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

**IN THE MATTER OF THE PROTEST OF**
**EDWARD CHAVEZ** **No. 14-40**
**TO ASSESSMENTS ISSUED UNDER LETTER**
**ID NO.'s L1182583760, L0645712848 and L1719454672**

## DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 24, 2014 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. Edward Chavez ("Taxpayer") appeared *pro se*. Maria Chavez, Taxpayer's daughter, also appeared. Staff Attorney Peter Breen appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibits #1-10 and Department Exhibits A-B were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On August 21, 2014, the Department assessed Taxpayer for $389.08 in gross receipts tax, $0.00 in penalty, and $79.36 in interest for a total assessment of $468.44 for the combined reporting period ending on December 31, 2008. [Letter id. no. L1182583760].

2. On August 21, 2014, the Department assessed Taxpayer for $1,472.03 in gross receipts tax, $0.00 in penalty, and $233.08 in interest for a total assessment of $1,705.11 for the combined reporting period ending on December 31, 2009. [Letter id. no. L0645712848].

3. On August 21, 2014, the Department assessed Taxpayer for $700.69 in gross receipts tax, $0.00 in penalty, and $83.20 in interest for a total assessment of $783.89 for the combined reporting period ending on December 31, 2010. [Letter id. no. L1719454672].

4. On August 28, 2014, Taxpayer protested the Department's assessments.

5. On September 10, 2014, the Department acknowledged receipt of Taxpayer's protest.

6. On October 17, 2014, the Department requested a hearing in this matter with the Hearings Bureau.

7. On October 21, 2014, within 90-days of the protest, the Hearings Bureau sent Notice of Administrative Hearing, setting this matter for a hearing on November 24, 2014.

8. On November 12, 2014, the Hearings Bureau sent Amended Notice of Administrative Hearing, correcting the spelling of address information, scheduling this matter for a hearing on November 24, 2014.

9. Taxpayer is a retired steel and iron worker.

10. In 2008, 2009, and 2010, Taxpayer performed maintenance services on homes for the Estate of Jane Batten, Mr. Kreg B. Hill personal representative.

11. Taxpayer would maintain the landscape, clean the interiors, and inspect up to 14-homes that were part of the estate.

12. Mr. Hill would call Taxpayer at the beginning of the week and direct him to which property on the estate needed attention. Taxpayer would then schedule his work accordingly.

13. Taxpayer would perform between 20 to 30 hours of work each week.

14. Taxpayer received an hourly salary for his work on the Estate.

15. Taxpayer received checks from the estate.

16. The estate did not withhold income or FICA taxes from Taxpayer's check.

17. The estate did not pay unemployment insurance or worker's compensation for Taxpayer's work.

18. Mr. Hill considered Taxpayer a contractor rather than an employee. [Taxpayer Ex. #2; 11-24-14 CD 25:02-12].

19. The estate provided Taxpayer with 1099-MISC's in 2008, 2009, and 2010 rather than W-2's. [Taxpayer Ex.'s 5-7].

20. Taxpayer did not have a CRS number and Taxpayer was unaware of the gross receipts tax implications of his services for the estate.

21. Taxpayer's CPA did not inform him of his gross receipts tax obligations. Taxpayer's CPA sent the Department a letter acknowledging her failure to inform Taxpayer about his gross receipts tax obligations.

22. There is no dispute that Taxpayer filed and paid appropriate federal and state income tax in 2008, 2009, and 2010.

23. Taxpayer listed the 1099-MISC income he received from the estates on Schedule C's in each year.

24. Through its tape match program with the IRS, the Department detected that Taxpayer had Schedule C income in 2008, 2009, and 2010 that had not been reported on a CRS return.

25. The Department issued its assessments, as discussed in finding of facts numbers 1-3.

26. The Department made prehearing abatements of the assessment in each year at issue. In 2008, the Department abated $14.48 including tax and interest. In 2009, the Department abated $183.71 including tax and interest. In 2010, the Department abated $77.55 including tax and interest. [Department Ex. A].

27. As of the date of hearing, for 2008, Taxpayer owed $376.28 in gross receipts tax and $80.80 in interest for a total 2008 liability of $457.08. In 2009, Taxpayer owed $1,310.64 in gross receipts tax and $221.64 in interest for a total 2009 liability of $1532.28. In 2010, Taxpayer owed $629.99 in gross receipts tax and $87.23 in interest for a total 2010 liability of $717.228. As of the date of hearing, Taxpayer had a total outstanding liability of $2,706.58. [Department Ex. B].

## DISCUSSION

At issue in this protest is whether Taxpayer was an employee or an independent contractor during 2008, 2009, and 2010. Also at issue is whether Taxpayer's liability may be excused because his CPA failed to inform him of his gross receipts tax obligations. Because Taxpayer was an independent contractor not an employee and because lack of knowledge of the gross receipts requirement is not a defense to liability, Taxpayer's protest is denied.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Moreover, "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also*

*TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447. 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*, 2003 NMCA 21, ¶13, 133 N.M. 217.

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). Taxpayer was performing activities for direct monetary benefit, meaning that Taxpayer was a person engaged in business. A lack of a CRS number does not alter these statutory definitions subjecting Taxpayer to gross receipts tax. 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).

Exempted from gross receipts taxes are the wages of employees. *See* NMSA 1978, § 7-9-17. Regulation 3.2.105.7 (A) NMAC lists seven criteria for the Department to use in determining whether a person is an employee for the purposes of the exemption under Section 7-9-17:

> A. In determining whether a person is an employee, the department will consider the following indicia:
> (1) is the person paid a wage or salary;
> (2) is the "employer" required to withhold income tax from the person's wage or salary;
> (3) is F.I.C.A. tax required to be paid by the "employer";
> (4) is the person covered by workmen's compensation insurance;
> (5) is the "employer" required to make unemployment insurance contributions on behalf of the person;
> (6) does the person's "employer" consider the person to be an employee;
> (7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

Under Regulation 3.2.105.7 (B) NMAC, "[i]f all of the indicia mentioned Subsection A of Section 3.2.105.7 NMAC are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present."

Applying those criteria under Regulation 3.2.105.7 (B) NMAC to the facts of this case, Taxpayer was an independent contractor and not an employee. Taxpayer was paid an hourly wage, the only factor that might suggest Taxpayer was an employee. However, the estate did not withhold any taxes from Taxpayer's checks, did not pay FICA, did not pay worker's compensation insurance, and did not make unemployment insurance payments on behalf of Taxpayer. Taxpayer was issued 1099-MISC's rather than W-2's. Mr. Hill considered Taxpayer a contractor rather than an employee. Taxpayer determined his schedule. Since Taxpayer was an independent contractor in 2008, 2009, and 2010 for the estate rather than an employee, Taxpayer did not establish he was entitled to the exemption from gross receipts tax under Section 7-9-17.

Although Taxpayer was subject to gross receipts tax, he argues that because he did not register for a CRS number and because no one ever told him of the requirements of gross receipts tax, he should not be held liable for the outstanding tax. It is true that Taxpayer's CPA failed to advise him of the gross receipts tax obligations for his work with the state. In recognition of the admitted lapse, the Department did not assess penalty in this case, presumably under Regulation 3.1.11.11 (D) NMAC (allows for abatement of penalty when a "taxpayer *proves* that the failure to pay a tax… was caused by *reasonable reliance* on the advice of *competent* tax counsel or *accountant* as to the taxpayer's liability after full disclosure of all relevant facts."). However, the CPA's failure to advise Taxpayer of his gross receipts tax liability does not excuse Taxpayer's underlying tax liability. 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. *Tiffany*

*Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. As a consequence of engaging in an activity for the purpose of direct monetary benefit, Taxpayer was required to pay gross receipts tax.

Regarding interest, when a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the 2008, 2009, and 2010 gross receipts tax was due but not paid until Taxpayer satisfies the gross receipts tax principal.

Aside from the prehearing abatements that the Department made in this matter, Taxpayer is liable for the assessed gross receipts tax and interest in 2008, 2009, and 2010. Taxpayer's protest is denied.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set and held in compliance with NMSA 1978, Section 7-1-24.1 (A) (2013).

B. Taxpayer was a person engaged in business under NMSA 1978, Section 7-9-4 (2002), and therefore all of Taxpayer's receipts in 2008, 2009, and 2010 are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

C. Six of the seven criteria under Regulation 3.2.105.7 (A) NMAC established that Taxpayer was an independent contractor and not an employee.

D. Since Taxpayer was an independent contractor rather than an employee, Taxpayer did not establish that he was entitled to the wages exemption from gross receipts tax under NMSA 1978, Section 7-9-17. *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735.

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

For the foregoing reasons, Taxpayer' protest **IS DENIED**. As of the date of hearing, for 2008, Taxpayer owed $376.28 in gross receipts tax and $80.80 in interest for a total 2008 liability of $457.08. In 2009, Taxpayer owed $1,310.64 in gross receipts tax and $221.64 in interest for a total 2009 liability of $1532.28. In 2010, Taxpayer owed $629.99 in gross receipts tax and $87.23 in interest for a total 2010 liability of $717.228. As of the date of hearing, Taxpayer had a total outstanding liability of $2,706.58.

DATED: December 17, 2014.

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