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

IN THE MATTER OF THE PROTEST OF
SOUTHWEST GIN SERVICE AND SUPPLY, INC. NO. 97-38
ID. NO. 02-191418-00 4, PROTEST TO
ASSESSMENT NO. 1974790

DECISION AND ORDER

This matter came on for formal hearing on September 12, 1997, before Gerald B. Richardson, Hearing Officer. Southwest Gin Service and Supply, Inc., hereinafter, "Taxpayer", was represented by Mr. Brent Stewart, CPA. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Following the hearing the record was held open to allow the Taxpayer to submit additional documentation. The additional documentation was received on September 29, 1997, and the matter was considered submitted for determination at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is in the business of selling cotton gins and cotton gin parts, and installs them or oversees the installation of those items.

2. The Taxpayer is headquartered in Chandler, Arizona.

3. During 1986, the Taxpayer had an employee who resided in New Mexico and made sales calls to establish business for the Taxpayer in New Mexico. The Taxpayer obtained a

tax identification number from the Department in order to report and pay gross receipts taxes and the Taxpayer paid taxes on its sales in New Mexico.

4. The Taxpayer's New Mexico employee quit his employment with the Taxpayer after about six months. Mrs. Fredna Watson, Secretary-Treasurer of the Taxpayer then contacted the Department and spoke with Department employees in the Las Cruces and Santa Fe offices of the Department concerning the Taxpayer's need to continue to keep its New Mexico tax number and pay taxes. Mrs. Watson explained that the Taxpayer no longer had a resident salesperson in New Mexico, and had no offices in New Mexico. She explained that the Taxpayer would continue to service its customers in New Mexico by shipping to them from the Taxpayer's Arizona office, but there was no discussion as to whether that shipping would be accomplished by common carrier or by the Taxpayer's own employees and vehicles.

5. Based upon her discussion with the Department's employees, the Taxpayer was informed that it no longer had sufficient presence in New Mexico for it to be required to report and pay taxes on its sales into New Mexico and the Taxpayer canceled its tax identification number.

6. The Taxpayer re-established its tax account with the Department in late 1991 when it had a qualifying party obtain a New Mexico contractor's license in order to perform construction services in connection with the installation of cotton gins in New Mexico. The Taxpayer resumed paying taxes on its sales in New Mexico.

7. During 1995 the Taxpayer was audited by the Department for the reporting periods of January, 1988 through October, 1993.

8. As a result of the audit, on November 9, 1995 the Department issued Assessment No. 1974790 to the Taxpayer assessing $83,663.69 in gross receipts taxes, $8,422.53 in penalty

and $53,033.73 in interest with respect to sales and installation of cotton gins and cotton gin parts in New Mexico during the audit period.

9. On November 29, 1995 the Taxpayer wrote to the Department and requested an extension of time in which to file a protest to the Department's assessment.

10. On January 16, 1996 the Department granted the Taxpayer until February 3, 1996 to file its protest.

11. On February 1, 1996 the Taxpayer filed a written protest to Assessment no. 1974790.

12. Since issuing the assessment, the Department has agreed to abate the penalty assessed in its entirety and has made adjustments to the tax and interest assessed to remove from the tax calculation the Taxpayer's receipts from sales into New Mexico where the property sold was not installed or delivered by the Taxpayer's employees and was shipped into New Mexico by common carrier.

13. The Taxpayer primarily disputes the inclusion of its receipts from three contracts entered into in 1991. The first was a contract in the amount of $139,500 with Four Points Gin in Las Cruces, N.M. The contract was broken into two components, $125,000 for equipment which the Taxpayer delivered in its own trucks and $14,500 which represented the contractual compensation for an employee of the Taxpayer to oversee the installation of the equipment. The second and third contracts were part of the same transaction with the Mesa Farmer's Coop in Dona Ana County, New Mexico. The transaction was broken down into a contract for the purchase of the cotton gin equipment in the amount of $700,000 and a contract for the construction of a building to house the gin equipment and installation of the equipment for $425,000. The equipment was delivered into New Mexico by the Taxpayer on its own vehicles.

The Taxpayer does not dispute the taxability of the portion of the contract for construction and installation of the equipment, but disputes the taxability of the sale of the equipment itself.

DISCUSSION

The Taxpayer disputes the Department's assessment of taxes for the time period prior to its reapplication for a New Mexico tax identification number in late 1991 on the basis that it had insufficient nexus with New Mexico for it to be subject to tax. During that period of time it had no office or resident employees in New Mexico, and its sales in New Mexico were made from its Arizona offices. It did, however, make deliveries to its New Mexico customers from its Arizona offices using its own employees and trucks.

The Taxpayer relies upon a recent Virginia case, ***Commonwealth of Virginia, Department of Taxation v. National Private Truck Council***, 1997 Va. LEXIS 12, (January 10, 1997). In that case, the Virginia Supreme Court struck down a regulation issued by the Virginia Department of Taxation which purported to restrict the immunity from income taxation provided under Public Law 86-272, the "Drummer Act", codified at 15 U.S.C. §381. The Drummer Act specifies that no state shall have the power to impose an income tax on income derived within the state from interstate commerce if the only activity of the person in the state is the solicitation of orders which are sent outside the state for approval or rejection and are filled by shipment or delivery from outside the state. Virginia's regulation interpreted the Drummer Act to immunize only solicitations and deliveries which were accomplished by common carrier and purported to subject to tax income sales in which the goods were delivered by a taxpayer's own vehicles. The Virginia Supreme Court struck down the regulation on the basis that the Drummer Act did not

draw the distinction between deliveries by common carrier and by a person's own delivery trucks.

The Department argues that this case has no applicability to the situation presented because by its own wording, the Drummer Act applies to restrict a state's power to tax with respect to income taxes only. Additionally, the Department argues that in the absence of an act of Congress similar to the Drummer Act which would apply to the power of states to impose taxes other than income taxes, that under existing precedent, the state has the power to impose its taxes under the circumstances of this case.

The Department is correct on both counts. The Drummer Act, as written, applies only to the power of states to impose "a net income tax on the income derived within such State..." and contains no restriction with respect to other taxes. Additionally, New Mexico's courts have upheld the imposition of New Mexico's gross receipts tax upon a company which sent sales representatives to service its New Mexico customers and delivered its goods to its New Mexico customers in its own trucks. ***See, Proficient Food Company v. New Mexico Taxation and Revenue Department,*** 107 N.M. 392, 758 P.2d 806, ***cert. denied***, 107 N.M. 308, 756 P.2d 1203 (1988). In upholding New Mexico's ability to impose its gross receipts tax in ***Proficient Food***, the New Mexico Court of Appeals relied upon the Supreme Court's decision in ***Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,*** 483 U.S.232 (1987). In that case the Supreme Court found that Washington state had sufficient nexus to impose its gross receipts tax upon a corporation which had no offices, owned no property and had no employees residing in Washington but it had independent contractor sales representatives soliciting orders and calling on customers in the state.

This case is indistinguishable from ***Proficient Food, supra.*** The Taxpayer made deliveries into New Mexico using its own trucks and employees. In such circumstances the sale by the Taxpayer clearly occurred in New Mexico because the transfer of title, possession and risk of loss of the property occurred in New Mexico. Additionally, the Taxpayer's employees serviced its New Mexico customers by such activities as overseeing the installation of the products it sold. Thus, the Taxpayer had sufficient contacts with New Mexico to allow the imposition of the tax at issue.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1974790 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer had sufficient nexus, under the Commerce Clause of the United States Constitution for the Department to properly impose its gross receipts tax upon the Taxpayer for sales in New Mexico which were delivered by the Taxpayer in its own trucks.

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

DONE, this 22nd day of October, 1997.