

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

**IN THE MATTER OF THE PROTEST OF
CAPACITY BUILDERS, INC.
TO ASSESSMENT ISSUED UNDER LETTER
NO. L0261743488**

No. 16-31

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 14, 2016, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Esq., attorney for the Department. Mr. Tom Dillon, protest supervisor, appeared as a witness for the Department. Capacity Builders, Inc. (“Taxpayer”) appeared through its owner, Wayne John Rausch, at the appointed time. The Department introduced into the record Exhibits A-D.

This matter was originally scheduled for hearing on April 14, 2016. The Notice of Administrative Hearing was mailed to Taxpayer at his last known address or at 1150 W. Littleton Blvd., Littleton, CO 80120. Taxpayer did not receive the Notice because he had moved his office during the seven years it took the Department to request a hearing. When the Hearing Officer issued her Decision and Order, she mailed the Decision and Order to Taxpayer’s last known address and his address listed on the internet. Taxpayer received the Decision and Order finding against him and requested that the matter be rescheduled. The Hearing Officer granted Taxpayer’s request. Prior to the commencement of this hearing, Taxpayer requested that the hearing be rescheduled. The Department objected to the continuance and the Hearing Officer

denied Taxpayer's request for a continuance.

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 September 14, 2009, the Department assessed Taxpayer for gross receipts tax: in the amount of \$11,690.25 in principal and \$3,266.61 in interest for tax period March 31, 2004 through March 31, 2008. No penalty was assessed. Taxpayer was also assessed \$2,314.59 in withholding principal tax, \$462.92 in penalty and \$818.46 in interest. [Letter Id. No. **L0261743488**].

2. Taxpayer filed his protest on October 9, 2009. Taxpayer did not protest the withholding tax assessment.

3. On October 15, 2009, the Department acknowledged the protest. [Letter ID No. **L1290057600**].

4. On November 4, 2015, the Department requested a hearing in the protest of the gross receipts tax assessment for the tax period at issue. A hearing cannot be set by the Administrative Hearings Office until a hearing request is submitted by either a taxpayer or the Department. There was no explanation offered by the Department as to why the matter was not submitted to the Administrative Hearings Office in a more timely manner.

5. This matter was reassigned to this Hearing Officer on April 8, 2016.

6. A Decision and Order was issued denying Taxpayer's protest on April 27, 2016.

7. The Hearing Officer granted Taxpayer's request on May 27, 2016 for a new hearing, and issued an Order setting the hearing for June 14, 2016.

8. Taxpayer did not file gross receipts returns for the periods at issue. [**Exhibit B, page AN1.1**].

9. 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 September 5, 2008. [**Exhibit B, page AN1.0**].

10. Taxpayer provided the Department with timely nontaxable transaction certificates (NTTCs) from HJ Martin & Son Inc. (Type 6), Southwest Fixture Installers, Inc. (Type 5), and Starnes & Oswald Construction Inc. (Type 5). [**Exhibits D-3, D-4 and D-5**].

11. During the tax periods at issue, Taxpayer was a S corporation and out-of-state business providing retail store setup, remodeling, finish outs, plant equipment moves, installation services of fixtures, carpentry and mechanical work to construction contractors. [**Exhibit B, page AN1.0 and CD 06/14/16, 6:55-7:07; 7:32-8:05 and 9:35**].

12. Taxpayer was engaged in construction-related services to contractors. [**CD 06/14/16, 5:40-5:50**].

13. Taxpayer employed skilled workers to complete the construction related services. [**Exhibit B, page AN1.4**].

14. The Department informed Taxpayer that he needed to obtain Type 5 (sale of a service for resale in the ordinary course of business) and Type 6 (sale of a construction service to be performed on a construction project that is subject to gross receipts tax upon completion) NTTCs. [**Exhibit B, page AN1.1**].

15. Taxpayer obtained as many Type 5 and Type 6 NTTCs as he could obtain.

16. Taxpayer was not able to obtain NTTCs from all the contractors he did business with because many had gone out of business. [CD 06/14/16, 22:16].

17. Upon finalizing the audit, and after the 60 day period had elapsed, the Department informed Taxpayer that the Type 5 and 6 NTTCs were the wrong type. [Exhibit B, page AN1.0].

18. The audit narrative does not explain why the auditor determined that the Type 5 and Type 6 NTTCs were the wrong type other than Taxpayer was a staffing company. [Exhibit B, page AN1.3].

19. Taxpayer testified that the services performed for HJ Martin & Son Inc. (Type 6), Southwest Fixture Installers, Inc. (Type 5) and Starnes & Oswald Construction Inc. (Type 5) (collectively known as “Companies”) were resold and the construction project was subject to gross receipts tax upon completion or the final projects were subject to gross receipts tax or

20. Taxpayer is not a licensed contractor. [CD 06/14/16, 14:12].

21. At the hearing, the Department conceded that a properly executed Type 5 NTTC was valid and should have been accepted by the auditor. [CD 06/14/16, 15:50-16:39].

22. All receipts detailed in the audit from Starnes & Oswald Construction Inc. are deductible because they were sold as a service for resale in the ordinary course of business and Taxpayer had a timely Type 5 NTTC. [Exhibit D-3 and Exhibit B, page AN1.0-AN1.6].

23. The Type 5 NTTC from Southwest Fixture Installers, Inc. was not properly executed, although it was timely and the correct type of NTTC. The auditor marked the NTTC with Taxpayer’s name. The NTTC was submitted one day prior to the 60th day or on September 4, 2008. [Exhibit D-4; CD 06/14/16, 26:00-26:59].

24. Taxpayer received the NTTC from Southwest Fixture Installers, Inc. in good faith.

25. All receipts detailed in the audit from Southwest Fixture Installers, Inc. are deductible even though the NTTC was not properly executed because Taxpayer received the NTTC in good faith. **[Exhibit D-4 and Exhibit B, page AN1.0-AN1.6].**

26. The Type 6 NTTC from HJ Martin & Son, Inc. was properly issued by the Department to a construction contractor.

27. The services provided to HJ Martin & Son, Inc. were construction-related services performed on a construction project that was subject to gross receipts tax upon completion.

28. All receipts detailed in the audit from HJ Martin & Son, Inc. are deductible and the Type 6 NTTC was valid. **[Exhibit D-5 and Exhibit B, page AN1.0-AN1.6].**

29. All other receipts from Structures, Inc., Quest Service Group, LLC, Allstate Installations, The Bean Team, Inc., Wepco, Inc., Phoenix Retail Group and Timberwolff Construction are not deductible because Taxpayer did not provide a NTTC to the Department.

30. Taxpayer does not dispute that the receipts from Structures, Inc., Quest Service Group, LLC, Allstate Installations, The Bean Team, Inc., Wepco, Inc., Phoenix Retail Group and Timberwolff Construction are not deductible.

DISCUSSION

The two issues to be decided are whether the NTTC from Southwest Fixture Installers, Inc. (Type 5) was valid since it was not properly executed and whether the NTTC from HJ Martin & Son Inc. (Type 6) is valid for the transactions at issue. As for the Type 5 NTTC, the Department argued that the Type 5 was not properly executed and it argued that Taxpayer was not engaged in construction and therefore the Type 6 NTTC was not valid.

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).

Good Faith and the Type 5 NTTC

For the tax periods at issue, Taxpayer provided a service and was in the business of construction related services to contractors; specifically Taxpayer provides services in retail store setup, remodeling, finish outs, plant equipment moves, installation services of fixtures, carpentry and mechanical work to construction contractors. Since the Department concedes that the Type 5 NTTC, a sale of service for resale¹, was valid for the deduction, the only issue is whether the Type 5 NTTC from Southwest Fixture Installers, Inc. was properly executed. There is no question that the Type 5 NTTC from Southwest Fixture Installers, Inc. did not contain the name of the seller or Taxpayer’s name.

An NTTC should be in executed properly. Section 7-9-43(A) provides that

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees 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. ... The nontaxable transaction certificates ***shall contain the information and be in a form prescribed by the department.***

NMSA 1978, §7-9-43(A) (2011) (emphasis added). In this case, the Type 5 NTTC form was the proper form, however, the buyer of the services failed to provide Taxpayer’s information as the seller of the services.

However, under the “good faith” provision found within Section 7-9-43(B) (2011), it provides that if a transaction is deductible, and if the NTTC is timely on a form prescribed by the

¹ NMSA 1978, §7-9-48 (2000).

Department, then the deduction is allowed. Tax statutes must “be given a fair, unbiased, and reasonable construction without favor or prejudice to either the taxpayer or the [s]tate, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered.” *Chavez v. Comm’r of Revenue*, 1970-NMCA-116, 7, 82 N.M. 97, 476 P.2d 67. In this case, Taxpayer had the right NTTC at the right time.

Normally, all of the information on an NTTC must be fully executed. What mitigates the requirement in this case, that the NTTC be fully executed, is that Taxpayer faxed the NTTC to the Department during the 60 day period. No one from the Department assisted Taxpayer in letting him know that the NTTC needed to be fully executed. Taxpayer submitted the NTTC one day prior to the expiration of the 60 days. He certainly had time to request a fully executed NTTC from Southwest Fixture Installers, Inc. prior to the expiration of the 60 days. Once the 60 days expires, the Department cannot accept an NTTC. With all of these facts, Taxpayer accepted the Type 5 NTTC from Southwest Fixture Installers, Inc. in good faith and the receipts are deductible.

Type 6 NTTC and Construction-Related Services

Generally speaking, a Type 6 NTTC may be used to deduct receipts if the sale consists of construction services to be performed on a construction project that is subject to gross receipts tax upon completion. NMSA 1978, Section 7-9-52(A) (2012) provides that “(r)eceipts 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.” (emphasis added). In addition, to ensure that the construction-

related service is related to construction, regulation 3.2.201.11(A) NMAC (11/30/05) requires that “(a)ny person applying to execute nontaxable transaction certificates (nttcs) related to construction ... must indicate the applicant’s New Mexico contractor’s license number or furnish proof that no contractor’s license is required...” By requiring the contractor’s license number of the buyer, the Department is assured that the buyer of the services is a contractor. Otherwise, the Department does not issue a Type 6 NTTC to the buyer, unless the buyer explains that that a contractor’s license is not necessary. 3.2.201.11(A) NMAC (11/30/05).

In this case, the Type 6 NTTC from HJ Martin & Son Inc. was issued by the Department to a contractor, HJ Martin & Son Inc. The services were provided to a contractor. The services do not have to be provided *by* a contractor. The services only have to be construction-related services under Section 7-9-52. This is evidenced in the regulations. For example, regulation 3.2.210.9 NMAC (05/31/01) allows well construction services to be deducted if the services are provided to a contractor; regulation 3.2.210.10 NMAC (12/14/12) allows haulers to deduct their services if the services are provided to a contractor; and regulation 3.2.210.15(A) NMAC (05/31/01) allows cleaning of the construction site to be deducted if the services are provided to a contractor.

In this case, the services provided by Taxpayer were construction-related and were provided to a contractor. Thus, the receipts from HJ Martin & Son Inc. are deductible under Section 7-9-52, and the Type 6 NTTC is proper.

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.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely written protest to the assessment issued under Letter ID No. L0261743488 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 rebutted the presumption that he owed some of the gross receipts tax principal amount.
- D. Taxpayer provided the Department with timely NTTCs from HJ Martin & Son Inc. (Type 6), Southwest Fixture Installers, Inc. (Type 5), and Starnes & Oswald Construction Inc. (Type 5).
- E. The Department conceded that the Type 5 NTTCs, while disallowed in the audit, were valid for the deduction claimed pursuant to NMSA 1978, Section 7-9-48(2000).

F. All receipts detailed in the audit from Starnes & Oswald Construction Inc. are deductible because they were sold as a service for resale in the ordinary course of business, a Type 5 NTTC.

G. Taxpayer received the Type 5 NTTC from Southwest Fixture Installers, Inc. in good faith, even though the Type 5 NTTC was not properly executed.

H. The receipts detailed in the Department's audit from Southwest Fixture Installers, Inc. are deductible.

I. The receipts from HJ Martin & Son Inc. are construction-related receipts and are deductible under NMSA 1978, Section 7-9-52 (2012).

J. The Type 6 NTTC received from HJ Martin & Son Inc., a contractor, is valid for the deduction claimed.

K. The services performed for HJ Martin & Son Inc. (Type 6), Southwest Fixture Installers, Inc. (Type 5), and Starnes & Oswald Construction Inc. (Type 5), were resold and the final projects were subject to gross receipts tax or the construction project was subject to gross receipts tax upon completion.

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

M. Taxpayer owes the withholding tax, penalty and interest as set out in the Notice of Assessment.

N. The Department shall make the adjustments as noted above.

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

DATED: June 28, 2016

Monica Ontiveros

MONICA ONTIVEROS
Hearing Officer
Administrative Hearings Office
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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 Griego, Administrative Hearings Office at P.O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

