

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

IN THE MATTER OF THE PROTEST  
OF KEN MILLER REAL ESTATE  
ID. NO. 01-806391-00 8  
ASSESSMENT NO. 2204815

98-37

**DECISION AND ORDER  
ON MOTION FOR SUMMARY JUDGMENT**

Ken Miller ("Miller"), sole proprietor of Ken Miller Real Estate, moved for summary judgment on his protest to the Taxation and Revenue Department's assessment of \$3,575.55 in gross receipts tax, interest and penalty for the period January 1-December 31, 1994. Miller was represented by R. "Trey" Arvizu, III, his attorney. The Taxation and Revenue Department ("Department") was represented by Frank D. Katz, Chief Counsel. The matter was submitted to Margaret B. Alcock, Hearing Officer, on June 22, 1998. Based on the facts and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Miller is a real estate broker in Roswell, New Mexico. *Statement A, Motion for Summary Judgment.*
2. Miller is registered with the Department under tax identification number 01-806391-00 8. *Statement B, Motion for Summary Judgment.*
3. On November 3, 1997, the Department mailed notice of a limited scope audit to Miller and his wife, Betty Miller, based on a discrepancy between the business income reported on their 1994 federal income tax return and the receipts reported on Miller's New Mexico gross receipts

tax returns for the period January 1-December 31, 1994. *Statement C and Exhibit A, Motion for Summary Judgment.*

4. The Department's notice stated that unless nontaxable transaction certificates ("NTTCs") and other documents required to support deductions from gross receipts were in Miller's possession within 60 days from the date of the notice, the deductions "will be disallowed." *Exhibit A, Motion for Summary Judgment.*

5. The 60-day period within which Miller could obtain NTTCs or other documents to support deductions taken from gross receipts expired January 2, 1998. *Exhibit A, Motion for Summary Judgment.*

6. On December 31, 1997, the Department issued Assessment No. 2204815 to Miller in the amount of \$3,575.55, representing gross receipts tax, penalty and interest due for the period January 1-December 31, 1994. *Statement D and Exhibit B, Motion for Summary Judgment.*

7. The statute of limitations for assessing the tax at issue expired January 1, 1998. *Statement E, Motion for Summary Judgment.*

8. On January 30, 1997, Miller filed a protest to the Department's assessment.

## **DISCUSSION**

The sole issue presented is whether the Department wrongfully assessed or was estopped from assessing Miller for gross receipts tax prior to the expiration of the 60-day notice period provided in Section 7-9-43 NMSA 1978 (1997 Supp.).<sup>1</sup>

**A. Authority to Assess.** Subsection B of Section 7-9-43 provides that NTTCs and other documents required to support deductions from gross receipts

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<sup>1</sup> The 1997 amendment to Section 7-9-43 applies to audits where the 60-day notice expired after the amendment's effective date of July 1, 1997. All references to Section 7-9-43 are to the version set forth in the 1997 cumulative

should be in the possession of the seller at the time the return is due for receipts from the transactions. If the seller is not in possession of these documents within sixty days from the date that the notice requiring possession of these documents is given to the seller by the department, deductions claimed by the seller or lessor that require delivery of these documents shall be disallowed.

Miller argues that Section 7-9-43(B) prohibits the Department from assessing gross receipts tax prior to the expiration of the 60-day notice period.<sup>2</sup> Miller asserts that his gross receipts tax deductions "were presumed to be correct until January 2, 1998." Only after this date could the Department determine that Miller did not have possession of the documents required to support his deductions and issue an assessment. Motion of Summary Judgment, pages 3-4.

It is a rule of statutory construction that statutes *in pari materia* should be read together to ascertain legislative intent. *Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 225, 668 P.2d 1101, 1102 (1983); *See also, Runyan v. Jaramillo*, 90 N.M. 629, 631, 567 P.2d 478, 480 (1977) (statutes on the same general subject should be construed by reference to each other). In this case, Miller's proposed construction of Section 7-9-43 conflicts with the overall statutory scheme governing deductions from gross receipts. Section 7-9-5 NMSA 1978 (1995 Repl. Pamp.) creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Sections 7-9-46 through 7-9-75 NMSA 1978 (1995 Repl. Pamp.) set out specific requirements that must be met before a taxpayer is entitled to claim a deduction from gross receipts. For example:

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supplement; references to other sections of the Gross Receipts and Compensating Tax Act are to the versions of those statutes in effect during the tax period January-December 1994.

<sup>2</sup> Miller later argues that the Department's assessment is estopped by the 60-day notice requirement in Section 7-9-43(A). *See*, Motion for Summary Judgment at 4. Subsection B of Section 7-9-43 applies to deductions taken under Sections 7-9-57, 7-9-58 and 7-9-74 NMSA 1978. Subsection A applies to all other deductions requiring possession of NTTCs. Although the facts submitted by the parties do not indicate which statutory deductions Miller claimed during the audit period, the language in Subsections A and B concerning application of the 60-day period is virtually identical, and the outcome of this matter would be the same regardless of which subsection applies to Miller's deductions.

Section 7-9-47 provides a deduction for receipts from selling tangible personal property "if the sale is made to a person who delivers a nontaxable transaction certificate to the seller."

Section 7-9-48 provides a deduction for receipts from selling services for resale "if the sale is made to a person who delivers a nontaxable transaction certificate to the seller."

Section 7-9-57 provides a deduction for receipts from selling services the product of which is delivered and initially used out-of-state if the buyer "delivers to the seller either a nontaxable transaction certificate or other evidence acceptable to the secretary...."

In each case, the seller's right to a deduction does not exist until the buyer delivers an NTTC or other acceptable documentation to the seller. Construing Section 7-9-43 to create a presumption of correctness for deductions taken by a seller who does *not* have the required documents is inconsistent with the language of the statutes granting those deductions. Such a construction also conflicts with the established rule that where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation & Revenue Department*, 111 N.M. 735, 740-41, 809 P.2d 649, 654-55 (Ct. App. 1991); *Security Escrow Corp. v. State Taxation and Revenue Department*, 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988).

Nothing in Section 7-9-43 indicates that the legislature intended to reverse established presumptions in favor of the taxability of receipts and create a new presumption of correctness for unsubstantiated deductions from gross receipts. To the contrary, the last sentence of Section 7-9-43(B) confirms that the right to a deduction arises "[w]hen the seller accepts these documents within the required time and in good faith that the buyer will employ the property or service transferred in a

nontaxable manner..." Until delivery and acceptance of documents required to support his deductions, the seller's receipts are presumed to be taxable. Section 7-9-5 NMSA 1978 (Repl.Pamp.1995)

The 60-day notice provision allows the Department to give some finality to its audit findings and prevent surprise at any hearing held on the taxpayer's protest. The notice provision is not mandatory. In this case, the Department could have completed its audit and issued an assessment without giving Miller a 60-day notice. Under those circumstances, Miller would have the right to produce additional documentation to support his deductions from gross receipts right up to the date of the hearing on his protest. Rather than leaving the matter open, the Department elected to use the 60-day notice provided in Section 7-9-43 to limit the time within which Miller could demonstrate timely possession of NTTCs and other required documents. The Department's decision to issue the 60-day notice had no effect on the Department's right to issue an assessment. Nor did the assessment have any effect on Miller's right to dispute his liability for tax by producing additional evidence to substantiate his deductions within the 60-day period. To require the Department to let the statute of limitations run on Miller's gross receipts tax liability based on the possibility that Miller would produce documents to support his unsubstantiated deductions within the 60-day period would lead to an absurd and unjust result that could not have been intended by the legislature.

**B. Estoppel.** Miller argues that Section 7-1-60 NMSA 1978 (1995 Repl. Pamp.) estops the Department from enforcing its assessment of gross receipts tax. Section 7-1-60 states:

In any proceeding pursuant to the provisions of the Tax Administration Act, the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of *was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally* and in writing by the secretary.... (emphasis added).

Miller has not identified any Department regulation on which he relied in failing to pay gross receipts tax or in failing to provide documentation to support deductions taken during the audit period. Nor has Miller shown that he ever requested or received a Department ruling. Accordingly, the estoppel provisions of Section 7-1-60 do not apply in this case.

The sole basis for Miller's estoppel argument is that he was not given the full 60 days to respond to the notice issued pursuant to Section 7-9-43. It is undisputed that Miller had not produced documentation to support his deductions when the Department issued its assessment on December 31, 1997. The record is silent on whether Miller produced additional documents after the assessment was issued but prior to expiration of the 60-day notice period. In its response brief, the Department states that "[a]ny NTTCs obtained by the Taxpayer within the 60 day period, *i.e.*, by January 3, 1998, could be used by the Taxpayer to support deductions taken from gross receipts...." Response to Taxpayer's Motion for Summary Judgment, page 2. This statement, which has not been challenged by Miller, indicates the Department's willingness to honor all documents produced by Miller during the 60-day period, even if production occurred after the assessment was issued. In the absence of any evidence that the Department refused to adjust Miller's assessment to reflect documents provided within the 60-day period, Miller has no basis for arguing that the Department failed to follow the requirements of Section 7-9-43.

#### **CONCLUSIONS OF LAW**

1. Miller filed a timely, written protest to Assessment No. 2204815 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. No presumption of correctness applied to Miller's gross receipts tax deductions during the 60-day notice period provided in Section 7-9-43 NMSA 1978.

3. The Department was not prohibited from assessing Miller for gross receipts tax, interest and penalty prior to the expiration of the 60-day notice period provided in Section 7-9-43 NMSA 1978.

4. The Department was not estopped from assessing Miller for gross receipts tax, interest and penalty prior to the expiration of the 60-day notice period provided in Section 7-9-43 NMSA 1978.

For the foregoing reasons, Miller's Motion for Summary Judgment is denied.

DONE this 15<sup>th</sup> of July 1998.