

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

IN THE MATTER OF THE PROTEST
OF JEFFERY A. WILLIAMS
ID. NO. 02-349142-00 6
ASSESSMENT NO. 2189404

98-48

DECISION AND ORDER

A formal hearing on the taxpayer's protest was held on August 24, 1998 before Margaret B. Alcock, Hearing Officer. Jeffery A. Williams represented himself. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the assessment period January-December 1994, Mr. Williams performed sales services for Foster Plumbing & Heating Company ("Foster") in Farmington, New Mexico.
2. Foster was in the business of providing plumbing services as a subcontractor on residential construction projects.
3. In the early 1990s, Foster faced increasing competition from other plumbing firms and hired Mr. Williams, who was familiar with the Farmington area, to help Foster obtain jobs with general contractors.
4. Mr. Williams would locate a contractor about to begin construction of a house and obtain a copy of the blueprints for the project. Mr. Williams would then draft a bid for Foster to submit to the contractor.

5. Foster told Mr. Williams it was hiring him as contract labor and he would be responsible for paying his own taxes, social security and insurance. Mr. Williams also paid all of the costs he incurred in connection with his work for Foster, including transportation and a home office.

6. Foster paid Mr. Williams a flat fee of \$1,500 per month. At the end of the year, Foster issued Mr. Williams a federal Form 1099 listing these payments as "Nonemployee compensation."

7. For tax year 1994, Mr. Williams filed a Schedule C, Profit or (Loss) From Business, to his federal income tax return listing his principal business or profession as "Consulting Services" and the name of his business as "New Horizons."

8. Mr. Williams reported the \$17,600 of income he received from services performed for Foster as "Gross receipts or sales" on Line 1 of his 1994 Schedule C. Mr. Williams claimed Schedule C business expenses of \$11,080 and a home office deduction of \$1,521. The expenses claimed included advertising, car and truck expenses, depreciation, office expense, supplies, taxes and licenses, and long distance telephone calls.

9. Mr. Williams reported self-employment tax on Schedule SE of his 1994 federal return.

10. It did not occur to Mr. Williams that he was subject to New Mexico gross receipts tax on his receipts from performing services for Foster. Nor did it occur to Mr. Williams that he should obtain a nontaxable transaction certificate ("NTTC") from Foster.

11. On July 23, 1997, the Department mailed a notice of a limited scope gross receipts tax audit to Mr. Williams based on the business income reported on his 1994 federal income tax return.

12. The Department's notice stated that unless NTTCs or other documentation required to support deductions from gross receipts were in Mr. Williams' possession within 60 days from the

date of the notice, the deductions would be disallowed. The 60-day period expired September 21, 1997.

13. When Mr. Williams received the Department's notice, he sent a copy to his accountant, Catherine Martinez.

14. Mr. Williams also called and left a voice message for Carol, the contact person listed in the Department's notice, that he had asked the IRS to review his situation to determine whether he was an independent contractor or an employee of Foster.

15. Mr. Williams did not receive a call back from Carol, nor did he try to call her again.

16. Mr. Williams did receive another copy of the original July 23, 1997 audit notice with the notation "8-4-97 Hold CW" at the top and "Please call" at the bottom.

17. Neither Mr. Williams nor his accountant, Ms. Martinez, called to determine the meaning of these notations or ask whether the Department had extended the September 21, 1997 deadline for obtaining NTTCs.

18. On October 21, 1997, the IRS sent Mr. Williams a letter acknowledging receipt of his request for a determination of his work relationship with Foster and notifying him that the determination could take eight to ten months.

19. Sometime after Mr. Williams' receipt of the October 21, 1997 letter from the IRS, Ms. Martinez called the Department and was told that Mr. Williams could not deduct his receipts from performing services for Foster because he did not have an NTTC from Foster.

20. On November 9, 1997, the Department issued Assessment No. 2189404 to Mr. Williams for the period January-December 1994 for gross receipts tax of \$996.24, penalty of \$99.60 and interest of \$491.89.

21. On November 18, 1997, Ms. Martinez called Foster and asked them to issue an NTTC to Mr. Williams.

22. On November 24, 1997, Foster issued Mr. Williams a Type 7 NTTC, Construction Contractor Purchase of Services.

23. On December 5, 1997, Ms. Martinez, on behalf of Mr. Williams, filed a written protest to the Department's assessment and enclosed a copy of the NTTC from Foster.

DISCUSSION

Mr. Williams raises the following arguments in support of his protest to the Department's assessment: (1) Mr. Williams' work as contract labor for Foster did not constitute "engaging in business" for purposes of the gross receipts tax; (2) The Type 7 NTTC Foster issued to Mr. Williams on November 24, 1997 entitles Mr. Williams to deduct his receipts from performing sales services for Foster; and (3) denying Mr. Williams a deduction from gross receipts will result in double taxation.

I. ENGAGING IN BUSINESS.

NMSA 1978, Section 7-9-4, imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. The definition of "engaging in business" includes "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, Section 7-9-3(E). The statute makes no distinction between activities engaged in by large corporations and activities engaged in by small "mom and pop" operations or by individuals acting as independent contractors. The term "gross receipts" is defined in Subsection F of Section 7-9-3 to include the total amount of money or the value of other consideration received from performing services in New Mexico. Here, Mr. Williams was providing services to Foster in return for the benefit of monthly payments. This activity comes within the definition of engaging in business for purposes of the gross receipts tax.

Although Mr. Williams asked the IRS to determine whether he was an independent contractor or an employee of Foster,¹ the evidence presented at the August 24, 1998 hearing confirms Mr. Williams' status as an independent contractor. *See*, Regulation 3 NMAC 2.17.7, setting out factors to consider in determining a worker's status. First, Mr. Williams acknowledged that he was hired as "contract labor." Foster paid him a flat monthly fee for his services and issued him a federal Form 1099 at the end of the year. Mr. Williams reported his income as business income on Schedule C to his 1994 federal income tax return. He listed his principal business or profession as "Consulting Services" and the name of his business as "New Horizons." Mr. Williams also took substantial business deductions, including costs of advertising, car and truck expenses, depreciation, supplies, taxes and licenses and long distance telephone calls. Finally, Mr. Williams reported self-employment tax on Schedule SE of his 1994 federal return.

New Mexico case law holds that a taxpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer may not treat a transaction one way for purposes of federal tax and another way for purposes of state gross receipts tax. *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *Co-Con, Inc. v. Bureau of Revenue*, 87 N.M. 118, 121-122, 529 P.2d 1239, 1241-1242 (Ct. App.), *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974). The evidence in this case supports the conclusion that Mr. Williams was providing services to Foster as an independent contractor and was engaging in business as defined in the Gross Receipts and Compensating Tax Act.

II DEDUCTION FOR SALE OF CONSTRUCTION SERVICES PROVIDED IN NMSA 1978, SECTION 7-9-52.

¹ The distinction between an employee and an independent contractor is significant because NMSA 1978, Section 7-9-17, exempts from gross receipts tax the receipts of employees from wages, salaries and commissions.

Mr. Williams maintains that if he was engaging in business, he was entitled to deduct his receipts from Foster under the provisions of NMSA 1978, Section 7-9-52(A), which states:

A. Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

There are two prerequisites to taking the deduction: (1) the taxpayer must be selling a construction service, and (2) the taxpayer must obtain an NTTC from the buyer of his construction services.

(a) *Sale of a Construction Service.* NMSA 1978, Section 7-9-3(C), defines "construction" as "building, altering, repairing or demolishing" a road or structure, as well as leveling, excavating and drilling wells. Regulation 3 NMAC 2.1.11.1.2 states:

"Construction" does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service.

Mr. Williams testified that he provided sales services to Foster, which was facing increasing competition from other plumbing firms. Mr. Williams was hired because he was familiar with the Farmington area and could help Foster obtain jobs with residential contractors. Mr. Williams would locate a contractor about to begin construction of a house and obtain a copy of the blueprints for the project. He would then draft a bid for Foster to submit to the contractor. Mr. Williams did not perform any of the plumbing work on the construction project itself.

Foster's payments to Mr. Williams were part of Foster's cost of doing business. Foster did not resell Mr. Williams' sales services to the general contractor, nor do these services come within the definition of construction services set out in Section 7-9-3(C). For this reason, Mr. Williams was not eligible to claim the deduction provided in Section 7-9-52.

(b) *Possession of NTTC*. Even if Mr. Williams had been selling a construction service, he could not have taken the deduction provided in Section 7-9-52 because he did not obtain an NTTC from Foster within the time required by statute. The requirements for obtaining NTTCs to support deductions from gross receipts are set out in NMSA 1978, Section 7-9-43. During 1994, the period at issue, the statute provided, in pertinent part:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees *shall be in the possession of the seller* or lessor for nontaxable transactions at the time the return is due for receipts from the transactions.... (emphasis added).

The word "shall" indicates that the provisions of a statute are mandatory and not discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Mr. Williams did not have an NTTC from Foster in his possession at the time his 1994 gross receipts tax returns were due. He did not meet the statutory requirements of Section 7-9-43 then in effect and was not entitled to claim a deduction.

In 1997, the legislature amended Section 7-9-43 to allow taxpayers additional time within which to obtain required NTTCs. Laws 1997, Chapter 72, Section 1. This version of the statute, effective July 1, 1997, provides:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

The amendment gave taxpayers audited after its effective date a second chance to obtain NTTCs that should have been in their possession at the time their deductions from gross receipts tax were taken. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their

deductions disallowed if they fail to obtain required NTTCs within the 60-day period provided by the legislature.

In this case, the Department's July 23, 1997 letter gave Mr. Williams notice that unless NTTCs or other documentation required to support deductions from gross receipts were in his possession within 60 days from the date of the letter, the deductions would be disallowed. When he received the notice, Mr. Williams called Carol, the Department's contact person. He did not talk with Carol personally but left a message that the IRS was reviewing his situation to determine whether he was an independent contractor or an employee of Foster. Mr. Williams did not receive a call back from Carol, nor did he try to call her again. Sometime in August, Mr. Williams received another copy of the July 23, 1997 audit notice with the notation "8-4-97 Hold CW" at the top and "Please call" at the bottom.

Neither Mr. Williams nor his accountant, Catherine Martinez, called to determine the meaning of these notations or ask whether the Department had extended the September 21, 1997 deadline for obtaining NTTCs. It was not until October or November, well after the deadline had passed, that Ms. Martinez called to talk with someone in the Department. At that time, she was told that Mr. Williams could not claim a deduction from gross receipts because he had not provided the Department with an NTTC. On November 18, 1997, nine days after the Department's assessment was issued, Ms. Martinez asked Foster to issue an NTTC to Mr. Williams, which it did on November 24, 1997. On December 5, 1997, Ms. Martinez sent a copy of the NTTC to the Department.

The November 24, 1997 NTTC was not in Mr. Williams' possession within the time period required by Section 7-9-43. Although Mr. Williams assumed the "Hold" notation on the copy of the Department's July 23, 1997 letter meant he did not have to comply with the 60-day deadline, he did not take any steps to confirm this assumption. Mr. Williams' reliance on the hand-written notation was not

reasonable given the clear language in the notice that failure to obtain NTTCs by September 21, 1997 would result in the disallowance of deductions. That language is taken directly from the statute itself. Section 7-9-43 does not give the Department discretion to extend the 60-day deadline: if a seller is not in possession of required NTTCs within 60 days from the date of the notice requiring possession, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added).

(c) *Burden of Proof.* There is a statutory presumption that the Department's assessment of gross receipts tax is correct. NMSA 1978, Section 7-1-17 (C). 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, Mr. Williams did not meet either of the requirements for taking the deduction provided in Section 7-9-52. First, his sales services for Foster do not meet the definition of construction services set out in Section 7-9-3(C). Second, the NTTC required to support the deduction was not in Mr. Williams' possession within the time period required by Section 7-9-43. Mr. Williams' claim to the deduction was properly disallowed.

III. DOUBLE TAXATION.

Mr. Williams argues that denying him a deduction from gross receipts results in double taxation. It is a popular misconception that double taxation is inherently illegal or unconstitutional. 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 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). In construing the Gross Receipts and Compensating Tax Act, the New Mexico Court of Appeals has also 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. The gross receipts tax was imposed—once—on Mr. Williams' sales services to Foster. The gross receipts tax was also imposed—once—on Foster's plumbing services to the general contractor.² Under the facts presented, there is no double taxation.

CONCLUSIONS OF LAW

1. Mr. Williams filed a timely written protest to Assessment No 2189404, and jurisdiction lies over the parties and the subject matter of this protest.

² If Foster obtained an NTTC from the general contractor, Foster's receipts from performing subcontract plumbing services on a construction project would have been deductible under NMSA 1978 Section 7-9-52.

2. During 1994, Mr. Williams was engaging in business as defined in NMSA 1978, Section 7-9-3(E), and is liable for gross receipts tax on his receipts from performing services for Foster Plumbing & Heating Company.

4. Mr. Williams is not entitled to claim the deduction from gross receipts provided in NMSA 1978, Section 7-9-52.

For the foregoing reasons, Mr. Williams' protest IS DENIED.

DONE, this 4th day of September 1998.