STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SANDIA DEVELOPMENT & CONSULTING SERVICES INC. **No. 16-02**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1357783088

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on December 15, 2015 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Oswaldo Galarza, President of Sandia Development & Consulting Services Inc. ("Taxpayer") appeared *pro se*. Chief Legal Counsel Brad Odell 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-E 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 July 10, 2015, through letter id. no. L1357783088, the Department assessed Taxpayer for $1,332.61 in gross receipts tax, $266.53 in penalty, and $81.81 in interest for a total assessment of $1,680.95 for the CRS reporting periods from June 30, 2011 through June 30, 2014.

2. On September 25, 2015, Taxpayer protested the Department's assessment.

3. On September 29, 2015, the Department's protest office acknowledged receipt of a valid protest.

4. On November 9, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

5. On November 12, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on December 15, 2015.

6. On December 15, 2015, within 90-days of the Department's receipt and acknowledgement of a valid protest, the Administrative Hearings Office conducted a hearing in the above-captioned matter.

7. Taxpayer is a New Mexico business that provides business consulting services and sells high-grade construction materials. [Dept. Ex. B].

8. Mr. Oswaldo Galarza is Taxpayer's President.

9. Taxpayer was selected for a Department audit, which commenced on August 7, 2014. [Dept. Ex. B].

10. On August 7, 2014, the Department provided Taxpayer with notice that Taxpayer had 60-days, until October 6, 2014, to possess an executed nontaxable transaction certificate ("NTTC or NTTCs") supporting any claimed deduction. [Dept. Ex. C].

11. During the relevant period, in 2014, Taxpayer claimed a deduction for sale of a geotextile impregnated concrete to LANL.

12. On or about March 10, 2014, LANL sent Taxpayer an email entitled "Tax Exempt Form.pdf." Although the attachments was not provided in the record, Mr. Galarza credibly testified that the attachments was a blank form that Taxpayer needed to fill out and return to LANL. [Taxpayer Ex. #1].

13. Taxpayer does not have a copy of the completed form and LANL did not have a copy of the form.

14. On April 15, 2014, LANL sent Taxpayer a letter discussing that it had furnished Taxpayer with a NTTC. However, Taxpayer could not find and did not present a copy of the NTTC referenced in that April 15, 2014 LANL letter either to the Department as part of the aduit or at the protest hearing. [Taxpayer Ex. #2].

15. Taxpayer did not produce any NTTC executed by the October 6, 2014 60-day NTTC deadline.

16. In May of 2015, after discussing the potential tax liability with Taxpayer's account, Mr. Galarza reached out to LANL about a NTTC for the 2014 transaction at issue.

17. On May 6, 2015, seven-months after the October 6, 2014 NTTC deadline, LANL executed a Type 6 NTTC to Taxpayer. This NTTC was untimely. [Dept. Ex. D].

18. In reviewing this matter, Department Auditor Nicholas Pacheco reviewed the Department's NTTCnet database, which showed a history of electronic NTTCs executed to Taxpayer.

19. The NTTCnet database shows that of the nine NTTCs noted on Taxpayer's account, LANL only executed one NTTC to Taxpayer, the untimely Type 6 NTTC executed on May 6, 2015. There were no other NTTCs executed by LANL before the October 6, 2014 60-day deadline. [Dept. Ex. E].

DISCUSSION

The main issue at protest is whether the Department can allow for deduction when Taxpayer did not possess or produce a requisite NTTC for the deduction either at the time the taxes were due on the transaction or within 60-days of the Department's notice of audit. Taxpayer argues in this protest that should not be required to pay the assessed gross receipts tax, penalty, and interest because it presented evidence that LANL informed Taxpayer by letter on

April 15, 2014 that a NTTC had been furnished to Taxpayer. The Department counters that it has no authority to grant a deduction premised on a NTTC unless Taxpayer presented a timely-executed NTTC by the 60-day deadline.

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. 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, Deductions, and the Requirement of 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). 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). 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).

Taxpayer was a New Mexico business engaged in selling both consulting services and high-grade construction materials during the audit period. In particular, for the specific receipts in question in this protest, Taxpayer was selling high-grade construction materials to LANL. Unless otherwise established through a valid exemption or deduction, all of Taxpayer's receipts during the audit period (including receipts from the sale to LANL) 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 construction material to persons engaged in the construction business under NMSA 1978, Section 7-9-51 (2001). In pertinent part, Section 7-9-51 (A) (emphasis added) states that:

> Receipts from selling construction material may be deducted from gross receipts if the sale is made to a person engaged in the construction business *who delivers a nontaxable transaction certificate to the seller*...

Simply selling the construction material to a buyer engaged in the construction business, as the Taxpayer did in this instance, is not enough to satisfy the requirements of the deduction under

Section 7-9-51. The statute clearly and unambiguously conditions the deduction on a sale made to a person/entity who delivers a NTTC.

In pertinent part, NMSA 1978, Section 7-9-43 (A) (2011) articulates the requirements for obtaining NTTCs:

> All nontaxable transaction certificates of the appropriate series executed by buyers or lessees 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 except as provided in Subsection E of this section....

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.

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 2014 selling of the construction materials to LANL. Although Taxpayer did present some evidence that alluded to LANL issuing a NTTC in March and April of 2014, Taxpayer was not able to present a NTTC executed at the time the CRS taxes were due on the 2014 sale of construction materials to LANL. Nor was Taxpayer able to produce a NTTC executed by the Section 7-9-43, 60-day second chance deadline of October 6, 2014. After passage of the October 6, 2014 60-day deadline, under Section 7-9-43 and Regulation 3.2.201.12 (C), the Department had no authority to allow Taxpayer's claimed deduction. 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."). The Department simply had no authority to grant Taxpayer's claimed refund based on the NTTC executed on May 6, 2015, because that NTTC was executed well after the 60-day deadline.

Taxpayer argued that his presentation of the April 15, 2014 letter from LANL, where LANL indicates it had executed a NTTC to Taxpayer, ought to be sufficient to substantiate its claimed deduction under Section 7-9-51. However, under Section 7-9-43 (E), the Department may only accept alternative evidence other than a NTTC to substantiate a claim for a deduction for the sale of tangible personal property for resale pursuant to NMSA 1978, Section 7-9-47. Since this case does not involve a claim for deduction under Section 7-9-47, subsection E of Section 7-9-43 does not

apply to Taxpayer. Thus, Taxpayer was required to produce a timely executed NTTC rather than any alternative evidence in order to support the claimed deduction under Section 7-9-51. Consequently, even though the April 15, 2014 letter from LANL refers to a NTTC, under the requirements of Section 7-9-43 and Section 7-9-5, the letter itself is an insufficient substitute for the requisite, timely-executed NTTC.

While the March 10, 2014 email of LANL and the April 15, 2014 letter of LANL circumstantially suggest that LANL intended to execute a NTTC to Taxpayer for Taxpayer's sale of construction materials to LANL, the evidence did not establish that LANL in fact timely executed the NTTC referred to in either document. Taxpayer itself could never produce either the referenced blank attachment from the March 10, 2014 email or a timely executed NTTC. And the Department's NTTCnet database does not show that Taxpayer received an executed NTTC from LANL until May 6, 2015, well after the transaction and 60-day deadline had passed.

In Taxpayer's protest letter, Taxpayer also argued that it did not owe gross receipts taxes because it never collected the tax from LANL. However, while taxpayers often choose to pass on the cost of the gross receipts tax to the buyers of the products and services, in New Mexico the gross receipts tax is the liability of the business selling the goods or services, not the buyer of those goods and services. *See* Regulation 3.2.4.8 NMAC & Regulation 3.2.6.9 NMAC. Without a timely NTTC, Taxpayer is not entitled to the claimed deduction under Section 7-9-51 and liable for the assessed gross receipts tax regardless of whether Taxpayer "charged" LANL for the gross receipts tax.

Penalty and Interest.

Taxpayer did not specifically address interest and penalty, but because Taxpayer asked for "affirmative relief of the charges" under assessment in the protest letter, interest and penalty will briefly be addressed 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 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." Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. In this case, although certainly not intentional, Taxpayer was civilly negligent under Regulation 3.1.11.10 (B) NMAC by not obtaining a timely executed NTTC necessary to support its claimed deduction under Section 7-9-51. There is no

evidence supporting abatement of penalty under either Section 7-1-69 (B) or the multiple scenarios listed under Regulation 3.1.11.11 (D) NMAC. Therefore, the Department properly assessed penalty and interest. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

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

B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

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. Taxpayer was engaged in business in New Mexico selling consulting services and high-end construction materials for the purposes of NMSA 1978, Section 7-9-4 (2002), and therefore all of Taxpayer's receipts during the audit period 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 construction materials under NMSA 1978, Section 7-9-51 (2001). 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 7-9-51. *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. Under Section 7-9-43 (E), the Department is not allowed to accept substitute evidence other than a timely executed NTTC for the claimed deduction under Section 7-9-51.

G. 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.

H. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction met the definition of civil negligence under Regulation 3.1.11.10 (B) NMAC.

For the foregoing reasons, the Taxpayers' protest **IS DENIED**. Taxpayer is liable for the assessed gross receipts tax, penalty, and interest. Under Section 7-1-67, interest continues to accrue until tax principal is satisfied.

DATED: February 8, 2016.

Brian VanDenzen
Interim Chief Hearing Officer
Administrative Hearings Office
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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.