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

IN THE MATTER OF THE PROTEST OF
AMERICAN MEDICAL ALARMS, INC. **No. 12-15**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1727093120

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 15, 2011, before Monica Ontiveros, Hearing Officer. The final Memorandum in this matter was filed on January 4, 2012. The Taxation and Revenue Department ("Department") was represented by Ida M. Lujan, Esq., attorney for the Department. Ms. Sylvia Sena, protest auditor, appeared as a witness for the Department. American Medical Alarms, Inc. ("Taxpayer") appeared at the appointed time and was represented by counsel, Zachary L. McCormick, Esq. On October 19, 2011, Taxpayer filed a Motion to Permit Telephonic Testimony of its witness, Kirby Schall, President of American Medical Alarms, Inc. The Order was granted on October 20, 2011.

Prior to the hearing, the following pleadings were filed. On December 8, 2011, the parties filed Parties' Joint Stipulation of Facts. The Department filed Memorandum in Support of Department's Motion for Judgment on the Pleadings on December 9, 2011. Since a hearing was held in this matter, no Order on the Department's Motion for Judgment on the Pleadings was entered. Taxpayer submitted Prehearing Memorandum of Taxpayer American Medical Alarms, Inc. on December 9, 2011. On December 15, 2011, the Department filed Department's Response to Taxpayer's Prehearing Memorandum. After the hearing, Taxpayer was allowed to submit a response to the Department's Prehearing Hearing Memorandum by January 6, 2012. On January 4, 2012, Taxpayer filed Taxpayer's Reply to Department's Response to Taxpayer's

Prehearing Memorandum. The Exhibits introduced into the record are: Exhibits #A-K. The parties introduced some documents that were already part of the administrative file, e.g., the Notice of Assessment, the Request for Extension, and the Acknowledgment Letter. These documents are part of the administrative file and do not need to be introduced by the parties.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 3, 2008, the Department assessed Taxpayer in the gross receipts principal amount of $10,694.09, $2,127.08 in penalty and $4,438.71 in interest for tax years January 31, 2001 through December 31, 2007.

2. On July 29, 2008, Taxpayer requested an extension of time to file a protest.

3. The Department granted the extension of time to file a protest.

4. On September 28, 2008, the Department acknowledged the protest.

5. On July 15, 2011, the Department requested a hearing in this matter.

6. On July 27, 2011, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for December 15, 2011.

7. The Department conducted a desk audit of Taxpayer. The audit concluded on or about May 9, 2008. (Joint Stipulation of Fact #36).

8. The Department determined that Taxpayer had failed to report gross receipts in the amount of $213,880.53 for the tax period January 31, 2001 through December 31, 2007. (Joint Stipulation of Fact #37).

9. Taxpayer is an S corporation domiciled in Illinois. (Joint Stipulation of Fact #1).

10. Taxpayer sells medical alarm monitoring services and began selling its services in New Mexico in January 2000. (Joint Stipulation of Fact #3).

11. In January 2008, Taxpayer registered as a business with the Department and is currently filing and reporting its gross taxes on the medical alarm monitoring services it performs in New Mexico. (Joint Stipulation of Fact #3).

12. Taxpayer markets its medical alarm monitoring services in New Mexico. (Joint Stipulation of Fact #2).

13. Taxpayer asserts in its marketing literature that the "monitoring is provided 24 hours a day, 7 days a week, 365 days a year by an operator that is State certified and trained to respond specifically to medical alarms." Exhibit #D.8.

14. Taxpayer is among the "top five" medical alarm companies in the country according to AARP. (Joint Stipulation of Fact #4).

15. Taxpayer has no offices, employees, in-house or independent sales agents or representatives, stores, bank accounts, mailing addresses or any other "on the ground" presence in New Mexico. (Joint Stipulation of Fact #5).

16. The service provided by Taxpayer is to monitor the medical alarm equipment installed by Taxpayer in the New Mexico customer's residence. Exhibit #D.6-7 (Agreement)

17. Taxpayer charges a monthly fee for the monitoring of and the use of the alarm console and pendant or wristband transmitter. The monthly fee is also charged for responding to the emergency calls made by the New Mexico customer. The monthly fee for the use of the alarm console and pendant or wristband transmitter and for responding to the emergency call is $24.95 regardless of the number of telephone calls made by the New Mexico customer. (Joint Stipulations of Fact #6, #19, #23, #24).

18. The medical alarm equipment is comprised of an alarm console which connects to an existing operating landline telephone wall jack in the New Mexico customer's residence and a pendant or wristband transmitter, the customer's choice. (Joint Stipulation of Fact #6).

19. The alarm console is an acoustical computer that is specifically designed for the hearing impaired and has a back up battery to allow the alarm to continue working for up to 18 hours in the event of a power outage. (Joint Stipulation of Fact #7).

20. The medical alarm equipment is designed for emergency situations in which the New Mexico customer may press a button on the pendant or wristband transmitter to activate a medical alarm system.

21. Once the transmitter is activated, the alarm console sends a voice-to-voice communication that allows an operator at a call center to speak to a customer in New Mexico. When the call center receives the communication, it, then, calls the appropriate medical personnel in New Mexico to assist the New Mexico customer. (Joint Stipulation of Fact #8).

22. The call center is located in California. (Joint Stipulation of Fact #5).

23. The medical personnel are located in New Mexico.

24. Taxpayer retains ownership of the medical alarm equipment. (Joint Stipulation of Fact #10).

25. Taxpayer is responsible for repairing the medical alarm equipment. (Joint Stipulation of Fact #11).

26. Taxpayer passes on a 5% sales tax on the same monitoring services to Florida customers. (Joint Stipulation of Fact #11).

27. Taxpayer uses a standard agreement form for all of its New Mexico customers encompassing the same terms as listed in these Findings of Fact. Exhibit #D.6-D.8.

28. Taxpayer has a separate contractual agreement with the California call center. New Mexico customers do not contract with the California call center. Exhibits #G and #H.

DISCUSSION

The sole issue to be determined is whether the services provided by Taxpayer are performed in New Mexico or in California.

Burden of Proof and Standard of Review.

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. Accordingly, it is Taxpayer'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. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

Gross Receipts.

Generally speaking, services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in § 7-9-3.5(A)(1):

> (1) "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or services exchanged, "gross receipts" means the reasonable value of the property or services exchanged;"

NMSA 1978, Section 7-9-3.5(A) (1) (2003). The Gross Receipts and Compensating Tax Act, Sections 7-9-1 through 114 defines "service" as "all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as

distinguished from selling or leasing property. … In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not controlling." NMSA 1978, Section 7-9-3(M) (2007). The New Mexico Supreme Court in 1937 decided *Comer v. State Tax Comm'n,* 41 N.M. 403, 412, 69 P.2d 936, 941 (1937) in which it stated that gross receipts shall include "all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect."

The crux of this case rests on how to define the services being provided for consideration or "gain or benefit." [1] Taxpayer argues that because the call center in California is responding to the New Mexico customer's emergency calls, then the service is being performed in California. Taxpayer argues that it is the call center in California that is responding to the emergency calls and sending out the emergency personnel to assist the New Mexico customers, and not the Taxpayer. Taxpayer is correct in describing the role of the California call center. However, Taxpayer's argument fails insofar as the receipts at issue are the receipts of Taxpayer and not of the California call center. The California call center and Taxpayer are two separate entities. This is acknowledged in the contract between Taxpayer and the California call center. Exhibits #G and #H.

The California call center contracts with Taxpayer and Taxpayer contracts with its New Mexico customers to provide monitoring services to the New Mexico customers. Taxpayer is reselling the California call center services and adds its own services to the package that it sells to the New Mexico customer. The California call center cannot sell its services to the New

[1] An argument may have been made that the services performed by Taxpayer are similar to "telephone" services since the telephone jack is accessed to send the transmission from the New Mexico customer through the telephone lines. If the receipts terminate or originate in New Mexico, then those telephone services are taxable. See Regulation 3.2.1.18 NMAC (2003).

Mexico customers because there would be no point to the services since there would be no medical alarm equipment to respond to.

Taxpayer markets its medical alarm monitoring services in New Mexico and clearly states that the services are being provided in New Mexico. Taxpayer markets itself to New Mexico customers as among the "top five" medical alarm companies in the country according to AARP. (Joint Stipulation of Fact #4). Taxpayer asserts in its marketing literature that the "monitoring is provided 24 hours a day, 7 days a week, 365 days a year by operator that are State certified and trained to respond specifically to medical alarms" in the New Mexico customers' residence. Exhibit #D.8. Taxpayer states in "Our Commitment to Our Customer Features", "(y)our medical alert transmitter is designed to work ANYWHERE within your home and will even work two to three hundred feet outside your home." Exhibit #D.8. The service that is taxable as gross receipts is the service of "peace of mind that you or someone you love can get help from anywhere in their home with just a push of a button." Exhibit #D.11.

The monitoring of the medical alarm system is occurring at the point of where the alarm console and the wristband or pendant are located or where the customer is located. If the customer is located in New Mexico then the service is being performed in New Mexico. The fee that is being charged to the New Mexico customer by Taxpayer is for the monitoring of and the use of the console and pendant or wristband transmitter. The form Agreement used by Taxpayer provides that the service provided by Taxpayer is to monitor the medical alarm equipment installed by Taxpayer in the New Mexico customer's home. Exhibit #D.6-7. These monitoring services are different and distinct from the call center services. It seems irrelevant for these purposes of where the call center is located. In fact, Taxpayer's redundancy call center is located in Texas.

Taxpayer's argument rests on its parsing or separating each part of the service. However, Taxpayer admits that the medical alarm monitoring system cannot operate without the alarm console that connects to an existing operating landline telephone wall jack in the New Mexico customer's residence. (Joint Stipulation of Fact #6). It admits that that sole purpose of the medical alarm equipment is to provide a response system for New Mexico customers who have an emergency situation. To get assistance, the New Mexico customer has to press a button on the pendant or wristband transmitter to activate a medical alarm system. If the button is pressed, a voice-to-voice communication allows an operator at a call center to speak to a customer in New Mexico. When the call center receives the communication, it, then, calls the appropriate medical personnel to assist the New Mexico customer. (Joint Stipulation of Fact #8). It is the activation of the transmitter, the voice-to-voice communication along with the dispatching of medical personnel that is the service that is being provided by Taxpayer in New Mexico.

The consideration or "gain or benefit" at issue is also an indication of where the services are being provided. Taxpayer is charging a monthly fee to respond to the emergency calls made by the New Mexico customer and dispatch the appropriate medical personnel. Taxpayer concedes in its Prehearing Memorandum of Taxpayer American Medical Alarms, Inc., that the service for which it receives payment of $24.95 per month is for services rendered for monitoring the medical alarm equipment installed in the New Mexico customer's residence. The monthly fee for the use of the console and pendant or wristband transmitter and for responding to the emergency call is $24.95 regardless of the number of telephone calls made by the New Mexico customer. (Joint Stipulations of Fact #6, #19, #23, #24). The consideration or "gain or benefit" is incurred and paid in New Mexico.

The liability to Taxpayer for not responding to calls in a manner agreed to in the Agreement is also incurred in New Mexico. In fact, Taxpayer assumes the liability for any calls that are not properly responded to by the call center. Under the terms of the Agreement, Taxpayer agrees that if the medical alarm equipment does not operate properly it is liable to the New Mexico customer in an amount not to exceed $250.00. Exhibit # D.6 and D.7. Taxpayer receives compensation or receipts for the monitoring of the medical alarm equipment to its New Mexico customers. It is these receipts that are taxable in New Mexico as gross receipts.

All of these facts provide ample evidence that the monitoring that is occurring is occurring within the State of New Mexico and not within the State of California. The monitoring of the medical alarm equipment and the responding to the calls of the New Mexico customer and location of the equipment determines where the service is being performed, despite the call center being located in California. The service is comprised of two parts that are inextricably linked because to separate out the parts would render the service meaningless to the New Mexico customer. The parts or components of the service are the monitoring of the medical alarm equipment and responding to the emergency calls from the New Mexico customer. In fact, the Agreement between the New Mexico customers and Taxpayer contemplates that the New Mexico customer has an alternative to its services and the alternative is calling 911. Exhibit #D.6, paragraph 2.

If there was no medical alarm equipment located in New Mexico or if there was no New Mexico customer with the equipment installed in their homes, there would be no monitoring service. It is the monitoring of the New Mexico customers' medical alarm equipment provided by Taxpayer and the calling of a response team that is the service being provided by Taxpayer.

Taxpayer argues that the exemption stated in NMSA 1978, Section 7-9-13.1 (1989), which provides that the services performed outside of New Mexico, the product of which is initially used in New Mexico, are exempt from taxation. This argument fails because Taxpayer is a separate legal entity from the California call center and the California call center's receipts are not at issue. This argument fails since the product, the medical alarm equipment, is always used in New Mexico and was never initially used in New Mexico.

Taxpayer also argues that it does not have nexus with the State of New Mexico because it has no offices, employees, in-house or independent sales agents or representatives, stores, bank accounts, mailing addresses or any other "on the ground" presence in New Mexico. (Joint Stipulation of Fact #5). However, Taxpayer retains ownership of the medical alarm equipment. (Joint Stipulation of Fact #10). Taxpayer is also responsible for repairing the medical alarm equipment in New Mexico. (Joint Stipulation of Fact #11). Since Taxpayer is responsible for the monitoring, maintenance and care of the medical alarm equipment, there is sufficient nexus. *See, Tyler Pipe Industries v. Washington,* 483 U.S. 232 (1987) (in-state independent consultant's activities sufficient to establish nexus)*; Scripto* v. Carson, 362 U.S. 207 (1960) (independent salesmen in the state soliciting orders for taxpayer constituted 'physical presence).

Taxpayer argues that a 10% percent penalty amount should apply to the assessment. The Court of Appeals has ruled that the 20% percent penalty amount may be imposed if the date of assessment is post January 1, 2008. *See GEA Integrated Cooling v. New Mexico Taxation and Revenue Dept,* 2012-NMCA-010. Therefore, the Department may impose a penalty of 20% percent. The Notice of Assessment was issued post January 2008.

No testimony or evidence was offered regarding whether there were any indications of nonnelglince. Regulation 3.1.11.10 NMAC (01/15/2001) defines nonnegligence .

There is sufficient evidence in the record to find by a preponderance standard that Taxpayer's monitoring of the medical alarm equipment is located in New Mexico.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest of the Notice of Assessment Letter No. # L1727093120 for gross receipts taxes, penalty, and interest for the period years January 31, 2001 through December 31, 2007.

B. The Department proved by a preponderance of the evidence that Taxpayer's services were performed within New Mexico.

C. Taxpayer performed services in New Mexico by monitoring the medical alarm equipment it installed in the homes of the New Mexico customers.

D. Taxpayer has substantial nexus with the State of New Mexico.

E. Taxpayer owes $10,694.09 in gross receipts principal and $2,127.08 in penalty for tax years January 31, 2001 through December 31, 2007. Interest continues to accrue until the date the principal amount of tax is paid.

For the foregoing reasons, the Taxpayer's protest **IS DENIED.**

DATED: June 26, 2012

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25, the Taxpayers have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

CERTIFICATE OF SERVICE

On July 2, 2012, a copy of the foregoing Decision and Order was mailed via certified mail # 7011 0470 0001 1511 6092 to Zachary L. McCormick, Esq., Modrall, Sperling, Roehl, Harris & Sisk, PA located at P.O. Box 2168, Albuquerque, NM 87103-2168, and delivered through interoffice mail to Staff Attorney Ida M. Lujan, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.

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John Griego