STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
PROFESSIONAL SERVICES COMPANY **No 16-36**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L1114262848 and L2087341376

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on February 10, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Thomas Austin appeared *pro se* for Professional Service Company ("Taxpayer"). Staff 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 Exhibits #1-9 were admitted into the record. Department Exhibits A-C and J were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 5, 2013, through letter id. no. L2087341376, the Department assessed Taxpayer for $450.28 in gross receipts tax, $90.06 in penalty, and $72.16 in interest for a total assessment of $602.50 for the CRS reporting period ending December 31, 2008.

2. On February 5, 2013, through letter id. no. L1114262848, the Department assessed Taxpayer for $374.83 in gross receipts tax, $74.97 in penalty, and $42.99 in interest for a total assessment of $492.79 for the CRS reporting period ending December 31, 2009.

3. On February 22, 2013 and February 26, 2013, Taxpayer timely protested the Department's respective assessments.

4. On March 4, 2013 and March 7, 2013, the Department's protest office acknowledged receipt of the protests.

5. On October 19, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office, an agency independent of the Department under the Administrative Hearings Office Act.

6. Before the October 19, 2015 Department request for hearing, the Administrative Hearings Office had no knowledge of this matter and no statutory authority to act in this matter.

7. On October 29, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on December 2, 2015 at 1:00 p.m.

8. On November 10, 2015, the Department moved for a continuance of the scheduled December 2, 2015 hearing until later on that same date because of a medical appointment.

9. On November 13, 2015, the Administrative Hearings Office sent Amended Notice of Administrative Hearing, rescheduling this matter for a merits hearing on December 2, 2015 at 2:00 p.m.

10. On December 2, 2015, Taxpayer submitted motion to continue the scheduled hearing, citing that he had conceded tax liability for the 2009 assessment but wanted to gather further information in the form of bank statements regarding the 2008 assessment. The Department opposed Taxpayer's request for continuance.

11. The December 2, 2015 hearing was continued and on December 3, 2015, the Administrative Hearings Office sent a Second Amended Notice of Administrative Hearing, rescheduling the hearing for February 10, 2016 at 1:00 pm.

12. On December 4, 2015, the Department filed a certificate of service on Interrogatories and Request for Production.

13. Taxpayer responded to the Interrogatories and Request for Production in a series of emails to the Department's attorney. In one such email, dated January 18, 2016, Taxpayer asserted that his 2009 receipts were exempted from gross receipts tax as isolated and occasional sales or leasing in light of a recent decision and order of the Administrative Hearings Office, *In the Matter of the Protest of Larry J. Gonzales*, No. 15-40 (non-precedential).

14. After conclusion of the hearing, on February 11, 2016, Taxpayer submitted an unsolicited email statement to the Administrative Hearings Office and to the Department's counsel.

15. Mr. Austin is a civil engineer who performs surveying work and serves as a construction project superintendent.

16. Mr. Austin is the sole proprietor of Taxpayer Professional Services Company, started in 2008, performing various professional services including surveying-related services, construction-related civil engineering services, real estate development, guiding hunters, federal tax preparation services, and process serving/evictions.

17. In 2008, Taxpayer received $7,044.76 from TKG Development, LLC, which Taxpayer used to pay bills accrued on behalf of TKG. [Taxpayer Exhibit #3].

18. TKG Development, LLC, provided Taxpayer with a 1099-MISC for the money it had paid to Taxpayer in 2008, including $7,044.76 amount. [Taxpayer Exhibit #5].

19. Taxpayer did not establish that he was a disclosed agent of TKG Development, LLC, for the receipt of the money.

20. Taxpayer did not provide evidence that the $7,044.76 amount had been billed separately to TKG Development, LLC.

21. In 2008 and 2009, Mr. Austin performed surveyor work for Construction Surveying Services, along with four other surveyors.

22. Mr. Austin used his own equipment to perform the work with Construction Surveying Services and charged Construction Surveying Services a rental fee for use of the equipment.

23. Mr. Austin was paid $15.00 per hour for the surveying work he did for Construction Surveying Services.

24. Taxpayer did not establish that Construction Surveying Services was required to withhold income tax from Mr. Austin's wage.

25. Taxpayer did not establish that Construction Surveying Services was required to pay FICA tax on Mr. Austin's wage.

26. Taxpayer did not establish that Construction Surveying Services paid worker's compensation insurance for Mr. Austin.

27. Taxpayer did not establish that Construction Surveying Services paid unemployment insurance contributions for Mr. Austin.

28. Taxpayer did not establish whether Construction Surveying Services considered Mr. Austin an employee.

29. Construction Surveying Services provided Mr. Austin with a 1099 for the money it paid Taxpayer in 2009 for the rental of equipment.

30. Through its Schedule C mismatch program with the IRS, the Department detected that Mr. Austin reported business income on his federal Schedule C income tax return that did not match the reported gross receipts reported on Taxpayer's filed CRS returns. [Dept. Ex. B].

31. As a result of that mismatch, the Department issued its assessment described in more detail in findings of fact #1 and #2.

32. As of the date of hearing, for the CRS reporting period ending on December 31, 2008, Taxpayer owed $450.28 in gross receipts tax, $90.06 in penalty, and $106.90 in interest for a total outstanding liability of $647.24. As of the date of hearing, for the CRS reporting period ending on December 31, 2009, Taxpayer owed $374.837 in gross receipts tax, $74.97 in penalty, and $73.33 in interest for a total outstanding liability of $523.13. [Dept. Ex. J].

DISCUSSION

There are two main issues in this protest. The first issue is whether in 2008, Taxpayer's receipts from TKG Development, LLC, were exempt from gross receipts tax as reimbursed expenditures. The second issue is whether Taxpayer's 2009 receipts from Construction Surveying Services were not subject to gross receipts tax either as employee wages or as isolated and occasional sales.

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *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.

Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *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). 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.

Gross Receipts Tax in 2008 and 2009.

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). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), the term "gross receipts" is broadly defined to mean

> 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.

"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). Gross receipts applies to the performance of a service in New Mexico as well as the leasing of property employed in New Mexico. *See* NMSA 1978, § 7-9-3.5 (2007). 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 this case, Mr. Austin was a person engaged in business as the sole proprietor of Professional Service Company performing myriad services, including renting surveying equipment as he performed surveying services. As such, under Section 7-9-5, all of Taxpayer's receipts in both 2008 and 2009 are statutorily presumed subject to gross receipts tax.

Taxpayer argued that the 2008 assessment of gross receipt tax was incorrect because he made an accounting error in including reimbursed expenses he received from TKG Development, LLC, on the Schedule C, an amount that Taxpayer contends was not subject to gross receipts tax because it was reimbursed expenses. Supporting this argument, Taxpayer presented an amended Schedule C that removed the amount Mr. Austin considered as reimbursed expenditures from his gross receipts on the Schedule C. However, removing the amount from the Schedule C does not establish whether the receipts in question constituted gross receipts tax or were not subject to gross receipts as reimbursed expenditures.

NMSA 1978, Section 7-9-3.5(A) (3) (f) states that excluded from gross receipts are "amounts received solely on behalf of another in a disclosed agency capacity." Under Regulation 3.2.1.19(C) (1) NMAC, "(a)n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal." Regulation 3.2.1.19(C)(2) NMAC further requires that the reimbursed expenditure be separately stated on the bill and listed separately on the taxpayer's books. In applying the reimbursed expenditures to the gross receipts tax, the Court of Appeals in *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶36, 133 N.M. 217, construed Regulation 3.2.1.19(C)(1) NMAC to mean that:

> (1) the agent [taxpayer] has the authority to bind the principal… to an obligation… created by the agent [taxpayer], and (2) the beneficiary of

> that obligation… is informed by contract that he or she has a right to proceed against the principal… to enforce the obligation.

Additionally, the New Mexico Court of Appeals in *MPC LTD* noted that Regulation 3.2.1.19 (C) NMAC imposed additional bookkeeping requirements that must be met in order to exclude receipts received as part of a disclosed agency capacity from gross receipts. *See id*.

In this case, Taxpayer presented no evidence that he was a disclosed agent of TKG Development, LLC, with the ability to bind TKG Development, LLC, to a third party. Nor did Taxpayer present any billing information establishing that the amounts in question were separately stated as a reimbursed expenditure. Therefore, Taxpayer failed to carry his burden under the presumption of correctness to establish that the receipts in question were received in a disclosed agency capacity under Section 7-9-3.5 (A) (3) (f) or Regulation 3.2.1.19 (C) NMAC. Thus, the Department's 2008 assessment was proper.

Turning to the 2009 receipts, Taxpayer argued that his rental of his equipment to Construction Surveying Services as an employee was isolated and occasional and thus not subject to gross receipts tax under NMSA 1978, Section 7-9-28, as interpreted in the recent decision and order *In the Matter of the Protest of Larry J. Gonzales*, No. 15-40 (non-precedential).

Exempted from gross receipts taxes are the wages of employees. *See* NMSA 1978, § 7-9-17. A person who is an employee is not required to register, file, or pay gross receipts tax. *See* § 7-9-5 (A) and Regulation 3.2.100.8 NMAC. The determination of whether a taxpayer is an employee is a fact intensive inquiry. Regulation 3.2.105.7 (A) NMAC lists seven criteria for the Department to use in determining whether a person is an employee for the purposes of the exemption under

Section 7-9-17:

> A. In determining whether a person is an employee, the department will consider the following indicia:
> (1) is the person paid a wage or salary;
> (2) is the "employer" required to withhold income tax from the person's wage or salary;
> (3) is F.I.C.A. tax required to be paid by the "employer";
> (4) is the person covered by workmen's compensation insurance;
> (5) is the "employer" required to make unemployment insurance contributions on behalf of the person;
> (6) does the person's "employer" consider the person to be an employee;
> (7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

Under Regulation 3.2.105.7 (B) NMAC, "[i]f all of the indicia mentioned in Subsection A of Section 3.2.105.7 NMAC are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present." In this case, although he suggested in testimony numerous times that he was an employee, Mr. Austin (whom carries the burden under the presumption of correctness) did not present sufficient evidence to establish he was an employee of Construction Surveying Services under the factors articulated by Regulation 3.2.105.7 (A) NMAC. Thus, to the extent that Taxpayer argued his receipts from Construction Surveying Services were exempt from gross receipts tax under Section 7-9-17, Taxpayer did not carry his burden on this point.

Taxpayer further argued that the rental of the surveying equipment to Construction Surveying Services was isolated and occasional under NMSA 1978, Section 7-9-28. Exempt from gross receipts tax under NMSA 1978, Section 7-9-28, are

> …the receipts from the isolated or occasional sale of or leasing of property or a service by a person who is neither regularly engaged nor holding himself out as engaged in the business of selling or leasing the same or similar property or service.

Under Regulation 3.2.116.8 NMAC,

> The department will use the following criteria, but not exclusively, in determining whether or not a transaction involves only an "isolated or occasional" sale or lease:
> A. the nature of the service or property;
> B. the nature of the market for the service or property sold or leased;
> C. the number of sales or leases made within a given period;
> D. the regularity of the sales;
> E. the duration of the sales or leasing activity;
> F. any promotional activity such as advertising or telephone yellow page listings; and
> G. any holding out as being in business by the seller or lessor.

Applying those factors to the the facts of this case, Taxpayer rental services to Construction Surveying Services were not isolated and occasional under subparagraphs (A), (C), (D), (E), and (G). Under Regulation 3.2.116.8 (G) NMAC, and unlike the protesting taxpayer at issue *In the Matter of the Protest of Larry J. Gonzales*, No. 15-40 (non-precedential), Taxpayer in this case had a registered business with the state, Professional Services Company, where Taxpayer performed various professional service activities. The Larry J. Gonzales taxpayer was a teacher without any other separate business entity related to that service, while in this case Taxpayer had a business where he engaged in multiple different types of activities, including activities related to the rental of the surveying equipment. In 2009, Taxpayer rented the equipment on a regular basis to Construction Surveying Services over the course of the year to regularly perform surveying work, which resulted in a not insignificant total of $26,567.75, establishing subparagraphs (A), (C), (D), & (E). Under these facts, there is no basis to conclude that Taxpayer's rental activities were isolated and occasional in 2009. Thus, under the presumption of correctness, the Department's 2009 assessment was proper.

<u>Interest and Penalty.</u>

Since Taxpayer challenged all of the assessments, interest and penalty will briefly be addressed even though they were not expressly argued at hearing. When a taxpayer fails to make

timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24. The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. In this case, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from when the tax was originally due until Taxpayer pays the gross receipts tax principal in this matter.

When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

> 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.

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp* , ¶22 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C)

"inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was negligent under Regulation 3.1.11.10 (B) & (C) NMAC because Taxpayer failed to report and pay gross receipts tax when due because he believed the receipts in question were not subject to gross receipts tax. Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. In New Mexico, a lack of knowledge of the requirements of taxation, inadvertent error, and/or erroneous belief constitutes the civil negligence subject to penalty under Section 7-1-69. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795 (inadvertent error constitutes civil negligence). Taxpayer's mistaken belief that the receipts from TKG Development, LLC in 2008 and from Construction Surveying Services in 2009 were not subject to gross receipts tax amounted to civil negligence. The Department's assessment of penalty and interest in this matter was appropriate and Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessments, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer was a person engaged in business for the purposes of NMSA 1978, § 7-9-3.3 (2003), and as such all of Taxpayer's receipts were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

C. Taxpayer did not establish he was a disclosed agent of TKG Development LLC in 2008, did not establish that he separately billed the disputed amount on the invoices on TKG Development LLC, and thus did not meet the requirements under NMSA 1978, Section 7-9-3.5(A)

(3) (f) or Regulation 3.2.1.19(C) NMAC to exclude those amounts from gross receipts tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶36, 133 N.M. 217.

D. Taxpayer did not establish that he was entitled to an exemption of tax under NMSA 1978, § 7-9-17 as an employee for the receipts reported on the Schedule C from Construction Surveying Services in 2009.

E. Taxpayer 2009 rental of equipment to Construction Surveying Services was not isolated and occasional under NMSA 1978, Section 7-9-28 in light of the factors under Regulation 3.2.116.8 NMAC.

F. Taxpayer did not overcome the presumption of correctness that attached to the assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

G. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

H. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. As of the date of hearing, for the CRS reporting period ending on December 31, 2008, Taxpayer owed $450.28 in gross receipts tax, $90.06 in penalty, and $106.90 in interest for a total outstanding liability of $647.24. As of the date of hearing, for the CRS reporting period ending on December 31, 2009, Taxpayer owed $374.837 in gross receipts tax, $74.97 in penalty, and $73.33 in interest for a total

outstanding liability of $523.13. Interest under both assessments continues to accrue until the underlying tax principal is satisfied.

DATED: July 12, 2016.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
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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.