

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

**IN THE MATTER OF THE PROTEST OF
PLUMBWEST PLUMBING & HEATING,
TO ASSESSMENT ISSUED UNDER
ID NO. L0764680656**

No. 15-1

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 25, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Christopher West, owner of Plumbwest Plumbing and Heating (Taxpayer), appeared for the hearing and represented the Taxpayer. Ms. Bernardo was given until October 10, 2014 to provide updated information regarding the assessment. The Taxpayer was given until October 17, 2014 to provide a response. 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 September 20, 2013, the Department assessed the Taxpayer for gross receipts tax, withholding tax, penalty, and interest for the tax periods from January 31, 2006 to March 31, 2012. The assessment for gross receipts tax was \$30,956.13, penalty of \$6,396.41, and interest \$8,695.30. The assessment for withholding tax was \$1,600.31, penalty of \$320.04, and interest of \$157.98.
2. On November 12, 2013, the Taxpayer filed a formal protest letter.

3. On December 23, 2013, the Hearings Bureau was first notified of the protest when the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On December 23, 2013, the Hearings Bureau issued a notice of hearing for a telephonic scheduling conference on January 27, 2014. The hearing date was set within ninety days of the protest.
5. On January 27, 2014, the scheduling conference was held. The Taxpayer confirmed on the record at the scheduling conference that the Taxpayer did not have representation.
6. On February 12, 2014, the scheduling order and notice of hearing was issued.
7. On August 29, 2014, the amended notice of hearing was issued.
8. The Taxpayer was informed on the record of its right to representation at the hearing. The Taxpayer acknowledged and understood that right, but went forward with the hearing representing itself.
9. The Taxpayer was conducting business in New Mexico during the tax periods.
10. The Taxpayer obtained non-taxable transaction certificates (NTTCs) for some of the receipts at issue.
11. The Taxpayer felt that its bookkeeper, Mr. West's ex-wife, during the tax periods should be responsible for part of the tax assessed.
12. The Department partially abated the assessment based on NTTCs provided by the Taxpayer.
13. After the hearing, the Taxpayer filed a request for a 60-day continuance of the hearing so that it could obtain representation.

14. On January 2, 2015, more than 60 days after the Taxpayer's request was made, nothing further had been submitted by the Taxpayer or by an attorney on the Taxpayer's behalf.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for tax, penalty, and interest for the tax periods from January 31, 2006 through March 31, 2012.

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 it is entitled to an abatement of the assessment.

Assessment.

The Taxpayer acknowledged doing business in New Mexico and having a CRS number. The Taxpayer argued that he was given some credit on the NTTCs and that he intended to obtain more NTTCs. A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2005). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due. *See* NMSA 1978, § 7-9-43. If the 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." *Id.*

(emphasis added). The word “shall” indicates that the disallowance 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. The Taxpayer was notified of the assessment in September 2013. The Taxpayer was still not in possession of the NTTCs at the hearing. Therefore, any deductions based on the NTTCs would be disallowed as they were not provided timely.

The Taxpayer hoped to bring the owner’s ex-wife in, but was unable to do so. The right to subpoena witnesses was explained to the Taxpayer at the scheduling hearing on January 27, 2014. The Taxpayer understood that it would have to request a subpoena for anyone that it wanted to be present at the hearing. The Taxpayer never requested a subpoena.

The Department provided information by the October 10, 2014 deadline that the amount of gross receipts tax had been adjusted from \$30,956.13 down to \$27,897.33 based on NTTCs provided by the Taxpayer. The Department also adjusted penalty and interest accordingly. The Taxpayer responded on October 15, 2014 that it would like to request a 60-day continuance so it could try to obtain legal counsel. The Taxpayer knew of its right to an attorney. The Taxpayer confirmed at the scheduling conference that it did not have representation. The Taxpayer confirmed at the merits hearing that it understood its right to be represented. The Taxpayer knew of its right to have counsel, but failed to avail itself of that right when the hearing was held. A party may be denied a statutory right to counsel when the party knowingly waived that right. *See State v. Perlman*, 1981-NMCA-076, ¶ 9, 96 N.M. 779. The Taxpayer was informed on the record of the statutory right to representation, and the Taxpayer went forward with the hearing by representing itself. Moreover, more than 60 days passed after the Taxpayer’s request, and there was still no entry of appearance from an attorney, and the Taxpayer did not submit anything further. The hearing will not be continued as it has already been conducted, and the decision will

not be stayed any longer since the Taxpayer's requested time has elapsed with no further action by the Taxpayer.

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). 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

1. The Taxpayer filed a timely written protest to the Notice of Assessment of taxes issued under Letter ID number L0764680656, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Department abated part of the assessment of gross receipts tax based on NTTCS provided by the Taxpayer. Further NTTCS would not be timely. *See NMSA 1978, § 7-9-43*. The Taxpayer failed to overcome the presumption of correctness as to the remainder of the assessment. *See NMSA 1978, § 7-1-17*.

3. The Taxpayer was properly assessed for gross receipts tax, withholding tax, penalty, and interest for the tax periods from January 31, 2006 through March 31, 2012.

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

DATED: January 7, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
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