

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

**IN THE MATTER OF THE PROTEST OF
JOAN DEWBRE,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0297045376 and L0565480832**

No. 14-18

DECISION AND ORDER

A formal hearing on the above-referenced protest was held March 18, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Ms. Joan Dewbre (Taxpayer) appeared for the hearing and represented herself. 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. On December 11, 2008, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005. The assessment was for \$8,380.40 tax, \$1,676.08 penalty, and \$3,205.35 interest.
2. On December 11, 2008, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006. The assessment was for \$6,451.58 tax, \$1,290.32 penalty, and \$1,502.11 interest.
3. On January 20, 2009, the Taxpayer filed a request for extension of time to file protest.
4. On January 26, 2009, the Department granted an extension of time to file.
5. On March 9, 2009, the Taxpayer filed a formal protest letter.

6. On July 29, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
7. A hearing was set for October 27, 2013. The hearing was continued upon the Taxpayer's request and was reset for March 18, 2014.
8. The Taxpayer was working as a manager and supervisor at a medical center in 2005 and in 2006.
9. The Taxpayer failed to file gross receipts tax with the Department for 2005 and 2006.
10. The Taxpayer was ultimately treated as an independent contractor by the medical center, and she was issued 1099s.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax periods ending in December 2005 and December 2006.

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 assessments issued to the Taxpayer are presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that she is not liable for the tax and is 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 Taxpayer's services as a manager and supervisor at the

medical center are taxable. It is the responsibility of the taxpayer, who is in the position to know the details of her business activities, to determine accurately and to report her tax liabilities to the Department. *See* NMSA 1978, § 7-1-13.

The Taxpayer argued that she was not supposed to be an independent contractor with the medical center. The Taxpayer was supposed to be an employee of the organization that was selling her services to the medical center. However, the Taxpayer admitted that somewhere along the way, they ended up treating her like an independent contractor. The Taxpayer was issued 1099s and not W-2s. The Taxpayer also failed to obtain any NTTCs. The Taxpayer argued that the organization should have been paying gross receipts tax and that she should not be liable for its tax. The Department agreed that the medical organization should have been paying gross receipts on its sales. However, the Department argued that the Taxpayer was also liable for gross receipts taxes for the sales of her services to the organization. The Department conceded that the Taxpayer would have been eligible to deduct her gross receipts taxes if she had obtained a NTTC. The Department argued that the Taxpayer was barred from claiming the deduction as she never obtained a proper NTTC.

Again, the Taxpayer's services were taxable. *See* 3.2.1.18 (A) NMAC (2003). Services can be deducted from gross receipts tax when the seller has obtained a NTTC from the buyer. *See* NMSA 1978, § 7-9-48 (2000). Sellers should be in possession of a NTTC at the time the return is due for the transaction. *See* NMSA 1978, § 7-9-43. However, a seller has sixty days from a notice requiring production of the NTTC to obtain the NTTC. *See id.* The Taxpayer still has not obtained a NTTC. Therefore, the Taxpayer cannot deduct her gross receipts tax.

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*, 1976-NMCA-127, 90 N.M. 16. Therefore, the exception does not apply, and 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). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 1977-NMSC-010, 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.

Timeliness of Hearing.

The Taxpayer argued that she was prejudiced by the Department's extensive delay in requesting that the hearing be set. The Taxpayer filed her protest on March 9, 2009. On July 29, 2013, the Department requested that this matter be set for hearing. This matter was promptly set for hearing after the Hearings Bureau received the request for hearing.

When she filed her protest, the Taxpayer had several witnesses who were prepared to testify on her behalf. The Taxpayer was confident that the witnesses would have established her status as an employee rather than independent contractor. However, all of the Taxpayer's witnesses have become unavailable in the years between 2009 and 2014. Many have moved out of state. The Taxpayer argued that she was prejudiced by the Department's more than three year delay in requesting a hearing. The Department argued that the Taxpayer's protest was filed in 2009 and that there was no statutory time limit to hold her hearing.

In 2009, there was not a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24 (2003). Currently, a hearing must be set within ninety days of the protest. *See* NMSA 1978, § 7-1-24.1 (2013). However, there is no statutory or regulatory authority for the Hearing Officer to dismiss a previously filed protest for unreasonable and unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. *See also Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶13, 100 N.M. 632 (holding that public officers' failure to timely carry out their duties is not a defense to an action by the state and that the statute does not provide a remedy for failure to set a hearing promptly). Hearing officers are also unable to grant equitable remedies. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, 118 N.M. 273 (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). As there was not a statutory or regulatory violation in failing to refer the Taxpayer's protest for such extended period of time, there is no administrative remedy that can be granted.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L0297045376 and L0565480832, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was properly assessed for gross receipts tax and interest for 2005 and 2006.

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

DATED: May 27, 2014.

Dee Dee Hoxie

DEE DEE HOXIE

Hearing Officer
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