STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF **17-06**
RANDALL & JUDITH GILBERT
TO ASSESSMENT
ISSUED UNDER LETTER ID NO. L0560913456

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on December 20, 2016 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, John P. McKinley, Jr., C.P.A., of Woodard, Cowen & Co., C.P.A., represented Randall and Judith Gilbert ("Taxpayer") and testified on their behalf. Staff Attorney, Peter Breen, appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Nicholas Pacheco appeared as a witness for the Department. Taxpayer Exhibit #1 and Department Exhibits A – B were admitted into the record. Taxpayer Exhibit #2 was not admitted into the evidentiary record, but was accepted for the record of the hearing. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. On January 11, 2017, the Hearing Officer requested additional information pertaining to a Secretary Ruling to which the Taxpayer referred at the hearing and in his Formal Protest. The deadline to respond to that inquiry was January 20, 2017. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 3, 2015, through Letter ID No. L0560913456, the Department assessed Taxpayer for $75,019.81 in gross receipts tax, $15,003.96 in penalty, and $10,974.46 in

interest for a total assessment of $100,998.23 for the CRS reporting periods from January 1, 2008 through December 31, 2012.

2. On March 2, 2016, Taxpayer protested the Department's assessment.

3. The Department received the protest on March 2, 2016.

4. On March 7, 2016, the Department's protest office acknowledged receipt of a valid protest in this matter.

5. On April 15, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

6. On April 18, 2016, the Administrative Hearings Office sent Notice of Telephonic Scheduling Hearing, setting this matter for a scheduling hearing on May 13, 2016.

7. On May 13, 2016, the Taxpayer filed a Tax Information Authorization to authorize representation by John P. McKinley, Jr., C.P.A., of Woodard, Cowen & Co., C.P.A. in all state tax matters for any year.

8. On May 13, 2016, the Administrative Hearings Office issued an Amended Notice of Telephonic Scheduling Hearing, setting this matter for a scheduling hearing on May 27, 2016.

9. On May 27, 2016, within 90-days of the Department's receipt and acknowledgement of a valid protest, the Administrative Hearings Office conducted a scheduling hearing in the above-captioned matter. Neither party objected that conducting the scheduling hearing satisfied the 90-day hearing requirement under the statute while also allowing for discovery, motions, and other prehearing activities intended to allow the parties to prepare for an ample and fair presentation of their respective cases pursuant to NMSA 1978, Sec. 7-1-24.1 and NMSA 1978, Sec. 7-1B-6 (D)(2016).

10. On May 27, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting various deadlines for discovery and motions, and setting the matter for a hearing on the merits on December 20, 2016.

11. The assessment subject of this protest arose from a Schedule C mismatch. **[Testimony of Mr. Pacheco]**.

12. Taxpayer, Randall Gilbert, owns and operates a business in which he sells custom or semi-custom cabinetry to building contractors or individual customers from his place of business in Farwell, Texas. The typical transaction involves a building contractor or individual customer placing an order with Taxpayer, which he submits to the manufacturer. The manufacturer ships the product directly to the installation site where the building contractor or individual customer install the product. Taxpayer does not perform installation services. **[Testimony of Mr. McKinley]**.

13. Taxpayer established his business in Texas because there was a manufacturer that refused to conduct business with him so long as he was operating in New Mexico. **[Testimony of Mr. McKinley]**.

14. Taxpayer filed Personal Income Tax returns in New Mexico. **[Testimony of Mr. McKinley].**

15. Farwell, Texas borders the Texas-New Mexico boundary and the municipality of Texico, New Mexico.

16. Depending on the circumstances, Taxpayer may visit a construction site to obtain measurements or may rely on the building contractor or customer for measurements. **[Testimony of Mr. McKinley]**.

17. Taxpayer may generate a computer rendering to enable the building contractor or individual customer to visualize the installed and finished product. **[Testimony of Mr. McKinley]**.

18. In the typical transaction, the Taxpayer invoices the building contractor or individual customer. Taxpayer then makes payment to the manufacturer, less the portion of the sales price, which it retains, to which Mr. McKinley referred to as the upcharge. **[Testimony of Mr. McKinley]**.

19. Since 2008, Taxpayer has sold goods and associated services to building contractors and individual customers in Texas and New Mexico. Sales to building contractors were mostly for use in remodel and new construction projects. Associated services may include taking measurements and creating computer renderings of the installed product. **[Testimony of Mr. McKinley; Taxpayer Ex. 1]**.

20. Some sales to building contractors may have also consisted of product samples. **[Testimony of Mr. McKinley]**.

21. Taxpayer's invoice summary reflects sales to New Mexico building contractors and individual customers, in which the manufacturer shipped the product to a New Mexico address or construction site, in the total amount of $1,495,208.75 between September 28, 2008 through December 18, 2012. **[Testimony of Mr. McKinley; Taxpayer Ex. 1]**.

22. During the same period of time, sales to out-of-state building contractors and individual customers, in which the manufacturer shipped the product to a non-New Mexico address or construction site, totaled $89,273.72. **[Taxpayer Ex. 1]**.

23. On May 22, 2015, the Taxpayer was provided with a Notice of Limited Scope Audit Commencement – 60 Day Notice. The Taxpayer was notified that he had 60 days to obtain

and submit nontaxable transaction certificates ("NTTC or NTTCs") to the Department on or before July 21, 2015. **[Testimony of Mr. Pacheco; Department Exhibit B]**.

24. Taxpayer requested NTTCs from the general contractors with whom he conducted business during the relevant periods of time. **[Testimony of Mr. McKinley]**.

25. The Taxpayer was not able to obtain NTTCs for any of the transactions subject of the assessment and resulting protest. **[Testimony of Mr. McKinley]**.

26. Prior to the assessment being issued in this matter, the Taxpayer was not registered with the State of New Mexico for gross receipts tax reporting or payment. **[Testimony of Mr. Pacheco]**. Taxpayer was assigned a CRS number as part of the audit and assessment process. **[Testimony of Mr. McKinley].**

27. The Department's GenTax database did not reflect any communications with the Taxpayer except for a contact in January of 2016 in reference to NTTCs. The Taxpayer was referred to the auditor then handing Taxpayer's matter. The assessment at issue was issued the previous month. **[Testimony of Mr. Pacheco]**.

28. The Department's GenTax system does not reflect any conversations between Taxpayer or an authorized representative that address whether or not any sales of good or services were taxable under the New Mexico Gross Receipts and Compensating Tax Act. **[Testimony of Mr. Pacheco]**.

29. If Taxpayer would have possessed the appropriate NTTCs, then the Department could have allowed appropriate deductions as provided by the Gross Receipts and Compensating Tax Act. **[Testimony of Mr. Pacheco; Department Exhibit B]**.

30. A significant amount of Taxpayer's goods and associated services were resold by general contractors through remodel projects or new construction. However, there is no

mechanism available to determine whether the contractors paid the gross receipts tax on the gross receipts deriving from what would have been the final taxable transaction in the absence of NTTCs. **[Testimony of Mr. Pacheco]**.

31. Taxpayer did not pay gross receipts taxes on sales of goods or associated services to individual customers. **[Testimony of Mr. McKinley]**.

32. The services provided to Taxpayer by John P. McKinley, Jr., C.P.A., and Woodard, Cowen & Co., C.P.A. have been limited to federal and New Mexico state income tax matters only. John P. McKinley, Jr., C.P.A., and Woodard, Cowen & Co., C.P.A. did not provide services concerning gross receipts taxes prior to the assessment being issued in this matter. **[Testimony of Mr. McKinley]**.

33. As of December 20, 2016, Taxpayer's outstanding liability was $75,019.81 in gross receipts tax, $15,003.96 in penalty, and $13,799.59 in interest. **[Testimony of Mr. Pacheco; Department Exhibit A]**.

34. The outstanding liability as provided in Department Exhibit A reflects an adjustment made for out-of-state sales to out-of-state customers. **[Testimony of Mr. Pacheco; Department Exhibit B].** Consequently, the claimed tax liability is limited to receipts generated from sales of goods and associated services to New Mexico contractors and individual customers.

35. On January 11, 2017, the Hearing Officer requested that the parties cooperate in providing a copy of Secretary Ruling 422-00-1. Despite references to the cited ruling at the hearing on the merits, and in the Taxpayer's Formal Protest, the Hearing Officer was not able to locate the cited ruling at http://www.tax.newmexico.gov/rulings.aspx. On January 19, 2017, Taxpayer's representative responded that his reference to the ruling was actually a reference to

an email in which the Taxpayer's attention was directed to NMSA 1978, Sec. 7-9-55. The Department did not provide any response to the correspondence of January 11, 2017.

DISCUSSION

It was apparent at the conclusion of the hearing in this protest that there was minimal dispute of the material facts in this matter. The Taxpayer sold construction materials and associated services from his primary business location in Farwell, Texas to New Mexico customers and building contractors for use in New Mexico remodel and new construction projects.

From September 28, 2008 through December 18, 2012, total sales were $1,584,482.47 with sales to New Mexico building contractors and individual customers accounting for more than 94 percent of those sales. **[Taxpayer Ex. 1]**. When a Schedule C mismatch revealed that Taxpayer earned income from his business activities that he reported on his Schedule C, but which was never reported in New Mexico, the Department afforded the Taxpayer with an opportunity to provide additional documents to substantiate that the gross receipts were not subject to taxation. Among the documents requested were NTTCs. **[Testimony of Mr. Pacheco; Dept. Ex. B]**. Despite his efforts, Taxpayer was not able to obtain any NTTCs for any transaction in any reporting period subject of the protest. **[Testimony of Mr. McKinley]**.

Presumption of Correctness.

Under NMSA 1978, Sec. 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, Sec. 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of

correctness under Sec. 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 and NTTCs

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, Sec. 7-9-4 (2002). Under NMSA 1978, Sec. 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, Sec. 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, Sec. 7-9-5 (2002).

A taxpayer engaged in business may be able to deduct certain gross receipts when they are provided with NTTCs from buyers. *See* NMSA 1978, Sec. 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 60-day deadline set by the Department. *See* NMSA 1978, Sec. 7-9-43.

The New Mexico Gross Receipts and Compensating Tax Act provides various deductions of gross receipts tax. One deduction potentially applicable to the transactions in question is provided by NMSA 1978, Sec. 7-9-51 for the sale of construction materials to persons engaged in the construction business:

> A. 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.

The deduction is premised on the sale of a construction material for resale when the resale occurs in the regular course of business and the resale is subject to New Mexico gross receipts tax. Here, the evidence established that, with concern for sales to building contractors, the products were incorporated into finished construction projects intended for resale with applicable gross receipts tax being paid at the conclusion of the final taxable transaction. *See* Regulation 3.2.209.7 NMAC (establishing that the construction material must be an intended part of the finished project); *See* Regulation 3.2.209.22 NMAC (construction material includes "fixtures" as defined by Regulation 3.2.1.11(H)(1) NMAC); *See* Regulation 3.2.1.11(H)(1) NMAC (a "fixture" includes tangible property that is firmly attached to the realty to constitute part of the construction project, including kitchen equipment).

Thus, so long as Taxpayer met the NTTC requirements provided above, the transaction in question would fall under the sale of construction materials to persons engaged in the construction business under Sec. 7-9-51. It was for this reason that the Department provided Taxpayer with an

additional 60 days to obtain NTTCs to establish the right to the deductions for such sales. **[Testimony of Mr. Pacheco; Dept. Ex. B]**. The Taxpayer was unable to obtain any NTTCs. **[Testimony of Mr. McKinley]**. Although the transactions at issue themselves may have qualified for this deduction, because Taxpayer did not possess NTTCs, Taxpayer did not satisfy the NTTC requirement of this deduction and the Department was unable to permit any deductions on this basis.

To the extent there could be other deductions that could arguably be applicable upon delivery of an appropriate NTTC, those claims would fail for the same reason. The Taxpayer was unable to obtain any single NTTC for any transaction during the period subject to protest. **[Testimony of Mr. McKinley]**.

Taxpayer's inability to obtain NTTCs is regrettable. When the transaction takes place, the parties should have a mutual interest in cooperation and convenient access to all documentation, which makes that the ideal time to obtain an NTTC. Usually, a 60-day letter is issued months or years after a transaction occurs. With time, records can be misplaced or destroyed, businesses can cease to exist, business relationships can become acrimonious, and the motivation for cooperation can deteriorate. When a taxpayer "is not in possession of the required [NTTCs] within sixty days from the date that the notice…is given…, deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates *shall be disallowed*". NMSA 1978, Sec. 7-9-43 (A) (emphasis added). The word "shall" indicates that the denial of the deduction is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n,* 2009-NMSC-013, ¶ 22, 146 N.M. 24. Under the circumstances presented, Taxpayer is not able to meet its burden. Taxpayer could not present any NTTCs covering any transaction during any period subject of the protest.

Statutory and Equitable Estoppel

The Taxpayer asserted that the Department should be estopped from assessing him based on a conversation with a Department employee in which he understood that his business activities were not subject to gross receipts tax. In addition to such conversation, Taxpayer received an email on February 3, 2016 indicating that "receipts 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." **[Testimony of Mr. McKinley]**. Although a copy of the email was not introduced in evidence, the language read into the record by Mr. McKinley, is a direct quotation of the statutory language contained in NMSA 1978, Sec. 7-9-55. Taxpayer also asserted reliance on Secretary Ruling 422-00-1. **[Testimony of Mr. McKinley; Formal Protest]**. However, Secretary Ruling 422-00-1 could not be located and upon further inquiry of the parties and their representatives, Taxpayer's representative clarified that this reference to Secretary Ruling 422-00-1 was intended as a reference to the same email he read into the record.

Nevertheless, NMSA 1978, Sec. 7-1-60 (1993) provides for statutory estoppel in certain circumstances. In pertinent part, under Sec. 7-1-60, the Department is estopped from acting when a taxpayer's actions were "in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary…" The evidence presented in this protest did not establish that the Taxpayer's actions, at the time the various transactions occurred, were in accordance with any regulation effective during the time the asserted liability arose or in accordance with any ruling addressed to him personally in writing by the secretary. The email from February of 2016 was subsequent to all transactions eventually giving rise to the protest. Moreover, the email

simply directed the Taxpayer to NMSA 1978, Sec. 7-9-55. It did not attempt to instruct or advise the Taxpayer on how to assert a deduction under the statute.

Nevertheless, taxpayers are entitled to assert claims for deductions for receipts from transactions in interstate commerce. However, the deduction only applies to the extent the imposition of the gross receipts tax would be unlawful under the United States constitution. The Taxpayer did not present such evidence in this case.

However, when an interstate transaction occurs, *Kmart Corp. v. N.M. Taxation & Revenue Dep't.*, 2006-NMSC-006, ¶11, 139 N.M. 172, 131 P.3d 22 should be applied to the transaction to determine whether the sale is taxable in New Mexico. In *Kmart*, the New Mexico Supreme Court set out a two-part analysis to determine whether the gross receipts tax applies in multistate transactions. The first part of the test is whether the Legislature intended to tax the sale of products from Taxpayer, an out-of-state corporation, to customers in New Mexico.

Generally speaking NMSA 1978, Section 7-9-2 (1966) provides that the Gross Receipts Tax Act is intended to "provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax." In *Dell Catalog Sales, LP v. N.M. Taxation & Revenue Dep't.*, 2009-NMCA-001, ¶30, 145 N.M. 419, 199 P.3d 863, the court held that for purposes of determining whether an interstate transaction is a taxable sale under gross receipts tax law, the "destination principle" applies. The "destination principle" is defined as taxing the sale of goods that cross state lines at the point of destination or where the goods are consumed, which may be different from the point of delivery and where title is transferred. In *Dell*, the assumption is that the goods are consumed at the destination. *Dell Catalog Sales, LP*, 2009-NMCA-001, ¶28. It is

clear from *Dell* that if an out-of-state seller sells goods that are delivered in New Mexico, and consumed in New Mexico, then gross receipts tax applies on the sale of the goods. However, the *Dell* court also found that its analysis did not "apply in cases where the entire transaction occurs out-of-state and the parties are present out-of-state at the time and place of the transaction." *Dell Catalog Sales, LP*, 2009-NMCA-001, ¶25. The court concluded that "in those circumstances, the transaction is clearly not a sale "in NM for purposes of the Act." *Dell Catalog Sales, LP*, 2009-NMCA-001, ¶25. There is insufficient evidence in this case to find that the entire transaction took place out of state. Rather, the evidence establishes that the destination principle should apply.

In this protest, an overwhelming majority (94%) of Taxpayer's receipts during the period in protest derived from sales to building contractors and individual customers in New Mexico. Building contractors or individual customers would communicate their product preferences to Taxpayer, who occasionally came into New Mexico to take measurements. Taxpayer would then place the order with the manufacturer, which then shipped the product to New Mexico, where the buyer took possession at the location where the goods were to be affixed to the realty. Based on the foregoing, the sale of the goods was taxable in New Mexico. Taxpayer has not presented sufficient evidence to rebut this conclusion.

Taxpayer's argument may also be construed as asserting a claim for equitable estoppel. However, the availability of equitable estoppel for providing the relief the Taxpayer seeks is questionable in an administrative protest hearing. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 1994-NMSC-085, ¶18, 118 N.M. 273 (equitable remedies are not part of the "quasi-judicial" powers of administrative agencies). Even if it is available in this context, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving

the assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr., Inc.,* 1989-NMSC-015, ¶9, 108 N.M. 22. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Bien Mur Indian Market*, ¶9. Oral statements not reduced to writing are generally not grounds to grant equitable estoppel. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440. Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

Under *Kilmer*, ¶26 (internal citations omitted), in order for a taxpayer to establish an equitable estoppel claim against the Department, a taxpayer must show that

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury.

The claimant must also show "affirmative misconduct on the part of the government." *id*., ¶27 (internal citations omitted). There is simply no evidence to suggest affirmative misconduct by any employee of the Department with whom the Taxpayer may have communicated.

Penalty and Interest

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, Sec. 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. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent

clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full.

The Department has no discretion under Sec. 7-1-67 and must assess interest against Taxpayer from the time the tax was due, but not paid, until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and the Department is without legal authority to abate it despite the Taxpayer's lack of bad faith.

With concern for penalty, 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, NMSA 1978 Sec. 7-1-69 (2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(*italics* added for emphasis).

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 meet the legal definition of "negligence" even if, like here, Taxpayer's actions or inactions were unintentional.

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." In this case, Taxpayer was negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC due to inaction in failing to pay gross receipts tax when due resulting from the erroneous belief that the income derived from the business activity did not give rise to gross receipts tax obligations.

In instances where a taxpayer might come within the definition of civil negligence generally subject to penalty, Sec. 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not provide for abatement of penalty in this case.

The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty may be abated. Based on the argument of Taxpayer and the evidence presented, only two factors under Regulation 3.1.11.11 NMAC are potentially pertinent in this proceeding:

> A. the taxpayer proves the taxpayer was affirmatively misled by a department employee;
>
> …
>
> D. the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent;

There is no evidence to establish that the taxpayer was affirmatively misled by a department employee under Regulation 3.1.11.11 (A) NMAC. At the most, the evidence established that *after* the assessment resulting in the protest, a Department employee directed the Taxpayer to NMSA 1978, Sec. 7-9-55 without providing any additional advice or instruction.

There is also a lack of evidence under Regulation 3.1.11.11 (D) NMAC to establish that the Taxpayer's failure to pay the tax was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts. The evidence established that Taxpayer did not seek counsel until after the Department issued its assessment.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. In contrast, there was no dispute that the issue giving rise to this protest was the result of Taxpayer's inadvertence, erroneous belief, or inattention. In other words, Taxpayer's conduct was not in bad faith or with dishonest intentions. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 (A) and (D) NMAC do not provide grounds for abatement of the penalty in this case. Therefore, Taxpayer has not overcome the presumption of correctness and failed to establish an entitlement to an abatement of penalty in this matter.

The result is unfortunate. 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. Had Taxpayer consulted a tax professional or made a more thorough inquiry regarding his tax responsibilities prior to engaging in business, the results might be different.

Since the Taxpayer did not establish the right to the claimed deduction, or entitlement to an abatement of the assessed interest or penalty, the Taxpayer's protest should be 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, Sec. 7-1B-8 (2015).

C. Taxpayer did not qualify for any deduction under NMSA 1978, Sec. 7-9-51 because Taxpayer did not possess nontaxable transaction certificates at the time of the transactions subject of the protest or within the 60-day deadline set by the Department in accordance with NMSA 1978, Sec. 7-9-43.

D. Taxpayer did not establish that the right to a deduction pursuant to NMSA 1978, Sec. 7-9-55 because Taxpayer did not prove that the application of the gross receipts tax would be unlawful under the United States constitution under the circumstances of this protest.

E. Taxpayer did not prove entitlement to statutory estoppel pursuant to NMSA 7-1-60 (1993) or equitable estoppel under K*ilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440.

F. Taxpayer did not overcome the presumption of correctness that attached to the assessment under NMSA 1978, Sec. 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

For the foregoing reasons, the Taxpayer's protest **IS DENIED.**

DATED: January 31, 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 (2015), 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.