

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

**IN THE MATTER OF THE PROTEST OF
JDJ SERVICES, INC.; ID NO. 03-001720-00-3
TO ASSESSMENT OF GROSS RECEIPTS TAX
ISSUED UNDER LETTER ID L1008028416**

No. 07-14

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 18, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. JDJ Services, Inc. was represented by its attorney, Wayne E. Bingham, with Bingham, Hurst & Apodaca, P.C. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. JDJ is a private, for-profit corporation organized under the laws of the State of Oregon and engaged in business in several states. (Orazio Testimony; Exhibit 1, pp. F6.1, F6.9).
2. The officers and shareholders of JDJ are Kathyleen Orazio and Gerald Green, each of whom owns 50 percent of the outstanding common stock of JDJ. (Orazio Testimony; Exhibit 1, pp. F6.6, F6.16).
3. Amtrak was created by Congress as a railroad carrier to be operated and managed as a for-profit corporation and not as a department, agency, or instrumentality of the United States Government. 49 U.S.C. § 24301(a).
4. Amtrak, rail carrier subsidiaries of Amtrak, and any passenger or other customer of Amtrak or such subsidiaries are exempt from state and local taxes. 49 U.S.C. § 24301(l).

5. JDJ is not a subsidiary of Amtrak or a subsidiary in any affiliated group or parent-sub subsidiary controlled group. (Orazio & Milles Testimony; Exhibit 1, pp. F6.7, F6.17).

6. Part 238 of the Federal Railroad Administration's ("FRA") regulations require railroad carriers to have certain inspections, tests, and maintenance performed on trains traveling in interstate commerce. One of these tests is a Class I brake test that must be conducted prior to a train's departure from an originating terminal and every 1,500 miles thereafter. 49 CFR § 238.503(d).

7. Each railroad is required to maintain a training, qualification, and designation program for employees and contractors that perform the various inspections and maintenance required by federal regulations. 49 CFR § 238.109.

8. Amtrak uses its own employees to conduct federally-mandated inspections of its trains. In certain locations, however, Amtrak contracts with third parties to perform the required Class I brake test, as well as other services, during Amtrak's scheduled stops. (Orazio & Milles Testimony).

9. JDJ is one of four to six independent contractors providing inspection, maintenance, and cleaning services to Amtrak. In most cases, contracts are awarded through competitive bids submitted in response to a request for proposals. (Milles Testimony).

10. In December 2003, Amtrak asked JDJ to submit a bid on a contract to service Amtrak trains in Albuquerque, New Mexico. After reviewing internal documentation of anticipated costs and expenses, JDJ presented Amtrak with a proposed price for the requested services, which was accepted. (Orazio Testimony; Exhibit I, which consists of the following

documents: Purchase Order; Workscope; Generic Train Servicing Requirements; Services Contract; and Request for Proposal).

11. From approximately January 2004 through mid-February 2005, JDJ performed a variety of services on Amtrak rail cars located in Albuquerque, including testing and inspecting cars in accordance with federal regulations; overseeing the fueling of locomotives; performing emergency repairs and dumping of toilet waste systems; maintaining watering equipment; watering passenger cars; cleaning passenger car windows; and, on an as needed basis, cleaning cars cut off from the train by Amtrak's service manager. (Orazio Testimony; Exhibit 1, p. C6.2; Exhibit I, Workscope).

12. Under the contract, JDJ was required to maintain sufficient staffing levels to insure that the contracted level of service was provided. At a minimum, JDJ was required to provide three mechanics, one water person, and four window washers to service each train. (Exhibit I, Generic Train Servicing Requirements, ¶ 8).

13. JDJ's employees did not travel with the trains they were servicing, but performed their services, which took approximately 20 to 40 minutes, while the rail cars remained on the train tracks during Amtrak's scheduled stops in Albuquerque. (Orazio Testimony).

14. JDJ did not transport persons or property from Albuquerque to any point within or without New Mexico as part of the services it performed under its contract with Amtrak. (Orazio & Milles Testimony; Exhibit I, Workscope).

15. JDJ did not handle, store, pack or perform any other services on the property that Amtrak was transporting on its rail cars. (Orazio & Milles Testimony; Exhibit I, Workscope).

16. Amtrak's contract with JDJ specified that JDJ was not an agent, representative, or employee of Amtrak, but was an independent contractor. (Exhibit I, Services Contract, ¶ 6).

17. To insure that JDJ's employees had the proper training and certifications to perform federally-mandated inspections, the contract required JDJ, at its own expense, to send its employees to Amtrak's training facilities. (Exhibit I, Generic Train Servicing Requirements ¶¶ 19, 20, 46, 47).

18. Amtrak retained the right to approve key personnel and require that unsatisfactory workers be terminated, but JDJ was responsible for the actions and day-to-day management and supervision of its employees. (Exhibit I, Generic Train Servicing Requirements, ¶¶ 1,2, 7; Services Contract, ¶¶ 6, 11).

19. JDJ recruited, interviewed and hired the employees assigned to work in Albuquerque, established their benefits package, set their wages, supervised their day-to-day activities, and scheduled their work hours. (Orazio Testimony).

20. JDJ approved the employees' time sheets, paid their wages from a bank account over which Amtrak had no signature authority or other access, and issued W-2 forms to the employees at the end of the year. (Orazio Testimony).

21. JDJ maintained worker's compensation and liability insurance on its employees and indemnified Amtrak from all claims or damage suits that might arise from the actions of or injuries to JDJ employees working on Amtrak's premises. (Exhibit I, Purchase Order, pp. 3-11; Services Contract, ¶¶ 25, 26).

22. Amtrak's contract documents stated that Amtrak was exempt from all state and local taxes and directed JDJ not to include taxes imposed on Amtrak in its prices, but to include

other applicable taxes for which JDJ was liable. (Exhibit I, Services Contract, ¶ 16; Request for Proposal, ¶ 10).

23. Based on its experience in other states, JDJ assumed that New Mexico had a sales tax imposed on the buyer (Amtrak), rather than a gross receipts tax imposed on the seller (JDJ), and did not include New Mexico's gross receipts taxes in its price calculations. (Orazio Testimony).

24. At the time JDJ began doing business in New Mexico, it received a CRS Filer's Kit setting out the instructions for reporting gross receipts, compensating, and withholding taxes under New Mexico's combined reporting system. (Orazio Testimony; Exhibits 9 & 10).

25. The Filer's Kit lists the different types of nontaxable transaction certificates ("NTTCs") the Department issues and provides an explanation as to the proper use of each NTTC. (Sena Testimony).

26. After reviewing this information, Kathyleen Orazio, an officer and shareholder of JDJ, asked Amtrak's purchasing manager for an NTTC to support JDJ's exemption of its receipts from the gross receipts reported to the Department. The purchasing manager told Ms. Orazio that he was not aware of such certificates. (Orazio Testimony).

27. JDJ did not pursue the matter, but still decided to exclude its receipts from the CRS returns it filed with the Department. (Orazio Testimony; Exhibit 1, p. GN2).

28. In March 2006, the Department notified JDJ that it had been selected for audit for the period January 2003 through June 2005. (Exhibit B).

29. After receiving the Department's audit notice, Ms. Orazio again contacted Amtrak to ask for an NTTC. (Orazio Testimony).

30. Amtrak had a new purchasing manager who provided JDJ with a typed “Exemption Certificate” stating that Amtrak “certifies that the purchased/ leased property or service listed below is exempt from New Mexico sales/use tax under the provisions of Public Law 103-272 (49 U.S.C. § 24301).” The service listed on the certificate was “Mechanical inspections/maintenance on trains.” (Orazio Testimony; Exhibit G, second page).

31. Ms. Orazio had no discussions with Amtrak’s purchasing manager concerning the certificate and made no effort to determine whether it met the requirements of New Mexico law. (Orazio Testimony).

32. The exemption certificate Amtrak provided to JDJ was not an official NTTC issued by the Department and was not in a form approved by the Department. (Sena Testimony).

33. There is no New Mexico NTTC applicable to JDJ’s receipts from performing services for Amtrak in New Mexico. (Sena Testimony).

34. On November 30, 2006, the Department assessed JDJ for reporting periods January 2004 through July 2005 in the total amount of \$38,410.51, representing \$26,478.00 of gross receipts tax and \$687.44 of withholding tax, plus penalty and interest. (Exhibit 2).

35. On December 27, 2006, JDJ filed a written protest to the assessment. (Exhibit 3).

36. At the administrative hearing held on July 18, 2007, JDJ withdrew its protest to the assessment of withholding tax. (Orazio Testimony).

DISCUSSION

The issue to be decided is whether JDJ is liable for New Mexico gross receipts tax on its receipts from performing inspection, maintenance, and cleaning services on Amtrak’s rail cars during their scheduled stops in Albuquerque, New Mexico. JDJ raises the following arguments

in support of its protest: (1) JDJ qualifies for Amtrak's exemption from state taxes under 49 U.S.C. § 24301(l); (2) JDJ is exempt from state taxes because it is engaged in interstate commerce; (3) JDJ qualifies for the deduction provided in NMSA 1978, § 7-9-56 for intrastate transportation and services provided in connection with interstate commerce; and (4) JDJ relied on Amtrak's representations that JDJ's services were exempt from tax.

There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C); *MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308. There is also a presumption that all receipts of a person engaging in business in New Mexico are subject to gross receipts tax. NMSA 1978, § 7-9-5; *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 (2003). 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 JDJ's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it.

(1) Amtrak's Statutory Exemption from State Taxes. Amtrak is a for-profit corporation and is not a department, agency or instrumentality of the United States government. 49 U.S.C. § 24301(a). Although Amtrak does not qualify for the federal government's constitutional immunity from tax, it has been granted certain statutory exemptions. In particular, 49 U.S.C. § 24301(l) provides:

Amtrak, a rail carrier subsidiary of Amtrak, and any passenger or other customer of Amtrak or such subsidiary, are exempt from a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority on Amtrak, a rail carrier subsidiary of Amtrak, or on persons traveling in intercity rail passenger transportation or on mail or express transportation provided by Amtrak or such a subsidiary, or on the carriage of such persons, mail, or express, or on the sale of any such transportation, or on the gross receipts derived therefrom after September 30, 1981. In the case of a tax or fee that Amtrak was required to pay as of September 10, 1982, Amtrak is not exempt from such tax or fee if it was assessed before April 1, 1997.

In this case, JDJ is an independent contractor performing services for Amtrak. JDJ is not Amtrak, a rail carrier subsidiary of Amtrak, or a passenger or other customer of Amtrak or its subsidiaries. JDJ nonetheless argues that it is entitled to claim the exemption provided in § 24301(l) because its services are an integral part of Amtrak's transportation services and because the cost of the gross receipts tax imposed on JDJ ultimately would be passed on to Amtrak.

JDJ's arguments are not new. Similar arguments have been raised—and rejected—in challenges to New Mexico's assessment of gross receipts tax against contractors performing services for the federal government. In *United States v. New Mexico*, 455 U.S. 720 (1982), the United States Supreme Court upheld New Mexico's right to tax the receipts of three federal contractors hired to manage government-owned research and development facilities located in New Mexico. In proceedings below, the district court found that the government maintained control over the contractors' procurement systems, property management and disposal practices, payment methods, and other operations under the contracts. The Supreme Court nonetheless rejected the argument that the contractors were government agents immune from state taxation:

[A] finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." [citation omitted].

455 U.S. at 736. Quoting from its earlier decision in *United States v. Boyd*, 378 U.S. 39, 48 (1964), the Court concluded that regardless of substantial government oversight, the contractors in *New Mexico* were for-profit entities engaged in a commercial transaction and were not incorporated into the government structure for purpose of claiming immunity from state taxation:

Should the [Atomic Energy] Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy government immunity.

455 U.S. at 736. The same can be said in this case. Amtrak has the option of using its own employees or using outside contractors to inspect its rail cars. When it chooses to hire outside contractors to perform this service, those contractors are subject to the same taxes imposed on other private entities.

A key factor in the *New Mexico* decision was the Court's finding that the legal incidence of New Mexico's gross receipts tax fell on the contractor and not on the federal government. Unlike most other states, New Mexico does not have a sales tax that is charged to and collected from the buyer. New Mexico has a gross receipts tax that is imposed directly on the seller of goods and services. NMSA 1978, § 7-9-4; *Tiffany Construction Company v. Bureau of Revenue*, 96 N.M. 296, 300, 629 P.2d 1225, 1229 (1981). Although it is common practice for sellers to pass the cost of the gross receipts tax on to their buyers, a seller's inability to separately charge or obtain reimbursement of the tax does not affect the seller's legal obligation to report and pay tax to the state. *Grogan, supra*, 2003-NMCA-033, ¶ 24 (while retailers may almost universally pass the tax on to consumers, the law clearly imposes the tax on the retailer, and it remains the retailer's business decision as to how to compensate for that tax expense); *First National Bank v.*

Commissioner of Revenue, 80 N.M. 699, 705, 460 P.2d 64, 70 (Ct. App. 1969) (contract between parties regarding payment of tax does not shift incidence of the tax).

The fact that the ultimate cost of New Mexico's gross receipts tax may be borne by a tax-exempt entity is also irrelevant to the determination of a seller's liability for tax. As the United States Supreme Court held in *New Mexico, supra*, 455 N.M. at 734: "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *See also, United States v. California*, 507 U.S. 746, 753 (1993) (the government's agreement to reimburse, or even fund in advance, a contractor for state taxes does not make the government's payments direct disbursements of federal funds to the state); *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (when the legal incidence of a state tax falls upon an entity doing business with the federal government, it is the incidence of the tax and not the indirect economic consequences that determines whether a tax is barred by federal constitutional immunity); *South Carolina v. Baker*, 485 U.S. 505, 521 (1988) (earlier case law "completely foreclosed" any claim that the nondiscriminatory imposition of tax on private entities that pass the cost on to the states or the federal government unconstitutionally burdens state or federal functions).

Applying these principles to the facts of this case, it is clear that JDJ is not entitled to Amtrak's statutory exemption from state taxes. Although JDJ argues that it "stands in the shoes" of Amtrak because it performs federally-mandated inspections of Amtrak trains, nothing in the federal regulations indicates that this is a function only Amtrak can perform. To the contrary, 49 CFR § 238.109 states that beginning on January 1, 2002 "each railroad shall have adopted a training, qualification, and designation program for employees *and contractors* that perform any

of the inspections, tests, or maintenance required by this part....” (emphasis added). The regulations clearly contemplate that a railroad may use its own employees to perform federal inspections or may contract with outside parties to fulfill this function.

Amtrak’s contract with JDJ specifically states that JDJ “is not an agent, representative, or employee of Amtrak, but rather is an independent contractor.” Exhibit I, Services Contract, ¶ 6. While Amtrak has the right to approve key personnel and require that unsatisfactory workers be terminated, JDJ is responsible for the day-to-day management and supervision of its employees. This includes recruiting, interviewing, and hiring employees, establishing their benefits package, setting their wages, supervising their day-to-day activities, and scheduling their work hours. JDJ approves its employees’ time sheets, pays them from a bank account over which Amtrak has no signature authority or other access, and issues W-2 forms at the end of the year. JDJ maintains worker’s compensation and liability insurance on its employees. Under the parties’ contract, JDJ is required to indemnify Amtrak from all claims or damage suits that might arise from the actions of or injuries to JDJ employees working on Amtrak’s premises.

JDJ is one of four to six companies providing inspection and maintenance services to Amtrak. In most cases, contracts are awarded through a competitive bidding process. After reviewing internal documentation of anticipated costs and expenses, JDJ presents Amtrak with a proposed price for the requested services—a price that Amtrak is free to accept or reject. Amtrak’s decision to contract with JDJ (or one of its competitors) to perform federally-mandated inspections of Amtrak trains does not subsume JDJ into Amtrak’s corporate structure or extend Amtrak’s tax immunity to JDJ. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (fact that Indian tribe’s business venture served a federal function did not make that

venture a federal instrumentality or prohibit assessment of New Mexico gross receipts tax on the tribe's receipts). JDJ remains an independent taxable entity engaged in selling its services for profit. As such, it is subject to New Mexico gross receipts tax on receipts from services performed within this state.

(2) State Taxation of Interstate Commerce. JDJ contends that its receipts are exempt from New Mexico's gross receipts tax because its activities come within the constitutional prohibition against taxing interstate commerce. This argument misunderstands the constitutional parameters of the states' power to tax. Almost 70 years ago, the United States Supreme Court rejected a commerce clause challenge to New Mexico's assessment of gross receipts tax on receipts from out-of-state advertisers who placed ads in a New Mexico publication circulated both inside and outside the state. As the Court explained:

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way' [citations omitted], and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business.....

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). The Court further noted that the gross receipts tax "is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260. In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the Court expanded *Western Live Stock's* analysis, holding that a state tax on interstate business will not violate the protections of the commerce clause if the tax meets the following four-part test: (1) a sufficient nexus exists between the activity being taxed and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services

provided by the state. In this case, JDJ's activities in New Mexico meet the four-part test set out in *Complete Auto Transit*.

(a) *Substantial Nexus*. The first requirement is that the activity taxed must have a substantial nexus with the taxing state. Here, gross receipts tax was assessed on JDJ's receipts from its performance of services for Amtrak in New Mexico; there has been no attempt to tax services JDJ performed for Amtrak outside the state. The presence of JDJ's employees in Albuquerque establishes JDJ's physical presence in the state during the period at issue. This, and the fact that all of the activities subject to tax were performed in New Mexico, satisfies the requirement of substantial nexus.

(b) *Fair Apportionment*. The second inquiry is whether the tax assessed against JDJ is fairly apportioned, *i.e.*, whether the tax is both internally and externally consistent. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). *See also, Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983); *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The internal consistency test "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* The external consistency test looks at the in-state business activity on which the tax is imposed and the practical or economic effect of the tax to determine whether the State has taxed "only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg, supra*, 488 U.S. at 262.

As discussed above, the gross receipts tax at issue was assessed on JDJ's receipts from performing services in New Mexico, and the tax "is not one which in form or substance can be

repeated by other states.” *Western Live Stock, supra*, 303 U.S. at 260. In addition, taxing JDJ’s receipts at the place where the income-generating activities were performed reflects the economic reality of its contract with Amtrak. For this reason, both the internal and external consistency tests are met.

(c) *Discrimination Against Interstate Commerce.* The third prong of the *Complete Auto Transit* test is designed to insure that intrastate and interstate commerce stand on the same footing. Accordingly, no state is permitted to impose taxes which discriminate against interstate commerce by providing direct commercial advantage to local enterprises. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). Here, gross receipts tax was assessed against JDJ for the services it performed for Amtrak in New Mexico at exactly the same rate paid by in-state businesses performing services in the state. The assessment issued to JDJ does not discriminate against interstate commerce.

(d) *Relation to Services Provided By the State.* The final question is whether the state tax is fairly related to the presence and activity of the taxpayer within the state and “focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue.” *Goldberg, supra*, 488 U.S. at 267. In reviewing state transaction taxes, the United States Supreme Court has held that the benefits of fire and police protection, the use of public roads and utilities, and the other advantages of a civilized society are sufficient to justify the imposition of tax. *See, e.g., Id.* at 267; *Jefferson Lines, supra*, 514 U.S. at 200; *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988). All of these benefits were extended to JDJ in this case. Without water, electricity, telephone lines, roads, police protection and the other benefits of modern society, JDJ would have been unable to maintain a workforce in New

Mexico or to carry out the tasks it had undertaken to perform under its contract with Amtrak. For this reason, the fourth prong of the *Complete Auto* test is met.

(3) State Tax Deduction for Intrastate Transportation and Services in Interstate

Commerce. As its third argument, JDJ maintains that it is entitled to the deduction provided in NMSA 1978, § 7-9-56(A) and (B), which state:

A. Receipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property, including any special or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce under a single contract.

B. Receipts from handling, storage, drayage or packing of property or any other accessorial services on property, which property has moved or will move in interstate or foreign commerce, when such services are performed by a local agent for a carrier or by a carrier and when such services are performed under a single contract in relation to transportation services, may be deducted from gross receipts.

JDJ contends that it is performing a special or extra service reasonably necessary in connection with Amtrak's transportation of persons and property in interstate commerce under a single contract. The Department argues that the deduction provided in § 7-9-56(A) is limited to receipts from the actual transportation of persons and property and that JDJ's inspection, maintenance, and cleaning of Amtrak trains does not involve transportation.

New Mexico law supports the Department's position. In *Spillers v. Commissioner of Revenue*, 82 N.M. 41, 475 P.2d 41 (Ct. App.), *cert. denied*, 82 N.M. 81, 475 P.2d 778 (1970), Spillers Moving and Storage Company acted as a resident agent for Bekins Van Lines, an interstate carrier of household goods. Spillers received twenty percent of Bekins' transportation proceeds for "booking" or initiating orders for Bekins. The New Mexico Court of Appeals upheld the Department's imposition of gross receipts tax on Spillers' commissions and rejected

Spillers' claim to the deduction provided in § 7-9-56(A) (then codified at NMSA 1953, § 72-16A-14(I) (Supp. 1967)). The court acknowledged that "the receipts in question are transactions related to interstate commerce." *Id.*, 82 N.M. at 43, 475 P.2d at 43. The court nonetheless found that Spillers merely initiated the order for interstate transportation while Bekins was the entity that actually transported the goods:

The Commissioner contends that the language of the statute is not broad enough to permit deduction of receipts not resulting from act or acts of actual transportation. We agree with this interpretation.

Id., 82 N.M. at 45, 475 P.2d at 45. Here, as in *Spillers*, JDJ's services are related to interstate commerce. Those services do not, however, involve the act of transportation. Instead, JDJ performs services that allow *Amtrak* to transport persons and property both within and without New Mexico. While JDJ's services may be necessary to *Amtrak*'s operations—just as Spillers' services were necessary to Bekins' operations—those services do not come within the deduction provided in § 7-9-56(A) for "[r]eceipts from transporting persons or property from one point to another in this state...." *See also, McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601, 592 P.2d 515, 517 (Ct. App. 1979) (to deduct receipts under § 7-9-56(A), *the receipts must be from transporting persons from one point to another in New Mexico*; the transportation must have been in interstate commerce; and the transportation must have been under a single contract (emphasis added)).

Nor does JDJ qualify for the deduction in § 7-9-56(B). That deduction applies to receipts from "handling, storage, drayage or packing of property or any other accessorial services on property" which moved or will move in interstate commerce. JDJ's services are performed on *Amtrak*'s rail cars and not on the property moved by those cars. JDJ does not handle, store, pack

or have any other contact with the freight moved by Amtrak trains. Accordingly, the deduction in §7-9-56(B) is not applicable to JDJ's receipts.

(4) JDJ's Reliance on the Representations of Amtrak. Finally, JDJ argues that it was entitled to rely on Amtrak's representations that JDJ's services were exempt from tax. This argument is based on a misreading of the tax clauses in Amtrak's standard contract documents.

Paragraph 10 of Amtrak's Request for Proposal provides:

10. TAX EXEMPTION

Pursuant to 49 U.S.C. § 24301(l), Amtrak is exempt, to the same extent that the United States Government is exempt, from all state and local taxes, surcharges or fees. The prices or rates stated in Offeror's Price Proposal should not include any state or local taxes, surcharges or fees on Amtrak in connection with this transaction and should include all other applicable taxes for which Offeror is liable. (Emphasis in the original.)

Similar language appears in Paragraph 16 of Amtrak's Services Contract:

16. TAXES. Pursuant to 49 U.S.C. § 24301(l), Amtrak is exempt, to the same extent that the United States Government is exempt, from all state and local taxes, surcharges or fees. Contractor agrees that the prices or rates stated in the Contract (1) do not include any state or local taxes, surcharges or fees on Amtrak in connection with this transaction, and (2) do include all other applicable taxes for which Contractor is liable.

Both of these documents state that Amtrak is exempt from state and local taxes. They do not state that JDJ is exempt from tax or that JDJ is prohibited from recovering the cost of its gross receipts tax liability from Amtrak. JDJ's tax problem arose because it assumed—without first consulting a qualified tax advisor—that New Mexico law is similar to that of other states and imposes a sales tax on the buyer, rather than a gross receipts tax on the seller. A taxpayer's erroneous assumptions concerning the law does not constitute a defense to the taxpayer's liability for taxes due to the state.

JDJ also argues that it was entitled to rely on the “Exemption Certificate” it received from Amtrak in May 2006. There are two problems with this argument:

First, the certificate was not issued by or in a form approved by the Department. *See*, NMSA 1978, § 7-9-43(A) (nontaxable transaction certificates shall contain the information and be in a form prescribed by the department); Regulation 3.2.201.8(D) NMAC (an NTTC is valid only if it contains the information and is in a form prescribed by the department); *Proficient Food Company 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) (affirming Department's refusal to honor an NTTC that was not in official form).

Second, there is no deduction or exemption applicable to JDJ's receipts from performing services for Amtrak. As a result, Amtrak's exemption certificate is meaningless. *See*, *Arco Materials, Inc. v. State, Taxation & Revenue Department*, 118 N.M. 12, 878 P.2d 330 (Ct. App.) (taxpayers have a continuing duty to insure that the NTTC is of the type needed to cover the transaction at issue), *rev'd on other grounds*, 118 N.M. 647, 884 P.2d 803 (1994); *Gas Co. v. O'Cheskey*, 94 N.M. 630, 632, 614 P.2d 547, 549 (Ct. App. 1980) (issuance of NTTC does not transform an otherwise taxable transaction into a nontaxable one); *McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601-602, 592 P.2d 515, 517-518 (Ct. App. 1979) (because there was no NTTC applicable to the transaction at issue, Department's refusal to approve a deduction based on taxpayer's acceptance of an NTTC was not error).

As noted above, JDJ's failure to pay New Mexico gross receipts tax is attributable to its failure to seek the advice of a qualified tax professional at the time it began doing business in the state. When it registered with the Department, JDJ received information concerning the different

types of NTTCs the Department issues and an explanation as to their proper use. After reviewing this information, Kathyleen Orazio asked Amtrak's purchasing manager for a nontaxable transaction certificate but was told that the manager was not aware of such tax certificates. This should have put JDJ on notice that there might be an issue as to its liability for gross receipts tax. Instead of attempting to clarify the issue by consulting with an accountant or an attorney or contacting the Department, JDJ simply went ahead and excluded its receipts from the CRS returns it filed with the Department.

Two years later, after receiving the Department's audit notice, Ms. Orazio again contacted Amtrak to ask for a tax certificate. A new purchasing manager provided JDJ with a typed "Exemption Certificate" which stated that Amtrak "certifies that the purchased/ leased property or service listed below is exempt from New Mexico sales/use tax under the provisions of Public Law 103-272 (49 U.S.C. § 24301)." Ms. Orazio had no discussions with Amtrak's purchasing manager concerning the certificate and made no effort to determine whether it met the requirements of New Mexico law.

New Mexico has a self-reporting tax system, and taxpayers have a statutory obligation to determine their tax liabilities and accurately report those liabilities to the state. NMSA 1978, § 7-1-13; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct.App.1976). A taxpayer is not entitled to rely on the representations of its customer as a substitute for conducting its own investigation of the state's tax laws. The New Mexico Court of Appeals has held that such reliance will not even support an abatement of the negligence penalty, much less a taxpayer's liability for tax principal. *See, Grogan, supra*, 2003-NMCA-033, ¶ 35 (cigarette manufacturers on whom taxpayer relied were not tax experts; to avoid negligence

penalty, taxpayer must demonstrate that she reasonably attempted to ascertain whether her actions were justifiable under the tax statutes and regulations). The taxpayer in this case is JDJ—not Amtrak—and it was JDJ’s obligation to insure that its tax liabilities were properly reported and paid to the state.

CONCLUSIONS OF LAW

A. JDJ filed a timely, written protest to the assessment of gross receipts tax issued under Letter ID No. L1008028416, and jurisdiction lies over the parties and the subject matter of this protest.

B. JDJ is an independent contractor performing services for Amtrak; JDJ is not Amtrak, a rail carrier subsidiary of Amtrak, or a passenger or other customer of Amtrak, and is not entitled to claim the exemption provided in § 24301(1).

C. Imposition of New Mexico gross receipts tax on JDJ’s receipts from performing services in New Mexico does not violate the Commerce Clause of the United States Constitution.

D. JDJ’s receipts are not receipts from transporting persons or property from one point to another in this state, and JDJ is not entitled to the deduction provided in NMSA 1978, § 7-9-56(A).

E. JDJ performs services on Amtrak’s rail cars; JDJ does not handle, store, pack or perform services on the property moved by those cars and is not entitled to the deduction provided in NMSA 1978, § 7-9-56(B).

F. JDJ’s reliance on the representations of Amtrak does not excuse JDJ from liability for gross receipts tax on its receipts from performing services in New Mexico.

For the foregoing reasons, JDJ Services, Inc.'s protest to the assessment of gross receipts tax, interest, and penalty issued under Letter ID No. L1008028416 is denied.

DATED August 15, 2007.