

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

**IN THE MATTER OF THE PROTEST OF
LUIS M. FERNANDEZ,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0796504624**

No. 16-41

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 Mr. Marek Grabowski, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Luis Fernandez (Taxpayer) appeared for the hearing. At the Taxpayer's request, his brother and sister-in-law, Mr. Leonardo Fernandez and Ms. Amanda Ruggles, also appeared for the hearing. The Taxpayer, his brother, Ms. Ruggles, and Mr. Dillon testified at the hearing. No exhibits were submitted. After the record was closed, with all of the parties still in the hearing room, Mr. Grabowski gave the Taxpayer and the Hearing Officer a copy of the updated liability amounts. The document was placed with the administrative file, but as the document was not submitted on the record, it was not considered in the decision. 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, 2008 through December 31, 2012. The assessment was for \$16,520.78 tax, \$3,304.16 penalty, and \$2,675.47 interest.
2. On May 3, 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. During 2008 through 2012, the Taxpayer was working as a painter for a particular company (the Company).
6. The Taxpayer was paid weekly and was issued 1099s as an independent contractor.
7. The Taxpayer believed that he was an employee of the Company.
8. The Company, his co-workers, and his tax preparer led the Taxpayer to believe that he was receiving 1099s instead of W-2s because he did not have a social security number, but that he was still an employee.
9. The Taxpayer used a tax preparer who spoke Spanish and trusted that she was telling him how to handle his taxes appropriately. The tax preparer never explained gross receipts tax to the Taxpayer.
10. The Department issued a notice of audit to the Taxpayer on November 21, 2015. The notice also advised the Taxpayer of his responsibility to obtain nontaxable transaction certificates (NTTCs) within 60 days of the letter (the 60-day letter).
11. The deadline for NTTCs was January 20, 2016.
12. The Taxpayer first contacted his tax preparer for assistance. The tax preparer said she would take care of it and would send the documentation to the Department. The tax preparer did not do so and stopped responding to the Taxpayer.
13. The Taxpayer contacted the Company and requested a NTTC.

14. The Company was willing to execute a NTTC to the Taxpayer before the 60-day deadline, but was unable to do so at that time because the Company was ineligible for NTTCs due to its own tax delinquencies.
15. The Company came into compliance, and was issued NTTCs from the Department. The Company then executed a NTTC to the Taxpayer on April 29, 2016, which was more than three months past the 60-day deadline.
16. The NTTC provided to the Taxpayer was the wrong type. It was a NTTC for sale of tangible goods rather than one for the sale of services.

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 he did not know about gross receipts tax, believed he was an employee, and was not trying to evade his taxes.

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 he is entitled to an abatement. The burden is on the Taxpayer to prove that he 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.

Generally, services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). It is the responsibility of the taxpayer, who is in the position to know the details of his business activities, to determine accurately and to report his tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. However, an employee’s receipts of wages, salary, commissions, and other forms of payments for personal services are exempt from the gross receipts tax. *See* NMSA 1978, § 7-9-17 (1969). A taxpayer engaged in business may also be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (20011). The Taxpayer admitted that he was working as a painter for the Company during the tax periods at question. However, the Taxpayer believed that he was an employee, not an independent contractor engaged in his own business.

Employees.

Several factors should be considered in determining whether a person is an employee or an independent contractor. *See* 3.2.105.7 (A) NMAC (2001). Four factors deal with whether the employer should be withholding tax from the pay, should be paying FICA, should cover the

employee under workman's compensation, and should be paying unemployment insurance. *See id.* There was no indication that the Company was doing any of these things.

Another factor is whether the person was paid a wage or salary. *See id.* There was no evidence on how the Taxpayer's pay was calculated; just that he was paid weekly. Another factor is whether the employer considered the person to be an employee. *See id.* The Company's use of 1099s is an indication that it was treating the Taxpayer as an independent contractor rather than an employee. The final factor is whether the employer had the right to exercise control over the work. *See id.* There was no evidence on how the work was assigned or conducted. Based upon the totality of the evidence, there is not sufficient proof that the Taxpayer was an employee rather than an independent contractor.

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.* A person who is providing services may take a deduction if the person is in possession of a NTTC. *See* NMSA 1978, § 7-9-48 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 a NTTC from the Company on April 29, 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 he should not be subject to penalty. The Taxpayer argued that he was not trying to avoid his taxes; he was just unaware that he owed them. The Taxpayer also argued that he was led to believe that he was an employee by the Company and his co-workers, and that he had relied on his tax preparer’s advice.

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. A taxpayer is not negligent when relying on the advice of an accountant. *See* 3.1.11.11 NMAC (2001). A taxpayer is not negligent if he/she exercises ordinary business care. *See* 3.1.11.10 NMAC (2001). The Taxpayer took reasonable steps to understand and comply with his tax obligations, but the Taxpayer was misled by the Company,

his co-workers, and his tax preparer. Therefore, the Taxpayer was not negligent. Consequently, the penalty is abated.

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 L0796504624, and jurisdiction lies over the parties and the subject matter of this protest.

B. There was not sufficient proof that the Taxpayer was an employee rather than an independent contractor. *See* 3.2.105.7 (A) NMAC (2001).

C. 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).

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

E. The Taxpayer exercised ordinary business care, but was misled by others on his status as an employee. Therefore, the Taxpayer was not negligent, and penalty is HEREBY ABATED. *See* NMSA 1978, § 7-1-69. *See* 3.1.11.10 NMAC (2001).

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

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

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.