

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

**IN THE MATTER OF THE PROTEST OF
S.J. TILE
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L1721425216 and L0379247936**

No. 16-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 4, 2016, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Julia Belles, Esq., attorney for the Department. Ms. Sonya Varela, protest auditor, from the Department, appeared as a witness for the Department. S.J. Tile (“Taxpayer”) appeared through its owner, Steve Jones, at the appointed time. Mrs. Nora Jones, Steve Jones’ wife, also appeared at the hearing. The Department introduced into the record Exhibits A-F.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 28, 2013, the Department assessed Taxpayer in the principal amount of gross receipts tax of \$5,496.86, \$1,099.38 in penalty and \$903.93 in interest for the tax period ending December 31, 2008. [**Letter Id No. L1721425216**]. Again on March 28, 2013, the Department assessed Taxpayer in the principal amount of gross receipts tax of \$4,120.65,

\$824.13 in penalty and \$489.75 in interest for the tax period ending December 31, 2009. **[Letter Id No. L0379247936].**

2. Taxpayer filed a protest on each assessment on April 24, 2013.

3. On May 9, 2013, the Department acknowledged the protest filed by Taxpayer.

[Letter Id. No. L1559887168].

4. The Department requested a hearing in this matter with the Administrative Hearings Office on October 16, 2015.

5. The Administrative Hearings Office mailed a Notice of Administrative Hearing to Taxpayer on October 29, 2015 setting the hearing for May 2, 2016.

6. Taxpayer was audited through the Department's Schedule C mismatch program whereby the Internal Revenue Service provides computer records of Schedule C returns which are compared to the Department's gross receipts tax program. **[Letter Id No. L1721425216; Letter Id No. L0379247936].**

7. On May 7, 2012, the Department mailed Taxpayer a Notice of Limited Scope Audit Commencement ("60 day letter") which provided that Taxpayer was required to provide any nontaxable transaction certificates within 60 days or by July 6, 2012. **[Exhibit F].**

8. On the 60 day letter, the Department claimed that Taxpayer owed in gross receipts tax principal \$7,934.00 for tax year 2008 and \$5,316.00 for tax year 2009. **[Exhibit F].**

9. Taxpayer did not file gross receipts returns for the periods at issue.

10. Taxpayer was in business from approximately 1987 through 2012, and was in the business of tile setting for construction contractors. **[CD 1, 5-4-16, 16:40-16:51].** Taxpayer was a one-person operation. **[CD 1, 5-4-16, 6:59-7:12].**

11. Taxpayer only provided services for construction contractors because he did not want to have to pay gross receipts taxes. [CD 1, 5-4-16, 6:30-6:55].

12. Taxpayer obtained some nontaxable transaction certificates from the construction contractors he provided services to. He was not able to gather nontaxable transaction certificates from all of the construction contractors he provided services to because many of the contractors went out of business. [CD 1, 5-4-16, 7:59-8:45; 11:00-11:26].

13. Taxpayer worked for many of the construction contractors for 20 years and he knew the importance of the nontaxable transaction certificates. [CD 1, 5-4-16, 13:00-13:05].

14. Taxpayer provided the nontaxable transaction certificates he was able to obtain to the Department and the amounts of principal for both tax years were reduced to the assessed amounts.

15. Sometime during the reporting period, Taxpayer's health began failing. He developed stage four kidney failure and developed blindness. [CD 1, 5-4-16, 7:21-7:45]. Taxpayer also became a diabetic requiring six shots of insulin per day. [CD 1, 5-4-16, 12:34-12:36].

16. Taxpayer's new address is 8975 Angie Lane, Mesilla Park, New Mexico 88047.

DISCUSSION

The sole issue to be determined is whether the Department properly assessed Taxpayer for gross receipts tax, penalty and interest for the tax years ending December 31, 2008 and December 31, 2009. Taxpayer argued that he did not collect gross receipts tax so therefore he should not have to pay gross receipts tax. In addition, Taxpayer requested that the penalty be forgiven because he suffered from a number of health issues.

Burden of Proof and Standard of Review

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, §7-1-17(C) (2007). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement, in full or in part, of the assessment issued against him. *See, Carlsberg Management Co. v. State, Taxation and Revenue Dep't.*, 1993-NMCA-121, 116 N.M. 247, 861 P.2d 288. In addition, all receipts of a person engaging in business are presumed to be subject to the gross receipts tax pursuant to NMSA 1978, Section 7-9-5(A) (2002).

Gross Receipts

Generally speaking, goods sold or services performed within the State of New Mexico are taxable. The term "gross receipts" is broadly defined in Section 7-9-3.5(A)(1):

- (1) "gross receipts" means 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. In an exchange in which the money or other consideration received does not represent the value of the property or services exchanged, "gross receipts" means the reasonable value of the property or services exchanged;"

NMSA 1978, §7-9-3.5(A)(1) (2007). The Gross Receipts and Compensating Tax Act, specifically Section 7-9-3(M), defines "service" as "all activities ... which activities involve predominately the performance of a service as distinguished from selling or leasing property." NMSA 1978, §7-9-3(M) (2007). The gross receipts tax is imposed on "any person engaging in business in New Mexico." NMSA 1978, §7-9-4 (2010).

For the tax periods at issue, Taxpayer provided a service and was in the business of setting tile for construction contractors. Since Taxpayer was providing a service, Taxpayer was required to file gross receipts returns while in business. If Taxpayer was providing a service to a construction contractor, Taxpayer could have deducted his receipts from his return if he had asked for and received a nontaxable transaction certificate. NMSA 1978, Section 7-9-52(A) (2012) provides that “(r)ceipts from selling a construction service or a construction-related service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service or a construction-related service.” In this case, for those transactions that Taxpayer had a timely nontaxable transaction certificate, the Department allowed the deduction. For those transactions that Taxpayer did not have a timely nontaxable transaction certificate, the deduction was disallowed. A deduction is properly disallowed if the seller does not have a timely nontaxable transaction certificate. *See, Proficient Food Co. v. N.M. Taxation & Rev. Dept.*, 1988-NMCA-042, ¶18, 107 N.M. 392, 758 P.2d 806.

New Mexico has a self-reporting tax system. It was the obligation of Taxpayer, not the Department, to obtain and retain the nontaxable transaction certificates. A taxpayer has the obligation “to maintain books of account or other records in a manner that will permit the accurate computation of state taxes.” NMSA 1978, Section 7-1-10(A)(2007); *N.M. Taxation & Rev. Dept. v. Dean Baldwin Painting, Inc.*, 2007-NMCA-153, ¶12, 143 N.M. 189, 174 P.3d 525. It was also the obligation of Taxpayer to determine the amount of gross receipts tax due to the state and file timely returns. NMSA 1978, Section 7-1-13(B) (2013). Taxpayer failed to obtain

and retain the applicable nontaxable transaction certificates and therefore, the deductions were properly disallowed.

Taxpayer provided the Department with a nontaxable transaction certificate on or around December 2, 2015. **[Exhibits D and D-1]**. The certificate was executed by TAJ Construction Inc. to Taxpayer. The certificate was presented to the Department well after the 60 day period or after July 6, 2012. **[Exhibit F]**. All nontaxable transaction certificates must be in the possession of the seller at the time the return is due or no later than 60 days from the date the notice requiring possession is given by the Department to the seller or the deduction will be disallowed. NMSA 1978, §7-9-43(A)(1994). Because the TAJ nontaxable transaction certificate was received by the Department over three years after the 60 day letter was mailed to Taxpayer, the nontaxable transaction certificate cannot be considered.

Civil Penalty

Civil penalty is imposed when a taxpayer is “negligent” or disregards the Department’s rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

(e)except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so **or to file by the date required a return regardless of whether a tax is due**, there shall be added to the amount assessed a penalty in an amount equal to the greater of:

- (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid;

(Emphasis added) NMSA 1978, §7-1-69 (A) (1) (2007). The Department's regulation provides that "negligence" includes "failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention" for either failing to file a return on time or failing to make a payment on time. Regulation 3.1.11.10 NMAC. Inadvertent error is defined as "negligence." *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't.*, 1989-NMCA-070, ¶9, 108 N.M. 795, 779 P.2d 982. The regulations provide exceptions to the negligence definition. The applicable exception related to when a taxpayer is ill is found in regulation 3.1.11.11(B) which provides that:

the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of injury or illness;

To meet this regulation, Taxpayer must prove that he was disabled, which he has, but in addition, Taxpayer must prove that he was also unable to prepare a return and he was unable to procure the services of another person to prepare a return because of the injury or the illness.

Taxpayer's medical situation is clearly serious and it is undisputed that a prolonged debilitating illness can impede a taxpayer's ability to file a return. There is no dispute that this is true for Taxpayer and many other taxpayers. Taxpayer, nonetheless did not present any evidence that his illness prevented him from seeking assistance with the filing of his gross receipts returns. The only testimony presented by Taxpayer on this subject was that he did not think he owed any gross receipts tax which is why he did not register or file gross receipts returns. Therefore, penalty was properly assessed. This Decision and Order is consistent with a number of other Decision and Orders on this subject. *See, Gail Stefl*, No. 15-15; *Promoco*, No. 11-06; *Sandia Oil*

Company No. 01-01; *Gregory and Shirley Hale*, No. 01-02; *BR Gordon Construction Co.*, No. 98-01; and *Rio Rancho Pharmacy*, No. 97-05. *Cf, Tafoyas Store*, No. 97-43.

Interest

On the subject of interest, New Mexico law is very clear on the imposition of interest when the principal amount of tax is unpaid when due, even if the payment is received one day late. Section 7-1-67(A) (2013) states that 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) (2013). The word “shall” is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d 135. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due, interest was properly assessed on the principal amount until the date it was paid. Therefore, Taxpayer owes the interest amount calculated through date of payment of the principal as set out in the Department’s worksheet. **[Exhibit E]**.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessments issued under Letter ID Nos. L1721425216 and L0379247936 and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department’s assessment is presumed to be correct, and it is Taxpayer’s burden to come forward with evidence and legal argument to establish that it was entitled to an abatement.

C. Taxpayer did not rebut the presumption that he did owe the gross receipts tax principal amount, and more specifically he failed to present evidence that he submitted to the Department any other timely nontaxable transaction certificate within the 60 day period to support a deduction.

D. The nontaxable transaction certificate executed by TAJ Construction Inc. to Taxpayer was presented to the Department well after the 60 day period or after July 6, 2012 and therefore was not valid to support a deduction pursuant to NMSA 1978, §7-9-43(A)(1994).

E. While Taxpayer proved he was disabled and seriously ill, he failed to prove that he was also unable to prepare a return and he was unable to procure the services of another person to prepare a return because of the injury or the illness to support the abatement of the civil penalty pursuant to regulation 3.1.11.11(B) NMAC.

F. Taxpayer was negligent in not filing his gross receipts returns when due for the tax years 2008 and 2009; accordingly, he owes penalty.

G. Interest continues to accrue until the principal is paid in full and all payments should be applied to the principal amount of tax due.

H. The total amount due for tax year 2008 is \$5,496.86 in principal, \$1,099.37 in penalty, and \$1,415.67 in interest; and for the tax year 2009, the amount due is \$4,120.65 in principal, \$824.13 in penalty, and \$873.37 in interest.

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

DATED: June 2, 2016

Monica Ontiveros

MONICA ONTIVEROS
Hearing Officer
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the Taxpayer has 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 NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final. A party filing an appeal shall file a courtesy copy of the Notice of Appeal with the Administrative Hearings Office contemporaneously with the filing of the Notice with the Court of Appeals so that the Administrative Hearings Office may prepare the record proper. The Notice of Appeal should be mailed to John Grieg, Administrative Hearings Office at P.O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.