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

IN THE MATTER OF THE PROTEST OF
RUTH DILTS D/B/A THE GARDEN SPOT, No. 97-04
I.D. NO. 01-152043-00 4, PROTEST
TO ASSESSMENT NO. 1864780

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on January 22, 1997. Mrs. Ruth Dilts, hereinafter, "Mrs. Dilts," represented herself at the hearing. The Taxation and Revenue Department, hereinafter, "Department," was represented by Bridget A. Jacober, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Mrs. Dilts has worked as a nurse-companion since at least 1978.

2. In 1978, Mrs. Dilts was an employee of Medical Personnel Pool of New Mexico, Inc. Medical Personnel Pool assigned Mrs. Dilts to work as a home nurse companion for Mrs. T.M. Pepperday.

3. In 1980, Mrs. Pepperday asked Mrs. Dilts if she would come to work for her directly, on the same terms and conditions as she worked for Medical Personnel Pool. Mrs. Dilts agreed to do so. Mrs. Dilts continued to also work for Medical Personnel Pool, as evidenced by her 1982 federal form W-2 from Medical Personnel Pool.

4. Mrs. Dilts worked for Mrs. Pepperday as an employee during 1980 and 1981. For tax year 1981, Mrs. Dilts was given a federal form W-2 from Mrs. Pepperday showing that she had been paid $17,741.75 in wages and that federal income taxes, FICA tax and New Mexico income

tax was withheld from those wages by Mrs. Pepperday.

5. At some time during 1982, Mrs. Pepperday changed how she treated Mrs. Dilts for tax purposes, and no longer treated her as an employee. Mrs. Pepperday stopped withholding federal and state income taxes and social security taxes from the payments she made to Mrs. Dilts. For 1982, Mrs. Pepperday provided Mrs. Dilts with both W-2 forms showing wages paid and taxes withheld and a form 1099 showing that she had paid Mrs. Dilts $13,728.09 in "nonemployee compensation." Thereafter, Mrs. Pepperday provided form 1099s to Mrs. Dilts for each tax year showing the amounts she paid Mrs. Dilts to be nonemployee compensation.

6. During at least tax year 1988, Mrs. Dilts also ran a boarding house business out of her home. The business was called "The Garden Spot." Mrs. Dilts registered that business with the Department and paid gross receipts taxes on $400 in rental income during 1988 to the Department.

7. For tax year 1988, Mrs. Pepperday provided Mrs. Dilts a form 1099, showing that Mrs. Dilts was paid $100,948.89 in "nonemployee compensation." The 1099 form reflects no deductions from that amount for federal income tax, FICA tax, state income tax, or any other type of deduction.

8. For tax year 1988, Mrs. Dilts filed separately from her husband, Mr. Dale Dilts, for state and federal income taxes. She reported the $100,848.89 paid to her by Mrs. Pepperday on Schedule C of her 1988 federal return. Schedule C is captioned "Profit or Loss from Business," and the entire $100,849.89 was reported as net profit. That amount was carried forward to Line 12 of her form 1040 and reported as "business income." Mrs. Dilts also reported the $400 in boarding house rental income under Schedule E, as rental income. She described the property as a boarding home and business office, and she claimed over $75,000 in rental expenses against the rental income, claiming a loss of $75,886.64.

9. Among the expenses Mrs. Dilts claimed on Schedule E were $1,675 for new

nursing uniforms, which Mrs. Dilts wore when she worked for Mrs. Pepperday.

10. The Department and the Internal Revenue Service ("IRS") have an agreement whereby information about taxpayers is shared.

11. The Department has a program where it attempts to match amounts reported by taxpayers as business income on Schedule C to amounts reported to it for gross receipts tax purposes. Based upon the fact that Mrs. Dilts had only reported $400 in gross receipts for 1988, the Department assessed additional gross receipts tax on $100,449.89, which is the difference between the $100,849.89 in business income reported by Mrs. Dilts on her 1988 Schedule C and the $400 she had already reported.

12. Because Mrs. Dilts already was registered with the Department for gross receipts tax purposes as The Garden Spot, the Department issued the assessment to her under that name.

13. On October 21, 1994, the Department issued Assessment No. 1864780 to The Garden Spot, assessing $5,015.46 in gross receipts tax, $501.54 in penalty and $4,670.65 in interest for a total of $10,187.65 for the reporting periods of January, 1988 through December, 1988.

14. On November 14, 1994, Mrs. Dilts filed a written protest to Assessment No. 1864788 with the Department.

15. Mrs. Dilts prepares her own tax returns.

16. Mrs. Dilts is very sophisticated about tax matters.

DISCUSSION

The primary issue to be determined herein is whether the $100,849.89 which Mrs. Pepperday paid to Mrs. Dilts in 1988 was wages paid to Mrs. Dilts as an employee, or was it gross receipts from the performance of home nurse companion services. NMSA 1978, Section 7-9-17 (1988 Repl. Pamp.) provides:

> 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.

Mrs. Dilts testified that she considered herself an employee of Mrs. Pepperday. She testified that

prior to 1982, Mrs. Pepperday had paid unemployment insurance taxes, worker's compensation tax, FICA tax, and withheld income taxes from her pay. Mrs. Dilts claimed that after 1982, that Mrs. Pepperday continued to treat her the same, although she provided no proof that any of the taxes or unemployment or worker's compensation insurance coverages continued to be paid. In fact, the evidence, in the form of the 1099 forms Mrs. Pepperday provided to Mrs. Dilts indicate that Mrs. Pepperday no longer treated Mrs. Dilts as an employee for tax purposes since she no longer withheld any taxes from the compensation paid.

NMSA 1978, Section 7-9-3(F)(1988 Repl. Pamp.) defines "gross receipts" in pertinent part as follows:

> "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico....

The Department considers that the compensation paid to Mrs. Dilts to be money received from performing services in New Mexico. The Department based its assessment of gross receipts tax upon Mrs. Dilts 1988 federal tax returns. Mrs. Dilts made out these returns herself. She attached her 1099 form from Mrs. Pepperday which classified her compensation as "nonemployee compensation." She filled out Schedule C, captioned "Profit or Loss from Business" and declared the compensation to be "gross receipts or sales" and carried the total to line 12 of form 1040, declaring it to be "business income." She now claims that this was a "mistake."

NMSA 1978, Section 7-1-17(C) provides that there is a presumption of correctness which attaches to the Department's assessment of tax. This places a duty on a taxpayer challenging an assessment to present evidence tending to dispute the factual correctness of the assessment and to overcome this presumption. ***Champion International Corp. v. Bureau of Revenue***, 88 N.M. 411, 540 P.2d 1300 (Ct. App. 1975).

Mrs. Dilts first argues that the assessment is untimely and that it should be barred by the application of the doctrine of laches. The Department issued the assessment in October of 1994.

NMSA 1978, Section 7-1-18(D) (1993 Repl. Pamp.) provides:

> If a taxpayer in a return understates by more than twenty-five percent of the amount of his liability for any tax for the period to which the return relates, appropriate assessments may be made by the department at any time within six years from the end of the calendar year in which payment of the tax was due.

Mrs. Dilts only reported $400 in gross receipts during calendar year 1988. Her failure to report over $100,000 in gross receipts for that year[1] certainly meets the criteria of understating gross receipts by more than 25%. Since the assessment was issued within six years from the end of calendar year 1988, when her payment of gross receipts taxes would have been due, the assessment was issued within the statute of limitations which the legislature has provided for the assessment of the taxes at issue. In any event, Mrs. Dilts claims that this money was received separate from her boarding house business, The Garden Spot. The Department could have assessed the tax separately against Mrs. Dilts, and the statute of limitations would be seven years in that instance. This is because Section 7-1-18(C) allows assessments up to seven years after payment of the tax was due where a taxpayer has failed to complete and file any required return, and Mrs. Dilts never reported these receipts to the Department for gross receipts tax purposes.

Additionally, there is no basis for applying the doctrine of laches where the assessment falls within the statute of limitations prescribed by the legislature. This is because the statute of limitations provided Mrs. Dilts with at least constructive notice that the Department could assess gross receipts tax on the compensation which she characterized as gross receipts upon her own Federal Schedule C. If she thought that her characterization was a mistake, or wrong, she had almost six years to correct it prior to the Department's assessment of tax.

Turning to the issue of whether the compensation Mrs. Pepperday paid to Mrs. Dilts was wages, I find that Mrs. Dilts failed to carry her burden of proof. Regulation 3 NMAC 2.17.7 provides as follows:

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[1] This assumes, for purposes of the discussion of this issue that her compensation is not exempt from gross receipts taxation as wages.

7.1 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 means"mere suggestion").

7.2 If all of the indicia mentioned 3 NMAC 2.17.7.1 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.

Mrs. Dilts provided no evidence to meet the first five criteria. Mrs. Dilts 1988 Form 1099 shows her compensation to be nonemployee compensation, not wages or salary. It also shows no deductions for FICA tax, or income tax withholding. Mrs. Dilts presented no evidence to show that she was covered by unemployment insurance or workmen's compensation insurance during 1988. With respect to criteria 6, the 1099 form itself serves to demonstrate that at least Mrs. Pepperday considered Mrs. Dilts to not be an employee. With respect to criteria 7, Mrs. Dilts provide only a conclusory statement that Mrs. Pepperday treated her like an employee, but she gave no specifics to support her conclusion which would have demonstrated that Mrs. Pepperday exercised the degree of control over Mrs. Dilts to make Mrs. Dilts an employee rather than an independent contractor.

Mrs. Dilts offered her own testimony that she considered herself to be an employee of Mrs. Pepperday in support of her position. I do not consider her testimony to be credible. Mrs. Dilts demonstrated herself to be a highly sophisticated taxpayer. In presenting her case, she cited to both statutory and case law. A review of her 1988 income tax return shows that she understood how to fill out a return so that she paid virtually no tax on nearly $115,000 in income. A review of her Schedule E shows that she claimed over $75,000 in deductions against $400 of rental income from her boarding house business. Mrs. Dilts admitted that the $1675 that she deducted for new nursing uniforms was

for uniforms that she wore when working for Mrs. Pepperday. Mrs. Dilts also failed to offer any satisfactory explanation as to how it had escaped her notice that in the six years between 1982 and 1988 that Mrs. Pepperday was no longer treating her compensation as wages, was no longer withholding FICA or income taxes and was, in fact, classifying her compensation as nonemployee compensation. Mrs. Dilts is simply too sophisticated about filling out her income tax returns for this to have escaped her notice.

Even had it been an innocent mistake in how she filled out her income tax return, the case law in New Mexico is clear that in filing state and federal taxes, that a taxpayer must treat taxable transactions consistently for both taxing jurisdictions. ***Stohr v. Bureau of Revenue***, 90 N.M. 43, 559 P.2d 420 (Ct. App. 1976). Mrs. Dilts is bound by the manner in which she filed for federal tax purposes in the absence of the filing of an amended return, and there was no evidence that Mrs. Dilts filed an amended return with the Internal Revenue Service for 1988.

CONCLUSIONS OF LAW

1. Mrs. Dilts filed a timely, written protest to Assessment No. 1864780 pursuant to NMSA 1978, Section 7-1-24 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The compensation Mrs. Dilts received from Mrs. Pepperday for providing nurse-companion services in 1988 was payment for service rendered as an independent contractor and not wages received as an employee of Mrs. Pepperday.

For the foregoing reasons, Mrs. Dilts protest IS HEREBY DENIED.

DONE, this 31st day of January, 1997.