

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

**IN THE MATTER OF THE PROTEST OF
BEHR TRUCKING,
TO ASSESSMENTS ISSUED UNDER
ID NO. L0783269952**

No. 11-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 5, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Peter Breen, Special Assistant Attorney General. Ms. Andrea Umpleby, Auditor, also appeared on behalf of the Department. Mr. Richard Behrendsen, owner, appeared on behalf of Behr Trucking ("Taxpayer") and represented himself. The Hearing Officer took notice of all documents in the administrative file. Taxpayer #1 was admitted at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was engaged in business in New Mexico in 2006.
2. Taxpayer was providing hauling services for a construction project.
3. Taxpayer did not file gross receipts reports or pay gross receipts tax for the 2006 tax period.
4. The Department determined that there was a mismatch between Taxpayer's gross receipts reports and its federal Schedule C for the 2006 tax period.
5. On February 23, 2010, the Department assessed the Taxpayer for gross receipts tax of \$2,887.62, penalty of \$577.52, and interest of \$822.35 for the tax period ending on December 31, 2006.

6. The Department determined the amount of gross receipts tax from the amount listed as non-employment compensation on Taxpayer's 1099-MISC form that is contained in the administrative file.
7. The Department determined that the Taxpayer should have been filing gross receipts tax semi-annually, meaning that its gross receipts tax for 2006 would have been due in July 2006 and in January 2007.
8. On March 24, 2010, Taxpayer filed a formal protest letter regarding the assessment.
9. On February 14, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
10. Taxpayer argues that it attempted to obtain the correct non-taxable transaction certificates (NTTC) from the business that issued the 1099-MISC, but was unable to do so because the other business was no longer operating and the former owner was not cooperative in delivering an NTTC. Taxpayer argues that the other business already paid the gross receipts tax on the transactions.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the gross receipts tax, penalty, and interest for the tax period ending in December 2006, due to the failure to obtain a timely NTTC related to the transactions.

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 Center v. Taxation and Revenue Department*, 108 N.M.

795, 779 P.2d 982 (Ct. App. 1989). 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 not liable for the tax and is entitled to an abatement of penalty and interest.

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 (2005). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due. *See* NMSA 1978, § 7-9-43. If the taxpayer is not in possession of NTTCs within sixty days of the notice from the Department requiring possession of NTTCs, "deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall* be disallowed." *Id.* (emphasis added). The word "shall" indicates that the disallowance of the deduction is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Deductions are allowed on construction services in some instances. *See* NMSA 1978, § 7-9-52. Hauling for construction may or may not be deductible. *See* 3.2.210.10 (A) and (C) NMAC (2005). Whether the Taxpayer's hauling would have been deductible was not at issue because it was undisputed that Taxpayer was not in possession of the NTTC relating to the outstanding gross receipts tax assessment within the 60 days.

Taxpayer argued that the other business was at fault because the other business refused to provide an NTTC within the 60 days. Taxpayer also argued that it was unduly difficult to get the NTTC from the other business because they were no longer operating. Taxpayer also argued that the other business paid gross receipts on the transactions and that it was double taxation. Double taxation is not necessarily prohibited, and it is not considered double taxation when two separate

entities are taxed on their own transactions. *See N.M. Sheriffs and Police Ass'n. v. Bureau of Revenue*, 85 N.M. 565, 567, 514 P.2d 616 (Ct. App. 1973). A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess an NTTC in the 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.*, 107 N.M. 392, 397, 758 P.2d 806 (Ct. App. 1988) (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).

Because Taxpayer was not in possession of the proper NTTC within the time limits, the deduction was properly disallowed.

Assessment of Penalty.

A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). Therefore, the penalty was properly assessed.

Computation of Penalty.

On the assessment issued in this matter, the Department seeks to impose a penalty of up to 20% under NMSA 1978, § 7-1-69 (2008). The assessment issued was for taxes due in July 2006 and January 2007 for the 2006 tax period. The applicable penalty statute in effect for the 2006 tax period was capped at a maximum penalty "not to exceed" 10%. *See NMSA 1978, § 7-1-69 (2003)*. *See also NMSA 1978, § 66-8-112 (C)* (indicating that postponements on implied consent hearings are "not to exceed" ninety days). *See also State v. Bargas*, 2000-NMCA-103, 129 N.M. 800 (holding that the ninety days is jurisdictional and cannot be waived). At a maximum penalty "not to exceed" 10% at a rate of 2% per month from the time the tax was due, the penalty provision had

been exhausted for the 2006 tax period before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Ms. Umpleby testified that the Department had assessed a 20% cap because of the 2008 amendment. Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for the 2006 tax period was subject to a penalty “not to exceed” 10% pursuant to NMSA 1978, Section 7-1-69 (2003) because that was the provision in effect at the time the tax was due. *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (holding that a modified penalty regulation would not apply retroactively when the regulation was enacted after the applicable tax year).

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 provision is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of 2006 gross receipts taxes issued under respective Letter ID number L0783269952, and jurisdiction lies over the parties and the subject matter of this protest.
2. Taxpayer failed to obtain an NTTC for the gross receipts from the 2006 tax period within the 60-day deadline. *See* NMSA 1978, § 7-9-43.
3. Taxpayer was properly assessed for gross receipts tax of \$2,887.62 and interest for the 2006 tax period.

4. The assessment of penalty for the 2006 tax period was appropriate. However, the computation of penalty was incorrect. Penalty is capped at an amount not to exceed 10%. The amount of any penalty assessed in excess of the 10% cap is hereby abated.

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

DATED: June 3, 2011.