

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

**IN THE MATTER OF THE PROTEST OF
KAREN E. HOUSER, ID NO. 03-319275-00-7
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOS. L1854706176 & L0537774592**

No. 06-19

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 15, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. Karen E. Houser (“Taxpayer”) represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 2001, the Taxpayer worked as an independent contractor performing services for Angels of Assistance (“AOA”), which was in the business of providing in-home caregiving services to the public.
2. At the time she began working for AOA, the Taxpayer’s accountant advised her to obtain a nontaxable transaction certificate (“NTTC”) from AOA.
3. When the Taxpayer asked AOA for an NTTC, she was told that she did not need one and that the issue would never come up.
4. The Taxpayer reported her income from AOA as business income on Schedule C to her 2001 federal income tax return.
5. As part of an information-sharing program with the Internal Revenue Service, the Department received information concerning the business income reported on the Taxpayer’s

2001 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.

6. October 4, 2004, the Department notified the Taxpayer that it was conducting a limited scope audit of her 2001 tax reporting and asked her to explain why she had not paid gross receipts tax on the business income reported on Schedule C to her 2001 federal income tax return.

7. The Department's October 4, 2004 notice advised the Taxpayer that, pursuant to NMSA 1978, § 7-9-43, she must be in possession of all NTTCs required to support her deductions within 60 days from the date of the letter. The 60-day period expired on December 3, 2004.

8. After receiving the Department's notice, the Taxpayer contacted the owner of AOA and asked her to provide the Taxpayer with an NTTC to support the Taxpayer's deduction of her receipts from performing services for AOA.

9. The owner said that she would request NTTCs from the Department, but never followed through on her promise and never provided the Taxpayer with an NTTC.

10. On December 16, 2004, the Department assessed the Taxpayer for \$828.92 of gross receipts tax and \$0.68 of interest for reporting periods ending on June 30 and December 31, 2001; on February 7, 2005, the Department assessed the Taxpayer for \$390.15 of additional interest for the same periods.

11. On February 14, 2005, pursuant to a retroactive extension of time granted by the Department, the Taxpayer filed a written protest to the assessments.

DISCUSSION

The issue presented is whether the Taxpayer's failure to have an NTTC from Angels of Assistance ("AOA") in her possession within the 60-day period provided in the Department's notice of limited scope audit forecloses her from deducting her receipts from performing services for AOA during 2001. The Taxpayer argues that she should not be liable for gross receipts tax on her receipts because: (1) AOA collected and paid tax on its resale of the Taxpayer's services; and (2) the Taxpayer's inability to produce an NTTC from AOA was due to circumstances beyond her control.

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." NMSA, 1978, § 7-9-3.3. 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. In this case, the Taxpayer contracted with AOA to provide caregiving services in return for a monetary payment. Because the performance of such services comes within the broad classification of "any activity," her work meets the statutory definition of engaging in business and she is liable for gross receipts tax on her income.

Although the Taxpayer believed that AOA's payment of gross receipts tax on the amounts it collected from its clients relieved the Taxpayer of her obligation to pay tax on her receipts, that is not the case. AOA and the Taxpayer are separate taxpayers, each of which is engaged in business and each of which is liable for gross receipts tax. *See, e.g., House of Carpets, Inc. v. Bureau of Revenue*, 84 N.M. 747, 507 P.2d 1078 (Ct. App. 1973); *New Mexico Enterprises, Inc. v. Bureau*

of Revenue, 86 N.M. 799, 528 P.2d 212 (Ct. App. 1974). Nonetheless, in an effort to minimize the taxation of successive transactions, the Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. One such deduction is set out in NMSA 1978, § 7-9-48, 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....* (emphasis added).

Based on this language, the fact that the Taxpayer's services were sold to AOA for resale to the public is not sufficient to support a deduction under § 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 NMSA 1978, § 7-9-43, 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 her control prevented her from obtaining the NTTC required by § 7-9-48. AOA failed to provide the Taxpayer with an NTTC at the time it purchased her services and failed to respond to the Taxpayer's requests for a certificate 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 her gross receipts tax deductions to AOA 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 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 AOA—to determine whether she had the documentation needed to support her deductions. The Taxpayer's failure to obtain an NTTC within the 60-day period provided in § 7-9-43 leaves the Department no choice but to disallow her deductions.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessments issued under Letter IDs L1854706176 and L0537774592, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was engaged in the business of providing caregiving services to AOA during 2001 and was subject to gross receipts tax on the payments she received from AOA.

C. The Taxpayer did not qualify for the deduction in NMSA 1978, § 7-9-48 or for any other deduction or exemption.

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

DATED November 20, 2006.