

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

**IN THE MATTER OF THE PROTEST OF
JAMES M. AND TERRY K. CROWE
ID NO. 02-953793-00-2
ASSESSMENT NOS. 4068034 and 4068036**

No. 03-20

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 23, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. James M. Crowe ("Taxpayer") represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. James and Terry Crowe were residents of New Mexico during the 2000 tax year.
2. Dr. Terry Crowe worked at the University of New Mexico and also did consulting work for Louisiana State University in New Orleans and North Park University in Chicago.
3. Dr. Crow was paid \$4,900 for the consulting services she performed in Louisiana and Illinois during 2000.
4. In June or July 2000, James Crowe was hired as the Business Development Manager for EchoPort, Inc., a small company with offices located in Albuquerque, New Mexico.
5. EchoPort had developed a wireless device that allowed the level of liquid in a tank to be monitored electronically, thereby saving the time and expense of having a person manually check the fluid level.

6. Mr. Crowe had experience with start-up companies in California and was hired to help EchoPort market its remote sensing device.

7. Mr. Crowe spent some time at EchoPort's Albuquerque office consulting with the company's managers and using the telephone to contact potential customers, which included Culligan Water in Chicago and PraxAir in Mississippi.

8. Mr. Crowe received a flat fee of \$5,000 per month for his services.

9. When Mr. Crowe traveled out-of-state to meet with potential customers, EchoPort made all of the travel arrangements and paid for his expenses.

10. When Mr. Crowe incurred out-of-pocket expenses for such items as meals, tolls, parking, etc., he paid in cash and then submitted his receipts and an expense report to receive reimbursement from EchoPort.

11. Mr. Crowe's work with EchoPort ended in December 2000.

12. When James and Terry Crowe filed their 2000 federal income tax return, they reported the \$4,900 Dr. Crowe received from her consulting services and the \$28,875 Mr. Crowe received from his services for EchoPort on Schedule C to federal Form 1040.

13. The Crowes filed New Mexico personal income tax returns for 2000, but did not ask their accountant whether their compensation was also subject to the New Mexico gross receipts tax.

14. As part of an information-sharing program with the Internal Revenue Service, the Department was notified of the business income reported on the Crowes' 2000 federal income tax return. When the Department investigated, it found that neither of the Crowes was registered with the Department for payment of gross receipts tax.

15. On April 25, 2003, the Department sent the Crowes a Notice of Limited Scope Audit asking them to explain why they had not reported gross receipts tax on their 2000 business income.

16. In response to the Department's notice, Mr. Crowe sent the Department copies of the Form 1099s his wife received for her consulting services and the Form 1099 he received from EchoPort.

17. The Department accepted the 1099s from Louisiana State University and North Park University as evidence that Dr. Crowe's services were performed outside New Mexico.

18. Because EchoPort was based in Albuquerque, New Mexico, the Department asked Mr. Crowe to provide a statement from someone at EchoPort that would explain the nature of Mr. Crowe's services and establish that those services were performed out-of-state rather than in Albuquerque.

19. Mr. Crowe stated that he could not provide any documentation concerning the nature of his activities because EchoPort was no longer in business and he had lost contact with its principals.

20. On June 3, 2003, the Department issued the following assessments to the Crowes:

<i>Assessment</i>	<i>Report Period</i>	<i>Tax</i>	<i>Penalty</i>	<i>Interest</i>
4068034	1/00-6/00	\$793.08	\$ 79.31	\$338.17
4068036	7/00-12/00	\$793.08	\$ 79.31	\$278.34

21. On June 3, 2003, Mr. Crowe filed a written protest to the Department's assessments.

22. After the protest was filed, the Department's protest auditor wrote several letters to Mr. Crowe with suggestions as to the kinds of documents that could serve as evidence that his services were performed outside New Mexico. The list of documents the auditor requested from Mr. Crowe included his contract with EchoPort, travel receipts, canceled checks, or third party documents from trade shows he attended or customers he met with.

23. Mr. Crowe told the Department that he had thrown out all of the paperwork related to his work with EchoPort, including his employment contract and his expense reports and travel receipts, and did not have any documents that would establish his out-of-state travel during the 2000 tax year.

DISCUSSION

The Taxpayer maintains that the Department erroneously assessed gross receipts tax on payments he received for performing services outside New Mexico. The Department responds that the Taxpayer's records were inadequate to establish what portion of the Taxpayer's work was performed at EchoPort's Albuquerque office and what portion was performed out-of-state.

NMSA 1978, § 7-1-17(C) provides that any assessment of tax 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); *Wing Pawn Shop*, 111 N.M. 735, 741, 809 P.2d 649, 655 (Ct. App. 1991). Additionally, "it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax." NMSA 1978, § 7-9-5. In this case, the Taxpayer was unable to provide any records or other evidence to show that his services for EchoPort were performed outside New Mexico. At the administrative hearing, the Taxpayer acknowledged that he spent at least some time in EchoPort's Albuquerque office meeting with the company's managers and making telephone calls. Although the Taxpayer testified that all of the companies to which EchoPort marketed its sensing device were located out-of-state, he was able to identify only two of those companies: Culligan Water and PraxAir. The Taxpayer did not provide any information concerning the dates or length of time that he spent meeting with these companies.

NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." NMSA 1978, § 7-1-

11(C) states that taxpayers “shall upon request make their records and books of account available for inspection at reasonable hours to the secretary or the secretary's delegate.” The Taxpayer in this case testified that he destroyed all of the records pertaining to his work with EchoPort, including his employment contract and travel receipts. In *Al Zuni Traders v. Bureau of Revenue*, 90 N.M. 258, 561 P.2d 1351 (Ct. App. 1977), the New Mexico Court of Appeals held that the Department is not required to allow an exemption or deduction for out-of-state sales when the taxpayer is unable to provide proof of such sales. As stated by the court: “Taxpayer seeks to burden the Commissioner with proof that its sales were not interstate. The burden, however, rests squarely on the taxpayer to prove entitlement to an exemption.” 90 N.M. at 260, 561 P.2d at 1353. The same holds true in this case. In the absence of any records or other credible evidence to show that his services for EchoPort were performed outside New Mexico, the Taxpayer has failed to meet his burden of proof, and there is no basis for an abatement of the Department’s assessment against him.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 4068034 and 4068036, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer failed to meet his burden of proving that the Department’s assessment was incorrect.

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

DATED October 28, 2003.