

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

**IN THE MATTER OF THE PROTEST OF
S.J. TILE
TO ASSESSMENTS
ISSUED UNDER LETTER ID NO. L0845394480 and L0183544368**

No. 16-50

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 27, 2016, before David Buchanan, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Esq., attorney for the Department. Ms. Sonya Varela, protest auditor, from the Department, appeared as a witness for the Department. S.J. Tile (“Taxpayer”) appeared through its owner, Steve Jones, at the appointed time. Mrs. Nora Jones, Steve Jones’ wife, also appeared at the hearing. No exhibits were introduced into the record at the hearing. The Hearing Officer left the record open for submission of a spreadsheet of the current liabilities as of the hearing date. The Department timely submitted that document on September 28, 2016. It is admitted into the record as Department Exhibit A (Liabilities as of September 27, 2016).

Based on the aforementioned pleadings, the testimony introduced at the hearing, the exhibit submitted by the Department and the documents contained in the administrative record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 23, 2016, the Department assessed Taxpayer in the principal amount of gross receipts tax of \$636.82, \$127.36 in penalty and \$63.57 in interest for the tax period from January 1, 2012 through December 31, 2012. **[Letter Id No. L0845394480]**.

2. Taxpayer filed a protest of the assessment under Letter Id No. L0845394480 on May 20, 2016.

3. On May 20, 2016, the Department acknowledged the protest filed by Taxpayer.

4. The Department requested a hearing regarding the protest of the assessment under Letter Id No. L0845394480 with the Administrative Hearings Office on July 11, 2016.

5. The Administrative Hearing's Officer mailed a Notice of Telephonic Scheduling Hearing to Taxpayer on July 12, 2016, setting an initial hearing for July 29, 2016.

6. On March 21, 2016, the Department assessed Taxpayer in the principal amount of gross receipts tax of \$6,076.92, \$1,215.38 in penalty and \$903.86 in interest for the tax period from January 1, 2010 through December 31, 2011. **[Letter Id No. L0183544368]**.

7. Taxpayer filed a protest of the assessment under Letter Id No. L0183544368 on June 16, 2016.

8. On June 23, 2016, the Department acknowledged the protest filed by Taxpayer.

9. The Department requested a hearing regarding the protest of the assessment under Letter Id No. L0183544368 with the Administrative Hearings Office on July 29, 2016.

10. On July 29, 2016 a telephonic scheduling hearing occurred before Hearing Officer David Buchanan, pursuant to NMSA 1978, Section 7-1B-8 (2015). Taxpayer's protests were consolidated and a hearing on the merits was scheduled for September 27, 2016.

11. The parties did not object that conducting the scheduling hearing satisfied the 90-day hearing requirement of NMSA 1979, Section 7-1B-8(A) (2015).

12. Taxpayer was in business from 1987 through 2012. Taxpayer was in the business of setting tile.

13. From 2008, Taxpayer only worked for construction contractors and did not collect or pay gross receipt taxes.

14. Taxpayer testified that the contractors he worked for paid the gross receipt taxes themselves.

15. Taxpayer did not produce any nontaxable transaction certificates from the construction contractors he provided services to during the periods at issue.

16. Taxpayer has been a diabetic for the past twenty-two years. Taxpayer also became disabled and no longer works. Taxpayer suffers from kidney failure and blindness.

DISCUSSION

The issue to be determined is whether the Department properly assessed Taxpayer for gross receipts tax, penalty and interest for the tax years from January 1, 2010 through December 31, 2012. Taxpayer argued that he did not collect gross receipts tax and that the contractors he worked for paid the taxes. Taxpayer argued that constituted double taxation.

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 of the assessment issued against him. *See Grogan v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-033, ¶12, 133

N.M. 354, 62 P.3d 1236. 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) “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).

For the tax periods at issue, Taxpayer provided a service and was in the business of setting tile for construction contractors. Since Taxpayer was providing a service, Taxpayer was required to file gross receipts returns while in business. If Taxpayer was providing a service to a construction contractor, Taxpayer could have deducted his receipts from his return if he had asked for and received a nontaxable transaction certificate. NMSA 1978, Section 7-9-52(A) (2012) provided that “(r)ecceipts from selling a construction service or 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 construction-related service.” In this case, Taxpayer did not present any nontaxable transaction certificates. A deduction is properly disallowed if the seller does not have a timely nontaxable transaction certificate. *See, Proficient Food Co. v. N.M. Taxation & Rev. Dept.*, 1988-NMCA-042, ¶18, 107 N.M. 392, 758 P.2d 806.

New Mexico has a self-reporting tax system. It was the obligation of Taxpayer, not the Department, to obtain and retain the nontaxable transaction certificates. A taxpayer has the obligation “to maintain books of account or other records in a manner that will permit the accurate computation of state taxes.” NMSA 1978, Section 7-1-10(A) (2007); *N.M. Taxation & Rev. Dept. v. Dean Baldwin Painting, Inc.*, 2007-NMCA-153, ¶12, 143 N.M. 189, 174 P.3d 525. It was also the obligation of Taxpayer to determine the amount of gross receipts tax due to the state and file timely returns. NMSA 1978, Section 7-1-13(B) (2013). Taxpayer failed to provide the applicable nontaxable transaction certificates and therefore, the deductions were properly disallowed.

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, Taxpayer did not present any specific evidence to show that any other entity actually paid the gross receipt taxes at issue in this case. The only evidence presented was Taxpayer's general testimony that he did not pay any gross receipts taxes because the contractors he was working for were paying the gross receipts taxes. Due to the lack of specific evidence, Taxpayer did not establish the elements of equitable recoupment or that he was entitled to an abatement.

Civil Penalty

Civil penalty is imposed when a taxpayer is "negligent" or disregards the Department's rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

Except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, 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;

NMSA 1978, §7-1-69(A)(1) (2007). The Department's regulation provides that "negligence" includes "failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention" for either failing to file a return on time or failing to make a payment on time. Regulation 3.1.11.10 NMAC [01/15/01]. Inadvertent error is defined as "negligence." *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't.*, 1989-NMCA-070, ¶9, 108 N.M. 795, 779 P.2d 982. The regulations provide exceptions to the negligence definition. The application exception related to when a taxpayer is ill is found in regulation 3.1.11.11(B) [01/15/01] which provides that:

the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of injury or illness.

To meet this regulation, Taxpayer must prove that he was disabled, which he has, but in addition, Taxpayer must prove that he was also unable to prepare a return and he was unable to procure the services of another person to prepare a return because of the injury or the illness.

Taxpayer's medical situation is clearly serious and it is undisputed that a prolonged debilitating illness can impede a taxpayer's ability to file a return. However, Taxpayer did not present any evidence that his illness actually prevented him from filing or from seeking assistance with the filing of his gross receipt returns. Therefore, penalty was properly assessed.

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) 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. *See 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 is paid.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely written protest to the assessments issued under Letter ID Nos. L0845394480 and L0183544368 and jurisdiction lies over the parties and the subject matter of this protest.
- B. The scheduling hearing conducted on July 29, 2016 met the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015).
- C. 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 any abatement.
- D. Taxpayer did not rebut the presumption that he did owe the gross receipts tax principal amount, and more specifically he failed to present evidence that he submitted to the Department any timely nontaxable transaction certificates to support a deduction.
- E. Taxpayer did not present any evidence to establish that he was entitled to an abatement based on equitable recoupment.
- F. While Taxpayer proved he was disabled and seriously ill, he failed to prove that he was also unable to prepare a return or that he was unable to procure the services of another person

to prepare a return because of the injury or illness to support the abatement of the civil penalty pursuant to regulation 3.1.11.11(B) NMAC [01/15/01].

G. Taxpayer was negligent in not filing his gross receipts returns when due for the tax years 2010, 2011 and 2012; accordingly, he owes penalty.

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

I. The amounts due as of September 27, 2016 were \$6,076.92 in principal, \$1,215.38 in penalty and \$1,022.58 in interest for the tax years 2010 and 2011; and \$636.82 in principal, \$127.36 in penalty and \$77.41 in interest for the tax year 2012. The total amount due from Taxpayer as of September 27, 2016 was \$9,156.47. *See* Exhibit A.

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

DATED: October 27, 2016

David Buchanan
Hearing Officer
Administrative Hearings Office

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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 be preparing the record proper.