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

IN THE MATTER OF THE PROTEST OF
BRUCE A. KELLY; ID NO. 03-010402-00 5 **No. 05-23**
TO NOTICE OF ASSESSMENT OF TAXES
ISSUED TO KELLY'S HARDWARE
UNDER LETTER ID L1893805056

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 11, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Bruce A. Kelly ("Taxpayer") represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer moved to New Mexico in 1998 from El Paso, Texas, where he had engaged in the home repair business as an independent contractor.

2. The Taxpayer, who does not have a contractor's license, continued to engage in the home repair business in New Mexico, obtaining business through referrals and word-of-mouth.

3. The Taxpayer works for up to 200 different home owners a year, performing jobs that take anywhere from one hour to two days.

4. When performing home repair projects, the Taxpayer provides his own tools and materials.

5. After determining what materials were needed, the Taxpayer purchases the materials in his own name and not as an agent for the home owner.

6. When a job is completed, the Taxpayer charges the home owner for the cost of materials used, without any markup, and for labor at an agreed upon hourly rate.

7. The Taxpayer reported the income he earned during 2001 as business income on Schedule C to his federal income tax return, but did not report or pay New Mexico gross receipts tax on this income.

8. As part of an information-sharing program with the Internal Revenue Service, the Department was notified of the business income reported on the Taxpayer's 2001 federal income tax return.

9. On June 14, 2004, the Department assessed the Taxpayer under Letter ID L1893805056 for $599.64 of gross receipts tax, plus interest, on the business income reported on the Taxpayer's 2001 federal income tax return.

10. The Department issued the assessment under the name "Kelly's Hardware," which was the name of a sole proprietorship the Taxpayer registered with the Department in 2004 but never actually operated as a business.

11. Although the Taxpayer's 2001 income was not related to the business the Taxpayer proposed to operate as Kelly's Hardware, the Department's assessment was effective against the Taxpayer individually because there is no distinction between a sole proprietorship and its owner.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax on his income from performing home repairs during the period January through December 2001. The Taxpayer maintains that he was either a common law or a statutory employee of the home owners he worked for and is entitled to the exemption from gross receipts provided in NMSA 1978, § 7-9-17. Alternatively, the Taxpayer argues that he should not owe gross receipts tax on the cost of his materials because he was charged tax on those same materials at the time of purchase and resold them to his customers at cost. It is the Department's position that the Taxpayer was an independent contractor and not an employee. The Department maintains that the Taxpayer owes gross receipts tax on all of his receipts from performing home repairs, including receipts representing the cost of his materials.

Gross Receipts Tax Exemption for Employee Wages. The Taxpayer's first argument is that he worked as an employee and not as an independent contractor. The Taxpayer reaches this conclusion based on his belief that he comes within the exemptions set out in NMSA 1978, § 60-13-3(D)(10) and (13) of the Construction Industries Licensing Act, which exclude from the Act's licensing requirements:

> (10) an individual who, by himself *or with the aid of others who are paid wages and who receive no other form of compensation*, builds or makes installations, alterations or repairs in or to a single-family dwelling owned and occupied or to be occupied by him; …. (emphasis added)
>
> ….
>
> (13) an individual who works only for wages;

Having decided that his work falls within these exemptions, the Taxpayer argues that he must be an employee working for wages rather than an independent contractor. The Taxpayer's

reasoning puts the cart before the horse. The issue of whether the Taxpayer works for wages must be determined *before* any conclusion can be reached concerning his qualification for the exemptions in § 60-13-3. He cannot start with the conclusion he wants to reach as a method of proving the facts on which the conclusion is based. The term "wages" is defined in NMSA 1978, § 60-13-2(I) of the Construction Industries Act as "compensation paid to an individual by an employer from which taxes are required to be withheld by federal and state law." As discussed below, this could refer to common law employees or to statutory employees.

Common Law Employees. 26 U.S.C. § 3402(a) of the Internal Revenue Code requires every employer making payment of wages to withhold income taxes. In Revenue Ruling 87-41, 1987-1 C.B. 296, the IRS developed a twenty-factor test to determine whether an individual is an employee subject to withholding. The weight to be given these factors varies depending on the occupation and the factual context in which the services are performed. A summary of the factors supporting a finding of employee status are set out below:

1. The worker is required to comply with the employer's instructions about when, where, and how he is to work.
2. The worker receives training from the employer.
3. The worker's services are an integral part of the employer's business.
4. The worker's services are rendered personally and cannot be subcontracted.
5. The worker is hired, supervised, and paid directly by the employer.
6. The worker has a continuing relationship with the employer.
7. The worker has set hours established by the employer.
8. The worker devotes substantially full time to the business of the employer.
9. The worker performs his work on the employer's premises.

10. The worker is required to perform his services in the order or sequence set by the employer and must follow the established routines and schedules of the employer.
11. The worker is required to submit regular or written reports.
12. The worker is paid by the hour, week, or month, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job.
13. The employer pays the worker's business or travel expenses and has the right to control such expenses.
14. The employer furnishes the worker with significant tools, materials, and other equipment.
15. The worker does not have a significant investment in the facilities used to perform his services.
16. The worker receives a set salary and does not realize a profit or loss from his services.
17. The worker does not perform services for persons or firms unrelated to the employer.
18. The worker cannot make his services available to the general public on a regular and consistent basis.
19. The worker can be discharged at any time, even if he performs in accordance with the terms of his contract with the employer.
20. The worker can end his relationship with the employer at any time without incurring liability for unfinished work.

The factors set out in Revenue Ruling 87-41 are based on common law principles governing the employer-employee relationship. A similar test was adopted by the New Mexico Supreme Court in *Harger v. Structural Services, Inc.*, 121 N.M. 657, 916 P.2d 1324 (1996), which addressed the distinction between an employee and an independent contractor in the context of a worker's compensation claim. For purposes of determining whether a worker qualifies as an employee under NMSA 1978, § 7-9-17 of the Gross Receipts and Compensating Tax Act, Regulation 3.2.105.7 NMAC lists various factors the Department

will consider, including whether taxes are withheld, whether worker's compensation and unemployment insurance contributions are made on behalf of the employee, and whether the employer has "a right to exercise control over the means of accomplishing a result or only over the result."

In this case, the evidence weighs against the Taxpayer's claim to be an employee rather than an independent contractor. At the administrative hearing, the Taxpayer acknowledged that many home owners do not know how to do the work they hire the Taxpayer to perform and are relying on his expertise to complete the job. The Taxpayer provides his own tools, determines what materials are needed for each job, and purchases those materials in his own name. The Taxpayer is free to perform services for anyone he chooses and works for as many as 200 different home owners each year. The duration of the Taxpayer's jobs range from one hour to two days. Each home owner pays the Taxpayer at the end of the job based on the cost of materials and the number of hours worked. No state or federal taxes are withheld. Given these facts, the Taxpayer does not qualify as a common law employee subject to state and federal wage withholding and cannot claim the exemption provided in NMSA 1978, § 7-1-19.

Statutory Employees. In certain circumstances, workers who are independent contractors under common law rules still may be treated as employees subject to withholding for purposes of social security, Medicare, and federal unemployment taxes. *See*, 26 U.S.C. § 3101 *et seq*. In this case, the Taxpayer maintains that he is a statutory employee based on language in the IRS's instructions to the 2004 Form 1040, which states that statutory

employees "include full-time insurance agents, certain agent or commission drivers and traveling salespersons, and certain home workers." The Taxpayer believes he qualifies as a "home worker."

As a threshold issue, there is some question as to whether the exemption from gross receipts provided in NMSA 1978, § 7-9-17 applies to statutory employees. This issue need not be addressed, however, because the Taxpayer does not come within the definition of a statutory employee set out in the Internal Revenue Code. Pursuant to 26 U.S.C. § 3121(d)(3), a person who does not qualify as an employee under common law rules is treated as a statutory employee for employment tax purposes if that person performs services for remuneration:

> (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;
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> (B) as a full-time life insurance salesman;
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> (C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or
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> (D) as a traveling or city salesman…;
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> if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.

The Taxpayer argues that he is a statutory employee because he qualifies as a "home worker." That term has a specialized meaning, however, and does not include everyone who works or performs services within a home. Under § 3121(d)(3)(C), a home worker is someone who performs work on material or goods furnished by the employer, which goods must be returned to the employer or a person designated by the employer. In addition, a person shall not be treated as an employee under § 3121 "if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed." In this case, the Taxpayer does not perform work on material or goods provided by the home owners for whom he works. Nor does the Taxpayer have a continuing relationship with these home owners. The Taxpayer testified that he works for up to 200 separate customers a year and estimated that he has repeat business from only five of them. These customers do not use the Taxpayer's services on a regular basis, but may call upon him three or four times a year. Based on these facts, the Taxpayer does not qualify as a statutory employee.

Double Taxation. Finally, the Taxpayer argues that he should not have to pay gross receipts tax on receipts attributable to the cost of materials because he paid tax on those materials at the time of purchase. The Taxpayer complains that this amounts to double taxation, particularly in light of the fact that he charged the materials to his customers at cost.

Contrary to popular belief, there is no prohibition against double taxation. *See*, *Ft. Smith Lumber Co. v. Arkansas,* 251 U.S. 532, 533 (1920) (the United States Constitution does not forbid double taxation). *See also*, *New Mexico State Board of Public Accountancy v. Grant*, 61 N.M. 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. v.*

Gallegos, 44 N.M. 120, 99 P.2d 447 (1940); *State ex rel. Attorney General v. Tittmann*, 42 N.M. 76, 75 P.2d 701 (1938). In construing the Gross Receipts and Compensating Tax Act, New Mexico courts have also held that double taxation does not exist when the taxes complained of are imposed on the receipts of different taxpayers. *See, e.g., House of Carpets, Inc. v. Bureau of Revenue*, 84 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); *New Mexico Sheriffs & Police Association v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973); *New Mexico Enterprises, Inc. v. Bureau of Revenue*, 86 N.M. 799, 528 P.2d 212 (Ct. App. 1974).

In this case, the Taxpayer and the vendors from whom he purchased materials are separate taxpayers, each of which is engaged in business in New Mexico and is subject to payment of gross receipts tax. Pursuant to NMSA 1978, § 7-9-4, gross receipts tax is imposed on a vendor's receipts from selling materials to the Taxpayer. Gross receipts tax is also imposed on the Taxpayer's receipts from home repair jobs, including receipts attributable to the cost of materials. When a lumber yard pays gross receipts tax to the State on receipts from selling 2x4s to the Taxpayer, this does not excuse the Taxpayer from paying gross receipts tax on the total amount he receives from his home repair project, including the amount he charges the home owner for the 2x4s. The fact that the Taxpayer chooses not to add a markup to the cost of the lumber is immaterial. In *New Mexico Enterprises, supra*, 86 N.M. at 800, 528 P.2d at 213, the court of appeals specifically rejected the argument that a lack of profit excuses payment of gross receipts tax, noting: "In the instant case there were two distinct sales—the sale to the taxpayer, and the sales from the taxpayer to the client. The

absence of a profit does not change taxpayer's position…." Based on settled New Mexico law, the Taxpayer is liable for gross receipts tax on all of his receipts from his home repair jobs, including receipts attributable to the cost of materials.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessment of gross receipts tax issued under LETTER ID L1893805056, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer provided home repair services as an independent contractor rather than as an employee and is not entitled to the exemption provided in NMSA 1978, § 7-9-17.

C. The Taxpayer is liable for gross receipts tax on all of his receipts from his home repair jobs, including receipts attributable to the cost of materials.

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

DATED October 19, 2005.

MARGARET B. ALCOCK
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the Taxpayer has the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See*, NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

CERTFICATE OF SERVICE

On October 19, 2005, a copy of the foregoing Decision and Order was mailed by certified mail # 7003 0500 0002 3966 6030 to Bruce A. Kelly, HC 70 Box 32, Black Lake, NM 87734, and delivered by interoffice mail to Jeffrey W. Loubet, Special Assistant Attorney General, Taxation and Revenue Department, Santa Fe, New Mexico.

MARGARET B. ALCOCK