

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

IN THE MATTER OF THE PROTEST
OF M. KORY AND LUCIA ROWBERRY
ID. NO. 02-375201-00 7
ASSESSMENT NO. 2235930

98-59

DECISION AND ORDER

A formal hearing on the above-referenced protest was held December 21, 1998, before Margaret B. Alcock, Hearing Officer. M. Kory and Lucia Rowberry (referred to as "Dr. Rowberry" or "the Taxpayer") were represented by their attorney, James Jay Mason, who appeared by telephone. The New Mexico Taxation and Revenue Department ("Department") was represented by Bridget Jacober, Special Assistant Attorney General. The facts and exhibits upon which this decision is based were stipulated into evidence by the parties. Based on that stipulation and the legal arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1994, Dr. Rowberry was a licensed dentist providing dental services in Gallup, New Mexico, from the offices of Nick DeSantis, DDS, PC.
2. In 1987, Nick DeSantis, DDS, PC, signed a Taxation and Revenue Department form TS-22, Agreement to Collect and Pay Over Taxes, as an agent for Dr. Rowberry.
3. The TS-22 states, in pertinent part, that Nick DeSantis, DDS, PC, agrees with the Secretary of Taxation and Revenue of the State of New Mexico that Nick DeSantis, DDS, PC, will report the gross receipts of Kory Rowberry, together with the corporation's own gross receipts, under the corporation's tax identification number.
4. Nick DeSantis' signature attests that he signed the TS-22 on behalf of his corporation on January 7, 1987. The date and signature lines for approval by the Department are blank.

5. Attached to the TS-22 is the following typed statement:

1/1/87

Effective this date, my corporation known as Nick DeSantis DDS PC, will pay over to Kory Rowberry on a monthly basis the net amount of his receipts for his dental patients that he sees in my dental office.

The sales tax on those amounts will be paid by my corporation when I pay my sales tax (monthly basis).

The statement is signed by Nick DeSantis and M. Kory Rowberry and is witnessed by Steve A. Petranovich, CPA.

6. During 1994, Nick DeSantis, DDS, PC, reported and paid gross receipts tax to the Department under CRS tax identification number 01-165069-009.

7. Nick DeSantis, DDS, PC, issued federal form 1099 to Kory Rowberry reporting that it paid Dr. Rowberry nonemployee compensation of \$139,095.10 during tax year 1994.

8. Dr. Rowberry reported \$139,095.00 in gross receipts from the business of dentistry on Schedule C, Profit or Loss from Business, to his 1994 federal income tax return. Dr. Rowberry deducted business expenses which included advertising, depreciation, insurance, legal and professional services, office expenses, and supplies.

9. The Department compared Dr. Rowberry's 1994 federal income tax return to the Department's records of payment for gross receipts tax and determined that Dr. Rowberry had not reported or paid gross receipts tax on receipts of \$139,095.00.

10. The Department did not compare Dr. Rowberry's federal tax return to the federal tax return of Nick DeSantis, DDS, PC.

11. On March 4, 1998, the Department issued CRS registration number 02-375201-00 7 to M. Kory and Lucia Rowberry.

12. On March 25, 1996, the Department issued Assessment No. 2235930 to M. Kory and Lucia Rowberry for tax periods January-December 1994 in the total amount of \$13,423.95,

representing \$8,105.04 gross receipts tax, \$4,508.43 interest, and \$810.48 penalty due on receipts of \$139,095.00.

13. On April 17, 1998, Dr. Rowberry filed a written protest to the Department's assessment.

DISCUSSION

Dr. Rowberry maintains that Nick DeSantis, DDS, PC, paid gross receipts tax on all receipts the corporation collected from patients for dental services performed by both Dr. Rowberry and Dr. DeSantis and that no additional gross receipts tax is due. Dr. Rowberry argues that the TS-22 and separate agreement signed by Drs. Rowberry and DeSantis, together with copies of the 1994 CRS-1 returns filed by Nick DeSantis, DDS, PC, are sufficient evidence to rebut the presumption of correctness of the Department's assessment of gross receipts tax against Dr. Rowberry.

Presumption of Correctness. Section 7-1-17(C) NMSA 1978 states that any assessment of tax issued by the Department is presumed to be correct. Dr. Rowberry contends that the TS-22 agreement and CRS-1 returns introduced as Stipulated Exhibits 1 and 2 are sufficient to overcome this presumption and place the burden of coming forward with evidence of nonpayment of tax on the Department. This argument would have merit if the TS-22 had been signed by the Department. In those circumstances, the Department's acceptance of Nick DeSantis, DDS, PC, as agent for payment of Dr. Rowberry's gross receipts taxes, together with evidence that the corporation did, in fact, pay gross receipts tax to the state, would be sufficient to overcome the presumption of nonpayment of tax created by the Department's assessment.

In this case, however, the TS-22 relied on by Dr. Rowberry was never signed by the Department and is ineffective to establish Nick DeSantis, DDS, PC, as Dr. Rowberry's agent for payment of gross receipts tax. The second paragraph of the TS-22 states: "I agree with the Secretary

of Taxation and Revenue of the State of New Mexico...." There are two signature lines at the bottom of the form, one for the taxpayer's agent and one for the Department. No agreement can be formed without the signature of both parties. The TS-22 introduced as Stipulated Exhibit 1 shows the signature of Nick DeSantis, DDS, PC, but is not signed by the Department. There is no evidence the form was even tendered to the Department. In the absence of testimony from either Dr. Rowberry or Dr. DeSantis, the unsigned form could be seen as evidence that the parties decided *not* to pursue this course of action and therefore never submitted the TS-22 for Department approval.

Introduction of an unsigned TS-22 agreement does not overcome the presumption of correctness that attaches to the Department's assessment of gross receipts tax against Dr. Rowberry. The burden remains on Dr. Rowberry to establish that the assessment is incorrect.

Payment of Tax by Nick DeSantis, DDS, PC. Dr. Rowberry contends that Nick DeSantis, DDS, PC, paid gross receipts tax on all receipts the corporation collected from patients for dental services performed by both Dr. Rowberry and Dr. DeSantis. The Department responds that Dr. Rowberry has not produced any evidence to establish the source of the receipts reported by Nick DeSantis, DDS, PC. The Department also points out that the January 1, 1987 statement attached to Stipulated Exhibit 1 states that Nick DeSantis, DDS, PC, will pay tax on the "net amount" of Dr. Rowberry's receipts, while the statutes require payment of tax on "gross receipts". See Section 7-9-4 NMSA 1978.

The Department's evaluation of the evidence is correct. The CRS-1 reports introduced as Stipulated Exhibit 2 establish that Nick DeSantis, DDS, PC, paid tax on some of its receipts during 1994. The reports do not provide any information as to whether the reported receipts include patient payments for work performed by Dr. Rowberry, nor do they indicate whether tax was paid on gross receipts or net receipts. With regard to the latter point, Dr. Rowberry's attorney argues that the term

"net amount" in Stipulated Exhibit 1 means net of tax, not net of expenses. There is nothing in the record to corroborate this argument. Although testimony from Dr. DeSantis or someone from his office could have clarified the corporation's tax reporting, no such testimony was offered.¹

Even if the Taxpayer's assertions concerning payment of gross receipts tax by the corporation were accepted as true, this does not resolve the issue of Dr. Rowberry's liability for the Department's assessment. Under the facts presented, there are two taxable transactions: a sale of dental services by Dr. Rowberry to Nick DeSantis, DDS, PC, and a sale of dental services by Nick DeSantis, DDS, PC, to individual patients. There is no assessment against Nick DeSantis, DDS, PC, and the corporation's liability for payment of gross receipts tax on its receipts from patients is not currently in dispute. The only matter in dispute is whether Dr. Rowberry paid gross receipts tax on the payments he received from the corporation.

Dr. Rowberry argues there is only one sale at issue—the sale of dental services to individual patients. The evidence does not support his position. The parties stipulated that the assessment against Dr. Rowberry was based on \$139,095.00 of gross receipts reported on Schedule C to his 1994 federal income tax return. These receipts correspond to the nonemployee compensation reported on the 1994 federal form 1099 issued to Dr. Rowberry by Nick DeSantis, DDS, PC. There is no evidence that Dr. Rowberry sold his services directly to individual patients or that he billed or received payment from those patients. The Taxpayer's attorney confirmed during argument that all dental services provided in the offices of Nick DeSantis, DDS, PC, were billed by and paid to the corporation. While the arguments of counsel are not evidence, this position is nonetheless consistent with the corporation's issuance of the 1099 to Dr. Rowberry.

¹ The Taxpayer failed to present evidence on a number of issues raised in his original protest. After requesting four continuances of the scheduled hearing, all of which were granted, Dr. Rowberry decided to present his case on the basis of stipulated facts and exhibits rather than through the testimony of witnesses. Unfortunately, some of the legal

The facts of this case are very similar to those in *House of Carpets, Inc. v. Bureau of Revenue*, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973). There, the taxpayer was a corporation engaged in the business of selling carpets on an installed basis. The taxpayer hired a second corporation ("C2") to go into customers' homes and perform the installation service. C2 did not bill or receive payment from the taxpayer's customers. Instead, the taxpayer billed and collected the entire amount due for the carpet-installation package and then paid C2 for the installation services it provided to the taxpayer's customers.

The issue before the court was whether the taxpayer was liable for gross receipts tax on the installation portion of customers' payments when C2 had already paid gross receipts tax on its receipts from performing the installation service. The court held that C2's payment of gross receipts tax did not relieve the taxpayer of liability for tax on the payments it received from its customers. The court rejected the taxpayer's claim of double taxation, finding there were two separate transactions involved: a sale of installation services by C2 to the taxpayer, and a resale of those services by the taxpayer to its customers. Both transactions were subject to gross receipts tax. *See also, New Mexico Sheriffs & Police Association v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973).

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." 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. "Gross receipts" means "the total amount of money or

arguments made at the hearing, including the argument concerning payment of tax by Nick DeSantis, DDS, PC, were not supported by the factual record on which the Taxpayer chose to submit his protest.

the value of other consideration received...from performing services in New Mexico." Section 7-9-3(F) NMSA 1978.

During 1994, Dr. Rowberry and Nick DeSantis, DDS, PC, were separate taxpayers, each of which was engaged in business and had receipts from performing services in New Mexico. Although not established in the record, Dr. Rowberry contends that Nick DeSantis, DDS, PC, paid gross receipts tax on all payments the corporation received from patients for dental services performed in the corporation's offices. Dr. Rowberry does *not* contend that Nick DeSantis, DDS, PC, also paid gross receipts tax on the payments the corporation subsequently made to Dr. Rowberry. Gross receipts tax was due on both transactions.² Having failed to establish that gross receipts tax was paid on the compensation he received from Nick DeSantis, DDS, PC, and reported as business income on his 1994 federal income tax return, Dr. Rowberry remains liable for the Department's assessment of tax on those receipts.

CONCLUSIONS OF LAW

1. Dr. Rowberry filed a timely written protest to Assessment No 235930 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. Dr. Rowberry is liable for gross receipts tax on the \$139,095.10 of nonemployee compensation he received from Nick DeSantis, DDS, PC, during 1994 for performing dental services in the corporation's offices.
3. Dr. Rowberry failed to establish that his gross receipts tax liability on the \$139,095.10 of payments he received from Nick DeSantis, DDS, PC, has been paid and has not overcome the presumption of correctness that attaches to the Department's assessment.

² Sections 7-9-43 and 7-9-48 NMSA 1978 provide a deduction for receipts from the sale of services for resale when the buyer delivers a timely nontaxable transaction certificate ("NTTC") in the form prescribed by the Department. Although

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

DONE, this 30th day of December 1998.

the Taxpayer's original protest raised the issue of whether Dr. Rowberry had timely possession of an NTTC from Nick DeSantis, DDS, PC, there was no mention of an NTTC in the parties' stipulation of facts.