

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

**IN THE MATTER OF THE PROTEST OF
LARRY L. COTTON
ID NO. 02-404695-00-7
ASSESSMENT NO. 2514719**

No. 00-32

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 1, 2000, before Margaret B. Alcock, Hearing Officer. Larry L. Cotton ("the Taxpayer") represented himself. The Taxation and Revenue Department ("the Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1996, the Taxpayer worked as an independent contractor performing maintenance services for a rental management company ("the Company").
2. Pursuant to his contract with the Company, the Taxpayer earned a flat rate per hour, payable upon completion of each job, plus reimbursement for any expenses he incurred in connection with the performance of his services.
3. The Taxpayer was instructed to purchase materials as cheaply as possible, but he made the decision as to where to purchase the items needed.
4. The Taxpayer purchased materials in his own name and paid for them with cash or with his own credit card.
5. The vendors who sold materials to the Taxpayer included the New Mexico gross receipts tax as part of the price charged to the Taxpayer.

6. The Taxpayer did not include gross receipts tax as part of his charges to the Company, nor did the Taxpayer report or pay gross receipts tax on his receipts from the Company.

7. The Taxpayer's 1996 federal income tax return reported all receipts from his maintenance services, including reimbursed expenses, as business income on Schedule C to federal Form 1040.

8. In 2000, the Department received information from the Internal Revenue Service concerning the business income reported on the Taxpayer's 1996 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department and had not reported or paid gross receipts tax on this income.

9. On April 9, 2000, the Department issued Assessment No. 2514719 to the Taxpayer in the total amount of \$1,427.40, representing gross receipts tax, penalty and interest on his business receipts for tax periods January through December 1996.

10. On April 24, 2000, the Taxpayer filed a written protest to the Department's assessment.

DISCUSSION

The Taxpayer makes the following arguments in support of his protest to the Department's assessment of gross receipts tax: (1) the Taxpayer did not have a business, but simply provided services in return for an hourly wage; (2) the Taxpayer was purchasing materials as an agent for the Company and should not be liable for gross receipts tax on these reimbursed expenses; and (3) imposing tax on the Taxpayer's reimbursed expenses results in double taxation.

Engaging in Business. Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. The definition of "engaging in business" is quite broad and includes "carrying on or causing to be carried on *any activity with the*

purpose of direct or indirect benefit.” (emphasis added). Section 7-9-3(E), NMSA 1978. The statute makes no distinction between activities engaged in by large corporations and activities engaged in by small “mom and pop” operations or by individuals acting as independent contractors. In this case, the Taxpayer entered into a contract to perform maintenance services as an independent contractor in return for an hourly fee, plus expenses. Because this is an activity carried on for the purpose of obtaining a direct benefit (*i.e.*, payment), the Taxpayer’s work meets the statutory definition of engaging in business.

Tax on Reimbursed Expenses. As previously noted, Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. Section 7-9-3(F) defines the term “gross receipts” to include receipts from selling property in New Mexico, leasing property employed in New Mexico or selling services performed in New Mexico. The term "gross receipts" does not include amounts received solely on behalf of another in a disclosed agency capacity. As Regulation 3 NMAC 2.1.19.3.1 explains, reimbursed expenses are treated as receipts received in a disclosed agency capacity in only limited circumstances:

19.3 REIMBURSED EXPENDITURES:

19.3.1 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 agent 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, the Taxpayer’s reimbursed expenses were subject to gross receipts tax, unless he had the authority to legally bind the Company to pay for the purchases he made. Assume, for example, that the Taxpayer purchased a screen door and the check he gave to the store owner was returned for

insufficient funds. If the Taxpayer purchased the door as a disclosed agent for the Company, the store owner would have the right to take collection action directly against the Company.

Based on the facts presented at the hearing, the Taxpayer was not acting in a disclosed agency capacity. Instead, the Taxpayer was purchasing materials in his own name. The Company's name did not appear on any of the invoices, and the vendor would not have had the right to enforce payment against the Company in the event the Taxpayer's check bounced or his credit card was refused. In most cases, the vendor did not even know the Taxpayer was purchasing the materials for a third party. Given these facts, the reimbursements the Taxpayer received for expenditures made on behalf of the Company were not received in a disclosed agency capacity and were subject to gross receipts tax.

Double Taxation. The Taxpayer argues that imposing tax on his reimbursed expenses results in double taxation because the vendors who sold materials to the Taxpayer included the gross receipts tax as part of the purchase price. It is a popular misconception that double taxation is illegal or unconstitutional. In fact, New Mexico's courts have held, on numerous occasions, that there is no prohibition against double taxation. *See, e.g., 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). *See also, Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920).

In construing the New Mexico Gross Receipts and Compensating Tax Act, the New Mexico courts have also held that there is no double taxation where the taxes complained of are imposed on the receipts of different taxpayers resulting from separate transactions. *See, 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. Gross receipts tax was imposed on each vendor who sold goods to the Taxpayer. In that transaction,

the vendor was the only person liable for gross receipts tax on the sale—the Taxpayer had no obligation to report or pay tax on the vendor’s receipts. Gross receipts tax was also imposed on the Taxpayer when he billed the Company for the cost of materials used in performing his maintenance services. The Taxpayer was the only person liable for gross receipts tax on this transaction—neither the vendor nor the Company had any obligation to report or pay tax on the Taxpayer’s receipts.

In summary, the gross receipts tax is imposed on every seller of goods and services. Although it is common practice for a seller to pass the cost of the gross receipts tax on to the buyer, this does not change the legal incidence of the tax. If the buyer refuses or neglects to pay the amount of the passed-on gross receipts tax, the seller is still responsible for paying the tax to the state. When there are two sellers and two transactions, the courts have held that it is not double taxation to impose a tax on each successive transaction. Accordingly, it is not illegal to impose gross receipts tax on the Taxpayer’s receipts from reimbursed expenses, even though the vendor included gross receipts tax in its charge to the Taxpayer.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2514719, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was engaging in business in New Mexico as defined in Section 7-9-3(E) NMSA 1978 and was subject to gross receipts tax on his receipts from performing maintenance services during 1996.
3. The reimbursements the Taxpayer received for the purchase of materials were not received solely on behalf of another in a disclosed agency capacity. These reimbursements were receipts from engaging in business and were subject to gross receipts tax.

4. The imposition of gross receipts tax on the Taxpayer's reimbursed expenses does not constitute illegal or unconstitutional double taxation.

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

DATED November 14, 2000.