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

IN THE MATTER OF THE PROTEST OF
ADECCO USA, INC. **No. 14-16**
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1550143040

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 8, 2013, before Monica Ontiveros, Hearing Officer. Adecco USA, Inc. ("Taxpayer") was represented by Marc A. Simonetti, Esq. and Andrew D. Appleby, Esq. of Sutherland Asbill & Brennan LLP and Michael Hughes, Esq. of Silva & Gonzales, P.C. Ms. Diane Howell and Ms. Tonya Lain testified on behalf of Taxpayer. Mr. Simonetti filed an Affidavit of Non-Admitted Lawyer with the Hearings Bureau and as a non-admitted lawyer complied with Rule 24-106 NMRA. The Taxation and Revenue Department ("Department") was represented by Nelson Goodin and Susanne Roubidoux, attorneys for the Department. Ms. Lizzy Vedamanikam appeared and testified as a witness for the Department. Taxpayer filed a Brief in Support of Protest Hearing on November 14, 2013 and the Department filed Taxation and Revenue's Response to Adecco's Post Hearing Brief on December 6, 2013.

The Department introduced into the record Exhibits A-C. Taxpayer introduced into the record Exhibits 1, 2 and 11-20.[1] Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 9, 2012, the Department assessed Taxpayer in gross receipts tax in the amount of $379,215.79 in principal; $75,843.15 in penalty; and $33,450.77 in interest for tax

period January 31, 2004 – September 30, 2010. Letter Id No. L1550143040. Sometime in July 2012, the Department abated penalty.

2. Taxpayer requested an extension to file a protest on April 4, 2012. The extension of time was granted on April 17, 2012. Letter Id No. L0060104256.

3. On June 6, 2012, Taxpayer filed a protest to the assessment. Taxpayer protested the disallowance of the deduction or exemption by the Department of the receipts from the City. Taxpayer raised the issue of good faith in its protest filed on June 6, 2012.

4. On June 12, 2012, the Department acknowledged the protest. Letter Id No. L0050698560.

5. On June 10, 2013, the Department requested a hearing in this matter.

6. On June 11, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for September 9, 2013.

7. Taxpayer requested a continuance on July 17, 2013. The matter was reset for October 8, 2013.

8. Taxpayer filed an Amended Protest on October 1, 2013. The only new issue raised in the Amended Protest was whether the services were performed out of state.

9. The Department was provided an additional time to respond to the Amended Protest.

[1] The request for bid begins on pages 20-31 and then appears to skip to pages 260-285.

10. Taxpayer is a Delaware corporation headquartered in Melville, New York. Taxpayer is incorporated as a C corporation and had an office in Albuquerque, New Mexico during the audit period. Exhibit 1, page AN.1; Exhibit 12-8.

11. During the tax period at issue, Taxpayer provided temporary staffing services in New Mexico, but more specifically for the City of Albuquerque ("City"). Taxpayer and the City entered into a contract for the provision of the temporary staffing services. The request for bid, the request for bid response and the contract between the City and Taxpayer outlined the legal obligations of each party. Exhibits 11, 12 and 13. The contract is incomplete.

12. Taxpayer and the City entered into a contract on or about December 24, 2008 with an expiration date of November 14, 2009 for temporary staffing services. Exhibit 16-1.[2] The contract was extended through November 14, 2010. Exhibit 14-1; Exhibit 16-1.

13. The City entered into a contract with Taxpayer whereupon, Taxpayer would provide temporary workers ("employees"[3]) on an "as needed" basis. Exhibit 13-2, paragraph 2.

14. Taxpayer provided employees to the City to supplement the City's workforce in special work situations like employee absences, temporary skill shortages, temporary provision of specialized professional skills, seasonal workloads and special temporary assignments. Any employee placed with the City could not work longer than two continuous years for the City.

15. The services that Taxpayer provided to the City included recruiting, selecting, interviewing, hiring, paying, maintaining a software system that tracked the employees' hours,

[2] Taxpayers' exhibits are numbered with the exhibit number first followed by a dash and then the page number.
[3] The use of the word "employee" is used instead of the word "worker." No inference should be drawn regarding the legal relationship between the "employee" and the City.

compensation and benefits, and withholding and reporting state and federal income tax from the employees' paycheck.

16. There were potentially 110 positions or jobs that could be filled by Taxpayer. Exhibits 11-4 and 11-18.

17. Under the terms of the contract, the City, through an authorized City employee, would request that a position be filled and Taxpayer had 24 hours in which to provide a qualified employee for the job position. Exhibit 11-29, paragraph 18 and Exhibit 13-4, paragraph 22.

18. Prior to placing any employee, the City was requested to provide written authorization signed by the Director of the Department of Finance and Administrative Services and the City's Chief Administrative Officer that sufficient funds existed prior to the placement of the employee. Exhibit 13-2, paragraph 1. The City's individual departments contacted the Taxpayer requesting which positions needed filling. Exhibit 13-2, paragraph 4.

19. The City provided Taxpayer with bid descriptions to establish "performance requirements for the employment of temporary staff personnel." Exhibit 11-27. The job descriptions provided by the City were titled "City of Albuquerque Job Description." Exhibits 11-32 through 11-134.

20. Taxpayer was required to fill jobs or positions based on the job descriptions provided by the City. Exhibit 13-4, paragraph 25.

21. Taxpayer recruited and selected employees for the positions with the City. Exhibit 12-62. Taxpayer recruited the employees from referrals, direct mail, recruiting fairs, the internet, open houses, Xpert online, Adecco Career Accelerator Program, partnership with U.S. Department

of Labor, print and broadcast advertising, fax broadcasting, poster/flyers, classified ads, partnership with jobs for America's graduates, college recruiting, and job centers at airport locations. Exhibit 12-62.

22. Taxpayer evaluated and selected candidates based on "competence." Taxpayer performed a web based assessment on the candidates along with a skills proficiency evaluation to select employees to be placed with the City. Exhibit 11-29, paragraph 17; Exhibit 12-63; Exhibit 13-4, paragraph 21.

23. Taxpayer screened each applicant prior to placing the applicant in a position with the City. The screening included an automated application process, a personal interview, a skills and attitude test, an employer reference check, an employment eligibility verification, an I-9 verification, and a criminal background check. Exhibit 12-66.

24. The City did not participate in the recruiting, screening, testing or any other pre-placement contact of the employees.

25. The pay rate for each position with the City was set by Taxpayer at the time Taxpayer responded to the request for bid. Exhibit 11-20.

26. The City required Taxpayer to set out the difference or marginal rate between the per hour wage Taxpayer paid to the employee in a position and the per hour wage Taxpayer charged the City for each position at the time Taxpayer responded to the request for bid. Exhibit 11-20; Exhibit 12-33 through 12-38. The hourly rate was determined by the position and not the employee who filled the position. Exhibit 12-33 through 12-38.

27. Taxpayer provided a web based system for approval of hours worked by the employees and billing to the City. Exhibit 12-73. The employees entered the time into the web or IVR. Exhibit 12-73. The City employees received an email to approve the hours. Exhibit 12-79. The City employees approved the time records or modified the hours of employees placed with the City by Taxpayer. Exhibit 12-79. Taxpayer, then, initiated an invoice to the City. Exhibit 12-79. Exhibit 13-7, paragraph 41.

28. Taxpayer paid and guaranteed the wages of all the employees placed in positions with the City. Exhibit 11-20; Exhibit 12-79. Taxpayer issued W-9s to these employees and withheld state and federal tax from the wages of the employees it placed with the City. Exhibit 12-79. Taxpayer distributed its paychecks to the employees placed with the City. Exhibit 13-7, paragraph 42.

29. Taxpayer was required to pay for all benefits such as health insurance, life insurance, etc. Exhibit 11-27, paragraph 6 and Exhibit 13-2, paragraph 10. Taxpayer provided a comprehensive benefits program which included medical and dental insurance, holiday pay, service bonus, tuition reimbursement, direct deposit, 401(k) plan, short term disability and term life insurance. Exhibit 12-68.

30. Taxpayer was required to pay for all holidays. Exhibit 11-27, paragraph 8 and Exhibit 13-2, paragraph 12.

31. Taxpayer was required to pay for all sick and vacation leave. Exhibit 11-27, paragraph 7 and Exhibit 13-2, paragraph 11.

32. The City had unilateral authority to terminate an employee placed in any job position. Exhibit 11-29, paragraph 19 and Exhibit 13-4, paragraph 23.

33. The City controlled the duties, the assignments and the work product of the employees placed with the City. (CD 1:21-2:00).

34. Taxpayer's employees rarely visited the work site of any of the employees placed with the City. (CD 2:21).

35. If an employee had a dispute between his/her wages, the employee was required to seek redress from Taxpayer.

36. Taxpayer was required to purchase a fidelity bond for each employee placed with the City in the amount of $100,000.00 to protect the City from losses of monies, security and other property caused by the employees placed by Taxpayer with the City. Exhibit 13-2, paragraph 6.

37. The contract between the City and Taxpayer provided that it was the responsibility of Taxpayer to pay for "all taxes pertaining to employees." Exhibit 13-2, paragraph 8. The request for bid reiterated that it was Taxpayer's responsibility to pay for all taxes pertaining to employees. Exhibit 11-27, paragraph 4. The request for bid from the City stated that "the hourly rate (unit price) for all bid items must include all applicable taxes and all other costs associated with provide this service to the City." Exhibit 11-4.

38. Taxpayer was required to provide worker's compensation/employer liability insurance, bodily injury liability insurance, and comprehensive liability insurance for each employee placed with the City. Exhibit 13-4, paragraph 19.

39. Taxpayer was required to pay all unemployment claims of the employees it placed with the City. Exhibit 11-27, paragraph 5; Exhibit 13-2, paragraph 9.

40. There was no written contract between the City and any of the employees placed by Taxpayer.

41. Taxpayer agreed to indemnify the City from any and all claims, suits, demands, actions, or proceedings of every nature and description committed by Taxpayer's employees while they were placed with the City. Exhibit 11-275, paragraph L.

42. There was no tax liability for tax years 2004 and 2005. Exhibit 1, page AN1.3. The Department did not assess Taxpayer for any liability for tax years 2005 through 2007. Exhibit 1, page AN1.4.

43. The Department issued its 60 day letter to Taxpayer on November 16, 2010 and it required all nontaxable transaction certificates (nttcs) to be in Taxpayer's possession on or before January 15, 2011. Exhibit A.

44. The City executed a Type 9 nttc to Taxpayer dated November 29, 2010. Exhibit 17-1. The nttc was in the possession of Taxpayer in a timely manner.

45. The nttc states on its face that a Type 9 may be used "(f)or the purchase of tangible personal property only and may not be used for the purchase of services, for the lease of property or to purchase construction materials for the use in construction projects." Exhibit 17-1.

46. The City did not resell any of the temporary staffing services sold by Taxpayer to the City to a third party.

47. Taxpayer did not sell tangible personal property for resale in support of a deduction for a Type 9 NTTC.

48. Taxpayer's receipts for the services it provided to the City were not deductible, regardless of the type of nttc executed because its services were not resold to a third party.

49. The Type 9 nttc was not accepted in good faith by Taxpayer.

50. Taxpayer did not perform employee leasing services. Taxpayer's Brief in Support of Protest Hearing, page 12.

DISCUSSION

There are multiple issues raised in this protest. The issues presented are: is Taxpayer entitled to the good faith safe harbor presented in NMSA 1978, Section 7-9-43; was Taxpayer a disclosed agent for the City; were services provided outside New Mexico; and is Taxpayer allowed to amend its protest seven days prior to the hearing notwithstanding the Department was provided additional time to respond to the protest.

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 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 it was entitled to the deduction for services. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428, 431, 504 P.2d 638, 641. 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.

Gross Receipts.

In New Mexico, the general rule is that 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 a service is, 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*, 1937-NMSC-032, ¶37, 41 N.M. 403, 412, 69 P.2d 936, 941 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, the presumption is that Taxpayer's receipts from the services that Taxpayer provided to the City which included recruiting, selecting, interviewing, hiring, paying compensation and benefits, maintaining a software system that tracked the employees' hours and withholding and reporting state and federal income tax from the employees' paycheck with the City are presumed to be taxable. NMSA 1978, Section 7-9-5(A) (2002). Exhibits 12-62.

Good Faith.

Taxpayer argued that its receipts from the City were deductible because it accepted a Type 9 nttc in good faith and therefore, under the safe harbor provision, the Type 9 nttc was conclusive evidence and the only material evidence, that all of its receipts from the City were deductible. Section NMSA 1978, §7-9-43(A) (2005) provides that:

> [w]hen the seller or lessor accepts a nontaxable transaction certificate within the required time and in **good faith** that the buyer or lessee will employ the property or service transferred in a **nontaxable manner**, the properly executed nontaxable transaction certificate shall be **conclusive evidence**, and

> the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

(Emphasis added.) When construing a statute, the statute should be interpreted to give the meaning the Legislature intended and the interpretation should not render its application absurd, unreasonable, or unjust. *GEA Integrated Cooling Tech v. State Taxation and Revenue Dep't.*, 2012-NMCA-010, ¶6, 268 P.3d 48, 51. The courts follow the plain language rule when construing tax statutes. *GEA*, 2012-NMCA-010, ¶7. In addition, "(w)hen statutory language is clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶9, 146 N.M. 24, 28, 206 P.3d 135, 139. For the safe harbor to apply, the words "good faith" and "nontaxable manner" cannot have an absurd application and these words must have the intended meaning of the Legislature. The words also must be read together and in their plainest language.

Thus in reviewing the statute in its most plain and intended meaning, the seller or Taxpayer was required to accept a nttc in a timely manner and in ***good faith*** that the buyer will employ the service in a ***nontaxable manner.*** There is no doubt that Taxpayer accepted a nttc in the required time.[4] However, the inquiry does not end at this point. Regulation 3.2.201.15 NMAC (05/31/01) provides some guidance on what circumstances must exist prior to the safe harbor applying. Regulation 3.2.201.15 states that:

> Acceptance of [NTTCs] in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time of each transaction. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered

[4] The nttc was required to be in Taxpayer's possession at the time the transaction occurred or no later than 60 days from the Department's notice to Taxpayer. NMSA 1978, §7-9-43(A) (2005) and regulation 3.20.201.8(A)(1) and (2).

or services performed thereafter are of the type covered by the certificate.

Therefore, the determination is made if the buyer is employing the service in a nontaxable manner at the time of each transaction and the taxpayer has a continued responsibility to make sure that the service performed is covered by the certificate.

The courts have looked at the good faith safe harbor test. In *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, ¶15, 86 N.M. 629, 632, 526 P.2d 426, 429, the New Mexico Court of Appeals decided that there are three requirements that must be met "before an NTTC becomes conclusive evidence that proceeds of a transaction are deductible." The court analyzed NMSA 1978, Section 7-9-43(A) (2003)'s predecessor statue, NMSA 1953, Section 72-16A-13(A). The good faith, safe harbor provision of both statutes is substantially the same. The court found that a taxpayer must satisfy three statutory requirements before good faith may be applied: "timeliness of acceptance of the NTTC, good faith acceptance of the NTTC and a properly executed NTTC." *Leaco*, 1974-NMCA-076, ¶15. (There was no issue that the nttc was properly executed.) The court held that if all three requirements were met, then, the nttc becomes the only material and conclusive evidence establishing that the taxpayer is entitled to the claimed deduction even when the buyer improperly "issued" the nttc to the seller. *See also, Rainbo Baking Co. v. Commissioner of Revenue*, 1972-NMCA-139, 84 N.M. 303, 502 P.2d 406 (taxpayer's receipts were deductible but taxpayer was not in possession of the nttcs until after the audit. Since there was no showing of bad faith or that the certificates were improperly executed, taxpayer's final presentation of the nttc established that taxpayer's claim of good faith was conclusive evidence).

In *McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599,

601, 592 P.2d 515, 517, the court, seven years, later held that the good faith safe harbor provision did not protect a seller from taxation "unless the certificate covered the receipts in question." This means that the receipts must be deductible under a particular statutory deduction. The court went on to say that since there was "no certificate applicable" for the type of services that taxpayer provided, the Department's denial of the deduction was proper. *McKinley, 1979-NMCA-026*, ¶13. Finally eight years after *Leaco* the court intimated in *Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶12, 94 N.M. 630, 632, 614 P.2d 547, 549 that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." In *Arco Materials v. Taxation & Revenue Dep't*, 1994-NMCA-062, ¶¶9-11, 118 N.M. 12, 15-16, 878 P.2d 330, 333-334, rev'd on other grounds, 118 N.M. 647, 884 P.2d 803 (1994), the Court of Appeals held that a taxpayer was not protected by good faith when a change in law rendered the executed nttc invalid for the transaction in question. *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392, 397, 758 P.2d 806, 811 (taxpayer was not entitled to a deduction when the nttc form presented was not timely and in the form proscribed by the Department).

In many ways, these cases are not very instructive since they do not assist with the inquiry of what ***good faith*** means**.** In *Erica, Inc. v. N. M. Regulation and Licensing Dept*, 2008-NMCA-065, ¶18, 144 N.M. 132, 140, 184 P. 3d 444, 452, a nontax case, in determining the meaning of good faith in a different context, the court adopted *Black's Law Dictionary*, 701 (7th ed. 1999) definition of good faith as "(a) state of mind consisting in (1)honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of air dealing in a given trade or

business, or (4) absence of intent to defraud or to seek unconscionable advantage."

Therefore in applying the holdings of these cases along with Black's Law Dictionary's definition of good faith along with the statute and regulation, the good faith safe harbor rule applies if the seller or Taxpayer was able to prove that the transactions were deductible under a specific statutory deduction, regardless if the nttc is the wrong type and if the nttc was presented timely. There also must be some evidence of faithfulness to one's duty or obligation. Taxpayer argued that it accepted the nttc in good faith because the City was a governmental entity; because the City said in its request for bid that it would provide a nttc under appropriate circumstances; because the City executed a number of nttcs to Taxpayer; and because Taxpayer was led to believe by the City that it the transactions were exempt from gross receipts tax.

By turning first to Taxpayer's faithfulness to one's duty, the request for bid did not guarantee that Taxpayer's receipts were deductible as suggested by Taxpayer. The request for bid stated that "(t)he City will, under appropriate circumstances, furnish a non-taxable transaction certificate." Exhibit 11-274, paragraph G. Taxpayer failed to cite to the remaining portion of the paragraph which provides that "(d) etermination of whether the tax is due and payment of the tax is the responsibility of the Offeror." Exhibit 11-274, paragraph G. In addition, the contract between Taxpayer and the City provides in paragraph 8 that it was the responsibility of Taxpayer to pay for "all taxes pertaining to employees." Exhibit 13-2. Again, the request for bid reiterated that it was Taxpayer's responsibility to pay for all taxes pertaining to employees. Exhibit 11-27, paragraph 4. The request for bid from the City stated that "the hourly rate (unit price) for all bid items must include all applicable taxes and all other costs associated with provide this service to the City."

Exhibit 11-4.

There is no evidence the Hearing Officer could find supporting Taxpayer's contention that Taxpayer was misled by the City about whether Taxpayer's receipts were deductible. There was testimony from Dianne Howell that Taxpayer attempted to bill the City for gross receipts tax but that the City refused to pay the charge. This testimony is compelling but only to show that Taxpayer was alerted and at some point that it should have incorporated the gross receipts tax into its price. The City was unwilling to alter the terms of contract or the marginal rate because Taxpayer failed to incorporate the gross receipts into the marginal rate. The City required Taxpayer to set out the difference or marginal rate between the per hour wage Taxpayer paid to the employee in a position and the per hour wage Taxpayer charged the City for each position at the time Taxpayer responded to the request for bid. Exhibit 11-20; Exhibit 12-33 through 12-38. The hourly rate was determined by the position and not the employee who filled the position. Exhibit 12-33 through 12-38. Taxpayer was evaluated based on this marginal rate, which eventually led to Taxpayer being awarded the contract by the City.

Taxpayer argued that its tax advisors conducted due diligence and therefore, it should be entitled to the good faith harbor. This is a surprising statement because on the Type 9 nttc, it clearly states that a Type 9 may be used "(f)or the purchase of tangible personal property only and may not be used for the purchase of services, for the lease of property or to purchase construction materials for the use in construction projects." Exhibit 17-1. Taxpayer is correct in stating that a Type 9 nttc may be issued by a governmental entity. However, the nttc clearly states that it may

only be used for the purchase of tangible personal property and may not be used for the purchase of services.

The Department argued that the good faith safe harbor may only be utilized if a deduction is available to a taxpayer. In other words, the good faith safe harbor applies in situations where a taxpayer had a timely nttc in his or her possession but the nttc was of the wrong type. The transaction was deductible but for the wrong type of nttc in the possession of taxpayer. The Hearing Officer agrees with this position. In reading the line of cases beginning with *Leaco, McKinley Ambulance Serv. and Gas Co.,* the underlying transaction must be deductible before the good faith safe harbor can apply. To allow the good faith safe harbor to apply where no deduction (or exemption) applies, would render all of the deductions within the Gross Receipts Tax Act meaningless. If the good faith safe harbor applied regardless if the transaction was eligible for a deduction, then anyone who erroneously believed the transaction was deductible, would argue that the good faith safe harbor was conclusive proof that it is deductible. There also would be no incentive for taxpayers to determine whether their transactions were truly deductible. Therefore, Taxpayer did not submit sufficient evidence to rebut the presumption that the transactions were deductible under the good faith safe harbor provision.

No Deduction Applies.

Even assuming Taxpayer had the correct nttc, a Type 5 (Taxpayer had a Type 9 nttc), for the resell of a service, in reviewing a summary of the transactions in the Department's audit narrative (Exhibits A and 1), the receipts from the City are not deductible under NMSA 1978, §7-9-48 (2000), because the City did not resell any of the temporary staffing services sold by Taxpayer to the City

to a third party. For a transaction to be deductible under Section 7-9-48, the buyer of the services must "resell the service in the ordinary course of business and the resale must be subject to the gross receipts tax." Since there was no resell of the service, this deduction does not apply to Taxpayer's transactions.

Disclosed Agent.

Taxpayer argued in the alternative, that while the receipts that it received from the City were gross receipts, the receipts were not taxable to Taxpayer because an exemption applied to the receipts or that Taxpayer received these receipts in a disclosed agency capacity for the City pursuant to NMSA 1978, §7-9-3.5(A)(3)(f) (2010).[5] Section 7-9-3.5(A)(3)(f) states that excluded from gross receipts are "amounts received solely on behalf of another in a disclosed agency capacity." The Department defines what the test is to determine whether an agency relationship exists. Regulation 3.2.1.19(C) (1) NMAC (12/30/03) provides that "(a)n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal." Taxpayer argued that all of its receipts from the City should be exempted and that it had the same type of agency relationship as in *Carlsberg*.

There are three relevant cases that analyze when a taxpayer is exempt from gross receipts taxes because it acted in an agency relationship with the buyer of employee services. These cases are somewhat similar to this matter. In the three cases *Carlsberg*, *Brim* and *MPC LTD.*, there was a triangular relationship between three parties whereby one of the parties was the seller of

[5] The Hearing Officer applied the statute and the regulation in place at the time the tax was due. *See, Kewanee Indus.*

management or employment services, there was ultimate buyer of those services and the employees themselves. *Carlsberg* is dissimilar from *Brim* and *MPC LTD.*, insofar, as there were different legal responsibilities of the agent and this is the only case where the court held that a disclosed agency existed. In each case, there were employees who were employed by the taxpayer but worked at the facility of the buyer. In each case, the seller of services argued that the receipts it received from the buyer should be exempted because it paid wages to the employees who worked at the facility of the buyer.

A real quick review of these cases is warranted to determine whether an agency relationship existed in this case. When *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247, 861 P.2d 288 was decided, there was no specific statutory exemption allowing the reimbursement amounts to be exempted from gross receipts. The Department, as a matter of policy, allowed for reimbursed expenses to be exempted so long as the agency relationship was disclosed. In *Carlsberg* the court held that it was a factual determination whether there was an agency relationship between the principal and the agent. The factors the court considered were whether there "a principal's control over the agent" is present; and whether the "agent could bind the principal in dealings with third parties." *Carlsberg*, 1993-NMCA-121, ¶12. The court was not concerned with who paid the employees, but who had the discretion in manner other than by the terms of the agency relationship. *Carlsberg*, 1993-NMCA-121, ¶19. The *Carlsberg* court also looked at the indemnification clause in the contract which provided that the owner was the ultimate party responsible for wages. *Carlsberg* is the only case where the court has found that

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Inc. v. Reese, 1993-NMSC-006, 114 N.M. 784, 845 P.2d 1238.

there was an agency relationship between a seller and buyer of management services.

Carlsberg was followed by *Brim Healthcare, Inc. v. State*, 1995-NMCA-055, 119 N.M. 319, 896 P.2d 498, where the court held that there was no agency relationship between the buyer and the seller of management type services. In *Brim*, the court looked at whether the taxpayer was legally liable for paying the wages of the employees. In *Brim*, the court held that because the taxpayer was legally responsible for paying the wages of the employees and because there was no broad indemnification clause which required to seller to pay the wages, the court held that the taxpayer was liable for the gross receipts taxes.

Finally, the court of appeals took another look at the issue of agency relationship in *MPC LTD. v. New Mexico Taxation and Revenue Department*, 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308. In *MPC LTD.*, the court looked at a regulation, 3.2.1.19(E) that allowed for an exemption of gross receipts tax if the taxpayer was a "joint employer" and was engaged in "employee leasing." This paragraph of the regulation was repealed on September 30, 2010 and examples 7 and 8 were added to regulation 3.2.1.19(C). Examples 7 and 8 of regulation 3.2.1.19(C) attempt to distinguish between a seller who is receiving receipts as an agent from performing management type of functions and the receipts of a temporary employee agency, wherein all the receipts are considered receipts. Regulation 3.2.1.19(C)(1) and 3.2.1.19(C)(2) remained largely unchanged except for subparagraph numbering. Since the version of regulation 3.2.1.19(E) was in effect when the tax became due for all tax periods, this older version of the regulation is applied to Taxpayer.

In applying Section 7-9-3(F)(2)(f) and regulation 3.2.1.19(E)(1) and (2) (repealed in September 30, 2010), the central inquiry is whether Taxpayer was engaged in the employee leasing business and was a joint employer for the City. There is no evidence to suggest that Taxpayer was an employee leasing agency, since it was not registered as an employee leasing agency. NMSA 1978, Section 60-13A-3(A)(2010). Since Taxpayer is not in the employee leasing business, this repealed regulation, 3.2.1.19(E) does not apply to Taxpayer.

The only inquiry left is twofold: whether Taxpayer was an agent for the City and had the power to bind the City in a contract and whether the City or Taxpayer had disclosed to the employees placed with the City that Taxpayer was their employer or merely an agent for the City. There is no evidence that Taxpayer had the power to legally bind the City in a contract with a third party or the employees and that the third party or the employees, could enforce any legal obligations against the City. Instead the facts show that Taxpayer was the employees employer with zero disclosure to the employees that Taxpayer was the agent for the City.

A review of the evidence presented is warranted. The request for bid provided by Taxpayer, clearly states that Taxpayer was required to provide worker's compensation/employer liability insurance, bodily injury liability insurance, and comprehensive liability insurance for each employee placed with the City. Exhibit 13-4, paragraph 19. Taxpayer was also required to pay all unemployment claims of the employees it placed with the City. Exhibit 11-27, paragraph 5; Exhibit 13-2, paragraph 9. In addition, Taxpayer agreed to indemnify the City from any and all claims, suits, demands, actions, or proceedings of every nature and description committed by Taxpayer's employees while they were placed with the City. Exhibit 11-275, paragraph L.

Taxpayer was required to purchase a fidelity bond for each employee placed with the City in the amount of $100,000.00 to protect the City from losses of monies, security and other property caused by the employees placed by Taxpayer with the City. Exhibit 13-2, paragraph 6. These written contractual obligations between the City and Taxpayer indicate that if the legal recourse for employees placed with the City was to seek redress from Taxpayer for both unemployment and worker's compensation injuries. In addition, if any of these employees committed any tortious acts, Taxpayer was legally responsible for defending and paying any damages. The fidelity bond Taxpayer purchased insured that the City could collect damages against Taxpayer for the employees' acts.

The second part of the test under the statute and the regulation is whether there was any disclosure by either the City or Taxpayer that Taxpayer was an agent for the City. In reviewing the services that Taxpayer provided to the City, the employees could only have believed that Taxpayer was their employer. Taxpayer recruited, selected, interviewed, hired, paid compensation and benefits, maintained a software system that tracked the employees' hours, and withheld and reported state and federal income tax from the employees' paycheck. Taxpayer recruited the employees from referrals, direct mail, recruiting fairs, the internet, open houses, Xpert online, Adecco Career Accelerator Program, partnership with U.S. Department of Labor, print and broadcast advertising, fax broadcasting, poster/flyers, classified ads, partnership with jobs for America's graduates, college recruiting, and job centers at airport locations. Exhibit 12-62. Taxpayer evaluated and selected candidates based on "competence." Taxpayer performed a web based assessment on the candidates along with a skills proficiency evaluation to select employees

to be placed with the City. Exhibit 11-29, paragraph 17; Exhibit 12-63; Exhibit 13-4, paragraph 21. Taxpayer screened each applicant prior to placing the applicant in a position with the City. The screening included an automated application process, a personal interview, a skills and attitude test, an employer reference check, an employment eligibility verification, a I-9 verification, and a criminal background check. Exhibit 12-66. In reviewing the documents provided by Taxpayer, there was no mention that Taxpayer was an agent for the City. In the recruiting, hiring and selection process, the employees primarily dealt with Taxpayer and its employees.

Taxpayer argued that the City "defined the responsibilities" of both Taxpayer and the City. Brief, page 2. This statement "defining the responsibilities" does not assist with the test of whether the employees believed that Taxpayer was an agent for the City. These responsibilities were no more than part of the process in place for placing the employees with the City and paying them. Taxpayer chose which employees to recruit, select and hire and it was Taxpayer that filled potentially 110 positions or jobs. Exhibit 11-4 and 11-18. Taxpayer could not fill a position until the City, through an authorized City employee, would request a position be filled and Taxpayer had 24 hours in which to provide a qualified employee for the job position. Exhibit 11-29, paragraph 18 and Exhibit 13-4, paragraph 22.[6] Prior to placing any employee, Taxpayer was notified if the Director of the Department of Finance and Administrative Services and the City's Chief Administrative Officer in writing confirmed that sufficient funds existed prior to the placement. Exhibit 13-2, paragraph 1. It was only after the Director confirmed there was

[6] Taxpayer argued that the City determined which candidate to hire for the position. Brief, page 2. However, the

sufficient funds, that the City's individual departments contacted the Taxpayer with which positions needed filling. Exhibit 13-2, paragraph 4

Taxpayer argued that it was the City that controlled the work and performance of the employees. The City did provide job descriptions to establish "performance requirements for the employment of temporary staff personnel." Exhibit 11-27. The job descriptions provided by the City were titled "City of Albuquerque Job Description." Exhibits 11-32 through 11-134. This fact alone does not assist with the general inquiry of whether the employees believed that Taxpayer was their employer or merely an agent for the City. There is no evidence that the employees ever saw a City of Albuquerque job description.

The employees only dealt with Taxpayer for pay issues. The pay rate for each position with the City was set by Taxpayer at the time Taxpayer responded to the request for bid. Exhibit 11-20. The City only required Taxpayer to set out the difference or marginal rate between the per hour wage Taxpayer paid to the employee in a position and the per hour wage Taxpayer charged the City for each position at the time Taxpayer responded to the request for bid. Exhibit 11-20; Exhibit 12-33 through 12-38. The hourly rate was determined by the position and not the employee who filled the position. Exhibit 12-33 through 12-38. It was Taxpayer who provided a web based system for approval of hours worked by the employees and billing to the City. Exhibit 12-73. The employees entered the time into the web or IVR. Exhibit 12-73. The City employees received an email to approve the hours. Exhibit 12-79. The City employees approved the time records or modified the hours of employees placed with the City by Taxpayer. Exhibit 12-79.

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exhibits suggest otherwise.

Taxpayer, then, initiated an invoice to the City. Exhibit 12-79. Exhibit 13-7, paragraph 41. Finally it was Taxpayer who paid the wages of all the employees placed in positions with the City. Exhibit 11-20; Exhibit 12-79. Taxpayer issued W-9s to these employees and withheld state and federal tax from the wages of the employees it placed with Taxpayer. Exhibit 12-79. Taxpayer distributed its paychecks to the employees placed with the City. Exhibit 13-7, paragraph 42. Taxpayer also was required to pay for all benefits such as health insurance, life insurance, etc. Exhibit 11-27, paragraph 6 and Exhibit 13-2, paragraph 10. Taxpayer provided a comprehensive benefits program which included medical and dental insurance, holiday pay, service bonus, tuition reimbursement, direct deposit, 401(k) plan, short term disability and term life insurance. Exhibit 12-68. Taxpayer was required to pay for all holidays. Exhibit 11-27, paragraph 8 and Exhibit 13-2, paragraph 12. Taxpayer was required to pay for all sick and vacation leave. Exhibit 11-27, paragraph 7 and Exhibit 13-2, paragraph 11.

Taxpayer is correct and the Hearing Officer agrees that the City had unilateral authority to terminate an employee placed in any job position. Exhibit 11-29, paragraph 19 and Exhibit 13-4, paragraph 23. The City controlled the duties, the assignments and the work product of the employees placed with the City. Taxpayer's employees did not supervise the employees and visited the work site of any of the employees placed with the City on a quarterly basis. However, this is insufficient evidence to prove that the employees knew that Taxpayer was the City's agent.

Services Performed Outside of New Mexico.

Taxpayer argued that because it was headquarter in Delaware, that some of the services it performed for the City were performed outside of New Mexico and therefore exempt from gross

receipts taxes. The services that Taxpayer claimed were performed outside of New Mexico were the payroll activities and some of the recruiting activities. Brief, page 19-20. Taxpayer cites to Section 7-9-13.1(A) to support its position. Section 7-9-13.1(A) provides that "exempted from the gross receipts tax are the receipts from selling services performed outside New Mexico the product of which is initially used in New Mexico." NMSA 1978, Section 7-9-13.1(A)(1989).

This statute does not apply to Taxpayer. Taxpayer did not produce a product which was the result of a service performed outside of New Mexico. During the tax period in question, Taxpayer had an office in Albuquerque and employees. Taxpayer contracted with the City with no product that resulted from the contract, only services. This exemption does not apply to Taxpayer.

Amended Protest.

The Department argued that it was unfair for Taxpayer to file an amended protest seven days before the hearing and that it violated Section 7-1-24. Section 7-1-24(B) provides that "…the taxpayer may supplement the statement at any time prior to ten days before any hearing conducted on the protest…" NMSA 1978, Section 7-1-24(B) (2013). The statute attempts to balance the taxpayer's right to present its case before the Hearings Bureau and the Department's ability to respond to the arguments made by a taxpayer. In this case, the choices were to move the hearing date to meet the 10 day requirement for protests to be amended or to continue the hearing and allow the Department additional time to present its case. The Department did not request additional time to respond to Taxpayer's arguments and in fact filed a brief responding to all of Taxpayer's arguments. There was only one new issue raised in the Amended Protest, which the Department raised in its brief. The Department almost appears to be arguing that Taxpayer is

stuck with the arguments it originally made in its protest filed on June 2012 almost forgetting that the solution to the seven day versus 10 day issue was to move the hearing. In light of allowing a taxpayer the greatest opportunity to respond and defend itself in a hearing, the objection by the Department is again overruled.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest on June 6, 2012 to the assessment issued under Letter Id No. L1550143040 and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not receive a Type 9 nttc in good faith from the City.

C. The Type 9 nttc Taxpayer received from the City was not conclusive evidence that its receipts from the City were deductible.

D. No specific statutory deduction applied to the receipts received by Taxpayer from the City.

E. The City did not resell the services it purchased from Taxpayer.

F. Taxpayer was not a disclosed agent for the City and its receipts were not exempt.

G. Taxpayer was not engaged in employee leasing services with the City.

H. Taxpayer did not perform its services outside of New Mexico.

I. The Department was not prejudiced in any way by allowing Taxpayer to amend its protest seven days prior to the hearing.

J. Taxpayer did not present sufficient evidence to prove it was entitled to either an exemption or a deduction.

K. Interest is due and owing on the principal amount of tax due until the date the principal is paid.

L. Taxpayer owes gross receipts tax in the amount of $379,215.79 in principal and interest accrued through date of payment in interest for tax period January 31, 2004 – September 30, 2010.

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

DATED: May 22, 2014.

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