

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

**IN THE MATTER OF THE PROTEST OF
GUTIERREZ AGGREGATE SYSTEMS LLC,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1752805936**

No. 16-40

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 7, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Melinda Wolinsky, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Lawrence Gutierrez, owner of Gutierrez Aggregate Systems LLC (Taxpayer), appeared for the hearing. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 23, 2016, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period from January 1, 2012 through December 31, 2012. The assessment was for \$8,656.84 tax, \$1,731.36 penalty, and \$864.26 interest.
2. On May 2, 2016, the Taxpayer filed a formal protest letter.
3. On May 16, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On May 17, 2016, the Hearings Office issued a notice of hearing. The hearing was held within 90 days of the protest.

5. In 2012, the Taxpayer was engaged in business in New Mexico. The Taxpayer's business consisted of providing construction services and materials.
6. The Taxpayer served as a subcontractor for another business during that time.
7. The Department issued a notice of audit to the Taxpayer on November 21, 2015. The notice also advised the Taxpayer of its responsibility to obtain nontaxable transaction certificates (NTTCs) within 60 days of the letter (the 60-day letter).
8. The deadline for NTTCs was January 20, 2016.
9. The Taxpayer immediately contacted the owner of the business for whom it was serving as a subcontractor in 2012. The Taxpayer requested a NTTC from that business.
10. The owner of the business assured the Taxpayer that it would give the Taxpayer a NTTC.
11. The Taxpayer repeatedly contacted the business owner and requested the NTTC be delivered. The Taxpayer explained that he was on a deadline to obtain it.
12. The business owner said that she would get the NTTC at her convenience and then would issue it to the Taxpayer.
13. The business was issued the NTTC on March 15, 2016. The business then executed the NTTC to the Taxpayer on March 15, 2016.
14. The Taxpayer was in possession of the NTTC almost two months past the 60-day deadline of January 20, 2016.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the gross receipts tax, penalty, and interest that were assessed.

The Taxpayer argued that it was not at fault for the late NTTC. The Taxpayer argued that the other business owner refused to provide it in a timely fashion. The Taxpayer argued that the

Department should have granted it additional time to obtain the NTTC. The Taxpayer also argued that it was fundamentally unfair to require it to pay taxes years later when it has gone out of business.

The Department argued that the Taxpayer has the responsibility of obtaining NTTCs at the time of the transaction. The Department argued that the 60-day deadline is a function of the statute. The Department argued that the Taxpayer did not obtain the NTTC within the statutory time frame and that deductions are prohibited by the statute.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that it is entitled to an abatement. The burden is on the Taxpayer to prove that it is entitled to an exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep’t.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation and Revenue Dep’t.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep’t.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

Gross Receipts Tax.

Anyone who engages in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-3.5 (2007). Services are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2012). The Taxpayer admitted that it was engaged in business. The Taxpayer admitted that it was working as a subcontractor for the other business during 2012.

NTTCs.

A taxpayer may deduct certain gross receipts only when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2011). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due, but may also produce NTTCs within 60 days of notice from the Department. *See id.* The seller must accept the NTTC in good faith. *See id.* Businesses providing construction services and materials may deduct their gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-51 and § 7-9-52.

The Taxpayer was served with the 60-day letter by mailing on November 21, 2015, and the 60-day deadline was January 20, 2016. The Taxpayer received the proper NTTC from the other business on March 15, 2016. Therefore, the NTTC was not received timely. *See* NMSA 1978, § 7-9-43. When a taxpayer “is not in possession of the required [NTTCs] within sixty days from the date that the notice...is given..., deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall be disallowed*”. NMSA 1978, § 7-9-43 (A) (emphasis added). The word “shall” indicates that the denial of the deduction is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess a NTTC in the right form and within the time prescribed by the Department is a valid reason to deny the deduction even though

form is not favored over substance. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep't.*, 1988-NMCA-042, ¶ 22, 107 N.M. 392 (holding that the Department had properly denied the deduction when the taxpayer had not received the proper form from the buyer within the time limit). Therefore, the Department properly denied the deductions, and the Taxpayer is liable for the gross receipts tax.

Assessment of Penalty.

The Taxpayer argued that it should not have to pay penalty. The Taxpayer argued that the other business had a NTTC on file. The Taxpayer argued that it repeatedly contacted the other business after it received the 60-day letter. The Taxpayer argued that the failure of the other business to provide the NTTC within the deadline should not subject the Taxpayer to penalty.

Penalty “*shall* be added to the amount assessed” when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). Again, the word “*shall*” indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp.*, 2009-NMSC-013, ¶ 22. Assessments of penalty are presumed to be correct and it is a taxpayer’s burden to show that the assessment was not correct. *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070. It is a taxpayer’s responsibility to obtain NTTCs at the time that the return is due. *See* NMSA 1978, § 7-9-43. If a taxpayer is not in possession of NTTCs at that time, it should not take deductions on its gross receipts. *See id.* The fact that the statute allows an additional 60 days after notice is a legislative grace and does not mean that a taxpayer is entitled to take the deductions without a timely NTTC. *See id.* Moreover, a business that could execute NTTCs to its buyers is not required to do so. *See id.* (indicating that NTTCs are a privilege that buyers can exercise). If a buyer refuses to provide a NTTC to a seller,

then the seller knows not to take the deduction and to charge and pay the gross receipts taxes at the time. *See id.* A taxpayer who takes the deduction without first obtaining the NTTC is running the risk that the NTTC will be unavailable in the future. *See id.* Negligence includes failure to exercise ordinary business care, a mistaken belief, and inaction where action is required. *See* 3.1.11.10 NMAC (2001). As the Taxpayer was not in possession of the NTTC within the statutory deadline, the Taxpayer was negligent. Therefore, penalty was appropriately assessed.

Assessment of Interest.

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). Again, the word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp.*, 2009-NMSC-013, ¶ 22. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts taxes issued under Letter ID number L1752805936, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer failed to obtain a timely NTTC. *See* NMSA 1978, § 7-9-43. *See also* 3.2.201.8 NMAC. *See also Proficient Food Co.*, 1988-NMCA-042 (holding that failure to timely possess a NTTC was a valid reason to deny the deduction).

C. Therefore, the deductions were properly denied, and the Taxpayer was appropriately assessed for gross receipts taxes. *See* NMSA 1978, § 7-9-43.

D. The Taxpayer mistakenly believed that it would be able to obtain a timely NTTC and did not pay its gross receipts taxes when they were due. Therefore, the Taxpayer was negligent and penalty was appropriately assessed. *See* NMSA 1978, § 7-1-69. *See* 3.1.11.10 NMAC (2001).

E. The Taxpayer failed to pay the tax when it was due, so interest was appropriately assessed. *See* NMSA 1978, § 7-1-67.

F. The Taxpayer failed to overcome the presumption that the assessment was correct. *See* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: July 27, 2016.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

