

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
PETE'S TOP QUALITY LANDSCAPING, LLC,
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L1649029168**

No. 16-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 24, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Gabrielle Dorian, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Ms. Sandra Vigil and Mr. Pete Vigil, owners of Pete's Top Quality Landscaping, LLC (Taxpayer), appeared for the hearing. 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 August 14, 2015, the Department assessed the Taxpayer for the tax periods from January 31, 2008 through July 31, 2014. The assessment was for gross receipts tax of \$107,690.52, penalty of \$21,147.45, and interest of \$9,763.89; withholding tax of \$10,192.71, penalty of \$2,429.16, and interest of \$2,843.51; and compensating tax of \$1,918.65, penalty of \$383.73, and interest of \$238.50.
2. On November 12, 2015, the Taxpayer filed a formal protest letter.
3. On December 21, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. On December 29, 2015, the Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.
5. On January 29, 2016, a telephonic scheduling hearing was conducted. The hearing date was announced on the record.
6. On February 1, 2016, the Hearings Office issued the scheduling order and notice of hearing.
7. On the record at the hearing, the Taxpayer announced that it was no longer protesting the assessment on the withholding tax and on the compensating tax. The Taxpayer was only protesting the assessment on the gross receipts tax.
8. The Taxpayer was selling firewood and other items to its customers, including other landscape companies and restaurants.
9. The Taxpayer accepted nontaxable transaction certificates (NTTCs) from several of its customers and did not include those sales in its gross receipts.
10. The Department audited the Taxpayer and disallowed deductions for sales that the Taxpayer made of firewood to various restaurants. The Department determined that the restaurants were not reselling the firewood to their customers; rather, they were using it for cooking and/or heating.
11. The Department disallowed the deductions for sales to restaurants even when the Taxpayer had accepted NTTCs from those restaurants.
12. The Taxpayer acknowledged that it owed some of the gross receipts taxes. The Taxpayer admitted that it failed to obtain NTTCs from at least two of the other landscapers to whom it was selling.

13. The Taxpayer's protest focused solely on the sale of firewood to various restaurants that had issued NTTCs to the Taxpayer.
14. The Taxpayer argued that it should be allowed to deduct the sales for which it had NTTCs because it accepted the NTTCs in good faith.
15. The Taxpayer acknowledged that it knew that the restaurants were using the firewood.
16. The Taxpayer contacted the Department prior to accepting the NTTCs from the restaurants and inquired as to their applicability to sales to the restaurants. Two different Department employees assured the Taxpayer that the NTTCs were applicable and entitled it to take deductions as long as they were Type 2 NTTCs, which cover tangible personal property.
17. The Taxpayer confirmed that the restaurants were issuing Type 2 NTTCs and accepted them based on the restaurants' representations and based on the information from the Department's employees.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the gross receipts tax, penalty, and interest as assessed. The Taxpayer withdrew the protest on the withholding and compensating taxes.

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 Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,

and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

The burden is on the Taxpayer to prove that it 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.

Gross Receipts Tax.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services. *See* NMSA 1978, § 7-9-3.5. It was undisputed that the Taxpayer was engaging in business and generally subject to the gross receipts tax.

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). A taxpayer should be in possession of NTTCs when the taxes 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.* 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.

A taxpayer can be protected from tax liability when the taxpayer accepts a NTTC in good faith. *See Leaco Rural Telephone Coop., Inc. v. Bureau of Revenue*, 1974-NMCA-076, 86 N.M. 629. However, that protection will be conclusive only when three requirements are met; 1) the acceptance of the NTTC must be timely, 2) must be in good faith, and 3) the NTTC must be properly executed. *See id.* at ¶ 15. *See also Continental Inn v. N.M. Taxation and Revenue Dep’t.*, 1992-NMCA-030, ¶ 12-13, 113 N.M. 588 (holding that a NTTC represents to the seller that it is entitled to take a deduction and that the NTTC does not transform the taxable transaction into a nontaxable transaction but allows the Department to pursue the buyer for compensating tax). *See also Gas Co. v. O’Cheskey*, 1980-NMCA-085, ¶ 12, 94 N.M. 630 (holding that a NTTC does not transform a taxable transaction into a nontaxable transaction and recognizing that a NTTC does serve to shift the burden of the tax to the buyer when the seller accepts a NTTC in good faith even though the buyer wrongly issued it).

The Department argued that the NTTCs from the restaurants were invalid because the restaurants were not reselling the firewood. The Department argued that good faith did not apply because the Taxpayer knew that the restaurants were not reselling the firewood. The Department argued that the Taxpayer was required to take more action to understand the NTTCs rather than blindly accepting and trusting them.

The Taxpayer indicated that it did not really understand the import and purpose of the NTTCs. The Taxpayer knew that NTTCs could allow them to deduct sales from its gross receipts. The Taxpayer was leery of accepting the NTTCs from the restaurants and took

additional steps to try to understand the NTTCs. The Taxpayer contacted the Department on more than one occasion. The Taxpayer spoke to two different Department employees about selling firewood and about the NTTCs that the restaurants wanted to issue to it. Both employees told the Taxpayer that it could accept the NTTCs and deduct its sales to those restaurants from its gross receipts as long as the restaurants issued Type 2 NTTCs to it. The employees explained that Type 2 NTTCs cover tangible goods, such as firewood. The Taxpayer then accepted the Type 2 NTTCs from the restaurants.

It was undisputed that the Taxpayer was in possession of several properly executed NTTCs from various restaurants in a timely manner. It was also undisputed that the NTTCs were for tangible personal property, which is subject to deduction when the seller is given a NTTC by a buyer. *See* NMSA 1978, § 7-9-47. It was also undisputed that the Taxpayer was selling tangible personal property to the restaurants. The only issue at dispute was whether the Taxpayer accepted the NTTCs in good faith. The Taxpayer only accepted the NTTCs after being assured by Department employees that it could do so and would be entitled to take the deductions based on those NTTCs. Based upon the totality of the evidence, the Taxpayer accepted the NTTCs from the restaurants in good faith and was entitled to take the deductions.

Adjustment to tax.

The Department anticipated the possibility that the NTTCs would be sufficient to allow the Taxpayer to take the deductions for its sales of firewood to the restaurants that issued the NTTCs. Ms. Bernardo applied the NTTCs' deductions to the formula used in the audit to calculate the tax. Ms. Bernardo determined that the deductions from the restaurants that issued NTTCs would be fairly minimal to the Taxpayer's overall gross receipts tax liability. Ms. Bernardo concluded that the Taxpayer's gross receipts tax liability would be reduced by only

\$7,136.92 when the deductions were applied. Therefore, even allowing for the deductions for the NTTCs from the restaurants, the Taxpayer's gross receipts tax liability is still \$100,533.60.

Assessment of Penalty.

A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16. Therefore, penalty was properly assessed to the Taxpayer, but the amount of penalty will be adjusted accordingly to reflect the reduction in the gross receipts tax liability. *See* NMSA 1978, § 7-1-69 (using the amount of the unpaid tax liability as the basis to calculate the amount of penalty).

Assessment of Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). Again, the word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed. The amount of interest will also be adjusted accordingly to reflect the reduction in gross receipts tax liability. *See* NMSA 1978, § 7-1-67 (using the amount of unpaid tax liability as the basis to calculate interest). Interest continues to accrue until the underlying tax principal is paid. *See id.*

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment issued under Letter ID number L1649029168, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer withdrew its protest and conceded that it owed the withholding tax, the compensating tax, and their respective penalty and interest as assessed.

C. The Taxpayer accepted the NTTCs from the restaurants in good faith, and they are conclusive evidence that the Taxpayer was entitled to take the deductions. *See* NMSA 1978, § 7-9-43. *See also* *Leaco*, 1974-NMCA-076; *Continental Inn*, 1992-NMCA-030; *Gas Co.*, 1980-NMCA-085.

D. When the deductions pursuant to the NTTCs are applied to the Taxpayer's gross receipts, the gross receipts tax owed is reduced to \$100,533.60. Penalty and interest were properly assessed, but will be adjusted to reflect the reduced amount of tax owed. *See* NMSA 1978, § 7-1-69 and § 7-1-67.

For the foregoing reasons, the Taxpayer's protest is **GRANTED IN PART AND DENIED IN PART**.

DATED: April 25, 2016.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502