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

IN THE MATTER OF THE PROTEST OF
JORGE MIDON, ID. NO. 02-332414 -00 7 NO. 97-40
PROTEST TO ASSESSMENT . NO. 2125708

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on October 2, 1997. Mr. Jorge Midon, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer supports himself modestly by performing casual labor. The types of work he does is carpentry, yard cleaning, tree trimming, wood hauling, tile and stone work, ditchdigging, cleaning, painting, repairs and teaching dance.

2. The only work which the Taxpayer performs on a regular basis is he works as the Stage Manager for the Orchestra of Santa Fe when they perform in concert.

3. The Taxpayer does not advertise his services nor does he have a business card. He gets his work by referral from those for whom he has worked and word of mouth.

4. In general, he performs his work for individuals and most of the jobs he gets can be completed in one or two days.

5. The Taxpayer holds no licenses or professional certifications for the work which he performs.

6. The Taxpayer is usually paid in cash for the services he performs.

7. The Taxpayer works as often as he can find work, but his work is sporadic and seasonal.

8. For the 1993 and 1994 tax years, the Taxpayer reported to the Internal Revenue Service ("IRS") that he had gross income in the amounts of $11,474 and $10,320, respectively. These amounts were reported on Schedule C of Federal Form 1040

9. The Department has an information sharing agreement with the IRS whereby information about taxpayers who are residents of New Mexico is shared between the two agencies.

10. The Department received information from the IRS about the Taxpayer's Schedule C gross income. When the Department investigated, it found that the Taxpayer was not registered with the Department to pay gross receipts taxes.

11. As a result of the information received from the IRS, the Department assigned a taxpayer identification number to the Taxpayer and on March 29, 1997 issued Assessment No. 2125708 to the Taxpayer assessing $1,111.66 in gross receipts tax, $111.16 penalty and $504.66 in interest for tax years 1993 and 1994.

12. On April 23, 1997, the Taxpayer filed a written protest to Assessment No. 2125708 with the Department.

13. The Taxpayer does not dispute that portion of the assessment which relates to his compensation as a stage manager for the Orchestra of Santa Fe.

DISCUSSION

The Taxpayer disputes his liability for gross receipts tax upon his receipts from what he characterizes as "casual labor." The only exception to the Taxpayer's position that he should not be subject to gross receipts tax is with respect to his compensation as an independent contractor doing stage management for the Orchestra of Santa Fe. The Taxpayer agrees that since he regularly holds himself out as someone who performs stage management for the orchestra, that his receipts from performing those services should be subject to tax.

New Mexico's gross receipts tax is imposed upon the privilege of engaging in business in New Mexico. Section 7-9-4 NMSA 1978. The Taxpayer argues against being subject to the gross receipts tax because he does not consider that he is engaged in business when performing casual labor in the manner he does. In support of his argument, the Taxpayer points out that he has no business cards and he does not advertise himself as performing the services which he provides when performing casual labor. He also points out the short-term and sporadic nature of his work as indicating that he is not engaging in business. Additionally, he argues that he holds no professional licenses or other credentials for the kinds of work he performs.

While holding a license or professional qualification, advertising and having business cards and otherwise holding oneself out as offering to perform services are certainly indicative of a person's being engaged in business, the definition of engaging in business as contained in the

Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978 is written even more broadly. Section 7-9-3(E) defines "engaging in business" to mean, "carrying on or causing to be carried on *any activity with the purpose of direct or indirect benefit."* (emphasis added.) Because the Taxpayer undertakes the activities he engages in for the purpose of earning money and because his activities fall under the broad classification of "any activity", his activities meet the definition of engaging in business.

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." This presumption of taxability applies to the Taxpayer's activities and they are subject to tax unless the Taxpayer can demonstrate that they fall under an exemption or deduction provided by statute.

The Taxpayer argues that his activities should be exempt from tax under the exemption provided at Section 7-9-28 NMSA 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.

Although the Taxpayer performs a number of different services, with the exception of the dance lessons he offers, all of the activities he performs could be characterized as handyman services. The Taxpayer estimated that he does that sort of work as much as twenty hours a week in the summer, and less than that during other times of the year when the weather makes outdoor activities more difficult. Although this is not a lot of time, it is sufficient to qualify as work

which is performed "regularly" within the meaning of the statute, since the Taxpayer performs this work on a regular basis.

With respect to the dance lessons the Taxpayer gives from time to time, this decision maker thought it might be possible that this was done sporadically enough and the work was different enough from the Taxpayer's handyman services, that this work might qualify as isolated and occasional. The Taxpayer declined to provide any evidence, however, as to whether he had any receipts from such activities during the tax years in question and as to the amount of such receipts during those years. In the absence of any proof with respect to those receipts, there is no evidence upon which to base a conclusion that such receipts would be exempt.

Finally, the Taxpayer argues that his compensation for performing services should fall under the exemption provided at Section 7-9-17 NMSA 1978 for wages. Specifically, this section 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. (emphasis added.)

The Taxpayer argues that he qualifies for this exemption as an employee of the individuals for whom he performs services.

Regulation 3 NMAC 2.17.7, formerly GR 17:1 provides a listing of various indicia which the Department will consider in determining whether a person is an employee. They are as follows:

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 mean "mere suggestion").

Unfortunately, the Taxpayer did not provide information which allows these questions to be answered. We do not know whether the Taxpayer is paid hourly or by the job. We do not know the extent to which the Taxpayer's activities were controlled by the persons for whom he was working. There is a presumption of correctness which attaches to any assessment of tax pursuant to Section 7-1-17 NMSA 1978. This means that the burden of proving his entitlement to the exemption for wages as an employee was on the Taxpayer and this burden has not been met. Additionally, the very short term nature of the Taxpayer's work engagements also mitigates against a conclusion that he was an employee. For these reasons, it is concluded that the Taxpayer does not qualify for the exemption found at Section 7-9-17.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2125708 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer's activities constitute engaging in business as defined at Section 7-9-3(E) NMSA 1978.

3. The Taxpayer's activities performing handyman services are engaged in on a regular basis and so the Taxpayer's compensation for such activities is not exempt as receipts from the performance of services on an isolated or occasional basis under Section 7-9-28 NMSA 1978.

4. The Taxpayer has failed to present sufficient evidence to rebut the presumption of correctness which attaches to the assessment at issue herein.

5. The Taxpayer has failed to present sufficient evidence to establish his entitlement to the deduction for wages paid and employee pursuant to Section 7-9-17 NMSA 1978.

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

DONE, this 27th day of October, 1997.