

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

**IN THE MATTER OF THE PROTEST OF
SHAWN & LINDY EDWARDS
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L1316725632 and L0242983808**

No. 14-44

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 11, 2014 at 1:00 p.m. before Monica Ontiveros, Hearing Officer. This matter was originally heard on June 19, 2014. The hearing was continued to allow Taxpayers to be present at the hearing and to allow them to file an SS-8 Form with the Internal Revenue Service. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Esq., and Milagros Bernardo, protest auditor, appeared as a witness for the Department. Shawn and Lindy Edwards ("Taxpayers") were represented by John Lieuwen of the firm of John N. Lieuwen & Associates, P.A. Taxpayers did not appear at the hearing.

Mr. Lieuwen filed a legal and factual argument one day prior to the hearing or on December 10, 2014. The Department argued that it had not received the argument prior to the hearing. More troublesome is that the argument refers to factual matters that are not part of the record. The argument which consists of four pages was not admitted as an Exhibit, but is part of this record. Attached to the argument is a document entitled "Job Description." The Job Description, while part of the record, was not admitted as an Exhibit.

At the June 19, 2014 hearing, exhibits were introduced into the record. Taxpayer introduced into the record Exhibits 1 and 2. The Department introduced into the record Exhibits A and B. Exhibit B is the Internal Revenue Service form or SS-8 form which assists taxpayers in determining whether they are an employee or an independent contractor. The form introduced

into the record is the 2014 version of the form. The Hearing Officer made the SS-8 form in effect in 2006 and revised in November 2006 part of the record. Neither attorney objected to the SS-8 form revised November 2006 as being part of the record.

Also part of this record is the recording from the June 19, 2014 hearing.

Based on the evidence in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 3, 2009, the Department assessed Taxpayers for gross receipts taxes in the amounts of: \$7,654.52 in principal, \$1,530.90 in penalty and \$3,178.84 in interest for tax period January 1, 2005 through December 31, 2005; and \$6,767.38 in principal, \$1,353.48 in penalty and \$1,798.95 in interest for tax period January 1, 2006 through December 31, 2006. Letter ID Nos. L0242983808 and L1316725632.

2. Taxpayers filed an extension of time on September 28, 2009 to file their protest.

3. The protest was filed by Taxpayers on November 30, 2009, which was acknowledged by the Department on December 3, 2009. Letter ID No. L0092690496.

4. On October 2, 2013, the Department requested a hearing in the protest of the gross receipts tax assessments for the tax periods at issue.

5. This matter was originally set for hearing on February 14, 2014. The matter was reset for hearing on June 19, 2014. The matter was reset again for September 30, 2014 after a brief hearing. Because of a scheduling conflict the hearing was again reset.

6. Taxpayers were given ample opportunity to be present at the hearing held on December 11, 2014.

7. There were no reasons presented as to why Taxpayers were unable to be present at the hearing held on December 11, 2014.

8. The June 19, 2014 hearing was continued to allow "Taxpayers ... more time to

submit paperwork to the IRS that Shawn Edwards was an employee rather than an independent contractor and so that Mr. Edwards could appear to testify.” Continuance Order issued on June 20, 2014 by Hearing Officer VanDenzen.

9. The gross receipts at issue were earned by Shawn Edwards.
10. Mr. Edwards did not file gross receipts returns for the tax periods at issue.
11. Mr. Edwards did not file a SS-8 form with the Internal Revenue Service.

DISCUSSION

The issue to be determined is whether Taxpayers were able to rebut the presumption of correctness. During the course of the protest, Taxpayers made several arguments regarding why the assessments were incorrect. At first they argued that the agricultural exemption applied to them. This argument was abandoned on the record at the hearing held on December 11, 2014. The argument made at the June and December hearings was that Mr. Edwards was an employee and not an independent contractor.

Burden of Proof and Standard of Review.

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

Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect.

In this case, there is no evidence introduced into the record to prove that Mr. Edwards was an employee. The general rule is that wages, salaries, commissions for personal services are exempted from the gross receipts tax pursuant to NMSA 1978, Section 7-9-17 (1969). The determination of whether a taxpayer is an employee is a fact intensive inquiry. The test to determine whether a person is an employee may be found in Regulation 3.2.105.7 NMAC (05/15/01). Mr. Edwards had ample notice of the hearing date to make arrangements to be able to attend the hearing. He chose not to attend the hearing and present evidence. Without any facts in the record to support Taxpayers' argument, Taxpayers are unable to rebut the presumption. Therefore, without any evidence to rebut the presumption of correctness, the Departments' assessments are correct.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the assessments issued under Letter ID No. Letter ID Nos. L0242983808 and L1316725632 and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessments are presumed to be correct, and it is Taxpayers' burden to come forward with evidence and legal argument to establish that Mr. Edwards was entitled to an abatement.

C. Shawn Edwards failed to appear at the hearing and failed to provide any evidence that he was an employee.

D. By electing not to appear at the administrative hearing, Taxpayers have failed to rebut the presumption of correctness found in NMSA 1978, Section 7-1-17(C) (2007).

E. Taxpayer was not an employee for tax periods January 1, 2005 through December 31, 2006.

F. Taxpayer owes gross receipts tax in the amounts of \$7,654.52 in principal and \$1,530.90 in penalty for tax period January 1, 2005 through December 31, 2005; and \$6,767.38 in principal and \$1,353.48 in penalty for tax period January 1, 2006 through December 31, 2006. Interest continues to accrue through date of payment of the principal amount of tax.

For the foregoing reasons, Taxpayers' protest **IS DENIED**.

DATED: December 23, 2014.

Monica Ontiveros

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