

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

**IN THE MATTER OF THE PROTEST OF  
SOUTHWEST MOBILE SERVICE AND RICHARD CAMERON,  
TO THE ASSESSMENTS ISSUED UNDER  
LETTER ID NOS. L2087800896 and L0308437056**

**No. 15-08**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held January 21 and 22, 2015, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, and Ms. Veronica Galewaller also appeared on behalf of the Department. Mr. Richard Cameron (Taxpayer) appeared for the hearing with his attorney, Ms. Tracy Sanders. Mr. Shawn Harrison also appeared as a witness for the Taxpayer. 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 21, 2009, the Department assessed the Taxpayer for workman's compensation tax, penalty, and interest for the tax period from March 31, 2003 through March 31, 2008. The assessment was for \$2,433.80 tax, \$486.76 penalty, and \$1,030.47 interest [L2087800896].
2. On December 21, 2009, the Department assessed the Taxpayer for gross receipts tax, withholding tax, penalty and interest for the tax period from January 31, 2002 through March 31, 2008. The assessment was for gross receipts tax of \$294,259.04, penalty of

\$58,851.70, and interest of \$151,821.08. The assessment was for withholding tax of \$10,280.05, penalty of \$2,056.02, and interest of \$4,035.62. [L0308437056]

3. On January 22, 2010, the Taxpayer filed a formal protest letter.
4. On September 18, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
5. On September 18, 2013, the Hearings Bureau issued a notice of hearing for December 19, 2013.
6. On December 18, 2013, the Taxpayer filed a request for continuance of the hearing.
7. An order was issued on December 18, 2013 that advised the parties that the December 19, 2013 hearing would be held as a telephonic scheduling conference and that the hearing on the merits would be reset.
8. On December 19, 2013, the Taxpayer failed to appear and failed to have a bona fide employee, accountant, or attorney appear on his behalf.
9. On January 3, 2014, an order to show cause was issued.
10. On January 23, 2014, the Taxpayer's attorney filed an entry of appearance and response to the order to show cause.
11. On March 25, 2014, a scheduling conference was held by telephone. The hearing on the merits was set for September 18, 2014.
12. On August 22, 2014, the parties submitted a stipulated motion to continue the hearing.
13. On September 5, 2014, the request to continue was granted, and notice of the new hearing date on January 21, 2015 was issued.
14. At the hearing, the Taxpayer announced that he was withdrawing his protest as to the workman's compensation assessment and as to the assessment on the withholding tax.

Therefore, the only issue at protest was the gross receipts tax and the penalty and interest applicable thereto.

15. The Taxpayer was conducting business in New Mexico from 2002 through 2008.
16. The Taxpayer was providing maintenance services on buildings and vehicles to UPS Oasis (Oasis). Oasis was reselling the Taxpayer's services to its parent corporation.
17. The Taxpayer was also providing maintenance services for Oasis in Utah, Wyoming, and Idaho. The Taxpayer's contracts with Oasis indicated that the Taxpayer was not to charge sales tax to Oasis and that Oasis would be responsible for paying each state's applicable sales tax.
18. Oasis provided the Taxpayer with multijurisdictional uniform sales and use tax certificates (MTCs) on the services that the Taxpayer provided for them.
19. The Taxpayer checked the MTCs to be sure that New Mexico was listed as a participating state. New Mexico was listed.
20. The Taxpayer believed that its sales in New Mexico were not subject to the gross receipts tax based on the MTCs provided, the representations made by Oasis, and the advice of its accountant, who was a CPA.
21. The Taxpayer accepted the MTCs in good faith.
22. The Taxpayer did not file reports on its gross receipts tax.
23. In 2008, the Department commenced an audit of the Taxpayer.
24. The Taxpayer met with the auditor in May 2008. The Taxpayer took several of his employees and his accountant to the meeting with the auditor.

25. At the meeting in May 2008, the auditor served the Taxpayer with a letter (the 60-day letter) that advised him that he had 60 days to obtain appropriate nontaxable transaction certificates (NTTCs).
26. The Taxpayer signed in receipt of the 60-day letter, but did not recall being served with it. The Taxpayer explained that a lot of information and documents were exchanged at the meeting with the auditor. The Taxpayer entrusted all of the documents to his accountant.
27. Over the next several weeks and months, the Taxpayer spoke repeatedly to his accountant about the audit. The accountant repeatedly reassured the Taxpayer that the necessary documents were being obtained and that things were being taken care of.
28. During the audit, Oasis provided proof that it had paid the New Mexico gross receipts tax on its resales of the Taxpayer's services.
29. The Taxpayer failed to obtain a NTTC from Oasis within 60 days of the 60-day letter.
30. After the assessment was made and the protest was filed, the Taxpayer learned that his accountant had not been handling the case properly and had not obtained the necessary documents.
31. The Taxpayer immediately requested a NTTC from Oasis. Oasis was issued and executed a proper NTTC to the Taxpayer on February 2, 2009. The Taxpayer provided the NTTC to the Department.
32. The auditor on the case advised that the Taxpayer needed a NTTC that was dated within or prior to the 60-day deadline from the 60-day letter.
33. The Taxpayer requested another NTTC from Oasis that was backdated for that time period. Oasis provided an NTTC that was issued to them by the Department in 1998 and

executed to the Taxpayer on April 2, 2009. Oasis indicated in a typewritten note that the NTTC was effective from January 1, 2001. The Taxpayer provided the backdated NTTC to the Department.

34. The Department rejected the NTTC as untimely because its execution to the Taxpayer was after the 60-day deadline. The Department argued that the backdated NTTC was fraudulent and evidence of bad faith.
35. The Department conceded that the Taxpayer would have been able to deduct the sales to Oasis from his gross receipts if the Taxpayer had obtained the NTTC within the 60-day deadline. The Department also conceded that the MTC would have allowed the Taxpayer to deduct his sales to Oasis from his gross receipts if the Taxpayer were selling tangible property rather than services.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest as assessed. The Taxpayer argued that the MTC was accepted in good faith at the time of the contract and should serve as conclusive evidence that the Taxpayer was entitled to the deductions. The Department argued that the MTC was only valid for sales of tangible personal property and that a NTTC was required within the 60-day deadline for the deductions to be valid.

#### **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 Ctr. 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 entitled to an abatement. The burden is on the Taxpayer to prove that he is entitled to an exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

### **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 admitted that he was engaged in a service business performing maintenance. There was no dispute that the Taxpayer's services would ordinarily be subject to gross receipts tax. The Taxpayer argued that he was entitled to deduct his gross receipts based on his timely acceptance of a MTC and his eventual acceptance of a NTTC.

### **NTTCs.**

"Receipts 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 (emphasis added). A taxpayer may deduct certain gross receipts only when they are

provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2011). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due, but may also produce NTTCs within a deadline set by the Department. *See id.* The seller must accept the NTTC in good faith. *See id.*

The Taxpayer was served with the 60-day letter in May 2008. The Taxpayer received the proper NTTC from Oasis in February 2009. Therefore, the NTTC was not received timely. The Taxpayer received another NTTC from Oasis in April 2009 that attempted to establish its effective date as January 1, 2001. However, this NTTC was also received past the 60-day deadline and was, ultimately, not timely. *See* NMSA 1978, § 7-9-43. A taxpayer can be protected from tax liability when the taxpayer accepts a NTTC in good faith even though the transaction was not actually subject to deduction. *See Leaco Rural Telephone Coop., Inc. v. Bureau of Revenue*, 1974-NMCA-076, 86 N.M. 629. However, that protection will be conclusive only when three requirements are met; the acceptance of the NTTC must be timely, must be in good faith, and the NTTC must be properly executed. *See id.* at ¶ 15. The Taxpayer's acceptance of the NTTC was not timely as it occurred after the 60-day deadline. If a 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." NMSA 1978, § 7-9-43 (emphasis added). The word "shall" indicates that the denial of the deduction is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

### **MTCs.**

The Taxpayer accepted a timely MTC in good faith and argued that the same safe-harbor protection is afforded to him by that acceptance. A MTC that is recognized by the Department is treated the same as a NTTC. *See* NMSA 1978, § 7-9-43 (A). *See also Siemens Energy and Automation v. N.M. Taxation and Revenue Dep't.*, 1994-NMCA-173, ¶ 16, 119 N.M. 316 (indicating that MTCs and NTTCs serve the same purpose). The Department has elected to recognize MTCs only in reference to the sales of tangible personal property. *See* 3.2.201.13 NMAC. The Department argued that the MTC could not be accepted in good faith and could not be conclusive evidence that the Taxpayer was entitled to a deduction because the MTC indicated on its face that it was subject to the notes on the following pages and that one of the footnotes said that “New Mexico do[es] not permit the use of this certificate to claim a resale exemption for the purchase of a taxable service for resale.” Exhibit DD. Another footnote explained that New Mexico only accepts the MTC for sales of tangible property. *See id.*

The Taxpayer explained that he read the face of the MTC, which provides in the certification by the buyer that the certificate is for “any property or service”. *See id.* The Taxpayer also checked to be sure that New Mexico was listed as a state that accepted the MTCs. The Taxpayer did not read the footnotes and did not understand that the MTC was not accepted in New Mexico for sales of services. The Taxpayer was also relying on the representations made by Oasis and by his accountant that he did not owe New Mexico tax on his services to Oasis. Oasis paid the New Mexico gross receipts tax on the Taxpayer’s services when they were resold to the parent corporation.

The Taxpayer argued that a MTC was “other documentation”, as referenced to in the 60-day letter, that proved he was entitled to take a deduction. The legislature has specified in the statute that other documentation can be used to prove a deduction, but only in reference to those

sections that deal with tangible property. *See* NMSA 1978, § 7-9-43 (B) and (E). Therefore, other documentation is not sufficient to prove a deduction for the sale of services. *See also* 3.2.201.8 (C) NMAC (prohibiting acceptance of any other documentation to prove a deduction unless explicitly allowed by statute).

The Taxpayer argued that his good faith acceptance of the MTC should be treated the same as a good faith acceptance of a NTTC. The issuance and acceptance of MTCs are part of the Multistate Tax Compact. *See* NMSA 1978, 7-5-1. Article V of that section provides that a seller who accepts an exemption certificate in good faith is “relieved of liability for a sales or use tax with respect to the transaction.” *Id.* That language has been interpreted to offer the seller a safe harbor with absolute relief from tax liability when the seller accepted a MTC in good faith, regardless of whether the underlying transaction qualified for the exemption. *See Siemens*, 1994-NMCA-173, ¶ 15. Interpretations that would strip MTCs of their value in promoting uniformity and convenience are not favored. *See id.* at ¶ 24. Requiring “sellers to make a factual inquiry, and then make such a sophisticated legal decision on each MTC...would totally eviscerate any purpose for the MTC certificate and render the Compact a sham in this area.” *Id.* at ¶ 25. However, MTCs must be “authorized by the appropriate state”. NMSA 1978, § 7-5-1, Article V.

Even if the MTC could be treated as a NTTC, it is not clear that the Taxpayer would be entitled to take the deduction. According to the Department, a NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). There is caselaw that indicates that a NTTC will protect a taxpayer from liability even when the transaction could not properly be deducted. *See Leaco*, 1974-NMCA-076. *See also Continental Inn of Albuquerque v. N.M. Taxation and Revenue Dep’t.*, 1992-NMCA-030, 113 N.M. 588. However, there is also caselaw that indicates that a taxpayer is only protected from liability if the NTTC provided

actually covered the transaction at issue and that a taxpayer is responsible for knowing when a NTTC is not sufficient to justify taking a deduction. *See McKinley Ambulance Service v. Bureau of Revenue*, 1979-NMCA-026, 92 N.M. 599. *See also Arco Materials, Inc. v. State of N.M. Taxation and Revenue Dep't.*, 1994-NMCA-062, 118 N.M. 12. Moreover, “the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. The statute clearly indicates that MTCs are treated as NTTCs only when the Department has deemed them to be so treated. *See NMSA 1978*, § 7-9-43. Again, the Department has authorized MTCs only in reference to the sales of tangible personal property. *See 3.2.201.13 NMAC*. *See also NMSA 1978*, § 7-9-43 (A) (giving the Department the authority to determine which MTCs will be deemed as NTTCs). Therefore, a MTC will only be treated as a NTTC when the MTC is for the sale of tangible property. Since the MTC in this case was for the sale of services, it does not afford the Taxpayer the same protections as a properly executed NTTC would.

### **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 Taxpayer argued that Oasis had already paid the taxes. 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 City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 20-21, 126 N.M. 95. 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.* Identity of interest means that the same taxpayer is being taxed under two inconsistent theories on the same transaction. *See id.* at ¶ 13. Two separate parties can establish an identity of interest in certain circumstances. *See id.* at ¶ 11 (holding that an indemnity agreement was sufficient to establish an identity of interest between two parties). In this instance, the Taxpayer failed to establish a strict identity of interest between his business and Oasis. Although Oasis contracted with the Taxpayer and indicated that it would pay the gross receipts tax on the transaction, there was no indemnity agreement. *See also Siemens*, 1994-NMCA-173, ¶ 33 (indicating equitable recoupment does not apply when there is not an identity of interest). Moreover, the taxes were also not paid on an inconsistent theory. Rather, the Taxpayer was assessed for gross receipts tax, and Oasis paid the gross receipts tax. *See Teco*, 1998-NMCA-055 (indicating that the tax theories must be inconsistent). Therefore, equitable recoupment does not apply.

### **Fairness and Double Taxation.**

The Taxpayer argued that assessing the Taxpayer for transactions on which Oasis already paid the gross receipts tax is prohibited as double taxation. Double taxation is not necessarily prohibited, and it is not considered double taxation when two separate entities are taxed on their own transactions. *See N.M. Sheriffs and Police Ass'n. v. Bureau of Revenue*, 1973-NMCA-130, 85 N.M. 565.

The Taxpayer argued that assessing the Taxpayer for transactions for which he could have taken a deduction if he had obtained the NTTC a few months sooner is fundamentally unfair. This is essentially an argument for equitable estoppel. Estoppel may be found against the state where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140. However, even if estoppel were to apply, the Hearing Officer could not grant it. *See AA Oilfield Serv. v. New Mexico SCC*, 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).

### **Penalty.**

Penalty is due whenever a person fails to pay a tax when it is due, if that failure was due to negligence. *See* NMSA 1978, § 7-1-69. A taxpayer may be entitled to abatement of penalty when the taxpayer relied on advice of counsel or an accountant, or in various other circumstances. *See* 3.1.11.11 NMAC (2001). The Taxpayer was using an accountant during the tax periods. The accountant knew of the Taxpayer's business dealings with Oasis and was aware of the MTC that was issued. The accountant was present during the audit meeting in 2008 and knew what materials were being requested. The accountant repeatedly reassured the Taxpayer that she was working on the audit and was getting the necessary documents. The Taxpayer relied on the advice of his accountant. Moreover, the Taxpayer had a timely MTC, which he accepted in good faith, and which his accountant and Oasis assured him was an appropriate document to forego charging gross receipts tax to Oasis. Based upon the totality of the evidence, the Taxpayer was not negligent, and penalty is abated.

### **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 Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 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 tax was not paid when it was due, interest was properly assessed.

### **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely written protest to the assessment of gross receipts tax, penalty and interest for the tax period from January 31, 2002 through March 31, 2008 under Letter ID number L0308437056, and jurisdiction lies over the parties and the subject matter of this protest. Other items protested by the Taxpayer were abandoned and withdrawn prior to the hearing.

B. The Taxpayer failed to obtain a timely NTTC. *See* NMSA 1978, § 7-9-43. *See also* 3.2.201.8 NMAC. *See also Leaco*, 1974-NMCA-076 (indicating that the first requirement is timely acceptance of a NTTC).

C. The timely MTC provided to the Taxpayer did not afford the same protection as a NTTC because the Department has authorized the use of MTCs only for sales involving tangible personal property. *See* NMSA 1978, § 7-9-43. *See* 3.2.201.13 NMAC.

D. The Taxpayer was not negligent in failing to pay the gross receipts tax because he was relying on advice from his accountant as well as representations made to him by the multistate corporation that issued a MTC to him. Therefore, penalty is **HEREBY ABATED**. *See* NMSA 1978, § 7-1-69. *See also* 3.1.11.10 and 3.1.11.11 NMAC.

E. The Taxpayer failed to overcome the presumption of correctness on the assessment of gross receipts tax and interest. *See* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest is **DENIED IN PART and GRANTED  
IN PART.**

DATED: February 23, 2015.

*Dee Dee Hoxie*

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