

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

IN THE MATTER OF THE PROTEST OF  
**GEORGE TUCKER,**  
ID. NO. 02-34912-00 8, PROTEST TO  
DENIAL OF CLAIM FOR REFUND

**NO. 99-25**

**DECISION AND ORDER**

This matter came on for formal hearing on July 14, 1999 before Gerald B. Richardson, Hearing Officer. Mr. George Tucker, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Donald F. Harris, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer worked for more than 36 years in the field of Ionizing Radiation Safety for companies working under contract with the Department of Energy. In 1993, the Taxpayer retired from Sandia Corporation, a Department of Energy contractor.
2. Because of the Taxpayer's knowledge in the specialized field of Ionizing Radiation Safety, and the fact that the Taxpayer retained a security clearance, after his retirement, the Taxpayer agreed to work, as an independent contractor, in his specialized field on an as needed basis for two Department of Energy contractors, Enterprise Advisory Services Incorporated ("EASI") and Advanced Sciences, Inc., ("ASI").
3. Although the Taxpayer was aware of the fact that as an independent contractor, he was liable for his own state and federal income taxes, federal self-employment (social security)

taxes, etc. the Taxpayer was not aware of his own liability for gross receipts tax upon his receipts from engaging in business in New Mexico as an independent contractor. The Taxpayer understood that EASI and ASI paid gross receipts tax upon their contract receipts in New Mexico and the Taxpayer believed that this alleviated him from reporting and paying the same tax upon the compensation he received from those companies.

4. On July 22, 1997 the Department wrote to the Taxpayer informing him that the Internal Revenue Service had provided the Department information that the Taxpayer had reported income to it as a sole proprietorship and that the Department's records did not indicate that the Taxpayer had reported any receipts for gross receipts tax reporting purposes to the Department for tax year 1994. The Department's letter requested an explanation of the discrepancy. The Department's letter further informed the Taxpayer that as part of the limited scope audit its letter represented, that the Taxpayer was required to be in possession of any New Mexico Nontaxable Transaction Certificates (NTTC's) to support any deductions from his gross receipts and that he was required to possess the NTTC's within sixty days of the letter notifying him of the requirement to have the NTTC's. Finally, the Department's letter informed the Taxpayer that the consequence of not possessing the NTTC's within the sixty day time limit would be that any deductions claimed relating to the NTTC's would be disallowed.

5. The sixty days within which the Taxpayer could produce NTTC's to support a claim of deduction for gross receipts tax purposes expired on September 21, 1997.

6. After receiving the Department's letter, the Taxpayer registered with the Department for gross receipts tax purposes and obtained a taxpayer identification number. The Taxpayer also initiated actions with EASI and ASI to obtain NTTC's to support a claim of deduction for services sold for resale, pursuant to Section 7-9-48 NMSA 1978.

7. Although the Taxpayer was diligent in attempting to obtain NTTC's from EASI and ASI, he did not obtain them within the sixty day time limit specified in the Department's letter of July 23, 1997. EASI issued the Taxpayer an NTTC on January 9, 1998. ASI issued the Taxpayer an NTTC on February 23, 1998.

8. On November 12, 1997, the Department issued the Taxpayer an assessment of gross receipts tax, penalty and interest upon its gross receipts for tax year 1994.

9. On April 6, 1998, the Taxpayer issued a check to the Department for \$1,826.55 in payment of the Department's assessment of gross receipts tax, penalty and interest for the 1994 tax year.

10. On May 18, 1998, the Taxpayer applied to the Department for a refund of the \$1,826.55 it had paid for the 1994 tax year.

11. On August 18, 1998, the Department denied the Taxpayer's application for tax refund.

12. On September 12, 1998, the Taxpayer filed a formal protest with the Department to the Department's denial of its claim for tax refund.

### **DISCUSSION**

The sole issue to be determined herein is whether the Taxpayer is entitled to claim a deduction from gross receipts tax for his receipts from performing services for EASI and ASI during tax year 1994, thus entitling the Taxpayer to a refund of the tax, penalty and interest for which a claim was filed. The Taxpayer argues that the Department has already received its full due of gross receipts taxes on the services that he performed for EASI and ASI because they paid the Department gross receipts taxes on their gross receipts from performing services under their contracts with the Department of Energy. The Taxpayer also asks that consideration be given to

the fact his failure to report and pay tax or claim deductions from tax was not due to any attempt to avoid paying taxes owing the state, but was based upon his failure to understand the requirements that he either pay gross receipts tax or obtain NTTC's to support his claimed deductions. He also asks that consideration be given to the efforts he made to obtain the NTTC's and that his failure to obtain them within the sixty day time limit for producing them was due to circumstances beyond his control, those being the failure of EASI and ASI to provide them to him in a timely manner, in spite of his persistent efforts to obtain the NTTC's.

Section 7-9-48 NMSA 1978 (1993 Repl. Pamp.) provided that:

Receipts from selling a service for resale may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must separately state the value of the service purchased in his charge for the service on its subsequent sale, and the subsequent sale must be in the ordinary course of business and subject to the gross receipts tax or governmental gross receipts tax.

The Department does not dispute that if the Taxpayer had possessed the NTTC's in a timely manner from EASI and ASI, that he would have been entitled to take advantage of the deduction provided above. The Department argues, however, that because the Taxpayer did not have the NTTC's in a timely manner pursuant to Section 7-9-43(A) NMSA 1978, that the Taxpayer is not entitled to claim the deduction and thus he was not entitled to a refund of the taxes he paid.

Section 7-9-43(A) NMSA 1978 (1997 Cum. Supp.)<sup>1</sup> 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*

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<sup>1</sup> Because the Department's assessment denying the Taxpayer a deduction from gross receipts tax was issued in November, 1997, this is the version of Section 7-9-43 which was applied to deny the applicable deduction which the Taxpayer sought to claim.

*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.*

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It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). It is especially appropriate to apply this rule to the provisions of Section 7-9-43(A) NMSA 1978, since the legislature's use of the word "should" in the previous sentence regarding possession of the NTTC's at the time the deduction is claimed demonstrates even more clearly that the legislature was choosing its words carefully when it chose to use the more directory word, "shall" in the following sentence. Thus, it is clear that the requirement to possess the appropriate NTTC to support a claim of deduction within sixty days after notice is absolute and no exceptions to this requirement are contemplated by the Legislature. Given this interpretation, notwithstanding the Taxpayer's good faith efforts to obtain the NTTC's, the fact that the delays were not within the control of the Taxpayer and the Taxpayer's good faith belief that the payment of gross receipts taxes by EASI and ASI relieved him of any gross receipts tax obligation, the Taxpayer is simply barred from claiming the deduction.

The Taxpayer also raises the argument that if he is not refunded the taxes he paid, that the state, in effect, will receive tax twice on the receipts generated by his efforts, since it will receive tax from him and also tax from ASI and EASI. This argument misperceives the manner in which the Gross Receipts and Compensating Tax Act; Chapter 7, Article 9 NMSA 1978, operates. The gross receipts tax is imposed on every person engaging in business in New Mexico for the privilege of engaging in business. Section 7-9-4 NMSA 1978. Gross receipts includes the amount of money

or other compensation received from performing services in New Mexico. Section 7-9-3(F) NMSA 1978. Thus, the Taxpayer, who was engaging in business as a sole proprietorship, and EASI and ASI, who were also engaging in business in New Mexico, were all subject to gross receipts tax upon the money they received from performing services in New Mexico under their contracts. There were two separate taxable transactions in each instance. The Taxpayer's sale of services to either EASI or ASI and the sale of services to the Department of Energy by ASI or EASI.

The Gross Receipts and Compensating Tax Act does provide certain deductions to avoid the pyramiding of taxes. For instance, in addition to the deduction for the sale of services for resale, deductions are provided for receipts from the sale of tangible personal property for resale, Section 7-9-47, and for sales to manufacturers who incorporate the property into manufactured, products, Section 7-9-46. As noted above, the pyramiding of taxes could have been avoided in the Taxpayer's case had the requirements for claiming the deduction at issue been met.

Before closing, it should be noted that I have absolutely no doubt that Mr. Tucker never had any intention to avoid the payment of taxes with regard to his receipts from EASI and ASI. He simply failed to understand how the gross receipts tax statutes operated and applied to him. Unfortunately, apparently neither EASI or ASI informed him of his tax obligation or the fact that he could claim a deduction from the tax if they provided him with the proper NTTC. By the time he did receive the NTTC's, it was simply too late to claim the deductions provided.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to the Department's denial of his claim for refund and jurisdiction lies over both the parties and the subject matter of this protest.
2. Because the Taxpayer failed to submit NTTC's to support his claim of deduction pursuant to Section 7-9-48 NMSA 1978 within the time limit specified by Section 7-9-43(A)

NMSA 1978, the Taxpayer's claim of deduction and his resultant claim for refund based upon that claim were properly denied by the Department.

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

DONE, this 30<sup>th</sup> day of July, 1999.