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

IN THE MATTER OF THE PROTEST OF
DR. EDWARD E. GILMOUR **NO. 00-23**
ID. NO. 02-363657-00 2, PROTEST TO
ASSESSMENT NO. 2439518

DECISION AND ORDER

This matter came on for formal hearing on April 4, 2000 before Gerald B. Richardson, Hearing Officer. Dr. Edward E. Gilmour, hereinafter, "Taxpayer", was represented by Robert N. Hilgendorf, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. After the hearing, the record was held open for the Taxpayer to submit additional authority for the hearing officer to consider and this was done. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a psychiatrist who moved to New Mexico in 1995.

2. After obtaining his New Mexico medical license, the Taxpayer sought work as a psychiatrist.

3. In October, 1995, the Taxpayer spoke with Dr. Bill Johnson, the head of the Psychiatry Department of St. Vincent Hospital in Santa Fe, New Mexico, (hereinafter, "the hospital"), about obtaining work as a psychiatrist.

4. In October or November of 1995, Dr. Johnson offered the Taxpayer a staff position. The Taxpayer and Dr. Johnson negotiated an hourly rate at which the Taxpayer would be paid for his

services, which was in the $60 to $70 per hour range. They did not discuss whether the Taxpayer would be an independent contractor or an employee. The Taxpayer understood, however, that he was not being treated as a hospital employee who would receive employee benefits, such as retirement, sick leave accrual, workers compensation coverage, etc.

5. In November, 1995, the Taxpayer was granted medical staff privileges in the Section of Psychiatry of St. Vincent Hospital.

6. The hospital established the working hours and workplaces of the Taxpayer. The Taxpayer worked three days a week at the Galisteo Clinic, the hospital's psychiatric clinic in Santa Fe, one day a week at a clinic in Los Alamos affiliated with the hospital and one morning a week at the hospital's clinic in Espanola. The hospital also directed the Taxpayer as to which patients he would serve and handled the scheduling of appointments with those patients.

7. The Taxpayer's only remuneration under his agreement with the hospital was the per hour amount agreed upon between the Taxpayer and the hospital. The Taxpayer received no reimbursement for his expenses traveling to the Santa Fe, Espanola and Los Alamos clinics.

8. The Taxpayer submitted a statement of hours worked to the hospital for each pay period and the hospital compensated the Taxpayer on the basis of the statement of hours submitted. The Taxpayer's paychecks reflected no deductions for state or federal withholding taxes, FICA, or other deductions employers are required to make from employee paychecks.

9. In prescribing treatment for his patients, the Taxpayer exercised his own independent medical judgment.

10. The Taxpayer and the hospital did not have a written contract expressing the terms and conditions of the Taxpayer's working arrangement with the hospital.

11. The Taxpayer, the other psychiatrists on staff at the hospital and psychiatrists in private practice with staff privileges at the hospital, all took turns being on rotation or call. They would be called in to evaluate and possibly admit patients for psychiatric treatment when the crisis counselors at the hospital determined that this would be appropriate. In such cases, the examining physician admitting a patient had the option to take the patient as his or her own private patient, or to admit the patient as a hospital patient. The physician admitting a patient as his or her private patient would handle all billing and collection for his or her services and these would not be run through or handled by the hospital.

12. The Taxpayer exercised the option to keep as his own patients one or two patients who he evaluated and admitted to the hospital when he was on rotation during the period between October, 1995 and May, 1996.

13. During 1996, the Taxpayer had a few patients who he saw privately, apart from his work for the hospital.

14. On May 15, 1996, the hospital made the Taxpayer an employee of the hospital. At that time, it began withholding taxes from the Taxpayer's paychecks, made contributions to a retirement plan on behalf of the Taxpayer and the Taxpayer began to accrue sick leave and other benefits of employees of the hospital. Although the Taxpayer had the option of coverage under the hospital's health plan for employees, because the Taxpayer was already eligible for Medicare coverage, he opted for an hourly wage enhancement instead of health plan coverage.

15. After the Taxpayer became an acknowledged employee of the hospital, he continued to work the same hours at the hospital's clinics in Santa Fe, Espanola and Los Alamos. He continued to receive an hourly wage, he continued to submit periodic statements of his hours

worked and except for the deductions now taken from his paycheck for withholding taxes, FICA, etc., his working conditions remained the same as those previous to being made an employee.

16. Under his arrangements with the hospital, both when he was first engaged by the hospital and after he was officially made an employee in May of 1996, the Taxpayer was required by the hospital to carry his own professional liability insurance.

17. For calendar year 1996, the hospital reported the compensation it had paid the Taxpayer for the period prior to May 15, 1996 in the amount of $24,940 on a Form 1099, as miscellaneous income. Additionally, the hospital reported the compensation it paid to the Taxpayer for the period after May 15, 1996 in the amount of $44,132.07 on a Form W-2 as employee wages, tips and other compensation.

18. The Taxpayer did not dispute with the hospital the manner in which it characterized the compensation he was paid in 1996 for federal income tax purposes.

19. For tax year 1996, the Taxpayer reported the $24,940 he received from the hospital as reported on Form 1099 as gross receipts from a business on Federal Schedule C. Those receipts were designated as a consulting fee from St. Vincent Hospital. Additionally, he reported $1,601 as additional gross receipts from a business on the same schedule C. Those receipts were designated as fees from patients.

20. On the Taxpayer's 1996 Federal Schedule C, the Taxpayer claimed business expenses of $15,739, which included vehicle expenses in the amount of $780, which represented expenses of travel to and from work.

21. The Taxpayer was not aware that New Mexico imposed a gross receipts tax upon the receipts of persons engaged in rendering medical or psychiatric services when he was negotiating

the terms of his engagement by St. Vincent Hospital in late 1995 and did not take that into consideration when conducting those negotiations.

22. The Taxpayer remained an acknowledged employee of the hospital during 1997 and until January of 1998. During the entire period of the Taxpayer's engagement by the hospital, from October, 1995 through January, 1998, the Taxpayer maintained a private practice outside of his work for the hospital.

23. The hospital permitted the physicians who worked for it, either as contractors or employees, to maintain a private patient practice.

24. The Taxpayer did not report or pay gross receipts taxes to the Department during 1996 upon the compensation he received from either his private patients or the compensation received from the hospital which was reported on Federal Form 1099.

25. The Department has an information sharing program with the Internal Revenue Service (IRS) in which the IRS provides the Department with information regarding New Mexico taxpayers who report business income on Schedule C.

26. As a result of the information received from the IRS concerning the Taxpayer, on November 4, 1999, the Department issued Assessment No. 2439518 to the Taxpayer, assessing $1,561.24 in gross receipts tax, $156.12 in penalty and $722.07 in interest based upon the $26,541 in business income reported upon the Taxpayer's 1996 Schedule C.

27. On December 1, 1999, the Taxpayer filed a written protest to Assessment No. 2439518.

DISCUSSION

The issue to be determined herein is whether the compensation paid to the Taxpayer by the hospital and reported by the Taxpayer on Federal Schedule C as gross receipts from a

business or profession were subject to the gross receipts tax.[1] The Taxpayer argues that, in actuality, this compensation was wages from employment, which is exempt from gross receipts tax pursuant to § 7-9-17 NMSA 1978. Thus, the question presented is whether the Taxpayer was an employee of or an independent contractor for the hospital for the period from January, 1996 until May 15, 1996.

An employee is not defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978, so we will look to the common law definition of employee. In determining whether a person is an employee or an independent contractor, the rule in New Mexico and in general is that the principal consideration is the right to control. Thus, the relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the results, however, and not the details of the performance, the worker is usually considered to be an independent contractor. ***Buruss v. B.M.C. Logging Co.***, 38 N.M. 254, 31 P.2d 263 (1934). A more recent pronouncement of this rule can be found in ***Harger v. Structural Services, Inc.***, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In that case the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

> The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, as service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: whether the party employed engages in a distinct occupation or business; whether the work is part of the employer's regular business; the skill

[1] The Taxpayer does not dispute that gross receipts tax is owing upon his receipts from his private patients.

required in the particular occupation; whether the employer supplies the instrumentalities, tools or the place of work; the duration of a person's employment and whether that person works full-time or regular hours; whether the parties believe they have created the relationship of employer and employee and the manner and method of payment. The totality of all of the circumstances must be considered in determining whether the employer has the right to exercise that degree of control over a worker so as to make the worker an employee.

The Department has adopted a regulation under Section 7-9-17 to provide criteria by which the status of a worker may be determined. Regulation 3 NMAC 2.12.7. provides as follows:

> In determining whether a person is an employee, the department will consider the following indicia:
> 1. is the person paid a wage or salary;
> 2. is the "employer" required to withhold income tax from the person's wage or salary;
> 3. is F.I.C.A. tax required to be paid by the "employer";
> 4. is the person covered by workmen's compensation insurance;
> 5. is the "employer" required to make unemployment insurance contributions on behalf of the person;
> 6. does the person's "employer" consider the person to be an employee;
> 7. does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion').
>
> If all of the indicia mentioned are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

In this case, the strongest factor indicating that the Taxpayer was an independent contractor is that both he and the hospital considered the Taxpayer to be an independent contractor. The Taxpayer was aware that he was not being treated as an employee by the hospital. He was paid an hourly wage and was not compensated for his time or travel to the clinics where he worked. The Taxpayer did not accrue vacation or sick leave. The hospital did

not withhold state and federal income taxes, FICA or social security taxes, or any other deductions which employers are required to make from compensation paid to employees. The Taxpayer reported the compensation he received from the hospital as gross receipts from the operation of a business and he claimed numerous deductions from that income, such as his travel expenses incurred in traveling to the various clinics he was assigned to work at. In addition, the Taxpayer held himself out as being engaged in the business of rendering psychiatric services. Although he operated a business in a very small way with only a limited number of patients, he maintained a private practice outside of the work he performed for the hospital.

There are also factors which are indicative of the Taxpayer's employee status with the hospital. Foremost is the degree of control the hospital exercised over the Taxpayer's activities. The hospital established the working hours and workplaces where the Taxpayer performed his psychiatric services. The hospital established the patients who the Taxpayer would see and scheduled the patient's appointments with the Taxpayer. Additionally, the hospital provided the work environments where the Taxpayer performed his services for the hospital. Finally, I find it significant that none of these things changed in any way when the hospital officially placed the Taxpayer on employee status after May 15, 1996. There was no discernable difference in the degree of control the hospital exercised over the Taxpayer and the manner in which he delivered psychiatric services to the hospital's patients after he became an acknowledged employee. The only thing that changed is that the hospital now acknowledged Dr. Gilmour as an employee and treated him that way for tax reporting, tax withholding and other purposes.

The Department argues that because Dr. Gilmour exercised his professional judgment as to the treatment and care of the hospital's patients, he was not under the control of the hospital such that he must be considered an independent contractor. I do not find this argument

persuasive. The exercise of independent judgment is the hallmark of a professional. A medical professional is always under an obligation to exercise independent professional judgment in rendering professional services, regardless of whether he renders those as an independent contractor or as an employee. Otherwise, the mere exercise of independent professional judgment would mean that professionals could not be considered to be employees subject to the control of their employers. I know of no authority which would support such a conclusion. In the case of professionals, other aspects of control over the professional's work must be examined to determine employee or independent contractor status.

Although there are facts in this case which weigh on both sides of the determination of employee or independent contractor status, I find most persuasive the degree of control which the hospital exercised over the manner in which the Taxpayer was to deliver his services to the hospital and its patients. This is especially so because there was no discernable difference in the degree of control exercised once the Taxpayer became an acknowledged employee of the hospital. Because of the degree of control the hospital exercised over the Taxpayer, the Taxpayer was an employee of the hospital for the period prior to May 15, 1996.

There remains, however, another legal impediment to the Taxpayer's claim of entitlement to the deduction for wages received as an employee pursuant to § 7-9-17. New Mexico's courts have required that taxpayers report taxes consistently for both state and federal purposes. The first case to address this issue was ***Co-Con, Inc., v. Bureau of Revenue***, 87 N.M. 118, 529 P.2d 1239 (Ct. App., 1974), ***cert. denied,*** 87 N.M. 111, 529 P.2d 1232 (1974). Co-Con, Inc. was a wholly owned subsidiary of Universal Constructors, Inc. During the audit period, pieces of construction equipment common to the operations of both corporations were utilized by both on their construction projects without regard to which corporation held legal title to the equipment.

Each corporation owning the equipment attributed a value to the use of its equipment and reflected that value as "gross rentals" for federal income tax purposes. The department assessed gross receipts tax on those gross rental amounts reflected on the federal returns of Co-Con, Inc. and Universal Constructors, Inc. as gross receipts from leasing property in New Mexico. The corporations argued that they did not have gross receipts from equipment rental. The Court of Appeals upheld the assessments, finding that the treatment by the corporations of the transactions as gross rentals for federal income tax purposes indicated that the intent of the taxpayers was to treat the arrangements as rentals or leases. The court went on to state:

> Taxpayers must treat transactions uniformly for all purposes within the tax scheme and not attempt to show, first a lease for federal purposes and second, a non-taxable event for state tax purposes. We find ample evidence in the record to indicate that taxpayers engaged in leasing both by intent and within the statutory definition.

Id., 87 N.M at 121-122.

In ***Stohr v. New Mexico Bureau of Revenue,*** 90 N.M. 43, 559 P.2d 420 (Ct. App., 1976), ***cert. denied,*** 90 N.M. 254, 561 P.2d 1347 (1977), the Court of Appeals upheld an assessment of gross receipts tax against Mr. Stohr on the compensation he was paid by various individuals for doing carpentry. Mr. Stohr argued that these amounts were wages exempt from gross receipts tax under § 72-16A-12.5 NMSA 1953, the predecessor to § 7-9-17 NMSA 1978. The court noted that Mr. Stohr had filed self employment tax returns for social security purposes with the Internal Revenue Service ("IRS") for the compensation he received from the customers who did not withhold FICA tax, and had filed a Federal Schedule C during the audit years, reporting his compensation as being from a business or profession. In determining Mr. Stohr liable for gross receipts tax, the court examined the indicia of employment found in the department's regulation,

which are the same ones contained in the current regulation, 3 NMAC 2.12.7. The court, however, stated:

> The ***controlling*** factor, however, is that the taxpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer must not attempt to show one scheme for federal tax purposes and a nontaxable event for purposes of state gross receipts taxes. (citations omitted, emphasis added).

Thus, the court found that the manner by which Mr. Stohr reported his compensation for federal purposes controlled the determination of whether that compensation could be considered wages exempt from gross receipts taxes.

The most recent case to address the issue of whether consistency is required in filing state and federal returns is ***Sutin, Thayer & Browne v. Revenue Division of the Taxation and Revenue Department,*** 104 N.M. 633, 725 P.2d 833 (Ct. App. 1985), ***cert. denied,*** 102 NM 293, 694 P.2d 1358 (1986). That case concerned whether a taxpayer could claim a wage deduction for state corporate income tax reporting purposes that exceeded the wage deduction claimed for federal corporate income tax purposes. Under the Tax Reduction and Simplification Act of 1977, Pub. L. No. 95030, a new jobs tax credit was enacted to provide employers with a tax incentive to create new jobs. Under the act, a corporation could either claim a federal tax deduction for the wages paid to its employees or elect a jobs credit for wages paid to certain new employees. New Mexico did not have a similar jobs credit. The taxpayer had claimed a jobs credit with the IRS, forgoing a deduction for wages paid to those employees for whom the credit was claimed. Because New Mexico did not have a similar jobs credit, the taxpayer claimed a deduction for those wages on its New Mexico return that it had not claimed on its federal return, arguing that to deny it the wage deduction would be unfair and result in overstating its taxable income for state tax purposes. The court denied the taxpayer's claim of deduction, stating that,

"[A] taxpayer who makes an election for federal purposes is bound by that election in calculating the amount of its state taxes." ***Id.,*** 104 N.M. at 636.

As all of the above cases make clear, when there is a conflict in how a taxpayer has reported a transaction for federal purposes and how they are requesting that it be treated for state purposes, they are bound by the manner in which they reported for federal purposes. It should also be noted that if a taxpayer's method of reporting does not reflect the true nature of a transaction or taxable activity the taxpayer has the option, if not the obligation[2] to file amended federal returns. Because in this case the Taxpayer has treated the receipts in issue as gross receipts from engaging in a business or profession on his Federal Schedule C, the Taxpayer is not entitled to claim a deduction for those same receipts pursuant to § 7-9-17 NMSA 1978 unless and until an amended federal return is filed.[3]

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2439518, and jurisdiction lies over the parties and the subject matter of this protest.

2. Although St. Vincent Hospital treated the Taxpayer as an independent contractor for the period from October, 1995 until May 15, 1996, because of the degree of control the hospital exercised over the Taxpayer, the Taxpayer was an employee of the hospital.

3. The Taxpayer is not entitled to claim the deduction for wages paid to employees pursuant to § 7-9-17 NMSA 1978 because of the requirement that taxpayers file consistently for state and federal tax purposes.

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[2] Tax reporting, even when it does not distort income or result in tax savings, is not a matter of convenience. Tax returns should accurately reflect that which is being reported.

[3] The Taxpayer did have some receipts from private patients during 1996 which were properly reported on Schedule C. Thus, the Taxpayer undoubtedly has many legitimate deductions against such income for the expenses related to his private practice. It would appear, however, that to the extent deductions were claimed for expenses related to the Taxpayer's work for the hospital, those would need to be claimed as unreimbursed employee expenses, elsewhere on his federal return.

4. The Taxpayer would be entitled to the deduction provided at § 7-9-17 for the compensation paid him by the hospital upon the filing of an amended 1996 federal income tax return which is consistent with his position that the compensation he received from St. Vincent hospital for services rendered prior to May 15, 1996 was received as an employee.

For the foregoing reasons, the Taxpayer's protest IS HEREBY GRANTED IN PART AND DENIED IN PART.

DONE, this 24th day of July, 2000.