

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

**IN THE MATTER OF THE PROTEST OF
JOHN WIDELL
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOS. L0653511632, L1727253456, L0385076176 and L1458818000**

No. 15-10

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 10, 2015, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Julia Belles, attorney for the Department. Tom Dillon, Protest Office Supervisor, appeared and testified as a witness for the Department. John Widell, Esq. (“Taxpayer”) appeared and testified. The Department introduced into the record Exhibits A-1, A-2 and B. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 13, 2014, the Department issued four gross receipts tax assessments against Taxpayer: 1) in the amount of \$738.10 in principal tax, \$147.62 in penalty, and \$151.89 in interest for the tax period of June 30, 2008 through December 31, 2008 (Letter Id. No. L0653511632); 2) in the amount of \$318.52 in principal tax, \$63.70 in penalty, and \$51.02 in interest for the tax period of April 1, 2009 through December 31, 2009 (Letter Id. No. L1727253456); 3) in the amount of \$1,443.07 in principal tax, \$288.61 in penalty, and \$174.00 in interest for the tax period of April 1, 2010 through December 31, 2010 (Letter Id. No. L0385076176); 4) and in the amount of \$1,245.00 in principal tax, \$249.00 in penalty, and \$105.11 in interest for the tax period of April 1, 2011 through December 31, 2011 (Letter Id. No. L1458818000).

2. Taxpayer filed a protest to the assessments on November 12, 2014.
3. The Department acknowledged the protest on December 9, 2014. Letter Id. No. L1139541968.
4. On January 21, 2015, the Department requested a hearing in this matter.
5. The Hearings Bureau mailed a Notice of Administrative Hearing on January 21, 2015, setting the hearing for February 10, 2015.
6. Taxpayer is an attorney licensed in the State of New Mexico.
7. Taxpayer performed legal services, outside of New Mexico, during the tax periods.
8. The Department made a number of abatements or adjustments to Taxpayer's gross receipts tax liability based on Taxpayer's production of nontaxable transaction certificates or other evidence acceptable to the Secretary for the legal services he performed outside of New Mexico.
9. Taxpayer's remaining liability after the abatements was \$128.52 in principal tax, \$63.70 in penalty and \$54.13 for the tax period 2009 and \$700.64 in principal tax, \$140.13 in penalty and \$42.70 in interest for the tax period 2010. The interest is accrued through February 9, 2015. Exhibit B.
10. At the hearing, Taxpayer withdrew his protest as to the 2009 tax year and will work with the Department on providing nontaxable transaction certificates or other evidence to substantiate that the receipts for 2009 were out of state sales. [02-10-15 CD 9:35-11:35].
11. During the 2010 tax period, Taxpayer also was the sole proprietor of a band, Broomdust Caravan ("the band").
12. The band performed services for Tiny's Dine & Dance, Cowgirl Santa Fe and the Tin Star (collectively known as "the Bars") in Santa Fe during the tax period in 2010. Taxpayer received 1099s from the Bars.

13. Taxpayer did not register the band with the Department and the band was a non filer for the tax periods at issue.

14. When Taxpayer performed at the Bars, Taxpayer performed with other musicians.

15. Taxpayer was the only member of the band that provided the Bars' owners with a social security number for payment for services.

16. The Bars guaranteed a set amount of income against the fee charged at the door for the band.

17. Taxpayer received payment in the form of a check from the Bars which he cashed and he distributed the receipts to the band members.

18. Taxpayer distributed the entire receipts to his band members and did not retain any receipts or income for himself.

19. Taxpayer does not have in his possession a nontaxable transaction certificate.

DISCUSSION

The sole issue to be determined is whether the Department properly assessed Taxpayer for gross receipts tax, penalty and interest for the tax period April 1, 2010 through December 31, 2010 for receipts of payments from the Bars for services performed. Taxpayer argued that any receipts of payments from the Bars he distributed to the members of the band and those receipts were received in a disclosed agency capacity.

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, Section 7-1-17(C) (2007). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement, in full or in part, of the assessment issued against it. *See, TPL, Inc. v. Taxation and Revenue Dep't.*,

2000-NMCA-083, ¶8, 129 N.M. 539, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447.

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. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217; *Grogan v. Taxation and Revenue Dep't.*, 2003-NMCA-033, ¶11, 133 N.M. 354. Under Section 7-1-17(C), the assessment issued in this case is presumed to be correct.

Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect and establish that he was entitled to an exemption or deduction for the services he provided to the Bars. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428. The courts have held that "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." *Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶16, 111 N.M. 735.

Gross Receipts.

In New Mexico, the general rule is that services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in § 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, Section 7-9-3.5(A) (1) (2003). Section 7-9-3(M) defines "service" as "all activities ... which activities engaged in for other persons for a consideration, which activities involve predominately the performance of a service as distinguished from selling or leasing property. ... In

determining what a service is, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling.” NMSA 1978, Section 7-9-3(M) (2007). The Supreme Court in 1937 decided in *Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403, that gross receipts shall include “all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect.”

In addition thereto, “. . .it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, Section 7-9-5(A) (2002). Therefore, the presumption is that Taxpayer’s receipts from the services performed for the Bars are presumed to be taxable.

Disclosed Agent.

Taxpayer argued that the receipts or income he received from the Bars in 2010, while gross receipts were not taxable to Taxpayer because an exemption applied to the receipts or that Taxpayer received those receipts in a disclosed agency capacity for the other members of the band pursuant to NMSA 1978, §7-9-3.5(A)(3)(f) (2007). Section 7-9-3.5(A)(3)(f) states that excluded from gross receipts are “amounts received solely on behalf of another in a disclosed agency capacity.” The Department defines what the test is to determine whether an agency relationship exists. Regulation 3.2.1.19(C) (1) NMAC (12/30/03) provides that “(a)n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.”

In applying Section 7-9-3(F)(2)(f) and Regulation 3.2.1.19(C)(1) (12/30/03), the central inquiry is whether Taxpayer had the power to legally bind the Bars in a contract with a third party. There is no evidence that Taxpayer was an agent for the Bars or had the power to bind the Bars in

a contract. The Bars did not enter into any contracts with Taxpayer permitting Taxpayer to be their agent. Instead the facts show that Taxpayer was in charge of the band and chose to act as the sole proprietor of the band. Therefore, the exemption does not apply and Taxpayer is liable for the gross receipts tax.

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 he simply did not take any action to register the band for gross

receipts. Taxpayer is an attorney and had an obligation to research the law and ascertain whether any gross receipts were due for the services the band rendered. 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. 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 is 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. L0653511632, L1727253456, L0385076176 and L1458818000 for gross receipts tax principal, penalty and interest for the tax period of June 30, 2008 through December 31, 2008 (Letter Id. No. L0653511632); for the tax period of April 1, 2009 through December 31, 2009 (Letter Id. No. L1727253456); for the tax period of April 1, 2010 through December 31, 2010 (Letter Id. No. L0385076176); and for the tax period of April 1, 2011 through December 31, 2011 (Letter Id. No. L1458818000).

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. The Department made a number of abatements or adjustments to Taxpayer's gross receipts tax liability based on Taxpayer's production of nontaxable transaction certificates or other evidence acceptable to the Secretary for the legal services he performed outside of New Mexico.

F. Taxpayer's remaining liability after the abatements was \$128.52 in principal tax, \$63.70 in penalty and \$54.13 in interest for the tax period 2009 and \$700.64 in principal tax, \$140.13 in penalty and \$42.70 in interest for the tax period 2010. The interest is accrued through February 9, 2015. Exhibit B.

G. At the hearing, Taxpayer withdrew his protest as to the 2009 tax year and will work with the Department on providing nontaxable transaction certificates or other evidence to substantiate that the receipts for 2009 were out of state sales. [02-10-15 CD 9:35-11:35]. If Taxpayer is unable to prove with certainty that the receipts for tax year 2009 were not out of state sales, Taxpayer is liable for \$128.52 in principal tax, \$63.70 in penalty and \$54.13 in interest.

H. Taxpayer was not in a disclosed agency relationship with the Bars.

I. Taxpayer was not exempt from gross receipts tax for the tax periods at issue.

J. Taxpayer was negligent in not filing his gross receipts returns and paying his gross receipts tax when due for the tax year 2010; accordingly, he owes penalty.

K. 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.

L. The total amount due for tax year 2010 is \$700.64 in principal tax, \$140.13 in penalty and \$42.70 in interest. Exhibit B. The interest amount is calculated through February 9, 2015.

Exhibit B.

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

DATED: March 6, 2015

Monica Ontiveros

Monica Ontiveros
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