STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
FLAT LANDERS TAXIDERMY **No. 15-30**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1908441040

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on August 4, 2015 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Burton and Rosie Buchan appeared *pro se* for Flat Landers Taxidermy ("Taxpayer"). Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Nicholas Pacheco appeared as a witness for the Department. Taxpayer Exhibits #1-2 were admitted into the record. Department Exhibits A-H were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 23, 2015, through letter id. no. L1908441040, the Department assessed Taxpayer for $335.28 in gross receipts tax, $67.06 in penalty, and $75.97 in interest for a total assessment of $478.31 for the CRS reporting periods from January 1, 2008 through December 31, 2008.

2. On May 19, 2015, Taxpayer protested the Department's assessment.

3. On June 2, 2015, the Department's protest office acknowledged receipt of the protest.

4. On June 24, 2015, the Department filed a request for hearing in this matter with the Hearings Bureau[1].

5. On June 25, 2015, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on August 4, 2015.

6. On August 4, 2015, within 90-days of Taxpayer's protest, the Administrative Hearings Office conducted a hearing in the above-captioned matter.

7. Mr. Burton Buchan is a registered hunting guide with the New Mexico Department of Game & Fish, required to work under supervision of a registered outfitter. [Taxpayer Ex. #1].

8. In 2008, Mr. Buchan provided hunting guide services as an independent contractor of Business X[2].

9. Mr. Buchan had no written agreement in place with Business X. Business X would call him and ask him to assist guide a scheduled hunting trip.

10. Business X paid Mr. Buchan on a per day basis by check at a wage competitive with hunting guide services.

11. Business X paid Mr. Buchan $5000.00 for his guiding services in 2008. [Dept. Ex. B-2].

12. Business X did not withhold taxes from Mr. Buchan's check.

13. Business X did not pay any benefits to Mr. Buchan.

[1] On July 1, 2015, pursuant to enacted Senate Bill 356, the Hearings Bureau became the Administrative Hearings Office ("AHO"). The Hearings Bureau will be used for events that occurred before July 1, 2015, even though the hearing occurred before the Administrative Hearings Office.

[2] The name of the outfitter that Taxpayer worked with, which is contained on the record, is being changed to a generic business name because some taxpayer return information will be discussed in this decision and changing the name will protect the confidentiality of that business' tax return information.

14. At the end of the year, Business X provided Mr. Buchan with a Form 1099 for the guiding services.

15. Mr. Buchan did not see any invoices from Business X showing that gross receipts taxes were paid on the hunting trips where Mr. Buchan served as a guide.

16. Through its tape match program with the IRS, the Department detected that Mr. Buchan had reported Schedule C business income on his 2008, 2010, and 2011 personal income tax returns but did not have a corresponding CRS filing in those years.

17. On January 31, 2015, the Department sent Burton Buchan & Rosa Caro (Buchan) a Notice of Limited Scope Audit Commencement. The notice informed them that they had 60-days, until April 1, 2015, to possess an executed nontaxable transaction certificate ("NTTC or NTTCs") supporting any claimed deduction. [Dept. Ex. A].

18. On or about February 4, 2015, a CPA called on behalf of Taxpayer to discuss the limited scope audit, NTTCs, and other documents required. [Dept. Ex. C].

19. Ms. Buchan acknowledged that the CPA had informed her that Taxpayer needed to present a NTTC. [08-04-15 CD 1:54:18-56].

20. On March 11, 2015, the Department sent Burton Buchan & Rosa Caro (Buchan) a reminder notice of limited scope audit, again indicating that NTTCs were required by the 60-day deadline. [Dept. Ex. G].

21. On March 16, 2015, Rosie Buchan submitted a series of documents (a letter of from Taxpayer's accountant, a letter from Business X, and a letter from a third company) to the David Urrea with the Department via email. Ms. Buchan believed that these documents might be a sufficient substitute for a NTTC. Mr. Urrea indicated he would review and respond as soon as possible if additional information was still needed. [Dept. Ex. E-1].

22. Ms. Buchan sent Mr. Urea an undated letter of Business X, indicating that Business X had "paid gross receipts taxes and income taxes." [Dept. Ex. B-1].

23. After the March 16, 2015 email, Mr. Urrea never responded back to Ms. Buchan or Taxpayer about whether additional information was still required and the 60-day deadline passed.

24. Taxpayer did not present an executed NTTC by the April 1, 2015 60-day deadline.

25. After the April 1, 2015 deadline, Ms. Buchan spoke with another Department employee with the first name of Ritch who informed her that a NTTC executed by the deadline was required.

26. Taxpayer provided sufficient documentation to support that no gross receipts tax was due and owing for the 2010 and 2011 years also identified in the limited scope audit and no assessments were issued for those years. [08-04-15 CD 1:16:41-1:17:23].

27. On April 14, 2015, after the April 1, 2015 60-day deadline, Business X executed a Type 2 NTTC to Taxpayer. [Dept. Ex. D-1].

28. The Type 2 NTTC covers the sales of a tangible personal property for resale rather than the sale of a service of resale at issue in this protest, which is covered by the Type 5 NTTC.

29. On April 23, 2015, the Department issued its assessment for 2008 gross receipts tax to Mr. Buchan's previous registered business, Taxpayer Flat Landers Taxidermy. [Taxpayer Ex. #2].

30. Business X's spreadsheet of 2008 receipts, which noted the $5,000.00 payment to Mr. Buchan in November 2008, did not show in the gross receipts column the payment of gross

receipts tax in that month, the preceding month, or the following month. [Department Ex. B-3; 08-04-15 CD 1:18:30-1:19:24].

31. Protest Auditor Nicholas Pacheco reviewed Dept. Ex. F-1, Business X's 2008 Schedule C, and determined that the document was inconclusive about whether the outfitter had paid gross receipts tax on the hunting trips where Mr. Buchan served as a guide. [08-04-15 CD 1:29:34-1:30:23].

32. Protest Auditor Nicholas Pacheco also reviewed the Department's internal database program Gentax to check whether Business X had paid gross receipts tax and was unable to confirm that the gross receipts tax were paid. [08-04-15 CD 1:45:23-1:45:52].

33. After conclusion of the hearing, on August 5, 2015, the Department submitted a substitute Exhibit F-1, which was substantively identical to Exhibit F-1 presented at hearing except for the redaction of Business X's confidential taxpayer identification information. [Dept. Ex. F-1].

34. As of the date of hearing, Taxpayer owed $335.28 in gross receipts tax, $78.97 in interest, and $67.06 in penalty. [Dept. Ex. H].

DISCUSSION

There are three main issues in this protest. The first issue is whether the Department can allow a deduction from tax when Taxpayer presented a required supporting NTTC executed after the 60-day deadline, even when a Department employee did not timely inform Taxpayer that the documents Taxpayer presented were insufficient at a time when Taxpayer could have still attempted to obtain the NTTC. The second issue is whether equitable recoupment provides grounds to abate this assessment. The final issue is whether penalty and interest were appropriately assessed in this case.

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments 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. 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. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

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 its right to claim the deduction.

Gross Receipts Tax, Sale for Resale Deduction, and timely NTTCs

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). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), the term "gross receipts" is broadly defined to mean

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico,

> from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

"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 (2007). 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 protest, Taxpayer suggested that perhaps Mr. Buchan was not engaged in business because he had to work for a licensed outfitter and was merely a subcontractor of the outfitter, Business X. Exempted from gross receipts taxes are the wages of employees. *See* NMSA 1978, § 7-9-17. A person who is an employee is not required to register, file, or pay gross receipts tax. *See* § 7-9-5 (A) and Regulation 3.2.100.8 NMAC. However, as referenced, Taxpayer carries the burden of establishing he was entitled to the claimed exemption. *See Wing Pawn Shop*, ¶16.

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 in 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 the criteria under Regulation 3.2.105.7 (B) NMAC to the facts of this case, Taxpayer did not establish that Mr. Buchan was an employee of Business X during the relevant period. Taxpayer received a check based on the days guiding from Business X for performance of his guiding services. Business X did not withhold any taxes from Taxpayer's checks and there is no evidence that Business X paid worker's compensation insurance or unemployment insurance payments on behalf of Taxpayer. Business X considered Mr. Buchan a contract laborer rather than an employee. The evidence established by the preponderance that Mr. Buchan was an independent contractor and not an employee of Business X. Consequently, Taxpayer was a person engaged in business and all of his receipts in 2008 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. One particular deduction is at issue in this protest: the sale of a service for resale deductible 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. 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 the 2008 performance of guiding services for Business X. There is no evidence that Taxpayer possessed a NTTC at that time.

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. 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 Notices of Limited Scope Audit on January 31, 2015. The January 31, 2015 Notice of Limited Scope Audit provided Taxpayer with notice that it had 60-days, until April 1, 2015, to produce any requisite executed NTTCs to support a claimed deduction. Taxpayer did provide the Department some documents on March 16, 2015 via email, which Ms. Buchan hoped might substitute for the NTTC. The Department's Mr. Urrea told Taxpayer he would review the submitted March 16, 2015 documents and get back with Taxpayer if any other documents were required. Even though Taxpayer would still have had two weeks to try to obtain a NTTC, Mr. Urrea never responded back to Taxpayer that a NTTC was still required to support the deduction. As will be discussed more in the penalty section, and as the Department suggested at the hearing, Mr. Urrea's failure to timely respond warrants abatement of penalty.

Taxpayer did not provide the Department any NTTCs executed by the April 1, 2015, 60-day deadline. The reasons for Taxpayer's non-compliance with the 60-day statutory deadline appear not to be material to the analysis under Section 7-9-43. Under Section 7-9-43 and Regulation 3.2.201.12 (C), the Department has no authority to allow a deduction after the expiration of the second chance, 60-day deadline, even if a taxpayer has a reasonable explanation for the delay. By not presenting the NTTCs in a timely manner, as required by Section 7-9-43 and Regulation 3.2.201.12 (C), Taxpayer waived its right to the claimed deduction. *See Proficient Food Co.*, ¶22 (internal citations omitted) ("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. Urrea's failure to respond does not appear to provide an exception allowing for the Department to act after the statutory 60-day deadline. *See Rainaldi v. Public Employees Retirement*

Board, 1993-NMSC-028, ¶18-19, 115 N.M. 650 (Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute). While some elements of the Court of Appeals' decision in *New Mexico Taxation and Revenue Dep't. v. Case Manager*, No. 32,940 (N.M. Ct. App. April 29, 2015) (non-precedential) suggest that the Department's failure to timely respond to inquiries about the requirements for a NTTC may be grounds to grant relief, that case is distinguishable from this protest in that the good-faith, safe harbor statutory provision first requires a timely NTTC, which did not happen in this case. Therefore, in light of the statutory requirements for failing to submit a NTTC within 60-days, Taxpayer's relief for Mr. Urrea's failure to respond appears limited to abatement of penalty.

Equitable Recoupment.

In its protest letter, Taxpayer repeatedly mentioned that Business X had already paid the taxes and therefore the assessment should be abated. Additionally, Taxpayer argued at hearing that to impose tax on it would amount to double taxation because Business X had already paid the tax. While Taxpayer did not expressly use the phrase "equitable recoupment" or cite NMSA 1978, Section 7-1-28 (F) (2013), a reasonable reading of the protest letter placed the parties on notice that Taxpayer believed it should not be liable for taxes it believed were already paid by Business X, a sentiment that fairly encompasses the legal concept of equitable recoupment.

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." Equitable recoupment in tax matters is a doctrine developed largely by federal courts and is given a limited application in tax litigation. *See Vivigen, Inc. v. Minzner*, 1994-NMCA-027, ¶20, 117 N.M. 224. New Mexico has adopted equitable recoupment with the same limitations set forth by federal courts. *See Vivigen, Inc.*, ¶23.

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. However, under the presumption of correctness that attached to Department's assessment pursuant to Section 7-1-17 (C), Taxpayer has the burden of establishing that it is entitled to an abatement of assessed taxes under Section 7-1-28 (F)'s equitable recoupment basis.

Admitted into evidence in this case is a letter of Business X, Dept. Ex. B-1, indicating that it had paid gross receipts tax and incomes taxes. However, also admitted into the record is a spreadsheet of Business X's expenses, labeled as Dept. Ex. B-2, that does not show on the gross receipts column that gross receipts taxes were paid in any of the three months surrounding Taxpayer's November 2008 payment[3]. The Department's Protest Auditor, Mr. Pacheco, checked the Department's Gentax system and was unable to verify that Business X paid gross receipts tax for the period in question. While Business X may have paid the tax as claimed, in light of the omission on the spreadsheet and the testimony of Mr. Pacheco about his review of Gentax, the letter of Business X stating that the taxes had been paid without further supporting documentation or testimony was insufficient to establish that the tax had been paid. Because Taxpayer did not present sufficient evidence to establish the elements of equitable recoupment in this matter, Section 7-1-28 (F) does not provide grounds for the abatement of assessed taxes.

As to Taxpayer's double taxation argument, while it is generally to be avoided as a matter of good tax policy, there is no strict legal prohibition against double taxation. *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

[3] According to the spreadsheet, Business X had paid gross receipts tax in April, June, and July, which suggests that Business X was not on annual or quarterly CRS reporting method. Even if on annual or quarterly method, there is no information for January 2009, making the spreadsheet inconclusive as to payment of gross receipts tax.

tax is an excise tax on all the receipts of a person engaged in business, and therefore absent some specific deduction there may be multiple incidences of gross receipts tax liability to separate businesses when there is a transaction involving multiple people engaged in business.

Penalty and Interest.

Taxpayer did not specifically address interest and penalty, but because Taxpayer asked for abatement of all taxes interest and penalty are relevant in this decision. 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 2008 gross receipts tax was due but not paid until Taxpayer satisfies the gross receipts tax principal.

However, there is grounds 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."

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Further, in relevant part to this protest, Regulation 3.1.11.11 (A) NMAC allows for abatement of penalty when a "taxpayer proves that the taxpayer was affirmatively misled by a department employee." Here, during a time when Taxpayer would still had an opportunity to obtain the NTTC, Mr. Urrea told Taxpayer he would let them know if anything else was required as soon as possible, but did not do so. By relying on Mr. Urrea's affirmative statement that he would let them know if anything else was required to its detriment in terms of 60-day NTTC deadline expiring, under Regulation 3.1.11.11 (A) NMAC, Taxpayer was nonnegligent in this case and penalty must be abated.

CONCLUSIONS OF LAW

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

B. The hearing was timely set within 90-days of protest under NMSA 1978, Section 7-1-24.1 (2013).

C. Taxpayer 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.

D. Mr. Buchan was engaged in business as guide for the purposes of NMSA 1978, Section 7-9-4 (2002), and therefore all of Taxpayer's receipts in 2008 are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

E. Taxpayer did not present timely executed NTTCs to support the claimed deduction for the sale of a service for resale under NMSA 1978, Section 7-9-48 (2000). Under NMSA 1978, Section 7-9-43 (2011) and Regulation 3.2.201.12 (C), without 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 under Section 7-9-48. *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. Despite the Department's lack of effective communication, granting Taxpayer a claimed deduction when the NTTC was not timely executed would be contrary to statute. *See Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650 (Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute).

G. Taxpayer did not establish the elements of equitable recoupment by the preponderance and therefore was not entitled to an abatement of tax under NMSA 1978, Section 7-1-28 (F).

H. 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.

I. Under Regulation 3.1.11.11 (A) NMAC, Taxpayer was not negligent and not subject to the assessed civil penalty.

For the foregoing reasons, the Taxpayers' protest **IS PARTIALLY GRANTED AND PARTIALLY DENIED**. **IT IS ORDERED** that the $67.06 in penalty is abated but that Taxpayer is liable for $335.28 in gross receipts tax and $78.97 in interest as of the date of the hearing. Interest continues to accrue until the tax principal is satisfied.

DATED: September 10, 2015.

Brian VanDenzen
Interim Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may being preparing the record proper.

CERTIFICATE OF SERVICE

On September 10, 2015, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

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