

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

IN THE MATTER OF THE PROTEST
OF ANTOINE KHOURY
ID. NO. 02-207285-00 3
ASSESSMENT NO. 2234661

98-51

DECISION AND ORDER

A formal hearing on the taxpayer's protest was held on September 21, 1998, before Margaret B. Alcock, Hearing Officer. Antoine Khoury represented himself. The Taxation and Revenue Department ("Department") was represented by Jana C. Werner. 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. Khoury provided architectural consulting services to John K. Klee & Associates ("Klee") in Albuquerque, New Mexico.
2. Mr. Khoury and his wife, Shelley Brock, filed a joint 1994 federal income tax return (Form 1040). Mr. Khoury and Ms. Brock have since divorced.
3. Mr. Khoury reported the \$19,986.21 of income he received from his consulting services to Klee on a Schedule C, Profit or (Loss) From Business, to his 1994 Form 1040.
4. Ms. Brock filed a separate Schedule C reporting \$4,422.50 of income from her architectural and design services.
5. Mr. Khoury and Ms. Brock were registered with the Department for payment of gross receipts tax and filed quarterly gross receipts tax returns on their joint receipts under one tax identification number.

6. During 1994, Mr. Khoury and Ms. Brock reported gross receipts of \$4,298.00. They did not report or pay gross receipts tax on the \$19,986.21 of income Mr. Khoury earned from providing consulting services to Klee or on an additional \$123.79 of Ms. Brock's receipts.

7. On January 6, 1998, the Department mailed notice of a limited scope gross receipts tax audit to Mr. Khoury and Ms. Brock based on the \$20,110.00 discrepancy between the business income reported on their 1994 federal income tax return and the gross receipts reported to the Department.

8. The Department's notice stated that unless NTTCs or other documentation required to support deductions from gross receipts were in the taxpayers' possession within 60 days from the date of the notice, the deductions would be disallowed. The 60-day period expired March 7, 1998.

9. Mr. Khoury believed he had a Type 5 NTTC from Klee showing that Klee was purchasing Mr. Khoury's services for resale.

10. When Mr. Khoury received the Department's notice, he looked through his files but could not locate an NTTC from Klee. Mr. Khoury then called and left a message asking John Klee whether he could provide Mr. Khoury with a copy of the NTTC.

11. Mr. Klee was slow in getting back to Mr. Khoury and no NTTC had been found by March 7, 1998, the expiration of the 60-day period for obtaining possession of NTTCs to support deductions Mr. Khoury had taken during the 1994 audit period.

12. On March 7, 1998, Mr. Khoury wrote a letter to the Department asking for an extension of the 60-day period and stating that he would have a copy of the required NTTC the following week.

13. On March 19, 1998, the Department issued Assessment No. 2234661 to Mr. Khoury and Ms. Brock for \$1,929.70, representing gross receipts tax, interest and penalty due for the period January-December 1994.

14. John Klee was ultimately unable to find a copy of an NTTC executed to Mr. Khoury in his company's files. In April 1998, Klee executed and delivered a new Type 5 NTTC to Mr. Khoury.

15. On Monday, April 20, 1998, Mr. Khoury filed a letter protesting the assessment and enclosing a copy of the new NTTC.

DISCUSSION

The issue in this case is whether the Type 5 NTTC Klee delivered to Mr. Khoury in April 1998 entitles Mr. Khoury to deduct his receipts from providing consulting services to Klee during calendar year 1994.

Burden of Proof. Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Further, Section 7-9-5 NMSA 1978 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." 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). Accordingly, it is Mr. Khoury's burden to come forward with evidence to show that he was entitled to the deductions taken and that the Department's assessment is incorrect.

Evidence Required to Support Deductions under Section 7-9-48. The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. Mr. Khoury claims the deduction provided in NMSA 1978, Section 7-9-48:

Receipts from selling a service for resale may be deducted from gross receipts
... *if the sale is made to a person who delivers a nontaxable transaction certificate to the seller...* (emphasis added).

The fact that a taxpayer can prove his services were sold for resale is not sufficient to support a deduction under Section 7-9-48. The buyer of the services must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts.

Taxpayer Responsibility for Documenting Deductions. The requirements for obtaining NTTCs to support deductions from gross receipts are set out in NMSA 1978, Section 7-9-43:

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.

NTTCs required to support deductions must be "in the possession" of the seller within 60 days from the date of the Department's notice. The language of the statute is mandatory and does not give the Department discretion to extend the 60-day deadline: if a seller is not in possession of required NTTCs within the period allowed, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added). *See also, Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), *cert.*

denied, 107 N.M. 308, 756 P.2d 1203 (1988) (where a party claiming a right to a tax deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto).

Although Mr. Khoury believed he had obtained an NTTC from Klee, he was unable to locate the NTTC in his files. John Klee was unable to locate an NTTC in the company's files. It was not until April 1998, well after expiration of the 60-day period, that Klee executed and delivered a Type 5 NTTC to Mr. Khoury, who forwarded it to the Department. Mr. Khoury's failure to have the required NTTC in his possession within the 60-day period provided in Section 7-9-43 leaves the Department no choice but to disallow his deductions.

CONCLUSIONS OF LAW

1. Mr. Khoury filed a timely written protest to Assessment No. 2234661, and jurisdiction lies over the parties and the subject matter of this protest.

2. Mr. Khoury is liable for gross receipts tax on his receipts from providing consulting services to Klee.

3. Mr. Khoury is not entitled to claim the deduction from gross receipts provided in Section 7-9-52 because he did not have the required NTTC in his possession within the 60-day period provided in Section 7-9-43.

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

Dated September 25, 1998.