

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

**IN THE MATTER OF THE PROTEST OF  
JOHNNY & PHUONG NGUYEN,  
TO ASSESSMENT ISSUED UNDER  
ID NO. L0842830656**

**No. 14-17**

**AMENDED DECISION AND ORDER**

A formal hearing on the above-referenced protest was held November 21, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Aaron Rodriguez, Staff Attorney. Mr. Tom Dillon, Auditor, and Ms. Laura Gage, Auditor, also appeared on behalf of the Department. Mr. Johnny Nguyen (Taxpayer) appeared for the hearing and represented himself. Several parties were present during the hearing, at the request of the Taxpayer. Mr. Nhan Dang served as an interpreter for the Taxpayer and witnesses. Mr. Tony Nguyen (Witness) and Ms. Xuan Nguyen (Owner) testified as witnesses on behalf of the Taxpayer. The Hearing Officer took notice of all documents in the administrative file.

A Decision and Order was issued on this matter on February 21, 2014. On March 4, 2014, the Department filed a Motion to Reconsider. On March 7, 2014, the Hearing Officer issued an Order Staying the Decision and giving the Taxpayer 20 days to respond to the Motion to Reconsider. The Taxpayer did not file a response. References to the audio record are made by hour:minute:second. References to the audio record (AR) will indicate the approximate beginning time of a particular comment. The Decision and Order issued on February 21, 2014 is hereby withdrawn, and this decision is issued in its place. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

## **FINDINGS OF FACT**

1. On May 30, 2013, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2008. The assessment was for \$2,387.02 tax, \$477.40 penalty, and \$404.70 interest.
2. On June 24, 2013, the Taxpayer mailed a formal protest letter, which was filed by the Department on July 1, 2013.
3. On August 29, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. The Taxpayer has been registered with the Department for gross receipts purposes since January 2005.
5. The Taxpayer was working as a nail technician at a salon in the mall in Las Cruces, New Mexico in 2008. The Taxpayer was responsible for dealing with customers, providing nail services, collecting payments, and turning the payments over to his employer.
6. All of the services rendered by the Taxpayer occurred at the salon in the mall.
7. The Taxpayer was working for the Owner, who was the owner of the nail salon. The Owner collected all of the payments for services rendered from her employees, the nail technicians. The Owner paid the gross receipts tax on those transactions on behalf of her employees, including the Taxpayer.
8. The Owner controlled the work and schedule of the salon as she controlled the access to the premises. The Owner issued paychecks to her employees.
9. The Taxpayer and his witnesses were credible.
10. The Taxpayer received paychecks from the Owner.
11. The Owner considered the Taxpayer to be her employee and repeatedly referred to the Taxpayer as her "worker".

12. The Taxpayer performed all of his work in the salon, which was the Owner's business.
13. The Owner said that the Taxpayer was given a salary, but the Taxpayer indicated that he was paid on commission.
14. As the Taxpayer was paid a commission, the Taxpayer was not an employee and was an independent contractor.
15. The Taxpayer either failed to file gross receipts tax with the Department for 2008 or underreported his gross receipts tax by more than 25% for 2008.
16. On March 1, 2013, the Department mailed a notice of limited scope audit commencement to the Taxpayer at the address on file.
17. The address on file in March 2013 is still the Taxpayer's address.
18. The notice of limited scope audit advised that the Taxpayer had 60 days from the date of the letter to obtain any nontaxable transaction certificates (NTTCs).
19. The Department mailed a reminder notice to the Taxpayer on April 11, 2013.
20. The Department mailed a notice of potential assessment on May 1, 2013.
21. The Taxpayer did not receive any of these notices even though they were sent to the correct address.
22. The Taxpayer received the assessment made on May 30, 2013 and immediately took steps to resolve the situation.
23. On June 4, 2013, the Taxpayer obtained a NTTC from his employer.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax period ending in December 2008.

### **Issues presented.**

In the Motion to Reconsider, the Department argued that the issue was limited to whether the Taxpayer obtained a timely NTTC. The Department argued that considering any other legal bases for the protest went beyond the scope. The Department argued that the Taxpayer was limited to arguing on the timeliness of the NTTC because of what his filed protest said. The Department also argued that there was not sufficient notice that evidence beyond the timeliness of the NTTC would be considered.

A hearing officer is required to decide cases based on the facts and the law, but is not limited to a word-for-word consideration of the parties' arguments. *See TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2000-NMCA-083, ¶ 19, 129 N.M. 539, 10 P.3d 863, *rev'd on other grounds TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2003-NMSC-007, 133 N.M. 447, 64 P.2d 474 (filed December 19, 2002). *See also Kmart Properties, Inc. v. Taxation and Revenue Dep't.*, 2006-NMCA-026, ¶ 57, 139 N.M. 177 (noting that it is a well-established doctrine that a hearing officer can come to her own conclusion outside of the arguments of the parties). Moreover, under the Taxpayer Bill of Rights, taxpayers have "the right to abatement of an assessment of taxes determined to have been incorrectly, erroneously or illegally made[.]" NMSA 1978, § 7-1-4.2 (I) (2003). The Hearing Officer also announced on the record that the issue to be decided was whether the Taxpayer was liable for the tax, penalty, and interest in the assessment. (AR 00:08:20). The Department did not object or seek to narrow the issue; the only preliminary matter raised by the Department was a request to invoke the rule of exclusion of witnesses. (AR 00:08:53).

Although the Taxpayer and his witnesses mentioned the NTTC a few times, the focus of his argument was not the NTTC. Discussions of the NTTC or related documents were generally in response to comments or questions posed by the Department. The Taxpayer repeatedly argued and presented evidence that he was not responsible for the tax, that the tax was owed by and was paid by the Owner. (AR 00:19:44, 00:20:35, 00:26:24, 00:29:15, 00:30:11, 00:40:24, and 01:07:25). The

Department's attorney also expressed his understanding of this approach by the Taxpayer when he asked the Witness repeatedly about his prior conversation with the Witness and expressed his understanding that the Witness was expected to testify only about workers receiving 1099s and that the Owner was the one who paid the tax. (AR 00:38:56, 00:39:20, 00:40:11, and 00:40:30). The Department's attorney also demonstrated his understanding that the issues of the hearing were not limited to the word-for-word arguments of the parties when he argued that the Taxpayer was negligent after acknowledging that the Taxpayer had not made an overt argument about negligence. (AR 01:12:28).

The Department had ample notice that the Taxpayer was arguing that he did not owe tax, that the Owner was the one responsible for the tax, and that the Owner had paid the tax on his behalf. The Department had a meaningful opportunity at the hearing to address those arguments and to elicit evidence on those issues. Ultimately, the Department's Motion to Reconsider is persuasive on the issue of the Taxpayer's employment status.

### **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 Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is not liable for the tax and is entitled to an abatement of penalty and interest.

### **Gross Receipts Tax.**

Generally, services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). It is the responsibility of the taxpayer, who is in the

position to know the details of his business activities, to determine accurately and to report his tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. However, an employee's receipts of wages, salary, commissions, and other forms of payments for personal services are exempt from the gross receipts tax. *See* NMSA 1978, § 7-9-17 (1969). A taxpayer engaged in business may also be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2005).

### **Employees.**

Several factors should be considered in determining whether a person is an employee or an independent contractor. *See* 3.2.105.7 (A) NMAC (2001). Four factors deal with whether the employer should be withholding tax from the pay, should be paying FICA, should cover the employee under workman's compensation, and should be paying unemployment insurance. *See id.* There was no indication that the Owner was doing any of these things.

Another factor is whether the employer considers the person to be an employee. *See id.* The Owner and the Taxpayer repeatedly referred to the Taxpayer and others as employees of the Owner. The Department argued in the Motion to Reconsider that the Owner never used the term "employee". The Department argued that the Taxpayer was referred to as an "independent contractor" at the hearing. The Owner, or the translator, did not use the term "employee". The terms used by them were "work for" or "worker". (AR 00:26:24 and 00:27:55). The Taxpayer was referred to as an "independent contractor" at the hearing, but this phrase was used by the Department's attorney in his opening statement. (AR 00:12:20). The Owner testified that the Taxpayer was her worker, which is the relevant inquiry under the regulation. *See* 3.2.105.7 (A) NMAC (2001). Moreover, the Owner expressed her concern for the Taxpayer's assessment and explained that she went with him to the Department where she explained what happened and obtained a NTTC. (AR 00:31:22). The Owner also traveled to Santa Fe for the hearing and testified on behalf of the Taxpayer, even though no

subpoena had been issued for her to do so.<sup>1</sup> The Owner also indicated several times that she had already paid the tax on behalf of the Taxpayer and her other employees. (AR 00:26:24, 00:28:08, 00:28:21; 00:29:15; and 00:30:11). Based upon the totality of the evidence, the Owner considered the Taxpayer and other people working in her salon to be her employees.

Another factor is whether the employer has the right to exercise control over the means of performing the service. *See id.* The Taxpayer's work all occurred in the salon. The Owner set the schedule, and the Owner and Taxpayer both indicated that the Taxpayer worked for the Owner. The Department argued in the Motion to Reconsider that there was no evidence that the Owner set the schedule or controlled the work. Mr. Tony Nguyen (Witness) testified that the bosses, including the Owner, had the keys to the premises and the mailboxes and that the Taxpayer could not even get in without the Owner because the Taxpayer did not have keys. (AR 00:33:36). Therefore, the Owner had the right to exercise control over the work done and controlled the premises where the work occurred.

The final factor is whether the person is paid a wage or a salary. *See* 3.2.105.7 (A) NMAC (2001). The Taxpayer was issued paychecks by the Owner. The implication from the Owner was that the paychecks were regular and that the Taxpayer was paid a salary. (AR 00:29:15). In fact, the Owner and the Taxpayer indicated that all of the employees collected money from customers and turned it over to the Owner, who paid the taxes on the total amounts altogether. In the Motion to Reconsider, the Department argued that the Taxpayer was paid a commission. This testimony was initially overlooked by the Hearing Officer. However, the Taxpayer's testimony was that he was paid a commission. (AR 00:18:26). Generally, when a person is paid a commission and the commission is not subject to the withholding tax or to social security tax, the person is not considered to be an employee. *See* 3.2.105.10 NMAC (2001). As the Taxpayer indicated that he was paid a

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<sup>1</sup> The Hearing Officer took notice of all documents in the administrative file at the time of the hearing, and there were no subpoenas in the file. (AR 00:06:37).

commission and there was no evidence that the commission was subject to the withholding tax or social security tax, there is not sufficient evidence that the Taxpayer was an employee of the Owner for purposes of the statute.

### **NTTCs.**

An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due. *See* NMSA 1978, § 7-9-43. If the taxpayer is not in possession of NTTCs within sixty days of the notice from the Department requiring possession of NTTCs, “deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall* be disallowed.” *Id.* (emphasis added). The word “shall” indicates that the disallowance of the deduction is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The Taxpayer was audited by the Department. The Department issued a notice to the Taxpayer on March 1, 2013. That notice advised that the Taxpayer had 60 days to provide NTTCs, so the 60<sup>th</sup> day was approximately May 1, 2013. It was undisputed that Taxpayer was not in possession of the NTTC relating to the transaction in question within the 60 days. However, the Taxpayer argued that he never received the notice of audit or any of the follow-up letters even though they were mailed to his correct address.

Ms. Gage testified that the notice and follow-up letters were mailed to the Taxpayer at the address on file for him. (AR 00:52:17 and 00:55:22). Ms. Gage also testified that the Taxpayer either failed to report or filed reports with zero gross receipts tax. (AR 00:54:56). The Taxpayer confirmed that the address was correct and remains a good address for him. The Taxpayer did not dispute that he either failed to file or underreported. The Taxpayer explained that he never received the notice and did not know he needed a NTTC until after the assessment was made. The Taxpayer and others at the salon and at other businesses in the mall sometimes have trouble receiving mail at that address. The Taxpayer’s evidence was credible. He did not receive the audit letters even though

they were sent to the correct address. However, service does not necessarily encompass actual receipt. *See Cordova v. State*, 2005-NMCA-009, 136 N.M. 713 (holding that the relevant inquiry concerning notice of property tax sale does not include whether the notice was actually received). *See also Dusenbery v. United States*, 534 U.S. 161 (2002) (holding that reasonableness requires that the State attempt to provide actual notice, but due process does not require actual notice). Mailing the notices and letters to the address on file, which is still a good address, is a reasonable attempt to provide notice to the Taxpayer and was sufficient to trigger the statutory deadline for producing NTTCs.

The Taxpayer obtained and provided a NTTC on June 4, 2013, approximately one month after the deadline. A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess a NTTC in the form and within the time prescribed by the Department is a valid reason to deny the deduction. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep't.*, 107 N.M. 392, 397, 758 P.2d 806 (Ct. App. 1988) (holding that the Department had properly denied the deduction when the taxpayer had not received the proper form from the buyer within the time limit). *See also* NMSA 1978, § 7-9-43 (requiring the Department to deny deductions on NTTC that are not provided within the 60 days).

Because Taxpayer was not in possession of the proper NTTC within the time limits, the deduction was properly disallowed.

**Equitable recoupment.**

An assessment may be abated when another person paid the amount of the tax “on behalf of the taxpayer on the same transaction; provided that the requirements of equitable recoupment are met.” NMSA 1978, § 7-1-28 (F) (2013). The evidence established by preponderance that the Owner paid the taxes on behalf of the Taxpayer on the transactions in question. The Taxpayer could be entitled to an abatement of the assessment, if the elements of equitable recoupment are satisfied.

Generally, equitable recoupment allows a party to use a claim or defense that would otherwise be barred by a statute of limitations when the claim arises from the same transaction. *See City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 16, 126 N.M. 95. The purpose of the doctrine of equitable recoupment is to prevent the unjust enrichment of one party due to another's mistake and to bypass harsh applications of a procedural bar on limitations periods. *See id.* at ¶ 20-21. In tax transactions, there are three elements that must be met for equitable recoupment to apply. *See Teco Investments, Inc. v. Taxation and Revenue Dep't.*, 1998-NMCA-055, ¶ 8, 125 N.M. 103. There must be 1) a single taxable event, 2) taxes assessed on that single event on inconsistent theories, and 3) a strict identity of interest. *See id.* Separate parties may still have a strict identity of interest. *See id.* at ¶ 10-11. In this case, there was a single taxable event, the sale of the Taxpayer's services as a nail technician. The Taxpayer's claim to a deduction is barred by the statute of limitations because the NTTC was not obtained timely. However, there is no evidence that the taxes assessed on the single transaction involved inconsistent theories. Although the Owner referred to the tax as a "sales tax", it was clear from the context that the Owner was really referring to the gross receipts tax. The assessment on the Taxpayer was also for the gross receipts tax. Therefore, the elements of equitable recoupment have not been met.

#### **Assessment of Penalty.**

A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). The Taxpayer failed to secure a properly executed NTTC in a timely fashion. *See* 3.1.11.10 NMAC. Therefore, the penalty was properly assessed.

#### **Assessment of Interest.**

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). Again, the word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed.

### CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of 2008 gross receipts taxes issued under Letter ID number L0842830656, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer failed to rebut the presumption of correctness, and the assessment is presumed to be correct.

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

DATED: May 27, 2014.

*Dee Dee Hoxie*

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