

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

**IN THE MATTER OF THE PROTEST OF
ALBUQUERQUE VALVE & FITTING CO.
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0246638976**

No. 12-17

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on July 5, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. John Steigerwald, general manager of Albuquerque Valve and Fitting Co. (“Taxpayer”), appeared pro se on behalf of Taxpayer. Staff Attorney Ida M. Lujan appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Sylvia Sena appeared as a witness for the Department. Taxpayer Exhibits #1 and 1.1 through 1.11 are admitted into the record. Department Exhibits A-M are admitted into the record. All exhibits are more thoroughly described in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer sells tangible property in the form of valves, fittings, and related gas and liquid system components in New Mexico.
2. On August 30, 2007, the Department notified Taxpayer of audit for gross receipts, compensating tax, and worker’s comp fee for reporting periods July 2004 through August 2007. Taxpayer was also notified of audit of withholding tax and income tax for reporting periods July 2004 through December 2006. [Department A]

3. In its August 30, 2007 letter, the Department further notified Taxpayer that any nontaxable transaction certificate (“NTTC” or “NTTCs”) necessary to support claimed deductions needed to be available for inspection during the course of the audit. [Department A.2]

4. On October 19, 2007, the Department sent notice to Taxpayer of the start of the audit and the need for Taxpayer to present all NTTCs supporting a claimed deduction to the auditor. [Department B]

5. On October 29, 2007, the Department sent Taxpayer formal 60-day notice of the requirement to possess and execute any NTTCs necessary to support a claimed deduction by December 28, 2007 or the claimed deductions would be disallowed under NMSA 1978, Section 7-9-43 (C). [Department C]

6. Taxpayer, through General Manager Steigerwald’s signature, acknowledged receipt of the 60-day NTTC letter on October 29, 2007. [Department C]

7. Taxpayer and the Department agreed to conduct the audit based on a sample invoice basis, with sampled invoices broken into three strata: invoices between 0.00-\$1,000.00, invoices between 1000.01-\$15,000.00, and all invoices over \$15,000.01. The first two strata were based on a random sample of invoices, while all invoices were audited in the third stratum. [Department D.5]

8. At the time of the 60-day NTTC deadline on December 28, 2007, Taxpayer possessed a multijurisdictional sales and use tax certificate (“MTC certificate”) [Taxpayer #1.1] but not a state NTTC for invoices from Kinetic Systems, Inc., as follows:

a. Invoice #614013, sale to Kinetic Systems, Inc., totaling \$225.60, in the 0.00-\$1,000.00 audit sample stratum. [Department D.15]

b. Invoice #615701, sale to Kinetic Systems, Inc., totaling \$1,643.20, in the between 1000.01-\$15,000.00 audit sample stratum. [Department D.17]

9. The Department disallowed all \$1,868.80 in deductions from Kinetic Systems, Inc. receipts in both the 0.00-\$1,000.00 stratum and the 1000.01-\$15,000.00 stratum because the Department determined that Kinetic Systems, Inc. was required to be registered in New Mexico based on the presence of a state tax registration number on the face of the MTC certificate, invaliding the MTC certificate and requiring a NTTC.

10. On February 21, 2008, after the 60-day NTTC deadline, Kinetic Systems, Inc., provided Taxpayer with a NTTC. [Taxpayer # 1.2]. The Department did not accept this untimely NTTC.

11. At the time of the 60-day NTTC deadline on December 28, 2007, Taxpayer possessed a Type 5 NTTC [Taxpayer #1.3] for invoices from KSL, all from the 0.00-\$1,000.00 audit sample stratum , as follows:

- a. Invoice #348, KSL, totaling \$43.07. [Department D.15]
- b. Invoice #2698, KSL, totaling \$49.77. [Department D.15]
- c. Invoice #4372, KSL, totaling \$118.40. [Department D.15]

12. The Department disallowed all \$211.24 in claimed deductions from Taxpayer's KSL receipts in the 0.00-\$1,000.00 stratum as invalid because a Type 5 NTTC was not the valid kind for the transaction at issue. [Department D.15]

13. At the time of the 60-day NTTC deadline on December 28, 2007, Taxpayer possessed a MTC certificate [Taxpayer #1.4] but not a state NTTC for invoices from Grainger, all in the above \$15,000.01 audit sample stratum, as follows:

- a. Invoice #604794, Grainger, totaling \$24,660.40; [Department D.19]

- b. Invoice #609021, Grainger, totaling \$23,472.00; [Department D.19]
- c. Invoice #611163, Grainger, totaling \$20,342.40. [Department D.19]

14. The Department disallowed all \$68,474.40 in deductions from Grainger receipts in the above \$15,000.01 stratum because the Department determined that Grainger was required to be registered in New Mexico based on the presence of a state tax registration number on the face of the MTC certificate, invalidating the MTC certificate and requiring a NTTC.

15. On February 8, 2008, after the 60-day NTTC deadline, Grainger provided Taxpayer with a Type 2 NTTC. [Taxpayer # 1.5]. The Department did not accept this untimely NTTC.

16. At the time of the 60-day NTTC deadline on December 28, 2007, Taxpayer did not possess a state NTTC for invoice #610893, Intel Corporation, totaling \$30,583.80. [Department D.19]. Taxpayer did possess a purchase order from Intel indicating that the purchase was tax exempt. [Taxpayer #1.9]

17. On March 4, 2008, after the 60-day NTTC deadline, Taxpayer received a Type 9 NTTC from Intel for the \$30,583.80 in receipts.

18. Without timely possession of a valid NTTC, the Department disallowed the \$30,583.80 claimed deduction from the Intel receipt in the above \$15,000.01 sample stratum.

19. During the audit, the Department determined a percentage rate of error in the 0.00-\$1,000.00 stratum and the 1000.01-\$15,000.00 stratum by “dividing the total disallowed deduction exceptions amount by the total nontaxable sales invoice amount.” Using each respective percentage rate of error in these sample strata, the Department extrapolated a total gross receipts liability for these strata. [Department D.6]

20. The Department calculated the percentage rate of error for the 0.00-\$1,000.00 stratum as 2.40919%. [Department D.16]

21. The Department calculated the percentage rate of error for the 1000.01-\$15,000.00 stratum as 5.49536%. [Department D.18]

22. Since the Department audited every invoice in the invoices over \$15,000.01 stratum, it did not need to calculate a percentage rate of error for that stratum and instead calculated a total gross receipts liability from all actual invoices. [Department D.5-6]

23. On June 12, 2008, in letter id. #L0246638976, the Department assessed Taxpayer \$32,564.95 in gross receipts tax, \$9,403.46 in gross receipts interest, \$695.12 in compensating tax, and \$171.58 in compensating tax interest, for a total assessed liability of \$43,835.11. [Department G]

24. On July 9, 2008, Taxpayer filed a protest to the Department's assessment. Taxpayer did not protest the compensating tax assessment or interest. While the Department disallowed other claimed deductions as part of the gross receipts audit, Taxpayer's letter of protest (and presentation during hearing) makes clear that Taxpayer only protests the disallowed deductions articulated in Findings of Fact 8-18, and the resulting rates of error articulated in Findings of Fact 20-21 from those disallowed deductions used to calculate the overall gross receipts assessed liability. [Taxpayer #1, Department H]

25. On July 21, 2008, the Department acknowledged timely receipt of Taxpayer's protest. [Department I]

26. On April 25, 2012, the Department filed a request for hearing in this matter.

27. On May 4, 2012, the Department's Hearing Bureau sent notice of administrative hearing, scheduling this matter for July 5, 2012 at 9:00 AM.

28. On May 14, 2012, Taxpayer moved to continue the scheduled July 5, 2012 hearing so that Mr. Steigerwald would not have to travel on the 4th of July holiday.

29. On May 23, 2012, the Department's Hearings Bureau sent amended notice of administrative hearing, scheduling this matter for July 5, 2012 at 1:00 PM, giving Taxpayer more time to travel to the hearing on the July 5th.

30. As of the date of hearing, Taxpayer owed \$32,564.95 in gross receipts tax and \$14,736.87 in interest, for a total outstanding liability of \$47,301.82. [Department M]

DISCUSSION

Based on Taxpayer's well-articulated protest letter, the presentation of evidence at hearing, and the arguments of the parties at hearing, there are four main issues at protest. The first issue is whether Taxpayer was entitled to claimed deductions when it timely possessed MTC certificates from Kinetic Systems, Inc., and Grainger rather than state-issued NTTCs. The second issue is whether the Department may accept Taxpayer's NTTCs acquired after the expiration of the 60-day NTTC deadline. The third issue is whether Taxpayer is entitled to rely in good faith on KSL's Type 5 NTTC. And the final issue is whether general fairness concerns regarding the audit process and with the delay in conducting the protest hearing entitle Taxpayer to additional relief like the Department's acceptance of Taxpayer's untimely possessed NTTCs.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish that it was entitled to the claimed deductions during the sample audit period. *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 disallowed claims for deductions. "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).

However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. See *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Overview of Deduction and NTTCs

The Gross Receipts and Compensating Tax Act provides numerous deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. In order to qualify for the claimed deductions, many of the deductions require a taxpayer to obtain a supporting NTTC. All of Taxpayer's claimed deductions in this protest require a supporting NTTC.

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.

Regulation 3.2.201.8(A)(1) NMAC (05/31/01) further indicates that a taxpayer "should be in possession of all (NTTCs) at the time the deductible transaction occurs." While taxpayers "should" have possession of required NTTCs at the time the return is due from the receipts at issue under the

statute, NMSA 1978, §7-9-43 (2005) gives taxpayers audited by the Department a second chance to obtain the required NTTCs. *See also* Regulation 3.2.201.8(A)(2) NMAC (05/31/01).

Regardless of the reason for failing to obtain a requisite NTTC, taxpayers who rely on the statute's second chance provision run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the legislature. 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). NMSA 1978, §7-9-43 (2005).

Issue 1: Whether Taxpayer could rely on MTC Certificates in lieu of NTTCs?

In this protest, Taxpayer argues that the Department should accept the MTC certificates timely in its possession in support of its claimed deductions for its receipts from Kinetic Systems, Inc. and Grainger. The Department expressed in questioning over the course of the hearing some uncertainty about what Taxpayer was hoping to achieve related to the claimed deductions, percentage rate of error, and ultimate assessed liability. To the extent that Department was suggesting that Taxpayer had not made explicit the grounds of its protests, and the specific relief requested, Taxpayer's protest letter, and the protest hearing make clear that Taxpayer is attempting to receive credit for the claimed deductions for Kinetic Systems, Inc. and Grainger receipts, which in turn would lead to a reduction in the percentage rate of error in each of the first two strata used to extrapolate Taxpayer's liability in those strata, and a reduction in the actual liability in the third stratum. In other words, if the Department should have accepted Taxpayer's MTC certificates, Taxpayer would be entitled to the claimed deductions, which would lower both Taxpayer's actual liability in the third stratum and the percentage rate of errors in the first and second strata used to extrapolate liability in those respective strata.

Under NMSA 1978, §7-9-43 (2005), the Department is authorized, through promulgation of regulation, to accept as a valid NTTC “documents issued by other states or the multistate tax commission to taxpayers not required to be registered in New Mexico.”

As directed by NMSA 1978, §7-9-43 (2005), the Department has in fact promulgated a regulation regarding the acceptance of MTC certificates. Under Regulation 3.2.201.13 (A) NMAC (05/31/01, before 3/15/10 changes), the Department will accept a MTC certificate issued by another state or the multistate tax commission “to a taxpayer not required to be registered in New Mexico” as equivalent to a New Mexico Type 1 or Type 2 NTTC.

The Department disallowed the MTC certificates in Taxpayer’s possession from Kinetic Systems, Inc. and Grainger because on the face of each respective MTC certificate, both Kinetic Systems, Inc. and Grainger listed New Mexico CRS identification numbers. However, the Department’s presumption that because Kinetic Systems, Inc. and Grainger listed a New Mexico CRS identification number on each respective MTC certificate means they were required to register in New Mexico is contrary to clear, applicable case law.

A New Mexico Court of Appeals, *Siemens Energy & Automation, Inc. v. New Mexico Taxation and Revenue Department*, 119 N.M. 316, 889 P.2d 1238 (Ct. App. 1994), is nearly directly on point to the facts of this case, and reaches a conclusion directly contrary to the Department’s position on disallowing Taxpayer’s timely possessed MTC certificates. In *Siemens*, the taxpayer timely possessed two MTC certificates to support claimed deductions. However, the Department disallowed the MTC certificates because each respective issuing company had listed a New Mexico tax registration number on the face of the MTC certificates. *See id.* at 317, 1239. The Court of Appeals noted that the Department misunderstood the presumption of correctness in this fact pattern: once the taxpayer presented a MTC certificate, the taxpayer successfully met

the presumption of correctness and the burden shifted to the Department to challenge the validity of the presented MTC certificates. *See id.* at 318, 1240.

Like in the present protest, the Department in *Siemens* simply presumed based on the listed New Mexico tax identification numbers that the issuers of the MTC certificates were required to be registered taxpayers in New Mexico. However, the Court of Appeals explicitly rejected the Department's presumption by finding in *Siemens* that "the mere possession of a New Mexico registration number does not mean that the taxpayer is registered with New Mexico for gross receipts tax purposes." *id.* at 320, 1242. Like the record in the present protest, the Court of Appeals noted in *Siemens* that "[t]he record also does not indicate why they [issuers of the MTC certificates] possessed New Mexico tax identification numbers," or what New Mexico taxes were being paid by MTC certificate issuers. In sum, the *Siemens*' Court of Appeals specifically held "that the fact [MTC Certificate issuers] included their New Mexico taxpayer identification numbers, without more, does not invalidate Siemens' reliance upon the MTC certificates." *id.* at 322, 1244.

Although it does not alter the clear applicability of the *Siemens*' holding to the present protest, it is worth briefly mentioning that because of the regulation then in place, and because of the requirements then listed on the MTC certificate consistent with that regulation, nexus played a part in the *Siemens*' analysis. Both the regulation in place at that time and the information on the back of the MTC certificate required as a condition of New Mexico's acceptance of the MTC certificate in lieu of a NTTC that the purchaser issuing the MTC certificate not have sufficient nexus with New Mexico to be subject to state gross receipts tax. In *Siemens*, the Department determined that the presence of the New Mexico taxpayer identification numbers on the face of the MTC certificates meant that the issuers were required to register as taxpayers in New Mexico

because they had sufficient nexus with New Mexico. The Court of Appeals rejected the Department's interpretation in *Siemens*' because it found that requiring a taxpayer to make a complicated nexus determination based on the face of the document would invalidate the very purpose of Multistate Tax Compact. *id.*

While nexus may continue to underpin the purpose of MTC certificates, nexus is no longer an explicit regulatory requirement, or a requirement written on the MTC certificate itself. Both Regulation 3.2.201.13 (A) NMAC (05/31/01, before 3/15/10 changes) and the version of the MTC certificate at issue in this protest have dropped reference to nexus and indicate that the Department will only accept a MTC certificate in lieu of an NTTC when the buyer is "not required to be registered in New Mexico." [Department F.3]. Similar to its rejected presumption in *Siemens*, it is clear that the Department in this protest determined based on the presence alone of New Mexico tax registration numbers on the MTC certificates that the buyers are required to be registered in New Mexico. Even without the added *Siemens*' nexus considerations, *Siemens* still stands for the proposition that the Department is not free to presume like it did in this protest that in the absence of additional information, the mere presence of New Mexico tax registration numbers on the face of the MTC certificates established that the buyer was required to be registered in New Mexico and invalidated the MTC certificate.

Because Taxpayer established that it timely possessed MTC certificates from Kinetic Systems, Inc. and Grainger, pursuant to *Siemens*, the burden shifted to the Department to establish that those MTC certificates were invalid. The Department did not present any additional evidence other than what was contained on the face of the MTC certificates. Under the holding of *Siemens*, without additional evidence that Kinetic Systems, Inc. and Grainger were required to be registered in New Mexico or the certificates were otherwise invalid, the

Department was not free to reach that conclusion merely based on the presence of New Mexico tax registration numbers on the MTC certificates. Like in *Siemens*, therefore, the Department must accept Taxpayer's timely possession of MTC certificates and allow Taxpayer's claimed deductions for the Kinetic Systems, Inc. and Grainger receipts. Based on these allowable deductions, the Department must recalculate the percentage rate of error in the first and second strata, extrapolate a new total liability in the first and second strata based on the recalculated percentage rate of error, and reduce Taxpayer's actual liability in the third strata accounting for the \$68,474.80 total Grainger allowable deductions.

Issue 2: Whether the Department has authority to accept untimely NTTCs?

Taxpayer argues that the Department should accept the untimely Intel NTTC it received after the expiration of the 60-day NTTC deadline. There is no dispute in this case that Taxpayer did not possess a valid NTTC from Intel at the time of the transaction, as indicated under Regulation 3.2.201.8(A)(1) NMAC (05/31/01), or at time the tax return was due from those receipts, as required under NMSA 1978, §7-9-43 (2005). Taxpayer therefore must rely on the 60-day second chance provision under NMSA 1978, §7-9-43 (2005) to obtain the valid NTTC.

The evidence established that Taxpayer had clear notice of the 60-day second chance NTTC statutory provision. Even before sending the official 60-day notice, the Department informed Taxpayer twice—on August 27, 2007 and October 19, 2007—of the necessity of obtaining the NTTCs as part of the audit process. On October 29, 2007, the Department formally sent Taxpayer notice of audit that included explicit notice that under NMSA 1978, §7-9-43 (2005), Taxpayer had 60-days until December 28, 2007 to obtain any NTTCs necessary to support its claimed deductions.

Although Taxpayer may have made genuine efforts to obtain the NTTC from Intel, the evidence is clear that Taxpayer did not receive the NTTC until March 4, 2008, nearly six-weeks

after the December 28, 2007 60-day NTTCs deadline. Regardless of the reason for non-possession of a required NTTC, NMSA 1978, §7-9-43 (2005), with its mandatory “shall be disallowed” language, provides no further extension of time beyond this 60-day second chance period. Taxpayer had a regulatory obligation at the time of the transactions to obtain the relevant NTTC supporting its claim for deductions and a statutory obligation to have all the NTTCs at the time the tax returns for the receipts at issue were due.

Perhaps the legislature made this initial requirement under NMSA 1978, §7-9-43 (2005) precisely because the legislature recognized the potential challenges of obtaining NTTCs after the transactions between the buyer 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 businesses can close or restructure. By waiting to obtain the NTTCs until the 60-day period after notice of audit, Taxpayer subjected itself to myriad risks that Intel would be unable or unwilling to timely provide a NTTC to Taxpayer.

Ultimately, Taxpayer and not Intel had the obligation under the statute to document its gross receipts tax deductions. Under New Mexico's self-reporting tax system, every entity is charged with the reasonable duty to ascertain the possible tax consequences of its 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 Intel invoice listing the transaction as non-taxable does not satisfy the NTTC possession requirement imposed on Taxpayer by statute. The incidence of the gross receipts tax is on the seller, and it was the responsibility of Taxpayer—not Intel—to determine whether it had the appropriate documentation needed to support Taxpayer’s claimed deductions. The Taxpayer's failure to obtain the requisite, valid NTTCs within the 60-day period

provided in NMSA 1978, §7-9-43 (2005) leaves the Department with no choice but to disallow the claimed deductions.

Issue 3: Whether the Taxpayer acted in good faith in accepting KSL's Type 5 NTTC?

As raised specifically in Taxpayer's protest letter, Taxpayer argues that it accepted and relied upon KSL's timely issued Type 5 NTTC in good faith, and therefore should be granted the claimed deductions for the KSL receipts.

Under NMSA 1978, §7-9-43 (2005), a seller who accepts a timely NTTC "in good faith that the buyer... will employ the property... transferred in a nontaxable manner," may rely on that NTTC as "conclusive evidence" that the receipts from that transaction "are deductible." Regulation 3.2.201.14 NMAC (05/31/01) indicates that the statutes "good faith" provision will be determined at the time of each transaction, and that a taxpayer claiming protection of an NTTC "continues to be responsible that the goods delivered... are of the type covered by the certificate."

By Regulation 3.2.201.14 NMAC (05/31/01) and by case law, a taxpayer may only rely on an NTTC if the goods delivered during the transaction are the correct type given the NTTC issued and the deduction at issue. *See 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); *see also McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601-602, 592 P.2d 515, 517-518 (Ct. App. 1979) (the "conclusive evidence" provision of § 7-9-43(A) does not apply when there is no NTTC applicable to the transaction at issue); *see also 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).

Here, the evidence is clear that KSL provided Taxpayer an incorrect type of NTTC to cover the transaction between KSL and Taxpayer. A Type 5 NTTC, which is the type KSL provided to Taxpayer, covers the sale of a service. Rather than providing a service to KSL, Taxpayer sold KSL tangible personal property in the form of valves, fittings, and fluid system components. When specifically asked if Taxpayer provided any installation or maintenance services, Mr. Steigerwald replied no, that Taxpayer only sold valves, fittings, and fluid system component products to customers. Therefore, since Taxpayer accepted the wrong type of NTTC given the nature of the transaction involving products rather than services, Taxpayer is not entitled to the statute's safe harbor, good-faith NTTC protection. The Department properly disallowed the claimed KSL deductions.

Issue 4: Whether fairness issues warrant further Taxpayer relief?

Without citing any legal authority, Taxpayer argued that fairness required that it be granted some additional relief and allowed credit for the untimely NTTC in this matter for two reasons. First, Taxpayer repeatedly suggested that the audit process itself was skewed heavily towards finding additional tax liabilities rather than locating any possible tax credits for items that Taxpayer might have inadvertently categorized as taxable. Second, Taxpayer found a contradiction with the fact that the Department argued that Taxpayer was liable under a strict 60-day NTTC possession deadline, yet it took the Department nearly four-years to hold the requested protest hearing.

Regarding the audit, there is no evidence on the record that the Department did anything improper or unprofessional in conducting this audit. To the contrary, the evidence suggests that the Department complied with all statutory audit requirements. The nature of New Mexico's self-

reporting tax system, and the fact that a taxpayer carries the burden to substantiate any claimed deduction, does put the onus squarely on a taxpayer during the audit to demonstrate that claimed deductions from the imposition of tax are legally warranted. Whether a taxpayer feels that this onus is fair or not, the Department was in compliance with the Legislature's tax statutes, the Tax Administration Act.

Regarding the delay from the time Taxpayer protested the audit until the time of hearing, it must be noted for the record that the Department's Hearing Bureau first learned of this case when it received the Department's request for hearing on April 25, 2012. Upon receipt of that request, the Hearing Bureau promptly scheduled this matter for protest hearing at the next available opportunity on the docket, some two-months later on July 5, 2012.

Although the reason for the Department's delay in requesting a hearing in this matter are unclear, New Mexico courts have applied the general rule of tardiness in administrative hearings under the Tax Administration Act: 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). Collection of taxes is the enforcement of public right/interest, and 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.* Further, while certainly an inconvenience, there is no evidence that Taxpayer suffered any prejudice to the presentation of its protest as a result of the unnecessary delay. See *In re Ranchers-Tufco Limestone Project Joint Venture* at 635, 525. The remedy sought for the delay by Taxpayer—granting of deductions for a NTTC possessed after the

mandatory 60-day statutory deadline and a NTTC of the wrong type for the transaction at issue—is not permissible under the applicable statutory, regulatory, and case-law authority. The Legislature has mandated that the Department disallow any deduction in which a taxpayer does not possess a valid NTTC within 60-days of notice of audit. While the delay is unfortunate and regrettable, Taxpayer is not entitled to any additional relief resulting from the delay.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the gross receipts portion of assessment L0246638976. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did timely possess MTC certificates for all claimed deductions of receipts from sales to Kinetics Systems, Inc. and Grainger under the rationale of *Siemens Energy & Automation, Inc. v. New Mexico Taxation and Revenue Department*, 119 N.M. 316, 889 P.2d 1238 (Ct. App. 1994).

C. Pursuant to the holding of *Siemens*, since it presented no other evidence challenging the validity of the MTC certificates other than the registration numbers on the face of the certificates, the Department must honor the MTC certificates and allow Taxpayer's claimed deductions from sales to Kinetics Systems, Inc. and Grainger.

D. Taxpayer did not timely possess the requisite NTTC from Intel within 60-days of the Department's Notice of Audit, as required under NMSA 1978, §7-9-43 (2005), and therefore the Department was required to disallow the claimed deduction.

E. Taxpayer could not rely on good faith acceptance of the KSL Type 5 NTTC because that NTTC type only applies to services and not products.

F. Taxpayer cites no authority that either a delay in the hearing process or alleged bias in the audit warrants further relief from the assessment.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART**. The Department is ordered to allow Taxpayer's claimed Kinetics Systems, Inc. and Grainger deductions, recalculate the applicable percentage of error or the actual exceptions in each audit sample strata in light of those allowable deductions, and use those new figures to extrapolate Taxpayer's outstanding gross receipts tax liability. Taxpayer is then ordered to pay the newly calculated gross receipts tax liability and any accrued interest.

DATED: July 19, 2012.

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