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

IN THE MATTER OF THE PROTEST OF
WILLIAM WANKER **No. 13-3**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0000564800

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on December 6, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. William Wanker ("Taxpayer") appeared pro se. Staff Attorney Peter Breen appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits #1-5 were admitted into the record. The Department did not tender any exhibits. 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. Taxpayer is a sole proprietorship registered as a New Mexico business using a Santa Fe address.

2. Taxpayer performs consulting and research services related to public education trends, practices, systems, funding, and technology systems.

3. Taxpayer is an expert in the field of public education. Taxpayer has a master's degree from St. John's College, a PhD from the London School of Economics, and has taught courses at the University of Denver. Taxpayer has worked as a researcher for the State of Oregon

Legislature, built a database for the United States Department of Education, and advised the White House, the United States Congress, New Mexico Governor's Office, and the Secretary of the New Mexico Department of Education on education issues.

4. In 2007, during the relevant period, Taxpayer worked in Santa Fe, New Mexico.

5. Taxpayer reached an agreement with Celero Partners ("Celero"), a Colorado corporation, to work as an independent contractor with Celero on a request for proposal ("RFP") that Celero submitted to the New Mexico Public Education Department. [Taxpayer Exhibit #4-3].

6. Celero won the RFP with the New Mexico Public Education Department.

7. As part of his independent contractor work with Celero, Taxpayer conducted research, directed research, prepared consultant reports, and provided advice to the New Mexico Public Education Department on the development of an educational database. Taxpayer provided broad strategic guidance to Celero, while Celero hired numerous support staff, subcontractors, and programmers to perform administrative services under the RFP with the New Mexico Public Education Department.

8. Under the New Mexico Public Education Department-Celero RFP, the New Mexico Public Education Department agreed to pay gross receipts taxes on its transaction with Celero.

9. Under the Celero-Taxpayer independent contractor agreement, Celero agreed to pay Taxpayer $150,000.00 per year base compensation. [Taxpayer Exhibit #4-3].

10. Additionally, under the Celero-Taxpayer independent contractor agreement, Celero agreed to compensate Taxpayer 45% of the gross profits received from the New Mexico Public Education Department, less only Taxpayer's and Celero Director of Services Mitch

Johnson's compensation. Gross profits were defined under the Celero-Taxpayer agreement as the entire amount billed to the New Mexico Public Education Department, which included gross receipts tax. [Taxpayer Exhibit #4-3].

11. Celero did not provide, and Taxpayer did not demand, executed nontaxable transaction certificates ("NTTC or NTTCs") for either the $150,000.00 per year in base compensation or the additional 45% gross profits under the Celero-Taxpayer independent contractor agreement.

12. Taxpayer and Celero reached a similar independent contractor agreement on a Celero-Education Commission of the States contract. In addition to receiving an hourly wage for hours worked, Celero agreed to compensate Taxpayer with 35% of the gross profits received on all contracts with the Education Commission of the States. [Taxpayer Exhibit #4-4].

13. Celero did not provide, and Taxpayer did not demand, executed NTTCs for either Taxpayer's hourly wage or the additional 35% gross profits received on all contracts with the Education Commission of the States under the Celero-Taxpayer independent contractor agreement.

14. Through a tape mismatch between Mr. Wanker's Schedule C, filed with the IRS, and Taxpayer's 2007 CRS return, the Department detected additional possible gross receipts tax liability.

15. On June 4, 2010, the Department sent Taxpayer a Notice of Amnesty Offer, informing Taxpayer that a "review of information provided to the [Department] had indicated" that Taxpayer may be selected for a gross receipts tax audit. The Department asked Taxpayer to fill out an application for the temporary amnesty program within 30-days. [Taxpayer Exhibit #2-1].

16. On July 1, 2010, Taxpayer applied for the Department's temporary amnesty program. [Taxpayer Exhibit #2-2].

17. On July 1, 2010, Taxpayer and the Department provisionally entered into an Amnesty Agreement, [Taxpayer Exhibit #4-17], which was modified further by changes on December 21, 2010. [Taxpayer Exhibit #4-15 and Taxpayer Exhibit #4-26].

18. While in the amnesty program, Taxpayer discussed in a series of emails between February 23, 2011 and March 3, 2011 whether any gross receipts taxes were due for the independent contractor receipts from the Colorado corporation Celero with Jacquelin Kohlasch, a Tax Account Auditor with the Department. [Taxpayer Exhibits #'s 3.10-3.13].

19. In Taxpayer's email conversation with the Department's Ms. Kohlasch, Taxpayer reported receiving conflicting advice from Department employees. [Taxpayer Exhibits #'s 3.10-3.13].

a. First, an unidentified male Department employee called Taxpayer and told him that he should not list his receipts from an out-of-state company on his CRS-1 returns because no tax was owing on those receipts and such unnecessary reporting made it difficult for the computer system to reconcile Taxpayer's return. [Taxpayer Exhibit #'s 3.10-3.11].

b. Later, a Department employee named Reva spoke with Taxpayer over the telephone and informed him that no gross receipts tax was owing on the receipts from the out-of-state company as those receipts were deductable. Reva further advised Taxpayer that it would be nice to obtain a NTTC from Celero to support the deduction, but that a NTTC was not necessary. [Taxpayer Exhibit #3.10].

20. After consulting with her supervisor twice, the Department's Ms. Kohlasch informed Taxpayer via email on March 3, 2011 that Taxpayer's gross receipts from Celero were taxable. [Taxpayer Exhibit #'s 3.10-3.11].

21. At some unspecified point before May 19, 2011, the Department cancelled Taxpayer's Amnesty Agreement with the Department because the Department alleged Taxpayer had not provided all requested information and documentation. [Taxpayer Exhibit #4-21].

22. On May 19, 2011, Taxpayer protested the Department's cancellation of the amnesty agreement, citing his communications with the Department's Ms. Kohlasch. [Taxpayer Exhibit #4-21].

23. On July 29, 2011, the Department sent Taxpayer a "Notice of Limited Scope Audit Commencement-Gross Receipts," requesting that Taxpayer present all executed NTTCs within 60-days on September 27, 2011. [Taxpayer Exhibit #4-23].

24. Taxpayer attempted to get NTTCs from Celero in the following manner:

a. On July 7, 2010, Taxpayer emailed Mitch Johnson at Celero to ask for applicable executed NTTCs. [Taxpayer Exhibit 4-27].

b. On February 23, 2011, Taxpayer again emailed Mitch Johnson at Celero to follow up on the earlier email request for NTTCs. [Taxpayer Exhibit 4-28].

c. Mitch Johnson at Celero emailed back Taxpayer on March 3, 2011 indicating he was working on obtaining the NTTC form, but was having difficulty providing it because of troubles with the Department. [Taxpayer Exhibit 4-28].

d. On March 4, 2011, Taxpayer responded via email to Mitch Johnson at Celero about having never received a NTTC originally. [Taxpayer Exhibit 4-29].

e. On March 5, 2011, Mitch Johnson of Celero emailed back Taxpayer and told Taxpayer that the issue was Taxpayer never asked for a NTTC at the time so Celero never prepared a NTTC and therefore does not have a copy to provide to Taxpayer. [Taxpayer Exhibit 4-29].

f. On August 22, 2011, Taxpayer emailed Mitch Johnson of Celero an invoice for the gross receipts tax in absence of a NTTC.

25. On August 22, 2011, Taxpayer again wrote the Department protesting the cancellation of the Amnesty Agreement. [Taxpayer Exhibit #3-4].

26. At some unspecified point between August 22, 2011 and November 17, 2011, the Department reopened its Amnesty Agreement with Taxpayer. [Taxpayer Exhibit #3-1].

27. Taxpayer did not provide the Department with any executed NTTCs by the 60-day deadline, September 27, 2011.

28. On January 9, 2012, under letter identification number L0000564800, the Department assessed Taxpayer for $10,445.13 in gross receipts tax for a reporting period ending December 31, 2007, $2,089.03 in penalty, and $2,354.55 in interest.

29. On June 31, 2012, Taxpayer filed a protest to the Department's assessment.

30. Because of Taxpayer's filing a formal protest to the assessment, the Department again cancelled the Amnesty Agreement with Taxpayer.

31. On February 27, 2012, the Department acknowledged timely receipt of Taxpayer's protest.

32. On September 13, 2012, the Department filed a request for hearing in this matter.

33. On October 4, 2012, the Department's Hearing Bureau sent notice of administrative hearing, scheduling this matter for December 6, 2012.

34. As of the December 6, 2012 hearing date, Taxpayer's obligations under the assessment were $10,445.13 in gross receipts tax, $2,089.03 in penalty, and $2,642.59 in accumulated interest, for a total outstanding balance of $15,159.25.

DISCUSSION

The primary issue at protest is whether Taxpayer is entitled to a deduction of gross receipts from his work as an independent contractor with Celero in the absence of a supporting NTTC. Taxpayer also raises numerous other arguments that can broadly be categorized as a request for equitable relief. In brief summary, Taxpayer is responsible for the assessed gross receipts tax and any accumulated interest because Taxpayer did not timely possess a NTTC. However, Taxpayer is not liable for penalty because Taxpayer demonstrated "nonnegligence."

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). 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*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Gross Receipts Tax, the Deduction, and NTTCs.

For the privilege in 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). 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 2007, Taxpayer was engaged in business as an education consultant in Santa Fe, New Mexico. As such, any of Taxpayer's receipts during 2007 (unless otherwise exempted or deductable) were subject to gross receipts tax under NMSA 1978, Section 7-9-4 (2002). In 2007, Taxpayer had receipts from working as an independent contractor with Celero. There is statutory presumption that Taxpayer's Celero receipts were taxable under NMSA 1978, Section 7-9-5 (2002).

The evidence overwhelmingly established that Taxpayer was an independent contractor with Celero, with receipts subject to gross receipts under NMSA 1978, § 7-9-5 (2002). Taxpayer did not establish that he was working in a disclosed agency capacity under NMSA 1978, Section 7-9-3.5(A)(3)(f) (2006). Taxpayer further did not establish that he was an employee of Celero who's wages were exempted from gross receipts tax under NMSA 1978, Section 7-9-17, using the criteria articulated under Regulation 3.2.105.7 NMAC (5/15/01).

Taxpayer argues that since the New Mexico Public Education Department agreed to pay gross receipts tax under its agreement with Celero, the gross receipts tax has already been paid to the State by Celero, still unduly in Celero's possession (in which Taxpayer argues that the State should assess Celero and not him), or is still in the treasury in the event that the New Mexico Public Education Department failed to comply with the terms of the RFP (in which case Taxpayer argues that the State suffered no economic loss by failing to receive the gross receipts tax). In any event, Taxpayer argues that to impose gross receipts tax on him would force him unfairly to pay a gross

receipts tax already accounted for by either the New Mexico Public Education Department or Celero.

Taxpayer's argument is premised on a misunderstanding of what is taxed under the New Mexico Gross Receipts Tax Act. The fact that Celero may have paid gross receipts tax on the monies it received from the New Mexico Public Education Department does not necessarily alter the analysis of Taxpayer's own gross receipts tax obligations. Unlike a sale tax system, the New Mexico Gross Receipts and Compensating Tax Act imposes a tax on all receipts of a business. The focal point under the New Mexico Gross Receipts and Compensating Tax Act is not any one transaction, but the receipts of all persons and companies engaged in business in the State. Here, there are two separate businesses possibly liable for gross receipts tax: Celero had receipts from its contract with the New Mexico Public Education Department and Taxpayer, as a separate business entity from Celero, had receipts for his services performed as an independent contractor with Celero. Both Celero and Taxpayer, two separate businesses, had receipts potentially subject to gross receipts tax liability, even if the money itself ultimately came from the same sales transaction between Celero and the New Mexico Public Education Department.

The New Mexico Gross Receipts and Compensating Tax Act does provide numerous deductions and exemption of gross receipts tax, some of which the Legislature put in place specifically to reduce the possible gross receipts tax pyramiding that Taxpayer complains of in this case. Taxpayer's sale of a service to Celero for resale to the New Mexico Department of Public Education is potentially deductable from gross receipts under NMSA 1978, Section 7-9-48 (2000).

NMSA 1978, § 7-9-48 (2000) states in pertinent part that:

> Receipts from selling a service for resale may be deducted from gross receipts or governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller....

Simply performing a service for resale, as the Taxpayer did in this instance as an independent contractor for Celero, is not enough to satisfy the requirements of the deduction under NMSA 1978, § 7-9-48 (2000). In order to qualify for that statutory deduction, the statute clearly and unambiguously conditions the deduction on a sale made to a person who delivers a NTTC.

NMSA 1978, § 7-9-43 (2011) articulates the requirements for obtaining NTTCs:

> 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.

Under NMSA 1978, Section 7-9-43 (2011), Taxpayer had a statutory obligation at the time he performed the services to Celero for resale and filed his corresponding CRS returns in 2007 to obtain the relevant NTTC supporting his claim for a deduction. Perhaps the Legislature made this initial requirement under NMSA 1978, §7-9-43 (2011) precisely because the Legislature recognized the potential challenges of obtaining an NTTC after the transaction between the buyer of the services and the seller had grown stale. The Legislature certainly knew that with time, records of transactions can accidently be lost, institutional memory of transactions can be forgotten, paperwork can be misfiled, the motivating initiative to exchange services for a sum of money can be lost after completion of the transaction, and disputes can develop between buyer and seller that preclude easy cooperation.

While taxpayers "should" have possession of required NTTCs at the time of the return is due from the receipts at issue, the statute gives taxpayers audited by the Department a second chance to obtain these NTTCs. Taxpayers who rely on this provision 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 cannot obtain a 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). *id*.

In this case, Taxpayer did not possess a NTTC from Celero at the time of the initial transaction or when the initial tax return was due for the 2007 gross receipts, as required under NMSA 1978, §7-9-43 (2011). Consequently, by not obtaining the NTTC at the time of the transaction or when the tax returns were due, Taxpayer subjected himself to myriad risks that some three-to-four-years after the transaction in question, Celero would not be able to provide an NTTC to Taxpayer by the expiration of the 60-day second chance provision under NMSA 1978, §7-9-43 (2005).

On July 29, 2011, the Department sent Taxpayer notice of limited scope audit, including explicit notice that Taxpayer had 60-days, until September 27, 2011, to obtain any necessary NTTCs necessary to support claimed deductions. This Department notice requesting supporting NTTCs within 60-days is in accord with the second chance provision under NMSA 1978, §7-9-43 (2005). Taxpayer made repeated and consistent efforts to obtain a NTTC from Mitch Johnson at Celero. However, Celero never provided Taxpayer with a NTTC. Consequently, Taxpayer did not present a NTTC to the Department by September 27, 2011. Regardless of the reason for non-possession of a required NTTC, NMSA 1978, §7-9-43 (2011), with its mandatory "shall be disallowed" language, does not allow the Department any leniency to grant Taxpayer a deduction not supported by a NTTC.

While Celero clearly failed to provide Taxpayer with a NTTC despite Taxpayer's persistent, good-faith efforts to obtain a NTTC, Taxpayer and not Celero had the obligation under the statute to document his gross receipts tax deductions. Under New Mexico's self-reporting tax system, every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *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). The incidence of the gross receipts tax is on the seller of the service—in this case Taxpayer—and it was the responsibility of Taxpayer not Celero to determine whether he had the documentation needed to support his claimed deductions. As Protest Auditor Tom Dillon explained at the hearing, Taxpayer could have insisted on receipt of a NTTC before performing any work for Celero, or threatened to charge Celero gross receipts tax unless Celero provided an NTTC, or in fact charged a gross receipts tax to Celero in order to protect Taxpayer's financial interests and tax obligations for the otherwise deductable receipts from Celero. While Taxpayer repeatedly pointed to the contractual provisions between Taxpayer and Celero as evidence that Taxpayer should not be liable for gross receipts tax, the Taxpayer-Celero contractual obligations do not alter the legal requirements of the Tax Administration Act for Taxpayer to possess a supporting NTTC (though it may provide a breach of contract action between the parties to the contract in another forum). The Taxpayer's failure to obtain a NTTC within the 60-day period provided in NMSA 1978, §7-9-43 (2011) leaves the Department no choice but to disallow the claimed deductions. Therefore, the Department properly assessed Taxpayer for 2007 gross receipts received from the Celero.

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, Section 7-1-67 (2007). 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 regardless of the explanation or justification provided by a taxpayer. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Therefore, in addition to the gross receipts principal in this case, Taxpayer is liable for accruing interest until such time as the tax principal is satisfied.

Penalty.

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, NMSA 1978, Section 7-1-69(A) (2007) imposes a penalty of two percent per month "from the date the tax was due," not to exceed twenty percent of the outstanding tax liability. The term "negligence" is defined in Regulation §3.1.11.10 NMAC (1/15/01) to include "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, NMSA 1978, § 7-1-69 (B) (2007) provides a limited exception: "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 (1/15/01) provides instances of nonnegligence where no penalty should be assessed against a taxpayer under the civil penalty statute. Relevant to this protest, under Regulation §3.1.11.11(A) (1/15/01) a taxpayer is nonnegligent when "the taxpayer proves the taxpayer was affirmatively misled by a department employee." Here, Taxpayer credibly established that a Department employee told him that a NTTC, while helpful, was not necessary to claim the deduction. This statement is contrary to the requirements of NMSA 1978, §7-9-48 (2000) and NMSA 1978, §7-9-43(2011). Moreover, the Department employee's statement was given at a time when Taxpayer meaningful could have still acted to obtain the

NTTC from Celero before even being audited by the Department and before the expiration of the 60-day second chance provision. Because Taxpayer nonnegligently relied on the Department employee's statement, civil penalty under NMSA 1978, § 7-1-69(A) (2007) is not warranted under this assessment and penalty must be abated.

Taxpayer's Other Arguments Related to Equitable Relief.

In Taxpayer's protest letter, and in Taxpayer's exhibit #1, Taxpayer makes numerous arguments against the assessment in this case that fall under the category of requests for equitable relief. Some of Taxpayer's arguments have largely been addressed above and will only be briefly summarized again in this section.

Taxpayer argues that it is unfair for him to now have to pay the tax he did not collect for serving as an independent contractor when the New Mexico Public Education Department already paid the gross receipts tax to Celero, and Celero in turn already paid the tax to New Mexico. As discussed above, Taxpayer's argument is incorrectly premised on a belief that the gross receipts tax resembles a sales tax, with each transaction subject to only one imposition of tax, rather than a tax on the gross receipts of any person/company engaged in business in this State. Taxpayer had receipts for his work as an independent contractor for Celero that, unless otherwise subject to exemption or deduction, were subject to tax under the New Mexico Gross Receipts and Compensating Tax Act.

Taxpayer argues that he never deliberately misled the Department in this situation. It is true that Taxpayer was diligent and genuine in his efforts to resolve this situation with the Department. There is no evidence that Taxpayer intentionally erred or did anything improper in this case. Further, Taxpayer argues that he complied with Department employee instructions, and that he should not be held liable for the conflicting and incomplete nature of their instructions.

Taxpayer's argument is partially persuasive, as discussed above as it relates to abatement of penalty. However, to the extent that Taxpayer seeks abatement of the gross receipts principal, Taxpayer's argument does not persuade.

Essentially, Taxpayer's argument is advocating for equitable estoppel. However, equitable estoppel does not appear to be a possible remedy in an administrative protest hearing before the Department. The adjudicative functions of an administrative agency like the Department are considered by New Mexico courts to be "quasi-judicial" powers. According to the New Mexico Supreme Court, the quasi-judicial powers of an administrative agency do not include the authority to grant equitable relief to a party before the agency. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 279, 881 P.2d 18, 24 (1994). Under *AA Oilfield Service*, it appears that only the judiciary may rule on the Taxpayer's broader claim for equitable relief.

Even if equitable estoppel was a remedy available to Taxpayer, it does not appear to apply to the facts of this case. As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *See Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 770 P.2d 873 (1989). Equitable estoppel generally does not apply against the State when a taxpayer relied on the oral advice of a Department employee. *See Bien Mur Indian Market* at 231, 876; *See also, Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 28, 136 N.M. 440, 447, 99 P.3d 690, 697 (N.M. Ct. App. 2004). Finally, estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See*

Rainaldi v. Public Employees Retirement Board, 115 N.M. 650, 658-59, 857 P.2d 761, 769-70 (1993). Here, because the deduction and NTTC statutes required Taxpayer to timely possess a NTTC, to grant equitable estoppel would be contrary to the requirements expressed by statute and contrary to *Rainaldi* holding.

Taxpayer argues that he should have been informed of alternative methods to obtain a substitute for a NTTC in light of Celero's inability to provide a NTTC. However, the undersigned hearing officer is only aware of two possible NTTC substitutes, neither of which is applicable under the facts of this case. First, a taxpayer may present a non-taxable transaction certificate from the multistate tax commission ("MTC") in lieu of a NTTC. See NMSA 1978, §7-9-43 (A) (2011). Taxpayer did not present a MTC certificate in this case, so this provision is not applicable. Even if applicable, a MTC certificate may not be used in lieu of a NTTC for the sale of a service for resale deduction at issue in this protest. *See* Regulation 3.2.201.13 NMAC (3/15/10). The second scenario is under NMSA 1978, §7-9-43 (E) (2011), when a taxpayer claiming a deduction under NMSA 1978, Section 7-9-47 (1994) for the sale of tangible personal property may present alternative evidence other than a NTTC, such other evidence described under Regulation 3.2.201.10 (F) NMAC (8/15/11). Again, this provision is not applicable because Taxpayer is not seeking a deduction under NMSA 1978, § 7-9-47 (1994).

Finally, Taxpayer argues that it is unfair to hold him accountable for Celero's failure to provide a NTTC, which Taxpayer believed Celero was required to provide without Taxpayer even having to request a NTTC from Celero. Celero was unable to execute a NTTC because, according to the email of Celero Director of Services Mitch Johnson, difficulties with the Department. But this illustrates exactly the point noted above: the NTTC statute requires a taxpayer to possess the NTTC at the time the tax is due because the Legislature anticipated that

with the passage of time, numerous obstacles would interfere with a taxpayer's ability to obtain a NTTC. As addressed above, despite Celero's failure to provide a NTTC, at the end of the analysis Taxpayer was responsible to determine and accurately report his own tax obligations. *See Tiffany Construction Co. v. Bureau of Revenue*, 17, 1156. When claiming a deduction, as Taxpayer does here, it is ultimately Taxpayer who carries the burden to show that he was entitled to the deduction. *See Wing Pawn Shop* 740, 654. Taxpayer had an obligation to obtain the NTTC from Celero at the time he originally filed his 2007 gross receipts tax. At that time, perhaps Celero would have been in a better position to provide the NTTC to Taxpayer. But since Taxpayer did not have the necessary NTTC from Celero at the time of the original tax filing or by the expiration of the statute's 60-day second chance provision to establish he was entitled to the deduction, the Department properly assessed Taxpayer for the 2007 gross receipts tax principal.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment L0000564800. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not possess the requisite NTTC at the time he filed his 2007 CRS returns and did not possess the requisite NTTC for 2007 within 60-days of the Department's Notice of Audit, as required under NMSA 1978, §7-9-43 (2011).

C. Under NMSA 1978, §7-9-43 (2011), the Department is not allowed to grant and Taxpayer is not entitled to a gross receipts tax deduction for receipts for services rendered for Celero during tax year 2007.

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

E. Under Regulation §3.1.11.11(A) NMAC (1/15/01), Taxpayer was nonnegligent. Therefore, Taxpayer is not subject to civil penalty under NMSA 1978, § 7-1-69 (2007).

For the foregoing reasons, the Taxpayer's protest **IS PARTIALLY GRANTED AND PARTIALLY DENIED.** The $2,089.03 in assessed penalty is abated. For tax year 2007, Taxpayer owes $10,445.13 in gross receipts tax and $2,642.59 in interest (as calculated as of the date of hearing). Pursuant to NMSA 1978, Section 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: February 15, 2013.

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