

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

**IN THE MATTER OF THE PROTEST OF
JAMES SZENASI,
TO THE ASSESSMENTS ISSUED UNDER
LETTER ID NOS. L1952892880, L0208062416, and L1281804240**

No. 15-25

DECISION AND ORDER

A formal hearing on the above-referenced protest was held June 18, 2015, before Hearing Officer Dee Dee Hoxie. 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. James Szenasi (Taxpayer) appeared for the hearing and represented himself. Ms. Jauwaun Fleuriot appeared by telephone 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 10, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of January 1, 2009 through December 31, 2009. The assessment was for \$2,702.62 tax, \$540.53 penalty, and \$459.25 interest.
2. On December 10, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of January 1, 2010 through December 31, 2010. The assessment was for \$1,991.03 tax, \$398.21 penalty, and \$259.49 interest.
3. On December 10, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of January 1, 2011 through December 31, 2011. The assessment was for \$2,251.52 tax, \$450.30 penalty, and \$212.11 interest.
4. On March 9, 2015, the Taxpayer filed a formal protest letter.

5. On March 27, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
6. On March 27, 2015, the Hearings Bureau issued a notice of hearing. The hearing date was set within ninety days of the protest.
7. On March 30, 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. On May 27, 2015, the Taxpayer requested that his witnesses be allowed to appear by phone.
11. On June 15, 2015, the request was granted as to one out-of-state witness and denied as to an in-state witness.
12. During 2009, 2010, and 2011, the Taxpayer was providing services in New Mexico by teaching courses at the federal facilities in Los Alamos and in Albuquerque.
13. The Taxpayer contracted with two companies to provide course instruction in New Mexico and in other areas. The companies then resold the Taxpayer's services to the federal government.
14. The companies were collecting and paying gross receipts taxes on the Taxpayer's services performed in New Mexico when they were resold to the federal government.
15. In 2014, the Department selected the Taxpayer for audit.
16. The Department sent the Taxpayer a letter (the 60-day letter) advising of the audit and giving the Taxpayer 60 days to obtain any applicable nontaxable transaction certificates (NTTCs).
17. The 60-day letter indicated that the deadline for obtaining NTTCs was August 26, 2014.
18. The Taxpayer lives in Arizona, but travels extensively throughout the summer months.

19. On June 23, 2014, the Taxpayer left his home in Arizona with plans to travel in Colorado and New Mexico for the next several weeks, but was expecting to return to his home within 30 days.
20. Before leaving home, the Taxpayer contacted his local post office about forwarding his mail. The post office advised that they would not forward mail for periods of less than 30 days. The post office advised that the Taxpayer could place a hold on his mail. The Taxpayer did so.
21. Toward the end of July 2014, the Taxpayer was called upon to take over instruction on a course that had been scheduled at the beginning of August in Washington, D.C.
22. The Taxpayer agreed to take over the course and changed his plans. The Taxpayer did not return home at the end of July. The Taxpayer instead went to Washington, D.C. and taught a course there.
23. The Taxpayer finally returned home in the evening on August 25, 2014.
24. On August 26, 2014, the Taxpayer went to the post office and picked up his mail.
25. The Taxpayer received the 60-day letter on August 26, 2014. The Taxpayer immediately contacted the Department and the companies for which he was providing his services.
26. The Taxpayer obtained NTTCs from both companies. One was issued to the company and executed to the Taxpayer on September 3, 2014, and one was issued and executed on September 5, 2014.
27. The Department rejected the NTTCs as they were not obtained by August 26, 2014 and assessed the Taxpayer.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the tax, penalty and interest as assessed. This issue hinges upon whether the Taxpayer's acceptance and submission of the NTTCs was timely.

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.

NTTCs.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). "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 60 days of when the taxpayer is notified that NTTCs are required. *See id.* If a taxpayer has not obtained NTTCs "within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given" then the deductions are disallowed. *Id.*

It was undisputed that the Taxpayer's receipts would be deductible if the NTTCs were allowed. It was undisputed that the NTTCs would cover the totality of the assessments.

Notice.

The Taxpayer argues that notice was given when he received the 60-day letter on August 26, 2014. The Department argues that notice was given when the letter was mailed to the Taxpayer at the correct address, which probably occurred sometime in June 2014. The Department argues that holding that notice was given as of date of receipt would allow a taxpayer to benefit from ignoring or refusing to read his/her mail.

The Department did not know the actual mailing date of the letter, but was able to determine that the 60-day letter was printed on June 24, 2014. The 60-day letter was actually dated June 27, 2014, and Ms. Bernardo explained that this was probably done to allow for when the letter would be mailed. However, there was no definitive proof of when the letter was mailed. The party relying on service by mail has the burden of proving that the mailing was done. *See Myers v. Kapnison*, 1979-NMCA-085, ¶ 8, 93 N.M. 215. The Taxpayer pointed out that the Department has a website that allows taxpayers to view a log of correspondence and when it was sent. The Taxpayer pointed out that the log on the website did not show that the 60-day letter was mailed. However, it is clear that the 60-day letter was mailed at some point since the Taxpayer received it when he picked up his mail on August 26, 2014.

Generally, notice is effective if it is mailed to the correct last known address. *See NMSA* 1978, § 7-1-9. "A properly addressed letter that is mailed is presumed to be received." *Garmond v. Kinney*, 1978-NMSC-043, ¶6, 91 N.M. 646. Generally, actual notice is not required and notice is presumed when it was given by means reasonably calculated to apprise the parties. *See Maso v. State*, 2004-NMSC-028, ¶ 10, 136 N.M. 161. *See also Cordova v. State*, 2005-NMCA-009, 136 N.M. 713. However, a party may rebut the presumption that notice sent in a properly addressed letter

was received. *See State Farm Fire and Casualty Co. v. Price*, 1984, NMCA-036, ¶ 24, 101 N.M. 438. Moreover, the adequacy of notice is not determined by the information available to the sender at the time of the mailing and the specific facts of each case should be considered in determining whether notice was given. *See Cordova*, 2005-NMCA-009 at ¶ 24. *See also DeArmond v. Halliburton*, 2003-NMCA-148, ¶ 15, 134 N.M. 630 (holding that the specific facts of the case refuted the presumption of notice by mailing). The purpose of sending notice is to apprise the parties of the impending action and to afford them an opportunity to make objections. *See Maso v. State*, 2004-NMSC-028, ¶ 10.

The particular facts and circumstances of this case show that the Taxpayer was not negligent or willfully dilatory in picking up his mail. The Taxpayer tried to obtain mail forwarding service before his trip, but was advised that it was unavailable for the time that he was originally planning to be gone. The Taxpayer provided documentation to show that he was actually away from home from June 23, 2014 to August 26, 2014. The Taxpayer's trip was unexpectedly lengthened when he was asked to take over a previously scheduled training in Washington, D.C. The Taxpayer acted immediately and expeditiously when he received the notice on August 26, 2014. Despite the fact that the Labor Day holiday occurred a few days after he received the notice, he was able to obtain NTTCs on September 3rd and 5th.

The companies for which the Taxpayer worked also provided information to the Department indicating that they were reselling the Taxpayer's services and were paying gross receipts tax on those resales. Ms. Fleuriot confirmed this as to her company in her testimony. *See New Mexico Taxation and Revenue Dep't. v. Case Manager*, No. 32,940 mem. op. at ¶ 20 (N.M. Ct. App. April 29, 2015) (non-precedential) (holding that a timely but flawed NTTC followed by an untimely but correct NTTC did not entitle the Department to collect the same gross receipts tax on the same transaction twice). An assessment may also 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). However, based on the facts of this case, it is not necessary to determine if equitable recoupment applies.

Given the particular facts and circumstances of this case, the Taxpayer successfully rebutted the presumption that the notice was given prior to August 26, 2014. The burden shifted to the Department to show that notice was given prior to that date or to show that the Taxpayer was negligent or willfully tardy in picking up the properly sent notice. *See MPC Ltd. v. New Mexico Taxation and Revenue Dep’t.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217. The Department failed to rebut the Taxpayer’s evidence. The Taxpayer was given notice that NTTCs were required when he received the 60-day letter on August 26, 2014. The NTTCs were obtained within 60 days of that date. *See* NMSA 1978, § 7-9-43. Therefore, the NTTCs were timely and are conclusive proof that the Taxpayer was entitled to deduct his sales from gross receipts. *See id.* Consequently, the Taxpayer does not owe gross receipts tax.

The Taxpayer also made arguments regarding the timeliness of some of the assessments. Those arguments are moot given that the Taxpayer prevailed on other issues.

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 L1952892880, L0208062416, and L1281804240, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was given notice that possession of NTTCs was required when he received the 60-day letter on August 26, 2014. *See* NMSA 1978, § 7-9-43. *See Maso v. State*, 2004-NMSC-028, ¶ 10, 136 N.M. 161. *See also Cordova v. State*, 2005-NMCA-009, ¶24, 136 N.M. 713. *See also DeArmond v. Halliburton*, 2003-NMCA-148, ¶ 15, 134 N.M. 630.

C. The Taxpayer obtained NTTCs within 60 days of August 26, 2014. Therefore, the NTTCs were timely and were conclusive evidence that the Taxpayer was entitled to deduct those sales from his gross receipts. *See* NMSA 1978, § 7-9-43.

D. The Taxpayer overcame the presumption of correctness and the burden shifted to the Department to establish that the assessments were correct. *See* NMSA 1978, § 7-1-17. *See also MPC Ltd. v. New Mexico Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217.

E. The Department failed to rebut the Taxpayer's evidence. *See MPC Ltd. v. New Mexico Taxation and Revenue Dep't.*, 2003-NMCA-021.

F. As the Taxpayer was entitled to deduct the gross receipts, no gross receipts taxes were owed and penalty and interest do not apply. *See* NMSA 1978, §§ 7-9-43, 7-1-69, and 7-1-67.

For the foregoing reasons, the Taxpayer's protest is **GRANTED and the assessments are hereby ABATED IN FULL.**

DATED: July 20, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
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