

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

IN THE MATTER OF THE PROTEST OF  
AMERICAN HOSPITALITY RESOURCES, INC.  
ID. NO. 02-228639-00 0  
ASSESSMENT NOs. 2105740 through 2105749

98-11

**DECISION AND ORDER**

This matter came on for formal hearing on February 26, 1998 before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department"), was represented by Bridget A. Jacober, Special Assistant Attorney General. American Hospitality Resources, Inc. ("AHR") failed to appear at the hearing. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During the assessment periods May 1995 and February 1996-October 1996, AHR was engaged in the business of selling hotel furnishings to hotels and motels in New Mexico.
2. On November 1, 1996, an anonymous person called Anita Williams, Audit Manager in the Department's Office of Inspector General. The caller complained that Victor Sprecher, president of AHR, was not charging gross receipts tax on the corporation's sales in New Mexico.
3. The caller stated that Mr. Sprecher bragged that he deposited receipts from New Mexico sales in a Colorado bank account and receipts from Colorado sales in a New Mexico bank account, thereby avoiding taxes in both states. The caller said Mr. Sprecher had closed his Colorado office, sold his Colorado home and moved to Albuquerque a couple of years before.
4. The anonymous caller mailed Ms. Williams a copy of the 1995-96 Membership Directory and Buyer's Guide issued by the New Mexico Hotel & Motel Association. AHR was listed

under the category “Suppliers” with an Albuquerque address and telephone number. Department Exhibit 5.

5. The cover letter sent with the directory listed the names and addresses of New Mexico lodging facilities that had purchased furnishings from AHR. The letter, which was signed “Several New Mexico Citizens”, stated that the only sales on which Victor Sprecher charged tax were sales of television sets “because his TV supplier requires that he collect state sales tax.” The letter questioned whether Mr. Sprecher actually paid the tax collected over to the state. Department Exhibit 12.

6. Ms. Williams subsequently called some of the lodging facilities listed in the letter. After determining that one hotel had purchased over \$300,000 of furnishings from AHR during 1996, Ms. Williams sent letters to seven other hotels and motels requesting confirmation of purchases made from AHR and copies of invoices relating to those purchases. Department Exhibit 16.

7. Based on the responses received, Ms. Williams confirmed that AHR had made at least \$800,000 of sales to New Mexico hotels and motels during 1995 and 1996. Department Exhibit 21.

8. The invoices also confirmed that the only sales on which tax was charged were sales of electronic equipment such as television sets and clock radios. Department Exhibit 18, 3/22/96 invoice; Department Exhibit 19, 2/23/96 and 3/7/96 invoices; Department Exhibit 28, 11/05/96 invoice.

9. Most of AHR’s invoices did not make any representations concerning tax. A January 2, 1996 invoice to Holiday Inn Farmington stated “TAXES NOT APPLICABLE. HOLIDAY INN IS REQUIRED TO PAY ANY AND ALL.” Department Exhibit 20. A January 22, 1996 memo and invoice to Keith Barbeau, General Manager of the Holiday Inn Farmington, stated: “A.H.R. does not collect sales tax as a result that we are a Colorado corporation. If you are required to pay any taxes this will be your responsibility.” The memo appeared on letterhead that listed AHR’s offices in Durango, Colorado; Albuquerque, New Mexico; and Kailua, Oahu, Hawaii. Department Exhibit 20.

10. Three invoices indicated delivery “FOB factory” or separately billed freight charges from the factory. Department Exhibit 15, 8/9/96 invoice; Department Exhibit 18, 4/8/96 invoice; Department Exhibit 20, 1/22/96 memo and invoice. The vast majority of invoices listed freight charges as part of the order and did not specify the point of delivery.

11. Several invoices for sales to New Mexico hotels included charges for carpet installation. Department Exhibit 15, 6/18/96 and 7/18/96 invoices; Department Exhibit 18, 4/4/96 invoice; Department Exhibit 19, 2/7/96 invoice.

12. One invoice showed a credit on the return of an office desk with the notation: “Vic to keep at Albuquerque Office.” Department Exhibit 19, 3/22/96 invoice.

13. In February 1996, Victor Sprecher and Donyce Sprecher purchased a house located at 11500 Zinfandel NE in Albuquerque, New Mexico. Department Exhibit 29.

14. In July 1996, the Sprechers purchased a 1996 Mercedes which was titled and licensed in New Mexico. Department Exhibit 7. In January 1997, Donyce Sprecher obtained a New Mexico driver’s license. Department Exhibit 6.

15. At Anita Williams’ request, the Colorado Department of Revenue provided information showing that the last year AHR filed corporate income tax returns with Colorado was 1995; the corporation filed its final sales tax return with Colorado in September 1996. The last year the Sprechers filed personal income tax returns with Colorado was 1994. Department Exhibit 27.

16. At some point, AHR registered with the Department for payment of New Mexico gross receipts, compensating and withholding taxes showing a start date for its business of June 1, 1993. The corporation subsequently retired its registration number effective December 31, 1992. AHR never reactivated its registration with the Department, nor did it apply for a new registration.

17. On November 7, 1997 and again on December 3, 1997, Anita Williams wrote to Victor Sprecher at 6205 Antiqua NE, Albuquerque, New Mexico, the address shown in AHR's listing in the New Mexico Hotel & Motel Association's 1995-96 Directory. Ms. Williams informed Mr. Sprecher that she had been unable to locate an active registration for AHR and asked him to provide his New Mexico tax identification number or call her for additional information. Department Exhibits 13 and 14.

18. On December 11, 1996, Victor Sprecher wrote to Ms. Williams stating that AHR was not registered for payment of New Mexico gross receipts tax because it was based in Colorado and "is fulfilling all of the reporting requirements necessitated by the laws of the state of Colorado." Mr. Sprecher indicated that he was well aware of requirements for filing tax returns with New Mexico, concluding: "if I do incur any gross receipts or income tax liabilities while in New Mexico, I will utilize the proper filing and reporting procedures as required by this state."

19. Based on the invoices and other evidence of AHR's business activities in New Mexico, the Department issued 10 assessments numbered 2105740 through 2105749 in the total amount of \$120,777.10 covering tax periods May 1995 and February 1996 through October 1996. The assessments, which were issued on February 2, 1997, imposed gross receipts tax, interest and the 50 percent civil penalty authorized by Section 7-1-69(C) for willful intent to evade or defeat payment of any tax.

20. On March 5, 1997, Arthur Anderson LLP filed a request for a 60-day extension of time for AHR to protest the Department's assessments. On March 19, 1997, the Department granted an extension until May 7, 1997.

21. On April 6, 1997, Donyce Sprecher, Vice President of AHR, filed a written protest on behalf of the corporation. The protest stated that AHR was a Colorado corporation that "does not

maintain an office in New Mexico.” The protest further stated that the corporation was a factory sales agent, that all customers accepted title to property at the factory and that all customers were informed that AHR was not paying gross receipts tax.

22. After the protest was filed, the Department made several attempts to contact someone at AHR to discuss the protest and obtain additional information. No response was received. Department Exhibits 23, 24, 25.

23. On January 9, 1998, the notice scheduling the formal hearing on AHR’s protest for February 26, 1998 was mailed certified mail, return receipt requested, to AHR at 1710 Main Avenue, Durango Colorado, the address shown on the protest filed by Donyce Sprecher. The signed green receipt card was returned showing a delivery date of January 14, 1998.

24. To insure that the taxpayer had notice of the hearing, the Department express mailed additional copies of the notice to three other addresses that appeared in AHR’s file. Two notices were returned as undeliverable, including a notice sent to the Sprecher’s residence at 11500 Zinfandel NE in Albuquerque, New Mexico. Department Exhibits 8 and 10. The third notice, which was mailed to 6205 Antiqua NE, Albuquerque, New Mexico, the address shown in AHR’s listing in the New Mexico Hotel & Motel Association’s 1995-96 Directory, was returned marked “Refused.” Department Exhibit 9.

### **DISCUSSION**

There is a statutory presumption that the Department’s assessment of tax is correct. Section 7-1-17(C) NMSA 1978; *Mears v. Bureau of Revenue*, 87 N.M. 240, 241, 531 P.2d 1213, 1214 (Ct. App. 1975). In order for the taxpayer to be successful, he must clearly overcome this presumption. *Archuleta v. O’Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Having failed to appear and present evidence in support of its protest, AHR has not met its burden of proof in this case and the

presumption of correctness that attaches to the Department's assessment establishes AHR's liability for gross receipts tax and interest.

The presumption of correctness does not apply to the Department's assessment of the 50 percent civil penalty for willful intent to evade or defeat payment of any tax. Section 7-1-78 NMSA 1978 states:

BURDEN OF PROOF IN FRAUD CASES. In any proceeding involving the issue of whether any person has been guilty of fraud or corruption, the burden of proof in respect of such issue shall be upon the director or the state.

In this case, the Department presented ample evidence to show that AHR willfully failed to file gross receipts tax returns resulting in an intentional evasion of payment of taxes due to New Mexico.

First, there is evidence that the corporation's officers were well aware of the existence of New Mexico's gross receipts tax. At one time, AHR was registered for payment of gross receipts tax and took affirmative action to cancel that registration. The corporation charged tax on its sales of electronic equipment to hotels and motels located in New Mexico, most likely at its supplier's insistence. Two of the invoices sent to the Holiday Inn Farmington contained written disclaimers of AHR's liability for New Mexico tax. Finally, Victor Sprecher assured Anita Williams that "if I do incur any gross receipts or income tax liabilities while in New Mexico, I will utilize the proper filing and reporting procedures as required by this state." All of these facts establish that AHR was well aware of New Mexico's tax laws.

Second, there is evidence that the corporation's officers knew they would be liable for payment of New Mexico gross receipts tax if the corporation maintained a presence in New Mexico or made sales in New Mexico. The January 22, 1996 memo and invoice sent to Keith Barbeau, General Manager of the Holiday Inn Farmington, stated: "A.H.R. does not collect sales tax *as a result that we are a Colorado corporation.*" (emphasis added). In his December 11, 1996 letter to Anita Williams,

Victor Sprecher stated that AHR was not registered for payment of New Mexico gross receipts tax because it was based in Colorado. The April 6, 1997 protest filed by Donyce Sprecher, Vice President of AHR, stated that the corporation was a Colorado corporation that “does not maintain an office in New Mexico.” The protest further stated that AHR’s customers accepted title to property at the factory and that the corporation did not bring property into New Mexico for resale. All of these statements indicate an awareness that a company maintaining an office in New Mexico or making sales in New Mexico would be subject to tax in New Mexico.

Third, there is evidence that AHR’s officers knowingly misrepresented the nature of the corporation’s activities in an effort to evade payment of New Mexico gross receipts tax. In December 1996, Victor Sprecher told Anita Williams that AHR was based in the state of Colorado and “is fulfilling all of the reporting requirements necessitated by the laws of the state of Colorado.” Two months before that statement was made, the corporation filed its final sales tax report with the Colorado Department of Revenue. The last year for which AHR filed corporate income tax returns with Colorado was 1995.

In the protest filed with the Department, Donyce Sprecher maintained that AHR was not liable for New Mexico gross receipts tax because it was a Colorado corporation that “does not maintain offices in New Mexico.” This statement is clearly false. AHR advertised an Albuquerque address and telephone number in the 1995-96 Membership Directory and Buyer’s Guide issued by the New Mexico Hotel & Motel Association. Victor Sprecher received letters that Anita Williams mailed to the address shown in the directory. A credit invoice issued to an Albuquerque hotel for the return of a desk contained the notation: “Vic to keep at Albuquerque Office.” Finally, the corporation’s letterhead represents that AHR maintains offices in Colorado, New Mexico and Hawaii.

Donyce Sprecher's statement that the corporation simply acted as a sales agent for manufacturers is also false. Several invoices for sales to New Mexico hotels included charges for carpet installation, establishing that AHR provided services in conjunction with its sale of certain tangibles. Other invoices refute the statement that "all customers" were informed that the corporation was not paying gross receipts tax. AHR charged tax to New Mexico customers who purchased electronic equipment such as television sets and clock radios. The tax collected by AHR was never reported or paid over to the Department.

The evidence presented by the Department establishes that AHR intentionally and willfully failed to report and pay New Mexico gross receipts tax in order to evade payment of those taxes.

#### **CONCLUSIONS OF LAW**

1. AHR filed a timely, written protest to Assessment Nos. 2105740 through 2105749 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. By failing to appear and present evidence in support of its protest, AHR has not met its burden of proving that the Department's assessment of gross receipts tax and interest is incorrect.

3. The Department has met its burden of proving that AHR's failure to report and pay gross receipts tax on its New Mexico sales was an intentional and willful attempt to evade payment of tax due to New Mexico, and the 50 percent civil penalty was properly imposed pursuant to Section 7-1-69(C).

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

DONE, this 9th day of March 1998.