

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

**IN THE MATTER OF THE PROTEST OF
LOUIS ORTEGA d/b/a PERFECTION FLOOR MAINTENANCE
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L2030277504 and L0606507904**

No. 12-16

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 19, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Louis Ortega (“Taxpayer”) appeared pro se. Staff Attorney Ida M. Lujan appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Andrea Umpelby appeared as a witness for the Department. Taxpayer Exhibits #1-3, 5, 6, and 12-16 were admitted into the record. Department Exhibits A-N are admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. Although Taxpayer initially protested assessments for tax years 2005 and 2006, Taxpayer conceded at hearing that he did not contest the assessment related to tax year 2005. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. Taxpayer provides floor maintenance services across New Mexico.
2. In 2005, Taxpayer performed services for San Jose/San Ysidro Church and Holy Ghost Catholic School (“non-profit charities”).
3. Taxpayer did not pass on the incidence of tax to the non-profit charities because the non-profit charities provided him with Type 9 NTTCs for the services he provided in 2005.

Taxpayer consequently did not pay any gross receipts taxes in 2005 for his receipts from the non-profit charities.

4. Based on a Schedule C mismatch, the Department conducted a limited scope audit of Taxpayer's 2005 gross receipts.

5. During that audit of 2005 gross receipts, the Department concluded that the Type 9 NTTC was invalid for the services Taxpayer performed for the non-profit charities, and disallowed Taxpayer's claimed deductions.

6. On May 20, 2009, the Department assessed Taxpayer for \$308.26 in 2005 gross receipts tax, \$61.65 in penalty, and \$112.87 in interest. [Department C]

7. Taxpayer originally protested the 2005 gross receipts assessment on June 5, 2009.

8. At hearing, Taxpayer conceded that the Type 9 NTTC he relied upon was invalid for the claimed deduction for services he provided to the non-profit charities in 2005. Taxpayer agreed that the Department's 2005 assessment for gross receipts tax was correct, and that he owed the outstanding liability under that assessment. Consequently, tax year 2005 is no longer at issue in this protest.

9. In 2006, an Illinois company, S.M.S. Assist ("SMS"), subcontracted with Taxpayer to provide floor maintenance services to Family Dollar stores in New Mexico.

10. In tax year 2006, Taxpayer had \$74,768.69 in receipts from his subcontracting work with SMS. [Department G.6]

11. Taxpayer believed that he was entitled to a gross receipts tax deduction for his 2006 receipts from SMS as subcontractor performing services for resale.

12. Taxpayer also performed services for the non-profit charities in tax year 2006, for which he timely received Type 9 NTTCs.

13. Based on the Schedule C mismatch, the Department also conducted a limited scope audit of Taxpayer's 2006 gross receipts.

14. On February 18, 2009, the Department sent a "Notice of Limited Scope Audit Commencement-Schedule C Gross Receipts" to Taxpayer, advising Taxpayer that he had 60-days (until April 19, 2009) to possess and execute any NTTC's necessary to support claimed deductions. [Department B.1]

15. On March 5, 2009, Taxpayer emailed Ms. Lauren Gegg of SMS to ask for the correct forms for his 2005 and 2006 state taxes. On that same date, SMS' Ms. Georgie Socha Kwit emailed a response to Taxpayer indicating that SMS remitted state "sales tax" to New Mexico, but had no forms for Taxpayer since it did not withhold any personal income tax on Taxpayer's behalf. [Taxpayer # 1 & Department I.2]

16. On March 30, 2009, the Department sent Taxpayer a "Reminder Notice of Limited Scope Audit", again informing Taxpayer that he had until April 19, 2009 to possess and execute any required NTTCs or the deduction related to the missing NTTCs would be disallowed. [Department B.4]

17. On April 14, 2009, less than seven-days before the 60-day NTTC deadline, Taxpayer contacted the Department's Tom Russell, the contact person listed on the Department's "Notice of Limited Scope Audit" and the "Reminder Notice of Limited Scope Audit".

18. On April 14, 2009, Taxpayer again emailed SMS' Ms. Georgie Socha Kwit and specifically asked for a Type 5 NTTC from SMS. SMS' Ms. Georgie Socha Kwit responded that since SMS did not withhold state tax for Taxpayer's independent contractor work, Taxpayer was responsible for any states taxes and that SMS did not have a Type 5 "reporting form." [Department I.5-I.6]

19. On the 60-day deadline for possession of the NTTC, Taxpayer possessed a Type 9 NTTC from services performed in 2006 for the non-profit charities, but did not possess the Type 5 NTTC from SMS. The Department disallowed Taxpayer's deductions for receipts from SMS for failure to timely possess the Type 5 NTTC. The Department also disallowed the 2006 deductions for Taxpayer's receipts from the non-profit charities because the Type 9 NTTC was invalid.

20. On May 20, 2009, the Department assessed Taxpayer for \$5,350.76 in 2006 gross receipts tax, \$1,070.15 in penalty, and \$1,158.39 in interest. [Department D]

21. On June 5, 2009, Taxpayer filed a protest to the Department's assessments. [Taxpayer #12 and Department E]

22. On June 24, 2009, the Department acknowledged timely receipt of Taxpayer's protest. [Department F]

23. After the April 19, 2009 60-day NTTC deadline, Taxpayer made numerous other attempts to obtain a Type 5 NTTC from SMS:

a. April 21, 2009 Taxpayer email to SMS' Ms. Georgie Socha Kwit. [Department I.5]

b. May 6, 2009 Taxpayer email to SMS' Ms. Georgie Socha Kwit. [Department I.7]

c. May 26, 2009 Taxpayer email to SMS' Ms. Gail Heiteen. [Department I.11]

d. On June 11, 2009, Taxpayer received an email response from SMS' Ms. Georgie Socha Kwit acknowledging Taxpayer's numerous attempts to reach her about the NTTC issue. [Department I.8]

- e. On June 19, 2009, Taxpayer emailed SMS' Ms. Georgie Socha Kwit to offer further assistance in obtaining the Type 5 NTTC. [Department I.12]
- f. On June 25, 2009, SMS' Ms. Georgie Socha Kwit emailed Taxpayer to inform him that she was working with the Department to obtain the NTTC. SMS' Ms. Georgie Socha Kwit apologized to Taxpayer for the delay. [Department I.15]
24. On June 30, 2009, more than two-months after the 60-day deadline, SMS provided Taxpayer with a Type 5 NTTC. [Taxpayer #14]
25. Taxpayer submitted SMS' Type 5 NTTC to the Department. The Department informed Taxpayer that it could not honor the Type 5 NTTC because it had not been timely executed by the 60-day deadline. [Department H]
26. Taxpayer acknowledged in writing that he owed the state tax for his 2006 receipts from the non-profit charities because the Type 9 NTTC was invalid. Taxpayer still continued his protest regarding the SMS Type 5 NTTC given his persistent efforts to obtain the NTTC in a timely manner. [Taxpayer #16]
27. On March 26, 2012, the Department filed a request for hearing in this matter.
28. On March 27, 2012, the Department's Hearing Bureau sent notice of administrative hearing, scheduling this matter for June 19, 2012.

DISCUSSION

The issue in this protest is whether the Department should have accepted Taxpayer's untimely Type 5 NTTC for the claimed 2006 tax deductions, and whether Taxpayer's continuing efforts to secure that NTTC from SMS excuse his tardiness in possessing the NTTC. In brief answer, because of the clear language of the statute, the Department has no authority to accept the untimely NTTC, or to excuse that tardiness based on Taxpayer's efforts to obtain the NTTC.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), both assessments issued in this case are presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessments and establish that he was entitled to deductions claimed in 2005 and 2006. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Moreover, this case involves Taxpayer's protest over a claim of a deduction. "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).

Taxpayer conceded during the hearing that he owed the assessed 2005 taxes. Consequently, in light of the concession and the presumption of correctness, Taxpayer owes the assessed taxes under letter identification number L2030277504 for tax year 2005.

The Deduction 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. The Taxpayer is seeking to qualify for the deduction provided in NMSA 1978, Section 7-9-48 (2000), which states in pertinent part that:

Receipts from selling a service for resale may be deducted from gross receipts ...if the sale is made to a person who delivers a nontaxable transaction certificate to the seller....

Simply performing a service for resale, as the Taxpayer did in this instance as subcontractor for SMS, is not enough to satisfy the requirements of the statute. In order to qualify for the statutory deduction, the statute clearly and unambiguously requires that the seller claiming the deduction

receive a NTTC from the buyer of that seller's service at the time the return for the receipts at issue are due.

NMSA 1978, Section 7-9-43 (2005) 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 return is due from the receipts at issue, the statute gives taxpayers audited by the Department a second chance to obtain these NTTCs. 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 irrelevant. 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.*

Taxpayer's failure to possess the NTTC by the statutory deadline precludes the deduction.

In this case, Taxpayer did not possess the Type 5 NTTC from SMS at the time the return was due for the 2006 gross receipts, as required under NMSA 1978, §7-9-43 (2005). Consequently, Taxpayer was relying on the 60-day second chance provision under NMSA 1978, §7-9-43 (2005).

On February 18, 2009, the Department sent Taxpayer notice of limited scope audit, including explicit notice that Taxpayer had 60-days, until April 19, 2009, to obtain any necessary NTTC's necessary to support a claimed deduction. Taxpayer initiated conversations about the

needed NTTC with SMS on March 5, 2009. On March 30, 2009, the Department sent Taxpayer a reminder of the pending 60-day, April 19, 2009, NTTC possession deadline under the statute.

For the first time, with less than a week until the NTTC deadline, Taxpayer contacted the Department on April 14, 2009 about the matter. After that time, Taxpayer made repeated and consistent efforts to obtain the NTTC from SMS. However, SMS was unable to provide Taxpayer with the NTTC until after the April 19, 2009 60-day statutory deadline. Taxpayer finally received the Type 5 NTTC from SMS on June 30, 2009, some 72-days after the statutory NTTC deadline.

The Taxpayer argues that he made good faith efforts to obtain the NTTC from SMS, and that he should be granted leniency for the untimely NTTC because of these efforts. However, the 60-day statutory deadline to obtain the NTTCs after notice of an audit already serves as Taxpayer's statutory extension to obtain the NTTCs that by statute he was required to possess at the time the CRS gross receipts tax returns were due. Regardless of the reason for non-possession of a required NTTC, NMSA 1978, §7-9-43 (2005) provides no further extension of time beyond this 60-day period. NMSA 1978, §7-9-43 (2005), with its mandatory "shall be disallowed" language, also does not allow the Department any leniency to grant a deduction based on an untimely NTTC.

Taxpayer had a statutory obligation at the time he performed the services for resale for SMS in 2006 to obtain the relevant NTTC supporting his claim for a deduction. Perhaps the legislature made this initial requirement under NMSA 1978, §7-9-43 (2005) precisely because the legislature recognized the potential challenges of obtaining an NTTC after the transaction between the buyer of the services and the seller had grown stale. The legislature certainly knew that with time, records of transactions can accidentally be lost, institutional memory of transactions can be forgotten, paperwork can be misfiled, the motivating initiative to exchange services for a sum of money can be lost after completion of the transaction, and disputes can develop between buyer and seller that preclude easy

cooperation. By waiting to obtain the NTTC until the 60-day period after notice of audit, the Taxpayer subjected himself to myriad risks that some three-years after the transactions in question, SMS would not timely be able to provide an NTTC to Taxpayer.

While SMS certainly could have been quicker and more responsive to Taxpayer's persistent efforts to obtain the NTTC, Taxpayer and not SMS had the obligation under the statute to document his gross receipts tax deductions. 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. *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, and it was the responsibility of the Taxpayer—not SMS—to determine whether he had the documentation needed to support his claimed deductions. The Taxpayer's failure to obtain an NTTC within the 60-day period provided in NMSA 1978, §7-9-43 (2005) leaves the Department no choice but to disallow the claimed deductions.

Taxpayer did timely possess Type 9 NTTCs for his receipts attributable to the non-profit charities in 2006. However, just as Taxpayer conceded for 2005, those Type 9 NTTCs are ineffective to support his claimed deduction for services rendered to the non-profit charities. Under the underlying deduction found at NMSA 1978, Section 7-9-60 (2007), only the sale of tangible personal property is deductible from gross receipts tax. *See also* Regulation 3.2.218.9 NMAC (6/14/01). Therefore, the Department properly disallowed Taxpayer's claimed deductions of receipts for Taxpayer's services to the non-profit charities in tax year 2006.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments L2030277504 and L0606507904. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer conceded he owes the liabilities for assessment L2030277504, 2005 gross receipts tax, penalty, and interest.

C. Taxpayer did not possess the requisite NTTCs at the time he filed his 2006 CRS returns, as required under NMSA 1978, §7-9-43 (2005).

D. Taxpayer did not possess the requisite NTTCs for 2006 within 60-days of the Department's Notice of Audit, as required under NMSA 1978, §7-9-43 (2005).

E. Under NMSA 1978, §7-9-43 (2005), the Department is not allowed to grant and Taxpayer is not entitled to a gross receipts tax deduction for receipts for services rendered for SMS during tax year 2006.

F. Under NMSA 1978, § 7-9-60 (2007) and Regulation 3.2.218.9 NMAC (6/14/01), services rendered to the non-profit charities are not permissible deductions, and therefore the Type 9 NTTC Taxpayer's relies on to claim that deduction is not applicable and invalid.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. For tax year 2005, Taxpayer owes \$308.24 in gross receipts tax, \$159.73 in interest (as calculated as of the date of hearing), and \$61.64 in penalty. For tax year 2006, Taxpayer owes \$5,305.36 in gross receipts tax, \$1,953.60 in interest (as calculated as of the date of hearing), and \$1,061.07 in penalty. Pursuant to NMSA 1978, Section 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: July 9, 2012.

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