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

IN THE MATTER OF THE PROTEST OF
IN HOME DAY CARE FOR CHILDREN **No. 03-17**
ID NO. 02-132493-00 0
ASSESSMENT NOS. 3936928 through 3936930,
3936932 through 3936934, 4066071 through 4066074

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 10, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. In Home Day Care for Children was represented by its sole proprietor, Sharon Hamby ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1989, the Taxpayer began taking care of children in her home as a means of making extra income.

2. The Taxpayer initially provided child care to one child and then expanded to two or three children.

3. The Taxpayer was not required to be licensed by the City of Albuquerque.

4. When the Taxpayer applied to a federal food program to obtain reimbursement for the cost of food for the children, she was told that she needed to register her business with the Taxation and Revenue Department.

5. The Taxpayer went to the Department's Albuquerque district office and registered her business for payment of gross receipts, compensating, and withholding taxes, which are reported under the Department's combined reporting system ("CRS").

6. In September 1989, the Taxpayer received a CRS Filer's Kit in the mail which contained tax forms and instructions concerning payment of the gross receipts tax.

7. The Taxpayer was confused by the information in the Filer's Kit and called the Albuquerque district office to find out whether she needed to file CRS returns.

8. The Department employee who took the call asked the Taxpayer a series of questions concerning her child care activities and then told the Taxpayer that she was not subject to gross receipts tax.

9. As a result of the call, the Taxpayer's CRS number was cancelled and she did not receive any further CRS Filer's Kits, nor did she pay any gross receipts tax on her receipts from providing child care services.

10. When the Taxpayer filed her income tax returns, her child care receipts were reported as business income on Schedule C to her federal return. The Taxpayer asked H&R Block whether these receipts were subject to gross receipts tax and was told that they were not.

11. In 2002, the Department received information from the Internal Revenue Service concerning business income reported on Schedule C to the Taxpayer's federal income tax returns. When the Department investigated, it found that the Taxpayer had not paid New Mexico gross receipts tax on this income.

12. On September 18, 2002, the Department issued the following assessments to the Taxpayer:

Assessment	*Report Period*	*Tax*	*Penalty*	*Interest*
3936928	1/99-6/99	$175.92	$ 17.59	$ 83.74
3936929	7/99-12-99	$168.75	$ 16.88	$ 67.67
3936930	1/98-6/98	$340.11	$ 34.01	$212.65
3936932	7/98-12/98	$340.11	$ 34.01	$187.27
3936933	1/97-6/97	$437.60	$ 43.76	$399.46
3936934	7/97-12/97	$456.18	$ 45.62	$319.27

13. On November 21, 2002, pursuant to a retroactive extension of time granted by the Department, the Taxpayer filed a written protest to the assessments.

14. On May 15, 2003, the Department issued the following assessments to the Taxpayer:

Assessment	*Report Period*	*Tax*	*Penalty*	*Interest*
4066071	1/00-6/00	$205.53	$ 20.55	$ 87.22
4066072	7/00-12/00	$205.53	$ 20.55	$ 71.71
4066073	1/01-6/01	$213.49	$ 21.35	$ 58.65
4066074	6/01-12/01	$213.49	$ 21.35	$ 42.54

15. On May 17, 2003, the Taxpayer filed a written protest to the Department's assessments.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax on her receipts from taking care of children in her home during the period January 1997 through December 2001. The Taxpayer raises the following arguments in support of her protest: (1) she is not engaged in business; (2) her receipts are not taxable because the type of care she provided is not covered by Department Regulation 3.2.1.18(P) NMAC; and (3) she should not be required to pay tax on her receipts because a Department employee advised her that her receipts were not subject to gross receipts tax.

Engaging in Business. The Taxpayer argues that she cannot be treated as a business because she had no employees and was not required to be licensed by the City of Albuquerque. She also maintains that she had no business location because she worked out of a rented residential apartment.

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*." (emphasis added). 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 acting as independent contractors. A person may be engaging in business for tax purposes even when that person has no employees or separate place of business. In this case, the Taxpayer took care of children in her home in order to earn additional income to support her family. Because child care comes within the broad classification of "any activity," her work meets the statutory definition of engaging in business. The Taxpayer's licensing argument fails to recognize that state tax laws and municipal licensing laws have different objectives and operate independently. The fact that the City of Albuquerque did not license the Taxpayer's child care activities does not preclude those activities from being subject to the state gross receipts tax.

Taxation of Receipts from Child Care. "'Gross receipts' means the total amount of money or the value of other consideration received from selling property in New Mexico,...or from performing services in New Mexico." NMSA 1978, § 7-9-3(F). In this case, the Taxpayer had receipts from performing child care services in New Mexico. There is a presumption that all persons engaging in business in New Mexico are subject to the gross receipts tax. NMSA 1978, §

7-9-5. For this reason, "taxation is the rule and the claimant must show that his demand is within the letter as well as the spirit of the law." *Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Department*, 2002-NMSC-013, ¶ 11, 132 N.M. 226, 46 P.3d 687 (quoting *Kewanee Industries, Inc., v. Reese*, 114 N.M. 784, 791, 845 P.2d 1238, 1245 (1993).

Here, the Taxpayer has not identified any statutory exemption or deduction that would remove her receipts from the general rule of taxation. Her only basis for arguing that these receipts are not taxable is the fact that her services do not come within the examples set out in Department Regulation 3.2.1.18(P) NMAC under NMSA 1978, § 7-3-9. The regulation, which is entitled "Day care centers", states that "[r]eceipts from providing day care are receipts from performing a service and are subject to gross receipts tax." The regulation then sets out several examples of day care activities that are subject to tax. The Taxpayer argues that she did not operate a "day care center" and that the examples set out in the regulation do not cover her specific circumstances. There is nothing in the regulation, however, to indicate that these are the only circumstances in which a person caring for children is subject to tax. In the absence of a specific provision stating that the type of services performed by the Taxpayer are not taxable, the general rule of taxation set out in NMSA 1978, § 7-1-5 applies.

Estoppel. The Taxpayer argues that she should be excused from payment of gross receipts tax because a Department employee told the Taxpayer during a 1989 telephone conversation that her receipts were not subject to gross receipts tax. In effect, the Taxpayer is raising the argument of estoppel, *i.e.*, that the erroneous advice given by the Department's employee estops the Department from enforcing collection of gross receipts tax, interest, and penalty otherwise due to the state. 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).

Estoppel Based on Statute. NMSA 1978, § 7-1-60 provides for estoppel against the Department in two circumstances: where the taxpayer acted according to a regulation or where the taxpayer acted according to a revenue ruling addressed to the taxpayer. Here, the Taxpayer has not identified any regulation that would exclude her receipts from tax, nor is there any evidence that she obtained a written ruling concerning her tax liability. Although the Taxpayer relied on Department Regulation 3.2.1.18(P) NMAC in making her legal arguments at the administrative hearing, nothing in that regulation states that providing child care services for two to four children in a residential apartment is exempt from gross receipts tax (see discussion in previous section). In addition, the Taxpayer acknowledged that she only became aware of the regulation when she was researching the tax statutes after her protest was filed. There is no evidence that the Taxpayer's decision not to pay gross receipts tax during the periods at issue was made in reliance on this or any other regulation.

Estoppel Based "Right and Justice". Equitable estoppel is rarely applied against the state and then only in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State of New Mexico, Human Services Department*, 1998-NMSC-11, ¶17, 125 N.M. 140, 958 P.2d 98. 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 (*i.e.*, the Taxpayer), 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 facts presented in this case do not support a finding of estoppel.

At the hearing, the Taxpayer testified that she called the Department's Albuquerque office in September 1989 after receiving a CRS Filer's Kit. The Taxpayer was confused by the information in the kit and called to ask whether she was required to file a return. The Department employee who took the call asked the Taxpayer a series of questions concerning her child care activities and then told the Taxpayer that she was not subject to gross receipts tax. As a result of the call, the Taxpayer's CRS number was cancelled and she did not receive any further CRS Filer's Kits. The Taxpayer does not know the name of the Department employee with whom she spoke.

Although the evidence indicates that the Taxpayer received erroneous advice from the Department, this alone is not sufficient to meet the requirements of estoppel. Estoppel based on the oral advice of an unidentified employee is particularly problematic because there is no way to confirm exactly what information the employee was given or what questions were asked. From the arguments made in the Taxpayer's protest letter and at the administrative hearing, it is clear that the Taxpayer was confused as to the relationship between the laws governing the licensing of businesses and the laws governing the payment of taxes. For example, the Taxpayer erroneously believed that

because she was not licensed by the City of Albuquerque, she could not be engaging in business for purposes of the state's gross receipts tax. She also believed that the tax registration certificate she received from the Department was issued pursuant to the provisions in NMSA 1978, § 3-38-1, *et seq*., dealing with municipal licenses and taxes, and argued that the state tax certificate could not be valid since she was never asked to pay the $35.00 fee required under NMSA 1978, § 3-38-3.

Given the Taxpayer's confusion between municipal licensing laws and state tax laws, it is difficult to know exactly what information the Taxpayer gave to or received from the Department employee with whom she spoke in 1989. There is no question that all of the facts on which the employee based her advice came from the Taxpayer. Although the Department employee may have been mistaken in her understanding of the facts (or in her interpretation of the tax law applicable to those facts), there is no evidence that the employee acted fraudulently or intended to induce the Taxpayer not to pay taxes the employee knew were owed to the state. Turning to the other side of the equation, the Taxpayer had access to the information needed to make her own determination concerning the taxability of her receipts. New Mexico's tax laws and regulations are a matter of public record available to all of the state's taxpayers. The law itself provides notice to taxpayers as to which transactions are subject to tax. *See, Vivigen, Inc. v. Minzner*, 117 N.M. 224, 228, 870 P.2d 1382, 1386 (Ct. App. 1994).

New Mexico has a self-reporting tax system and taxpayers have a statutory obligation to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, NMSA 1978, § 7-1-13. While the Department makes every effort to give correct advice to taxpayers who contact the Department, the ultimate responsibility for payment of tax remains with the taxpayer. 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. *See*, *Taxation and*

Revenue Department v. Bien Mur Indian Market, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (in light of New Mexico's statute providing for estoppel, taxpayer's reliance on the oral representations of a Department employee was not reasonable).

Penalty. Although the evidence does not support an abatement of the tax principal and interest assessed to the Taxpayer, there is evidence to support an abatement of the negligence penalty. Department Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including proof that the taxpayer was affirmatively misled by a Department employee or that the failure to pay tax was caused by reasonable reliance on the advice of competent tax counsel or accountant. In this case, there is sufficient evidence of these two circumstances to justify an abatement of penalty.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 3936928 through 3936930, 3936932 through 3936934, and 4066071 through 4066074, and jurisdiction lies over the parties and the subject matter of this protest.

2. During the period January 1997 through December 2001, the Taxpayer was engaged in the business of providing child care services, and her receipts from those services are subject to the New Mexico gross receipts tax.

3. The Department is not estopped from enforcing its assessments of tax against the Taxpayer.

4. The Taxpayer was not negligent in failing to pay gross receipts tax during the assessment periods at issue and the penalty assessed pursuant to NMSA 1978, § 7-1-69 should be abated.

For the foregoing reasons, the Taxpayer's protest is denied in part and granted in part. The Department is ordered to abate the ten-percent negligence penalty assessed against the Taxpayer. The Taxpayer remains liable for the payment of the tax principal and interest assessed by the Department.