

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

IN THE MATTER OF THE PROTEST OF
DONE-RITE DETAIL,
ID. NOS. 02-175106-00 4 AND
02-258685-00 7, PROTEST TO ASSESSMENT
NOS. 1960093 AND 1960097

NO. 97-36

DECISION AND ORDER

This matter came on for formal hearing on August 29, 1997 before Gerald B. Richardson, Hearing Officer. Done-Rite Detail, hereinafter, "Taxpayer" was represented by Mrs. Helen Baca, its owner, and her son, Mr. Greg Baca. The Taxation and Revenue Department, hereinafter, "Department", was represented by Margaret B. Alcock, Special Assistant Attorney General. The record was held open until September 15th to allow the Taxpayer to submit additional documentation in support of its protest. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a sole proprietorship which was in the business of providing auto detailing services. The majority of those services were performed for dealers of both new and used cars. The Taxpayer also provided auto detailing services at retail for walk in customers.

2. The auto detailing services on new cars consisted of hand-washing the vehicle, putting on a paint sealant called a "desert protection package" cleaning the windows, both inside and outside, and making sure that the engine is clean. The only dealer for which new car detailing services were performed was Westside Jeep-Eagle.

3. The used car auto detailing services were far more extensive. It involved degreasing and steam cleaning the engine, cleaning the wheels, fenders, door and trunk jams, hand-washing the car, waxing it, buffing it, cleaning the windows, dressing the tires, painting the wheel wells black, shampooing the carpets and seats, cleaning the dash and vents and otherwise cleaning and polishing the vehicle.

4. In 1995 the Taxpayer was audited by the Department. The Department's audit revealed that, in general, the Taxpayer was claiming a deduction for 100% of its gross receipts from performing auto detailing services. As part of its audit procedure, on February 21, 1995, the Department issued the Taxpayer a form DI-107 letter, commonly called a sixty day letter, requiring the Taxpayer to produce, within sixty days, all non-taxable transaction certificates ("NTTCs") upon which it based its claims of deduction from gross receipts tax during the audit period.

5. The Taxpayer was able to produce two type 13 NTTCs, which were accepted by the Department as supporting the deductions claimed by the Taxpayer for its gross receipts received from the taxpayers who issued

those certificates. The Taxpayer also produced type 5 NTTCs from various dealers for whom the Taxpayer provided auto detailing services on used vehicles. The Department disallowed the deductions claimed by the Taxpayer with respect to the Taxpayer's receipts from the issuers of the type 5 NTTCs because the Department did not believe that the conditions for claiming a deduction based upon a type 5 NTTC were met.

6. The Department's audit also determined that the Taxpayer had one worker, Mr. Leonard Araujo, whom the Department considered to be an employee of the Taxpayer, for whom the Taxpayer failed to withhold and remit withholding taxes.

7. Mr. Araujo was paid a salary by the Taxpayer as well as being paid on a commission basis for each car he detailed. Mr. Araujo's duties in the Taxpayer's office included answering telephones and preparing invoices for work done by the Taxpayer. He worked during the Taxpayer's normal business hours and his salary was paid with respect to his duties to man the Taxpayer's office, which duties were in addition to the work he did on a commission basis.

8. As a result of the Department's audit, the Department issued two assessments to the Taxpayer. Assessment No. assessed \$38,244.16 of gross receipts tax, \$768.00 of withholding tax, \$3,901.20 of penalty and \$10,344.00 of interest for the period of June, 1991 through December, 1994. Assessment No. 1960097 assessed \$8,867.35 of gross receipts tax, \$117.60 of withholding tax, \$898.50 of penalty and \$898.50 of interest for the period of June, 1994 through December, 1994. The two assessments were issued under the Taxpayer's two separate tax identification numbers which were obtained by the Taxpayer for the Taxpayer's two separate business locations. Both assessments were mailed to the Taxpayer on September 13, 1995.

9. On October 10, 1995, the Taxpayer made a written request of the Department for an extension of time in which to file its protest to the two assessments.

10. On October 20, 1995, the Department granted the Taxpayer an extension of time, until December 12, 1995, to file its protest.

11. On December 6, 1995 the Taxpayer filed a written protest to the two assessments with the Department.

DISCUSSION

The two issues presented for determination are whether the Taxpayer was properly assessed gross receipts tax for its auto detailing services for which the Taxpayer claimed deduction from tax and whether the Taxpayer is liable for withholding tax on the salary paid Mr. Araujo.

The Taxpayer was claiming a deduction for 100% of its receipts from performing auto detailing services. The Taxpayer said that the automobile dealers for whom they performed these services informed the Taxpayer that they did not pay tax on those services. The Taxpayer did not, however, require that the dealers provide a non-taxable transaction certificate to the Taxpayer to support their claim that taxes need not be charged. The Taxpayer provided no explanation as to why gross receipts taxes were not paid with respect to the auto detailing services which were provided to its individual customers. At the commencement of the audit the Taxpayer was given a form DI-107, which requires a taxpayer to produce all non-taxable transaction certificates upon which it relies in support of

claimed deductions within sixty days. The Taxpayer only had one type 13 NTTC in its possession at the commencement of the audit, and it produced additional type 5, type 1 and type 13 certificates before the audit was completed. The type 13 certificates from used car dealers were accepted by the Department and the deductions supported by those certificates were allowed. The deductions supported by the type 5 and type 1 certificates were disallowed because the Department did not believe that they supported the Taxpayer's claims of deduction under the circumstances of the case.

Type 1 NTTCs are the type issued by the Department to support the deduction provided at Section 7-9-46 NMSA 1978, which provides as follows:

Receipts from selling tangible personal property may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person engaged in the business of manufacturing who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must incorporate the tangible personal property as an ingredient or component part of the product that he is in the business of manufacturing.

Since this deduction is for the sale of tangible personal property and what the Taxpayer sells is a service, the certificate does not apply to support a claim of deduction for receipts from the sale of a service.

The Taxpayer claims entitlement to a deduction for its receipts from the sale of detailing services to automobile dealers because the Taxpayer believes that the dealers recover the cost of these services in the sales price of the vehicle and thus re-sell the services. There is a deduction for the sale of services which will be resold provided at Section 7-9-48 NMSA 1978. It provides as follows:

Receipts from selling a service for resale may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. *The buyer delivering the nontaxable transaction certificate must separately state the value of the service purchased in his charge for the service on its subsequent sale, and the subsequent sale must be in the ordinary course of business and subject to the gross receipts tax or governmental gross receipts tax.* (emphasis added).

Buyers wishing to purchase services for which the seller may claim a deduction from gross receipts tax may do so by issuing the seller a type 5 NTTC. The Taxpayer produced a window sticker from Westside Jeep-Eagle which lists a cost of \$695.00 for a "southwest desert protection package" as part of the sticker price of a vehicle. While this would meet the criteria of the statute which requires that when the service is resold, that its value be separately stated by the seller, Westside Jeep Eagle was not a customer for whom the Taxpayer was ever able to provide a non-taxable transaction certificate. Section 7-9-43(A) provides that if a taxpayer does not demonstrate to the Department that it is in possession of a NTTC to support a claim of deduction for which a certificate is required, the deduction shall be disallowed. Thus, in the absence of a NTTC from Westside Jeep Eagle, the Taxpayer was properly denied any claim of deduction for sales to that customer.

The Taxpayer was able to produce a number of type 5 NTTCs from other automobile dealers. However, with respect to those transactions for which deduction was claimed, the Taxpayer has also failed to establish its claim of deduction. This is because Section 7-9-48 requires that the subsequent sale by the customer must be subject to the gross receipts tax or governmental gross receipts tax. In the case of new and used motor vehicles, there is an exemption from gross receipts tax provided at Section 7-9-22 NMSA 1978 for receipts from selling vehicles on

which a tax is imposed by the Motor Vehicle Excise Tax Act, Sections 7-14-1 to 7-14-11 NMSA 1978. The motor vehicle excise tax applies to the sale in this state of all motor vehicles which are required to be registered in this state. Since the vehicles upon which the Taxpayer provided detailing services for automobile dealers would be subject to the motor vehicle excise tax, their sale would not be subject to gross receipts tax and so the deduction claimed by the Taxpayer would not apply to these transactions.

The remaining issue to be determined is whether the Taxpayer was liable for the payment of withholding tax on the amounts it paid Mr. Leonard Araujo. Employers are required by Section 7-3-3 NMSA 1978 to withhold and pay over to the Department withholding tax upon the wages paid their employees. The Taxpayer argues that Mr. Araujo was an independent contractor and not an employee and that it should not be liable for withholding tax.

There is a presumption of correctness which attaches to any assessment of tax by the Department. Section 7-1-17(C) NMSA 1978. This means that the burden of proof lies upon the Taxpayer to produce evidence or legal argument to rebut the presumption of correctness. The issue of whether a person is an employee turns on an analysis of many factors. The degree of control over the person's work product is key in determining whether a person is an employee or an independent contractor. In this case, there was not much evidence presented by the Taxpayer concerning Mr. Araujo's relationship to the Taxpayer. Although Mr. Baca testified that Mr. Araujo pretty much set his own hours of work, Mr. Baca also agreed that Mr. Araujo was at work during business hours and that he was paid a salary to compensate him for his duties of answering the telephone, preparing invoices and otherwise providing oversight over the Taxpayer's operations when the owners were not present. This evidence supports a conclusion that Mr. Araujo was an employee rather than an independent contractor because the Taxpayer set his duties to answer the telephones, prepare invoices, etc. The Taxpayer has failed to carry its burden of proving that Mr. Araujo was an independent contractor under the circumstances of this case.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 1960093 and 1960097 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was properly denied deductions where it failed to demonstrate timely possession of an NTTC from its customers in support of its claim of deduction for its gross receipts from transactions with those customers.

3. The Taxpayer was properly denied the deduction claimed for its sales to the Morning Star Motor Company which provide a type 1 NTTC to the Taxpayer because that certificate does not support a claim of deduction for receipts from performing services.

4. The Taxpayer was properly denied the deductions it claimed for its sales of services to customers who provided type 5 NTTCs because the transactions did not qualify for deduction under Section 7-9-48 because the auto detailing services were not resold in a transaction which was subject to the gross receipts tax.

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

DONE, this 7th day of October, 1997.