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

IN THE MATTER OF THE PROTEST OF
LORANGER CONSTRUCTION, **No. 11-07**
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0596200832 and L0809774464

DECISION AND ORDER

A formal hearing on the above-referenced protest was held February 10, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Peter Breen, Special Assistant Attorney General. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Ms. Lewana Clark and Ms. Cathleen Rooney appeared as translators for Mr. Dillon. Mr. Camille Loranger and Mr. Rene Loranger appeared on behalf of Loranger Construction ("Taxpayer"). The Hearing Officer took notice of all documents in the administrative file. Taxpayer #1 was admitted at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was engaged in business in New Mexico in 2005 and 2006.
2. Taxpayer was providing services on installations to other companies, which resold those services to its customers.
3. Taxpayer was not reporting the proceeds of those services as part of its gross receipts.
4. The Department determined that there was a mismatch between Taxpayer's gross receipts reports and its federal Schedule C for the 2005 and 2006 tax periods, which was discovered through the tape match program.

5. On December 9, 2008, the Department assessed the Taxpayer for gross receipts tax in the amount of $2,319.00 in principal, $463.80 in penalty, and $886.22 in interest for the tax period ending on December 31, 2005.

6. On December 9, 2008, the Department assessed the Taxpayer for gross receipts tax in the amount of $6,988.88 in principal, $1,397.78 in penalty, and $1,622.71 in interest for the tax period ending on December 31, 2006.

7. On January 6, 2009, Taxpayer filed a formal protest letter regarding both assessments.

8. On October 4, 2010, the Department filed a Request for Hearing asking that the Taxpayer's protests be scheduled for a formal administrative hearing.

9. The Department acknowledged that Taxpayer obtained valid non-taxable transaction certificates (NTTCs) for the tax period ending December 2005 within the 60-day deadline. Therefore, the assessment issued under L0596200832 was abated in full.

10. The Department acknowledged that Taxpayer obtained some valid NTTCs for the tax period ending December 2006 within the 60-day deadline. The NTTCs obtained for the 2006 period only covered part of the transactions that were assessed. Therefore, the assessment issued under L0809774464 was abated in part, with $5,320.86 of gross receipts tax still outstanding from transactions with another business.

11. Taxpayer argues that he attempted to obtain the correct NTTC from the other business within the deadline, and that he did obtain the correct NTTC just a few days after the deadline.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the remaining gross receipts tax, penalty, and interest for the tax period ending in December 2006, due to the failure to obtain timely NTTCs related to the transactions.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is not liable for the tax and is entitled to an abatement of penalty and interest.

NTTCs.

A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2005). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due. *See* NMSA 1978, § 7-9-43. If the taxpayer is not in possession of NTTCs within sixty days of the notice from the Department requiring possession of NTTCs, "deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall* be disallowed." *Id.* (emphasis added). The word "shall" indicates that the disallowance of the deduction is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). It was

undisputed that Taxpayer was not in possession of the NTTC relating to the outstanding gross receipts tax assessment within the 60 days.

Taxpayer argued that the buyer was at fault because the buyer provided the wrong type of NTTC and did not provide the correct type until after the 60 days. Taxpayer also argued that it was unduly difficult to get the NTTC from the buyer because the buyer's business office is out of state. Taxpayer also argued that the buyer paid gross receipts on the transactions and that it was double taxation. Double taxation is not necessarily prohibited, and it is not considered double taxation when two separate entities are taxed on their own transactions. *See N.M. Sheriffs and Police Ass'n. v. Bureau of Revenue*, 85 N.M. 565, 567, 514 P.2d 616 (Ct. App. 1973). A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess an NTTC in the form and within the time prescribed by the Department is a valid reason to deny the deduction. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep't.*, 107 N.M. 392, 397, 758 P.2d 806 (Ct. App. 1988) (holding that the Department had properly denied the deduction when the taxpayer had not received the proper form from the buyer within the time limit).

Because Taxpayer was not in possession of the proper NTTC within the time limits, the deduction was properly disallowed.

Assessment of Penalty.

A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). Therefore, the penalty was properly assessed.

Computation of Penalty.

On the assessment at issue in this matter, the Department seeks to impose a penalty of up to 20% under NMSA 1978, § 7-1-69 (2008). The assessment issued was for the 2006 tax period. The applicable penalty statute in effect for the 2006 tax period was capped at a maximum penalty of 10%. *See* NMSA 1978, § 7-1-69 (2003). Since the Taxpayer protested the imposition of any penalty, and because the Taxpayer's Bill of Rights requires that an assessment not be incorrect, erroneous, or illegal, the accuracy of the computation of total penalty amount assessed is an issue for consideration in this protest. *See* NMSA 1978, Section 7-1-4.2 (2003). Even though a taxpayer may be liable for penalty, the taxpayer is not required to pay a miscalculated or an incorrect amount of penalty. *See id.*

At a maximum penalty not to exceed 10%, the penalty provision had been exhausted for the 2006 tax period before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Mr. Dillon testified that the Department had assessed a 20% cap because of the 2008 amendment. Since the amended penalty provision would apply a new disability against a past transaction, a transaction that had already reached its maximum disability under the previous penalty provision, to apply the amended penalty provision in this situation would be a retroactive application. *See Wood v. State Educ. Ret. Bd.*, 2010 N.M. App. LEXIS 134 (N.M. Ct. App. Nov. 10, 2010), citing *Coleman v. United Eng'rs & Constructors, Inc.*, 118 N.M. 47, 52, 878 P.2d 996, 1001 (1994) (indicating that a statute or regulation is considered retroactive if it applies new disabilities to past transactions). A statute may only be applied retroactively if there is a clear, unambiguous legislative intent to do so. *See Psomas v. Psomas*, 99 N.M. 606, 609, 661 P.2d 884, 887 (1982). Absent such clear intent for a retroactive application, a statute only applies prospectively. *See id.* As there was no evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for the 2006 tax period was subject to a penalty "not to

exceed" 10% pursuant to NMSA 1978, Section 7-1-69 (2003) because that was the provision in effect at the time the tax was due. *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (holding that a modified penalty regulation would not apply retroactively when the regulation was enacted after the applicable tax year).

Assessment of Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). Again, the word "shall" indicates that the provision is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L0596200832 and L0809774464, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer obtained timely NTTCs for the 2005 tax period, and the Department abated assessment under L0596200832 in full.

3. Taxpayer obtained timely NTTCs for a portion of the gross receipts from the 2006 tax period, and the tax from those transactions was abated.

4. Taxpayer failed to obtain NTTCs for the remaining portion of the gross receipts from the 2006 tax period within the 60-day deadline. *See* NMSA 1978, § 7-9-43.

5. Taxpayer was properly assessed for gross receipts principal of $5,320.86 and interest for the outstanding portion of the 2006 tax period.

6. The assessment of penalty for the 2006 tax period was appropriate. However, the computation of penalty was incorrect. Penalty is capped at an amount not to exceed 10% or $532.08. The amount of any penalty assessed in excess of the 10% cap is hereby abated.

For the foregoing reasons, the Taxpayer's protest **is GRANTED IN PART AND DENIED IN PART**.

DATED: March 14, 2011.