

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

**IN THE MATTER OF THE PROTEST OF
JOSE L. AND CLARA ARRIETA
ID NO. 02-440248-00 6
ASSESSMENT NO. 2777430**

No. 03-02

DECISION AND ORDER

A formal hearing on the above-referenced protest was held January 13, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Jose L. Arrieta ("Taxpayer") failed to appear for the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. For tax year 1999, the Taxpayer reported income of \$17,394.00 as "gross receipts" on Schedule C, *Profit or Loss from Business*, to his federal income tax return. The Taxpayer listed his principal business as "Legal Services."
2. The Taxpayer deducted \$8,781.00 of business expenses on his 1999 Schedule C, including expenses for advertising, car and truck expenses, depreciation, postage, dues and continuing education.
3. The Taxpayer also filed Schedule SE, *Self-Employment Tax*, with his 1999 federal income tax return and paid self-employment tax on the business income reported on his 1999 Schedule C.
4. As part of an information-sharing program with the Internal Revenue Service, the Department was notified of the business income reported on Schedule C to the Taxpayer's 1999

federal income tax return. When the Department investigated, it found that the Taxpayer had not paid New Mexico gross receipts tax on this income.

5. On January 23, 2002, the Department sent the Taxpayer a letter asking him to explain why the business income reported on his 1999 federal income tax return was not reported to the Department for gross receipts tax purposes.

6. The Department's January 23, 2002 letter also advised the Taxpayer that he must be in possession of all nontaxable transaction certificates ("NTTCs") required to support his deductions within 60 days or those deductions would be disallowed.

7. On February 15, 2002, the Taxpayer sent the Department a letter stating that he did not report gross receipts tax on his 1999 income because he did not have a sole proprietorship in 1999, but worked as a paralegal for a Las Cruces attorney. The Taxpayer said that he had already submitted an NTTC to the Department, stating: "I was misinformed that the attorneys should file a certificate of non-taxable event for my compensation. I have filed a certificate of non-taxable event."

8. On May 3, 2002, the Department issued Assessment No. 2777430 to the Taxpayer, assessing him for \$1,042.44 gross receipts tax, \$436.52 interest and \$104.28 penalty on the \$17,394.00 of business income reported on his 1999 federal income tax return.

9. On May 8, 2002, the Taxpayer filed a written protest to the Department's assessment. As grounds for his protest, the Taxpayer stated: "As a paralegal in 1999, I received wages as an independent contractor.... There are no gross receipts on wages."

10. In his May 8, 2002 protest letter, the Taxpayer noted that the Department had previously assessed him for gross receipts tax on his 1996 earnings as a paralegal.

11. The 1999 assessment referenced in the Taxpayer's protest letter was partially abated after the Taxpayer provided proof that most of his 1996 income was earned in California. The Taxpayer paid the portion of the 1999 assessment attributable to gross receipts tax on his 1996 earnings from providing paralegal services in New Mexico.

12. During the protest proceeding on the 1999 assessment, the Taxpayer provided the Department with a copy of an NTTC that he had issued to the attorney for whom he worked in 1996. At that time, the Department's attorney notified the Taxpayer that the Department could not accept the NTTC because it was the buyer of the Taxpayer's services—not the Taxpayer—who was required to issue the NTTC.

13. The Taxpayer never obtained an NTTC from the attorney to whom he sold his paralegal services, but continued to rely on the NTTC he issued to the attorney. The Taxpayer resubmitted this same NTTC in connection with his protest to the Department's 2002 assessment of gross receipts tax.

14. On November 27, 2002, the Department filed a Request for Hearing asking that the Taxpayer's protest to the Department's 2002 assessment be scheduled for a formal hearing.

15. On December 2, 2002, the undersigned hearing officer notified the Taxpayer by certified mail, return receipt requested, that a hearing on his protest would be held on January 13, 2003 at 1:30 p.m. in the Department's offices in Santa Fe, New Mexico.

16. The green receipt card returned to the Department by the Post Office shows that the Taxpayer received the letter notifying him of the hearing on December 4, 2002.

17. On January 13, 2003 at 1:30 p.m., Bridget Jacober, the Department's attorney, and Alexis Lotero, the Department's protest auditor, appeared for the scheduled hearing on the Taxpayer's protest. The Taxpayer failed to appear at the hearing.

DISCUSSION

The issue presented is whether the Taxpayer is subject to gross receipts tax on his 1999 income from working as a paralegal. NMSA 1978, § 7-1-17 provides that any assessment of tax by the Department is presumed to be correct. *See also, Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). By failing to appear at the hearing to present evidence and argument in support of his protest, the Taxpayer failed to meet this burden. Nonetheless, the Department decided not to rely solely on the presumption of correctness, but chose to present testimony and documentary evidence in response to the arguments raised in the Taxpayer's protest.

The first argument concerns the Taxpayer's claim that he did not have a business or sole proprietorship during 1999, but simply performed services as an independent contractor. The Taxpayer misunderstands the scope of New Mexico's gross receipts 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(E). 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 working as independent contractors. In this case, the Taxpayer's protest letter acknowledges that he was an independent contractor performing paralegal services in return for payment. This activity meets the statutory definition of engaging in business.

The Taxpayer's second argument is that he is entitled to claim the exemption from gross receipts tax set out in NMSA 1978, § 7-9-17, which states:

Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

There is no evidence that the Taxpayer was an employee of the attorney for whom he performed services during 1999. The Taxpayer's May 8, 2002 protest letter states that he was working as an independent contractor. In addition, the evidence shows that for federal income tax purposes, the Taxpayer reported his 1999 income as business income and not as employee wages. The Taxpayer deducted certain business expenses that would not have been fully deductible by an employee. The Taxpayer also filed a Schedule SE, *Self-Employment Tax*, and paid self-employment tax on the business income reported on his 1999 Schedule C. Based on this evidence, the Taxpayer is not entitled to the exemption for employee wages set out in NMSA 1978, § 7-9-17.

The final issue is whether the Taxpayer is entitled to claim the deduction set out in NMSA 1978, § 7-9-48, which states as follows:

Receipts from selling a service for resale may be deducted from gross receipts...if the sale is made to a person who delivers a nontaxable transaction certificate to the seller.

In this case, the Taxpayer provided the Department with an NTTC that he issued to the attorney for whom he performed paralegal services. The NTTC was rejected by the Department because it was issued by the wrong party. As the Department had previously advised the Taxpayer in connection with his 1999 protest, the buyer of services (the attorney) is required to issue an NTTC to the seller of those services (the Taxpayer). Unfortunately, the Taxpayer refused to accept the Department's advice. As stated in his February 15, 2002 letter to the Department: "I was misinformed that the attorneys should file a certificate of non-taxable event for my compensation. I have filed a certificate of non-taxable event."

Where a party claiming a right to a tax exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *Proficient Food v. New Mexico Taxation & Revenue Department*, 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), *cert. denied*, 107

N.M. 308, 756 P.2d 1203 (1988). The NTTC that the Taxpayer issued to the buyer of his paralegal services does not meet the requirements of NMSA 1978, § 7-9-48 and was properly disallowed by the Department.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2777430, 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.
3. The Taxpayer performed services as an independent contractor during 1999 and is not entitled to the exemption for employee wages set out in NMSA 1978, § 7-9-17.
4. The Taxpayer was not in possession of required NTTCs and is not entitled to the deduction for receipts from selling services for resale provided in NMSA 1978, § 7-9-48.

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

DATED January 16, 2003.