

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

**IN THE MATTER OF THE PROTEST OF
DONALD COLEMAN, d/b/a, Building Trades
TO ASSESSMENT ISSUED UNDER LETTER
ID NOs. #L0430315904 and #L194289440**

No. 13-02

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 7, 2012, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Esq., attorney for the Department. Ms. Sonya Varela, protest auditor, appeared as a witness for the Department. Donald Coleman, d/b/a, Building Trades (“Taxpayer”) appeared at the appointed time.

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 October 3, 2008, the Department assessed Taxpayer in gross receipts tax principal in the amount of \$251.92, \$50.38 in penalty and \$93.48 in interest for tax year December 31, 2005. Letter Id No. L0430315904.
2. The Department issued a second assessment to Taxpayer on October 3, 2008. The Department assessed Taxpayer in gross receipts tax principal in the amount of \$269.82, \$53.97 in penalty and \$59.64 in interest for tax year ending December 31, 2006. Letter Id No. L1942829440.
3. On September 14, 2008, Taxpayer paid \$137.00 towards principal tax for the “discrepancy” that he owed. This amount was offset against the 2005 tax liability.

4. Taxpayer filed a protest to the assessments on October 31, 2008.
5. On December 4, 2008, the Department acknowledged the protest.
6. On April 24, 2012, the Department requested a hearing in this matter.
7. On May 4, 2012, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for August 7, 2012.
8. This matter is a Schedule C mismatch case. A Schedule C mismatch case involves a discrepancy between what the taxpayer reports as receipts on his Federal 1040, Schedule C and the gross receipts reported to New Mexico.
9. On July 2, 2008, the Department issued a Notice of Limited Scope Audit indicating that the discrepancy between what Taxpayer reported to the Federal government and the State government was \$4,781.00 for tax year 2005. Exhibit #1.
10. On July 2, 2008, the Department issued a Notice of Limited Scope Audit indicating that the discrepancy between what Taxpayer reported to the Federal government and the State government was \$4,421.00 for tax year 2006. Exhibit #2.
11. The Notice of Limited Scope Audit provided that Taxpayer had 60 days from the date of the July 2, 2008 letter to provide any nontaxable transaction certificates (“NTTCs”) to the Department. Exhibits #1 and 2.
12. Taxpayer is in the construction or contracting business.
13. Taxpayer testified that he provided his invoices and receipts for the tax years at issue to the Department years ago. He does not have all of his receipts because the tax years at issue were so long ago.
14. Taxpayer did not use NTTCs at the time of purchasing goods and he paid taxes on all goods he purchased.

15. Taxpayer complained that from the time he filed his protest in 2008 to the date of the request for hearing, four years had passed, which he considered excessive.

16. Taxpayer did not provide any NTTCs to the Department within the 60 day period or before August 31, 2008.

DISCUSSION

The sole issue to be determined is whether the receipts Taxpayer reported to the Federal government were gross receipts that were from the sales made or services performed in New Mexico. There was no evidence or testimony on whether the receipts at issue are for services or goods. There was no testimony or evidence as to whether the goods or services sold were sold or performed in New Mexico. Taxpayer believed at the hearing that the receipts at issue were the receipts for goods he purchased. Taxpayer paid taxes on the goods he purchased. It is unclear whether the receipts for goods purchased relate to the receipts underreported by Taxpayer. These may or may not be the receipts at issue.

The receipts at issue are for goods or services Taxpayer sold to customers. The assessments issued by the Department are not for the goods that Taxpayer purchased, but instead were issued based on Taxpayer's goods he sold in New Mexico or the services he performed in New Mexico.

Burden of Proof and Standard of Review.

NMSA 1978, Section 7-1-17(C) (2007) provides that any assessment of taxes made by the Department is presumed to be correct. 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. *See, TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on*

other grounds, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See, MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Dep't.*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002). Under NMSA 1978, Section 7-1-17(C) (2007), both assessments issued in this case are presumed to be correct.

Consequently, the Taxpayer has the burden to overcome the assessments and establish that he was entitled to deductions for tax years 2005 and 2006. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). To the extent that this case involves Taxpayer's protest over a claim of a deduction, "where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991).

Gross Receipts.

Generally speaking, goods sold or services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in § 7-9-3.5(A)(1):

(1) "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or services exchanged, "gross receipts" means the reasonable value of the property or services exchanged;"

NMSA 1978, Section 7-9-3.5(A) (1) (2003). The Gross Receipts and Compensating Tax Act, Sections 7-9-1 through 114, defines "service" as "which activities involve predominately the

performance of a service as distinguished from selling or leasing property. ... In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not controlling.” NMSA 1978, Section 7-9-3(M) (2003). The Supreme Court in 1937 decided *Comer v. State Tax Comm'n*, 41 N.M. 403, 412, 69 P.2d 936, 941 (1937) that gross receipts shall include “all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect.” Selling property is defined as “a transfer of property for consideration...” NMSA 1978 Section 7-9-3(A) (2003). In addition thereto, 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 (2002).

Taxpayer was in the construction or contracting business. Taxpayer presented no evidence or testimony that the goods or services were either sold or performed outside of New Mexico. In reviewing, the Notice of Limited Scope Audit, Taxpayer’s residence is in New Mexico. Therefore, more than likely the services were either performed in New Mexico or the goods were sold in New Mexico. Taxpayer presented no evidence or testimony as to why there was a discrepancy between the gross receipts he reported to the Federal government and the gross receipts he reported to the State of New Mexico.

To the extent that NTTCs were mentioned by both parties, it is unclear whether the Taxpayer was entitled to any deductions pursuant to NMSA 1978, Section 7-9-43 (2005). Taxpayer testified that no seller had ever provided him with any NTTCs nor had he ever applied for any NTTCs from the Department.

Taxpayer argued that it took the Department too long to request a hearing. He said that he had forgotten about the matter and that he should not have to pay interest because it took the Department so long to set the matter for hearing. The Hearing Officer pointed out to Taxpayer

that the letter from the Department dated December 4, 2008, Letter Id No. L 1621996672, indicates that interest continues to accrue while the principal tax is outstanding. Taxpayer was able to stop the accrual of some of the interest when he made a partial payment in the amount of \$137.00. Taxpayer said that he threw the Department's letter dated December 4, 2008 away. Taxpayer offered to have the Hearing Officer review his receipts. The receipts offered by Taxpayer appeared to be receipts for goods he purchased and not goods he sold.

Therefore, since Taxpayer has not presented any testimony as to why he did not report the same gross receipts to the State of New Mexico as he reported to the Federal government, Taxpayer's receipts are deemed to be taxable.

CONCLUSIONS OF LAW

- A. Taxpayer filed timely written protest of the Notices of Assessment Letter ID No. # L0430315904 and L1942829440 for gross receipts taxes, penalty, and interest for the period years December 31, 2005 and December 31, 2006.
- B. There was no evidence provided as to whether the receipts were for goods or services. There was no evidence provided as to why there was a discrepancy between what Taxpayer reported to the Federal government and the State of New Mexico.
- C. Taxpayer's receipts were either performed or sold in New Mexico.
- D. Taxpayer failed to present any evidence to rebut the presumption that the receipts are taxable as set forth in NMSA 1978, Section 7-9-5 (2002) and rebut the presumption of correctness of the assessment as set forth in NMSA 1978, Section 7-1-17(C) (2007).

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

DATED: February 15, 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, the Taxpayers have 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 February 15, 2013, a copy of the foregoing Decision and Order was mailed via certified mail # 7008 0500 0001 4688 5000 to Donald Coleman, d/b/a, Building Trades, located at 43 Skyland Blvd., Tijeras, New Mexico 87059 and delivered through interoffice mail to Staff Attorney Peter Breen, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.

John Griego