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

IN THE MATTER OF THE PROTEST OF
MARIAH AFFENTRANGER **No. 13-7**
TO ASSESSMENT ISSUED AGAINST
D & M RECOVERY UNDER LETTER
ID NO.'s L1459749184 & L0049066048

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 8, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Staff attorney Peter Breen represented the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Ms. Mariah Affentranger appeared protesting the assessments issued by the Department against D & M Recovery. Mr. Scott Affentranger appeared as witness on behalf of Ms. Affentranger. Protestant-Ms. Affentranger's Exhibits 1-7 and Department Exhibit A were admitted into the record. As the Department proposed and stipulated, Protestant's Exhibit 7, was received on January 9, 2013 and admitted into the record. That exhibit is 89-pages and has been sequentially numbered for ease of citing particular pages throughout the findings of fact. All other exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Ms. Affentranger was married to Dennis Fluitt from 1997 until their divorce on November 27, 2007. [Protestant Exhibit #7.87].

2. D&M Recovery, a sole proprietorship of Dennis Fluitt, repossesses automobiles.

3. D&M Recovery's business registration form was not introduced into the record. There is no evidence on the record of when D&M Recovery was formed. There is no evidence on the record of D&M Recovery's business address, or whether the business address was the same residential address where Ms. Affentranger and Mr. Fluitt resided during the marriage.

4. There is insufficient evidence to make a finding whether D&M Recovery was Mr. Fluitt's separate property obtained before marriage or community property formed during Mr. Fluitt's marriage with Ms. Affentranger.

5. Ms. Affentranger did not advise, encourage, or direct Mr. Fluitt to form D&M Recovery.

6. No evidence was presented that Ms. Affentranger has ever been an officer, employee, or agent of D&M Recovery.

7. Ms. Affentranger did not perform any activity or service on behalf of D&M Recovery or cause D&M Recovery to perform any activity, service, or sale.

8. Ms. Affentranger did not see, review, or otherwise play any role in the finances of D&M Recovery.

9. Ms. Affentranger did not assist Mr. Fluitt in preparing, reviewing, or submitting D&M Recovery's gross receipts taxes.

10. Ms. Affentranger is unfamiliar with gross receipts tax or the combined reporting system.

11. During the relevant period, Ms. Affentranger was employed only as a high school teacher/counselor.

12. Ms. Affentranger was not engaged in business in any capacity during the relevant period.

13. During the relevant period, Mr. Fluitt performed work for Bradford Industries, Inc. and received weekly paychecks. The evidence is unclear whether Mr. Fluitt worked directly as an employee of Bradford Industries, or whether Mr. Fluitt, in his capacity as sole proprietor of D&M Recovery, served as an independent contractor to Bradford Industries.

14. Mr. Fluitt's work for Bradford Industries, whether as an employee or an independent contractor through D&M Recovery, was his primary source of income during the relevant period.

15. D&M Recovery was a non-filer of gross receipts taxes during the relevant period.

16. Mr. Fluitt possesses all the tax records for D&M Recovery for the relevant period.

17. Ms. Affentranger does not have access to any tax records or nontaxable transaction certificates regarding D&M Recovery. Therefore, Ms. Affentranger did not present any such information during the protest hearing.

18. During the marriage, Ms. Affentranger was responsible for the couples' personal banking and the payment of the couples' bills.

19. Ms. Affentranger deposited checks, including Mr. Fluitt's paychecks from Bradford Industries, into the couple's joint bank account during the relevant period.

20. Ms. Affentranger and Mr. Fluitt used the services of H&R Block every relevant year to prepare and file their joint Federal Income tax returns.

21. H&R Block assisted Ms. Affentranger and Mr. Fluitt in preparing their personal incomes taxes only and did not prepare gross receipts tax/combined system returns for D&M Recovery.

22. At the Department's request, Ms. Affentranger submitted a copy of the Marital Settlement Agreement ("MSA") between her and Mr. Fluitt after the conclusion of the protest hearing, on January 9, 2013. [Protestant Exhibit #7.76-86].

23. The MSA was fully adopted on November 27, 2007 by the Final Decree of Dissolution of Marriage. [Protestant Exhibit #7.87-89].

24. The MSA only addressed Income Taxes liabilities. [Protestant Exhibit #7.82].

25. Under the MSA, "[i]n the event *any prior joint return* is audited or contested, any additional tax, interest or penalties are found due, each party will pay one-half of such additional tax, interest or penalties…" (italics for emphasis). [Protestant Exhibit #7.82].

26. The evidence established that the only prior joint returns that Ms. Affentranger and Mr. Fluitt filed were income tax returns.

27. D&M Recovery's gross receipts tax liability was not expressly divided in the MSA. Therefore, D&M Recovery's gross receipts tax liability is the separate debt of Mr. Fluitt under the terms of the MSA, which required him to be liable for all unspecified debt. [Protestant Exhibit #7.81, paragraph 4(B)(11)].

28. Through the Department's CSPAN program with the IRS, the Department detected that Mr. Fluitt had unreported New Mexico business income from the D&M Recovery on his Schedule C Federal Income tax filings during the relevant period.

29. On May 20, 2010, under letter identification number L1559015488, the Department assessed D&M Recovery for $2,406.92 in gross receipts tax, $431.38 in penalty, and $1,068.33 in interest, for the Combined Reporting System period ending on December 31, 2005.

30. On May 20, 2010, under letter identification number L0049066048, the Department assessed D&M Recovery for $1,620.64 in gross receipts tax, $324.13 in penalty, and $476.28 in interest, for the Combined Reporting System period ending on December 31, 2006.

31. In Protest Auditor Bernardo's seven-years experience with the Department, as a matter of practice, the Department sends assessments to a taxpayer based on the best-known address entered into the system.

32. In this specific case, Protest Auditor Bernardo did not know, and there is no other evidence on the record, as to why D&M Recovery's assessments were specifically mailed to Ms. Affentranger's address.

33. On May 21, 2010, Ms. Affentranger protested both assessments made against D&M Recovery. As part of her protest, Ms. Affentranger requested the dismissal of the assessments because she was never involved with D&M Recovery's business.

34. After the assessments were issued, Ms. Affentranger provided the Department with Mr. Fluitt's phone number and address.

35. Protest Auditor Bernardo did not attempt to contact Mr. Fluitt and there is no evidence that anyone with the Department ever attempted to contact Mr. Fluitt about D&M Recovery's gross receipts liabilities.

36. The Department requested a hearing in this matter on October 18, 2012.

37. On October 19, 2012, the Hearing Bureau sent Notice of Hearing, scheduling this matter for hearing on January 8, 2012.

38. On October 23, 2012, the Hearing Bureau sent Amended Notice of Hearing, scheduling this matter for hearing on January 8, 2013.

39. As of the date of hearing, D&M Recovery owed $2,406.92 in gross receipts tax, $481.38 in penalty, and $1,287.33 in interest for a total of $4,175.63 for the gross receipts reporting period ending on December 31, 2005. [Department Exhibit A].

40. As of the date of hearing, D&M Recovery owed $1,620.64 in gross receipts tax, $324.13 in penalty, and $623.74 in interest for a total of $2,568.51 for the gross receipts reporting period ending on December 31, 2006. [Department Exhibit A].

DISCUSSION

While much of the protest hearing focused on the question of whether Ms. Affentranger might qualify for Innocent Spouse Relief under NMSA 1978, Section 7-1-17.1 (2003), a predicate question controls the outcome of this protest: who is the taxpayer under the assessments? In short answer, Ms. Affentranger overcame any presumption of correctness that attached to the Department's assessments by showing that she is not a taxpayer subject o D&M Recovery's gross receipt tax liabilities.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments issued in this case are presumed to be correct. Consequently, the taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

In this case, Ms. Affentranger presented sufficient facts that she was not the relevant taxpayer to overcome the presumption of correctness, shifting the burden to the Department to support the assessments against her.

Who Constitutes a Taxpayer for Gross Receipts Tax purposes?

A "person" under the Tax Administration Act ("TAA"), NMSA 1978, Section 7-1-3(O) (2009),

> means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, limited liability partnership, joint venture, syndicate, other association or gas, water or electric utility owned or operated by a county or municipality; "person" also means, to the extent permitted by law, a federal, state or other governmental unit or subdivision, or an agency, department or instrumentality thereof; and "person", as used in Sections 7-1-72 through 7-1-74 NMSA 1978, also includes an officer or employee of a corporation, a member or employee of a partnership or any individual who, as such, is under a duty to perform any act in respect of which a violation occurs[.]

NMSA 1978, Section 7-1-3(Y) (2009) provides three ways a "person" is a "taxpayer" under the TAA: "a person liable for payment of any tax, a person responsible for withholding and payment or for collection and payment of any tax or a person to whom an assessment has been made, if the assessment remains unabated or the amount thereof has not been paid." The facts of this case quickly dispose of the second and third portions of the "taxpayer" definition under NMSA 1978, § 7-1-3(Y) (2009). The evidence established that Ms. Affentranger was not responsible for withholding, payment or collection of any of D&M Recovery's taxes. Therefore, Ms. Affentranger was not a "taxpayer" under the second portion of the definition of "taxpayer." Since the assessments in this case were not made against Ms. Affentranger but against D&M Recovery, Ms. Affentranger does not qualify as a "taxpayer" under the third portion of the definition of NMSA 1978, § 7-1-3(Y) (2009).

The first portion of the definition is the only way Ms. Affentranger might qualify as a "taxpayer" under NMSA 1978, § 7-1-3(Y) (2009) if she is a person liable for the payment of tax. Since this case involves two assessments of gross receipts tax against D&M Recovery, the question

under the first definition of "taxpayer" under NMSA 1978, § 7-1-3(Y) (2009) becomes whether Ms. Affentranger is a person liable for D&M Recovery's gross receipts taxes.

New Mexico imposes a gross receipts tax on the receipts of *any person engaged in business*. *See* NMSA 1978, Section 7-9-4 (2002) (italics for emphasis); *See also Comer v. State Tax Comm'n*, 41 N.M. 403, 406, 69 P.2d 936, 938 (N.M. 1937). "Engaging in business" is defined under the TAA as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, Section 7-9-3.3 (2003). Under Regulation 3.2.4.8 NMAC (04/30/01), "the gross receipts tax is imposed on persons engaging in business in New Mexico. Such persons are solely liable for payment of the tax[.]"

As the New Mexico Court of Appeals recently concluded, "only those persons who engage in business can be held liable for the gross receipts tax." *Breen v. State Taxation & Revenue Dep't*, 2012 NMCA 101, 31, 287 P.3d 379, 389 (N.M. Ct. App. 2012). *Breen* has some significant factual and legal differences from this protest, and as such, the most relevant portion of that decision is arguably dicta. However, in order to ultimately resolve the issue in *Breen*, the Court of Appeals had to consider the question of who was a taxpayer for gross receipts purposes of a business owned and operated solely by one of the spouses in a marriage. That analysis in *Breen*, even if dicta, is insightful to the resolution of this protest.

Breen involved a question of whether tax records could be subpoenaed as part of discovery in an employment discrimination action in the district court. As part of discovery, the defendant in *Breen* attempted to subpoena the gross receipts tax records of the plaintiff's spouse's business. The spouse asserted an evidentiary privilege against the disclosure of her business' tax records under NMRA 11-502, the New Mexico Taxpayer Bill of Rights, and various other confidentiality statutes under the Tax Administration Act. The defendant in *Breen*

argued that the records were discoverable because the plaintiff and spouse filed income taxes jointly and because the plaintiff owned a community property interest in his spouse's business income. *See id*. at 30-31, 389.

In addressing the question of whether the spouse's business gross receipts records were protected by a statutory privilege or whether they were discoverable, the *Breen* Court of Appeals asked the basic question of whether plaintiff was considered a taxpayer of his spouse's business gross receipts tax. *See id.* 31, 389. The Court of Appeals concluded that only a person engaged in business is liable for gross receipts tax. *See id.* Since the plaintiff played no role in his spouse's business, the *Breen* Court of Appeals found that that plaintiff was not a taxpayer regarding his spouse's business receipts. *See id*. 32, 389. The fact that a spouse filed taxes jointly with a person in engaged in business, or that a spouse had a community interest in the income of the business, did not alter the Court of Appeals analysis of who constituted a taxpayer for gross receipts purposes. *See id*. at 31-32, 389.

Applying the statutory definitions and *Breen* to the facts of this protest, Ms. Affentranger was not a person engaged in business subject to gross receipts tax during the relevant period. During the relevant period, Ms. Affentranger only worked as a high school teacher and guidance counselor. Ms. Affentranger was not involved in any manner with D&M Recovery during the relevant period. Ms. Affentranger did not prepare, consult, or review any of D&M Recovery's taxes during the relevant period. Ms. Affentranger did not carry on any activity or cause any activity to be carried on as it relates to D&M Recovery. D&M Recovery is the sole proprietorship of Dennis Fluitt, and he appears to be the only person engaged in the auto repossession business.

Like in *Breen*, the fact that Ms. Affentranger jointly filed personal income taxes with Mr. Fluitt, which would have included income Mr. Fluitt derived from D&M Recovery, does not

subject her to gross receipts tax for D&M Recovery. New Mexico personal income tax is a separate, distinct tax from gross receipts tax. Compare NMSA 1978, Section 7-2-1 *et seq*. to NMSA 1978, Section 7-9-1 *et seq*. There is no doubt that the income Mr. Fluitt derived from his receipts with D&M Recovery during the marriage was community property subject to income tax. *See Katson v. Katson*, 43 N.M. 214, 217, 89 P.2d 524, 526 (1939) (income earned from a husband's separate business is community property). There is no allegation in this case that Ms. Affentranger and Mr. Fluitt, as joint filers, failed to pay appropriate New Mexico income tax on all community income, including the income Mr. Fluitt received from D&M Recovery. Indeed, the fact that the Department detected D&M Recovery's gross receipts tax non-filing based on the Mr. Fluitt's Schedule C on the couple's joint federal income tax return suggests that the couple reported and paid income tax on the portion of the income attributable to Mr. Fluitt's D&M Recovery receipts. But liability for D&M Recovery's gross receipts tax obligations is a separate question from the couple's joint income tax liabilities.

Because Ms. Affentranger benefited from the community income that included Mr. Fluitt's D&M Recovery income, she remains potentially liable for any adjustments to income tax made against the couple's joint income tax returns. Under the terms of the MSA, Ms. Affentranger continues to be equally liable for any additional tax, penalty, and interest arising out of any prior joint income tax return. Since the tax provisions of the MSA only applies to personal income tax, under the MSA Ms. Affentranger only assumes potential liability for previously filed joint income tax returns.

To the extent that the Department argues that that D&M Recovery represents community property, it must be noted that it is not clear on this record when D&M Recovery was actually formed. Whether property is considered community property or separate property depends on the

"time and manner of its acquisition." *Lucas v. Lucas*, 95 N.M. 283, 284, 621 P.2d 500, 501 (N.M. 1980). Property acquired during a marriage is presumed to be community property until rebutted by the preponderance. *See* NMSA 1978, Section 40-3-12; *See also Stroshine v. Stroshine*, 98 N.M. 742, 743, 652 P.2d 1193, 1194 (N.M. 1982). Without knowing whether D&M Recovery was formed before or during the marriage, there is no presumption that it was community property and no definitive findings can be made whether D&M Recovery was the separate property of Mr. Fluitt or community property. Even assuming that D&M Recovery is community property, like the defendant alleged in *Breen*, that does not make Ms. Affentranger a "taxpayer" for the purposes of D&M Recovery's gross receipts[1].

There remains the question whether D&M Recovery's gross receipts tax liabilities are a community or separate debt. In New Mexico any debt incurred by either spouse during a marriage that is not separate debt is considered community debt. *See* NMSA 1978, Section 40-3-9(B). Under NMSA 1978, § 40-3-9 (A)(3), a separate debt is one so declared by a judgment or decree of any court having jurisdiction. As the finding of fact #27 indicates, D&M Recovery's gross receipts tax obligations are in fact a separate debt. The MSA, which was adopted by decree of a court having jurisdiction over the dissolution of marriage, clearly states that Mr. Fluitt has assumed full liability for any debt not previously divided under the MSA. Since D&M Recovery's gross receipts tax liability was not previously divided in the MSA, Mr. Fluitt is fully liable for that debt, making it a separate debt under NMSA 1978, § 40-3-9 (A)(3). By the terms of the MSA, Ms. Affentranger is not liable for Mr. Fluitt's separate D&M Recovery gross

[1] It is worth briefly mentioning that the Department at one time had a regulation establishing that a spouse can be "secondarily liable" to the tax liability of the other spouse's sole proprietorship. *See* Regulation 3.1.6.16 NMAC (10/31/96). However, that regulation was repealed without replacement on January 15, 2001, suggesting that the Department has changed its previous position on a spouse's secondary liability for a sole proprietorship.

receipts tax liability, and thus does not meet the first possible basis of a "taxpayer" under NMSA 1978, § 7-1-3(Y) (2009).

Ms. Affentranger is the only person that timely protested the assessments the Department issued in this case (there is no evidence that the Department mailed the assessments to Mr. Fluitt). In her protests, Ms. Affentranger specifically argued for the remedy of dismissal of the assessments against her since she was not involved in the D&M Recovery business in any manner. The fact that she alone protested the assessments does not make her a "taxpayer" for gross receipts tax purposes under the TAA's statutory definition or subject to gross receipts tax when she is not a person engaged in business. Rather, it is only evidence that she is a reasonably cautious citizen concerned about any possible liability upon receipt of an official Department mailing.

Nothing about this decision is meant to say that the Department's assessments are incorrect or inappropriate. The Department's assessments against D&M Recovery are entitled to the presumption of correctness against the correct taxpayer. Ms. Affentranger overcame the presumption of correctness in this protest by showing she was not a "taxpayer" for gross receipts purposes through her credible testimony that she played no role whatsoever with D&M Recovery's business and by showing through the divorce decree/MSA that Mr. Fluitt is solely liable for any unspecified debts, including D&M Recovery gross receipts tax liabilities, under that agreement. In this case, the correct taxpayer appears to be Mr. Fluitt. Ms. Affentranger has previously provided the contact information for Mr. Fluitt to the Department. With that information, the Department can proceed in whatever manner it deems appropriate to ensure that D&M Recovery is in compliance with its gross receipts tax obligations. But since Ms. Affentranger has overcome the presumption at it relates to her being liable for D&M Recovery's assessed gross receipts, and she does not meet the definition of "taxpayer" for gross receipts taxes purposes, her protest is granted.

Although the issue was addressed both factually and legally during the hearing, in light of the above discussion and the fact that the Secretary of the Department has not had an opportunity to make a determination on the issue, the hearing officer reserves findings of fact, discussion, and conclusions of law on the question of whether Ms. Affentranger was entitled to innocent spouse relief under NMSA 1978, Section 7-1-17.1 (2003).

CONCLUSIONS OF LAW

A. Ms. Affentranger filed a timely, written protest to the Department's assessments, and jurisdiction lies over the parties and the subject matter of this protest.

B. Ms. Affentranger was not an employee, agent, or principal of D&M Recovery, did not carry out or cause to be carried out any of D&M Recovery's activities/services/sales, and therefore was not a person engaged in business under NMSA 1978, § 7-9-3.3 (2003).

C. Ms. Affentranger, as a person not engaged in business during the relevant time, was not a taxpayer for purposes of gross receipts tax act. *See* NMSA 1978, Section 7-9-4 (2002); *See also Comer v. State Tax Comm'n*, 41 N.M. 403, 406, 69 P.2d 936, 938 (N.M. 1937), Regulation 3.2.4.8 NMAC (04/30/01), and *See Breen v. State Taxation & Revenue Dep't*, 2012 NMCA 101, 31, 287 P.3d 379, 389 (N.M. Ct. App. 2012).

D. Mr. Fluitt assumed all liability for any debts not divided under the MSA, making D&M Recovery's gross receipts tax liabilities (which were not divided under the MSA) his separate debt under the terms of the MSA.

E. Ms. Affentranger is not "taxpayer" under the three possible definitions of that word articulated by NMSA 1978, § 7-1-3(Y) (2009).

F. Ms. Affentranger overcame the presumption of correctness that attached to D&M Recovery's assessments, shifting the burden back to the Department to establish the assessments

were appropriately issued against her. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

For the foregoing reasons, Ms. Affentranger's protest **IS GRANTED**.

DATED: March 11, 2013.

Brian VanDenzen, Esq.
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630