STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
LUSCOUS MUSIC **No. 16-27**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0193420336

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on March 24, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Roark Barron appeared *pro se* for Luscous Music ("Taxpayer"). Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibit #1 and Department Exhibits A-B were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 9, 2015, under letter id. no. L0193420336, the Department assessed Taxpayer for $2,213.30 in gross receipts tax, $442.66 in penalty, and $348.52 in interest for the CRS reporting periods between January 1, 2009 and December 31, 2011.

2. On January 12, 2016, Taxpayer prepared a letter of protest of the Department's assessment.

3. The Department received Taxpayer's protest on January 14, 2016.

4. On January 20, 2016, the Department's protest office acknowledged receipt of a valid protest.

5. On March 1, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

6. On March 10, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on March 24, 2016.

7. The March 24, 2016 hearing occurred within 90-days of the Department's acknowledgment of receipt of a valid protest.

8. Roark Barron is a sole proprietor doing business as Luscous Music as a music performer and seller of his musical work on a compact disc.

9. Taxpayer has a CRS number with the Department.

10. Taxpayer has a business license with the City of Santa Fe.

11. Taxpayer has a business website and has business cards.

12. Taxpayer would also occasionally perform paid gigs at local churches and events in Santa Fe.

13. Taxpayer performed as a street musician/busker on the Santa Fe Plaza, primarily for the purpose of selling his compact disc of music.

14. Taxpayer would perform on the Santa Fe Plaza three-times a week for two-hours at a time.

15. While performing on the street, Taxpayer sold compact discs for $10.00 and collected money from people passing-by in a tip jar.

16. Taxpayer sold on average between three and four compact discs, priced at $10.00 per disc, during each of his performances on the Plaza.

17. Taxpayer collected on average between $20 to $50 in his tip jar from people passing by during each of his performances on the Plaza.

18. Taxpayer maintained a ledger where he would note his compact disc sales separately from the money he received in the tip jar.

19. Taxpayer reported and paid gross receipts tax on his sales of compact discs, but did not report or pay gross receipts tax on the money collected from people passing by as he performed because he believed tips were not subject to gross receipts tax from his previous experience as a waiter.

20. Taxpayer used the volunteer services of AARP to prepare his federal and state income tax returns.

21. Taxpayer did not discuss his gross receipt tax obligations with the AARP volunteers.

22. There is no evidence that Taxpayer received a 1099 from any person or entity related to the money he collected in his tip jar.

23. Taxpayer did report the money he received in his tip jar from the people passing by on his federal income tax returns.

24. Through its Schedule C mismatch program with the IRS, the Department detected that Mr. Barron reported business income on his federal Schedule C income tax return that did not match the reported gross receipts on Taxpayer's filed CRS returns; this mismatch relates to money Taxpayer collected in his tip jar while performing street music on the Plaza. [Dept. Ex. B].

25. As a result of that mismatch, the Department issued its assessment described in more detail in finding of fact #1.

26. As of the date of hearing, Taxpayer owed $2,213.30 in gross receipts tax, $442.66 in penalty and $348.52 in interest for a total outstanding liability of $3,023.73. [Dept. Ex. A].

27. Taxpayer claimed he made approximately a $100 payment towards the liability which was not reflected on the Department's updated spreadsheet of liabilities. The Department agreed to review Taxpayer's records, review any canceled checks, and perhaps make an adjustment.

DISCUSSION

This case involves a question about whether money received in a tip jar while performing as a street musician is subject to gross receipts tax. Taxpayer asserted that he believed (based on his previous experience as a waiter) that tips were not subject to gross receipts and therefore, while he reported and paid gross receipts tax on his sales of compact discs to customers, he did not report and pay gross receipts tax on the money he received in a tip jar. The Department argues that the money Taxpayer received in the "tip" jar was not a tip, but actual payment for his services as a street musician on the Santa Fe Plaza, and thus subject to gross receipts tax.

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 he is entitled to an abatement, in full or in part, of the assessments issued against him. *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). "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). Taxpayer maintained a business website, had business cards, performed music gigs, sold CD's, had a business license with the City of Santa Fe, and had a business identification number registered with the Department for purposes of filing and paying CRS taxes. Under Regulation 3.2.116.9 NMAC, a person licensed to do business is considered to be engaged in business for gross receipts tax purposes. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). These facts make clear that Taxpayer was a person engaged in business in New Mexico under Section 7-9-3.3[1]. 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 under NMSA 7-9-3.5 (A) (1), the Legislature has defined "gross receipts" to mean "the total amount of money or the value of other consideration received from selling property in New Mexico… or from performing services in New Mexico." Taxpayer's receipts from sale of compact discs of music are subject to gross receipts tax, and Taxpayer in fact reported and paid gross receipts tax on those receipts. The question in this case is whether the money placed in his tip jar as Taxpayer performed street music on the Plaza constituted gross

[1] That does not necessarily mean that all buskers and street performers are people engaged in business in every circumstance, only that in this particular case where Taxpayer developed a website, issued business cards, accepted paid musical gigs, sold compact discs, and had a business license, this Taxpayer planned and carried out an activity for a direct financial benefit, meeting the definition under Section 7-9-3.3 and the condition articulated under Regulation 3.2.116.9 NMAC.

receipts subject to gross receipt s tax or whether it constituted a “tip” or “gratuity” not subject to gross receipts tax.

The Department has promulgated numerous regulations clarifying what is and what is not considered gross receipts, particularly as it relates to performance of services. *See generally* Regulation 3.2.1.18 NMAC. There regulations are presumed to be proper interpretations of the statute. *See Chevron U.S.A., Inc.*, 2006-NMCA-50, ¶16. Regulation 3.2.1.18 (R) NMAC addresses tips in the gross receipts tax context. Regulation 3.2.1.18 (R) NMAC states:

> R. Service charges; tips.
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> (1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.
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> (2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.
>
> (3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

Most pertinent to this case, is subparagraph (2), which states that a gratuity offered to service personnel to acknowledge a service given is not gross receipts. While such a tip usually arises in the context of hotels and restaurants, there is nothing about Regulation 3.2.1.18 (R) NMAC that limits a gratuity specifically to service personal in those industries. A street musician performs services that someone could certainly acknowledge through giving voluntary tips. While the Department argued that a tip is only something that can be added to a bill, there are many

circumstances were a person provides a tip entirely independent of a bill, such as to a house cleaner at a hotel, to the person who carries luggage at a hotel or airport, or to a bartender at a restaurant before moving onto the dinner table (where the bill comes after the meal). The method of how the tip is left is less important than the notion that it is a gratuity offered as acknowledgement for a service rendered by service personal.

Applying this regulation to the facts of this case, the money that Taxpayer received in the jar was a gratuity, not gross receipts. Black's Law Dictionary (10th Edition, 2014) defines "gratuitous" or "gratuity" as something "done or performed without obligation to do so; given without consideration in circumstances that do not otherwise impose a duty." In this case, no one who heard Taxpayer's street music performance on the Plaza was under a duty or obligation to remunerate Taxpayer in any manner. The Plaza is a public place, and no one was required to pay to listen to any of the music being performed on the Plaza. Taxpayer did not sell tickets for his performance, was not paid by the City of Santa Fe to perform on the Plaza, and there was no evidence, such as a 1099, that he was paid by any private entity or business to perform on the Plaza. Surely, many people who heard Taxpayer playing music on the Plaza choose to listen to Taxpayer's performance without purchasing a compact disc or placing any money in Taxpayer's jar. Although there was no requirement for anyone to do so, some people choose to give Taxpayer money in appreciation for his service of performing street music. People voluntarily throwing a quarter, or a dollar, or five dollar bill into Taxpayer's jar on the street, when there was absolutely no requirement to do so, constitutes the giving of a gratuity under the Black's Law Dictionary definition and for the purposes of Regulation 3.2.1.18 (R) (2) NMAC. As such, these receipts under the particular facts and circumstances of this case are not included in gross receipts and therefore are not subject to the gross receipts tax. Taxpayer's protest IS GRANTED.

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. Under Regulation 3.2.116.9, Taxpayer was licensed and thus Taxpayer was a person engaged in business under NMSA 1978, Section 7-9-3.3. As such, all of Taxpayer's receipts were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5.

D. Taxpayer reported and paid gross receipts tax on the sale of his compact discs.

E. Voluntary amounts of money placed in Taxpayer's tip jar by satisfied members of the public on the Plaza constituted gratuities under the Black's Law definition and under Regulation 3.2.1.18 (R) (2) NMAC, and thus under that regulation did not constitute gross receipts subject to gross receipts tax.

For the foregoing reasons, the Taxpayers' protest **IS GRANTED. IT IS ORDERED** that the Department's assessment **IS ABATED**.

DATED: June 17, 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 being preparing the record proper.