

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

**IN THE MATTER OF THE PROTEST OF
CARLOS CHAVEZ FORMERLY D/B/A MAYAN CONSTRUCTION
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1077909120**

NO. 12-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 1, 2012, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Ms. Ida Lujan, staff attorney. Ms. Andrea Umpleby, Protest Auditor, testified on behalf of the Department. Carlos Chavez formerly d/b/a Mayan Construction (“Taxpayer”) appeared on his own behalf and was also represented by Dean Willingham, his Certified Public Accountant, Atkinson & Co. In addition to the documents contained in the administrative file articulated at the beginning of the hearing, the following documents are admitted into the record: Taxpayer Exhibits #1 through #5 and the Department’s Exhibits A through W. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACTS

1. Taxpayer operated Mayan Construction in New Mexico, as a sole proprietorship from May 1996 through December 2005. Taxpayer requested and was granted deactivation of the sole proprietorship New Mexico State Combined Reporting System (“CRS”) identification number as of December 31, 2005.
2. Taxpayer incorporated the business as an “S” Corporation organized in New Mexico as Mayan Construction Inc. as of January 2006. Taxpayer received a new CRS identification number and began reporting to the Department utilizing the new number.

3. Taxpayer is a general contractor primarily providing concrete services to other licensed general contractors, who resold those services to their customers.
4. In 2002, Taxpayer submitted CRS reports to the Department but did not report the proceeds of those services as part of his gross receipts.
5. During 2002, Taxpayer's Certified Public Accountant, Mr. John Hager, reviewed all work and documents completed by Taxpayer's bookkeeper including the CRS reports. The initial CRS reports noted \$0 gross receipts and \$0 gross receipts tax due. Mr. Hager verified the documents as correct allowing them to be issued erroneously concluding that all gross receipts were deductible and therefore the CRS reports were correct as issued.
6. As part of an information-sharing program with the Internal Revenue Service ("IRS") known as the "Tape-Match Program", the Department was notified of the business income reported on Schedule C of Taxpayer's 2002 Federal Income Tax Return.
7. The Department found a substantial discrepancy between the Taxpayer's Schedule C IRS filing and Taxpayer's 2002 CRS returns determining that Taxpayer had underreported its gross receipts tax by more than 25%.
8. On October 17, 2006, the Department sent Taxpayer notice that it was commencing a limited scope audit of his 2002 Gross Receipts tax reporting because of the mismatch between Taxpayer's Schedule C 2002 IRS return and Taxpayer's 2002 CRS reports. The notice advised Taxpayer that he must be in possession of all 2002 nontaxable transaction certificates ("NTTCs") required to support his deductions within 60 days from the date of the letter. The 60-day period expired on December 16, 2006. [Taxpayer Exhibit 3 and Department Exhibit E].

9. The Department's notice also advised that the NTTCs must be dated no later than the end of the 60-day period (response dated) and that if, on the response date the NTTCs were not in his possession and properly executed, the "DEDUCTIONS RELATING TO THE NTTCs WILL BE DISALLOWED." [Taxpayer Exhibit 3 and Department Exhibit E].
10. On October 26, 2006, the Department received notification from Taxpayer's employee that Taxpayer was in possession of the required NTTCs and 1099s and that returns would be filed with the Department. [Department Exhibit H].
11. On November 28, 2006, the Department mailed a reminder notice of the limited scope audit again informing Taxpayer that all NTTCs' required to support his 2002 claimed deductions must be in his possession and executed on or before the listed response date of December 18, 2006 or the deductions relating to the NTTCs would be disallowed. [Taxpayer Exhibit 3 and Department Exhibit F].
12. On December 18, 2006, the Department granted Taxpayer an extension of time to provide the required records, notifying Taxpayer that if the records were not received within 90 days, or by March 18, 2007, the Department would issue an assessment for any tax due including penalty and interest, based on the records in its possession. [Taxpayer Exhibit 3 and Department Exhibit G].
13. On March 19, 2007, Taxpayer requested an additional three-week period to supply documentation. On April 17, 2007, Taxpayer's Certified Public Accountant, Mr. Tim Burrell, requested and received an additional 90-day extension to supply all required documentation. [Department Exhibit H].
14. Taxpayer was incorrectly notified by Mr. Burrell that the 90-day additional time to provide documents extended the date to obtain validly executed NTTCs. Mr. Burrell was

notified by Ms. Umpleby that the 90-day extension was limited to providing documentation to the Department and did not extend the date for obtaining valid NTTCs. [Taxpayer Exhibit 3 and Department Exhibit G].

15. Taxpayer claimed that it possessed all of the required NTTCs in 2002 but due to the length of time between the tax year and notification of the audit, hard copies of the NTTCs had been purged by both Taxpayer and its customers. Taxpayer claimed that, due to the activation of NTTC.net online program in July 2005, the transfer from paper to paperless NTTC reporting and the deactivation of its sole proprietorship CRS number, hard copies of the purged NTTCs were unobtainable.
16. On August 3, 2007, the Department assessed Taxpayer \$165,021.94 for Project Gross Receipts Tax, \$16,502.20 in penalty and \$117,253.04 in interest for 2002. [Taxpayer Exhibit 3 and Department Exhibit I].
17. On August 29, 2007, Taxpayer filed a formal written protest to the assessment. The protest was received and accepted as timely by Department letter dated October 9, 2007. [Taxpayer Exhibit 3 and Department Exhibits J and K].
18. On December 26, 2007, Taxpayer completed a self audit for tax years 2002 through 2005 and submitted amended 2002 CRS reports and \$28,637.16 for gross receipts tax. [Taxpayer Exhibit 4].
19. Prior to July 2005 and the electronic application and receipt of NTTCs, taxpayers received hard copy NTTCs.
20. Subsequent to July 2005, buyers issuing NTTCs had the option of using hard copy forms if still in their possession, printing up to five blank forms and issuing hard copy NTTCs

to its sellers or utilizing the NTTC.net system to generate an electronic NTTC, which would not require a hard copy.

21. As of December 18, 2006, Taxpayer did not provide to the Department all necessary proof of properly executed NTTCs for the gross receipts tax deductions claimed. The Department disallowed Taxpayer's claim of proper deductions under NMSA 1978, §7-9-43 (2001).
22. Taxpayer spoke with varied Department employees who provided differing suggestions for providing the missing NTTCs including supplying the hard copy NTTCs under the S corporation CRS number, supplying electronic NTTCs under the S Corporation CRS number and supplying affidavits as to having provided hard copy NTTCs at time of the completion of the work. The electronic NTTCs were dated October 2007 and the affidavits were dated April 2011. [Taxpayer Exhibits 4 and 5].
23. The backdated hard copy NTTCs issued to the S Corporation and the electronic NTTCs issued to the S Corporation were not accepted as validly executed NTTCs. The Department declined to accept the affidavits in lieu of the statutorily required NTTCs.
24. Taxpayer provided total 2002 deposit detail reflecting payments from its customers. Taxpayer also submitted contracts between the contract buyers and his sole proprietorship for many of the denied deductions. [Department Exhibit L and Taxpayer Exhibit 5].
25. Taxpayer submitted a timely NTTC from Alfa Legacy Construction, deposit detail of deposits and the contract between Afra Construction, the contractor and Taxpayer, the subcontractor for the Hilton Garden Inn Project, to support its contention that the NTTC

was timely and proper for the work completed by Taxpayer pursuant to the contract with Afra Construction. [Taxpayer Exhibit 5A and 5A.03; Department Exhibit L].

26. Afra Construction and Alfa Legacy Construction are separate construction companies each have a separate construction license, different addresses, different agents, and different filing and identification numbers with the New Mexico Public Regulation Commission (“PRC”). [Taxpayer Exhibit 5A and Department Exhibit X and Y].

27. The Department acknowledged that Taxpayer obtained some of the requested valid NTTCs for the 2002 tax period within the 60-day deadline. The NTTCs obtained only covered some of the assessed transactions. Therefore the assessment, issued under Letter Id No. L1077909120, was abated in part with the resulting balance of \$75,788.03 gross receipts tax, \$10,442.52 penalty and \$95,404.33 interest through March 1, 2012. [Department Exhibit V].

DISCUSSION

In determining whether Taxpayer is liable for the assessed gross receipts taxes, civil penalty and continuing interest based on the Department’s audit for 2002 gross receipts tax, there are three separate issues to be decided: first, whether the Department properly disallowed deductions for the gross receipts taxes based on Taxpayer’s failure to provide the requisite NTTCs to support the claimed deductions within the 60-day period provided in the Department’s audit notice; second, whether the NTTC from Alfa Construction should be accepted to properly allow the deductions for Taxpayer’s receipt of payments on the Hilton Garden Inn Project; and third, whether Taxpayer is entitled to an abatement of the assessed penalty based on his reasonable reliance on the advice of competent tax accountants as to his tax liability.

Burden of Proof.

NMSA 1978, Section 7-1-17 (C) (2007), provides that any assessment of taxes made by the Department is presumed to be correct. Regulation 3.1.6.12 (A) NMAC explains that, once an assessment is issued to a taxpayer, the presumption of correctness attaches and therefore the taxpayer has the burden of submitting evidence to dispute the correctness. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). Also NMSA 1978, §7-1-3 NMSA (2009). *Holt v. New Mexico Department of Taxation & Revenue*, 2002-NMSC-34, ¶4, 133 N.M. 11, 59 P.3d 491. NMSA 1978, §7-1-3 (2009), defines “tax” to include not only the amount of tax principal imposed but also, “unless the context otherwise requires, the amount of any interest or civil penalty relating thereto.” *See also El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P. 2d 982 (Ct. App. 1989). Accordingly, it is Taxpayer’s burden to come forward with evidence and legal documents to establish that he is entitled to an abatement of the assessment, in full or in part.

Gross Receipts Tax.

Pursuant to NMSA 1978, Section 7-9-4 (2010), any person or entity “engaging in business in New Mexico” is subject to payment of gross receipts tax. The definition of “engaging in business” is very broad including “carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit.” NMSA 1978, Section 7-9-3.3 (2002). The term “gross receipts” as defined in NMSA 1978, Section 7-9-3.5(A) (1) (2007), “means the total amount of money or value of other consideration ...from performing services in New Mexico.” Moreover, there is a statutory presumption that all receipts of a person engaging in business in New Mexico are subject to gross receipts tax. NMSA 1978, Section 7-9-5 (2002). A taxpayer claiming the receipts are not taxable must carry the burden of proving the assertion. *TPL Inc. v. Taxation and Revenue*,

Dept., 2000-NMCA-083, ¶18, 129 N.M. 539, 10 P.3d 863. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd v. New Mexico Taxation and Revenue Dep't*, 2003-NMCA-021, ¶12, 133 N.M. 217, 62 P.3d 308.

As this protest involves deduction from tax, Taxpayer has the burden of establishing that he was entitled to the deductions pursuant to NMSA 1978, Section 7-9-43 (2001). In *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991) ¶¶29 -32, the court explained,

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...taxation is the rule and the claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.

See also *Security Escrow Corp. v. Taxation and Revenue Department*, 107 N.M. 540, 543, 760 P.2d 1306, 130 (Ct. App. 1988) §18-20. Taxpayer acknowledged he was performing concrete services for the general contractors. Taxpayer claimed he had valid NTTCs to substantiate his deductions of gross receipts tax. Therefore, in this matter, Taxpayer had the responsibility to establish that he had in his possession the required NTTCs at the time the services were provided or within the 60-day allowance provided by the notice of limited scope audit.

NTTC Requirement for Claimed Deductions.

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. The Taxpayer is seeking to qualify for the deduction provided in NMSA 1978, §7-9-52 (2000), which states in subsection A:

Receipts from selling a construction 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.* (emphasis added).

This statute allows a taxpayer to deduct its receipts from performing services as a subcontractor if, and only if, the general contractor provides the taxpayer with a properly executed NTTC. The requirements of NMSA 1978, Section 7-9-52 are very specific. If the subcontractor fails to obtain an NTTC from the general contractor, there is no basis for the deduction.

The requirements for obtaining NTTCs are set out in NMSA 1978, Section 7-9-43 (2005), which provides that all nontaxable transaction certificates:

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. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

While taxpayers “should” have possession of properly executed NTTCs at the time of the transaction at issue, the statute provides taxpayers, audited by the Department, a second chance to obtain these NTTCs. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the legislature. The reason why a taxpayer does not obtain an NTTC is irrelevant. The language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, “deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed.*” (emphasis added). *See also*, NMSA 1978, Section 12-2A-4 (1997) of the Uniform Statute and Rule Construction Act (the words “shall” and “must” express a duty, obligation, requirement or condition precedent). Taxpayer had to

establish possession of the required gross receipt NTTCs within the response date noted on the Reminder Notice of Limited Scope Audit, December 18, 2006.

Taxpayer Failed to Possess NTTCs by Statutory Deadline.

Taxpayer claimed there were several valid reasons why it was unable to comply with the Department's requirement that it provide valid NTTCs within the 60-day notification of the limited scope audit. Taxpayer claimed that it had initially properly obtained the NTTCs at the time the services were performed but that the documents had been purged as the notice of audit was issued four years after the tax year in which the documents were created. Taxpayer's customers also indicated they had purged their hard copy records. Taxpayer also claimed that the launch of NTTC.net offering on line electronic receipt of NTTCs along with the deactivation of his sole proprietorship CRS number prevented his obtaining the hard copies required. Taxpayer viewed the website as preventing any options for obtaining the NTTCs other than electronically. Taxpayer's understanding of the limitations of NTTC.net was incorrect. Taxpayer received differing suggestions from multiple Department personnel as how to provide the NTTCs.

Taxpayer attempted to comply with the Department's request for documentation by securing backdated hard copy NTTCs from its customers. As the sole proprietorship CRS number was deactivated, Taxpayer's customers provided backdated NTTCs issued to the S Corporation CRS number. These were not accepted by the Department as the NTTCs were issued to the incorrect seller of the service. A Department employee suggested that Taxpayer obtained electronically generated NTTCs. Taxpayer's accountant, Sabine Budagher, obtained electronically generated NTTCs issued to the S Corporation, issued after December 18, 2006. Ms. Budagher did not notify the Department as to any problems obtaining the NTTCs in the sole proprietorship name until submitting them to the Department in 2007. These NTTCs were not accepted by the Department as

the NTTCs were issued again to the S Corporation rather than the sole proprietorship and were dated after the 60-day allowance provided for timely dated NTTCs.

Taxpayer suggested to the Department that he submit affidavits from his customers as to the previously properly issued NTTCs. While Taxpayer viewed the Department's actions as an approval and subsequent withdrawal of an agreement to submit affidavits in lieu of the required NTTCs, the Department's employee, Ms. Umpleby, conveyed to Taxpayer that the Department would consider the possibility if Taxpayer would submit a proposed affidavit. The Department did not authorize submission of affidavits in lieu of the required NTTCs. The Department thereafter denied the proposal and refused to accept affidavits in lieu of the required NTTCs.

New Mexico law requires that each taxpayer retain records sufficient to prove his tax calculations. NMSA 1978, Section 7-1-10 (2001) and Regulation 3.1.5.8 (A) NMAC (12/29/2000). Additionally, Regulation 3.2.201.10 (A) NMAC (05/31/2001) requires that a deduction is allowed under the Gross Receipts and Compensating Tax Act, "only if documentation justifying the deduction is maintained so it can be verified upon audit." (emphasis added). In 2002, prior to NTTC. net being available online, hard copies of the NTTCs had to be retained to establish the validity of a claimed deduction. Therefore while Taxpayer explained that records pertaining to his 2002 gross receipts tax obligations were purged, Taxpayer had the obligation to retain his 2002 NTTC records to provide evidence upon being audited.

Taxpayer claimed that the audit was so many years after the tax year involved that he should not be blamed for purging the documents. This argument is without merit. As noted above, each taxpayer is required to maintain documentation to prove his deductions. Additionally, NMSA 1978, §7-1-18 (1994), while generally limiting the Department's issue of an assessment to three years from the end of the calendar year in which payment of taxes was due, does allow assessments

to be issued past the three year limitation under specific circumstances. Subsection D, allows for the Department to issue assessments at any time within six years from the end of the calendar year in which payment of the tax was due, “[i]f a taxpayer in a return, understates by more than twenty-five percent the amount of his liability for any tax for the period to which the return relates....” In this matter, Taxpayer, due to errors of review by his accountant, failed to properly report gross receipts earned for 2002. The 2002 CRS reports understated the gross receipts liability by more than twenty-five percent. Therefore the assessment for 2002, issued in 2007, was properly issued. Taxpayer had a responsibility to maintain and provide to the Department NTTCs justifying its claimed deductions upon being audited. Taxpayer failed to maintain these records.

In October 2006, Taxpayer’s employee claimed, in communications with the Department, that Taxpayer had the proper NTTCs and only needed time to create a spreadsheet and verify that the necessary calculations were correct. Taxpayer did not provide all of the NTTCs to the Department. Taxpayer then claimed that, in good faith and with due diligence, he obtained backdated NTTCs, electronically issued NTTCs and affidavit evidencing his proper deductions. While Taxpayer did provide these documents to the Department, they were not provided timely and they were not issued to the sole proprietorship.

Taxpayer claimed that he was prevented by the Department from electronically obtaining valid NTTCs from his buyers as the sole proprietorship CRS number had been deactivated. Taxpayer claimed that his buyers had attempted to electronically input the sole proprietorship CRS number into NTTC.net, but such attempts were rejected because the CRS number was not active. The Department’s protest auditor, Ms. Umpleby, testified that Taxpayer’s accountant, Ms. Sabine Budagher, after the time for timely submission had expired, reasoned that backdated NTTCs and electronically issued NTTCs to the S Corporation were issued as the buyers of the services were

unable to issue NTTCs under the sole proprietorship CRS number. Ms. Budagher failed to timely notify any Department employee of the problem but rather had the NTTCs issues to the S Corporation rather than attempt to obtain direction from the Department as to re-activation of the sole proprietorship CRS number. Ms. Umpleby explained that NTTC.net not only allows for electronic submission of NTTCs but also allows for an NTTC issuer to print out five blank NTTCs and hand write in the information to supply a service provider. The NTTC issuers also had the option, if still in possession of hard copy NTTCs, to complete and supply Taxpayer, a backdated hard copy NTTC utilizing the sole proprietorship CRS number.

In August 2011, Ms. Noelle Elliott, Taxpayer's employee, requested the Department re-activate the sole proprietorship CRS number. The Department complied with the request. While admittedly this was after the date permitted for timely submission of correctly dated NTTCs, reactivating the CRS number was an additional option. Had the Department been notified of the problems expressed by Ms. Budagher, there would have been the possibility that the NTTCs could have been timely obtained and submitted. While the Department was asked for and allowed extensions of time to provide documentation, it was not notified that Taxpayer was having problems obtaining the NTTCs in the name of the sole proprietorship until the date allowed for timely obtaining the NTTCs had expired. Additionally, while Taxpayer argued that the Department in the past had accepted affidavits in lieu of properly executed NTTCs, there was no evidence offered to support this argument.

The 60-day statutory deadline after notice of the limited audit scope served as Taxpayer's statutory extension to obtain the NTTCs that he should have already possessed at the time of the work being completed. Regardless of his reasoning for the non-possession of a required NTTC, NMSA 1978, Section 7-9-43 (2005) provides no further extension of time. The fact that the

Department allowed additional opportunity to submit the NTTCs does not negate the mandatory language of NMSA 1978, §7-9-43 (2005), which requires that the deduction “shall be disallowed” and does not allow the Department any leeway in granting a deduction in instances of untimely possession of the required NTTCs.

Taxpayer was able to provide the Department with some timely NTTCs, and the gross receipts tax, based on those timely submitted NTTCs, was properly deducted and an abatement of the tax was allowed. While acknowledging Taxpayer’s frustration with the Department’s employees as to the different advice provided as to complying with submission of evidence of proper NTTCs, Taxpayer failed to properly retain documentation to verify the correctness of the deductions taken. By not maintaining his records to properly to establish the claimed deductions, Taxpayer created the problems he subsequently encountered in attempting to recreate the NTTCs after being notified of the limited scope audit. *See Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

While Taxpayer attempted to obtain NTTCs and did submit the obtained NTTCs to the Department, Taxpayer did not obtain the NTTCs by December 18, 2006, the 60-day date allowance deadline nor did Taxpayer obtain them in the name of the sole proprietorship. Taxpayer was not in possession of validity executed NTTC for the claimed deductions by December 18, 2006, the last date allowed by the reminder notice of limited scope audit. Therefore, Taxpayer’s failure to provide evidence of timely and validly executed NTTCs pursuant to NMSA 1978, §7-9-52 (2000) and his failure obtain the NTTCs within the 60-day period provided in NMSA 1978, §7-9-43 (2005) leaves the Department no choice but to disallow his deductions.

Allowance of Timely Submitted Alfa Legacy Construction NTTC.

Taxpayer submitted a timely dated NTTC to the Department issued by Alfa Legacy Construction to allow the deduction for receipt of funds received for concrete services for the Hilton Garden Inn project. Taxpayer also submitted a pay application form dated July 20, 2001 billing Alfa Legacy Construction for payment on the project. Taxpayer provided the contract for the project which revealed that Afra Construction was the contractor, Architects Studio was the architect, and Primetime Hospitality was the owner of the site. The contract was signed by the president of Afra Construction. There is no mention of Alfa Legacy Construction in the contract. Taxpayer submitted other service contracts each revealing the buyer to be the general contractor, whose names were also indicated on the 2002 deposit detail as paying for the work completed.

In Taxpayer's 2002 direct deposit detail, Afra Construction is noted as the company paying Taxpayer for the work completed and includes the notation, "Architects Studio: Hilton Garden Inn". The deposit detail notes as an explanation "Alfa Legacy". Taxpayer provided PRC documentation to establish the connection between Afra Construction and Alfa Legacy Construction. Taxpayer explained that, when the work was being completed, both companies were situated in the same building and had the same mailing address. The documentation established that Alfa Legacy Construction LLC, Primetime Hospitality Inc. and Kassam Construction LLC are possibly related as they share the same corporate address and the same agent information. However such information alone does not establish a business relationship between the companies. More importantly, the PRC information provided does not provide any information that would establish even a possible business relationship between Afra Construction and Alfa Legacy Construction.

Taxpayer testified that Afra Construction was the design architect and that Alfa Legacy was the general contractor for the Hilton Garden Inn project. He testified that Alfa Legacy Construction

was the company that he invoiced and who paid the bill, and therefore he obtained the NTTC from Alfa Legacy Construction. Both Taxpayer and the Department's witness, Ms. Umpleby, agreed that the NTTC should have been obtained from the company paying the bills. The deposit detail showed that Afra Construction was paying Taxpayer for work on the project. When the Department asked for explanatory information as to the relationship between Afra Construction and Alfa Legacy Construction, it received the contract and the 2002 deposit detail. The Department argued that Taxpayer never supplied any evidence that Afra Construction and Alfa Legacy Construction were related in any business way or that Alfa Legacy was authorized to and did pay Taxpayer for the work completed. Therefore the Department refused to allow the deduction claiming that Afra Construction was the proper entity to issue the NTTC.

NMSA 1978, Section 7-9-43, entitled "Nontaxable transaction certificates and other evidence required to entitle persons to deductions" clearly requires that a properly executed NTTC be executed by the "buyers or lessees" and provides that a properly executed NTTC is required to support a deduction for receipts from such transactions. Subsection A specifically requires that a seller accept the NTTC in good faith from the buyer or lessee. The contract clearly states that the agreement is between Afra Construction and Taxpayer in his sole proprietorship capacity. The deposit detail reveals that payments were made to Taxpayer by Afra Construction. Additionally, while Taxpayer testified that Afra Construction was the design architect and Alfa Legacy was the general contractor, the contract established that Afra Construction was the contractor and that Architect Studio was the architect.

There was no evidence presented to establish that Alfa Legacy Construction was the buyer or a lessee for the Hilton Garden Hill project. The two construction companies were separate and distinct legal entities with different construction license numbers issued by the state. While the

NTTC was a valid NTTC, it was not a valid NTTC to enable Taxpayer to deduct the payments received from Afra Construction for the work completed by Taxpayer on the Hilton Garden Hill project. Taxpayer failed to carry his burden that the NTTC issued by Alfa Legacy Construction was properly issued for the contract between Taxpayer and Afra Construction and therefore was unable to establish that the NTTC was obtained in good faith. Therefore, without evidence that Alfa Legacy Construction actually paid Taxpayer for the services provided, Taxpayer was required to obtain a timely and validly executed NTTC from Afra Construction in order to deduct the receipts from his gross receipt tax obligation.

Interest Due on Unpaid Principal.

NMSA 1978, Section 7-1-67 (2008) governs the imposition of interest on late payments of tax and provides, interest *shall be paid* to the state from the first day following the day on which the tax becomes due until the tax principal is paid in full.(emphasis added). The assessment of interest is mandatory rather than discretionary regardless of the explanation provided by the taxpayer. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977).

In this matter, Taxpayer failed to pay gross receipts taxes when he had a legal duty to pay the tax. Taxpayer was notified multiple times by the Department that interest would continue to accrue on any unpaid balance of principal tax. As payment of interest is designed to compensate the state for the time value of unpaid revenues and the evidence established that the gross receipts taxes were not paid when statutorily due, interest was appropriately charged and continues to be charged until the gross receipts tax principal is paid in full.

Penalty Due for Failure to Pay Tax.

NMSA 1978, Section 7-1-69 (2007) establishes the imposition of a penalty for failure to pay tax due. Subsection A states:

...[i]n the case of failure due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid...there *shall be added* to the amount as penalty 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... (Emphasis added).

While the assessment was issued in 2007, the increase from ten percent to twenty percent became effective for assessments issued after January 1, 2008. *See GEA Integrated Cooling v. New Mexico Taxation and Revenue Dept*, 2012-NMCA-010. Therefore the maximum penalty imposed is ten percent.

Regulation 3.1.11.10 NMAC (01/15/2001) defines negligence as:

- (A) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- (B) inaction by taxpayers where action is required; or
- (C) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

The statute imposes a penalty based on negligence for failure to timely pay a tax due. The good faith of Taxpayer is not at issue. What is to be determined is whether Taxpayer was negligent in failing to report his taxes properly.

NMSA 1978, Section 7-1-69 (B) (2003) permits a limited exception to the general definition of civil negligence stating: “No penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds.” Regulation 3.1.11.11 NMAC (01/15/2001) provides several examples to consider in establishing whether a taxpayer’s failure to pay tax was negligent or in disregard of rules and regulations. Subsection D explains that a taxpayer could establish evidence of non-negligence if:

the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts....

In this matter, Taxpayer had an in-house employee completing tax documentation including CRS reports. Taxpayer then had his Certified Public Accountant, Mr. John Hager, review the employee's work for accuracy. Mr. Hager allowed the CRS reports to be issued to the Department as correct. The CRS reports initially submitted in 2002 were incorrect as they did not report accurately all gross receipts taxes and all allowable deductions. Additionally, Taxpayer's subsequent accountant, Mr. Tim Burrell, incorrectly notified Taxpayer that the 90-day extension for submission of timely obtained documentation was actually an extension of the 60-day allowance for properly executing NTTCs. Further, Ms. Sabine Budagher, also an accountant with Mr. Burrell's firm, failed to notify the Department as to problems obtaining NTTCs in the sole proprietorship's name. Had the Department been notified of the problem, potentially, the Department could have explained the process for re-activating the sole proprietorship CRS number. Taxpayer's buyers could then possibly have utilized NTTC.net to issue backdated NTTCs to the sole proprietorship. The Department did re-activate the CRS number when it was requested in 2011.

Ms. Umpleby had discussions with Mr. Burrell, as to his misconception as to Taxpayer's ability to obtain validly executed NTTCs during the 90-day extension to submit timely dated documentation. Ms. Umpleby explained Ms. Budagher's acknowledgment to her that electronically generated NTTCs to the S Corporation were generated as that was what the NTTC.net system would allow. Ms. Budagher did not notify the Department of the problems she was having in generating the NTTCs due to the de-activation of the sole proprietorship CRS

number. Taxpayer credibly testified that, while experienced in concrete work, he was not experienced in tax matters and therefore he had to rely on his accountant's expertise and knowledge as to submission of tax documentation to the Department. Taxpayer established by a preponderance that he sought, paid for and relied on advice of competent Certified Public Accountants in filing his CRS returns in 2002, in the extensions allowed for supplying documentation to the Department and to relying that his hired accountants would notify the Department of issues regarding obtaining properly dated NTTCs.

Taxpayer established that pursuant to Regulation 3.1.11.11 (D) NMAC (01/15/2001) he was non-negligent because his failure to properly submit correct CRS reports in 2002 and to subsequently timely submit properly dated NTTCs was attributable to his reasonable reliance on the advice of his accountants, Mr. Hager, Mr. Burrell and Ms. Budagher. Therefore the imposition of penalty against Taxpayer for non-payment of gross receipts taxes for 2002 is not warranted and should properly be abated.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment of gross receipts tax, penalty and interest issued under Letter ID No. L1077909120, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer was engaged in the business of providing concrete services to his customers and was subject to gross receipts tax on the payments he received from his customers.

C. Taxpayer failed to overcome the presumption of correctness as Taxpayer did not establish that he was qualified for gross receipts tax deduction based on his failure to provide timely properly executed NTTCs pursuant to NMSA 1978, Section 7-9-52 and Section 7-9-43.

D. Taxpayer is not entitled gross receipts tax deduction for receipts of services to Afra Construction based on the NTTC issued by Alfa Legacy Construction.

E. Taxpayer failed to timely pay taxes due to the state. Therefore interest was properly being assessed pursuant to NMSA 1978, Section 7-1-67.

F. Taxpayer established that he was non-negligent under NMSA 1978, Section 7-1-69 and Regulation 3.1.11.11(D) NMAC (01/15/2001) due to his reasonable reliance on advice of his tax accountants, and therefore the negligence penalty imposed should be abated.

For the foregoing reasons, the protest of Carlos Chavez D/B/A Mayan Construction is **GRANTED IN PART AND DENIED IN PART**: The Department is ordered to abate the penalty assessed against Taxpayer with Taxpayer remaining liable for the revised amount of principal of \$75,788.03 and interest of \$95,404.33 with interest continuing to accumulate until the principal balance is paid in full.

Dated: March 12, 2012.

SALLY GALANTER
Hearing Officer
Taxation & Revenue Department