

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

**IN THE MATTER OF THE PROTEST OF
RICHARD AND ARLENE HALL d/b/a
CORNERSTONE CONTRACT SERVICE
ID NO. 02-402690-00-5
ASSESSMENT NO. 2551992**

No. 01-32

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 15, 2001, before Margaret B. Alcock, Hearing Officer. Richard and Arlene Hall represented themselves. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1994, Richard Hall retired from his employment as a principal engineer at Allied Signal ("Allied").
2. Allied subsequently approached Mr. Hall about coming back to work as an independent contractor to perform services in connection with a contract Allied had entered into with the federal government.
3. In the course of negotiations, Allied told Mr. Hall that if it contracted with him directly, it could not compensate him for the cost of the New Mexico gross receipts tax Mr. Hall would owe on his receipts from performing services for Allied.

4. Allied said it could include the cost of the gross receipts tax if the services were purchased from a company with which Allied already had a contract. One such company was Pathfinder Technology (“Pathfinder”).

5. Mr. Hall then entered into an agreement whereby he performed services for Allied as a subcontractor of Pathfinder, which then resold his services to Allied. As part of this agreement, Pathfinder told Mr. Hall that it would take care of paying the gross receipts tax due on Mr. Hall’s receipts from performing services in New Mexico.

6. Under his agreement with Pathfinder, Mr. Hall submitted a weekly time card to Pathfinder for the hours he spent performing services for Allied. Pathfinder then submitted an invoice to Allied which included the cost of Mr. Hall’s services plus an additional amount representing Pathfinder’s profit on its resale of Mr. Hall’s services.

7. Although Mr. Hall assumed Pathfinder was billing Allied for the gross receipts tax due on Mr. Hall’s receipts and paying this tax to the state on his behalf, Mr. Hall never verified this with Pathfinder, Allied or the Department.

8. Under certain circumstances, the Department will enter into what is known as a “TS-22 agreement”, which allows one taxpayer to pay gross receipts tax legally owed by another taxpayer. Pathfinder never entered into a TS-22 agreement with the Department, nor did it pay the gross receipts tax Mr. Hall owed on the compensation he received from Pathfinder.

9. Pathfinder accepted a Type 5 nontaxable transaction certificate (“NTTC”) from Allied, which allowed Pathfinder to deduct its receipts from Allied pursuant to Section 7-9-48 NMSA 1978. The Type 5 NTTC issued to Pathfinder did not cover Mr. Hall’s receipts or affect Mr. Hall’s liability for gross receipts tax on the compensation he received from Pathfinder.

10. Because Mr. Hall believed Pathfinder was paying the gross receipts tax on his behalf, he did not register with the Department and did not report or pay gross receipts tax on the compensation he received from Pathfinder.

11. Mr. Hall did report his compensation from Pathfinder as business income on Schedule C of the Halls' 1996 federal income tax return.

12. Sometime in 2000, the Department received information from the Internal Revenue Service concerning the business income reported on the Halls' 1996 federal income tax return. When the Department investigated, it found that no New Mexico gross receipts tax had been reported or paid on this income.

13. On July 12, 2000, the Department issued Assessment No. 2551992 to the Halls under the name "Cornerstone Contract Service", which was the name of a sole proprietorship Mr. Hall registered after he stopped doing business with Pathfinder.

14. Assessment No. 2551992 was issued in the total amount of \$6,732.94, representing gross receipts tax, plus penalty and interest accrued through July 25, 2000, on the compensation Mr. Hall received from Pathfinder during 1996.

15. On August 7, 2000, the Halls filed a written protest to the Department's assessment.

DISCUSSION

The issue presented is whether the Halls are liable for gross receipts tax on the compensation Mr. Hall received from performing services for Allied as a subcontractor of Pathfinder. Mr. Hall maintains he is not liable for the gross receipts tax because: (1) all of his services were performed for Allied and not for Pathfinder; (2) he did not collect the gross receipts tax from Pathfinder and it is now impossible for him to recover the tax; (3) his agreement with Pathfinder shifted the

responsibility for payment of his gross receipts tax to Pathfinder; and (4) payment of the tax will create a financial hardship.

(1) Application of Gross Receipts Tax to Sales for Resale. Mr. Hall argues that he should not be liable for tax on the payments he received from Pathfinder because all of his services were performed for Allied. Mr. Hall's argument is based on a misunderstanding of the nature of the transactions at issue and the structure of New Mexico's gross receipts tax.

Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. "Engaging in business" is defined in Section 7-9-3(E) NMSA 1978 to mean carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit. 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. Each separate transaction is subject to gross receipts tax.

The application of the gross receipts tax to resale transactions is illustrated by the New Mexico Court of Appeals' decision in *House of Carpets, Inc. v. Bureau of Revenue*, 87 N.M. 747, 507 P.2d 1078 (Ct. App. 1973). That case involved two taxpayers, a retailer of wall-to-wall carpet and an installer of carpet. The retailer sold carpet to the public and included installation as part of the sales package. Once a sales contract was entered into, the installer went to the customer's home and installed the carpet. The installer then billed the retailer, who resold the installation service to the customer. The court found that while the installer's services were performed only once, there were two taxable transactions: the first transaction was the installer's sale of his services to the retailer; the second transaction was the retailer's resale of the installer's services to the customer.

The court held that gross receipts tax was due on both transactions, rejecting the retailer's argument that this resulted in "double assessment" on the services provided by the installer.

In this case, Allied had a contract to provide certain services to the federal government. Allied subcontracted those services to Pathfinder who further subcontracted them to Mr. Hall. This fact pattern is the same as that in *House of Carpets, supra*, with one added layer of complexity. Although Mr. Hall performed his services only once, those services were sold three times: the first sale was from Mr. Hall to Pathfinder; the second sale was from Pathfinder to Allied; and the third sale was from Allied to the federal government. As established by the court's decision in *House of Carpets*, each of these transactions was subject to gross receipts tax. In this case, however, Allied delivered a Type 5 NTTC to Pathfinder. This allowed Pathfinder to deduct its receipts from Allied pursuant to Section 7-9-48 NMSA 1978, which provides a deduction for selling services for resale when certain conditions are met. Because the NTTC only covered Pathfinder's sale of services to Allied, and did not cover Mr. Hall's separate sale of services to Pathfinder, his receipts from that transaction remain subject to gross receipt tax.

(2) Failure to Collect Gross Receipts Tax from the Buyer. Mr. Hall maintains he should not be required to pay gross receipts tax that he never collected from Pathfinder and that it is now impossible for him to recover. The problem with this argument is that, unlike many other states, New Mexico does not have a sales tax that is charged to and collected from the buyer. New Mexico has a gross receipts tax that is imposed directly on the seller of goods and services. In effect, the gross receipts tax is part of the seller's cost of doing business. Although it is a common practice for sellers to pass the gross receipts tax on to the buyer, the seller's ability to separately charge or obtain reimbursement of the tax does not affect his legal obligation to report and pay gross receipts tax to the state. In this case, Mr. Hall was legally liable for payment of gross receipts tax on the payments

he received from performing services as a subcontractor of Pathfinder. The fact that he did not charge or collect the tax from Pathfinder does not relieve him of this liability.

(3) Pathfinder's Agreement to Pay Gross Receipts Tax. Mr. Hall's third argument is that his agreement with Pathfinder shifted responsibility for payment of his gross receipts tax to Pathfinder. A taxpayer's responsibility for payment of gross receipts tax is not something that can be delegated to a third party. As stated by the New Mexico Court of Appeals in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

In this case, Mr. Hall was charged with the duty to insure that his gross receipts taxes were paid in a timely manner. He was not entitled to simply turn this responsibility over to Pathfinder. He had an obligation to check with Pathfinder or the Department to confirm that the taxes for which he was liable were being paid. Mr. Hall's agreement with Pathfinder was a private matter. The state was never consulted and never became a party to the agreement. Accordingly, the agreement had no effect on Mr. Hall's legal obligations to the state and does not serve to relieve Mr. Hall of his liability for the Department's assessment of gross receipts tax.

(4) Financial Hardship. Finally, Mr. Hall asks the Department to consider the fact that he and his wife are senior citizens living on a fixed income and that payment of the assessment will create a financial hardship. Unfortunately, these factors are not something the Department can consider. Department Regulation 3.1.6.14 NMAC specifically states that the Secretary "may not compromise a taxpayer's liability because of the taxpayer's inability to pay." Nor does the hearing

officer have authority to relieve a taxpayer of his statutory liability for tax, penalty or interest. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the supreme court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. *See, e.g., Chalamidas v. Environmental Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit)*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984) (stating that an "agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue*, 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct. App. 1972).

The legislature has not granted the Department or its hearing officer the authority to abate or adjust tax assessments based on the financial or personal situations of individual taxpayers.

CONCLUSIONS OF LAW

1. The Halls filed a timely, written protest to Assessment No. 2551992, and jurisdiction lies over the parties and the subject matter of this protest.
2. Mr. Hall was liable for gross receipts tax on his receipts from performing services for Allied as a subcontractor of Pathfinder.
3. The fact that Mr. Hall did not charge or collect gross receipts tax from Pathfinder does not relieve him of his legal obligation for payment of the tax.
4. Mr. Hall's private agreement with Pathfinder did not relieve him of his legal obligation for payment of gross receipts tax due on his receipts.
5. The hearing officer does not have authority to override the provisions of New Mexico's tax laws to relieve the Halls from payment of tax, penalty or interest due to the state.

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

DATED November 29, 2001.

