

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

**IN THE MATTER OF THE PROTEST OF  
K and N WELDING  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L0799044672**

**No. 13-33**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on August 26, 2013, before Monica Ontiveros, Hearing Officer. This matter was originally set for hearing on July 22, 2013. Taxpayer requested a continuance in this matter on July 10, 2013. The Department did not object to the request for continuance. An Order was entered granting the continuance and changing the hearing date to August 26, 2013.

At the hearing, the Taxation and Revenue Department (“Department”) was represented by Aaron Rodriguez, Esq., attorney for the Department. Ms. Sonya Varela, protest auditor, appeared as a witness for the Department. K and N Welding was represented by its owner, Kenneth R. Hooten (“Taxpayer”) who appeared at the appointed time. The exhibits introduced into the record are: Exhibit 1-Type 5 NTTC; Exhibit 2-Letter dated March 31, 2010; Exhibit A-Notice of Limited Scope Audit Commencement; Exhibit B-Notice of Extension to Provide Records; Exhibit C-Type 5 NTTC; and Exhibit D-Department spreadsheet.

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 May 28, 2010, the Department assessed Taxpayer in gross receipts tax principal in the amount of \$5,847.98, \$1,169.60 in penalty and \$1,726.94 in interest for tax period ending 2006. Letter Id No. L0790044672.
2. Taxpayer filed a protest to the assessment on July 7, 2010.
3. Taxpayer requested a retroactive extension to file a protest on July 8, 2010.
4. On August 17, 2010, the Department granted the retroactive extension and acknowledged the protest. Letter Id No. L1540623424.
5. On June 6, 2013, the Department requested a hearing in this matter.
6. On June 10, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for July 22, 2013. The matter was rescheduled to August 26, 2013.
7. Taxpayer filed a Federal 1040, Schedule C, reporting gross receipts.
8. Taxpayer failed to file gross receipts with New Mexico for tax period ending December 31, 2006.
9. On October 14, 2009, the Department issued a Notice of Limited Scope Audit indicating a discrepancy of \$91,690.00 for tax year 2006 between what Taxpayer reported to the Federal government and the State government. Exhibit A.
10. The Notice of Limited Scope Audit provided that Taxpayer had 60 days from the date of the Notice of Limited Scope Audit letter or until December 13, 2009 to provide any nontaxable transaction certificates (“NTTCs”) to the Department. Exhibit A.
11. The Department issued a Notice of Extension to Provide Records. This Notice provided Taxpayer with an additional 60 days to provide any NTTCs to the Department. The deadline to provide NTTCs was extended to March 14, 2010. Exhibit B.

12. In 2006, Taxpayer provided welding and fabricator services to Madron Services, Inc. (“Madron”) in the Carlsbad and Roswell area. Taxpayer was Madron’s only welder who had passed tests to meet “code specifications.” (CD 25:07). Taxpayer worked in the mines for Madron.

13. Taxpayer used his truck, his equipment and his tools to perform services for Madron. Taxpayer used his own welder and paid for all repairs to the welder. Madron paid Taxpayer on a weekly basis based on the number of hours worked by Taxpayer. Madron’s supervisors told Taxpayer where to work but Madron did not direct or control the work of Taxpayer. Taxpayer traveled a great deal on Madron’s behalf. Taxpayer did not receive any benefits from Madron, except for a liability policy that covered Taxpayer. (CD 22:50-23:43).

14. Taxpayer provided services only to Madron. (CD 25:07). Taxpayer was an independent contractor.

15. Madron sold welding, mining and oilfield services.

16. At the time Taxpayer began providing welding and fabricator services to Madron, Madron did not execute a NTTC to Taxpayer.

17. After receiving the first letter from the Department, Taxpayer attempted to get Madron to execute a NTTC to him.

18. Sometime between October 2009 and June 2010, the Department refused to issue NTTCs to Madron because Madron was not in tax compliance.

19. Madron executed a Type 5 NTTC to Taxpayer on June 28, 2010, over 3 months from the extended deadline. Exhibit 1.

20. Madron resold Taxpayer’s services in the ordinary course of business and the subsequent sale of the service was taxed.

21. Taxpayer's CPA, Golden Seward & Kelly, LLC ("Golden"), also provided accounting services to Madron. Golden told Taxpayer that it would get a NTTC from Madron. Later, Golden told Taxpayer that the Department could not issue a Type 5 NTTC to Madron because Madron was not in tax compliance. (CD 36:17). An employee at Golden left and this contributed to Taxpayer receiving the NTTC after the expiration of the extended 60 day period.

22. Taxpayer did not provide any NTTCs to the Department within the extended 60 day period or before March 14, 2010. Exhibits 1 and C.

23. Taxpayer was provided a Type 5 NTTC from Golden executed by Madron on or about June 28, 2010. Exhibits 1 and C.

## **DISCUSSION**

The sole issue to be determined is whether the Department was required to allow Taxpayer to deduct his receipts from Madron. Taxpayer argued that he was unaware that he needed a Type 5 NTTC at the time he provided services to Madron. He also argued that he was unable to get a NTTC from Madron because they were not in compliance with the Department. The Department argued that the Type 5 NTTC was untimely executed.<sup>1</sup>

### ***Burden of Proof and Standard of Review.***

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-17(C) (2007). 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

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<sup>1</sup> There are insufficient facts to apply an equitable recoupment analysis pursuant to NMSA 1978, Section 7-1-28(F) (2013).

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 Department*, 2003-NMCA-033, ¶11, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40. Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct.

Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect and establish that he was entitled to the deduction for services rendered to Madron. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). The courts have held that "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*, 1991-NMCA-024, ¶16, 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 "all activities ... 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 be controlling.” NMSA 1978, Section 7-9-3(M) (2003). The Supreme Court in 1937 decided in *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.” 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). Therefore, Taxpayer’s welding and fabricating services performed for Madron in New Mexico are gross receipts and presumed to be taxable. NMSA 1978, 7-9-5(A) (2002).

***Type 5 NTTC.***

Receipts from selling a service that are resold are deductible if all the statutory conditions are met. Section 7-9-48 provides that “(r)ceipts 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, Section 7-9-48 (2000). In this case, Taxpayer presented the Department with the correct type of NTTC, Type 5, and there was no issue that the services that Taxpayer sold to Madron were resold in the ordinary course of business and taxable. Therefore, the only issue is whether Taxpayer may deduct his receipts if the NTTC was provided to the Department after the 60 day period expired.

Section 7-9-43(A) provides that:

(a)ll nontaxable transaction certificates of the appropriate series executed by buyers or lessees 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 ... deductions **shall** be disallowed.

(Emphasis added.) NMSA 1978, Section 7-9-43(A) (2011).

In this case, because Taxpayer failed to request or obtain the Type 5 NTTC from Madron when he first started working for Madron or within the extended 60 day period, Taxpayer failed to meet the requirement that the NTTC be his possession within 60 days. The Department provided Taxpayer with two 60 day notices that provided deadlines for Taxpayer to be in possession of the NTTC. The Department issued its first notice to Taxpayer when it mailed its Notice of Limited Scope Audit on October 14, 2009 to Taxpayer giving Taxpayer 60 days or until December 13, 2009 to provide any NTTCs to the Department to support a deduction. Instead, it is not clear from the facts if Taxpayer, his CPA or Madron were the cause of the delay in Taxpayer obtaining a NTTC from Madron after this first notice. Regardless, the Department extended the 60 day period when it issued to Taxpayer a Notice of Extension to Provide Records. This Notice provided Taxpayer with an additional 60 days to provide any NTTCs to the Department. The deadline to provide NTTCs was extended to March 14, 2010. Exhibit B. Unfortunately because the Type 5 NTTC from Madron was executed after the extended deadline, Taxpayer is not entitled to deduct his receipts from Madron.

Taxpayer argued that because he did not know of the filing requirements and because of Madron's tax compliance issues he should not have to suffer the consequences. Unfortunately there is no provision within the Gross Receipts Tax Act that allows for an extension of the 60 day period once it has expired. The Department does have the right, but it is not required, to refuse to approve an application to issue NTTCs of a person or company if the person or company is found to be delinquent or to have a non-filed period. NMSA 1978, Section 7-9-43(D) (2011). In this case, the Department refused to issue any NTTCs to Madron until Madron

became compliant. Therefore Taxpayer is not allowed to deduct its receipts because he did not timely possess the Type 5 NTTC.

***Civil Penalty.***

Taxpayer did not specifically argue that he did not owe penalty; however, his protest is broad in its scope and this argument will be addressed. Taxpayer failed to file gross receipts returns for tax year 2006 because he was unaware that he was required to do so. Civil penalty is imposed when a taxpayer is “negligent” or disregards the Department’s rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

(e)except as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, 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;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2007). The Department’s regulation provides that “negligence” includes “failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.” Regulation 3.1.11.10 NMAC (2001).

By Taxpayer’s own admission, he was negligent in not filing and reporting his



gross receipts returns. Therefore, Taxpayer is liable for penalty. The penalty assessed is \$1,169.60.<sup>2</sup>

***Interest.***

Taxpayer did not specifically argue that he did not owe interest; however, his protest is broad in its scope and this argument will be addressed. Section 7-1-67(A) (2007) states that interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A) (2007). The word “shall” is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32, 206 P.3d 135, 143 (2009). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due, interest was properly assessed. Therefore, Taxpayer owes the interest amount calculated through date of payment of the principal. The interest assessed through August 26, 2013 is \$2,362.17.

Exhibit D.

**CONCLUSIONS OF LAW**

- A. Taxpayer filed a timely written protest of the Notices of Assessment Letter ID No. # L0799044672 for gross receipts taxes, penalty, and interest for the period ending 2006.
- B. Jurisdiction lies over the parties and the subject matter of this protest.
- C. Taxpayer sold services to Madron in the ordinary course of business. Madron resold Taxpayer’s services and collected tax on the sale of the services.
- D. Taxpayer provided the correct type of NTTC to substantiate its receipts as deductible, but he was not in possession of the NTTC within 60 days of the Department’s notice.

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<sup>2</sup> There is a \$1.00 difference between the assessed penalty amount and Exhibit D.

- E. There is no provision that allows an extension of the 60 day period.
- F. Taxpayer did not rebut the presumption of correctness.
- G. Taxpayer was negligent in not filing his gross receipts returns for period ending 2006; accordingly, he owes penalty.
- H. Interest is due and owing on the principal amount of tax due until the date the principal is paid.
- I. The total amount due is \$5,847.98 in principal; \$1,169.60 in penalty and interest accrued through the date of payment of the principal.

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

DATED: November 4, 2013

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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 (1989), 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. 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.