

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

**IN THE MATTER OF THE PROTEST OF  
MARC A. GELINAS  
TO ASSESSMENT  
ISSUED UNDER LETTER  
ID NO. L1020757296**

**v.**

**D&O No. 18-02**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

A protest hearing occurred in the above captioned matter on November 9, 2017 at 9:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. David H. Mahone, C.P.A., appeared and represented Mr. Marc A. Gelinas (“Taxpayer”). Taxpayer appeared in person and testified on his own behalf. Staff Attorney, Mr. David Mittle, appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor, Mr. Thomas Dillon, appeared as a witness for the Department. Department Exhibit A was admitted into the record without objection and is described in the Administrative Exhibit Log. Taxpayer proffered Taxpayer Exhibit #5 to which the Department did not initially object. Upon further consideration, the Department objected at which time the Hearing Officer determined that Taxpayer Exhibit #5 lacked foundation to establish reliability and trustworthiness and was not relevant. Taxpayer Exhibit #5, although not proffered as a separate exhibit, is contained in the administrative file as an attachment to correspondence filed with the Administrative Hearings Office on October 10, 2017. Taxpayer did not proffer any other

exhibits. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

### FINDINGS OF FACT

1. On March 17, 2017, the Department assessed Taxpayer for the amounts of \$4,378.81 in gross receipts tax, \$875.76 in penalty, and \$907.17 in interest for a total amount due of \$6,161.74 under Letter ID No. L1020757296 for the reporting periods from January 1, 2010 to December 31, 2010. [See Administrative File, Letter ID No. L1020757296].

2. On May 22, 2017, Taxpayer submitted correspondence to the Department's Protest Office which was received on June 5, 2017. A second copy of the same correspondence indicated that it was also received in the Department's Protest Office on June 28, 2017. [See Administrative File, Correspondence dated May 22, 2017].

3. On June 28, 2017, Taxpayer submitted a second item of correspondence to the Department's Protest Office. Although the correspondence purported to be a formal protest, the Department considered the Taxpayer's initial correspondence received on June 5, 2017 as the document initiating Taxpayer's protest. [See Administrative File, Correspondence dated June 23, 2017].

4. On July 10, 2017, the Department acknowledged the receipt of the Taxpayer's protest. [See Administrative File, Letter ID No. L2109484336].

5. On August 14, 2017, the Department requested a hearing in the matter subject of the Taxpayer's protest. [See Administrative File, Hearing Request].

6. On August 16, 2017, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference that set a hearing on September 8, 2017. [See Administrative File].

7. On September 8, 2017, a scheduling hearing occurred. Among other deadlines, a hearing on the merits was scheduled for November 9, 2017. The Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing on September 8, 2017. [See Administrative File].

8. On October 10, 2017, Taxpayer submitted correspondence to the Administrative Hearings Office. The correspondence indicated that it was also provided to counsel for the Department. [See Administrative File, Correspondence dated October 8, 2017].

9. On November 6, 2017, the Department submitted its portions of the Joint Prehearing Statement. [See Administrative File].

10. During the relevant periods of time, Taxpayer was a salesperson who sold implantable medical devices, such as prosthetics for knees, hips and shoulders, on a commission basis. [See Department's Joint Prehearing Statement, Sec. II; Testimony of Mr. Gelinis].

11. Taxpayer's only compensation was in the form of commissions from sales of such devices. [Testimony of Mr. Gelinis].

12. Taxpayer's income from commissions were reported on 1099-MISC forms from the distributors. [See Administrative File; Testimony of Mr. Gelinis].

13. Upon concluding a sale, Taxpayer prepared order forms and distributed copies of the forms to the buyer, the manufacturer, and the distributor. [Testimony of Mr. Gelinis].

14. Payment for the goods were typically made by the buyer to the manufacturer. The manufacturer, in turn, would pay a portion of the sales price to the distributor, which would then

pay a commission to Taxpayer from its portion of the proceeds from the sale. [Testimony of Mr. Gelinas].

15. Taxpayer did not receive non-taxable transaction certificates from any buyers of prosthetic devices. [Testimony of Mr. Gelinas; Testimony of Mr. Dillon].

16. Taxpayer never filed gross receipts reports or made gross receipts tax payments in relation to compensation he received in the form of commissions from sales of prosthetic devices. [Testimony of Mr. Dillon].

17. The assessment at issue arose from a Schedule C mismatch. [Testimony of Mr. Dillon].

18. As of the date of hearing, Taxpayer's liability for the periods from January 1, 2010 to December 31, 2010 were \$4,378.81 in gross receipts tax, \$875.76 in penalty, and \$518.48 in interest for a total amount of \$5,773.05. [Testimony of Mr. Dillon; Dept. Ex. A].

19. On December 4, 2017, the Administrative Hearings Office entered its Order for Additional Briefing which requested briefing on the potential application of NMSA 1978, Section 7-9-66.

20. Taxpayer responded to the Order for Additional Briefing in the form of correspondence dated December 12, 2017 and received by the Administrative Hearings Office on December 14, 2017. The Department submitted Department's Additional Briefing on December 18, 2017.

## **DISCUSSION**

Based on the evidence presented and the arguments of the parties, the primary issue is whether the Taxpayer established entitlement to an applicable deduction from gross receipts in

the form of commissions earned from the sale of tangible personal property, and more specifically, implantable medical devices.

### **Timeliness of Protest**

Although the Department does not raise timeliness of the protest as an issue, the Hearing Officer noted that the Taxpayer's correspondence dated May 22, 2017 had a date stamp indicating that it was received in the Department's Protest Office on June 28, 2017, a date exceeding 90 days from the date appearing on the face of the assessment. However, a handwritten notation on the letter indicated that the correspondence was timely submitted. The notation states "[t]his letter was attached in GenTax 6/5/17 – timely". This notation is significant because the date indicated is within the deadline for filing a protest.

To the extent an issue could have been raised as to the timeliness of Taxpayer's protest under NMSA 1978, Section 7-1-24, the Department did not do so. Consequently, the Hearing Officer presumed in the absence of evidence or argument to the contrary that the protest was timely, and any potential objections as to the timeliness of Taxpayer's protest were waived.

### **Unreasonable Delay**

Taxpayer objected to the length of time which passed between the transactions giving rise to the assessment in 2010 and the issuance of the assessment in 2017. NMSA 1978, Section 7-1-18 (C) provides "[i]n case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required *may be assessed at any time within seven years from the end of the calendar year in which the tax was due*, and no proceeding in court for the collection of such tax without the prior assessment thereof shall be begun after the expiration of such period."

In this case, it was uncontroverted that Taxpayer did not file returns related to gross receipts taxes in 2010 which provided the Department with seven years to assess Taxpayer from the end of the calendar year in which the tax was due. With the exception of gross receipts for the month of December 2010, the end of the calendar year for all other months in protest would have been December 31, 2010. Seven years from that date, and the deadline to assess Taxpayer would have been December 31, 2017. Because gross receipts taxes for December of 2010 would have been due in January of 2011, the deadline to assess taxes for December of 2010 would have been seven years from the end of the calendar year in which those taxes were due, or seven years from December 31, 2011. In any regard, the assessment in this protest, dated March 17, 2017, was timely and within the period required by Section 7-1-18 (C).

To the extent Taxpayer continues to take issue with the perception of tardiness, despite the assessment coming within the applicable statute of limitations, New Mexico courts have applied the general rule of tardiness in administrative hearings under the Tax Administration Act: the “tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests.” *See Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-026, 139 N.M. 177, 131 P.3d 27 (Ct. App. 2001); *See also Matter of Ranchers-Tufco Limestone Project*, 1983-NMCA-126, 100 N.M. 632, 674 P.2d 522 (Ct. App. 1983). Collection of taxes is the enforcement of public right/interest, and therefore, despite the tardiness of its actions, the Department still had an obligation to enforce a public right or protect a public interest under the rationale of *Kmart Props., Inc.*

### **Burden of Proof**

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of tax issued in this case are presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act,

“tax” is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 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). Taxpayers have the burden to overcome the assessments. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services in New Mexico. *See* NMSA 1978, Section 7-9-3.5. For the purpose of the Gross Receipts and Compensating Tax Act, “gross receipts” includes the total commissions or fees derived from selling services. *See* NMSA 1978, Section 7-9-3.5 (A) (2) (b).

If a taxpayer asserts entitlement to an exemption or deduction from gross receipts, then the burden is on the taxpayer to prove the entitlement to the asserted exemption or deduction. *See Public Service Co. v. N.M. Taxation and Revenue Dep’t.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation and Revenue Dep’t.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep’t.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

At the hearing, the parties directed their presentation of evidence and legal argument toward the application of NMSA 1978, Section 7-9-73 (1992) which states as follows:

**7-9-73. Deduction; gross receipts tax; governmental gross receipts; sale of prosthetic devices.**

Receipts from selling prosthetic devices may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who is licensed to practice medicine, osteopathic medicine, dentistry, podiatry, optometry, chiropractic or professional nursing and who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must deliver the prosthetic device incidental to the performance of a service and must include the value of the prosthetic device in his charge for the service.

History: 1953 Comp., § 72-16A-14.30, enacted by Laws 1970, ch. 78, § 2; 1992, ch. 100, § 10.

The Department did not dispute that the devices or the sales at issue came within the scope of Section 7-9-73. The Department's position was that Taxpayer failed to possess nontaxable transaction certificates ("NTTCs") from the buyer of the devices, and that in the absence of those NTTCs, the Taxpayer was obligated to pay gross receipts taxes on his commissions from the sales of prosthetic devices.

This application of Section 7-9-73 relies on the presumption that Taxpayer is the "seller" of the prosthetic devices. However, the evidence established that the Taxpayer was a salesperson not employed by the seller of any products he sold. Rather, he was an independent contractor of the distributors utilized by manufacturers for distributing its products. In other words, Taxpayer was not a "seller" in the sense that he was engaged in "selling" as that term is defined at NMSA 1978, Section 7-9-3 (A), because Taxpayer was not transferring property for consideration. The Department's portion of the Joint Prehearing Statement similarly agrees that Taxpayer was not a "seller." See Joint Prehearing Statement, Sec. III (Department's Position).



Rather, Taxpayer was an agent of the seller who was compensated in the form of commissions for transacting sales between the buyers of the prosthetic devices and the manufacturers. This is illustrated by the uncontroverted testimony regarding the methods by which the transactions were funded. Taxpayer testified that the buyer of the prosthetic devices was usually a hospital which made payment directly to the manufacturer. The manufacturer then paid the distributor a portion of the proceeds from the sale. The distributor would in turn pay a commission to Taxpayer from its proceeds from the transaction.

Meanwhile, in consideration for payment, ownership of the prosthetic devices would transfer to the buyer from the manufacturer. There was no evidence to infer that Taxpayer ever acquired or possessed any ownership interest in the prosthetic devices. Rather, Taxpayer's only interest came in the form of commissions paid to Taxpayer which were reported on Form 1099-MISC as nonemployee compensation.

Since Taxpayer is not a "seller" of prosthetic devices, Section 7-9-73 is not directly applicable to the issues at protest. However, it does establish that the sales of prosthetic devices are deductible from gross receipts. This observation is significant because it focuses attention on the statute that is relevant for consideration in this protest, but largely overlooked by the parties until further briefing was requested. The statute governing Taxpayer's protest is NMSA 1978, Section 7-9-66 which states:

**7-9-66. Deduction; gross receipts tax; commissions.**

A. Receipts derived from commissions on sales of tangible personal property which are not subject to the gross receipts tax may be deducted from gross receipts.

B. Receipts of the owner of a dealer store derived from commissions received for performing the service of selling from the owner's dealer store a principal's tangible personal property may be deducted from gross receipts.

C. As used in this section, "dealer store" means a merchandise facility open to the public that is owned and operated by a person who contracts with a principal to act as an agent for the sale from that facility of merchandise owned by the principal.

History: 1953 Comp., § 72-16A-14.22, enacted by Laws 1969, ch. 144, § 57; 1999, ch. 169, § 1.

Consequently, Section 7-9-66 (A) (1999) allows a deduction from gross receipts from receipts derived from commissions on sales of tangible personal property which are not subject to gross receipts taxes. The Department provides further interpretation at Regulation 3.2.1.18 HH (6) which states:

If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.

Section 7-9-66 and Regulation 3.2.1.18 HH (6) are directly on point. Taxpayer was an independent contractor who received commissions from the sales of tangible property of another that were deductible under Section 7-9-73. Unlike Section 7-9-73, Section 7-9-66 does not require possession of an NTTC, because it does not require that the seller in the underlying transaction actually claim the applicable deduction. Rather, Section 7-9-66 only requires that the transaction be "deductible." This implementation of Section 7-9-66, as expressed in Regulation 3.2.1.18 HH (6) has been consistent during all periods of time relevant to Taxpayer's protest, and remains consistent with the Department's most recent publication on the subject of gross receipts taxes. *See* FYI-105, *Gross Receipts & Compensating Taxes: An Overview* (Rev. 7/2017), Pg. 17.

The Department's response to the request for additional briefing did not acknowledge Regulation 3.2.1.18 HH or FYI-105, but continued to assert that Taxpayer was obligated to

possess an NTTC as required by Section 7-9-73, although Taxpayer was also not admittedly, a “seller”.

The Hearing Officer was unpersuaded that Section 7-9-66 should not apply when the plain meaning of the statute, the relevant regulation, and the Department’s own publications are directly on point to the contrary. Although the Department is correct that commissions are generally subject to gross receipts tax under NMSA 1978, Section 7-9-3.5 and Regulation 3.2.225.9 (C) NMAC, the central issue in this protest comes within an exception to the general rule established by Section 7-9-66 and implemented by Regulation 3.2.1.18 HH NMAC.

Taxpayer’s protest should be GRANTED because his commissions derived from sales of prosthetic devices which were not subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-66 (A); Regulation 3.2.1.18 HH NMAC; FYI-105 (Rev. 7/2017), Pg. 17.

### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely written protest to the assessments issued under Letter ID No. L1020757296 and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department’s assessment is presumed to be correct, and it is Taxpayer’s burden to come forward with evidence and legal argument to establish entitlement to an abatement.

C. The evidence established that Taxpayer’s gross receipts in the form of commissions were entitled to the deduction under NMSA 1978, Section 7-9-66 and Regulation 3.2.1.18 HH NMAC because they arose from sales that were also deductible under NMSA 1978, Section 7-9-73.

D. NMSA 1978, Section 7-9-66 does not require Taxpayer to obtain or possess a nontaxable transaction certificate.

E. NMSA 1978, Section 7-9-73 does not require Taxpayer to obtain or possess an nontaxable transaction certificate in order to claim a deduction under NMSA 1978, Section 7-9-66.

For the foregoing reasons, Taxpayer's protest **IS GRANTED**. The Department is hereby ordered to **ABATE** assessed tax, penalty, and interest.

DATED: January 9, 2018



---

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.

## **CERTIFICATE OF SERVICE**

On January 9, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner: