

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

**IN THE MATTER OF THE PROTEST OF
DENISE THOMAS,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1451696176**

No. 15-34

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 23, 2015 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Gabrielle Dorian, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Ms. Denise Thomas (Taxpayer) appeared for the hearing by telephone. 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 July 14, 2015, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax periods from April 1, 2011 through December 31, 2011. The assessment was for \$551.76 tax, \$110.36 penalty, and \$61.78 interest.
2. On July 28, 2015, the Taxpayer filed a formal protest letter.
3. On September 15, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On September 17, 2015, the Hearings Office issued a notice of hearing for October 23, 2015. The hearing date was set within ninety days of the protest.
5. The Taxpayer was working for a mortgage services company (the Company) by doing property inspections in 2011.
6. The Taxpayer did inspections for the Company at their request on an as-needed basis.

7. The Taxpayer did not realize that she should be paying gross receipts taxes on the services she was providing.
8. On March 13, 2015, the Department issued an audit notice to the Taxpayer and gave her a deadline of May 12, 2015 (the 60-day deadline) for obtaining nontaxable transaction certificates (NTTCs).
9. The Taxpayer contacted the Company and asked for a NTTC.
10. The Company advised the Taxpayer that they were also being audited and were not able to issue NTTCs at that time. The Company assured the Taxpayer that they would issue a NTTC as soon as they were able to do so.
11. The Taxpayer was not in possession of the NTTC by the 60-day deadline of May 12, 2015.
12. In August 2015, approximately two months after the 60-day deadline, the Taxpayer received a Type 2 NTTC from the Company. The Company assured the Taxpayer that this was a good NTTC and that they have issued the same type of NTTC to others and those deductions were allowed.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the assessment.

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 she is entitled to an abatement. The burden is on the Taxpayer to prove that she 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 she was engaged in providing the services of property inspection. There was no dispute that the Taxpayer’s services would ordinarily be subject to gross receipts tax. The Taxpayer argued that she was entitled to deduct her gross receipts based on the NTTC.

NTTCs.

“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 a deadline set by the Department. *See id.* The seller must accept the NTTC in good faith. *See id.*

The Taxpayer was served with the 60-day letter by mailing on March 13, 2015, and the 60-day deadline was May 12, 2015. The Taxpayer received a Type 2 NTTC from the Company in August 2015. Therefore, the NTTC was not received timely. *See* NMSA 1978, § 7-9-43. When a taxpayer “is not in possession of the required [NTTCs] within sixty days from the date that the notice...is given..., deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall be disallowed*”. NMSA 1978, § 7-9-43 (A) (emphasis added). The word “shall” indicates that the denial 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. A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess a NTTC within the time prescribed by the Department is a valid reason to deny the deduction. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep’t.*, 1988-NMCA-042, ¶ 22, 107 N.M. 392 (holding that the Department had properly denied the deduction when the taxpayer had not received the proper form from the buyer within the time limit).

A taxpayer can be protected from tax liability when the taxpayer accepts a NTTC in good faith even though the transaction was not actually subject to deduction. *See Leaco Rural Telephone Coop., Inc. v. Bureau of Revenue*, 1974-NMCA-076, 86 N.M. 629. However, that protection will be conclusive only when three requirements are met; 1) the acceptance of the NTTC must be timely, 2) must be in good faith, and 3) the NTTC must be properly executed. *See id.* at ¶ 15. The Taxpayer’s receipt of the NTTC was not timely as it occurred after the 60-day deadline. When a taxpayer is not “in possession” of a NTTC within the 60-day deadline, the deductions are disallowed. *See* NMSA 1978, § 7-9-43. Consequently, the parties’ arguments regarding the type of NTTC and issues related to that are moot.

Assessment of Penalty.

The Taxpayer argued that she should not have to pay penalty. The Taxpayer felt that her mistake was due to ignorance and that she had no idea she should be paying gross receipts taxes and did not know anything about NTTCs until she was audited. 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). 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

A. The Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts taxes, penalty, and interest issued under Letter ID number L1451696176, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was not in possession of the NTTC within the 60-day deadline; therefore, the deductions were disallowed. *See* NMSA 1978, § 7-9-43.

C. The Taxpayer is liable for the assessment.

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

DATED: November 10, 2015.

Dee Dee Hoxie

DEE DEE HOXIE

Hearing Officer
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