not sell the hoof trimmings to any third party. Accordingly, even if hoof trimmings could be classified as an agricultural product or as some form of a hide or pelt, Mr. Dow does not have any receipts from selling such products and is ineligible for the exemption.

Section 7-9-19 NMSA 1978 states:

- A. Exempted from the gross receipts tax are the receipts of any person derived from feeding or pasturing livestock.
- B. Receipts derived from penning or handling livestock prior to sale are receipts derived from feeding livestock for the purposes of this section.
- C. Receipts derived from training livestock are receipts derived from feeding livestock for the purposes of this section.

Mr. Dow claims the exemption for handling livestock provided in Subsection B. Mr. Dow's hoof trimming services include chasing the cow into a chute, turning the cow over, tying its feet, and then trimming the hoofs by hand. In the absence of any statutory or regulatory definition to the contrary, Mr. Dow's activities appear to come within the common meaning of "handling". To be eligible for the exemption, however, the taxpayer's receipts must be derived from "handling livestock *prior to sale.*" (emphasis added). Mr. Dow argues that because the milk-producing life of a dairy cow is only three years, after which the cow is sold to the slaughterhouse, all hoof trimming services performed during the cow's life are performed "prior to sale." This is too broad a reading of the statute.

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." If a tax is clearly applicable, except for a statutory exemption, the provision for the exemption must be narrowly but reasonably construed. *Chavez v. Commissioner of Revenue*, 82 N.M. 97, 99, 476 P.2d 67 (Ct. App.1970). Subsection B of Section 7-9-19 NMSA 1978 limits the gross receipts tax exemption for receipts from handling livestock to activities performed "prior to sale." Neither of the exemptions contained in Subsections A or C of Section 7-9-19 contain such limiting language. This indicates the legislature did not intend to grant a blanket exemption for receipts from the activities described in Subsection B, but intended to require some connection between the handling of the livestock and the sale of the livestock. To find otherwise would render the limitation meaningless. Accepting Mr. Dow's argument, receipts from handling a

cow at any point in its life would qualify for the exemption, as long as there was a likelihood the animal would someday be sold. Such a construction of the statute is neither narrow nor reasonable.

Mr. Dow's hoof trimming services are not performed in conjunction with or in preparation for the cow's sale. To the contrary, Mr. Dow acknowledged there would be no point to trimming the hoofs of a cow designated for sale to the slaughterhouse. His services are intended to prolong the useful life of the dairy cow and put off the date when the cow can no longer produce milk and must be sold for beef. Although the cows on which Mr. Dow performs services will someday be sold—if they do not die in the dairy—his hoof trimming services do not come within the exemption for handling livestock “prior to sale.”

ESTOPPEL. Mr. Dow argues that Section 7-1-60 NMSA 1978 estops the Department from enforcing its assessment of gross receipts tax. Section 7-1-60 states:

In any proceeding pursuant to the provisions of the Tax Administration Act, the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of *was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary*, unless the ruling had been rendered invalid or had been superceded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose. (emphasis added).

Mr. Dow has not identified any Department regulation on which he relied in failing to pay gross receipts tax on receipts from his hoof trimming business. Nor has the Department issued a formal ruling to Mr. Dow. Although Mr. Dow maintains the oral advice he received from the Department's employee constitutes a “ruling” for purposes of Section 7-1-60 NMSA 1978, the statute requires that the ruling be “addressed to the party personally and in writing by the secretary.” Oral advice from a Department employee does not meet this requirement. *See also, Taxation and Revenue Department v.*

Bien Mur Indian Market, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (taxpayer's reliance on the oral representations of a Department employee was not reasonable).

It should also be noted that this is not a situation where Mr. Dow was paying tax on his receipts and only stopped in reliance on advice received from the Department. Mr. Dow made his own determination that his receipts were exempt after reading a Department pamphlet describing the exemption in Section 7-9-19 NMSA 1978. He testified that he initially filed gross receipts tax returns reporting zero receipts and then stopped filing altogether after he met with an unidentified employee in the Department's Roswell office.¹ Mr. Dow could not remember exactly when this meeting occurred. Although he thought it might have been in 1994, the Department's audit workpapers indicate that Mr. Dow did not stop filing gross receipts tax reports until March 1996 (Department Exhibit 1, page 1 of Audit Narrative).

In June 1996, Mr. Dow discussed his liability for gross receipts tax with Allen Wesson, an auditor in the Roswell office. After checking with someone in Santa Fe, Mr. Wesson told Mr. Dow his receipts were not exempt from tax under Section 7-9-19 NMSA 1978, but might be deductible under another section of the Gross Receipts and Compensating Tax Act (Department Exhibit 2, page B5). At that point, Mr. Dow was on notice that he could be liable for payment of gross receipts tax. He did not seek written clarification of his tax status until November 28, 1997, a year and a half after his discussion with Mr. Wesson. On January 5, 1998, the Tax Information/Policy Office sent Mr. Dow a letter advising him that his receipts from hoof trimming were neither exempt nor deductible and were subject to New Mexico gross receipts tax (Department Exhibit 2, page B6.1).

¹ The June 12, 1996 note from Allen Wesson to George Romero (Department Exhibit 2, page B5) tentatively identified the unknown employee as "Frank." In his audit narrative (Department Exhibit 1, page 2) George Romero states that based on the description Mr. Dow gave Mr. Wesson, Mr. Dow "could have talked to a former auditor (Frank Montoya)."

Given the above facts, Mr. Dow cannot claim that his failure to pay gross receipts tax during the years 1993 through 1997 was solely due to erroneous advice received from the Department. Clearly, his failure to pay tax was not based on his reliance on a written regulation or ruling issued by the Department, and the estoppel provisions of Section 7-1-60 NMSA 1978 do not apply to this case.

CONCLUSIONS OF LAW

1. Mr. Dow filed a timely written protest to Assessment No. 2260093 and jurisdiction lies over the parties and the subject matter of this protest.

2. Mr. Dow's receipts from hoof trimming services are not exempt from gross receipts tax under Section 7-9-18 NMSA 1978.

3. Mr. Dow's receipts from hoof trimming services are not exempt from gross receipts tax under Section 7-9-19 NMSA 1978.

4. The Department is not estopped from assessing gross receipts tax against Mr. Dow.

For the foregoing reasons, Mr. Dow's protest of the Department's assessment of gross receipts tax and interest is denied.

DATED March 1, 2000.