

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

IN THE MATTER OF THE PROTEST OF
DEPENDABLE MAINTENANCE SERVICE
ID. NO. 01-876159-00-3
ASSESSMENT NOS. 2109506 & 2109507

98-17

DECISION AND ORDER

This matter came on for formal hearing on March 26, 1998 before Margaret B. Alcock, Hearing Officer. Thomas D. Hassler appeared on his own behalf as the sole proprietor of Dependable Maintenance Service. The Taxation and Revenue Department ("the Department"), was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In the mid-1970s, Mr. Hassler started in the business of performing maintenance services. When Mr. Hassler went to the City of Albuquerque to obtain a business license, he was told he had to register for payment of gross receipts tax. Mr. Hassler subsequently went to the Taxation and Revenue Department and registered under the Department's combined reporting system (CRS) for payment of gross receipts, compensating and withholding taxes.
2. During the early years of the business, Mr. Hassler worked primarily as a subcontractor. Around 1980, Mr. Hassler obtained a contract to perform maintenance services for Burger King. From that point on, this contract accounted for virtually all of his business.
3. Mr. Hassler's services included basic cleaning, degreasing floors, washing windows and minor repair and painting projects.

4. Mr. Hassler charged a base fee, plus an hourly fee for additional maintenance projects requested by Burger King.

5. Burger King did not withhold income taxes or social security taxes from its payments to Mr. Hassler. Each year, Burger King issued Mr. Hassler a federal Form 1099 reporting his payments under the maintenance contract.

6. Mr. Hassler reported and paid self-employment taxes to the federal government and reported his income and business deductions on Schedule C of federal Form 1040.

7. In 1982, Mr. Hassler applied to the Department to file his gross receipts tax returns on a six-month basis.

8. After 1983, Mr. Hassler fell behind in reporting and paying his gross receipts taxes.

9. In 1985, Mr. Hassler filed an application with the Department to obtain New Mexico nontaxable transaction certificates.

10. In January 1987, Mr. Hassler filed a registration change request with the Department changing the location and mailing addresses of his business.

11. In 1988, Mr. Hassler's registration for payment of gross receipts, compensating and withholding taxes was retired.

12. Mr. Hassler was not affirmatively misled concerning his liability for gross receipts tax by a Department employee.

13. The Department's CRS-1 Filer's Kit contains a Registration Change Request form and an ID Number Cancellation Request form. Department Exhibit C.

14. It is Department policy that any change to a taxpayer's registration, including retirement of a taxpayer's account, must be documented by a written request from the taxpayer.

15. The Department has an information sharing agreement with the IRS under which the Department is able to obtain information about the federal income tax returns filed by taxpayers who are residents of New Mexico. The information is not available to the Department until about three years after the federal returns have been filed.

16. The Department received information from the IRS concerning Mr. Hassler's business income as reported on Schedule C of Mr. Hassler's 1993 and 1994 federal income tax returns. When the Department investigated, it found that Mr. Hassler's registration for payment of gross receipts tax was retired.

17. On February 19, 1997, as a result of the information received from the IRS, the Department issued two assessments against Mr. Hassler for calendar years 1993 and 1994: Assessment No. 2109506 in the amount of \$2,245.92 gross receipts tax, \$224.64 penalty, and \$1,193.16 interest; and Assessment No. 2109507 in the amount of \$2,315.88 gross receipts tax, \$231.60 penalty, and \$882.93 interest.

18. On March 17, 1997, the Department received Mr. Hassler's written protest to the above assessments.

DISCUSSION

Mr. Hassler's protest raises the issue of estoppel, asserting that Mr. Hassler should not be held liable for the assessments of gross receipts tax, penalty and interest because he was misinformed as to his tax liability by a Department employee. At the hearing, Mr. Hassler suggested that the employee may have concluded that Mr. Hassler was an employee of Burger King, rather than an independent contractor. It was never clear whether Mr. Hassler was taking an affirmative position that he was an employee of Burger King and therefore exempt from gross receipts tax or whether he was simply offering a possible explanation for the advice he said he received. Because Mr. Hassler's

status as an independent contractor affects his liability for the tax assessed, that issue will be addressed as well as the issue of estoppel.

I. Employee v. Independent Contractor.

A. *Statement of the Law.* Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. “Engaging in business” is defined in Subsection E of Section 7-9-3 NMSA 1978 to mean “carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit.” The term “gross receipts” is defined in Subsection F of Section 7-9-3 NMSA 1978 as:

the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico, from selling services performed outside New Mexico the product of which is initially used in New Mexico or from performing services in New Mexico.

Section 7-9-17 NMSA 1978 exempts from gross receipts tax “the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.”

In determining whether a person is an employee or an independent contractor, the common law meaning of those terms will apply unless there is persuasive evidence of a contrary legislative intent. *Harger v. Structural Services, Inc.*, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In *Harger*, the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) (1958) to determine a worker’s status as an employee or an independent contractor. Among the factors to be considered are: whether the party employed engages in a distinct occupation or business; whether the work is part of the employer’s regular business; the skill required in the particular occupation; whether the employer supplies the instrumentalities, tools, or the place of work; the duration of a person’s employment and whether that person works full-time or regular hours; or whether the parties believe they have created the relationship of employer and employee, insofar as this belief indicates an assumption of control by one and submission to control

by the other. *Id.*, comments h-m. The manner and method of payment is also relevant to the issue of control. *Harger*, 121 N.M. at 667, 916 P.2d at 1334; *Tafoya v. Casa Vieja, Inc.*, 104 N.M. 775, 777, 727 P.2d 83, 85 (Ct. App. 1986). While all of these factors may be considered, it is the totality of the circumstances that should determine whether the employer has the right to exercise essential control over a particular worker.

The Department has adopted a regulation under Section 7-9-17 that uses similar criteria to determine whether a worker qualifies as an employee. Regulation 3 NMAC 2.17.7 (formerly GR 17:1) provides as follows:

7.1 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”).

B. Burden of Proof. There is a statutory presumption that the Department’s assessment of gross receipts taxes is correct. Section 7-1-7, NMSA 1978; *Mears v. Bureau of Revenue*, 87 N.M. 240, 241, 531 P.2d 1213, 1214 (Ct. App. 1975). In order for the taxpayer to be successful, he must clearly overcome this presumption. *Archuleta v. O’Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App.

1972). Moreover, where an exemption from tax is claimed, the exemption is strictly construed in favor of the taxing authority. *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *Rock v. Commissioner*, 83 N.M. 478, 479, 493 P.2d 963, 964 (Ct. App. 1972).

C. *Application of Law to Facts.* In this case, Mr. Hassler entered into a contract with Burger King to provide maintenance services, including cleaning and minor repair jobs. When the Department's counsel asked Mr. Hassler whether he was an employee of Burger King, Mr. Hassler answered that it was an "interesting" question. Mr. Hassler stated that:

they had the right to tell me what to do, where to do it and when to do it. So it's hard to say. Because of the control that they had I could say yes, I was an employee. But as far as for income purposes, it appeared that they did not pay my federal income tax or anything of that nature. So, yes and no.

Mr. Hassler did not provide any other testimony to illustrate the nature of Burger King's control. For example, there was nothing to indicate whether someone at Burger King would simply tell Mr. Hassler that the floor at a certain restaurant location needed to be degreased that night or whether Burger King directed Mr. Hassler as to the method and specific cleaning agent to be used in cleaning the floor.

Applying the factors set out in the Restatement (Second) of Agency and in the Department's regulation to the testimony and documentary evidence that was submitted at the hearing leads to the conclusion that Burger King did not exercise sufficient control over the manner in which Mr. Hassler accomplished his work to support the conclusion that he was an employee:

The sale of maintenance and janitorial services is a distinct line of business; when Mr. Hassler first started his business, he applied to the City of Albuquerque for a business license.

The sale of maintenance services is not part of Burger King's regular business.

Mr. Hassler's Schedule C deductions establish that he provided his own supplies and transportation.

The registration change request filed with the Department in 1987 establishes that Dependable Maintenance Service maintained a business name, location and telephone number separate from that of Burger King. Mr. Hassler took deductions on his Schedule C for office expenses and utilities.

Neither Burger King nor Mr. Hassler considered Mr. Hassler to be an employee for federal tax purposes.

The last factor is of particular importance in determining whether a person is acting as an employee or an independent contractor. New Mexico case law holds that a taxpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer may not treat a transaction one way for purposes of federal tax and another way for purposes of state gross receipts tax. *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *Co-Con, Inc. v. Bureau of Revenue*, 87 N.M. 118, 121-122, 529 P.2d 1239, 1241-1242 (Ct. App.), *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974).

In this case, Burger King issued Mr. Hassler an annual Form 1099 indicating that its payments to him were nonemployee compensation. There is no evidence that Burger King provided either unemployment insurance or workmen's compensation insurance. Mr. Hassler reported and paid self-employment taxes to the federal government, reported his income as business income on his federal income tax return, and listed his occupation as "self-employed." *See* Department Exhibits H and I. Mr. Hassler testified to his understanding that federal law required him to file both a Schedule C (Profit or Loss from Business) and a Schedule SE (Self-Employment Tax) with his federal Form 1040. There is no indication that Mr. Hassler has or intends to file amended federal returns to report his earnings as wages rather than as business income. Under New Mexico law, Mr. Hassler may not claim to be an independent contractor for purposes of filing his 1993 and 1994 federal and state income tax returns and then claim to be an employee exempt from filing gross receipts tax returns during the same period.

Based on the facts in the record, Mr. Hassler has not met his burden of proving that his relationship with Burger King was that of an employee entitled to the exemption provided in Section 7-9-17 NMSA 1978.

II ESTOPPEL

A. *Statement of the Law.* Having established that Mr. Hassler was acting as an independent contractor and that his income was subject to New Mexico gross receipts tax, the issue to be determined is whether equitable estoppel should operate to estop the Department from enforcing the assessments of gross receipts tax, penalty and interest issued against him for the years 1993 and 1994. As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when “right and justice demand it.” *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989).

Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: where the taxpayer acted according to a revenue ruling addressed to the taxpayer or where the taxpayer acted according to a regulation.

Case law provides for estoppel against the State where right and justice demand its application. For estoppel to apply, the party seeking it must show: (1) lack of knowledge of the true facts in question; (2) detrimental reliance on the other party’s conduct; and (3) that its own reliance was reasonable. *Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

B. Application of Law to Facts. Mr. Hassler testified that his failure to pay gross receipts tax was not due to his reliance on either a revenue ruling or a regulation issued by the Department. Accordingly, there is no statutory basis for estoppel under Section 7-1-60.

(1) Reliance on Advice of Department Employee. Mr. Hassler argues that the Department should be estopped from enforcing its assessments of gross receipts tax, penalty and interest because Mr. Hassler was affirmatively misled by a Department employee who told Mr. Hassler his income was exempt from gross receipts tax and retired his CRS registration. A review of the evidence reveals several inconsistencies in Mr. Hassler's account of his meeting with the Department employee. In the protest filed in March 1997, Mr. Hassler asserted that he visited the Department's Albuquerque office "in 1993 or so" and was told that he was no longer required to file CRS-1 reports because his income was exempt. The protest letter also states that the Department employee retired Mr. Hassler's account at that time.

The Department's auditor testified that according to the Department's records, Mr. Hassler's CRS registration was retired in 1988. The Department was not able to locate a copy of the document retiring the account. Mr. Hassler responded to this information by stating that he did not keep any notes and may have been mistaken as to the date. Mr. Hassler stated numerous times that his visit to the Albuquerque office was made in response to the tax amnesty program provided by the New Mexico legislature. He had gotten behind on filing his CRS-1 returns when he received a notice from the Department informing him of the amnesty program. Mr. Hassler stated that the amnesty program offered him an opportunity to get everything straightened out and so he took his records to the Albuquerque office for review. He apologized to the hearing officer for not knowing the date, stating: "It's just that I cannot remember. And my records are not where I can grab them or find them for those years anyway."

Mr. Hassler testified that he met with a Department employee who asked several questions regarding the source of Mr. Hassler's income. The Department employee then told Mr. Hassler his income was exempt from gross receipts tax. Mr. Hassler said he "didn't fully understand what he was meaning at that time and I'm not so sure that I know now what he would say." Mr. Hassler testified several times that his CRS account was retired by the Department employee when Mr. Hassler went to the Albuquerque office to take advantage of the tax amnesty program offered by the legislature. Mr. Hassler did not get a copy of the document retiring the account, did not know the name of the employee with whom he met, and did not keep any notes of the meeting.

It is understandable that Mr. Hassler might not remember exactly when he visited the Albuquerque office. Had the tax amnesty program occurred in 1988, when Mr. Hassler's CRS account was retired, it might be possible to conclude that he had simply lost track of the passage of time. In this case, however, the tax amnesty program occurred during the fiscal year beginning July 1, 1985. Subsection A of Laws 1985, Chapter 44, Section 1 reflects the following appropriation by the 1985 legislature:

A. one hundred thousand dollars (\$100,000) is appropriated from the general fund to the taxation and revenue department for expenditure in the seventy-fourth fiscal year for the purpose of conducting a tax amnesty program as provided in Subsection B of this section. Any unexpended or unencumbered balance remaining at the end of the seventy-fourth fiscal year shall revert to the general fund.

Subsection B authorized the governor "to declare an amnesty period of no more than ninety days, *provided that the entire amnesty period is within the seventy-fourth fiscal year*" (emphasis added). The state's seventy-fourth fiscal year is the year beginning July 1, 1985 and ending June 30, 1986. A review of the state's session laws confirms that there has been no tax amnesty offered to CRS taxpayers since 1985.

Mr. Hassler's CRS account was retired in 1988. It is therefore impossible for the account to have been retired by the Department employee with whom Mr. Hassler said he met during the state's tax amnesty program. Nor does the evidence support the conclusion that Mr. Hassler believed the account was retired at that time since he himself filed a CRS registration change request with the Department in January 1987 to reflect a change in his business location and address (Department Exhibit E).

Based on my observations and the discrepancies in the testimony resulting from Mr. Hassler's admitted lack of memory and the complete absence of any records or notes that could refresh or substantiate his recollection, I do not find Mr. Hassler's testimony to be reliable. While it is possible that at some point an employee of the Department met with Mr. Hassler concerning his delinquent tax liabilities, I simply do not believe Mr. Hassler's testimony that a Department employee reviewed all pertinent information, including Mr. Hassler's Schedule C business income and deductions, advised Mr. Hassler that he was exempt from gross receipts tax on that business income, and then ignored Department policy by retiring Mr. Hassler's account without asking him to sign an ID Number Cancellation Request form. In light of my finding that Mr. Hassler was not affirmatively misled concerning his liability for gross receipts tax by a Department employee, there is no basis for applying the doctrine of equitable estoppel.

Even if Mr. Hassler's testimony were accepted as accurate, the account of his meeting with a Department employee would not satisfy the requirements for equitable estoppel. In particular, Mr. Hassler's account of events fails to establish that his reliance on the advice he claims to have received from the Department employee was reasonable.

When Mr. Hassler first started business, he was told by the City of Albuquerque that he had to register with the state for payment of gross receipts tax. When Mr. Hassler registered with the

Department, he was told he would have to file and pay gross receipts tax on his business income. The CRS-1 Filer's Kit sent to CRS taxpayers for the period July through December 1987, which is prior to retirement of Mr. Hassler's CRS account, states that every person engaged in business in New Mexico is subject to gross receipts tax (*see*, Department Exhibit C). In describing his meeting with the Department employee, Mr. Hassler testified that he did not fully understand what the employee meant when he told Mr. Hassler that his income was exempt from gross receipts tax. Even so, Mr. Hassler made no effort to clarify the basis for the statement or obtain written confirmation from the Department concerning his tax status. Indeed, Mr. Hassler did not even note the name of the employee advising him, testifying that "back then, I had no reason to find out that employee's name."

Under the circumstances presented, Mr. Hassler could not reasonably rely on oral advice that directly contradicted information he had previously received from the City of Albuquerque, from other employees of the Department and from the Department's written tax filing instructions. The fact that Mr. Hassler did not fully understand why his income should be exempt would have provided even more reason for him to seek written clarification concerning his tax liability to the state. Based on the provisions of Section 7-1-60, of which all taxpayers have at least constructive notice, reliance on the oral representations of a Department employee is not reasonable. *See also, Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (In light of New Mexico's statute providing for estoppel, taxpayer's reliance on the oral representations of a Department employee was not reasonable).

(2) *Delay in Issuing the Assessment.* Finally, Mr. Hassler argues that the Department's delay in notifying him of his liability for payment of gross receipts tax on his 1993 and 1994 business income should estop the Department from enforcing its assessments. Under the Tax Administration Act, the Department has seven years from the end of the calendar year in which a tax

is due to issue an assessment when the taxpayer has failed to complete and file any required return. Section 7-1-18(C) NMSA 1978. As a six-month filer, the due dates for Mr. Hassler's CRS returns for 1993 and 1994 were as follows: for the period January-June 1993: July 25, 1993; for the period July-December 1993: January 25, 1994; for the period January-June 1994: July 25, 1994; for the period July-December 1994: January 25, 1995. *See*, Regulation 3 NMAC 2.11.13 (formerly GR 11:8).

Mr. Hassler did not file any CRS returns for 1993 or 1994, and the Department's February 19, 1997 assessments were well within the seven-year statute of limitations provided in Section 7-1-18(C). Mr. Hassler has not cited to any authority that would preclude the Department from enforcing an assessment issued within the period allowed by statute based solely on a finding of unfair delay in issuing the assessment. Nor is it reasonable for a taxpayer to rely on the Department's failure to issue an assessment within a few months of the due date of a return as evidence that no tax is due when the statute of limitations for issuing the assessment is seven years. Mr. Hassler has not established a basis for application of the doctrine of equitable estoppel in connection with the Department's delay in issuing the assessments.

CONCLUSIONS OF LAW

1. Mr. Hassler filed a timely, written protest to Assessment Nos. 2109506 & 2109507 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over the parties and the subject matter of this protest.
2. Mr. Hassler was not an employee of Burger King and is not entitled to claim the exemption from gross receipts tax provided in Section 7-9-17 NMSA 1978.
3. Equitable estoppel does not apply to prevent the Department from enforcing its assessments of gross receipts tax, interest and penalty.

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

DONE, this 6th day of April 1998.