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

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LOBO TECH, LLC

v.

AHO No. 23.12-068A

TAXATION AND REVENUE DEPARTMENT

D&O No. 24-11

DECISION AND ORDER

On March 1, 2024, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference hearing on the merits of the protest to the assessment. The Taxation and Revenue Department (Department) was represented by Peter Breen, Staff Attorney. Mitchell Bartholomew, Auditor, also appeared on behalf of the Department. Lobo Tech, LLC (Taxpayer) was represented by its owner, Pauline Carrillo. Ms. Carrillo and Mr. Bartholomew testified. The parties agreed to recess the hearing and to recommence at a later date. On July 31, 2024, the hearing was recommenced. Ms. Carrillo was present for the Taxpayer. The Department was represented by Christopher Orton, Staff Attorney, and Nicholas Pacheco, Auditor. Ms. Carrillo and Mr. Pacheco testified. The Hearing Officer took notice of all documents in the administrative file. The Department's exhibits A (acknowledgment letter), B (assessment), C (protest), D (Taxpayer's documents), E (updated amounts), and F (2015 liabilities) were admitted¹.

The main issues to be decided are whether any part of the assessment is beyond the statute of limitations and whether the Taxpayer is entitled to any relief from penalties and interest. The Hearing Officer considered all of the evidence and arguments presented by both parties. Because part of the assessment is beyond the statute of limitations and because the

¹ The Department pre-filed Exhibits A, B, C, and D, which were admitted at the hearing on July 31, 2024. The Department requested additional time to submit Exhibit E as the updated amounts had just been approved. The request was granted with a deadline of August 2, 2024, and directions to provide additional calculations on the interest due as of July 23, 2023. Exhibit E was timely submitted. The order for clarification required Exhibit F to be filed by August 30, 2024 if the Taxpayer was a monthly filer. Exhibit F was timely submitted.

1 Department failed to promptly acknowledge the protest and request a hearing, the Hearing
2 Officer finds partially in favor of the Taxpayer. Because the Taxpayer failed to prove that it was
3 entitled to more deductions and failed to prove that it was not negligent, the Hearing Officer
4 finds partially in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

5 **FINDINGS OF FACT**

6 ***Procedural findings.***

7 1. On November 2, 2022, the Department issued an assessment to the Taxpayer for
8 gross receipts tax for the tax periods from January 1, 2015 to December 31, 2018. The
9 assessment was for tax principal of \$46,489.02, penalty of \$9,288.62, and interest of \$9,271.36,
10 for a total liability of \$64,973.13. [Exhibit B].

11 2. On January 23, 2023, the Taxpayer filed a timely written protest to the
12 assessment. [Exhibit C].

13 3. On June 29, 2023, slightly more than five months after the protest was filed, the
14 Department acknowledged its receipt of the protest. [Exhibit A].

15 4. The Department offered no explanation or justification for the five-month delay in
16 acknowledgement.

17 5. On December 21, 2023, the Department filed a request for hearing with the
18 Administrative Hearings Office. [Admin. file request].

19 6. The request for hearing was filed 332 days after the protest was filed. [Admin.
20 file].

21 7. On January 29, 2024, a telephonic scheduling hearing was conducted, which was
22 within 90 days of the date that the request for hearing was filed, as required by statute. [Admin.
23 file].

1 8. The Taxpayer objected to the telephonic scheduling hearing and argued that the
2 protest had already been improperly delayed. [Admin. file].

3 9. The hearing on the merits commenced on March 1, 2024, which the parties agreed
4 was within 90 days of the request for hearing, as required by statute. [Admin. file].

5 10. The parties agreed to recess the hearing so that the Taxpayer could gather more
6 evidence, and the parties agreed to recommence the hearing on the merits later. [Admin. file].

7 11. The Taxpayer requested a continuance of the initial recommencement setting, and
8 the Department requested a continuance of the second recommencement setting. Both requests
9 were granted. [Admin. file].

10 12. On August 19, 2024, an order for clarification was issued. [Admin. file].

11 13. On August 22, 2024, the Department filed a clarification and Exhibit F. [Admin.
12 file; Exhibit F].

13 ***Substantive findings.***

14 14. The Taxpayer is a plumbing contractor. [Testimony of Ms. Carrillo; Testimony
15 of Mr. Pacheco].

16 15. The Taxpayer frequently provides plumbing services that are resold by a general
17 contractor. [Testimony of Ms. Carrillo; Testimony of Mr. Pacheco; Exhibit D].

18 16. During the tax periods at issue, the Taxpayer entrusted its tax filing and payments
19 to an employee. [Testimony of Ms. Carrillo].

20 17. During the pandemic², the Taxpayer's employee was working from home and
21 took most of the Taxpayer's records to her home. [Testimony of Ms. Carrillo].

² Generally, the years 2020 and 2021.

1 18. The Taxpayer's employee left the Taxpayer's employ and moved out of state, but
2 the employee did not return the Taxpayer's records. [Testimony of Ms. Carrillo].

3 19. The Taxpayer's attempts to retrieve its records have not been successful, and the
4 former employee has canceled her old phone number and has not provided updated contact
5 information to the Taxpayer. [Testimony of Ms. Carrillo].

6 20. After the assessment, Ms. Carrillo tried to piece together what had happened with
7 the Taxpayer's gross receipts tax filings, and she was able to provide copies of some documents
8 to the Department. [Testimony of Ms. Carrillo; Exhibit D].

9 21. Ms. Carrillo learned that the employee who handled the gross receipts tax
10 reporting had not been reporting the gross receipts and deductions properly. [Testimony of Ms.
11 Carrillo].

12 22. Ms. Carrillo admits that the Taxpayer underreported the gross receipts tax for the
13 tax periods in question and concedes that the six-year statute of limitations should apply.
14 [Testimony of Ms. Carrillo].

15 23. The Department did not dispute that the six-year statute of limitations should
16 apply.

17 24. Exhibit E details the tax, penalty, and interest by six-month intervals for the 2015
18 tax periods, the 2017 tax periods, and the 2018 tax periods.

19 25. Exhibit F details the tax, penalty, and interest by month for the 2015 tax periods.

20 26. The Department determined that the Taxpayer was entitled to take some
21 deductions as a subcontractor for the resale of its services based on one nontaxable transaction
22 certificate (NTTC), some invoices, and alternative evidence based on its research of building
23 projects and permits. [Testimony of Mr. Pacheco; Exhibit D; Exhibit E].

1 27. The Department determined that the Taxpayer was not entitled to take deductions
2 based on another NTTC because it was for the sale of tangible items to a government agency,
3 which does not cover the sale of the Taxpayer's services. [Testimony of Mr. Pacheco; Exhibit
4 D.1].

5 28. Mr. Pacheco reviewed the Taxpayer's submissions, and he determined that the
6 Taxpayer had proven that it was entitled to an adjustment³ of the assessment. [Testimony of Mr.
7 Pacheco; Exhibit D; Exhibit E].

8 29. The Taxpayer established that \$11,389.00 of gross receipts from September 2015
9 were attributable to the NTTC that the Department disallowed. [Exhibit D.1; Exhibit D.7;
10 Exhibit D.10].

11 30. Because the Taxpayer's former employee took its records, the Taxpayer is not
12 able to provide more evidence of its gross receipts, which gross receipts apply to which
13 customers, or of its possible deductions for the tax periods at issue. [Testimony of Ms. Carrillo].

14 31. The Department determined that the Taxpayer was liable for the tax period ending
15 June 30, 2015⁴ in the amount of \$3,416.38 tax, \$683.28 penalty, and \$1,179.37 interest⁵, for a
16 total liability for that tax period of \$5,279.03. [Exhibit E; Exhibit F].

17 32. The tax period ending June 30, 2015 had a tax due date of July 25, 2015. *See*
18 *NMSA 1978, § 7-9-11 (1969). See also 3.2.2.13 NMAC (2001).*

19 33. Six years after the end of the calendar year of the tax due date of July 25, 2015
20 was December 31, 2021.

³ The evidence did not specify how much was adjusted in each tax period; however, since the adjustments were based on the deductions allowed and the amounts proven by the invoices, it seems that the adjustments were made to the 2017 and 2018 tax periods.

⁴ The breakdown of the monthly tax liability for 2015 shows that only tax periods that were part of the assessment were the June 2015 and the December 2015 tax periods. [Exhibit F].

⁵ For reasons discussed *infra*, the interest amounts used are those only through July 23, 2023.

1 NMCA-099, ¶8. The presumption extends to the assessment of penalty and interest. *See* 3.1.6.13
2 NMAC (2001). “The effect of the presumption of correctness is that the taxpayer has the burden of
3 coming forward with some countervailing evidence tending to dispute the factual correctness of the
4 assessment”. 3.1.6.12 (A) NMAC (2001). *See Gemini Las Colinas, LLC v. N.M. Taxation &*
5 *Revenue Dep’t*, 2023-NMCA-039. *See also* 22.600.1.18 and 22.600.3.24 NMAC.

6 **Gross receipts tax and deductions.**

7 Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See*
8 NMSA 1978, § 7-9-4 (2010). To engage in business in New Mexico means “carrying on or causing
9 to be carried on any activity with the purpose of direct or indirect benefit.” NMSA 1978, § 7-9-3.3
10 (2019). Gross receipts include the total amount received “from performing services in New
11 Mexico.” NMSA 1978, § 7-9-3.5 (A) (1) (2019). There is a statutory presumption that “all receipts
12 of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, § 7-9-5 (A)
13 (2019). The Taxpayer provided plumbing services in New Mexico. [Testimony of Ms. Carrillo].
14 Presumptively, the Taxpayer’s receipts for providing those services are subject to the gross receipts
15 tax. *See* NMSA 1978, § 7-9-4, §7-9-5.

16 The burden is on the Taxpayer to prove that it is entitled to an exemption or deduction.
17 *See Public Services Co. v. N.M. Taxation and Revenue Dep’t.*, 2007-NMCA-050, ¶ 32, 141 N.M.
18 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction
19 from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the
20 right to the exemption or deduction must be clearly and unambiguously expressed in the statute,
21 and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation*
22 *and Revenue Dep’t.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v.*
23 *Taxation and Revenue Dep’t.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v.*

1 *Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. *See also Pittsburgh and Midway*
2 *Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

3 A taxpayer may establish that it is entitled to take a deduction from their gross receipts “by
4 obtaining a properly executed nontaxable transaction certificate from the purchaser.” NMSA 1978,
5 § 7-9-43 (A) (2018). The Department conceded that the Taxpayer had obtained a properly executed
6 NTTC and adjusted the assessment based on it. [Testimony of Mr. Pacheco; Exhibit D; Exhibit E].
7 Because of the Taxpayer’s lack of records, the Department’s adjustments were limited to the gross
8 receipts that the Taxpayer was able to prove through its invoices came from that purchaser.
9 [Testimony of Mr. Pacheco; Exhibit D; Exhibit E].

10 A taxpayer may also establish that it is entitled to take a deduction “by presenting alternative
11 evidence that demonstrates the facts necessary to support entitlement to the deduction”. NMSA
12 1978, § 7-9-43 (B). The Department conceded that the Taxpayer had provided sufficient alternative
13 evidence on the gross receipts from another general contractor to support a deduction. [Testimony
14 of Mr. Pacheco; Exhibit D]. The Department adjusted the assessment based on the alternative
15 evidence, but the adjustments were again limited to the gross receipts that the Taxpayer was able to
16 prove through its invoices came from that general contractor. [Testimony of Mr. Pacheco; Exhibit
17 D; Exhibit E].

18 The Department rejected one NTTC that the Taxpayer provided because it was for sale of
19 tangible property to a government agency, not for the resale of services. [Testimony of Mr.
20 Pacheco; Exhibit D.1]. *See* 3.2.201.8 (D) NMAC (2001). *See also McKinley Ambulance Serv. v.*
21 *Bureau of Revenue*, 1979-NMCA-026, 92 N.M. 599 (noting that a NTTC is conclusive evidence only
22 if the NTTC applies to the transaction at issue).

23 A properly executed NTTC “shall be conclusive evidence, and the *only material evidence*,
24 that the proceeds from the transaction are deductible[.]” NMSA 1978, § 7-9-43 (A) (emphasis

1 added). Several cases indicate that a NTTC is conclusive evidence that the seller is entitled to take
2 the deduction even when the buyer improperly issued the NTTC. *See Leaco Rural Tel. Coop. v.*
3 *Bureau of Revenue*, 1974-NMCA-076, ¶ 22, 86 N.M. 269 (holding that the taxpayer was not entitled
4 to deduct the sale of phone services as they were not tangible personal property, but also holding that
5 the taxpayer was not liable for the tax because the NTTC that it accepted in good faith protected it
6 from liability). *See also Continental Inn v. N.M. Taxation and Revenue Dep't.*, 1992-NMCA-030, ¶
7 12-13, 113 N.M. 588 (holding that a NTTC represents to the seller that it is entitled to take a
8 deduction and that the NTTC does not transform the taxable transaction into a nontaxable transaction
9 but allows the Department to pursue the buyer for compensating tax). *See also Gas Co. v.*
10 *O'Cheskey*, 1980-NMCA-085, ¶ 12, 94 N.M. 630 (holding that a NTTC does not transform a taxable
11 transaction into a nontaxable transaction and recognizing that a NTTC does serve to shift the burden
12 of the tax to the buyer when the seller accepts a NTTC in good faith even though the buyer wrongly
13 issued it). The Taxpayer established that \$11,389.00 of its gross receipts in September 2015 were
14 attributable to the government agency. [Exhibit D.1; Exhibit F]. The only tax periods with tax
15 liabilities in 2015 were June and December. [Exhibit F]. Therefore, the Department's disallowance
16 of the NTTC is moot as a deduction of the proceeds from the transaction in September 2015 would
17 not affect the assessment because there was no assessment for the September 2015 tax period.

18 **Statute of limitations.**

19 The Taxpayer argued that the assessment of several tax periods was made beyond the statute
20 of limitations. In general, the Department has three years from the end of the calendar year in which
21 the tax was due to make an assessment. *See NMSA 1978, § 7-1-18 (A) (2021)*. However, the
22 Department has six years from the end of the calendar year in which the tax was due to make an
23 assessment when a taxpayer underreports their tax liability by more than twenty-five percent. *See*
24 *NMSA 1978, § 7-1-18 (D)*. The Taxpayer conceded that the six-year statute of limitations applied

1 because the Taxpayer was underreporting its tax liability by more than twenty-five percent.

2 [Testimony of Ms. Carrillo]. After the order of clarification, Exhibit F established that the only tax
3 periods assessed for 2015 were June 2015 and December 2015.

4 The tax period ending in June 2015 had a tax due date of July 25, 2015. Six years from the
5 end of the calendar year in which the tax was due was December 31, 2021. *See* NMSA 1978, § 7-1-
6 18. Therefore, the final date for the Department to assess the June 2015 tax period was December
7 31, 2021. *See id.* The assessment was made on November 2, 2022. [Exhibit B]. Therefore, the
8 assessment for the June 2015 tax period was made beyond the statute of limitations. *See* NMSA
9 1978, § 7-1-18. Consequently, the assessment for the June 2015 tax period, a total of \$5,279.03⁷, is
10 **HEREBY ABATED.**

11 The tax period ending December 31, 2015 had a tax due date of January 25, 2016. Six years
12 from the end of the calendar year in which the tax was due was December 31, 2022. Therefore, the
13 final date for the Department to assess the December 2015 tax period was December 31, 2022. *See*
14 *id.* The assessment was made on November 2, 2022. Therefore, the assessment for the tax period
15 ending on December 31, 2015 was made within the statute of limitations. The remaining tax
16 periods occurred in 2017 and 2018. [Exhibit B; Exhibit E]. Therefore, their tax due dates were in
17 2017, 2018, and 2019, respectively. *See* NMSA 1978, § 7-1-18. Six years from the end of 2017
18 was December 31, 2023, from the end of 2018 will be December 31, 2024, and from the end of
19 2019 will be December 31, 2025. *See id.* Therefore, the assessment was made within the statute of
20 limitations for the tax periods in 2017 and for the tax periods in 2018. *See id.*

⁷ From Exhibit E, including the tax, penalty, and interest thru July 23, 2023.

1 **Assessment of penalty.**

2 The Taxpayer requested relief from the penalty assessed. When a tax is not paid by the due
3 date, “there *shall* be added to the amount assessed a penalty”. NMSA 1978, § 7-1-69 (A) (2021)
4 (emphasis added). The word “shall” indicates that the assessment of penalty is mandatory, not
5 discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶
6 22, 146 N.M. 24. If a taxpayer is not negligent, a penalty may be excused. *See* 3.1.11.11 NMAC
7 (2001) (listing several factors that indicate non-negligence). Negligence includes “inadvertence,
8 indifference, thoughtlessness, carelessness, erroneous belief or inattention.” 3.1.11.10 NMAC
9 (2001). It also includes failure to act where action is required and the failure to exercise the degree
10 of ordinary business care and prudence that reasonable taxpayers would exercise in similar
11 circumstances. *See id.* Generally, a taxpayer’s reliance on an agent to perform acts, such as filing
12 returns, is not an excuse for penalty. *See* 3.1.11.11 NMAC. The Taxpayer explained that the
13 employee who was handling the taxes made some mistakes. [Testimony of Ms. Carrillo].
14 Therefore, the Taxpayer was negligent.

15 However, no penalty is owed when the failure to pay the tax “results from a mistake of law
16 made in good faith and on reasonable grounds.” NMSA 1978, § 7-1-69 (B). A mistake of law is a
17 mistake about the legal effect of a known fact. *See State v. Hubble*, 2009-NMSC-014, ¶ 22, 146
18 N.M. 70 (quoting from dictionary). The Taxpayer presented evidence that it could have relied on
19 the NTTC from the government agency. However, the only tax period that the Taxpayer
20 established it might have relied on the NTTC from the government agency was the September 2015
21 tax period. [Exhibit D.7]. Since no assessment occurred with respect to the September 2015 tax
22 period, no penalty was applied to that tax period. With respect to the tax periods that were assessed,
23 the Taxpayer failed to present evidence to establish that its failure to pay the tax when it was due

1 was based on a mistake of law made in good faith and on reasonable grounds. *See* NMSA 1978, §
2 7-1-69. Therefore, the Taxpayer failed to overcome the presumption of correctness on the penalty
3 assessment. *See* NMSA 1978, § 7-1-17. *See also Gemini Las Colinas, LLC*, 2023-NMCA-039.

4 **Untimely request for hearing and halting interest.**

5 The Taxpayer argued that the hearing was not timely because the protest was filed in
6 January 2023, but the Department did not request a hearing until December 2023. The evidence
7 shows that the protest was made on January 23, 2023. [Exhibit C]. “Within one hundred eighty
8 days, but no earlier than sixty days after the date of the protest, the taxation and revenue department
9 shall request a hearing”. NMSA 1978, § 7-1B-8 (B) (2019). One hundred eighty days from
10 January 23, 2023 was July 22, 2023. Therefore, the Department’s request for hearing did not
11 comply with the statutory time frame for requesting a hearing. *See id.*

12 The regulation permits the 180 days to run from the date that the protest was acknowledged.
13 *See* 22.600.3.8 NMAC (2020). However, this provision is meant to provide a very limited latitude
14 because the statute requires the Department to “*promptly* acknowledge the protest by letter”.
15 NMSA 1978, § 7-1B-8 (A) (emphasis added). If the Department is not going to acknowledge a
16 protest because it has determined that the protest is deficient, it must notify a taxpayer of the
17 deficiency within 21 days and provide an opportunity to correct the deficiency. *See id.* The
18 Department acknowledged the Taxpayer’s protest on June 29, 2023, which was 157 days after the
19 protest was made on January 23, 2023. [Exhibit A; Exhibit C]. Acknowledging the protest 157
20 days after it was made is not a prompt acknowledgement. The Department provided no explanation
21 or justification for the delay. As the Department did not comply with the statute by providing a
22 prompt acknowledgement, the regulation does not extend the time for the Department to request a
23 hearing. *See* NMSA 1978, § 7-1B-8. *See also* 22.600.3.8 NMAC.

1 C. The Taxpayer admitted that it was underreporting, so the six-year statute of
2 limitations applies. *See* NMSA 1978, § 7-1-18.

3 D. The assessment for the June 2015 tax period was made beyond the statute of
4 limitations; therefore, the total liability of \$5,279.03 for the June 2015 tax period is **HEREBY**
5 **ABATED**. *See id.*

6 E. The Taxpayer was negligent; therefore, penalty was properly assessed. *See* NMSA
7 1978, § 7-1-69. *See* 3.1.11.10 and 3.1.11.11 NMAC.

8 F. The tax was not paid when it was due; therefore, interest was properly assessed. *See*
9 NMSA 1978, § 7-1-67.

10 G. The Department failed to promptly acknowledge the protest and failed to request a
11 hearing within 180 days of the protest; therefore, no further interest will accrue on this assessment
12 as of July 23, 2023. *See* NMSA 1978, § 7-1B-8. *See* 22.600.3.18 (E) NMAC.

13 For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND**
14 **DENIED IN PART. IT IS ORDERED** that Taxpayer is liable for \$36,447.28 in gross receipts
15 taxes, \$7,345.32 in penalty, and \$8,820.06 in interest through July 23, 2023, for a total
16 outstanding liability of \$52,612.66.

17 DATED: August 28, 2024.

18 *Dee Dee Hoxie*

19 _____
20 Dee Dee Hoxie
21 Hearing Officer
22 Administrative Hearings Office
23 P.O. Box 6400
Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On August 28, 2024, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *First Class Mail & Email*

First Class Mail & Email

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19 ***INTENTIONALLY BLANK***