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

**IN THE MATTER OF THE PROTEST OF**
**MARCELINO SANCHEZ** **No. 01-22**
**ID NO. 02-404230-00-7**
**ASSESSMENT NO. 2475914**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 10, 2001, before Margaret B. Alcock, Hearing Officer. Marcelino Sanchez ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. During 1996, the Taxpayer performed auto repair services for Empire Auto Sales ("Empire") in Albuquerque, New Mexico.

2. Empire provided the Taxpayer with work space to perform his services.

3. Empire told the Taxpayer he would be working as contract labor and did not offer him health insurance, sick leave, vacation or other benefits.

4. The Taxpayer set his own hours and provided his own supplies and materials.

5. The Taxpayer was paid by the job, not by the hour.

6. Empire paid the Taxpayer in cash and did not withhold any income or social security taxes.

7. Empire did not issue a Form 1099 or any other tax form to the Taxpayer to indicate how much the Taxpayer had earned from performing services for Empire.

8. The Taxpayer kept a notebook where he listed the money he earned from his auto repair jobs and the cost of the supplies and materials used in each job.

9. The Taxpayer did not realize that New Mexico gross receipts tax applied to his receipts from working as an independent contractor for another business. Accordingly, the Taxpayer did not charge Empire gross receipts tax on his services and did not report or pay gross receipts tax to the Department.

10. The Taxpayer went to H&R Block to prepare his 1996 personal income tax returns.

11. H&R Block used the information in the Taxpayer's notebook to determine his income and expenses from performing auto repair services and reported this information on Schedule C (Profit or Loss from Business) of his federal income tax return.

12. On December 15, 1999, as a result of information obtained from the IRS, the Department mailed the Taxpayer a notice of limited scope audit concerning the discrepancy between business income reported to the IRS on Schedule C of the Taxpayer's 1996 federal income tax return and business income reported to the Department for gross receipts tax purposes.

13. On December 30, 1999, the Department issued Assessment No. 2475914 to the Taxpayer in the total amount of $852.95, representing gross receipts tax, penalty and interest for the period January-December 1996.

14. The Taxpayer filed a written protest with the Department, which was received by the Department on February 1, 2000.

**DISCUSSION**

The Taxpayer has challenged his liability for the gross receipts tax, penalty and interest assessed on his receipts from performing auto repair services during 1996. The Taxpayer raises the following issues: (1) whether the Taxpayer's services for Empire qualified as a business subject to

gross receipts tax, and (2) whether penalty and interest should be reduced because the Taxpayer was not aware of his liability for gross receipts tax.

Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3(X) NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also*, *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the assessment of gross receipts tax, penalty and interest is presumed to be correct, and it is the Taxpayer's burden to present evidence showing he is entitled to an abatement of these amounts.

**Liability of Independent Contractors for Gross Receipts Tax.** The Taxpayer does not dispute that he worked as an independent contractor performing services for Empire Auto Sales. He does not believe, however, that the work he did qualified as a business because he worked simply to earn personal income for himself. The Taxpayer did not have other employees or a separate business location, nor did he charge gross receipts tax on his services.

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*." (Emphasis added.) 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 statutes make no distinction between large corporations, small "mom and pop" operations, or individuals acting as independent contractors. In this case, the Taxpayer entered into an agreement with Empire to perform auto repair services—which qualifies as an "activity"—in return for money—which was a direct benefit to him. The Taxpayer's work for

Empire meets the statutory definition of engaging in business and his receipts from that business are subject to gross receipts tax.

New Mexico's gross receipts tax is imposed on the seller of goods and services, not on the buyer. As a practical matter, the tax is simply part of the seller's cost of doing business. Although it is a common practice for sellers of services (such as the Taxpayer) to pass the cost of the gross receipts tax on to the buyer of those services (in this case, Empire), the seller's ability to separately charge or obtain reimbursement of the tax does not affect the seller's legal obligation to pay tax to the state. Accordingly, the Taxpayer is liable for gross receipts tax on his receipts from performing services for Empire, even though he never charged or collected gross receipts tax on his earnings.

**Lack of Knowledge of the Gross Receipts Tax**. The Taxpayer maintains that the amount of penalty and interest assessed is too high and should be reduced. The Taxpayer argues that his failure to pay the tax was due to his lack of knowledge and points to the fact that neither the Department nor H&R Block notified him that he owed gross receipts tax on his income.

*Interest*. Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

> A. If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid* to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute.

The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Here, the Taxpayer failed to pay gross receipts tax due to the state on his 1996 income. Although this failure was based on the Taxpayer's lack of knowledge and was not intentional, the fact remains that the Taxpayer had the use of those tax funds during the period at issue. Section 7-1-67 NMSA 1978 requires interest to be paid for any period of time during which the state is denied the use of the funds to which it is legally entitled. Accordingly, interest was properly assessed against the Taxpayers and there is no basis for abatement.

*Penalty***.** Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

> 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
>
> 2) inaction by taxpayers where action is required;
>
> 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, the Taxpayer's failure to pay gross receipts tax was due to his lack of knowledge of New Mexico law. The Taxpayer's belief that the Department should have notified him of his liability for gross receipts tax is based on a misunderstanding of New Mexico's self-reporting tax system. Although the Department makes a continuing effort to educate taxpayers through workshops, regulations, instructions and other publications, the Department is not omniscient, 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). A taxpayer's lack of knowledge or erroneous belief that no tax is due has been held to constitute negligence for purposes of Section 7-1-69 NMSA 1978. *Id.*

The Taxpayer's argument that he was not negligent because H&R Block failed to advise him of his gross receipts tax liability raises a more difficult issue. Regulation 3.1.11.11 NMAC 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...." Although the Taxpayer relied on H&R Block to prepare his state and federal income tax returns for the 1996 tax year, there is no evidence he ever asked whether there might be other taxes due in connection with the business income reported on his federal return. Given these facts, the Taxpayer cannot claim that his failure to file gross receipts tax returns was an informed decision based on advice received from his tax advisor. The Taxpayer neither requested nor received advice from H&R Block concerning the gross receipts tax, and there is no basis to excuse the Taxpayer from payment of penalty under Regulation 3.1.11.11 NMAC.

**CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to Assessment No. 2475914, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was engaging in business in New Mexico as defined in Section 7-9-3(E) NMSA 1978 and was subject to gross receipts tax on his receipts from performing auto repair services as an independent contractor.

3. Pursuant to Section 7-1-67 NMSA 1978, interest was properly assessed against the Taxpayer on his unreported gross receipts tax for the period January-December 1996.

4. Pursuant to Section 7-1-69 NMSA 1978, the Taxpayer was negligent in failing to report gross receipts tax during the period January-December 1996 and penalty was properly assessed.

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

DATED September 12, 2001.