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

**IN THE MATTER OF THE PROTEST OF**
**RAVELLE'S JEWEL'S** **No. 13-27**
**TO ASSESSMENT ISSUED UNDER LETTER**
**ID NO. L0992151616**

## DECISION AND ORDER

A protest hearing occurred on the above captioned matter on September 4, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Ravelle Smoor appeared pro se on behalf of Ravelle's Jewel's ("Taxpayer"). Mr. Martjin Kolloffel appeared as a witness on behalf of Taxpayer. Staff Attorney Kathleen Carlow appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Mary Griego appeared as a witness for the Department. Taxpayer Exhibits 1-3 and Department Exhibits A-F were admitted into the record, as described more thoroughly 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 is a sole proprietorship formed by Ms. Smoor. Taxpayer was only engaged in business in 2006.

2. Before 2006, Ms. Smoor worked as an employee performing physical therapy services at Southwest Sport and Spine. **[09-04-13 CD 42:15-49]**.

3. Because of change in family circumstances, in 2006 Ms. Smoor gave up her employment with Southwest Sport and Spine. **[09-04-13 CD 27:33-50; 42:15-34]**.

4. In 2006, Taxpayer performed physical therapy services working as an independent contractor for Southwest Sport and Spine. **[09-04-13 CD 27:33-50; 42:15-34]**.

5. In 2006, Southwest Sport and Spine resold Taxpayer's physical therapy services in its regular course of business.

6. Taxpayer did not receive a Nontaxable Transaction Certificate ("NTTC or NTTCs") in 2006 from Southwest Sport and Spine. [**09-04-13 CD 27:58-28:13]**.

7. After 2006, Ms. Smoor again worked as employee of Southwest Sport and Spine. **[09-04-13 CD 42:44-55]**.

8. In 2006, Ms. Smoor and Mr. Kolloffel filed their personal income taxes married, filed jointly. **[09-04-13 CD 13:56-14:12]**.

9. In 2006, Ms. Smoor and Mr. Kolloffel hired Dale O. Wilson, the Tax Consultant, to prepare and file their 2006 federal and state personal income tax returns. [**09-04-13 CD 14:22-51]**.

10. Taxpayer does not know whether Mr. Wilson was a Certified Public Accountant. A review of New Mexico Regulation Licensing Division License look-up does not list Mr. Dale O. Wilson as a Certified Public Accountant.

11. Taxpayer did not discuss gross receipts tax obligations with Mr. Wilson. [**09-04-13 CD 23:41-46; 43:15-37]**.

12. Mr. Wilson never informed Taxpayer of the necessity of obtaining a NTTC. [**09-04-13 CD 16:07-40]**.

13. Through a tape mismatch between Taxpayer's Schedule C's, filed with the IRS, and Taxpayer's 2006, the Department detected possible gross receipts tax liability. **[09-04-13 CD 46:41-59]**.

14. On November 22, 2009, Ms. Smoor and Mr. Kolloffel flew out of the country to South Africa, where they remained until they returned home on January 4, 2010. [**09-04-13 CD 13:04-48]**.

15. On November 25, 2009, the Department mailed Taxpayer a "Notice of Limited Scope Audit Commencement-Schedule C Gross Receipts," requesting that Taxpayer present all executed Nontaxable Transaction Certificates ("NTTC or NTTCs") within 60-days—January 24, 2010. **[Department Ex. B]**.

16. On January 4, 2010, the Department sent Taxpayer a "Reminder Notice of Limited Scope Audit-Schedule C Gross Receipts," reminding Taxpayer that all NTTCs must be executed by the 60-day deadline on January 24, 2010. **[Department Ex. C]**.

17. Upon returning to the country, on approximately January 6, 2010, Taxpayer received the Department's Notice of Limited Scope Audit 60-day demand for NTTCs. [**09-04-13 CD 30:56-31:16]**.

18. After receiving the Department's Notice of Limited Scope Audit, Taxpayer requested a NTTC from Southwest Sport and Spine. [**09-04-13 CD 26:42-59; 30:]**.

19. On January 19, 2010, Taxpayer faxed a letter to the Department indicating that Taxpayer requested a NTTC from Southwest Sport and Spine. **[Taxpayer Ex. #1; 09-04-13 CD 37:29-38:05]**.

20. The Department's Mr. Christopher Van Lone maintained a contact log of his discussions with Taxpayer and Mr. Kolloffel. The log shows that Mr. Van Lone told Taxpayer that she needed to submit any NTTC no later than January 25, 2010. At no point does that log reflect that Mr. Van Lone told Taxpayer the Department would accept an untimely NTTC after the 60-day deadline. **[Department Ex. F]**.

21. Southwest Sport and Spine's accountant did not timely execute a NTTC to Taxpayer by the January 24, 2010 deadline. [**09-04-13 CD 27:00-08]**.

22. After the 60-day deadline, on February 2, 2010, Southwest Spine and Sport executed a Type 5 NTTC to Taxpayer. **[Department Ex. A; 09-04-13 CD 28:25-36]**.

23. On February 4, 2010, Mr. Kolloffel faxed to the Department a copy of the Type 5 NTTC that Southwest Sport and Spine executed to Taxpayer on February 2, 2010. **[Taxpayer Ex. #2; 09-04-13 CD 38:02-38:08]**.

24. On February 12, 2010, the Department assessed Taxpayer $2,009.98 in gross receipts tax, $402.00 in penalty, and $569.80 in interest for a total assessment of $2,981.78 for the combined reporting system period ending on December 31, 2006. **[Letter id. no. L0992151616]**.

25. On February 17, 2010, Taxpayer protested the Department's assessment.

26. On March 8, 2010, the Department acknowledged receipt of Taxpayer's protest.

27. On May 6, 2013, the Department requested a hearing in this matter.

28. On May 7, 2013, the Hearing Bureau issued Notice of Administrative Hearing, scheduling this matter for September 4, 2013.

29. As of the date of hearing, Taxpayer owed $2,009.98 in tax, $402.00 in penalty, and $813.09 in interest for a total outstanding liability of $3,225.07. Interest continues to accrue at $0.16 per day. **[Department Ex. D]**.

## DISCUSSION

In this case, the Department detected that Taxpayer reported business income to the IRS in 2006 for her work as an independent contractor with Southwest Sport and Spine but did not file and pay corresponding New Mexico gross receipts tax. On November 25, 2009, the

Department issued a Notice of Limited Scope Audit, demanding that Taxpayer present any requisite NTTCs within 60-days on January 24, 2010. Taxpayer was out of the country from November 22, 2009 until January 4, 2010, leaving Taxpayer only 20-days to attempt to obtain a NTTC from Southwest Sport and Spine. Southwest Sport and Spine executed a NTTC to Taxpayer after the 60-day deadline. Because the NTTC was untimely, the Department assessed Taxpayer 2006 gross receipts tax, penalty, and interest. Taxpayer protested, arguing that she did not receive Notice of Limited Scope Audit until January 4, 2010, only 20-days before the letter's deadline. Taxpayer argued that she and Mr. Kolloffel did their best to obtain the NTTC from Southwest Sport and Spine in the limited window of time that they had, but were unable to obtain the NTTC until shortly after the 60-day deadline had expired. Taxpayer asked that that her protest be granted and that the Department accept the late NTTC as timely.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. 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*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

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, § 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, § 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, § 7-9-5 (2002).

In this case, it is undisputed that Taxpayer worked as an independent contractor for Southwest Sport and Spine in 2006 rather than as an employee. *See* NMSA 1978, § 7-9-17 (exempting wages of employees from gross receipts tax); *See also* Regulation 3.2.105.7 NMAC (defining "employee"). Since Taxpayer was an independent contractor in 2006 rather than an employee, Taxpayer was a person engaged in business and all her receipts are presumed subject to gross receipts tax. *See* § 7-9-3.3 and § 7-9-5.

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions of gross receipts tax. Taxpayer's sale of physical therapy services to Southwest Sport and Spine for resale by Southwest Sport and Spine to its clients is potentially deductable from gross receipts under NMSA 1978, Section 7-9-48 (2000). Section 7-9-48 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 court 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, is not enough to satisfy the requirements of the deduction under Section 7-9-48. The statute clearly and unambiguously conditions the deduction on a sale made to a person/entity who delivers a NTTC.

NMSA 1978, Section 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 Section 7-9-43, Taxpayer had a statutory obligation to possess a NTTC at the time when the gross receipts tax was initially due for her 2006 performance of the services for Southwest Sport and Spine. In this case, Taxpayer did not possess a NTTC from Southwest Sport and Spine when the 2006 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, Section 7-9-43 gives taxpayers audited by the Department a second chance to obtain these NTTCs: within 60-days of when the Department gives notice, taxpayers must possess a NTTC in order to claim a deduction. Taxpayers who rely on this 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 reason why a taxpayer cannot obtain a NTTC is irrelevant. The language of Section 7-9-43 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 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Consistent with the statutory language, under Regulation 3.2.201.12 (C), a taxpayer "is not entitled to the deduction" when the NTTC is untimely. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). The New Mexico Court of Appeals has held that, despite its general reluctance to place "form over substance," the failure to timely and properly present a requisite NTTC is a "valid basis" for the Department to deny a

claimed deduction. *Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392.

Taxpayer suggested that the date of actual receipt of the Department's Notice of Limited Scope should trigger the 60-day period[1]. However, under NMSA 1978, Section 7-1-9 (1997), any required notice under the Tax Administration Act for mailing is effective upon the Department's mailing to the person at the last address of record. In this case, the Department mailed the Notice of Limited Scope Audit on November 25, 2009, making November 25, 2009 the effective date triggering the 60-day NTTC second-chance requirement. While it is unfortunate that Taxpayer was out of the country for a large portion of the 60-day period, that is the risk Taxpayer ran by not obtaining the NTTC originally in 2006, as required by Section 7-9-43. Under Section 7-9-43, the Department has no authority to allow a deduction after the expiration of the second chance, 60-day deadline.

Further, the Department has no basis to abate civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) in this case. 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, by its use of the word "shall", Section 7-1-69 requires that civil penalty be added to the assessment. 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."

Regulation 3.1.11.10 NMAC 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."

[1] Mr. Kolloffel raised a question about how a military service member whom is deployed overseas might be affected by Notice of Limited Scope Audit triggering the 60-day second chance period. A deployed service member has specific federal and state statutory protections tolling deadlines that do not apply to Taxpayer in this situation.

Erroneous belief and inadvertent error meets the legal definition of "negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department,* 1989-NMCA-070, ¶10, 108 N.M. 795. Under *Tiffany Construction Co. v. Bureau of Revenue,* 1976-NMCA-127, ¶5, 90 N.M. 16, failure to do reasonable research into what the tax law requires or to meet with a qualified tax professional "may constitute negligence."

Here, Taxpayer did not obtain the requisite NTTC when required in 2006, or within 60-days of the Department's Notice of Limited Scope audit. While Taxpayer's inactions were certainly inadvertent and unintentional, given the clear requirements to a NTTC articulated by the deduction under Section 7-9-48, those inactions meet all three definitions of negligence under Regulation 3.1.11.10 NMAC. Therefore, Taxpayer was properly assessed civil negligence penalty under Section 7-1-69.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) 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." Further, under Regulation 3.1.11.11 NMAC, there are several situations where a taxpayer can show nonnegligence. Potentially relevant in this case is Regulation 3.1.11.11 (D) NMAC, which allows for abatement of penalty when a taxpayer "proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts…"

Although Ms. Smoor and Mr. Kollofel relied on a third party to prepare their 2006 personal income tax returns, the evidence did not establish that Mr. Wilson was a CPA. Mr. Wilson was hired to prepare personal income taxes, not gross receipts taxes. Taxpayer did not discuss her gross

receipts tax obligations with Mr. Wilson. There is no evidence that Mr. Wilson had any particular knowledge about New Mexico's gross receipts tax requirements. Since Mr. Wilson was not a CPA and was not hired to prepare gross receipts tax, it cannot be said that he was competent accountant vis-à-vis gross receipts taxes. Moreover, there is no evidence that Taxpayer, either directly or through Mr. Wilson, ever filed a Combined Systems Return listing gross receipts. Under Regulation 3.1.11.11 (D) NMAC, failure to file a return cannot be excused by reliance on an agent. For these reasons, Taxpayer is not entitled to abatement of penalty under Regulation 3.1.11.11 (D) NMAC. Finally, there is no good faith mistake of law when there is no evidence that Taxpayer initially researched and considered the relevant law or consulted with an appropriate gross receipts expert about the law. Taxpayer's failure to obtain the NTTC was not result of a mistake of law made in good faith, as lack of reasonable research into the law constitutes civil negligence. *See Tiffany Construction Co.*, ¶5. Taxpayer's protest is denied.

## CONCLUSIONS OF LAW

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

B. In 2006, Taxpayer was a person engaged in business under NMSA 1978, Section 7-9-4 (2002). Therefore, all of Taxpayer's receipts in 2006 are presumed subject to gross receipts tax under NMSA 1978, Section 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, Section 7-9-48 (2000) at the time the 2006 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, Section 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. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392 (Court found it valid for the Department to deny a claimed deduction when taxpayer did not timely present a requisite NTTC).

E. Under NMSA 1978, Section 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 NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty.

For the foregoing reasons, Taxpayer' protest **IS DENIED.** Taxpayer owes $2,009.98 in 2006 gross receipts tax, $402.00 in penalty, and $813.09 in interest for a total outstanding liability of $3,225.07. Interest continues to accrue at $0.16 per day.

DATED: September 27, 2013.

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