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

IN THE MATTER OF THE PROTEST OF
ENCHANTMENT CUSTOM HOOF CARE, **No. 14-21**
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0382000512 and L1455742336

DECISION AND ORDER

A formal hearing on the above-referenced protest was held March 18, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Enchantment Custom Hoof Care (Taxpayer) appeared by and through its owners Mr. Martin VanBeek and Ms. Carol VanBeek with its attorney, Mr. Max Best. Mr. Martin VanBeek and Ms. Milagros Bernardo testified at the hearing. 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. On February 26, 2009, the Department assessed the Taxpayer for gross receipts tax and interest for the tax period ending on December 31, 2005. The assessment was for $7,594.87 tax and $3,038.88 interest. No penalty was assessed.
2. On February 26, 2009, the Department assessed the Taxpayer for gross receipts tax and interest for the tax period ending on December 31, 2006. The assessment was for $8,564.42 tax and $2,181.16 interest.
3. On March 9, 2009, the Taxpayer filed a protest to the assessments.

4. On March 19, 2009, the Department sent the Taxpayer a letter acknowledging the receipt of the protest.

5. On November 4, 2013, the Department requested that the Taxpayer's protest be set for hearing.

6. On November 7, 2013, the Hearings Bureau sent notice of hearing to the parties.

7. On January 14, 2014, the Hearings Bureau sent amended notice of hearing to the parties.

8. The Taxpayer was engaged in business in New Mexico during the tax years of 2005 and 2006. The Taxpayer was selling its services to local dairies.

9. The Taxpayer was trimming the hooves of dairy cattle.

10. Hoof trimming is necessary to maintain a dairy cow's health and milk production.

11. In 2008, the Department audited the Taxpayer for the 2005 and 2006 tax years.

12. On August 29, 2008, the Department issued a Notice of Limited Scope Audit Resolution to the Taxpayer. The notice indicated that no further action would be taken by the Department.

13. In February 2009, the Taxpayer was, nevertheless, assessed for the 2005 and 2006 tax years.

14. The Department did not assess penalty. The Department also abated 180 days of interest because the assessment was not made within 180 days of the audit.

15. The Taxpayer believes that it should not have been assessed and that its receipts were exempt or deductible. The Taxpayer also argues that the Department was negligent in referring the case for hearing.

16. The Taxpayer filed a Memorandum and Brief in Support of Taxpayer's Protest on February 28, 2014.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax and interest for the tax periods ending in December 2005 and December 2006.

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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. 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 interest.

Gross Receipts Tax.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). The Taxpayer admitted that it was performing services in New Mexico. There is a presumption that all receipts from engaging in business are subject to the gross receipts tax. *See* NMSA 1978, § 7-9-5 (2002). The Taxpayer argued that its services were exempt or deductible from the gross receipts tax under Sections 7-9-18, 7-9-19, and 7-9-59.

Exemptions and Deductions.

The burden is on the Taxpayer to prove that it is entitled to the exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. "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." *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

The Taxpayer argues that its receipts are exempt under Section 7-9-18. Receipts from the sale of livestock, live poultry, unprocessed agricultural products, hides, and pelts are exempt from the gross receipts tax. *See* NMSA 1978, § 7-9-18. Cattle are included in the definition of livestock. *See id.* The Taxpayer is not in the business of selling any of these products. The Taxpayer is selling its services as a hoof trimmer. Therefore, this exemption does not apply to the Taxpayer.

The Taxpayer argues that its receipts are exempt under Section 7-9-19. Receipts from feeding or pasturing livestock are exempt from the gross receipts tax. *See* NMSA 1978, § 7-9-19. Receipts for "penning and handling livestock prior to sale" and for training livestock are considered to be receipts from feeding livestock for purposes of the statute. *Id.*

The Taxpayer argues that it was handling livestock and should, therefore, be exempt from the gross receipts tax. The Taxpayer argues that the clause "prior to sale" is ambiguous and should be disregarded. The Taxpayer argues that the clause was also omitted from the regulation and shows an intent to disregard the requirement.

The Department seems to concede that hoof trimming is handling. The Department argues that the handling must be connected to a sale. The Department also argues that the statutory language controls.

Statutes are to be applied as written unless a literal use of the words would lead to an absurd result. *See New Mexico Real Estate Comm'n. v. Barger*, 2012-NMCA-081, ¶ 7. If a

statute is ambiguous or would lead to an absurd result, then it should be construed in accordance with the legislative intent or spirit and reason for the statute, even though it may require a substitution or addition of words. *See id. See also State ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346. *See also Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, 114 N.M. 784. When statutes and regulations are inconsistent, the statute prevails. *See Picket Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49. A regulation cannot overrule a statute. *See Jones v. Employment Servs. Div.*, 1980-NMSC-120, 95 N.M. 97.

The regulation in this case provides that "[o]nly the receipts from feeding, pasturing, penning or handling livestock are exempt" and that the same activities performed for "any animals which are not livestock are subject to the gross receipts tax." 3.2.107.8 NMAC (A) (2010). The purpose of the regulation appears to be to emphasize that the exemption applies only to livestock. *See id.* However, even if the regulation's omission of the clause "prior to sale" were inconsistent with the statute, the statue would, nevertheless, prevail. *See Jones*, 1980-NMSC-120. The statute provides that "handling livestock prior to sale" is exempt. *See* NMSA 1978, § 7-9-19.

Assuming that the clause "prior to sale" is ambiguous, the statute must be construed according to its purpose. *See Kewanee*, 1993-NMSC-006. The legislative intent of the gross receipts tax "is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico[.]" NMSA 1978, § 7-9-2. *See also Till*, 1972-NMCA-046. There is also a statutory presumption that services performed in New Mexico are subject to gross receipts tax. *See* NMSA 1978, § 7-9-5. *See also* NMSA 1978, § 7-9-3.5. Handling must occur prior to a sale in order for the exemption to apply. *See* NMSA 1978, § 7-9-19. *See also Till*, 1972-NMCA-046, ¶ 25 (holding that the taxpayer was not exempt from gross

receipts because the handling of the racehorse was not performed prior to a sale). The fact that a sale might be possible in the right circumstances does not bring the handling within the exemption. *See Till*, 1972-NMCA-046, ¶ 25. The Department's argument is persuasive. Handling "prior to sale" means handling that occurs in anticipation of or in preparation for a sale that is expected to occur within a close period of time. The Taxpayer's handling of the dairy cattle in order to trim their hooves so that the cows remain healthy and continue to produce milk is not handling livestock "prior to sale". Therefore, the exemption does not apply to the Taxpayer.

The Taxpayer argues that its receipts are deductible under Section 7-9-59. "Receipts from threshing, cleaning, growing, cultivating or harvesting agricultural products…may be deducted from gross receipts." NMSA 1978, § 7-9-59 (B) (2000).

The Taxpayer argues that trimming hooves of dairy cattle is a kind of cultivation. The Taxpayer explained that the hoof trimming helped to maintain the health of the cow. The Taxpayer also explained that the hoof trimming helped to maintain or increase milk production by the cow. The Taxpayer submitted Ruling 432-85-1 in support of its argument. The Taxpayer argues that hoof trimming of dairy cattle is similar to the trimming of pecan trees that are the subject of the Ruling. The Ruling indicated that trimming pecan trees is part of cultivating the trees and that the nuts produced by the trees are agricultural products since they are intended for human consumption. The Taxpayer presented an article that indicated that pruning pecan trees is necessary to their health and helps to enable crop production. The Taxpayer argues that hoof trimming is necessary to the health of the cow and helps enable the production of milk, which is an agricultural product intended for human consumption.

The Department argues that the Taxpayer's analogy is too much of a stretch. The Department also presented evidence that Ruling 432-85-1 had been withdrawn, but the reason for its withdrawal was not known. The Department argues that hoof trimming is not cultivation.

Harvesting is interpreted in the regulations to include shearing of sheep. *See* 3.2.217.12 NMAC (2001). However, cultivating is not defined in the statute, the regulations, or in the general definitions of the Tax Code. *See* NMSA 1978, §§ 7-1-3 and 7-9-59. Absent a statutory or regulatory definition, a traditional dictionary definition will be used. The primary definition of cultivate is "to prepare and use (soil) for growing plants". *See Merriam-Webster, n.d. Web.* (2014) at http://www.merriam-webster.com/dictionary/cultivate. Without a statutory or regulatory authority for broadening the definition of cultivate, hoof trimming does not meet this definition. Again, the statute allowing the deduction must be narrowly construed in favor of the taxing authority and must be "clearly and *unambiguously* expressed in the statute". *See Wing Pawn Shop*, 1991-NMCA-024, ¶ 16 (emphasis added). Consequently, the Taxpayer failed to prove that it was entitled to this deduction.

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*, 1977-NMSC-010, ¶ 4, 90 N.M. 103. 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. The Department also abated 180 days of interest for failing to assess within 180 days of the audit. *See* NMSA 1978, § 7-1-67 (A) (2013).

Estoppel.

The Taxpayer argues that the Department was, nevertheless, estopped from assessing when the Department issued the letter in August 2008 that indicated that no further action would be taken by the Department. The Taxpayer argues that the letter was, essentially, a ruling directed to the Taxpayer and that statutory estoppel applies.

The Department argues that the letter is not a ruling as it does not meet the requirements of a ruling. The Department also argues that even if the letter were a ruling, it was issued in 2008 and could not be reasonably relied upon by the Taxpayer for failing to pay its taxes when they were due for the 2005 and 2006 tax years.

The Department can be estopped from taking action against a taxpayer when the party's action or inaction was due to a regulation in effect at the time or a ruling addressed to the party personally in writing by the secretary that was in effect at the time that the liability arose. *See* NMSA 1978, § 7-1-60 (1993). Rulings must meet certain criteria, including a signature by the secretary and by counsel. *See* 3.1.2.8 NMAC (2000). The August 2008 letter is not a ruling as it does not meet the criteria required by the regulation. *See id.* Moreover, the August 2008 letter was issued after the tax liability for the 2005 and 2006 tax years arose. *See Wing Pawn Shop*, 1991-NMCA-024, ¶ 25 (holding that even if the department misled a taxpayer into believing sales were not subject to gross receipts tax, the letter was transmitted after the transactions occurred and did not support estoppel). Therefore, statutory estoppel does not apply. Hearing officers are also unable to grant equitable remedies. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary).

Timeliness of Assessment.

The Taxpayer argues that the Department was not able to assess after the August 2008 indicated that no further action would be taken by the Department. The Department has seven years from the end of the year in which the tax is due to make an assessment when the taxpayer failed to file any return. *See* NMSA 1978, § 7-1-18 (C). The Department is required to give taxpayers a notice of audit, but is not required to give a notice of resolution of the audit and does not appear to be statutorily bound to honor any such notice of resolution. *See* NMSA 1978, § 7-1-11.2 (2007). *See also* NMSA 1978, § 7-1-18.

The Taxpayer was a non-filer for the 2005 and 2006 tax years. Final payments for 2005 would have been due in January 2006, and for 2006 would have been due in January 2007. *See* NMSA 1978, § 7-9-11. Therefore, the Department had until 2013 and 2014, respectively, to assess. The assessments were made in 2009. Therefore, the assessments were made timely, and no other statutory or regulatory authority exists for abating the assessments based on the August 2008 letter.

Timeliness of the hearing.

The Taxpayer argues that the period of time between the protest and the hearing was unreasonable. The Taxpayer argues that the Department's action should be dismissed as presumptively prejudicial. The Department argues that there was not a deadline in which to hold the hearing. The Taxpayer filed its protest on March 9, 2009. The Department referred the Taxpayer's protest to the Hearings Bureau for hearing on November 4, 2013, more than four years later. The Hearings Bureau promptly set the hearing.

In 2009, there was not a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24 (2003). Currently, a hearing must be set within ninety days of the protest. *See* NMSA 1978, § 7-1-24.1 (2013). However, there is no statutory or

regulatory authority for the Hearing Officer to dismiss a previously filed protest for unreasonable and unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. *See also Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶ 13, 100 N.M. 632 (holding that public officers' failure to timely carry out their duties is not a defense to an action by the state and that the statute does not provide a remedy for failure to set a hearing promptly). As there was not a statutory or regulatory violation in failing to refer the Taxpayer's protest for such an extended period of time, there is no administrative remedy that can be granted.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L0382000512 and L1455742336, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was properly assessed for gross receipts tax and interest for 2005 and 2006.

3. The Taxpayer's gross receipts were not exempt under Sections 7-9-18 and 7-9-19.

4. The Taxpayer's gross receipts were not deductible under Section 7-9-59.

5. The Department was not estopped by statute from assessing the Taxpayer, and its assessment was timely.

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

DATED: June 5, 2014.

Dee Dee Hoxie

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