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

IN THE MATTER OF THE PROTEST OF
QUE LINDA, ID. NO. 02-163233-00 2 NO. 98-07
PROTEST TO ASSESSMENT NO. 2063602

DECISION AND ORDER

THIS MATTER came on for formal hearing on January 28, 1998, before Gerald B. Richardson, Hearing Officer. Que Linda, hereinafter, "Taxpayer", was represented by Mr. Robert Sanchez, co-owner. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Esq. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Luz de Nambe is a business engaged in retailing cast metal serving pieces and candlesticks which are commonly known as "Nambeware".

2. For many years, Linda Sanchez, co-owner of the Taxpayer, has worked for Luz de Nambe as an employee in one of their retail outlets, selling Nambeware.

3. Customers who purchase Nambeware sometimes desire to have it engraved. Luz de Nambe offered these customers engraving services for an add-on to the price of the piece purchased. Luz de Nambe reports and pays gross receipts tax on the total amount of money they charge their customers for the piece(s) sold and for any additional engraving charges.

4. Starting in about 1991, Linda Sanchez, in order to earn additional income, agreed to do engraving for Luz de Nambe, in addition to her duties as an employee. She was paid on a piece-work basis, using her own engraving tool. She could choose where she did the engraving and she did it at the shop, both during and after hours, and she also took work home to engrave.

5. The Taxpayer registered with the Department as a business under the name, Que Linda, on January 14, 1991, and obtained a taxpayer identification number with the Department. Que Linda was the business through which Linda Sanchez ran her engraving business. Ms. Sanchez had hoped she would pick up other engraving business from customers other than Luz de Nambe, but that never materialized.

6. For tax year 1993, Linda Sanchez received a W-2 form from Luz de Nambe reporting the wages she earned as an employee. For that same year, she also received a federal form 1099 from Luz de Nambe reporting as non-employee compensation the amounts paid to Mrs. Sanchez for the engraving services she performed for them.

7. In reporting their income to the Internal Revenue Service for tax year 1993, Mr. and Mrs. Sanchez reported the amount reported on the form 1099 as income from a business on federal Schedule C. Business expenses were also claimed against the income reported.

8. The Taxpayer did not report the compensation it received for performing engraving services for Luz de Nambe during 1993 to the Department as gross receipts from engaging in business and no gross receipts taxes were paid on those amounts.

9. The Taxpayer has not produced a non-taxable transaction receipt from Luz de Nambe in support of any claim of deduction for its receipts from performing engraving services for Luz de Nambe.

10. The Department has an information sharing agreement with the Internal Revenue Service whereby information contained in the federal income tax returns of New Mexico residents is shared with the Department.

11. As a result of information, the Department received from the Internal Revenue Service about the income reported by Mr. and Mrs. Sanchez on their Schedule C for 1993, on August 24, 1996, the Department issued Assessment No. 2063602 to the Taxpayer, assessing $699.42 in gross receipts tax, $69.95 in penalty and $292.42 in interest for tax year 1993.

12. On September 21, 1996, the Taxpayer filed a written protest to Assessment No. 2063602 with the Department.

DISCUSSION

The Taxpayer disputes its liability for the taxes assessed on several grounds. First, the Taxpayer alleges that Mrs. Sanchez was an employee of Luz de Nambe with respect to the engraving services she performed and that as such, her receipts would be exempt from gross receipts tax under the exemption found at Section 7-9-17 NMSA 1978, which provides an exemption for wages paid to employees. In determining whether a person is an employee or an independent contractor, the rule in New Mexico, and in general, is that the principal consideration is the right to control. Thus, the relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the results, however, and not the details of the performance, the worker is usually considered to be an independent contractor. ***Buruss v. B.M.C. Logging Co.***, 38 N.M. 254, 31 P.2d 263 (1934). There are many factors to be evaluated in making the determination of employee or independent contractor status. The Department has

adopted a regulation under Section 7-9-17 to provide criteria by which the status may be determined. Regulation 3 NMAC 2.12.7. provides as follows:

> 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 mean "mere suggestion').
>
> If all of the indicia mentioned 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.

Applying these criteria to Mrs. Sanchez' work as an engraver, it is clear that she was not an employee. She was not paid a wage or salary. She was paid by the piece. There was no income tax or F.I.C.A. tax withheld. Luz de Nambe considered Mrs. Sanchez to be an independent contractor and not an employee as evidenced by the fact that the amounts it paid her for engraving were reported on a Form 1099, rather than a W-2. Finally, and most significantly, it is clear that Luz de Nambe only exercised control over the result, the engraved end product, because Mrs. Sanchez could choose when and where she performed the engraving work. Because Mrs. Sanchez' compensation for performing engraving services was not performed as an employee, the exemption for wages of employees would not apply to exempt Mrs. Sanchez' gross receipts from performing engraving services from gross receipts tax.

The second argument raised by the Taxpayer is that it should not be held liable for gross receipts tax on the engraving services because gross receipts tax was already paid on the value of

those services when they were sold to the ultimate purchaser by Luz de Nambe. While the Taxpayer is correct that gross receipts tax is imposed twice under these circumstances, it does not provide a defense to the assessment at issue. This is because there were two separate transactions, which are each subject to tax under the definition of gross receipts. 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 was engaged in the business of providing engraving services and its receipts from performing those services are subject to the gross receipts tax. Luz de Nambe is in the business of selling Nambeware, some of which is custom engraved. Both transactions are subject to gross receipts tax unless a deduction or exemption applies. In fact, the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978 does provide for certain deductions to avoid the pyramiding of tax. There is a deduction which could have been applicable to the Taxpayer's receipts in this instance. Section 7-9-48 NMSA 1978 provides a deduction for receipts from selling a service for resale, which is what the Taxpayer did, since Luz de Nambe resold the engraving services. The problem for the Taxpayer is that the statute requires that in order to claim the deduction, the buyer of the service must have delivered a non-taxable transaction certificate to the seller for the seller to claim the deduction. The Taxpayer never produced a nontaxable transaction certificate from Luz de Nambe, nor was there any evidence that they ever had one. Thus, the deduction is not available to the Taxpayer.

The Taxpayer argued that this is somehow unfair. The Taxpayer argued that if it had known that it needed such a nontaxable transaction certificate, it would have gotten one, and the Taxpayer implied that somehow, this was the Department's fault.

While I have no question that the Taxpayer was not aware of the need for a non-taxable transaction certificate, the Taxpayer admitted to receiving a filers kit when it registered with the Department. Had the Taxpayer read those materials, it would have explained how the gross receipts tax applies and provided information about deductions and exemptions. While the Department does try to provide information to assist taxpayers with their responsibility to accurately report and pay taxes, ultimately, it is the taxpayer's responsibility to understand the tax consequences of its activities. ***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). Thus, the Department's failure to do more than provide the Taxpayer with the filer's kit and registration materials, does not provide a defense to the assessment at issue. In this regard, the Taxpayer never did provide an explanation as to why gross receipts taxes were not reported and paid, other than that it did not know taxes were due. While I do not doubt the veracity of this statement, as the ***Tiffany Construction*** case above notes, taxpayer ignorance is not a defense to a tax liability. Taxpayers are under an obligation to make inquiry, either with the Department, by reading the statutes and published materials of the Department, or by consulting with a tax expert, to understand how the tax laws apply to their activities. Having failed to do so, the Taxpayer may not now complain of the consequences which flow from that failure.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2063602 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was not an employee of Luz de Nambe and thus may not claim the exemption from gross receipts tax found at Section 7-9-17 NMSA 1978.

3. Because the Taxpayer did not receive a nontaxable transaction certificate from Luz de Nambe, it was not entitled to claim a deduction pursuant to Section 7-9-48 NMSA 1978.

4. Ignorance of how the tax laws apply to the Taxpayer's activities is no defense to an otherwise proper assessment of tax.

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

DONE, this 6th day of February, 1997.