

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

**IN THE MATTER OF THE PROTEST OF
DIAMOND T US MAIL SERVICES INC.
TO DENIAL OF REFUND
ISSUED UNDER LETTER ID NO. L1873411120**

17-02

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on December 5, 2016 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Esteli Juarez, Esq., appeared representing Diamond T U.S. Mail Services, Inc. (“Taxpayer”). Linda Anaya and Raymond Anaya appeared and testified as witnesses for the Taxpayer. John Anaya, son of Linda Anaya and Richard Anaya, observed with the expressed authorization of Taxpayer’s counsel. Staff Attorney Peter Breen appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Tom Dillon appeared as a witness for the Department. Protest Auditor Juan Trujillo was also present for observation and training purposes. Department Exhibit A and Taxpayer Exhibit 1 were admitted into the record without objection. 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 December 28, 2015, through Letter ID No. L1873411120, the Department denied Taxpayer’s claim for refund of \$179,732.03 in CRS taxes for the reporting ending July 31, 2015.
2. On January 8, 2016, the Department received Taxpayer’s protest of the Department’s denial of claim for refund. The protest was submitted by and through Raymond

Anaya of AAA Gross Receipts Consulting and Tax Service, LLC. As grounds for the protest, Mr. Anaya indicated that Taxpayer was not a star route contractor with the United States Postal Service and that Taxpayer had incorrectly reported receipts earned in interstate commerce.

3. Taxpayer executed a Tax Information Authorization on August 26, 2015 authorizing Mr. Anaya and AAA Gross Receipts Consulting and Tax Service, LLC to represent it in reference to all state and CRS taxes for any year.

4. On January 14, 2016, the Department's protest office acknowledged receipt of a valid protest.

5. On February 29, 2016, the Department filed a Hearing Request with the Administrative Hearings Office notifying it of the above-captioned protest and requesting a hearing.

6. On March 7, 2016, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference, setting this matter for a scheduling hearing on March 25, 2016.

7. On March 25, 2016, a scheduling conference occurred in which the parties agreed that the hearing would satisfy the 90-day hearing requirement established in NMSA 1978, Section 7-1B-8 (A). The hearing occurred within 90 days of the date the Department received the protest.

8. On March 28, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing. A hearing on the merits was set for October 20, 2016 at 10 a.m.

9. On April 5, 2016, the Department filed a Certificate of Service indicating that the Department's First Set of Requests for Production of Documents and Interrogatories were served on Mr. Anaya by first class U.S. Mail on the same date.

10. On October 7, 2016, the Department filed its portion of the required Joint Prehearing Statement.

11. On October 17, 2016, Mr. Anaya filed on Taxpayer's behalf a request for a continuance. The request asserted that Taxpayer retained Mr. Santiago Juarez to represent it in the matter and Mr. Juarez required additional time to prepare.

12. On October 19, 2016, the Department indicated by email that it did not oppose the request for a continuance.

13. On October 19, 2016, the Administrative Hearings Office granted the request and entered a Continuance Order, Notice of Reassignment, and Amended Notice of Administrative Hearing. The order reassigned the protest to the undersigned Hearing Officer and set a hearing on the merits to occur on December 5, 2016.

14. On December 5, 2016, Esteli Juarez, Esq., of Amparo Legal Services entered an appearance on behalf of Taxpayer.

15. Mr. Anaya owns and operates AAA Gross Receipts Consulting and Tax Service, LLC. He has provided tax services to Taxpayer since 2015. **[Testimony of Mr. Anaya].**

16. Taxpayer is a mail courier under an HCR contract, also known as a Highway Contract Route, with the United States Postal Service. **[Testimony of Mr. Anaya; Testimony of Ms. Anaya].**

17. Under the HCR contract, Taxpayer transports mail over highways between designated points. **[Taxpayer Ex. 1].**

18. In this case, Taxpayer transports mail in bulk from Lubbock, Texas to various post office distribution sites in New Mexico. Specific delivery locations identified by Mr. Anaya include Roswell, Tatum, Lovington, Eunice, Jal, and Hobbs, New Mexico. **[Testimony of Mr. Anaya].**

19. Taxpayer also picks up mail from the distribution sites for transportation back to Lubbock, Texas. **[Testimony of Mr. Anaya].**

20. Mr. Anaya on Taxpayer's behalf submitted a claim for refund in the amount of \$179,732.03. Mr. Anaya testified that the claim for refund relied on NMSA 1978, Section 7-9-55 and NMSA 1978, Section 7-9-56. **[Testimony of Mr. Anaya].**

21. The claim for refund was submitted in October of 2015 and denied in December of 2015. The Department denied the refund claiming that the Taxpayer was a star route contractor. **[Testimony of Mr. Anaya].**

22. Mr. Anaya and Ms. Anaya allege that the term star route contractor is obsolete and for that reason, serves as an improper basis upon which to deny the claim for refund. **[Testimony of Mr. Anaya; Testimony of Ms. Anaya].** Ms. Anaya also works at with AAA Gross Receipts Consulting and Tax Service, LLC.

23. Despite Taxpayer's assertions regarding the term "star route contractor" or "star route," Taxpayer Exhibit 1, which derives from a publication of the United States Postal Service suggests that the term "star route" has been replaced by "HCR" or "Highway Contract Route." **[Taxpayer Ex. 1].**

24. The Department attempted to obtain logs from the Taxpayer for the purpose of apportioning taxes between services provided in New Mexico and those provided in interstate

commerce. The Department did not receive any documents responsive to its request.

[Department Ex. A; Testimony of Mr. Dillon].

DISCUSSION

Although the Department did not issue Taxpayer an assessment in this matter, Taxpayer still has the burden of establishing it was entitled to the claimed refund at issue. Taxpayer's claim for refund is premised on a deduction from gross receipts tax. "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." *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; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Consequently, Taxpayer still must show that it is entitled to the deduction that is the basis of its claim for refund.

This case involves the question of whether Taxpayer is entitled to a refund of taxes paid on gross receipts for delivery of U.S. mail transported between Lubbock, Texas and various delivery points in New Mexico under a contract with the United States Postal Service. Taxpayer argued that the refund is due under NMSA 1978, Section 7-9-55 and Section 7-9-56.

The Department did not contest that the Taxpayer could be entitled to a deduction and a refund under either statute upon presenting proper documentation. The problem from the perspective of the Department is that the Taxpayer did not provide the necessary documentation to establish the right to the deduction. **[Testimony of Mr. Dillon; Dept. Ex. A].** It was because

Taxpayer failed to provide adequate documents that the Department was unable to approve Taxpayer's refund.

The documents that the Department determined would be relevant in considering the claim for refund are addressed in Regulation 3.2.213.10 B (1) NMAC which provides that a person who holds a contract for the transportation of United States mail from points within New Mexico to other points outside of New Mexico may deduct a portion of gross receipts which were derived from transactions in interstate commerce. Regulation 3.2.213.10 B (2) NMAC provides the method by which the deduction is calculated. The total receipts from the contract are to be multiplied by a fraction, the numerator of which is the total number of delivery points in New Mexico and the denominator of which is the total number of delivery points. The term "delivery point" is used to denote any point at which mail is required to be delivered under the contract.

The Taxpayer asserted that Regulation 3.2.213.10 did not apply because the regulation makes specific reference to "star route contractors." The Taxpayer argued that it is not a star route contractor and for that reason, Regulation 3.2.213.10 is inapplicable.

The contract under which Taxpayer provides service is known as an HCR contract or a Highway Contract Route. [**Testimony of Mr. Anaya**]. The term as defined by the United States Postal Service, as provided in Taxpayer Exhibit 1 denotes:

A route of travel served by a postal contractor to carry mail in bulk over highways between designated points. HCRs generally do not deliver mail to individual customer addresses along the line of travel. Highway contract routes make up the largest single group of transportation services used by USPS and range from long-haul tractor trailers to box delivery routes. (*Formerly called star route.*)

(Emphasis added)

Although Mr. Anaya and Ms. Anaya both allege that the HCR contract is distinct from a star route contract, a term they both assert to be obsolete, Taxpayer Exhibit 1 suggests via the emphasized parenthetical that they are the same, but under different designations. Accordingly, the Hearing Officer interprets the parenthetical as signifying that the term “star route” has been supplanted by “HCR” or “Highway Contract Route”, but that the underlying definitions are functionally equivalent.

To the extent a contrary interpretation could be attributed to the parenthetical in Taxpayer Exhibit 1, Taxpayer did not present any evidence or testimony from witnesses having personal knowledge or expertise regarding the procedures or operations of the United States Postal Service, who could have established a material distinction between the terms.

The testimony of Mr. Anaya and Mrs. Anaya established that the Taxpayer held a contract for the transportation of mail from Lubbock, Texas to points within New Mexico, and from points within New Mexico back to Lubbock, Texas. [**Testimony of Mr. Anaya; Testimony of Ms. Anaya**]. Regardless of the terminology favored by the Taxpayer, the activity falls squarely within the scope of Regulation 3.2.213.10.

For this reason, the Department sought documentation from the Taxpayer to determine the portion of the receipts from the contract which were subject to gross receipts tax. The Department presumably intended to identify the total receipts from the contract and then multiply that figure by a fraction, the numerator of which is the total number of delivery points in New Mexico and the denominator of which is the total number of delivery points. *See* Regulation 3.2.213.10 (B) (2) NMAC. However, the documents that the Taxpayer provided were insufficient. [**Testimony of Mr. Dillon**].

The evidence presented at the hearing was also insufficient to clearly establish the right to the deduction upon which the claim for refund relies. The evidence upon which the Taxpayer relied was the testimony of Mr. Anaya, Mrs. Anaya, and Taxpayer Exhibit 1, much of which was directed at asserting that the Regulation 3.2.213.10 was inapplicable because the Taxpayer was not a “star route contractor.” Otherwise, the record is devoid of any evidence upon which findings of fact may be made to establish the portion of the receipts from the contract subject to gross receipts tax from those receipts which are not, and consequently establish the amount of a deduction and resulting refund. Relevant evidence on the issue subject of this protest may have included the Taxpayer’s contract with the United States Postal Service, testimony from the Taxpayer regarding his business activities, relevant records tending to establish the total receipts from the contract, the total number of delivery points in New Mexico, the overall number of delivery points, and records which may have established whether there was any intrastate delivery of mail.

Even if the Hearing Officer would have been persuaded that the use of the allegedly outdated term, “star route”, rendered Regulation 3.2.213.10 inapplicable, the Taxpayer nevertheless failed under NMSA 1978, Section 7-9-55 to present evidence that the imposition of gross receipts taxes in the context of Taxpayer’s business activities was unlawful under the United States constitution. Section 7-9-55 (A) provides that “[r]eceipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.”

Reliance on NMSA 1978, Section 7-9-56 fails for the same reason. Section 7-9-56 provides that “[r]eceipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property, including any special

or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce under a single contract.” The evidence presented was once again insufficient for the Taxpayer to establish the right to the claimed deduction.

For example, to deduct receipts under Section 7-9-56 (A), a taxpayer is required to show three items: 1) the receipts must be from transporting persons or property from one point to another in New Mexico; 2) the transportation must have been in interstate commerce; and 3) the transportation must have been under a single contract. *See McKinnley Ambulance Serv. v. Bureau of Revenue*, 92 N.M. 599, 592 P.2d 515 (Ct.App.1979). The evidence presented in this protest was insufficient to establish any of the elements under *McKinnley*. As previously explained, Taxpayer relied only on the testimony of Mr. Anaya, Mrs. Anaya, and Taxpayer Exhibit 1. The Taxpayer did not seek to introduce any contract it had with the United States Postal Service, or other records to establish any of the essential elements in establishing a right to claim a deduction under Section 7-9-56 (A).

Because the Hearing Officer has made frequent references to the lack of evidence in this protest, the Hearing Officer will state as a final remark that at the onset of the hearing, the Hearing Officer summarized the contents of the administrative file in this protest. Taxpayer’s counsel and witnesses were also permitted to review the administrative file and the parties were informed that if either party wished for the Hearing Officer to consider other documents as part of the record, the party was required to introduce those documents into the record as part of the presentation of their case. Having reviewed the administrative file, Taxpayer elected only to introduce Taxpayer Exhibit 1 as an exhibit and rely on the testimony of Mr. Anaya and Mrs. Anaya. Without more, Taxpayer has failed to establish a right to the claimed deduction and the resulting refund.

Based on the insufficiency of evidence presented at the protest hearing in this case, the Taxpayer's protest must be denied.

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 and held within 90-days of the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not establish entitlement to any refund with the evidence it presented at hearing.

For the foregoing reasons, the Taxpayers' protest **IS DENIED**. Taxpayer did not establish it was entitled to any refund for the July 31, 2015 reporting period.

DATED: January 4, 2017.



Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office 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 be preparing the record proper.