

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

**IN THE MATTER OF THE PROTEST OF  
LEWIS & SHARON STEINBERG  
ID NO. 02-256160-00-9  
ASSESSMENT NO. 2555379**

**No. 02-07**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held February 18, 2002, before Margaret B. Alcock, Hearing Officer. Lewis and Sharon Steinberg were represented by Sharon Steinberg. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Lewis and Sharon Steinberg filed a joint 1996 federal income tax return reporting the income each of them had earned during 1996 on separate Schedule Cs (Profit or Loss From Business).
2. Lewis Steinberg reported \$58,842 of income he earned from his refrigeration and heating business on his Schedule C. During 1996, Mr. Steinberg was registered with the Department and reported and paid New Mexico gross receipts tax on \$44,344 of this income.
3. Sharon Steinberg reported \$24,258 of income she earned performing medical audits and patient counseling services on her Schedule C. During 1996, Ms. Steinberg was not registered with the Department and did not report or pay New Mexico gross receipts tax on her income.
4. Ms. Steinberg did not report gross receipts tax on her auditing receipts because most of the income was derived from services performed outside New Mexico and because she was advised by

an employee of the Department that receipts from her auditing services were not subject to gross receipts tax.

5. Ms. Steinberg did not report gross receipts tax on her counseling receipts because she performed those services for Harold Cohen, a medical doctor who resold Ms. Steinberg's services to his patients, and Ms. Steinberg believed that only Dr. Cohen was responsible for payment of gross receipts tax.

6. Dr. Cohen's office manager told Ms. Steinberg that a nontaxable transaction certificate ("NTTC") had been placed in her personnel file. Ms. Steinberg was not told what type of NTTC had been issued by Dr. Cohen, nor did Ms. Steinberg ever see the NTTC or have it in her possession.

7. On April 17, 2000, as a result of information obtained from the IRS, the Department mailed the Steinbergs a notice of limited scope audit concerning the discrepancy between business income reported to the IRS on their 1996 Schedule Cs and business income reported to the Department for gross receipts tax purposes.

8. The notice stated that, pursuant to Section 7-9-43 NMSA 1978, the Steinbergs must be in possession of all required NTTCs within 60 days from the date of the notice or any deductions relating to NTTCs would be disallowed. The 60-day period expired on June 16, 2000.

9. After receiving the notice, Ms. Steinberg called Dr. Cohen, but discovered that he had closed his office and destroyed many of his records, including Ms. Steinberg's personnel file.

10. Ariane Emery, Dr. Cohen's wife and office manager, gave Ms. Steinberg a letter stating that Dr. Cohen paid gross receipts tax on all receipts coming into the office. The letter concludes that Ms. Steinberg's income "was never subject to gross receipts tax, since that was already paid out". The letter does not mention the existence of an NTTC.

11. On July 19, 2000, the Department issued Assessment No. 2555379 to the Steinbergs in the total amount of \$3,090.02, representing \$1,734.72 gross receipts tax, \$173.52 penalty, and \$1,181.78 interest for tax periods January through December 1996.

12. On August 16, 2000, the Steinbergs filed a written protest to the assessment.

13. During the course of the protest, Ms. Steinberg provided evidence that \$6,521.60 of her 1996 receipts were from services performed outside New Mexico, and the Department abated the portion of the assessment attributable to those receipts.

14. Following the hearing, in a letter to the parties dated February 19, 2002, the hearing officer raised the issue of whether the Department's assessment against Mr. Steinberg for receipts earned between January and November 1996 was issued within the limitations period set out in Section 7-1-18 NMSA 1978. By letter dated February 27, 2002, the Department acknowledged that since Mr. Steinberg's gross receipts tax liability for this period was understated by less than 25 percent, the assessment of tax on his income was not timely and would be abated.

15. The amount of Ms. Steinberg's receipts remaining at issue is \$17,736.40. This includes the \$14,979.72 Ms. Steinberg earned from performing patient counseling services for Dr. Harold Cohen, and an additional \$2,756.68 Ms. Steinberg earned from medical auditing services.

16. Although most of her auditing receipts were attributable to services performed outside New Mexico, Ms. Steinberg does not have records to establish the percentage of in-state v. out-of-state work. During the protest and again at the hearing, Ms. Steinberg stated that she was not challenging the Department's assessment of tax on the \$2,756.68.

### **DISCUSSION**

The issues remaining to be decided in this protest are: (1) whether Ms. Steinberg's inability to produce an NTTC bars her from claiming a gross receipts tax deduction for receipts from

performing services for Dr. Harold Cohen during 1996, and (2) whether the Department's delay in issuing its assessment and bringing this matter to hearing should excuse Ms. Steinberg from payment of at least a portion of accrued interest.

**Requirement for Possession of NTTC.** The Gross Receipts and Compensating Tax Act provides several deductions for taxpayers who meet the statutory requirements set by the legislature. Ms. Steinberg claims the deduction provided in Section 7-9-48 NMSA 1978, which states, in pertinent part:

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)

As the highlighted passage confirms, the fact that a taxpayer sells her 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 of 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 an NTTC within 60 days from the date of the Department's notice, deductions requiring delivery of the NTTC "shall be disallowed."

In this case, Ariane Emery, Dr. Cohen's office manager, told Ms. Steinberg that an NTTC had been placed in her personnel file. At the February 18, 2002 hearing, Ms. Steinberg acknowledged that she never actually saw the NTTC or had it in her possession. Although Ms. Steinberg introduced a letter from Ms. Emery as evidence, the letter simply states that Dr. Cohen paid gross receipts tax on all receipts coming into the office and concludes that Ms. Steinberg's income "was never subject to gross receipts tax, since that was already paid out". The letter does not mention the existence of an NTTC.

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 right to the deduction 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). When the party claiming a right to a tax deduction fails to follow the method prescribed by statute or regulation, she waives her 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). Here, Ms. Steinberg failed to demonstrate timely possession of the NTTC needed to support her deduction of receipts from performing services for Dr. Cohen. Based on the evidence, it is not clear that an NTTC was actually issued to Ms. Steinberg. What is clear is that the NTTC was never in Ms. Steinberg's possession as required by Section 7-9-43 NMSA 1978. Accordingly, the Department had no choice but to disallow the deduction.

**Assessment of Interest.** Ms. Steinberg maintains that even if tax is due on her receipts from Dr. Cohen, she should not be liable for the full amount of interest assessed because of the initial delay in notifying the Steinbergs of their reporting problems and the Department's subsequent delay

in evaluating the information provided by Ms. Steinberg to determine how much of the assessment could be abated.

Section 7-1-67 NMSA 1978 (1996) governs the imposition of interest during the period at issue and states, in pertinent part:

A. If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid* to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid.... (emphasis added).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Accordingly, the reason for a late payment of tax is irrelevant to the imposition of interest.

While it could be argued that the rate of interest is excessive in comparison with current market rates, that is a matter within the discretion of the legislature.

In this case, the state was entitled to receive payment of Ms. Steinberg's gross receipts tax in 1996, and Ms. Steinberg—not the state—has had the use of those tax funds during the last six years. Accordingly, interest was properly assessed by the Department and there is no basis for abatement.

#### **CONCLUSIONS OF LAW**

1. The Taxpayers filed a timely, written protest to Assessment No. 2555379, and jurisdiction lies over the parties and the subject matter of this protest.
2. Because Ms. Steinberg was unable to demonstrate possession of an NTTC from Dr. Harold Cohen, she is not entitled to deduct her receipts from selling services to Dr. Cohen, and those receipts are subject to gross receipts tax.

3. Pursuant to Section 7-1-67(A) NMSA 1978, interest was properly assessed against Ms. Steinberg's unreported gross receipts tax.

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

DATED March 7, 2002.