

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

**IN THE MATTER OF THE PROTEST OF
EXPRESS PACKAGING AND POSTAL SERVICE, INC.,
TO ASSESSMENT ISSUED UNDER
ID NO. L0169401344**

No. 12-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held January 17, 2012, before Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Ms. Lizzy Vedamanikam, Auditor, also appeared on behalf of the Department. Express Packaging and Postal Service, Inc. (Taxpayer) appeared for the hearing and was represented by its President, Mr. Maurice Landavazo. The Hearing Officer took notice of all documents in the administrative file. TRD "A" through "P" were admitted. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico for the tax periods from January 1998 through August 2003. The Taxpayer's business provided services for its customers.
2. The Taxpayer was audited by the Department. The Department determined that the Taxpayer was a non-filer on gross receipts tax or was underreporting its gross receipts tax by more than 25% for most months from January 1998 through August 2003.
3. On August 12, 2004, the Department assessed the Taxpayer for gross receipts tax, compensating tax, withholding tax, and interest for the tax period from January 31, 1998 through August 31, 2003. The assessment was for gross receipts tax of \$19,515.20 and

interest of \$9,073.16, compensating tax of \$700.20 and interest of \$354.11, and withholding tax of \$4,379.51 and interest of \$2,130.16. No penalty was assessed.

4. On August 23, 2004, the Taxpayer filed a formal protest letter.
5. On July 18, 2011, the Taxpayer's accountant withdrew his representation of the Taxpayer on this case.
6. On December 16, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
7. The Taxpayer requested a continuance at the hearing.
8. The request for continuance was denied.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, compensating tax, withholding tax, and interest for the tax periods from January 31, 1998 through August 31, 2003, due to its failure to file gross receipts tax reports and due to its underreporting its gross receipts tax by more than 25%.

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 interest.

The Taxpayer presented no evidence and made no arguments with respect to the assessment of the compensating tax or of the withholding tax. Therefore, the assessment of those taxes is presumed to be correct.

The Taxpayer argued that it was unable to properly defend itself at the hearing. Mr. Landavazo explained that he had received documents from the accountant only a few days prior to the hearing. Mr. Landavazo also explained that he had not attempted to secure other representation after he was notified of the hearing because he did not feel that he would be able to get anyone in that amount of time. Mr. Landavazo claimed that he needed more time to secure the NTTCs in question and argued that he did not know that reports for several months during the tax period in question had not been filed. The Department argued that this case was already several years old, that the Taxpayer had been involved in the original audit and that the NTTCs could not be submitted this late in any case. Ms. Vedamanikam also explained that even if the Taxpayer had NTTCs from the two businesses that they would not be applicable to the Taxpayer's gross receipts. As the Taxpayer made no effort to secure representation prior to the hearing, and based upon the facts presented, the request for continuance was denied.

Gross Receipts Tax.

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 its business activities, to determine accurately and to report its tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. At the hearing, the Taxpayer did not dispute that it was providing services and that the receipts from the services were taxable. The Taxpayer argued that it had non-taxable transaction certificates (NTTCs) from two businesses that should have reduced its tax liabilities. However, the NTTCs from the businesses were never provided.

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). The Taxpayer was audited by the Department prior to the assessment, which was made in August 2004. The Taxpayer was still not in possession of the NTTCs at the hearing. Therefore, any deductions based on the NTTCs would be disallowed as they were not provided timely.

Moreover, Ms. Vedamanikam explained that the two business from which the Taxpayer claimed to have NTTCs were organizations that would be classified as “501 (C)” or as government entities. Ms. Vedamanikam explained that “501 (C)” organizations and government entities are only allowed to issue Type 9 NTTCs, which are for the sale of tangible personal property. As the Taxpayer was in the business of providing services and not in the business of resale of tangible personal property, the NTTCs from those two businesses would not be applicable to the Taxpayer’s gross receipts anyway.

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 Lujan*, 90 N.M. at 105. The assessment of interest is not

designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues.

Because the taxes were not paid when they were due, interest was properly assessed. Mr.

Landavazo acknowledged at the hearing that he was aware interest continued to accrue on unpaid tax principal.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts tax, compensating tax, withholding tax, and interest for the tax periods from January 31, 1998 through August 31, 2003 issued under Letter ID number L0169401344, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer was properly assessed for gross receipts tax, compensating tax, withholding tax, and interest for the tax periods from January 31, 1998 through August 31, 2003. Any NTTCs that the Taxpayer could provide would be denied as untimely, and would also not be applicable to the Taxpayer's gross receipts tax.

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

DATED: February 10, 2012.

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
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