

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

**IN THE MATTER OF THE PROTEST OF
SANTA LUCIA
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOS. L1413860304, L0876989392, and L1950731216**

No. 15-07

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 21, 2015, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Melinda Wolinsky, attorney for the Department. Milagros Bernardo appeared and testified as a witness for the Department. Sarah T. Fresquez (“Taxpayer”) appeared and testified. Her father, Steve Fresquez, appeared as a witness. The Department introduced into the record Exhibits A and B. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 8, 2014, the Department issued three gross receipts tax assessments against Taxpayer: 1) in the amount of \$1,049.47 in tax, \$209.90 in penalty, and \$167.84 in interest for the tax period of January 1, 2009 through December 31, 2009 (Letter Id. No. L1413860304); 2) in the amount of \$1,998.91 in tax, \$399.78 in penalty, and \$240.53 in interest for the tax period of March 1, 2010 through December 31, 2010 (Letter Id. No. L0876989392); and 3) in the amount of \$2,005.86 in tax, \$401.18 in penalty, and \$168.86 in interest for the tax period of January 1, 2011 through December 31, 2011 (Letter Id. No. L1950731216).

2. Taxpayer filed a protest to the assessments on October 30, 2014. A number of documents were attached the protest letter including a Type 5 non-taxable transaction certificate

(NTTC) issued on July 17, 2014, a tax collection notice, six CRS returns, 15 summary details for Santa Lucia, LLC, two summary details for Jamalczewski (same CRS number as Santa Lucia, LLC), one email from Santa Lucia, LLC and a letter dated August 19, 2014 from Santa Lucia, LLC.

3. The Department acknowledged the protest on November 5, 2014. Letter Id. No. L2003041232.

4. On December 30, 2014, the Department requested a hearing in this matter.

5. On December 31, 2014, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for January 21, 2015.

6. Sara T. Fresquez was the sole proprietor of Santa Lucia.

7. During the tax periods at issue, Taxpayer contracted with Santa Lucia, LLC to provide services to people with developmental disabilities living in New Mexico. The services included community base services (teaching individuals with life skills), in-home care services/respice care, job coach services, and transportation services. [01-21-15 CD 12:43-14:02].

8. Taxpayer failed to file gross receipts returns for the tax periods at issue.

9. Santa Lucia, LLC (“Lucia”) is a separate entity from Taxpayer.

10. The letter from Lucia dated August 19, 2014 states that it “pays all the CRS tax for all the Independent Contractors that provides services through Santa Lucia.” Letter dated August 19, 2014 attached to protest letter.

11. There is insufficient evidence to prove that Lucia resold Taxpayer’s services and the resale was subject to gross receipts tax.

12. On May 16, 2014, the Department issued Taxpayer a Notice of Limited Scope Audit Commencement-Gross Receipts letter or a 60 day letter. Exhibit A.

13. Taxpayer was required to have in her possession all NTTCs or Taxpayer had 60 days or until July 15, 2014 to produce any NTTCs to the Department.

14. Taxpayer received the 60 day letter from the Department and attempted to have in her possession a NTTC from Lucia before the expiration of the 60 days.

15. On July 2, 2014, 13 days prior to the expiration of the 60 days, Taxpayer requested a NTTC from Lucia. Email attached to protest letter.

16. Taxpayer was not prompt in trying to obtain a NTTC from Lucia.

17. At some point, Lucia was suspended by the Department from executing NTTCs. On July 11, 2014, four days prior to the expiration of the 60 day letter, Lucia was still suspended from issuing NTTCs, because it had failed to timely pay its gross receipts taxes. Letter dated August 19, 2014 attached to protest letter.

18. On July 17, 2014, Lucia executed a Type 5 NTTC to Taxpayer.

19. The Type 5 NTTC was not issued by the Department within the 60 day period or before July 15, 2014.

20. The Department refused to issue NTTCs or suspended Lucia from executing NTTCs because Lucia was not in tax compliance. Letter dated August 19, 2014.

21. Sometime in 2010, Taxpayer and her father sought advice from Robert Rivera, CPA. Mr. Rivera instructed Taxpayer to register as an independent contractor and file gross receipts returns. [01-21-15 CD 49:44-51:09].

22. Taxpayer registered, in person, with the Department as an independent contractor

in March 2010. [01-21-15 CD 49:44-51:00].

23. Taxpayer received a registration certificate from the Department on April 20, 2010. [01-21-15 CD 49:24-49:34].

24. Taxpayer had multiple contacts with the Department.

25. Taxpayer pays her personal income tax in a timely manner. [01-21-15 CD 21:56-21:59].

DISCUSSION

The sole issue to be determined is whether the Department properly assessed Taxpayer for gross receipts tax, penalty and interest for the tax periods January 1, 2009 through December 31, 2009; March 1, 2010 through December 31, 2010; and January 1, 2011 through December 31, 2011. Taxpayer argued that because Lucia was unable to provide her with a timely NTTC, the Department should abate the tax. In addition she requested that the penalty be forgiven.

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, §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, Carlsberg Mgt Co. v. State, Taxation and Revenue Dep't.*, 1993-NMCA-121, 116 N.M. 247. In addition, all receipts of a person engaging in business are subject to gross receipts tax pursuant to NMSA 1978, Section 7-9-5(A) (2002).

Gross Receipts.

Generally speaking, goods sold or services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in Section 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, §7-9-3.5(A)(1) (2003). The Gross Receipts and Compensating Tax Act, specifically Section 7-9-3(M), defines “service” as “all activities ... which activities involve predominately the performance of a service as distinguished from selling or leasing property.” NMSA 1978, Section 7-9-3(M) (2007).

There is no question that the services Taxpayer sold to Lucia are gross receipts and taxable. The services included community base services, in-home care services, job coach services, respite care services, and transportation services. These are all services as defined by Section 7-9-3(M). Therefore, Taxpayer’s services performed for Lucia in New Mexico are gross receipts and taxable, unless deducted.

Type 5 NTTC.

Receipts from selling a service that are resold are deductible if **all** the statutory conditions are met. Section 7-9-48 provides that, “(r)ceipts from selling a service for resale may be deducted from gross receipts ... if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must resell the service in the ordinary course of business and the resale must be subject to the gross receipts tax.” NMSA 1978, §7-9-48 (2000).

In this case, Taxpayer presented evidence of the correct type of NTTC, Type 5 (Taxpayer is reselling her services for resale); however, the NTTC was issued by the Department outside of the 60 day period. A taxpayer may deduct her receipts if the NTTC was issued by the Department and executed by second seller (Lucia in this case) at the time the services were rendered but in any event no later than 60 days from the date of the letter from the Department or July 15, 2014.

Section 7-9-43(A) provides that:

(a) All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession ... deductions shall be disallowed.

NMSA 1978, §7-9-43(A) (2011).

In this matter, Taxpayer did not have in her possession the requisite NTTC when she contracted with Lucia. In addition, she was not able to obtain the NTTC within the 60 day period because Lucia had been suspended by the Department from executing NTTCs. The 60 day period began when the Department issued Taxpayer a Notice of Limited Scope Audit Commencement-Gross Receipts letter or a 60 day letter on May 16, 2014. Exhibit A. Taxpayer had 60 days or until July 15, 2014 to produce any NTTCs to the Department. Taxpayer waited until July 2, 2014 or 13 days before the expiration of the 60 day time period before she requested a NTTC from Lucia. Email attached to protest letter. Taxpayer provided no explanation why she waited until two weeks before the expiration of the 60 day time period to request the NTTC from Lucia. It wasn't until July 17, 2014 that Lucia issued a Type 5 NTTC to Taxpayer. Taxpayer took a risk by waiting until the last minute to request a NTTC from Lucia. The Hearing Officer somewhat sympathizes with Taxpayer that the NTTC was issued only two days after the expiration of the 60

day letter, but nonetheless, the NTTC was not timely issued and therefore Taxpayer's receipts are not deductible.

As for the other legal requirement of Section 7-9-48, there is insufficient evidence in the record to determine whether Lucia imposed gross receipts tax on the resale of Taxpayer's services. Taxpayer testified that the director of Lucia assured her that the gross receipts taxes were paid to the Department on Taxpayer's services. [01-21-15 CD 22:03-22:40]. Taxpayer also provided a letter from the Director of Lucia stating that Lucia had paid CRS (gross receipts) taxes for all the independent contractors. Letter dated August 19, 2014. The letter from Lucia dated August 19, 2014 states that it "pays all the CRS tax for all the Independent Contractors that provides services through Santa Lucia." Letter dated August 19, 2014. However, because Lucia was not in tax compliance, the Hearing Officer places little weight on this statement.

Taxpayer also submitted a number of NM WebFile summary details for Lucia indicating that Lucia was filing its returns. However, there is no evidence to indicate that the amount of gross receipts reported to the Department included the receipts for Taxpayer's services. Taxpayer testified that a number of other independent contractors working for Lucia had a problem similar to hers and it is not clear whose receipts were reported to the Department by Lucia. [01-21-15 CD 12:43-14:57]. There is insufficient evidence in the record to rebut the presumption that the assessment is correct.

Civil Penalty.

Civil penalty is imposed when a taxpayer is "negligent" or disregards the Department's rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A)(1) states that:

(e) except as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, **but without intent to evade or defeat a tax**, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:

(1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid;

(Emphasis added). NMSA 1978, Section 7-1-69(A)(1) (2007). The Department's regulation provides that, "negligence" includes "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention" for either failing to file a return on time or failing to make a payment on time. Regulation 3.1.11.10 NMAC (2001). Inadvertent error is defined as "negligence." See *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶14, 108 N.M. 795.

Taxpayer testified that at the time she was performing services for Lucia she was unaware that she was required to register and file gross receipts returns. [01-21-15 CD 21:29-21:40]. However, at some point in 2010, Taxpayer and her father sought advice from Robert Rivera, CPA. Mr. Rivera instructed Taxpayer to register as an independent contractor and file gross receipts returns. Taxpayer registered in person with the Department as an independent contractor in March 2010 and she received a registration certificate from the Department, but she still failed to file her returns. [01-21-15 CD 49:24-49:34]. Taxpayer had multiple opportunities to discuss the tax consequences of performing services as an independent contractor with the Department.

Taxpayer's actions were careless based on erroneous belief or inattention which is by definition negligent and subject to civil penalty. Therefore, Taxpayer owes the penalty amount.

Interest.

New Mexico law is very clear on the imposition of interest when the principal amount of tax is unpaid when due, even if the payment is received one day late. Section 7-1-67(A) (2007) states that 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) (2007). The word "shall" is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013, ¶22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due, interest was properly assessed on the principal amount until the date it was paid. Therefore, Taxpayer owes the interest amount calculated through date of payment of the principal.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely written protest to the Notice of Assessments Letter Id. Nos. L1413860304, L0876989392, and L1950731216 for gross receipts tax principal, penalty and interest for the tax periods ending 2009, 2010 and 2011.
- B. Jurisdiction lies over the parties and the subject matter of this protest.
- C. The hearing was timely set as required by NMSA 1978, Section 7-1-24.1(A) (2013).
- D. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment

is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to an abatement.

E. Taxpayer did not possess a Type 5 NTTC at the time the services were provided to Lucia or in any event no later than 60 days after the expiration of the 60 day time period or no later than July 15, 2014.

F. Taxpayer failed to provide sufficient evidence that Lucia imposed gross receipts tax on the resale of Taxpayer's services.

G. Taxpayer was negligent in not filing her gross receipts returns when due for the tax years 2009, 2010 and 2011; accordingly, she owes penalty.

H. Interest is due on the amount of unpaid principal tax and continues to accrue on the unpaid principal amount until the principal amount of tax due is paid.

I. The total amount due for tax year 2009 is \$1,049.47 in principal, \$209.90 in penalty and \$182.50 in interest. For tax year 2010, the amount due is \$1,998.91 in principal, \$399.78 in penalty and \$268.46 in interest. For tax year 2011, the amount due is \$2,005.86 in principal, \$401.18 in penalty and \$196.89 in interest. The interest amount is calculated through January 21, 2015.

Exhibit B.

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

DATED: February 23, 2015

Monica Ontiveros

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