

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

IN THE MATTER OF THE PROTEST OF
SANTA FE BUSINESS SERVICES
ID NO. 02-189277-00 6,
PROTEST TO ASSESSMENT NO. 2313218

NO. 00-17

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson on May 10, 2000. Santa Fe Business Services, hereinafter, "Taxpayer", was represented by Robert S. Caballero, its owner. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 14, 1998 the Department issued Assessment No. 2313218 to the Taxpayer assessing \$712.52 in gross receipts tax, \$71.24 in penalty and \$342.91 in interest for calendar year 1995.
2. On November 20, 1998, the Taxpayer filed a written protest to Assessment No. 2313218.
3. The Taxpayer is engaged in the business of providing accounting services.
4. The Assessment was based upon the Taxpayer's failure to report and pay gross receipts tax on a portion of its total receipts during the assessment period. The Taxpayer failed to report and pay gross receipts tax upon \$5,418.44 it received for performing contract work for Greg Osborn, CPA and \$6,294.56 it received from performing contract accounting services for Morningstar Gallery Ltd.

5. On August 25, 1998, the Taxpayer was presented a letter from the Department providing it sixty days, until October 24, 1998, to demonstrate to the Department the possession of any nontaxable transaction certificates in support of any deductions claimed during the 1995 tax year.

6. With respect to the Taxpayer's receipts from Greg Osborn, CPA, Mr. Osborn directed the Taxpayer not to charge gross receipts tax on the basis that the Taxpayer's services were being resold to Mr. Osborn's clients. Mr. Osborn failed to provide a nontaxable transaction certificate to the Taxpayer and the Taxpayer failed to request one from Mr. Osborn until long after the transactions at issue. The Taxpayer was unable to obtain such a certificate from Mr. Osborn.

7. In 1995, the Taxpayer was hired by Morningstar Gallery Ltd., in Santa Fe, New Mexico, to perform accounting services and to prepare monthly and quarterly statements reflecting the business of the gallery which could be incorporated into the records of the gallery's parent corporation, Masco, Inc. These financial statements included profit and loss statements, bank reconciliations, and balance sheets.

8. Masco, Inc. is a Michigan corporation headquartered in Taylor, Michigan.

9. In preparing the accounting documents for Morningstar Gallery Ltd., the Taxpayer worked closely with the accountants at Masco, Inc., so that the documents were in the form Masco wanted. The documents the Taxpayer prepared were faxed to Masco, Inc. at its Michigan offices. At the same time, the documents were also provided to the managers of Morningstar Gallery Ltd., Mr. Joe Rivera and Mr. Dick Pohrt at the gallery offices in Santa Fe.

10. The Taxpayer invoiced Morningstar Gallery Ltd. for the services it provided and it received payment of its invoices from the gallery. The Taxpayer also received a Federal form 1099 from Morningstar Gallery Ltd. reflecting the compensation it received for the services it provided.

11. The Taxpayer never received a nontaxable transaction certificate from Morningstar Gallery Ltd. to support a claim of deduction for its receipts from the gallery.

12. Subsequent to the issuance of the Department's August 25, 1998 letter to the Taxpayer, but prior to the issuance of Assessment No. 2313218, the Taxpayer discontinued business as a sole proprietorship and incorporated as Santa Fe Business Services, Ltd. When that occurred, Santa Fe Business Services, Ltd. assumed all of the assets and liabilities of Santa Fe Business Services.

DISCUSSION

The Taxpayer does not dispute the portion of the assessment relating to its receipts from Greg Osborne, CPA, on the basis of his failure to demonstrate possession of a non-taxable transaction certificate to support a claim of deduction from tax. The Taxpayer does claim a deduction, pursuant to § 7-9-57 NMSA 1978 for its receipts from Morningstar Gallery Ltd. because that provision, while providing for the receipt of a non-taxable transaction certificate to support a claim of deduction, also allows a taxpayer the option of providing other evidence acceptable to the Department, to support a claim of deduction.

The version of § 7-9-57 which was in effect at the time the Taxpayer received the receipts for which deduction is claimed provides as follows:

Deduction, gross receipts tax; sale of certain services to an out-of-state buyer.

- A. Receipts from performing a service may be deducted from gross receipts if the sale of the service is made to a buyer who delivers to the seller either a nontaxable transaction certificate or other evidence acceptable to the secretary that the transaction does not contravene the conditions set out in Subsection C of this section.
- B. The buyer delivering the nontaxable transaction certificate or other evidence acceptable to the secretary shall not contravene the conditions set out in Subsection C of this section.

- C. Receipts from performance of a service shall not be subject to the deduction provided if the buyer of the service or any of the buyer's employees or agents:
- (1) makes initial use of the product of the service in New Mexico; or
 - (2) takes delivery of the product of the service in New Mexico.

* * *

§ 7-9-57 NMSA 1978 (1995 Repl. Pamp.)

In this case, the Taxpayer sought evidence from Masco, Inc. that it made initial use of the product of the Taxpayer's service, the monthly and quarterly reports, outside of New Mexico. The Taxpayer was not successful in obtaining this information. From the information that was elicited from the Taxpayer at the hearing, however, the Taxpayer would not qualify for the deduction.¹ In the first place, the buyer of the Taxpayer's services was not Masco, Inc., which may be an out-of-state buyer, but Morningstar Gallery. The Taxpayer was hired by the gallery, invoiced the gallery for the services provided and was paid by the Gallery. Thus, the buyer of the services was an in-state entity, rather than its out-of-state parent. Additionally, because the Taxpayer's work product was delivered both to Masco, Inc. as well as to the gallery, the work product was delivered in New Mexico. Both of these facts make the transaction ineligible for the deduction provided at § 7-9-57.

The final matter raised by the Taxpayer is the Taxpayer's argument that since all of the assets and liabilities of the Taxpayer had been transferred to Santa Fe Business Services, Inc. at the time the assessment was issued, that the assessment should have been issued to the successor corporation, rather than the Taxpayer. This argument is without merit. The Taxpayer was a sole proprietorship at the time the deductions were claimed and when those deductions are disallowed, they become a liability of the Taxpayer. The fact that responsibility for payment of

¹ Mr. Caballero, owner of the Taxpayer, was candid and forthcoming in providing testimony concerning his business relationship with Morningstar Gallery Ltd. and Masco, Inc.

that liability can be passed on to the corporate successor under the terms of the transfer in no way invalidates the assessment itself. Whether the Taxpayer can seek indemnification from the corporate successor for the liability is a matter between those parties governed by the terms of the transfer. The Department was not a party to that transaction and is not bound by the terms of that agreement.²

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2313218 and jurisdiction lies over the subject matter and parties to this protest.

2. The Taxpayer failed to demonstrate possession of a nontaxable transaction certificate from Greg Osborn, CPA to demonstrate its entitlement to claim a deduction for its receipts from Mr. Osborn.

3. The Taxpayer did not qualify to claim a deduction pursuant to § 7-9-57 NMSA 1978 for its receipts from Morningstar Gallery Ltd. because the buyer of the product of the Taxpayer's services received delivery of the product of the services within New Mexico in contravention of § 7-9-57(C)(2).

4. Assessment No. 2313218 is valid against the Taxpayer even though at the date of the Assessment, the Taxpayer had transferred all of its assets and liabilities to Santa Fe Business Services, Ltd.

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

² Although the Department is not bound by the terms of the transaction transferring the Taxpayer's assets, the Department may be able to assert liability against the corporate successor in addition to the Taxpayer under the successor in business provisions of the Tax Administration Act, §§ 7-1-61 to 7-1-64 NMSA 1978.

DONE, this 23rd day of June, 2000.