

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

**IN THE MATTER OF THE PROTEST OF
ACME MECHANICAL,
TO THE ASSESSMENTS ISSUED UNDER
LETTER ID NO. L1302818096**

v.

D&O No. 18-03

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A formal hearing on the above-referenced protest was held December 5, 2017, before Administrative Law Judge Lauren Baldwin in Santa Fe, New Mexico. The Taxation and Revenue Department (Department) was represented by Peter Breen, Staff Attorney. Danny Pogan, Auditor, also appeared and testified on behalf of the Department. Gene Palmeri, owner of ACME Mechanical (Taxpayer), appeared for the hearing and represented himself. Stephanie Duquette appeared and testified as a witness for the Taxpayer. The Administrative Law Judge took notice of all documents in the administrative file. Taxpayer Exhibits 1 – 5 and Department Exhibits A – C were admitted into the evidentiary record of the hearing without objection. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 16, 2017, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period of January 1, 2012 through December 31, 2014. The assessment was for \$3694.58 tax, \$738.92 penalty, and \$494.46 interest.

2. On August 30, 2017, September 21, 2017, and September 22, 2017 the Taxpayer protested the Department's assessment. The Department acknowledged receipt of each protest letter, respectively, on September 5, 2017, September 26, 2017, and September 28, 2017.
3. On November 8, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On November 9, 2017, the Administrative Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.
5. During 2012, 2013, and 2014, the Taxpayer was providing services in New Mexico as a plumbing contractor.
6. The Taxpayer subcontracted with two companies to provide plumbing services on construction projects in New Mexico.
7. The companies directly contracted or billed the Taxpayer's plumbing services to construction projects subject to gross receipts tax.
8. In 2017, the Department selected the Taxpayer for audit.
9. The Department sent the Taxpayer a Notice of Limited Scope Audit Commencement – 60 Day Notice, dated June 3, 2017, (the 60-day letter) advising of the audit and giving the Taxpayer 60 days to obtain any applicable nontaxable transaction certificates (NTTCs). [Dept. Exh. A].
10. The 60-day letter indicated that the deadline for obtaining NTTCs was August 2, 2017. [Dept. Exh. A].

11. The Department sent the Taxpayer a Reminder Notice of Limited Scope Audit – Gross Receipts, dated July 13, 2017, (Reminder Notice) reminding Taxpayer of the August 2, 2017 deadline for obtaining NTTCs. [Dept. Exh. B].
12. The Taxpayer obtained NTTCs from both companies. One was issued and executed to the Taxpayer on September 21, 2017, which was 49 days after the deadline of August 2, 2017, listed in the 60-day letter. The second NTTC was issued on September 15, 2017, and executed on September 22, 2017, which was 43 days after the deadline. [Taxpayer Exhs. 2 and 3].
13. The Department rejected the NTTCs as they were not obtained by August 2, 2017 and assessed the Taxpayer.
14. As of the date of hearing, Taxpayer owed \$3694.58 in gross receipts tax, \$738.92 in penalty, and \$540.17 in penalty. [Dept. Exh. C].

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the tax, penalty and interest as assessed. This issue hinges upon whether the Taxpayer's acceptance and submission of the NTTCs was timely.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, §7-1-17 (2007). 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.” NMSA 1978, §7-1-3 (2007). *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be

correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement.

NTTCs.

Services performed within the State of New Mexico are subject to the gross receipts tax. See NMSA 1978, §7-9-4 (2010); 3.2.1.18 (A) NMAC (2012). A taxpayer may deduct gross receipts from sales of construction or construction-related services in New Mexico in certain instances, as provided in NMSA 1978, Section 7-9-52 (2012). “Receipts from selling a construction service or a construction-related service 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 person performing the construction service or a construction-related service.” §7-9-52 (emphasis added).

NMSA 1978, Section 7-9-43(A) (2011) provides that a taxpayer “*should* be in the possession of” the NTTC when the return for the receipts from the transaction is due, but also gives taxpayers audited by the Department a second chance to obtain the NTTC within 60 days of when the Department notifies the taxpayer that an NTTC is required. *Id.* (emphasis added). The applicable statute specifically provides that, if a taxpayer has not obtained the NTTC within the sixty days, the deduction is disallowed. *Id.* Consistent with the statutory language, under Regulation 3.2.201.12 (C) NMAC (2012), a taxpayer “is not entitled to the deduction” when the NTTC is untimely. The New Mexico Court of Appeals has held that despite its general reluctance to place “form over substance,” the failure to timely and properly present a requisite NTTC is a “valid basis” for the Department to deny a claimed deduction. *Proficient Food Co. v. New Mexico Taxation & Revenue Dep’t*, 1988-NMCA-042, ¶22, 107 N.M. 392.

It is undisputed that the Taxpayer’s receipts would be deductible if the NTTCs were allowed. It is undisputed that the NTTCs would cover the totality of the assessments. But it also

is undisputed that the NTTCs were not executed to or in Taxpayer's possession until September 15, 2017 and September 21, 2017.

Gene Palmeri has operated ACME Mechanical for many years. The business originally was limited to service calls for plumbing matters, but Mr. Palmeri more recently began subcontracting for large construction companies.

Mr. Palmeri has limited knowledge of bookkeeping and accounting. Stephanie Duquette began helping Mr. Palmeri with bookkeeping and accounting for ACME Mechanical on a very intermittent and part-time basis approximately two years ago.

Mr. Palmeri was not familiar with NTTCs before the audit in this matter occurred. He testified that he did not understand the gravity of the 60-day letter and Reminder Notice when he received them. He did not confer with Ms. Duquette about the 60-day letter and Reminder Notice until after the deadline for obtaining executed NTTCs had passed. With Ms. Duquette's assistance, Mr. Palmeri obtained the NTTCs, but not until more than 40 days after the deadline listed in the 60-day letter had passed. Mr. Palmeri testified that he understood his error but hoped that, since he eventually did obtain the appropriate NTTCs, he could be given a "fresh start" and the NTTCs could be accepted.

While a plumber understandably may not be skilled in bookkeeping and accounting, the 60-day letter explained that documentation could be "provided to the department to substantiate that your gross receipts are not subject to taxation," including "[i]nvoices with corresponding NTTCs . . ." (Exh. A). And both the 60-day letter and the Reminder Notice stated explicitly in capital letters:

**NEW MEXICO STATUTE REQUIRES THAT ANY NONTAXABLE
TRANSACTION CERTIFICATES (NTTCs) BE IN YOUR POSSESSION AND
BE EXECUTED (DATED) ON OR PRIOR TO THE RESPONSE DATE ON**

THIS NOTICE OR DEDUCTIONS RELATING TO THE NTTCS WILL BE
DISALLOWED.

(Exhs A and B).

Under Section 7-9-43 and 3.2.201.12 (C) NMAC, the Department has no authority to allow a deduction after the expiration of the second chance, 60-day deadline, even if a taxpayer has a reasonable explanation for the delay. By not presenting the NTTCS in a timely manner, as required by Section 7-9-43 and 3.2.201.12 (C) (NMAC), Taxpayer waived its right to the claimed deduction. *See Proficient Food Co.*, ¶22 (internal citations omitted) (“Where a party claiming a right to an exemption or deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto.”).

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of 2012, 2013, and 2014 gross receipts taxes issued under Letter ID number L1302818096, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set within 90-days of protest under NMSA 1978, Section 7-1B-8(A) (2015).

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

D. Under NMSA 1978, Section 7-9-43 (2011), Taxpayer had a statutory obligation to possess an NTTC when the gross receipts tax was initially due for the 2012, 2013, and 2014 sales of plumbing services in New Mexico.

E. The Taxpayer was given notice that possession of NTTCS was required by August 2, 2017, in the 60-day letter, dated June 3, 2017. *See* §7-9-43.

F. Taxpayer did not present timely executed NTTCs to support the claimed deduction for the sale of construction or construction-related services under NMSA 1978, Section 7-9-52 (2012).

G. Under Section 7-9-43 and 3.2.201.12 (C) (2012) NMAC, without a timely executed NTTC at either the time of the filing of returns or by August 2, 2017, the Department cannot allow and Taxpayer is not entitled to the claimed deduction under Section 7-9-52. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary). *See also Proficient Food Co. v. New Mexico Taxation & Revenue Dep't*, 1988-NMCA-042, ¶22, 107 N.M. 392 (Court found it valid for the Department to deny a claimed deduction when taxpayer did not timely present a requisite NTTC).

For the foregoing reasons, the Taxpayers’ protest **IS DENIED. IT IS ORDERED** that the Taxpayer is liable for \$3,694.58 in gross receipts tax, \$738.92 in penalty, and \$540.17 in interest as of the date of the hearing. Interest continues to accrue until the tax principal is satisfied.

DATED: January 4, 2018.

Lauren M. Baldwin

Lauren M. Baldwin
Administrative Law Judge
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal **with the New Mexico Court of Appeals** within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 20__ in the following manner: