

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

**IN THE MATTER OF THE PROTEST OF
ESTES SPEHAR DESIGN
ID NO. 02-083244-00 3
ASSESSMENT NOS. 3952402 and 3952403**

No. 03-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 28, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Estes Spehar Design was represented by Kim Estes Spehar, its owner (“Taxpayer”). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in the advertising business and is registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department’s combined reporting system.
2. When the Taxpayer started her business, she had several discussions with employees of the Taxation and Revenue Department concerning the application of the New Mexico gross receipts tax to her business receipts.
3. Based on these discussions and her own research, the Taxpayer obtained Type 2 nontaxable transaction certificates (NTTCs) from her customers, which allowed the Taxpayer to deduct her receipts from selling tangible personal property for resale.
4. Most of the Taxpayer’s work consisted of the sale of posters, stationery, signs, and other tangible items that she designed and produced for her customers.

5. Several years after the business began, the Taxpayer accepted a job to create a billboard display. The job included purchasing space from the billboard company and arranging for an advertisement to be displayed on the billboard.

6. The Taxpayer did not realize that receipts derived from contracts to place advertising on outdoor billboards located in New Mexico are receipts from performing a service.

7. The Taxpayer did not realize that a Type 2 NTTC would not cover her receipts from the billboard contract and that she needed to obtain a Type 5 NTTC (which covers the sale of services for resale) from her customer.

8. The Taxpayer did not research New Mexico's tax statutes or regulations or consult with her accountant concerning the taxability of her receipts from the billboard contract.

9. The Taxpayer does not remember consulting with anyone at the Department concerning her receipts from the billboard contract.

10. In June 2002, the Department began a limited scope audit of the Taxpayer for tax year 1999.

11. On June 4, 2002, the Department sent the Taxpayer a notice that she had 60 days within which to obtain possession of all NTTCs needed to support her deductions and further stating that the statute "REQUIRES THAT THESE NTTCS...BE IN YOUR POSSESSION WITHIN SIXTY (60) DAYS FROM THE DATE OF THE NOTICE REQUIRING THEM OR DEDUCTIONS CLAIMED RELATING TO THE NTTC's WILL BE DISALLOWED." (capitalization in the original).

12. The 60-day period expired on August 3, 2002.

13. After receiving the Department's notice in June 2002, the Taxpayer called the Department and spoke with the Department employee assigned to the audit. The Taxpayer explained

the nature of her business and provided the employee with copies of billing records and the Type 2 NTTCs the Taxpayer had obtained from her customers.

14. The employee told the Taxpayer that “everything looked okay” and that she “did not see a problem” with the Taxpayer’s reporting. The employee then said she would forward the file to her supervisor.

15. The Taxpayer did not check with the Department before the expiration of the 60-day period in August 2002 to determine whether the Department had made its final audit findings.

16. The Taxpayer did not consult with her accountant concerning the Department’s audit or ask him to review her gross receipts tax reporting.

17. On October 31, 2002, the Department mailed two assessments to the Taxpayer in the following amounts:

<i>Assessment</i>	<i>Report Period</i>	<i>Tax</i>	<i>Penalty</i>	<i>Interest</i>
3952402	1/99-6/99	\$635.84	\$ 63.58	\$313.09
3952403	7/99-12/99	\$609.93	\$ 60.99	\$254.57

18. On November 20, 2002, the Taxpayer filed a written protest to the assessments.

19. An auditor with the Department’s protest office subsequently told the Taxpayer that the assessments resulted from the Taxpayer’s failure to obtain a Type 5 NTTC to support her deduction of receipts from her services in connection with the billboard display.

20. The Taxpayer called the billboard company, which confirmed that billboard advertising constitutes a service and that the Taxpayer should have had a Type 5 NTTC from her customer.

21. On January 31, 2003, the Taxpayer obtained a Type 5 NTTC from her customer and provided a copy to the Department.

22. Because the NTTC was not in the Taxpayer's possession within the 60-day period required by statute, the Department refused to accept the NTTC or to abate the assessments issued against the Taxpayer.

DISCUSSION

The issue presented is whether the Department's failure to advise the Taxpayer that she needed to obtain a Type 5 NTTC to support her deduction of receipts relieves the Taxpayer of her obligation for tax, penalty, and interest due on those receipts. The Taxpayer acknowledges that she was required to have a Type 5 NTTC to support her deduction of receipts from her billboard contract. She also concedes that she did not obtain the required NTTC until after the 60-day period allowed by statute. The Taxpayer argues, however, that the Department employee who handled the initial audit misled the Taxpayer into believing that the records and NTTCs the Taxpayer had previously provided to the Department were sufficient, thereby preventing the Taxpayer from obtaining the Type 5 NTTC within the 60-day period.

In effect, the Taxpayer is raising an estoppel argument. As a general rule, courts are reluctant to apply the doctrine of estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989).

Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: when the taxpayer acted according to a regulation or when the taxpayer acted according to a written revenue ruling specifically addressed to the taxpayer. Here, the Taxpayer's failure to obtain

the required NTTC was not attributable to any Department regulation or written ruling, and the estoppel provisions of Section 7-1-60 do not apply.

Case law provides for estoppel against the state where right and justice demand its application. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied*, 114 N.M. 227, 836 P.2d 1248 (1992). The following elements must be shown as to the party to be estopped (*i.e.*, the Department): (1) conduct that amounts to a false representation or concealment of material facts, (2) actual or constructive knowledge of the true facts, and (3) an intention or expectation that the other party will act on the representations. As to the party claiming estoppel, the following must be shown: (1) lack of knowledge of the true facts, (2) detrimental reliance on the adverse party's representations or concealment of facts, and (3) that such reliance was reasonable. *Id. See also, Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

The evidence presented in this case does not establish a basis for applying equitable estoppel against the Department. First, there was no concealment or misrepresentation of material facts by the Department. All of the facts concerning the transaction at issue were provided by the Taxpayer and were within the Taxpayer's knowledge. Although the Department employee was mistaken in her interpretation of the tax law applicable to those facts, there is no evidence the employee acted fraudulently or intended to prevent the Taxpayer from obtaining the NTTC needed to support her deductions. Turning to the other side of the equation, the Taxpayer had access to the information needed to make her own determination concerning the nature of her receipts and the need for a Type 5 NTTC. Department Regulation 3.2.1.18 NMAC under Section 7-9-3 NMSA 1978 specifically states:

O. **Billboard advertising.** Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

This regulation is based on a 1975 decision by the New Mexico Court of Appeals, which held that the posting of billboard messages on billboards located within New Mexico is a service subject to New Mexico gross receipts tax. *Markham Advertising Co. v. Bureau of Revenue*, 88 N.M. 176, 538 P.2d 1198 (Ct. App.1975). Both this case and the Department’s regulation are matters of public record.

New Mexico has a self-reporting tax system, and taxpayers have a statutory obligation to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13 NMSA 1978. While the Department makes every effort to give correct advice to taxpayers who contact the Department, a taxpayer is not entitled to rely on the oral advice of a Department employee as a substitute for making his or her own independent review of the statutes and regulations or consulting with a qualified tax professional. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989). Here, the statements of the Department’s employee that “everything looked okay” and that she “did not see a problem” with the Taxpayer’s reporting was not the kind of advice on which the Taxpayer could reasonably rely, particularly when the employee indicated that she was not the final decision-maker and that the file was being forwarded to her supervisor for review.

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct. Where a deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the 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). When a

taxpayer claiming a 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). In this case, the Taxpayer did not comply with the statutory requirement for timely possession of NTTCs and has failed to meet her burden of showing that the Department's assessments are incorrect.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 3952402 and 3952403, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer did not have timely possession of the NTTC required to support her deduction of receipts from performing advertising services for her customer.

3. The Department's failure to advise the Taxpayer that she needed to obtain a Type 5 NTTC to support her deduction of receipts does not provide a basis for equitable estoppel and does not relieve the Taxpayer of her obligation for tax, penalty, and interest due on those receipts

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

DATED June 2, 2003.