

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

**IN THE MATTER OF THE PROTEST OF
HANK GALLEGOS TRUCKING
TO ASSESSMENT ISSUED UNDER
LETTER ID NOs. L1922839808 & L2073179392**

No. 12-20

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on August 28, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Gilbert Sanchez, C.P.A., and Charlotte Burkhead, C.P.A. appeared in person, representing Hank Gallegos Trucking (“Taxpayer”). Mr. Hank Gallegos testified on behalf of Taxpayer. Staff Attorney Peter Breen 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 #1-5 were admitted into the record. Department Exhibits A-C were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer provides hauling services and construction services, including demolition, earth work, and roadwork.
2. Mr. Hank Gallegos owned and operated Taxpayer as a sole proprietorship from 1995 until December 31, 2003.
3. On December 31, 2003, Taxpayer changed from a sole proprietorship to a corporation as Hank Gallegos Trucking, Inc.

4. In Hank Gallegos Trucking, Inc.'s 2004 application for a tax identification number with the Department, Taxpayer described its nature of business as "trucking, construction, earthmoving, and demolition." [Taxpayer Exhibit #4].

5. Taxpayer has a GS05 Contractor's License with the State of New Mexico. [Taxpayer Exhibit #2].

6. Taxpayer has a GS08 Contractor's License with the State of New Mexico. [Taxpayer Exhibit #3].

7. Taxpayer's New Mexico Contractor's Licenses were valid from May 2004 through 2007. [Department Exhibit B, page 4].

8. Taxpayer did not provide proof that it had a valid New Mexico Contractor's License from January 2000 through December 2003. [Department Exhibit B, page 7].

9. On July 20, 2005, the Department selected Taxpayer's sole proprietorship for an audit of CRS reporting periods January 2002 through December 2003. [Department Exhibit B].

10. On July 20, 2005, the Department selected Taxpayer's corporation for an audit of CRS reporting periods January 1, 2004 through June 30, 2005. [Department Exhibit C].

11. Taxpayer timely presented type 6 and type 7 Nontaxable transaction certificates ("NTTCs") he had received from construction contractors for claimed construction services deductions.

12. As part of the audit process, Taxpayer provided the Department auditor with customer statements that included attached tickets. [Department Exhibit B, page 4 & Department Exhibit C, page 3].

13. After reviewing Taxpayer's customer statements with attached tickets, the Department disallowed Taxpayer's claimed construction services deductions because it

determined that Taxpayer could not substantiate that it provided qualifying construction services other than the non-qualifying hauling and transporting services. [Department Exhibit B, page 4 and 7, & Department Exhibit C, page 5].

14. The Department determined that Taxpayer's sole proprietorship had underreported by 25%, and therefore expanded the audit to include the reporting period January 1, 2000 through January 1, 2002. [Department Exhibit B, page 5].

15. On May 5, 2006, Taxpayer presented a letter from Construction Contracting Management, Inc. ("CCM") to the Department where CCM indicated that it had paid Taxpayer's sole proprietorship and Taxpayer's corporation to perform "various construction services... such as loading, hauling, and spreading." [Taxpayer Exhibits #1 & #1.1].

16. On May 16, 2006, the Department informed Taxpayer via letter that CCM's letters provided to the Department "would not justify deductions for construction services for CCM." The letter also informed Taxpayer that the Type 6 & 7 NTTCs Taxpayer received were "inappropriate and not in good faith" without additional records to "justify that a construction service was performed..." [Taxpayer Exhibit #5].

17. On October 17, 2006, the Department assessed Taxpayer's sole proprietorship for \$303,131.09 in gross receipts tax for reporting periods December 31, 1999 through December 31, 2003 and \$184,424.03 in interest, for a then total assessment of \$487,555.12.

18. On October 17, 2006, the Department assessed Taxpayer's corporation for \$69,073.16 in gross receipts tax for reporting periods June 30, 2004 through June 30, 2005 and \$12,939.91 in interest, for a then total assessment of \$82,013.07.

19. The Department did not assess Taxpayer with civil penalty under either of the assessments.

20. On November 21, 2006, Taxpayer filed a request for a retroactive extension of time to file its protests of the assessments.

21. Taxpayer's November 21, 2006 letter also contained Taxpayer's formal protest to the Department's assessments.

22. On February 6, 2007, the Department informed Taxpayer that it granted Taxpayer's request for a retroactive extension of time in which to file protests to the Department's assessments and acknowledged receipt of Taxpayer's protest.

23. On May 23, 2011, the Department's then counsel, Chief Legal Counsel Nelson Goodin, asked Taxpayer to provide any information to substantiate its claim that it provided construction services beyond hauling of materials by June 15, 2011. Mr. Goodin never received any additional documentation to support Taxpayer's claimed deduction. [Department Exhibit A].

24. On August 8, 2011, the Department requested a hearing with the Department's Hearings Bureau in this matter.

25. On August 26, 2011, the Hearings Bureau sent Notice of Administrative Hearing, scheduling a protest hearing on March 13, 2012.

26. On February 2, 2012, the Hearings Bureau sent Amended Notice of Administrative Hearing, rescheduling the protest hearing to May 24, 2012.

27. On May 22, 2012, Taxpayer's representative moved to continue the May 24, 2012 hearing because of a family medical emergency. The Department did not oppose Taxpayer's request for continuance.

28. On May 22, 2012, the Hearings Bureau issued an order continuing the May 24, 2012 hearing and rescheduling the formal protest hearing in this matter for August 28, 2012.

29. As of the date of hearing, \$298,878.01 in interest had accumulated against Taxpayers' sole proprietorship and \$39,020.04 in interest had accumulated against Taxpayer's corporation.

DISCUSSION

Taxpayer protests the Department's denial of a deduction for selling construction services to person engaged in construction business under NMSA 1978, Section 7-9-52 (2000). Taxpayer argues that it was entitled to the claimed deduction because Taxpayer is a licensed general contractor and because Taxpayer provided hauling services that, in the nomenclature of the construction industry, includes spreading and laying materials down. Moreover, Taxpayer argued that it was entitled to accept and rely on the NTTCs it received in good faith.

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 it was entitled to the claimed deductions. *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).

Gross Receipts Tax and the Construction Services Deduction.

For the privilege in engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002).

Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2002).

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, § 7-9-52 (2002), which states in pertinent part that:

Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

NMSA 1978, Section 7-9-3(C) (2001) defines construction for gross receipt tax purposes as the “building, altering, repairing or demolishing” any of the 18-listed items under the statute.

Regulation 3.2.1.11(A) NMAC (10/31/2000) limits construction services to the 18 items/activities listed under NMSA 1978, § 7-9-3(C) (2001). Moreover, Regulation 3.2.1.11(A) NMAC (10/31/2000) specifically excludes “hauling to or from the construction site except as otherwise provided” under Regulation 3.2.52.10 (C) NMAC (05/31/01).

Regulation 3.2.52.10 (C) NMAC (05/31/01) allows a deduction pursuant to NMSA 1978, § 7-9-52 (2002) only when the person had receipts “from hauling and spreading dirt, sand, gravel, and rock, treated or untreated, for the purposes of furnishing materials to a construction project *when such materials have been obtained from source which is on or in the proximity of that construction project...*” (italics added for emphasis). In other words, only when the hauling is of material obtained from a source that is on or in close proximity of that specific construction project can hauling qualify for a deduction under NMSA 1978, § 7-9-52 (2002). Department regulations interpreting a statute are presumed proper and are to be given substantial weight. *See Chevron*

U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue, 139 N.M. 498, 503, 2006 NMCA 50, 16, 134 P.3d 785, 790 (N.M. Ct. App. 2006).

Simply proving that Taxpayer was a licensed contractor in New Mexico during a portion of the audit period, which Taxpayer certainly did prove during the hearing, does not satisfy Taxpayer's burden to establish it was entitled to a deduction under NMSA 1978, § 7-9-52 (2002) given the clear requirements of Regulation 3.2.52.10 (C) NMAC (05/31/01). Taxpayer did not present any evidence in any fashion during the audit or during the protest hearing that Taxpayer was hauling and spreading materials that Taxpayer obtained from a source on or near the specific construction project. Taxpayer Exhibits #1 & #1.1 only establish that Taxpayer generically provided construction services such as loading, hauling, and spreading for CCM. Those exhibits do not specify what materials were hauled, from which source, or from what distance in relation to the specific construction site. Reviewing the audit summaries of Taxpayer's audits contained in Department Exhibit B & C, the invoices do not show that Taxpayer was hauling or spreading any materials Taxpayer obtained from either at the construction project site or in close proximity to the construction site.

Taxpayer testified and argued that detailed contracts are not a construction industry standard because general contractors want the flexibility to shop a bid until the last possible moment in the event they can find a cheaper subcontractor. Further, Taxpayer testified and argued that in the construction industry, the word "hauling" means hauling, spreading, and laying down all transported materials at the construction site. Even accepting and considering these industry practices, the testimony of Taxpayer still does not provide enough specific information to determine whether any of Taxpayer's individual receipts were entitled to the deduction under Regulation 3.2.52.10 (C) NMAC (05/31/01) because there is no way to determine if the source of the hauled

and spread materials came from on or in close proximity to the construction site. Moreover, under Regulation 3.2.1.11(A) NMAC (10/31/2000), “hauling to or from the construction site...” alone is excluded from the definition of a construction service even if the industry uses the word hauling to describe hauling, spreading, and laying down all transported materials.

Without more detailed invoices showing the source and destination of the hauling and spreading of materials, and the type of materials hauled and spread, there is no way to determine whether Taxpayer qualified for the deduction under the requirements of Regulation 3.2.52.10 (C) NMAC (05/31/01). As such, Taxpayer failed to meet the standard under *Wing Pawn Shop* to establish it was entitled a deduction and Taxpayer failed to overcome the presumption of correctness attached to the assessments.

Good Faith Acceptance of NTTCs

Taxpayer also argued it was entitled to claim the deduction under NMSA 1978, § 7-9-52 (2002) because Taxpayer accepted the NTTCs from CCM and other construction companies in good faith.

Under NMSA 1978, §7-9-43 (2001), a seller who accepts a timely NTTC “in good faith that the buyer... will employ...the service 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 statute’s “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... services performed thereafter 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 services performed 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, Taxpayer presented no evidence that he performed qualifying construction services by hauling materials originating from or within close proximity of the construction site, as required under Regulation 3.2.52.10 (C) NMAC (05/31/01). Consequently, the services performed were not of the type that would qualify for the issued NTTCs. Taxpayer is not entitled to the statute's safe harbor, good-faith NTTC protection. The Department properly disallowed the claimed deductions.

Assessment of Interest

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. *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 6, 2007 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 this matter in accord with the statutory mandate.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments L2073179392 and L1922839808. Jurisdiction lies over the parties and the subject matter of this protest.

B. Because Taxpayer could not establish the source of the hauled and spread materials Taxpayer provided to construction sites came from on or in close proximity to that construction site, Taxpayer did not satisfy the requirements of Regulation 3.2.52.10 (C) NMAC (05/31/01) for a claim for deduction under NMSA 1978, Section 7-9-52 (2002).

C. Taxpayer did not demonstrate that it was entitled to a deduction under NMSA 1978, Section 7-9-52 (2002) for the transportation, hauling, and spreading services it provided to construction contractors.

D. Under *Gas Co. v. O'Cheskey*, 94 N.M. 630, 632, 614 P.2d 547, 549 (Ct. App. 1980), given the non-construction hauling services actually rendered, Taxpayer could not rely on good faith acceptance of the NTTCs to transform an otherwise taxable transaction into a nontaxable transaction.

E. Under NMSA 1978, Section 7-1-67 (2001) and *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977), Taxpayer shall pay interest on the outstanding tax liabilities.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. Taxpayer's sole proprietorship owes \$303,131.09 in gross receipts tax and \$298,878.01 in interest as of the date of hearing. Taxpayer's corporation owes \$69,073.16 in gross receipts tax and \$39,020.04 in interest as of the date of hearing. Pursuant to NMSA 1978, Section 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: September 27, 2012.

Brian VanDenzen, Esq.
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630