

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

**IN THE MATTER OF THE PROTEST OF  
ENID C. AND DANNY J. GRUBB  
TO ASSESSMENT OF GROSS RECEIPTS TAX  
ISSUED UNDER ASSESSMENT NOS. 3886962-3886963**

**No. 08-01**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on January 23, 2008, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Enid C. and Danny J. Grubb represented themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Enid and Dan Grubb were residents of New Mexico during the 1999 tax year.
2. Between 1995 and 2000 or 2001, the Grubbs owned a business known as Flag Creek Tack & Apparel (“Tack Store”), which was registered with the Department for payment of gross receipts tax.
3. Dan Grubb is an experienced carpenter who owns his own tools and truck. He is also able to perform welding services and drive a forklift.
4. During 1999, Dan Grubb performed various services for Tradewinds Construction, Inc. (“TRWC”), which was the contractor on two large construction projects in Farmington, New Mexico.

5. Mr. Grubb also performed services for Sunrise Builders (“Sunrise”), which was TRWC’s framing subcontractor. Sunrise was owned by James Abernathy, who supervised the construction work, and his wife Katy Abernathy, who took care of the bookkeeping.

### **Services Dan Grubb Performed for Sunrise**

6. In March 1999, Sunrise hired Dan Grubb as one of about 40 workers performing framing and carpentry work under Sunrise’s subcontract with TRWC.

7. Mr. Grubb’s working relationship with Sunrise could be terminated at will, by either party, without liability.

8. While working for Sunrise, Mr. Grubb’s hours of work, including morning and afternoon breaks, were dictated by its owner, James Abernathy.

9. Mr. Abernathy handed out the work assignments, directing which jobs Mr. Grubb and the other members of the work crew would perform each day.

10. Mr. Grubb could not delegate his work to others or hire someone else to perform the work assigned.

11. Mr. Abernathy was generally on-site and inspected the work done by his crew on a daily basis.

12. In order to be paid, Mr. Grubb was required to fill out a time card and turn it in to Katy Abernathy, who issued paychecks based on the number of hours Mr. Grubb worked during each pay period.

13. James Abernathy considered Mr. Grubb to be a regular employee, but paid him as an independent contractor because Mr. Grubb provided his own tools.

14. When Mr. Grubb performed the same kind of carpentry work for Mr. Abernathy in later years, Mr. Grubb was paid wages as an employee and issued a Form W-2, rather than a Form 1099, at the end of the year.

15. When Mr. Grubb received his first paycheck from Sunrise in 1999, he questioned Katy Abernathy as to why there were no withholdings from his wages.

16. Ms. Abernathy told him that she did not want to deal with withholding taxes and that he would be responsible for paying his own taxes at the end of the year.

17. Between March and November 1999, Sunrise issued checks to Mr. Grubb showing payments for hourly labor in the amount of \$10,942.26. At the end of the year, Sunrise issued Mr. Grubb a federal Form 1099 reporting nonemployee compensation of \$10,943.28.

18. Some of the check stubs issued by Sunrise listed small additional amounts to reimburse Mr. Grubb for supplies he purchased. For example, the check issued to Mr. Grubb on September 3, 1999 shows a payment of \$542.34 for 30.13 of work at \$18.00 per hour, plus an additional \$20.15 identified as “reimbursement for parts.” These reimbursements were not included in the nonemployee compensation Sunrise reported on Mr. Grubb’s Form 1099.

#### **Services Dan Grubb Performed for TRWC**

19. During the same period he worked for Sunrise in 1999, Dan Grubb also performed services for TRWC.

20. The bulk of this work involved welding a guard rail TRWC was required to install to meet the requirements of the Americans with Disabilities Act.

21. When TRWC was unable to find a welder to work on the guard rail, James Abernathy suggested they hire Mr. Grubb, who had done welding work in the past.

22. Mr. Abernathy did not want Mr. Grubb to perform the welding work through Sunrise because the company was only insured for framing work.

23. As a result, Mr. Grubb contracted directly with TRWC to perform the work on nights and weekends and was paid by TRWC rather than Sunrise.

24. TRWC issued a Type 6 NTTC to Mr. Grubb so that he would not have to pay gross receipts tax on the payments he received from TRWC.

25. Rather than obtain a second New Mexico tax identification number, Mr. Grubb told TRWC to issue the NTTC to him under the name and tax identification number of the Tack Store, which he and his wife operated as sole proprietors.

26. TRWC paid Mr. Grubb \$5,463.89 during 1999 and reported this amount as nonemployee compensation on a Form 1099 it issued to Mr. Grubb.

### **The Grubbs' 1999 Federal Income Tax Return**

27. Enid Grubb prepared the Grubbs' 1999 federal income tax return, which was filed with the Internal Revenue Service ("IRS") in early 2000.

28. Mrs. Grubb reported business income on two Schedule Cs to federal Form 1040.

29. One schedule reported \$10,944 of income, the amount reported on the Form 1099 Sunrise issued to Dan Grubb, under the business code for Carpentry & Floor Contractors.

30. The second schedule reported \$15,599 of income under the business code for Pet & Pet Supply Store; of this amount, \$5,464 was attributable to the amount Mr. Grubb received from services performed for TRWC.

### **The Audit and Protest**

31. In 2002, as part of an information-sharing program with the IRS, the Department received an electronic tape containing information on the business income the Grubbs reported on their 1999 federal income tax return.

32. When the Department investigated, it located the Grubbs' registration for the Tack Store, but found that no gross receipts had been reported for the Tack Store during 1999.

33. On March 18, 2002, the Department notified the Grubbs that it was conducting a limited scope audit of their 1999 tax reporting and stated:

Our records indicate that Gross Receipts, as reported on your CRS-1(s) do not match the amount reported on your Federal Form(s) Schedule C, Part 1, Line 3 OR our records do not show that your business(s) was registered with the New Mexico Taxation and Revenue Department.

The notice listed the \$26,503 of business income reported on the Grubbs' two Schedule Cs, the tax identification number the Department had located for the Tack Store, and the fact that no gross receipts had been reported under that number.

34. On May 8, 2002, Enid Grubb responded to the notice, explaining that her husband, Dan Grubb, worked for Sunrise and TRWC during 1999 and enclosing copies of the check stubs received from each company, along with the NTTC issued by TRWC. On May 17, 2002, Mrs. Grubb provided the Department with a Form 1099 from Sunrise.

35. The Department did not respond to Mrs. Grubb directly, but did reduce the discrepancy amount shown on the Notice of Limited Scope Audit by subtracting the \$5,464 of

receipts Dan Grubb received from TRWC based on the check stubs and NTTC provided by Mrs. Grubb.

36. On June 28, 2002, the Department assessed the Grubbs for \$1,190.88 of gross receipts tax, plus penalty and interest, on \$21,039 of the \$26,503 of income reported on the two Schedule Cs to their 1999 federal income tax return.

37. On August 5, 2000, the Grubbs filed a written protest to the assessment.

38. The Department initially denied the protest as untimely. The Grubbs protested that decision and in 2004, the Department granted the Grubbs a retroactive filing extension and accepted their protest of the June 28, 2002 assessment.

39. On September 7, 2007, the Department's attorney filed a Request for Hearing asking that the Grubbs' protest to the Department's assessment of 1999 gross receipts tax be scheduled for a formal administrative hearing,

40. A hearing was originally scheduled for November 1, 2007, but was subsequently continued to January 23, 2008, at 1:30 p.m.

## **DISCUSSION**

The issues to be decided are: (1) whether Dan Grubb worked for Sunrise Builders ("Sunrise") as an employee, which would allow him to claim the exemption from gross receipts set out in NMSA 1978, § 7-9-17; and (2) whether \$10,095 of the income the Grubbs reported on the 1999 Schedule C for Flag Creek Tack & Apparel ("Tack Store") is subject to gross receipts tax.

**Burden of Proof.** Any assessment of tax made by the Department is presumed to be correct. NMSA 1978, § 7-1-17(C). 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 Grubbs' burden to come forward with evidence and legal argument to show that the Department's assessment is incorrect and should be abated, in full or in part.

**Employee v. Independent Contractor.** The Grubbs maintain that Dan Grubb worked for Sunrise as an employee, rather than as an independent contractor, and is therefore entitled to the exemption from gross receipts found in NMSA 1978, § 7-9-17, which states:

Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

The Department contends that Mr. Grubb was an independent contractor whose self-employment income is subject to gross receipts tax.

In determining whether a person is an employee or an independent contractor, the principal consideration is the right to control. In *Harger v. Structural Services, Inc.*, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996), the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: (1) direct evidence of control; (2) the right to terminate the employment at will, by either party, without liability; (3) the right to delegate the work or to hire and fire assistants; (4) the method of payment, whether by time or by the job; (5) whether the party employed engages in a distinct occupation or business; (6) whether the work is part of the employer's regular business; (7) the skill required in the particular occupation; (8) whether the employer supplies the instrumentalities, tools or the place of work; (9) the duration of a person's employment and whether that person works full-time or regular hours; and (10) whether the parties believe they have created the relationship of employer and employee, insofar as this belief indicates an assumption of control by one and submission to control by the other. *Benavidez v. Sierra Blanca Motors*, 125 N.M. 235, 238, 959 P.2d 569, 572 (Ct. App. 1998). While all of the above factors may be considered, it is the totality of the circumstances that should determine whether the employer has the right to exercise essential control over a particular worker.

For purposes of the exemption from gross receipts set out in § 7-9-17, Department Regulation 3.2.105.7 NMAC lists a series of questions to consider in determining whether a worker qualifies as an employee, including whether taxes are withheld, whether social security, worker's compensation and unemployment insurance contributions are made on behalf of the employee, and whether the employer has "a right to exercise control over the means of accomplishing a result or only over the result."

In this case, there is evidence supporting each party's position. The facts supporting the conclusion that Dan Grubb worked for Sunrise as an independent contractor include:

Mr. Grubb was a skilled carpenter who provided his own tools and truck;



During the period Mr. Grubb worked for Sunrise, he also performed services for TRWC;

Sunrise did not withhold state, federal or social security taxes from Mr. Grubb's paychecks, nor did it contribute to worker's compensation or unemployment insurance for Mr. Grubb;

Sunrise issued Mr. Grubb a Form 1099, reporting its payments as nonemployee compensation; and

The Grubbs reported the income Mr. Grubb received from Sunrise as business income on Schedule C to their 1999 federal income tax return.

The facts supporting the conclusion that Dan Grubb was an employee of Sunrise include:

Mr. Grubb as one of about 40 workers performing framing and carpentry work for Sunrise;

Mr. Grubb's working relationship with Sunrise could be terminated at will, by either party, without liability;

Mr. Grubb could not delegate his work to others or hire and fire assistants;

Mr. Grubb's framing and carpentry work was part of Sunrise's regular business;

While working for Sunrise, Mr. Grubb's hours of work, including morning and afternoon breaks, were dictated by its owner, James Abernathy;

Mr. Abernathy handed out the work assignments, directing which jobs Mr. Grubb and the other members of the crew would perform each day;

Mr. Abernathy was generally on-site and inspected the work done by his crew on a daily basis;

Mr. Grubb was required to fill out and submit a time card and was paid based on the number of hours worked; and

Mr. Abernathy considered Mr. Grubb to be an employee, although he was paid as an independent contractor for work performed in 1999; when Mr. Grubb performed exactly the same work for Mr. Abernathy in later years, Mr. Grubb was paid as an employee and issued a Form W-2 rather than a Form 1099.

Most of the factors supporting the Department's position involve Sunrise's failure to treat Mr. Grubb as an employee for tax reporting and payment purposes. The factors supporting the Grubbs' position are more substantive and go to the issue of control, which is "the principal consideration" in determining whether a person qualifies as an employee. *Harger, supra*, 121 N.M. at 663, 916 P.2d at 1330. Where there is only control over the results, and not the details of the performance, the worker is usually considered to be an independent contractor. *Burruss v. B.M.C. Logging Co.*, 38 N.M. 254, 31 P.2d 263 (1934). Where, as here, the worker is subject to close supervision, directed when to take breaks, required to account for each hour spent on the job, and assigned specific tasks to perform on a daily basis, the worker qualifies as an employee. Based on the level of supervision James Abernathy exercised over his work crew, Dan Grubb was an employee of Sunrise and is entitled to an exemption from gross receipts for the \$10,944 of income reported on the Form 1099 Sunrise issued to him for tax year 1999.

**Unidentified Income.** The Grubbs' 1999 federal income tax return reported \$26,503 of business income on two Schedule Cs to their Form 1040. The first schedule identified \$10,944 as income from the business of Carpentry & Floor Contractors. This matches the amount shown on the Form 1099 Sunrise issued to Mr. Grubb and also matches the amount shown on the Sunrise check stubs Enid Grubb provided to the Department in 2002. As discussed in the previous section, Sunrise erroneously characterized this income as nonemployee compensation when it should have been treated as employee wages. For this reason, the Grubbs are not liable for New Mexico gross receipts tax on the \$10,944 reported on the first Schedule C.

The Grubbs' second Schedule C reported \$15,599 of income under the business code for Pet & Pet Supply Store, which refers to the Tack Store the Grubbs owned and operated between 1995 and 2000 or 2001. Of this amount, \$5,464 has been identified as receipts from the work Dan Grubb performed for TRWC. These receipts were reported on the Tack Store's Schedule C because TRWC issued an NTTC to Mr. Grubb using the Tack Store's New Mexico tax identification number. After Enid Grubb provided the Department with a copy of the NTTC, the Department subtracted the \$5,464 Mr. Grubb received from TRWC from the \$15,599 reported on the second Schedule C and no tax was assessed on this amount.

This leaves \$10,095 of unidentified income. The Grubbs maintain that this amount represents cash payments Dan Grubb received from Sunrise for both regular wages and reimbursements for purchases of supplies. However, they have been unable to substantiate their claim or provide any records to show the timing or amount of the payments. Each check stub issued by Sunrise details the number of hours Mr. Grubb worked and multiplies that number by his hourly rate to show how the final payment was calculated. The check stubs also break out reimbursements for small purchases of supplies. Sunrise would have needed this information to prepare and substantiate its own tax reporting. Since Sunrise treated Mr. Grubb as an independent contractor and was not making social security, worker's compensation or unemployment contributions, it is not clear how Sunrise would benefit by paying Mr. Grubb an additional \$10,000 in cash and then omitting this amount from the Form 1099 it issued at the end of the year. Nor is there any apparent reason for Mrs. Grubb to report such payments on the Tack Store's Schedule C. In her May 8, 2002 letter to the Department,

Mrs. Grubb acknowledged that “I don’t remember why I put Sunrise Builders checks under one schedule C and the cash they paid under the Tack Store schedule C....”

While Sunrise may have made some cash payments to Mr. Grubb, it seems likely that a substantial part of the \$10,095 reported on the Tack Store’s Schedule C represents receipts from operation of the Tack Store. Enid Grubb testified that the store was open from 1995 through 2000 or 2001. Based on this testimony, the Tack Store must have generated some receipts during 1999. Although Mrs. Grubb testified that the store operated at a loss, gross receipts from an unprofitable business still must be reported to the IRS on Schedule C in order to calculate the amount of the loss.

NMSA 1978, § 7-1-10(A) requires every person to “maintain books of account or other records in a manner that will permit the accurate computation of state taxes....” In addition, as the New Mexico Court of Appeals has noted: “There exists a statutory presumption that all receipts are taxable. NMSA 1978, § 7-9-5 (1966) (amended 2002). The taxpayer claiming that receipts are not taxable bears the burden of proving that assertion.” *Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶ 11, 133 N.M. 354, 62 P.3d 1236, *cert. denied*, 133 N.M. 413, 63 P.3d 516.

At the administrative hearing held on January 23, 2008, the Grubbs argued that the Department allowed so much time to pass before requesting a hearing that the Grubbs could not locate the records needed to establish their case. It is true that more than 3½ years passed between the date the Department accepted the Grubbs’ protest and the date the Department’s attorney filed his Request for Hearing. There is no information as to why the Department waited so long to ask for a hearing. Nor is there any indication that the Grubbs contacted the

Department during this period to inquire as to the status of their case. Whatever the reason for the delay, there is no basis for the Grubbs' claim that the delay prevented them from locating needed documents. The Grubbs were originally notified of the discrepancy in their tax reporting in March 2002. This was well within both state and federal statutes of limitation for the audit and assessment of 1999 taxes. In May 2002, the Grubbs responded to the Department's notice by providing copies of check stubs, 1099 forms and the NTTC issued by TRWC. They did not provide any documents to establish the source of the \$10,095 of income reported on the Tack Store's Schedule C.

The Notice of Limited Scope Audit the Department sent to the Grubbs in March 2002 specifically noted that the Department had located the Tack Store's registration and tax identification number and that no gross receipts were reported under that number during 1999. The Grubbs have been unable to produce records to show that receipts from the Tack Store were reported to the Department or that gross receipts taxes were paid. They have also failed to produce any records to support their claim that a portion of the income reported on the Tack Store's Schedule C actually represented cash wages Sunrise paid to Mr. Grubb. Based on the evidence presented, the Grubbs have not met their burden of proving that the \$10,095 reported as business income on their 1999 federal income tax return is not subject to New Mexico gross receipts tax.

### **CONCLUSIONS OF LAW**

A. Pursuant to the Department's retroactive extension of time, the Grubbs filed a timely protest to the assessment of gross receipts tax issued under Assessment Nos. 3886962-3886963, and jurisdiction lies over the parties and the subject matter of this protest.

B. Dan Grubb was an employee of Sunrise Builders during 1999 and is entitled to claim the exemption from gross receipts provided in NMSA 1978, § 7-9-17 for the \$10,944 of income Sunrise Builders reported to him on Form 1099.

C. The Grubbs failed to meet their burden of proving that \$10,095 of the income reported as business income on Schedule C of their 1999 federal income tax return is not subject to New Mexico gross receipts tax.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART: the Department is ordered to abate the gross receipts tax, plus accrued penalty and interest, assessed on the \$10,944 of income Sunrise Builders paid Mr. Grubb during 1999 and reported to him on Form 1099; the Grubbs are ordered to pay the gross receipts tax, plus accrued penalty and interest, assessed on \$10,095 of the income reported on the Grubbs' 1999 federal income tax return.

Dated February 6, 2008.