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

IN THE MATTER OF THE PROTEST OF
ALBUQUERQUE TENTS, LLC. **No. 13-30**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO. L0184601920

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on September 30, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Attorney R. Tracy Sprouls appeared representing Albuquerque Tents, LLC. ("Taxpayer"). Mr. David Ortiz appeared as a Taxpayer witness. Chief Legal Counsel Nelson Goodin appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Lizzy Vedamanikam appeared as a witness for the Department. Taxpayer Exhibits #1-2 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 November 30, 2012, the Department assessed Taxpayer $235,368.89 in gross receipts tax principal, $00.00 in penalty, and $38,594.33 in interest for a total assessment of $273,963.22 for the CRS reporting periods January 31, 2006 through June 30, 2010. **[Letter id. no. L0184601920]**.

2. On December 26, 2012, Taxpayer requested an extension of time in which to file a protest.

3. On January 7, 2013, the Department granted Taxpayer an extension in which to file a protest.

4. On February 27, 2013, Taxpayer filed a written protest of the assessment.

5. On March 8, 2013, the Department acknowledged receipt of Taxpayer's protest.

6. On July 30, 2013, the Department requested a hearing in this matter.

7. On July 31, 2013, the Hearing Bureau issued Notice of Administrative Hearing, scheduling this matter for September 30, 2013.

8. Taxpayer's primary business is the rental of tents, tables, chairs, linens, china, glassware, staging, power generators, dance floors, lightning, and other materials needed for social engagements, parties, and entertainment. **[09-30-13 CD 17:10-46]**.

9. Taxpayer occasionally sells items to customers directly through its store or when leased equipment is damaged, destroyed, lost, or stolen. **[09-30-13 CD 17:46-18:50]**.

10. Taxpayer's sales and rentals are documented through invoices. **[09-30-13 CD 18:51-19:07]**.

11. Lost or damaged rental items are separately invoiced as a sale. **[09-30-13 CD 18:55-19:22; 09-30-13 CD 38:59-39:27]**.

12. A large portion of Taxpayer's customers are governmental agencies and 501(c)(3) non-profit organizations. **[09-30-13 CD 19:30-20:19]**.

13. Taxpayer's annual revenue has grown from approximately $500,000.00 to $1,300,000.00. **[09-30-13 CD 20:26-20:45]**.

14. On June 12, 2008, Taxpayer invoiced the City of Albuquerque for $434.60 for the lease of two canopies, a riser, and basket lights. **[Taxpayer Ex. #1.1]**.

15. Attached to the June 12, 2008 invoice to the City of Albuquerque is an order form with a note indicating that tables and chairs (which were not listed as rented equipment on the original invoice) were stolen. **[Taxpayer Ex. #1.3; 09-30-13 CD 40:28-41:54]**.

16. Taxpayer did not present any evidence into the record that Taxpayer invoiced to the City of Albuquerque the sale of the stolen tables and chairs or the amount of any such invoice; Taxpayer only presented an invoice charging the City of Albuquerque $434.60 without stating the nature of the transaction or the items invoiced. **[Taxpayer Ex. #1.4; 09-30-13 CD 42:12-42:22]**.

17. On December 8, 2009, Taxpayer invoiced Mountain Valley Church for $2,500.00 for the direct sale of a large tent, windowalls, and sidewalls. **[Taxpayer Ex. #2; 09-30-13 CD 38:25-50].**

18. Mr. David Ortiz is the owner of Taxpayer, Albuquerque Tents, LLC, and has been for nine-years. Mr. Ortiz has been in the tent rental business for 30-years. **[09-30-13 CD 16:07-34]**.

19. Based on Mr. Ortiz's experience in the tent rental industry and experience in reordering of inventory annually, Mr. Ortiz testified that the general expected rate of breakage, loss, or damage of rented equipment is approximately 10% annually. **[09-30-13 CD 25:05-26:34]**.

20. Based on Mr. Ortiz's experience in the tent rental industry and experience in reordering of inventory annually, Mr. Ortiz testified that the expected rate of breakage, loss, or damage of rented equipment to governmental agencies is approximately 5% annually. **[09-30-13 CD 26:35-27:03]**.

21. Based on Mr. Ortiz's experience in the tent rental industry and experience in reordering of inventory annually, Mr. Ortiz testified that the expected rate of breakage, loss, or damage of rented equipment to 501(c)(3) non-profit organizations is approximately 10% annually. **[09-30-13 CD 27:03-23]**.

22. Taxpayer did not provide any documentation showing the amount of replacement products Taxpayer purchased annually because of loss of inventory attributable to direst sales or to breakage, loss, or damage of rented equipment. **[09-30-13 CD 29:13-30:13]**.

23. Taxpayer did not provide sufficient evidence and/or sampling of invoices to establish that the expected rate of direct sales and breakage, loss, or damage of rented equipment sales was between 5% to 10% annually.

24. During the audit, and at hearing, Taxpayer did not have or provide sufficient information to differentiate between invoices to private customers conducting an event on Pueblo land subject to gross receipts tax and tribal members conducting an event on Pueblo land not subject to gross receipts tax. **[09-30-13 CD 32:56-34:52]**.

25. Taxpayer timely possessed the correct type of nontaxable transaction certificates ("NTTC or NTTCs") to support the claimed deductions at issue in the protest[1].

26. An updated spreadsheet of Taxpayer's liabilities, including accrual of interest since the time of assessment, was not tendered into the record.

DISCUSSION

As a result of an audit, in pertinent part, the Department disallowed Taxpayer's claimed deduction for the sale of tangible personal property to governmental agencies and 501(c)(3)

[1] Neither side at hearing addressed the issue of whether Taxpayer timely possessed the requisite NTTC for this transaction. However, as both the protest letter indicates and the Department's Request for Hearing "issue to be determined" section supports, Taxpayer timely possessed the correct Type 9 NTTC and the only issue at protest was factually whether a sale had occurred instead of a lease.

organizations because it found that Taxpayer's invoiced the transactions as leases or failed to provide sufficient evidence that a sale had occurred instead of the leasing arrangement typical in Taxpayer's business. The Department issued an assessment after that audit. Taxpayer protested that assessment. At hearing, Taxpayer argued that between 5% to 10% of its gross receipts were attributable to direct sales or the sale of damaged, lost or stolen tangible personal property to the government or to 501(c)(3) organizations, and therefore that same percentage of its gross receipts should be deductable.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. 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*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

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, § 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, § 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, § 7-9-5 (2002).

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions of gross receipts tax. There are two related deductions at issue in this case. Under NMSA 1978,

Section 7-9-54 (2003), "[r]eceipts from selling tangible personal property to the United States or New Mexico or any governmental unit… may be deducted from gross receipts or from governmental gross receipts." In accord with the clear language of the statute, under Regulation 3.2.212.8 NMAC, the leasing of tangible personal property is not deductible. Further, under Regulation 3.2.212.9 NMAC, the sale of a service to governmental agency is not deductible.

The second related deduction at issue is found under NMSA 1978, Section 7-9-60 (2007). Section 7-9-60 applies to the sale of tangible personal property to non profit 501(c)(3) organizations. Like the deduction under Section 7-9-54, the leasing of tangible personal property or the sale of a service for resale is not deductible under Section 7-9-60. *See* Regulation 3.2.218.9 (A) NMAC.

Taxpayer's primary business is the leasing of social event equipment like tents, tables, chairs, etc. to private customers, governmental agencies, and 501(c)(3) non-profit organizations. Since by regulation neither deduction under Section 7-9-54 or Section 7-9-60 applies to leasing of property, Taxpayer is not entitled to either deduction for most of its gross receipts during the audit period. The only question at protest is whether Taxpayer is entitled to some deductions for the direct sale of tangible personal property and the sale of originally leased personal property items that were broken, damaged, destroyed, lost, or stolen during the lease period.

While these direct sales and breakage sales of tangible personal property to governmental agencies and 501(c)(3) organizations are potentially legally deductable under Section 7-9-54 and Section 7-9-60, Taxpayer did not present enough evidence to substantiate the claimed deductions for the 5%-10% rate of direct sales and sales of broken, lost or stolen leased items. At one point, Mr. Ortiz testified that this rate of direct sales and breakage/loss sales comes from the annual inventory reorder rate. However, annual inventory does not necessarily correlate to annual gross receipts,

especially in a business focused heavily on leasing. More importantly, as will be addressed in more detail in the discussion of the two admitted exhibits in this matter, Taxpayer's two presented invoices are not illustrative of the claimed 5%-10% direct sales and breakage/loss sales. While Taxpayer did not need to produce every invoice showing the 5%-10% direct sales and breakage/loss sales rate, Taxpayer did need to produce at least a sampling of invoices that illustrate and support that claimed percentage. Without more applicable, concrete examples of invoices substantiating the claimed 5%-10% direct sales and breakage/loss sales rate, Mr. Ortiz's testimony is speculative and provides an insufficient basis to differentiate between leases, leases converted to sales through breakage, and direct sales.

The two invoices presented into the evidence as **Taxpayer Ex.'s #1** & **#2** illustrate Taxpayer's fundamental lack of evidence in this protest to either substantiate the claimed deductions or overcome the presumption of correctness of the assessment. **Taxpayer Ex. #1** shows that Taxpayer leased two canopies, a riser, and basket lights to the City of Albuquerque for $434.60. Under Regulation 3.2.212.8 NMAC, the leasing of this property does not qualify for the claimed deduction, and therefore Taxpayer is not entitled to deduction of this amount. Attached to this first invoice is a hand-written note that tables and chairs were stolen. **[Taxpayer Ex. #1.3]**. However, tables and chairs were are not listed as leased on the original invoice, **Taxpayer Ex. #1.1**. Attached to the original leasing invoice is **Taxpayer Ex. 1.4**, an invoice for $434.60 that does not specify the nature of the transaction, whether it was a sale or a lease, or the specific property exchanged under the invoice. It is possible that Taxpayer sold the City of Albuquerque tables and chairs, as the note indicates, or the two canopies, the riser, and the basket lights as originally leased on the invoice. But the Department is left to guess what, if anything, was sold to the City versus what was leased. Given the inconsistencies of **Taxpayer Ex. #1**, this transaction is insufficient to substantiate Taxpayer's

claim that between 5%-10% of its annual inventory is sold because of breakage/loss of leased equipment. In fact, even without the inconsistencies of **Taxpayer Ex. #1**, Taxpayer needed to produce an additional sampling of invoices to support that claimed percentage of breakage/loss sales during the audit period.

In contrast, **Taxpayer Ex. #2** is much clearer: Taxpayer directly sold $2,500.00 in property to Mountain Valley Church. Taxpayer is entitled to a deduction under Section 7-9-60 for this sale. If Taxpayer had produced more invoices like **Taxpayer Ex. #2**, then Taxpayer would have been able to establish it was entitled to further claimed deductions and overcome more portions of the assessment. However, by itself, **Taxpayer Ex. #2** does not establish what portion of Taxpayer's overall gross receipts during the audit period were attributable to direct sales.

Taxpayer indicated that it did not have the human resources to search through its invoices to find the invoices reflecting the sale of tangible personal property, either in direct sales or through breakage/loss of leased goods. Under NMSA 1978, Section 7-1-10 (2007), taxpayers are required to maintain "records in a manner that will permit the accurate computation of state taxes…" While Taxpayer made an economic choice that the additional resources required to locate and present the sales invoices was not justified, there are tax liability consequences to that choice. Under applicable case law, when claiming a deduction from imposition of gross receipts tax, it is Taxpayer whom bears the burden and responsibility of demonstrating that it was entitled to the claimed deduction. *See Wing Pawn Shop*, ¶16. Further, under Section 7-1-17 (C), Taxpayer also bore the burden to overcome the presumption of correctness that attached to the Department's assessment. By deciding that it had insufficient resources to find and produce the relevant invoices needed to justify the claimed deductions, Taxpayer was unable to substantiate any more of its claimed deductions under *Wing Pawn Shop* and unable to overcome the presumption of correctness under Section 7-1-17 (C).

Turning to the assessment of interest, when a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the tax was due but not paid until the tax is paid.

In conclusion, while some of Taxpayer's transactions might have met the legal requirements for deductions under Section 7-9-54 and Section 7-9-60, factually Taxpayer did not prove at hearing which transactions or percentage of transactions were entitled to further deductions. Taxpayer only presented two invoices, neither of which was sufficient to support Mr. Ortiz's claimed 5%-10% direct sales and breakage/loss sales rate. Without a broader sample of invoices supporting Mr. Ortiz's testimony, there is insufficient evidence to apply that 5%-10% rate to all of Taxpayer's gross receipts over the entire audit period. Therefore, Taxpayer did not carry its burden under *Wing Pawn Shop*, ¶16, to establish it was entitled to further deductions and did not overcome the presumption of correctness under Section 7-1-17 (C). With the exception of an applicable deduction for the direct sale to Mountain Valley Church, Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. After the Department properly granted an extension in which to file a protest, Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not produce sufficient evidence and/or a sampling of invoices necessary to substantiate its claimed deductions under NMSA 1978, Section 7-9-54 (2003) and under NMSA 1978, Section 7-9-60 (2007). By failing to produce the requisite invoices, Taxpayer did not carry its burden under *Wing Pawn Shop* to show it was entitled to a deduction and did not overcome the presumption of correctness under NMSA 1978, Section 7-1-17 (C).

C. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

For the foregoing reasons, Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART.** If not previously allowed during the audit, Taxpayer is entitled to a deduction of gross receipts tax associated with the $2,500.00 direct sale to Mountain Valley Church. Otherwise, Taxpayer is liable for payment of the remaining gross receipts tax and interest under the assessment.

DATED: October 29, 2013.

Brian VanDenzen, Esq.
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630