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

IN THE MATTER OF THE PROTEST OF
WESLEY K. MILLER **No. 13-15**
W & T MILLER
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0986908736 and L1406939200

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 7, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Richard Eisen, CPA, appeared representing Wesley K. Miller/W&T Miller, ("Taxpayer"). Staff Attorney Susanne Roubidoux appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits #1-6 were admitted into the record. Department Exhibits L1, L2, and L3 were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 4, 2010, the Department assessed Taxpayer $2,261.82 in gross receipts tax, $452.36 in penalty, and $984.50 in interest for a total assessment of $3,698.68 for the reporting period ending December 31, 2005. [Letter id. no. L0986908736].

2. On March 4, 2010, the Department assessed Taxpayer $2,577.14 in gross receipts tax, $515.42 in penalty, and $736.47 in interest for a total assessment of $3,829.03 for the reporting period ending December 31, 2006. [Letter id. no. L1406939200].

3. On March 12, 2010, Taxpayer filed a formal written protest of the assessments.

4. On June 7, 2010, the Department acknowledged receipt of Taxpayer's protest.

5. Taxpayer's father, Larry Miller d/b/a Big River Grain, provided transportation services to large out-of-state companies shipping grain to New Mexico customers. [Compact Disc May 7, 2013, counter 29:20-29:51; counter 35:00-35:05].

6. Larry Miller would pick up grain at the railhead in Albuquerque and deliver the grain to various farmers in Valencia County and Bernalillo County. [CD 5-7-13, 29:20-29:51].

7. When Larry Miller could not handle the volume of incoming grain shipments, Larry Miller would subcontract the work out to his son, Taxpayer. [CD 5-7-13, 30:11-30:37].

8. Taxpayer's subcontractor work for Larry Miller involved transporting grain from the railhead to farmers in central New Mexico. [CD 5-7-13, 30:11-30:37].

9. Taxpayer's deliveries of grain under subcontract with Larry Miller were exclusively intrastate within New Mexico. [CD 5-7-13, 39:28-39:44].

10. Taxpayer is not a party to the contract between Larry Miller and the out-of-state companies. [CD 5-7-13, 31:03-31:07].

11. Taxpayer did not receive a copy of the shipping contract between Larry Miller and the out-of-state companies. [CD 5-7-13, 31:07-31:30].

12. Taxpayer has never seen a contract between Larry Miller and the out-of-state companies. [CD 5-7-13, 31:55-31:59].

13. Taxpayer has no evidence/knowledge that Larry Miller ever had a formal contract with the out-of-state companies; Taxpayer assumed that such a contract existed. [CD 5-7-13, 32:00-32:22].

14. For Taxpayer's subcontracting work, Larry Miller issued Taxpayer a Form 1099 for 2005, reporting $33,193.00 in non-employee compensation. [Taxpayer Ex. #2].

15. For Taxpayer's subcontracting work, Larry Miller issued Taxpayer a Form 1099 for 2006, reporting $37,473.00 in non-employee compensation. [Taxpayer Ex. #1].

16. On January 7, 2013, Department Protest Auditor Thomas Dillon sent Taxpayer's representative a letter indicating that the Department would need a copy of the single contract for the out-of-state shipping services. [Department Ex. L1].

17. On February 18, 2013, Mr. Dillon sent Taxpayer's representative a letter requesting a copy of the single contract for the out-of-state shipping services to see whether Taxpayer qualified for deduction. Mr. Dillon asked for the single contract by February 28, 2013. [Department Ex. L2].

18. On March 6, 2013, Mr. Dillon again sent Taxpayer's representative a letter indicating that the Department needed to see the single contract for the out-of-state shipping services in order to assess the merits of the protest. Since Taxpayer had not responded to the three previous requests for the single contract, Mr. Dillon indicated that the Department would request a protest hearing. [Department Ex. L3].

19. In response to Mr. Dillon's repeated requests, Taxpayer did not produce a copy of the single contract for the out-of-state shipping services to the Department.

20. On March 28, 2013, the Department requested a hearing.

21. On March 28, 2013, the Hearing Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing five weeks later on May 7, 2013.

22. On May 2, 2013, five days before the scheduled hearing, Taxpayer moved to continue the hearing because it needed more time to secure a copy of the single contract.

23. On May 3, 2013, the Hearing Bureau issued an Order Denying the Continuance. That Order is part of the record of this proceeding.

24. On May 6, 2013, Larry Miller submitted a letter indicating that he contracted with Wesley Miller to complete the delivery of cattle feed shipments from Garvey Processing, Lansing Grain, and D.B.S. Commodities. [Taxpayer Ex. #5].

25. Attached to Larry Miller May 6, 2013 letter were eight weight tickets/invoices:

a. December 30, 2006, Taxpayer transportation of 53,280 lb. of stored Lansing Grain grain to Edeal Dairy. [Taxpayer Ex. #6.1].

b. September 28, 2005, Taxpayer transportation of 56,820 lbs. of D.B.S. grain from railcar to Edeal Dairy. The weight ticket included invoice #29153 totaling $727.92. [Taxpayer Ex. #6.2].

c. September 19, 2005, Taxpayer transportation of 44,860 lbs. of Garvey Processing grain from railcar to Pareo Dairy. The weight ticket included invoice #1437, totaling $717.07. [Taxpayer Ex. #6.3].

d. September 15, 2005, Taxpayer transportation of 45,240 lbs. of Garvey Processing grain from railcar to Pareo Dairy. The weight ticket included invoice #1430, totaling $736.91. [Taxpayer Ex. #6.4].

e. September 7, 2005, Taxpayer transportation of 58,680 lbs. of D.B.S. Commodities product to Edeal Dairy. The weight ticket included invoice #28995, totaling $1,007.66. [Taxpayer Ex. # 6.5].

f. September 6, 2005, Taxpayer transportation of 66,960 lbs. of D.B.S. Commodities product to Edeal Dairy. The weight ticket included invoice #28995, the same invoice attached to Taxpayer Ex. #6.5, and totaling $1,007.66. [Taxpayer Ex. #6.6].

g. October 28, 2005, Taxpayer transportation of 56,940 lbs. of D.B.S. Commodities product to Edeal Dairy. The weight ticket included invoice #29639, totaling $726.16. [Taxpayer Ex. 6.7].

h. September 19, 2005, Taxpayer transportation of 61,800 lbs. of Garvey Processing grain from railcar to Pareo Dairy. Invoice #1437 was attached to the weight ticket for $717.07, the same invoice attached to Taxpayer Ex. #6.3. [Taxpayer Ex. 6.8].

26. On May 7, 2013, at the beginning of the hearing, Taxpayer filed a formal objection to the denial of the continuance.

27. At the hearing, Taxpayer did not produce a copy of a single contract showing that the subcontracting transportation services Taxpayer provided to Larry Miller were part of interstate commerce under a single contract.

DISCUSSION

There is one substantive issue and one procedural issue at dispute in this protest. Substantively, Taxpayer argues that the assessed gross receipts tax, penalty, and interest for 2005 and 2006 should be abated because Taxpayer was entitled to a deduction under NMSA 1978,

Section 7-9-56 (1994). Procedurally, Taxpayer objects to the denial of a request for continuance and argues prejudice in the inability to produce a single contract as evidence in this matter given the denial of the continuance.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments issued in this case are presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessments and establish that he was entitled to the claimed deductions. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). Moreover, "[w]here 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); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003 NMSC 7, ¶9, 133 N.M. 447, 451, 64 P.3d 474, 478 (N.M. 2002). However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217, 220, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Gross Receipts Tax and the Claimed Deduction.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). "Engaging in business" is defined as "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 (2003). Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in

business are taxable. *See* NMSA 1978, Section 7-9-5 (2002). During 2005 and 2006, Taxpayer was engaged in the transportation business as a subcontractor for his father, Larry Miller. As such, any of Taxpayer's receipts during 2005 and 2006 (unless otherwise exempted or deductable) were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

In this protest, Taxpayer claims a deduction from gross receipts tax under NMSA 1978, §7-9-56 (1994). In pertinent part, NMSA 1978, §7-9-56 (A) (1994) states that

> [r]eceipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property… *is being transported in interstate or foreign commerce under a single contract*.

(emphasis added). Regulation 3.2.214.8 (A) NMAC (05/31/01) further addresses the deduction:

> [the deduction applies] to the receipts of persons who are not a party to a single contract for the transportation of property or persons in interstate commerce but who are selling such services to the person who is obligated to furnish the transportation in interstate commerce under the terms of the contract.

Regulation 3.2.214.8 NMAC (05/31/01) also provides several examples of whom might qualify for a deduction under NMSA 1978, §7-9-56 (1994). Taxpayer argues that his services qualify for deduction under the example articulated under Regulation 3.2.214.8 (B) NMAC (05/31/01):

> Example 1: X, a pipe supply house in Durango, Colorado, sells C in Las Cruces, New Mexico, a truckload of pipe. T, a truck line service, regularly transports property from Durango to Albuquerque. B, another truck line service, has New Mexico authority to transport property from Albuquerque to Las Cruces. X ships the pipe under a through bill of lading to Las Cruces with T. T carries the pipe to Albuquerque. At Albuquerque B attaches a tractor to T's trailer and carries the pipe on to Las Cruces. B can deduct the receipts which B receives from hauling the pipe from a point in New Mexico to another point in New Mexico. The pipe is being shipped in interstate commerce under a single contract. T can deduct its receipts from this transaction under the provisions of Section 7-9-56 NMSA 1978.

However, another example under Regulation 3.2.214.8 (D) NMAC (05/31/01) is also relevant to the resolution of this protest:

> Example 3: Y orders materials from an out-of-state supplier and the materials are shipped to Albuquerque under a single contract. The materials are stored in Albuquerque and then Y hires X, a local hauler, to take the materials from the place of storage to the job site. X claims receipts from performing this service are deductible under Section 7-9-56 NMSA 1978. X's receipts are not deductible. X's hauling was not under the single contract or tariff for the interstate shipment. The single contract has previously been completed.

Having addressed the legal underpinnings of this issue, the remaining question is largely factual and a question of the sufficiency of evidence: whether Taxpayer established that his portion of intrastate transportation of grain to New Mexico farmers was part of the shipment of interstate transportation under a single contract. Taxpayer did not introduce the contract between Larry Miller and the out-of-state companies into the record. Taxpayer has never seen a single contract.

While the weight tickets and letter of Larry Miller do provide some circumstantial evidence that such a single contract might have existed, they are not sufficient to find by the preponderance that all of Taxpayer's receipts in 2005 and 2006 resulted from Taxpayer's intrastate transportation services as part of interstate shipments under a single contract. Even though the companies might be large out-of-state corporations, Larry Miller's letter does not specify that the shipment of grain originated from out-of-state. Further, the weight tickets and invoices do not specify whether the grain originated from an out-of-state destination with an intended final destination. The weight tickets also do not specify whether the New Mexico portion of the transportation was part of the fulfillment of an interstate single contract. Moreover, those weight ticket invoices account only for a small portion of Taxpayer's receipts in the years in question. The non-duplicative invoices[1] of all the weight tickets totaled $3,915.72, an amount much smaller than Taxpayer's 2005 and 2006 Form

[1] Two of the weight tickets presented included duplicate invoices, as noted in FOF #25(f) and FOF #25(g).

1099 income totaling $70,666.00. Even if this evidence was arguably sufficient to qualify for the deduction, at best it would only entitle Taxpayer to deduction of $3,915.72 of Taxpayer's receipts in 2005 and 2006, a very small portion of the Department's assessments of tax. Finally, Taxpayer Ex. #6.1 shows that Taxpayer picked up the shipped grain from storage. Picking up the grain from storage suggests that the third example contained under Regulation 3.2.214.8 (D) NMAC (05/31/01), as cited above, controls that Taxpayer is not entitled to the claimed deduction for that invoice. Like in the third example, picking up a stored product suggests that single contract had been completed upon delivery to storage.

Example 1 contained under Regulation 3.2.214.8 (B) NMAC (05/31/01) does not control because there simply is not enough evidence to establish that the intrastate transportation services Taxpayer provided were part of the completion of interstate shipment under a single contract. In example 1, there was a bill of lading detailing the transportation from the out-of-state origin to its final destination in New Mexico. No such evidence exists in this case. As discussed above, the weight tickets do not provide clear evidence of an out-of-state origin and in-state destination for the products that Taxpayer transported.

Ultimately, when claiming a deduction, Taxpayer has the burden to substantiate that he is entitled to the claimed deduction. *See Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003 NMSC 7, ¶9, 133 N.M. 447, 451, 64 P.3d 474, 478 (N.M. 2002). Taxpayer's representative in this case acknowledged that Taxpayer did not in fact know whether there was a single contract in place between the large companies and Larry Miller, and simply assumed that such a contract existed. Without producing a copy of the single contract, witness testimony, or other more detailed evidence substantiating the intrastate transportation was part of the completion of

interstate commerce under a single contract, Taxpayer failed to demonstrate that he was entitled to the claimed deduction under NMSA 1978, §7-9-56 (A) (1994) and failed to overcome the presumption of correctness that attached to the Department's assessments. Since Taxpayer made no arguments about penalty and interest, Taxpayer also did not overcome the presumption of correctness as to penalty and interest.

Denial of Continuance

Taxpayer's representative argued that the notice of hearing left insufficient time to prepare for the hearing and that the denial of the continuance prejudiced the ability to obtain a copy of the single contract at issue in this matter. Taxpayer argued that it was unreasonable to deny Taxpayer's continuance on the grounds it was filed with short notice considering that the Department delayed acting on this protest for two-years. This argument does not persuade.

The transactions at issue in this protest occurred in 2005 and 2006. When claiming a deduction from tax, Taxpayer had an obligation to substantiate the claimed deductions. Nothing about the procedural posture of this protest alters the basic fact Taxpayer did not have the single contract supporting the deduction at the time of filing the 2005 and 2006 gross receipts tax returns. Nor did Taxpayer present a copy of the single contract upon assessments on March 4, 2010, a time when Taxpayer was clearly on notice that Taxpayer would need proof of his claimed deductions.

It is true that it took two years for the Department to request a protest hearing with the Hearing Bureau. There is no explanation on this record for the Department's delay in requesting hearing. The Hearing Bureau first learned of this matter upon the Department's filing of a request for hearing on March 28, 2013. That same day, in compliance with NMSA 1978, Section 7-1-24 (D) (2003), the Hearing Bureau promptly mailed Notice of Administrative Hearing, scheduling this matter for a protest hearing more than five-weeks later on May 7, 2013. Five-days before the

scheduled hearing, Taxpayer moved to continue this matter for an additional 10-days so that Taxpayer could obtain a copy of the single contract. Given the constraints of the Hearing Bureau's docket, a forthcoming legislative change in statute under NMSA 1978, §7-1-24[2] likely to constraint the docket further, and the five day notice of Taxpayer's request for continuance, Taxpayer's request for a continuance was denied. *See* Regulation 3.1.8.9 NMAC (08/30/01) (granting Hearing Officer independent authority to avoid delay in the proceeding and to rule on continuances).

While there is an unexplained Department delay in addressing this protest, it is also true that the Department sent Taxpayer's representative three letters referencing the need for presentation of the single contract. Taxpayer did not submit the single contract in response to Mr. Dillon's January 7, 2013 letter, the February 18, 2013 letter, or the March 6, 2013 letter. Since January 7, 2013, Taxpayer has had express notice that the Department required a copy of the single contract in order to grant Taxpayer a deduction under NMSA 1978, §7-9-56 (A) (1994). Yet, Taxpayer did not present that single contract to the Department in response to those letters or by the May 7, 2013 hearing date, four months after Mr. Dillon's letter. If Taxpayer was unable to obtain the single contract in the four months since Mr. Dillon's January 7, 2013 letter, it is unlikely that the granting of an additional 10-day continuance—as Taxpayer asked for in the request for continuance—would have been sufficient to secure the single contract.

In this case, Taxpayer had adequate notice of hearing and a reasonable opportunity to be heard. *See Matthew v. Eldridge*, 424 U.S. 319 (1976) ("the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); *see also Mills v. New Mexico State Bd. of Psychologist Exam'rs*, 123 N.M. 421, 426 (N.M. 1997) ("[p]rocedural due process requires notice and an opportunity to be heard…"). *See also Cordova*

[2] 2013 N.M. Laws, ch. 27, §7,codified at NMSA 1978, §7-1-24.1(A) (2013) (requiring setting of hearing within 90-days of the protest).

v. Taxation & Revenue, Prop. Tax Div., 2005 NMCA 9, ¶22, 136 N.M. 713, 719 104 P.3d 1104, 1110 (N.M. Ct. App. 2004). Five-weeks is hardly an inadequate amount of notice to prepare for a protest hearing, particularly for a protest involving a straight-forward factual and legal issue of whether Taxpayer qualified for a claimed deduction for interstate transportation under a single contract. At the protest hearing, Taxpayer was represented by a CPA, had an opportunity to present evidence, witness testimony, cross examine the Department's witness, and make argument. Taxpayer complains that the denial of the continuance filed five-days before the hearing deprived him of the opportunity to present the single contract. However, Taxpayer's inability to obtain the single contract did not result from the denial of the continuance but from Taxpayer's own inactions dating back until at least January 7, 2013, if not all the way back to the date of assessments in 2010. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not know whether a single contract existed and did not present a single contract showing that his intrastate transportation services were part of a larger interstate transaction under a single contract. Without proof that the transportation services rendered were part of fulfillment of interstate commerce under a single contract, Taxpayer is not entitled to a claim a deduction under NMSA 1978, §7-9-56 (1994).

C. Taxpayer did not overcome the presumption of correctness that attached to the assessments of interest. *See* Regulation 3.1.6.13 NMAC (01/15/01). Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessments, which continues to accrue until the tax principal is satisfied.

D. Taxpayer did not overcome the presumption of correctness that attached to the assessments of penalty. *See* Regulation 3.1.6.13 NMAC (01/15/01). Taxpayer was civilly negligent and thus liable for civil penalty pursuant to NMSA 1978, Section 7-1-69 (2007).

For the foregoing reasons, the Taxpayer's protest of the assessments **IS DENIED.** Taxpayer owes the assessed 2005 and 2006 tax, penalty, and interest. Under NMSA 1978, § 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: June 3, 2013.

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