

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

**IN THE MATTER OF THE PROTEST OF
GRANDIN TESTING LAB, INC.
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0095765888**

No. 13-22

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 11, 2013, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Nelson Goodin, Esq., attorney for the Department. Ms. Lizzy Vedamanikan, manager of the protest office, and Ms. Robin Cruz, auditor, appeared as witnesses for the Department. Mr. Robert E. Grandin, owner of Grandin Testing Lab, Inc. (“Taxpayer”) appeared at the appointed time.

Prior to the hearing, the following pleadings were filed. On May 8, 2013, the Department filed a Motion to Compel Discovery. No response was filed by Taxpayer. An Order was entered by the Hearing Officer on May 23, 2013. The exhibits entered into the record are: Department Exhibits A, B, C, D, E, F, G, H, I, J, K, L and M and Taxpayer’s Exhibits 1, 2, 3, 4 and 5.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 30, 2008, the Department assessed Taxpayer in the gross receipts principal amount of \$88,558.65 and \$50,415.67 in interest for tax periods January 31, 2000 through October 31, 2005. Taxpayer was assessed for withholding tax in the amount of

\$35,838.01 in principal and \$18,608.62 in interest for the same tax period. The Department did not assess penalty on either the gross receipts tax or the withholding tax.

2. On October 22, 2008, Taxpayer filed a protest to the assessment.
3. December 4, 2008, the Department acknowledged the protest.
4. On March 28, 2013, the Department requested a hearing in this matter.
5. On March 29, 2013, the Hearings Bureau mailed a Notice of Administrative

Hearing setting the hearing for June 11, 2013.

6. Taxpayer was a nonfiler for purposes of gross receipts taxes for tax periods March 2003 through July 2005. Exhibit E, pages C5.3-C5.7. (Note that the letter from the Department states that Taxpayer was a nonfiler from March 2003 through October 2005. Exhibit C.)

Taxpayer filed and paid gross receipts taxes for the other periods within the assessment.

7. Taxpayer is a corporation incorporated within the State of New Mexico. Exhibit D, page AN2. Taxpayer has been incorporated and has been doing business since August 1991.

8. Taxpayer provides geotechnical engineering and testing services in New Mexico. Exhibit D, page AN2. Taxpayer tests soils (foundation design, field moisture/density testing, laboratory moisture/density relationship, sieve analysis, excavation evaluation, construction observation, footing inspections, plasticity index/liquid limit), asphalt (mix designs, unit weight/low/stability, sieve analysis, extraction, total voids, maximum theoretical unit weight), aggregates (source evaluation, specific gravity, unit weight, sieve analysis, Los Angeles Abrasion, absorption, sodium soundness), concrete (mix designs, compressive strength of cylinders, field-air content, slump, unit weight, yield, field-mold compressive strength specimens, construction observation), and masonry (grout mix design, mortar mix design, field

cast compressive strength specimens, compressive strength testing, CMU Unit Compressive Strength, CMU Unit Weight/Absorption). (“Services”)

9. Taxpayer sells most of its services to general construction contractors.

10. On November 28, 2005, the Department mailed a letter to Taxpayer notifying it that it had been selected for audit. Exhibit C. The Department conducted a field audit of Taxpayer’s business. The audit started on November 28, 2005 and ended on August 13, 2007. Exhibit D, page AN1.

11. Robin Cruz, the assigned auditor in this matter, made a field visit with her supervisor, Mary Rogers to Taxpayer’s business. Ms. Cruz reviewed all records provided by Taxpayer.

12. The Department provided Taxpayer with two 60 day letters which required Taxpayer to produce nontaxable transaction certificates (“NTTCs”) within the 60 day time period. Exhibit D, page AN2. The second 60 day letter expired on October 14, 2006. Exhibit D, page AN2.

13. Some of the services sold by Taxpayer involved the testing of dirt or concrete. Some of these services were resold to construction contractors.

14. When Ms. Cruz first conducted the audit, she determined that the services provided by Taxpayer were not construction services because she believed that Taxpayer was in the business of performing laboratory work, such as the design or testing of dirt or concrete work and not in the business of altering any roads or highways.

15. After her initial evaluation of Taxpayer’s business, Ms. Cruz spoke with the CORE (upper management) committee and they determined that some of the services provided by Taxpayer were construction services. The CORE committee determined that if the service

“physically altered the construction project,” the service was a construction service and deductible, if and only if, Taxpayer provided a Type 6 or a Type 7 NTTC for that service.

16. Based on the CORE committee’s determination, Ms. Cruz prepared work papers. Exhibit E.

17. In determining which services were construction services, Mr. Grandin provided Ms. Cruz with an Excel spreadsheet listing all the transactions for the tax periods at issue. Mr. Grandin indicated on the spreadsheet which transactions involved physically altering a construction project. Mr. Grandin made the determination whether a transaction was a construction service. This spreadsheet was condensed into a list of deductible and nondeductible transactions. Exhibit E, pages C11.1-C.11.2. Ms. Cruz did not challenge Mr. Grandin’s designation of which services were construction services.

18. Ms. Cruz had at least two separate conferences with Taxpayer in which Taxpayer expressed his concern with the audited amounts. The CORE committee met to discuss Taxpayer’s concerns.

19. One of Taxpayer’s concerns was that a Type 5 NTTC from Star Paving was not accepted. The Department did not accept the Type 5 NTTC because it was outside of the 60 day period for the first 60 day letter issued by the Department. The Department issued Taxpayer another 60 day letter with an expiration date of October 14, 2006. Exhibit D, page AN2. The Type 5 NTTC was, then, accepted by the Department and the deduction was allowed. Exhibit D, page AN3.

20. The Department disallowed the following NTTCs: Bosque Auto Body, City of Rio Rancho, City of Socorro, Falls Properties, Village of Jemez Springs, Peralta United

Methodist Church, Village of Bosque Farms, Village of Los Lunas, and Valencia County.
Exhibit E, pages C11.1-C.11.2.

21. Ms. Cruz provided in her work papers an explanation as to why each NTTC was disallowed. Exhibit E, pages C11.1-C.11.2.

22. Taxpayer's evidence as to why NTTCs from Bosque Auto Body, City of Rio Rancho, City of Socorro, Falls Properties, Village of Jemez Springs, Peralta United Methodist Church, Village of Bosque Farms, Village of Los Lunas, and Valencia County should be allowable deductions is that he provides 100% construction services.

23. Taxpayer presented to the Department within 60 days, Type 9 NTTCs for construction services provided to the City of Rio Rancho, the City of Socorro, the Village of Jemez Springs, the Village of Bosque Farms, the Village of Los Lunas and Valencia County.

24. Taxpayer presented to the Department within 60 days, a Type 9 NTTC for construction services provided to Peralta United Methodist Church, and Type 2 NTTCs for construction services provided to Bosque Auto Body and Falls Properties.

25. Taxpayer was provided a copy of the audit work papers. Ms. Cruz' supervisors reviewed these same audit work papers. Ms. Cruz' supervisor determined that Ms. Cruz was initially correct in her determination that Taxpayer's services were not construction services. Ms. Cruz prepared a second set of work papers based on her supervisor's review. Exhibit D.

26. While Taxpayer was in protest, Ms. Vedamanikan reversed the position of Ms. Cruz' supervisor and prepared a third set of audit work papers. Exhibit F. In preparing the audit work papers, Ms. Vedamanikan, left credits for those periods of time outside of the statute of limitations (January 2000-December 2001), but did not include the tax amount for these same

periods. Exhibit F, page C2.1. Taxpayer's tax liability was reduced as a result of Ms. Vedamanikan's efforts.

27. Ms. Cruz' work papers are reliable and extremely detailed. She was a credible witness and her work papers were very well documented.

28. Ms. Vedamanikan's work papers are reliable and it is clear that she spent a great deal of time in an attempt to provide Taxpayer with the least tax liability.

29. Taxpayer asserted that he believed he should have qualified for a managed audit and he worked under the assumption that he was under a managed audit. (CD: 14:26-15:10).

30. The Department selected Taxpayer for an audit because Taxpayer had failed to file returns for March 2003 through October 2005. The Department mailed Taxpayer a letter on November 28, 2005 notifying Taxpayer that it had been selected for audit. Exhibit C.

31. Mr. Grandin notified the Department on or after December 2, 2005, that he was interested in participating in a managed audit.

32. The Department never entered into a managed audit with Taxpayer.

33. To date, Taxpayer has not paid its tax liability.

34. Mr. Grandin stated at the hearing that the reason he did not pay withholding at the time it was due was because he did not have sufficient funds to pay the amount. (CD: 21:39-24:00). Mr. Grandin implicitly agreed to the amount of the withholding tax liability.

35. After the Department made a number of revisions to the amount of gross receipts tax due, the amount of principal gross receipts tax due is \$44,217.46, plus interest. The amount of withholding tax due is \$35,838.01, plus interest. The Department agreed to make an adjustment to interest of \$5,346.48 to correspond with the adjusted principal tax amounts that were for periods outside of the 180 day time period. Exhibits J and K.

DISCUSSION

The issues to be determined are whether Taxpayer presented evidence to substantiate his claim that the remaining receipts at issue were not taxable and whether Taxpayer participated in a managed audit.

Burden of Proof and Standard of Review.

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. In addition, Section 7-9-5 states that “it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, Section 7-9-5(A) (2002). Accordingly, it is Taxpayer’s burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. 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).

Disallowed Deductions.

In this case, Mr. Grandin stated that all of his services were 100 % construction services. Taxpayer presented Type 9 NTTCs to the Department to substantiate the deductions for these governmental agencies: City of Rio Rancho, City of Socorro, Village of Jemez Springs, Village of Bosque Farms, Village of Los Lunas and Valencia County. A construction service provided to a governmental agency is not deductible pursuant to NMSA 1978, Section 7-9-54(B) (2003). See also, Regulation 3.2.212.10 NMAC (May 31, 2001). Therefore, construction services provided to City of Rio Rancho, City of Socorro, Village of Jemez Springs, Village of Bosque

Farms, Village of Los Lunas and Valencia County are not deductible because construction services provided to a governmental agency are not deductible.

The construction services provided to Peralta United Methodist Church, Bosque Auto Body and Falls Properties are not deductible for other reasons. A sale of a service to a 501(c) (3) or church is taxable pursuant to NMSA 1978, Section 7-9-60 (2007). The Department correctly disallowed the deduction(s) for construction services sold to Peralta United Methodist Church. The Department disallowed deductions for construction services to Bosque Auto Body and Falls Properties because these companies are not in the engaged in the business of construction. Section 7-9-52(A) provides 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.” Mr. Grandin presented Type 2 NTTCs for construction services sold to these companies. Mr. Grandin testified at the hearing that he sold 100 % construction services. A Type 2 NTTC is for the resale of a tangible pursuant to NMSA 1978, Sections 7-9-46, 7-9-47 and 7-9-50 to name a few sections. Therefore, these services are also not deductible.

Managed Audit.

Mr. Grandin argued that he is not liable for interest because he believed he should have qualified for a managed audit and he worked under the assumption that he was under a managed audit. (CD: 14:26-15:10). Mr. Grandin did not apply for a managed audit; nor did the Secretary or her delegate enter into an agreement for a managed audit with Mr. Grandin. Mr. Grandin argues that he “should” be eligible for a managed audit, because he was working under the assumption that he would be entitled to a managed audit. Mr. Grandin makes these arguments because if a taxpayer enters into a managed audit agreement with the Department, penalty and interest are not due. NMSA 1978, Sections 7-1-69(G) (2) (2007) and 7-1-67(A) (4) (2007).

There are very precise prerequisites that must exist prior to the Department agreeing to enter into a managed audit with a taxpayer. NMSA Section 7-1-11.1 (2001); Department Publication FYI-404, *Managed Audits for Taxpayers*. One of the requirements is that the agreement be in writing. Mr. Grandin admitted that he did not have any written agreement with the Department. There is no evidence that the Department ever entered into a managed audit with Taxpayer.

Mr. Grandin argued during the hearing that he came forth to file those non filed periods and therefore this is proof that he wanted a managed audit. By the time Mr. Grandin came forth, the Department had already selected him for an audit. Ms. Cruz testified that Taxpayer was already in the system to be audited and that he was selected for audit because Taxpayer had failed to file returns for March 2003 through July 2005. Ms. Cruz' November 2005 letter predates Taxpayer's letter of December 2005 to the Department requesting a managed audit. Exhibit C.

In addition, according to FYI-404, *Managed Audits for Taxpayers*, Taxpayer did not qualify for a managed audit. This publication states that a taxpayer must pay the outstanding liability prior to requesting a managed audit. FYI-404, *Managed Audits for Taxpayers*, page 3. At the time of the audit, Mr. Grandin had not paid his outstanding tax liability, which made his company ineligible for a managed audit. Therefore, there can be no inference that Mr. Grandin was working under the assumption that there was a managed audit agreement with the Department.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest of the Notice of Assessment Letter No. # L0095765888 for gross receipts taxes and interest.

B. The Department proved by a preponderance of the evidence that the remaining deductions disallowed were properly disallowed.

C. Taxpayer did not present any evidence disputing the withholding tax liability.

D. Taxpayer owes \$44,217.46 in gross receipts tax, plus interest and \$35,838.01 in withholding tax, plus interest. The Department agreed to make an adjustment to interest of \$5,346.48 to correspond with the adjusted principal tax amounts that were for periods outside of the 180 day time period. Interest continues to accrue until the date the principal amount of tax is paid.

E. Taxpayer did not enter into a managed audit with Taxpayer.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**.

DATED: August 16, 2013

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25, Taxpayer has the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

CERTIFICATE OF SERVICE

On August 19, 2013, a copy of the foregoing Decision and Order was mailed to Robert E. Grandin, President of Grandin Testing Lab, Inc. located at 11 Roberts Circle, Los Lunas, NM 87031, and delivered through interoffice mail to Nelson Goodin, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.
