

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

**IN THE MATTER OF THE PROTEST OF
ANTHONY MARTINEZ,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1506998832**

No. 16-48

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 22, 2016 before Hearing Officer Dee Dee Hoxie. Hearing Officer Chris Romero was also present. The Taxation and Revenue Department (Department) was represented by Ms. Melinda Wolinsky, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Anthony Martinez (Taxpayer), Mr. Steve Barela, and Mr. Ralph Apodaca appeared for the hearing. The Taxpayer, Mr. Barela, and Ms. Bernardo testified. The Department's exhibits "A" and "E" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. 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 April 27, 2016, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax periods from January 1, 2011 through December 31, 2013. The assessment was for \$9,323.92 tax, \$1,864.80 penalty, and \$971.79 interest.
2. On May 13, 2016, the Taxpayer filed a formal protest letter.
3. On July 1, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. On July 6, 2016, the Hearings Office issued a notice of hearing.
5. On August 5, 2016, a telephonic scheduling hearing was conducted. The hearing was held within ninety days of the protest.
6. On August 8, 2016, the Hearings Office issued the scheduling order and notice of hearing.
7. A healthcare company was providing services to the Taxpayer's grandfather through a federal program.
8. The Taxpayer was working as an independent contractor for the healthcare company so that he could be paid for providing services to his grandfather.
9. The healthcare company issued 1099s to the Taxpayer.
10. The healthcare company provided a training manual and required that certain items be recorded and reported on a regular basis.
11. The Taxpayer coordinated with his grandfather for working hours and what services would be provided in general.
12. In 2013, the Taxpayer's grandfather became dissatisfied with the healthcare company and switched to another provider. The Taxpayer also ceased to be an independent contractor with the healthcare company and began working as an independent contractor for the new provider so that he could continue to help his grandfather.
13. The Taxpayer and the healthcare company became involved in lawsuit at some point after their split, and there has been animosity between them.
14. The Department audited the Taxpayer when it found the mismatch of business income on his federal return and no gross receipts reported to New Mexico.

15. The Taxpayer received the audit notice (the 60-day letter), which informed him that he had 60 days to obtain any nontaxable transaction certificates (NTTC). The deadline for obtaining the NTTCs was April 5, 2016.
16. The Taxpayer contacted the healthcare company. The owner of the company told him that the company paid all of the gross receipts on the services that he provided to his grandfather. However, the company refused to provide any proof of tax payments and refused to issue a NTTC to the Taxpayer.
17. The Taxpayer is still not in possession of any NTTCs.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the assessment. The Taxpayer argued that the services were provided by the healthcare company and that they owed the tax. The Taxpayer argued that the healthcare company paid the tax on those services. The Taxpayer argued that the healthcare company helped other independent contractors who were audited, but refused to help him because of their acrimonious relationship since his grandfather stopped using their services. The Taxpayer argued that he should not be penalized because the healthcare company refused to help him and refused to issue NTTCs to him. The Taxpayer argued that requiring him to pay gross receipts taxes was double taxation.

The Department argued that the Taxpayer was engaged in business by providing services as an independent contractor for the healthcare company. The Department argued that the Taxpayer's receipts were taxable. The Department argued that the healthcare company is not required to issue NTTCs to its independent contractors. The Department argued that there was no evidence that the healthcare company paid the gross receipts taxes for the Taxpayer. The Department agreed that the Taxpayer would have been able to deduct his sale of services as a

subcontractor for the healthcare company if he had a properly executed and timely NTTC; however, since the Taxpayer did not have a NTTC, he could not take the deduction. The Department argued that it is not double taxation to tax the Taxpayer on his receipts for the services that he rendered.

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.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services. *See* NMSA 1978, § 7-9-3.5. It was undisputed that the Taxpayer was providing services to his grandfather as an independent contractor for the healthcare company. Therefore, the Taxpayer was subject to the gross receipts tax.

NTTCs.

A taxpayer engaged in business may be able to deduct certain gross receipts 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 taxes from the transaction are due, but may also produce NTTCs within a 60-day deadline set by the Department. *See* NMSA 1978, § 7-9-43.

The Taxpayer admitted that he received the 60-day letter, which had a deadline of April 5, 2016. The Taxpayer is still not in possession of any NTTCs. When the transaction takes place, the parties should have ready access to all documentation and have an interest in cooperation, which makes that the ideal time to obtain a NTTC. *See id.* Usually, 60-day letters are issued months or years after the transactions occur. With time, items can be lost, businesses can fail, paperwork can be destroyed, relationships can become acrimonious, and the motivation for cooperation can evaporate. By failing to obtain a NTTC at the time of the transaction, the Taxpayer subjected himself to the numerous risks that years later he would not be able to obtain a NTTC from the healthcare company, which is precisely what occurred. 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. *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). Buyers have the privilege of executing NTTCs to sellers, but they are not required to do so. *See* NMSA 1978, § 7-9-43 (D). Even if the healthcare company paid gross receipts taxes on the services it provided to the Taxpayer’s grandfather, it is not considered double taxation when two separate entities are taxed on their own transactions, and double taxation is not necessarily prohibited. *See N.M. Sheriffs and Police Ass’n. v. Bureau of Revenue*, 85 N.M. 565, 567, 514 P.2d 616 (Ct. App. 1973).

Equitable recoupment.

An assessment may be abated when another person paid the amount of the tax “on behalf of the taxpayer on the same transaction; provided that the requirements of equitable recoupment are met.” NMSA 1978, § 7-1-28 (F) (2013). Generally, equitable recoupment allows a party to use a claim or defense that would otherwise be barred by a statute of limitations when the claim arises from the same transaction. *See City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 16, 126 N.M. 95. The purpose of the doctrine of equitable recoupment is to prevent the unjust enrichment of one party due to another’s mistake and to bypass harsh applications of a procedural bar on limitations periods. *See id.* at ¶ 20-21.

In tax transactions, there are three elements that must be met for equitable recoupment to apply. *See Teco Investments, Inc. v. Taxation and Revenue Dep't.*, 1998-NMCA-055, ¶ 8, 125 N.M. 103. There must be 1) a single taxable event, 2) taxes assessed on that single event on inconsistent theories, and 3) a strict identity of interest. *See id.* Separate parties may still have a strict identity of interest. *See id.* at ¶ 10-11. In this case, there was a single taxable event: the provision of services to the Taxpayer's grandfather. However, there is no evidence that the taxes allegedly paid by the healthcare company were anything other than gross receipts taxes, and the Taxpayer was assessed for gross receipts taxes. Therefore, there was not tax assessed on that single event on inconsistent theories. Moreover, there was no evidence, such as an agreement to indemnify, that there was a strict identity of interest between the Taxpayer and the healthcare company. Therefore, the elements of equitable recoupment have not been met.

Assessment of 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. Negligence includes inadvertence, mistake, and erroneous belief. *See* 3.1.11.10 (C) (2001). Therefore, the penalty was properly 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). *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 Assessment issued under Letter ID number L1506998832, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was engaged in business as an independent contractor and was providing services. The Taxpayer was subject to the gross receipts tax. *See* NMSA 1978, § 7-9-3.5 and § 7-9-4.

C. The Taxpayer was not in possession of a timely, properly executed NTTC; therefore, the Taxpayer was not entitled to take a deduction. *See* NMSA 1978, § 7-9-43.

D. The Taxpayer did not prove that the healthcare company paid gross receipts taxes on his behalf and failed to prove the elements of equitable recoupment. *See* NMSA 1978, § 7-1-28. *See also Teco Investments, Inc. v. Taxation and Revenue Dep't.*, 1998-NMCA-055, ¶ 8, 125 N.M. 103.

E. The Taxpayer failed to prove that he was not negligent; therefore, penalty was properly assessed. *See* NMSA 1978, § 7-1-69.

F. The tax was not paid when it was due, so interest was properly assessed. *See* NMSA 1978, § 7-1-67.

G. The Taxpayer failed to overcome the presumption of correctness. *See* NMSA 1978, § 7-1-17.

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

DATED: September 30, 2016.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer

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