

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

IN THE MATTER OF THE PROTEST OF
SHAWN AND DENISE TILLMAN
ID. NO. 02-339395-005
ASSESSMENT NOs. 2136423 & 2143093

98-05

DECISION AND ORDER

This matter came on for formal hearing on January 22, 1998 before Margaret B. Alcock, Hearing Officer. Shawn and Denise Tillman ("Tillmans" or "Taxpayers"), were represented by Rob Beltran, their tax preparer and authorized representative. The Taxation and Revenue Department ("Department"), was represented by Bruce J. Fort, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Denise Tillman works as an independent contractor for two companies that sell food products to a commissary located on a United States military base in Albuquerque, New Mexico.
2. Ms. Tillman is hired to insure that the shelves of the commissary remain fully stocked with each company's food products. She is responsible for monitoring the stock, ordering additional products when needed, stocking the shelves when the cases of food come in and setting up displays.
3. Ms. Tillman is paid 25 cents for each case of food products she puts on the shelves. Payment is not contingent on the price or sale of the food, although Ms. Tillman benefits if sales are good because this requires the shelves to be restocked more often.
4. Ms. Tillman does not take title to any of the food products she orders to restock the shelves.

5. Ms. Tillman is not involved in negotiating the sales contracts between the food companies and the commissary, nor is she familiar with the terms of those contracts.

6. Ms. Tillman is hired by and takes direction from the local sales representative for each company, although her contract is with the company itself.

7. Ms. Tillman has been told by the sales representatives that the food companies do not pay gross receipts tax on their sale of food products to the commissary.

8. For the 1994, 1995 and 1996 tax years, Ms. Tillman and her husband, Shawn Tillman, reported Ms. Tillman's income from her stocking contracts to the Internal Revenue Service ("IRS") on Schedule C of Federal Form 1040, Profit or Loss from Business. The Tillmans took certain business deductions for the vehicle Ms. Tillman used to travel to and from the commissary and to transport displays and signs provided to her by the sales representatives.

9. The Tillmans hired an accountant to prepare their 1994, 1995 and 1996 Federal Forms 1040. The Tillmans did not have any discussions with the accountant concerning the New Mexico gross receipts tax.

10. 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.

11. The Department received information from the IRS concerning the Tillmans' Schedule C business income. When the Department investigated, it found that neither of the Tillmans was registered with the Department to pay gross receipts taxes.

12. As a result of the information received from the IRS, the Department assigned a taxpayer identification number to the Tillmans and on May 18, 1997, the Department issued Assessment No. 2136432 for calendar year 1994 in the amount of \$575.86 gross receipts tax, \$57.58 penalty, and \$223.15 interest. On June 14, 1997, the Department issued Assessment No. 2143093

for calendar years 1995 and 1996 in the amount of \$1,457.38 gross receipts tax, \$145.74 penalty, and \$236.07 interest.

13. On June 9, 1997, the Tillmans filed a protest to Assessment No. 2136432. On June 25, 1997, the Tillmans filed a protest to Assessment No. 2143093.

DISCUSSION

At the hearing, the Taxpayers raised the following arguments in support of their protest to the Department's assessments: (1) because Ms. Tillman was not in a position to bargain with the companies for which she worked as an independent contractor and was not able to pass on the cost of the gross receipts tax, she should not be required to pay gross receipts tax to the state; (2) gross receipts tax is not due on Ms. Tillman's receipts because she was entitled to claim the deduction from gross receipts provided in Section 7-9-66, NMSA 1978; and (3) the Taxpayers should not be subject to penalty because they did not act in bad faith or with intent to defraud the state.

Liability of Independent Contractors for Gross Receipts Tax.

The Taxpayers do not dispute that Ms. Tillman worked as an independent contractor and not as an employee of the two food companies with which she held contracts. The Taxpayers nonetheless argue that Ms. Tillman should not be treated as engaging in business for purposes of the New Mexico gross receipts tax because she was not in a position to bargain with the companies in order to pass on the cost of the gross receipts tax.

Section 7-9-4, NMSA 1978, imposes an excise tax on the gross receipts of any 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.*" (emphasis added). 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 acting as independent contractors. In this case, Ms. Tillman entered into contracts to stock shelves in order to obtain the benefit of earning money. Because stocking shelves comes within the broad classification of “any activity”, her work meets the statutory definition of engaging in business.

New Mexico’s gross receipts tax is imposed on the seller of goods and services, not on the buyer. As a practical matter, the tax is simply part of the seller’s cost of doing business. Although it is a common practice for sellers to pass the cost of the gross receipts tax on to the buyer, the seller’s ability to separately charge or obtain reimbursement of the tax does not affect the seller’s legal obligation to pay tax to the state. In the absence of a specific statutory exemption or deduction, Ms. Tillman is liable for gross receipts tax on receipts from her activities as an independent contractor.

Deduction Provided in Section 7-9-66, NMSA 1978.

The Taxpayers maintain that Ms. Tillman is not subject to gross receipts tax because she is entitled to claim the deduction provided in Section 7-9-66, NMSA 1978, which states:

Receipts derived from commissions on sales of tangible personal property which are not subject to the gross receipts tax may be deducted from gross receipts.

Regulation 3 NMAC 2.66.1.12 provides that when receipts from selling tangible personal property are either exempted from gross receipts tax or deductible from gross receipts, commissions paid on those sales are entitled to the deduction provided in Section 7-9-66.

Ms. Tillman testified she was told that the two companies for which she worked did not pay gross receipts tax on their sale of food products to the commissary. This information is consistent with the deduction provided in Section 7-9-54(A), NMSA 1978, for receipts from selling tangible personal property to the United States or any governmental unit, subdivision, agency, department or instrumentality thereof. This information does not, however, support the conclusion that Ms. Tillman is

entitled to deduct her receipts as being derived from commissions on the sale of food products to the government.

Ms. Tillman does not take title to or have any ownership interest in the products she stocks, nor does she participate in soliciting or negotiating the contract under which the commissary purchases those products. Ms. Tillman is paid 25 cents for each case of food products she stocks on the shelves of the commissary. Her compensation is not contingent on the price or the sale of the products. Whether the commissary sells all of the products at a premium price, half of the products at a sale price, or none of the products, Ms. Tillman is paid exactly the same amount for her services in stocking those products on the shelves. These facts do not support the Taxpayers' position that Ms. Tillman's receipts are derived from commissions on the sale of food products to the federal government or that she is entitled to the deduction provided in Section 7-9-66.

Assessment of Penalty.

The Taxpayers object to the imposition of penalty because their failure to pay gross receipts tax on Ms. Tillman's income was due to a lack of knowledge and not to bad faith or an intent to defraud the state. Section 7-1-69, NMSA 1978 (1995 Repl.Pamp. and 1996 Supp.) governs the imposition of penalty during the periods at issue in this protest. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent:

in the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid...

The statute imposes penalty based upon negligence (as opposed to fraud) for failure to timely pay tax. There is no contention on the part of the Department that the Taxpayers' failure to report and pay gross receipts tax was the result of bad faith or fraud. What remains to be determined is whether the Taxpayers were negligent in failing to report their taxes properly.

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC

1.11.10 as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, the Taxpayers' failure to report and pay gross receipts tax was based on their lack of knowledge of New Mexico's tax laws. New Mexico has a self-reporting tax system that relies upon taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. There are insufficient government resources to audit every taxpayer periodically to assure tax compliance. Every person is therefore charged with the reasonable duty to ascertain the possible tax consequences of his or her actions, and the failure to do so constitutes negligence for purposes of Section 7-1-69(A). *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).

Although the Taxpayers used an accountant to file their federal income tax returns, they did not make any inquiry as to whether there might be other taxes due in connection with the income reported as business income on Schedule C of their Federal Forms 1040. Thus, although reliance on the advice of a competent tax advisor can be a defense to the imposition of penalty under Regulation 3 NMAC 1.11.11(4), there is no evidence in this case that the Tillmans sought or received any advice with regard to their gross receipts tax liability for the years in question. Although the Taxpayers acted in good faith, with no intention to avoid the payment of taxes, they were negligent in failing to take such action as

was required to determine their tax liability to the state. For this reason, penalty was properly imposed under Section 7-1-69(A).

CONCLUSIONS OF LAW

1. The Taxpayers filed timely, written protests to Assessment Nos. 2136423 and 2143093 pursuant to Section 7-1-24, NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. Ms. Tillman was engaging in business in New Mexico as defined in Section 7-9-3(E), NMSA 1978, and was subject to gross receipts tax on her receipts from acting as an independent contractor during the years at issue.

3. Ms. Tillman's receipts were not derived from commissions on the sale of food products to the United States government and Ms. Tillman was not entitled to the deduction provided in Section 7-9-66, NMSA 1978.

4. The Taxpayers were negligent in failing to report gross receipts tax on business income earned during tax years 1994, 1995 and 1996 and penalty was properly imposed pursuant to Section 7-9-69(A).

For the foregoing reasons, the Taxpayers' protest IS HEREBY DENIED.

DONE, this 26th day of January 1998.