

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

**IN THE MATTER OF THE PROTEST OF
ADC LTD NM INC.
f/k/a CORDOVA SUPPORT SERVICES, INC.
TO ASSESSMENT ISSUED UNDER LETTER
ID NOs. L3988749 through L3988786**

No. 11-25

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 27, 2011, before Brian VanDenzen, Tax Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Staff Attorney for the Department. Ms. Silvia Sena also appeared as a witness on behalf of the Department. Attorney Marshall Anguiler represented ADC Ltd. NM Inc. ("Taxpayer"). Mr. Arthur Cordova and Brenda Cordova appeared as witnesses for the Taxpayer. Taxpayer's Exhibits #1, #3, and #5 are admitted into the record. Department's Exhibits A, C, D, and E are admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Sometime around 1987, Arthur Cordova Jr. started a small auditing and security firm as a sole proprietorship. This firm served as a contractor with the various National Laboratories in New Mexico.
2. Mr. Cordova's business was very successful and steadily grew. In 2000, Mr. Cordova's business incorporated in New Mexico as "Cordova Support Services." The corporation amended its name to "A.D.C. Ltd. NM Inc." ("Taxpayer") sometime thereafter.

3. Beginning in 1999, Taxpayer entered into a subcontractor agreement with Prime Support Team (“PSST”), which itself was a division of Comforce Corporation, to provide temporary security personnel and other clerical support personal to the WEC and WIPP project sites in or near Carlsbad, NM. [Taxpayer Exhibit #1]

4. The contract included a provision stating “WEC is exempt from New Mexico gross receipts Tax. A copy of the Nontaxable transaction Certificate shall be mailed to the subcontractor under separate cover.” [Taxpayer Exhibit #1, page 4 of 12]

5. The Department of Energy (“D.O.E.”) was ultimately the end user of the subcontractor services Taxpayer provided under the contract with PSST/Comforce. [Taxpayer Exhibit #5]

6. On July 24, 2002, the Department selected Taxpayer for an audit of tax periods January 1, 1999 through May 31, 2002. [Department Exhibit E]

7. During the audit period, Taxpayer’s controller was Elizabeth Lardizabal

8. On August 14, 2002, the Department notified Taxpayer in writing that it had 60-days, or until October 15, 2002, to obtain the appropriate nontaxable transaction certificates (“NTTC”) to support any claimed deductions. Taxpayer’s Ms. Larizabal received the 60-day letter. [Department Exhibit C]

9. In an effort to obtain an NTTC from PSST/Comforce, Ms. Larizabal apparently contacted Comforce. Comforce informed Taxpayer’s Ms. Larizabal via email that it believed it had produced a reseller certificate to Taxpayer. [Taxpayer Exhibit #7]

10. However, according to the list of NTTCs presented at the time of the audit, Taxpayer did not possess and/or provide the Department with any NTTCs related to the

subcontractor services it provided to PSST/Comforce and DOE by November 21, 2002.

[Department Exhibit C, C11]

11. During the audit, the Department allowed deductions related to the Taxpayer's Type 5 NTTC, but disallowed the Taxpayer's Type 6 and Type 7 NTTCs for construction services because security services and clerical support services are ancillary services not related to construction.

12. Based on the audit, on December 4, 2002, the Department assessed Taxpayer for unpaid gross receipts tax, compensating tax, withholding tax, and interest.

13. On December 19, 2002, Taxpayer filed a written protest to the assessment.

14. On February 7, 2003, the Department acknowledged Taxpayer's protest letter.

15. Sometime after the audit, assessment, and protest, Mr. Paul Worley replaced Ms. Elizabeth Larizabal as Taxpayer's controller.

16. There was no further attempted contact between the Department and Taxpayer until sometime in the spring of 2008, when the Department's Mike Baca made four attempts to contact Taxpayer over the telephone. The evidence is unclear whether Mr. Baca actually spoke with Taxpayer or Taxpayer's designated representative or simply left messages.

17. On June 16, 2010, the Department requested a hearing on Taxpayer's protest.

18. On July 1, 2010, the Hearing Bureau of the Department sent notice of hearing, scheduling an administrative protest hearing on December 1, 2010.

19. On November 23, 2010, the Hearing Bureau of the Department sent Amended Notice of Administrative Hearing, rescheduling the hearing for March 25, 2011, upon information and belief that an attorney was about to enter an appearance on behalf of Taxpayer and the attorney would need more time to prepare.

20. Consistent with the Hearing Bureau's information and belief about the entry of an attorney, seven days later on November 30, 2010 attorney Marshall C. Aungier formally entered his appearance on behalf of Taxpayer.

21. On March 17, 2011, Taxpayer moved to continue the scheduled March 25, 2011 hearing.

22. On March 17, 2011, Taxpayer's unopposed Request for Continuance was granted, and the hearing was rescheduled for September 27, 2011.

23. On September 16, 2011, Taxpayer filed a supplemental statement of protest grounds.

DISCUSSION

There are two issues in this protest: first, whether Taxpayer was required to have the requisite NTTCs for its claimed deduction within 60-days of the commencement of the Department audit; and second, whether the lengthy delay between Taxpayer's protest to the assessment and the Department's request for a formal protest hearing denied Taxpayer procedural due process, necessitating abatement of the assessment. In brief answer, Taxpayer failed to timely produce valid NTTCs within 60-days of commencement of audit, and Taxpayer did not suffer a due process violation by the Department's lengthy delay because Taxpayer suffered no prejudice from the delay.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, §7-1-17(C) (2007), the assessments issued in this case are presumed to be correct. Consequently, the Taxpayer has the burden to overcome the presumption and establish that he was entitled to claimed deductions during the audit period. *See Archuleta v.*

O'Cheskey, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). “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).

The Audit and NTTCs

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. Like at issue in the present protest, some claimed deductions to gross receipts tax require a taxpayer claiming the deduction to possess a nontaxable transaction certificate. *See* NMSA 1978, Section 7-9-43 (2001). NMSA 1978, §7-9-43 (A) (2001) articulates the requirements for obtaining NTTCs:

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. *See id.* 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 not relevant. 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). *id.*

In this protest, during the gross receipts reporting periods beginning January 1999 through May 2002, Taxpayer claimed numerous deductions from gross receipts tax based on NTTCs. On August 14, 2002, the Department notified Taxpayer that it had 60-days to obtain the relevant NTTCs supporting its claimed deductions, or those claimed deductions would be disallowed during the audit. While Taxpayer may have believed it was entitled to receive an NTTC from PSST/Comforce for the "personal services" it provided as a subcontractor (based on the contract admitted into the record as Taxpayer Exhibit #1, the email from Bruce Stephens of Comforce as Taxpayer Exhibit #3, and Taxpayer's own protest letter and testimony), Taxpayer failed to produce an NTTC supporting its claimed deduction by October 15, 2002, the 60-day NTTC deadline. Whether or not PSST/Comforce was contractually obligated to provide the NTTC to Taxpayer does not excuse Taxpayer's inability to produce and possess the relevant NTTC within the mandatory statutory deadline. Under the clear language of NMSA 1978, §7-9-43 (A) (2001), the Department had no choice but to disallow Taxpayer's claimed deduction.

Taxpayer argues in its protest letter that it should not be held liable for PSST/Comforce's error in suggesting that the project was tax free. However, under New Mexico's self-reporting tax system, every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *See 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 of the services, and it was the responsibility of the Taxpayer—not PSST/Comforce—to determine whether it had the documentation needed to support its claimed deductions. Taxpayer's inability to timely provide an NTTC, even if PSST/Comforce indicated to

Taxpayer that such document would be provided, does not satisfy the minimum requirements of the statute.

In addition to disallowing the claimed deduction where Taxpayer did not timely possess the NTTC, the Department also disallowed a Type 6 NTTC and a Type 7 NTTC that Taxpayer presented in support of additional claimed deductions. Type 6 and 7 NTTCs are appropriate for sellers of construction materials and construction services to buyers engaged in the construction business under NMSA 1978, Section 7-9-51 (2001) and NMSA 1978, Section 7-9-52 (2000). However, under regulation 3.2.210.8 NMAC (5/31/01), indirect services, like “accounting, architecture, engineering, drafting, bid depository services and plan room services are not construction services.”

Taxpayer was providing security and clerical support personnel to the WIPP construction project as a subcontractor with PSST/Comforce. These services do not qualify as a construction service, but as indirect support services akin to the non-qualifying listed services under regulation 3.2.210.8 NMAC (5/31/01). Consequently, the Department correctly disallowed Taxpayer’s claimed deduction under construction services.

Unnecessary Delay, Timeliness of Protest Hearing, and Due Process

Taxpayer’s main argument in this matter is that the delay between Taxpayer’s protest letter and the time of contact by the Department in 2010 and the protest hearing in 2011 deprived Taxpayer of procedural due process. Taxpayer did not hear from the Department after the Department acknowledgement of protest on February 7, 2003. Taxpayer argued that it assumed its protest letter resolved the issue in its favor. During the hearing, Taxpayer further argued it was prejudiced by the unnecessary delay because its controller, Mr. Paul Worley has since passed on,

making it more difficult to locate the missing NTTCs by the time of the hearing in 2011. Because of the Department's delay, Taxpayer argues that the assessment should be abated.

The Department offered no explanation in the delay between acknowledging the protest and requesting a hearing with the Department's Hearing Bureau. New Mexico courts have held that in administrative hearings under the Tax Administration Act, the general rule of tardiness still applies: the "tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests." *See Kmart Props., Inc. v. Taxation & Revenue Dep't*, 139 N.M. 177, 192, 131 P.3d 27, 42, 2006 NMCA 26, 54 (N.M. Ct. App. 2001); *See also Matter of Ranchers-Tufco Limestone Project*, 100 N.M. 632, 635, 674 P.2d 522, 525, 1983 N.M. App. LEXIS 788 (N.M. Ct. App. 1983). While it is true that 7 ½ years passed between Taxpayer's protest and the Department's request for hearing, Taxpayer is liable for taxes to the State after audit and assessment because collection of taxes is the enforcement of public right/interest. Therefore, despite the tardiness of its actions, the Department still had an obligation to enforce a public right or protect a public interest under the rationale of *Kmart Props., Inc.*

Even aside from this general rule of tardiness, one of the touchstone questions under a procedural due process analysis is what prejudice if any a party suffered as result of the unnecessary delay. *See In re Ranchers-Tufco Limestone Project Joint Venture* at 635, 525. In this protest, Taxpayer points to the death of Mr. Worley as the prejudice suffered in this matter. However, Ms. Lardizabal was Taxpayer's controller during the audit period, and accepted the Department's 60-day NTTC letter. Through Mr. Lardizabal, Taxpayer had an opportunity to produce the relevant NTTCs during the audit period. Even if the Mr. Worley could have assisted Taxpayer in finding and producing the relevant NTTCs for an earlier scheduled protest hearing, producing the NTTCs during the protest hearing would not have changed the outcome of the assessment because the

relevant NTTCs needed to be produced during the audit period by October 15, 2002. In other words, Taxpayer could not be prejudiced for the delay in this case because the failure to possess the NTTC had occurred long before the protest letter, the delay, and the protest hearing.

Moreover, since Mr. Worley was not Taxpayer's controller until after the audit period and after the issuance of the assessment, it can fairly be assumed he had no specialized knowledge of the facts surrounding the audit, the assessment, and the protest. The person with such specialized knowledge would have been Mr. Cordova, who testified, and Ms. Lardizabal. While Mr. Cordova mentioned that Ms. Lardizabal has since retired, Taxpayer still could have subpoenaed her as a witness in this proceeding, but did not do so. Since Mr. Worley was not the controller during the relevant period of time, and the production of NTTCs after the 60-day deadline would not extinguish Taxpayer's tax liability, his unfortunate death by the time of the protest hearing does not affect the legal or evidentiary questions surrounding this protest.

Finally, Taxpayer claims that he assumed his protest had been resolved based on the submission of his protest letter. This assumption was not reasonable given New Mexico's self-reporting tax regime, which places the responsibility on a taxpayer to determine their possible tax liabilities. *See Tiffany Construction Co.* At no point did Taxpayer receive any written notification that the Department was considering abatement based on its protest letter or that the assessment had been abated based on that protest letter. While Taxpayer did present evidence that the Department did not initiate any contact about the protest from 2003 until at least 2008 (the phone calls of Mr. Baca) if not 2010, Taxpayer did not present any evidence of steps it took to contact the Department to resolve the assessment and protest during that same period of time. Given that *Tiffany Construction Co.* places the responsibility on a taxpayer to determine their own tax liabilities, that same rationale made it incumbent upon this Taxpayer to also maintain contact with the Department,

even when the Department itself had not contacted Taxpayer, in an effort to resolve the protest of the contested assessments. While the unnecessary delay was regrettable, it did not materially alter the factual and legal analysis of this protest.

Assessment of Interest

Although Taxpayer made no arguments about the imposition of interest, there was testimony from the Department's Ms. Sena about Taxpayer's reluctance to withdraw the protest in light of the high amount of accumulated interest. Because of this testimony, the issue of interest merits a brief discussion.

When a taxpayer fails to make timely payment of taxes due to the state, "interest shall be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Section 7-1-67 (2001). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory regardless of the explanation provided by a taxpayer. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues.

Taxpayer was informed in the Department's February 7, 2003 acknowledgement of protest letter that interest would continue to accrue throughout the protest period, but that Taxpayer had the option to pay the assessment to stop accrual of further interest pending the outcome of the protest. Because no such payment was made, interest continued to accrue in accord with the statutory mandate.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to Assessment Nos. # L3988749 through L3988786, and jurisdiction lies over the parties and the subject matter of this protest.

B. Because Taxpayer did not possess the relevant NTTC at the time of the transaction or within 60-days of the NTTC letter as required by NMSA 1978, Section 7-9-43 (2001), Taxpayer is not entitled to a gross receipts tax deduction for receipts for contract services rendered to PSST/Comforce during tax years 1999 through 2003.

C. Taxpayer was not entitled to Type 6 and Type 7 NTTCs because under regulation 3.2.210.8 NMAC (5/31/01), Taxpayer was providing indirect support services rather than construction services.

D. Taxpayer was not prejudiced by the lengthy delay between Taxpayer's protest letter and the time of the Department's request for protest hearing.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. The Taxpayer is ordered to pay the assessments.

DATED: October 18, 2011.

BRIAN VANDENZEN
Hearing Officer
Taxation & Revenue Department
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