BOGLE MANAGEMENT CO., INC. V. NEW MEXICO TAXATION AND REVENUE DEP'T

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

BOGLE MANAGEMENT CO., INC.,
Protestant-Appellant,
v.
NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
Respondent-Appellee,
IN THE MATTER OF THE PROTEST OF
BOGLE MANAGEMENT CO., INC., to
Assessment Issued Under Letter ID
No. L0705077632.

No. A-1-CA-35641

COURT OF APPEALS OF NEW MEXICO

December 5, 2017

APPEAL FROM TAXATION & REVENUE DEPARTMENT, Dee Dee Hoxie, Hearing Officer

COUNSEL

Betzer, Roybal & Eisenberg, P.C., Gary D. Eisenberg, Albuquerque, NM, for Protestant

Hector H. Balderas, Attorney General, Elena M. Morgan, Special Assistant Attorney General, Santa Fe, NM, for Respondent

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Bogle Management Co., Inc. (Taxpayer) appeals the New Mexico Taxation and Revenue Department's (the Department) decision to assess gross receipts tax on reimbursement payments and management fees it received, pursuant to the New Mexico Gross Receipts and Compensating Tax Act (the Act). NMSA 1978, §§ 7-9-1 to -115 (1966, as amended through 2017). On appeal, Taxpayer contends that the Department's decision was erroneous because Taxpayer was acting as a disclosed agent under the Act; it is located in another state and did not perform any services in New Mexico; and therefore, its reimbursements and management fees are exempt from New Mexico gross receipts tax.

{2} For the reasons set forth in this opinion, we hold that the hearing officer's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and that the decision and order were supported by substantial evidence in the record. Specifically, the hearing officer determined that Taxpayer did not meet the requirements for the disclosed agent exemption and was engaged in business in New Mexico. As a result, Taxpayer's reimbursements and management fees are subject to New Mexico gross receipts tax. Accordingly, we affirm the hearing officer's decision and order.

BACKGROUND

{3} Taxpayer is an Arizona corporation whose owners reside and conduct all of Taxpayer's business in Georgia. Taxpayer provides agricultural management services to farms located in New Mexico. While Taxpayer does not have a physical office in New Mexico, it did have a physical presence in the State through its managers.

{4} Taxpayer's original owner owned multiple farms located in New Mexico, known as Bogle Ltd Co. and Bill Bogle Farm (the Farms). Taxpayer was established as a separate entity from the Farms for the purpose of providing farm managers with employment benefits, which the Farms did not want to provide to general farm employees, including retirement plans and medical reimbursement plans. In 1977 Taxpayer registered in New Mexico for tax purposes. In 1998 and under new ownership, Taxpayer entered into two written management agreements (the Agreements) with the Farms, whereby Taxpayer would supply the Farms with agricultural managers (the managers) in exchange for a management fee equal to 10 percent of the agricultural managers' gross salaries. Under the Agreements, Taxpayer was an independent contractor, and was a joint venturer with the Farms. Taxpayer provided payroll services for the Farms. Taxpayer, as the employer of the managers, was responsible for all calculations and physical activities related to the payroll services, including issuing paychecks, withholding taxes, managing the benefits programs, and issuing year-end Internal Revenue Service Form W-2 (W-2) to each of the managers.

{5} The Agreements required the Farms to "reimburse" Taxpayer for all payments Taxpayer issued to the managers, "including salary, the cost of worker's compensation

insurance, payroll taxes, pension benefits, group insurance[,] medical benefits[,] and all other normal and reasonable costs required for the employment of [the m]anagers" (collectively, the reimbursement payments). Taxpayer sent monthly invoices to the Farms detailing the amount of reimbursements and management fees owed, and the Farms, as required under the Agreements, made all payments to Taxpayer. The Agreements also placed the ultimate responsibility including an obligation to indemnity Taxpayer for any indemnification on the Farms for all costs associated with payroll and taxes on the Farms.

{6} "Taxpayer did not recruit, interview, hire, promote, or fire any of the managers at the Farms. There were no formal agreements between . . . Taxpayer and the managers." The only direct communications Taxpayer had with the managers were when it sent them notices of eligibility for medical reimbursement plans, a pension plan enrollment form, and their W-2s. The Farms had complete control over hiring, promoting and firing the managers; determination of salary and salary increases; as well as providing supervision and control of all work performed by the managers.

{7} In December 2007 the Department assessed Taxpayer for gross receipts tax "principal of $338,079.42; penalty in the amount of $33,807.97; and [interest in the amount] of $194,142.58" for the tax period of January 31, 2000 through June 30, 2006. In January 2008 Taxpayer filed a formal protest letter with the Department. Approximately eight years later in February 2016 the parties participated in an administrative hearing before a hearing officer. In May 2016 the hearing officer issued her decision and order, granting Taxpayer's protest in part and denying it in part.

{8} In relevant part, the hearing officer concluded: (1) "Taxpayer was engaged in business in New Mexico by supplying managers to the Farms"; (2) "Taxpayer was not a disclosed agent of the Farms, and all of its receipts were subject to the gross receipts tax"; and (3) because Taxpayer's failure to pay taxes was based on a "mistake of law made in good faith[,]" and the penalty fee was abated.

{9} On appeal, Taxpayer broadly argues that the hearing officer erred in finding that the management fees and reimbursement payments were subject to gross receipts tax under the Act. More specifically, Taxpayer argues that pursuant to the Agreements it maintained with the Farms, it was acting as the Farms' disclosed agent and, therefore, the reimbursement payments should not be subject to gross receipts tax. Taxpayer further maintains that it was not "engaging in business" in New Mexico under the Act and was deriving no benefit from its receipt of the management fees and the reimbursement payments. In response, the Department argues that the hearing officer did not abuse her discretion in finding the management fees and reimbursement payments were subject to gross receipts tax as "[a]ll of [Taxpayer's] receipts are subject to gross receipts tax because it sold services in New Mexico, had a presence in New Mexico, and allocated its receipts to New Mexico."

I. DISCUSSION

A. Standard of Review

{10} Taxpayer does not dispute the hearing officer's findings of fact, rather it disputes the conclusions of law finding that "Taxpayer was engaged in business in New Mexico by supplying managers to the Farms, . . . was not a disclosed agent of the Farms, and all of its receipts were subject to the gross receipts tax." The parties do not agree on the standard of review this Court should apply. Taxpayer encourages this Court to apply a de novo standard of review. The Department argues the applicable standard is a substantial evidence review. Our review of the hearing officer's decision and order is also controlled by NMSA 1978, Section 7-1-25(C) (2015). This Court can only set aside the decision and order on appeal if we conclude that it is: "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." *Id.* This Court is also required to give deference to the hearing officer's reasonable interpretation and application of the law. *See Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 25, 136 N.M. 630, 103 P.3d 554. While we are not bound by the agency's interpretation of the law, we do "give a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Id.* (internal quotation marks and citation omitted).

B. Statutory Presumptions and Burden of Proof

{11} There are two statutory presumptions relevant to this case. The first presumption is that all receipts are taxable. *See* § 7-9-5(A) ("To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax."). Therefore, "[t]he taxpayer claiming that receipts are not taxable bears the burden of proving the assertion." *MPC Ltd.*, 2003-NMCA-021, ¶ 12. The second statutory presumption is a presumption of correctness of the Department's tax assessment. *See* NMSA 1978, § 7-1-17(C) (2007) ("Any assessment of taxes or demand for payment made by the department is presumed to be correct."). Regulation 3.1.6.12(A) NMAC explains the effect of the presumption of correctness:

> The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.

If Taxpayer meets its burden of proof and overcomes the presumption of correctness, the burden shifts back to the Department to prove the correctness of its tax assessment. *See MPC Ltd.*, 2003-NMCA-021, ¶ 13.

C. Reimbursements and Disclosed Agent Exception

{12} On appeal, Taxpayer argues that an agency relationship existed and not only was it evidenced in the agreements it was also disclosed to the managers as evidenced by the communication between them. Taxpayer contends that by virtue of the Agreements, the Farms approved of Taxpayer acting on the Farms' behalf, and Taxpayer agreeing to act as the Farms' agent. Taxpayer also argues that the Farms are ultimately responsible for any employment claims. Relying on 3.2.1.19(C)(1) NMAC, Taxpayer further contends that it had the power to bind the Farms in any employment/tax claims by the managers, so that the managers could enforce any such contractual obligation of employment/tax claims against the Farms. Taxpayer also argues that the bookkeeping and billing procedures as specified in the administrative regulation are "nonsensical." The Department responds by arguing that Taxpayer did not meet its burden by producing sufficient evidence to prove that Taxpayer was a disclosed agent. The Department further contends that the administrative decision should be upheld on this point because the written agreements made no mention of an agency relationship and there is no evidence that Taxpayer made an affirmative disclosure of such a relationship to the managers. We agree.

{13} "The purpose of the gross receipts tax is that [businesses] should pay taxes for the privilege of engaging in business within New Mexico." *ITT. Educ. Servs. Inc. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 5, 125 N.M. 244, 959 P.2d 969 (internal quotation marks and citation omitted). Pursuant to the Act, "gross receipts" is defined in relevant part as "the total amount of money or the value of other consideration received . . . from selling services performed outside New Mexico, . . . or from performing services in New Mexico." Section 7-9-3.5(A)(1).

{14} Gross receipts excludes "amounts received solely on behalf of another in a disclosed agency capacity." Section 7-9-3.5(A)(3)(f). Regulation 3.2.1.19(C)(1) NMAC states that "[a]n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal." Additionally, to qualify for the disclosed agent exception, Taxpayer must abide by specific bookkeeping and billing procedures:

> Receipts from the reimbursement of expenses incurred as agent on behalf of a principal while acting in a disclosed agency capacity are not included in the agent's gross receipts if the expenses are separately stated on the agent's billing to the client and are identified in the agent's books and records as reimbursements of expenses incurred on behalf of the principal party.

3.2.1.19(C)(2) NMAC. If these procedures are not followed "the reimbursement of expenses are included in the agent's gross receipts." 3.2.1.19(C)(3) NMAC. "Exemptions to the gross receipts tax are to be construed strictly in favor of the taxing authority." *Rauscher, Pierce, Refsnes, Inc. v. N.M. Taxation & Revenue Dep't*, 2002-NMSC-013, ¶ 11, 132 N.M. 226, 46 P.3d 687 (omission, internal quotation marks, and citation omitted).

{15} In the present case, the hearing officer concluded that Taxpayer did not meet the disclosed agency requirements for two reasons: first, because there was no actual, affirmative disclosure by Taxpayer to the managers that it was acting as the Farms' agent; and second, because there was no evidence that Taxpayer satisfied the bookkeeping and billing requirements. The hearing officer based this conclusion on the fact that Taxpayer's communication with the managers was very limited and solely comprised of contact during a manager's first year of employment, when Taxpayer would send and receive benefits information. The hearing officer noted that "[t]hose enrollment forms did not inform the managers about . . . Taxpayer's relationship with the Farms[,] and did not inform the managers that the Farms were ultimately responsible for the payment of the managers' wages." Lacking evidence of an actual, affirmative disclosure by Taxpayer to the managers that it was acting as the Farms' agent, the hearing officer found that Taxpayer failed to meet its burden of proving it met the requirements to qualify as a disclosed agent.

1. Affirmative Disclosure of Agency Relationship

{16} Taxpayer points us to two sections in the agreements between Taxpayer and the Farms as evidence of an agency relationship. Section 1.1 of the Agreements, "Engagement of Company," reads in part: "Bogle hereby engages [Taxpayer] to supply Bogle with [the m]anagers for the Agricultural Businesses during the term of this Agreement." Section 2.2 of the agreements, entitled "Expenses," states: "All of the costs, expenses and obligations of [Taxpayer] under this Agreement, including compensation due the . . . [m]anagers and any tax obligations, shall be the ultimate responsibility of Bogle and shall be paid from Bogle funds."

{17} The language in these two sections does not support Taxpayer's claim that it disclosed an agency relationship between it and the Farms. "The purpose, meaning, and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 31, 314 P.3d 688 (alteration, internal quotation marks, and citation omitted). Section 1.1 sets forth the purpose of the agreement, and Section 2.2 clarifies various financial obligations. Neither section states that Taxpayer would be acting as the Farms' agent with respect to the managers. Furthermore, Taxpayer's own admission that it "did not actually recruit, interview or hire prospective managers," but instead, "was notified of all hires and pay rates directly by the owners of the Farms" undercuts its claim that the agreements evidenced an agency relationship. In *MPC Ltd.*, this Court explained that the disclosed agency capacity exists when: "(1) the agent ([Taxpayer]) has the authority to bind the principal ([the Farms]) to an obligation ([to the mangers]) created by the agent ([Taxpayer]), and (2) the beneficiary of that obligation ([the manager]) is informed by contract that he or she has a right to proceed against the principal ([the Farms]) to enforce the obligation." 2003-NMCA-021, ¶ 37.

{18} Taxpayer nevertheless maintains that the communications between it and the managers, coupled with the "long-standing relationship between all the parties," prove that an agency relationship existed, and that the managers "clearly knew" Taxpayer was

acting in an agency capacity. However, Taxpayer fails to direct us to any specific communications between it and the managers that supports its claim. An actual, affirmative statement disclosing the agency relationship is necessary. *See id.* Moreover, by its own admission, "[t]here were no agreements, written or unwritten, between the . . . [m]anagers and the [Taxpayer]." Taxpayer otherwise fails to point to any evidence that it actually and affirmatively disclosed any agency relationship with the Farms to the managers, as the law requires. *See id.*

{19} Taxpayer attempts to differentiate *MPC Ltd.* from this case. Taxpayer argues that here, the Farms have the ultimate responsibility for any claims made by the managers, whereas in *MPC Ltd.*, that taxpayer failed to show its clients had any obligation to the employee for payroll. Like the taxpayer in *MPC Ltd.*, Taxpayer claims that the managers clearly knew that Taxpayer was working in an agency capacity for the Farms; however, it never provided any evidence to support its claim that the managers were specifically told they could enforce any payroll or tax obligations against Bogle and not Taxpayer. Because there is nothing in the record to show Taxpayer had any power or authority to bind the Farms in their interactions with the managers, and because there was no actual disclosure, we conclude that Taxpayer failed to establish it was not acting as the Farms' disclosed agent.

2. The Bookkeeping Requirement

{20} Taxpayer's final argument as it relates to the disclosed agency exception is essentially an attack on the regulatory bookkeeping requirement itself. It criticizes the bookkeeping and billing procedures articulated in 3.2.1.19(C)(2) NMAC as "nonsensical," and it defends its position by relying on the Restatement (Third) of Agency, which contains "no discussion at all in the entire restatement that discusses any billing requirement." We note that the Restatement would not be likely to discuss a nuanced topic such as a billing requirement that relates to a single exception in the New Mexico tax code as it is a learned treatise articulating general legal principles. Additionally, Taxpayer's argument that 3.2.1.19(C)(2) NMAC "goes too far" and "should be ignored" is an invitation to this Court to ignore the plain language of a sufficiently detailed, clear, and explicit regulation because its consequence serves as an inconvenience to Taxpayer. We are unpersuaded by this undeveloped argument. We decline to accept Taxpayer's invitation. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal").

{21} For the aforementioned reasons, we find that Taxpayer did not meet its burden of proof that it was acting as the Farms' disclosed agent. As a result, any reimbursements for payroll related expenditures were not exempt from gross receipts tax under the Act.

D. Management Fees

{22} Taxpayer argues that gross receipts tax should not have been applied to its receipt of the management fees because its services were performed in Georgia, not

New Mexico. Pursuant to the Agreements, the Farms agreed to compensate Taxpayer 10 percent of the gross salaries of the managers. The hearing officer found that these management fees were clearly subject to gross receipts tax under the Act because the fees solely benefitted Taxpayer, and because they were paid in exchange for Taxpayer's service of providing managers to the Farms and coordinating payroll services. Taxpayer argues that all of the services it provided to the Farms to earn the management fees, including accounting, administrative, and payroll services, were exclusively performed in Georgia and therefore not subject to gross receipts tax in New Mexico. However, 3.2.1.18(D)(1) NMAC provides that

> [g]eneral administrative and overhead expenses incurred outside New Mexico and allocated to operations in this state for bookkeeping purposes, costs of travel outside New Mexico, which travel was an incidental expense of performing services in New Mexico, employee benefits, such as retirement, hospitalization insurance, life insurance and the like, paid to insurers or others doing business outside New Mexico for employees working in New Mexico and other expenses incurred outside New Mexico which are incidental to performing services in New Mexico, all constitute the taxpayer's expenses of performing services in New Mexico.

As such, its services are deemed performed in New Mexico.

{23} We hold that the hearing officer's conclusions that Taxpayer performed services in New Mexico, received a monetary benefit in exchange for providing said services, and is therefore subject to gross receipts tax under the Act are sufficiently supported by substantial evidence in the record. Moreover, the fact that Taxpayer performed these accounting, administrative, and payroll services from Georgia has no bearing on the result that the management fees are subject to gross receipts tax because the consumption of the services took place in New Mexico. *See Dell Catalog Sales LP v. N.M. Taxation & Revenue Dep't*, 2009-NMCA-001, ¶¶ 21, 38, 145 N.M. 419, 199 P.3d 863 (holding that an interstate sales transaction of computers was subject to New Mexico gross receipts tax, despite the physical location of the plaintiff's principal place of business in Texas, because the use of the computers took place in New Mexico and were therefore sold in New Mexico for tax purposes).

II. CONCLUSION

{24} For the foregoing reasons, we affirm the hearing officer's decision and order.

{25} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

HENRY M. BOHNHOFF, Judge