

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

**IN THE MATTER OF THE PROTEST OF
LOVE TREE BUILDERS
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1017585712**

No. 16-08

DECISION AND ORDER

A protest hearing occurred on the above captioned matter December 14, 2015 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Delwin Nordman appeared *pro se* for Love Tree Builders (“Taxpayer”). Staff Attorney Gabrielle Dorian appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Nicholas Pacheco appeared as a witness for the Department. Department Exhibits A-C and Taxpayer Exhibit #1 were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 30, 2015, through letter id. no. L1017585712, the Department assessed Taxpayer for \$1,831.56 in gross receipts tax, \$366.32 in penalty, and \$150.81 in interest for a total assessment of \$2,344.86 for the CRS reporting periods from June 1, 2012 through December 31, 2012.
2. On August 6, 2015, Taxpayer protested the Department’s assessment, asking for abatement of all assessed tax principal, penalty, and interest.
3. On August 12, 2015, the Department’s protest office acknowledged receipt of a valid protest.

4. On September 30, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate, independent agency from the Department.

5. On October 2, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on October 19, 2015.

6. On October 16, 2015, Taxpayer moved to continue the October 19, 2015 merits hearing and requested a telephonic appearance. The Department opposed both requests.

7. On October 16, 2015, the Administrative Hearings Office issued an order and Amended Notice of Administrative Hearing Setting Telephonic Scheduling Conference, converting the October 19, 2015 merits hearing into a telephonic scheduling conference.

8. On October 19, 2015, a Scheduling Conference Hearing occurred. The parties did not object that conducting the scheduling hearing satisfied the requirement that a hearing be set within 90-days of protest.

9. On October 19, 2015, the Administrative Hearings Office issued a Second Notice of Telephonic Scheduling Conference, setting this matter for another scheduling conference on November 2, 2015.

10. On November 2, 2015, the Second Scheduling Conference Hearing occurred. The parties agreed to conduct a merits hearing on December 14, 2015.

11. On November 2, 2015, the Administrative Hearings Office issued a Notice of Administrative Hearing in this matter, setting the merits hearing for December 14, 2015.

12. At the relevant time, in the second half of 2012, Taxpayer was in the business of performing construction services in New Mexico.

13. Delwin Nordman is the owner and operator of Taxpayer.

14. Taxpayer filed and paid New Mexico gross receipts tax during the relevant period.
15. Mr. Nordman and his wife filed and paid New Mexico personal income tax in 2012.
16. As part of its Schedule C Tape Match program with the IRS, the Department discovered a \$24,201.00 discrepancy between Mr. Nordman's business income reported on his personal income tax federal Schedule C and Taxpayer's gross receipts tax return.
17. Taxpayer was selected for a limited scope audit based on this discrepancy.
18. Taxpayer has consistently asserted during the limited scope audit, during the protest, and at the protest hearing that the \$24,201.00 discrepancy resulted from out-of-state services Taxpayer performed during a weather emergency in Minnesota.
19. Mr. Nordman's wife is from north-central Minnesota and her family still resides there on tribal land on a lake.
20. On July 2-4, 2012, a severe weather storm struck north central Minnesota, with sustained 80-m.p.h. winds, which resulted in extensive physical damage to property in the area. As a result of the significant weather event, the State of Minnesota had a special legislative session where a \$167-million disaster relief bill was passed and signed into law by Minnesota's Governor. [Taxpayer Ex. #1].
21. July is one of the busiest times of the year in that area of the Minnesota, with many thousands of people from the Twin Cities vacationing at the many lakes in the area over the Fourth of July holiday weekend.
22. Mr. Nordman learned of the emergency weather event from his wife's family, who resides in the area, and requested any assistance Mr. Nordman could provide.

23. Mr. Nordman immediately packed up his equipment on a trailer (a small tractor and a CAT backhoe) and in his two trucks. Mr. Nordman and his wife drove from New Mexico to Minnesota overnight.

24. Upon arrival, in addition to assisting his immediate family that resided in that area of Minnesota, Mr. Nordman went from house-to-house around the lake using his equipment to perform clean-up and repair work at the many lake properties.

25. Because of the nature of the emergency, Taxpayer moved quickly from house-to-house to perform work on a cash-only basis (Mr. Nordman did not want to deal with waiting for insurance companies to approve claims or wait for checks to clear).

26. In order to expedite the clean-up process while working long 12-hour days around the lake helping people clean up their property, Taxpayer did not prepare any contracts with the customers or have any formal invoices.

27. Taxpayer remained in Minnesota doing clean-up work longer than anticipated, staying through early August of 2012.

28. Mr. Nordman's testimony was highly credible, particularly in light of the fact that despite operating on a cash-only basis without a discernable paper trail, Mr. Nordman did the proper thing in reporting all the cash income he had received during the emergency on his federal income tax return.

29. As of the date of hearing, the Department alleged that Taxpayer owed \$1,831.56 in gross receipts tax, \$172.29 in interest, and \$366.32 in penalty. [Dept. Ex. C].

DISCUSSION

The issue in this case is whether Taxpayer is liable for gross receipts tax on the \$24,201.00 discrepancy detected between Mr. Nordman's federal Schedule C and Taxpayer's CRS filings in the second half of 2012.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd.*, 2003 NMCA 21, ¶13.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, § 7-9-4 (2002). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), the term "gross receipts" is broadly defined to mean

the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

"Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2003). Gross receipts applies to the performance of a service in New Mexico. *See* NMSA 1978, § 7-9-3.5 (2007). Under the

Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (2002). Taxpayer in this case was engaged in the construction business services in New Mexico, and therefore any of his receipts were presumed subject to gross receipts tax under Section 7-9-5. However, any service performed outside of New Mexico and not initially used in New Mexico was not subject to gross receipts tax under the definition contained in Section 7-9-3.5 (A)(1).

Taxpayer overcame the presumption of correctness in this case by credibly establishing that the receipts in question were earned through the performance of services out-of-state during a weather emergency. Taxpayer consistently argued during the audit, the protest, and at the hearing that the out-of-state services were performed on a cash-only basis during the weather emergency in Minnesota. Mr. Nordman's family resides on tribal land in north-central Minnesota, and he answered their call for assistance during the July Fourth storm that struck that area in 2012. After bringing his equipment north and helping his family, Mr. Nordman continued to help many of the thousands of private landowners around the many lakes in the area. In an emergency situation, where there are many thousands of part-time residents seeking any help they can get, Mr. Nordman credibly established he was more focused on helping as many people as he could in a short period of time than on the niceties of completing thoroughly documented business transactions. While the Department insistence on receiving more documentary evidence to support Taxpayer's claim is certainly reasonable (and would be absolutely required in most circumstances), given the unique facts in this case related to the genuine weather emergency, Taxpayer's credible explanation as to why he did not have contracts or invoices is persuasive.

While *MPC Ltd.*, ¶13, and Regulation 3.1.6.12(A) NMAC does not allow a taxpayer to overcome the presumption simply by making conclusory statements that the assessment was

incorrect, that is not what Taxpayer did in this protest. Taxpayer's credible testimony, which is fully admissible evidence, established that he provided cash-only sales in Minnesota during the weather emergency. Taxpayer provided documentation to establish that disaster had occurred at the time of the sales in Minnesota, consistent with his testimony. In other words, Taxpayer was simply not making conclusory statements that the assessment was wrong, but providing credible, factual evidence showing why the assessment was factually and legally incorrect. Taxpayer took steps to report the undocumented, cash-only income he received during the weather emergency on his federal Schedule C, which speaks to Taxpayer's credibility in this case, as someone trying to avoid a tax liability on that amount would have likely behaved in a far less honest manner given the undocumented, cash-only transactions. Given the credibility of Taxpayer in testifying and reporting the cash-only receipts in the first place rather than trying to avoid all tax liability on those amounts, as well as the weather emergency situation that Taxpayer was responding to in this matter, Taxpayer's protest is granted and the entire assessment is ordered abated.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.
- B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).
- C. Taxpayer overcame the presumption of correctness that attached to the assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428 by showing through credible testimony given the unique weather emergency that the \$24,201.00 discrepancy from the federal Schedule C was attributable to services performed out-of-state and not subject to New Mexico gross receipts tax.

D. Once Taxpayer overcame the presumption of correctness, the burden shifted to the Department to reestablish the correctness of its assessments, which the Department was unable to do in this case. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

For the foregoing reasons, the Taxpayers' protest **IS GRANTED. IT IS ORDERED** that the Department abate all of the assessed tax, penalty, and interest.

DATED: March 15, 2016.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may be preparing the record proper.