

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

**IN THE MATTER OF THE PROTEST OF
RUSSELL BURRIS & JANICE SILVA
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1086800848, L0013059024 and L0549929936**

No. 14-47

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 13, 2014 before Chief Hearing Officer Brian VanDenzen, Esq., in Santa Fe. Russell Burris appeared *pro se*, representing Russell Burris & Janice Silva (“Taxpayers”). Staff Attorney Melinda Wolinsky 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 #1-15 and Department Exhibits A, B, D, E, F, J, and K were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 4, 2014, the Department assessed Taxpayers for \$4,263.70 in gross receipts tax, \$852.74 in penalty, and \$1,193.28 in interest for a total assessment of \$6,309.72 for the combined reporting period ending on December 31, 2007. [Letter id. no. L0013059024].
2. On June 4, 2014, the Department assessed Taxpayers for \$788.44 in gross receipts tax, \$157.69 in penalty, and \$90.51 in interest for a total assessment of \$1,036.64 for the combined reporting period ending on December 31, 2010. [Letter id. no. L1086800848].

3. On June 4, 2014, the Department assessed Taxpayers for \$616.26 in gross receipts tax, \$123.26 in penalty, and \$48.48 in interest for a total assessment of \$788.00 for the combined reporting period ending on December 31, 2011. [Letter id. no. L0549929936].

4. On June 9, 2014, Taxpayers protested the Department's assessments, arguing that Mr. Burris did not have a CRS number, was not in business, and had already paid personal income taxes for the commissions he received from a real estate company and from the Noni Corporation.

5. The Department received the protest on June 19, 2014.

6. The Hearings Bureau first learned of this matter when the Department requested a hearing on August 21, 2014.

7. On August 22, 2014, the Hearings Bureau set this matter for a hearing on September 11, 2014 and sent Notice of Administrative Hearing accordingly to Taxpayers and the Department.

8. On September 2, 2014, Taxpayers moved for a continuance of the scheduled protest hearing because of scheduled medical treatment and listed alternative dates for the hearing. The Department did not oppose Taxpayers' continuance request.

9. On September 3, 2014, the Hearings Bureau continued the September 11, 2014 hearing and sent Notice of Administrative Hearing setting the hearing for November 13, 2014.

10. Taxpayers Russell Burris and Janice Silva jointly filed taxes in the relevant years. Only the portion of Taxpayers' income directly attributable to Mr. Burris' receipts during the relevant period are at issue in this protest.

11. The Department detected that Taxpayers had reported Schedule C income on their federal returns but had not reported or paid corresponding gross receipts tax in 2007, 2010, and 2011.

12. Because of the Schedule C mismatch, on February 21, 2014 the Department commenced a Limited Scope Audit on Taxpayers. [Taxpayer Ex. # 11].

13. In the Department's February 21, 2014 Notice of Limited Scope Audit, the Department informed Taxpayers that they had until April 22, 2014, 60-days later, to provide any nontaxable transaction certificates ("NTTCs") and other evidence to substantiate that the Schedule C amounts in 2007, 2010, and 2011 were not subject to gross receipts tax. [Department Ex. A-1].

14. On April 1, 2014, the Department sent Taxpayers a reminder of the necessity of producing NTTCs and other evidence to substantiate that no gross receipts tax was owed under the limited scope audit for 2007, 2010, and 2011. [Department Ex. E].

15. On April 9, 2014, the Department provided Taxpayers an extension to provide documentation related to the limited scope audit. [Department Ex. F].

16. In 2007, Taxpayers had \$68,020.00 in Schedule C income reported on the federal income tax returns that was not reported on New Mexico CRS returns in that year. [Department Ex. A-3].

17. In 2010, Taxpayers had \$12,469.00 in Schedule C income and \$9,485.00 in 1099-MISC income reported on the federal income tax returns that was not reported on New Mexico CRS returns in that year. [Department Ex. A-3].

18. In 2011, Taxpayers had \$9,420.00 in Schedule C income and \$8,700.00 in 1099-MISC income reported on the federal income tax returns that was not reported on New Mexico CRS returns in that year. [Department Ex. A-3].

19. In the 1990's, Mr. Burris started a business named Zia Technical Services and obtained a CRS number. That business did not succeed and stopped business activities shortly after starting. However, that entity was not assessed in this matter.

20. Mr. Burris was a licensed real estate broker whom had commissions from the sale of real estate in 2007 from Centerfire Real Estate. Taxpayers were given credit for that real estate commission exemption under NMSA 1978, Section 7-9-66.1 (1990) and the receipts from the commission were not included in the assessment of 2007 tax.

21. In 2007, 2010, and 2011, Mr. Burris received bonus commission checks for the sales of Tahitian Noni Juice from the Noni Corporation¹, a corporation headquartered in Utah.

22. Mr. Burris did not consider himself a sales person of Noni Corporation.

23. When Mr. Burris referred customers whom placed orders for Noni Juice, Noni Corporation paid Mr. Burris commission checks on the sales amount.

24. Mr. Burris claimed that many of the Noni Juice sales were to people outside of New Mexico. However, Mr. Burris did not present any evidence to document which of the Noni sales were to people out of state.

25. In 2010 and 2011, Mr. Burris played the fiddle at weddings, funerals, and other occasions approximately 20 times a year. Mr. Burris received 1099's for some of this work. Other times Mr. Burris would receive cash payments for these performances.

¹ Mr. Burris called this company Noni Corporation most of the time, but occasionally referenced the same company as the Mirinda Corporation.

26. In 2010 and 2011, Mr. Burris used his tractor for leveling, grading services, and general earthmoving services approximately 6 times a year.
27. Taxpayers used Ray Garcia, CPA, to prepare their personal income taxes in 2007.
28. Taxpayers discussed with Ray Garcia, CPA, Mr. Burris' Schedule C income, the method for reporting the Schedule C income, and the amount of the performance in 2007.
29. Taxpayers used Ronnie Hemphill, CPA, to prepare their personal incomes taxes in 2010 and 2011.
30. Taxpayers discussed with Mr. Hemphill, CPA, Mr. Burris' Schedule C income, the method for reporting the Schedule C income, and the amount of the performance in 2007, 2010, and 2011. Taxpayers depended on the CPAs advice related to the Schedule C income.
31. The Department did not provide a spreadsheet of the remaining liabilities as of the date of the hearing.

DISCUSSION

Taxpayers challenge the Department's assessments, arguing that Mr. Burris was not engaged in business, did not have a CRS number, that his former business Zia Technical Services had been active since the 1990's, that they had already paid income taxes on the income in question, and that Mr. Burris' services of fiddle playing and earth-working were incidental.

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. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See NMSA 1978, §7-1-3 (X) (2013)*. Under Regulation 3.1.6.13 NMAC, the presumption of

correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest.

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. Because Taxpayer is claiming a deduction from gross receipts tax, Taxpayer must establish his right to claim the 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). Gross receipts applies to the performance of a service in New Mexico. *See* NMSA 1978, § 7-9-3.5 (A) (1) (2007). Gross receipts includes commission from the sale or promotion of *any* property. *See* NMSA 1978, § 7-9-3.5 (A) (2) (2007) (emphasis added). 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).

While Taxpayers focused a great deal of the hearing disputing that he was selling any tangible personal property, the Gross Receipts and Compensating Tax Act encompasses more than just sales, but the performance of a service. Here, Mr. Burris was performing a service for Noni Corporation: promotional activities for Noni Juice. Mr. Burris received direct benefit from this promotional activity: payment of bonus commission checks for sales volumes. This constitutes the

commissions articulated under Section 7-9-3.5 (A) (2). The taxable transaction here is Mr. Burris promotional and marketing activities that lead to Noni sales. Mr. Burris received commission checks for that promotion and marketing activities. Although Mr. Burris did not believe he was engaged in business, his promotional activities for remuneration of bonus commission money from the sales of Noni Juice was for direct benefit, satisfying the “engaging in business” definition found under Section 7-9-3.3. A lack of a CRS number does not alter these statutory definitions subjecting Mr. Burris’ receipts to gross receipts tax. For the purposes of the statute, Mr. Burris was a person engaged in business and all of his receipts in 2007, 2010, and 2011 are presumed subject to gross receipts tax. *See* § 7-9-3.3 and § 7-9-5.

While Taxpayers presented a great deal of evidence related to their correspondence with the Department, Taxpayers did not present evidence to establish that any of Mr. Burris’ receipts in the relevant years were exempt, deductible, or otherwise not subject to gross receipts tax. Generally, the correspondence of Mr. Burris shows his belief that he should not be subjected to a sales tax because he was not selling any retail product. However, New Mexico’s gross receipts tax is not a sales tax. Rather, as explained above, the gross receipts tax applies to the receipts of any person engaged in business, including those performing services and promoting the sales of tangibles like a retail product. Because Mr. Burris received commissions from Noni Corporation for his promotional activities leading to the sale of Noni juice, he had receipts presumed subject to gross receipts tax.

Mr. Burris expressed concern as to how the Department could attribute income earned in 2007, 2010, and 2011 to his old business, Zia Technical Services, which had been defunct since the 1990’s. However, Zia Technical Services is not listed on any of these assessments, as all of the assessments in this matter were addressed to Taxpayers, Russell Burris & Janice Silva. The Limited Scope Audit in this case resulted from the Department detecting that Taxpayers Russell Burris &

Janice Silva had reported Schedule C business income in their federal return that was not reported as New Mexico gross receipts tax. Again, the fact that Taxpayers did not have a CRS number or that Zia Technical Services was no longer in business does not alter the requirement that Mr. Burris was required to pay gross receipts tax for the promotional sales activities he performed for commission from the Noni Corporation. Section 7-9-5, the Department has authority to presume all receipts of a person engaged in business are subject to gross receipts tax. When it became clear that Zia was defunct, the Department still had the ability to presume Mr. Burris' receipts were subject to gross receipts tax.

In light of this presumption, when the Department detected that Taxpayers had reported business income on their federal returns, the Department properly initiated a Limited Scope Audit and asked Taxpayers to provide documentation and/or a requisite NTTC to establish that the reported business income was not subject to gross receipts tax. Taxpayers did not produce that information by the April 22, 2014 deadline. Although there was never identification of a possible deduction that might require a NTTC, the Department cannot allow a deduction where Taxpayers did not have a requisite NTTC by the expiration of the 60-day deadline. *See* NMSA 1978, Section 7-9-43 (2011); *See also* Regulation 3.2.201.12 (C) NMAC; *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392 (“Where a party claiming a right to an exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto.”).

Mr. Burris argued that his receipts from earthmoving and fiddling services were isolated and occasional. Exempt from gross receipts tax under NMSA 1978, Section 7-9-28, are

...the receipts from the isolated or occasional sale of or leasing of property or a service by a person who is neither regularly engaged nor

holding himself out as engaged in the business of selling or leasing the same or similar property or service.

Under Regulation 3.2.116.8 NMAC,

The department will use the following criteria, but not exclusively, in determining whether or not a transaction involves only an "isolated or occasional" sale or lease:

- A. the nature of the service or property;
- B. the nature of the market for the service or property sold or leased;
- C. the number of sales or leases made within a given period;
- D. the regularity of the sales;
- E. the duration of the sales or leasing activity;
- F. any promotional activity such as advertising or telephone yellow page listings;
- and
- G. any holding out as being in business by the seller or lessor.

In this case, Mr. Burris performed relatively consistent services for a period of three years, establishing a lengthy duration of the activity. For the fiddling work, Mr. Burris indicated he performed about 20-times a year, establishing the duration. Mr. Burris performed earthmoving services approximately six times a year. Given these factors, Mr. Burris did not carry his burden of establishing he was entitled to the incidental and occasional sale exemption under Section 7-9-28.

See Wing Pawn Shop, ¶16.

In the exhibits and protest letter, Taxpayers repeatedly referenced the fact that they had already paid income taxes on Mr. Burris' receipts as grounds why no gross receipts tax was applicable. This argument essentially amounts to a claim of double taxation. Double taxation is not prohibited. *See New Mexico State Bd. of Pub. Accountancy v. Grant*, 1956-NMSC-068, ¶11, 61 N.M. 287; *see also New Mexico Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶12, 85 N.M. 565. Gross receipts tax is an excise tax on all the receipts of a person engaged in business. Gross receipts is a distinct tax from personal income tax and there is no double taxation in having to pay both taxes. *See State ex rel. AG v. Tittmann*, 1938-NMSC-005, 42 N.M. 76. (State may select subjects of taxation so long as equal and uniform; state may impose an excise tax and a

personal income tax). Taxpayers received income from Mr. Burris' business activities subject to income tax. Mr. Burris also had business receipts subject to gross receipts tax. Collection of gross receipts, in addition to other taxes, does not amount to impermissible double taxation.

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 Taxpayers from the time the 2007, 2010, and 2011 gross receipts tax was due but not paid until Taxpayers satisfies the gross receipts tax principal.

Taxpayers did establish that they are entitled to abatement of penalty in this matter under Regulation 3.1.11.11 (D) NMAC. Taxpayers used two CPAs in 2007, 2010, and 2011 to prepare their taxes. Mr. Burris discussed his Schedule C activities with the CPAs. Mr. Burris and the CPAs specifically discussed how that income should be reported, whether it related to sales activities, and what amount was required to be reported. Having specifically discussed the implications of the Schedule C income with two CPAs, Taxpayers reasonably relied to the CPAs. Under Regulation 3.1.11.11 (D) NMAC, civil penalty pursuant to NMSA 1978, Section 7-1-69 (2007) should be abated.

Taxpayers also indicated that they have limited income and are undergoing difficult personal circumstances. Unfortunately, financial hardship is not grounds for the Department to abate any portion of the assessment under Regulation 3.1.6.14 NMAC (01/15/01). Under Section 7-1-17, the Department is required to assess any tax liability greater than \$25.00.

Ultimately, Taxpayers had the burden to overcome the presumption of correctness of the assessments, the presumption of taxability of any receipts of a person engaged in business, and the burden of establishing entitlement to a deduction or exemption from taxation. Mr. Burris was a genuine witness who tried honestly to explain his situation. However, Mr. Burris performed services (promotional and marketing activities for Noni, fiddling services, and earthmoving services) for direct benefit: commissions and payments. Taxpayers did not meet the burden to overcome the presumption of correctness of the assessments and did not present evidence to establish that any other deduction or exemption applied. With the exception of abatement of penalty pursuant to Regulation 3.1.11.11 (D) NMAC, Taxpayers protest is denied and Taxpayers owe the remaining assessed amounts.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayers did not overcome the presumption of correctness that attached to the assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

C. Mr. Burris performed marketing and promotional services in 2007, 2010, and 2011 for Noni Corporation for which he was compensated in the form of commissions for referred sales. As such, Mr. Burris was a person engaged in business and subject to gross receipts tax in those

years. See NMSA 1978, § 7-9-3.3 (2003); See also NMSA 1978, § 7-9-3.5 (A) (1) (2007); See also NMSA 1978, § 7-9-3.5 (A) (2) (2007).

D. Because Mr. Burris' was a person engaged in business under NMSA 1978, Section 7-9-4 (2002), all of Mr. Burris' receipts in 2007, 2010, and 2011 are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

E. Taxpayers did not carry their burden to establish that any deduction or exemption applied to Mr. Burris' receipts in 2007, 2010, and 2011.

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

G. Under Regulation 3.1.11.11 (D) NMAC, civil penalty pursuant to NMSA 1978, Section 7-1-69 (2007) is abated because of Taxpayers' specific reliance on their CPAs regarding how to treat and report the Schedule C income during the relevant years.

For the foregoing reasons, Taxpayers' protest **IS PARTIALLY GRANTED AND IS PARTIALLY DENIED**. Penalty is ordered abated. **IT IS ORDERED THAT** the Department prepare a spreadsheet of outstanding liabilities remaining after abatement of penalty and provide that information to Taxpayers promptly so that a payment plan can be arranged as Mr. Burris requested during the hearing.

DATED: December 31, 2014.

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