STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
LARRY J. GONZALES **No. 15-41**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO.'s L0857997360, L1931739184, L0186908720 and L1260650544

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on October 30, 2015 before Brian VanDenzen, Esq., Interim Chief Hearing Officer, in Santa Fe. At the hearing, Larry J. Gonzales ("Taxpayer") appeared along with his representative, Dennis Kennedy, CPA. Staff Attorney Gabrielle Dorian appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor J. Amanda Carlisle appeared as a witness for the Department. Taxpayer Exhibits #1, a letter from Mr. Kennedy, CPA, was admitted into the record. Department Exhibit A, an updated spreadsheet of alleged liabilities as of the hearing date, was admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 27, 2015, through letter id. no. L0857997360, the Department assessed Taxpayer for $256.40 in gross receipts tax, $51.28 in penalty, and $58.21 in interest for a total assessment of $365.89 for the CRS reporting periods from January 1, 2008 through December 31, 2008.

2. On April 27, 2015, through letter id. no. L1931739184, the Department assessed Taxpayer for $329.10 in gross receipts tax, $65.82 in penalty, and $59.67 in interest for a total

assessment of $454.59 for the CRS reporting periods from January 1, 2009 through December 31, 2009.

3. On April 27, 2015, through letter id. no. L0186908720, the Department assessed Taxpayer for $238.98 in gross receipts tax, $47.49 in penalty, and $33.82 in interest for a total assessment of $320.59 for the CRS reporting periods from January 1, 2010 through December 31, 2010.

4. On April 27, 2015, through letter id. no. L1260650544, the Department assessed Taxpayer for $441.58 in gross receipts tax, $88.32 in penalty, and $46.61 in interest for a total assessment of $576.51 for the CRS reporting periods from January 1, 2011 through December 31, 2011.

5. On June 8, 2015, Taxpayer protested the Department's assessment, asking for abatement of all assessed tax principal, penalty, and interest.

6. On June 11, 2015, the Department's protest office acknowledged receipt of the protest.

7. On July 29, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate, independent agency from the Department.

8. On July 30, 2015, the Administrative Hearings Office sent Notice of Telephonic Scheduling Conference, scheduling this matter for a scheduling hearing on August 14, 2015.

9. On August 14, 2015, a Scheduling Conference Hearing occurred. The parties did not object that conducting the scheduling hearing satisfied the requirement that a hearing be set within 90-days of protest.

10. On August 14, 2015, the Administrative Hearings Office issued a Notice of Administrative Hearing in this matter, setting the merits hearing for September 15, 2015.

11. On September 8, 2015, the Department moved to continue the merits hearing, citing concerns about presentation of federal confidential taxpayer information without a specific agreement in place with the IRS that would allow it to share the information with the newly-created, independent Administrative Hearings Office (this issue has subsequently been resolved). Taxpayer did not object.

12. On September 10, 2015, the Administrative Hearings Office issued a Continuance Order and Amended Notice of Administrative Hearing, rescheduling this matter for a merits hearing on October 30, 2015.

13. Taxpayer is employed as a math and physical education teacher with Albuquerque Public Schools ("APS"). Over his thirty years at APS, Taxpayer has also been employed as a basketball coach and athletic director at the school where he works.

14. During the relevant period, APS had an arrangement with the Albuquerque Youth Basketball League ("AYBL") whereby that organization could use APS gym facilities for extracurricular practices and sports events not otherwise part of APS' formal athletics programing.

15. APS would only allow AYBL to use APS facilities if an APS employee was present during the activity.

16. As part of the performance of his job duties as athletic director and at direction of his school's principal, Taxpayer was responsible for supervising school and sport activities in the school gym.

17. Taxpayer was tasked with monitoring and protecting APS' property when AYBL used the gym. When AYBL used the gym at his school, Taxpayer opened the facility, monitored the practice/activity, and closed the facility at the conclusion of the event.

18. This activity occurred approximately five-months a year, one to four times per week.

19. On a weekly basis, AYBL paid Taxpayer for his time serving as a monitor by check.

20. At the end of each relevant year, AYBL provided Taxpayer with 1099-MISC for all the money it had paid Taxpayer in that year.

21. In the summer, Taxpayer also served as a teacher-chaperone on one overseas student trip per year with an organization called Education First Cultural Exchange.

22. According to Taxpayer's otherwise credible testimony, Education First Cultural Exchange is an APS Board approved program.

23. Education First Cultural Exchange develops the curriculum and itinerary for the cultural exchange trip with Taxpayer.

24. Taxpayer is paid directly by Education First Cultural Exchange at the end of the annual trip.

25. Education First Cultural Exchange provides Taxpayer with a 1099-MISC at the end of the year.

26. Taxpayer receives a W-2 from APS for his annual teacher wages.

27. Taxpayer's accountant Mr. Kennedy, CPA, helped prepare Taxpayer's tax returns each of the relevant years.

28. Taxpayer did not file or pay gross receipts tax in any of the relevant years because he believed he was not engaged in business and thought all his income was earned within the scope of his employment at APS.

29. Taxpayer did report and pay income tax on all of the 1099-MISC income listed on his federal Schedule C in each relevant year.

30. Through its Schedule C Tape Mismatch Program with the IRS, the Department detected a mismatch between the income reported on Taxpayer's federal Schedule C and the lack of a CRS return reporting and paying gross receipts tax.

31. Based on the mismatch information, the Department issued the assessments described in findings of fact #1 through #4.

32. After Taxpayer filed its protest but before the scheduled hearing, the Department abated the penalty in this case.

33. As of the date of hearing, the Department alleged that Taxpayer owed $1266.06 in gross receipts tax and $205.34 in interest. [Dept. Ex. A].

DISCUSSION

There are two main issues involved in this protest. The first issue is whether the income Taxpayer earned from AYBL and/or the Education First Cultural Exchange Program was in his scope as an employee of APS and therefore exempt from gross receipts tax. The second issue is even if Taxpayer earned the income as an independent contractor, whether Taxpayer nevertheless was exempt from gross receipt tax because of the isolated and occasional nature of the work does not amount to engaging in business. Because Taxpayer used the services of a CPA to prepare and file his tax returns, the Department properly abated penalty and therefore that assessed amount is not at issue in this protest.

Presumption of Correctness.

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 assessment. *See*

Archuleta v. O'Cheskey, 1972-NMCA-165, ¶11, 84 N.M. 428. Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217. 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. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. 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.*, 2003 NMCA 21, ¶13.

Gross Receipts Tax, Employee Wages, and Isolated and Occasional Sales

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 argued that he was merely an employee of APS when he monitored APS' gym facility at Taxpayer's school while AYBL used the facility. 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. The determination of whether a taxpayer is an employee is a fact intensive inquiry. 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."

In New Mexico, the question of whether a person is an employee or independent contractor turns on control. *See Harger v. Structural Servs.*, 1996-NMSC-018, ¶12, 121 N.M. 657. *See also Rock v. Comm'r of Revenue*, 1972-NMCA-012, ¶5, 83 N.M. 478. New Mexico courts have looked to the Restatement (Second) of Agency §220 for guidance on the question of employee versus independent contractor. *See Celaya v. Hall*, 2004-NMSC-005, ¶11, 135 N.M. 115. In addition to control, the New Mexico Supreme Court noted that the Restatement (Second) of Agency §220 identifies numerous other factors for consideration:

> 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business. *Furthermore, a complete analysis may require an assessment not only of the relevant factors enumerated in the Restatement, but of the circumstances unique to the particular case*.

Celaya v. Hall, 2004-NMSC-005, ¶15 (citations omitted and emphasis added).

Applying the criteria under Regulation 3.2.105.7 (B) NMAC and case law to the facts of this case, Taxpayer established that he was serving as an employee of APS in performance of his monitoring of APS' gym facilities even if not all the factors under the regulation were met. There is no evidence on factors two through five that Taxpayer had income tax withheld from his payment of wages from AYBL, that FICA was paid from these wages, and that worker's compensation insurance or unemployment insurance were paid. Taxpayer was paid an hourly wage for his time monitoring APS' gym facility while AYBL used the facility. While AYBL was the one to pay Taxpayer for the monitoring time, presumably pursuant to APS' agreement with AYBL (which neither party actually presented into the record), all other circumstances in this case support that Taxpayer performed the service within the scope of his APS employment.

Most importantly under the regulation and the case law, Taxpayer as a teacher and athletic director was directed by his school's principal to arrange use and monitor the gym anytime AYBL used the APS' facility. Taxpayer performed the monitoring duties at direction of his APS supervisor and in furtherance of APS' interest in protecting its own property. There is no evidence presented that APS had a formal or informal agreement in place with Taxpayer that would have allowed Taxpayer to conduct his alleged independent contracting business activity using APS property. There is no evidence that Taxpayer himself had liability insurance that would cover damage to APS' property or liability for use of that property or injury while Taxpayer monitored the gym, which one could reasonably conclude would be an absolute requirement for use of a public school facility for any private or business purpose. Taxpayer indicated that APS would only allow use of its gym facilities when one of its employees were present, which is why he monitored the activity. While it is true that Taxpayer was remunerated directly for his time by AYBL, under these unique circumstances where Taxpayer's school principal directed him to arrange and supervise AYBL's use of the APS's facility, where APS had an agreement in place with AYBL which required an APS employee to monitor APS' gym facilities while in use, Taxpayer functionally did so within the scope of his APS employment.

Regarding the Education First Cultural Exchange receipts, Taxpayer argued that he was not engaged in business but only participating on a limited basis. 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.

Under this standard and the unique circumstances of this case involving a teacher, Taxpayer's once-annual overseas educational program (a program apparently approved by the APS Board) is an isolated and occasional activity exempted from gross receipts under 7-9-28. Taxpayer was providing an educational service closely related to his employment at APS for a program apparently approved by APS. The market for that service is for students interested in overseas educational activities, again closely related to Taxpayer's employment at APS. In previous hearings, Department auditors have suggested that if the activity occurs more than once, it would not meet the Department's isolated and occasional standard. The trip occurred once per year, not violating that purported internal standard. There is no evidence that Taxpayer engaged in any promotional or sales activity related to the trip. Taxpayer was not holding himself out as a business or being in business as it relates to the school trips. The isolated and occasional nature of that activity for a narrow and limited purpose generally related and closely associated with his employment activity is exempted from gross receipts tax under Section 7-9-28.

Even if Taxpayer's school-related once per year trip does not qualify for the isolated and occasional exemption under Section 7-9-28, given the limited nature of that activity closely related to Taxpayer's work as a teacher at APS, and even under the broad definition of engaging

in business, in this limited context Taxpayer was not engaged in business. Nor was Taxpayer engaged in business for the AYBL monitoring activity.

Taxpayer had the initial burden to overcome the presumption of correctness, which occurred in this case through Taxpayer's credible testimony establishing the evidence that he was an employee of APS. While *MPC Ltd.*, ¶13, and Regulation 3.1.6.12(A) NMAC does not allow a taxpayer to overcome the presumption simply by making conclusory statements that the assessment was incorrect, that is not what Taxpayer did in this protest. Taxpayer's credible testimony, which is fully admissible evidence, established that he was an employee of APS acting within that scope when he earned the receipts in question. In other words, Taxpayer was simply not making conclusory statements that the assessments were wrong, but providing credible, factual evidence showing why the assessments were factually and legally incorrect.

Under *MPC Ltd.* 2003 NMCA 21, ¶13, the burden then shifted back to the Department to establish the correctness of its assessment. In preparation for that potential, the Department could have requested copies of APS' agreement with AYBL, the APS-Teacher collective bargaining agreement, or APS' agreement/approval of the Education First Cultural Exchange program, which it could have used to challenge Taxpayer's assertions about the nature of those agreements/transactions. The Department did not reestablish the correctness of its assessment or successfully attack the credibility of Taxpayer's testimony. While the definition of engaging in business is admittedly quite broad, a common sense, non-technical analysis of this fact pattern clearly established that this Taxpayer was not a person engaged in business other than to conduct work closely associated with his employment and work as a teacher. Taxpayer's protest is granted and the entire assessment is ordered abated.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessments, 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 overcame 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. Taxpayer's activities of monitoring APS' gym facilities while AYBL used the facilities occurred within Taxpayer's scope of employment for APS and the wages for that activity were exempt from gross receipts tax under NMSA 1978, Section § 7-9-17, Regulation 3.2.105.7 (A) NMAC, Restatement (Second) of Agency §220.

E. Taxpayer's chaperoning of the educational overseas trip was not for a business purpose, did not constitute engaging in business, and were isolated and occasional subject to exemption under NMSA 1978, Section 7-9-28.

F. Once Taxpayer overcame the presumption of correctness, the burden shifted to the the Department to reestablish the correctness of its assessments, which the Department was unable to do in this case. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

For the foregoing reasons, the Taxpayers' protest **IS GRANTED**. **IT IS ORDERED** that the Department abate all of the assessed tax.

DATED: December 29, 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.