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

IN THE MATTER OF THE PROTEST OF
CHARLES L. FORKNER NO. 98-32
ID. NO. 02-327122-00 1, PROTEST TO
ASSESSMENT NO. 2105598

DECISION AND ORDER

This matter came on for formal hearing on April 14, 1998 before Gerald B. Richardson, Hearing Officer. Charles L. Forkner, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a commodities broker licensed by the federal Commodities Futures Trading Commission. He is neither licensed, nor required to be licensed by the state of New Mexico to be a commodities broker.

2. The Taxpayer maintains an office in Albuquerque, New Mexico.

3. During the relevant tax years, the Taxpayer maintained a relationship with a clearinghouse, First Commercial Financial Group of Chicago, Illinois. Clearinghouses have seats on commodities exchanges in order to be able to execute commodities transactions.

4. Individual clients who wish to make a commodities futures transaction may not do so directly through a clearinghouse. Rather, they do so through a broker. Individual clients do, however, maintain an account with a clearinghouse which reflects transactions executed through commodities brokers, balances on deposit, etc.

5. The Taxpayer's role in a commodities futures transaction is to act as a broker on the transaction and to give advice, should a client desire, on commodities transactions. In a typical transaction, a customer will telephone the Taxpayer and place an order for a commodity, for a future date, at a designated price. The Taxpayer then telephones in the order to the clearinghouse. The clearinghouse will either execute the transaction or not, depending upon whether the transaction can be completed at the price set by the client. If the transaction is executed, the clearinghouse telephones the Taxpayer to confirm that the transaction has been executed and the Taxpayer telephones the client to inform the client that the transaction has been executed. The clearinghouse then generates a financial statement of the trade and the client's account to the client. The Taxpayer receives a daily summary of all transactions executed on behalf of his clients from the clearinghouse. The clearinghouse charges a commission on the transaction to the client's account and sends the Taxpayer its share of the commission.

6. All commodities futures transactions for which the Taxpayer acted as broker were executed in New York, Chicago or Kansas City, where commodities exchanges exist.

7. The Taxpayer handles no client money in its role as broker for commodities futures transaction. Rather, the client maintains an account with the clearinghouse from which funds are drawn or credited as buy and sell transactions are made.

8. The Taxpayer has clients from both within New Mexico and out of state. Roughly 50% of the trades brokered by the Taxpayer are performed for in-state clients and 50% are performed for out-of-state clients.

9. During tax years 1990 through 1994, the Taxpayer reported the commissions he earned as a commodities broker on federal Schedule C when reporting his income for federal income tax purposes.

10. Pursuant to the information sharing agreement between the Internal Revenue Service and the Department, the Department was provided information concerning the commissions the Taxpayer earned as a commodities broker during tax years 1990 through 1994.

11. As a result of this information, on February 5, 1997, the Department issued Assessment No. 2105598 to the Taxpayer, assessing $23,255.08 in gross receipts tax, $2,325.54 in penalty and $14,226.65 in interest for tax years 1990 through 1994.

12. On March 3, 1997 the Taxpayer filed a written protest to Assessment No. 2105598 with the Department.

13. The Department has agreed to abate the penalty portion of the assessment.

DISCUSSION

The Department assessed gross receipts tax upon the Taxpayer's commissions received on commodities futures transactions for which he acted as a broker. The Taxpayer had not paid gross receipts tax upon his commissions because he had been informed in the early 1970s by former commissioners of the New Mexico Securities Division that because the commodities transaction was a transaction in interstate commerce, that it was not subject to gross receipts tax. Additionally, he was informed

that because commodities trading was regulated by the federal government, he was not required to be licensed by the state to broker commodities transactions nor were such transactions regulated by the state Securities Division.

The sole issue to be determined herein is whether the Taxpayer is subject to gross receipts tax upon his commissions. "Gross receipts" generally include receipts from performing services in New Mexico, and are specifically defined to include:

> the total commissions or fees derived from the business of buying, selling or promoting the purchase, sale or leasing, as an agent or broker on a commission or fee basis, of any property, service, stock, bond or security;

Section 7-9-3(F)(1)(b) NMSA 1978, 1993 Repl. Pamp.[1] The Department had a regulation under Section 7-9-3 during the periods relevant to the assessment at issue which addressed stockbroker's commissions which provided that:

> Gross receipts include commissions received by stockbrokers, located in New Mexico, for handling transactions for out-of-state as well as in-state residents.

Regulation GR 3(F):17.

The Taxpayer argues that he is not subject to gross receipts tax upon his commissions on several grounds. First, he argues that as a commodities broker, he is quite different than a stockbroker, being subject to different federal laws and regulation, not requiring licensing by the state, etc. Secondly, he argues that because the commodities futures transactions are transactions in interstate commerce, and are subject to federal regulation, they are immune from state taxation.

---

[1] The prior version of the statute, applicable to the earlier years covered by the Department's assessment was substantially similar, providing that, " 'Gross receipts', for the purpose of the business of buying, selling or promoting the purchase, sale or leasing, as an agent or broker on a commission or fee basis, of

In making these arguments, the Taxpayer cited to the Grain Futures Act of 1921, the Commodity Exchange Act of 1936, and the Commodities Futures Trading Commission Act of 1974, all of which are federal laws pertaining to and regulating commodities trading. These acts are codified in 7 U.S.C. §§ 1-25.

While it is undisputed that commodities futures brokers are different than stockbrokers, coming under different federal regulatory acts, not being licensed or regulated by the state, etc., the definition of gross receipts found at § 7-9-3(F)(1)(b) does not limit itself to commissions derived from the purchase or sale as agent or broker of only stocks, bonds or securities. Rather, it is broadly worded to include commissions derived from acting as agent or broker promoting the purchase or sale of "any property". Since a commodities future represents a kind of intangible property, the taxpayer's commissions fall within the definition of gross receipts.

Although the Taxpayer's commissions are gross receipts, there is a deduction from gross receipts tax for certain transactions in interstate commerce. The Department does not dispute that the commodities transactions for which the Taxpayer received a commission were transactions occurring in interstate commerce. It disputes, however, that the Taxpayer's transactions are such that the deduction is available to the Taxpayer.

The deduction for receipts from transactions in interstate commerce is found at § 7-9-55 (A) NMSA 1978. It provides:

> Receipts from transactions in interstate commerce may be deducted from gross receipts *to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.* (emphasis added)

---

any property, service, stock, bond or security, includes the total commissions or fees derived from the business."

As the emphasized language indicates, the deduction is not a blanket deduction for any transaction in interstate commerce, but is limited to those situations where imposition of a tax would be prohibited under the law as it has developed under the Commerce Clause. The Taxpayer appears to be operating under a misunderstanding of the law as it applies to transactions in interstate commerce because his argument appears to be that once a transaction occurs in interstate commerce, states are barred from imposing any sort of tax. While there may have been some basis for this understanding of the law in the early 1970s, when the Taxpayer was informed by state securities commissioners that he was not subject to tax on his commissions, the law of taxation with respect to the Commerce Clause has evolved since that time. In 1951, the Supreme Court had struck down a Connecticut tax on the privilege of engaging in business when it was applied against a business engaged exclusively in interstate commerce. ***Spector Motor Service v. O'Connor,*** 341 U.S. 602 (1951). That decision was overruled, however, in ***Complete Auto Transit v. Brady***, 420 U.S. 276 (1977), which remains the seminal case regarding the taxation of transactions in interstate commerce. In ***Complete Auto Transit***, the court announced a four part test for determining whether a state tax violates the Commerce Clause. A tax will not violate the Commerce Clause where it is applied to an activity with substantial nexus with the taxing state, is fairly apportioned, did not discriminate against interstate commerce and is fairly related to the services provided by the state. ***Id.*** 430 U.S 278-279.

Applying this test to the facts of this case, I find that the state's tax does not violate the Commerce Clause. New Mexico's gross receipts tax is imposed upon the privilege of engaging in business in New Mexico. Section 7-9-4 NMSA 1978. What the

Taxpayer does when he brokers a commodities transaction is to counsel clients and place orders over the telephone from his office in Albuquerque. He also receives confirmations when those orders are executed out of state, at his office in Albuquerque. The gross receipts tax was imposed upon his commissions from the service of brokering commodities trades, which service the Taxpayer performs from his office in Albuquerque. Thus, there is no question that the activity taxed has substantial nexus with New Mexico, since the activity taxed occurs in New Mexico. The tax is also fairly apportioned. It only applies to the Taxpayer's commission. The portion of the commission which is retained by the clearinghouse, which compensates them for their activities in executing the requested trade, which occurs out of state, was not taxed by New Mexico. The only portion of the commission taxed was the Taxpayer's commission, which related to his brokering activities performed in New Mexico. There is also no basis to find that the tax discriminates against interstate commerce. The tax is only being applied to activities occurring in New Mexico and there is no allegation that any other state can impose a tax upon the Taxpayer's activities which occur in New Mexico. Finally, the tax is fairly related to services provided by the state. The Taxpayer receives the benefit of engaging in business in New Mexico, which includes police protection, access to the courts, roads, highways, public education and the many other benefits which fall under the broad categorization as the benefits of living in a civilized society. Thus, the tax does not interfere with interstate commerce in such a manner as to violate the Commerce Clause.

Although the Taxpayer did not explicitly articulate a federal preemption argument against the imposition of the gross receipts tax, implicit in his Commerce Clause

argument was the argument that the various federal statutes which regulate the commodities business regulate it so comprehensively so as to leave no room for any state to act in that realm. While it is undisputed that Congress in enacting the various federal laws regulating futures trading intended to prescribe the means and conditions under which futures trading can be conducted, nothing in the application of New Mexico's gross receipts tax to the Taxpayer's commissions from futures trading conflicts with or interferes with the federal regulation of futures trading. Futures trading is not singled out for taxation from any other business to which the gross receipts tax applies nor is the imposition of such a tax inconsistent with any provision of the federal law.[2] Not only does the state's tax not conflict with the federal acts, but it is also clear that Congress did not completely bar state laws which address commodities trading, so long as they are not in conflict with the federal provisions. ***See, Dickson v. Uhlmann Grain Co.***, 288 U.S. 188 (1933) (Grain Futures Act did not supersede provisions of Missouri law making gambling in grain futures illegal). Because the state's gross receipts tax in no way affects the manner in which commodities futures transactions are traded, nor does it conflict with any of the provisions of the federal acts regulating the trading of commodities futures, the imposition of tax upon the commissions derived from commodities futures trading is not preempted.

CONCLUSIONS OF LAW

[2] The burden of proving the Department's assessment to be contrary to law was upon the Taxpayer. Section 7-1-17(C) NMSA 1978. The Taxpayer cited to no provision of the federal acts regulating commodities futures trading which are inconsistent with the imposition of the state's gross receipts tax upon the Taxpayer's commissions. Additionally, this decision maker was unable to find any provisions which prohibit or are inconsistent with the imposition of the gross receipts tax under the facts of this case.

1. The Taxpayer filed a timely, written protest to Assessment No. 2105598 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The imposition of gross receipts tax upon the commissions the Taxpayer earned from brokering commodities futures transactions does not violate the Commerce Clause of the United States Constitution.

3. The imposition of gross receipts tax upon the commissions the Taxpayer earned from brokering commodities futures transactions is not preempted by the federal laws regulating the trading of commodities futures.

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

DONE, this 26th day of May, 1998.