

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

**IN THE MATTER OF THE PROTEST OF
CAROLE ANN KIRBY; CRS ID 03-036936-00-3
TO DENIAL OF CLAIM FOR REFUND
ISSUED UNDER LETTER ID L0893413632**

No. 06-18

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 26, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. Carole Ann Kirby (“Taxpayer”) represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a registered nurse and naturopath.
2. On January 1, 2005, the Taxpayer entered into a written contract to perform medical services as an independent contractor for the Whole Life Clinic, Integrated and Biological Medicine (“the Clinic”) in Santa Fe, New Mexico.
3. Under the terms of the contract, the Taxpayer received 50% of “all personal production,” which was defined as “monies created by the associate that are billed as a fee for their personal service.” The Taxpayer was responsible for all of her own business expenses, including disability, health, and professional liability insurance.
4. For the 2005 tax year, the Clinic provided the Taxpayer with a Form 1099-MISC reporting nonemployee compensation of \$52,335.15.

5. The Taxpayer reported the \$52,335.15 of nonemployee compensation as business income on Schedule C to her 2005 federal income tax return and claimed \$21,674 of business expenses against that income.

6. The Taxpayer also paid New Mexico gross receipts tax on the payments she received from the Clinic.

7. The Taxpayer was subsequently advised by the Clinic's business manager that she did not have to pay gross receipts tax and that none of the Clinic's other contractors were paying the tax.

8. On March 1, 2006, the Clinic provided the Taxpayer with a letter stating as follows:

Carole Ann Kirby is a independent contractor at the Whole Life Clinic, and is paid a commission based upon her production for the clinic. She does not personally bill out services for patients and does not collect monies or CRS taxes. The front office at the Whole life Clinic bills for service, collects and charges tax under its name solely. This includes 100% of all Carole's production.

The letter further stated that based on the Clinic's understanding of state tax law, the Taxpayer "does not need to pay CRS Tax, since they are already applied to the Whole Life Clinic's revenue."

9. On March 5, 2006, in reliance on the Clinic's letter, the Taxpayer filed a claim for refund of the gross receipts tax she paid during 2005.

10. On May 2, 2005, the Department asked the Taxpayer for additional information, including copies of any nontaxable transaction certificates ("NTTCs") supporting her claim.

11. When the Taxpayer asked the Clinic whether it could provide her with an NTTC, she was told that the Clinic did not have any NTTCs.

12. On June 15, 2006, the Department denied the Taxpayer's claim for refund.

13. On July 10, 2006, the Taxpayer filed a written protest to the denial of her claim for refund.

DISCUSSION

The issue to be determined is whether the Taxpayer is entitled to a refund of the gross receipts tax she paid on her compensation from performing services as an independent contractor for the Clinic. Relying on information she received from the Clinic, the Taxpayer believed that she paid the tax in error and that her receipts were being taxed twice. The Department disagreed, arguing that the Taxpayer's sale of services to the Clinic and the Clinic's resale of those services to its patients were two separate transactions, each of which was subject to tax.

NMSA 1978, § 7-9-4 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. The definition of "engaging in business" is quite broad and includes "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA, 1978, § 7-9-3.3. The statute makes no distinction between activities engaged in by large corporations and activities engaged in by small "mom and pop" operations or by individuals acting as independent contractors. In this case, the Taxpayer entered into a contract to provide medical services to the Clinic in return for a monetary commission. Because the performance of medical services comes within the broad classification of "any activity," her work meets the statutory definition of engaging in business and she is liable for gross receipts tax on her income from those services.

The Taxpayer questions whether her payment of gross receipts tax would result in double taxation. Contrary to popular belief, there is no prohibition against double taxation. *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). In construing the Gross Receipts and Compensating Tax Act, the New Mexico Court of

Appeals has 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 Enterprises, Inc. v. Bureau of Revenue*, 86 N.M. 799, 528 P.2d 212 (Ct. App. 1974). That is the case here. The Taxpayer and the Clinic are separate entities, each of which is engaged in business in New Mexico and each of which is liable for payment of gross receipts tax.

Even though taxing successive transactions is not double taxation, the New Mexico legislature has provided a number of statutory deductions to prevent the pyramiding or stacking of gross receipts tax. Pursuant to NMSA 1978, § 7-9-48, receipts from selling services for resale may be deducted if—and only if—the buyer of the service provides the seller with an NTTC and resells the service in the ordinary course of the buyer’s business. In this case, the Taxpayer does not qualify for the deduction because she did not receive an NTTC from the Clinic.

The fact that the Clinic was either unable or unwilling to provide the Taxpayer with an NTTC is irrelevant. The law provides that when an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). The law also provides that a taxpayer waives the right to a deduction when he or she fails to follow the requirements prescribed by statute or regulation. *Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App. 1988). In this case, the Taxpayer did not obtain an NTTC from the Clinic as required by § 7-9-48. For this reason, there is no legal basis for granting her claim for refund of the gross receipts taxes she paid on her commissions from performing services for the Clinic.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely protest to the Department's denial of her claim for refund of gross receipts tax issued under Letter ID L0893413632, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was engaged in the business of providing medical services to the Clinic during 2005 and was subject to gross receipts tax on the payments she received from the Clinic.

C. The Taxpayer did not qualify for the deduction in NMSA 1978, § 7-9-48 or for any other deduction or exemption.

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

DATED October 31, 2006.