BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
JASON P. ABLE **No. 10-07**
TO ASSESSMENTS ISSUED UNDER
LETTER ID # L2086641024 & L1737809280

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 27, 2010, before Brian VanDenzen, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Ms. Silvia Sena also appeared as a witness on behalf of the Department. Jason P. Able appeared and represented himself pro se ("Taxpayer"). Mr. Raymond Anaya also appeared as a witness on behalf of Mr. Able. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Since 2001, the Taxpayer has contracted with various entities in the Carlsbad area as an oil-well pumper. An oil-well pumper monitors, maintains, and performs services (or call others to perform certain tasks) on oil-wells located across a broad geographical region on a daily basis.

2. In the tax year ending in December 2005 ("TY05") and again in the tax year ending in December 2006 ("TY06"), Taxpayer had a contract with his father's business, Able Pumping Service, as an oil-well pumper.

3. During TY05 and TY06, Taxpayer believed that his father's business, Able Pumping Service, was responsible for the payment of Gross Receipts to the State of New Mexico.

4. At the time Taxpayer performed services for Able Pumping Service in TY05 and TY06, Taxpayer did not ask for and did not possess a nontaxable transaction certificate ("NTTC") from Able Pumping Service.

5. As part of an information-sharing program with the Internal Revenue Service ("IRS') known as the "Tape-Match Program", the Department was notified of the business income reported on Schedule C to the Taxpayer's 2005 and 2006 Federal income tax return.

6. The Department found some discrepancies between the Taxpayer's Schedule C IRS filing and the Taxpayer's 2005 and 2006 New Mexico State Combined Reporting System ("CRS") returns.

7. On September 3, 2008, the Department sent the Taxpayer a notice that it was conducting a limited scope audit of his 2005 Gross Receipts tax reporting because of the mismatch between the Taxpayer's Schedule C 2005 IRS return and the Taxpayer's 2005 CRS state return. [Department A]

8. The Department mailed this September 3, 2008 notice to "Jason P Able, 15 Red Juniper Road, Carlsbad, NM 88220-9414", the same address that Taxpayer listed in his letter of protest in this matter and same address reported to the Department by the IRS as part of the tape-match program. [Department A]

9. The Department's September 3, 2008 notice advised the Taxpayer that, pursuant to NMSA 1978, Section 7-9-43 (2005), he must be in possession of all NTTCs required to

support his deductions for TY05 within 60 days from the date of that letter. The 60-day period expired on November 2, 2008. [Department A]

10. On September 3, 2008, the Department sent the Taxpayer a notice that it was conducting a limited scope audit of his 2006 Gross Receipts tax reporting because of the mismatch between the Taxpayer's Schedule C 2006 IRS return and the Taxpayer's 2006 CRS state return. [Department B]

11. The Department mailed this September 3, 2008 notice of limited scope audit for TY06 to "Jason P Able, 15 Red Juniper Road, Carlsbad, NM 88220-9414", the same address that Taxpayer listed in his letter of protest in this matter and same address reported to the Department by the IRS as part of the tape-match program. [Department B]

12. The Department's September 3, 2008 notice advised the Taxpayer that, pursuant to NMSA 1978, §7-9-43 (2005), he must be in possession of all NTTCs required to support his deductions for TY06 within 60 days from the date of that letter. The 60-day period expired on November 2, 2008. [Department B]

13. October 14, 2008, the Department mailed a Reminder Notice of Limited Scope Audit to the same address, again informing the Taxpayer that any NTTCs required to support his deductions for TY05 be in his possession on or before the listed response date of November 3, 2008. [Department A]

14. October 14, 2008, the Department mailed a Reminder Notice of Limited Scope Audit to the same address, again informing the Taxpayer that any NTTCs required to support his deductions for TY06 be in his possession on or before the listed response date of November 3, 2008. [Department B]

15. After receiving the Department's notice of limited scope audit for TY05 and TY06, the Taxpayer consulted with certified public accountant Mr. S. John Manganaro in Carlsbad, New Mexico.

16. According to the Taxpayer, Mr. Manganaro advised Taxpayer to obtain the relevant NTTCs for TY05 and TY06 from Able Pumping Service.

17. Taxpayer contacted Able Pumping Service through the business' owner, the Taxpayer's father, and requested Type 5 NTTCs for TY05 and TY06 to support the deduction of his receipts from Able Pumping Service in those years.

18. According to Taxpayer, his father as owner of Able Pumping Service applied to New Mexico for the appropriate NTTCs.

19. Taxpayer followed up with his father at least twice before the November 2, 2008 deadline for possession of the NTTCs.

20. On the November 2, 2008 deadline for possession of relevant NTTCs for both TY05 and TY06, Taxpayer did not possess any NTTCs.

21. Taxpayer was issued the type 5 NTTC by Able Pumping Service on December 18, 2008, 47-days after the November 2, 2008 deadline. [Taxpayer #1]

22. According to Taxpayer, the only reason he received the NTTCs untimely is because the Department held-up the issuance of the NTTCs to Able Pumping Service for an unspecified reason.

23. Ms. Silvia Sena, Senior Tax Auditor for the Department, indicated that there are legitimate and lawful reasons why the Department may not immediately authorize the privilege of executing an NTTC to an applicant like Able Pumping Service, such as a delinquent applicant

account or a non-filing on the applicant's account with the Department as indicated by NMSA 1978, §7-9-43(D) (2005).

24. Because the Taxpayer did not possess the NTTCs at the time the services were performed in TY05 and TY06, and because the Taxpayer did not possess the NTTCs within 60-days of the notice of limited scope audit for TY05 and TY06, the Department disallowed Taxpayer's claim of deduction under NMSA 1978, Section 7-9-48 (2000).

25. On February 27, 2009, the Department assessed the Taxpayer for $6,038.56 gross receipts tax, $1,207.72 penalty, and $2,379.92 interest for TY05 under letter ID number L208661024.

26. On February 27, 2009, the Department assessed the Taxpayer for $6,462.50 gross receipts tax, $1,292.50 penalty, and $1,579.88 interest for TY06 under letter ID number L1737809280.

27. On February 9, 2009, Taxpayer completed, filed, and paid $2,499.80 in gross receipts taxes for TY05, TY06, and Tax Year 2007. At the time of the hearing, Ms. Sena provided a $60.00 off-set for TY05, reducing the overall balance in TY05 from $9,912.44 to $9,852.44. At the time of the hearing, Ms. Sena provided a $1,226.64 off-set for TY06, reducing the overall balance in TY06 from $9,585.56 to $8,358.92. [Department D, E, and F]

28. Both assessments in this case were sent automatically by the GEN-TAX proprietary computer system using Taxpayer's last know address within the GEN-TAX system, 105 Means Rd., Carlsbad, NM 88220-9401.

29. Although the Taxpayer no longer lived at that address, Taxpayer nevertheless received the two Notices of Assessment in this matter as evidenced by his Protest Letter.

30. On April 24, 2009, Taxpayer submitted a Protest Letter for both assessments and a Request for a Retroactive Extension for filing of his protest because of late receipt of the letters of assessments in light of the out-of-date address information listed on those assessments.

31. On May 13, 2009, pursuant to its authority under NMSA 1978, Section 7-1-24 (B) (2003), the Department granted the Taxpayer a retroactive extension for filing of protest and accepted the Taxpayer's April 24, 2009 Protest Letter.

32. This matter was originally set for hearing on March 9, 2010, but was continued upon request of Mr. Raymond Anaya, the Taxpayer's gross receipts consultant.

33. Mr. Anaya is not an attorney, a certified public accountant, a registered public accountant or a bona-fide employee of the Taxpayer. Consequently, although Mr. Anaya was allowed to participate in the hearing as a witness and to assist Taxpayer, Mr. Anaya was not allowed to argue directly on the Taxpayer's behalf under NMSA 1978, Section 7-1-24 (E) (2003) or under NMSA 1978, Section 36-2-27 (1999).

DISCUSSION

The issue in this case is whether the Taxpayer was required to have the NTTCs from Able Pumping Service in his possession within the 60-day period provided in the Department's audit notice in order to deduct his receipts from performing services for Able Pumping Service in TY05 and TY06 under NMSA 1978, §7-9-48 (2000) for sale of a service for resale. The Taxpayer argues that his inability to timely possess the relevant NTTCs for TY05 and TY06 is a result of the Department's withholding of the NTTCs from Able Pumping Service until December 18, 2008 rather than from any lack of action or diligence by the Taxpayer. Without going into any specifics about the reason for delay in issuing a NTTC to Able Pumping Service,

the Department contends that the statute provides a lawful basis to withhold NTTCs from an applicant when the applicant's account with the Department is delinquent or shows a non-filing period under NMSA 1978, §7-9-43(D) (2005). In any case, the Department argues that the Taxpayer is precluded from claiming the deduction under NMSA 1978, §7-9-48 (2000) in TY05 and TY06 because Taxpayer failed to possess the relevant NTTCs both at the time Taxpayer rendered the services to Able Pumping Service and within 60-days of the notice of the limited scope audit.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, §7-1-17(C) (2007), both assessments issued in this case are presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessments and establish that he was entitled to deductions under NMSA 1978, §7-9-48 (2000) in TY05 and TY06. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Moreover, this case involves Taxpayer's protest over a claim of a deduction. "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*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991).

The Deduction and NTTCs

The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory requirements set by the legislature. The Taxpayer is seeking to qualify for the deduction provided in NMSA 1978, §7-9-48 (2000), which states in pertinent part that:

> Receipts from selling a service for resale may be deducted from gross receipts ...if the sale is made to a person who delivers a nontaxable transaction certificate to the seller....

Simply performing a service for resale, as the Taxpayer did in this instance for Able Pumping Service, is not enough to satisfy the requirements of the statute. In order to qualify for the statutory deduction, the statute clearly and unambiguously requires that the seller claiming the deduction receive a NTTC from the buyer of that seller's service at the time of the sale or transaction. NMSA 1978, §7-9-43 (2005) articulates the requirements for obtaining NTTCs:

> All nontaxable transaction certificates...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.

While taxpayers "should" have possession of required NTTCs at the time of the transaction at issue, the statute gives taxpayers audited by the Department a second chance to obtain these NTTCs. Taxpayers who rely on this provision must recognize, however, that they 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 an NTTC is irrelevant. The language of the statute 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). *id.*

Taxpayer's failure to possess the NTTC by the statutory deadline precludes the deduction.

The Taxpayer briefly raised questions about the address that the Department mailed the two notices of assessments and suggested that because of the non-current addresses listed on the

assessments that perhaps the two notices of limited scope audits that triggered the 60-deadline for possesion of NTTCs were not timely delivered to him. However, the evidence clearly established that the two notices of limited scope audit were mailed directly to the Taxpayer's address at the time of mailing on September 3, 2008: Jason P Able, 15 Red Juniper Road, Carlsbad, NM 88220-9414. That is the same address the Taxpayer provided the IRS on his schedule C for TY05 and TY06. Since the Department was relying on the Tape Match Program information from the IRS, it sent the limited scope of audit notices to the address the Taxpayer had provided to the IRS. That is the same address that the Taxpayer listed in his request for hearing. The notices of assessments were sent to the last reported address that the Taxpayer provided to the Department, as reflected in the GEN-TAX system, and thus those assessments reflected a prior address that the Taxpayer had resided. Ultimately, the Taxpayer has a duty to inform the Department about any changes in address, and by failing to do so, the letters of assessment were sent to the Taxpayer's previous address. But any issue with the subsequent letters of assessments in this case does not change the fact that the Department mailed the notice of limited scope audit on September 3, 2008 to the correct address.

While the Taxpayer attempted to obtain the NTTCs through Able Pumping Service before November 2, 2008, the evidence is clear that Taxpayer did not in fact obtain the NTTCs until 47-days after the November 2, 2008 60-day deadline. The Taxpayer argues that this 47-day delay is not his fault but is attributable to the Department because the Department withheld the NTTCs from Able Pumping Service. Consequently, the Taxpayer requests that the failure to timely obtain the NTTCs should be forgiven or that he should be granted a retroactive extension on filing the NTTCs.

However, as the Department argued, the 60-day statutory deadline to obtain the NTTCs after notice of an audit already serves as the Taxpayer's statutory extension to obtain the NTTCs that he should have already possessed at the time of the transaction with Able Pumping Service. Regardless of reason or excuse for non-possession of a required NTTC, NMSA 1978, §7-9-43 (2005) provides no further extension of time beyond this 60-day period. NMSA 1978, §7-9-43 (2005), with its mandatory "shall be disallowed" language, also does not allow the Department any leeway in granting a deduction in instances of untimely possession of a required NTTC.

While the Taxpayer's frustration with the process of waiting for the Department to issue the NTTC to Able Pumping Service may be understandable, it does not alter the legal analysis in this case or warrant any equitable relief. Although presumably for confidentially reasons the Department did not precisely articulate the reason for its delay with Able Pumping Service, the Department pointed to its authority in general to delay in granting an NTTC in instances of delinquent or non-filing accounts. Absent a more thorough showing by the Taxpayer (who has the burden in this case) of thwarted attempts by Able Pumping Service to obtain the NTTC from the Department, there simply is not evidence in this case that the Department did something improper or with intent to needlessly delay the issuance of the NTTC to Able Pumping Service.

At the end of the day, Taxpayer had a statutory obligation at the time he performed the services for Able Pumping Service in 2005 and again in 2006 to obtain the relevant NTTCs that support his claim for a deduction. Perhaps the legislature made this initial requirement under NMSA 1978, §7-9-43 (2005) precisely because the legislature recognized the potential challenges of obtaining an NTTC after the transaction between the buyer of the services and the seller had grown stale. The legislature certainly knew that with time, records of transactions can accidently be lost, institutional memory of transactions can be forgotten, paperwork can be misfiled, the

motivating initiative to exchange services for a sum of money can be lost after completion of the transaction, and disputes can develop between buyer and seller that preclude easy cooperation. By waiting to obtain the NTTCs until the 60-day period after notice of audit, the Taxpayer subjected himself to a multitude of risks that some two-years after the transactions in question, Able Pumping Service would no longer be able to provide him timely with an NTTC.

Regardless of the cause of Able Pumping Service's failure to timely provide the relevant NTTC to the Taxpayer, the Taxpayer and not Able Pumping Service had the obligation under the statute to document his gross receipts tax deductions. 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*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). The incidence of the gross receipts tax is on the seller, and it was the responsibility of the Taxpayer—not Able Pumping Service—to determine whether he had the documentation needed to support his deductions. The Taxpayer's failure to obtain an NTTC within the 60-day period provided in NMSA 1978, §7-9-43 (2005) leaves the Department no choice but to disallow his deductions.

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, §7-1-67 (2003). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory regardless of the explanation provided by a taxpayer. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The language of the statute also makes it clear that interest begins to run from the original due date of the tax.

In this case, Taxpayer could not claim the deduction in question without obtaining the NTTC's. Consequently, the taxes were due but not paid for tax years 2005 and 2006. The Department has no choice but to impose interest from the original due date of the tax.

Penalty

The Department seeks to impose a penalty of 20% against the Taxpayer for his failure to pay Gross Receipts Taxes. At the time the taxes were due but not paid for tax years 2005 and 2006, the applicable penalty statute capped the maximum penalty at 10%. *See* NMSA 1978, Section 7-1-69 (2003). Effective January 1, 2008, the legislature amended the penalty statute, increasing the penalty cap from 10% to 20%. *See* NMSA 1978, Section 7-1-69 (2008). The Hearing Bureau and the Department are in disagreement in numerous cases about whether the Department can retroactively apply the additional 10% penalty to taxes that were due but not paid before the January 1, 2008 amended statute. The issue is on appeal and will be resolved by the New Mexico Court of Appeals. Until the Court of Appeals issues a decision, however, the Department should not be surprised about inquiries into their legal rational supporting their position, as each case is a separate and distinct record.

In this case, the Department argues that since the legislature adjusted the interest provisions downward, the legislature intended the increase in the maximum allowable penalty to soften the blow to the State coffers from the lost of interest payments. In other words, the Department points out that just like the Taxpayer has benefited from a decrease in the interest provisions, the Taxpayer should pay the detriment of the increased penalty. However, the Department does not cite any legislative intent to support its position, nor does the Department point towards any retroactivity provision of the amended statute. The Department also argues that since both assessments occurred

after the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008), the Department is able to apply the new penalty provision against taxes owed but not paid from TY05 and TY06.

In the absence of clear intent by the Legislature to apply a new or amended statute retroactively, a statute operates prospectively. *See Psomas v. Psomas*, 99 N.M. 606, 609, 661 P.2d 884, 887 (1982). Nothing on the face of the statute in question indicates a clear intent by the Legislature for retroactive application of NMSA 1978, Section 7-1-69 (2008). The Department cites no evidence or presents no legal authority that supports that the legislature intended to retroactively apply the increased 20% penalty cap against *due and not paid* taxes that had already reached the 10% cap before the January 1, 2008 effective date of the legislation. Moreover, in the realm of penalty provisions here in New Mexico, the New Mexico Supreme Court in *Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) declined to retroactively apply a modified penalty regulation enacted after the applicable tax year.

In suggesting that the penalty provision operates in a symbiotic relationship with interest provision, the Department ignores the plain language distinction between the penalty and interest provisions. The clear language of the negligence penalty provision, which establishes a maximum penalty, appears to preclude the application of the additional amount of the penalty once the Taxpayer has reached and exhausted the maximum cap on penalty. The negligence penalty begins accruing at a rate of 2% each month after the tax is *due and not paid* until the amount of penalty reaches the statutory limit. A taxpayer reached this statutory cap after five months under the old law and ten months under the revised law. Both under the new revision and the old law, no additional penalty can accrue after the taxpayer reached the statutory penalty cap even though the principal outstanding tax still technically and factually remains *due and not paid*. In other words, once this statutory limit is reached (after five-months under the old law), even though the tax still

factually remains *due and not paid*, the Department may not impose any additional negligence penalty because the negligence penalty provision has been capped by the amount that may be imposed.

Unlike the provisions on negligence penalty, the Legislature did not impose either a cap in the cumulative interest or in the length of time interest is too accrue under NMSA 1978, §7-1-67 (2008). Interest continues to accrue every month while the principal tax remains *due and not paid*. The statute imposing interest only contains a cap on the maximum amount that can be imposed on all amounts due and owing at the time the change in interest rate occurs. This cap does not end after a period of time, like the penalty amount. The critical distinction being that unlike penalty, the interest provision does not contain any concept of expiration of a time period. Both before and after the change of law, the negligence penalty and the interest provision operated slightly differently from each other, a fact that undermines the Department's argument that they should be treated identically. If the Legislature intended the interest provision and the negligence penalty provision to act entirely in conjunction with one another, then either both or neither of the provisions would have a cap after a period of time. Because there is a difference between the two provisions, one has to conclude that the Legislature intended that each provision have a distinct application. Thus, the mere fact that the legislature amended both provisions in the same legislation session does not obliterate their distinct applications.

In this case, regardless of the date of issuing the assessments, Taxpayer's penalty reached the maximum penalty cap five months after the taxes were due but not paid, meaning that the penalty was exhausted by June of 2006 for TY05 and June 2007 for TY06. Both of these dates are well before NMSA 1978, §7-1-69 (2008) became law on January 1, 2008. Once the Taxpayer reached that maximum penalty cap, the tax remained due but not paid. Because the penalty

provision had already been exhausted by the time the new amendment went into law, and because the Department failed to articulate a clear intent by the Legislature that the new penalty provision was intended to apply retroactively to instances where the penalty provision had already been exhausted, the Department was precluded by the plain language of the statute from increasing the penalty beyond 10% penalty cap.

CONCLUSIONS OF LAW

1. After the Department's granting of a request for retroactive extension, the Taxpayer filed a timely, written protest to Assessment Nos. # L2086641024 and L1737809280, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is not entitled to a gross receipts tax deduction for receipts for services rendered for Able Pumping Service during tax years 2005 and 2006.

3. Taxpayer is entitled to a reduction of the outstanding penalty consistent with the 10% maximum penalty cap articulated under NMSA 1978, Section 7-1-69 (2003).

For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART.** The Taxpayer is ordered to pay the assessments for tax years 2005 and 2006. The Department is ordered to abate the maximum penalty amount for tax years 2005 and 2006 consistent with the 10% maximum penalty cap articulated under NMSA 1978, Section 7-1-69 (2003).

DATED: May 27, 2010.