

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

**IN THE MATTER OF THE PROTEST OF
MANS CONSTRUCTION COMPANY
TO REFUND DENIAL ISSUED UNDER LETTER
ID NO. L0989313072**

No. 16-24

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on March 10, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Angela Torres and Norma Salgado of MANS Construction Company (“Taxpayer”) appeared *pro se*. Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Sonya Varela appeared as a witness for the Department. Department Exhibits A-E were admitted into the record. Taxpayer Exhibit #1 was admitted into the record at hearing. After conclusion of the hearing, and without objection, Taxpayer submitted additional evidence into the record, which are admitted into the record as Taxpayer Exhibits #2, #3, #4, and #5. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 10, 2015, through letter id. no. L0989313072, the Department denied Taxpayer’s claim for refund of \$25,539.62 in CRS taxes for the reporting ending October 31, 2012.

2. On December 8, 2015, Taxpayer protested the Department's denial of claim for refund. As grounds for the protest, Taxpayer indicated that its accountant "had accidentally forgot to back out the tax amount before paying the CRS tax, so we double paid our taxes."

3. On December 10, 2015, the Department's protest office received the protest.

4. On December 15, 2015, the Department's protest office acknowledged receipt of a valid protest.

5. On January 22, 2016, the Department filed a request with the Administrative Hearings Office, a separate agency, for a protest hearing.

6. On January 25, 2016, the Administrative Hearings Office issued a Notice of Administrative Hearing, setting this matter for a merits protest hearing on March 7, 2016.

7. On February 25, 2016, Taxpayer moved to continue the scheduled March 7, 2016 hearing date and moved to appear telephonically at the hearing. The Department did not oppose the request for continuance, but did oppose the request to appear telephonically.

8. On February 29, 2016, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing rescheduling the hearing to March 10, 2016 in Santa Fe. That order also found that the Administrative Hearings Office had set the hearing to occur within 90-days, and that any delay was attributable to Taxpayer's continuance request.

9. On November 26, 2012, Taxpayer filed its CRS report indicating it had \$92,949.54 in gross receipts tax liability for the reporting period ending on October 31, 2012. There is no dispute that Taxpayer timely paid that balance. [Dept. Ex. A].

10. On July 16, 2015, Taxpayer filed an amended CRS Return for the reporting period ending on October 31, 2012, indicating only \$67,409.92 in gross receipts tax liability for that period. [Dept. Ex. B].

11. On August 3, 2015, Taxpayer requested a refund of \$25,539.62 in its overpayments of gross receipts tax for the CRS reporting period ending on October 31, 2012. [Dept. Ex. C-1].

12. On August 17, 2015, the Department sent Taxpayer a letter requesting additional information so that it could review Taxpayer's claim for refund. [Dept. Ex. D].

13. On November 10, 2015, as cited in finding of fact #1, the Department denied Taxpayer's claim because it "failed to provide the requested documentation to support the refund claim..." [Dept. Ex. E].

14. Consistent with the grounds cited in its protest letter, Taxpayer employee Angela Torres credibly testified at hearing that Taxpayer had made a simple accounting error in failing to back out the gross receipts tax from its total gross receipts for the CRS reporting period ending on October 31, 2012, resulting in over-reporting its total receipts in that period and overpayment of CRS tax in that period.

15. Taxpayer reported and paid gross receipts taxes for the October 31, 2012 CRS reporting period on a project it had been working on in White Sands Missile Range. That project was billed with gross receipts included, but Taxpayer did not back out that amount from its gross receipts report.

16. Taxpayer filed a refund claim for another period for the same reason and the Department granted and paid out that refund claim without delay.

17. At the hearing, without objection from the Department, the undersigned hearing officer directed Taxpayer to submit additional documentation showing the accounting error to support its refund claim within seven-days.

18. On March 10, 2016, after conclusion of the hearing, Taxpayer submitted a series of documents via email to the Administrative Hearings Office and to protest auditor Sonya Varela (which was the process discussed at hearing). Included with that submission were two invoices related to a project on White Sands Missile Range, one invoice related to the construction project noted as Walmart Rinconada, a contract related to Walmart Rinconada, and an invoice related to a fence restretching project also at White Sands Missile Range.

- a. On September 27, 2012, Taxpayer billed MICCMD for a project on White Sands Missile Range for \$1,108,096.36 on an “Application and Certification for Payment.” Page 2, item 270 of that billing indicates that the bill included \$63,814.05 for gross receipts tax. Page 3, item 390 of that billing indicates that the bill included an additional \$2,593.61 in gross receipts tax. Thus, there was \$66,407.66 in gross receipts tax included in the \$1,108,096.36 in billings for the White Sands Missile Range project. [Taxpayer Ex. #2].
- b. Taxpayer also submitted a contract and Application for Billing related to project identified as “Walmart Rinconada.” The Application for Billing for that project does not show that any gross receipts tax were included in \$368,439.15 billed amount. Further, the contract did not indicate that the total contracted payment price included a specific amount of gross receipts tax. [Taxpayer Ex.’s #3 & #4].
- c. Taxpayer also submitted a contract and Application for Billing related to project identified as Fence Restretching. The Application for Billing for that project does not show that any gross receipts tax were included in \$1,891.93 billed amount. [Taxpayer Ex. #5].

19. On March 22, 2016, the Department submitted a Motion to Close the Record, indicating that it had not received a further submission from Taxpayer by the deadline. However, this is contradicted by the email submission of the documents that clearly included Department Auditor Sonya Varela, which was in compliance with the post-hearing submission procedures discussed and agreed to on the record.

20. On March 22, 2016, the Department also submitted an affidavit of Sonya Varela, indicating that Ms. Varela was unable to locate any information related to the issuance of a NTTC. This affidavit is non-responsive to this protest. There was no indication in Taxpayer's protest letter or in argument at hearing that Taxpayer was claiming a deduction requiring a NTTC. The question raised by Taxpayer's protest letter and testimony at hearing was whether Taxpayer made an accounting error in failing to back-out gross receipts tax from its reported total gross receipts during the reporting period.

DISCUSSION

This case involves a simple question of whether Taxpayer is entitled to a refund when it made an accounting error by including separately stated gross receipts tax payments it received from a customer in its report of total gross receipts for the CRS reporting period ending on October 31, 2012. Although no assessment was issued in this case, and thus the typical presumption of correctness found under NMSA 1978, Section 7-1-17 (C) (2007) does not apply, Taxpayer nevertheless carries the burden in the protest proceeding under Regulation 3.1.8.10 NMAC and must establish entitlement to the claimed refund.

Although taxpayers bear the incidence of the gross receipts tax in New Mexico, *see* Regulation 3.2.4.8 NMAC, they may choose to pass on the cost of the gross receipts tax to their customers. When a taxpayer choose to pass on the cost of the gross receipts tax to their customer

by separately stating the amount of tax, it is customary for that taxpayer to remove that collected tax amount from its total reported gross receipts in order to avoid paying an additional tax on the collected gross receipts tax. The Department describes this process of backing out collected gross receipts tax from the total reported gross receipts in more detail in its published instruction FYI-105 (specifically on pages 4, 5, and 47 of that publication).

The Department's motion to close the record and attached affidavit were not responsive to the narrow issue presented in the protest letter, the protest hearing, and Taxpayer's submission of the additional documents to the Administrative Hearings Office and Protest Auditor Varela. Taxpayer argued in its protest letter and at hearing that it made an accounting error related to failing to back out the gross receipts tax it had collected from its total gross receipts. At no point did Taxpayer make an argument related to a claimed deduction that would make the possession of a NTTC relevant in this matter. The only issue in this protest, as articulated in the protest letter, is whether Taxpayer made an accounting error in failing to back out collected gross receipts tax from its reported gross receipts. Thus, the Department's pleading is not relevant to resolution of this protest.

Angela Torres credibly testified that Taxpayer made an accounting error by not backing out the amount of gross receipts tax it collected from its customer for the White Sands Missile Range construction project when it reported its total gross receipts in the October 31, 2012 reporting period. Supporting the testimony of Ms. Torres, after the hearing Taxpayer submitted an Application and Certification for Payment to the Administrative Hearings Office and Department Auditor Varela, showing that \$66,407.66 in a separately stated gross receipts tax payment were included in the \$1,108,096.36 billing for the White Sands Missile Range Construction project. Based on the straightforward and credible testimony of Ms. Torres and the

presentation of the supporting documentation, the hearing officer finds by the preponderance that Taxpayer inadvertently failed to back out \$66,407.66 in collected gross receipts tax from its calculation of total gross receipts in the reporting period ending on October 31, 2012 and thus Taxpayer is due a refund of gross receipts tax in an amount corresponding to reduction of total gross receipts tax in that period.

However, Taxpayer did not establish that made a similar accounting error in failing to back out collected gross receipts in the other invoices submitted into the record, which was the only cited grounds for Taxpayer's protest. Taxpayer also submitted an Application and Certification for Payment and contract related to a Walmart Rinconada project and a for a fence restretching project at White Sands. However, neither the Walmart Application and Certification nor the fence restretching project show that any gross receipts tax was included in the bill for those projects and Ms. Torres provided no testimony about these projects at hearing. All receipts of a person engaged in business are presumed subject to gross receipts tax until shown otherwise, and as such it is presumed that these other invoices were subject to gross receipts tax for the fully billed amount. *See* NMSA 1978, Section 7-9-4 (2010) and NMSA 1978, Section 7-9-5 (2002). Taxpayer did not establish, at least with the evidence presented into this record, any basis to grant a refund claim related to the receipts on these two projects.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of the claim for refund, 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).

C. Taxpayer established by the preponderance that it made an accounting error in failing to back out \$66,407.66 in collected gross receipts tax from its gross receipts in the CRS reporting period ending on October 31, 2012. As such, Taxpayer was entitled to reduce its total reported gross receipts in that reporting period by that amount and was entitled to corresponding refund of gross receipts tax for that reduction.

D. Taxpayer did not establish entitlement to any further refund with the evidence it presented at hearing.

For the foregoing reasons, the Taxpayers' protest **IS PARTIALLY GRANTED AND PARTIALLY DENIED**. Taxpayer is entitled to receive a refund in amount corresponding to the \$66,407.66 reduction in its reported total gross receipts for the CRS reporting period ending on October 31, 2012. Taxpayer did not establish it was entitled to any additional refund for the October 31, 2012 reporting period. **IT IS ORDERED** that the Department calculate the total refund do to Taxpayer in light of that \$66,407.66 reduction in its reported total gross receipts and promptly issue Taxpayer a refund check in that amount plus any applicable interest as required under NMSA 1978, Section 7-1-68 (2013).

DATED: June 6, 2016.

Brian VanDenzen
Chief Hearing Officer
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