

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

**IN THE MATTER OF THE PROTEST OF  
MOBILE BLOOD SERVICES  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L1323706928**

**No. 16-26**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on June 2, 2016, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Marek Grabowski, Esq., attorney for the Department. Mr. Tom Dillon, protest officer supervisor, from the Department, appeared as a witness for the Department. Mobile Blood Services (“Taxpayer”) appeared through its owner, David Quintana, at the appointed time. Mrs. Noreen Quintana, David Quintana’s wife, also appeared at the hearing. The Department introduced into the record Exhibits A and B, and Taxpayer introduced into the record Exhibits 1 and 2.

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 10, 2016, the Department assessed Taxpayer in the principal amount of gross receipts tax of \$87,164.25, \$15,213.24 in penalty and \$10,690.84 in interest for the tax periods January 31, 2009 through May 31, 2015. [**Letter Id No. L1323706928**]. As part of this same assessment Taxpayer was assessed \$1,822.43 in withholding principal tax, \$323.34 in

penalty and \$52.26 in interest. Taxpayer was also given a credit for compensating tax in the amount of \$11,801.57. **[Letter Id No. L1323706928].**

2. Taxpayer filed a protest of the assessment on April 11, 2016.

3. On April 19, 2016, the Department acknowledged the protest filed by Taxpayer.

**[Letter Id. No. L0298187312].**

4. The Department requested a hearing in this matter with the Administrative Hearings Office on May 3, 2016.

5. The Administrative Hearings Office mailed a Notice of Administrative Hearing to Taxpayer on May 6, 2016 setting the hearing for May 23, 2016.

6. Taxpayer filed gross receipts returns for the periods at issue.

7. Taxpayer has been in business from approximately January 1996 and continues to be in business. **[CD 6-2-16, 6:52-6:57].**

8. Taxpayer was registered with the State of New Mexico to conduct business. He also filed and paid gross receipts taxes. **[CD 6-2-16, 14:55-15:10].**

9. Taxpayer's primary business is to provide a service or to conduct laboratory testing, including DNA testing and drug screening or testing. **[CD 6-2-16, 6:57-7:20].** Taxpayer does business all over the country. **[CD 6-2-16, 7:27-7:36].**

10. All of the receipts at issue are from the New Mexico Children, Youth and Families Department ("CYFD").

11. Taxpayer began providing laboratory testing to CYFD in 1999. **[CD 6-2-16, 8:44].**

12. Sometime in 1999 when Taxpayer began providing services to CYFD, Frances from the Administrative Services Division of CYFD, told Taxpayer that he should not charge gross receipts tax and CYFD executed a nontaxable transaction certificate (“NTTC”) to Taxpayer. **[CD 6-2-16, 8:44]; [Exhibit 1].**

13. On September 16, 1999, CYFD executed a timely Type 9 NTTC to Taxpayer. **[Exhibit 1].**

14. The backside of the Type 9 NTTC states that a Type 9 NTTC is for the purchase of tangible personal property. **[Exhibit 2].**

15. Taxpayer was selling a service to CYFD, which in turn was not reselling the service in the ordinary course of business.

16. CYFD did not enter into a contract at any time with Taxpayer. **[CD 6-2-16, 15:25-15:33].**

17. Taxpayer did not charge or collect gross receipts taxes on its receipts from CYFD.

18. Sometime in July 2015, Sarah Palmer from CYFD, notified Taxpayer that he should begin charging CYFD gross receipts tax. **[CD 6-2-16, 15:44-15:59].**

19. After receiving the call from Ms. Palmer, Taxpayer began charging, collecting and remitting gross receipts for his services. **[CD 6-2-16, 8:58-9:20].**

20. During the audit period in question, an accountant prepared Taxpayer’s gross receipts returns. **[CD 6-2-16, 16:13-16:58; 18:39-18:57; 25:44-25:47].**

21. At no time did Taxpayer’s accountant inform him that the Type 9 NTTC was not valid for the transactions with CYFD.

22. During the hearing, the Department offered that abatement of penalty might be appropriate. [CD 6-2-16, 30:03-30:13].

23. At the hearing, it was pointed out to the Department that the reporting periods through November 2009 which were included in the 2016 assessment were outside of the six year statute of limitations provided in NMSA 1978, Section 7-1-18(D) (2013). The Department made an adjustment to tax year 2009. [Exhibit B].

24. The revised amount of gross receipts tax due is \$60,764.10 in principal tax and \$7,587.48 in interest for gross receipts, withholding and compensating tax, with interest accrued through June 13, 2016. [Exhibit B].

25. Both Mr. and Mrs. Quintana testified and they were credible and believable in their testimony that Frances from CYFD misinformed them that the Type 9 NTTC allowed them not to charge gross receipts tax on the services they provided to CYFD. They were also credible that their accountant did not advise them that they should not be deducting the CYFD receipts.

## **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 January 31, 2009 through May 31, 2015. There was no argument made that Taxpayer did not owe withholding tax. Taxpayer argued that he was misled by Frances from CYFD and because she worked for a state agency, he believed that he was able to deduct the receipts from CYFD from his returns. Taxpayer thought that he could deduct CYFD's gross receipts because CYFD provided him with a NTTC.

### ***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, ¶10, 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). Taxpayer has the burden of overcoming the statutory presumption created by Section 7-9-5(A) and establish that he is entitled to a deduction. *TPL, Inc. v. Taxation & Revenue Dep't.*, 2000-NMCA-083, ¶8, 129 N.M. 539, 10 P.3d 863, *rev'd on other grounds*, 2003-NMSC-007, 133 N.M. 447, 64P.3d 474.

### ***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 conducting laboratory testing, including DNA and drug testing. Since Taxpayer was providing a service, Taxpayer was required to charge, collect and remit gross receipts on the services he provided to CYFD. Services sold to a governmental agency are generally taxable pursuant to regulation 3.2.212.9 NMAC. Taxpayer was provided a Type 9 NTTC from CYFD, but because Taxpayer was providing a service to CYFD and not selling tangible personal property, the Type 9 NTTC was not applicable to the transactions with CYFD. A Type 9 NTTC may only be used by a seller if he is selling tangible personal property to a governmental agency and does not apply to the purchase of services by a governmental agency. NMSA 1978, §7-9-54 (2003). On the back of the NTTC, the Types and uses of NTTCs are described in specificity. **[Exhibit 2]**.

Unfortunately, Taxpayer was misinformed by Frances from CYFD that the services he provided were nontaxable and that he should not charge gross receipts taxes on his services. A taxpayer is always responsible for understanding the tax laws and paying taxes accordingly, even if Taxpayer was misinformed by a CYFD employee. A general proposition in tax law is “(i)mplicit in a requirement to self-declare is an obligation to assess one’s tax obligation under applicable tax law.” *Kinder Morgan C02 Co. L.P. v. State Taxation & Revenue Dep’t.*, 2009-NMCA-019, ¶43, 145 N.M. 579, 203 P.3d 110. There is no provision within the law that excuses a taxpayer from paying a tax because he relied on a state employee.

Taxpayer provided services to CYFD for approximately 16 years before CYFD or the Department took any action in informing Taxpayer that he was not charging or remitting gross

receipts on his services to CYFD. Why the delay in informing Taxpayer that his returns were incorrect and that he failed to charge gross receipts tax; there is no explanation. Nonetheless, Taxpayer is now fully aware of his tax obligations.

In addition, the Department has a very informative FYI (For Your Information), which is available on the internet, on which transactions are deductible when conducting business with a governmental agency. FYI-240, *Transactions with Government Agencies* (7/2014). FYI-240 makes it clear that:

A government may say, "We're not taxable, so don't charge us gross receipts tax." Remember that the gross receipts tax applies to the *seller's* receipts. Unless an exemption or deduction applies, the seller's receipts are taxable regardless of the buyer's tax status. When an exemption is in place, the seller's receipts are not taxed and do not have to be reported (Section 7-9-12 NMSA 1978). Only the seller or lessor can be exempt from taxation because gross receipts tax is the liability of the seller of a product or a service and of the person who leases property to someone else. While governmental entities are exempt from gross receipts tax on their own receipts (Section 7-9-13 NMSA 1978), *persons who sell to governmental entities are not automatically exempt from gross receipts tax on their receipts*. Note, however, that even when a transaction is not exempt, it may be deductible.

FYI-240, *Transactions with Government Agencies* (7/2014), page 3.

### ***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)xcept 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. After reviewing the exceptions or indications of nonnegligence found in regulation 3.1.11.11 NMAC (1/15/01), the only possible applicable regulation that might apply to Taxpayer is found in paragraph D of the regulation. Regulation 3.1.11.11(D) provides that:

(t)he taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by taxpayer's reliance on an agent;

To meet this regulation, it requires Taxpayer to prove that he reasonably relied on the advice of a competent accountant and that the competent accountant provided incorrect tax advice. The term "reasonable reliance" is a factual determination made by the Hearing Officer.

It requires evidence that the taxpayer acted reasonably or acted in a “(f)air, proper or moderate under the circumstances” and the person exercised reliance or a “(d)ependence or trust” on the advice of a competent accountant. *Black’s Law Dictionary*, 1379, 1404 (9<sup>th</sup> ed. 2009). This indication, as with the other indications of nonnegligence, are in keeping with the holding in *El Centro Villa Nursing Center v. Taxation & Revenue Dep’t.*, where the court stated that “(u)nder the statutory definition of negligence, it is inappropriate to impose a penalty where the taxpayer acted reasonably in failing to report income or to pay taxes.” *Id.* at ¶6. The court also held that a taxpayer is not relieved of his or her duty to ascertain the possible tax consequences of his action or inaction by abdicating this responsibility by merely appointing an accountant to act as an agent in tax matters. *Id.* at ¶14. Thus, in reading the regulation and *El Centro Villa*, the hiring of an accountant by itself is insufficient to prove that a taxpayer is nonnegligent. The taxpayer must act reasonably and he or she must have relied on the accountant’s incorrect tax advice.

The Administrative Hearings Office (formally known as the Hearings Bureau) has ruled in numerous cases that reasonable reliance on a CPA may be a reason for abatement of penalty especially when it seems clear from the evidence that the accountant provided “incorrect tax advice.” *See, Carlos Chavez Formerly d/b/a Mayan Construction*, Decision and Order No. 12-09 (the accountant failed to review the work of Taxpayer’s employee and failed to properly advise Taxpayer of time deadlines); *Jesus Hernandez*, Decision and Order No. 11-16 (the accountant stated in a letter that he had provided taxpayer with incorrect advice); *Wal-Mart*, Decision and Order No. 06-07 (taxpayer relied on in-house tax accountants to form a subsidiary company to reduce state tax liability); *Children’s Orchard*, Decision and Order No. 01-05 (taxpayer hired an accountant to give them advice to assist them in making sure their taxes were properly paid); and

*Eileen P. Cahoon*, Decision and Order No. 98-38 (taxpayer relied on her accountant's advice in not providing a timely NTTTC). *But see, Marilyn Stock*, Decision and Order 05-04 (taxpayer was not granted a refund of the penalty amount she paid even though she had relied on her CPA who used the wrong tax table in determining her tax liability).

In this case, Taxpayer's accountant was in charge of filing Taxpayer's gross receipts returns during the tax periods at issue. The accountant may have relied on Frances's statement that the transactions were nontaxable. Regardless, the transactions were taxable and Taxpayer reasonably relied on his accountant to file and pay gross receipts returns. Therefore, penalty should be abated.

### ***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 B]**.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessment issued under Letter ID No. L1323706928 and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set as required by NMSA 1978, Section 7-1B-8(A) (2015).

C. 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 he was entitled to an abatement.

D. Taxpayer did not rebut the presumption that he did owe the gross receipts tax.

E. Taxpayer provided laboratory services and he did not sell tangible personal property to CYFD for tax periods January 31, 2009 through May 31, 2015.

F. The Type 9 NTTC CYFD executed to Taxpayer was not applicable to the transactions with CYFD because it is not permissible to deduct services sold to a governmental agency pursuant to NMSA 1978, Section 7-9-54 (2003).

G. Services sold to a governmental agency are generally taxable pursuant to regulation 3.2.212.9 NMAC.

H. Taxpayer proved that he reasonably relied on Frances from CYFD and his accountant to deduct the receipts, albeit the receipts were not deductible.

I. Pursuant to regulation 3.1.11.11(D) NMAC, penalty is abated because Taxpayer relied on his accountant to deduct the receipts from CYFD for tax periods January 31, 2009 through May 31, 2015; accordingly, he does not owe penalty.

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

K. The total amount due for tax periods January 31, 2009 through May 31, 2015 is \$60,764.10 in principal gross receipts tax and \$7,587.48 in interest, with interest accrued through June 13, 2016.

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

DATED: June 14, 2016

*Monica Ontiveros*

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MONICA ONTIVEROS  
Hearing Officer  
Administrative Hearings Office

#### 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 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

