

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
FRANCIS J. BROWN,  
TO THE ASSESSMENTS ISSUED UNDER  
LETTER ID NOS. L0854247376, L1927989200, and L0183158736**

**No. 15-24**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held June 19, 2015, before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Francis Brown (Taxpayer) appeared for the hearing and represented himself. Mr. Raymond Archuleta 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 16, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period from January 1, 2009 through December 31, 2009. The assessment was for \$1,765.09 tax, \$353.02 penalty, and \$300.83 interest.
2. On December 16, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period from January 1, 2010 through December 31, 2010. The assessment was for \$2,675.38 tax, \$535.08 penalty, and \$350.04 interest.
3. On December 16, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period from January 1, 2011 through December 31, 2011. The assessment was for \$3,005.84 tax, \$601.16 penalty, and \$284.66 interest

4. On February 2, 2015 and February 12, 2015, the Taxpayer filed formal protest letters to the assessments.
5. On April 1, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
6. On April 7, 2015, the Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.
7. On April 17, 2015, the Taxpayer requested a continuance of the hearing.
8. On April 23, 2015, the request for continuance was granted, and the delay of the hearing was attributable to the Taxpayer.
9. On April 23, 2015, the Hearings Bureau sent amended notices of hearing.
10. The Taxpayer has been collecting disability for several years.
11. At some point after he became disabled, the Taxpayer began doing volunteer work for his local church parish.
12. The Taxpayer was very involved in the church and helped organize a chapter of the Fraternity of the Secular Franciscan Order to provide goods and services to the needy in his community.
13. At some point in 2007 or 2008, the priest of the Taxpayer's parish requested that the Taxpayer oversee some construction and restoration projects that the church was undertaking. The priest offered to compensate the Taxpayer for his services.
14. The Taxpayer accepted the offer and began to manage and oversee several projects for the church. The Taxpayer did this for several years, including 2009, 2010, and 2011.
15. The church offered work on these projects to its parishioners. The church would send various people to the Taxpayer to work on the projects.
16. The priest occasionally dismissed people from working on the projects.

17. The Taxpayer also recruited people to work on the projects and refused the priest's request to dismiss at least one person who was working on a project for him.
18. The priest would instruct the Taxpayer what was to be done on each project, but the Taxpayer was in charge of accomplishing the goals set by the priest.
19. The Taxpayer had some experience in historical restorations and never had an adverse inspection on such a project.
20. After the Taxpayer ceased working for the church, the church was given a red tag on an inspection for violating certain historical restoration restrictions. The church then asked the Taxpayer to return to work for them, but the Taxpayer was wary of doing so since he did not feel that the church had dealt fairly with him in issuing 1099s.
21. The church began by paying each worker, including the Taxpayer, separately. The workers turned in timesheets to the church, and the church would issue checks or cash to the individual worker.
22. The Taxpayer often took possession of the checks or cash from the church and passed them out to the individual worker. Usually this occurred when the worker was unable to go to the church himself on the payday.
23. The Taxpayer was in charge of supervising, keeping, and turning in the timesheets.
24. The church began paying the Taxpayer for the entire amount of time spent on a project with respect to certain workers' timesheets. The Taxpayer partially refused this arrangement.
25. The Taxpayer accepted payments on behalf of his own timesheets and certain other workers' (usually relatives) timesheets, but refused to accept payments based on other workers' timesheets and insisted that the church issue separate checks for those workers.
26. The church issued 1099s to some of the workers, and issued W-2s to others.

27. When it began issuing the Taxpayer the payments for more than his individual hours, the church began referring to the Taxpayer's services as Francis Brown Construction in its paperwork.
28. The Taxpayer utilized forms printed out by the church that referred to his business in this way.
29. The church issued 1099s to the Taxpayer for the 2009, 2010, and 2011 tax years.
30. The Taxpayer included the income from those 1099s in his personal income taxes. However, the Taxpayer was not filing or paying gross receipts taxes for those time periods.
31. The Taxpayer argues that he was an employee of the church and was not an independent contractor who should be subject to gross receipts.
32. While the protest was pending, the Taxpayer paid the 2009 assessment in full.
33. As of the hearing date, the Taxpayer's outstanding balances are \$2,675.38 tax, \$535.08 penalty, and \$392.04 interest for the 2010 tax year, and \$3,005.84 tax, \$601.17 penalty, and \$331.85 interest for the 2011 tax year. Interest continues to accrue until the tax principal is paid.

### **DISCUSSION**

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

#### **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.

### **Gross Receipts Tax.**

Generally, services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). It is the responsibility of the taxpayer, who is in the position to know the details of his business activities, to determine accurately and to report his tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. However, an employee's receipts of wages, salary, commissions, and other forms of payments for personal services are exempt from the gross receipts tax. *See* NMSA 1978, § 7-9-17 (1969).

### **Employees.**

Several factors should be considered in determining whether a person is an employee or an independent contractor. *See* 3.2.105.7 (A) NMAC (2001). Four factors deal with whether the employer should be withholding tax from the pay, should be paying FICA, should cover the employee under workman's compensation, and should be paying unemployment insurance. *See id.* There was no indication that the church was doing any of these things. These factors weigh against the Taxpayer's claim that he was an employee

Another factor is whether the employer considers the person to be an employee. *See id.* There was no evidence that the church considered the Taxpayer to be an employee. The church issued 1099s to the Taxpayer, while it also issued W-2s to other workers. This indicates that the church did not consider the Taxpayer to be an employee. This factor weighs against the Taxpayer's claim that he was an employee.

Another factor is whether the person is paid a wage or a salary. *See id.* The Taxpayer was paid by the hour and was only paid for work on certain projects. The Taxpayer also claimed that the church included all of the workers' pay in his 1099s. There was no evidence to support this

allegation, and the Taxpayer admitted that the church issued 1099s or W-2s to its other workers. This factor weighs in favor of the Taxpayer's claim that he was an employee as he was being paid an hourly wage.

Another factor is whether the employer has the right to exercise control over the means of performing the service. *See id.* Generally, this factor is the one principally used to determine whether a person was acting as an independent contractor or as an employee. *See Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 7, 111 N.M. 410. *See also Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 26, 147 N.M. 512 (determining whether a person was an employee or an independent contractor under the Construction Industries Licensing Act and under Section 60-13-3.1). Although Section 60-13-3.1 is not directly applicable in this case, it is helpful in setting out general criteria for determining if a person is an independent contractor. Meeting only one standard set out in Section 60-13-3.1 (A) will classify a person as an independent contractor and not as an employee. *See Reule Sun Corp.* at ¶ 30.

One standard under that statute is whether the person has the authority to hire and fire employees. *See* NMSA 1978, § 60-13-3.1 (A) (4). The Taxpayer presented some evidence that the church was the one hiring and firing workers. However, the Taxpayer also presented evidence that he hired and retained workers against the wishes of the church. The Taxpayer mentioned a specific worker who has lost a leg, or possibly both legs. The Taxpayer described this man as sort of a rough-looking character. The Taxpayer explained that the priest and other church organizers did not want that man doing any work on their projects. Mr. Archuleta confirmed that the church did not want that man working on their projects. However, the Taxpayer retained that man's services and had him help with ceiling installation on at least one project. Therefore, there was evidence that the Taxpayer had the authority to hire and fire employees.

Another standard of work as an independent contractor is whether the person was free to control the manner and means of accomplishing the work. *See* NMSA 1978, § 60-13-3.1 (A) (1). *See also* 3.2.105.7 (A) NMAC. The Taxpayer argued that the priest was directing the course of work, what was to be done, by whom, and when. The priest also directed that work be done or halted based on funding or other considerations. Mr. Archuleta confirmed that he was hired by the priest, was paid by the church, and that the priest sometimes came by and gave directions on projects. However, the Taxpayer also explained that he was in charge of the workers and directed them on what to do. The Taxpayer explained that he used the workers where they were qualified. The Taxpayer explained that one worker sent over by the priest was the priest's relative and had no construction knowledge or skills. The Taxpayer felt obligated to use this worker as he was the priest's relative, but his work was mostly limited to sweeping up or other jobs that did not require any construction skills. The Taxpayer also explained that he injured his back when he climbed up to show a worker how he wanted a particular job done. Based upon the totality of the evidence, the Taxpayer had the right to exercise control over how the work was being conducted. Therefore, there is insufficient evidence to establish that the Taxpayer was actually an employee of the church. Consequently, the Taxpayer was an independent contractor and his services were subject to the gross receipts tax.

#### **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 to the Taxpayer.

#### **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 Notices of Assessment of 2009, 2010, and 2011 gross receipts taxes issued under Letter ID numbers L0854247376, L1927989200, and L0183158736, and jurisdiction lies over the parties and the subject matter of this protest.
- B. The Taxpayer failed to overcome the presumption of correctness. *See* NMSA 1978, § 7-1-17.
- C. The Taxpayer was working as an independent contractor and was not an employee. *See* 3.2.105.7 (A) NMAC (2001). *See Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 7, 111 N.M. 410. *See also Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 26, 147 N.M. 512.
- D. Therefore, the Taxpayer was properly assessed.

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

DATED: July 15, 2015.

*Dee Dee Hoxie*  
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DEE DEE HOXIE  
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