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

IN THE MATTER OF THE PROTEST OF
LAYTON TALBOTT, also d/b/a SILK & STONE No. 00-25
ID NO. 02-143347-00-0
ASSESSMENT NOS. 2216424, 2309959 & 2460279

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 19, 2000, before Margaret B. Alcock, Hearing Officer. Layton Talbott ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. At the request of the parties, the hearing on the issue of out-of-state sales was continued to August 30, 2000. On August 15, 2000, the Taxpayer provided additional information to the Department to substantiate certain of his out-of-state sales and requested the hearing officer to vacate the hearing scheduled for August 30, 2000. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is in the business of selling artwork, gift items and home furnishings. Most of the Taxpayer's business is from sales for resale, although some portion of his business comes from retail sales to the final consumer.

2. The Taxpayer's wholesale business is generated by manufacturer's representatives in the field, who solicit orders from businesses located both within New Mexico and out-of-state. The representatives forward orders to the Taxpayer by mail, phone or fax. The Taxpayer then fills the orders and ships them directly to the wholesale customers.

3. In 1990, the Taxpayer moved to New Mexico from Arizona and registered with the Department for payment of gross receipts, compensating and withholding taxes, which are reported under New Mexico's Combined Reporting System (CRS).

4. At the time he registered, the Taxpayer was given a CRS Filer's Kit, which contains forms and instructions explaining the application of the gross receipts tax.

5. The Taxpayer read on page 4 of the Filer's Kit (Taxpayer's Exhibit 1) that deductions could be substantiated by "one or a combination of the following: 1. Nontaxable transaction certificate (see description) ... 4. Other documents including invoices, purchase orders, contracts, etc." The section of the Filer's Kit immediately following this language went on to state: "The NTTC is the only acceptable substantiation for certain deductions.... When claiming a deduction you should have the necessary NTTC in your possession. Otherwise the Department will disallow the deduction and assess tax, penalty and interest."

6. The Taxpayer ignored the statement in the Filer's Kit that the NTTC is the only acceptable substantiation for certain deductions. Relying solely on the section immediately preceding this statement, the Taxpayer determined that he did not need to obtain NTTCs, but could use invoices and other documents to substantiate his deduction of receipts from selling tangible personal property for resale.

7. Sometime during 1991 or 1992, the Taxpayer discussed the gross receipts tax with his accountant in Arizona, who agreed with him that invoices, purchase orders and other similar documents should be sufficient to establish the Taxpayer's deduction of receipts from selling tangible personal property for resale.

8. The Taxpayer also discussed the gross receipts tax with an employee of the Department. The Taxpayer understood the employee to say that the Taxpayer's receipts from sales

for resale were exempt and did not have to be reported on his CRS-1 returns. Although this conflicted with information concerning deductions in the Filer's Kit, the Taxpayer did not ask for clarification, but simply stopped reporting all of his wholesale receipts.

9. The Taxpayer's Arizona accountant prepared the Taxpayer's federal income tax returns for 1994, 1995 and 1996. Schedule C to the federal returns listed all the Taxpayer's business receipts, including the receipts he had excluded from his New Mexico gross receipts tax returns.

10. In November 1997, the Department sent the Taxpayer a notice asking him to explain why the receipts reported on his 1994 gross receipts tax returns were lower than the receipts reported as business income on his 1994 federal income tax return.

11. The Taxpayer responded with a letter explaining that the discrepancy was attributable to receipts from selling tangible personal property for resale and that a Department employee had told him these receipts were exempt.

12. On February 8, 1998, the Department issued Assessment No. 2216424 to the Taxpayer in the total amount of $6,753.62, representing gross receipts tax, penalty and interest for the period January-December 1994.

13. On February 24, 1998, the Taxpayer filed a written protest to the assessment.

14. On October 31, 1998, the Department issued Assessment No. 2309959 to the Taxpayer in the total amount of $4,943.11, representing gross receipts tax, penalty and interest for the period January-December 1995.

15. On December 7, 1998, the Taxpayer filed a written protest to the assessment. The protest was not accepted by the Department's protest office because it was not filed within 30 days of the date of the assessment as required by Section 7-1-24 NMSA 1978.

16. In December 1998, the Taxpayer also sent the Department written notice of his new address in Arizona.

17. On December 13, 1999, the Department issued Assessment No. 2460279 to the Taxpayer at his Arizona address in the total amount of $4,448.70, representing gross receipts tax, penalty and interest for the period January-December 1996.

18. On December 20, 1999, the Taxpayer filed a written protest to the assessment.

19. After the Taxpayer's protests were filed, the Taxpayer provided the Department with some invoices and shipping documents to establish that a portion of his receipts were from out-of-state sales and were not subject to New Mexico gross receipts tax. Based on these documents, the Department agreed to make certain adjustments.

20. At the hearing held July 19, 2000, the parties agreed to continue the hearing to August 30, 2000 to give the Taxpayer time to provide additional information to the Department on the issue of out-of-state sales.

21. On August 15, 2000, the Taxpayer sent the Department additional documents supporting his out-of-state sales and requested the hearing officer to vacate the hearing scheduled for August 30, 2000.

22. On August 23, 2000, the Department filed a worksheet showing the adjustments made from the information provided by the Taxpayer. The worksheet, attached to this decision as Appendix A, also shows the outstanding balances remaining in dispute.

DISCUSSION

The Taxpayer's protest raises the following issues: (1) whether the hearing officer has jurisdiction to consider the Taxpayer's protest of Assessment No. 2309959; (2) whether the Taxpayer's receipts from New Mexico sales of tangible personal property for resale are either

deductible or exempt from gross receipts tax, even though the Taxpayer did not have NTTCs from his buyers; (3) whether the Department is estopped—by the information contained in the CRS Filer's Kit or by the advice given to the Taxpayer by an employee of the Department—from enforcing collection of the tax, penalty and interest assessed against the Taxpayer; (4) whether the Taxpayer is liable for the negligence penalty imposed by Section 7-1-69 NMSA 1978 (1992 & 1996).

Section 7-1-17(C) NMSA 1978 (1992) states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Further, Section 7-9-5 NMSA 1978 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." 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). Accordingly, it is the Taxpayer's burden to come forward with evidence and legal arguments to show that he is entitled to the deductions and exemptions claimed and that the Department's assessment is incorrect.

Jurisdiction. On October 31, 1998, the Department issued Assessment No. 2309959 to the Taxpayer in the total amount of $4,943.11, representing gross receipts tax, penalty and interest for the period January-December 1995. On December 7, 1998, the Taxpayer's accountant filed a written protest on the Taxpayer's behalf. The protest was not accepted by the Department's protest office because it was not filed within 30 days of the date of the assessment as required by Section 7-1-24(B) NMSA 1978 (1993). At the hearing held July 19, 2000, the Taxpayer maintained the assessment was sent to the wrong address and he should have been given additional time to protest.

Section 7-1-17(B)(2) NMSA 1978 (1992) states that assessments of tax are effective "when a document denominated 'notice of assessment of taxes', issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted...." Section 7-1-9(A) NMSA 1978 (1997), states that "any notice required or authorized by the Tax Administration Act to be given by mail is effective if mailed ... to the taxpayer or person at the last address shown on his registration certificate or other record of the department." In this case, the Department mailed Assessment No. 2309959 to the Taxpayer at Box 22387, Santa Fe, NM 87502, the last address shown on the Department's records. The Taxpayer maintained the Department knew he had moved to Arizona and testified that prior to the assessment he faxed several letters to the Department that listed his Arizona telephone number at the top. The Taxpayer acknowledged, however, that he does not have any record of notifying the Department of his Arizona address or asking the Department to change his registration until early December 1998, well over a month after the assessment was mailed.

In the absence of any evidence that the Department had the Taxpayer's Arizona address at the time Assessment No. 2309959 was issued in October 1998, the assessment was effective when mailed to the Santa Fe address shown on the Department's records. Pursuant to Section 7-1-24(B) NMSA 1978 (1993), the protest filed December 7, 1998 was not timely, and the hearing officer has no jurisdiction to consider the Taxpayer's arguments concerning Assessment No. 2309959.

Sales for Resale. Most of the Taxpayer's business during the years at issue involved the sale of tangible personal property for resale. Some sales were made to customers in New Mexico and some sales were made to customers located out-of-state. There is no dispute that out-of-state sales are not subject to the New Mexico gross receipts tax, and the Department abated the gross receipts tax, penalty and interest assessed on receipts the Taxpayer was able to trace to sales made outside

New Mexico. What remains in dispute is whether the Taxpayer is entitled to deduct receipts from New Mexico sales of tangible personal property for resale when the Taxpayer did not have timely possession of NTTCs from his buyers.

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. The Taxpayer claims the deduction provided in Section 7-9-47 NMSA 1978 (1994):

> Receipts from selling tangible personal property or licenses may be deducted from 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 resell the tangible personal property or license either by itself or in combination with other tangible personal property in the ordinary course of business. (emphasis added) ....

The fact that a particular transaction was a sale of tangible personal property for resale is not sufficient to support a deduction under Section 7-9-47. The requirements of the statute are very specific. The buyer of tangible personal property must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts. 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.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988). Because the Taxpayer did not have timely NTTCs from his buyers, he is foreclosed from claiming a deduction under Section 7-9-47.

Estoppel. The Taxpayer asserts that the instructions in the CRS Filer's Kit misled him into believing he did not need to obtain NTTCs to support his deduction of receipts from selling tangible personal property for resale. He also asserts that a Department employee told him his receipts from wholesale transactions were exempt from gross receipts tax and did not have to be reported on his

CRS-1 returns. Based on these allegations, the Taxpayer argues that the Department is estopped from denying him the deduction provided in Section 7-9-47.

As a general rule, courts are reluctant to apply the doctrine of 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).

Estoppel Based on Statute. Section 7-1-60 NMSA 1978 (1993) provides for estoppel against the Department in two circumstances: when the taxpayer acted according to a regulation or when the taxpayer acted according to a revenue ruling specifically addressed to the taxpayer. In this case, the Taxpayer's failure to obtain NTTCs was not in accordance with any Department regulation or ruling. To the contrary, had the Taxpayer read the Department's regulations, he would have realized that he was required to obtain NTTCs to support the deduction provided in Section 7-9-47. *See*, for example, Regulation 3 NMAC 2.47.8.1 which states:

> 8.1 In order for a taxpayer to qualify for the deduction provided in Section 7-9-47 the taxpayer must meet the requirements of Section 7-9-47, which include being the recipient of a nontaxable transaction certificate (NTTC) of the type specified and furnished by the Department to be delivered by a buyer who resells tangible personal property in the ordinary course of business.

There is no statutory basis to estop the Department from enforcing its assessment of gross receipts tax against the Taxpayer.

Estoppel Based "Right and Justice". Case law provides for estoppel against the state where right and justice demand its application. For estoppel to apply, the party seeking it must show: (1) lack of knowledge of the true facts in question; (2) detrimental reliance on the other party's conduct; and (3) that its own reliance was reasonable. *Johnson & Johnson v. Taxation and Revenue Department*, 1997-

NMCA-030, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997). The facts of this case do not establish a basis for applying equitable estoppel against the Department.[1]

Filer's Kit. The Taxpayer claims he was misled by the instructions contained in the CRS Filer's Kit. At issue is the following language found on page 4 of the 1994 Filer's Kit (Taxpayer's Exhibit 1):

> **Substantiation Required to Support a Deduction**
>
> The Department requires taxpayers to retain substantiation in their records when claiming a deduction from gross receipts. That substantiation can be one or a combination of the following:
>
> 1. Nontaxable transaction certificate (see description)
> ...
> 4. Other documents including invoices, purchase orders, contracts, etc.
>
> **Nontaxable Transaction Certificate (NTTC)**
>
> The NTTC is the only acceptable substantiation for certain deductions. The buyer obtains an NTTC from the Department to give to a seller, which entitles the seller to deduct those receipts when determining taxable gross receipts....
>
> When claiming a deduction you should have the necessary NTTC in your possession. Otherwise the Department will disallow the deduction and assess tax, penalty and interest.

Reading only the first section of the language quoted above, the Taxpayer determined that he could substantiate a deduction of receipts from selling tangible personal property for resale with invoices, purchase orders and similar documents. The Taxpayer ignored the subsequent statement that the NTTC "is the only acceptable substantiation for certain deductions." The Taxpayer also ignored the

[1] It should be noted that the hearing officer's powers do not include authority to grant an equitable remedy not authorized by statute. *See*, *AA Oilfield Service v. New Mexico State Corporation Commission***,** 118 N.M. 273, 881 P.2d 18 (1994). Even if the hearing officer determined that equitable estoppel were appropriate in a particular case, the taxpayer would have to appeal to the New Mexico Court of Appeals to obtain such relief.

discussion of specific deductions set out on pages 5-7 of the Filer's Kit. The discussion begins on page 5 with the following statement:

> **List of Deductions**
>
> A list of deductions from gross receipts is presented below along with any special requirements for claiming the deduction and specific substantiation required to support the deduction (e.g. an NTTC)....

And continues at the top of page 7:

> **Property Resale Deduction**
>
> Receipts from sales of tangible personal property for resale (7-9-47)
> • Requirement: Type 2 NTTC

The Taxpayer's reliance on a single section of the Filer's Kit—to the exclusion of other sections bearing directly on the specific deduction covering his transactions—was not reasonable. Had the Taxpayer read the entire Filer's Kit, he would have known that possession of an NTTC is a requirement for taking the deduction provided in Section 7-9-47. At a minimum, the Taxpayer would have been alerted to the need to clarify the documentation needed to support his deductions. His decision to rely on only that portion of the instructions he found most convenient to follow does not establish a basis for estopping the Department from enforcing the law as written.

Advice of Department Employee. The Taxpayer originally reported all of his receipts on his CRS-1, deducted his wholesale receipts and paid tax on the balance. He maintains he was subsequently misled by a Department employee who advised him that wholesale receipts were exempt from tax and did not have to be reported at all. Based on the evidence in the record, it is my conclusion that the Taxpayer misunderstood the advice he received from the Department.

It is true the Taxpayer was not required to report wholesale receipts from sales made to customers located out-of-state. This is because receipts from selling property outside New Mexico do

not come within the statutory definition of "gross receipts." *See*, Section 7-9-3(F) NMSA 1978. The Taxpayer was required, however, to report wholesale receipts from sales made to customers in New Mexico. Those receipts could then be deducted if the Taxpayer obtained a timely NTTC from the buyer.

Although there is a clear distinction between the taxability of receipts from in-state and out-of-state sales, the Taxpayer has consistently refused to recognize this distinction. In his correspondence with the Department, the Taxpayer insisted that all his receipts should be treated in the same way, regardless of whether the sale was to a New Mexico customer or an out-of-state customer. In response to the protest auditor's February 8, 2000 letter attempting to explain the difference between these sales, the Taxpayer stated: "I have not enclosed shipping documents for out of state sales because to do so would indicate that I agree with your assessment that I owe tax on in state sales. I do not owe tax on any sales, neither in state nor out of state." The Taxpayer reiterated this position at the hearing, and it was only at the hearing officer's insistence that he agreed to provide additional information to establish his out-of-state sales, which would then give the Department a basis to abate the tax assessed on those sales.

After reviewing the testimony and other evidence submitted at the hearing, I do not find it credible that an employee of the Department told the Taxpayer he did not have to report receipts from New Mexico sales on his CRS-1 returns. Based on the Taxpayer's misunderstanding of the law applicable to in-state and out-of-state sales, I find it more likely that the employee told the Taxpayer he did not have to report wholesale receipts from out-of-state sales and the Taxpayer interpreted this to apply to all of his wholesale receipts.

Even if the Department employee had given the Taxpayer erroneous advice, this would not satisfy the requirements for equitable estoppel because the Taxpayer has failed to show that his reliance

on that advice was reasonable. Prior to his conversation with the employee, the Taxpayer was reporting all of his receipts on the CRS-1, deducting his wholesale receipts and paying tax on the balance. This method of reporting conformed to the instructions on page 4 of the CRS Filer's Kit:

> A deduction from gross receipts, like an exemption, is a nontaxable amount but unlike an exemption, **A DEDUCTION MUST BE REPORTED ON THE CRS-1 FORM AS "GROSS RECEIPTS" IN COLUMN C AND THEN DEDUCTED IN COLUMN D, "TOTAL DEDUCTIONS**." (emphasis in the original)

The information the Taxpayer says he received from the Department employee was in direct conflict with the instructions in the Filer's Kit. The Taxpayer was aware of this, but stated in his May 27, 1999 letter to the protest auditor (Department Exhibit 1): "It didn't matter to me if I included wholesale income then deducted all of it leaving only retail or if I excluded it entirely." Taxpayers are not entitled to take such a casual approach to their tax reporting obligations. Knowing the advice given to him by the employee was contrary to the instructions in the Filer's Kit, the Taxpayer had an obligation to clarify the basis for the employee's advice or obtain written confirmation from the Department concerning the proper method of reporting his gross receipts taxes. The Taxpayer's unquestioning reliance on the oral representations of a Department employee was not reasonable, particularly when the information received conflicted with the Department's written instructions. *See*, *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989).

Penalty. Section 7-1-69 NMSA 1978 (1992 & 1996) imposes a penalty of two percent per month, up to a maximum of ten percent, "in the case of failure, due to negligence or disregard of rules and regulations" to pay tax in a timely manner. Department Regulation 3 NMAC 1.11.11 sets out several situations that may indicate a taxpayer has not been negligent, including "reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts...." In this case, the Taxpayer testified that sometime during 1991 or 1992, he

discussed the gross receipts tax with his accountant in Arizona, who agreed with him that invoices, purchase orders and similar documents were sufficient to establish the Taxpayer's deduction of receipts from selling tangible personal property for resale. This testimony is consistent with the position taken in the protest letters the Taxpayer's accountant filed on his behalf. I find the Taxpayer reasonably relied on the advice of his accountant and the negligence penalty should be abated.

CONCLUSIONS OF LAW

1. The Taxpayer filed timely, written protests to Assessment Nos. 2216424 and 2460279, and jurisdiction lies over the parties and the subject matter of the protests to these assessments.

2. The Taxpayer's written protest to Assessment No. 2309959 was not timely, and the hearing officer does not have jurisdiction to consider the Taxpayer's protest to this assessment.

3. The Taxpayer is not entitled to a deduction or exemption of his receipts from New Mexico sales of tangible personal property for resale because the Taxpayer did not have timely possession of required NTTCs.

4. Estoppel does not apply to prevent the Department from enforcing its assessments of gross receipts tax, interest and penalty.

5. The Taxpayer reasonably relied on the advice of his accountant, and the negligence penalty imposed by Section 7-1-69 NMSA 1978 should be abated.

For the foregoing reasons, the Taxpayer's protest is partially granted and partially denied. The Department is ordered to abate the negligence penalty assessed against the Taxpayer. In all other respects, the Department's assessments of gross receipts tax and interest, adjusted pursuant to the worksheet attached as Appendix A, are upheld.

DATED August 31, 2000.