

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

**IN THE MATTER OF THE PROTEST OF
GECKO SOUTHWEST HOMES, LTD.
ID NO. 02-310948-00 3
ASSESSMENT NO. 2507983**

No. 02-20

DECISION AND ORDER

The Decision and Order originally issued in this matter on September 5, 2002 is withdrawn and the following Decision and Order is substituted therefor.

A formal hearing on the above-referenced protest was held June 11 and 12, 2002, before Margaret B. Alcock, Hearing Officer. Gecko Southwest Homes was represented by Patricia Tucker, its attorney. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. The parties' final brief was filed on August 16, 2002, at which time the matter was submitted for decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1982, Gerald Tabet graduated from the University of New Mexico with a degree in business.
2. During his last year of college and the first year following his graduation, Mr. Tabet worked for an accounting firm. His work included performing bank reconciliations, posting checks and general work for other accountants at the firm. Mr. Tabet did not do any state gross receipts tax work during this period.
3. Mr. Tabet subsequently obtained a real estate license and worked as a sales associate at a real estate firm.

4. Mr. Tabet then went into business for himself and formed a number of separate corporations through which he intended to engage in real estate sales and development. Most of these corporations never did any business or generated any income. One business operated for a period of four to six months and engaged in the sale of raw land.

5. Mr. Tabet did not pay any gross receipts tax to the state in connection with the corporations he formed. In most cases, this was because his businesses did not generate any receipts. With regard to his receipts from the sale of raw land, Mr. Tabet's accountant advised him that such sales were not subject to gross receipts tax.

6. In 1992, Mr. Tabet became a shareholder and corporate officer of Western Vending, Inc., a corporation engaged in the vending machine business.

7. In February 1992, Mr. Tabet registered Western Vending with the Department for payment of gross receipts tax.

8. Mr. Tabet was responsible for various office and bookkeeping tasks, including reconciling Western Vending's bank statements and filing gross receipts tax returns.

9. Western Vending was not economically successful and ceased doing business in 1993.

10. Mr. Tabet was subsequently contacted by the Department because Western Vending had not filed its monthly gross receipts tax returns or paid gross receipts tax due to the state.

11. In November 1993, Mr. Tabet filed Western Vending's monthly gross receipts tax returns for reporting periods August 1992 through October 1993, showing a delinquent gross receipts tax liability of \$41,267.49. (Exhibits 3, 20 & 21). Because the corporation was no longer doing business and had no assets, the Department deemed the account to be uncollectible and deactivated the liability on the Department's collection system. (Exhibit 3).

12. Following the failure of Western Vending, Mr. Tabet formed two other corporations to engage in the vending machine business and registered those corporations with the Department

for payment of gross receipts tax. Neither corporation ever started operations or earned any income.

13. From 1992 to 1996, Mr. Tabet worked as an independent contractor for a mortgage company in Albuquerque, performing services as a loan officer.

14. In 1996, Mr. Tabet formed TFC Metro, Inc., which operated under the name Metro Mortgage Company.

15. Mr. Tabet registered Metro Mortgage for payment of gross receipts tax and paid gross receipts tax for the first few months. He subsequently learned that receipts from charges made in connection with the origination or making of loans and for handling loan payments are deductible for purposes of the gross receipts tax and obtained a refund of the taxes previously paid.

16. In 1996, Mr. Tabet decided to go into the home construction business, which would be separate from his ongoing business as a mortgage broker.

17. In May 1996, Gerald Tabet registered his sole proprietorship, "Gecko Southwest Homes, Ltd." with the Department for payment of gross receipts taxes.

18. The proprietorship's business was described on the registration form as "New Home Construction" and Gerald S. Tabet was listed as the sole owner. The start date for the business was May 12, 1996. (Stipulated Exhibit 3).

19. On June 5, 1996, Mr. Tabet opened Bank Account No. 170005526 at the Bank of New Mexico. Deposits continued to be made to the account through December 14, 1998. (Exhibit 9, pp. C10.1-C10.10).

20. Because Mr. Tabet did not have a contractor's license, he entered into an agreement with Tom Cardenas, a building contractor with experience in new home construction, to provide the needed license and expertise for the business.

21. Mr. Cardenas had a history of credit problems, including tax problems. For this reason, Mr. Tabet decided not to enter into a partnership or joint venture with Mr. Cardenas.

22. On July 1, 1996, Contractor's License No. 057914 was issued to Gecko Southwest Homes, Mr. Tabet's sole proprietorship. The license had an expiration date of July 31, 1999.

23. On October 21, 1996, Mr. Tabet opened Bank Account No. 170005712 at the Bank of New Mexico. Deposits continued to be made to the account up through March 31, 1997. (Exhibit 9, pp. C10.1-C10.10).

24. On November 6, 1996, Mr. Tabet opened Bank Account No. 170005771 at the Bank of New Mexico. Deposits continued to be made to the account up through April 8, 1997. (Exhibit 9, pp. C10.1-C10.10).

25. On November 15, 1996, Articles of Incorporation for "Gecko Southwest Homes, Inc." were filed with the New Mexico State Corporation Commission, which issued a certificate of incorporation on November 19, 1996. (Stipulated Exhibit 5).

26. Subsequent to the date of its incorporation, Gecko Southwest Homes, Inc. opened three separate bank accounts in connection with specific construction projects: Bank of New Mexico Account No. 170005852; New Mexico Bank & Trust Account No. 6101802; and First State Bank Account No. 1265830. (Exhibit 9, pp. C10.1-C10.10).

27. On November 27, 1996, Mr. Tabet filed an Application for Employer Identification Number, Federal Form SS-4, on behalf of the corporation. The tax identification number assigned to the corporation was 85-0446638. (Exhibit H).

28. On November 27, 1996, Gerald Tabet prepared a Registration Update to cancel the CRS tax identification number issued to his sole proprietorship, Gecko Southwest Homes, Ltd. The update form stated that the business had incorporated and that the proprietorship stopped doing business in New Mexico on November 19, 1996. (Exhibit O).

29. Gerald Tabet was the sole shareholder of Gecko Southwest Homes, Inc.

30. There is no record that Gerald Tabet made any contributions of cash or property to Gecko Southwest Homes, Inc. in return for his shares of stock in the company. Mr. Tabet stated in a letter he delivered to the Department's auditor in 1999 that the corporation was never funded. (Exhibit M).

31. The Articles of Incorporation of Gecko Southwest Homes, Inc. named Gerald Tabet and Tom Cardenas to the initial board of directors. (Stipulated Exhibit 5).

32. The Bylaws of Gecko Southwest Homes, Inc. stated that no loans could be contracted on behalf of the corporation and no evidences of indebtedness could be issued in the name of the corporation unless authorized by a resolution of the directors. (Stipulated Exhibit 6).

33. On January 30, 1998, Gerald Tabet signed a certificate stating that he was the secretary of Gecko Southwest Homes, Inc. and certifying the accuracy of a corporate resolution "adopted by the Board of Directors" of the corporation. The attached resolution stated that the shareholders authorized the corporation to "borrow, on an as needed basis, construction loans from First State Bank for various residential projects" and further stated that "Gerald S. Tabet, President of Gecko Southwest Homes, Inc. shall have the complete authority to act on behalf of the corporation to execute any agreements that are necessary for the construction loans" and to "make any other arrangements or execute any other agreements that may be required for securing such loans." (Exhibit G).

34. The Profit Corporate Report that Gerald Tabet prepared for the year ending December 1996 listed Gerald Tabet and Tom Cardenas as directors, Gerald Tabet as president, and Dianne Tabet as secretary. (Stipulated Exhibit 7).

35. The Biennial Profit Corporate Report that Gerald Tabet prepared in April 1998 for the year ending December 31, 1997 listed Gerald Tabet and Tom Cardenas as directors, Gerald Tabet

as president/treasurer, and Tom Cardenas as vice president/secretary. The report stated that their terms expired in November 1999. (Exhibit N).

36. Other than the two profit corporate reports and the January 1998 corporate resolution, there are no corporate minutes, resolutions, or other documents to indicate that meetings of the shareholders or directors of Gecko Southwest Homes, Inc. were ever held.

37. When Mr. Tabet and Mr. Cardenas began working together, they agreed that Mr. Cardenas would be responsible for all on-site construction work and Mr. Tabet would be responsible for the office and financing work and all other duties that did not involve on-site work.

38. On December 9, 1996, the Bank of New Mexico made a \$183,800 loan to “Gerald S. Tabet, Diane L. Tabet, d/b/a Gecko Southwest Homes, Inc.” (Exhibit E).

39. In December 1996, Gerald Tabet applied to the Department for Type 6 and Type 7 nontaxable transaction certificates (“NTTCs”) to be issued in the name of Gecko Southwest Homes, Inc.

40. The back of the NTTC application form and the back of each Type 6 and Type 7 NTTC issued to Gecko Southwest Homes, Inc. explained the limitations on the use of each type of NTTC issued by the Department. The explanations for Type 6 and Type 7 NTTCs stated that certificates could be used to purchase construction services or materials for “a construction project which is subject to the gross receipts tax” upon its completion. (Exhibit 11).

41. During the period December 1996 through December 1998, Gecko Southwest Homes, Inc. issued over 100 NTTCs to its suppliers and subcontractors, which meant that the corporation was not charged gross receipts tax on these purchases. With only a few exceptions, all of the NTTCs were signed by Gerald Tabet. (Exhibit 11).

42. Tom Cardenas signed a change order, dated October 7, 1996, between Gecko Southwest Homes, Inc. and the purchaser of a home located at 5335 Montano Plaza Drive in Albuquerque. The change order listed additional costs to the purchaser, including the contractor's overhead and profit, and charged the purchaser gross receipts tax on the entire amount. (Exhibit 17).

43. Tom Cardenas signed a second change order, dated March 18, 1997, between Gecko Southwest Homes, Inc. and the purchaser of a home located at 5335 Montano Plaza Drive in Albuquerque. The change order listed additional costs to the purchaser, including the contractor's overhead and profit, plus interest. Except for the amount of interest shown, the purchaser was charged gross receipts tax on the entire amount. (Exhibit 15).

44. On April 3, 1997, Tom Cardenas signed a change order between Gecko Southwest Homes, Inc. and the purchaser of a home being constructed at 5327 Montano Plaza Drive in Albuquerque. The change order listed additional costs to the purchaser, including the contractor's overhead and profit, and charged the purchaser gross receipts tax on the entire amount. (Exhibit 16).

45. On April 21, 1997, Tom Cardenas signed a construction supervision contract between Gecko Southwest Homes, Inc. and the owners of a lot located in Albuquerque, New Mexico. The supervision contract required the lot owners to pay the contractor a specified sum for services rendered, "plus New Mexico gross receipts tax." (Exhibit I).

46. The April 21, 1997 construction supervision contract stated that the work would be performed under Contractor's License No. 057914, which was the license issued to Mr. Tabet's sole proprietorship. (Exhibit I).

47. On May 20, 1997, Gerald Tabet sent invoices to the adjoining owners of Lot 27 in the Chamisa Trail Subdivision, charging them for their share of costs incurred to erect a common

block wall between the properties. The invoices stated that the adjoining lot owners would have to pay gross receipts tax on the construction costs or provide an NTTC to Gecko Southwest Homes, Inc. (Exhibits 12 & 13).

48. In May 1997, Gerald Tabet applied to the Bank of New Mexico for a construction loan in connection with the construction of a house at 12719 Sandia Ridge Place, NE, Lot 41 in the Chamisa Trail Subdivision. The application package included a Purchase Agreement for Lot 41, a Builder Application, and a Construction Cost Breakdown listing cost estimates for all labor, materials and other costs required for the construction. (Exhibit F).

49. The Purchase Agreement for Lot 41 listed the buyer as “Gecko Southwest Homes, Gerald Tabet.” On February 3, 1997, a \$2,000 earnest money deposit was made by check drawn on Bank of New Mexico Account No. 170005852. The check was not preprinted with the account holder’s name, but was a “counter check” on which the name “Gecko Southwest Homes” had been typed. (Exhibit F).

50. The Builder Application for Lot 41 was submitted in the name “Gecko Southwest Homes.” The form of ownership was listed as “sole proprietorship.” (Exhibit F).

51. The Construction Cost Breakdown for Lot 41 listed the builder’s total estimated costs, including a line for gross receipts tax in the amount of \$8,300. (Exhibit F).

52. On November 3, 1997, Contractor’s License No. 060705 was issued to Gecko Southwest Homes, Inc. The license had an expiration date of November 30, 2000.

53. In January 1998, Gerald Tabet applied to the Bank of New Mexico for a construction loan in connection with the construction of a house at 10917 Pino Avenue NE, Lot 31 in North Albuquerque Acres. The application package included a Vacant Land Purchase Agreement for Lot 31, a Builder Application, and a Construction Cost Breakdown listing cost estimates for all labor, materials and other costs required for the construction. (Exhibit J).

54. The Vacant Land Purchase Agreement for Lot 31 listed the buyer as “Gerald Tabet and/or assigns.” A \$1,000 earnest money deposit was made on the lot by check drawn on a Bank of New Mexico account held in the names of Gerald S. Tabet and Dianne L. Tabet. (Exhibit J)

55. The Builder Application for Lot 31 was submitted in the name “Gecko Southwest Homes, Inc.” The form of ownership was listed as “corporation.” The number of the contractor’s license on the application was 057914, which was the license issued to Mr. Tabet’s sole proprietorship. (Exhibit J).

56. The Construction Cost Breakdown for Lot 31 listed the builder’s total estimated costs, including a line for gross receipts tax in the amount of \$9,000. (Exhibit J).

57. Mr. Tabet regularly received the Department’s CRS Filer’s Kit, which is mailed to every registered taxpayer once every six months. The CRS Filer’s Kit mailed to Mr. Tabet for the period January through June 1997 contained specific instructions concerning how construction contractors should report their gross receipts, advising them that the proper business location for reporting receipts from construction projects was the location of the job site. (Exhibit 18).

58. Mr. Tabet filed CRS-1 returns reporting zero gross receipts for his sole proprietorship for the months of May, June, July, August, September and October of 1996 and February and March of 1997. The last return was filed April 25, 1997 for the March 1997 reporting period. (Exhibit 22). After Mr. Tabet made his first sale and received his first receipts from the business in April 1997, he stopped filing CRS-1 returns for his sole proprietorship.

59. Gecko Southwest Homes, Inc. never filed CRS-1 returns, nor did it file state or federal income tax returns or issue Schedule K-1s to its shareholders.

60. Between January 1997 and June 1999, Mr. Tabet and Mr. Cardenas withdrew more than \$265,000 from the business, in roughly equal shares. (Exhibits A, B & C). There were no written contracts or other documents authorizing these withdrawals.

61. On July 13, 1998, the Department sent a letter to Gecko Southwest Homes, Inc. stating that it had been selected for audit. The letter further stated: “You are hereby requested to make your records and books of account available for examination”, but did not set out a date or location for the production of these records. (Exhibit P).

62. Mr. Tabet did not respond to the Department’s July 13, 1998 letter.

63. As of July 1998, Mr. Tabet had not decided whether it would be more advantageous for him to operate his construction business as a sole proprietorship or as a corporation. For this reason, he had not yet filed individual or corporate income tax returns for the 1997 tax year.

64. In October 1998, Mr. Tabet filed his 1997 personal state and federal income tax returns.

65. Had Mr. Tabet’s construction business been operating as a sole proprietorship, Mr. Tabet should have reported all of the income and expenses from the business on Schedule C to his federal return. Instead, Mr. Tabet reported only the amount of his “draws” from the business on Schedule C.

66. Had Mr. Tabet’s construction business been operating as an S corporation, Mr. Tabet should have reported all of the income and losses from the business on Schedule E to his federal return. Mr. Tabet did not file a Schedule E.

67. Mr. Tabet did not file a 1997 corporate income tax return for Gecko Southwest Homes, Inc., nor did he prepare a Schedule K-1, which all S corporations are required to issue to their shareholders to report each shareholder’s share of corporate income and losses.

68. In January 1999, in response to several telephone calls from Department auditor Steve Weems, Mr. Tabet and his accountant met with Mr. Weems at the Department’s Albuquerque office. Mr. Tabet brought some, but not all, of the documents relating to the homes constructed during the audit period with him to the meeting.

69. At the January 1999 meeting, Mr. Weems asked for clarification as to whether the business was operating as a corporation or as a proprietorship. Mr. Tabet responded that he never intended to operate the business as a corporate entity and had not maintained corporate records.

70. Following the January 1999 meeting, Mr. Tabet delivered a letter to Mr. Weems stating that his construction business had always operated as a sole proprietorship and explaining that the “reason we never filed any Federal or State Corporation tax returns is because the corporation was never funded nor intended to be in business.... We never operated as a Corporation.” (Exhibit M).

71. In June 1999, Mr. Weems was promoted to audit supervisor and the Tabet audit was reassigned to Michele Salaz. At that time, Ms. Salaz called Mr. Tabet and asked him for a list of all of the homes he had built during the audit period. Mr. Tabet responded by delivering settlement statements for four properties.

72. A short time later, Ms. Salaz was looking through a real estate brochure when she saw a home by Gecko Southwest Homes that had not been included in the four settlement statements provided by Mr. Tabet. Ms. Salaz then obtained a list of building permits from the City of Albuquerque for the period May 1996 through June 1999. The list included five building permits issued to Gerald Tabet or his sole proprietorship and two permits issued to Gecko Southwest Homes, Inc. (Exhibit 9, pp. C11.3-C11.9).

73. On June 30, 1999, Ms. Salaz sent Mr. Tabet a letter requesting additional information needed to complete the audit, including the settlement statements for the additional homes she had located on the City’s list of building permits. (Exhibit 10). It was finally determined that Mr. Tabet had built a total of eleven homes during the audit period: eight homes were sold; two homes were converted to the personal use of Mr. Tabet and Mr. Cardenas; and one home was converted to a rental. (Exhibit 9, C11.1).

74. On October 25, 1999, in a letter written to Ms. Salaz by his attorney, Mr. Tabet reversed his earlier position that his construction business was always operated as a sole proprietorship and asserted that the business was actually a corporation. (Exhibit 10).

75. The October 25, 1999 letter stated that Mr. Tabet and Mr. Cardenas formed Gecko Southwest Homes, Inc. as a separate taxpayer in 1996 and enclosed balance sheets showing that “the shareholders contributed \$10,000 for their common stock.” (Exhibit 10).

76. On March 30, 2000, the Department issued Assessment No. 2507983 to “Gecko Southwest Homes” under the tax identification number of Mr. Tabet’s sole proprietorship. The assessment was issued for reporting periods May 1996 through February 1999 in the total amount of \$163,764.65, representing \$116,391.28 gross receipts tax, \$1,550.93 compensating tax, \$11,794.24 penalty, and \$34,028.20 interest. (Stipulated Exhibit 1).

77. On June 12, 2000, pursuant to a retroactive extension of time granted by the Department, Mr. Tabet filed a written protest to the Department’s assessment.

78. On May 18, 2001, the Department amended Assessment No. 2507983 to increase the amount of penalty assessed from \$11,794.24 (the ten percent penalty authorized by Section 7-1-69(A), NMSA 1978) to \$58,971.17 (the fifty-percent penalty authorized by Section 7-1-69(C), NMSA 1978). (Stipulated Exhibit 2).

79. On May 30, 2001, Mr. Tabet filed a written protest to the Department’s amended assessment.

80. On July 6, 2001, Gerald and Dianne Tabet filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of New Mexico.

81. On October 30, 2001, the bankruptcy court entered a “Discharge of Debtor(s) in a Chapter 7 Case” in the Tabet’s bankruptcy proceeding. (Stipulated Exhibit 9).

DISCUSSION

Gerald Tabet does not dispute the correctness of the Department's determination of gross receipts and compensating taxes due as a result of the Department's audit. Instead, Mr. Tabet asserts that the Department assessed the wrong taxpayer and also disputes that the failure to report or pay tax was the result of his willful intent to evade or defeat that tax.

I. IDENTITY OF THE TAXPAYER.

The primary issue presented is whether Mr. Tabet's construction business operated as a sole proprietorship or as a corporation during the period April 1997 (the date the business generated its first receipts) through February 1999. Mr. Tabet maintains that while Gecko Southwest Homes was originally formed as a sole proprietorship, the business was incorporated in November 1996 and operated as a corporate entity after that date. Mr. Tabet asserts that he has no personal liability for the taxes owed by the corporation and that the Department's assessment of tax to his sole proprietorship should be abated. It is the Department's position that Mr. Tabet never funded the corporation, never observed corporate formalities, and never operated his construction business as a corporation. In the alternative, the Department argues that if the corporation is recognized, the corporate entity should be disregarded and Mr. Tabet should be held personally liable for the delinquent taxes owed on receipts from the sale of homes during the audit period.

Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Accordingly, Mr. Tabet has the burden of proving that the Department's assessment of tax and interest against his sole proprietorship was incorrect. Mr. Tabet has made several factual allegations, set out below, to establish that his construction business was operated as a corporation during the period at issue in this case. As discussed after each set of statements,

the facts presented are either not supported by the evidence or do not lead to the conclusion advocated by Mr. Tabet.

A. Gecko Southwest Homes, Inc. was incorporated in the State of New Mexico on November 19, 1996. Gerald Tabet and Dianne Tabet were the shareholders. Gerald Tabet and Tom Cardenas were the directors and officers. The corporation obtained its own federal and state tax identification numbers. (Opening Brief, p. 5).

The formation of a corporation is usually a strong indicator of the intent to operate as a corporate entity. In this case, however, there is evidence that Mr. Tabet had a practice of setting up and registering shell corporations and other business entities to have on hand in the event one of his numerous business schemes came to fruition. After Mr. Tabet obtained his real estate license, he registered several businesses with the Department in the hopes of putting together various real estate deals. With the exception of one company that engaged in business for a period of four to six months, none of these entities ever operated as a business or generated any income. After his venture into the vending machine business, Mr. Tabet registered two more entities, Big Vend of New Mexico and Metro Vend. Mr. Tabet testified that these businesses “never went anywhere” and their tax registrations were subsequently retired.

Given this history, the fact that Mr. Tabet incorporated and registered the entity known as Gecko Southwest Homes, Inc. carries little weight in determining whether Mr. Tabet actually used the corporation to conduct business. At the administrative hearing, Mr. Tabet testified that as of July 1998, more than 1½ years after the date of incorporation, he “had not decided” whether to operate his construction business as a corporation or as a sole proprietorship. During his initial meeting with the Department’s auditor in January 1999, Mr. Tabet told Mr. Weems that he never intended to operate the business as a corporate entity. Mr. Tabet subsequently gave the auditor a written statement that “the corporation was never funded nor intended to be in business.” (Exhibit M).

B. Shortly after incorporating Gecko Southwest Homes, Inc., Mr. Tabet prepared and filed a registration update to retire the registration of his sole proprietorship. (Opening Brief, p.5).

On November 27, 1996, Gerald Tabet cancelled the CRS registration for his sole proprietorship, stating that the proprietorship stopped doing business in New Mexico on November 19, 1996. Mr. Tabet subsequently filed CRS-1 returns for the sole proprietorship for the months of February and March 1997. In addition, Mr. Tabet continued to conduct his construction business under the contractor's license issued to the sole proprietorship.

Mr. Tabet's use of the proprietorship's license is significant. The Construction Industries Licensing Act (Section 60-13-1 NMSA 1978 *et seq.*) requires every entity operating as a contractor to obtain a license in its own name. The fact that a partner, shareholder, or agent of the entity holds a contractor's license is not sufficient to meet the requirements of the Act. *See, Nickels v. Walker*, 74 N.M. 545, 395 P.2d 679 (1964); *Kreischer v. Armijo*, 118 N.M. 671, 884 P.2d 827 (Ct. App. 1994). Under Section 60-13-30 NMSA 1978, an unlicensed contractor is prohibited from bringing judicial action to recover compensation for work performed and, further, is liable for returning any amounts received as a result of his contracting work. *Mascarenas v. Jaramillo*, 111 N.M. 410, 414, 806 P.2d 59, 63 (1991). In this case, Gecko Southwest Homes, Inc. did not obtain a contractor's license until November 1997 and was legally prohibited from operating as a contractor prior to that date. Even after the corporation obtained a contractor's license, Mr. Tabet continued to use the license assigned to the proprietorship. *See*, Exhibit J, Builder Application dated January 1998. These facts support the conclusion that Mr. Tabet's construction business continued to operate as a proprietorship after the date he cancelled its tax registration with the Department.

C. The corporation applied for nontaxable transaction certificates (NTTCs), which the Department issued in the name Gecko Southwest Homes, Inc. (Opening Brief, pp. 5-6).

There is no dispute as to this fact. I note, however, that 89 of the 113 NTTCs Mr. Tabet delivered to suppliers and subcontractors were dated before November 3, 1997, the date the corporation obtained its contractor's license. (Exhibit 11). Accordingly, most of the NTTCs executed in the name of the corporation were used on construction projects built under the contractor's license issued to Mr. Tabet's sole proprietorship.

D. Various bank accounts were opened, all in the corporate name. All business activity was done through the corporate bank accounts, even on the occasions when a check was initially drawn on a personal account. All receipts from the sale of the homes at issue were deposited in the corporate accounts. (Opening Brief, p. 6).

At the administrative hearing, Mr. Tabet testified that all bank accounts were opened in the name of the corporation and that he never had a business account in his name or in the name of his sole proprietorship. This testimony is contradicted by evidence that three of the six bank accounts used by Mr. Tabet's construction business were opened prior to the date Gecko Southwest Homes, Inc. was incorporated. When the Department's counsel asked Mr. Tabet how the Bank of New Mexico account opened on June 5, 1996—which appears to have been the business's primary account—could have been opened in the name of a corporation that did not then exist, Mr. Tabet had no answer.

In February 1997, Tom Cardenas signed a \$2,000 check drawn on another Bank of New Mexico account opened after the date of incorporation. The account name typed on the check was "Gecko Southwest Homes," without the "Inc." needed to identify a corporate entity. *See*, Exhibit F. In January 1998, when Mr. Tabet put down a \$1,000 earnest money deposit on the purchase of Lot 31 in North Albuquerque Acres, the check was drawn on a personal account held in the name of "Gerald S. Tabet and Dianne L. Tabet." (Exhibit J).

Mr. Tabet points to the fact that the auditor identified the taxpayer as "Gecko SW Homes, Inc." on her summary of bank deposits (Exhibit 9, pp. C10.1-C10.10) as evidence that those

accounts were held in the corporate name. I do not find this persuasive. The Department's audit notice was originally issued to the corporation because Mr. Tabet had retired the registration for his sole proprietorship. The date on the bank summary is July 23, 1999, shortly after the auditor was assigned to the audit in June 1999. It was only after the auditor completed her review of documents—including Mr. Tabet's written statement that he never operated as a corporation—and consulted with the Department's attorney that a final determination was made to treat the business as a sole proprietorship. (Exhibit 9, p. GN2). Accordingly, the fact that the July 1999 work papers list the taxpayer under the corporate name is not determinative, particularly since the tax identification number shown on the bank summary is the number of the sole proprietorship.

The only documentary evidence introduced to support Mr. Tabet's assertion that all business accounts were held in the name of the corporation was a June 1999 bank statement for an account at New Mexico Bank & Trust, one of the three accounts opened after the date of incorporation. With regard to the other five accounts, including the three opened prior to the date of incorporation, Mr. Tabet's testimony is the only evidence that these accounts were held in the corporate name. As discussed in more detail under Point II, *infra*, I did not find Mr. Tabet to be a credible witness and was not convinced by his testimony.

E. Accounting was entered contemporaneously into the corporate bookkeeping system and reports were prepared at the end of each month. Mr. Tabet prepared these reports from the accounting records he maintained for the corporation. Each of the eight projects was recorded as a corporate project on the corporate records. (Opening Brief, pp. 6-7).

The fact that Mr. Tabet maintained an accounting system and prepared monthly cash flow reports does not support the conclusion that the business was operated as a corporation. Every business is required to maintain accounting records, whether the business operates as a corporation or as a sole proprietorship. In this case, the bookkeeping system was a computer software program called QuickBooks, which Mr. Tabet used to enter data. His designation of this system as

“corporate” carries little weight since the system was used for internal purposes and was never used to generate CRS or income tax returns for the corporation. The only tax returns filed using information entered into the “corporate” bookkeeping system were the CRS-1 returns filed for Mr. Tabet’s sole proprietorship. I also note that while Mr. Tabet states that each construction project was properly recorded in the accounting system, the Department’s auditor found a large discrepancy between the gross receipts shown on Mr. Tabet’s books and the gross receipts established in the audit. (Exhibit 9, p. GN4). Mr. Tabet stipulated that the gross receipts reflected in the audit are correct.

F. Draws were taken by Mr. Cardenas and Mr. Tabet in approximately equal amounts. Mr. Tabet did not treat the draws taken from the corporation as wages, but reported the income as management fees on Schedule C to his personal income tax return. Mr. Tabet did not include the income or deductions related to the sale of residences on his Schedule C. (Opening Brief, pp. 6, 11-12).

The fact that Mr. Tabet and Mr. Cardenas withdrew funds from the construction business in approximately equal shares does not support the conclusion that the business was operating as a corporation. Mr. Tabet was the sole shareholder of Gecko Southwest Homes, Inc. It is not normal practice for the sole shareholder of a corporation to split the corporate profits with someone who has no ownership interest in the business. Mr. Tabet maintains that he and Mr. Cardenas worked for the corporation as independent contractors and that all compensation was paid to them on that basis. No written contracts, corporate resolutions or other documents exist, however, to show that the corporation ever authorized such payments.

Mr. Tabet testified that he did not file his 1997 federal income tax return on time because he had not yet decided whether to operate his construction business as a sole proprietorship or as a corporation. In October 1998, after receiving the Department’s audit notice, Mr. Tabet filed a return for the 1997 tax year reporting only the “draws” he had taken from his construction business on Schedule C to his federal Form 1040. Mr. Tabet’s method of reporting did not

accurately reflect the income from his construction business. If the business operated as a sole proprietorship, Mr. Tabet should have reported all of the income and expenses from the business on Schedule C. If the business operated as an S corporation, Mr. Tabet should have reported the company's income and losses on Schedule E to his federal return, based on information contained in the Schedule K-1 the corporation was required to issue to its shareholders. Although Mr. Tabet argues that filing a Schedule C reporting only the draws he took from the business was "inconsistent with the treatment of the business as a sole proprietorship" (Opening Brief, p.12), his failure to issue a Schedule K-1 on behalf of the corporation or to file a Schedule E to his personal income tax return was equally inconsistent with the treatment of the business as a corporation.

G. Where possible, contracts, closing statements, loan applications and other documents were done in the corporate name. Certain transactions were done in Mr. Tabet's name rather than in the name of the corporation because the corporation was new and had no borrowing history. When Mr. Tabet borrowed funds in his individual name, he did so on behalf of the corporation in accordance with a corporate resolution signed on January 1, 1998. (Opening Brief, pp. 7-8).

As set out below, there was no consistency in the names and identification numbers Mr. Tabet used to conduct his construction business.

The list of Albuquerque building permits used by the Department's auditor lists seven of the eleven homes constructed during the audit period. (Exhibit 9, pp. C 11.3-C 11.9). Mr. Tabet applied for the building permits using the following contractor names:

<u>Date</u>	<u>Property Address</u>	<u>Contractor Name</u>
06/05/96	5331 Montano Plaza Dr. NW	Gerald Tabet
11/25/96	5335 Montano Plaza Dr. NW	Gecko Southwest Homes
12/10/96	5327 Montano Plaza Dr. NW	Gecko Southwest Homes
01/16/97	12701 Sunset Ridge Pl. NE	Gecko Southwest Homes
05/06/97	12719 Sandia Ridge Pl. NE	Gecko Southwest Homes, Inc.
06/24/97	12704 Desert Sky Ave. NE	Gerald Tabet
10/22/98	12919 Sunrise Trail NE	Gecko Southwest Homes, Inc.

Although six of the seven building permits were issued after the date Gecko Southwest Homes, Inc. was incorporated, four of the six permits listed the contractor as Gerald Tabet or his sole proprietorship. The corporation was listed as the contractor for only two homes.

During 1997, Tom Cardenas entered into three change orders and a construction supervision contract in the name of Gecko Southwest Homes, Inc. (Exhibits 15, 16, 17 & I). As discussed under Point I(B), *supra*, the contractor's license used for these construction projects was the license issued to Mr. Tabet's sole proprietorship.

Mr. Tabet introduced settlement statements for two of the eleven homes built during the audit period. (Exhibits K & L). The May 1997 HUD-1 settlement statement for the home at 5327 Montano Plaza Drive lists the seller as Gecko Southwest Homes, Inc. But the contractor listed on the building permit was Mr. Tabet's sole proprietorship and, based on the date of sale, the house was constructed under the sole proprietorship's contractor's license.

The second settlement statement introduced by Mr. Tabet was for the November 1999 sale of a residence at 12704 Desert Sky Avenue. Again, while the settlement statement lists the seller as Gecko Southwest Homes, Inc., the building permit was issued to Gerald Tabet. I also note that this was one of the homes converted to the contractor's personal use and on which the Department assessed compensating tax. The subsequent sale of the home in November 1999 falls outside the audit period, which ended on February 28, 1999, and the settlement statement was prepared after Mr. Tabet reversed his initial position that the business was a sole proprietorship and adopted his current position that the business operated as a corporation. Given these facts, the November 1999 settlement statement is self-serving and lends little weight to Mr. Tabet's arguments.

In May 1997, six months after the date Gecko Southwest Homes, Inc. was incorporated, Mr. Tabet applied to the Bank of New Mexico for a loan in connection with the construction of a

house at 12719 Sandia Ridge Place NE, Lot 41 in the Chamisa Trail Subdivision. The building permit was issued to Gecko Southwest Homes, Inc. All of the documents submitted in support of the loan application were in the name of Gerald Tabet or Gecko Southwest Homes, without the qualifying "Inc." The form of ownership listed on the builder application was "sole proprietorship." (Exhibit F).

In January 1998, Mr. Tabet applied to the Bank of New Mexico for a loan in connection with the construction of a house at 10917 Pino Avenue, NE in Albuquerque. The builder application was submitted in the name of "Gecko Southwest Homes, Inc." The contractor's license Mr. Tabet listed on the application was the license issued to his sole proprietorship, even though a separate contractor's license had been issued to Gecko Southwest Homes, Inc. in November 1997. The lot purchase agreement listed the buyer as "Gerald Tabet and/or assigns." The earnest money deposit was made by a check drawn on Mr. Tabet's personal bank account. (Exhibit J).

Mr. Tabet testified that the only reason he applied for loans in his individual name was because the corporation had no credit history. He does not explain why loans could not have been issued in the name of the corporation with Mr. Tabet acting as guarantor, a common practice for small, closely-held corporations. Nor does he explain why the May 1997 loan application was submitted, not in his individual name or in the name of the corporation, but in the name of Gecko Southwest Homes, which was identified as a sole proprietorship. This, together with the continued use of the proprietorship's contractor's license, indicates that Mr. Tabet was, in fact, operating his construction business as a sole proprietorship.

Mr. Tabet also maintains that his borrowing was authorized by and in accordance with a corporate resolution signed on January 30, 1998. (Exhibit G). That resolution states that the shareholders authorized the corporation to "borrow, on an as needed basis, construction loans from

First State Bank for various residential projects” and further states that “Gerald S. Tabet, President of Gecko Southwest Homes, Inc. shall have the complete authority to act on behalf of the corporation to execute any agreements that are necessary for the construction loans” and to “make any other arrangements or execute any other agreements that may be required for securing such loans.” It is difficult to see how a 1998 resolution authorizing Mr. Tabet to act on behalf of the corporation to secure loans from First State Bank serves to ratify the 1997 loan Mr. Tabet secured from the Bank of New Mexico in the name of his sole proprietorship.

An additional problem arises from the fact that the *shareholders’* resolution was certified as a resolution of the *board of directors* of Gecko Southwest Homes, Inc. by Gerald Tabet, who signed the certificate as secretary of the corporation. Mr. Tabet was never elected as secretary of Gecko Southwest Homes, Inc. The Profit Corporate Report that Mr. Tabet prepared for the year ending December 1996 lists Dianne Tabet as secretary. (Stipulated Exhibit 7). The Biennial Profit Corporate Report that Mr. Tabet prepared in April 1998 for the year ending December 1997 lists Tom Cardenas as vice president/secretary and states that his term of office would not expire until January 13, 1999. (Exhibit N). Mr. Tabet was not the secretary of Gecko Southwest Homes, Inc. on January 30, 1998, and the certificate he signed in that capacity was not valid.

This is just one example of Mr. Tabet’s failure to observe corporate formalities. Other than the two profit corporate reports, there are no corporate minutes, resolutions, or other documents to indicate that annual or special meetings of the shareholders or directors of Gecko Southwest Homes, Inc. were ever held. At the administrative hearing, Mr. Tabet admitted there were no documents evidencing contributions or loans made to the corporation. Nor is there any evidence that the lots purchased in Mr. Tabet’s name were transferred to the corporation or that the corporation ever held title to the properties it claims to have sold. The corporation never filed any tax returns. Mr. Tabet maintains that he did not file CRS returns because he did not know

that tax was due. This does not explain why the corporation failed to file state and federal income tax returns or to issue Schedule K-1s to its shareholders.

Based on the exhibits and testimony presented at the administrative hearing, there is substantial evidence to support Mr. Tabet's written admission that his construction business always operated as a sole proprietorship and that Gecko Southwest Homes, Inc. "was never funded nor intended to be in business." (Exhibit M). Mr. Tabet's testimony attempting to refute this earlier admission was not credible. Mr. Tabet failed to meet his burden of proving that the assessment of tax principal and interest to his sole proprietorship was incorrect, and he is personally liable for these amounts.

II FRAUD PENALTY.

Having determined that the Department's assessment was properly issued against Mr. Tabet's sole proprietorship (referred to hereinafter as "Gecko"), the next issue to be addressed is whether Mr. Tabet is liable for the fifty-percent civil fraud penalty imposed pursuant to Section 7-1-69(C) NMSA 1978. The parties stipulated that the Department has the burden of proving Mr. Tabet's liability for the fraud penalty by clear and convincing evidence. (Joint Prehearing Submission, p.4, ¶N). The Department has met its burden in this case.

Section 7-1-69(C) NMSA 1978 states as follows:

C. In the case of failure, with willful intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, there shall be added to the amount fifty percent of the tax or a minimum of twenty-five dollars (\$25.00), whichever is greater.

In *State v. Long*, 1996-NMCA-011 ¶6, 121 N.M. 333, 335, 911 P.2d 227, 229, *cert. denied*, 121 N.M. 119, 908 P.2d 1387 (1996), the court of appeals construed a similar statute governing criminal tax fraud to include "all willful attempts to evade taxes, including willful failure to file returns if that results in evasion of taxes and willful failure to pay taxes required by New Mexico

law if that is motivated by an intent to evade.” Because an individual's intent is seldom subject to proof by direct evidence, intent may be proved by circumstantial evidence. *State v. Pizio*, 1995-NMCA-9, 119 N.M. 252, 259, 889 P.2d 860, 867, *cert. denied*, 119 N.M. 168, 889 P.2d 203 (1995). *See also, State v. Motes*, 118 N.M. 727, 729, 885 P.2d 648, 650 (1994) (intent is rarely established by direct evidence and almost always inferred from other facts).

Mr. Tabet maintains that he did not report or pay gross receipts tax during the period at issue because he believed that receipts from the sale of newly constructed residences were not subject to tax. I did not find his testimony to be credible. In *State v. Lovato*, 112 N.M. 517, 521, 817 P.2d 251, 255 (Ct. App. 1991) the court noted that even uncontradicted testimony may be rejected if:

(1) the witness is shown to be unworthy of belief, or (2) his testimony is equivocal or contains inherent improbabilities, or (3) concerns a transaction surrounded by suspicious circumstances, or (4) is contradicted, or subjected to reasonable doubt as to its truth or veracity, by legitimate inferences drawn from the facts and circumstances of the case.

The basis for rejecting Mr. Tabet’s testimony in this case is set out below.

A. Mr. Tabet’s testimony at the hearing conflicted with his earlier statements.

After Mr. Tabet and his accountant met with auditor Steve Weems in January 1999, Mr. Tabet gave Mr. Weems a signed letter stating that his construction business had always operated as a sole proprietorship and explaining that the “reason we never filed any Federal or State Corporation tax returns is because the corporation was never funded nor intended to be in business.... We never operated as a Corporation.” (Exhibit M). At the administrative hearing on his protest, Mr. Tabet testified that his earlier statements were false and that the business was operated as a corporation. As discussed in the previous section, the evidence supports Mr. Tabet’s original position. Either way, *i.e.*, whether Mr. Tabet lied in the written statements he

submitted to the Department during the audit or whether he lied in his testimony at the administrative hearing, Mr. Tabet has shown himself to be unworthy of belief.

A second example of Mr. Tabet's conflicting statements relates to the funding of the corporation. Mr. Tabet originally stated that the corporation was never funded. A few months later, on October 25, 1999, Mr. Tabet submitted the following information through a letter his attorney sent to auditor Michelle Salaz:

In late 1996, Mr. Tabet and Mr. Cardenas formed a separate taxpayer, Gecko Southwest Homes, Inc.

...

As the enclosed balance sheets show, the shareholders contributed \$10,000 for their common stock.... While I do not have information at this point concerning the date on which stock certificates were signed, the two shareholders did make a significant capital contribution in exchange for their stock.

(Exhibit 10). At the administrative hearing, Mr. Tabet testified that he was the sole shareholder of Gecko Southwest Homes, Inc. If Mr. Cardenas were not a shareholder, then the balance sheets submitted to the Department showing that Mr. Cardenas made a contribution to capital in exchange for shares of stock were false representations of the corporation's records. The Department's counsel asked Mr. Tabet when he made his own contribution to the corporation and why this contribution did not show up as a deposit on the business's bank accounts. Mr. Tabet had no answer, other than to say that if the balance sheet showed contributions were made, they must have been made. He then suggested that his contribution was made in the form of office furniture or equipment, but was unable to identify any of the items contributed. I find Mr. Tabet's initial written statement that the corporation was never funded to be the correct version of events. His subsequent backtracking, and his submission of false balance sheets, simply highlight his general lack of credibility.

B. Mr. Tabet's testimony conflicted with that of another, more credible witness.

Mr. Tabet testified that he gave the Department's auditors all of the documents he had relating to his construction business at the beginning of the audit. Michelle Salaz, the primary auditor, testified that when she asked Mr. Tabet for a list of all of the houses he had built during the audit period, he provided her with four settlement statements. Ms. Salaz only discovered the existence of additional homes when she saw another home by Gecko Southwest Homes advertised in a real estate brochure. Ms. Salaz testified that she obtained a list of building permits from the City of Albuquerque and found several additional homes not disclosed by Mr. Tabet. It was only as a result of Ms. Salaz's own investigation and her subsequent requests for additional information that she was able to determine that Mr. Tabet had built a total of eleven homes during the audit period. I found Ms. Salaz to be a credible witness. When viewed in context with the other evidence submitted at the hearing, her testimony supports the conclusion that Mr. Tabet initially failed to provide complete information concerning the homes built during the audit period with the intent of evading payment of New Mexico's gross receipts tax.

C. Mr. Tabet's testimony was inherently unbelievable and was contradicted by inferences drawn from the documentary evidence admitted at the hearing. The

Department's records (Exhibit 22) show that Mr. Tabet filed CRS-1 returns reporting zero gross receipts for his sole proprietorship for the months of May, June, July, August, September and October of 1996 and February and March of 1997. The last return was filed April 25, 1997 for the March 1997 reporting period. After Mr. Tabet made his first sale and received his first receipts from the business in April 1997, he stopped filing returns. This filing history indicates that Mr. Tabet was well aware of his duty to file CRS returns for his construction business.

A second indication that Mr. Tabet knew his construction receipts were subject to tax is the fact that the business included gross receipts tax in its charges to customers and on cost

estimates submitted with its loan applications. *See*, October 7, 1996 change order (Exhibit 17); March 18, 1997 change order (Exhibit 15); April 3, 1997 change order (Exhibit 16); April 21, 1997 construction supervision contract (Exhibit I); construction cost breakdown for Lot 41 (Exhibit F); and construction cost breakdown for Lot 31 (Exhibit J). Mr. Tabet's assertion that he never read the payment terms set out in the supervision contract was not credible, especially in light of his testimony that he was responsible for all of Gecko's financial affairs, including bank deposits, cash flow reports, profit and loss statements, tax returns, etc.

Equally unbelievable was Mr. Tabet's statement that he thought the gross receipts tax shown on the change orders and cost estimates represented tax Gecko would have to pay to its suppliers and subcontractors, rather than tax due on Gecko's own receipts. A review of the three change orders clearly shows that gross receipts tax was calculated on the entire amount of additional charges to the customer, including Gecko's overhead and profit. Mr. Tabet's assertion also conflicts with the fact that he applied for and executed more than 100 NTTCs to Gecko's suppliers and subcontractors in order to avoid gross receipts tax on those purchases. (Exhibit 11). Having obtained NTTCs to use on his construction projects, Mr. Tabet had no reason to believe that Gecko would have to pay gross receipts tax on its purchases of construction materials and subcontract labor.

The back of the Department's NTTC application form explained the limitations on the use of each type of NTTC issued by the Department. (Exhibit 11). The following explanation appeared for Type 6 and Type 7 NTTCs:

Type 6 certificates may be executed by a CONSTRUCTION CONTRACTOR for the purchase of CONSTRUCTION MATERIALS which will be incorporated as an ingredient or component part of a construction project which is subject to the gross receipts tax (1) upon its completion or (2) upon completion of the overall construction project of which it is a part or (3) upon the sale in the ordinary course of business of the real property on which it is constructed. Section 7-9-51 NMSA 1978.

Enter your Contractor's License Number or submit proof one is not required.

Type 7 certificates may be executed by a CONSTRUCTION CONTRACTOR for the purchase of CONSTRUCTION SERVICES to be performed on a construction project which is subject to the gross receipts tax (1) upon its completion or (2) upon completion of the overall construction project of which it is a part or (3) upon the sale in the ordinary course of business of the real property on which it is constructed. Section 7-9-52 NMSA 1978. Enter your Contractor's License Number or submit proof one is not required.

This same information appeared on the back of each of the NTTCs Mr. Tabet delivered to Gecko's suppliers and subcontractors, and in the CRS Filer's Kit the Department mailed to registered taxpayers every six months. The Filer's Kit also contained instructions on how construction contractors should report their gross receipts, advising them that the proper business location for reporting receipts from construction projects was the location of the job site. (Exhibit 18). Mr. Tabet acknowledged receiving the Filer's Kit, but testified that he never read it. He also testified that he never noticed and never read the printed explanation on the back of each of the 100 NTTCs he signed during the audit period.

Despite Mr. Tabet's professed ignorance concerning the taxation of construction receipts and the use of NTTCs, in May 1997 he sent invoices to the adjoining owners of Lot 27 in the Chamisa Trail Subdivision, charging them for construction costs, including gross receipts tax, that Gecko incurred to erect a common block wall between the properties. (Exhibits 12 & 13). The invoices indicated that the adjoining lot owners would have to pay gross receipts tax on the construction costs or provide Mr. Tabet with an NTTC made out to Gecko's tax identification number. Mr. Tabet testified that the lot owners paid the gross receipts tax Gecko charged on the invoices. This tax was never paid over to the Department.

D. The evidence establishes that Mr. Tabet's failure to pay gross receipts and compensating taxes was motivated by the willful intent to evade and defeat those taxes. At

the administrative hearing, Mr. Tabet portrayed himself as the hapless victim of his own ignorance and of erroneous advice received from his business partner, his accountant, and the Department. The evidence paints a different picture, and establishes that: (1) At the time Mr. Tabet started his construction business in May 1996, he held a business degree from the University of New Mexico and had already participated in a number of business ventures, including a corporation that ended up with a substantial liability for unpaid gross receipts tax. (2) Mr. Tabet registered Gecko for payment of gross receipts tax and filed returns for the first several months the business was in existence. (3) Mr. Tabet stopped filing returns at the same time that Gecko sold its first home and generated its first taxable receipts. (4) Even after Mr. Tabet stopped filing returns, Gecko continued to include gross receipts tax in its charges to customers and on cost estimates submitted with its loan applications. (5) Mr. Tabet received the Department's CRS Filer's Kit every six months. Included in the kit were instructions on the proper use of NTTCs and instructions concerning the proper way to report construction receipts. (6) Mr. Tabet issued NTTCs to Gecko's suppliers and subcontractors to avoid the pyramiding of tax on his construction projects, but failed to report or pay gross receipts tax on his receipts from the final project. (7) The profit and loss statements prepared by Mr. Tabet show that during the period that Gecko failed to pay its CRS taxes, Mr. Tabet and Mr. Cardenas withdrew substantial sums of money from the business as "management fees." (8) Mr. Tabet did not file his federal or state income tax returns in a timely manner. After receiving the Department's audit notice, he filed returns that did not accurately report the income from his construction business, regardless of whether the business was a sole proprietorship or a corporation. (9) When the Department's auditor asked Mr. Tabet for a list of the homes he built during the audit period, Mr. Tabet failed to disclose seven of the eleven homes ultimately found to be subject to gross receipts or compensating tax. (10) Mr. Tabet formed a corporation with the same name as his sole

proprietorship, but never funded the corporation. (11) Mr. Tabet subsequently used his individual name, the name of his proprietorship and the name of the corporation to conduct his business.

(12) At the time the audit started, Mr. Tabet gave the Department a letter stating that Gecko had always operated as a sole proprietorship and that “the corporation was never funded nor intended to be in business.” (13) As the audit continued and the extent of Mr. Tabet’s exposure for back taxes became clear, Mr. Tabet changed his position. In October 1999, Mr. Tabet informed the Department that his earlier statement was false, that Gecko was a corporation rather than a sole proprietorship, and that, consequently, he had no personal liability for CRS taxes due from the business.

The facts set out above, together with the conflicts in Mr. Tabet’s testimony and his general lack of credibility, are sufficient to establish, by clear and convincing evidence, that Mr. Tabet’s failure to pay gross receipts and compensating taxes during the audit period was done with the willful intent to evade and defeat those taxes.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2507983, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Department’s assessment was properly issued against Gerald Tabet’s sole proprietorship, and Mr. Tabet is personally liable for the tax principal and interest shown on the assessment.
3. Mr. Tabet’s failure to pay the gross receipts and compensating taxes at issue in this case was motivated by the willful intent to evade and defeat those taxes, and the fifty-percent civil penalty was properly assessed pursuant to Section 7-1-69(C) NMSA 1978.

For the foregoing reasons, the Taxpayer's protest to the Department’s assessment IS DENIED.

Dated September 16, 2002.