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

IN THE MATTER OF THE PROTEST OF
RIO GRANDE ELECTRIC CO. INC. **No. 13-16**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1447715200

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 Rio Grande Electric Co. Inc., ("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, #8, and #9 were admitted into the record. Department Exhibits D, E1-5, and J were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. At the beginning of the hearing, the Department agreed to make numerous abatements. After the hearing, on May 8, 2013, the Department submitted a filing updating the alleged liabilities in light of those last-minute, pre-hearing abatements. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 31, 2007, the Department assessed Taxpayer $21,177.32 in gross receipts tax principal, $2,117.74 in penalty, and $7,369.92 in interest for a total assessment of $30,664.98 for the reporting periods of January 31, 2004 through December 31, 2006. [Letter id. no. L1447715200].

2. On January 29, 2008, Taxpayer protested the Department's assessment.

3. On February 8, 2008, the Department acknowledged receipt of Taxpayer's protest.

4. In 2007, the Department selected Taxpayer for an audit of gross receipts tax reporting periods January 31, 2004 through December 31, 2006. [Department Ex. J-5].

5. On February 22, 2007, the Department provided Notice of Audit to Taxpayer, including notice that Taxpayer must present any necessary nontaxable transaction certificates ("NTTCs or NTTC") and other supporting documents to substantiate any claimed deductions before expiration of 60-days on April 23, 2007. [Department Ex. J-5].

6. As a result of the audit, the Department disallowed numerous of Taxpayer's claimed deductions and issued the above-referenced assessment.

7. On December 31, 2008, Taxpayer paid $20,000.00 towards the assessed liability. [Department Ex. D-1].

8. On November 19, 2009, the Department's Linda Palmer, CPA, sent Taxpayer's representative a letter asking for detailed invoices for the receipts/deposits where the Department had disallowed claimed deductions. [Department Ex. E.1].

9. On November 21, 2012, the Department's Thomas J. Dillon, CPA, sent Taxpayer's representative a letter asking for detailed invoices for the receipts/deposits where the Department had disallowed claimed deductions. [Department Ex. E.2].

10. On January 2, 2013, Mr. Dillon again sent Taxpayer's representative a letter asking for detailed invoices for the receipts/deposits where the Department had disallowed claimed deductions. [Department Ex. E.3].

11. On February 18, 2013, Mr. Dillon sent Taxpayer's representative another letter asking for detailed invoices for the receipts/deposits where the Department had disallowed claimed deductions. Mr. Dillon also informed Taxpayer that the Department would be requesting a hearing in this matter. [Department Ex. E.4].

12. On March 27, 2013, the Department filed a Request for Hearing in this matter.

13. On March 27, 2013, the Hearing Bureau sent Notice of Administrative Hearing, scheduling the protest hearing in this matter on May 7, 2013.

14. Taxpayer filed a request for continuance in this matter on May 2, 2013.

15. On May 3, 2013, the Hearing Bureau issued an Order Denying Continuance.

16. During a pre-hearing conference with Taxpayer on the date of the hearing, the Department agreed to make numerous abatements of gross receipts tax. [CD 5-7-13, 19:27-19:48].

17. On May 8, 2013, the day after the hearing, the Department submitted a summary of receipts (totaling $30,359.05) where it now agreed that Taxpayer was entitled to previously disallowed deductions:

a. The December 2, 2005 and June 22, 2006, receipts from Elite Custom Builders totaling $25,000.

b. The February 13, 2006 and March 9, 2006 receipts from State Farm Insurance totaling $359.05.

c. The August 3, 2004 receipts from GBY Construction totaling $5000.00.

[Department's May 8, 2013 filing, Ex. A-1].

18. After the hearing, the Department determined that the auditor had already allowed $133,740.94 in claimed deductions for receipts from DRH Southwest Construction, B Jar

Construction, and Miller Homes and therefore made no further abatement for those previously substantiated deductible receipts. [Department's May 8, 2013 filing, Ex. A-1].

19. As a result of these pre-hearing adjustments, the Department agreed to abate $2,019.72 in gross receipts tax, $201.98 in penalty, and $537.75 in interest for a total abatement of $2,759.45. [Department's May 8, 2013 filing].

20. At hearing, Taxpayer only protested two series of disallowed deductions: those receipts totaling $23,858.00 attributable to President Homes, Inc. ("President Homes") and those receipts totaling $25,800.00 attributable to Associated Home & RV Sales, Inc. ("Associated Home"). [CD 5-7-13, 14:06-14:49].

21. Taxpayer is an electrical contractor that installs lighting fixtures, wiring, telephone lines, wall plugs, etc. on behalf of customers. [CD 5-7-13, 37:59-38:16].

22. President Homes and Associated Home hired Taxpayer to retrofit homes or repair damaged electrical items in homes that President Homes and Associated Home intended to resell upon completion of the refurbishment. [CD 5-7-13, 38:11-38:37].

23. President Homes is a manufacturer or retailer that sells manufactured homes and recreational vehicles. [CD 5-7-13, 16:53-17:14].

24. President Homes is not a construction contractor. [CD 5-7-13, 17:49-17:58].

25. For President Homes, Taxpayer claimed the following invoices/receipts totaling $23,857.61 were deductible from gross receipts tax:

a. An October 3, 2005 invoice totaling $2,411.64 for electrical and lighting on a heated 1,766 square-foot property. [Taxpayer Ex. #1.2].

b. A June 7, 2005 invoice totaling $4,956.64 for electrical and lighting on a heated 3,382 square-foot property. [Taxpayer Ex. #1.3].

c. A February 18, 2005 invoice totaling $4,438.08 for electrical and lighting on a 3,301 square-foot property. [Taxpayer Ex. #1.4].

d. A March 30, 2005 invoice totaling $5,492.00 for electrical and lighting on a 4,169 square foot property. [Taxpayer Ex. #1.5].

e. An April 22, 2005 invoice totaling $1,823.89 for electrical and lighting on a heated 1,750 square foot property. [Taxpayer Ex. #1.6].

f. An October 14, 2005 invoice totaling $2,413.26 for electrical and lighting on a heated 1,770 square foot property. [Taxpayer Ex. #1.7].

g. An October 20, 2005 invoice totaling $2,322.10 for electrical and lighting on a heated 1,560 square-foot property. [Taxpayer Ex. #1.8].

26. Taxpayer timely received an executed Type 2 NTTC from President Homes on May 18, 2005. [Taxpayer Ex. 1.1].

27. The Department stipulated that Taxpayer accepted the Type 2 NTTC from President Homes in good faith. [CD 5-7-13, 18:46-19:25].

28. If Taxpayer had possessed the correct type of NTTC, the construction materials and services Taxpayer provided in installing and selling electrical components to President Homes otherwise would qualify for a recognized deduction. [CD 5-7-13, 47:46-48:23].

29. Associated Home is a retailer in the business of selling recreational vehicles. [CD 5-7-13, 17:15-17:29].

30. Associated Home is not a construction contractor. [CD 5-7-13, 17:49-17:58].

31. According to its CRS registration, Associated Home does business as Enchantment RV. [Taxpayer Ex. #8.2].

32. For Associated Home, Taxpayer did not present any specific invoices where Taxpayer claimed a deduction.

33. There is not a single bank deposit referencing Associated Home or Enchantment RV in the Department's Computation of Gross Receipts per Audit. [Department Ex. J.16 –J.24].

34. Taxpayer's representative Mr. Eisen testified that Taxpayer told him Shannon and Pauline Curry operated Associated Home. [CD 5-7-13, 33:30-36:50].

35. There are two references to bank deposits from Shannon and Pauline Curry in the Department's Computation of Gross Receipts per Audit:

a. Shannon & Pauline Curry, June 22, 2005, $6,000. [Department Ex. J.19].

b. Shannon & Pauline Curry, September 26, 2005, $3,000. [Department Ex. J.19].

36. There is insufficient, admissible, and competent evidence to establish that Shannon and Pauline Curry are affiliated with Associated Home d/b/a Enchantment RV.

37. Taxpayer timely received an executed Type 5 NTTC from Associated Home with an execution date of January 21, 2005. [Taxpayer Ex. #8.1].

38. The Department stipulated that Taxpayer accepted the Type 5 NTTC from Associated Home in good faith. [CD 5-7-13, 18:46-19:25].

39. If Taxpayer had possessed the correct type of NTTC, the construction materials and services Taxpayer provided in installing and selling electrical components to Associated Home otherwise would qualify for a recognized deduction. [CD 5-7-13, 47:46-48:23].

40. Without specific invoices from Associated Home, Enchantment RV, or some other proof such as Taxpayer testimony that Shannon & Pauline Curry are affiliated with

Associated Home, Taxpayer did not establish which receipts might qualify for a deduction under the Associated Home NTTC.

41. At the hearing, Taxpayer submitted a written argument into the record objecting to the denial of the continuance. [CD 5-7-13, 04:28-10:40].

42. As of the May 7, 2013, including the Department's pre-hearing abatements, Taxpayer owed $19,157.60 in gross receipts tax, $1,915.76 in penalty, and $6,832.17 in interest for a total of $27,905.53. Crediting Taxpayer's May 6, 2011 $20,000.00 payment against this outstanding amount, Taxpayer owed a total of $7,905.53 under the assessment as of May 7, 2013. [Department May 8, 2013 filing, Ex. A-2].

DISCUSSION

There are three issues in this protest. First, whether Taxpayer is entitled to the claimed deductions for its receipts from President Homes. Second, whether Taxpayer is entitled to the claimed deductions for its receipts from Associated Home. Finally, whether Taxpayer was prejudiced by the delay in the protest proceedings and the denial of the continuance.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish that it was entitled to the claimed deduction. *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, the Deduction, NTTCs, and Good Faith.

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). Taxpayer's receipts during the audit period were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

For the relevant President Homes and Associated Home transactions in dispute, Taxpayer was engaged in business as an electrician repairing and retrofitting manufactured homes for resale. Taxpayer also sold President Homes and Associated Home light fixtures. Department witness Protest Auditor Thomas Dillon testified that the receipts from the construction materials and services Taxpayer provided and performed were potentially deductible. The Department conceded that Taxpayer timely possessed NTTCs from both President Homes and Associated Home. The Department further stipulated that Taxpayer accepted the NTTCs in good faith. However, the Department argued that transactions in dispute were not deductible because the Type 2 NTTC President Homes executed to Taxpayer and the Type 5 NTTC Associated Home executed to

Taxpayer were not the correct types of NTTCs for construction materials and constructions services deductions under NMSA 1978, Section 7-9-51 (2001) and NMSA 1978, Section 7-9-52 (2000).

NMSA 1978, §7-9-43(A) (2011) establishes a conclusive evidence, safe harbor protection for taxpayers who accept a NTTC in good faith:

> [w]hen 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.

In other words, the statute grants the seller of the service safe harbor from taxation when the seller timely accepts a properly executed NTTC in good faith from the buyer.

In *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 86 N.M. 629, 632, 526 P.2d 426, 429 (N.M. Ct. App. 1974), the New Mexico Court of Appeals considered what requirements must be met "before an NTTC becomes conclusive evidence that proceeds of a transaction are deductible." While the *Leaco* Court of Appeals was considering NMSA 1978, §7-9-43(A) (2011)'s predecessor statue, NMSA 1953, Section 72-16A-13(A), the good faith, safe harbor provision of both statutes is substantially the same. In *Leaco*, a buyer had executed a NTTC to a seller for a transaction held to be subject to tax. The *Leaco* court found that a seller-taxpayer must satisfy three statutory requirements before good faith, conclusive evidence safe harbor protection attaches to the transaction. *See id.* As the *Leaco* Court of Appeals expounded, those three "requirements are timeliness of acceptance of the NTTC, good faith acceptance of the NTTC and a properly executed NTTC." *id*. By "properly executed" the *Leaco* Court of Appeals—relying on the Black's Law Dictionary—meant only that the NTTC forms were filled out and signed. *See id*. If these three conditions are met, then the *Leaco* Court of Appeals found that the NTTC becomes the only material and conclusive evidence establishing that the seller-taxpayer is entitled to the claimed

deduction even when the buyer improperly issued the NTTC to the seller. *See id; See also Rainbo Baking Co. v. Commissioner of Revenue,* 84 N.M. 303, 305 502 P.2d 406, 408 (N.M. Ct. App. 1972) (absent a claim of bad faith, some other issue of good faith, or a claim of improper execution of the NTTC, a taxpayer's presentation of the NTTC established that taxpayer's claim with conclusive evidence). The *Leaco* Court of Appeals found no relevance to the fact that the buyer had improperly issued a NTTC to the seller by stating that was an issue between the Department and the buyer. *See Leaco* at 632, 429.

While *Leaco* found no relevance to whether the buyer improperly issued a NTTC to the seller, the Court of Appeals modified that stance somewhat when it found in *McKinley Ambulance Serv. v. Bureau of Revenu*e, 92 N.M. 599, 601, 592 P.2d 515, 517 (N.M. Ct. App. 1979) that the good-faith, conclusive evidence provision did not protect a seller from taxation "unless the certificate covered the receipts in question." That is, since there was "no certificate applicable" for the type of services that taxpayer provided, the *McKinley Ambulance Serv.* Court of Appeals upheld the Department's denial of the deduction. *id*. at 602, 58. Similarly (although perhaps in dicta), the Court of Appeals in *Gas Co. v. O'Cheskey*, 94 N.M. 630, 632, 614 P.2d 547, 549 (N.M. Ct. App. 1980) stated that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." However, the *Gas Co.* Court of Appeals expressly noted that *Leaco* remained an exception[1]. *See Gas Co.* at 632, 549. Since *Gas Co*. was decided after *McKinley Ambulance Serv., Gas Co.*'s subsequent reaffirmation of *Leaco* meant that *Leaco* remained good law even after *McKinley Ambulance Serv.* In *Arco Materials v. Taxation & Revenue Dep't,* 118 N.M. 12, 15-16, 878 P.2d 330, 333-334 (N.M. Ct. App. 1994), rev'd on other grounds, 118 N.M. 647, 884 P.2d 803 (1994), the Court of Appeals cited

[1] Although in practical effect, *Leaco* did exactly what *Gas Co.* sought later to prohibit: through its good faith acceptance of an improperly executed NTTC, the seller in *Leaco* was able to convert a taxable transaction not otherwise subject to any valid deduction into a nontaxable transaction.

Regulation 3.2.201.15 NMAC (05/31/01) favorably in finding that a taxpayer was not protected by its acceptance of an executed NTTC when a change in law rendered the executed NTTC invalid for the transaction in question. *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 107 N.M. 392, 397, 758 P.2d 806, 811 (N.M. Ct. App. 1988) (taxpayer not entitled to a deduction when the nontaxable transaction form presented was not in the NTTC form proscribed by the Department).

Leaco and not *McKinley Ambulance Serv.*, *Arco, Proficient Food Co.,* or *Gas Co*. control the outcome of this protest both because those other cases are distinguishable from the transactions at issue in this protest and because NMSA 1978, §7-9-43(A) (2011) must be read to give full effect to that statute's good-faith, safe harbor provision. Based on the testimony of Mr. Dillon, the Department does not dispute that Taxpayer was eligible for deduction for these transactions, presumably under NMSA 1978, Section 7-9-51 (2001) and NMSA 1978, Section 7-9-52 (2000). *McKinley Ambulance Serv*. is distinguishable from the facts of this protest because the fact that no certificate could have covered the transaction (because that taxpayer's services did not qualify for a deduction) was an important part of the Court of Appeals finding in *McKinley Ambulance Serv*. *See id*. at 602, 518. Unlike here, the Court of Appeals in *McKinley Ambulance Serv.* found the transaction at issue in that case was taxable and not covered by the claimed deduction. *See McKinley Ambulance Serv*. at 601, 517. This protest is not the *McKinley Ambulance Serv.* or *Gas Co.* scenario where Taxpayer is attempting to convert a taxable transaction not covered by any relevant deduction into a nontaxable transaction by virtue of NMSA 1978, §7-9-43(A) (2011)'s good faith, conclusive evidence, safe harbor provision. Nor is this the *Arco* case, where a statutory change rendered the executed NTTC invalid for the underlying transaction. Moreover, this is also

not the *Proficient Food Company* case because all the NTTCs executed in this matter were on a form proscribed by the Department.

The other reason *McKinley Ambulance Serv., Arco,* and Regulation 3.2.201.15 NMAC (05/31/01) do not control the outcome of this protest has to do with giving full effect to NMSA 1978, §7-9-43 (A) (2011)'s good faith, conclusive evidence, safe harbor provision. Statutes are to be interpreted in a manner to give the entire statute effect and not render portions of the statute superfluous. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers,* 1998-NMSC-20, ¶28, 125 N.M. 401, 411, 962 P.2d 1236, 1246 (N.M. 1998). If Taxpayer is not entitled to the statute's good-faith safe harbor protection merely because the buyers timely and properly executed an incorrect type of NTTC to Taxpayer, then the safe-harbor protection of NMSA 1978, §7-9-43 (A) (2011) would be superfluous. That is so because if the good faith safe harbor only applied to instances where the buyer timely executed a proper type of NTTC to a seller-taxpayer for a legitimately deductable transaction, a seller-taxpayer would have already qualified for the deduction under the first portion of NMSA 1978, §7-9-43 (A) (2011) without ever having to consider that statute's safe harbor provision. In other words, there would be no purpose in creating a good faith, safe harbor exception to the statute's NTTC requirements if the only way a taxpayer could ever qualify for the exception is by otherwise satisfying the statute's primary NTTC requirements. In simplest form, this principal is best stated as there is no meaningful exception to the rule if the exception itself requires full compliance with the rule. Therefore, in order to give full effect to NMSA 1978, §7-9-43 (A) (2011), the good-faith, safe harbor provision must be considered for an otherwise nontaxable taxable transaction even though the buyers executed improper types of NTTCs to Taxpayer.

Applying *Leaco* to Taxpayer's President Homes receipts, Taxpayer is entitled to the claimed deductions on those receipts. Taxpayer timely accepted the Type 2 NTTC from President Homes, satisfying the first part of the *Leaco* test. *See Leaco* at 632, 429. The Department stipulated that Taxpayer accepted the Type 2 NTTC in good faith from President Homes, satisfying the second prong of *Leaco*. *See Leaco* at 632, 429. The other factor under *Leaco* is whether there was a properly executed NTTC. *See Leaco* at 632, 429. Again, by "proper execution", the *Leaco* court meant only that the NTTC was filled out, signed, and completed. *See id.* In this case, the Type 2 NTTC was completed and signed by President Homes in a form developed by the Department. While President Homes' executed an incorrect type of NTTC to support the transaction at issue, under *Leaco* that is an issue between the Department and President Homes. *See Leaco* at 632, 429. Taxpayer's timely, good faith acceptance of the Type 2 NTTC for an otherwise deductible transaction is conclusive evidence that Taxpayer is entitled to the deduction of President Homes' receipts pursuant to NMSA 1978, §7-9-43 (A) (2011) and *Leaco*.

While the same good-faith, *Leaco* legal rationale would likely apply to Taxpayer's acceptance of the Type 5 NTTC from Associated Home, the problem is that Taxpayer did not present sufficient evidence to establish which receipts were related to Associated Home. Unlike President Homes, Taxpayer did not present actual invoices from Associated Home. There are no deposits listed as disallowed in the audit from Associated Home d/b/a Enchantment RV.

Taxpayer's Representative Mr. Eisen testified that Taxpayer told him that Shannon and Pauline Curry were affiliated with Associated Home. However, Taxpayer did not appear and testify to substantiate that claim at hearing. Associated Home's CRS registration information does not reference Shannon or Pauline Curry. While Associated Home apparently went out of business in 2008, Taxpayer still could have appeared to testify directly on the alleged Curry

connection or presented detailed Associated Home invoices that connected to the Curry deposits. Without some other evidence, like specific invoices or the direct testimony of Taxpayer, hearsay testimony is insufficient to establish that the deposited checks of Shannon and Pauline Curry had some relation to the Associated Home NTTC. *See Chavez v. City of Albuquerque*, 1997-NMCA-111, ¶4,124 N.M. 239, 241, 947 P.2d 1059, 1061 (N.M. Ct. App. 1997) (legal residuum rule requires that an agency's administrative decision be "supported by some evidence that would admissible under the rules" of evidence). Ultimately, when claiming a deduction, Taxpayer has the burden to substantiate that it is entitled to the claimed deduction. *See Wing Pawn Shop* at 740, 654; *See also TPL, Inc.* at ¶9, 451, 478. By not producing evidence of which receipts were affiliated with Associated Home, Taxpayer did not carry that burden to show Taxpayer was entitled to claimed deductions under the Associated Home NTTC.

Timeliness, Delay in the Protest Process, and the Denial of the Continuance.

Taxpayer made two arguments broadly related to the timeliness and delay in the hearing process. First, Taxpayer argues that the Department's delay in bringing this protest to resolution hampered Taxpayer's ability to substantiate the Associated Home claimed deductions because Associated Home went out of business in 2008 or 2009. Second, Taxpayer objected to the denial of the continuance in this matter as unfair in light of the Department's lengthy delay in addressing this protest.

Even with the Department's delay in addressing this protest, Taxpayer had opportunities to obtain the necessary documentation from Associated Home before it went out of business. The transactions at issue occurred in 2005 or 2006, a time when Taxpayer was still actively engaged in a business relationship with Associated Home and could have probably obtained copies of invoices or other documentation related to the transaction. While Associated Home may have gone of business

in 2008 or 2009, the Department's audit in this matter occurred in early 2007. On February 22, 2007, the Department notified Taxpayer that it had 60-days to obtain the relevant substantiation for any claimed deductions. If Associated Home did not go out of business until 2008 or 2009, then the entire audit (including the 60-day period for Taxpayer to gather substantiating evidence) occurred at a time before Associated Home went out of business. Moreover, the assessments were issued on December 31, 2007, possibly giving Taxpayer more time to obtain necessary documentation from Associated Home before Associated Home went out of business in 2008 or 2009. Again, any taxpayer seeking a deduction has the obligation to substantiate that deduction. *See Wing Pawn Shop* at 740, 654; *See also TPL, Inc.* at ¶9, 451, 478. It is difficult to find any prejudice in the delay where Taxpayer did not produce any documentation despite having had an obligation initially to substantiate the deductions, had clear notice that he was required to substantiate the claimed deductions as part of the audit process, and was assessed when Associated Homes was still in business.

At the beginning of the hearing, Taxpayer filed a written objection to the Hearing Bureau's Order Denying Continuance, particularly in light of the Department's delay in addressing Taxpayer's protest. Taxpayer believed that denial of the continuance was unreasonable.

The Department cited turn-over and a significant backlog in the protest office as the reason for the delay. Although there was a significant delay, the Department sent Taxpayer four letters requesting additional substantiation for the claimed deductions on November 19, 2009, on November 21, 2012, on January 2, 2013, and on February 18, 2013. When the Department received no additional information, it requested a hearing, just as it warned Taxpayer it would in the February 18, 2013 letter.

The Hearing Bureau first learned of this matter upon the Department's filing of a request for hearing on March 27, 2013. That same day, in compliance with NMSA 1978, Section 7-1-24 (D) (2003) and in recognition of the age of this protest, the Hearing Bureau made this a priority case and 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 so that Taxpayer could obtain documentation out of storage for the hearing. 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).

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 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. 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. The only evidence that Taxpayer did not produce were the invoices related to Associated Home, which Taxpayer also argued were now difficult to track down because Associated Home went out

[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).

of business. A continuance would not have remedied the fact that Associated Home is now out of business. Taxpayer was not prejudiced by the denial of the continuance.

In summary, Taxpayer is entitled to the claimed deduction for $23,857.61 in its President Homes' receipts and the Department should abate gross receipts tax, penalty, and interest accordingly. However, because Taxpayer did not establish which receipts were related to the Associated Home NTTC, Taxpayer is not entitled to the Associated Home claimed deductions. Taxpayer also did not demonstrate prejudice for the delay in the protest process or for the denial of the continuance. Taxpayer's protest is granted in part and denied in part.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment of gross receipts tax, penalty and interest. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer timely accepted a completed and executed Type 5 NTTC from President Homes in good faith.

C. Taxpayer's timely, good faith acceptance of an executed Type 5 NTTC is conclusive evidence under NMSA 1978, §7-9-43(A) (2011) that Taxpayer was entitled to the claimed deduction for the President Homes' receipts. *See Leaco Rural Tel. Coop. v. Bureau of Revenue*, 86 N.M. 629, 632, 526 P.2d 426, 429 (N.M. Ct. App. 1974).

D. Taxpayer did not clearly demonstrate that it was entitled to any further deductions under the Associated Home NTTC because it could not connect which other receipts were related to the Associated Home NTTC with admissible, competent evidence. *See Wing Pawn Shop* at 740, 654; *See also TPL, Inc.* at ¶9, 451, 478; *See also Chavez*, ¶4, 241,1061.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART.** The Department shall allow an additional $23,857.61 in deductions for Taxpayer's

President Homes receipts and abate gross receipts tax, penalty, and interest accordingly. Otherwise, Taxpayer shall pay any remaining liabilities under the assessment in this matter.

DATED: June 10, 2013.

Brian VanDenzen, Esq.
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