

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

**IN THE MATTER OF THE PROTEST OF
BBCB, LLC,
TO THE DENIAL OF REFUND ISSUED UNDER
ID NO. L0748686656**

No. 14-33

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 23, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Kathleen Carlow, Staff Attorney. Ms. Mary Griego, Auditor, also appeared on behalf of the Department. BBCB, LLC (Taxpayer) appeared for the hearing by and through its owners, Mr. Earl Brooks and Ms. Elaine Brooks, and represented itself. Mr. Troy Scott, an enrolled agent, was also present at the Taxpayer's request. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 11, 2012, the Taxpayer filed an application for refund of gross receipts tax for the tax period from December 1, 2008 through December 31, 2008.
2. On October 31, 2012, the Department denied the request for refund.
3. On November 26, 2012, the Taxpayer filed a formal protest letter.
4. In April 2013, the Department granted a partial refund for the December 2008 tax period, in the amount of \$165.31.
5. On September 9, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing. The hearing was promptly set, but was continued several times at the requests of the Taxpayer.

6. The Taxpayer serves as a Regional Developer for a massage corporation that is based in Arizona. As the Regional Developer, the Taxpayer sells licenses to franchisees for the corporation, helps to obtain the license from the corporation, and helps the franchisee to set up the clinic. The Taxpayer also has very limited “police” duties after the franchisee has opened the clinic.
7. The Taxpayer receives a commission on every license sold. The Taxpayer also receives a commission on monthly royalties that are paid to the corporation by franchisees who worked with the Taxpayer in opening their clinics.
8. The Taxpayer’s development area includes New Mexico, Oklahoma, and parts of Texas.
9. The Taxpayer was filing and paying gross receipts tax to include the commission on the monthly royalties that it receives.
10. Mr. Scott began working with the Taxpayer and advised that its commission on the monthly royalties was not subject to gross receipts tax.
11. The Taxpayer filed an application for refund for the December 2008 tax period based on this advice.
12. The Taxpayer provided to the Department a copy of its royalty reports from the corporation for the 2008 tax year.
13. Ms. Griego reviewed the royalty report and determined the total amounts that were paid to the Taxpayer in December 2008.
14. Ms. Griego then determined which payments were received for commissions on royalties paid on the franchisees that were within the state of New Mexico.
15. Ms. Griego applied the gross receipts tax to those commissions at the rate where the franchisees were located.
16. The Taxpayer’s principal place of business is in Bernalillo County, New Mexico.

DISCUSSION

The issue to be decided is whether the Taxpayer is entitled to a refund of the gross receipts tax paid on the payments it received in December 2008 that were derived from royalties paid to the massage corporation.

Gross Receipts.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* NMSA 1978, § 7-9-3. *See also* 3.2.1.18 (A) NMAC (2003). Gross receipts include commissions, fees, and amounts paid for the performance of services. *See* NMSA 1978, § 7-9-3.5 (2007). There is a presumption that all receipts of a taxpayer from engaging in business are subject to the gross receipts tax. *See* NMSA 1978, § 7-9-5 (2002).

The Taxpayer argues that the statutes on gross receipts are silent on the issue of royalty payments. The Taxpayer argues that the monthly commissions it receives are royalties since they are derived from royalty payments to the corporation and that its receipts on those should not be subject to the gross receipts tax.

The Department argues that the monthly commissions paid to the Taxpayer are compensation for services that it provides to the corporation. The Department points out that the Taxpayer's contract with the corporation requires the Taxpayer to provide inspections and reports on franchisees and that the failure to do so during any month will negate the Taxpayer's right to receive the commissions from the corporation.

Royalties are not specifically mentioned in the gross receipts statute. *See* NMSA 1978, §§ 7-9-3 and 7-9-3.5. However, commissions are specifically mentioned and are clearly subject to the gross receipts tax. *See* NMSA 1978, § 7-9-3.5 (A) (2). The Taxpayer's contract with the corporation identifies the monthly payments made to the Taxpayer as "Commissions on Royalty Fees". *See* TRD "C", ¶ 8.2. The franchisees are paying a monthly royalty to the corporation, not to the Taxpayer, for

the use of the corporation's intellectual property or its brand name. The corporation has contracted with the Taxpayer to check up on its franchisees to ensure that its brand is being used in accordance with its standards. In exchange for this supervision, the corporation pays the Taxpayer a commission from the royalties that it receives each month. The Taxpayer is not entitled to that commission if it does not perform its duties of supervision. The Taxpayer argues that it is rarely ever called upon to perform those duties. Regardless of the frequency that the corporation actually calls upon the Taxpayer to do so, the Taxpayer is receiving a monthly commission from the corporation in exchange for the performance of supervisory services. Consequently, the receipts derived from the monthly commission are for the services performed in the state of New Mexico and are subject to the gross receipts tax.

Amount of Refund.

The Taxpayer argues that the amount of refund that was granted by the Department was incorrect. The Taxpayer argues that the tax rate used to calculate the tax was not the tax rate for Bernalillo County, which is where the Taxpayer's business is located.

The Department argues that the Taxpayer might not have been entitled to a refund at all since Mrs. Brooks testified that the Taxpayer only reported the gross receipts of the commissions paid on the New Mexico franchisees. However, Ms. Griego's testimony was clear that she received the raw data on all of the payments made for all of the franchisees related to the Taxpayer, including those from out of state. Ms. Griego reviewed the data and determined which payments were related to the franchisees located within the state of New Mexico.

Ms. Griego then calculated what tax was owed on those payments and issued a refund for the amount in excess of the tax owed for those payments. Ms. Griego explained that she used the tax rates of the franchisees' locations. Ms. Griego admitted that this was probably a mistake and that the Taxpayer's tax rate should have been the location of its business. Ms. Griego determined that the

total amount of receipts subject to the gross receipts tax for December 2008 was \$6,935.65. Applying tax rates from the various franchisee locations, she determined that the total amount of gross receipts tax due for December 2008 was \$486.93. The Taxpayer reported and paid \$652.24 gross receipts tax for December 2008. Therefore, the Department issued the Taxpayer a refund of \$165.31. The tax rates applied were 6.7500%, 6.9375%, and 7.9375%. The Department provided a gross receipts tax schedule for December 2008, which indicates that Bernalillo County's gross receipts tax rate was 5.8125%. The Taxpayer should have been charged the Bernalillo County rate as its business is located within Bernalillo County. Therefore, the Taxpayer's gross receipts tax liability for December 2008 was \$403.13. The amount that should have been refunded to the Taxpayer was \$249.11. Consequently the Taxpayer is entitled to a refund of an additional \$83.80.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the denial of refund issued under Letter ID number L0748686656, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was receiving monthly commissions for acting as a supervisory agent on behalf of the corporation. The Taxpayer was subject to the gross receipts on the commissions paid for supervising franchisees located within the state of New Mexico.
3. The Department conceded that the Taxpayer was entitled to a partial refund of the gross receipts tax paid in December 2008.
4. The Taxpayer was subject to the gross receipts tax in Bernalillo County, New Mexico. The tax rate applied to the Taxpayer was in excess of the rate for Bernalillo County. Consequently, the Taxpayer is entitled to an additional refund of \$83.80.

For the foregoing reasons, the Taxpayer's protest is **GRANTED IN PART AND DENIED IN PART. The Department will issue an additional refund of \$83.80 to the Taxpayer.**

DATED: September 22, 2014.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630