

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

**IN THE MATTER OF THE PROTEST OF
CASE MANAGER
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0767748416**

No. 13-12

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on April 4, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Ms. Teresa Maestas, Case Manager, (“Taxpayer”) appeared. Mr. David G. Zlotnick, C.P.A., appeared representing Taxpayer. Staff Attorney Ida Luján appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits #1-3 were admitted into the record. Department Exhibits A-M 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. Since October 2007, Taxpayer has worked as an independent contractor for Visions Case Management, Inc., (“Visions”) providing case-management services to the developmentally disabled across northern New Mexico. Taxpayer handles a caseload of approximately 30-clients.
2. Visions resold Taxpayer’s subcontracting services in the regular course of its business to the State of New Mexico, Department of Health.

3. Visions paid gross receipts tax on the resale of Taxpayer's services. [Taxpayer Ex. #3, Department Ex. J].

4. Through a tape mismatch between Taxpayer's Schedule C's, filed with the IRS, and Taxpayer's 2008 and 2009 CRS return, the Department detected possible gross receipts tax liability.

5. On August 13, 2012, the Department mailed Taxpayer a "Notice of Limited Scope Audit Commencement-Gross Receipts," requesting that Taxpayer present all executed Nontaxable Transaction Certificates ("NTTC or NTTCs") within 60-days—October 12, 2012. [Department Ex. A].

6. In response to the Department's Notice of Limited Scope Audit, Taxpayer requested and received a Type 2 NTTC from Visions [Department Ex. B].

7. Visions completely filled out, signed, and executed a Type 2 NTTC to Taxpayer. The Type 2 NTTC had an execution date of May 25, 2010. [Department Ex. B].

8. Taxpayer got a copy of the executed Type 2 NTTC at some unspecified point in October of 2012 from Visions' administrative assistant. [Compact Disc, April 4, 2013, counter 01:08:40-01:10:26].

9. Taxpayer accepted the Visions' executed Type 2 NTTC in good faith that it was the document she needed to send to the Department. [CD 4-4-13, 01:10:38-01:10:51].

10. In accordance with the contact information listed on the Department's "Notice of Limited Scope Audit Commencement-Gross Receipts," Taxpayer called the Department's Laura Gage three times at unspecified points in October 2012 and left messages. Taxpayer did not hear back from Ms. Gage. [CD 4-4-13, 23:02-23:37].

11. At an unspecified point in October 2012, Taxpayer went to a Department field office off Zafarano Road in Santa Fe to inquire about what documentation she needed to provide to Ms. Gage. Taxpayer spoke with two Department employees, who advised Taxpayer to submit all her paperwork to Laura Gage. [CD 4-4-13, 36:24-38:18].

12. On October 22, 2012, Ms. Gage sent a letter to Taxpayer informing Taxpayer that Taxpayer had insufficient documentation to make adjustments to Taxpayer's gross receipts liabilities. That letter further advised Taxpayer that she had until October 31, 2012 to present supporting documentation, including NTTCs, or the Department would issue her assessments. [Department Ex. C].

13. On or after October 22, 2012, in response to Ms. Gage's October 22, 2012 letter, Taxpayer attempted to contact Ms. Gage via telephone about what information was still needed. Taxpayer did not hear from Ms. Gage. [CD 4-4-13, 45:15-45:42].

14. Taxpayer presented a copy of the executed Type 2 NTTC to the Department via facsimile on October 31, 2012, after the October 12, 2012 60-day deadline but in accordance with the deadline articulated in Ms. Gage's October 22, 2012 letter. [Department Ex. B].

15. Taxpayer presented her 2008 federal Schedule C and her 2009 federal 1099-MISC form to the Department via facsimile on October 31, 2012. [Department Ex. B].

16. On November 6, 2012, Ms. Gage sent Taxpayer a letter informing Taxpayer that the Type 2 NTTC presented was not the correct type for the claimed deduction and that all deadlines of the audit had expired. Ms. Gage did not allege that the Type 2 NTTC was untimely. [Department Ex. D].

17. On November 13, 2012, under letter identification number L0767748416, the Department assessed Taxpayer for \$2,486.10 in gross receipts tax for the reporting period ending December 31, 2008, \$497.22 in penalty, and \$381.06 in interest. [Department Ex. E].

18. On or about November 13, 2012, the Department also issued an assessment for 2009 gross receipts tax, penalty, and interest. [CD 4-4-13, 49:55-50:07].

19. On December 11, 2012, Taxpayer filed a protest to the Department's 2008 assessment. In pertinent part, that letter stated

I am writing in protest in regards to the state review completed on period ending Dec. 31, 2008. The review was for Gross Receipts Tax for the period ending Dec. 31, 2008 for the amount of \$3,364.38 which includes penalty and interest. The agency I am contracted with has agreed to pay all the gross receipts taxes for all who are contracted with them. I do admit that I did not report for 2008...

[Department Ex. F].

20. Taxpayer's protest letter did not mention the year 2009, the 2009 assessment, or the assessed amounts of tax for reporting periods ending in 2009. [Department Ex. F].

21. On December 28, 2012, the Department acknowledged timely receipt of Taxpayer's protest, listing only the 2008 assessment as protested. [Department Ex. G].

22. On January 9, 2013, the Department's Protest Auditor Tom Dillon sent Taxpayer a letter requesting that Taxpayer present a Type 5 NTTC by January 25, 2013 that was either "dated by the due date of the transaction or by the expiration of the 60 day period [.]". That letter referenced only the 2008 assessment and the 2008 total assessed liability. [Department Ex. H].

23. On January 17, 2013, the Department's Protest Auditor Tom Dillon sent Taxpayer another letter informing Taxpayer that she had presented an incorrect Type 2 NTTC rather than the required Type 5 NTTC. Mr. Dillon did not allege that the Type 2 NTTC was untimely. Mr.

Dillon further informed Taxpayer that the time had passed for Taxpayer to obtain the correct Type 5 NTTC from Visions Case Management. That letter referenced only the 2008 assessment and the 2008 total assessed liability. [Department Ex. I].

24. On February 6, 2013, the Department filed a request for hearing in this matter, listing only the 2008 assessment and the 2008 total assessed liability.

25. On February 6, 2013, Chief Legal Counsel Nelson Goodin sent Taxpayer a copy of the request for hearing, including a cover letter that referenced only the 2008 assessment and the 2008 total assessed liability. [Department Ex. K].

26. On February 6, 2013, the Department's Hearing Bureau sent Notice of Administrative Hearing, scheduling this matter for April 4, 2013. This Notice only referenced the 2008 Assessment number.

27. On March 14, 2013, after the expiration of the October 12, 2012 60-day deadline, Visions executed a Type 5 NTTC to Taxpayer. Taxpayer did not timely possess this Type 5 NTTC. [Taxpayer Ex. #2].

28. On April 2, 2013, Visions acknowledged that through inadvertent error, "an incorrect NTTC" was issued to Taxpayer and "through no fault of [Taxpayer's] own[,Taxpayer] assumed it was correct." [Taxpayer Ex. #3].

29. As of the April 4, 2013 hearing date, Taxpayer's obligations under the 2008 assessment were \$2,486.10 in 2008 gross receipts tax, \$497.22 in penalty, and \$411.48 in accumulated interest, for a total outstanding balance of \$3,394.80. [Department Ex. L].

DISCUSSION

There are two issues at protest. The first issue is whether Taxpayer's protest encompassed only the assessment of 2008 gross receipts tax, or as Taxpayer argued at hearing, also included

the assessment of 2009 gross receipts tax. The second issue is whether Taxpayer is entitled to a deduction of gross receipts tax from her work as an independent contractor with Visions when she possessed an incorrect Type 2 NTTC executed before the expiration of the October 12, 2012 60-day statutory deadline.

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 deduction. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). Moreover, “[w]here 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); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003 NMSC 7, ¶9, 133 N.M. 447, 451, 64 P.3d 474, 478 (N.M. 2002). 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*, 2003 NMCA 21, ¶13, 133 N.M. 217, 220, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Taxpayer's Protest and the 2009 Assessment.

In opening statements at the hearing, the Department pointed out that Taxpayer's protest letter was limited solely to 2008. Taxpayer argued during the hearing that she intended to protest both tax years 2008 and 2009. However, even giving Taxpayer every benefit in reading her

protest letter as broadly as possible, it is clear that Taxpayer only protested the assessment of 2008 gross receipts tax.

NMSA 1978, Section 7-1-24(A) (2003) lists the substantive requirements of a protest:

[a]ny taxpayer may dispute the assessment to the taxpayer of any amount of tax...by filing with the secretary a written protest against the assessment... Every protest shall identify the taxpayer and the tax involved and state the grounds for the taxpayer's protest and the affirmative relief requested. The statement of grounds for protest shall specify individual grounds upon which the protest is based and a summary statement of the evidence expected to be produced supporting each ground asserted, if any; provided that the taxpayer may supplement the statement at any time prior to ten before any hearing conducted on the protest...

See also Lopez v. New Mexico Dep't of Taxation & Revenue, 1997-NMCA-115, ¶9, 124 N.M. 270, 272, 949 P.2d 284, 286 (N.M. Ct. App. 1997) (on a deferential review standard, Court of Appeals affirmed the hearing officer's finding that the taxpayer in that matter had not timely protested an audit because the letter that taxpayer submitted within 30-days did not identify the tax protested, the grounds for protest, the relief requested, and suggested acquiescence to the Department's proposed audit).

Two regulations address what is substantively required of a protest. To be an effective protest under Department Regulation 3.1.7.10 NMAC (01/15/01), the purported protest must be in writing, filed with the secretary, identify the taxpayer and taxes at issue, state the grounds of protest, and state the affirmative relief requested. Under Regulation 3.1.7.10 (C) NMAC (01/15/01), while a document not complying with the statute is not considered a protest, the Secretary may require more specificity from a taxpayer in those instances where a protest letter lacks sufficient grounds for protest. The second regulation addressing the substantive requirements of a protest is Regulation 3.1.7.12 NMAC (08/30/01). Regulation 3.1.7.12 (A) NMAC (08/30/01) requires a statement of the grounds of protest, an explanation of the law and

facts supporting the protest, a legal basis to challenge the assessment, and a summary of the evidence expected to be produced. Further, Regulation 3.1.7.12 (C) NMAC (08/30/01) provides an example of an appropriate protest.

Before depriving a taxpayer a protest on the merits that a taxpayer is otherwise entitled to, any timely filed letter should be given its broadest possible reading. However, even under this broad reading, Taxpayer's protest letter in this case narrowly focused only on the assessment of 2008 gross receipts tax. Taxpayer mentioned a tax period ending on December 31, 2008 twice in her protest letter. Taxpayer also referenced 2008 a third time in her protest letter when she admitted not reporting in that year. Taxpayer also listed the specific total amount of gross receipts tax, penalty, and interest assessed in 2008. In contrast to the references to 2008 in the protest letter, Taxpayer did not mention the year 2009, 2009 gross receipts taxes, any reporting period ending in 2009, the 2009 assessment's letter identification number, or the total amount of assessed 2009 gross receipts tax in her protest letter. Taxpayer never protested the 2009 assessment.

Moreover, despite receiving numerous documents listing only the 2008 assessment at issue in the protest, Taxpayer never amended her protest letter to include any reference to 2009 or attempted to file a new protest of the 2009 assessment. The Department's acknowledgement of protest letter listed only the assessment of \$3,364.38 in tax for a reporting period ending on December 31, 2008. Both of Mr. Dillon's letters and General Counsel Nelson Goodin's letter only referenced the "2008 Project Assessment, Amount Assessed: \$3,364.38." The Department's February 6, 2013 Request for Hearing in this matter, a copy of which was sent to Taxpayer, referenced only the 2008 Assessment's letter id. # L0767748416 and listed only the 2008 assessment \$3,364.38 as in controversy. That is not to say that any of these Department letters

control or limit a Taxpayer's articulated grounds of protest. But these letters show that Taxpayer had reasonable notice that the Department believed her protest was limited to the assessment of 2008 taxes and Taxpayer did nothing to challenge that view such as file a new protest or attempt to amend her original protest to include the 2009 assessment.

Because even under a broad reading Taxpayer's protest letter cannot be read to include a protest of the 2009 assessment, the 2009 assessment is not before the hearing officer in this matter.

Gross Receipts Tax, the Deduction, NTTCs, and Good Faith.

For the privilege of 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). "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, Section 7-9-3.3 (2003). 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). During 2008, Taxpayer was engaged in business as a subcontractor for Visions in northern New Mexico. As such, any of Taxpayer's receipts during 2008 (unless otherwise exempted or deductible) were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions and exemption of gross receipts tax. Taxpayer's sale of her case management services to Visions is potentially deductible from gross receipts under NMSA 1978, Section 7-9-48 (2000). NMSA 1978, § 7-9-48 (2000) states that:

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

The buyer delivering the nontaxable transaction certificate must resell the service in the ordinary course of business and the resale must be subject to the gross receipts tax....

There is no doubt on this record that Visions resold Taxpayer's case management services in its ordinary course of business and that this resale was subject to gross receipts tax. Consequently, since the transaction at issue was otherwise nontaxable under NMSA 1978, § 7-9-48 (2000), Taxpayer needed only to satisfy the NTTC requirement to claim that deduction.

There are two relevant requirements for obtaining NTTCs under NMSA 1978, § 7-9-43 (A) (2011). First, under that that statute,

[a]ll 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...*

(emphasis added). 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. However, 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 case, Taxpayer presented two executed NTTCs: a Type 2 NTTC executed before the 60-day deadline on May 25, 2010, and a Type 5 NTTC executed on March 14, 2013, after the 60-day deadline. While Taxpayer presented a timely executed Type 2 NTTC, a Type 2 is not the correct type of NTTC for her claimed deduction. Since Taxpayer was seeking a deduction for the selling of a service for resale under NMSA 1978, § 7-9-48 (2000) rather than the selling or leasing

of tangible personal property covered by a Type 2 NTTC, Taxpayer needed to present a Type 5 NTTC. The Type 5 NTTC that Taxpayer eventually presented, while the correct type to support Taxpayer's claimed deduction under NMSA 1978, §7-9-48 (2000), was not timely executed or possessed by the October 12, 2012 60-day deadline. Therefore, under NMSA 1978, §7-9-43 (A) (2011), the Department cannot consider that Type 5 NTTC to support Taxpayer's claimed deduction.

However, because of the second relevant portion of NMSA 1978, §7-9-43(A) (2011), the good-faith, conclusive evidence safe harbor portion, the analysis in this case does not end with the untimely Type 5 NTTC. NMSA 1978, §7-9-43(A) (2011) grants taxpayers a good-faith acceptance, conclusive evidence safe harbor in some circumstances:

[w]hen the seller or lessor accepts a nontaxable transaction certificate within the required time and in good faith that the buyer or lessee will employ the property or service transferred in a nontaxable manner, the properly executed nontaxable transaction certificate shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

In other words, the statute grants the seller of the service safe harbor from taxation when the seller timely accepts a properly executed NTTC in good faith from the buyer. Regulation 3.2.201.15 NMAC (05/31/01) discusses good faith acceptance of a NTTC:

Acceptance of [NTTCs] in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time of each transaction. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered or services performed thereafter are of the type covered by the certificate.

The remaining question in this case then is whether Taxpayer's presentation of a timely executed, but improper Type 2 NTTC is conclusive evidence under NMSA 1978, §7-9-43 (A) (2011) supporting her claimed deduction.

Turning to the case law for guidance on this remaining question, in *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 86 N.M. 629, 632, 526 P.2d 426, 429 (N.M. Ct. App. 1974), the New Mexico Court of Appeals considered what requirements must be met “before an NTTC becomes conclusive evidence that proceeds of a transaction are deductible.” While the *Leaco* Court of Appeals was considering NMSA 1978, §7-9-43(A) (2011)’s predecessor statute, NMSA 1953, Section 72-16A-13(A), the good faith, safe harbor provision of both statutes is substantially the same. In *Leaco*, a buyer had executed a NTTC to a seller for a transaction held to be subject to tax. The *Leaco* court found that a seller-taxpayer must satisfy three statutory requirements before good faith, conclusive evidence safe harbor protection attaches to the transaction. *See id.* As the *Leaco* Court of Appeals expounded, those three “requirements are timeliness of acceptance of the NTTC, good faith acceptance of the NTTC and a properly executed NTTC.” *id.* By “properly executed” the *Leaco* Court of Appeals—relying on the Black’s Law Dictionary—meant only that the NTTC forms were filled out and signed. *See id.* If these three conditions are met, then the *Leaco* Court of Appeals found that the NTTC becomes the only material and conclusive evidence establishing that the seller-taxpayer is entitled to the claimed deduction even when the buyer improperly issued the NTTC to the seller. *See id.*; *See also Rainbo Baking Co. v. Commissioner of Revenue*, 84 N.M. 303, 305 502 P.2d 406, 408 (N.M. Ct. App. 1972) (absent a claim of bad faith, some other issue of good faith, or a claim of improper execution of the NTTC, a taxpayer’s presentation of the NTTC established that taxpayer’s claim with conclusive evidence). The *Leaco* Court of Appeals found no relevance to the fact that the buyer had improperly issued a NTTC to the seller by stating that was an issue between the Department and the buyer. *See Leaco* at 632, 429.

While *Leaco* found no relevance to whether the buyer improperly issued a NTTC to the seller, the Court of Appeals modified that stance somewhat when it found in *McKinley Ambulance*

Serv. v. Bureau of Revenue, 92 N.M. 599, 601, 592 P.2d 515, 517 (N.M. Ct. App. 1979) that the good-faith, conclusive evidence provision did not protect a seller from taxation “unless the certificate covered the receipts in question.” That is, since there was “no certificate applicable” for the type of services that taxpayer provided, the *McKinley Ambulance Serv.* Court of Appeals upheld the Department’s denial of the deduction. *id.* at 602, 58. Similarly (although perhaps in dicta), the Court of Appeals in *Gas Co. v. O’Cheskey*, 94 N.M. 630, 632, 614 P.2d 547, 549 (N.M. Ct. App. 1980) stated that “[t]he issuance of a ‘Nontaxable Transaction Certificate’ does not operate to transform an otherwise taxable transaction into a nontaxable transaction.” However, the *Gas Co.* Court of Appeals expressly noted that *Leaco* remained an exception¹. *See Gas Co.* at 632, 549. Since *Gas Co.* was decided after *McKinley Ambulance Serv.*, *Gas Co.*’s subsequent reaffirmation of *Leaco* meant that *Leaco* remained good law even after *McKinley Ambulance Serv.* In *Arco Materials v. Taxation & Revenue Dep’t*, 118 N.M. 12, 15-16, 878 P.2d 330, 333-334 (N.M. Ct. App. 1994), rev’d on other grounds, 118 N.M. 647, 884 P.2d 803 (1994), the Court of Appeals cited Regulation 3.2.201.15 NMAC (05/31/01) favorably in finding that a taxpayer was not protected by its acceptance of an executed NTTC when a change in law rendered the executed NTTC invalid for the transaction in question. *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep’t*, 107 N.M. 392, 397, 758 P.2d 806, 811 (N.M. Ct. App. 1988) (taxpayer not entitled to a deduction when the nontaxable transaction form presented was not in the NTTC form proscribed by the Department).

Leaco and not *McKinley Ambulance Serv.*, *Arco*, *Proficient Food Co.*, or *Gas Co.* control the outcome of this protest both because those other cases are distinguishable from transaction at issue in this protest and because NMSA 1978, §7-9-43(A) (2011) must be read to give full effect to

¹ Although in practical effect, *Leaco* did exactly what *Gas Co.* sought later to prohibit: through its good faith acceptance of an improperly executed NTTC, the seller in *Leaco* was able to convert a taxable transaction not otherwise subject to any valid deduction into a nontaxable transaction.

that statute's good-faith, safe harbor provision. The transaction at issue between Taxpayer and Visions in this protest qualified for a deduction under NMSA 1978, § 7-9-48 (2000) because Taxpayer sold Visions a service, which Visions resold in its regular course of business to the State, the resale of which was subject to gross receipts tax that Visions in fact paid. *McKinley Ambulance Serv.* is distinguishable from the facts of this protest. Unlike here, the Court of Appeals in *McKinley Ambulance Serv.* found that transaction at issue in that case was taxable and not covered by the claimed deduction. *See McKinley Ambulance Serv.* at 601, 517. The fact that no certificate could have covered the transaction (because Taxpayer's services did not qualify for a deduction) was an important part of the Court of Appeals finding in *McKinley Ambulance Serv.* *See id.* at 602, 518. This protest is not the *McKinley Ambulance Serv.* or *Gas Co.* scenario where Taxpayer is attempting to convert a taxable transaction not covered by any relevant deduction into a nontaxable transaction by virtue of NMSA 1978, §7-9-43(A) (2011)'s good faith, conclusive evidence safe harbor provision. Nor is this the *Arco* case, where a statutory change rendered the executed NTTC invalid for the underlying transaction. Moreover, this is also not the *Proficient Food Company* case because all the NTTCs executed in this matter were on a form proscribed by the Department. In this case, Taxpayer merely seeks to substantiate a deduction for a transaction that but for the procedural NTTC issue would clearly qualify as a recognized and proper deduction under NMSA 1978, § 7-9-48 (2000).

The other reason *McKinley Ambulance Serv.*, *Arco*, and Regulation 3.2.201.15 NMAC (05/31/01) do not control the outcome of this protest has to do with giving full effect to NMSA 1978, §7-9-43 (A) (2011)'s good faith, conclusive evidence safe harbor provision. Statutes are to be interpreted in a manner to give the entire statute effect and not render portions of the statute superfluous. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-

NMSC-20, ¶28, 125 N.M. 401, 411, 962 P.2d 1236, 1246 (N.M. 1998). If the answer to the remaining issue in this protest is that Taxpayer is not entitled to the statute's good-faith safe harbor protection merely because Visions timely and properly executed an incorrect type of NTTC to Taxpayer, then the safe-harbor protection of NMSA 1978, §7-9-43 (A) (2011) would be superfluous. That is so because if the good faith safe harbor only applied to instances where the buyer timely executed a proper type of NTTC to a seller-taxpayer for a legitimately deductible transaction, a seller-taxpayer would have already qualified for the deduction under the first portion of NMSA 1978, §7-9-43 (A) (2011) without ever having to consider that statute's safe harbor provision. In other words, there would be no purpose in creating a good faith, safe harbor exception to the statute's NTTC requirements if the only way a taxpayer could ever qualify for the exception is by otherwise satisfying the statute's primary NTTC requirements. In simplest form, there is no meaningful exception to the rule if the exception itself requires full compliance with the rule. Therefore, in order to give full effect to NMSA 1978, §7-9-43 (A) (2011), the good-faith safe harbor provision must be considered for an otherwise nontaxable taxable transaction even though Visions executed an improper type of NTTC to Taxpayer .

Under the three-part *Leaco* good-faith, conclusive evidence test, Taxpayer presented conclusive evidence that she is entitled to her claimed deduction. The first prong is the timeliness of acceptance of a NTTC. *See Leaco* at 632, 429. While it is unclear exactly when in October Taxpayer received a copy of the Type 2 NTTC, the Type 2 NTTC had an execution date of May 25, 2010, well before the October 12, 2012 60-day statutory deadline. By presenting an NTTC with an execution date before the 60-day deadline, Taxpayer met her initial burden and shifted the burden to the Department to establish that she did not timely possess that document by the October 12, 2012 60-day deadline. *See Siemens Energy & Automation, Inc. v. New Mexico Taxation and Revenue*

Department, 119 N.M. 316, 318, 889 P.2d 1238, 1240 (Ct. App. 1994) (presentation of a multistate nontaxable transaction certificate satisfied presumption of correctness and shifted burden to Department to show certificate was invalid); *See also MPC Ltd.* at ¶¶13, 220, 311.

It is also worth noting that the Department's own letters in this case indicate that the Department's main concern was the date of the execution of Taxpayer's supporting NTTC, not whether Taxpayer showed the Department that document by October 12, 2012. Ms. Gage gave Taxpayer until October 31, 2012 to produce the documents, including NTTCs, supporting the deduction, a deadline Taxpayer complied with in this matter. Since that date was after the statute's mandatory 60-day deadline, the purpose of allowing Taxpayer to submit a NTTC after the 60-day deadline could only have been for Ms. Gage to check the execution date of the NTTC. Even clearer is Mr. Dillon's letter of January 9, 2013, where he asks Taxpayer to submit a Type 5 NTTC by January 25, 2013 that "must have been dated... by the expiration of the 60-day period..." Although Mr. Dillon was focused on a different type of NTTC, his interest was still on the execution date of that NTTC. At no point did either Ms. Gage or Mr. Dillon allege that Taxpayer did not timely possess the Type 2 NTTC, only that it was the incorrect type to cover the transaction at issue.

Another factor under *Leaco* is whether there was a properly executed NTTC. *See Leaco* at 632, 429. Again, by "proper execution", the *Leaco* court meant that the NTTC was filled out, signed, and completed. *See id.* In this case, the Type 2 NTTC was completed and signed by Visions in a form developed by the Department. The fact that Visions Management, Inc. improperly executed a Type 2 NTTC to Taxpayer rather than a Type 5 NTTC that covered the transaction is an issue between the Department and Visions Management, Inc. *See Leaco* at 632, 429.

The final requirement under *Leaco* is good faith acceptance. *See id.* NMSA 1978, §7-9-43 (2011), Regulation 3.2.201.15 NMAC (05/31/01), and *Leaco* do not expressly define what is meant

by good faith acceptance of a NTTC. However, another recent Court of Appeals cases provided some guidance on what is meant by good faith acceptance of a NTTC. In *Cont'l Inn v. N.M. Taxation & Revenue Dep't*, 113 N.M. 588, 591-592, 829 P.2d 946, 949-950 (N.M. Ct. App. 1992), the Court of Appeals rejected a claim of no good faith because “the timely delivery of a NTTC from the buyer to the seller convey[ed] a message to the seller that the use of the NTTCs is such that the seller is entitled to deductions...” *id.* at 592, 950. In other words, the message conveyed by a buyer to a seller by the issuance of a NTTC is enough for the seller to have good faith (or at least not bad faith) that it is entitled to a deduction for the transaction at issue.

Further, in other contexts, the New Mexico Court of Appeals has turned to Black’s Law Dictionary to define good faith. In the case *Erica, Inc. v. N.M. Regulation & Licensing Dep't*, 2008 NMCA 65, ¶18, 144 N.M. 132, 140, 184 P.3d 444, 452 (N.M. Ct. App. 2008), the Court of Appeals stated that

[g]ood faith is a broad term: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context." Black's Law Dictionary 701 (7th ed. 1999) (internal quotation marks and citation omitted) (defining good faith as "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage").

Considering these conceptions of good faith in applying the final *Leaco* safe harbor requirement, Taxpayer in good faith believed that the Type 2 NTTC Visions executed to her allowed Taxpayer to deduct her Visions’ gross receipts. Visions indicated that through no fault of Taxpayer, she assumed that the Type 2 NTTC executed to her allowed her to deduct the gross receipts tax that Visions was responsible for paying. Like discussed in *Cont'l Inn* at 592, 950, Taxpayer’s belief and acceptance of the executed Type 2 NTTC was not unreasonable or in bad faith given the message that Visions Management, Inc’s conveyance of that NTTC sent to Taxpayer

(a message perhaps even stronger than in *Cont'l Inn* given Visions' additional assurances that it was responsible for the gross receipts tax). There is no evidence on this record that Taxpayer acted with dishonesty, deceit, with intent to defraud, or in any other malevolent manner in accepting Visions' executed Type 2 NTTC. The Department did not allege or prove that Taxpayer did not act in good faith in accepting Visions' executed Type 2 NTTC. The facts of this case fall under the *Cont'l Inn* conception of good faith and meet the Black's Law Dictionary definition of good faith cited favorably by the Court of Appeals in *Erica, Inc.* at ¶18, 140.

In summary, all three *Leaco* requirements for the good faith, conclusive evidence protection under the statute are met in this case. While *McKinley Ambulance Serv.* and Department Regulation 3.2.201.15 NMAC (05/31/01) still provide some hesitation given that the Type 2 NTTC was not the correct type to cover the otherwise nontaxable transaction, it is difficult to conceive that the statute's good-faith, conclusive evidence protection could transform *Leaco*'s clearly taxable transaction unsupported by any applicable deduction into a nontaxable transaction, yet not protect Taxpayer in this circumstance when the transaction is covered by a deduction and all other NTTC safe harbor requirements are met. Consequently, *Leaco* dictates in this circumstance that the timely executed Type 2 NTTC Taxpayer accepted in good faith is conclusive evidence under NMSA 1978, §7-9-43(A) (2011) that Taxpayer is entitled to the deduction under NMSA 1978, § 7-9-48. Taxpayer's protest to the 2008 assessment is granted.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the assessment of 2008 gross receipts tax. Jurisdiction lies over the parties and the subject matter of this protest.
- B. Taxpayer protested the 2008 assessment in her protest letter. Taxpayer did not protest the 2009 assessment.

C. In the regular course of its business, Visions resold the services of Taxpayer and paid gross receipts tax on the receipts from that resale, making the transaction eligible for a deduction under NMSA 1978, § 7-9-48 (2000).

D. Taxpayer timely accepted a completed and executed Type 2 NTTC from Visions in good faith.

E. Taxpayer's possession of a timely executed Type 2 NTTC that she accepted in good faith is conclusive evidence under NMSA 1978, §7-9-43(A) (2011) that she was entitled to her claimed deduction. *See Leaco Rural Tel. Coop. v. Bureau of Revenue*, 86 N.M. 629, 632, 526 P.2d 426, 429 (N.M. Ct. App. 1974).

For the foregoing reasons, the Taxpayer's protest of the 2008 Assessment **IS GRANTED**.

DATED: May 15, 2013.

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