

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

**IN THE MATTER OF THE PROTEST OF
JM BODY SHOP
ID NO. 02-249518-00-5
ASSESSMENT NO. 2654206**

No. 02-13

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 6, 2002, before Margaret B. Alcock, Hearing Officer. JM Body Shop was represented by Justino Martinez ("Taxpayer"), its owner. 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. From March 1997 through September 1999, the Taxpayer operated a paint and body shop in Roswell, New Mexico.
2. When the Taxpayer began business, he consulted with an accountant concerning his tax responsibilities and engaged the accountant to file quarterly gross receipts tax returns for the business.
3. The accountant told the Taxpayer he could deduct his receipts from performing work for auto dealerships and other legitimate businesses engaged in selling used cars on which the Taxpayer performed paint and body work.
4. The accountant did not explain the use of nontaxable transaction certificates ("NTTCs") or advise the Taxpayer that no deduction could be taken unless the customer provided the Taxpayer with an appropriate NTTC.

5. Based on the accountant's advice, the Taxpayer did not charge gross receipts tax to the auto dealerships for which he performed work, even when the dealership failed to provide the Taxpayer with an NTTC. The Taxpayer listed his receipts from these transactions as deductible on the records he provided to his accountant, which the accountant then used to prepare the Taxpayer's quarterly gross receipts tax returns.

6. In October 1999, the Taxpayer sold his business.

7. In 2000, the Department audited the Taxpayer for the period March 1997 through September 1999.

8. The Department disallowed the Taxpayer's deduction of receipts from transactions where the Taxpayer did not have a valid NTTC from its customer. This included a number of transactions where the identify of the customer was unknown and it was impossible for the Department to determine whether the Taxpayer had a valid NTTC applicable to the transaction.

9. On October 13, 2000, the auditor gave the Taxpayer what is known as a "60-day letter." The letter advised the Taxpayer that, pursuant to Section 7-9-43 NMSA 1978, the Taxpayer must be in possession of all required NTTCs within 60 days or deductions claimed relating to the NTTCs would be disallowed. The sixty-day period expired on December 12, 2000.

10. After receiving the 60-day letter, the Taxpayer contacted his customers to try and obtain the NTTCs needed to support the Taxpayer's deductions.

11. Although the Taxpayer obtained NTTCs from B&R Motors, Inc. and Carb's-N-Tunes, the Department refused to accept the NTTCs because the Taxpayer did not receive them until after the expiration of the 60-day period provided in Section 7-9-43 NMSA 1978. In addition, the NTTCs were issued under the tax identification number of the new owners of JM Body Shop, rather

than under the tax identification number used by the Taxpayer during the period he owned the business.

12. On April 28, 2001, the Department issued Assessment No. 2654206 to the Taxpayer in the amount of \$8,975.47, representing \$5,812.85 of gross receipts tax, \$2,581.33 of interest and \$581.29 of penalty for reporting periods March 1997 through September 1999.

13. On May 21, 2001, the Taxpayer filed a written protest to the assessment.

DISCUSSION

The Taxpayer does not dispute the correctness of the Department's audit findings or the fact that he was unable to demonstrate timely possession of NTTCs needed to support certain deductions taken during the audit period. Nonetheless, the Taxpayer believes it is unfair to assess him for gross receipts taxes he never collected from his customers, particularly when this failure resulted from his lack of knowledge and his accountant's failure to properly advise him concerning the use of NTTCs.

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). Where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the 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 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.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988).

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. In this case, the Taxpayer claimed the deduction provided in Section 7-9-75 NMSA 1978, which states:

Receipts from selling the service of combining or processing components or materials may be deducted from gross receipts if the sale is made to a person engaged in the business of manufacturing *who delivers a nontaxable transaction certificate to the seller*. The buyer delivering the nontaxable transaction certificate must have the service performed directly upon tangible personal property which he is in the business of manufacturing or upon ingredients or component parts thereof. (emphasis added)

Because an automobile dealer generally repairs, repaints and sometimes reupholsters used cars to increase their value for sale in the ordinary course of the dealer's business, the Department treats the dealer as a manufacturer of the refurbished vehicles. Pursuant to Section 7-9-75 NMSA 1978, the Taxpayer was entitled to deduct his receipts from performing services directly on used vehicles that a dealer was preparing for sale only if the dealer delivered a Type 1 or 13 NTTC to the Taxpayer. As quoted above, the requirements of the statute are very specific. The buyer of services performed on a manufactured product must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts.

The requirements for obtaining NTTCs to support deductions from gross receipts are set out in Section 7-9-43(A) NMSA 1978. At the time of the audit, this section provided, in pertinent part:

A. 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 language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller...that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added). In this case, the 60-day period expired on December 12, 2000. Although the Taxpayer subsequently obtained NTTCs from two of his customers, these NTTCs were not in the Taxpayer's possession until after December 12, 2000. To the extent the Taxpayer did not have timely NTTCs from his customers, he is foreclosed from claiming a deduction under Section 7-9-75 NMSA 1978.

The Taxpayer does not dispute his failure to obtain timely NTTCs, but argues that he should not be required to pay gross receipts tax that he never collected from his customers and that it is now impossible for him to recover. The problem with this argument is that, unlike 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 common practice for a seller 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. Here, the Taxpayer was legally liable for payment of gross receipts tax on his receipts from performing services for his customers. The fact that he did not charge or collect the tax from his customers does not relieve him of this liability.

The final issue concerns the imposition of penalty. Section 7-1-69(A) NMSA 1978 imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes in a timely manner. Regulation 3.1.11.11(D) NMAC, provides that a taxpayer will not be considered negligent where:

D. the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts....

In this case, the Taxpayer consulted with an accountant concerning his tax responsibilities and engaged the accountant to file quarterly gross receipts tax returns for the business. The accountant told the Taxpayer he could deduct his receipts from performing work for auto dealerships and other legitimate businesses engaged in selling used cars on which the Taxpayer performed paint and body work. The accountant did not explain the use of NTTCs or advise the Taxpayer that no deduction could be taken unless the customer provided the Taxpayer with an appropriate NTTC. Based on the accountant's advice, the Taxpayer did not charge gross receipts tax to the auto dealerships for which he performed work, even when the dealerships failed to provide the Taxpayer with an NTTC.

At the hearing, the Department conceded that the Taxpayer's failure to properly report gross receipts tax was attributable to his reasonable reliance on the advice of his accountant. Although this reliance does not excuse the Taxpayer from payment of the tax principal or interest due to the state, it does establish that the Taxpayer is not liable for the negligence penalty imposed pursuant to Section 7-1-69 NMSA 1978.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2654206, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer is liable for gross receipts tax and interest on the disallowed deductions set out in the Department's audit.
3. The Taxpayer reasonably relied on the advice of his accountant and was not negligent in failing to report gross receipts tax during the period at issue.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the \$581.29 of penalty assessed against the Taxpayer. The Taxpayer remains liable for payment of tax principal and interest.

DATED May 8, 2002.