

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

**IN THE MATTER OF THE PROTEST OF
CYNTHIA B. KING
ID NO. 02-439721-00-0
ASSESSMENT NO. 2716067**

No. 02-10

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 3, 2002, before Margaret B. Alcock, Hearing Officer. Cynthia B. King ("Taxpayer") represented herself. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1999, the Taxpayer entered into a contract with the United States Postal Service ("USPS") to deliver mail along a highway contract route ("HCR") in Placitas, New Mexico, during the period April 24, 1999 through June 30, 2001.
2. Under the terms of HCR contracts, the contractor is charged with delivering mail into multiple mail box units the USPS sets up and maintains along the HCR.
3. The contract provides detailed guidelines concerning delivery of the mail. The contractor must agree to follow the specific HCR established by the USPS, including directions on where to enter and make turns along the route. The contractor may propose changes to the HCR, but any changes must be approved by the USPS.
4. The contract includes a daily schedule setting out the average time each task to be performed by the contractor is expected to take. On a day-to-day basis, the contractor must report to

the Post Office at approximately the same time each morning, but has some flexibility as to the time spent on each task and is not required to strictly conform to the daily schedule.

5. The USPS may terminate a HCR contract for cause.

6. The UPSP conducts periodic route surveys to determine whether the time it takes the contractor to perform services under the contract conforms to the number of hours estimated in the contract bid. A similar review is conducted to determine whether the contractor's expenses for fuel and vehicle maintenance conform to the expenses shown on the cost statement used to negotiate the contract.

7. If the USPS determines that the hours and expenses used to negotiate the contract do not reflect actual costs and expenses, this will be taken into account when the contract is renegotiated.

8. The contractor may operate the HCR personally or may hire employees. The contractor is responsible for supervising his employees and is held accountable for their work.

9. The USPS does not provide substitute carriers to take over when the contractor is ill or on vacation. Instead, it is the contractor's responsibility to arrange a substitute to insure the route is covered.

10. The contractor and his employees are subject to a screening process and must provide the USPS with a personnel questionnaire and a 5-year motor vehicle record.

11. A contractor whose relief employees drive on a regularly scheduled basis must, by law, pay the employees the wages and fringe benefits outlined in the "wage determination" incorporated into the contract. Occasional relief employees are not subject to this law, but must be paid according to contract provisions.

12. The contractor is required to provide the vehicle used to deliver mail along the HCR. The cost of fuel and vehicle maintenance is factored into the contract price and the contractor is not reimbursed on a dollar-for-dollar basis.

13. The contractor's vehicle must pass an annual inspection by the USPS. The USPS also makes periodic checks to insure that no mail is being left in the vehicle and that the vehicle meets the requirements of the contract.

14. The USPS provides the contractor with other equipment needed to perform the contract, including mail cases, straps, trays and postal forms.

15. The contractor is required to attend training sessions conducted by the USPS, which cover such topics as new delivery programs, anthrax, suspicious mail, how to back up a vehicle safely, watching out for rattlesnakes, etc..

16. The contractor is required to follow instructions received from the USPS's manager of transportation contracts and the local administrative official assigned to oversee the contract.

17. The administrative official insures that the contractor reports to the Post Office each morning and departs on the HCR at the times specified in the contract. The administrative official also monitors the contractor's performance and reports any performance or operational failures to the manager of transportation contracts.

18. The contractor is paid on a monthly basis. The amount of each payment is one-twelfth of the annual compensation agreed upon in the contract.

19. When the Taxpayer put in her bid for the HCR contract in 1999, she completed an expense worksheet which was used in negotiating the terms of the contract. The Taxpayer did not include the cost of the New Mexico gross receipts tax as an expense on her worksheet, but was told

by the USPS that New Mexico charges gross receipts tax on contract payments and that this item would have to be taken into account in the final contract.

20. The final contract price was based on various adjustments to the individual expense categories on the Taxpayer's preliminary expense worksheet. Among these adjustments was a decrease in the amount that the USPS would allow for operational costs of the Taxpayer's vehicle and an increase in the amount allocated for taxes to include the amount of gross receipts tax the Taxpayer would owe on the contract payments.

21. In early 2000, the Taxpayer received a Form 1099 from the USPS which reported her 1999 income under the category "other income", rather than under the category "non employee compensation." The Taxpayer was confused as to how to report this income since the IRS manual described "other income" as income from prizes, awards, and gambling winnings.

22. The Taxpayer contacted the IRS for assistance. After the Taxpayer explained the source of her income, the IRS instructed her to file as self-employed and report the contract payments as business income on Schedule C ("Profit and Loss from Business") to her federal income tax return. The Taxpayer followed these instructions.

23. The Taxpayer never contacted anyone at the USPS to question how her income had been reported for federal income tax purposes, nor did she dispute her status as a self-employed independent contractor.

24. The Taxpayer had previously decided to ignore the information provided by the USPS concerning her liability for New Mexico gross receipts tax because she believed the USPS unfairly reduced the amount she bid for operational expenses in order to increase the amount allowed for payment of the gross receipts tax.

25. The Taxpayer did not call the Department or consult with an accountant or an attorney concerning her liability for New Mexico gross receipts tax.

26. At some point during the contract term the Taxpayer became aware that the Department had assessed other USPS contractors for gross receipts tax, but the Taxpayer still took no steps to register with the Department or pay gross receipts tax on her own contract income.

27. In 2001, the Department received information from the IRS concerning the business income reported on the Taxpayer's 1999 federal income tax return. When the Department investigated, it found that the Taxpayer was not registered with the Department and had never paid gross receipts tax on this income.

28. On November 8, 2001, the Department issued Assessment No. 2716067 to the Taxpayer in the total amount of \$1,525.61, representing \$1,080.37 gross receipts tax, \$108.04 penalty and \$337.20 interest on her receipts from performing services for the USPS during tax periods January through December 1999.

29. On November 27, 2001, the Taxpayer filed a written protest to the assessment.

DISCUSSION

The issue presented is whether the Taxpayer is liable for gross receipts tax on the income she received under her HCR contract with the USPS and reported as business income on her 1999 federal income tax return. The Taxpayer maintains that she was an employee of the USPS and is entitled to the exemption from gross receipts provided in Section 7-9-17 NMSA 1978, which states:

Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

It is the Department's position that the Taxpayer performed services for the USPS as an independent contractor and did not qualify for the exemption provided in Section 7-9-17.

Burden of Proof. 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). Moreover, where an exemption from tax is claimed, the exemption is strictly construed in favor of the taxing authority. *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *Rock v. Commissioner*, 83 N.M. 478, 479, 493 P.2d 963, 964 (Ct. App. 1972). Accordingly, it is the Taxpayer's burden to establish that the Department's assessment of gross receipts tax, penalty and interest on her 1999 income is incorrect.

Employee v. Independent Contractor. In *Harger v. Structural Services, Inc.*, 1996-NMSC-018, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996), the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) (1958) 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, and 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: (1) direct evidence of control; (2) the right to terminate the employment at will, by either party, without liability; (3) the right to delegate the work or to hire and fire assistants; (4) the method of payment, whether by time or by the job; (5) whether the party employed engages in a distinct occupation or business; (6) whether the work is part of the employer's regular business; (7) the skill required in the particular occupation; (8) whether the employer supplies the instrumentalities, tools or the place of work; (9) the duration of a person's employment and whether that person works full-time or regular hours; and (10) whether the parties believe they have created the relationship of employer and employee, insofar as this belief indicates

an assumption of control by one and submission to control by the other. *Harger, supra*, 121 N.M. at 667, 916 P.2d at 1334. In determining the existence of an employer-employee relationship, no one single factor is decisive; rather, all relevant circumstances must be considered. *Id.*; *see also*, *Benavidez v. Sierra Blanca Motors*, 1996-NMCA-045, 122 N.M. 209, 215, 922 P.2d 1205, 1211 (1996).

Department Regulation 3.2.105.7 NMAC sets out the following questions to be asked in determining whether a worker qualifies as an employee: is income tax withheld from the worker's paychecks; is the worker covered by worker's compensation insurance; is the "employer" obligated to pay social security taxes and make unemployment insurance contributions on behalf of the worker; does the "employer" consider the worker to be an employee; and does the "employer" have a right to exercise control over the means of accomplishing a result or only over the result?

In this case, there is some evidence to support each party's position. In arguing that she is an employee and not an independent contractor, the Taxpayer relies on the detailed requirements set out in the HCR contract concerning delivery of the mail. The contractor must agree to follow the specific delivery route established by the USPS, including where to enter and make turns along the route. The contractor may propose changes to the HCR, but any changes must first be approved by the USPS. The contractor's vehicle must pass an annual inspection by the USPS. The contractor is expected to follow a daily schedule and conform to all USPS regulations and bulletins concerning handling and delivery of the mail. The contractor must attend training sessions covering such topics as new delivery programs, anthrax, suspicious mail, how to back up a vehicle safely, watching out for rattlesnakes, etc. The contractor's hours are closely monitored by USPS personnel. The contractor is required to follow instructions received from the USPS's manager of transportation contracts and the local administrative official assigned to oversee the contract.

It is true that the HCR contract requirements are very detailed. However, many of these requirements are necessary to insure compliance with the law and the safety of both the mail and the public. The fact that the USPS requires vehicles used on the delivery route to pass an annual inspection and requires contractors and their employees to provide proof of a clean driving record does not indicate the type of control necessary to establish an employer-employee relationship. It should also be noted that while the HCR contract is based on a schedule setting out the average time the contractor's route is expected to take, the Taxpayer has some latitude in the daily operation of her route. This is illustrated by the documents included in Taxpayer's Exhibit A. The Box Delivery Contract Route Survey shows that the Taxpayer is "required" to start her delivery route at 11:05 (military time) and return to the Post Office at 13:35 (military time) each day. The Route Data Volume Count shows that the Taxpayer's actual times during the survey week of September 25, 2000 were as follows:

	<u>Mon</u>	<u>Tue</u>	<u>Wed</u>	<u>Thu</u>	<u>Fri</u>	<u>Sat</u>
Required Start Time	11:05	11:05	11:05	11:05	11:05	11:05
Actual Start Time	10:20	09:30	09:30	09:35	10:30	10:45
Required End Time	13.35	13:35	13:35	13:35	13:35	13:35
Actual End Time	12:40	11:20	11:35	11:20	12:40	13:10

At the April 3, 2002 hearing, the Taxpayer testified that she had hurried to finish her delivery route early that morning so she would be on time for the 1:30 p.m. hearing. There is no indication that the Taxpayer had to obtain permission from anyone at the Post Office before adjusting her schedule in this manner.

There are a number of other facts supporting the Department's position that the Taxpayer is an independent contractor. The Taxpayer is required to provide her own vehicle to deliver the mail and is responsible for the cost of operating, maintaining and insuring the vehicle. The Taxpayer may

operate the HCR herself or hire one or more employees to deliver the mail under her supervision. The USPS does not provide substitute carriers to take over when the Taxpayer is ill or on vacation. Instead, it is the Taxpayer's responsibility to arrange a substitute to insure the route is covered. The contract may be terminated for cause.¹ The Taxpayer receives equal monthly payments based on the parties' negotiated contract price, rather than on the specific expenses incurred by the Taxpayer during that month. No income taxes, social security taxes, worker's compensation or similar items are deducted from these payments. The USPS reports the contract payments to the Taxpayer on a Form 1099 rather than on a Form W-2. After the Taxpayer discussed the source of her 1999 income with the IRS, the IRS told the Taxpayer to report her USPS payments as business income on Schedule C to her federal income tax return.

Of all the facts listed above, the one that most strongly supports the conclusion that the Taxpayer is an independent contractor is her ability to hire employees to fulfill her obligations under the HCR contract. As stated in 41 Am.Jur.2d, Independent Contractors, § 23:

An independent contractor has the right to choose his or her own employees and servants to carry on the work, being responsible only to the other party to the contract to produce a result according to the contract.

The right to substitute another to do the work is indicative of an independent contractual relation, whereas personal service is a marked characteristic of the relation of master and servant.

The New Mexico Supreme Court has recognized the personal character of service rendered by an employee, noting: "The employee renders personal service. The independent contractor may or may not." *Buruss v. B.M.C. Logging Co.*, 38 N.M. 254, 257, 31 P.2d 263, 264 (1934).

¹ The General Contract Administration handbook introduced by the Taxpayer states that the contract may be terminated for cause "or for the convenience of the Postal Service as specified within the clauses of the contract." (Taxpayer Ex. B, page 2 § 131.2(d)). Because the Taxpayer did not introduce the contract itself, it is not possible to determine the basis for terminating a contract based on convenience. There is no indication, however, that either of the parties may terminate the contact at will.

Also significant are the numerous federal court decisions holding that mail delivery contracts similar to the one at issue in this case do not create an employer-employee relationship. *See, Norton v. Murphy*, 661 F.2d 882 (10th Cir. 1981); *Tunder v. United States*, 522 F.2d 913 (10th Cir.1975); *Fisher v. United States*, 356 F.2d 706 (6th Cir.), *cert. denied*, 385 U.S. 819 (1966); *Duncan v. United States*, 562 F. Supp. 96 (E.D. La. 1983); *Thomas v. United States*, 204 F.Supp. 896 (D.Vt.1962); *Smick v. United States*, 181 F.Supp. 149 (D.Nev.1960). In *Tunder, supra*, the Tenth Circuit Court of Appeals held that a person delivering mail under a Star Route Contract entered into with the old Post Office Department was an independent contractor. In *Norton, supra*, the Tenth Circuit considered the same issue in connection with the Transportation Services Contract adopted by the new Postal Service. As the court found:

The *old* Star Route Contract and the *new* Transportation Services Contract are not identical, but they are nonetheless sufficiently similar to the end that we are disinclined to bring the instant case out from under the rule of *Tunder*. Both contracts refer to the mail carrier as a “contractor” and not as an “employee” of the United States....

While the contract is in considerable detail as to the work to be performed, it does not provide for detailed supervision or control of the carrier as he proceeds along his route. Indeed, the very length and detail of the contract entered into by the United States and Murphy suggests, to us, an independent contractor relationship between the parties. To us, it is doubtful that a master-servant relationship, where the master tells the servant what to do and when to do it, would require a contract of the type here involved.

Other factors which enter into our resolution of the matter are: (1) Murphy uses his own vehicle in delivering the mail; (2) under the contract, Murphy is required to provide his own automobile liability insurance; (3) Murphy pays self-employment Social Security tax, and there is no employee withholding tax on the monthly contract payments made by the United States to Murphy; (4) Postal Service regulations prohibit the award of any contract of the type here involved to *employees* of the Postal Service; and (5) Murphy has the authority to subcontract his work to others. (Emphasis in the original.)

Norton, supra, 661 F.2d at 884. The same considerations apply to the contract in this case.

The Department has also adopted a regulation stating that a person holding a contract for transportation of United States mail within New Mexico as a “star route contractor” is subject to gross receipts tax. Regulation 3.2.1.18(Y) NMAC. At the April 3, 2002 hearing, the Taxpayer was insistent in her position that she is not a star route contractor and that the Department’s regulation cannot apply to her. The only difference she could identify between a star route and her route, however, is that star route contractors deliver mail to individual mail boxes put up by homeowners while she delivers mail to multiple mail box units owned and maintained by the USPS. This distinction has no relevance in the context of this case.

Consistency in Reporting. Finally, it must be noted that New Mexico law requires taxpayers to treat transactions uniformly for all purposes within the tax laws. A taxpayer may not report business income on the taxpayer’s federal income tax return and then recharacterize the income as nontaxable employee wages for purposes of New Mexico’s gross receipts tax. 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's compensation from performing carpentry work for various individuals. Mr. Stohr argued that these amounts were wages exempt from gross receipts tax. In responding to these arguments, the court noted that during the audit period Mr. Stohr filed self-employment tax returns for social security purposes and filed federal Schedule C's reporting his compensation as business income. In determining Mr. Stohr liable for gross receipts tax, the court first examined the indicia of employment found in the Department’s regulations, and then concluded:

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. (Emphasis added)

90 N.M. at 46, 559 P.2d at 423. Thus, the court found that the manner in which Mr. Stohr reported his compensation for federal purposes controlled the determination of whether that compensation could be considered wages exempt from gross receipts tax. *See also, 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).

In this case, the Taxpayer reported her 1999 income from the USPS as business income on Schedule C to her 1999 federal income tax return. The Taxpayer testified that she was confused by the USPS's Form 1099, because it listed the contract payments as "other income", which is defined by the IRS manual as income from prizes, awards and gambling winnings. The Taxpayer subsequently contacted the IRS for assistance. After she explained the source of her income, the IRS instructed the Taxpayer to file as self-employed and to report her contract payments as business income on Schedule C to her federal income tax return. Although the Taxpayer now maintains that she was an employee of the USPS in 1999, she never raised this issue with the IRS. Nor did she contact anyone at the USPS to ask why she was given a Form 1099 or dispute her status as an independent contractor.

Only after receiving the Department's gross receipts tax assessment did the Taxpayer assert that she was an employee entitled to claim the exemption in Section 7-9-17 NMSA 1978. Based on New Mexico law, however, the Taxpayer is bound by the manner in which she filed her federal income tax returns. Before asking the Department to recognize her as an employee exempt from payment of gross receipts tax, the Taxpayer must resolve her employment status with the USPS and report her income as employee wages on her federal income tax returns.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2716067, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer's 1999 receipts from her mail delivery contract with the USPS were receipts from performing services as an independent contractor and not as an employee of the USPS.

3. The Taxpayer is not entitled to claim the exemption from gross receipts provided in Section 7-9-17 NMSA 1978.

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

DATED April 17, 2002.