

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

**IN THE MATTER OF THE PROTEST OF  
ALAN MOYA  
TO ASSESSMENTS ISSUED UNDER LETTER  
ID NO.'s L1220085056 & L0146343232**

**No. 13-13**

**DECISION AND ORDER**

A protest hearing occurred on the above captioned matter on May 16, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Alan R. Moya (“Taxpayer”) appeared *pro se*. Chief Legal Counsel Nelson Goodin appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #1-2 and Department Exhibits A and 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. On September 20, 2012, the Department assessed Taxpayer \$2,536.54 in gross receipts tax principal, \$507.30 in penalty, and \$377.78 in interest for a total assessment of \$3,421.62 for the reporting period ending December 31, 2008. [Letter id. no. L0146343232].
2. On September 20, 2012, the Department assessed Taxpayer \$2,782.14 in gross receipts tax principal, \$556.43 in penalty, and \$287.46 in interest for a total assessment of \$3,626.03 for the reporting period ending December 31, 2009. [Letter id. no. L1220085056].

3. On November 7, 2012, Taxpayer filed a written request for a retroactive extension in which to file a protest.
4. On November 7, 2012, Taxpayer filed a written protest to the assessments.
5. On November 27, 2012, the Department granted Taxpayer a retroactive extension in which to file a protest and acknowledged receipt of Taxpayer's protest as timely.
6. On February 8, 2013, the Department requested a hearing in this matter.
7. On February 8, 2013, the Hearing Bureau sent Notice of Administrative Hearing, scheduling the protest hearing in this matter on May 16, 2013.
8. As of May 16, 2013, Taxpayer owed \$2,536.54 in gross receipts tax principal, \$507.30 in penalty, and \$428.58 in interest for the reporting period ending on December 31, 2008. [Department Ex. C].
9. As of May 16, 2013, Taxpayer owed \$2,782.14 in gross receipts tax principal, \$556.43 in penalty, and \$343.18 in interest for the reporting period ending on December 31, 2009. [Department Ex. C].
10. In 2008 and 2009, Taxpayer worked as subcontractor performing home inspections exclusively for WIN Home inspection ("WIN").
11. On June 25, 2012, the Department sent Taxpayer "Notice of Limited Scope Audit Commencement." [Department Ex. A].
12. The "Notice of Limited Scope Audit Commencement" informed Taxpayer that Taxpayer had 60-days, until August 24, 2012, to produce any necessary nontaxable transaction certificates ("NTTC or NTTCs") to support Taxpayer's claimed deductions.
13. Taxpayer did not possess or produce any NTTCs by the August 24, 2012, 60-day deadline.

14. On October 3, 2012, after the 60-day deadline had expired, WIN executed a Type 5 NTTC to Taxpayer for Taxpayer's subcontracting services. This Type 5 NTTC was untimely. [Taxpayer Ex. 1].

15. On October 3, 2012, Bonnie Norris, co-owner of WIN, wrote the Department a letter indicating that WIN had paid the gross receipts tax for Taxpayer's services, that WIN was unaware of the NTTC requirements, and that it would have issued the NTTC to Taxpayer at the time the services were performed if it had been aware of the requirements. [Taxpayer Ex. 2].

## **DISCUSSION**

The issue at protest is whether Taxpayer is entitled to a deduction of gross receipts from his work as a subcontractor with WIN when Taxpayer did not receive the NTTC, and the NTTC was not executed, until after the 60-day deadline. While Taxpayer stated he understood the need for some sort of penalty for the delay in producing the NTTC, Taxpayer argued that imposing the full assessment on Taxpayer when WIN had already paid the taxes was excessive and amounted to double taxation.

### **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).

**Gross Receipts Tax, the Deduction, and NTTCs.**

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).

Taxpayer suggested that since he only performed home inspection work for WIN, Taxpayer was not engaged in business. However, Taxpayer acknowledged that he was performing home inspection work as a subcontractor for WIN. There is no evidence that Taxpayer was an employee of WIN. *See* NMSA 1978, Section 7-9-17 (exempting wages of employees from gross receipts tax); *See also* Regulation 3.2.105.7 NMAC (5/15/01) (defining “employee”). Since Taxpayer worked as a subcontractor rather than an employee, Taxpayer met the definition of engaged in business under NMSA 1978, § 7-9-3.3 (2003). Therefore, Taxpayer’s receipts from performing services for WIN are presumptively taxable under NMSA 1978, § 7-9-5 (2002).

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions of gross receipts tax. Taxpayer’s sale of home inspection services to WIN, whom in turn resold Taxpayer’s home inspection service to its own clients, 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....

Simply performing a service for resale, as the Taxpayer did in this instance as a subcontractor for WIN, is not enough to satisfy the requirements of the deduction under NMSA 1978, § 7-9-48 (2000). The statute clearly and unambiguously conditions the deduction on a sale made to a person who delivers a NTTC.

NMSA 1978, § 7-9-43 (2011) 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.

Under NMSA 1978, Section 7-9-43 (2011), Taxpayer had a statutory obligation at the time he performed the services for WIN and filed his corresponding CRS returns in 2008 and 2009 to obtain the relevant NTTC supporting the claim for a deduction. In this case, Taxpayer did not possess a NTTC from WIN either at the time of the initial transaction or when Taxpayer's tax returns for 2008 and 2009 gross receipts tax were due.

While taxpayers "should" have possession of required NTTCs at the time 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 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 a NTTC is irrelevant. The language of NMSA 1978, § 7-9-43 (2011) 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). See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009 NMSC 013, ¶22, 146 N.M. 24, 32, 206 P.3d 135, 143 (N.M. 2009) (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

On June 25, 2012, the Department sent Taxpayer Notice of Limited Scope Audit, including express notice that Taxpayer had 60-days, until August 24, 2012, to obtain any NTTCs necessary to support claimed deductions. This Department notice requesting supporting NTTCs within 60-days is in accord with the second chance provision of NMSA 1978, §7-9-43 (2011). Only after the 60-day deadline had passed did Taxpayer seek and receive the NTTC from WIN; the NTTC was executed over a month after the 60-day deadline. Regardless of the reason for non-possession of a required NTTC, NMSA 1978, §7-9-43 (2011), with its mandatory "shall be disallowed" language, does not allow the Department any leniency to grant Taxpayer a deduction not supported by a timely NTTC. Therefore, the Department was required to deny Taxpayer's claim for a sale of a service for resale deduction under NMSA 1978, § 7-9-48 (2000) and assess the full gross receipts tax for 2008 and 2009.

Taxpayer argued that imposition of the full assessments against him when WIN had already paid the gross receipts tax amounted to excessive double taxation. However, under the New Mexico Gross Receipts Tax Act, the fact that WIN may have paid gross receipts tax on the home inspection receipts does not necessarily alter the analysis of Taxpayer's own gross receipts tax obligations. The New Mexico Gross Receipts and Compensating Tax Act imposes a tax on all receipts of a business. The focal point under the New Mexico Gross Receipts and Compensating Tax Act is not any one

transaction, but the receipts of all persons and companies engaged in business. Here, there are two separate businesses liable for gross receipts tax: WIN had receipts from its sale of home inspection service to its clients, and Taxpayer, as a separate business entity from WIN, had receipts for his subcontracting services with WIN. Both WIN and Taxpayer, two separate businesses, had receipts potentially subject to gross receipts tax liability. The receipts of each respective business, in absence of an exemption or a deduction, were subject to gross receipts tax. *See House of Carpets v. Bureau of Revenue*, 84 N.M. 747, 750-751, 507 P.2d 1078, 1081-1082 (N.M. Ct. App. 1973) (in a case where no NTTC was executed, court found no double taxation on the sale of a service of resale because each taxable transaction was for a different subject matter). *See also New Mexico Sheriffs & Police Ass'n v. Bureau of Revenue*, 85 N.M. 565, 567 514 P.2d 616, 618 (N.M. Ct. App. 1973) (finding no double taxation when a tax is imposed on the gross receipts of two separate businesses).

Taxpayer also argued the imposition of the full assessments against him was excessive and created a burden on his finances. However, the assessed tax was the amount legally required in absence of a deduction. Moreover, Regulation 3.1.6.14 NMAC (01/15/01) does not allow the Department to abate otherwise legally required assessments based on Taxpayer's ability to pay.

**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 (2007) (italics for emphasis). 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 Marbob Energy Corp.*, ¶22, 32, 133. 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 Department has no discretion

under NMSA 1978, § 7-1-67 (2007) and must assess interest against Taxpayer from the time the tax was due but not paid until such time as the tax is paid.

**Penalty.**

When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid. (*italics added for emphasis*)

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional. In instances where a taxpayer might otherwise fall under the definition of civil negligence subject to penalty, NMSA 1978, § 7-1-69 (B) (2007) provides a limited exception: "No penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds."

Regulation 3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." Inadvertent error meets the legal definition of "negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989).

While Taxpayer may not have been aware of the NTTC requirements in 2008 and 2009, that lack of knowledge meets the definition of negligence under Regulation 3.1.11.10 (C) NMAC (1/15/01) because it demonstrates “inattention” or “indifference.” Moreover, 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. *See Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). Under *Tiffany Construction Co.*, failure to do reasonable research into what the tax law requires meets the definition of negligence. *See id.* The incidence of the gross receipts tax is on the seller of the service—in this case Taxpayer—and it was the responsibility of Taxpayer not WIN to determine whether there was sufficient documentation to support the claimed deductions.

Moreover, while it is certainly understandable that Taxpayer may have been busy at the time of the Department’s Notice of Limited Scope Audit setting the 60-day NTTC deadline, Taxpayer’s inaction in the face of that notice nevertheless meets the definition of negligence for purposes of civil penalty under the statute. Under these facts, Taxpayer did not show that the failure to pay gross receipts resulted from a good faith mistake of law on reasonable grounds under NMSA 1978, § 7-1-69 (B) (2007). Taxpayer also did not establish any of the non-negligence factors under Regulation 3.1.11.11 NMAC (01/15/01) that might allow the abatement of penalty. Consequently, the Department must assess civil penalty under NMSA 1978, § 7-1-69 (2007).

## **CONCLUSIONS OF LAW**

A. After the Department granted a retroactive extension pursuant to its authority under NMSA 1978, Section 7-1-24 (B) (2003), Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer is a person engaged in business under NMSA 1978, § 7-9-4 (2002). All Taxpayer's receipts are presumed subject to gross receipts tax under NMSA 1978, § 7-9-5 (2002).

C. Taxpayer did not possess the requisite NTTC to support the claimed deduction for the sale of a service for resale under NMSA 1978, § 7-9-48 (2000) at the time the 2008 and 2009 CRS returns were due and did not possess the requisite NTTC within 60-days of the Department's Notice of Audit.

D. Under NMSA 1978, §7-9-43 (2011), without possession of a timely executed NTTC at either the time of the filing of returns or within 60-days of notice of audit, the Department is not allowed to grant and Taxpayer is not entitled to the claimed deduction.

E. Under NMSA 1978, § 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessments. Interest continues to accrue until the tax principal is satisfied.

F. Under Regulation 3.1.11.10 (C) NMAC (1/15/01), Taxpayer was negligent and thus liable for civil penalty pursuant to NMSA 1978, § 7-1-69 (2007). *See Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976).

For the foregoing reasons, Taxpayer's protest **IS DENIED**. For tax year 2008, Taxpayer owes \$2,536.54 in gross receipts tax principal, \$507.30 in penalty, and \$428.58 in interest (as calculated as of the date of hearing). For tax year 2009, Taxpayer owes \$2,782.14 in gross receipts tax, \$556.43 in penalty, and \$343.18 in interest (as calculated as of the date of hearing). Under NMSA 1978, § 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: May 17, 2013.

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