

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

**IN THE MATTER OF THE PROTEST OF  
SKELSEY-SMITH, INC.  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L0450631232**

**No. 14-01**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on October 28, 2013, before Monica Ontiveros, Hearing Officer. At the hearing, the Taxation and Revenue Department (“Department”) was represented by Nelson Goodin, Esq., attorney for the Department. Ms. Milagros Bernardo, protest auditor, appeared as a witness for the Department. Skelsey-Smith, Inc. was represented by its owner, Michael S. Smith (“Taxpayer”) who appeared at the appointed time. On October 24, 2013, Taxpayer requested a continuance. The request was denied on October 25, 2013. The exhibits introduced into the record are: Exhibit 1-Type 5 NTTC January 4, 2011; Exhibit 2-Type 5 NTTC April 25, 2011; Exhibit A- NTTCs (4); Exhibit C- Correspondence and Phone Log; Exhibit D-December 17, 2009 60 day letter; and Exhibit E- portion of Audit.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On February 28, 2011, the Department assessed Taxpayer in gross receipts tax principal in the amount of \$7,200.79, \$1,440.60 in penalty and \$564.64 in interest for tax period June 30, 2004-June 30, 2009. Letter Id No. L0450631232.
2. Taxpayer filed a protest to the assessment on March 29, 2011.

3. On April 4, 2011, the Department acknowledged the protest. Letter Id No. L0307702336.
4. On August 1, 2013, the Department requested a hearing in this matter.
5. On August 2, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for October 28, 2013.
6. During the tax period at issue, Taxpayer provided painting services of heavy equipment for certain buyers. Taxpayer was incorporated as a corporation in Texas in 1987.
7. Taxpayer sold its services for resale in the ordinary course of business.
8. During the tax period at issue Taxpayer employed between 8-9 employees.
9. Taxpayer provided most of its services, out of state, for tax years 2004-2007.
10. On December 17, 2009, the Department issued a 60 day letter to Taxpayer, informing Mr. Smith that he had until February 15, 2010 to produce any nontaxable transaction certificates (NTTCs). Exhibit D-1.
11. The Department reissued its 60 day letter to Taxpayer informing Mr. Smith that the 60 day deadline to produce NTTCs had been extended to March 22, 2010. Exhibit D-2.
12. During the 60 day period, Taxpayer produced a number of NTTCs and provided them to the Department. The Department reviewed these exhibits and allowed all deductions for which Taxpayer had a timely Type 5 NTTC.
13. The Department rejected any Type 2 and Type 7 NTTCs from Taxpayer because these were the wrong type of NTTCs needed to support the deduction.
14. The Department rejected NTTCs executed by Frank's Supply Co., Worldwide Operating, Inc., and Romero Excavating/Trucking Inc. Exhibit E-1.

15. Taxpayer provided the Department with a Type 2 NTTC from Frank's Supply Co., Inc. Exhibit A-3. The NTTC was timely executed; however it was the wrong type of NTTC.

16. Taxpayer provided the Department with a Type 5 NTTC from Frank's Supply, Co. Inc. Exhibit A-4. The NTTC was the right type, but it was executed outside of the 60 day period.

17. Taxpayer provided the Department with a Type 7 NTTC from Romero Excavating/Trucking Inc. The NTTC was timely executed; however it was the wrong type of NTTC. Exhibit E-1.

18. Taxpayer provided the Department with a Type 2 NTTC from Worldwide Operating, Inc. Exhibit A-1. The NTTC was the wrong type of NTTC.

19. Taxpayer provided the Department with a Type 5 NTTC from Worldwide Operating, Inc. Exhibit A-2. The NTTC was the right type, but it was executed outside of the 60 day period.

20. Taxpayer's services were sold in the ordinary course of business and the subsequent sale of the service was taxed.

21. Taxpayer did not sell tangible personal property in support of a deduction for a Type 2 NTTC.

22. Taxpayer did not sell construction services for resale in support of a deduction for a Type 7 NTTC.

23. Taxpayer did not accept the Type 2 and Type 7 NTTCs in good faith.

## **DISCUSSION**

The sole issue to be determined is whether the Department properly denied the deductions for Frank's Supply Co., Inc., Worldwide Operating, Inc., and Romero Excavating/Trucking, Inc. Taxpayer argued that all of the NTTCs he provided should be accepted. The Department argued that it accepted all the timely Type 5 NTTCs and rejected those NTTCs that were untimely or of the wrong type.

***Burden of Proof and Standard of Review.***

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-17(C) (2007). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See, TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See, MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶11, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40. Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct.

Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect and establish that it was entitled to the deduction for services. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428, 431, 504 P.2d 638, 641. The courts have held that "where 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, 740, 809 P.2d 649, 654 (Ct. App. 1991). Taxpayer did not present evidence to rebut the presumption of correctness.

### ***Gross Receipts.***

Generally speaking, goods sold or services performed within the State of New Mexico are taxable. The term “gross receipts” is broadly defined in § 7-9-3.5(A)(1):

(1) “gross receipts” means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or services exchanged, “gross receipts” means the reasonable value of the property or services exchanged;”

NMSA 1978, Section 7-9-3.5(A) (1) (2003). The Gross Receipts and Compensating Tax Act, Sections 7-9-1 through 114, defines “service” as “all activities ... which activities involve predominately the performance of a service as distinguished from selling or leasing property. ... In determining what a service is, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling.” NMSA 1978, Section 7-9-3(M) (2003). The Supreme Court in 1937 decided in *Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403, 412, 69 P.2d 936, 941 that gross receipts shall include “all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect.” In addition thereto, it is presumed that “all receipts of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, Section 7-9-5 (2002). Therefore, Taxpayer’s painting services performed for Frank’s Supply

Co., Worldwide Operating, Inc. and Romero Excavating/Trucking, Inc. are gross receipts and are presumed to be taxable. NMSA 1978, Section 7-9-5(A) (2002).

***Wrong Type of NTTC.***

Receipts from selling a service that are resold are deductible if all the statutory conditions are met. Section 7-9-48 provides that “(r)ceipts from selling a service for resale may be deducted from gross receipts ... if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must resell the service in the ordinary course of business and the resale must be subject to the gross receipts tax.” NMSA 1978, Section 7-9-48 (2000). Regulation 3.2.201.8(D) NMAC requires Taxpayer to be in possession of the correct type of NTTC. The regulation provides that the type or form of NTTC must be correct. To deduct receipts for services performed for Romero Excavating/Trucking, Inc., Taxpayer was required to provide a Type 5 NTTC for services sold to Romero Excavating/Trucking, Inc. Taxpayer did not present a Type 5 NTTC, but only provided a Type 7 NTTC, for transactions for Romero Excavating/Trucking, Inc. Therefore, the deduction was properly disallowed by the Department.

***Untimely NTTCs.***

The other two buyers, Frank’s Supply Co. and Worldwide Operating, Inc., provided Taxpayer with the correct type of NTTC, however, Taxpayer failed to meet the requirement that the NTTCs be in its possession within 60 days. Section 7-9-43(A) provides that:

(a)ll nontaxable transaction certificates of the **appropriate** series executed by buyers or lessees 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 ... deductions shall be **disallowed**.

(Emphasis added.) NMSA 1978, Section 7-9-43(A) (2011). In addition regulation 3.2.201.8(A)(3) NMAC provides that a taxpayer who acquires a NTTC after the 60 day period is not entitled to the deduction.

The Department provided Taxpayer with two 60 day notices that provided deadlines for Taxpayer to be in possession of the NTTCs. The Department issued its first notice to Taxpayer on December 17, 2009 giving Taxpayer 60 days or until February 15, 2010 to provide any NTTCs to the Department to support a deduction. Exhibit D-1. The Department provided Taxpayer with a second 60 day letter on January 21, 2010 giving Taxpayer 60 additional days or until March 22, 2010 to provide any NTTCs to the Department to support a deduction. Exhibit D-2. In reviewing the Department's notes, Taxpayer claimed that he had not received the first 60 day letter and a second 60 day letter was issued to him. Exhibit C-2. The Type 5 NTTCs provided to the Department from Frank's Supply Co., Inc. and Worldwide Operating, Inc. were untimely because they were executed after March 22, 2010. The Department properly disallowed these deductions.

Mr. Smith argued that because the auditor did not specifically tell him in writing or orally that it needed a Type 5 NTTC that Taxpayer should not be responsible for the not providing the correct type of NTTC. In reviewing the auditor's notes from December 15, 2009, made prior to the expiration of the 60 day period, the auditor made a specific notation that Mr. Smith was informed that he would need to provide a Type 5 NTTC. Exhibit C-2. In addition thereto, in reading the Type 2 or the Type 7 NTTCs, Taxpayer should have been alerted that its business of reselling painting services did not fall within the activities described on the Type 2 or Type 7 NTTC. Finally, Mr. Smith must have known that he needed to provide Type 5 NTTCs because

he provided a number of Type 5 NTTCs. Exhibit E-1. Thus, the Department correctly denied the untimely and wrong types of NTTCs during the 60 day period.

***Civil Penalty.***

Taxpayer did not specifically argue that it did not owe penalty; however, its protest is broad in its scope and this argument will be addressed. Taxpayer failed to provide either timely or Type 5 NTTCs for all of its transactions for tax periods June 30, 2004-June 30, 2009. Civil penalty is imposed when a taxpayer is “negligent” or disregards the Department’s rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

(e)xcpt as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:

(1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2007). The Department’s regulation provides that “negligence” includes “failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.” Regulation 3.1.11.10 NMAC (2001).

By Mr. Smith’s own admission, Taxpayer was negligent in not filing and reporting his gross receipts returns. Therefore, Taxpayer is liable for penalty. The penalty assessed is \$1,140.16.

***Interest.***

Taxpayer did not specifically argue that it did not owe interest; however, Taxpayer's protest is broad in its scope and this argument will be addressed. Section 7-1-67(A) (2007) states that 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) (2007). The word "shall" is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32, 206 P.3d 135, 143. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due, interest was properly assessed. Therefore, Taxpayer owes the interest amount calculated through date of payment of the principal. The interest assessed through February 28, 2011 is \$564.64.

### **CONCLUSIONS OF LAW**

- A. Taxpayer filed a timely written protest of the Notices of Assessment Letter Id No. L00450631232 for gross receipts taxes, penalty, and interest for the periods June 30, 2004-June 30, 2009.
- B. Jurisdiction lies over the parties and the subject matter of this protest.
- C. Taxpayer sold services to Romero Excavating/Trucking, Inc., Frank's Supply Co., Inc. and Worldwide Operating, Inc. in the ordinary course of business. Romero Excavating/Trucking Inc., Frank's Supply Co., Inc. and Worldwide Operating, Inc. resold Taxpayer's services in the ordinary course of business.
- D. Romero Excavating/Trucking Inc. issued the wrong type of NTTC to Taxpayer.

E. Frank's Supply Co., Inc. and Worldwide Operating, Inc. issued the correct type of NTTC to Taxpayer to substantiate Taxpayer's receipts as deductible, but Taxpayer was not in possession of the NTTCs within 60 days of the Department's second notice.

F. There is no provision that allows an extension of the 60 day period.

G. Taxpayer did not rebut the presumption of correctness.

H. Taxpayer was negligent in not filing its gross receipts returns for tax periods at issue; accordingly, it owes penalty.

I. Interest is due and owing on the principal amount of tax due until the date the principal is paid.

J. The total amount due is \$7,200.79 in principal; \$1,440.16 in penalty and interest accrued through the date of payment of the principal.

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

DATED: January 28, 2014

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Monica Ontiveros  
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 (1989), Taxpayer has 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* NMRA, 12-601 of the Rules of Appellate Procedure. 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**

On January 29, 2014, a copy of the foregoing Decision and Order was mailed by first class mail to Michael S. Smith, owner of Skelsey-Smith, Inc. located at 120 Savannah Lane, Corrales, New Mexico 87048 and delivered through interoffice mail to Staff Attorney Kathleen Carlow Esq. Taxation and Revenue Department, Santa Fe, New Mexico.

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John Griego