

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

**IN THE MATTER OF THE PROTEST OF
JOSEPH AND CARMEN GARCIA,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0857603024; L1931344848;
L0186514384; and L1260256208**

No. 15-12

DECISION AND ORDER

A formal hearing on the above-referenced protest was held March 19, 2015, before Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared on behalf of the Department. Mr. Joseph Garcia (Taxpayer) appeared for the hearing and represented himself. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 31, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period January 1, 2008 through December 31, 2008. The assessment was for \$292.11 tax, \$58.42 penalty, and \$62.09 interest. **[L0857603024]**
2. On October 31, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period January 1, 2009 through December 31, 2009. The assessment was for \$1,949.75 tax, \$389.95 penalty, and \$325.25 interest. **[L1931344848]**
3. On October 31, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period January 1, 2010 through December 31, 2010. The assessment was for \$2,864.87 tax, \$572.97 penalty, and \$363.99 interest. **[L0186514384]**

4. On October 31, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period January 1, 2011 through December 31, 2011. The assessment was for \$1,645.66 tax, \$329.14 penalty, and \$149.89 interest. [L1260256208]
5. On January 27, 2015, the Taxpayer filed a formal protest to the assessments.
6. On February 23, 2015, the Department filed a request for hearing on this protest with the Hearings Bureau.
7. The Taxpayer was engaged in business in New Mexico in 2008 through 2011 (the tax years). The Taxpayer provided services to another company in maintaining and repairing foreclosed and vacant properties.
8. The Department determined that the Taxpayer was a non-filer on gross receipts tax for the tax years.
9. The Department began an audit of the Taxpayer and requested proof of any nontaxable transaction certificates by October 7, 2014.
10. The Taxpayer produced a properly executed and timely nontaxable transaction certificate (NTTC) for services.
11. The Taxpayer accepted the NTTC in good faith.
12. The Department rejected the NTTC provided because it had been visibly altered. There was white correction fluid visible on the NTTC.
13. The Taxpayer explained that the NTTC had been issued to him in that condition.
14. The Taxpayer contacted the buyer who issued the NTTC, and the buyer provided letters to the Taxpayer that confirmed that the NTTC had been issued to the Taxpayer in 2008.

15. The Department also contacted the buyer, and the buyer confirmed again that the NTTC had been issued to the Taxpayer in 2008. The buyer spoke to Ms. Galewaler. The buyer explained that she is the owner of the company that contracted with the Taxpayer.
16. The buyer explained that she filled out the NTTC and used the white correction fluid on it when she realized that she had made a mistake when she was filling it out.
17. The buyer applied the white correction fluid to the Taxpayer's address where she had written the incorrect information. The buyer then filled in the correct information for the Taxpayer and issued the NTTC to the Taxpayer in 2008.
18. The Department still refused to accept the NTTC and assessed the Taxpayer.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax years or whether the Taxpayer was entitled to deduct his gross receipts based upon his acceptance of a NTTC.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Dep't.*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayers is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is not liable for the tax and is entitled to an abatement of penalty and interest.

Gross Receipts Tax.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). The Taxpayer admitted that he was engaged in a service business performing maintenance and repairs on properties. There was no dispute that the Taxpayer's services would ordinarily be subject to gross receipts tax. The Taxpayer argued that he was exempt from the tax based on his acceptance of a NTTC.

NTTCs.

A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, § 7-9-43 (2011). An NTTC must be in the proper form and of the proper type to be valid. *See* 3.2.201.8 (C) NMAC (2012). *See also McKinley Ambulance Serv. v. Bureau of Revenue*, 1979-NMCA-026, 92 N.M. 599 (noting that a NTTC is conclusive evidence only if the NTTC applies to the transaction at issue). A taxpayer should be in possession of NTTCs when the receipts from the transaction are due, but may also produce NTTCs within a deadline set by the Department. *See* NMSA 1978, § 7-9-43. The seller must accept the NTTC in good faith. *See id.* The Taxpayer produced a timely, properly executed NTTC for services. There was no dispute that the NTTC was of the right type and contained all of the required information. There was no dispute that the NTTC would cover the amount of gross receipts taxes in the assessments.

NTTCs for services.

“Receipts from selling a service for resale may be deducted from 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 course of business and the resale must be subject to the gross receipts tax[.]” NMSA 1978, § 7-9-48. The

Taxpayer was selling his maintenance and repair services to the buyer, and the Taxpayer was aware that the buyer was reselling his service to its customers. The buyer delivered a NTTC to the Taxpayer. The NTTC was of the proper type, for resale of services. The Taxpayer was in timely possession of the NTTC. Therefore, the Taxpayer accepted the NTTC in good faith. A properly executed NTTC “shall be conclusive evidence, and the *only material evidence*, that the proceeds from the transaction are deductible[.]” NMSA 1978, § 7-9-43 (A) (emphasis added). The word “shall” indicates that the provision is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Consequently, the Taxpayer has overcome the presumption and has provided conclusive evidence that the transactions are deductible.

Burden shifted.

When a taxpayer presents evidence sufficient to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep’t.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217 (filed October 2, 2002). The Department argued that the Taxpayer had not overcome the presumption of correctness. The Department argued that the NTTC was not properly executed. The Department argued that the NTTC was invalid and could not be relied upon for that reason.

The burden is on the Taxpayer to prove that he is entitled to an exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep’t.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation*

and Revenue Dep't., 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. A properly executed NTTC is conclusive proof that the seller is entitled to the deductions. *See NMSA 1978, § 7-9-43.*

However, that protection will be conclusive only when three requirements are met; the acceptance of the NTTC must be timely, must be in good faith, and the NTTC must be properly executed. *See Leaco Rural Telephone Coop., Inc. v. Bureau of Revenue*, 1974-NMCA-076, ¶ 15, 86 N.M. 629. Several cases also indicate that a properly executed NTTC delivered to the seller is conclusive proof that the seller is entitled to the deductions. *See Proficient Food Co. v. N.M. Taxation and Revenue Dep't.*, 1988-NMCA-042, 107 N.M. 392, 396 (holding that a properly executed NTTC is conclusive evidence that the transaction is deductible). *See also Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, 86 N.M. 269 (holding that proper issuance of an NTTC is the responsibility of the buyer and that an accepted NTTC is conclusive evidence that the deduction is allowed). *See also Continental Inn v. N.M. Taxation and Revenue Dep't.*, 1992-NMCA-030, ¶ 12-13, 113 N.M. 588 (holding that proper issuance of an NTTC is a matter between the buyer who issued it and the Department, and that a timely delivery of an NTTC by a buyer conveys that the seller is entitled to deduction). *See also Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶ 12, 94 N.M. 630 (indicating that when a seller accepts a NTTC in good faith, the burden of the tax shifts to the buyer who issued the NTTC, even if it was wrongfully issued).

However, none of these cases deal with proper execution of a NTTC. The statute is likewise silent on what “properly executed” means. *See NMSA 1978, § 7-9-43.* The Department argued that having white correction fluid applied to the document meant that it was altered and was, therefore, not properly executed. The Department cited no authority in support

of its position. Execution of a NTTC is defined by regulation, and says that a NTTC is executed when “a taxpayer, having already obtained the requisite forms from the department, completes an nttc form by entering the required information about the vendor to whom the nttc is to be delivered.” 3.2.201.16 NMAC (2001). Nothing in this regulation prohibits execution of a NTTC because of a visible correction made due to a scrivener’s error. *See id.* “An nttc is not valid if it does not contain the information or is not in a form prescribed by the department.” 3.2.201.8 (C) NMAC (2012). Forms are issued to taxpayers by the department in the appropriate type and are serially numbered. *See* 3.2.201.9 NMAC (2001). Again, NTTCs are executed “[a]fter completion of the information required on the nttc and after proper signature”. 3.2.201.9 (D) NMAC. Again, nothing in the regulations prohibit the use of white correction fluid or indicate that corrections on scrivener’s errors will invalidate a NTTC. *See id.*

Although it is understandable that the Department might be wary of document that appeared to be altered, the Taxpayer provided ample explanation for the white correction fluid on the NTTC provided to him. The Taxpayer explained that he received the NTTC from the buyer in that condition. The buyer provided written documentation to the Taxpayer that the NTTC was provided to the Taxpayer in 2008 and that the white correction fluid was applied to correct an error made while filling out the document. The NTTC contained the information required and a proper signature. The Department also communicated with the buyer, and confirmed that the buyer had made a mistake while filling out the NTTC and had used white correction fluid to correct the error.

Again, no statute, regulation, or case cited prohibits the acceptance of a NTTC for the use of white correction fluid. The Taxpayer accepted the timely, properly executed NTTC in good faith and is entitled to the safe harbor protection of the statute. *See* NMSA 1978, § 7-9-43.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notices of Assessment of 2008, 2009, 2010, and 2011 gross receipts taxes issued under respective Letter ID numbers L0857603024, L1931344848, L0186514384, and L1260256208, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer had a properly executed and timely NTTC for the sale of his services, which the Taxpayer accepted in good faith. *See* NMSA 1978, § 7-9-43.
3. The Taxpayer successfully rebutted the presumption of correctness as an NTTC is conclusive evidence. *See id.*
4. The Department failed to establish that the assessments were correct and failed to establish that NTTCs with visible corrections are prohibited or will negate a taxpayer's safe harbor protection. *See id.* *See also* 3.2.201.8 and 3.2.201.9 NMAC.
5. As the Taxpayer was entitled to deduct the gross receipts, he owed no gross receipts taxes. Therefore, penalty and interest do not apply.

For the foregoing reasons, the Taxpayers' protest is **GRANTED and the assessments are hereby ABATED.**

DATED: April 13, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
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