

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

**IN THE MATTER OF THE PROTEST OF
US FIELD SERVICE INC.
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L1903815744**

No. 16-56

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 3, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared on behalf of the Department. Mr. Ray Conover, Vice-President, and Ms. Sue Conover, President, for US Field Service Inc. (Taxpayer) appeared for the hearing. The Taxpayer's exhibits 1 through 10 and 14 through 16, and the Department's exhibit "A" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The Department objected to most of the Taxpayer's exhibits based on relevance. The objections were overruled. 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 June 16, 2010, the Department assessed the Taxpayer for gross receipts tax and interest for the tax periods from December 31, 2004 through December 31, 2006. The assessment was for \$13,058.10 tax and \$6,335.74 interest. No penalty was assessed.
2. On August 6, 2010, the Taxpayer filed a formal protest letter. The Taxpayer paid the tax principal, but protested the assessment of interest.

3. On July 1, 2016, the Department filed a Request for Hearing with the Administrative Hearings Office (AHO) asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On July 6, 2016, the AHO issued a notice of hearing.
5. The hearing date was not set within ninety days of the protest as the AHO was unaware of the Taxpayer's protest until the Request for Hearing was filed. However, the Taxpayer's protest was filed prior to the statutory change that now requires a hearing be held within 90 days of the protest.
6. On July 26, 2016, the Taxpayer filed a request for continuance of the hearing set on July 28, 2016.
7. On July 27, 2016, the request was granted and amended notices of hearing were sent.
8. During the tax years, the Taxpayer was engaged in business doing construction, maintenance, and equipment rental.
9. The Taxpayer was hired to do some work in New Mexico by a wind power company (the wind power company). The wind power company was a subcontractor for the overall project managing company (the project manager).
10. The Taxpayer provided a crane and a crane-operator to the wind power company and assisted in the construction of several windmills.
11. The Taxpayer invoiced the wind power company for the services it provided. The Taxpayer included a charge for gross receipts tax on its invoice.
12. The wind power company then executed a nontaxable transaction certificate (NTTC) to the Taxpayer on January 12, 2005. The type of NTTC was for construction.

13. The Taxpayer accepted payment from the project manager on behalf of the wind power company in the amount of the invoice for the services, but the gross receipts tax was not collected due to the Taxpayer's reliance on the NTTC.
14. The Taxpayer relied in good faith on the NTTC and deducted its sales to the wind power company from its gross receipts tax return, which resulted in zero tax liability.
15. Several years later, the Department issued a notice of audit to the Taxpayer.
16. On February 26, 2010, the Department issued a letter to the Taxpayer that informed the Taxpayer of the deadline to obtain any NTTCs (the 60-day letter).
17. The Taxpayer responded to the audit and provided documentation, including the NTTC, invoice, and payment information.
18. The Taxpayer did not protest the tax principal assessed, but still does not believe that the tax was owed. The Taxpayer protested the assessed interest.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for interest. The Taxpayer argued that it should not have to pay interest because it relied on the NTTC in good faith. The Department argued that the Taxpayer conceded the tax was owed by paying it and that interest is therefore due. The Department argued that the Taxpayer's reliance on the NTTC was not reasonable because it was the wrong type of NTTC for equipment rental. The Department also argued that the NTTC could not be used to deduct the gross receipts from the wind power company when the project manager was the one that actually made the payment.

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.

Gross Receipts Tax and Interest.

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 it was engaged in a service business doing construction, maintenance, and rentals. There was no dispute that the Taxpayer's services would ordinarily be subject to gross receipts tax. The Taxpayer argued that it did not pay tax because it relied on the NTTC. The Taxpayer argued that since it was entitled to rely on the NTTC, it should not have to pay 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). 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. Ordinarily, interest is not subject to abatement; however, interest is only due if the tax was due. *See* NMSA 1978, § 7-1-67.

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). Receipts from selling construction services or construction-related services can be deducted if a NTTC is issued. *See* NMSA 1978, § 7-9-52. 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 accepted a timely NTTC from the wind power company. The Taxpayer's understanding from the

wind power company, from the project manager, and from its own dealings with the Department regarding NTTCs led the Taxpayer to rely on the NTTC and caused it to believe that it did not owe gross receipts tax on its services performed for the wind power company. 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). Again, 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 transaction was deductible. As the transaction was deductible, the tax was not due and interest does not apply.

Burden shifted.

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. A properly executed NTTC is conclusive proof that the seller is entitled to the deductions. *See* NMSA 1978, § 7-9-43. 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 NTTC was not the correct type to be valid because it was for construction services. The Department argued that the Taxpayer was really leasing equipment and an operator, which is excluded from construction services by regulation. See 3.2.210.22 NMAC. The safe harbor protection will be conclusive 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, regardless of whether the NTTC was the correct type for the transaction or whether the transaction would have been eligible for a NTTC. 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 even when the transaction would not have been eligible for a NTTC). 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). See also *New Mexico Taxation and Revenue Dep't. v. Case Manager*, No. 32,940 mem. op. at ¶ 20 (N.M. Ct. App. April 29, 2015) (non-precedential) (holding that a timely but flawed NTTC followed by an untimely but correct NTTC did not entitle the Department to collect the same gross receipts tax on the same transaction twice). See also *In Re Southwest Mobile Service*, No. 34,551 mem. op. at ¶ 15-16 (N.M. Ct. App. July 25, 2016) (non-

precedential) (discussing the good faith harbor in light of improperly issued certificates). Therefore, the Department's position that the NTTC was the wrong type or prohibited by regulation cannot prevail.

The Department argued that the NTTC was not properly executed because the wind power company issued the NTTC, but the project manager paid the invoice. None of the cases cited above deal with proper execution of a NTTC. The statute is likewise silent on what "properly executed" means. *See* NMSA 1978, § 7-9-43. 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). "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. Nothing in the regulations prohibit the use of a NTTC by a buyer when the buyer is subcontracting for an overall project. *See id.* There is likewise no requirement that the payment come from the buyer who issues the NTTC. *See id.* In fact, the statute clearly contemplates that a buyer engaged in construction services might issue a NTTC to a subcontractor. *See* NMSA 1978, § 7-9-52 (allowing for buyers to issue NTTCs for construction services when those services are performed as part of and charged to an overall construction project). It is the buyer of the services who issues the NTTC, not the overall construction project. *See id.*

The Department argues that the payment from the project manager could have been for something other than the services performed for the wind power company. This is speculation at best, and it does not withstand the evidence presented by the Taxpayer. The Taxpayer has

maintained for more than a decade, throughout the course of the work, audit, and protest, that it was performing services for the wind power company and that the project manager made the payment on the wind power company's behalf. At the hearing, the Taxpayer pointed out the payment itself indicated that it was in reference to the wind power company and that it was in the exact amount owed by the wind power company. I found the Taxpayer's evidence to be credible. On its face, the NTTC was properly executed as required by the regulation. 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. Therefore, no tax was due, and interest does not apply.

Timeliness of hearing.

The Taxpayer expressed its concern that the Department waited several years to conduct the audit, and then waited almost another six years to refer the protest for hearing. The Taxpayer filed its protest on August 6, 2010. The Administrative Hearings Office first learned of the Taxpayer's protest when the Department filed a request for hearing on July 1, 2016, almost six years later. The Administrative Hearings Office promptly set the matter for hearing.

In 2010, there was not a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24 (2003). Currently, a hearing must be set within ninety days of the protest. *See* NMSA 1978, § 7-1B-8 (2015). However, there is no statutory or regulatory authority for the Hearing Officer to dismiss a previously filed protest for unreasonable and unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. Another taxpayer previously argued that the Department denied it the statutory right to a prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13. The court found that the general rule is that the tardiness of public officer's is not a defense to an action by the state. *See id.* The court noted that the statute did not provide a consequence for failure to comply with the requirements of a prompt hearing. *See*

id. Therefore, “[t]he general rule is applicable in these cases unless [the statute] makes it inapplicable.” *Id.* Another taxpayer argued that the failure of the hearing officer to render a decision in 30 days, as required by statute, divested the hearing officer of jurisdiction. *See also Kmart Properties, Inc. v. Taxation and Revenue Dep’t.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177. The court found that the tax statutory deadline was not jurisdictional because of the general tardiness rule and the heavy statutory presumption of correctness that favors the Department. *See id.* at ¶ 54. The court found that the statutory deadline did not affect the essential power to decide complex and time-consuming protests. *See id.* at ¶ 55. As there was not a statutory or regulatory violation in failing to refer the Taxpayer’s protest for such an extended period of time, there is no administrative remedy that can be granted.

CONCLUSIONS OF LAW

- A. The Taxpayer filed a timely written protest to the assessment of interest issued under Letter ID number L1903815744, and jurisdiction lies over the parties and the subject matter of this protest.
- B. The Taxpayer was in possession of a properly executed and timely NTTC for the sale of its services, which the Taxpayer accepted in good faith. *See NMSA 1978, § 7-9-43. See also NMSA 1978, § 7-9-52.*
- C. The Taxpayer successfully rebutted the presumption of correctness as an NTTC is conclusive evidence. *See NMSA 1978, § 7-9-43.*
- D. The Department failed to establish that the assessments were correct and failed to establish that NTTCs must be issued by the payor or will negate a taxpayer’s safe harbor protection. *See id. See also 3.2.201.8 and 3.2.201.9 NMAC. See also Leaco, 1974-NMCA-076. See also In Re Southwest Mobile Service, No. 34,551 mem. op. at ¶ 15-16 (N.M. Ct. App. July 25, 2016) (non-precedential).*

E. As the Taxpayer was entitled to deduct the gross receipts, it owed no gross receipts taxes. Therefore, interest does not apply. *See* NMSA 1978, § 7-1-67.

F. The Taxpayer's hearing was not required to be set within 90 days of the protest because the protest was filed prior to the statutory change, and there is no administrative remedy to the Department's tardy referral of the protest for hearing. *See* NMSA 1978, § 7-1-24 (2003). *See also* NMSA 1978, § 7-1B-8 (2015). *See also Ranchers-Tufco*, 1983-NMCA-126, ¶ 13.

For the foregoing reasons, the Taxpayer's protest is **GRANTED and the interest assessed is HEREBY ABATED.**

DATED: November 30, 2016.

Dee Dee Hoax

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

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.