STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SAIZ TRUCKING AND EARTHMOVING, **No. 15-27**
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0680042816

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 29, 2015 and on July 2, 2015, before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Mark Wachter, Auditor, and Ms. Mary Beth Bailey, Legal Assistant, also appeared on behalf of the Department. For the first day of the hearing, Mr. Tom Dillon, Auditor, also appeared for the Department. On the last day of the hearing, Mr. Jesse Muniz also appeared as a witness for the Department. Mr. Larry Saiz, owner of Saiz Trucking and Earthmoving (Taxpayer), appeared for the hearing with his attorney, Mr. Wayne Chew. Ms. DiAnne Thompson, bookkeeper for the Taxpayer, also appeared. For the first day of hearing, Mr. John Casados and Ms. Colleen Frenz appeared as witnesses on behalf of 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 February 9, 2012, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax periods from January 31, 2004 through March 31, 2010. The assessment was for $606,943.41 tax, $121,388.71 penalty, and $175,418.66 interest.
2. On February 13, 2012, the Taxpayer filed a formal protest letter.
3. On June 11, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. On June 17, 2014, the Hearings Office issued a scheduling order and notice of hearing. As the protest was filed in 2012, the current statutory requirements for setting a hearing within 90 days of the protest did not apply.

5. On March 5, 2015, the Taxpayer requested a continuance of the hearing.

6. On March 9, 2015, the request for continuance was granted, and the delay of the hearing was attributable to the Taxpayer. The continuance order also contained the amended notice hearing.

7. The hearing was commenced on May 29, 2015. Due to the number of witnesses and volume of documents, the parties were unable to complete their presentation of evidence on that date. Therefore, a second day of hearing was set for July 2, 2015 and announced on the record. Written notice of the second hearing date was also sent to the parties.

8. The Taxpayer was engaged in business in New Mexico from 2004 through 2010.

9. The Taxpayer seems to have been engaged in business primarily consisting of moving and hauling dirt or gravel and performing grading at sites.

10. The Taxpayer's main customer during that time was the City of Albuquerque (City).

11. The Taxpayer won several contracts to provide services for the City. The contracts characterized the work to be performed as "equipment rental with operator" or for "spoil and misc. hauling".

12. The Taxpayer worked primarily for the City's parks department.

13. The parks department was engaged in managing, renovating, and constructing landscape and park projects.

14. The Taxpayer provided services under contract for the City for various parks department projects. The Taxpayer often hauled or provided dirt and gravel, and often installed those items on the projects as well.

15. In 2010, the Department commenced an audit of the Taxpayer.

16. The audit was completed in 2011, and the Taxpayer was assessed in 2012.

17. The Taxpayer filed its protest and argued that part of the assessment was barred by the statute of limitations and that the Taxpayer was entitled to deduct most of its gross receipts in dealing with the City.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the tax, penalty, and interest as assessed and whether any part of the assessment is barred by the statute of limitations.

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.

The burden is on the Taxpayer to prove that it 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.

Construction projects.

Receipts of sales of tangible personal property to a government agency are deductible and do not require a nontaxable transaction certificate. *See* NMSA 1978, § 7-9-54 (A) (2003). However, this deduction does not apply to property that is sold as construction material or as part of a service. *See id.*

Landscaping items and their installation may be deducted under this statute "[e]xcept when the landscape items are part of a construction project". 3.2.212.14 (A) NMAC (2000).

The Taxpayer argued that it was entitled to deduct most of its gross receipts from the City because it was really engaged in selling tangible personal property in the form of landscaping materials. The Department argued that the Taxpayer was really selling a service as provided in its contracts with the City. The Department argued that the Taxpayer's profit and loss statements did not reflect it was stocking up on or selling any tangible personal property. The Department also argued that, in any event, the Taxpayer was engaged in work that was part of various construction projects and was not entitled to be deducted.

Ms. Frenz and Mr. Casados worked for the City's parks department and dealt with the Taxpayer during part of the audit period. Ms. Frenz described the work done by the City's parks department as managing and constructing landscaping projects, which included medium-sized projects as well as renovation of existing facilities and construction of new park projects. It was in the execution of this work that the Taxpayer's services were performed for the City. Ms. Frenz and Mr. Casados characterized the Taxpayer's role on many projects as providing and installing landscaping materials, usually dirt and gravel. Ms. Frenz explained that she researched the Taxpayer's invoices to the City, matched them to individual projects, and then determined how much of the Taxpayer's paid invoices should be subject to gross receipts based on the items that were used in the individual projects. Ms. Frenz gave a specific example regarding a ballfield. Ms. Frenz determined that the Taxpayer could deduct 100% of its gross receipts on that project because the ballfield consisted mainly of dirt, gravel, grass, and a sloped area. Ms. Frenz believed that the Taxpayer's work on that project should be characterized as providing landscaping materials and installation, which would be deductible.

The term "construction project" is not defined, but "construction" includes "the building, altering, repairing, or demolishing in the ordinary course of business any: … (d) park, trail, athletic field, golf course or similar facility". NMSA 1978, § 7-9-3.4 (2003). "Construction material" is any tangible

personal property that is incorporated into or intended to be incorporated into any construction project. *See id. See also Arco Materials v. State of New Mexico Taxation and Revenue Dep't.*, 1994-NMCA-062, ¶ 6, 118 N.M. 12 (holding that "construction project" was not distinguishable from the statutory definition of "construction" under the tax code), *partially overruled on other grounds by Blaze Constr. Co. v. Taxation and Revenue Dep't.*, 1995-NMSC-110, 118 N.M. 647. "Receipts from selling and installing these landscape items as part of a construction project may not be deducted". 3.2.212.14 (A) NMAC (2000). Based upon the totality of the evidence, the Taxpayer's work for the City, and any tangible personal property provided thereto, was part of a construction project as the work was directly related to building or altering parks, ballfields, and other similar facilities. Therefore, the Taxpayer's gross receipts were not deductible. *See id.*

Timeliness of the Assessment.

Generally, assessments must be made within three years of the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18. The Department argued that the Taxpayer was underreporting its gross receipts tax liability by more than 25%, and that there was additional time to assess. When a taxpayer underreports its tax liability by more than 25%, the Department has to assess "within six years from the end of the calendar year in which payment of the tax was due." NMSA 1978, § 7-1-18 (D) (2013). This was true under the previous statute as well. *See* NMSA 1978, § 7-1-18 (D) (1994). The Taxpayer argued that it was not underreporting its tax liability by more than 25% because it was entitled to deduct most of its transactions with the City. As determined in the previous section of this decision, the Taxpayer was not entitled to take those deductions. Therefore, the Taxpayer was underreporting its tax liability by more than 25%. Consequently, the Department had six years from the end of the year in which the taxes were due to assess.

Gross receipts taxes are due on the twenty-fifth day of the month following the month when the transaction occurred. *See* NMSA 1978, § 7-9-11 (1969). Therefore, gross receipts taxes for the periods of January through November 2004 were due in 2004. Six years from 2004 was 2010. Therefore, the

assessments as to the periods from January 2004 through November 2004 were not timely and were barred by the statute of limitations. Gross receipts taxes for the periods of December 2004 through November 2005 were due in 2005. Six years from 2005 was 2011. Therefore, the assessments as to the periods from December 2004 through November 2005 were not timely and were barred by the statute of limitations. Gross receipts taxes for the periods of December 2005 through November 2006 were due in 2006. Six years from 2006 was 2012. Therefore, the assessments as to the periods from December 2005 through November 2006 were timely. Consequently, the assessments for all periods after that time frame were also timely.

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. Penalty was properly assessed on the tax periods from December 2005 through March 2010.

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 on the tax periods from December 2005 through March 2010.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts taxes from January 2004 through March 2010 issued under Letter ID number L0680042816, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was providing materials and services to the City on various construction projects involving parks, ballfields, and other similar facilities. *See* NMSA 1978, § 7-9-3.4 (2003).

C. The Taxpayer was not entitled to deduct its gross receipts from the City. *See* NMSA 1978, § 7-9-54 (A) (2003). *See also* 3.2.212.14 (A) NMAC (2000).

D. The Taxpayer was underreporting its gross receipts taxes by more than 25% from January 2004 through March 2010; therefore, the Department had six years to assess. *See* NMSA 1978, § 7-1-18 (D) (2013).

E. The assessments of gross receipts taxes from January 2004 through November 2005 occurred more than six years after the tax was due. Consequently, those assessments are not timely and are barred by the statute of limitations. *See* NMSA 1978, § 7-9-11 (1969). *See* NMSA 1978, § 7-1-18 (D) (2013).

F. As the assessments of gross receipts taxes from January 2004 through November 2005 were barred by the statute of limitations, those assessments of tax, penalty, and interest are HEREBY ABATED. *See* NMSA 1978, § 7-1-18 (D) (2013). *See* NMSA 1978, § 7-1-28 (2013).

G. The assessments of gross receipts taxes from December 2005 through March 2010 were made within six years of when the tax was due. Therefore, those assessments were timely and were properly made. *See* NMSA 1978, § 7-1-18 (D) (2013).

H. The Taxpayer is liable for the gross receipts taxes, penalty, and interest that were assessed from December 2005 through March 2010. *See id.*

For the foregoing reasons, the Taxpayer's protest **is DENIED IN PART and GRANTED IN PART**.

DATED: July 27, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office

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