

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

**IN THE MATTER OF THE PROTEST OF
DRISCOLL WOODWORKING
ID NO. 02-488187-00 2
ASSESSMENT NOS. 3875791 & 3875792**

No. 03-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held June 12, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Driscoll Woodworking was represented by Jonathan Driscoll, its owner ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a woodworker who worked as an employee for a cabinet making company until 1999.
2. In 1999, work had slowed at the Taxpayer's employer and he was offered work as an independent contractor by United West Group-Cohen, Inc. ("United West"), an Arizona company that was the general contractor on a construction project in the Las Campanas development in Santa Fe, New Mexico.
3. During 1999, the Taxpayer earned \$8,175.38 for his work for United West and \$9,711.62 for his work for other customers.
4. The Taxpayer did not know that his receipts from performing services as an independent contractor were subject to New Mexico gross receipts tax and did not report or pay gross receipts tax on this income.

5. The Taxpayer was not given and did not ask for a nontaxable transaction certificate (“NTTC”) from United West or any of the other customers for whom he performed work in 1999.

6. 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 the Taxpayer was not registered with the Department and had not reported or paid gross receipts tax on this income.

7. On January 23, 2002, the Department sent the Taxpayer a notice that it was conducting a limited scope audit of his 1999 tax reporting and asked him to explain why he had not paid gross receipts tax on the business income reported on Schedule C to his 1999 federal income tax return.

8. The Department’s January 23, 2002 notice advised the Taxpayer that, pursuant to Section 7-9-43 NMSA 1978, he must be in possession of all nontaxable transaction certificates (“NTTCs”) required to support his deductions within 60 days from the date of the letter. The 60-day period expired on March 24, 2002.

9. After receiving the Department’s notice, the Taxpayer tried to call United West, but found that it was no longer doing business in New Mexico.

10. The Taxpayer located a telephone number for United West in Arizona and talked with a secretary named Susan about his need for a New Mexico NTTC to support the deduction of his receipts from United West.

11. Although Susan said she would take care of getting the NTTC, the Taxpayer never heard back from her. He called Susan two more times, each time without success.

12. On the last day of the 60-day period, the Taxpayer met with a Department employee named Kay and explained that he had been unable to obtain an NTTC from United West.

13. Kay called United West and talked to Susan. Kay explained how to download an NTTC from the computer and told Susan to complete the form and fax it directly to Kay at the Taxation and Revenue Department before the end of the day.

14. The Taxpayer left the Department assuming that the NTTC problem was resolved.

15. Susan never sent the NTTC from United West to the Department, and on June 28, 2002, the Department assessed the Taxpayer for \$982.56 gross receipts tax, \$98.26 penalty, and \$392.65 interest for reporting periods January through December 1999.

16. On July 13, 2002, the Taxpayer filed a written protest to the tax, penalty and interest assessed on his \$8,175.38 of receipts from United West.

17. The Taxpayer was subsequently told by a former employee of United West that the company was no longer in business and had declared bankruptcy.

DISCUSSION

The issue presented is whether the Taxpayer's failure to have an NTTC from United West in his possession within the 60-day period provided in the Department's audit notice forecloses him from deducting his receipts from performing services for United West during 1999. While acknowledging that the Department's assessment is legally correct, the Taxpayer asks the hearing officer to consider the following facts in his favor: (1) United West resold his services to the final consumer, which should allow the Taxpayer to claim the deduction for selling services for resale; and (2) the Taxpayer's inability to produce an NTTC from United West was due to circumstances outside his control.

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Where 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 Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. The Taxpayer is seeking to qualify for the deduction provided in Section 7-9-48 NMSA 1978, which states:

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....

Based on this language, the fact that the Taxpayer's services were sold to United West for resale is not sufficient to support a deduction under Section 7-9-48. The requirements of the statute are very specific. The buyer of services must deliver an NTTC to the seller before the seller is entitled to claim a deduction from gross receipts. The requirements for obtaining NTTCs are set out in Section 7-9-43 NMSA 1978, which provides, in pertinent part:

All nontaxable transaction certificates...should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

While taxpayers "should" have possession of required NTTCs at the time of the transaction at issue, the statute gives taxpayers audited by the Department a second chance to obtain these NTTCs. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the legislature. The reason why a

taxpayer cannot obtain an NTTC is irrelevant. The language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added).

In response, the Taxpayer points out that circumstances outside his control prevented him from obtaining the NTTC required by Section 7-9-48. United West failed to provide the Taxpayer with an NTTC at the time it purchased his services and then refused to respond to requests from both the Taxpayer and the Department during the 60-day period allowed by the Department's audit notice. While this series of events is unfortunate, the Taxpayer's attempt to shift responsibility for documenting his gross receipts tax deductions to the buyer of his services is inconsistent with New Mexico's self-reporting tax system. Every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). The incidence of the gross receipts tax is on the seller, and it was the responsibility of the Taxpayer—not United West—to determine whether he had the documentation needed to support his deductions. The Taxpayer's failure to obtain an NTTC within the 60-day period provided in Section 7-9-43 NMSA 1978 leaves the Department no choice but to disallow his deductions.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 3875791 and 3875792, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer is not entitled to a gross receipts tax deduction for receipts from selling services to United West Group-Cohen, Inc. during 1999.

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

DATED June 13, 2003.