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

IN THE MATTER OF THE PROTEST OF
AAA AIR AND WATER FILTER SYSTEMS **NO. 98-21**
ID. NO. 02-131952-00 9, PROTEST TO
ASSESSMENT NO. 1883591

DECISION AND ORDER

This matter came on for formal hearing on March 12, 1998, before Gerald B. Richardson, Hearing Officer. AAA Air and Water Filter Systems, hereinafter, "Taxpayer", was represented by its owner, Gay Wynnett Stracener. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Esq. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 22, 1994, the Department issued to the Taxpayer Assessment No. 1883591, which assessed $ 1,351.44 in gross receipts tax, $135.12 in penalty and $1,292.32 in interest for reporting periods of January, 1988 through December, 1988.

2. The Department's assessment was issued as a result of the Department's information sharing agreement with the Internal Revenue Service ("IRS"). Under that agreement the Department receives information from the IRS with respect to the returns filed with the IRS by New Mexico residents.

3. The Department's assessment was based upon information received from the IRS that for tax year 1988, Ms. Stracener had reported gross receipts from operating a business on federal Schedule C in the amount of $23,876.

4. On February 17, 1995, the Taxpayer wrote the Department, requesting a retroactive extension of time to file a protest to Assessment No. 1883591.

5. The Department granted an extension of time to file a protest until March 22, 1995.

6. On March 17, 1995 the Taxpayer filed a written protest to Assessment No. 1883591.

7. The receipts which Ms. Stracener reported on her 1988 federal Schedule C as gross receipts from a business or profession were commissions Ms. Stracener received from selling advertisements for Quick Quarter Want Ads, ("Quick Quarter").

8. The Department issued Assessment No. 183591 in the name of AAA Air and Water Filter Systems because this was a tax identification number assigned to another business which was owned by Ms. Stracener.

9. Ms. Stracener was hired by Quick Quarter as a commissioned advertising sales person and was hired as an independent contractor. Ms. Stracener received no salary but was compensated solely by commissions earned on advertisements she sold on behalf of Quick Quarter. She received a federal form 1099 from them at the end of 1988 reporting the commissions she received during that year on advertisement sales. She did not receive a form W-2 from Quick Quarter.

10. Ms. Stracener was naive about taxes in general and did not understand the tax ramifications of being an independent contractor. She filed a Schedule C reporting income and loss from business in reliance upon her accountant who prepared her income tax returns.

11. Ms. Stracener did not have set hours of work at Quick Quarter. She was expected to be there on Tuesdays for a mandatory sales meeting and to report in every morning and to report when she would be out sick, but she could leave work when her work was done, she received no sick leave and accumulated no vacation time.

12. Ms. Stracener called on businesses and attempted to sell them advertisements which would be published in the Quick Quarter. She used her own vehicle when making sales calls and she made her own determinations as to who she would call upon to sell advertisements.

13. Ms. Stracener requested that the IRS make a determination of employment status for federal employment tax purposes between Quick Quarter and herself for tax

year 1990 when Ms. Stracener was performing the same duties as she had been in 1988. The IRS determined that Ms. Stracener was not an employee of Quick Quarter.

14. The Department has abated the penalty portion of Assessment No. 1883591.

DISCUSSION

The primary issue to be determined herein is whether Ms. Stracener was an employee of Quick Quarter or whether she was an independent contractor. If she was an employee, then her commission receipts would be exempt from gross receipts tax pursuant to § 7-9-17, which provides an exemption from tax for the wages, salaries or commissions of employees. An employee is not defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978, so we will look to the common law definition of employee. In determining whether a person is an employee or an independent contractor, the rule in New Mexico and in general is that the principal consideration is the right to control. Thus, the relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the results, however, and not the details of the performance, the worker is usually considered to be an independent contractor. ***Buruss v. B.M.C. Logging Co.***, 38 N.M. 254, 31 P.2d 263 (1934). The most recent pronouncement of this rule can be found in ***Harger v. Structural Services, Inc.***, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In that case the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

> The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: whether the party employed engages in a distinct occupation or business; whether the work is part of the employer's regular business; the

skill required in the particular occupation; whether the employer supplies the instrumentalities, tools or the place of work; the duration of a person's employment and whether that person works full-time or regular hours; whether the parties believe they have created the relationship of employer and employee and the manner and method of payment. The totality of all of the circumstances must be considered in determining whether the employer has the right to exercise that degree of control over a worker so as to make the worker an employee.

The Department has adopted a regulation under § 7-9-17 that uses similar criteria to determine whether a worker qualifies as an employee. Regulation 3 NMAC 2.17.7 provides as follows:

> 7.1 In determining whether a person is an employee, the department will consider the following indicia:
> 1. is the person paid a wage or salary;
> 2. is the "employer" required to withhold income tax from the person's wage or salary;
> 3. is F.I.C.A. tax required to be paid by the "employer;
> 4. is the person covered by workmen's compensation insurance'
> 5. is the "employer" required to make unemployment insurance contributions on behalf of the person;
> 6. does the persons "employer" consider the person to be an employee;
> 7. does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").
>
> 7.2 If all of the indicia mentioned in 3 NMAC 2.17.7.1 are present , the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

Also pertinent to the facts of this case is Regulation 3 NMAC 2.17.10 dealing with commissioned salespersons. It provides as follows:

> A salesperson who sells for a company on a commission basis is not an employee of the company where the company exercises no direct control over the details of performance of the salesperson's duties beyond general statements about the scope and nature of the salesperson's obligations under the contract between the salesperson and the company. In addition, where commissions paid to a salesperson are not subject to withholding taxes or social security taxes, the salesperson is not considered an employee of the company. Therefore, receipts from commissions paid to such salesperson for selling property in New Mexico are subject to the gross receipts tax.

Evaluating the facts of the instant case, it is clear that Ms. Stracener was not an employee of Quick Quarter. She was not paid a wage or salary, but rather, only a commission on sales she made. There is no requirement that Quick Quarter withhold federal income tax from Ms. Stracener's commissions or to make payments pursuant to the Federal Unemployment Tax Act, according to the IRS ruling addressed to Ms. Stracener. Quick Quarter considered Ms. Stracener to be an independent contractor, as evidenced by the fact that it reported her commissions on a Form 1099 and by the fact that at the time she was hired, Quick Quarter made it clear to Ms. Stracener that she was being hired as an independent contractor. Finally, the course of conduct between Quick Quarter and Ms. Stracener does not demonstrate the degree of control required to find an employment relationship. Quick Quarter did not exercise control over how Ms. Stracener did her job. She was free to find her own sales prospects and to make her sales calls as she saw fit, so long as the deadlines for placement of ads were met and the advertising fees were collected and paid. Thus, Ms. Stracener does not meet the definition of an employee who would be entitled to claim the exemption from gross receipts tax found at § 7-1-17 NMSA 1978.

Although this addresses the most substantive legal issue raised by Ms. Stracener, she raised several other issues as well. She raised the fact that the advertising fees she collected on the sales she made were payable to Quick Quarter and she alleged that she was certain that Quick Quarter had paid gross receipts tax on those receipts. Assuming all of this is true, it does not provide a defense to the imposition of gross receipts tax upon Ms. Stracener's receipts. This is because there are two transactions involved. One is the sale of advertising, which was made by Quick Quarter through its salesperson, Ms. Stracener. Quick Quarter would be subject to gross receipts tax upon its receipts from performing advertising services for the customers who bought advertisements. The second transaction is Ms. Stracener's receipt of a commission from Quick Quarter. Ms. Stracener had gross receipts from performing a service. The service she performed was the sale of advertisements for the Quick Quarter. There were two separate services provided to two different entities or persons and thus there were two separate taxable transactions, although the transactions are related transactions.

Ms. Stracener also argued that the application of gross receipts tax to her commissions constitutes illegal double taxation. As noted above, double taxation does not exist in this case as there are two separate and distinct taxable transactions. Ms. Stracener's argument also assumes, as do many persons who are not sophisticated in tax matters, that double taxation is somehow illegal. It is a popular misconception that there is something inherently illegal or unconstitutional with double taxation. Almost 80 years ago, in ***Ft. Smith Lumber Co. v. Arkansas,*** 251 U.S. 532 (1920), the United States Supreme Court summarily disposed of the plaintiff's argument that Arkansas had imposed a double

tax on corporate stock in violation of the federal constitution. As stated by Justice Oliver Wendell Holmes, writing for the majority:

> The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax..."

251 U.S. at 533. New Mexico courts have also held, on numerous occasions, that there is no constitutional prohibition against double taxation. ***New Mexico State Board of Public Accountancy v. Grant***, 61 N.M. 287, 299 P.2d 464 (1956); ***Amarillo-Pecos Valley Truck Line, Inc. v. Gallegos***, 44 N.M. 120, 99 P.2d 447 (1940); ***State ex rel. Attorney General v. Tittmann***, 42 N.M. 76, 75 P.2d 701 (1938).

It should also be noted that in construing the New Mexico Gross Receipts and Compensating Tax Act, the New Mexico courts have held that there is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. ***See, e.g., House of Carpets, Inc. v. Bureau of Revenue***, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); ***New Mexico Sheriffs & Police Association v. Bureau of Revenue***, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973). That is the case here.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1883591 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was not an employee of Quick Quarter and therefore is not eligible to claim the deduction found at § 7-9-17 NMSA 1978 for her commissions received from Quick Quarter.

3. Although Quick Quarter was subject to gross receipts tax on its advertising sales revenues, it does not constitute double taxation to also impose gross receipts tax upon Ms. Stracener's commissions from those advertising sales because there are two separate taxpayers and two separate taxable transactions.

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

DONE, this 17th day of April, 1998.