

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

**IN THE MATTER OF THE PROTEST OF  
CUMBERLAND THERAPY SERVICES  
ID NO. 02-475331-00-9  
TO ASSESSMENT ISSUED UNDER  
LETTER ID NO. L0674253056**

**No. 08-04**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on July 22, 2008, before Monica Ontiveros, Chief Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Amy Chavez, Special Assistant Attorney General. Cumberland Therapy Services, Inc. (“Cumberland”) was represented by its representative, Henry Ricci. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Cumberland provides professional therapy services for schools in the areas of psychology, social work therapy, occupational therapy, physical therapy, and speech and language therapy. Exhibit M, pages GN1 and B11.
2. Cumberland’s principal office is located at 4130 Quakerbridge Rd., Lawrenceville, New Jersey 08648. Exhibit B11.
3. Cumberland provided professional therapy services to five New Mexico school districts. Those school districts were Roswell, Tucumcari, Moriarty, Clovis and Albuquerque. Exhibit M, page GN1.
4. The Department conducted a thorough audit of Cumberland on

September 19, 2005 for the audit period July 1, 2001 through June 30, 2005. Exhibit M, page GN1.

5. The audit was completed on December 21, 2005. Exhibit M, page GN1.

6. The Department determined that Cumberland improperly took deductions for professional therapy services by deducting its receipts from each of the five New Mexico school districts. Exhibit M.

7. On May 5, 2006, the Department assessed Cumberland in the amount of \$102,703.57 in gross receipts tax principal and \$1,804.36 in withholding taxes. (These amounts do not include interest.) Exhibit N.

8. The Department did not assess penalty on the gross receipts taxes. Exhibit N.

9. On May 5, 2006, the Department assessed interest on the gross receipts taxes in the amount of \$28,954.91. Exhibit N. The amount of interest accrued through the date of the hearing is set forth in Exhibit O.

10. On June 13, 2006, the Department advised Cumberland, through its attorney of record, in Letter ID: L0788326656 that "interest on any amount of tax determined to be due at the conclusion of your protest will continue to accrue at a rate of .041% per day until such liability has been paid." The letter also states that "(y)ou may make payment on a protested assessment to stop the accrual of interest and penalty." Exhibit Q.

11. On October 20, 2005, Cumberland paid the principal amount of the withholding tax due of \$1,804.36. Exhibit M, page B3.1.

12. On June 2, 2006, Cumberland protested the assessment of gross receipts

taxes. Exhibit P.

13. The grounds set out by Cumberland for the protest are that Henry Ricci, a certified public accountant, had researched New Mexico law and had determined that the gross receipts were deductible. Mr. Ricci requested and received Nontaxable Transaction Certificates (“NTTCs”), Type 9s based on his research into New Mexico law. Exhibit P.

14. Cumberland entered into a contract with the Albuquerque Public Schools Special Education Department (“Albuquerque Public Schools”) whereby the Albuquerque Public Schools contracted to pay Cumberland a per hour rate for therapy plus “New Mexico Gross Receipts Tax.” Exhibit R, pages 2-5.

15. Cumberland entered into a contract with the Tucumcari Public Schools whereby the Tucumcari Public Schools contracted to pay Cumberland a per hour rate for therapy services. Exhibit R, page 6.

16. The Roswell Board of Education executed a Type 9 NTTC to Cumberland on December 9, 2005. Exhibit R, pages 13-14.

17. The Moriarity Municipal Schools executed a Type 9 NTTC to Cumberland on September 19, 2001. Exhibit R, pages 11-12.

18. The Clovis Municipal Schools executed a Type 9 NTTC to Cumberland on October 11, 2005. Exhibit R, pages 7-8.

19. The Tucumcari Public Schools executed a Type 9 NTTC to Cumberland on October 11, 2005. Exhibit R, page 15.

20. The Albuquerque Public Schools executed a Type 9 NTTC to Cumberland in November 2005. Exhibit R, pages 9-10.

21. The NTTCs executed to Cumberland had an instruction side on the back side. The instruction side clearly states that a Type 9 NTTC certificate may be issued by GOVERNMENTAL AGENCIES and 501(c)(3) ORGANIZATIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY. (The language varies on some of the NTTCS, but it has essentially the same meaning.) Exhibit R, pages 8, 10, 12 and 14; and Exhibit S1, page 2.

22. The Department mailed CRS-1 Filer's Kits to Cumberland.

23. The CRS-1 Filer's Kit for July through December 2001 defines gross receipts as "the total amount of money or other consideration received from selling property in New Mexico, leasing property employed in New Mexico, performing services in New Mexico..." Exhibit T.

24. The CRS-1 Filer's Kit for July through December 2001 cites to a State of New Mexico web page if further information is needed regarding gross receipts taxes. The Filer's Kit also states that the "...instructions are intended to provide general guidance and do not address all specific circumstances, they are not binding on the Department. If you have any questions regarding your particular situation please contact the department's district tax offices or the Santa Fe headquarters." Exhibit T.

25. The CRS-1 Filer's Kit for July through December 2001 describes what a deduction is and describes under what circumstances a deduction may be taken. Exhibit T.

26. The CRS-1 Filer's Kit for January through June 2002 refers the taxpayer to the local Taxation and Revenue Department Office if the taxpayer has any questions. The Kit also lists the Department's mailing address and lists telephone numbers for

technical help. The Kit also lists a series of free publications including, SALES TO GOVERNMENT AGENCIES (FYI-240) and cites to the Department's website if additional information is needed. Included within the Kit is an Application For NONTAXABLE TRANSACTION CERTIFICATES which states that Type 9 NTTCs may be executed by "GOVERNMENTAL AGENCIES, 501(c)(3) ORGANIZATIONS or FEDERALLY or STATE-CHARTERED CREDIT UNIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY." Exhibit U.

27. The CRS-1 Filer's Kit for July through December 2002 describes what a governmental deduction is and describes under what circumstances this deduction may be taken. Exhibit V. It also provides additional contact information if the taxpayer has any technical questions. Exhibit V.

28. The CRS-1 Filer's Kit for July through December 2002 defines gross receipts as "the total amount of money or other consideration received from selling property in New Mexico, leasing property employed in New Mexico, performing services in New Mexico..." Exhibit V.

29. The CRS-1 Filer's Kit for January through June 2003 refers the taxpayer to the local Taxation and Revenue Department Office if the taxpayer has any questions. The Kit also lists the Department's mailing address and lists telephone numbers for technical help. The Kit also lists a series of free publications including, SALES TO GOVERNMENT AGENCIES (FYI-240) and cites to the Department's website if additional information is needed. Included within the Kit is an Application For NONTAXABLE TRANSACTION CERTIFICATES which states that Type 9 NTTCs may be executed by "GOVERNMENTAL AGENCIES, 501(c)(3) ORGANIZATIONS or

FEDERALLY or STATE-CHARTERED CREDIT UNIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY.” Exhibit W.

30. The CRS-1 Filer’s Kit for July through December 2003 refers the taxpayer to the local Taxation and Revenue Department Office if the taxpayer has any technical questions. The Kit also lists the Department’s mailing address and lists telephone numbers for technical help. It also lists a series of free publications including, SALES TO GOVERNMENT AGENCIES (FYI-240) and cites to the Department’s website if additional information is needed. Included within the Kit is an Application For NONTAXABLE TRANSACTION CERTIFICATES which states that Type 9 NTTCs may be executed by “GOVERNMENTAL AGENCIES, 501(c)(3) ORGANIZATIONS or FEDERALLY or STATE-CHARTERED CREDIT UNIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY.” Exhibit X.

31. The CRS-1 Filer’s Kit for January through June 2004 refers the taxpayer to the local Taxation and Revenue Department Office if the taxpayer has any technical questions. The Kit also lists the Department’s mailing address and lists telephone numbers for technical help. It also lists a series of free publications including, SALES TO GOVERNMENT AGENCIES (FYI-240) and cites to the Department’s website if additional information is needed. Included within the Kit is an Application For NONTAXABLE TRANSACTION CERTIFICATES which states that Type 9 NTTCs may be executed by “GOVERNMENTAL AGENCIES, 501(c)(3) ORGANIZATIONS or FEDERALLY or STATE-CHARTERED CREDIT UNIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY.” Exhibit Y.

32. The CRS-1 Filer’s Kit for July through December 2004 refers the taxpayer

to the local Taxation and Revenue Department Office if the taxpayer has any technical questions. The Kit also lists the Department's mailing address and lists telephone numbers for technical help. It also lists a series of free publications including, How to Contact the Department (B-100.1) and SALES TO GOVERNMENT AGENCIES (FYI-240), and cites to the Department's website if additional information is needed. Included within the Kit is an Application For a Nontaxable Transaction Certificate, which states on the reverse side that a Type 9 NTTC may be executed for the purchase of tangible personal property only and may not be used for the purchase of services, for the lease of property or to purchase construction materials. Exhibit Z.

33. The CRS-1Filer's Kit for January through June 2005 refers the taxpayer to the local Taxation and Revenue Department Office if the taxpayer has any technical questions. The Kit also lists the Department's mailing address and lists telephone numbers for technical help. The Kit also lists a series of free publications including, How to Contact the Department (B-100.1) and SALES TO GOVERNMENT AGENCIES (FYI-240) and cites to the Department's website if additional information is needed. Included within the Kit is an Application For Nontaxable Transaction Certificates, which states on the reverse side that a Type 9 NTTC may be executed for the purchase of tangible personal property only and may not be used for the purchase of services, for the lease of property or to purchase construction materials. Exhibit AA.

34. Mr. Ricci argues on behalf of Cumberland that he accepted the Type 9 NTTCs in good faith which should be sufficient to claim the deductions set forth in NMSA 1978, Section 7-9-54 (2003).

35. Mr. Ricci did not dispute that Cumberland sold professional therapy

services and that these services were not tangible personal property.

## **DISCUSSION**

The issue to be decided is whether Cumberland is liable for the gross receipts tax assessed on its receipts from providing professional therapy services to five New Mexico school districts, (Roswell, Tucumcari, Moriarty, Clovis and Albuquerque) during the period of July 1, 2001 through June 30, 2005. Cumberland raises two arguments in support of its protest: (1) that Cumberland accepted the NTTCs it received from the five New Mexico school districts in good faith and is entitled to claim a deduction under NMSA 1978, §7-9-54 (2003), which states that receipts from selling tangible personal property to the United States or New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof may be deducted from gross receipts; and (2) that Mr. Ricci's research into New Mexico law indicated that the receipts were deductible.

**Burden of Proof.** There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, §7-1-17(C) (2007); *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 (2002); *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 the taxpayer's burden to come forward with evidence or legal argument to show that it is entitled to the deductions claimed and that the Department's assessment is incorrect.

**Sale of Tangible Personal Property to Governments.** Section 7-9-54 provides a deduction for receipts from selling tangible personal property to "the United States or New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof..." NMSA 1978, §7-9-54(A) (2003). Mr. Ricci did not dispute that the professional therapy services Cumberland sold to the five New Mexico school districts were "services" and not "property" as defined respectively by the NMSA 1978, Sections 7-9-3(M) and (J). Therefore, the deduction provided in Section 7-9-54 does not apply to Cumberland.

**Taxpayer's Acceptance of NTTCs.** Mr. Ricci maintains that Cumberland accepted the Type 9 NTTCs in good faith and that this should suffice. Section 7-9-43 does give a safe harbor to sellers who accept an NTTC in good faith that the buyer "will employ the property or service transferred in a nontaxable manner." NMSA 1978, §7-9-43(A) (2005). The purpose of this provision is to protect a seller who has no way of verifying whether a customer's subsequent use of goods or services purchased with a valid NTTC complies with the requirements of that certificate. For example, a tool manufacturer is entitled to accept a Type 2 NTTC (sale of tangible personal property for resale) from a hardware store in good faith that the hardware store will use the tools in a nontaxable manner, *i.e.*, will resell the tools in the ordinary course of business. The seller is not required to check on its customer during the following months to be sure the

tools were actually resold.

A different scenario is presented, however, when the NTTC tendered by the customer does not apply to the transaction at issue. New Mexico law provides that taxpayers have a continuing duty to assess the validity of deductions taken in reliance on NTTCs. *Arco Materials, Inc. v. New Mexico Taxation and Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App.) (because Type 9 NTTCs no longer applied to the sale of construction materials to government agencies, they could not be used to support the deductions claimed, “regardless of what the NTTCs represented on their face”), *rev’d on other grounds*, 118 N.M. 647, 884 P.2d 803 (1994); *See also*, Department Regulation 3.2.201.14(A) NMAC (2001). Unless the NTTC covers the transaction at issue, the seller is not entitled to a deduction. *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).

In this case, Cumberland would have received the CRS-1 Filer’s Kit. The Kits that were introduced into the record are replete with information related to the deductions that are allowed. In addition, the Kits provide telephone numbers, the Department’s website addresses, and citations to the Department’s regulations. Mr. Ricci did not avail himself of the information provided to him within the Kits nor did he take the time to call the Department to ascertain whether the deductions were

allowable.

Mr. Ricci testified that he was a licensed CPA and had access to the Department's regulations. One regulation in particular would have clarified any questions he might have had regarding whether the receipts in question were deductible. In the example found under regulation 3.2.212.9(B) NMAC (2001), the city contracted with a temporary agency to provide services to a governmental agency. The deduction was disallowed because the temporary agency provided services and not tangible personal property. This regulation was available to Mr. Ricci and if Mr. Ricci was unsure of its applicability to the receipts in question, he should have contacted the Department. Because New Mexico law does not provide a deduction for receipts from the sale of services to governments, these deductions were properly disallowed.

#### **Interest Due on the Unpaid Principal.**

Section 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

NMSA 1978, §7-1-67(A) (2007). The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. See, NMSA 1978, § 7-1-13(E)

(2007).

Interest must be assessed on tax that is due, and continues to accrue until the principal amount of tax is paid. In the acknowledgment letter of June 2006 from the Department to Cumberland, the Department notified Cumberland that interest would continue to accrue on any unpaid balances of principal. See Exhibit Q. The letter also informed Cumberland that it could pay the principal to stop the accrual of interest. Exhibit Q. Mr. Ricci, certainly, had sufficient notice that interest would continue to accrue on any unpaid principal tax due. Because the receipts are not deductible, the interest on the tax is also due and owing.

#### **CONCLUSIONS OF LAW**

A. Cumberland filed a timely, written protest to Assessment issued under Letter ID NO. L0674253056, and jurisdiction lies over the parties and the subject matter of this protest.

B. There is no deduction applicable to receipts from selling services to New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof, and Cumberland cannot deduct these receipts based on the Type 9 NTTCS provided by its customers.

C. Cumberland underreported its gross receipts and owes the principal amount of tax as set forth in the Assessment issued under Letter ID NO. L0674253056 in the amount of \$102,703.57.

D. Interest was properly assessed against Cumberland pursuant to NMSA 1978, § 7-1-67 (2007) and continues to accrue on any unpaid balances until the principal is paid in full.

E. Cumberland owes the interest due and owing on the principal amount of tax.

F. For the foregoing reasons, Cumberland's protest IS DENIED.

Dated November 19, 2008.