

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

**IN THE MATTER OF THE PROTEST OF  
YVONNE BARNUM; ID NO. 02-953870-00 0  
TO ASSESSMENT NOS. 4118218 & 4118219**

**NO. 05-15**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on July 18, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Yvonne Barnum ("Taxpayer") was represented by Debi H. Hale, CPA. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is a New Mexico resident with a professional background in engineering and military defense.
2. During tax year 2000, the Taxpayer provided consulting and quality assurance services in New Mexico to Vendor Surveillance Corporation ("VSC"), which has its headquarters in Irvine, California.
3. The Taxpayer provided consulting and inspection services to certain VSC customers, most of which were large corporations performing work in New Mexico under government contracts.
4. The Taxpayer visited the New Mexico offices of these corporations to determine whether they were in compliance with the terms of their government contracts. For example, the Taxpayer might inspect a customer's computer hardware and software to insure that they met contract specifications.

5. When the Taxpayer completed her inspection, she wrote a report of her findings. A copy of the report was sent to VSC in California and another copy of the report was provided to VSC's customer in New Mexico.

6. The Taxpayer sent VSC weekly invoices of her time and expenses and was paid based on her contract rate. VSC then billed its customer based on the purchase order the customer had issued to VSC.

7. The Taxpayer did not realize that she was subject to New Mexico gross receipts tax on her receipts from performing services in New Mexico and did not report or pay gross receipts tax on this income.

8. The Taxpayer did not consult with her accountant or with the Department concerning her liability for gross receipts taxes.

9. The Taxpayer never received a nontaxable transaction certificate from VSC.

10. 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 2000 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.

11. On April 25, 2003, the Department mailed the Taxpayer a Notice of Limited Scope Audit for the 2000 tax year, asking the Taxpayer to provide documentation to substantiate any gross receipts tax exemptions or deductions taken during 2003. The notice also advised the Taxpayer that she must be in possession of all required NTTCs within 60 days from the date of the notice or any deductions claimed relating to the NTTCs would be disallowed.

12. The Taxpayer does not remember receiving the April 25, 2003 notice, but acknowledged that the address shown on the notice was correct.

13. On August 19, 2003, the Department issued Assessment Nos. 4118218 and 4118219 to the Taxpayer for tax periods January through December 2000 in the total amount of \$2,124.01, representing \$1,392.64 gross receipts tax, \$139.26 penalty and \$592.11 interest.

14. On September 17, 2003, the Taxpayer filed a protest through her certified public accountant, Debi H. Hale, who stated that the Taxpayer “is in receipt of your notices (copies attached) and has engaged this firm to respond on her behalf.”

15. As grounds for the protest, Ms. Hale stated that the Taxpayer was a subcontractor of VSC and that VSC “is responsible for charging sales taxes to the final consumer. Taxpayer is not subject to charging gross receipts tax.”

16. Enclosed with the protest letter was a copy of a Form 1099 Misc. issued by VSC, which showed that \$25,352.25 of nonemployee compensation was paid to the Taxpayer during tax year 2000.

17. Sometime after filing the Taxpayer’s protest, Ms. Hale moved her office, but failed to notify the Department of her new address.

18. On February 26, 2004, the Department’s protest auditor mailed a letter to Ms. Hale asking for additional information concerning the nature of the services the Taxpayer performed for VSC. Specifically, the auditor asked Ms. Hale for “a detailed description of the work Ms. Barnum performs for Video Surveillance as well as supporting documentation.”

19. On April 29, 2004, the auditor sent another letter to Ms. Hale requesting information concerning the Taxpayer’s services for VSC.

20. On May 18, 2004, the auditor sent a third letter to Ms. Hale marked “Final Request.” The third letter repeated the Department’s request for a detailed description of the nature of the

Taxpayer's services, "as well as supporting documentation," and advised Ms. Hale that a failure to respond would result in the matter being forwarded for a formal hearing.

21. Upon receipt of the auditor's third letter requesting information, Ms. Hale left a telephone message for the auditor.

22. On July 12, 2004, the auditor called Ms. Hale, but was unable to reach her and left a telephone message.

23. Ms. Hale did not return the auditor's telephone call or make any other attempt to contact the Department. Ms. Hale did not provide the Department with the requested information concerning the nature of the Taxpayer's services.

24. On December 17, 2004, the Department's attorney requested a hearing on the Taxpayer's protest.

25. On December 20, 2004, a Notice of Administrative Hearing was sent to the Taxpayer's CPA scheduling a hearing for February 23, 2005. The notice included an information sheet concerning hearing procedures which advised taxpayers as follows:

A taxpayer challenging the Department's assessment, refund denial, or other action has the burden of proving that the action taken by the Department does not comply with New Mexico law. It is the taxpayer's responsibility to gather all documents or other evidence supporting the protest, including nontaxable transaction certificates, tax returns, invoices, bank statements, etc....

In addition to presenting the facts, the taxpayer is responsible for researching the statutes, regulations and case law supporting the protest. The purpose of the administrative hearing is to determine whether the action taken by the Department is authorized by law. Arguments that the law is unfair or creates an undue hardship on the taxpayer will not be considered by the hearing officer. The taxpayer should discuss the statutes and regulations applicable to the protest with the Department's protest auditor or attorney. The hearing officer cannot discuss the case with either party prior to the formal hearing.

26. At the Taxpayer's request, the hearing on her protest was continued three times: first to April 12, 2005, then to June 1, 2005, and finally, to July 13, 2005.

27. During these continuances, the Taxpayer's CPA provided the Department with some information concerning the nature of the Taxpayer's services, but did not provide a copy of the Taxpayer's contract with VSC or any other supporting documentation.

## DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the gross receipts tax, penalty, and interest assessed on her receipts from performing services in New Mexico during the 2000 tax year.

The Taxpayer argues that she is not liable for tax because: (1) her services were sold for resale; (2) she worked for VSC as an employee; (3) the Department never notified her of the requirement to pay gross receipts tax; and (4) the Department abated an assessment of gross receipts tax against another, similarly situated taxpayer.

**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). Further, NMSA 1978, § 7-9-5 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." 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 to show that she is not liable for gross receipts tax on her receipts from performing services in New Mexico.

**Services for Resale.** The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the New Mexico Legislature. At the administrative hearing, the Taxpayer's CPA argued that the Taxpayer is

entitled to the deduction for receipts from selling services for resale. The CPA acknowledged, however, that she has never read the statutes or regulations pertaining to this deduction. Had she done so, she would have realized that selling services for resale does not—by itself—provide the basis for a deduction. NMSA 1978, § 7-9-48 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....* (emphasis added)

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. In this case, there is no dispute that the Taxpayer never received an NTTC from VSC. Where a party claiming 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). By failing to obtain possession of the NTTC required by the statute, the Taxpayer waived her right to claim a deduction under Section 7-9-48.

**Employee v. Independent Contractor.** The Taxpayer testified that she worked for VSC as an employee, raising the issue of whether she was entitled to claim the exemption for employee wages provided in NMSA 1978, § 7-9-17. From the evidence presented at the hearing, however, neither the Taxpayer nor her CPA understands the legal distinction between an employee and an independent contractor. The Taxpayer's opening argument began with the statement that the Taxpayer worked for VSC as a subcontractor. The Taxpayer then introduced a document signed by Maria B. Sara, VSC's vice president of operations, which states:

This is to certify that Yvonne Barnum is a quality services independent contractor for Vendor Surveillance Corporation (VSC). She performs services in New Mexico for the benefit of our customers.... She sends VSC an invoice of her time and expenses and is

paid based on her contract rate. VSC in turn bills our customer based on the Purchase Order issued to us.

This certification supports the conclusion that the Taxpayer worked for VSC as an independent contractor and not as an employee. Further confirmation can be found in the fact that VSC issued the Taxpayer a Form 1099 Misc. for tax year 2000 reporting \$25,352.25 of “nonemployee compensation.” The Taxpayer then reported this income as business income on Schedule C to her 2000 federal income tax return. Based on the evidence, the Taxpayer is not entitled to the exemption provided in § 7-9-17.

**Lack of Notice.** The Taxpayer believes the Department should have notified her that she was liable for gross receipts tax on her receipts from performing services for VSC. The Taxpayer’s position is based on a misunderstanding of New Mexico’s self-reporting tax system. Although the Department makes a continuing effort to educate taxpayers through workshops, regulations, instructions and other publications, the Department is not omniscient, and cannot be expected to know when a particular individual enters into a contract, starts a business or undertakes some other income-producing activity that is subject to the gross receipts tax. For this reason, the law charges every individual 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). Here, the Taxpayer’s lack of knowledge of New Mexico tax law does not excuse her from liability for gross receipts tax imposed by the New Mexico Legislature or for the penalty and interest due on late payment of that tax.

**Treatment of Other Taxpayers.** The Taxpayer maintains that the Department abated an assessment of gross receipts tax issued against another, similarly situated taxpayer and that this justifies an abatement of the assessment issued against her. In support of her argument, the Taxpayer introduced a February 27, 2004 letter from a Department attorney to an unidentified taxpayer which states, in pertinent part:

Thank you for being so prompt in getting me the materials that enabled us to make a decision on your protest. I passed them along to the appropriate people and have been advised the assessment has been abated....

I did, nevertheless, want to answer your question about the proper procedure for you to follow in the future. So long as your working arrangement remains generally the same as that apparent from the documents sent to this Department, the same deduction applies, and you will not be liable for New Mexico gross receipts taxes. Because your compensation results from services you perform in New Mexico, the law requires you to file CRS-1 reports.... On this report, you will simply report your gross receipts from services performed in New Mexico and then list the same amount as a deduction, showing no tax due....

Although the Taxpayer testified that this letter was sent to another subcontractor of VSC who performed the same type of services as the Taxpayer, there is nothing in the document itself to corroborate this testimony. The name of the other taxpayer has been blocked out and no mention of VSC appears in the letter. The letter does not describe the nature of the unknown taxpayer's services. The documentation that provided the basis for the Department's abatement was not attached to the letter or separately introduced by the Taxpayer in this case. In short, the February 27, 2004 letter does not provide sufficient information to draw any conclusions concerning the circumstances surrounding the Department's actions in that case.

In any event, it has long been the rule in New Mexico that a taxpayer who has not been assessed more than the law allows has no cause for complaint in the absence of some well-defined and established scheme of discrimination or some fraudulent action. *Appelman v. Beach*, 94 N.M. 237, 608 P.2d 1119, *cert. denied*, 449 U.S. 839 (1980). There is no evidence of fraud or discrimination in this case. The Taxpayer does not dispute that she had receipts from performing services in New Mexico during the 2000 tax year. In the absence of any evidence that the Taxpayer qualifies for one of the exemptions or deductions provided by the Legislature, gross receipts tax was properly imposed on the Taxpayer's receipts.



## **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely, written protest to Assessment Nos. 4118218 and 4118219, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer's receipts from performing services in New Mexico during tax year 2000 are subject to New Mexico's gross receipts tax.

C. The Taxpayer failed to meet her burden of establishing that she is entitled to any of the exemptions or deductions provided in the Gross Receipts and Compensating Tax Act.

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

DATED July 21, 2005.