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

IN THE MATTER OF THE PROTEST OF
ELLEN BERKOVITCH **NO. 00-09**
ID. NO. 02-154452-00 2, PROTEST TO
ASSESSMENT NO. 2308883

DECISION AND ORDER

This matter came on for formal hearing on February 7, 2000 before Gerald B. Richardson, Hearing Officer. Ellen Berkovitch, hereinafter, "Taxpayer", represented herself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1995, the Taxpayer entered into a professional services contract with the New Mexico State Library to be a "materials manager" for the Statewide Reading Program. Among the Taxpayer's duties under this contract are to coordinate the research, production and editing of a program manual for librarians as part of the Statewide Reading Program.

2. The Taxpayer's duties under the contract were selecting, hiring and overseeing a printer to print the program manual, the purchase of various materials and services to be used in the production of the manual, distributing and shipping the manual.

3. The contract required that the Taxpayer handle all financial matters related to the services provided and to submit to the State Library the invoices, statements and evidences of payment related to the materials and services provided. The contract specified that all expenses incurred

by the Taxpayer in performing the services were the responsibility of the Taxpayer and that the Taxpayer was an independent contractor.

4. The Taxpayer paid for the purchase of materials and services used to produce the program manual and received reimbursement for those purchases from the State Library as part of her compensation under the terms of the contract with the State Library.

5. When the Taxpayer made those purchases of materials and services, the vendor of those materials and services charged the Taxpayer the cost of passed on gross receipts tax.

6. In 1995, the Taxpayer purchased $9,174.64 in materials and services as part of her contract with the State Library. The invoices for those materials and services, even though they were issued to the Taxpayer, listed the purchases as for the State Library or the State Library project. The Taxpayer was reimbursed by the State Library for the purchases she made.

7. For tax year 1995, the Taxpayer reported $14,127 in gross receipts from a business or profession on Schedule C of her 1995 Federal income tax return.

8. The Taxpayer was new to the state in 1995 and did not understand that she would be subject to gross receipts tax on the performance of services under her contract with the State Library.

9. The Department, through its information sharing agreement with the Internal Revenue Service ("IRS"), obtained information about the Taxpayer's 1995 Federal Schedule C and determined that the Taxpayer had not reported or paid gross receipts taxes in 1995 on the amount reported on her Federal Schedule C.

10. On October 26, 1998, the Department issued Assessment No. 2308883 to the Taxpayer, assessing $738.00 in gross receipts tax, $73.80 in penalty and $364.40 in interest for reporting periods, January, 1995 through December, 1995.

11. On November 11, 1998 the Taxpayer filed a written protest to Assessment No. 2308883.

DISCUSSION

The issue to be determined is whether the Taxpayer is liable for gross receipts tax upon the $9,174.64 in reimbursements for expenditures she made as part of her contract with the State Library[1]. In making this argument, the Taxpayer relies upon Regulation 3 NMAC 19.3.1 which provides:

> The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by Subsection F of Section 7-9-3, unless that person incurs such expense as agency on behalf of a principal while acting in a disclosed agency capacity. An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.

In this case it appears that the vendors were aware that the materials and services were being purchased for use in a State Library project, and thus, there is no issue with the disclosure of the Taxpayer's relationship with the State Library. It must then be determined whether the relationship between the State Library and the Taxpayer created an agency relationship such that the vendors would have the right to enforce payment against the State Library if they had not been paid by the Taxpayer. This requires an examination of the contractual relationship between the State Library and the Taxpayer to determine whether the contract establishes an agency relationship such that the Taxpayer is empowered to bind the State Library in its transactions with the third-party vendors. The Scope of Work portion of the contract enumerates the responsibilities of the Taxpayer. With respect to the vendors, the contract requires that the Taxpayer select, hire and oversee printers and artists in the development and printing of program

[1] The Taxpayer does not dispute her liability for gross receipts tax on the remainder of her receipts from the State Library contract.

materials, to arrange for the printing of program materials, to select and obtain materials, as needed, to arrange for and oversee the distribution and shipment of program materials and to handle all financial matters related to those services and submit to the State Library all invoices, statements and evidences of payment related to the services the Taxpayer renders. The contract further provides that "all expenses shall be the responsibility of the Contractor" and that the Contractor is an independent contractor.

These terms do not establish an agency relationship. This case is analogous to that in ***Brim Healthcare v. State, Taxation and Revenue Department,*** 119 N.M. 818, 498 P.2d 498 (Ct. App. 1995). In that case, Brim contracted with hospitals to manage them and also to provide key management personnel who were employees of Brim. Under its contracts with hospitals, Brim received compensation for its management services and also reimbursement for the salaries, fringe benefits and expenses for Brim's management employees working at the hospitals. Brim had claimed that its receipts for the reimbursement of the salaries, benefits and expenses of its employees should not be considered gross receipts subject to tax because it was acting as an agent for the hospitals in paying these expenses. The Court of Appeals rejected this argument, noting that when it received the expense reimbursements under its contract with the hospitals, it was receiving them for its own account and expended them to meet its own responsibilities to its own employees. The same holds true in the instant matter. Although the Taxpayer received reimbursement of the expenses she incurred in purchasing materials and services in performance of her contract, the vendors were of her own choosing and as the contract specified, the expenses incurred were her responsibility.

The Taxpayer relies upon a Dispositional Order of Reversal issued by the New Mexico Supreme Court in the matter of ***Taxation and Revenue Department v. Francis & Starzynski,***

P.A., No. 24,440, Nov. 9, 1998. That matter involved the reimbursement receipts of a law firm for photocopying expenses incurred on behalf of its clients. The Order reversed an administrative decision of the Department which had found that those reimbursements were not reimbursements of expenses incurred in an agency capacity. In determining to reverse the Department, the Supreme Court found that the clients of the law firm had ultimate control over the photocopying. It distinguished ***Brim Healthcare*** on the basis of the attorney-client relationship, where it is well established that it is within the implied authority of an attorney to bind his client for expenses incurred in representing the client. ***Francis & Starzynski*** is thus distinguishable from this case, which does not involve an attorney-client relationship and where the control over the selection and payment of the vendors remained with the Taxpayer.

The Taxpayer also argues that she should not be subject to gross receipts tax upon her reimbursed expenses because when she made those purchases, the vendors included in their billing the cost of gross receipts taxes. The Taxpayer thus argues that this amounts to double taxation which she believes to be improper and illegal. It is a popular misconception that there is something inherently illegal or unconstitutional with double taxation. Eighty years ago, in ***Ft. Smith Lumber Co. v. Arkansas,*** 251 U.S. 532 (1920), the United States Supreme Court summarily disposed of the plaintiff's argument that Arkansas had imposed a double tax on corporate stock in violation of the federal constitution. As stated by Justice Oliver Wendell Holmes, writing for the majority:

> The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax..."

251 U.S. at 533. New Mexico courts have also held, on numerous occasions, that there is no constitutional prohibition against double taxation. ***New Mexico State Board of Public Accountancy v. Grant***, 61 N.M. 287, 299 P.2d 464 (1956); ***Amarillo-Pecos Valley Truck Line, Inc. v. Gallegos***, 44

N.M. 120, 99 P.2d 447 (1940); ***State ex rel. Attorney General v. Tittmann***, 42 N.M. 76, 75 P.2d 701 (1938).

It should also be noted that in construing the New Mexico Gross Receipts and Compensating Tax Act, the New Mexico courts have held that there is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. ***See, e.g., House of Carpets, Inc. v. Bureau of Revenue***, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); ***New Mexico Sheriffs & Police Association v. Bureau of Revenue***, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973). That is the case here. In this case there are separate taxpayers and separate taxable transactions. The vendor is subject to gross receipts tax upon its receipts from performing services or selling materials and the Taxpayer is subject to gross receipts tax upon her receipts from performing services under her contract with the State Library. There are deductions provided in the Gross Receipts and Compensating Tax Act which would have been available to avoid the stacking of taxes which occurred in this case. If the Taxpayer had obtained and issued the appropriate non-taxable transaction certificates to its vendors, the vendors could have claimed the deduction for the sale of tangible personal property for resale or for the sale of services for resale pursuant to §§ 7-9-47 and 7-9-48 and would not have included tax in their charges to the Taxpayer. Unfortunately, apparently because she was new to the state and unfamiliar with the operation of the gross receipts tax, the Taxpayer did not know to take advantage of these provisions.

For the reasons stated herein, the Taxpayer is subject to gross receipts on the amounts she was paid under her contract with the State Library which amounted to reimbursement of the expenses she incurred under her contract.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 230883, and jurisdiction lies over both the parties and the subject matter of this protest.

2. The expenses incurred by the Taxpayer under her contract with the State Library were not expenses incurred in an agency capacity pursuant to Regulation 3 NMAC 19.3.1. They are gross receipts from engaging in business and are thus subject to gross receipts tax.

3. The transactions where the Taxpayer purchased materials and services and the transaction where the Taxpayer was compensated for the performance of services under her contract with the State Library were separate transactions which were each subject to gross receipts tax.

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

DONE, this 15th day of March, 2000.