

1 Officer finds in favor of the Taxpayer on the penalty. IT IS DECIDED AND ORDERED AS
2 FOLLOWS:

3 **FINDINGS OF FACT**

4 1. On December 11, 2019, under letter id. no. L1324561072, the Department issued
5 an assessment to the Taxpayer for gross receipts taxes from January 31, 2012 through April 30,
6 2019. The assessment was for gross receipts tax of \$47,581.59, penalty of \$9,516.33, and
7 interest of \$6,951.13 for a total liability of \$64,049.05. [Admin. file L1324561072].

8 2. On January 10, 2020, the Taxpayer filed a timely written protest to the
9 assessment. [Admin. file protest].

10 3. On February 27, 2020, the Department acknowledged its receipt of the protest.
11 [Admin. file L1240177328].

12 4. On August 24, 2020, the Department filed a request for hearing with the
13 Administrative Hearings Office. [Admin. file request].

14 5. On September 25, 2020, a telephonic scheduling hearing was conducted, which
15 was within 90 days of the request as required by statute. [Admin. file].

16 6. The Taxpayer was providing information management and technology services
17 (IT services) to Holloman Air Force Base (Holloman) and to Cannon Air Force Base (Cannon)
18 in New Mexico. [Ex. A; Testimony of Mr. Lamont; Testimony of Ms. Tapia].

19 7. The Taxpayer was assessed for the services that it provided at Cannon. [Ex. A;
20 Testimony of Mr. Lamont; Testimony of Ms. Tapia].

21 8. Based on discussions with the auditor, the Taxpayer believed that it would be able
22 to deduct the services it performed for Cannon from its gross receipts if it obtained a nontaxable
23 transaction certificate (NTTC). [Admin. file; Testimony of Mr. Lamont].

1 also *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. The presumption
2 extends to the assessment of penalty and interest. See 3.1.6.13 NMAC (2001).

3 The burden is on the Taxpayer to prove that it is entitled to an exemption or deduction.
4 See *Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M.
5 520. See also *Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction
6 from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the
7 right to the exemption or deduction must be clearly and unambiguously expressed in the statute,
8 and the right must be clearly established by the taxpayer.” See *Escrow Corp. v. State Taxation*
9 *and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. See also *Wing Pawn Shop v.*
10 *Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. See also *Chavez v.*
11 *Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. See also *Pittsburgh and Midway*
12 *Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

13 **Gross receipts tax.**

14 Anyone engaging in business in New Mexico is subject to the gross receipts tax. See
15 NMSA 1978, § 7-9-4 (2010). To engage in business in New Mexico “means carrying on or causing
16 to be carried on any activity with the purpose of direct or indirect benefit.” NMSA 1978, § 7-9-3.3
17 (2019)³. Gross receipts include the total amount received “from performing services in New
18 Mexico.” NMSA 1978, § 7-9-3.5 (A) (1) (2019).

19 There is a statutory presumption “that all receipts of a person engaging in business are
20 subject to the gross receipts tax.” NMSA 1978, § 7-9-5 (A) (2019). The Taxpayer admits that it
21 was performing IT services in New Mexico, which are the subject of this assessment. [Admin. file;

³ The most current version of statutes and regulations will be referenced unless there is a relevant substantive change between it and the version in effect at the time that the Taxpayer’s services were rendered.

1 Testimony of Mr. Lamont]. Therefore, the Taxpayer’s gross receipts are presumptively subject to
2 the gross receipts tax. *See* NMSA 1978, § 7-9-5.

3 **An NTTC issued by the Department.**

4 The Taxpayer argues that it is entitled to take a deduction since it was issued a Type 15
5 NTTC by the Department. A taxpayer may establish that it is entitled to take a deduction from
6 their gross receipts “by obtaining a properly executed nontaxable transaction certificate from the
7 purchaser.” NMSA 1978, § 7-9-43 (A) (2018). For a purchaser to obtain a NTTC that it can then
8 execute to the seller, the purchaser must “apply to the department for permission to execute
9 nontaxable transaction certificates”. NMSA 1978, § 7-9-43 (E). Obtaining the NTTC from the
10 Department did not entitle the Taxpayer to take a deduction; rather, it allows the Taxpayer to serve
11 the NTTC to a seller from whom it is purchasing something. *See id.* *See also* 3.2.201.16 (2001)
12 (explaining the difference between the Department issuing a NTTC and a purchaser executing a
13 NTTC). Moreover, a Type 15 NTTC may not be issued “for the purchase of services.” *See*
14 3.2.205.11 (B) (2001).

15 **An NTTC must be timely.**

16 The Taxpayer argues that it is entitled to take a deduction because Cannon served it with an
17 NTTC during the course of the audit. Again, a taxpayer may establish that it is entitled to take a
18 deduction from their gross receipts “by obtaining a properly executed nontaxable transaction
19 certificate from the purchaser.” NMSA 1978, § 7-9-43 (A) (2018). A taxpayer should be in
20 possession of NTTCs when the transaction occurs. *See* 3.2.201.8 (A) (2012). A taxpayer must be
21 in possession of the NTTCs “within 60 days of notice by the department requiring such possession.”
22 *Id.* Possession of the NTTC “after the 60 days following notice have expired will not be honored by
23 the department for the period covered by the audit.” *Id.*

1 Neither party presented evidence of a formal written demand for NTTCs. The notice is not
2 required to be in writing. *See id.* *See* NMSA 1978, § 7-9-43. *Contrast with* NMSA 1978, § 7-1-
3 11.2 (2007) (requiring commencement of audit notices to be in writing). The only evidence was
4 presented by the Taxpayer. [Admin. file; Testimony of Mr. Lamont]. The Taxpayer admitted that it
5 was notified of the need for NTTCs in its phone call with the auditor on September 20, 2019.
6 [Admin. file; Testimony of Mr. Lamont].

7 Given the Taxpayer’s admission, there is sufficient evidence to conclude that the Taxpayer
8 was given verbal notice that it must provide any NTTCs to the Department. Sixty days from the
9 admitted verbal notice on September 20, 2019 was November 19, 2019. Cannon executed a Type 9
10 NTTC to the Taxpayer on November 26, 2019. [Admin. file]. Therefore, the NTTC was not in the
11 Taxpayer’s possession within 60 days of the notice. When a taxpayer fails to present a NTTC
12 within the deadline, the taxpayer “is not entitled to the deductions.” 3.2.201.12 (C) NMAC (2001).
13 As the Taxpayer failed to obtain the NTTC within 60 days of the notice when the auditor requested
14 them, the NTTC does not entitle the Taxpayer to take the deduction. *See id.*

15 **Alternative evidence.**

16 A taxpayer who fails to obtain a properly executed and timely NTTC may still establish that
17 it is entitled to take a deduction “by presenting alternative evidence that demonstrates the facts
18 necessary to support entitlement to the deduction.” NMSA 1978, § 7-9-43 (B). A taxpayer may
19 deduct “[r]eceipts from selling a service for resale”. NMSA 1978, § 7-9-48 (2000). In other words,
20 the taxpayer is selling its services to a client who then resells the taxpayer’s services to the ultimate
21 consumer. *See id.*

22 With respect to the Taxpayer’s receipts for its sales to Holloman, it was able to establish that
23 it was acting as a subcontractor and that its services were resold to Holloman by the Taxpayer’s

1 client. [Testimony of Ms. Tapia; Ex. A]. Consequently, the Taxpayer's receipts for sales to
2 Holloman were not assessed as it had established that it was entitled to a deduction for the resale of
3 its services. [Testimony of Ms. Tapia; Ex. A]. *See also* NMSA 1978, § 7-9-48.

4 At Cannon, the Taxpayer was not acting as a subcontractor; rather, it was providing services
5 directly to the ultimate consumer, which was Cannon. [Testimony of Ms. Tapia; Ex. A]. Since the
6 Taxpayer's services were not being resold at Cannon to another consumer, the Taxpayer failed to
7 prove that it is entitled to take the deduction. *See* NMSA 1978, § 7-9-48. Nevertheless, Cannon
8 executed a Type 9 NTTC to the Taxpayer. [Admin. file; Testimony of Mr. Lamont].

9 The Type 9 NTTC states that it is “[f]or the purchase of tangible personal property only and
10 may not be used for the purchase of services”. [Admin. file]. *See also* NMSA 1978, § 7-9-47
11 (allowing a deduction for receipts from selling tangible personal property to a customer who resells
12 it). The Taxpayer was not selling tangible personal property; it was selling IT services. [Admin.
13 file; Testimony of Mr. Lamont; Testimony of Ms. Tapia]. Therefore, the NTTC was not the proper
14 type to cover the sale of the Taxpayer's services. *See* 3.2.201.8 NMAC (C) (noting that each type
15 of NTTC is limited to the particular type of deduction). The Type 9 NTTC also failed to prove that
16 the Taxpayer is entitled to take the deduction for the resale of its services. *See* NMSA 1978, § 7-9-
17 48.

18 The Taxpayer argued during the audit that its sales should not be subject to state tax because
19 it was providing services for a federal agency on federal property. [Ex. A]. Sales of tangible
20 personal property to a government agency are deductible. *See* NMSA 1978, § 7-9-54. This
21 deduction does not extend to sales of services to a government agency. *See id.* *See also* 3.2.212.9
22 NMAC (2001).

23 **Accepted in good faith.**

1 “When a person accepts in good faith a properly executed [NTTC] from the purchaser, the
2 properly executed [NTTC] shall be conclusive evidence that the proceeds from the transaction are
3 deductible from the person’s gross receipts.” NMSA 1978, § 7-9-43 (D). *See also Leaco Rural Tel.*
4 *Coop. v. Bureau of Revenue*, 1974-NMCA-076, ¶ 22, 86 N.M. 269 (holding that the taxpayer was
5 not entitled to deduct the sales of the phone services, but also holding that the taxpayer was not
6 liable for the tax because the NTTC that it timely accepted in good faith protected it from liability).
7 *See also CCA of Tennessee, LLC v. N.M. Taxation and Revenue Dep’t*, No. A-1-CA-37548, mem.
8 op. (NMCA, January 21, 2021) (non-precedential) (holding that the NTTC timely accepted in good
9 faith provided the taxpayer safe harbor from its tax liability even though the sale was not
10 deductible). *See also Continental Inn v. N.M. Taxation and Revenue Dep’t*, 1992-NMCA-030, ¶
11 12-13, 113 N.M. 588. *See also Gas Co. v. O’Cheskey*, 1980-NMCA-085, ¶ 12, 94 N.M. 630.p

12 An NTTC does not transform a taxable transaction into a nontaxable transaction. *See*
13 *Continental Inn*, 1992-NMCA-030, ¶ 12-13. *See also Gas Co.*, 1980-NMCA-085, ¶ 12. *See also*
14 *McKinley Ambulance Serv. v. Bureau of Revenue*, 1979-NMCA-026, 92 N.M. 599 (noting that a
15 NTTC is conclusive evidence only if the NTTC applies to the transaction at issue). *See also*
16 *Arco Materials, Inc. v. State of New Mexico Taxation and Revenue Dep’t.*, 1994-NMCA-062,
17 118 N.M. 12, *overruled on other grounds by Blaze Constr. Co. v. Taxation and Revenue Dep’t.*,
18 1995-NMSC-110, 118 N.M. 647 (holding that the seller had a duty to know that a previously
19 valid NTTC had been invalidated by a change in the statute that disallowed the previously
20 allowed deduction).

21 Acceptance of an NTTC in good faith “is determined at the time of each transaction.”
22 3.2.201.14 NMAC (2001). The safe harbor protection will be conclusive when three
23 requirements are met; the acceptance of the NTTC 1) must be timely, 2) must be in good faith,

1 and 3) the NTTC must be properly executed. *See Leaco Rural*, 1974-NMCA-076, ¶ 15. *See also*
2 *Continental Inn*, 1992-NMCA-030. *See also Gas Co.*, 1980-NMCA-085. *See also CCA*, No. A-
3 1-CA-37548. A timely NTTC “conveys a message to the seller that the use of the NTTCs is
4 such that the seller is entitled to deductions”. *Continental Inn*, 1992-NMCA-030, ¶ 13. *See also*
5 *Gas Co.*, 1980-NMCA-085, ¶ 12. *See also CCA*, No. A-1-CA-37548, ¶ 27.

6 The Taxpayer’s acceptance of the NTTC was not timely as it occurred more than 60 days
7 after the Department notified it that NTTCs were required. [Admin file; Testimony of Mr.
8 Lamont]. *See also* 3.2.201.8 and 3.2.201.12 NMAC. Therefore, the first criterion of the safe
9 harbor protection has not been met. *See Leaco Rural*, 1974-NMCA-076, ¶ 15. Moreover, the
10 Taxpayer did not rely on the NTTC to take deductions. [Ex. A]. Instead, the Taxpayer did not
11 report any gross receipts and deductions because it believed sales to the federal government on
12 federal property would be exempt from taxation. [Ex. A].

13 **Penalty.**

14 Penalty “shall be added to the amount assessed” when a tax is not paid on time due to
15 negligence or disregard of rules. *See NMSA 1978*, § 7-1-69 (A) (2007). The penalty assessed is
16 presumptively correct, and the Taxpayer has burden of proving otherwise. *See* 3.1.11.8 NMAC
17 (2001). Generally, a taxpayer is not considered negligent when the taxpayer relied on advice from
18 tax counsel or an accountant. *See* 3.1.11.10 NMAC (D) (2001).

19 The Taxpayer had a contract with a CPA firm that provided for quarterly meetings to
20 discuss state tax issues. [Admin. file]. The Taxpayer does business in multiple states. [Admin. file;
21 Testimony of Mr. Lamont]. The Taxpayer was reporting and paying the withholding tax in New
22 Mexico. [Ex. A]. Although the CPA firm did not claim to be experts in the taxes of every state,
23 they reviewed the Taxpayer’s files and advised that the Taxpayer was in compliance with the state

1 tax regulations in every state where it was doing business. [Admin. file; Testimony of Mr. Lamont].
2 Upon learning that the CPA firm was incorrect about the New Mexico state tax obligations, the
3 Taxpayer fired that CPA firm and found another to consult. [Admin. file; Testimony of Mr.
4 Lamont].

5 Based on the totality of the evidence, the Taxpayer has met its burden. Consequently, the
6 Taxpayer was not negligent in failing to report and pay its gross receipts taxes. Therefore, the
7 penalty is abated.

8 **Interest.**

9 Interest “shall be paid” on taxes that are not paid by their due date. NMSA 1978, § 7-1-67
10 (A) (2013). The word “shall” indicates that the assessment of interest is mandatory, not
11 discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶
12 22, 146 N.M. 24. There are some instances when interest will not be due, such as when a managed
13 audit is done and promptly paid. *See* NMSA 1978, § 7-1-67 (A) (1-7).

14 There was no evidence that any of these exceptions apply to the Taxpayer’s assessment. *See*
15 *id.* The assessment of interest is not designed to punish, but to compensate the state for the time
16 value of unpaid revenues. Because the tax was not paid when it was due, interest was properly
17 assessed.

18 **CONCLUSIONS OF LAW**

19 A. The Taxpayer filed a timely, written protest of the Department’s assessment and
20 jurisdiction lies over the parties and the subject matter of this protest.

21 B. The first hearing was timely set and held within 90 days of the request for hearing.
22 *See* NMSA 1978, Section 7-1B-8 (2019).

1 C. The Taxpayer failed to establish that it was entitled to take a deduction for the sale of
2 its services to Cannon. *See* NMSA 1978, § 7-9-48, § 7-9-43. *See also* 3.2.201.8 and 3.2.201.12
3 NMAC.

4 D. The Taxpayer's possession of the NTTC was not timely, as it occurred more than 60
5 days after the Department notified it that NTTCs were required. *See* 3.2.201.8 and 3.2.201.12
6 NMAC.

7 E. As the Taxpayer's acceptance of the NTTC was not timely, the safe harbor
8 protection does not apply. *See id.* *See also* 3.2.201.14 NMAC. *See also* *Leaco Rural*, 1974-
9 NMCA-076, ¶ 15. *See also* *Continental Inn*, 1992-NMCA-030. *See also* *Gas Co.*, 1980-NMCA-
10 085. *See also* *CCA*, No. A-1-CA-37548.

11 F. The Taxpayer consulted with a CPA firm and relied on its advice regarding their
12 multistate tax issues. Therefore, the Taxpayer was not negligent, and penalty is abated. *See*
13 NMSA 1978, 7-1-69. *See also* 3.1.11.11 NMAC.

14 G. The Taxpayer failed to overcome the presumption that the assessment of tax and
15 interest was correct. *See* NMSA 1978, § 7-1-17, § 7-1-67.

16 For the foregoing reasons, the Taxpayer's protest **IS DENIED IN PART AND**
17 **GRANTED IN PART. IT IS ORDERED** that the \$9,516.33 penalty is HEREBY ABATED, and
18 the Taxpayer remains liable for the \$47,581.59 in gross receipts tax and \$6,951.13⁴ in interest.
19 Interest continues to accrue until the tax principal is paid.

20 DATED: May 21, 2021.

21 *Dee Dee Hoxie*

22 _____
Dee Dee Hoxie

⁴ This was the amount of interest due at the time of the assessment. An updated amount was not provided.

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.

1 **CERTIFICATE OF SERVICE**

2 On May 21, 2021, a copy of the foregoing Decision and Order was submitted to the parties
3 listed below in the following manner:

4 *Email*

Email

5 INTENTIONALLY BLANK
6

7 _____
8 John Griego
9 Legal Assistant
10 Administrative Hearings Office
11 P.O. Box 6400
Santa Fe, NM 87502