

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

**IN THE MATTER OF THE PROTEST OF
CALEB DUTTON
DUTTON DIESEL REPAIR,
TO ASSESSMENTS ISSUED UNDER
LETTER ID NOS. L1769170896, L0426993616, and L1500735440**

No. 15-19

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 28, 2015, before Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Caleb Dutton (Taxpayer) appeared for the hearing with his attorneys, Mr. James Burns and Mr. John Lieuwen. 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 February 11, 2015, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of June 30, 2009 through December 31, 2009. The assessment was for \$3,836.77 tax, \$767.35 penalty, and \$671.32 interest. [L1769170896]
2. On February 11, 2015, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of April 1, 2010 through December 31, 2010. The assessment was for \$10,696.62 tax, \$2,139.32 penalty, and \$1,449.69 interest. [L0426993616]
3. On February 11, 2015, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of April 1, 2011 through December 31, 2011. The

assessment was for \$14,511.92 tax, \$2,902.38 penalty, and \$1,442.29 interest.

[L1500735440]

4. On April 3, 2015, the Taxpayer filed a formal protest letter.
5. On May 1, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
6. On May 4, 2015, the Hearings Bureau issued a notice of hearing. The hearing date was set within ninety days of the protest.
7. On May 27, 2015, the Taxpayer requested a continuance of the hearing because he had just received notice, was interested in a settlement, and his attorney had just entered his appearance.
8. On May 28, 2015, the request for continuance was denied as it was filed the day before the hearing and did not involve an extraordinary circumstance.
9. The Taxpayer was conducting business in New Mexico during the tax periods that were assessed (tax periods). The Taxpayer runs a repair shop. The Taxpayer primarily does repairs and sells parts to UPS Oasis (Oasis).
10. Oasis resells the Taxpayer's repair services and parts to its parent corporation.
11. The Taxpayer failed to file timely CRS reports for the tax periods.
12. The Department conducted a limited scope audit on the Taxpayer.
13. The Taxpayer then filed CRS reports in January 2015 for the tax periods that were assessed.
14. The Taxpayer claimed deductions for large portions of his gross receipts based on his acceptance of a multistate jurisdiction sales and use tax certificate (MTC) from Oasis.

15. The Taxpayer requested the appropriate tax documents for New Mexico from Oasis when he began doing business with them.
16. In response to his request, Oasis provided the Taxpayer with the MTC in January 2009.
17. The Taxpayer relied upon the MTC and believed that his gross receipts were not taxable.
18. The Taxpayer was also doing some business with other entities. The Taxpayer did not pay or file gross receipts tax on those transactions.
19. The Taxpayer argued that his gross receipts were less than those assessed and should be limited to the amounts reported in his late filed CRS reports.

DISCUSSION

The issue to be decided is whether the Taxpayer is for gross receipts tax, penalty, and interest for the tax periods.

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 repairs. 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 that the amount of gross receipts tax that he owed was actually less than the amount assessed. The Taxpayer failed to provide any evidence to support or to explain his calculations of the gross receipts tax. Therefore, the Taxpayer failed to overcome the presumption that the amounts assessed were correct.

MTCs.

The Taxpayer accepted a timely MTC in good faith and argued that he was entitled to deduct his gross receipts. A MTC that is recognized by the Department is treated the same as a nontaxable transaction certificate (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 was totally inapplicable to the Taxpayer’s gross receipts because they were for services and not tangible property.

The Taxpayer explained that he read the face of the MTC and did not understand the footnotes in the MTC that indicated that the MTC was not recognized in New Mexico for the sale of services. The Taxpayer was also relying on the representations made by Oasis and believed that Oasis would have sent him the correct tax documents when he requested them. Oasis provided a letter, which was included with the protest, that indicated that Oasis paid the New Mexico gross receipts tax on the Taxpayer's services when they were resold to the parent corporation.

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.

Assessment of Penalty.

A taxpayer’s lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16. Therefore, penalty was properly assessed.

Assessment of 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). 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 assessments issued under Letter ID numbers L1769170896, L0426993616, and L1500735440, and jurisdiction lies over the parties and the subject matter of this protest.

B. 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.*

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

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

DATED: June 22, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
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