

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

**IN THE MATTER OF THE PROTEST OF
KIMBERLY ANN CAYLOR
ID NO. 02-405075-00-0
ASSESSMENT NO. 2511074**

No. 00-34

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 9, 2000, before Margaret B. Alcock, Hearing Officer. Kimberly Ann Caylor ("Taxpayer") represented herself. The Taxation and Revenue Department ("Department") was represented by Lewis Terr, Esq. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Between January and November of 1996, the Taxpayer worked as a commissioned salesperson for Elements, a business engaged in the sale of antiques, fabrics, and similar items.
2. The Taxpayer was an independent contractor who received a fixed percentage of each sale she made on behalf of the store.
3. Although most of the customers the Taxpayer worked with were either located out-of-state or purchasing items for resale, the Taxpayer also made some retail sales to the final consumer of the goods purchased.
4. Elements maintained a file of nontaxable transaction certificates ("NTTCs") received from its customers.
5. At the time of each sale, the Taxpayer checked the NTTC file to determine whether gross receipts tax should be included on the sales invoice.

6. Because she was paid on commission, the Taxpayer retained copies of invoices from most of the sales she made, together with copies of relevant NTTCs.

7. The Taxpayer's 1996 federal income tax return reported her sales commissions as business income on Schedule C to federal Form 1040.

8. The Taxpayer was not aware that she was subject to New Mexico gross receipts tax on her business income.

9. In late 1999, the Department received information from the Internal Revenue Service concerning the business income reported on the Taxpayer's 1996 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department and had not reported or paid gross receipts tax on this income.

10. In January 2000, the Department sent the Taxpayer notice that it was conducting a limited scope audit of her 1996 tax reporting and asked her to explain why she had not paid gross receipts tax on the business income reported on Schedule C of her 1996 federal income tax return.

11. The Taxpayer responded to the Department's inquiry with documents showing that approximately 80 percent of the Taxpayer's 1996 income was deductible under Section 7-9-66 NMSA 1978 because it was income derived from commissions on sales of tangible personal property that were not subject to gross receipts tax. The documents established that these underlying sales were either out-of-state sales or sales for resale supported by a valid NTTC.

12. The Taxpayer was unable to provide additional documentation to show that she was entitled to deduct the remaining 20 percent of her income.

13. The Taxpayer attempted to obtain copies of sales invoices and NTTCs from Elements. One of the owners provided copies of a few NTTCs, but stated that he and his partner had sold the business and he no longer had all of the paperwork relating to the 1996 period.

14. On April 7, 2000, the Department issued Assessment No. 2511074 to the Taxpayer in the total amount of \$690.80, representing gross receipts tax, penalty and interest on the business income for which the Taxpayer was unable to produce documents to support her claim to a deduction under Section 7-9-66 NMSA 1978.

15. On May 3, 2000, the Taxpayer filed a written protest to the assessment.

DISCUSSION

The issue presented is whether the Taxpayer's inability to prove that her 1996 sales commissions were derived from out-of-state sales or sales for resale supported by a valid NTTC forecloses the Taxpayer from deducting her receipts from these transactions. The Taxpayer maintains that circumstances outside her control prevented her from obtaining the invoices and NTTCs needed to establish her right to the deduction claimed. She testified that she could have made copies of the necessary documents at the time of each transaction, but did not do so because she did not know her commissions were subject to gross receipts tax. The Taxpayer questions why the Department took so long to notify her of her tax liability. By the time she received the Department's audit notice in January 2000, Elements had been sold and the former owners were either unwilling or unable to provide her with the NTTCs and other documents needed to establish her right to deduct her commissions. The Taxpayer believes these circumstances should excuse her from payment of the gross receipts tax on the balance of her 1996 income.

The Taxpayer's arguments are based on a misunderstanding of New Mexico's self-reporting tax system. It is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13(B), NMSA 1978. There are insufficient government resources available for the Department to continually audit every citizen to determine whether he or she has fully complied with

state tax laws. Although the Department performs periodic "tape matches" that compare information reported to the IRS with information reported to New Mexico, there is some delay before the federal tape match information is made available to the Department. Under the Tax Administration Act, the Department has three years from the end of the calendar year in which a tax is due to issue an assessment. Section 7-1-18(A) NMSA 1978. The April 2000 assessment issued to the Taxpayer was well within the statutory limitations period provided by the New Mexico Legislature.

In conjunction with its audit work, the Department makes a continuing effort to educate taxpayers concerning New Mexico's gross receipts tax. The Department holds regular workshops at its district offices; it has a variety of publications addressing issues of concern to various businesses; it issues regulations interpreting the state's gross receipts tax statutes; and it gives taxpayers the opportunity to ask for written rulings on issues not specifically covered in the Department's regulations and instructions. The Department is not omniscient, however, and cannot be expected to know when a particular individual starts a business or undertakes some other income-producing activity that is subject to the gross receipts tax. For this reason, the law charges every individual with the reasonable duty to ascertain the possible tax consequences of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). In this case, it was the Taxpayer's responsibility to register with the Department and obtain the forms needed to properly report gross receipts tax on her business income.

While there is no question that the Taxpayer's failure to file required returns or provide adequate records to the Department was due to a lack of knowledge, and not to any fraudulent intent, the burden remains with the Taxpayer to establish her right to the deductions claimed. Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct. *See also, Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972).

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). In this case, the Taxpayer has been unable to provide the invoices and NTTCs needed to show that the sales underlying the commissions in dispute were nontaxable transactions, entitling her to the deduction provided in Section 7-9-66 NMSA 1978. Accordingly, she has not met her burden of proof and the assessment must be upheld.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2511074 and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer failed to meet her burden of proving that the sales commissions in dispute were derived from nontaxable transactions, and the Taxpayer is not entitled to claim the deduction provided in Section 7-9-66 NMSA 1978.

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

DATED November 29, 2000.