

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

IN THE MATTER OF THE PROTEST  
OF NYLE AND ELAINE TACK  
ID. NO. 02-376786-00-3  
ASSESSMENT NO. 2331970

00-02

**DECISION AND ORDER**

This matter came on for formal hearing on January 11, 2000, before Margaret B. Alcock, Hearing Officer. Nyle and Elaine Tack appeared on their own behalf. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During 1995, Elaine Tack worked as an independent contractor for Homes Illustrated, an advertising publication for realtors.
2. Realtors who purchased space in Homes Illustrated's publication provided a list of the houses to be included in the advertisement. Homes Illustrated then gave the list of houses to Mrs. Tack, who went to each site and photographed the house.
3. Homes Illustrated paid Mrs. Tack on a per photo basis and resold the photographs to the realtor, listing the photographs as a separate charge on the invoice.
4. Neither Mrs. Tack nor her husband, who handled the couple's tax filing, was aware that the New Mexico gross receipts tax applied to her receipts from working as an independent contractor taking photographs for Homes Illustrated. Accordingly, Mrs. Tack did not register with the Department for payment of gross receipts tax and did not file gross receipts tax returns during 1995.

5. Mrs. Tack never requested a New Mexico nontaxable transaction certificate (“NTTC”) from Homes Illustrated, nor did the magazine provide her with one.

6. The Tacks filed a joint 1995 federal income tax return, Form 1040, reporting the income Mrs. Tack was paid by Homes Illustrated on Schedule C (Profit or Loss From Business).

7. On October 14, 1998, as a result of information obtained from the IRS, the Department mailed the Tacks a notice of limited scope audit concerning the discrepancy between business income reported to the IRS on Schedule C of the Tacks’ 1995 federal income tax return and business income reported to the Department for gross receipts tax purposes.

8. The October 14, 1998 notice asked the Tacks to state whether they were registered for payment of gross receipts tax and to provide information to substantiate any gross receipts tax exemptions or deductions taken during 1995. The notice advised the Tacks that, pursuant to Section 7-9-43 NMSA 1978, they must be in possession of all required NTTCs within 60 days from the date of the notice or deductions claimed relating to the NTTCs would be disallowed.

9. Mr. Tack does not remember receiving the October 14, 1998 notice, but acknowledges receiving some notice or other correspondence from the Department asking for information concerning the business income reported on the Tacks’ 1995 federal income tax return.

10. Neither Mr. Tack nor the Department could produce any notice or correspondence sent to the Tacks by the Department during 1998, other than the October 14, 1998 notice maintained in the Department’s files and introduced as Exhibit TRD #C.

11. On November 20, 1998, Mr. Tack sent a letter to the Department explaining that Mrs. Tack was a wholesaler for Homes Illustrated and objecting to the fact that the Department was trying “to collect sales tax from Homes Illustrated and myself for the same item.”

12. Because Mr. Tack sent his November 20, 1998 letter to the Department's Santa Fe office, rather than to the Albuquerque office handling the audit, the letter did not reach the auditor until January 4, 1999.

13. On January 4, 1999, the auditor attempted to reach the Tacks by telephone, but discovered she had the wrong telephone number. She then sent the Tacks a notice asking them to call her at their convenience to discuss their tax situation.

14. On January 13, 1999, Mr. Tack called the auditor and explained his position that his wife was selling services to Homes Illustrated for resale and should not be subject to tax on her receipts. Mr. Tack asked the auditor whether he could obtain an NTTC from Homes Illustrated to establish the resale transaction.

15. The auditor told Mr. Tack that Homes Illustrated was selling advertising, not photographs, and that no NTTC applied to give his wife a deduction.

16. On January 14, 1999, the Department issued Assessment No. 2331970 to Mr. and Mrs. Tack for tax periods January through December 1995 in the amount of \$964.08 gross receipts tax, \$96.36 penalty and \$500.12 interest.

17. On February 9, 1999, Mr. Tack filed a written protest to the Department's assessment.

18. At the conclusion of the January 11, 2000 hearing, Department counsel stated that the Department would concede the penalty assessed against the Tacks because it appeared they had been misled by a Department employee concerning the applicability of NTTCs.

### **DISCUSSION**

The Tacks raise the following arguments in support of their protest to the Department's assessment: (1) Mrs. Tack was a wholesaler for Homes Illustrated and should not be subject to gross

receipts tax; (2) collecting gross receipts tax from both Homes Illustrated and Mrs. Tack results in double taxation; (3) the Tacks should not be penalized for not having an NTTC that the Department's auditor told them was inapplicable to their situation.

## **I      LIABILITY FOR PAYMENT OF GROSS RECEIPTS TAX.**

The Tacks maintain that Mrs. Tack should not be liable for tax on her receipts from selling services which were resold by Homes Illustrated. The Tacks believe that only Homes Illustrated should be required to pay tax on its sale to the final consumer. This argument is based on a misunderstanding of New Mexico's tax system.

Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. "Engaging in business" is defined in Section 7-9-3(E) NMSA 1978 to mean carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit. The term "gross receipts" is defined in Section 7-9-3(F) NMSA 1978 to include the total amount of money or the value of other consideration received from performing services in New Mexico. The statute makes no distinction between persons selling services for resale and persons selling services to the final consumer. Accordingly, unless a specific statutory exemption or deduction applies, Mrs. Tack is liable for gross receipts tax on her receipts from performing photography services for Homes Illustrated.

Section 7-9-48 NMSA 1978 provides a deduction for receipts from selling services for resale when certain conditions are met. In order for a seller of services to qualify for the resale deduction, the buyer must: (1) provide the seller with an NTTC; (2) resell the service in the ordinary course of business; (3) separately state the value of the service at the time it is resold; and (4) be subject to gross receipts tax on the subsequent sale. Although it appears that Mrs. Tack met conditions 2, 3, and 4, she did not meet the first condition requiring possession of an NTTC.

There is a statutory presumption that the Department's assessment of gross receipts tax is correct. Section 7-1-17(C) NMSA 1978. 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). 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. 1988).

In this case, Mrs. Tack has not met her burden of showing that she is entitled to an exemption or deduction from gross receipts tax. As discussed above, Mrs. Tack does not qualify for the resale deduction provided in Section 7-9-48 NMSA 1978 because she did not obtain an NTTC from the buyer of her services. She has not provided information to support a claim to any other exemption or deduction.<sup>1</sup> Mrs. Tack is therefore liable for gross receipts tax on her receipts from performing services for Homes Illustrated.

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<sup>1</sup> At the hearing, Mr. Tack suggested that Mrs. Tack was engaged in selling tangible personal property rather than services. Homes Illustrated was not buying ready-made photographs that Mrs. Tack was in the business of selling. Rather, Homes Illustrated was buying Mrs. Tack's services to go out to a designated site and take photographs of a specific house. This constitutes the sale of services. In any event, the failure to obtain a timely NTTC would bar Mrs. Tack from claiming a resale deduction for receipts from selling tangible personal property as well as receipts from selling services. *See*, requirements set out in Section 7-9-47 NMSA 1978.

## **II. DOUBLE TAXATION.**

The Tacks argue that payment of gross receipts tax by both Homes Illustrated and the Tacks results in double taxation. It is a popular misconception that there is something inherently illegal or unconstitutional with double taxation. New Mexico courts have held, on numerous occasions, that there is no constitutional prohibition against double taxation. *New Mexico State Board of Public Accountancy v. Grant*, 61 N.M. 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. v. Gallegos*, 44 N.M. 120, 99 P.2d 447 (1940); *State ex rel. Attorney General v. Tittmann*, 42 N.M. 76, 75 P.2d 701 (1938). *See also, Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920).

In construing the New Mexico Gross Receipts and Compensating Tax Act, the New Mexico courts have also held that there is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. *See, e.g., House of Carpets, Inc. v. Bureau of Revenue*, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); *New Mexico Sheriffs & Police Association v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973). That is the case here. Mrs. Tack and Homes Illustrated are separate taxpayers, each of which is engaged in business in New Mexico. The gross receipts tax is imposed—once—on Mrs. Tack’s receipts from selling services to Homes Illustrated. As the seller, only Mrs. Tack is liable for this tax. The gross receipts tax is also imposed—once—on Homes Illustrated’s resale of Mrs. Tack’s photography services to its customers. Only Homes Illustrated is liable for this tax. Under the facts of this case, there is no double taxation.

## **III. ERRONEOUS ADVICE FROM DEPARTMENT EMPLOYEE.**

Mr. Tack maintains that Mrs. Tack’s failure to obtain an NTTC to support a deduction under Section 7-9-48 NMSA 1978 was attributable to the erroneous advice he received from the Department’s auditor. It is true that the auditor was incorrect when she concluded that Mrs. Tack’s

services did not qualify as a sale of services for resale. It is not clear, however, that this advice was the cause of Mrs. Tack's failure to obtain the NTTC needed to claim the deduction.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43 NMSA 1978. During 1995, the year at issue in this case, the statute provided:

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). Mrs. Tack did not have an NTTC from Homes Illustrated in her possession at the time her 1995 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.

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 fail to obtain required NTTCs within the 60-day period provided by the legislature. The reason a taxpayer does not 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).

In this case, the Department mailed a notice to the Tacks on October 14, 1998, advising them they had to be in possession of required NTTCs on or before December 13, 1998 or any deductions claimed in reliance on NTTCs would be disallowed. The notice was mailed to the correct address and there is no evidence it was ever returned to the Department by the Post Office. Although Mr. Tack does not remember receiving the October 14, 1998 notice, he acknowledges receiving some notice or correspondence that resulted in his November 20, 1998 letter to the Department explaining his position on the Tacks' gross receipts tax liability. Neither Mr. Tack nor the Department produced a copy of any notice or correspondence sent to the Tacks during 1998, other than the October 14, 1998 notice. Based on the evidence presented, I can only conclude that Mr. Tack did receive the October 14, 1998 notice and simply does not recall the details of the 60-day provision.

On January 13, 1999, Mr. Tack called the Department's auditor to discuss his tax situation. During that call, the auditor informed Mr. Tack that no NTTC was applicable to his wife's sale of services to Homes Illustrated. Although this information was incorrect, the 60-day period within which the Tacks could have obtained an NTTC had expired one month earlier on December 13, 1998. Accordingly, the auditor's advice could not have adversely affected the Tacks' ability to substantiate the resale deduction provided in Section 7-9-48 NMSA 1978.

As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it."



*Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989). Under Section 7-1-60 NMSA 1978, the Department is estopped from collecting tax due when a taxpayer has acted in accordance with a revenue ruling addressed to the taxpayer or when a taxpayer has acted in accordance with a Department regulation. Neither of those circumstances applies here. Nor does “right and justice” demand application of equitable estoppel because, even if the auditor’s advice to Mr. Tack was misleading, the 60-day period within which the Tacks could have obtained an NTTC from Homes Illustrated had already expired.<sup>2</sup>

The receipt of erroneous advice may affect a taxpayer’s liability for penalty. Regulation 3 NMAC 1.11.11 gives the Department discretion to waive penalty when a taxpayer can show that he was affirmatively misled by a Department employee. In this case, the Department has already agreed to abate penalty based on the conflicting information given to the taxpayers. No additional relief is available.

### **CONCLUSIONS OF LAW**

1. The Tacks filed a timely written protest to Assessment No 2331970 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. When Mrs. Tack performed services for Homes Illustrated during 1995, she was engaging in business as defined in Section 7-9-3(E) NMSA 1978 and was subject to gross receipts tax on her receipts.
3. The Tacks did not meet their burden of establishing that Mrs. Tack was entitled to an exemption or deduction in connection with her receipts from performing services for Homes Illustrated.

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<sup>2</sup> It should also be noted that the hearing officer’s powers do not include authority to grant an equitable remedy. *See, AA Oilfield Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 881 P.2d 18 (1994). Even if

4. The Department is not estopped from enforcing collection of the gross receipts tax and interest due under Assessment No. 2331970.

For the foregoing reasons, the Taxpayers' protest is denied, except to the extent of the penalty waived by the Department.

DATED January 14, 2000.

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the hearing officer determined that equitable estoppel was appropriate in a particular case, the taxpayer would have to appeal to the New Mexico Court of Appeals to obtain such relief.