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

IN THE MATTER OF THE PROTEST OF
CORNELL CORRECTIONS OF TEXAS
TO DEPARTMENT'S FAILURE TO GRANT OR DENY A REFUND **No. 14-35**

DECISION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on July 22, 2014, before Brian VanDenzen, Chief Hearing Officer. Chief Legal Counsel Brad Odell appeared representing the Taxation and Revenue Department ("Department"), along with protest auditor Andrick Tsbetsaye. Attorney Timothy R. Van Valen appeared representing Cornell Corrections of Texas ("Taxpayer"). Josh Cohen and Josh Killian of Ryan, LLC also appeared for Taxpayer. This matter was presented on the Department's February 28, 2014 Motion for Summary Judgment and Taxpayer's April 7, 2014 response in opposition to Summary Judgment, which Taxpayer supplemented further on July 11, 2014. All affidavits attached to the parties' summary judgment pleadings are admitted into the record. The parties submitted 16 stipulations of fact and stipulated to the admission of exhibits A-G, all of which are incorporated into the administrative record in this matter. Based on the Stipulation of Facts, review of stipulated exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 28, 2012, Taxpayer timely filed a claim for refund of $969,712 in state and local gross receipts tax for the reporting periods of December 31, 2008 through December 31, 2009. [Stipulation of Facts #2-5].

2. The Department took no action to either approve or deny Taxpayer's claim for refund within 120-days. [Stipulation of Facts #2-5].

3. On July 24, 2013, Taxpayer timely filed a protest to the Department's failure to allow or deny Taxpayer's claim for refund.

4. On August 2, 2013, the Department acknowledged receipt of Taxpayer's protest.

5. On September 9, 2013, the Department requested a hearing in this matter with the Hearings Bureau.

6. On September 10, 2013, the Hearings Bureau set this matter for a telephonic Scheduling Conference on September 25, 2013.

7. On September 25, 2013, a Scheduling Conference in this matter occurred, setting the merits hearing for March 26, 2014.

8. On February 14, 2014, the parties filed their Stipulation of Facts, incorporated herein.

9. On February 28, 2014, the Department moved for Summary Judgment.

10. On March 13, 2014, Taxpayer moved to vacate and reschedule the hearing on the merits.

11. On March 25, 2014, the Hearings Bureau granted Taxpayer's Motion to Vacate and reschedule, setting a summary judgment motion hearing on April 14, 2014 and a merits hearing on July 22, 2014.

12. On April 2, 2014, the Hearings Bureau issued a Notice of Reassignment of Hearing Officer.

13. On April 7, 2014, Taxpayer filed its Response to the Department's Motion for Summary Judgment.

14. On April 9, 2014, the parties jointly moved to supplement their respective summary judgment pleadings.

15. On April 10, 2014, the parties jointly moved to continue the April 14, 2014 summary judgment motion hearing.

16. On April 15, 2014, the Hearings Bureau issued an order granting joint motion to supplement summary judgment, motion for continuance of summary judgment hearing, and notice of hearing on summary judgment motion in lieu of scheduled protest hearing. This order set the summary judgment motion hearing date for July 22, 2014.

17. On May 14, Taxpayer filed a Motion for Protective Order and a Special Request for Hearing. On May 20, 2014, the Department filed its Response to Motion for Protective Order.

18. On May 23, 2014, the Hearings Bureau issued an Amended Notice of Administrative Hearing, scheduling the merits hearing for November 4, 2014.

19. On May 29, 2014, the Hearings Bureau denied Taxpayer's request for a protective order.

20. On July 11, 2014, Taxpayer filed its supplement to its response to the Department's Motion for Summary Judgment.

21. On July 22, 2014, the summary judgment motion hearing occurred.

22. On October 15, 2014, the Hearings Bureau vacated the November 4, 2014 merits hearing pending order on summary judgment.

23. Taxpayer is a private prison company that manages and operates Bernalillo County's Regional Correctional Center in Albuquerque, New Mexico.

24. Taxpayer timely paid gross receipts tax to the state in 2008 and 2009 for its receipts derived from its operation of Bernalillo County's Regional Correctional Center.

25. Bernalillo County owns the Regional Correctional Center in Albuquerque, New Mexico.

26. On October 14, 2003, Taxpayer and Bernalillo County reached a lease agreement of the corrections facility. [Stipulated Ex. C].

27. Under the lease, Taxpayer paid Bernalillo County rent monthly, at rates that increased over the term of the lease in a specified manner. [Stipulated Ex. C-1].

28. Under the lease agreement, Taxpayer was allowed to use and occupy the correctional facility for the housing of incarcerated inmates only when a valid operating agreement between Taxpayer and Bernalillo County or other New Mexico County was in effect. [Stipulated Ex. C-2].

29. The lease agreement required Bernalillo County to complete and submit all information necessary to the appropriate federal agency to enter into an agreement to house federal prisoners in the facility. [Stipulated Ex. C-2].

30. In the event Bernalillo County entered into an intergovernmental agreement with the federal government for the housing of federal prisoners at the facility, then Taxpayer and Bernalillo County were required to enter into a Qualified Management Agreement covering the federal prisoners, "pursuant to which Tenant [Taxpayer] shall be vested with authority equivalent

to that required for services to operate a jail under New Mexico Statute Annotated (1978) Section 33-3-27." [Stipulated Ex. C-2].

31. Effective July 1, 2004, Bernalillo County reached an Intergovernmental Service Agreement with the United States Department of Justice for the "housing, safekeeping, and subsistence of federal prisoners" at the Regional Correctional Center on a per diem rate basis. [Stipulated Ex. D-1].

32. The Intergovernmental Service Agreement required Bernalillo County to "accept and provide for the secure custody, care, and safekeeping of federal prisoners in accordance with federal, state, and local law, standards, policies, procedures, or court orders applicable to the operations of the facility…" [Stipulated Ex. D-2].

33. Under the Intergovernmental Service Agreement, Bernalillo County was required to bill the United States Department of Justice for the housing of inmates. [Stipulated Ex. D-4].

34. In 2007, Taxpayer reached an Operating and Management Agreement with Bernalillo County for the Regional Correctional Center. [Stipulated Ex. B].

35. Under the Operating and Management Agreement, Taxpayer was required to operate, maintain, and manage the Regional Correctional Center in accord with all operating standards including federal, state or local laws, rules, codes, regulations and the constitution. [Stipulated Ex. B-6].

36. Taxpayer under the Operating and Management Agreement had the "sole right to supervise, manage, operate, control, and direct the performance…" of the required services. [Stipulated Ex. B-21].

37. Taxpayer was required under the Operating and Management Agreement to "maintain all licenses, permits, and franchises necessary for its business where the failure to so maintain may have a material adverse effect on [Taxpayer]'s ability to perform under this Management Agreement." [Stipulated Ex. B-6].

38. The Operating and Management Agreement prohibited Taxpayer from subcontracting any material portion of the services to be performed under the agreement without prior written consent. [Stipulated Ex. B-21].

39. The Operating and Management Agreement established Taxpayer as an independent contractor. [Stipulated Ex. B-21].

40. Under the Operating and Management Agreement, Taxpayer was liable for the payment of "any federal income, F.I.C.A., or other taxes claimed or owed to by…" Taxpayer. [Stipulated Ex. B-21].

41. Under the Operating and Management Agreement, Taxpayer at its sole expense was required to perform, manage, supervise, or provide 21 different services at the Regional Correctional Center: adequate staffing; establish a separate records department; maintain inmate records; provide required reports; facility and records access to Bernalillo County; training; extensive medical treatment; provide food service to inmates; provide laundry and clothing to inmates; provide necessary supplies; provide programming and special educational/rehabilitation programming to inmates; provide a commissary to inmates, provide telephone services to inmates, maintain the facility, establish inmate work opportunities; provide visitation services and court access; provide a grievance procedure for inmates; establish and maintain a discipline policy; provide drug testing; provide intake classification standards; meet legal authority requirements;

establish and train on use of force protocol; provide safety and security; and conduct safety and fire inspections. [Stipulated Ex. B-7 through B-20].

42. Under the Operating and Management Agreement, the definition of inmate includes any prisoner assigned and transferred to the Regional Correctional Center "pursuant to the Intergovernmental Service Agreement between the County and the United States Government or the County and the State of New Mexico." [Stipulated Ex. B-3].

43. Taxpayer is paid on a per diem basis for the housing of inmates at the Regional Correctional Center. [Stipulated Ex. B-22].

44. In 2008 and 2009, Bernalillo County made payment to Taxpayer for the housing of federal prisoners at the Regional Correctional Center. [Stipulated Ex. F].

45. Taxpayer sought and obtained accreditation of its operation of the Regional Correctional Center in Albuquerque through the Commission on Accreditation for Corrections. The initial audit for the accreditation occurred in 2010, after the period encompassing the refund period. [Stipulated Ex. E].

46. On October 3, 2013, after the initiation of this protest, Lizzy Vedamanikam of the Department's Protest Office told Taxpayer that she could not obtain approval of Taxpayer's claim for refund. [Stipulation of Facts #8].

47. On October 23, 2013, Lizzy Vedamanikam also provided Taxpayer with 60-days notice to obtain any applicable non-taxable transaction certificates ("NTTC"). [Stipulation of Facts #8].

48. On November 20, 2013, Bernalillo County executed a Type 9 NTTC covering the purchase of tangible personal property to Taxpayer. [Stipulation of Facts #10; Stipulated Ex. A].

49. Taxpayer's representative knew that the Type 9 NTTC covered tangible personal property rather than the sale of a license that Taxpayer claimed as the basis of the deduction. [Affidavit of Joshua Cohen, ¶6].

50. Taxpayer provided the Department with an executed Type 9 NTTC on December 2, 2013, within the 60-day deadline. [Stipulation of Facts #9].

DISCUSSION

The primary issue in this matter is whether for the purposes of NMSA 1978, Section 7-9-47 (1994), Taxpayer provided Bernalillo County a license, which Bernalillo County resold to the federal government for the housing of federal inmates at the Regional Correctional Center in the regular course of its business. Taxpayer claims it is entitled to a deduction under Section 7-9-47 because it was selling a license to Bernalillo County to house prisoners in an accredited facility, which Bernalillo County resold to the federal government. The Department moved for summary judgment, arguing that that Taxpayer was selling services to Bernalillo County rather than a license, which the Department argued as a matter of law did not qualify for the claimed deduction under Section 7-9-47. The secondary issue is whether Taxpayer was entitled to good faith, safe harbor protection when it accepted the incorrect type of NTTC from Bernalillo County.

Burden of Proof and Standard of Review.

Although the Department did not issue Taxpayer an assessment in this matter, Taxpayer still has the burden of establishing it was entitled to the claimed refund at issue. Taxpayer's claim for refund is premised on a deduction from gross receipts tax. "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 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Consequently, Taxpayer still must show that it is entitled to the deduction that is the basis of its claim for refund.

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713. If the movant for summary judgment makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331. Both parties agreed at the summary judgment motion hearing that there were no genuine disputes of fact in this matter, making this matter ripe for a decision upon the Department's summary judgment motion if the Department is entitled to judgment as a matter of law.

Gross Receipts Tax and the Claimed Deduction

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).

Taxpayer is engaged in business in New Mexico operating Bernalillo County's Regional Correctional Center. As such, all receipts of Taxpayer are presumed subject to New Mexico's gross receipts tax. Taxpayer did timely pay gross receipts tax on its receipts from operating Bernalillo County's Regional Correctional Center, but now seeks a refund based on the claimed deduction.

In this case, Taxpayer's claim for refund is premised on the deduction for sale of tangible personal property or licenses for resale found under Section 7-9-47. Section 7-9-47 states that:

> Receipts from selling tangible personal property or licenses may be deducted from gross receipts or from governmental 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 tangible personal property or license either by itself or in combination with other tangible personal property or licenses in the ordinary course of business.

License is not specifically defined either under Section 7-9-47 or broadly defined under the Gross Receipts and Compensating Tax Act or under the Tax Administration Act. *See Quantum Corp. v. State Taxation & Revenue Dep't*, 1998-NMCA-050, ¶10, 125 N.M. 49. In the absence of a statutory definition, the New Mexico Court of Appeals turned to Black's Law Dictionary to define "license" as "[a] permission, by a competent authority to do some act which without such authorization would be illegal or would a trespass or a tort…" *N.M. Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶7, 85 N.M. 565; *See also Quantum Corp*., ¶10.

The fundamental question in this case is whether Taxpayer was providing a license to Bernalillo County potentially deductible under that section or instead was predominately performing a service. NMSA 1978, Section 7-9-3 (M) (2007) defines "service" as "all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a

service as distinguished from selling or leasing property." Section 7-9-3 (M) indicates that "[i]n determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling."

In constructing the Lease and the Operating and Management Agreement between Taxpayer and Bernalillo County, the form does not determine the character of the instruments; instead, it is the intention of the parties as shown by the contents of the instruments that controls. *See Transamerica Leasing Corporation v. Bureau of Revenue*, 1969-NMCA-011, ¶17, 80 N.M. 48. Looking at the Lease, the Operating and Management Agreement, and the Intergovernmental Service Agreement, it is clear that the intention of the parties was that Bernalillo County contracted for the provision of services: the operation and management of the Regional Correctional Center in accord with relevant law and standards.

There is no indication in the content or structure of the Intergovernmental Service Agreement that Bernalillo County and the federal government considered the transaction the sale of a license. The Intergovernmental Service Agreement between Bernalillo County and the federal government required Bernalillo County to accept and provide secure custody, care, safekeeping, food service, and medical services to federal prisoners. These services were required to maintain the facility in accord with applicable legal standards. There is no indication that either party contemplated the agreement to be the sale of license because the agreement itself focused predominantly on the services that Bernalillo County was required to provide and perform.

In this case, the Lease is contingent on a valid operating and management agreement, making that Operating and Management Agreement the heart of the transaction between Taxpayer and Bernalillo County. But turning briefly to the Lease, in the event that Bernalillo County entered into an

agreement with the federal government, the Lease required that Taxpayer and Bernalillo County enter into a management agreement that vested Taxpayer with authority equivalent to that required for services to operate the jail in compliance with New Mexico law. Under the lease, reaching an agreement for the performance of services was critical.

Similarly, the substantive heart of the Operating and Management Agreement are the services Taxpayer is required to provide as part of its contractual obligation to "supervise, manage, operate, control and direct the performance of services" under the agreement. While not dispositive to the intent of the parties, the fact that the Operating and Management Agreement is replete with the words "service" or "services" is instructive as to how the parties conceived of the nature of their agreement. Article III of the Operating and Management Agreement is devoted to the scope of 21 different listed services Taxpayer was required to provide. These 21 services included the critical security, training of officers, maintenance of facility, medical, and food services necessary to operate a jail. Without performance of most of these services, Taxpayer could not have operated the facility as a correctional facility because these services were necessary for Taxpayer, as operator of the Regional Correctional Center, to fulfill its duty of maintaining public order and holding prisoners in secure custody. *See Methola v. County of Eddy*, 1980 NMSC 145, ¶17, 95 N.M. 329 (jailers are charged with a public duty to maintain order and hold persons in custody); *See also* NMSA 1978, Section 33-3-27 (2007) (setting minimum comprehensive standards for a private independent contractor for the operation of jail before approval of operation agreement).

Further, under the Operating and Management Agreement, the term inmate includes prisoners "assigned and transferred" to the Regional Correctional Center under Bernalillo County's "Intergovernmental Service Agreement." The Operating and Management Agreement itself specified

that Bernalillo County would assign federal prisoners pursuant to Bernalillo County's service agreement with the federal government rather than a license.

Regarding accreditation, in this case Bernalillo County entered into its agreement with the United States Department of Justice even before it had an Operating and Management Agreement in place. And, based on the stipulated exhibit, Taxpayer did not undergo the initial accreditation audit until 2010, after the period in which Taxpayer claims a refund. Given these timeline issues, the accreditation that Taxpayer relies so heavily on in arguing it was selling a license does not appear to have the importance that Taxpayer suggests.

In any case, the Department's analogy to a construction contractor with a professional license referenced in Stipulated Ex. G is persuasive. Before performing any construction work, a construction professional must obtain the professional license from the state before engaging in construction activity. That is a precondition of the transaction, not the nature of the transaction itself, which is the performance of the construction services. Similarly, Taxpayer was required under the terms of the Operating and Management Agreement to maintain the accreditation because failure to do so would adversely affect Taxpayer's ability to perform under the agreement. While the accreditation may have been a condition to house federal prisoners, the transaction itself was Taxpayer performing the services necessary to operate, manage, and maintain a detention facility in accord with legal requirements and the accreditation standards.

Taxpayer argues that the services contracted for and rendered are merely incidental to the license in a similar manner to the incidental services rendered by a hotel as part of the guest's license to use the room for the evening. This argument does not persuade. A hotel may still provide its essential function—the licensing of a room for the evening—even when an incidental service like

providing cable television or climate control do not function. If the complimentary breakfast promised at a hotel never materializes, a person may leave the hotel grounds to get something to eat around the corner. However, if the Correctional Facility fails to provide food service, a prisoner is not at liberty to walk to the local coffee shop for breakfast.

Unlike the incidental services of a hotel, the contracted services Taxpayer provided are critical to providing a functioning and lawful correctional facility. Without trained guards, security protocols, and maintained premises, a jail cannot meets is essential function as a secure detention facility. Nor can a correctional facility meets its rehabilitation purpose without the programming services contained in the Operating and Management Agreement. Without appropriate medical care, legal visits, and court transportation services, a correctional facility cannot comply with its legal obligations. Without all of those services, the ostensible license that Taxpayer claims would be meaningless for the purposes of housing federal prisoners because there would not be a functional correctional facility. Indeed, without these core services involving security, training, staffing, and operational standards, Bernalillo County could not have entered into agreement with Taxpayer. *See* Section 33-3-27 (setting minimum comprehensive standards for a private independent contractor for the operation of jail before approval of operation agreement). The agreements between Taxpayer and Bernalillo County were predominately about Taxpayer's performance of services, satisfying the definition of a "service" under Section 7-9-3 (M)[1].

Taxpayer's argument that the parties contracted for the sale of a license in a similar vain to a hotel selling a license to a lodger appears to stem from an over reading of *Corrections Corp. of*

[1] Even if it were possible to separate the contracted services from the functioning of the jail, there is no evidence that the billing occurred in such a manner to differentiate the services from the claimed license. *Cf Corrections Corp.*, ¶24. Taxpayer received a per diem rate by prisoner, not broken down by food costs, room cost, security cost, medical costs etc.

America v. State of N.M., 2007-NMCA-148, 142 N.M. 779. In *Corrections Corp.*, ¶1, the taxpayer sought a refund of gross receipts tax because it claimed its agreements to house prisoners for governmental agencies at facilities that taxpayer owned and operated constituted a lease not subject to gross receipts tax under a different applicable deduction. The issue in *Corrections Corp.* was whether the contract constituted a lease, not whether the contract was for the sale of a license. The agreements in *Corrections Corp.*, ¶3-10, are quite similar to the Operating and Management Agreement in this case. Like in this protest, the taxpayer in *Corrections Corp.*, ¶6, charged the governmental entities on a per diem basis. However, unlike the present protest where Bernalillo County owned the facilities it leased to Taxpayer, the *Corrections Corp.* taxpayer owned the prison facilities outright. The Court of Appeals in *Corrections Corp.*, ¶28, ultimately held that the contract was not a lease that qualified for the claimed deduction in that case because the "government entities did not pay a fixed amount in exchange for the guarantee of physical real property to house inmates…" In the next sentence, after the Court of Appeals had already reached its holding, the court indicated that the agreement in dispute was "more like" the arrangement between hotels and lodgers than leases of real property. *Id*. While this sentence appears to be dicta because it is not essential to the court's holding, it also does not go as far as Taxpayer's argument suggests. Between two choices, the court simply stated that the arrangement was "more like" one alternative than another. The Court of Appeals in fact did not state that the agreement in *Corrections Corp.* was identical to the hotel-lodger agreement or was in fact a license. And the fact that Bernalillo County owned the facility rather than the private prison company at issue in *Corrections Corp.* may further distinguish that statement from this protest.

In the very next paragraph, *Corrections Corp.*, ¶29, the Court of Appeals reiterates that its holding is an accord with the presumption of taxation and the construction of deductions narrowly.

Indeed, the Court of Appeals stated that "[w]e find nothing in our law to support CCA's position that we should expand the definition of 'lease for real property…' to include agreements between governmental entities and private prison companies." That same principal would certainly apply to Taxpayer's attempt to expand the concept of a license to include Taxpayer's agreement to manage and operate Bernalillo County's jail. In the absence of clear proof that Taxpayer sold a license for resale, there is nothing to suggest that the Legislature intended Section 7-9-47 to apply to Taxpayer's management, operation, and provision of services for Bernalillo County's Regional Correctional Center.

Good Faith Acceptance of a NTTC.

In the alternative, Taxpayer argued in briefing that its timely acceptance of the incorrect type 9 NTTC executed by Bernalillo County entitled it to the safe harbor protection of NMSA 1978, Section 7-9-43 (A) (2011). In support of this argument, Taxpayer cited *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, ¶15, 86 N.M. 629 and a decision and order of the Hearings Bureau, *In the Matter of the Protest of Rio Grande Electric Co., Inc,* No. 13-16 (June 10, 2013) to support its argument[2].

NMSA 1978, §7-9-43(A) (2011) grants taxpayers a good-faith acceptance, conclusive evidence safe harbor in some circumstances:

> [w]hen the seller or lessor accepts a nontaxable transaction certificate within the required time and in good faith that the buyer or lessee will employ the property or service transferred in a nontaxable manner, the properly executed nontaxable transaction certificate shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

[2] *Rio Grande Electric Co., Inc.* was premised on the Hearings Bureau decision and order *In the Matter of Case Manager (Theresa Maestas),* No. 13-12 (May 15, 2013). *In the Matter of Case Manager* is currently on appeal.

In other words, the statute grants the seller of the nontaxable property or service safe harbor from taxation when the seller timely accepts a properly executed NTTC in good faith from the buyer. Regulation 3.2.201.15 NMAC (05/31/01) discusses good faith acceptance of a NTTC:

> Acceptance of [NTTCs] in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time of each transaction. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered or services performed thereafter are of the type covered by the certificate.

As recently made clear in another Hearings Bureau decision and order *In the Matter of the Protest of Adecco USA*, No. 14-16 (May 22, 2014), even under the broader reading of the safe harbor exception applied by the Hearings Bureau in *In the Matter of the Protest of Case Manager* and *In the Matter of the Protest of Rio Grande Electric Co., Inc*, the safe harbor protection only applies when the underlying transaction itself is covered by a recognized deduction. That is, the safe harbor provision cannot serve to make a taxable transaction not covered by any deduction into a nontaxable transaction merely by possession of a NTTC. In *McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599, the Court of Appeals held that the good faith safe harbor provision did not protect a seller from taxation "unless the certificate covered the receipts in question." The court went on to say that since there was "no certificate applicable" for the type of services that taxpayer provided, the Department's denial of the deduction was proper. *See McKinley,* ¶13. Although perhaps dicta, the Court of Appeals stated in *Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶12, 94 N.M. 630 that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." In order for the safe harbor provision to apply, the receipts in question must otherwise be covered by a recognized deduction. That is not the case in this protest.

Here, since Taxpayer did not establish that the transaction constituted a license, the transaction is not covered by a recognized deduction, and Taxpayer cannot rely on its acceptance of the NTTC in good faith to convert this taxable transaction into a nontaxable transaction. The Department's summary judgment motion is well-taken and is granted. Consequently, Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's failure to grant or deny Taxpayer's claim for refund and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Because, as the parties agreed during the summary judgment motion hearing, there is no genuine dispute as to any material fact, summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

C. Under NMSA 1978, § 7-9-3.3 (2003), Taxpayer is engaged in business in the management and operation of Bernalillo County's Regional Correctional Center in Albuquerque.

D. Under NMSA 1978, Section 7-9-5 (2002), all of Taxpayer's receipts in New Mexico are presumed subject to New Mexico's gross receipts tax.

E. Taxpayer had the burden to establish its claim for refund premised on the deduction articulated under NMSA 1978, Section 7-9-47 (1994), a deduction that must be narrowly construed. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779.

F. The Operating and Management Agreement between Taxpayer and Bernalillo County predominately involved the performance of services, satisfying the definition of "services" under NMSA 1978, Section 7-9-3 (M) (2007) subject to gross receipts tax.

G. As a matter of law, without establishing that the transaction involved the sale of a license for resale, Taxpayer did not meet its burden of establishing it was entitled to the deduction under NMSA 1978, Section 7-9-47 (1994). *See Corr. Corp. of Am. of Tenn. v. State*, ¶29.

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

DATED: November 20, 2014.

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