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

IN THE MATTER OF THE PROTEST OF
HEALING THROUGH HYPNOSIS **No. 14-9**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1305376832

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on March 5, 2014 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Charlette Forteza-Bach appeared *pro se* for Healing Through Hypnosis ("Taxpayer"). Mr. Martin Klehn appeared as a witness on behalf of Taxpayer. Staff Attorney Kathleen Carlow 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 1-3 and Department Exhibits A-D 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 January 14, 2010, the Department assessed Taxpayer for $4,620.84 in gross receipts tax, $924.16 in penalty, and $1,295.69 in interest for a total assessment of $6,840.69 for the combined reporting period ending on December 31, 2006. **[Letter id. no. L1305376832]**.

2. On January 15, 2010, Taxpayer protested the Department's assessment.

3. On May 17, 2010, the Department acknowledged receipt of Taxpayer's protest.

4. On August 8, 2013, the Department requested a hearing in this matter with the Hearings Bureau.

5. On August 12, 2013, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on September 19, 2013.

6. On August 30, 2013, the Hearings Bureau *sua sponte* sent Amended Notice of Administrative Hearing, rescheduling the protest hearing in this matter on March 5, 2014.

7. Taxpayer is a sole proprietorship formed by Ms. Bach in 2006.

8. In 2006, Taxpayer provided counseling services for Martin Klehn as an independent contractor.

9. 2006 was the first year that Taxpayer and Mr. Klehn worked together.

10. In 2006, Mr. Klehn contracted with Value Options, Inc, a medical insurance company, to provide group and individual counseling services.

11. Mr. Klehn consulted with the Department about whether he needed to pay gross receipts tax to the Department on money he received under the Value Options, Inc. contract. Mr. Klehn was informed by a Department employee that those receipts qualified as a healthcare services medical deduction.

12. Because the receipts were deductible, Mr. Klehn never paid any gross receipts tax on the money he received from Value Options, Inc.

13. Taxpayer, as an independent contractor with Mr. Klehn, actually performed Value Options, Inc.'s contracted counseling services. Mr. Klehn then paid Taxpayer the entire contracted amount. **[Taxpayer Ex.'s 1-2]**.

14. Taxpayer assumed that because Mr. Klehn's Value Options Inc. receipts were deductible from gross receipts tax, Taxpayer's receipts were also deductible.

15. Taxpayer did not file 2006 gross receipts tax returns with the Department.

16. Taxpayer did not possess a NTTC from Mr. Klehn in 2006 when she performed her independent contracting services for him, and did not have a NTTC at the time the 2006 gross receipts tax were due.

17. Based on the Tapematch Program the IRS has with the Department, the Department detected that Taxpayer had Schedule C business income on her 2006 personal income tax return that had not been reported as gross receipts in New Mexico.

18. On June 3, 2009, the Department sent Taxpayer Notice of Limited Scope Audit Commencement, informing Taxpayer of the discrepancy between the Schedule C and absence of gross receipts tax filings and informing Taxpayer that she had until August 2, 2009 to produce any Nontaxable Transaction Certificates ("NTTC") supporting a claimed deduction. [**Department Ex. A**].

19. Taxpayer called the contact number on the June 3, 2009 Notice of Limited Scope Audit and asked for an extension.

20. On July 31, 2009, the Department reissued a Notice of Limited Scope Audit, effectively extending the initial 60-days deadline until the September 29, 2009 deadline listed on that document.

21. Taxpayer was out of state in California during August and did not receive the July 31, 2009, Notice of Limited Scope Audit until she returned.

22. Although Taxpayer believed she received an extension of time from the Department to produce a NTTC beyond the September 29, 2009 deadline, Taxpayer did not submit a written request for an extension of time to the Department and never received anything in writing indicating that she had been granted an extension of time beyond September 29, 2009.

23. On October 29, 2009, a full month after the 60-day deadline had passed, Taxpayer received a Type 5 NTTC from Mr. Klehn.

24. The Type 5 NTTC Taxpayer received from Mr. Klehn was untimely and was incomplete because it was not generated using the Department's online system and did not include an execution date.

25. On June 29, 2010, the Department captured $497.99 of Ms. Bach's 2009 personal income tax refund and applied it to Taxpayer's liability. [**Taxpayer Ex. #3**].

26. As of the date of hearing, Taxpayer owed $4,122.85 in gross receipts tax, $924.17 in penalty, and $1,875.71 in interest for a total outstanding liability of $6,922.73. **[Department Ex. D]**.

DISCUSSION

Taxpayer was a non-filer of gross receipts taxes in 2006, which the Department discovered through its tape-match program with the IRS. The Department sent Taxpayer two Notices of Limited Scope Audit, the last of which established a September 29, 2009 deadline to produce a NTTC. Taxpayer did not present any NTTCs executed by that deadline. The Department assessed Taxpayer and Taxpayer timely protested the assessment.

There are three main issues in this protest. The first main issue is whether Taxpayer established she was entitled to a deduction from gross receipts tax in this matter and whether Taxpayer timely possessed a NTTC supporting a claimed deduction. The second issue is whether equitable recoupment applies to the facts of this case. The third issue is whether alleged undocumented oral statements of a Department employee waived Taxpayer's liability in this matter. The fourth issue is whether Taxpayer is liable for interest that accrued during the delay

from the protest until the hearing. And the final issue is whether Taxpayer was subject to civil negligence penalty.

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *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.

Gross Receipts Tax, Deductions, and the Requirement for a Timely NTTC

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).

In this case, it is undisputed that Taxpayer worked as an independent contractor for Martin Klehn in 2006 rather than as an employee. *See* NMSA 1978, § 7-9-17 (exempting wages of employees from gross receipts tax); *See also* Regulation 3.2.105.7 NMAC (defining "employee"). Since Taxpayer was an independent contractor in 2006 rather than an employee, Taxpayer was a

person engaged in business and all her receipts are presumed subject to gross receipts tax. *See* § 7-9-3.3 and § 7-9-5.

The New Mexico Gross Receipts and Compensating Tax Act provides numerous deductions of gross receipts tax. It is unclear exactly which deduction Taxpayer sought in this matter, as neither Taxpayer nor the Department asserted the specific deduction that Taxpayer was claiming. Presumably, the deduction at issue is sale of a service for resale under NMSA 1978, Section 7-9-48 (2000). Section 7-9-48 states that:

> Receipts from selling a service for resale may be deducted from gross receipts or 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 service in the ordinary court of business and the resale must be subject to the gross receipts tax....

Simply performing a service for resale, as the Taxpayer did in this instance, is not enough to satisfy the requirements of the deduction under Section 7-9-48. Taxpayer must both have a NTTC and the subsequent resale of the service in the ordinary course of business must be subject to gross receipts tax in order to qualify for a deduction under Section 7-9-48. Taxpayer did not establish that either condition was satisfied in this matter and therefore Taxpayer was not entitled to the Section 7-9-48 sale of a service for resale deduction.

Contrary to the requirements of the Section 7-9-48 deduction, Mr. Klehn's subsequent resale of Taxpayer's services was not subject to gross receipts tax. Mr. Klehn testified that he did not pay gross receipts tax on his contract with Value Options, Inc. because it was deductible under an unspecified medical deduction. Additionally, there is no evidence on this record whether Value Options, Inc. paid any gross receipts taxes on the counseling services that Mr. Klehn subcontracted to Taxpayer.

Moreover, Taxpayer also did not timely possess a NTTC in this case. The statute clearly and unambiguously conditions the deduction on a sale made to a person/entity who delivers a NTTC. NMSA 1978, Section 7-9-43 (2011) articulates the requirements for obtaining NTTCs:

> All nontaxable transaction certificates...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 of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.

Under Section 7-9-43, Taxpayer had a statutory obligation to possess a NTTC at the time when the gross receipts tax was initially due for her 2006 performance of counseling services for Mr. Klehn. In this case, it is undisputed that Taxpayer did not possess a NTTC from Mr. Klehn when the 2006 gross receipts tax were due.

While taxpayers "should" have possession of required NTTCs at the time the return is due from the receipts at issue, Section 7-9-43 gives taxpayers audited by the Department a second chance to obtain these NTTCs: within 60-days of when the Department gives notice, taxpayers must possess a NTTC in order to claim a deduction. Taxpayers who rely on this second chance provision run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the Legislature. The reason why a taxpayer cannot obtain a NTTC is irrelevant. The language of Section 7-9-43 is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed."* (emphasis added). *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).

Consistent with the statutory language, under Regulation 3.2.201.12 (C), a taxpayer "is not entitled to the deduction" when the NTTC is untimely. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). The New Mexico Court of Appeals has held that, despite its general reluctance to place "form over substance," the failure to timely and properly present a requisite NTTC is a "valid basis" for the Department to deny a claimed deduction. *Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392.

In this case, the Department issued a Notice of Limited Scope Audit on June 3, 2009, directing Taxpayer to produce a supporting NTTC by August 2, 2009. Taxpayer effectively received an extension of the 60-day second chance NTTC statutory limit when the Department issued a second Notice of Limited Scope Audit on July 31, 2009, setting a new deadline for a NTTC by September 29, 2009. Taxpayer did not produce a NTTC executed by this September 29, 2009 deadline. Although Taxpayer indicated she was out of state in August, causing her to not request the NTTC in time, the reason why Taxpayer did not have a NTTC by this September 29, 2009 deadline is immaterial under Section 7-9-43. Under Section 7-9-43, the Department has no authority to allow a deduction after the expiration of the second chance, 60-day deadline.

Taxpayer claimed she received an oral extension of time beyond the September 29, 2009 60-day NTTC deadline. There is insufficient evidence to find that Taxpayer was granted another extension in this matter. Even assuming that a Department employee made such a statement, there was nothing reduced to writing. Equitable estoppel generally does not apply against the State when a taxpayer relied on the oral advice from a Department employee rather than a written assertion. *See Kilmer v. Goodwin*, 2004 NMCA 122, ¶28, 136 N.M. 440. The NTTC that Taxpayer

presented in this matter with an issue date of October 29, 2009 was a full month after the Section 7-9-43 deadline and the Department lacked authority to allow the claimed deduction.

The only other deduction that might possibly apply in this matter is the deduction found under NMSA 1978, Section 7-9-77.1 (2007) for certain medical and health care services, which does not require a NTTC. In pertinent part, Section 7-9-77.1 (A) allows deduction of receipts from payment of the United States government or any agency therefore for the provision of counseling services to Medicare beneficiaries. Taxpayer did not receive payment from an agency of the US government, but from Mr. Klehn, making Section 7-9-77.1 (A) inapplicable. Section 7-9-77.1 (B) allows deduction from receipts paid by a third-party administer of the federal TRICARE program for medical and other health services by medical doctors and osteopathic physicians. This section does not apply in this matter for a couple of reasons. First, there is no evidence that Mr. Klehn is a third-party administrator of a TRICARE program. Secondly, unlike subsection (A) which lists counselors and therapists as eligible for the deduction, this section lists only medical doctors and osteopathic physicians, suggesting that even if there was evidence that Mr. Klehn was a third-party administer, Taxpayer's counseling services would not be eligible for a deduction under Section 7-9-77.1 (B).

Equitable Recoupment and Equitable Estoppel.

Because the protest letter indicated that Taxpayer's "employer made tax payments to the State on" Taxpayer's behalf, a potential issue at hearing is whether equitable recoupment under NMSA 1978, Section 7-1-28 (F) (2013) supported abatement of the assessment. Under Section 7-1-28 (F), an assessment can be abated by the "amount of tax previously paid by another person on behalf of the taxpayer on the same transaction; provided that the requirements of equitable

recoupment are met.[1]" However, the evidence during the hearing did not establish that anyone paid gross receipts tax on behalf of Taxpayer. Mr. Klehn testified that he did not pay any gross receipts tax on the money he received from Values Options, Inc., and that he assumed Taxpayer likewise would not have to pay the gross receipts tax. There is no evidence whether Value Options, Inc. paid gross receipts taxes on behalf of Taxpayer. Since Taxpayer could not establish that someone else paid the gross receipts tax on her behalf, equitable recoupment under Section 7-1-28 (F) does not provide a basis to abate the assessment.

Taxpayer also suggested that a Department employee had told her either that her outstanding liability had been extinguished, or that the Department's capture of her 2009 personal income tax refund satisfied her outstanding gross receipts tax liability. Although Taxpayer's assertion is somewhat unclear, the hearing officer understands Taxpayer's argument to be a request for equitable relief in light of the oral statements of a Department employee.

As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving the assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr., Inc.*, 1989-NMSC-015, ¶9, 108 N.M. 22. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Bien Mur Indian Market*, ¶9. As discussed above, oral statements not reduced to writing are generally not amendable to equitable estoppel. *See Kilmer*, ¶28.

Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board,* 1993-NMSC-028, ¶18-19, 115 N.M. 650. The Department is statutorily obligated to pursue an

[1] The elements of equitable recoupment are: "1) a single taxable event, 2) taxes assessed on that event on inconsistent theories, and 3) a strict identity of interest." *Teco Invs. v. Taxation & Revenue Dep't*, 1998 NMCA 55, ¶8, 125 N.M. 103.

outstanding tax liability exceeding $25.00 under Section 7-1-17 of the Tax Administration Act. Moreover, the Department is obligated to pursue an outstanding tax liability under the anti-donation clause of the New Mexico Constitution, Article IX, §14. Perhaps it is because of these obligations that the application of estoppel in cases involving taxation are disfavored.

In this case, there is very little evidence related to Taxpayer's assertions that she was told her liability was forgiven. Assuming for argument that such oral statements were made to Taxpayer, those statements were not reduced to writing. Considering a formal, written notice of assessment had been issued in this matter, it is not reasonable to rely on an oral statement of employee that the liability was extinguished in the absence of a written statement. Estoppel does not apply in this matter.

Penalty and Interest.

Taxpayer argued that she should not be held liable for interest in this matter considering that her protest unnecessarily languished in the Department's Protest Office for two years. Taxpayer does not cite any legal authority to support this proposition. The general rule is that tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or protect public interest. *See Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13, 100 NM 632.

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.*, ¶22. 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 2006 gross receipts was due but not paid until Taxpayer satisfies the gross receipts tax principal.

Further, the Department has no basis to abate civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) in this case. When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word "shall", Section 7-1-69 requires that civil penalty be added to the assessment. As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence."

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." Erroneous belief and inadvertent error meets the legal definition of "negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department,* 1989-NMCA-070, ¶10, 108 N.M. 795. Under *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16, failure to do reasonable research into what the tax law requires or to meet with a qualified tax professional "may constitute negligence."

Here, Taxpayer did not do any research into possible gross receipts tax consequences of her contract work for Mr. Klehn. Further, despite being given well over the usual 60-day second chance period to obtain the NTTC, Taxpayer did not present a timely executed NTTC. While Taxpayer's inactions were certainly inadvertent and unintentional, this case meets all three

definitions of negligence under Regulation 3.1.11.10 NMAC. Moreover, Taxpayer's lack of reasonable research into the tax law constitutes civil negligence. *See Tiffany Construction Co.*, ¶5. Therefore, Taxpayer was properly assessed civil negligence penalty under Section 7-1-69. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

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

B. In 2006, Taxpayer was a person engaged in business under NMSA 1978, Section 7-9-4 (2002). Therefore, all of Taxpayer's receipts in 2006 are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

C. The deduction for sale of a service for resale under NMSA 1978, Section 7-9-48 (2000) does not apply to Taxpayer's counseling services because there is no evidence that the resale of those services by Mr. Klehn was subject to gross receipts tax.

D. Taxpayer did not possess the requisite NTTC to support the claimed deduction for the sale of a service for resale under NMSA 1978, Section 7-9-48 (2000) at the time the 2006 CRS returns were due and did not possess the requisite NTTC within 60-days of the Department's Notice of Audit.

E. Under NMSA 1978, Section 7-9-43 (2011), without possession of a timely executed NTTC at either the time of the filing of returns or within 60-days of notice of audit, the Department is not allowed to grant and Taxpayer is not entitled to the claimed deduction. *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). *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M.

392 (Court found it valid for the Department to deny a claimed deduction when taxpayer did not timely present a requisite NTTC).

F. Taxpayer could not reasonably rely on the alleged oral statements of Department employees extending the 60-day, second chance NTTC deadline as a basis for equitable relief. *See Kilmer v. Goodwin*, 2004 NMCA 122, ¶28, 136 N.M. 440.

G. Taxpayer could not reasonably rely on the alleged oral statements of Department employees informing her that her liability had been forgiven because such statement is contrary to the requirements of Section 7-1-17 and the anti-donation clause of the New Mexico Constitution, Article IX, §14. *See Kilmer v. Goodwin*, 2004 NMCA 122, ¶28, 136 N.M. 440. *See also Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

H. Since there is no evidence that someone else paid gross receipts tax on behalf of Taxpayer, equitable recoupment under NMSA 1078, Section 7-1-28 (F) (2013) does not apply.

I. 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.

J. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty.

For the foregoing reasons, Taxpayer' protest **IS DENIED.** As of the date of hearing, Taxpayer owed $4,122.85 in gross receipts tax, $924.17 in penalty, and $1,875.71 in interest for a total outstanding liability of $6,922.73.

DATED: March 31, 2014.

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