

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

**IN THE MATTER OF THE PROTEST OF
DOUG'S MOBILE SERVICE
ID NO. 02-360754-00-8
ASSESSMENT NO. 2232477**

No. 03-08

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 13, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Doug's Mobile Service was represented by Douglas G. Leach ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1994, the Taxpayer worked as a mechanic for an auto repair business in Las Cruces, New Mexico.
2. The Taxpayer was required to work from 8:00 a.m. to 6:00 p.m. Monday through Friday and from 8:00 a.m. to 5:00 p.m. every other Saturday.
3. The Taxpayer was paid every Friday.
4. All of the Taxpayer's work was performed on the employer's premises.
5. The Taxpayer received job assignments from a supervisor designated by the employer. Any problems the Taxpayer encountered had to be reported to the supervisor.
6. The Taxpayer was not permitted to install parts or perform labor that had not been approved by his supervisor.

7. With the exception of basic hand tools, the employer provided the Taxpayer with all parts and equipment needed to perform his job assignments.

8. The employer provided the Taxpayer with a uniform that he was required to wear while at work.

9. The Taxpayer did not perform work for any other employer during 1994.

10. At the end of the 1994 tax year, the employer gave the Taxpayer a federal Form 1099 reporting the wages he earned during the year as “nonemployee compensation.”

11. The Taxpayer did not understand why he received a Form 1099 instead of a Form W-2 and told his employer that he did not know how his income should be reported.

12. The Taxpayer’s employer then arranged to have its accountants in El Paso, Texas, prepare the Taxpayer’s federal and state income tax returns.

13. The 1994 federal income tax return prepared for the Taxpayer by the Texas accounting firm reported the Taxpayer’s compensation as business income on Schedule C to federal Form 1040 and listed business deductions in the total amount of \$1,785.00.

14. The Taxpayer signed and filed the return prepared by his employer’s accountants.

15. The Taxpayer did not understand that income reported as business income for federal income tax purposes is also subject to New Mexico gross receipts tax, and the Taxpayer did not report or pay gross receipts tax on this income.

16. On March 13, 1998, the Department issued Assessment No. 2232477 to the Taxpayer in the total amount of \$1,108.74, representing gross receipts tax, penalty and interest due on the business income reported on the Taxpayer’s 1994 federal income tax return.

17. April 2, 1998, the Taxpayer filed a written protest to the Department’s assessment.

18. The Department subsequently abated the penalty.

19. The Department also determined that, except for the method used to report the Taxpayer's 1994 compensation for federal and state income tax purposes, the facts indicated that the Taxpayer had performed services during 1994 as an employee and not as an independent contractor.

20. On May 2, 2001, the Department wrote the Taxpayer a letter stating that it would cancel the assessment of gross receipts tax if the Taxpayer filed an amended federal income tax return to report his 1994 compensation as wages, rather than as business income. The letter explained that this would increase the Taxpayer's federal adjusted gross income by \$1,785.00, the amount claimed as business deductions on Schedule C to the Taxpayer's 1994 Form 1040.

21. The Taxpayer went to his local IRS office to obtain the forms needed to amend his 1994 federal return, but was told it was too late to file an amended return for 1994.

22. In the absence of an amended federal return, the Department refused to abate the gross receipts tax assessment.

23. At the administrative hearing held May 13, 2002, the Department's attorney acknowledged that New Mexico does not have any statute that would prohibit the Taxpayer from voluntarily filing an amended 1994 New Mexico income tax return to report his compensation as wages and pay additional tax due.

24. At the Hearing Officer's request, the Department's auditor determined that as of May 13, 2003, the additional income tax the Taxpayer would owe New Mexico on such an amended return would be \$39.00, plus interest of \$47.17, for a total of \$86.17.

25. The Taxpayer then offered to pay the \$86.17 that would be due if an amended 1994 New Mexico personal income tax return were filed and accepted by the Department.

DISCUSSION

The Department concedes that all of the facts presented in this case support the conclusion that the Taxpayer worked as an employee during 1994 and not as an independent contractor. Accordingly, the Taxpayer should be entitled to claim the exemption from gross receipts tax provided for employee wages in NMSA 1978, § 7-9-17. The Department's only basis for refusing to abate its gross receipts tax assessment is the Taxpayer's failure to amend his 1994 federal income tax return to correctly report those wages and pay additional tax due on the \$1,785.00 of deductions taken on Schedule C to his 1994 Form 1040. The Department's May 2, 2001 letter expressly states that if the Taxpayer amended his federal return, the assessment would be cancelled.

It is true that New Mexico law requires taxpayers to treat transactions uniformly for all purposes within the tax laws. *See, Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 559 P.2d 420 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). *See also, Co-Con, Inc., v. Bureau of Revenue*, 87 N.M. 118, 529 P.2d 1239 (Ct. App., 1974), *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974). In the context of the gross receipts tax, the purpose behind this rule is to prevent a taxpayer from "double-dipping" by simultaneously claiming to be an independent contractor entitled to offset his income with business deductions on his federal income tax return and an employee exempt from tax on his New Mexico gross receipts tax returns.

Under the facts of this case, the Department's rigid adherence to the rule of consistent reporting fails to take the policy behind that rule into account. From the testimony presented at the administrative hearing, it is clear that the Taxpayer had no understanding of the tax laws and made no conscious election to file as an independent contractor in order to claim undeserved business deductions. The deductions themselves were minimal, representing only 15 percent of the Taxpayer's relatively modest income of \$11,360. When the Department's auditor calculated the

effect of the deductions claimed, he determined that the Taxpayer's incorrect reporting netted him a "windfall" of only \$39.00. Although the federal time limit to amend the Taxpayer's 1994 federal income tax return had passed, the Taxpayer offered to amend his 1994 New Mexico income tax return to repay the additional \$39.00 due to the state, with interest.

The Department apparently believes that the Taxpayer's New Mexico income tax return cannot be adjusted without a corresponding adjustment to his federal return. This is incorrect. In *Holt v. New Mexico Department of Taxation and Revenue*, 2002-NMSC-034, ¶ 24, 133 N.M. 11, 59 P.2d 491, the New Mexico Supreme Court recognized the Department's authority to recalculate New Mexico income tax owed by taxpayers who failed to report their wages as taxable income, even though no change had been made to the taxpayers' federal return, stating: "It would be untenable for this Court to hold that the Department is bound by a taxpayer's obvious miscalculation on a federal tax form that is directly contradicted by required documentary evidence." Here, the Taxpayer attempted to amend his 1994 federal income tax return, but was turned away by the IRS. Given these circumstances, and the clear evidence that the Taxpayer's 1994 income should have been reported as employee wages rather than business income, it is well within the Department's authority to accept the Taxpayer's offer to amend his 1994 New Mexico income tax return and pay additional tax due to the state. Once payment is received, New Mexico's requirement for consistent reporting will be met.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2232477, and jurisdiction lies over the parties and the subject matter of this protest.
2. During the 1994 tax year, the Taxpayer performed services as an employee and not as an independent contractor.

3. The Taxpayer will be entitled to claim the gross receipts tax deduction provided in NMSA 1978, § 7-1-17 once the Taxpayer pays the additional New Mexico income tax, plus interest, due on his 1994 employee wages.

For the foregoing reasons, the Department is ordered to accept the Taxpayer's tender of additional tax due for tax year 1994 and, upon receipt of such payment, is ordered to abate Assessment No. 2232477 in its entirety.

DATED May 19, 2003.