STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF **No. 17-41**
HIGHLAND CONSTRUCTION LLC
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1005232432

DECISION AND ORDER

A formal hearing on the merits in the above-captioned protest was held on August 21, 2017 before Hearing Officer Chris Romero, Esq., in Santa Fe, New Mexico. The Taxation and Revenue Department (Department) was represented by Mr. David Mittle, Staff Attorney. Mr. Nicholas Pacheco, Auditor, also appeared on behalf of the Department. Staff Attorney Jama Fisk observed for training purposes. Mr. Joseph Walsh, Esq. (Sommer Udall Law Firm) appeared with Mr. Michael Quintana, sole member of Highland Construction, L.L.C. (Taxpayer). Taxpayer Exhibits 1 – 11 and Department Exhibits C and F were admitted into the evidentiary record of the hearing. Taxpayer did not proffer an exhibit 8 nor did the Department proffer exhibits A, B, D, or E. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. 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 December 9, 2016, the Department assessed Taxpayer for gross receipts tax, penalty, and interest for the tax period from January 1, 2013 through December 31, 2014. The assessment was for $97,564.52 in gross receipts tax, $19,512.92 in penalty, and $9,033.03 in interest.

2. On February 8, 2017, Taxpayer filed a formal protest letter by and through its counsel of record.

3. Taxpayer's formal protest was received in the Department's Protest Office on February 10, 2017.

4. On February 21, 2017, the Department acknowledged receipt of Taxpayer's protest.

5. On April 3, 2017, the Department filed a Hearing Request asking that Taxpayer's protest be set for a scheduling conference.

6. On April 3, 2017, the Administrative Hearings Office filed and served a Notice of Telephonic Scheduling Conference setting a telephonic scheduling conference for April 21, 2017.

7. On April 21, 2017, a telephonic scheduling conference occurred. The parties did not object that the hearing occurred within 90 days of Taxpayer's protest.

8. On April 24, 2017, the Administrative Hearings Office filed and served a Scheduling Order and Notice of Administrative Hearing which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protest for August 21, 2017.

9. On August 4, 2017, Taxpayer filed Taxpayer's Unopposed Motion for Extension to File Prehearing Statement. The motion was granted without formal order of the Hearing Officer.

10. On August 8, 2017, the parties filed their Joint Prehearing Statement.

11. During the relevant periods of time, Taxpayer was engaged in business in New Mexico as Highland Construction, L.L.C. [Testimony of Mr. Quintana].

12. Mr. Quintana is the sole member of the limited liability company through which Taxpayer is organized to conduct business in New Mexico. [Testimony of Mr. Quintana].

13. Taxpayer presently has 12 employees. [Testimony of Mr. Quintana].

14. Taxpayer has been in business for approximately 12 years. [Testimony of Mr. Quintana].

15. Taxpayer performs approximately 25 to 30 construction contracts per year. [Testimony of Mr. Quintana].

16. Mr. Quintana is a licensed contractor holding a GB98 contractor's license. [Testimony of Mr. Quintana].

17. Taxpayer provides services in residential construction, institutional construction, and small commercial construction. [Testimony of Mr. Quintana].

18. The overwhelming majority, or approximately 95 percent of Taxpayer's construction services, are provided in residential construction on behalf of individual clients. [Testimony of Mr. Quintana].

19. Mr. Quintana is not trained or knowledgeable with Taxpayer's tax responsibilities under New Mexico law. He relies on a bookkeeper with whom he consults on an as-needed basis. The bookkeeper is not employed by Taxpayer. [Testimony of Mr. Quintana].

20. Taxpayer's standard practice is to charge gross receipts tax on all construction services. [Testimony of Mr. Quintana].

21. The only occasions in which the Taxpayer did not charge gross receipts tax arose from the services now subject of the Taxpayer's protest. [Testimony of Mr. Quintana].

22. Those services involved projects for United World College (UWC) and Collins Lake Autism Center (CLAC), both of which are situated in northern New Mexico. [Testimony of Mr. Quintana; Taxpayer Exs. 5 – 11].

23. Taxpayer's understanding is that UWC and CLAC are organized as non-profit organizations. [Testimony of Mr. Quintana].

24. In reference to UWC, Taxpayer, in 2012, performed construction work and submitted an invoice for payment containing a line item for gross receipts tax. [Testimony of Mr. Quintana; Taxpayer Ex. 10.1].

25. Through its director of facilities, UWC notified Taxpayer that it would not pay gross receipts tax because it was organized as a non-profit organization. [Testimony of Mr. Quintana].

26. UWC required that Taxpayer revise and submit a new invoice that removed all charges for gross receipts tax in order to receive payment. [Testimony of Mr. Quintana; Taxpayer Ex. 3]

27. UWC indicated that it would provide the Taxpayer with a Non-Taxable Transaction Certificate (NTTC). [Testimony of Mr. Quintana; Taxpayer Ex. 3]

28. UWC executed a Type 9 NTTC to Taxpayer. [Taxpayer Ex. 1].

29. Mr. Quintana admitted that he did not personally review the NTTC [Taxpayer Ex. 1] from UWC at the time of the transactions. Rather, his only review of the NTTC was not until the hearing in this protest. [Testimony of Mr. Quintana].

30. Mr. Quintana authorized that the gross receipts tax be removed from the UWC invoice when an unidentified individual from his office confirmed that UWC submitted an NTTC. [Testimony of Mr. Quintana].

31. Construction services provided for UWC were thereafter invoiced without Taxpayer passing along any charge for gross receipts tax. [Testimony of Mr. Quintana; Taxpayer Exs. 10.2 – 11.7].

32. UWC was the first client Mr. Quintana recalled that raised an issue of gross receipts tax being passed along to non-profit organizations. [Testimony of Mr. Quintana].

33. Taxpayer performed construction services for CLAC during the same relevant periods of time. [Testimony of Mr. Quintana].

34. Mr. Quintana understood that CLAC was also a non-profit entity based on a conversation he had with its director. [Testimony of Mr. Quintana].

35. Mr. Quintana informed CLAC that gross receipts tax would be charged for construction services unless CLAC provided an NTTC. [Testimony of Mr. Quintana; Taxpayer Ex. 4].

36. The position Mr. Quintana took in reference to CLAC was based on an understanding he developed during his business dealings with UWC. [Testimony of Mr. Quintana].

37. CLAC executed a Type 9 NTTC to Taxpayer. [Taxpayer Ex. 2].

38. Mr. Quintana admitted that he did not review the NTTC [Taxpayer Ex. 2] at the time of the transactions. Rather, his only review of the NTTC was not until the hearing in this protest. [Testimony of Mr. Quintana].

39. Mr. Quintana authorized that the gross receipts tax be removed from the CLAC invoices when an unidentified individual from his office confirmed that CLAC submitted an NTTC. [Testimony of Mr. Quintana].

40. Construction services provided for CLAC were thereafter invoiced without Taxpayer passing along any charge for gross receipts tax. [Testimony of Mr. Quintana; Taxpayer Ex. 6.1 – 6.13; Taxpayer Ex. 7.1 – 7.6].

41. Taxpayer also performed services for the director of CLAC in his personal capacity. Because that work was not performed for CLAC, but instead for its director, Taxpayer charged gross receipts tax. [Testimony of Mr. Quintana; Taxpayer Ex. 9].

42. However, on at least one occasion, Taxpayer did not charge gross receipts tax for services provided for the director of CLAC in his personal capacity. [Testimony of Mr. Quintana; Dept. Ex. C.1].

43. Taxpayer did not, at any relevant time, consult any tax professional regarding his tax liabilities or obligations in reference to the taxability of receipts generated from construction activities he performed for UWC and CLAC. [Testimony of Mr. Quintana].

44. At all relevant times, Taxpayer's standard procedure was to file NTTCs until they were required by the bookkeeper for tax reporting or filing purposes. [Testimony of Mr. Quintana]

45. Mr. Quintana admitted he is unfamiliar with the various types of NTTCs. [Testimony of Mr. Quintana].

46. The face of the NTTCs indicate in relevant part that they are "[f]or the purchase of tangible personal property only and may not be used for the purchase of services, for the lease of property or to purchase construction materials for the use in construction projects." [Taxpayer Ex. 1; Taxpayer Ex. 2].

47. Mr. Quintana could not estimate the number of previous transactions in which a client presented Taxpayer with an NTTC. [Testimony of Mr. Quintana].

48. Mr. Quintana's present-day understanding of Taxpayer's gross receipts tax obligations differs from his understanding prior to the assessment. [Testimony of Mr. Quintana].

49. As a result of the assessment, Taxpayer now passes along gross receipts taxes on all construction services, including non-profit organizations. This has resulted in a loss of business from UWC and CLAC. [Testimony of Mr. Quintana].

50. As a result of the assessment that issued in this protest, Taxpayer made a written demand to UWC for payment of gross receipts tax. UWC refused Taxpayer's request. [Testimony of Mr. Quintana].

51. As of the date of the hearing on the merits of Taxpayer's protest, Taxpayer's outstanding liability was $97,161.09 in gross receipts tax, $19,888.95 in penalty, and $11,798.19 in interest for a total amount due and owing of $128,846.97. [Testimony of Mr. Pacheco; Dept. Ex. F].

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest that were assessed on receipts generated from construction services performed for two non-profit organizations. Those entities, UWC and CLAC, both provided Taxpayer with Type 9 NTTCs for construction projects. Taxpayer, in reliance on the NTTCs, did not pass along any charges for gross receipts tax or otherwise report or pay tax to the Department on the receipts generated from those construction services.

The Taxpayer argued that it should be entitled to the benefit of the good-faith, safe harbor provision provided in NMSA 1978, Sec. 7-9-43 because it accepted the NTTCs in good-faith reliance on the representations of UWC and CLAC. In contrast, the Department argued that the Taxpayer failed to establish good faith, in part due to ignorance of the law, and a failure to seek assistance or make other efforts to become knowledgeable in the matters of Taxpayer's reporting and payment obligations arising from construction activities performed for non-profit organizations.

Burden of Proof

Assessments by the Department are presumed to be correct. *See* NMSA 1978, Sec. 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." *See* NMSA 1978, Sec. 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 Taxpayer is presumed to be correct, and it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

The burden is also on Taxpayer to prove that it is entitled to an exemption or deduction, if one should possibly apply. *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." *See Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

Gross Receipts Tax

Anyone who engages in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Sec. 7-9-3.5; Sec. 7-9-4. Services are subject to the gross receipts tax. *See* Regulation 3.2.1.18 (A) NMAC. According to NMSA 1978, Sec. 7-9-3, "'[s]ervice' includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project."

Neither the Gross Receipts and Compensating Tax Act nor the regulations that implement it provide any exceptions for construction activities provided for non-profit organizations. *See* NMSA 1978, Sec. 7-9-60. In contrast, Regulation 3.2.218.9 (B) NMAC provide that "Receipts from performing a construction project for a 501 (c) (3) organization, including construction services and the value of property used in the construction project, are receipts derived from performing a service and are fully taxable." Therefore, receipts from construction activities, even for non-profit organizations, are taxable.

Nevertheless, Taxpayer relied on the representations of UWC and CLAC that construction services to non-profit organizations were not taxable and Taxpayer accepted Type 9 NTTCs. Taxpayer asserts that it accepted the NTTCs in good faith and should be entitled to the safe harbor provision contained in NMSA 1978, Sec. 7-9-43 (A).

Non-Taxable Transaction Certificates

While the transactions at issue were not deductible as discussed in the preceding section, Sec. 7-9-43 provides a safe harbor from taxation in some circumstances when a seller accepts an NTTC in good faith. Sec. 7-9-43 states in relevant part:

> [w]hen the seller or lessor accepts a nontaxable transaction certificate within the required time and in good faith that the buyer or lessee will employ the property or service transferred in a nontaxable manner, the properly executed nontaxable transaction certificate shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

Consequently, the statute grants the seller of the service safe harbor from taxation when the seller timely accepts a properly executed NTTC in good faith from the buyer. Regulation 3.2.201.14 NMAC (05/31/01) discusses good faith acceptance of an NTTC:

> Acceptance of nontaxable transaction certificates (nttcs) in good faith that the property or service sold thereunder will be employed by the

> purchaser in a nontaxable manner *is determined at the time of each transaction*. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered or services performed thereafter are of the type covered by the certificate.
>
> (Emphasis added)

The Administrative Hearings Office, and its predecessor the Hearings Bureau, have employed a broader view of the good-faith, safe harbor protection since the 2013 issuance of the decision and order *In the Matter of the Protest of Case Manager*, No. 13-12 (non-precedential) and *In the Matter of the Protest of Rio Grande Electric Co., Inc*, No. 13-16 (non-precedential). In an unpublished decision, the New Mexico Court of Appeals affirmed the ruling in the *Case Manager* under a right for any reason standard. *See New Mexico Taxation and Revenue Dep't. v. Case Manager*, No. 32,940 (N.M. Ct. App. April 29, 2015) (non-precedential).

However, even under the broader reading of the safe harbor protection employed since *Case Manager* and *Rio Grande Electric*, the good-faith, safe-harbor provision is limited to cases where the underlying transaction itself is otherwise covered by a recognized statutory deduction. *See In the Matter of the Protest of Adecco USA, Inc.*, Decision and Order No. 14-16 (non-precedential); *See also In the Matter of the Protest of The GEO Group, Inc.*, Decision and Order No. 14-36 (non-precedential). Those decisions and orders have consistently determined that the safe harbor provision cannot serve to make a taxable transaction, not covered by any recognized statutory deduction, into a nontaxable transaction merely by possession of a NTTC.

In *McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599, the Court of Appeals held that the good faith safe harbor provision did not protect a seller from taxation "unless the certificate covered the receipts in question." The court went on to say that since

there was "no certificate applicable" for the type of services that taxpayer provided, the Department's denial of the deduction was proper. *See McKinley*, ¶13.

Consistent with *McKinley*, the Court of Appeals stated in *Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶12, 94 N.M. 630 that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." Further, in *Arco Materials, Inc. v. Taxation & Revenue Dep't,* 1994-NMCA-062, 18 N.M. 12 (overturned on other grounds), the New Mexico Court of Appeals relied on a taxpayer's continuing obligation to ensure that the NTTC covers the type of goods sold in finding that a taxpayer was not entitled to a deduction when the transaction was no longer subject to a deduction. While *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, ¶15, 86 N.M. 629 and *Continental Inn v. N.M. Taxation and Revenue Dep't.*, 1992-NMCA-030, 113 N.M. 588 suggest that timely, good faith acceptance of a properly executed NTTC is sufficient for a taxpayer to claim a deduction even if the transaction itself did not fall under any recognized deduction, those cases must be interpreted in the context of the cases that followed, *McKinley* , *Gas Co*., and *Arco Materials*.

The problem with applying the good-faith, safe harbor provision in this case, and what makes this case distinguishable from *Continental Tire,* is that under no circumstance could these transactions qualify for a deduction because receipts from construction services provided to non-profit organizations are taxable. Because the transactions at issue in this protest are not deductible, there was no NTTC certificate applicable to Taxpayer's services and Taxpayer's acceptance of a NTTC in this instance does not convert what was clearly a taxable transaction into a nontaxable one. *See McKinley,* ¶13; *See also Gas Co.* ¶12.

As mentioned, the *Continental Inn* case is distinguishable from the facts of the present protest because in that case, the transactions were potentially deductible under a recognized deduction if the

buyer in that case had adhered with the usual requirements of the Gross Receipts and Compensating Tax Act. In *Continental Inn*, a general contractor constructing an inn issued NTTCs to subcontractors. *See id*. at ¶1 – 3. The Court of Appeals noted that the transactions themselves were potentially deductible under two recognized deductions if the general contractor ultimately paid gross receipts tax on the sale of the constructed inn. *See id*. at ¶7. However, for uncertain reasons, the general contractor chose not to pay gross receipts tax on the constructed inn. *See id*. The Department pursued the general contractor with a compensating tax assessment, which the Court of Appeals ultimately upheld. In addressing one of the taxpayer's arguments, the Court of Appeals in *Continental Inn* reviewed the good-faith, safe harbor provision under Section 7-9-43 and found that the general contractor's issuance of the NTTCs to the subcontractors "represented to the subcontractors that the use of the NTTCs was such that the subcontractors were entitled to the deduction from gross receipts." *Id*. ¶13. This statement is arguably dicta, since the case involved Taxpayer's liability for compensating tax rather than the subcontractors' ability to claim a deduction. But even if applicable, *Continental Inn* is still distinguishable from the present protest in that the transactions with the subcontractors in *Continental Inn* would have qualified for a recognized deduction but for the buyer's failure to otherwise proceed as expected in the transaction. In this protest, there is no circumstance where the transaction could have qualified for any recognized deduction.

Even if the safe harbor provision was applicable in circumstances where there was no pertinent deduction, it cannot be said, in this case, that Taxpayer's acceptance of the NTTCs was made in good-faith. "Questions of good faith belief . . . are questions of fact." *See Erica, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-65, ¶23, 144 N.M. 132, 184 P.3d 444 (Ct.App.2008) (*quoting State v. Vandenberg*, 2003-NMSC-30, ¶18, 134 N.M. 566, 81 P.3d 19).

In *Erica*, the New Mexico Court of Appeals referenced Black's Law Dictionary to define good faith. The Court of Appeals stated

> [g]ood faith is a broad term: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context." Black's Law Dictionary 701 (7th ed. 1999) (internal quotation marks and citation omitted) (defining good faith as 'A state of mind consisting in (1) honesty in belief or purpose, (2) *faithfulness to one's duty or obligation*, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage"). *Id.* at ¶18. (Emphasis Added)

The Hearing Officer did not doubt Mr. Quintana's sincerity. He was candid and forthcoming and the Hearing Officer was persuaded that he did not act with ill intention. Despite those observations, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Under the facts of this protest, Mr. Quintana breached his duty to ascertain the consequences of his actions, contrary to *Erica* and the dictionary definition of "good faith."

Taxpayer operates under Mr. Quintana's contractor's license through a limited liability company in which he is the sole member. It was evident that Mr. Quintana was exclusively in charge of his business operations. It was also clear that the decision to accept the NTTCs was entirely his, and he did not delegate that authority to any employee or other party. To the extent Mr. Quintana could have relied on anyone else, such as a bookkeeper, accountant, or employee, he neither identified them, called upon them to present evidence, nor attributed any statements to them which could have established some reasonable reliance for his acceptance of the NTTCs in these transactions.

Rather, Mr. Quintana admitted that he never saw, reviewed, or read the NTTCs from UWC or CLAC prior to protesting the assessment. At the time of the transactions, Mr. Quintana admitted that his understanding of the NTTCs was based on information from UWC or CLAC. Unfortunately, Taxpayer made no effort verify the information which UWC and CLAC provided, did not seek expert opinion, or even review the face of the NTTCs at any time prior to the protest of the assessment. Instead, Taxpayer accepted the information of UWC and CLAC without further inquiry, investigation, or due diligence to ascertain the correctness of their explanations or Taxpayer's obligations under the law.

Had Taxpayer conducted even a superficial examination of the NTTCs at the time the transactions arose, or made other inquiries, he may have been alerted to the fact that the Type 9 NTTC, although commonly utilized by non-profit organizations, is not applicable to construction services. This was evident from the face of the NTTCs in this protest, and should have alerted the Taxpayer of the need to conduct additional research or seek professional assistance at the time the transactions were occurring.

Once again referring to *McKinley*, 1979-NMCA-026, ¶10, the good faith safe harbor provision will not protect a seller from taxation "unless the certificate covered the receipts in question." In this case, the NTTC provided actual notice that it was not to be utilized for construction services, but Taxpayer failed to heed the notice. Therefore, Taxpayer did not establish that his reliance on the NTTCs was in good faith under the circumstances in this protest. The Taxpayer is therefore not entitled to the safe harbor provision under which he seeks relief in this protest.

Taxpayer expressed disappointment with the possibility that it may be liable for the amounts due under the assessment. Mr. Quintana testified that he made a written demand to UWC seeking reimbursement for the gross receipts taxes it should have paid but for its representations

that it was not obligated to pay because it was a non-profit organization. UWC denied the request. Although Taxpayer's sentiments in this regard are respected, New Mexico imposes a gross receipts tax on all the receipts of a person or entity engaged in business. Although it is common for a business to pass the tax on to the consumer, it is not the consumer who bears the obligation of paying the tax. Rather, the obligation rests solely with the person or entity engaged in business. Regulation 3.2.4.8 NMAC states "[t]he gross receipts tax is imposed on persons engaging in business in New Mexico. Such persons are solely liable for payment of the tax; they are not 'collectors' on behalf of the state."

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." *See* 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. The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. In this case, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from when the tax was originally due until Taxpayer pays the gross receipts tax principal in this matter.

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 Section 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).

Again, 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." *See Marbob.*

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, because Taxpayer failed to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances to report and pay gross receipts tax when due.

In instances where a taxpayer might fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception in that "[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 that gross receipts tax did not apply to the services subject of this protest. *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 mandate 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 evidence presented, only one factor under Regulation 3.1.11.11 NMAC is potentially applicable in this protest:

> 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;

Although Taxpayer testified that he occasionally utilized a bookkeeper or an accountant, Taxpayer did not purport to rely on this person for any purpose relevant to the issues in this protest, nor did Taxpayer present evidence to establish that this person was competent, such that any reliance on his or her advice would be reasonable.

Taxpayer readily admitted that he was inexperienced in tax matters and the Department does not contend that he acted with bad intentions. Undeniably, Taxpayer's actions resulted from inadvertence, erroneous belief, and inattention. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty.

Unfortunately, Taxpayer's lack of experience, knowledge, or understanding is no defense to the assessment. "[E]very person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co., supra*. The Department's assessment of penalty and interest in this matter was correct and there was no authority for an abatement.

For the reasons stated herein, Taxpayer's protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts taxes issued under Letter ID number L1005232432, 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 Taxpayer's protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not overcome the presumption of correctness that attached to the assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428 and did not establishment entitlement to any specific statutory deduction.

D. Receipts from performing a construction project for a 501(c)(3) organization, including the construction services and the value of all property used in the construction project, are receipts derived from performing a service and are fully taxable pursuant to Regulation 3.2.218.9 (A) NMAC, NMSA 1978, Sec. 7-9-60, and NMSA 1978, Sec. 7-9-3.

E. Because no deduction or certificate covered the transaction at issue, Taxpayer did not establish good-faith acceptance of the NTTCs and thus was not entitled to safe harbor protection under NMSA 1978, Section 7-9-43 (A). *See McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599.

F. Under NMSA 1978, Sec. 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

G. Under NMSA 1978, Sec. 7-1-69 (2007), Taxpayer are liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC.

For the foregoing reasons, Taxpayer's protest **IS DENIED**. As of the date of the hearing on the merits of Taxpayer's protest, Taxpayer's outstanding liability was $97,161.09 in gross receipts

tax, $19,888.95 in penalty, and $11,798.19 in interest for a total amount due and owing of $128,846.97. Interest shall continue to accrue until the underlying tax principal is satisfied.

DATED: September 28, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. 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.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this _____ day of September, 2017 in the following manner:

First Class Mail and Fax *Interoffice Mail*