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

IN THE MATTER OF THE PROTEST
OF INEZ BAY 00-03
ID. NO. 02-392265-00-6
ASSESSMENT NO. 2365558

DECISION AND ORDER

This matter was heard on January 11, 2000, before Margaret B. Alcock, Hearing Officer. Inez Bay represented herself. Bridget A. Jacober, Special Assistant Attorney General, represented the Taxation and Revenue Department ("Department"). Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1995, Inez Bay worked as an independent contractor performing proof-reading services for Bean & Associates, Inc., a professional court reporting service.

2. Ms. Bay proofread copies of transcripts provided by Bean & Associates, noting errors in typing, spelling and grammar. The transcripts were then returned to the court reporter for correction.

3. Bean & Associates billed its clients for its court reporting services. The cost of Ms. Bay's proofreading services was factored into the overall charge and was not separately stated on the invoice.

4. Ms. Bay did not realize the New Mexico gross receipts tax applied to her receipts from working as an independent contractor. Accordingly, Ms. Bay did not register with the Department for payment of gross receipts tax and did not file gross receipts tax returns during 1995.

5. Ms. Bay filed a 1995 federal income tax return, Form 1040, reporting the income she earned from Bean & Associates on Schedule C (Profit or Loss From Business).

6. On November 10, 1998, as a result of information obtained from the IRS, the Department mailed Ms. Bay a notice of limited scope audit concerning the discrepancy between business income reported to the IRS on Schedule C of her 1995 federal income tax return and business income reported to the Department for gross receipts tax purposes.

7. The November 10, 1998 notice advised Ms. Bay that, pursuant to Section 7-9-43 NMSA 1978, she must be in possession of all required nontaxable transaction certificates ("NTTCs") within 60 days from the date of the notice or any deductions relating to the NTTCs would be disallowed. The 60-day period expired on January 9, 1999.

8. After receiving the notice, Ms. Bay went to Bean & Associates and obtained a Type 4 NTTC, back dated to January 1, 1995.

9. Each NTTC issued by the Department shows the type of NTTC at the top of the form and gives an explanation of the permitted use of each type of NTTC on the back.

10. The NTTC form Ms. Bay accepted from Bean & Associates reads: "04 Purchase for Subsequent Lease" at the top. The back of the NTTC states that Type 4 certificates "may be executed for the purchase of tangible personal property FOR SUBSEQUENT LEASE in the ordinary course of business" and references Section 7-9-49 NMSA 1978.

11. Ms. Bay did not read the front or the back of the NTTC and did not question Bean & Associates to determine why she was given an NTTC that applied to the purchase of property for subsequent lease.

12. Ms. Bay mailed the Type 4 NTTC to the Department. The NTTC was received by the Department auditor originally assigned to Ms. Bay's case on January 14, 1999.

13. Several weeks later, a different auditor notified Ms. Bay that the Type 4 NTTC was not applicable to her receipts because she was not engaged in selling tangible personal property for subsequent lease.

14. On April 15, 1999, the Department issued Assessment No. 2365558 to Ms. Bay for reporting periods January through December 1995 in the amount of $1,502.82, representing $918.24 gross receipts tax, $91.80 penalty and $510.82 interest.

15. On April 23, 1999, Ms. Bay returned to Bean & Associates and was given a Type 5 NTTC, which is applicable to the sale of services for resale. The back of the NTTC states that a Type 5 NTTC "may be executed for the purchase of a SERVICE FOR RESALE IF (1) the value of the service purchased is stated separately in the charge upon subsequent sale of the services; (2) the subsequent sale by the buyer is in the ordinary course of business; and (3) the subsequent sale of the service is taxable under the Gross Receipts and Compensating Tax Act, Section 7-9-48 NMSA 1978."

16. Although Ms. Bay knew the cost of her proofreading services was factored into Bean & Associates' charge for court reporting services and was not separately stated, she did not read the back of the Type 5 NTTC form and did not realize her receipts from proofreading services did not qualify for the deduction.

17. Ms. Bay gave a copy of the Type 5 NTTC to the Department's auditor, who told Ms. Bay it was too late for the Department to accept the NTTC because the 60-day period provided in Section 7-9-43 NMSA 1978 had expired.

18. On May 12, 1999, Ms. Bay filed a written protest to the Department's assessment.

19. At the January 11, 2000 hearing, the Department stated that it would abate the penalty assessed against Ms. Bay, and this portion of the assessment is no longer in dispute.

DISCUSSION

Ms. Bay protests the Department's assessment on the following grounds: first, Ms. Bay believes the Department is responsible for her failure to obtain a timely Type 5 NTTC because the Department failed to promptly notify her that the Type 4 NTTC she submitted was not acceptable; second, Ms. Bay argues that Bean & Associates has already paid the gross receipts tax due on her proofreading services and charging her tax on the same services results in double taxation.

I LIABILITY FOR PAYMENT OF GROSS RECEIPTS TAX.

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. In this case, Ms. Bay was engaged in the business of selling proofreading services to Bean & Associates. Unless a specific statutory exemption or deduction applies, Mrs. Bay is liable for gross receipts tax on her receipts from these services.

Type 4 NTTC. During the course of the Department's audit, Ms. Bay attempted to claim deductions based on two different types of NTTCs she obtained from Bean & Associates. The first was a Type 4 NTTC, which relates to the deduction provided in Section 7-9-49 NMSA 1978 for receipts from selling tangible personal property or licenses to a person engaged in the business of leasing or selling the same kind of tangible personal property or licenses.

It is clear the deduction in Section 7-9-49 NMSA 1978 does not apply to Ms. Bay's activities. Had Ms. Bay read the explanation printed on the Type 4 NTTC, she would have realized she had the wrong form. The front of the NTTC, admitted into evidence as Taxpayer's Exhibit 1, reads: "04

Purchase for Subsequent Lease" at the top. The back of the NTTC states that Type 4 certificates "may be executed for the purchase of tangible personal property FOR SUBSEQUENT LEASE in the ordinary course of business" (emphasis in the original) and references Section 7-9-49 NMSA 1978. As the court held in *McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601, 592 P.2d 515, 517 (Ct. App. 1979), an NTTC serves as conclusive evidence of the right to a deduction only when the certificate covers the receipts in question. A Type 4 NTTC does not cover receipts from performing services.

Type 5 NTTC. Although it should have been apparent the Type 4 NTTC submitted by Ms. Bay was inapplicable to her situation, it was several weeks before the Department notified her of this fact. When Ms. Bay subsequently submitted a Type 5 NTTC, she was told it was too late because the 60-day period within which she could obtain NTTCs had expired. There is nothing in the record to explain the Department's delay in rejecting the Type 4 NTTC. Nonetheless, the facts do not support a finding that this delay was responsible for Ms. Bay's inability to claim a deduction based on the untimely Type 5 NTTC.

On November 10, 1998, the Department notified Ms. Bay that she had 60 days within which to obtain NTTCs needed to support deductions from her gross receipts. This notice was based on Section 7-9-43(A) NMSA 1978, which states, 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 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 60-day period expired on January 9, 1999. The Type 4 NTTC Ms. Bay mailed to the Department was not received by the auditor until January 14, 1999.[1] Even if the auditor had telephoned Ms. Bay immediately to tell her the Type 4 NTTC would not support a deduction of receipts from performing services, it would have been too late for Ms. Bay to obtain a timely Type 5 NTTC.

Of greater importance is the fact that Ms. Bay is not entitled to a deduction based on the Type 5 NTTC, which applies to the sale of services for resale. Section 7-9-48 NMSA 1978 provides a deduction for receipts from selling services for resale if the buyer (1) provides the seller with an NTTC; (2) resells the service in the ordinary course of business; (3) separately states the value of the service at the time it is resold; and (4) is subject to gross receipts tax on the subsequent sale. In this case, Bean & Associates was in the business of selling court reporting services. Ms. Bay's proofreading services were not resold by Bean & Associates but were used to ensure the quality of its court reporters' transcripts. As Ms. Bay testified at the hearing, the cost of her services was factored into Bean & Associates' charge for its court reporting services and was not separately stated. Given these facts, Ms. Bay did not qualify for the deduction provided in Section 7-9-48 NMSA 1978.

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). Ms. Bay has not established her right to an exemption or deduction under the Gross Receipts and Compensating Tax Act, and she is liable for gross receipts tax on her receipts from performing services in New Mexico.

II. DOUBLE TAXATION.

Ms. Bay argues that collecting gross receipts tax from her and from Bean & Associates results in double taxation. Although it 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 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. Ms. Bay and Bean & Associates are separate taxpayers, each of which is engaged in business in New Mexico. The gross receipts tax is imposed on Ms. Bay's receipts from selling proofreading services to Bean & Associates. As the seller, only Ms. Bay is liable for this tax. The gross receipts tax is also imposed on Bean & Associates' sale of court reporting services to its customers. Only Bean & Associates is liable for this tax. Based on the decisions cited above, there is no double taxation.

---

[1] Given the fact that the auditor did not reject the NTTC as untimely, it must be assumed the postmark date on Ms.

CONCLUSIONS OF LAW

1. Inez Bay filed a timely written protest to Assessment No 2365558 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. When Ms. Bay performed services for Bean & Associates during 1995, she was engaging in business as defined in Section 7-9-3(E) NMSA 1978 and was is subject to gross receipts tax on her receipts.

3. Ms. Bay is not entitled to any exemption or deduction in connection with her receipts from performing services for Bean & Associates.

For the foregoing reasons, Ms. Bay's protest is denied.

DATED January 20, 2000.

Bay's correspondence fell within the 60-day period.