

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

**IN THE MATTER OF THE PROTEST OF
APEX NEW MEXICO DISTRIBUTER LLC,
TO ASSESSMENTS ISSUED UNDER
ID NO. L0183380288**

No. 13-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 23, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Aaron Rodriguez, Staff Attorney and Mr. Nelson Goodin, Chief Legal Counsel. Ms. Sonya Varela, Auditor, also appeared on behalf of the Department. Mr. James Montoya, owner and President of Apex New Mexico Distributer LLC (Taxpayer), appeared for the hearing and represented itself. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico as a wholesaler of building products and concrete forms in the 2009 tax year.
2. The Department began an audit of the Taxpayer in 2012.
3. On June 26, 2012, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2009. The assessment was for \$1,106.38 tax, \$221.28 penalty, and \$106.33 interest.
4. On July 20, 2012, the Taxpayer filed a formal protest letter.

5. The Taxpayer produced a non-taxable transaction certificate (NTTC) for part of the gross receipts taxes that were assessed.
6. The Department partially abated the assessment based on the NTTC. The assessment has been adjusted to \$698.32 in gross receipts tax, \$139.66 in penalty, and \$84.91 in interest.
7. On May 21, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
8. The Taxpayer was unable to obtain an NTTC for the remaining balance of the assessment because the company that the Taxpayer dealt with has gone out of business and has been uncooperative. The Taxpayer's business manager was negligent in not obtaining NTTCs at the time of the transactions, and the Taxpayer did not realize the NTTCs had not been obtained until the audit began in 2012.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax period ending in December 2009, due to its failure to obtain an NTTC.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is not liable for the tax and is entitled to an abatement of penalty and interest.

NTTCs.

A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2005). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (D) NMAC (2001). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due. *See* NMSA 1978, § 7-9-43. If the taxpayer is not in possession of NTTCs within sixty days of the notice from the Department requiring possession of NTTCs, “deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall* be disallowed.” *Id.* (emphasis added). The word “shall” indicates that the disallowance of the deduction is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977).

A right to a deduction must be established by the taxpayer claiming the deduction, and the failure of the taxpayer to possess an NTTC in the form and within the time prescribed by the Department is a valid reason to deny the deduction. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep’t.*, 107 N.M. 392, 397, 758 P.2d 806 (Ct. App. 1988) (holding that the Department had properly denied the deduction when the taxpayer had not received the proper form from the buyer within the time limit).

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

Assessment of Penalty.

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

Assessment of Interest.

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of 2009 gross receipts taxes issued under Letter ID number L0183380288, and jurisdiction lies over the parties and the subject matter of this protest.
2. Taxpayer was properly assessed for gross receipts tax, penalty, and interest for the 2009 tax year.
3. The Taxpayer failed to obtain an NTTC for the remaining gross receipts tax balance of \$698.32

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

DATED: September 12, 2013.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. See Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this ____ day of _____, 20__ in the following manner:

First Class Mail

James Montoya
Apex New Mexico Distributer LLC
PO Box 2661
Los Lunas, NM 87031-2661

Interoffice Mail

Aaron Rodriguez
Taxation and Revenue Department, Legal
1100 S. St. Francis
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