

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

**IN THE MATTER OF THE PROTEST OF
J. NOLD MIDYETTE; ID NO. 03-056443-00 3
TO ASSESSMENT OF WITHHOLDING TAX
ISSUED UNDER LETTER ID L0445292032**

No. 07-13

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 16, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. J. Nold Midyette (“Taxpayer”) represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 2001, J. Nold Midyette (“JNM”) and his wife, Mary K. Midyette, formed a New Mexico limited liability company known as “731 Canyon Road LLC” for the purpose of acquiring improved real estate in Santa Fe, New Mexico.
2. Patricia Sherwood, the owner of the real estate, was unwilling to sell the property, but agreed to lease the property to the Midyettes’ LLC with a first right of refusal to purchase the property in the event she decided to sell in the future.
3. The leased premises included a large building formerly used as a restaurant. The lease terms required the lessee to split the space, subleasing one portion as a restaurant and the other as a gallery. Ms. Sherwood retained the right to approve any sublessees of the premises.

4. In order to keep track of remodeling and set-up expenses, JNM and Mary K. Midyette formed two additional limited liability companies: one to sublease the restaurant and one to sublease the gallery.

5. Because JNM had a prospective tenant who wanted to open a cantina in the restaurant space, he named one of the LLCs “Canyon Road Cantina LLC” (Cantina LLC).

6. On April 17, 2001, JNM applied to the New Mexico Taxation and Revenue Department (Department) for a CRS tax identification number for Cantina LLC, which was used to report the LLC’s monthly gross receipts, compensating and withholding taxes.

7. The application was signed by JNM as the “managing member” of Cantina LLC and indicated that he was opening a new business at 731 Canyon Road which would operate as a restaurant and bar. The anticipated start date shown on the application was June 1, 2001.

8. Patricia Sherwood refused to approve JNM’s prospective tenant as a sublessee of the restaurant space, and the opening of the restaurant was delayed.

9. On November 6, 2001, JNM responded to a Department inquiry as to why no CRS returns had been filed for Cantina LLC, explaining:

Canyon Road Cantina is not currently in business and therefore does not have any employees. The earliest projected date of business is January 2002. We will send another letter at that time to inform of business status and number of employees.

10. David Salazar, who owned another restaurant on Canyon Road, subsequently expressed an interest in opening a restaurant in the space subleased by Cantina LLC.

11. Because JNM was unable to obtain Ms. Sherwood’s approval for a further sublease of the premises, JNM decided to have Cantina LLC operate the restaurant, with the intention of transferring ownership of the LLC to David Salazar at a later date.

12. JNM and David Salazar agreed that Mr. Salazar would be in charge of the day-to-day operation of the restaurant, although JNM would contribute additional capital needed to cover the lease payments on the property. Once the business generated sufficient profits for JNM to recover his capital contributions, ownership of the LLC would be transferred to Mr. Salazar.

13. JNM's agreement with David Salazar was a verbal understanding and was never reduced to writing.

14. In April 2002, David Salazar opened a bank account under the name "Cantina LLC d/b/a The Canyon" and used this account to pay the day-to-day operating expenses of the restaurant.

15. In November 2002, JNM discovered that David Salazar had fallen behind on the payment of taxes owed by Cantina LLC.

16. In late 2002, JNM sent Mr. Salazar \$25,000 to pay Cantina LLC's tax liability.

17. In early 2003, Mr. Salazar told JNM that the restaurant was not making a profit and he would not be able to buy out JNM's interest in Cantina LLC.

18. JNM then allowed Victoria Nulman, the restaurant's executive chef, to take over the day-to-day operation of the restaurant under the same verbal agreement he had with David Salazar, *i.e.*, once the business generated sufficient profits to enable JNM to recover his capital contributions, ownership of the LLC would be transferred to Ms. Nulman.

19. David Salazar was removed and Victoria Nulman was added as a signor on Cantina LLC's bank account. The bank also required JNM, as the LLC's managing member, to be a signor on the account.

20. Cantina LLC paid David Salazar's bookkeeper to transfer the LLC's books to Jan Marie DuBois, the bookkeeper selected by Victoria Nulman.

21. At the time Ms. DuBois was hired in early 2003, JNM instructed her to notify him immediately if taxes or other bills that could create a lien on the property were not paid.

22. At JNM's direction, Ms. DuBois sent financial information concerning the income and expenses from the restaurant, including payroll taxes, to JNM's accountant in Colorado, who used this information to prepare Cantina LLC's income tax returns.

23. On October 13, 2003, JNM signed Cantina LLC's 2002 New Mexico Income and Information Return for Pass-Through Entities (2002 PTE) reporting a loss of \$263,938. The attached Schedule PTE-D and Federal Form 1065 show that this loss was passed through one-half to JNM and one-half to his wife, Mary K. Midyette.

24. Cantina LLC reported similar losses for the 2003 and 2004 tax years. In each case, the LLC's returns were signed by JNM as the managing member and the losses generated by the LLC were passed through one-half to JNM and one-half to Mary K. Midyette. No income or losses of Cantina LLC were passed through to David Salazar or Victoria Nulman.

25. In early 2004, Jan Marie DuBois notified JNM that she was receiving tax liens from the Internal Revenue Service.

26. JNM subsequently learned that Victoria Nulman had not mailed the checks that Jan Marie DuBois prepared to pay Cantina LLC's tax obligations and that back taxes were due.

27. In June 2004, Victoria Nulman's husband sent JNM an e-mail representing that the Nulmans had paid Cantina LLC's back taxes.

28. On June 30, 2004, the Nulmans notified JNM that they had closed the restaurant located at 731 Canyon Road.
29. After the restaurant closed, JNM discovered that Cantina LLC still had substantial past-due tax liabilities.
30. In November 2004, JNM notified the Department that Cantina LLC was no longer in business.
31. At the same time, JNM provided the Department with a Corporate Financial Information Statement for Cantina LLC, which is a document the Department requires taxpayers to complete before entering into an installment agreement for payment of back taxes.
32. JNM subsequently decided not to enter into a payment agreement.
33. On December 2, 2005, the Department assessed JNM individually, in his capacity as owner and managing member of Cantina LLC, for \$5,428.13 of withholding taxes, plus penalty and interest, due from Cantina LLC for the period June 2003 through May 2004.
34. On January 3, 2006, pursuant to an extension of time granted by the Department, JNM filed a written protest to the assessment of withholding taxes.

DISCUSSION

New Mexico's Withholding Tax Act (NMSA 1978, § 7-3-1, *et seq.*) requires "every employer" who deducts and withholds federal income tax from an employee's wages to also deduct and withhold state income tax and pay that amount over to the state. NMSA 1978, §§ 7-3-3 and 7-3-6. The term "employer" is defined in NMSA 1978, § 7-3-2(C) as follows:

C. "employer" means a person, or an officer, agent or employee of that person, having control of the payment of wages, doing business in or deriving income from sources within the state for whom an individual performs or performed any service as the employee of that person, except

that if the person for whom the individual performs or performed the services does not have control over the payment of the wages for such services, "employer" means the person having control of the payment of wages.

In this case, there is no dispute that taxes were deducted and withheld from the paychecks of the employees working in the restaurant located at 731 Canyon Road. Instead of being paid over to the state, however, the taxes withheld for the period June 2003 through May 2004 were diverted to other uses. The issue to be decided is whether J. Nold Midyette (JNM), the owner and managing member of Canyon Road Cantina LLC (Cantina LLC), meets the definition of "employer" set out in § 7-3-2(C) and is liable for payment of these taxes.

JNM argues that he is not an "employer" under the Withholding Tax Act because he did not have control of the payment of wages. It is his position that Victoria Nulman was effectively operating the restaurant at 731 Canyon Road as a sole proprietor and that the restaurant workers were her employees and not the employees of Cantina LLC. The facts do not support this position. To the contrary, the facts show that:

Cantina LLC, as sublessee, was the entity with the legal right to occupy the premises at 731 Canyon Road;

JNM, as managing member of Cantina LLC, signed the application for the New Mexico tax identification number used to report the restaurant's gross receipts and payroll taxes, and was the signatory on other forms and correspondence filed with the Department in connection with the restaurant;

Upon learning that the restaurant's first manager had fallen behind on the payment of taxes owed on the restaurant's operations, JNM provided the funds needed to pay those taxes;

When Victoria Nulman took over as manager, she used a bank account held in the name Cantina LLC, on which JNM was also a signatory, for the day-to-day operation of the restaurant;

Although Victoria Nulman selected Jan Marie DuBois as the bookkeeper for the restaurant, JNM gave Ms. DuBois direction, advising her to notify him immediately if taxes or other bills that could create a lien on the property were not paid;

At JNM's direction, Ms. DuBois regularly provided financial information concerning the restaurant's income and expenses to JNM's accountant in Colorado, who used this information to prepare Cantina LLC's income tax returns;

The income and expenses from the restaurant, including payroll taxes, were reported on the tax returns of Cantina LLC, which were signed by JNM as managing member; and

As 100 percent owners of Cantina LLC, JNM and his wife—not Victoria Nulman—claimed the tax benefit of the losses generated by the restaurant.

Based on these facts, JNM, as owner and managing member of Cantina LLC, had legal control over the restaurant business located at 731 Canyon Road. The fact that he delegated authority to manage the restaurant to Victoria Nulman, with the verbal understanding that she could buy him out at some time in the future, did not change the legal status of the parties during the period at issue in this protest. Until ownership of Cantina LLC actually changed hands, JNM was the person with ultimate control over the operation of the restaurant, including the payment of wages to the restaurant's employees. His decision not to exercise that control or to insure that the taxes withheld from employee paychecks were paid to the state does not relieve him of liability.

CONCLUSIONS OF LAW

A. J. Nold Midyette filed a timely, written protest to the assessment of withholding tax issued under Letter ID L0445292032, and jurisdiction lies over the parties and the subject matter of this protest.

B. During the period June 2003 through May 2004, Cantina LLC was the sublessee of the property located at 731 Canyon Road in Santa Fe, New Mexico, and was the legal employer of the employees working in the restaurant operating at that location.

C. As the owner and managing member of Cantina LLC and a signatory on the bank account used for the operation of the restaurant business, J. Nold Midyette had control over the payment of wages to Cantina LLC's employees.

D. J. Nold Midyette is liable for the unpaid withholding taxes assessed against him for the period June 2003 through May 2004.

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

DATED July 27, 2007.