

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

**IN THE MATTER OF THE PROTEST OF
LINDA WASKO
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1074817072 and L0537946160**

No. 16-18

DECISION AND ORDER

A protest hearing occurred on the above captioned matter February 1, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Linda Wasko (“Taxpayer”) appeared *pro se*. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits #1-5 and Department Exhibits A-F were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 6, 2015, through letter id. no. L1017585712, the Department assessed Taxpayer for \$348.20 in gross receipts tax, \$69.64 in penalty, and \$33.24 in interest for a total assessment of \$451.08 for the CRS reporting periods from January 1, 2012 through June 30, 2012. [Dept. Ex. B].
2. On October 6, 2015, through letter id. no. L0537946160, the Department assessed Taxpayer for \$348.20 in gross receipts tax, \$69.64 in penalty, and \$27.99 in interest for a total assessment of \$445.83 for the CRS reporting periods from July 1, 2012 through December 31, 2012. [Dept. Ex. C].
3. On October 14, 2015, Taxpayer protested the Department’s assessments.

4. The Department acknowledged receipt of a valid protest on November 4, 2015.
5. On December 9, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate agency from the Department.
6. On December 10, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on February 1, 2016.
7. The February 1, 2016 hearing occurred within 90-days of the Department's acknowledgement of receipt of a valid protest.
8. Taxpayer is a sole proprietor that sells artwork outside of New Mexico and also worked as a teacher.
9. During the relevant period, Taxpayer also provided in-home elder care services for a company called Elite Home Care. The receipts from this service are what are at issue in this protest.
10. In order to qualify for the sale of a service for resale deduction from gross receipts tax for the elder care services Taxpayer performed to Elite Home Care, Taxpayer timely needed a Type 5 nontaxable transaction certificate ("NTTC or NTTCs") executed by Elite Home Care.
11. Taxpayer did not receive a NTTC from Elite Home Care at the time her taxes were due in 2012.
12. Taxpayer did not report, file, or pay gross receipts tax during the period in question.
13. As part of its Schedule C Tape Match program with the IRS, the Department discovered \$12,832.00 in sole proprietorship income reported on Taxpayer's personal income tax federal Schedule C that was not reported as gross receipts on CRS tax return. [Dept. Ex. A].

14. On June 26, 2015, the Department prepared a Notice of Limited Scope Audit Commencement-60 Day Notice asking Taxpayer to explain the mismatch and provide any necessary NTTCs supporting claimed deductions for the \$12,832.00 in business income reported to the IRS on the Schedule C. [Dept. Ex. A].

15. Department Protest Auditor Tom Dillon is a CPA who has worked for the Department for more than 20-years in the Department's protest office. Mr. Dillon has a high-level of knowledge, experience, and competency with the various tax programs, processes and systems administered by the Department.

16. Upon questioning, Department Protest Auditor Tom Dillon acknowledged based on his previous knowledge and experience that the Notice of Limited Scope Audit Commencement was probably mailed out on Friday, June 26, 2015 but may not have been mailed until the next working day, Monday, June 29, 2016.

17. The Department did not produce or provide any direct evidence as to the date of mailing of the Notice of Limited Scope Audit Commencement in this case, such as a postmark date or a date of mailing of batch noted in GenTax.

18. Aside from Mr. Dillon's testimony about his general knowledge and experience with the mailing process, the Department did not produce or provide any other general evidence about its mailing procedures for such documents that could have established through practice the date of mailing of the Notice of Limited Scope Audit Commencement in this case.

19. Taxpayer, a Santa Fe resident, did not receive the Notice of Limited Scope Audit until a week to ten days after the June 26, 2015 date of the document.

20. The Notice of Limited Scope Audit Commencement indicated a response deadline of August 25, 2015 for production of necessary NTTCs, 60-days after the date on the Notice.

[Dept. Ex. A].

21. Taxpayer worked with Steve at Elite Home Care to try to get the NTTC beginning in August.

22. On August 24, 2015, Taxpayer and Steve of Elite Home Care attempted to complete the NTTC, but were unable to do so. Taxpayer contacted Department employee Doug Nava for help, and he indicated they should try again the next day and report if they had additional troubles.

23. On August 25, 2015, using the Department's website, Elite Home Care attempted to execute a Type 5 NTTC to Taxpayer but was unable to do so. [Taxpayer Ex. #3-4].

24. Late in the day on August 25, 2015, Taxpayer contacted Mr. Nava again about the trouble in executing the NTTC. Mr. Nava told Taxpayer to have Steve at Elite Home Care call or come in for assistance so Mr. Nava could walk them through the process.

25. Taxpayer did not produce or provide an executed NTTC by the August 25, 2015 deadline stated in the Notice of Limited Scope Audit Commencement.

26. On August 26, 2015, again using the Department's website and apparently with the telephonic assistance of Department employee Doug Nava, Elite Home Care successfully executed a Type 5 NTTC to Taxpayer. [Taxpayer Ex. #3-4; Dept. Ex. D].

27. Because the Type 5 NTTC was executed one-day after the August 25, 2015 deadline listed on the Notice of Limited Scope Audit Commencement, the Department disallowed Taxpayer the claimed deduction for the Elite Home Care receipts (less the

adjustments for the receipts earned for art sales outside of New Mexico) and issued the assessments referenced in findings of fact #1 and #2.

28. As of the date of hearing, the Department alleged that Taxpayer owed \$696.40 in gross receipts tax, \$139.64 in penalty, and \$68.33 in interest under both assessments. [Dept. Ex. F].

DISCUSSION

The issue in this case relates to whether Taxpayer is allowed to claim a deduction for the sale of a service for resale deduction when she produced a Type 5 NTTC executed one-day after the 60-day deadline articulated in the Department's Notice of Limited Scope Audit Commencement and on what date the Department provided notice to Taxpayer, triggering the 60-day period.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *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 assessments issued against her. *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). In pertinent part, Taxpayer in this case was engaged in performing elder care services for Elite Home Care, and therefore any of her receipts from that service were presumed subject to gross receipts tax under Section 7-9-3.3 and Section 7-9-5.

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions of gross receipts tax. One particular deduction is at issue in this protest: the sale of a service for resale deductible under NMSA 1978, Section 7-9-48 (2000). Section 7-9-48 states that:

Receipts from selling a service for resale may be deducted from gross receipts or governmental 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....

Simply performing a service for resale, as the Taxpayer did in this instance for Elite Home Care, is not enough to satisfy the requirements of the deduction under Section 7-9-48. The statute clearly and unambiguously conditions the deduction on a sale made to a person/entity who delivers a NTTC.

NMSA 1978, Section 7-9-43 (2011) articulates the requirements for obtaining NTTCs:

All nontaxable transaction certificates...should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

Under Section 7-9-43, Taxpayer had a statutory obligation to possess a NTTC at the time when the gross receipts tax was initially due for the 2012 performance of elder care services for Elite Home Care. There is no evidence that Taxpayer possessed a NTTC at that time.

While taxpayers “should” have possession of required NTTCs at the time the return is due from the receipts at issue, Section 7-9-43 gives taxpayers audited by the Department a second chance to obtain these NTTCs: within 60-days of when the Department gives notice, taxpayers must possess a NTTC in order to claim a deduction. Taxpayers who rely on this second chance provision run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the Legislature. The reason why a taxpayer cannot obtain a NTTC is irrelevant. The language of Section 7-9-43 is mandatory: if a seller is not in possession of required NTTCs within 60 days from the Department's notice, "deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed.*" (emphasis added). See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary).

Consistent with the statutory language, under Regulation 3.2.201.12 (C), a taxpayer “is not entitled to the deduction” when the NTTC is untimely. The New Mexico Court of Appeals has held that despite its general reluctance to place “form over substance,” the failure to timely and properly present a requisite NTTC is a “valid basis” for the Department to deny a claimed deduction.

Proficient Food Co. v. New Mexico Taxation & Revenue Dep't, 1988-NMCA-042, ¶22, 107 N.M. 392.

When does the Department give notice to a taxpayer for the purposes of triggering Section 7-9-43's timeliness requirement? Under Section 7-9-43 (C), "(n)otice... is sufficient if the notice is mailed or served as provided in Subsection A of Section 7-1-9 NMSA 1978." Under NMSA 1978, Section 7-1-9 (A) (1997), notice is effective when mailed to the person at the last address shown on the registration certificate or other record of the Department. Section 7-1-9 (B) also grants the Department's secretary authority to promulgate regulations to determine what is adequate for actual time of delivery. Under Regulation 3.1.4.9 NMAC (C), the Department generally looks to the postmark date to determine timeliness of mailings required under the Tax Administration Act, as Mr. Dillon indicated was controlling in determining when the Department notified a taxpayer of the 60-day deadline. Here, there is no doubt that the Department sent the Notice of Limited Scope Audit Commencement notice to Taxpayer at her address of record, but the evidence presented raised a legitimate issue as to when such notice was mailed.

The Department asserts in this case that the NTTC was executed one-day late, which if correct, would require that the deduction be disallowed. It is undisputed in this case that the Type 5 NTTC (which was of the correct type and covered the receipts in question) was not executed by Elite Home Care to Taxpayer until August 26, 2015. If August 26, 2015 was more than 60-days "from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department...", then under Section 7-9-43 that Department had no choice but to disallow Taxpayer's claimed deduction regardless of the reason she was unable to obtain it. Under the language of the applicable statute, regulation, and case law, Taxpayer's asserted claim that the Department's computer system had a glitch, her assertion of a her own financial

hardship, or her assertion of her efforts to be a compliant taxpayer would be insufficient to allow for the deduction. Again, this is because the 60-day window is already a taxpayer's second chance to obtain what they were required to obtain at the time the tax was due on the transaction.

The Department is fully entitled to the presumption of correctness of its assessments and as such it is the burden of Taxpayer to establish that Notice of Limited Scope Audit Commencement was not mailed or personally delivered on the date asserted on the face of that document. Therefore, in most cases related to this issue, there will be little evidence or issue to dispute that the Notice of Limited Scope Audit was mailed on the date listed on the face of the document. But in this particular case, upon questioning by Taxpayer and the hearing officer, the highly knowledgeable, experienced, and competent Department protest auditor Tom Dillon acknowledged that he did not know when the Notice of Limited Scope Audit was mailed and that based on his own experience, the Notice of Limited Scope Audit Commencement could have been mailed on Friday, June 26, 2015 or may have not been mailed until the following business day, Monday, June 29, 2015.¹ If it was the former, then the NTTC was untimely but if it was the latter, then the NTTC was timely and Taxpayer was entitled to her claimed deduction. Taxpayer, a Santa Fe resident, credibly testified that she did not receive the Notice of Limited Scope Audit until a week to ten days after its listed June 26, 2015 date, which (even acknowledging the mailing went to a P.O. Box) is more consistent with the possibility that the letter was not mailed in fact until June 29, 2015.

¹ Interestingly, in a separate decision and order being issued at the same time as this case, *In the Matter of the Protest of Reggie Olguin*, No. 16-19, the Department did provide mailing information to demonstrate that an assessment dated on its face as October 26, 2016 was not in fact mailed until the following business day, October 27, 2016, illustrating exactly this potential scenario and why mailing information on a case involving an allegation of one-day's tardiness could be important.

Once a taxpayer meets the presumption of correctness, the burden shifts back to the Department to establish the correctness of its assessments. *See MPC Ltd.*, 2003 NMCA 21, ¶13. In this case, the Department was relying on the mailing of the Notice of Limited Scope Audit to establish the date it gave notice to Taxpayer that it had 60-days to provide executed NTTCs. A “party relying on service by mail has the burden of proving the mailing.” *Myers v. Kapnison*, 1979-NMCA-085, ¶8, 93 N.M. 215. Here, the Department presented no evidence of the actual date of mailing of the Notice of Limited Scope Audit Commencement such as a copy of the postmarked envelope, GenTax mailing information, or a mailing log. In the absence of actual proof of mailing, the Department also did not attempt to present any general testimony or evidence regarding the Department’s Notice of Limited Scope Audit mailing procedures, practices, routines, or policies that might have established that this notice was mailed in conformance therewith. That is not to say that this type of detailed evidence of mailing is always required, especially in light of the presumption of correctness. However, considering that in this protest the Department avers that Taxpayer’s NTTC was one-day late and through questioning there is some evidence that the Notice of Limited Scope Audit Commencement may not have been mailed out until the next business day, June 29, 2016, rather than the date on the document, detailed evidence and proof of actual date of mailing is critical to the question of timeliness of the NTTC in this specific case. Without such information, there is no basis to conclude that Taxpayer’s NTTC was untimely in this matter. Consequently, Taxpayer was entitled to the claimed deduction under Section 7-9- 48 and her protest is granted as it relates to the Elite Home Care receipts.

Despite the outcome of this particular case, it is important to reiterate that taxpayers must overcome the presumption of correctness and thus in most instances the Department will not

need to show the specific date of mailing triggering the 60-day deadline under Section 7-9-43 (though it may be best practice to do so when a NTTC is considered only a day or two late). It is not enough for a taxpayer to overcome this presumption and shift this burden back to the Department by merely speculating that the notice may have not been mailed out when indicated on the face of the document. *See MPC Ltd.*, 2003 NMCA 21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC; *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶29, 111 N.M. 735 (there is a presumption of administrative regularity that a taxpayer must overcome when it comes to adequacy of notice). Like in the present case, rather than a mere speculative possibility, there must be some actual evidence on the record from a credible source to raise a genuine question as to the date of the Department's notice, especially in instances where a taxpayer is alleged to miss a deadline by one day². But when a taxpayer is able to overcome the presumption of correctness related to the timeliness of the mailing of a Notice of Limited Scope Audit with credible testimony or evidence, especially in a case involving one-day difference under the deadline, then the Department must be prepared to establish the mailing date (or service date if relying on personal delivery) of the Notice of Limited Scope Audit Commencement.

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 the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

² *See In the Matter of Club 33, Inc.*, Decision and Order Number 12-13 (non-precedential) for a similar example but with the notable exception that in that case no presumption of correctness had attached yet under the statute. With this issue, taxpayers have an affirmative duty to overcome the presumption of correctness that attached to the assessment.

C. Taxpayer received an executed NTTC of the correct type, establishing Taxpayer's entitlement to sale of a service for resale deduction under NMSA 1978, Section 7-9-48 if not untimely.

D. Taxpayer established a genuine issue as to the Department's date of mailing of the Notice of Limited Scope Audit that triggered the 60-day Notice based on her own receipt date of the mailing, the acknowledgements that the highly-experienced and credible Mr. Dillon made upon questioning about the possible date of mailing being the following business day, and alleged one-day tardiness on the submission of the NTTC.

E. When the burden shifted back to the Department, the Department did not present any evidence of actual mailing or mailing practice to establish when it gave notice of the 60-day NTTC deadline to Taxpayer. *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 that relates to the Elite Home Care receipts.

DATED: May 20, 2016.

Brian VanDenzen
Chief Hearing Officer
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