

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
MERCHANTS AUTOMOTIVE GROUP, INC.
NM ID NO. 02-11118-00-9, TO ASSESSMENT
ISSUED UNDER LETTER ID NO. L0888202496**

No. 07-12

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 26, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. Merchants Automotive Group, Inc. (“Merchants”) was represented by its attorneys, Thomas Smidt II, with Tax, Estate & Business Law, N.A., LLC, and Paul Lanagan and Dan Sklar, with Nixon Peabody LLP. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Parties’ Stipulation of Facts

1. In 2000, the New Mexico General Services Department (“GSD”) requested bids for the leasing of vehicles to be used by the GSD Transportation Services Division (“TSD”). *See* Exhibit A.
2. The terms and conditions of this bidding process specifically provided that “the unit price shall exclude all State taxes.” *See Id.* at p.1 ¶9.
3. Merchants Automotive Group (“Merchants”) is a New Hampshire corporation located in Hooksett, New Hampshire, specializing in commercial vehicle leases, especially large fleet lease programs.

4. After receiving GSD's request for services, Merchants submitted a bid in accordance with its terms.

5. As part of the bidding process, Greg McIntyre, the director for government contracts at Merchants, directly contacted James E. Russell, the director of TSD/GSD. *See id.* at p. 4.

6. Gary Singer, a principal and vice president at Merchants, was also intimately involved in the bidding process.

7. Over its thirty-five year history, Merchants has entered into fleet leases with hundreds of state and federal agencies.

8. All of these leases with governmental agencies have been conducted on a tax-exempt basis: In specific, Merchants cannot recall a prior situation where a state government assessed a sales tax upon one of its own agencies.

9. In direct reliance on GSD's requirement to exclude State taxes from the bid (coupled with the representations referred to below), Merchants reduced the per vehicle leasing rate by the taxes it would have charged or collected from GSD on each vehicle if the lease rate used for its bid had been calculated on a taxable basis.

10. As part and parcel of the bidding process, GSD, through its director, also represented to Merchants that its bid should not include gross receipts taxes because the leases are tax exempt under New Mexico law. This representation corresponded with the vast experience of Messrs. Singer and McIntyre in contracting with federal and state government agencies.

11. On November 21, 2000, GSD awarded the contract to Merchants. *See Exhibit B.*

12. Based on GSD's representation that the vehicles or the gross receipts generated under the leases were tax exempt, Merchants did not include any taxes when calculating the per vehicle lease rate for its original bid as reflected on its original internally generated documents, which included, *inter alia*, (1) the Lease Term Sheet and (2) the Rate Sheet. *See* Exhibits C, D.

13. Merchants also entered the transaction into its accounting system as tax exempt and proceeded at that time (and at all times subsequent) under the impression that GSD was accurately representing the tax exempt status of the leases. *See* Exhibit E.

14. On December 13, 2000, a few weeks after obtaining the contract, GSD formalized these prior representations by executing and issuing a nontaxable transaction certificate ("NTTC") (Number A-1875845-09-02842) Type 9 signed by a "Rodriguez" (the full name of the signatory is difficult to read on the NTTC) in favor of Merchants and faxing it to Merchants. *See* Exhibit F.

15. As Exhibit F shows, the NTTC that GSD faxed to Merchants was a single-sided document and did not contain a back page describing the various types of NTTCs used by the Taxation and Revenue Department ("Department"). Merchants believed that the faxed NTTC contained all of the information necessary for the transaction to qualify as nontaxable. Exhibit F is the only copy or version of the NTTC that Merchants received prior to the audit.

16. Pursuant to the terms of the Master Lease Agreement, Merchants generated the "Schedule A" to the Master Lease Agreement for each vehicle, which expressly references the lessee's tax exempt status as well as the NTTC No. A-1875845-09-02842. *See* Exhibit G.

17. Merchants accepted the NTTC in reliance on at least the following representations of GSD:

- (a) that TSD/GSD (the buyer) will employ the property or service transferred in a nontaxable manner;
- (b) the NTTC's execution by a GSD official;
- (c) the NTTC's display of an official certificate number;
- (d) the NTTC's explicit reference in all capital letters across the top of the certificate that the NTTC pertains to "09 GOVERNMENTAL AGENCIES AND ORGANIZATIONS;"
- (e) the NTTC bears the name of a state agency-General Services Department on its face;
- (f) the warning that an issuer who misuses the NTTC may be subject to suspension of the right to use NTTCs; and
- (g) that the registrant (*i.e.* GSD) has been approved as eligible to issue the NTTC for the stated transaction.

18. In sum, in reliance on GSD's demand that the bid should not include State taxes, as well as the oral representations of Mr. Russell and the written representations in the form of the single-sided NTTC, Merchants submitted its bid, and proceeded thereafter at all times under the impression that the leases were, in fact, tax exempt.

19. Had Merchants known that GSD's representations were false and/or the NTTC was improperly issued by GSD, it would have included the taxes in its bid for services.

20. Finally, based upon its extensive experience leasing to state agencies, Merchants had no superior knowledge or reason to suspect that under New Mexico law the receipts from the vehicle leases with TSD/GSD might actually be subject to a sales or gross receipts tax.

21. On August 16, 2005, the Department informed Merchants that it will be conducting an audit to determine Merchants' compliance with the State's tax laws. *See* Exhibit H.

22. Merchants immediately informed GSD of the Department's scheduled audit.

23. On September 13, 2005, Deborah Moll, the General Counsel for GSD, wrote a letter to Merchants stating that any tax liability on the part of Merchants in connection with its leases to GSD is an issue solely between Merchants and the Department. *See Exhibit I.*

24. In November 2005, Merchants contacted the Department regarding whether the receipts from the leases were deductible from gross receipts or exempt from gross receipts tax or other New Mexico taxes based on issuance of the NTTC.

25. In response, the Department requested a copy of the NTTC issued to Merchants, and Merchants complied.

26. In November 2005, Merchants contacted an attorney familiar with New Mexico state taxation regarding whether the receipts from the leases were deductible from gross receipts or exempt from gross receipts tax or other New Mexico taxes.

27. In December 2005, counsel for Merchants wrote to Attorney Moll, explaining Merchants' position and putting GSD on notice that Merchants believed that this dispute was actually a matter between the Department and GSD. *See Exhibit J.*

28. In January 2006, the Department commenced an audit of Merchants for the periods from January 1, 1999 to June 30, 2005.

29. Merchants fully cooperated with the auditors, immediately produced the NTTC, and explained its position to the Department.

30. The Department completed the audit in March 2006.

31. On July 21, 2006, the Department issued a Combined Reporting System Audit Assessment to Merchants for periods from December 31, 1999 to June 30, 2005 for gross

receipts tax of \$209,854.54, plus \$96,166.89 in interest for a total of \$306,021.43

(“Assessment”).

32. On August 23, 2006, Merchants filed a formal protest and request for retroactive extension of time to file a written protest.

33. On August 25, 2006, the Department granted a retroactive extension of time to file a written protest of the Assessment.

Hearing Officer’s Additional Findings of Fact

34. The information that GSD provided to potential bidders in its invitation for bids (Exhibit A) included a document titled “Vehicles, Passenger, Leasing,” which contained the following statements:

INTRODUCTION:

The intent and purpose of this Invitation for Bids is to establish a term contract...for the lease of vehicles for use by New Mexico State agencies, commissions, boards, and institutions. Other political subdivisions and local public bodies allowed by law may also issue orders against this agreement, but only through the Transportation Services Division....

GENERAL REQUIREMENTS:

1. The Transportation Services Division (TSD) will exercise exclusivity on behalf of the State of New Mexico. State agencies, commissions, boards, universities, other institutions of higher learning, municipalities, counties, public school districts and other political subdivisions and public-funded entities must sub-lease from TSD. (emphasis in the original).

35. The NTTC that GSD provided to Merchants upon award of the leasing contract was issued to GSD by the Taxation and Revenue Department (“Department”) on January 1, 1996. *See* Exhibit F.

36. The NTTC displayed the following typed notation at the top: “09 GOVERNMENTAL AGENCIES AND ORGANIZATIONS” and included the following statement: “The

registrant named above has been approved as eligible to issue Nontaxable Transaction Certificates for the transaction stated above and more specifically described in the Gross Receipts and Compensating Tax Act.” *See* Exhibit F.

37. The face of the NTTC did not indicate that governmental agencies’ use of the NTTC was restricted to the purchase of tangible personal property, nor was there any reference to information contained on the back of the NTTC.

38. In addition to leasing vehicles to GSD, Merchants was engaged in leasing vehicles in New Mexico to the federal government and to private entities.

39. During the audit period at issue, Merchants was registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department’s combined reporting system (“CRS”).

40. The Department’s auditor made the following findings concerning Merchants’ CRS reporting history:

The taxpayer was aware that gross receipts taxes were due on leased vehicle receipts, except in instances where the customer delivered a nontaxable transaction certificate and the property was not used in any manner other than in a subsequent lease. The taxpayer also believed that gross receipts taxes were not due on vehicle leases entered into with governmental agencies (State of New Mexico, Department of Energy, United States Armed Services, etc.) since one government agency (State of New Mexico) executed a nontaxable transaction certificate and the certificate was accepted in good faith. As a result of their reliance on the nontaxable transaction certificate issued by the State of New Mexico and other governmental contracts entered with other federal governmental agencies, the taxpayer exempted gross receipts derived from government agencies and reported and paid gross receipts taxes on all other gross receipts.

Exhibit 1, Audit Narrative, p. AN2.

41. The auditor concluded that there was no basis for Merchants’ exemption of its receipts from leasing vehicles to the federal government and found that \$13,232.67 of additional

gross receipts tax was due on these receipts, plus accrued interest. At the administrative hearing and in a subsequent filing with the Hearing Officer, the Taxpayer conceded its liability for this portion of the assessment, as well as for \$156.20 of gross receipts tax assessed on receipts from nongovernmental entities. *See Taxpayer's Notice Regarding Protest*, filed June 29, 2007.

42. The auditor reviewed several documents provided by Merchants, including a Master Lease Agreement, Schedule A to the Master Lease Agreement, and the NTTC Merchants produced to explain its failure to pay gross receipts tax on receipts from that agreement. *See Exhibit 1, p.AN1.*

43. The auditor concluded that the NTTC was not applicable to the underlying lease transaction, stating: "The motor vehicles leased by the taxpayer are used by the customer in the ordinary course of business and are not subsequently leased, therefore, the deduction afforded by Section 7-9-50 NMSA 1978 is not applicable to the taxpayer. The auditor determined that NTTCs were not an issue during the course of the audit." *See Exhibit 1, Audit Narrative, p. AN2.*

44. The auditor further noted that the Type 9 NTTC produced by Merchants was "valid only for the purchase of tangible personal property to governmental agencies or 501(c)(3) organizations and not for the lease of tangible personal property employed in New Mexico." *See Exhibit 1, Audit Narrative, p. AN2.*

45. Based on these findings, the auditor determined that Merchants was liable for \$196,465.67 of additional gross receipts tax, plus interest, on the receipts from its contract with GSD.

46. During the course of the audit, Merchants sent GSD a letter setting out Merchants' position that it was entitled to rely on the NTTC it received from GSD to support the deduction provided in NMSA 1978, § 7-9-50 of the Gross Receipts and Compensating Tax Act, which states that a lessor may deduct receipts from leasing tangible personal property for subsequent lease if the lessee delivers an NTTC to the lessor. *See* Exhibit J.

47. In its August 23, 2006 protest to the Department's assessment, Merchants reconfirmed its position that it had accepted the NTTC from GSD in good faith and was entitled to claim the deduction provided in § 7-9-50. *See* Exhibit 3, Formal Protest, p. 2.

DISCUSSION

The issue to be decided is whether Merchants is liable for the gross receipts tax assessed on its receipts from leasing vehicles to GSD during the period January 1, 1999 through June 30, 2005. Merchants raises two alternative arguments in support of its protest: (1) that Merchants accepted the NTTC it received from GSD in good faith and is entitled to claim a deduction under NMSA 1978, § 7-9-50, which states that a lessor may deduct receipts from leasing tangible personal property for subsequent lease if the lessee delivers an NTTC to the lessor; and (2) if Merchants is not entitled to the deduction in NMSA 1978, § 7-9-50, Merchants still should be excused from payment of gross receipts tax based on GSD's representations that receipts from leasing vehicles to the State are tax exempt.

Burden of Proof. Any assessment of tax made by the Department is presumed to be correct. NMSA 1978, § 7-1-17(C). 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. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Once the presumption of correctness is rebutted, however, the burden shifts to the Department to show the correctness of the assessed tax. *New Mexico Taxation and Revenue Department v. Whitener*, 117 N.M. 130, 133, 869 P.2d 829, 832 (Ct. App. 1993).

Statutes at Issue. NMSA 1978, § 7-9-50 states as follows:

Except as provided otherwise in Subsection B of this section, receipts from leasing tangible personal property or licenses may be deducted from gross receipts if the lease is made to a lessee who delivers a nontaxable transaction certificate to the lessor. The lessee delivering the nontaxable transaction certificate may not use the tangible personal property or license in any manner other than for subsequent lease in the ordinary course of business.

NMSA 1978, § 7-9-43(A) sets out the requirements for execution and acceptance of NTTCs and provides, in pertinent part:

All nontaxable transaction certificates of the appropriate series executed by buyers or lessees should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions.... The nontaxable transaction certificates shall contain the information and be in a form prescribed by the department.... When the seller or lessor accepts a nontaxable transaction certificate within the required time and in good faith that the buyer or lessee will employ the property or service transferred in a nontaxable manner, the properly executed nontaxable transaction certificate shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

Application of § 7-9-50 to the Lease Transaction Between Merchants and GSD. In this case, the Department's field auditor noted that Merchants "was aware that gross receipts taxes were due on leased vehicle receipts, *except in instances where the customer delivered a nontaxable transaction certificate and the property was not used in any manner other than in a subsequent lease.*" Exhibit 1, Audit Narrative, p. AN2 (emphasis added). The auditor further

noted that “as a result of their reliance on the nontaxable transaction certificate issued by the State of New Mexico,” Merchants exempted its receipts from the GSD contract. *Id.*; *see also*, Stipulated Facts 17 & 18. The auditor nonetheless concluded:

The motor vehicles leased by the taxpayer are used by the customer in the ordinary course of business and are not subsequently leased, therefore, the deduction afforded by Section 7-9-50 NMSA 1978 is not applicable to the taxpayer. The auditor determined that NTTCs were not an issue during the course of the audit.

Exhibit 1, Audit Narrative, p. AN2. This is the same argument the Department made at the administrative hearing, *i.e.*, that GSD is not engaged in leasing vehicles for subsequent lease and that there is no other deduction applicable to Merchants’ receipts from the lease agreement. Consequently, the Department argues, the NTTC Merchants received from GSD has no effect. *See, Gas Co. v. O’Cheskey*, 94 N.M. 630, 632, 614 P.2d 547, 549 (Ct. App.1980) (issuance of NTTC does not transform an otherwise taxable transaction into a nontaxable one); *McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601-602, 592 P.2d 515, 517-518 (Ct. App. 1979) (the "conclusive evidence" provision of § 7-9-43(A) does not apply when there is no NTTC applicable to the transaction at issue).

The problem with the Department’s argument is that the information GSD provided to potential bidders indicates that GSD was, in fact, engaged in subleasing vehicles to other state entities. Paragraph 1 of the General Requirements section of the Invitation to Bid states:

The Transportation Services Division (TSD) will exercise exclusivity on behalf of the State of New Mexico. State agencies, commissions, boards, universities, other institutions of higher learning, municipalities, counties, public school districts and other political subdivisions and public-funded entities must sub-lease from TSD. (emphasis in the original).

Exhibit A. *See also*, GSD Regulations 1.5.3.7(H) NMAC (defining a “motor pool vehicle” as a state vehicle in the custody of TSD that is available for short-term or long-term lease to state agencies) and 1.5.3.8 NMAC (setting out the terms for state agencies to lease vehicles from TSD).

There may be a legal issue as to whether GSD’s “lease” of vehicles to other state agencies is simply an interagency transaction and not a true lease as contemplated by the Gross Receipts and Compensating Tax Act.¹ This is the type of issue, however, that the use of NTTCs was designed to avoid. In *Siemens Energy & Automation, Inc. v. New Mexico Taxation and Revenue Department*, 119 N.M. 316, 889 P.2d 1238 (Ct. App. 1994) the Court of Appeals held that Siemens was entitled to accept multijurisdictional sales and use tax certificates (“MTC certificates”) from its customers, even though the presence of a tax identification number on the certificates could be seen as evidence that the customers had nexus with New Mexico and were subject to gross receipts tax. As the court explained:

If a seller must presume that any purchaser with a New Mexico taxpayer identification number is automatically disqualified, it places the burden on the seller to determine, at the seller's own peril, the nature of the purchaser's nexus with New Mexico.... An interpretation which would require sellers to make a factual inquiry, and then make such a sophisticated legal decision on each MTC received from purchasers across the country, would totally eviscerate any purpose for the MTC certificate and render the Compact a sham in this area. Siemens was entitled to rely on the certifications contained on the MTC certificates received from Westinghouse and Triangle.

Id., 119 N.M. at 321-322, 889 P.2d at 1243-1244. Although *Siemens* involved the use of MTC certificates, rather than NTTCs, the court noted that NTTCs

serve the same purpose in intrastate transactions that are served by MTCs for interstate drop shipments. Regarding NTTCs, this Court stated in *Continental Inn*

¹ The Transportation Services Act (NMSA 1978, §§ 15-8-1, et seq.) authorizes TSD to “assign” the use of vehicles to other state agencies. *See*, NMSA 1978, § 15-8-6.

v. New Mexico Taxation & Revenue Department, 113 N.M. 588, 829 P.2d 946 (Ct. App. 1992):

The deduction from gross receipts pursuant to Sections 7-9-51 and 7-9-52 is not conditioned upon proper issuance of the NTTCs by the buyer. The determination of whether a NTTC has been properly issued is a matter between the Department and the buyer....

Id., 119 N.M. at 319, 889 P.2d at 1241. In this case, Merchants was entitled to accept GSD's representations that it was engaged in subleasing the vehicles it leased from Merchants. Merchants was not required to investigate GSD's claims to determine the legal effect of its transactions with other state entities.

Acceptance of Type 9 NTTC. The final issue to be determined is whether the NTTC Merchants accepted from GSD supports the deduction provided in § 7-9-50. The Department's auditor found that the Type 9 NTTC produced by Merchants was "valid only for the purchase of tangible personal property to governmental agencies or 501(c)(3) organizations and not for the lease of tangible personal property employed in New Mexico." Exhibit 1, Audit Narrative, p. AN2. At the administrative hearing, the Department reiterated its position that the use of Type 9 certificates is limited to the sale—and does not cover the lease—of tangible personal property to governmental entities.

In response, Merchants argued that it was not required to conduct any inquiry or independent research to determine whether the Type 9 NTTC covered the transaction at issue, but was entitled to rely on GSD's oral representations that the lease transaction was tax exempt.² Similar arguments have been repeatedly rejected by the courts. New Mexico has a self-reporting

² Merchants also argued that GSD "negligently or fraudulently" misrepresented New Mexico law by instructing potential bidders to exclude state taxes from the unit price of their bids. In fact, GSD was statutorily required to include this instruction in its bid invitation. *See*, NMSA 1978, § 13-1-108.

tax system, and taxpayers have a statutory obligation to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13 NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct.App.1976). A taxpayer is not entitled to rely on the oral advice of a state employee as a substitute for conducting its own analysis of New Mexico's tax statutes and regulations. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989). *See also*, *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 122, 136 N.M. 440, 99 P.3d 690 (oral statements do not provide a basis to apply estoppel against a state agency); *Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶ 35, 133 N.M. 354, 62 P.3d 1236, *cert. denied*, 133 N.M. 413, 63 P.3d 516 (2003) (to avoid negligence penalty, taxpayer must demonstrate that she reasonably attempted to ascertain whether her actions were justifiable under the tax statutes and regulations); *Rainaldi v. Public Employees Retirement Board*, 115 N.M. 650, 658-59, 857 P.2d 761, 769-70 (1993) (estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute); *Trujillo v. Gonzales*, 106 N.M. 620, 622, 747 P.2d 915, 917 (1987) (county not estopped by promises of county commissioners made outside of a legally called board meeting); *Patten v. Santa Fe National Life Ins. Co.*, 47 N.M. 202, 208, 138 P.2d 1019, 1023 (1943) (when a party seeking to establish estoppel shows indifference to information at hand, that party may be precluded from relying on the doctrine of estoppel).

The issue, then, is whether Merchants knew, *or reasonably should have known*, that it could not accept a Type 9 NTTC to support a deduction of receipts from leasing vehicles for subsequent lease. New Mexico's Gross Receipts and Compensating Tax Act does not describe the types of NTTCs taxpayers may accept in support of the deductions provided in the Act.

NMSA 1978, § 7-9-43 simply states that NTTCs “shall contain the information and be in a form prescribed by the department.” Regulation 3.2.201.8(D) NMAC under § 7-9-43 explains that:

The department issues different types of NTTCs. Each type is of limited useage and relates to a particular deduction allowed by possession of that certificate. An NTTC is valid only if it contains the information and is in a form prescribed by the department....

The regulation does not, however, identify the types of NTTCs issued by the Department or explain the proper use of each type.

The only evidence the Department presented concerning the types of NTTCs applicable to specific deductions is found in Exhibit 6. This exhibit includes the front and back of a sample NTTC. The notation: “Type X-XXXXXXXXXXXX” appears at the top of the front page. The back page lists 15 different NTTCs, with an explanation as to the proper use of each type. The explanation under Type 9 states:

Type 9 certificates may be executed by GOVERNMENTAL AGENCIES, 501(c)(3) ORGANIZATIONS or FEDERALLY or STATE-CHARTERED CREDIT UNIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY. These certificates may not be used for the purchase of services or for the lease of property....

The Department argues that this explanation should have alerted Merchants that it could not accept a Type 9 NTTC to support a deduction of lease receipts. Unfortunately, the notation in the top left-hand corner of Exhibit 6 establishes that it is a sample of an NTTC form revised in July 1997. The NTTC Merchants received from GSD was issued by the Department in January 1996. *See*, Exhibit F. A comparison of the two forms shows that the language used in the 1997 version is somewhat different than that in the earlier version. There is no way to tell whether the NTTC form the Department issued to GSD in 1996—and GSD subsequently executed to

Merchants—including the information found on the back of the 1997 sample form introduced at the administrative hearing.

The NTTC that GSD provided to Merchants does not make any reference to information on the reverse side. The front of the form states: “The registrant named above has been approved as eligible to issue Nontaxable Transaction Certificates for the transaction stated above and more specifically described in the Gross Receipts and Compensating Tax Act.” Exhibit F. As previously discussed, the Gross Receipts and Compensating Tax Act does not provide any information concerning the type of NTTC needed to qualify for a particular deduction. The only “transaction stated” on the NTTC itself is “09 GOVERNMENTAL AGENCIES AND ORGANIZATIONS.” The form does not indicate that governmental agencies’ use of the NTTC is restricted to the purchase of tangible personal property. This distinguishes the facts of this case from those of *McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601, 592 P.2d 515, 517 (Ct. App. 1979), where the taxpayer accepted an NTTC titled “PURCHASE OF SERVICES FOR EXPORT.” Based on this description of the intended use of the NTTC, the court concluded that the taxpayer could not rely on the certificate to claim a deduction of receipts from the taxpayer's in-state ambulance service. Here, the Type 9 NTTC tendered to Merchants did not provide any information concerning the use of the NTTC, except that it applied to transactions with governmental agencies and organizations.

The Department’s prehearing memorandum argues that Merchants could have obtained information concerning the proper use of Type 9 NTTCs from the Department’s CRS Filer’s Kit or its web site. The Filer’s Kit was not introduced as an exhibit, however, nor did the Department call any witnesses to testify concerning the content of the Filer’s Kit or the web site.

The arguments of counsel are not evidence. *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶ 36, 139 N.M. 498, 134 P.3d 785. Based on the evidence in the record, there is nothing to support the conclusion that Merchants should have known that the Type 9 NTTC tendered by GSD was not applicable to the parties' lease transaction. Instead, the evidence shows that GSD represented that it was engaged in leasing vehicles for sublease to other state agencies; that Merchants knew a deduction existed for receipts from leasing vehicles for subsequent lease if the lessee provided the lessor with an NTTC; that GSD provided Merchants with an NTTC, the title of which indicated that it applied to transactions with governmental agencies. These facts support the conclusion that Merchants accepted the NTTC tendered by GSD in good faith and is entitled to claim the deduction provided in NMSA 1978, § 7-9-50.

Time Period at Issue. Merchants states that it is seeking an abatement of gross receipts taxes assessed for the period December 31, 1999 to June 30, 2005, as well as "an explicit recognition or declaratory judgment that the same leases with GSD are tax exempt from this date going forward." Merchants' June 22, 2007 Memorandum of Law, p. 13. Pursuant to NMSA 1978, § 7-1-24, the Hearing Officer is charged with hearing and deciding taxpayers' protests to existing assessments; there is no provision for issuing advisory or preemptive decisions applicable to reporting periods not yet assessed. This Decision and Order is based solely on the evidence presented at the June 26, 2007 administrative hearing and on the facts as they existed during the period December 31, 1999 through June 30, 2005. The Hearing Officer takes no position on whether Merchants was entitled to rely on the Type 9 NTTC tendered by GSD for any period subsequent to June 30, 2005.

CONCLUSIONS OF LAW

A. Merchants filed a timely, written protest to the assessment issued under Letter ID No. L0888202496, and jurisdiction lies over the parties and the subject matter of this protest.

B. Merchants was entitled to accept GSD's representations that it was engaged in leasing vehicles for sublease, and Merchants was not required to investigate GSD's claims to determine the legal effect of its transactions with other state entities.

C. Merchants accepted the NTTC tendered by GSD in good faith and is entitled to claim the deduction provided in NMSA 1978, § 7-9-50.

For the foregoing reasons, Merchants' protest IS GRANTED. The Department is ordered to abate the \$196,465.67 of gross receipts tax, plus accrued interest, assessed on Merchants' receipts from leasing vehicles to GSD during the period December 31, 1999 to June 30, 2005.

DATED July 11, 2007.