

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

IN THE MATTER OF THE PROTEST OF
WAYNE F. WEAVER
ID. NO. 02-323056- 00 8,
PROTEST TO ASSESSMENT NO. 2088223

NO. 97-39

DECISION AND ORDER

THIS MATTER came on for formal hearing before Gerald B. Richardson, Hearing Officer, on September 17, 1997. Mr. Wayne Weaver, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, "Department", was represented by Margaret B. Alcock, Special Assistant Attorney General. Following the hearing, the record was held open to allow the Department to research an issue in its records and to notify the Hearing Officer if adjustments to the assessment could be made. The Department provided this information on September 24, 1997 and the matter was considered submitted for decision at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer receives \$468 a month from Social Security to support himself and his wife. In order to supplement this income the Taxpayer engages in a number of other activities.
2. For tax year 1993, the Taxpayer reported that he received \$13,706.65 in gross income from his various income generating activities on Schedule C of his federal personal income tax return, which is the schedule for reporting income or loss from a business.
3. The Department has an agreement with the Internal Revenue Service ("IRS") to share information about Taxpayers who reside in New Mexico. Pursuant to this agreement, the Department received information concerning the Taxpayer's 1993 federal personal income tax return.

4. As a result of the information received from hereinafter the IRS, on November 22, 1996, the Department issued Assessment No. 2088223 to the Taxpayer assessing \$751.74 in gross receipts tax, \$75.18 in penalty and \$347.68 in interest for calendar year 1993.

5. On December 17, 1997 the Taxpayer filed a written protest to the assessment with the Department.

6. The Taxpayer's income producing activities consisted of the following. The Taxpayer sells Amway products. The Taxpayer also takes apart worn out appliances and salvages copper and other metals and sells them to a metal recycling business. The Taxpayer repaired and sold an old car. The Taxpayer does baby sitting and tax preparation. The Taxpayer performs services for a homing pigeon club where he hauls pigeons to remote destinations and releases them on weekends. Finally, the Taxpayer and his wife perform caretaking and management services for a self-storage facility as independent contractors for the facility.

7. The Department has made adjustments to its original assessment by removing the Taxpayer's receipts from the sale of an automobile and by removing the Taxpayer's receipts from selling Amway products from the tax base upon which tax was assessed because the tax on those sales has been paid by Amway.

DISCUSSION

New Mexico's gross receipts tax is imposed for the privilege of engaging in business in New Mexico. Section 7-9-4 NMSA 1978. "Engaging in business" is broadly defined at Section 7-9-3(E) to mean "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." Additionally, Section 7-9-5 provides that, "[T]o prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax." Given the broad definition of engaging in business it is apparent that the Taxpayer's activities to supplement his income, even though they don't generate much income, qualify as receipts from engaging in business. Thus the presumption of taxability applies and the burden of proving that its receipts are not subject to tax requires that the Taxpayer demonstrate that some exemption or deduction from tax which would apply to prevail in disputing the Department's assessment of tax.

The Taxpayer feels that his activities are so minimal and inconsequential, and represent his efforts to support himself and his wife without going on any kind of public assistance, that surely the legislature did not intend to subject him to tax. Regrettably, there is no *de minimis* exemption or deduction provided in the Gross Receipts and Compensating Tax Act which would apply to the Taxpayer's situation. Thus, if any relief can be provided to the Taxpayer, it must be in the form of some other deduction or exemption.

There is an exemption provided at Section 7-9-28 for the occasional sale of property or services. It provides as follows:

Exempted from the gross receipts tax are the receipts from the isolated or occasional sale of or leasing of property or a service by a person who is neither regularly engaged nor holding himself out as engaged in the business of selling or leasing the same or similar property or service.

This exemption, however, would not apply to any of the Taxpayer's activities at issue, since the Taxpayer regularly engages in these activities.

The Taxpayer also argues that his compensation for his caretaking and management activities should not be taxable because there is an exemption provided at Section 7-9-17 NMSA 1978 Taxpayer for the receipts of employees from wages, salaries or other forms of remuneration for personal services. The Taxpayer does not actually argue that he falls within the terms of the exemption because he does not claim to be an employee of the self-storage facility, but he feels that it is unfair that he is subject to gross receipts tax on his compensation while an employee doing the same things would not be subject to gross receipts tax on his compensation. While he may not feel that New Mexico's statutory scheme which exempts the compensation of employees but not independent contractors is fair, it is well established that in the field of taxation, more than in other areas, the legislature is given the greatest freedom to classify and tax different activities and taxpayers differently. *Michael J. Maloof & Co. v. Bureau of Revenue*, 80 N.M. 485, 458 P.2d 89 (1969). Thus, there is no legal infirmity in the distinction drawn by the legislature as long as there is some rational basis to justify the distinction. The tax law recognizes many differences between employees and independent contractors. Employees are subject to income tax upon their entire compensation from employment whereas independent contractors may deduct their expenses of conducting business from their gross income to arrive at their net income subject to income tax. Employees are under the control of their employers for

their activities as employees while independent contractors exercise far more independence in how they perform their jobs for the persons for whom they render personal services. These distinctions are sufficient to justify the differential tax treatment found in New Mexico's statutory scheme.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2088223 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Gross Receipts and Compensating Tax Act contains no *de minimis* level of receipts before a taxpayer's receipts are subject to gross receipts tax.

3. There are no exemptions or deductions which would apply to insulate the Taxpayer's activities from the imposition of gross receipts tax under the facts and circumstances of this case.

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

DONE, this 27th day of October, 1997.