

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

**IN THE MATTER OF THE PROTEST OF  
MARKET SCAN INFORMATION SYSTEMS, INC.,  
TO ASSESSMENT ISSUED UNDER  
LETTER ID NO. L0859259712**

**No. 16-44**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on July 29, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney, and Ms. Diana Martwick. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. John Sarna, accountant, and Mr. Todd Tickner, CPA, appeared for the hearing on behalf of Market Scan Information Systems, Inc. (Taxpayer). 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 March 4, 2013, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the periods from January 31, 2007 through September 30, 2011. The assessment was for \$5,684.59 tax, \$1,136.91 penalty, and \$817.67 interest.
2. On April 24, 2013, the Taxpayer filed a formal protest letter.
3. On September 29, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On September 30, 2015, the Hearings Office issued a notice of telephonic scheduling hearing. The hearing date was not required to be set within ninety days of the protest because the protest was filed before the statute was amended.

5. On November 20, 2015, a telephonic scheduling hearing was conducted. The scheduling order and notice was issued on November 23, 2015.
6. On March 8, 2016, the Taxpayer filed a request for continuance of the hearing.
7. On March 30, 2016, the Hearings Office sent amended notices of hearing and granted the request for continuance.
8. The Taxpayer sells licenses to use software in New Mexico, mainly to car dealerships.
9. The Taxpayer admits that its sales in New Mexico are subject to gross receipts tax.
10. The Taxpayer contracts directly with its customers when it sells the software licenses.
11. The Taxpayer's customers frequently need to use financing options to pay for the software licenses.
12. In all cases, the Taxpayer's customers must make an initial down payment.
13. In some cases, the Taxpayer contracts with customers to make monthly payments directly to the Taxpayer.
14. In most cases, the Taxpayer contracts with customers to make a lump sum total payment and refers its customers to its preferred lenders for financing.
15. The Taxpayer has a separate agreement with the lenders that it recommends to customers. The Taxpayer accepts a reduced amount as paid-in-full from its recommended lenders when the customers get a loan with those lenders.
16. The Taxpayer did not have the authority to bind the lenders in any transaction, and the lenders were free to decline to finance the Taxpayer's customers.
17. The customers who acquired loans made monthly payments to their lenders.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for the assessment. The Taxpayer argues that the lenders were responsible for the gross receipts taxes on its contracts with its

customers. The Taxpayer argues that the lenders in fact paid the gross receipts taxes. The Taxpayer admits that with respect to two of its customers, there were no lenders involved and that the Taxpayer is liable for the gross receipts taxes on those two customers. The Taxpayer argued that the amount of gross receipts for all of its customers was incorrect and proposed alternative amounts of gross receipts taxes due. The Taxpayer calculated gross receipts taxes at the earliest from 2008, even though several of the contracts it provided indicated that the customer had an existing account when the contract was renewed. The assessment included amounts from 2007. There was no evidence that the amounts assessed were incorrect if all of the tax periods in question were included.

The Department argued that the Taxpayer was required to pay gross receipts taxes on all of its sales to its customers. The Department argued that the financing institutions were paying their own gross receipts taxes, if they paid any, and were not paying the Taxpayer's gross receipts taxes.

**Burden of Proof.**

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

The burden is on the Taxpayer to prove that it is entitled to an exemption or deduction. *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.” *Sec. Escrow Corp. v. State Taxation and Revenue*

*Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540 (emphasis added). *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.**

“[I]t is presumed that all receipts of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, § 7-9-5 (2002). Gross receipts include any money that is obtained “from leasing or licensing property employed in New Mexico”. NMSA 1978, § 7-9-3.5 (2007). The Taxpayer admits that its sales of the software licenses were subject to the gross receipts tax. There are a number of exemptions and deductions that may apply to gross receipts. *See* NMSA § 7-9-12 through § 7-9-78.1. The Taxpayer presented no evidence and no argument regarding any specific exemption or deduction.

**Equitable recoupment.**

An assessment may be abated when another person paid the amount of the tax “on behalf of the taxpayer on the same transaction; provided that the requirements of equitable recoupment are met.” NMSA 1978, § 7-1-28 (F) (2013). The Taxpayer argued that the financing institutions paid the gross receipts taxes on behalf of the Taxpayer on the transactions in question. However, the Taxpayer presented no evidence to establish that the financing institutions were in fact paying on their behalf. The only evidence presented was a general payment history from a lender on one customer, which indicated that sales tax was included in the payment, but there was no explanation of the document or its import to the Taxpayer.

Generally, equitable recoupment allows a party to use a claim or defense that would otherwise be barred by a statute of limitations when the claim arises from the same transaction. *See City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 16, 126 N.M. 95. The purpose of the doctrine of equitable recoupment is to prevent the unjust enrichment of one party due to another’s mistake and to

bypass harsh applications of a procedural bar on limitations periods. *See id.* at ¶ 20-21. In tax transactions, there are three elements that must be met for equitable recoupment to apply. *See Teco Investments, Inc. v. Taxation and Revenue Dep't.*, 1998-NMCA-055, ¶ 8, 125 N.M. 103. There must be 1) a single taxable event, 2) taxes assessed on that single event on inconsistent theories, and 3) a strict identity of interest. *See id.* Separate parties may still have a strict identity of interest. *See id.* at ¶ 10-11. In this case, there was not just a single taxable event. The first taxable event was the Taxpayer's sale of the license to the customer. The second taxable event was the financing companies' loans to the customers. The financing companies and the Taxpayer were each responsible for their own gross receipts taxes on those events. Moreover, there is no evidence that the taxes assessed on the single transaction involved inconsistent theories or that there was a strict identity of interest between the Taxpayer and the financing institutions. In fact, the financing institutions were free to decline to finance the Taxpayer's customers. The Taxpayer even explained to its customers in their contracts that the recommended lenders were third-party lenders who did not share financial information with the Taxpayer. Therefore, the elements of equitable recoupment have not been met.

#### **Assessment of Penalty.**

Penalty "shall be added to the amount assessed" when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word "shall" indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Penalty was properly assessed.

#### **Assessment of Interest.**

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22,

146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

### CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment issued under Letter ID number L0859259712, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer admitted that its sales were subject to gross receipts taxes. *See* NMSA 1978, § 7-9-3.5.

C. The Taxpayer failed to prove that the taxes were paid by another on its behalf and failed to prove equitable recoupment. *See* NMSA 1978, § 7-1-28.

D. The assessment is presumed to be correct. *See* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: September 12, 2016.

*Dee Dee Hoxie*

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DEE DEE HOXIE  
Hearing Officer  
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,

Market Scan Information Systems, Inc.

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Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.