

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

**IN THE MATTER OF THE PROTEST OF
KEVIN'S KUSTOM WELDING
ID NO. 02-424139-00-3; TO ASSESSMENT
OF GROSS RECEIPTS TAX ISSUED
UNDER LETTER ID NO. L0720047104**

No. 05-13

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 13, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Kevin's Kustom Welding was represented by its owner, Kevin Keune. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In April 2000, Kevin Keune opened a welding business and registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are reported under New Mexico's Combined Reporting System (CRS).
2. Mr. Keune's wife, who handles the bookkeeping, received a CRS Filer's Kit containing forms and instructions explaining the application of the gross receipts tax.
3. The instructions in both the January-June and the July-December Filer's Kits for 2000 define the term "gross receipts" to include "the total amount of money received, plus the monetary value of other consideration received, from selling property in New Mexico; leasing property employed in New Mexico; performing services in New Mexico...."

4. The section titled “Overview of Gross Receipts and Compensating Taxes” explains that “[g]ross receipts are either taxable, exempt or deductible. If your receipts do not fall under any exemption or deduction, those receipts are taxable.”

5. The Filer’s Kit sets out a list of available exemptions and deductions, including the “Property Resale Deduction,” which allows a seller of tangible personal property to deduct receipts from a buyer who provides the seller with a nontaxable transaction certificate (“NTTC”).

As explained at page 5 of the July-December 2000 Filer’s Kit:

The NTTC is the only acceptable substantiation for certain deductions. The buyer obtains an NTTC from the Department to give to a seller, which entitles the seller to deduct those receipts when determining taxable gross receipts. In practice, this means the buyer is able to purchase goods and services free of the gross receipts tax that is usually passed on to the buyer....

The Filer’s Kit further states that all taxpayers “who wish to execute NTTCs” are required to register with the Department and complete an application.

6. Ms. Keune was confused concerning the use of NTTCs and called the Department for more information. Ms. Keune spoke with Victor Vigil, who explained that using NTTCs would allow the Keunes to purchase materials that are resold to their customers tax free.

7. Ms. Keune thought that applying for and issuing NTTCs would result in a lot of extra paperwork, and she asked Mr. Vigil if the business was required to use NTTCs. Mr. Vigil told her that the use of NTTCs was voluntary.

8. Ms. Keune assumed, but did not verify with Mr. Vigil, that if the business elected not to use NTTCs when purchasing materials, and paid the gross receipts tax charged by the supplier at the time of purchase, the business would not have to pay gross receipts tax when it charged its customers for those materials.

9. Based on this erroneous assumption, Ms. Keune prepared billings that separated the cost of labor from the cost of materials and charged gross receipts tax only on the cost of labor. The materials were charged to customers at cost, without any markup.

10. In preparing CRS-1 returns for the business, Ms. Keune reported the amounts that customers paid for labor and excluded the amounts that customers paid for materials.

11. In 2004, the Keunes' business was audited by the Department.

12. During the course of the audit, the auditor explained that the Keunes were required to pay tax on *all* of their receipts, including receipts attributable to the cost of materials.

13. On May 6, 2004, the Department issued an assessment under Letter ID No. L0720047104 to Kevin's Kustom Welding in the total amount of \$1,888.51, representing \$1,534.06 of gross receipts tax, plus \$354.45 of interest due for reporting periods April 2000 through October 2003.

14. On May 15, 2004, Mr. Keune filed a written protest to the assessment.

DISCUSSION

The issue to be determined is whether the Keunes are liable for gross receipts tax on the portion of their receipts from Mr. Keune's welding jobs that represent the cost of materials. The Keunes argue that taxing receipts from materials that were previously taxed at the time of purchase results in double taxation. They also maintain that they should be excused from payment of the tax because they were misled by a Department employee. The Department responds that New Mexico law imposes gross receipts tax on the total amount of money and other consideration received by a taxpayer, and that no deduction or exemption applies to the Keunes' receipts from materials sold to their customers.

Burden of Proof. NMSA 1978, § 7-1-17 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). Accordingly, it is the taxpayer's burden to come forward with evidence and legal arguments to show that a Department's assessment is incorrect.

Double Taxation. The Keunes argue that they should not be subject to gross receipts tax on receipts attributable to the cost of materials because they were charged gross receipts tax on those same materials at the time of purchase. The Keunes complain that this amounts to double taxation, particularly in light of the fact that they made no profit on the resale of materials to their customers. Contrary to popular belief, however, there is no prohibition against double taxation. As stated by Supreme Court Justice Oliver Wendell Holmes in *Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532, 533 (1920):

The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax....

See also, New Mexico State Board of Public Accountancy v. Grant, 61 N.M. 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. v. Gallegos*, 44 N.M. 120, 99 P.2d 447 (1940); *State ex rel. Attorney General v. Tittmann*, 42 N.M. 76, 75 P.2d 701 (1938).

In construing the Gross Receipts and Compensating Tax Act, New Mexico courts have also held that double taxation does not exist when the taxes complained of are imposed on the receipts of different taxpayers. *See, e.g., House of Carpets, Inc. v. Bureau of Revenue*, 84 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); *New Mexico Sheriffs & Police Association v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973); *New Mexico Enterprises, Inc. v. Bureau of Revenue*, 86 N.M. 799, 528 P.2d 212 (Ct. App. 1974). That is the case here. The Keunes and their suppliers are separate taxpayers, each of which is engaged in business in New Mexico and is subject to payment of gross receipts tax. Pursuant to NMSA 1978, § 7-9-4, gross receipts tax is imposed on a supplier's receipts from selling materials to the Keunes. Only the supplier is liable for this tax. Gross receipts tax is also imposed on the Keunes' receipts from welding jobs, including receipts attributable to the cost of materials. Only the Keunes are liable for this tax. The fact that the supplier paid tax on his receipts from the sale of materials does not excuse the Keunes from paying tax on their receipts from reselling the materials to their customers, regardless of whether they made a profit on the resale. In *New Mexico Enterprises, supra*, 86 N.M. at 800, 528 P.2d at 213, the court of appeals specifically rejected the argument that a lack of profit excuses payment of gross receipts tax, noting: "In the instant case there were two distinct sales—the sale to the taxpayer, and the sales from the taxpayer to the client. The absence of a profit does not change taxpayer's position, nor does the fact of its failure of delivery of a non-taxable transaction certificate to its supplier."

Advice Received from Department Employee. The Keunes maintain that they were misled by Victor Vigil, the Department employee who advised them that the use of NTTCs was voluntary. Mr. Vigil's advice was correct. Although New Mexico law offers a procedure by which taxpayers may apply for NTTCs in order to avoid charges for gross receipts tax on the

purchase of certain materials, taxpayers are not required to avail themselves of this offer. In certain cases, a taxpayer may decide that the cost of the paperwork required to use NTTCs is not worth the resulting savings. In those cases, the taxpayer may forego the use of NTTCs and pay the tax charged by its supplier.

The Keunes' real complaint is that Mr. Vigil did not correct Ms. Keune's erroneous assumption that paying the gross receipts tax charged by the supplier would excuse the Keunes from paying tax on the resale of materials to their customers. Unfortunately, Ms. Keune never discussed her assumption with Mr. Vigil. Department employees are not clairvoyant and cannot be expected to answer questions that are never asked or to give advice on issues that are never raised by the taxpayer. In this case, the Keunes were not misled by the Department. There was nothing in the advice given by Mr. Vigil or in the CRS Filer's Kit to support the Keunes' conclusion that they did not have to pay tax on receipts attributable to materials on which tax was charged at the time of purchase. The fact that the Keunes misunderstood the nature of New Mexico's gross receipts tax system is unfortunate, but does not excuse their legal liability for taxes due on their underreported gross receipts for the period at issue.

CONCLUSIONS OF LAW

A. The taxpayers filed a timely, written protest to the assessment issued under Letter ID No. L0720047104, and jurisdiction lies over the parties and the subject matter of this protest.

B. The taxpayers are liable for gross receipts tax on all of their receipts from Mr. Keune's welding jobs, including receipts that represent the cost of materials passed on to the customer.

C. The advice given to the taxpayers by a Department employee was correct, and the Department is not estopped from enforcing its assessment against the taxpayers.

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

DATED July 18, 2005.