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

IN THE MATTER OF THE PROTEST OF
OSCAR HERRERA **No. 02-29**
ID NO. 02-396863-00 0
DENIAL OF CLAIM FOR REFUND
OF 1995 CRS TAXES

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 12, 2002, before Margaret B. Alcock, Hearing Officer. Oscar Herrera ("Taxpayer"), who appeared by telephone, represented himself. The Taxation and Revenue Department ("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. For eighteen years, the Taxpayer worked as a trucker hauling materials in New Mexico.

2. For most of his career, the Taxpayer worked for a single trucking company.

3. During 1995, business was slow, and the Taxpayer decided to look for other work.

4. The Taxpayer found work with Four Seasons Trucking company, who resold the Taxpayer's trucking services to Barnett and Sons, Inc., located in Clovis, New Mexico.

5. Barnett had a contract to haul material to a construction site on New Mexico Interstate 25.

6. Barnett used two different groups of drivers to meeting its hauling needs: the first group consisted of drivers who drove trucks owned by Barnett; the second group, characterized as

"independents", drove their own trucks. Barnett obtained the services of independents, including the Taxpayer, through its contract with Four Seasons.

7. The independents' trucks were not required to display the name of Four Season Trucking or Barnett and Sons, Inc., nor were the independents required to wear uniforms.

8. The independents had control over the type of trucks they drove, as long as the trucks were in good working condition. The independents were responsible for maintaining, insuring and obtaining required licenses and permits for their trucks.

9. The independents were hired only when there was too much work for Barnett's own trucks and drivers.

10. Depending on the work load, Barnett called Four Seasons Trucking with the number of trucks it was likely to need during a specified period. Four Seasons then contacted the Taxpayer and the other independent truckers it had on contract.

11. The Taxpayer was required to arrive at Barnett's place of business each morning to see whether there was any work available that day. If Barnett could handle the work using its own trucks, the Taxpayer would not be hired and would receive no payment.

12. If the Taxpayer failed to show up in the morning or left early in the day, he ran the risk of losing his place to another independent trucker.

13. Generally, the Taxpayer worked two or three days a week and was paid either by the hour or by the haul. The payment he received included compensation for the use of his truck as well as for his driving services.

14. The distance between the loading point and the construction site was approximately six miles, and Barnett gave the truckers directions on which route to take.

15. In early 1996, the Taxpayer received a federal Form 1099-MISC from Four Seasons showing that Four Seasons had paid the Taxpayer $50,313.02 of nonemployee compensation during

1995. The form also showed that no state, federal or social security taxes had been withheld from the compensation paid to the Taxpayer.

16. The Taxpayer had an accountant prepare the Taxpayer's 1995 federal income tax return, Form 1040.

17. The $50,313 of compensation the Taxpayer received from Four Seasons was reported as "gross receipts" on Schedule C (*Profit or Loss from Business*) to the Taxpayer's federal income tax return.

18. The Taxpayer's Schedule C also listed business expenses of over $40,000, resulting in a net profit of $10,150 being reported as taxable income on the Taxpayer's 1995 federal return.

19. The business expenses deducted on Schedule C included the following:

Line 13	Depreciation	$11,569	
Line 15	Insurance	3,673	
Line 16(b)	Interest		35
Line 17	Legal and professional services	250	
Line 20(a)	Rent or lease (vehicles, machinery and equipment)		3,285
Line 21	Repairs and Maintenance	2,376	
Line 22	Supplies	2,433	
Line 23	Taxes and licenses	1,354	
Line 24(d)	Travel, meals and entertainment		1,322
Line 25	Utilities	1,594	
Line 26	Wages	1,499	
Line 27	Other expenses (fuel & oil, tire, equipment, tools)	10,773	
Line 28	Total Expenses	$40,163	

20. In 1999, the Department received information from the Internal Revenue Service concerning the business income reported on Schedule C to the Taxpayer's 1995 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department and had never paid gross receipts tax on this income.

21. On April 21, 1999, the Department sent the Taxpayer a letter asking him to explain why the business income reported on his 1995 federal income tax return was not reported to the Department for gross receipts tax purposes.

22. The Department's April 21, 1999 letter advised the Taxpayer that, pursuant to Section 7-9-43 NMSA 1978, he must be in possession of all nontaxable transaction certificates ("NTTCs") required to support his deductions within 60 days from the date of the letter. The 60-day period expired on June 20, 1999.

23. After receiving the Department's letter, the Taxpayer met with a Department employee. The Taxpayer, whose primary language is Spanish, had difficulty communicating with the employee, who was not fluent in Spanish.

24. At some point before the 60-day period expired, the Taxpayer realized that he needed to obtain a Type 5 NTTC from Four Seasons Trucking to establish his right to deduct his receipts from selling his trucking services to Four Seasons for resale to Barnett.

25. The Taxpayer contacted Four Seasons, but the company was unwilling to issue an NTTC to the Taxpayer.

26. In May 1999, the Department assessed the Taxpayer for gross receipts tax, interest and penalty on the $50,313 of business income reported on his 1995 federal income tax return.

27. A few days before the June 20, 1999 deadline for obtaining NTTCs, the Taxpayer contacted an employee in the Department's Roswell office, who spoke to someone at Four Seasons and explained that it would be proper for Four Seasons to issue a Type 5 NTTC to the Taxpayer.

28. On June 30, 1999, Four Seasons issued a Type 5 NTTC to the Taxpayer.

29. When the Taxpayer delivered a copy of the NTTC to the Department, the Department refused to accept the NTTC because it had not been in the Taxpayer's possession on June 20, 1999, the expiration of the 60-day deadline.

30. The Taxpayer paid the Department's May 1999 assessment.

31. On November 9, 2000, the Taxpayer filed a claim for refund in the amount of $5,170.56, representing the amount the Taxpayer had paid on the Department's May 1999 assessment of gross receipts tax, penalty and interest on the $50,313 of gross receipts the Taxpayer reported as business income on his 1995 federal income tax return.

32. On March 22, 2001, the Department denied the Taxpayer's claim for refund.

33. On April 16, 2001, the Taxpayer filed a written protest to the Department's denial of his claim for refund.

DISCUSSION

The Taxpayer raises two alternative arguments in support of his protest to the Department's denial of his claim for refund: (1) the Taxpayer was an employee of Four Seasons Trucking during 1995 and is entitled to claim the deduction for employee wages provided in Section 7-9-17 NMSA 1978; and (2) in the event the Taxpayer is found to be an independent contractor, the NTTC issued to the Taxpayer on June 30, 1999 should be accepted to support the deduction for selling services for resale provided in Section 7-9-48 NMSA 1978.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Although this protest involves a claim for refund, that claim is based on the Taxpayer's challenge to the Department's May 1999 assessment of gross receipts tax, penalty and interest on his 1995 income. Accordingly, the Taxpayer has the burden of proving that the Department's assessment was incorrect and that he is entitled to the refund claimed. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972).

Liability for Gross Receipts Tax. Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of every 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." 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. The term "gross receipts" is defined in Section 7-9-3(F) NMSA 1978 to include "the total amount of money...received from...performing services in New Mexico." Based on these definitions, the Taxpayer is liable for gross receipts tax on his receipts from performing trucking services in New Mexico, unless he can establish that a specific exemption or deduction applies.

Exemption for Employee Wages. The Taxpayer's first argument is that he worked for Four Seasons Trucking as an employee, rather than as an independent contractor, and is entitled to claim the exemption from gross receipts set out in Section 7-9-17 NMSA 1978:

> 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.

The Department contends that the Taxpayer was performing services as an independent contractor and does not qualify for the exemption provided in Section 7-9-17.

In *Harger v. Structural Services, Inc.*, 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) to determine whether a worker is 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. *Id*., 121 N.M. at 667, 916 P.2d at 1334; *Benavidez v. Sierra Blanca Motors*, 125 N.M. 235, 238, 959 P.2d 569, 572 (Ct. App. 1998). While all of the above factors may be considered, it is the totality of the circumstances that determines whether the employer has the right to exercise essential control over a particular worker.

Department Regulation 3.2.105.7 NMAC also sets out factors to be considered in determining whether a worker qualifies as an employee for purposes of the Gross Receipts and Compensating Tax Act, including whether taxes are withheld, whether worker's compensation and unemployment insurance contributions are made on behalf of the employee, and whether the employer has "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. The following facts support the Taxpayer's position: The Taxpayer was required to report to Barnett's each morning to see whether work would be available that day. When there was sufficient hauling work for Barnett to enlist the services of the independent truckers, the Taxpayer was expected to work all day and could not leave early without risking the loss of future jobs. In addition, Barnett instructed the Taxpayer as to which route he should take to the construction site (although there was no evidence presented as to whether alternate routes existed, given the fact that the construction site was only six miles from the place where materials were loaded).

The following facts support the Department's position: The Taxpayer was required to provide, maintain and insure his own equipment and to obtain all necessary licenses and permits.

The Taxpayer's truck did not display the name of either Four Season Trucking or Barnett and Sons, Inc., nor was the Taxpayer required to wear a uniform. The Taxpayer worked a part-time, irregular schedule, depending on the work available. The Taxpayer was sometimes paid by the haul and sometimes paid by the hour. These payments included compensation for use of the Taxpayer's truck, as well as the Taxpayer's labor. Four Seasons did not withhold any state, federal or social security taxes from the payments it made to the Taxpayer. Four Seasons considered the Taxpayer to be an independent contractor, as evidenced by the fact that it reported its payments to the Taxpayer as "nonemployee compensation" on federal Form 1099-MISC. The Taxpayer reported his receipts as business income on Schedule C to his 1995 federal income tax return and claimed business expenses totaling almost 80 percent of this income.

Based on the totality of the evidence presented at the hearing, the Taxpayer has failed to establish that he provided trucking services to Four Seasons and Barnett as an employee rather than as an independent contractor. Of particular weight is the Taxpayer's treatment of his receipts on his 1995 federal income tax return. New Mexico law holds that a taxpayer must treat transactions uniformly for all purposes within the tax laws. *See, e.g., 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); *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 N.M. 293, 694 P.2d 1358 (1986). 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 rejected the taxpayer's claim that he was performing carpentry services as an employee, noting that he had reported his receipts from these services as business income on Schedule C to his federal return. In determining that Mr. Stohr was liable for gross receipts tax on his income, the court 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).

90 N.M. at 46, 559 P.2d at 423.

In this case, the Taxpayer's treatment of his receipts as business income on his 1995 federal income tax return allowed him to claim business expenses that reduced his taxable income from $50,313 to $10,150. If the Taxpayer had treated his 1995 income as employee wages on his federal return, his eligible expenses would have been limited, and his income tax liability would have been substantially higher. Having reaped the benefit of treating his receipts as business income on his 1995 federal income tax return, the Taxpayer cannot now claim that these same receipts were actually employee wages exempt from New Mexico gross receipts tax.

Deduction of Receipts from Selling Services for Resale. Having determined that the Taxpayer performed services as an independent contractor during 1995, the next issue is whether he is entitled to claim the deduction set out in Section 7-9-48 NMSA 1978, which states as follows:

> 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.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. During 1995, the period at issue in this case, the statute provided:

> All nontaxable transaction certificates of the appropriate series executed by buyers or lessees *shall be in the possession of the seller* or lessor for nontaxable transactions at the time the return is due for receipts from the transactions.... (Emphasis added).

The word "shall" indicates that the provisions of a statute are mandatory and not discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The Taxpayer did not have an NTTC from Four Seasons in his possession at the time his 1995 gross receipts tax returns were due. He did not meet the

statutory requirements of Section 7-9-43 then in effect and was not entitled to claim a deduction for purposes of calculating the New Mexico gross receipts tax due to the state.

In 1997, the legislature amended Section 7-9-43 to allow taxpayers additional time within which to obtain required NTTCs. Laws 1997, Chapter 72, Section 1. This version of the statute, effective July 1, 1997, provides:

> 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 amendment gave taxpayers audited after its effective date a second chance to obtain NTTCs that should have been in their possession at the time their deductions from gross receipts tax were taken. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they are unable to obtain required NTTCs within the 60-day period provided by the legislature. The language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed."* (Emphasis added).

In this case, the Taxpayer did not obtain possession of the Type 5 NTTC needed to support his deductions until June 30, 1999, ten days after the 60-day deadline expired. The Taxpayer maintains that circumstances outside his control prevented him from obtaining the NTTC within the statutory time limit. The Taxpayer points to the fact that he had difficulty understanding the Department employee with whom he initially spoke because the employee was not fluent in Spanish. The Taxpayer then had difficulty convincing Four Seasons to issue him an NTTC. It was only after the intervention of another Department employee that Four Seasons finally agreed to do so, by which

time the 60-day deadline had passed. While this series of events is unfortunate, the Taxpayer's attempt to shift responsibility for documenting his gross receipts tax deductions to Four Seasons or to the Department is inconsistent with New Mexico's self-reporting tax system. Every person is charged with the duty to ascertain the possible tax consequences of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). The incidence of the gross receipts tax is on the seller of services, and it was the responsibility of the Taxpayer—not Four Seasons or the Department—to insure that he had the documentation needed to support his deductions.

Where a party claiming a right to a tax exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his 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). The Taxpayer's failure to obtain a Type 5 NTTC from Four Seasons within the 60-day period provided in Section 7-9-43 NMSA 1978 left the Department with no choice but to disallow his deductions.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of his claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer worked for Four Seasons as an independent contractor and is not entitled to the exemption for employee wages set out in Section 7-9-17 NMSA 1978.

3. The Taxpayer was not in possession of required NTTCs within the 60-day period set out in Section 7-9-43 NMSA 1978 and is not entitled to the deduction for receipts from selling services for resale provided in Section 7-9-48 NMSA 1978.

4. The Taxpayer was liable for the gross receipts tax, penalty and interest he paid on the Department's May 1999 assessment, and the Taxpayer is not entitled to a refund of these amounts.

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

Dated November 20, 2002.