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

IN THE MATTER OF THE PROTEST
OF JAMES M. AND DONA H. CURL 98-22
ID. NO. 02-153661-00 9
ASSESSMENT NO. 2054402

DECISION AND ORDER

This matter came on for formal hearing on April 15, 1998, before Margaret B. Alcock, Hearing Officer. James M. Curl and Dona H. Curl were represented by Dona H. Curl. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1993, Dona Curl performed services as an independent contractor for Integral Systems, Inc. ("ISI"), which resold her services to Intel Corporation in Rio Rancho, New Mexico.

2. Each week, Ms. Curl submitted a time sheet to ISI and received payment for her services from ISI. Exhibits I and J. ISI then submitted an invoice for professional services to Intel. The invoice identified Ms. Curl as the person who performed the services and stated the number of hours worked and the charge per hour. Exhibit K.

3. Ms. Curl was not aware that the New Mexico gross receipts tax applied to her receipts from working as a subcontractor. Ms. Curl believed that tax was due only on ISI's resale of her services to Intel.

4. Ms. Curl never had any discussion with ISI or her accountant concerning the payment of gross receipts tax on her services.

5. Ms. Curl never requested a New Mexico nontaxable transaction certificate ("NTTC") from ISI, nor did ISI provide her with one.

6. The Curls filed a joint 1993 federal income tax return, Form 1040, which was prepared by their certified public accountant. Exhibit 1.

7. The 1993 Form 1040 indicates that both Mr. Curl and Ms. Curl were self-employed.

8. The income Ms. Curl earned from services performed for ISI was reported on Schedule C (Profit or Loss From Business) to the Curls' 1993 Form 1040. Ms. Curl also filed a Schedule SE, Self-Employment Tax.

9. Ms. Curl never asked the accountant who prepared the Curls' 1993 federal income tax return whether she should be paying gross receipts tax on her business income or whether any other tax was due on this income.

10. From January to May 1994, Ms. Curl provided services directly to Intel. At that time, Ms. Curl registered with the Department for payment of gross receipts tax.

11. From August 1990 through July 1993, Ms. Curl and her husband operated an electronic repair business under the tradename "D&M Electronics Repair." Exhibits A, B & C.

12. At the time the business began in August 1990, the Curls registered the business as a proprietorship under the business name "James M. and Dona H. Curl." Exhibit A. The Department assigned the Curls CRS ID No. 02-153661-009.

13. On July 22, 1993, Ms. Curl notified the Department that D&M Electronic Repair, operating under CRS ID No. 02-153661-009, was going out of business on July 31, 1993 and would not be filing monthly CRS reports after that date.

14. During the three years that the Curls' CRS number was active, they received CRS-1 Filer's Kits from the Department. *See, e.g.,* Exhibit 2.

15. On July 17, 1996, as a result of information obtained from the IRS, the Department sent the Curls a notice of the discrepancy between business income reported to the IRS on Schedule C to the Curls' 1993 federal income tax return and business income reported to the Department for gross receipts tax purposes. The Department asked the Curls to indicate whether they were registered for payment of gross receipts tax and to provide information to substantiate any gross receipts tax exemptions or deductions taken during 1993. Exhibit H.

16. Ms. Curl returned the form stating that she did not register for a New Mexico CRS identification number. On July 30, 1996, Ms. Curl wrote a letter to the Department explaining that she worked as a subcontractor to ISI. Ms. Curl stated that she was unaware that she was supposed to obtain a CRS number and report gross receipts tax on her income from ISI and was unaware that she needed to obtain an NTTC from ISI. Exhibit M.

17. Ms. Curl requested information as to whether ISI paid tax on its resale of her services to Intel. The Department told Ms. Curl it was unable to provide her with this information, which is confidential under Section 7-1-8 NMSA 1978.

18. On August 2, 1996, The Department issued Assessment No. 2054402 for the period January-December 1993 in the amount of $2,252.20 gross receipts tax, $225.24 penalty

and $999.42 interest, for a total assessment of $3,476.86. The assessment was issued under the Curls' retired CRS ID No. 02-153661-00 9. Exhibit E.

19. On August 19, 1996, Ms. Curl filed a protest to the Department's assessment.

DISCUSSION

The Curls raise the following arguments in support of their protest to the Department's assessment: (1) ISI, not Ms. Curl, was the party responsible for paying gross receipts tax on Ms. Curl's services; (2) because collecting gross receipts tax from both ISI and Ms. Curl results in illegal double taxation, the Department's refusal to disclose whether ISI paid gross receipts tax on its resale of Ms. Curl's services should excuse the Curls from paying the Department's assessment; (3) the Department assessed the wrong taxpayer when it issued the assessment under the CRS ID number the Curls obtained for their electronics repair business; (4) Ms. Curl relied on her family accountant to advise her of her tax liabilities.

I LIABILITY FOR PAYMENT OF GROSS RECEIPTS TAX.

Ms. Curl argues that as a subcontractor, she was not liable for tax on her sale of services to ISI. Ms. Curl believes that only ISI, the prime contractor with Intel, was required to collect what she refers to as the "sales tax" on her services.

Ms. Curl's argument is based on a misunderstanding of New Mexico's tax system. New Mexico does not have a sales tax that is charged to and collected from the final consumer. New Mexico has a gross receipts tax that is imposed directly on the seller of goods and services. Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. The term "gross receipts" is defined in Subsection F of Section 7-9-3 NMSA 1978 to include the total amount of money or the value of other consideration received

from performing services in New Mexico. The statute makes no distinction between persons selling services for resale and persons selling services to the final consumer. Accordingly, unless a specific statutory exemption or deduction applies, Ms. Curl is liable for gross receipts tax on her receipts from performing services as a subcontractor of ISI.

Section 7-9-48 NMSA 1978 provides a deduction for receipts from selling services for resale when certain conditions are met. In order for a seller of services to qualify for the resale deduction, the buyer must: (1) provide the seller with an NTTC; (2) resell the service in the ordinary course of business; (3) separately state the value of the service at the time it is resold; and (4) be subject to gross receipts tax on the subsequent sale. In this case, Ms. Curl does not qualify for the deduction because she did not receive an NTTC from ISI.

It is possible that ISI failed to give Ms. Curl an NTTC because ISI was also unaware of the requirements of New Mexico law. Alternatively, ISI may have determined that it did not meet the conditions of Section 7-9-48. For example, if ISI were entitled to claim a deduction for the sale of services to Intel, ISI would not be subject to gross receipts tax on its resale of Ms. Curl's services and would not be entitled to issue her an NTTC. The reason that ISI did not provide Ms. Curl with an NTTC is irrelevant. Whether ISI paid gross receipts tax on its resale of Ms. Curl's services to Intel is also irrelevant. The only matter at issue here is whether Ms. Curl is liable for gross receipts tax on her sale of services to ISI.

There is a statutory presumption that the Department's assessment of gross receipts taxes is correct. Section 7-1-17(C) NMSA 1978. 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). Where a party claiming a right to a tax exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App. 1988).

In this case, Ms. Curl has not met her burden of showing that she is entitled to an exemption or deduction from gross receipts tax. As discussed above, Ms. Curl does not qualify for the resale deduction provided in Section 7-9-43 because she did not obtain an NTTC from the buyer of her services. She has not provided information to support a claim to any other exemption or deduction. Ms. Curl is therefore liable for gross receipts tax on her receipts from performing services for ISI.

II. DOUBLE TAXATION.

The Curls argue that they are entitled to know whether ISI paid tax on its resale of Ms. Curl's services to Intel because payment of the gross receipts tax by both ISI and the Curls would result in double taxation. 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 the federal constitution prohibits a state from taxing the same transaction twice. 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. Ms. Curl and ISI are separate taxpayers, each of which is engaged in business in New Mexico. The gross receipts tax is imposed--once--on Ms. Curl's receipts from selling services to ISI. As the seller, only Ms. Curl is liable for this tax. The gross receipts tax is also imposed--once--on ISI's sale of services, including the resale of Ms. Curl's services, to Intel. Only ISI is liable for this tax. Under the facts of this case, there is no "double taxation."

Even though taxing successive transactions is not double taxation, the New Mexico legislature has been careful to provide a number of statutory deductions to prevent the pyramiding or stacking of the gross receipts tax. Thus, it has provided a deduction for the sale of tangible personal property for resale when the purchaser of the property provides the seller with an NTTC and represents that the property will be resold. *See,* Section 7-9-47 NMSA 1978. Similarly, it has provided a deduction for the sale of services for resale when certain statutory conditions are met. *See*, Section 7-9-48 NMSA 1978 and discussion in Part I, above. The deduction in Section 7-9-48 would have been available to Ms. Curl if she had obtained an NTTC from ISI. Unfortunately, she

did not, and there is no basis for relieving her of the liability for gross receipts tax due on her receipts from performing services for ISI.

III CRS IDENTIFICATION NUMBER.

The Curls argue that by issuing the assessment of gross receipts tax due on Ms. Curl's services to ISI under the retired CRS ID number the Curls obtained for their electronics repair business, the Department assessed the wrong taxpayer.

Unlike a corporation, a proprietorship has no legal identity separate and apart from that of its owners. Although the Curls operated their business under the tradename "D&M Electronics Repair", the business was not a separate legal entity; D&M Electronics Repair was, in fact, James and Dona Curl. It is also important to note that the business was not registered under the tradename D&M Electronics, but was registered under the name "James M. and Dona H. Curl." *See* Exhibit A. The Department's assessment was issued to "Curl James M. & Dona H." The Curls have failed to show that there was anything improper or prejudicial in the Department's decision to reactivate the Curls' retired CRS number to assess gross receipts tax on the business income reported on Schedule C to the Curls' 1993 federal income tax return.

IV PENALTY.

The Curls' 1993 federal income tax return was prepared by their family accountant. Ms. Curl testified that she relied on the accountant to advise her concerning her tax liabilities. Although reliance on an accountant does not affect a taxpayer's liability for tax principal and interest, it may affect the taxpayer's liability for the 10 percent negligence penalty.

Section 7-1-69 NMSA 1978 (1993 Repl.Pamp.) governs the imposition of penalty during the period at issue in this protest. Subsection A imposes a penalty of two percent per month, up to a maximum of 10 percent:

> [i]n the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid...

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation GR 69:3 (now 3 NMAC 1.11.10) 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.

Regulation GR 69:4 (now 3 NMAC 1.11.11) 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...."

The Curls' failure to report and pay gross receipts tax was not based on advice received from their accountant, but on their inattention to the requirements of New Mexico law and Ms. Curl's erroneous belief that a subcontractor is not liable for payment of gross receipts tax on the sale of services for resale. The evidence shows that the Curls were well aware of the existence of New Mexico's gross receipts tax, having reported and paid the tax on receipts from their previous business. The January-June 1992 CRS-1 Filer's Kit issued by the Department was mailed to everyone who held an active CRS ID number, which included the Curls. The kit contains a definition of gross receipts that should have alerted Ms. Curl to the fact that her receipts from

performing services for ISI were subject to tax. *See* Exhibit 2, pp. 1-2. The kit also explains the use of NTTCs, including the following statement (Exhibit 2, p. 4):

> There are different Types of NTTCs. The type of transaction determines the type of NTTC needed, that is, a Type 2 NTTC is for the sale of tangible personal property for resale, a Type 5 NTTC is for the sale of a service for resale....
>
> When claiming a deduction you should have the necessary NTTC in your possession. Otherwise the Department may disallow the deduction and assess tax, penalty and interest.

The Curls' inattention to the tax information provided to them by the Department and Ms. Curl's erroneous belief that a subcontractor is not subject to gross receipts tax comes within the definition of negligence for purposes of Section 7-1-69.

Ms Curl believes that her accountant should have advised her of her liability for gross receipts tax on her 1993 income. Ms. Curl acknowledges, however, that she never asked the accountant whether there might be other taxes due in connection with the business income reported on her federal income tax return. Nor did Ms. Curl discuss the applicability of the gross receipts tax or the use of NTTCs with her accountant at the time she began performing services for ISI. Although reasonable reliance on the advice of a competent tax advisor may be a defense to the imposition of penalty under Regulation GR 69:4, there is no evidence that Ms. Curl either sought or received advice concerning her gross receipts tax liability on her 1993 income.

Although the Curls acted in good faith, with no intention to avoid the payment of taxes, they were negligent in failing to take such action as was required to determine their gross receipts tax liability to the state. For this reason, penalty was properly imposed under Section 7-1-69.

CONCLUSIONS OF LAW

1. The Curls filed a timely written protest to Assessment No 2054402 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's use of the Curls' CRS number 02-153661-00 9 to assess gross receipts tax, penalty and interest due on business income reported on the Curls' 1993 federal income tax return was proper.

3. When Ms. Curl performed services for ISI during 1993, she was engaging in business as defined in Section 7-9-3(E) NMSA 1978 and was subject to gross receipts tax on her receipts.

4. The Curls did not meet their burden of establishing that Ms. Curl was entitled to an exemption or deduction in connection with her receipts from performing services for ISI and they are liable for the gross receipts tax and interest assessed.

5. The Curls were negligent in failing to report gross receipts tax on business income earned during 1993 and are liable for the negligence penalty assessed pursuant to Section 7-1-69 NMSA 1978.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

DONE, this 21st day of April 1998.