

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

IN THE MATTER OF THE PROTEST
OF EILEEN P. CAHOON
ID. NO. 02-246724-00-6
ASSESSMENT NO. 2205089

98-38

DECISION AND ORDER

A formal hearing on the taxpayer's protest was held on July 13, 1998, before Margaret B. Alcock, Hearing Officer. Eileen P. Cahoon appeared at the hearing on her own behalf. The Taxation and Revenue Department ("Department"), was represented by Frank D. Katz, Chief Counsel. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1994, Eileen P. Cahoon, Ph.D., performed counseling services as an independent contractor for Desert Hills, a diagnostic and treatment center licensed by the New Mexico Department of Health.
2. Desert Hills paid Ms. Cahoon for her services. Desert Hills then resold Ms. Cahoon's services to insurance companies and paid gross receipts tax on the payments it received from the insurance companies.
3. Desert Hills provided Ms. Cahoon with a Form 1099 showing the amount of money Desert Hills paid Ms. Cahoon for her services during 1994.
4. Desert Hills did not provide Ms. Cahoon with a nontaxable transaction certificate ("NTTC") indicating that it was purchasing her services for resale.

5. Ms. Cahoon reported her receipts from performing services for Desert Hills on Schedule C to her 1994 federal income tax return. Ms. Cahoon did not report or pay New Mexico gross receipts tax on her receipts from Desert Hills.

6. In October 1997, the Department mailed notice of a limited scope audit to Ms. Cahoon based on the discrepancy between the business income reported on her 1994 federal income tax return and the receipts reported on her New Mexico gross receipts tax returns for the period January 1-December 31, 1994.

7. The amount of the discrepancy shown on the Department's notice represented an underreporting of greater than 25 percent.

8. The Department's notice stated that unless NTTCs or other documentation required to support deductions from gross receipts were in Ms. Cahoon's possession within 60 days from the date of the notice, the deductions would be disallowed. The 60-day period expired December 22, 1997.

9. When Ms. Cahoon received the Department's notice, she consulted a certified public accountant ("CPA") to determine how she should respond.

10. The CPA was slow to get back to Ms. Cahoon and then incorrectly advised her that individuals working for licensed health care entities were not subject to gross receipts tax. The CPA did not explain the use of NTTCs and did not tell Ms. Cahoon that any deduction of receipts from selling services for resale must be supported by an NTTC produced within the 60-day period provided in the Department's notice.

11. Because she did not understand the statutory requirements governing the deduction of receipts from performing services for resale, Ms. Cahoon did not make an effort to obtain an

NTTC from Desert Hills. Instead, she provided the Department with other documents to show that Desert Hills had resold her services and had paid gross receipts tax on the resale amount.

12. On December 18, 1997, Francisco Donez, the Department's auditor, told Ms. Cahoon that the documents she provided would not support her deductions and she must obtain an NTTC from Desert Hills before the expiration of the 60-day period.

13. Between 1994 and 1997, the business operated by Desert Hills was sold twice and Desert Hills' tax identification number was deactivated.

14. Ms. Cahoon does not know the details of the two transfers. Ms. Cahoon believes that Desert Hills was a corporation, but does not know whether the new owners purchased the shares of the corporation or simply purchased the corporation's assets.

15. In December 1997, the business was owned by Youth Services International of New Mexico ("YSI") and was operated under a different tax identification number than that used by Desert Hills.

16. In late December 1997, Ms. Cahoon located Dan Lopez, the former owner of Desert Hills. Mr. Lopez called Francisco Donez and told him that YSI was willing to issue an NTTC to Ms. Cahoon.

17. Mr. Donez told Mr. Lopez that Ms. Cahoon must have an NTTC issued under the tax identification number of the business for which she worked during 1994 and could not substitute an NTTC from YSI.

18. Mr. Donez advised Mr. Lopez to reactivate Desert Hills' tax identification number and issue an NTTC to Ms. Cahoon under that number. Mr. Lopez completed the necessary paperwork in January 1998, by which time the 60-day period within which Ms. Cahoon could produce the required NTTC had expired.

19. The Department subsequently issued Assessment No. 2205089, dated January 1, 1998, to Ms. Cahoon assessing \$1,303.04 gross receipts tax, \$130.30 penalty and \$635.23 interest for the period January 1-December 31, 1994.

20. On January 10, 1998, Ms. Cahoon sent the Department a letter protesting the assessment.

21. At the July 13, 1998 hearing on her protest, Ms. Cahoon produced an NTTC from YSI. Ms. Cahoon said she did not obtain the NTTC during the 60-day period provided in the Department's audit notice because Mr. Donez told her it would not support her deductions.

22. At the July 13, 1998 hearing, the Department indicated that its assessment may have erroneously included tax on Ms. Cahoon's receipts from performing services outside New Mexico. On July 14, 1998, Gay Romero, Senior Tax Auditor in the Department's Protest Office, provided a letter stating that tax principal assessed should be reduced by \$318.04, plus related penalty and interest. The amount remaining in dispute, including penalty and interest calculated through July 25, 1998, is \$985.00 gross receipts tax, \$98.50 penalty, and \$554.40 interest for a total of \$1,637.90.

DISCUSSION

The issue presented is whether Ms. Cahoon's failure to have an NTTC from Desert Hills in her possession within the 60-day period provided in the Department's audit notice forecloses her from deducting her receipts from performing services for Desert Hills during 1994. Ms. Cahoon raises the following arguments in support of her claim to the deduction: (1) she provided the Department with documentation that Desert Hills resold her services and paid gross receipts tax on the resale amount; (2) she offered to produce an NTTC from YSI, but this offer was rejected; (3) her inability to produce an NTTC from Desert Hills in a timely manner was due to circumstances outside

her control; and (4) she acted reasonably in seeking the advice of a certified public accountant and should not be penalized for the accountant's errors.

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Further, Section 7-9-5 NMSA 1978 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or 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 and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Accordingly, it is Ms. Cahoon's burden to come forward with evidence to show that she was entitled to the deductions taken and that the Department's assessment is incorrect.

Issue 1: Evidence Required to Support Deductions under Section 7-9-48. The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. Ms. Cahoon claims the deduction provided in Section 7-9-48:

Receipts from selling a service for resale may be deducted from gross receipts
... if the sale is made to a person who delivers a nontaxable transaction
certificate to the seller (emphasis added)

The fact that Ms. Cahoon can prove her services were sold to Desert Hills for resale is not sufficient to support a deduction under Section 7-9-48. The requirements of the statute are very specific. The buyer of services must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts. Where a party claiming a right to a tax exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *Proficient Food v. New Mexico*

Taxation & Revenue Department, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988). By failing to obtain possession of the NTTC required by the statute, Ms. Cahoon waived her right to claim a deduction under Section 7-9-48.

Issue 2: NTTC from YSI. To be deductible under Section 7-9-48, the sale of services must be "made to a person who delivers a nontaxable transaction certificate to the seller." A deduction cannot be taken based on an NTTC issued by someone other than the person to whom the taxpayer sold the services. In this case, Ms. Cahoon sold her services to Desert Hills, not YSI. Ms. Cahoon has not provided any evidence to show that Desert Hills and YSI are the same entity. To the contrary, the fact that YSI is the second purchaser of the business, that Desert Hills' tax identification number was deactivated, and that YSI is operating under its own name and tax identification number supports the conclusion that YSI is a separate entity that merely acquired the assets of the business formerly owned by Desert Hills. Based on the evidence presented, an NTTC issued by YSI will not support deductions taken for receipts from selling services to Desert Hills.

Issue 3: Taxpayer Responsibility for Documenting Deductions. Ms. Cahoon maintains that circumstances outside her control prevented her from obtaining the NTTC required by Section 7-9-48. Ms. Cahoon points out that Desert Hills failed to provide her with an NTTC at the time it purchased her services and that Desert Hills' sale of its business prevented her from obtaining an NTTC within the 60-day time period required by the Department's audit notice. While this series of events is unfortunate, Ms. Cahoon's attempt to shift responsibility for documenting her gross receipts tax deductions to Desert Hills is inconsistent with New Mexico's self-reporting tax system. Every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *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). The incidence of the gross receipts tax is on the

seller, and it was the responsibility of Ms. Cahoon—not Desert Hills—to determine whether she had the documentation needed to support her deductions.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. During 1994, when Ms. Cahoon was performing services for Desert Hills, the statute provided, in pertinent part:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees *shall be in the possession of the seller* or lessor for nontaxable transactions at the time the return is due for receipts from the transactions.... (emphasis added).

The word "shall" indicates that the provisions of a statute are mandatory and not discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Ms. Cahoon did not have an NTTC from Desert Hills in her possession at the time her 1994 gross receipts tax returns were due. She did not meet the statutory requirements of Section 7-9-43 then in effect and was not entitled to claim a deduction. At that point, it was well within her control to either request an NTTC from Desert Hills or pay the gross receipts tax due to New Mexico. No action of Desert Hills or the Department prevented her from doing so.

In 1997, the legislature amended Section 7-9-43 to allow taxpayers additional time within which to obtain required NTTCs. Laws 1997, Chapter 72, Section 1. This version of the statute, effective July 1, 1997, provides:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

The amendment gave taxpayers audited after its effective date a second chance to obtain NTTCs that should have been in their possession at the time their deductions from gross receipts tax were taken. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they are unable to obtain required NTTCs within the 60-day period provided by the legislature. The reason a taxpayer cannot obtain an NTTC is irrelevant. The language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added). Ms. Cahoon's failure to obtain an NTTC within the 60-day period provided in Section 7-9-43 leaves the Department no choice but to disallow her deductions.

Issue 4: Reliance on the Advice of an Accountant. When Ms. Cahoon received the Department's audit notice, she consulted a CPA. The CPA gave Ms. Cahoon erroneous advice that led her to believe she did not need to provide documentation to support her deductions. By the time Ms. Cahoon received the correct advice from the Department's auditor and located Mr. Lopez, the former owner of Desert Hills, it was mid-December. Although Mr. Lopez acted promptly to reactivate his tax identification number and apply for a new NTTC to give Ms. Cahoon, the paperwork was not completed until January 1998. The 60-day notice period expired December 22, 1997. Had Ms. Cahoon received correct advice from her CPA and called Mr. Lopez as soon as she received the 60-day notice, it is more than likely that Mr. Lopez could have provided Ms. Cahoon with a timely NTTC to support her gross receipts tax deductions.

Ms. Cahoon's reliance on the erroneous advice of her CPA does not excuse Ms. Cahoon from her liability for tax and interest due to the state. It does indicate, however, that Ms. Cahoon was not negligent in failing to obtain the documents needed to support her deductions. In this case, the

Department imposed the ten percent negligence penalty provided in Section 7-1-69(A) NMSA 1978. Department Regulation 3 NMAC 1.11.11(4) states that a taxpayer's reasonable reliance on the advice of an accountant may be a defense to the imposition of penalty. Ms. Cahoon reasonably relied on the advice of her CPA in failing to take the action necessary to obtain a timely NTTC from Desert Hills. Accordingly, the negligence penalty should be abated.

CONCLUSIONS OF LAW

1. Ms. Cahoon filed a timely, written protest to Assessment No. 2205089, and jurisdiction lies over the parties and the subject matter of this protest.
2. Ms. Cahoon is not entitled to a gross receipts tax deduction for receipts from selling services to Desert Hills during 1994.
3. Ms. Cahoon reasonably relied on the advice of her CPA and was not negligent in failing to obtain an NTTC from Desert Hills within the 60-day period provided in the Department's audit notice.

IT IS THEREFORE ORDERED that the Taxpayer's protest is granted as to the assessment of penalty in the amount of \$98.50. On all other issues, the Taxpayer's protest is denied.

Entered July 17, 1998.