

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

**IN THE MATTER OF THE PROTEST OF  
JAMES OTERO AND TANJA FORD (f/k/a TANJA KERR)  
TO ASSESSMENTS ISSUED UNDER  
ID NOS. L1493654592 and L0390683712**

**No. 13-31**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held September 19, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Susanne Roubidoux, Staff Attorney. Ms. Jennifer Carlisle, Auditor, also appeared on behalf of the Department. Mr. James Otero and Ms. Tanja Ford (Taxpayers) appeared for the hearing and represented themselves. Mr. Clay Kerr was also present during the hearing at the Taxpayers' request. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

**FINDINGS OF FACT**

1. The Taxpayers were engaged in business in New Mexico in 2005 and 2006. The Taxpayers' business was a vehicle washing service.
2. The Department determined that the Taxpayers were a non-filer on gross receipts tax for 2005 and 2006.
3. On May 25, 2010, the Department assessed the Taxpayers for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005. The assessment was for \$2,070.74 tax, \$414.15 penalty, and \$919.94 interest.

4. On May 25, 2010, the Department assessed the Taxpayers for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006. The assessment was for \$1,994.36 tax, \$398.88 penalty, and \$587.85 interest.
5. On June 16, 2010, the Taxpayers filed a formal protest letter.
6. The Taxpayers produced a properly executed and timely nontaxable transaction certificate (NTTC) for services.
7. The buyer who issued the NTTC was a truck rental company.
8. The Taxpayers were aware that the buyer was also contracting with other truck companies to provide services and maintenance.
9. One of the services that the buyer was selling was vehicle washing.
10. The buyer subcontracted the Taxpayers to provide vehicles washes on trucks that were too large to fit into the buyer's wash bays.
11. The Taxpayer accepted the NTTC in good faith.
12. The Taxpayers' testimony was credible.
13. On September 5, 2013, the Department filed a Request for Hearing asking that the Taxpayers' protest be scheduled for a formal administrative hearing.
14. On September 5, 2013, the parties were sent a Notice of Hearing. On September 9, 2013, the parties were sent an amended notice that corrected the time of the hearing.

### **DISCUSSION**

The issue to be decided is whether the Taxpayers are liable for gross receipts tax, penalty, and interest for the tax periods ending in December 2005 and December 2006 or whether the Taxpayers were entitled to deduct their gross receipts based upon their acceptance of a NTTC.

#### **Burden of Proof.**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Dep’t.*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayers is presumed to be correct, and it is the Taxpayers’ burden to present evidence and legal argument to show that they are not liable for the tax and are entitled to an abatement of penalty and interest.

### **Gross Receipts Tax.**

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). The Taxpayers admitted that they were engaged in a service business performing vehicle washes in 2005 and 2006. There was no dispute that the Taxpayers’ services would ordinarily be subject to gross receipts tax. The Taxpayers argued that they were entitled to deduct their gross receipts based on their acceptance of a NTTC. The Taxpayers argued that since they were entitled to deduct their gross receipts, they did not owe any tax.

### **NTTCs.**

A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2011). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). *See also McKinley Ambulance Serv. v. Bureau of Revenue*, 1979-NMCA-026, 92 N.M. 599 (noting that a NTTC is conclusive evidence only if the NTTC applies to the transaction at issue). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due, but may also produce NTTCs within a deadline set by the Department. *See* NMSA 1978, § 7-9-43. The seller must accept the NTTC in good faith. *See id.* The Taxpayers produced a timely, properly

executed NTTC for services. There was no dispute that the NTTC was of the right type and properly executed. There was no dispute that the NTTC would cover the amount of gross receipts taxes in the assessments.

**NTTCs for services.**

“Receipts from selling a service for resale may be deducted from 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[.]” NMSA 1978, § 7-9-48. The Taxpayers were selling their vehicle washing service to the buyer, and the Taxpayers were aware that the buyer was reselling their service to accommodate customers with vehicles that were too large to fit into the buyer’s wash bays. The buyer delivered a NTTC to the Taxpayers. The NTTC was of the proper type, for resale of services. The Taxpayers were in timely possession of the NTTC. To the best of the Taxpayers’ knowledge, the buyer was charging gross receipts tax on the resale of their services. Therefore, the Taxpayers accepted the NTTC in good faith. A properly executed NTTC “shall be conclusive evidence, and the *only material evidence*, that the proceeds from the transaction are deductible[.]” NMSA 1978, § 7-9-43 (A) (emphasis added). The word “shall” indicates that the provision is mandatory, not discretionary. *See State v. Lujan*, 1977-NMSC-010, 90 N.M. 103, 105. Consequently, the Taxpayers have overcome the presumption and have provided conclusive evidence that the transactions are deductible.

**Burden shifted.**

When a taxpayer presents evidence sufficient 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 (filed October 2, 2002). The Department

argued that the Taxpayers were responsible for providing documentation to show that the buyer was satisfying its responsibilities in issuing the NTTC. The Department cited Regulation 3.2.206.9. *See* 3.2.206.9 NMAC (2000) (indicating that the requirement for separate billing on pre-July 1, 2000 transactions can be satisfied by an attachment). The Department also cited Ruling 401-00-1, which basically discusses the different types of NTTCs and gives examples of when they may and may not be used. The Department essentially argued that the Taxpayers' testimony was not sufficient and that the Taxpayers were required to provide additional proof that the buyer was reselling their services, that the buyer was taxing those resells, and that the buyer was separately stating the resells on its invoices.

An auditor with the Department told the Taxpayers that if they obtained an invoice from the buyer showing the separately stated resale of their services subject to tax then the Department would abate the assessments. The Taxpayers requested an invoice from the buyer on its resale of their services, but the buyer refused to provide one because their customer information is kept confidential. The Taxpayers produced an email from the buyer indicating that certain vehicles were no longer contracted to receive washes and to cease washing those vehicles. The Taxpayers argued that the email was sufficient documentation to show that the washing services were separately contracted. The Taxpayers also argued that they had the NTTC, that they trusted that the buyer was adhering to its responsibilities in issuing the NTTC, and that the Department should go after the buyer if something was not done properly.

I found the Taxpayers to be credible. The Department did not challenge the evidence that NTTC was properly executed and timely. The Department also failed to rebut the testimony that the buyer was reselling the services subject to the gross receipts tax. The Department has the authority to require buyers issuing NTTCs to provide the records and books on their accounts.

See NMSA 1978, § 7-1-11 (granting the Department the authority to require production of records from all taxpayers). There was no evidence that the Department even attempted to contact the buyer on the issue. The Taxpayers did contact the buyer, but the buyer refused to provide their records to the Taxpayers. Moreover, the Taxpayers' argument coincides with the clear language of the statutes and regulations.

A properly executed NTTC is conclusive proof that the seller is entitled to the deductions. See NMSA 1978, § 7-9-43. "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[.]" NMSA 1978, § 7-9-48 (emphasis added). The regulation also indicates that the seller is entitled to deduct when a buyer has delivered a NTTC, and if the buyer does not resell the service subject to tax, then the buyer "is subject to the compensating tax[.]" 3.2.206.8 (A) NMAC (2001). Several cases also indicate that a properly executed NTTC delivered to the seller is conclusive proof that the seller is entitled to the deductions. See *Proficient Food Co. v. N.M. Taxation and Revenue Dep't.*, 1988-NMCA-042, 107 N.M. 392, 396 (holding that a properly executed NTTC is conclusive evidence that the transaction is deductible). See also *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, 86 N.M. 269 (holding that proper issuance of an NTTC is the responsibility of the buyer and that an accepted NTTC is conclusive evidence that the deduction is allowed). See also *Continental Inn v. N.M. Taxation and Revenue Dep't.*, 1992-NMCA-030, ¶ 12-13, 113 N.M. 588 (holding that proper issuance of an NTTC is a matter between the buyer who issued it and the Department, and that a timely delivery of an NTTC by a buyer conveys that the seller is entitled to deduction). See also *Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶ 12, 94 N.M. 630 (indicating that when a

seller accepts a NTTC in good faith, the burden of the tax shifts to the buyer who issued the NTTC, even if the buyer wrongfully issued it).

### **CONCLUSIONS OF LAW**

1. The Taxpayers filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L1493654592 and L0390683712, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayers had a properly executed and timely NTTC for the sale of their services and believed that the buyer was reselling their services subject to the gross receipts tax. The Taxpayers were entitled to deductions for 2005 and 2006.

3. The Taxpayers successfully rebutted the presumption of correctness as an NTTC is conclusive evidence, and the Department failed to establish that the assessments were correct.

4. As the Taxpayers were entitled to deduct the gross receipts, they owed no gross receipts taxes. Therefore, penalty and interest do not apply.

For the foregoing reasons, the Taxpayers' protest is **GRANTED and the assessments are hereby ABATED.**

DATED: October 28, 2013.

*Dee Dee Hoxie*

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DEE DEE HOXIE  
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 parties 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 Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

### CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ in the following manner:

***First Class Mail***

James Otero  
6 King Court  
Los Lunas, NM 87031-7195

And

Tanja Ford  
40 Lopez Loop  
Belen, NM 87002

***Interoffice Mail***

Susanne Roubidoux  
Taxation and Revenue Department, Legal  
1100 S. St. Francis  
Santa Fe, NM 87504

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