

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

IN THE MATTER OF THE PROTEST OF  
**BRET A. BISHOP,**  
ID. NO. 02-351818-00 9, PROTEST TO  
ASSESSMENT NO. 2205099

**NO. 99-14**

**DECISION AND ORDER**

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on February 17, 1999. Mr. Bret Bishop, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During calendar year 1994, the Taxpayer worked as a fly fishing guide in New Mexico. He did so as an independent contractor performing guide services for a business called the Solitary Angler, which was owned by Mr. Van Beacham.

2. The Taxpayer reported his income from performing fishing guide services on federal Schedule C of his 1994 federal income tax return, which is the form for reporting profit or loss from a business which is a sole proprietorship.

3. The Taxpayer was not aware of New Mexico's gross receipts tax and that it would apply to him for his receipts from performing fishing guide services. Consequently, the Taxpayer was not registered with the Department for gross receipts tax reporting purposes and did not report and pay gross receipts tax upon his gross receipts from performing fishing guide services.

4. The Department has an information sharing agreement with the Internal Revenue Service (“IRS”) under which the IRS provides the Department with tax filing information about New Mexico residents who file returns with the IRS.

5. As a result of information the Department received from the IRS about the Taxpayer, on November 17, 1997, the Department wrote to Mr. Bishop informing him that although he had reported to the IRS receipts from a business in New Mexico in 1994, the Department had no records to indicate that the Taxpayer was reporting gross receipts to the Department. The Department’s letter also informed the Taxpayer that it was conducting a limited scope audit to resolve this discrepancy. The Department’s letter informed the Taxpayer of the requirement to possess New Mexico nontaxable transaction certificates (“NTTCs”) to substantiate deductions, if any, which might be claimed by the Taxpayer. The letter also provided notice to the Taxpayer that it must produce and deliver to the Department copies of any NTTCs it had within sixty days or any deductions claimed relating to the NTTCs would be disallowed. Additionally, the Department’s letter provided a phone number and the name of an employee, Francisco, in the Department’s support office who the Taxpayer could call if further information was needed.

6. The day following the day on which the Taxpayer received the Department’s letter, the Taxpayer telephoned Francisco. The Taxpayer did not believe he was subject to gross receipts tax because he understood that the Solitary Angler paid taxes on its receipts from the fishing guide services he performed. The Taxpayer tried to explain this to Francisco. Francisco told the Taxpayer that if he did not agree he was subject to gross receipts tax, he should file a protest. Francisco did not inform the Taxpayer about NTTCs and how they might apply to allow the Taxpayer to claim a deduction for its receipts from the Solitary Angler.

7. The Taxpayer wrote the Department and attempted to file a protest as advised by Francisco. Because no assessment had yet been issued by the Department which could be protested, the Department rejected the Taxpayer's protest.

8. On January 1, 1998, the Department issued Assessment No. 2205099 ("the assessment") to the Taxpayer, assessing \$810.84 in gross receipts tax, \$81.09 in penalty and \$395.29 in interest for the January through December, 1994 reporting periods. Because January 1 is the New Year's Day holiday, the assessment would not have been mailed until January 2nd.

9. On February 2, 1998, the Taxpayer filed a written protest with the Department to the assessment.

10. The Taxpayer's protest was assigned to Mr. Tom Dillon of the Department's Protest Office. On May 5, 1998, Mr. Dillon wrote the Taxpayer and explained why the Department believed that the Taxpayer was subject to gross receipts tax. The letter further explained that the Taxpayer was a separate taxpayer from the outfitter who resold the Taxpayer's services and charged its customers gross receipts tax. The letter explained that the outfitter (the Solitary Angler) could have issued the Taxpayer a type 5 NTTC, which would have entitled the Taxpayer to claim a deduction for services which would be resold, but since more than sixty days had expired from the Department's November 17, 1997 letter, it was too late to present a NTTC to support a claim of deduction.

11. On May 11, 1998, the Taxpayer called Mr. Dillon and discussed his telephone conversation with Francisco. As a result of this conversation, Mr. Dillon became concerned that a Department employee might have misled the Taxpayer about the requirement to have a NTTC from the Solitary Angler.

12. On May 12, 1998, Mr. Dillon wrote the Taxpayer asking for a letter documenting the Taxpayer's conversation with Francisco and requesting that the Taxpayer secure a type 5 NTTC and provide it to the Department for review.

13. On June 17, 1998, Mr. Dillon again wrote the Taxpayer, stating that no response had been received to the requests made in the May 12, 1998 letter and asking for a response by June 30, 1998.

14. By an undated letter which Mr. Dillon received on August 27, 1998, the Taxpayer responded to Mr. Dillon's letter of June 17, 1998. The letter enclosed a copy of a type 2 NTTC the Taxpayer had received from the Solitary Angler. Type 2 NTTCs are for the sale of tangible personal property for resale and do not cover the sale of services for resale.

15. The Taxpayer did not understand the difference between a type 2 NTTC and a type 5 NTTC and neither did Mr. Beacham, the owner of the Solitary Angler.

16. On February 16, 1999, the Department received a copy of a type 5 NTTC which the Solitary Angler had issued to the Taxpayer on January 8, 1999.

## **DISCUSSION**

The Taxpayer disputes the assessment on the basis that his failure to report and pay taxes was based upon an innocent mistake of not understanding that he was a business subject to tax independently of the Solitary Angler. The Taxpayer also disputes the assessment on the basis that he should not be denied a deduction from tax based upon the technicality that he did not

have a proper type of NTTC within sixty days of the Department's notice of the need for such a certificate.

While I have no doubt whatsoever that the Taxpayer never intended to avoid any applicable taxes and that his failure to report and pay gross receipts tax was based upon a misunderstanding that the Solitary Angler was paying all applicable taxes with respect to his fishing guide services, nonetheless, the Taxpayer's ignorance of the requirements of the tax statutes cannot excuse his failure to pay tax. This is because New Mexico has a self reporting tax system which places the responsibility to determine tax consequences and report and pay taxes upon taxpayers themselves. Thus, it is well settled that every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions. *Tiffany Construction Company 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 Taxpayer also argues that since there is no dispute that his services were resold by the Solitary Angler or that he would have been eligible for the deduction provided at § 7-9-48 had he obtained the proper NTTC in a timely manner and since Mr. Dillon of the Department's protest office had given him additional time to obtain a NTTC, that the Department should have the ability to grant additional time once again and to accept the type 5 NTTC which the Taxpayer presented to the Department the day before the formal hearing and allow him the deduction. To address these arguments, we must first review the statutory provisions governing the manner of claiming the deduction at issue herein. There is a deduction, found at §7-9-48 NMSA 1978, which enables persons who sell their services to others who resell those services, to claim a deduction from gross receipts tax for their receipts from performing such services. To be

deductible, the sale of services must be made to a buyer who delivers a NTTC to the seller. As provided by Regulation 3 NMAC 2.43.1.8.4:

The department issues different types of NTTCs. Each type is of limited usage and relates to a particular deduction allowed by possession of that certificate. An NTTC is valid only if it contains the information and is in a form prescribed by the department. All other types of proof of deductibility are invalid and will not be accepted by the Department, unless the deduction provision explicitly permits other proof.<sup>1</sup>

Pursuant to this regulation, the Department has designated type 5 NTTCs as the type required to support a claim of deduction for services which are resold pursuant to § 7-9-48.

Section 7-9-43 NMSA 1978 (1997 Cum. Supp.) governed the use of NTTCs to entitle persons to claim deductions from gross receipts tax at the time the Department issued the assessment at issue. Specifically, it provided in pertinent part:

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 nontaxable transaction certificates shall contain the information and be in a form prescribed by the department.

Thus, while a seller “should” have NTTCs of the proper type when its tax return is due and the deduction would normally be claimed, a seller is allowed 60 days after notice from the Department to obtain the certificate, or the deduction “shall be disallowed.”

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<sup>1</sup> In the case of the deduction provided at § 7-9-48, the statute requires the delivery of an NTTC. No other form of proof of eligibility for the deduction is permitted by the statute.

In this case, the Department's letter of November 17, 1997 gave the Taxpayer notice that he must deliver to the Department any NTTCs he relied upon to claim deductions by January 16, 1998. Upon receipt of the letter, the Taxpayer contacted the Department employee referenced in the letter, Francisco. Apparently, the Taxpayer and Francisco did not discuss the need for NTTCs, but rather, Francisco informed the Taxpayer that if it disputed its liability for tax, a protest must be filed. The Taxpayer promptly attempted to do this, but because no assessment had yet been issued, there was no assessment to be protested. After the assessment was issued, the Taxpayer was able to file a protest and the matter was assigned to Mr. Tom Dillon of the Department's protest office. On May 4, 1998, Mr. Dillon wrote a letter to the Taxpayer explaining that it was a separate taxpayer from the outfitter which resold its services and that a type 5 NTTC was necessary to support a claim of deduction for the services the Taxpayer sold to the outfitter to be resold. Mr. Dillon's letter also explained that since the Taxpayer did not present such NTTCs before the sixty day deadline of January 16, 1998, that no adjustments to the assessment could be made. Upon receipt of Mr. Dillon's letter, the Taxpayer telephoned Mr. Dillon to discuss the matter further. After those discussions, Mr. Dillon became concerned that the Taxpayer may have been misled by his discussion with Francisco into thinking that a protest would legally protect him and be lulled into complacency with respect to obtaining the necessary NTTCs. If the Taxpayer had been misled by a Department employee, that could provide the Taxpayer a basis for claiming that the Department would be estopped from denying a deduction for failure to provide the NTTC within the sixty day statutory period. For that reason, Mr. Dillon wrote to the Taxpayer on May 12, 1998 requesting that the Taxpayer send a letter documenting his conversation with Francisco and that the Taxpayer secure a type 5 NTTC from the outfitter. When Mr. Dillon had not heard from the Taxpayer, he wrote again on June 17, 1998. Finally, the

Taxpayer responded in late August, enclosing an incorrect type 2 NTTC he had gotten from the Solitary Angler. Although eventually, the Taxpayer obtained the correct type 5 NTTC, that was not issued to the Taxpayer until January 8, 1999 and was delivered to the Department on February 16, 1999.

While it is unfortunate that the Taxpayer did not understand the significance of the correct type of NTTC and may not have understood the importance of presenting such certificates after its discussion with a Department employee, even when the Taxpayer eventually presented an NTTC to the Department, it was of a type which was not proper to support a deduction given the fact that the Taxpayer provided services and not tangible personal property to the Solitary Angler and it was presented well beyond the statutory time period for producing the documentation to support a claim of deduction. Because the requirements of § 7-9-43 were not met by the Taxpayer, the Department properly denied the Taxpayer's claim of deduction for its gross receipts.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest, pursuant to § 7-1-24 NMSA 1978 to the assessment and jurisdiction lies over both the parties and the subject matter of this protest.

2. Because the Taxpayer failed to produce a correct type of NTTC to support its claim of deduction within the time requirements of § 7-9-43 NMSA 1978, the Department properly denied the Taxpayer's claim of deduction for its receipts from the Solitary Angler.

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

DONE, this 26<sup>th</sup> day of February, 1999.