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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **NEW MEXICO TAXATION AND REVENUE**
3 **DEPARTMENT,**

4 Petitioner-Appellant,

5 v.

No. 32,940

6 **CASE MANAGER (TERESA MAESTAS),**

7 Respondent-Appellee,

8 **IN THE MATTER OF THE PROTEST OF**
9 **CASE MANAGER.**

10 **APPEAL FROM THE TAXATION AND REVENUE DEPARTMENT**

11 **Brian VanDenzen, Hearing Officer**

12 NM Department of Taxation and Revenue

13 Hector H. Balderas, Attorney General

14 Nelson J. Goodin, Special Assistant Attorney General

15 Santa Fe, NM

16 for Appellant

17 Teresa Maestas

18 Medanales, NM

19 Pro Se Appellee

20 **MEMORANDUM OPINION**

21 **ZAMORA, Judge.**

1 {1} Teresa Maestas (Taxpayer), claiming a gross receipts tax deduction pursuant
2 to NMSA 1978, Section 7-9-48 (2000), submitted the wrong form to support her
3 claimed deduction. By the time Taxpayer obtained the correct form the deadline for
4 submission had passed. Taxes were assessed and Taxpayer protested. The New
5 Mexico Department of Taxation and Revenue Hearing Bureau (the Bureau)
6 determined that Taxpayer was entitled to the claimed deduction. Although we differ
7 somewhat in our legal analysis, we affirm.

8 **BACKGROUND**

9 {2} While the parties are familiar with the facts, the time line in this case is
10 important to this Court's decision. We will therefore be setting forth the factual
11 background in more detail than is generally necessary for a memorandum opinion.
12 Taxpayer worked as a case manager for the developmentally disabled across Northern
13 New Mexico. She provided case-management services as an independent contractor
14 for Visions Case Management, Inc. (Visions). Visions resold Taxpayer's services to
15 the New Mexico Department of Health. Visions paid gross receipts taxes on the resale
16 of Taxpayer's services.

17 {3} On August 13, 2012, the New Mexico Department of Taxation and Revenue
18 (the Department) sent Taxpayer a notice that it would be conducting a limited scope
19 audit and requested that she provide Non-Taxable Transaction Certificates (NTTCs)

1 to show that her gross receipts for 2008 and 2009 were not subject to taxation. The
2 notice gave Taxpayer sixty days or until October 12, 2012, to respond. The notice
3 identified Laura Gage, a Department employee, as Taxpayer's point of contact.

4 {4} Taxpayer called Ms. Gage three times in October 2012 to inquire about the
5 documentation she was required to provide. Taxpayer never received a return call.
6 Taxpayer went to the Department's field office in Santa Fe to inquire about the
7 documentation she was required to provide. Taxpayer was advised to submit all her
8 paperwork to Ms. Gage. Ten days after the original deadline, Ms. Gage sent a letter
9 on October 22, 2012, to Taxpayer advising her that she had until October 31, 2012,
10 to provide the documentation requested in the August 13, 2012, notice. In response
11 to this letter, Taxpayer once again attempted to reach Ms. Gage telephonically to
12 determine what information or documentation she needed to provide. Again, she never
13 received a return call.

14 {5} Taxpayer requested and received an NTTC from Visions. She submitted the
15 NTTC along with her 2008 federal Schedule C and her 2009 federal 1099-MISC form
16 directly to Ms Gage via facsimile by the October 31 deadline. It was not until
17 November 6, 2012, that Ms. Gage sent Taxpayer a letter informing her that she had
18 submitted a Type 2 NTTC for tangible goods instead of a Type 5 NTTC for services,
19 that all deadlines for the audit had expired and that the Department would be assessing

1 gross receipts tax based on the gross receipts Taxpayer reported to the IRS on her
2 Schedule C form. The Department did not challenge the timeliness of Taxpayer's
3 submission.

4 {6} On November 13, 2012, the Department assessed Taxpayer's gross receipts tax
5 for 2008, including penalties and interest to be \$3,364.38, taxes were also assessed for
6 2009, however, Taxpayer only protested the 2008 assessment. On January 9, 2013, the
7 Department's protest office sent Taxpayer a letter informing her that she was liable
8 for assessed gross receipts taxes for 2008 unless she could produce a Type 5 NTTC
9 from Visions dated by the due date of the transaction, or by the expiration of the sixty-
10 day period she was given in the notice of audit October 12, 2012. The Department
11 gave Taxpayer until January 25, 2013, to submit the properly dated Type 5 NTTC. In
12 a follow up letter dated January 17, 2013, and after receipt of the Department's audit
13 file, the protest office notified Taxpayer that the time to submit the Type 5 NTTC had
14 passed.

15 {7} It is unclear from the record when Taxpayer requested the Type 5 NTTC from
16 Visions, but on March 14, 2013, Visions executed a Type 5 NTTC for Taxpayer.
17 Visions also wrote a letter to the Department dated April 2, 2013, accepting
18 responsibility for the gross receipts taxes associated with the services performed by
19 Taxpayer. Visions' letter explained that it had initially issued the incorrect type of

1 NTTC to Taxpayer but had subsequently issued the correct type of NTTC in an effort
2 to remedy the situation.

3 {8} An administrative hearing before the Bureau was held on April 4, 2013. The
4 Bureau concluded that Taxpayer was entitled to the claimed deduction under the safe
5 harbor provision of NMSA 1978, Section 7-9-43(A) (2011). Taxpayer’s protest was
6 granted. This appeal followed.

7 **DISCUSSION**

8 {9} On appeal, the Department argues that Taxpayer is not entitled to her claimed
9 deduction because she failed to timely submit the correct type of NTTC to support her
10 deduction and because the safe harbor provision does not apply. We conclude that,
11 under the circumstances of this case, Taxpayer established her entitlement to the
12 claimed deduction. We need not decide whether the safe harbor provision applies here
13 because we may uphold the Bureau’s decision if it is right for any reason. *See*
14 *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208
15 P.3d 901. Under the right for any reason doctrine, appellate courts may affirm a lower
16 court’s decision if it is right for any reason, “so long as the circumstances do not make
17 it unfair to the appellant to affirm.” *Id.* Appellate courts may take such action “if those
18 grounds do not require us to look beyond the factual allegations that were raised and
19 considered below.” *Id.* (internal quotation marks and citation omitted); *see Jaramillo*

1 v. *Jaramillo*, 1991-NMSC-101, ¶ 15, 113 N.M. 57, 823 P.2d 299 (“A [forum’s]
2 decision will be affirmed on review if that decision was correct, even though the court
3 may have used an incorrect rationale in arriving at its result.”). Because our decision
4 does not require us to look beyond the factual allegations raised and considered below
5 and because the Department’s argument before the Bureau and on appeal rests
6 primarily with the incorrect NTTC submitted by Taxpayer, it is not unfair to the
7 Department for us to resolve this case on that basis.

8 {10} We do not address any argument the Department makes related to 3.2.201.9(E)
9 NMAC (5/31/2001), and the extent to which it precludes deductions from gross
10 receipts tax where a taxpayer does not have the correct form to support the taxpayer’s
11 specific type of claimed deduction. This issue is raised for the first time on appeal, and
12 as a result, Taxpayer was not given an opportunity to respond to the argument and no
13 decision on the issue was fairly invoked by the Bureau. *See* Rule 12-216(A) NMRA
14 (“To preserve a question for [appellate] review it must appear that a ruling or decision
15 by the [tribunal] was fairly invoked[.]”); *see also Garcia ex rel. Garcia v. La Farge*,
16 1995-NMSC-019, ¶ 27, 119 N.M. 532, 893 P.2d 428 (stating that the preservation rule
17 serves to allow the opposing party a fair opportunity to argue the issue and to alert the
18 lower court to the claim of error giving the court an opportunity to correct any
19 mistake).

1 **Standard of Review**

2 {11} When reviewing the Department’s decision we can reverse the decision and
3 order only if we conclude that it is “(1) arbitrary, capricious[,] or an abuse of
4 discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not
5 in accordance with the law.” *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep’t*,
6 1998-NMCA-078, ¶ 4, 125 N.M. 244, 959 P.2d 969 (internal quotation marks and
7 citation omitted); *see Arco Materials, Inc. v. Taxation & Revenue Dep’t*, 1994-
8 NMCA-062, ¶ 2, 118 N.M. 12, 878 P.2d 330, *rev’d on other grounds sub nom. Blaze*
9 *Constr. Co. v. Taxation & Revenue Dep’t*, 1994-NMSC-110, 118 N.M. 647, 884 P.2d
10 803; *see also* NMSA 1978, § 7-1-25(C) (1989) (same). In reviewing for sufficiency
11 of the evidence we look to the whole record and review the evidence, in the light most
12 favorable to the agency’s findings. *Wing Pawn Shop v. Taxation & Revenue Dep’t*,
13 1991-NMCA-024, ¶ 8, 111 N.M. 735, 809 P.2d 649.

14 **Taxpayer Established Her Entitlement to the Claimed Gross Receipts Tax**
15 **Deduction**

16 {12} The New Mexico gross receipts tax is assessed upon “any person engaging in
17 business in New Mexico.” NMSA 1978, § 7-9-4(A) (2010). Gross receipts includes
18 consideration received for performing services in the state. NMSA 1978, § 7-9-
19 3.5(A)(1) (2007). By statute “it is presumed that all receipts of a person engaging in
20 business are subject to the gross receipts tax.” NMSA 1978, § 7-9-5(A) (2002). “A

1 taxpayer has the burden of overcoming the statutory presumption created by Section
2 7-9-5” and establish that the taxpayer is entitled to any claimed deduction. *TPL, Inc.*
3 *v. Taxation & Revenue Dep’t*, 2000-NMCA-083, ¶ 8, 129 N.M. 539, 10 P.3d 863,
4 *rev’d on other grounds*, 2003-NMSC-007, 133 N.M. 447, 64 P.3d 474; *Wing Pawn*
5 *Shop*, 1991-NMCA-024, ¶ 16.

6 {13} The New Mexico Gross Receipts and Compensating Tax Act (the Act), NMSA
7 1978, §§ 7-9-1 to -114 (1966, as amended through 2011), provides numerous
8 deductions and exemptions to gross receipts tax. *See* §§ 7-9-13 to -41.4. Relevant here
9 is Section 7-9-48 that allows a seller to deduct sales of services to a buyer who resells
10 the services in the ordinary course of business. *See* § 7-9-43(A). The buyer is required
11 to deliver an NTTC to the seller. *Id.* If the seller does not have possession of the
12 NTTC within the time permitted, the deductions claimed shall be disallowed. Section
13 7-9-43(B). “[T]he [NTTCs] shall contain the information and be in a form prescribed
14 by the [D]epartment[,] . . . [and a] properly executed [NTTC] shall be conclusive
15 evidence, . . . that the proceeds from the transaction are deductible from . . . gross
16 receipts.” Section 7-9-43(A).

17 {14} The Department’s regulations limit the use of NTTCs to buyers that have
18 applied for and received authority to issue the NTTCs. 3.2.201.9(A) NMAC. The
19 Department issues serially numbered NTTC forms to authorized buyers. 3.2.201.9(C)

1 NMAC. Each type of NTTC relates to a particular type of deduction. 3.2.201.8(C)
2 NMAC (12/14/2012). Buyers are responsible for completing, executing, and issuing
3 to the seller, each NTTC form. 3.2.201.9 NMAC. Sellers are required to accept the
4 correct type of NTTC. *See id.* The Department prohibits use of NTTCs by anyone
5 other than the person to whom it was issued and may require buyers to account for
6 each NTTC issued. 3.2.201.9(F) NMAC.

7 {15} Here, the Department, relies on *Proficient Food Co. v. Taxation and Revenue*
8 *Dep't*, claiming that Taxpayer waived her right to the claimed deduction by failing to
9 submit the correct type of NTTC within the time allowed. 1988-NMCA-042, ¶ 22, 107
10 N.M. 392, 758 P.2d 806 (“Where a party claiming a right to an exemption or
11 deduction fails to follow the method prescribed by statute or regulation, he waives his
12 right thereto.”). We believe the Department misconstrues the applicability of
13 *Proficient Food Co.* to the facts of this case.

14 {16} In *Proficient Food Co.*, a foreign corporation sold goods to another company
15 for use in New Mexico. *Id.* ¶ 3. The corporation deducted receipts from these sales,
16 but did not submit a supporting NTTC to the department. *Id.* ¶ 5. Instead, the
17 corporation obtained from the buyer a form entitled “Blanket Exemption Certificate.”
18 *Id.* (internal quotation marks omitted). The form contained the general information
19 needed, however, it was neither serially numbered for verification purposes nor issued

1 by the department. *Id.* ¶ 20. The department argued that allowing buyers to use their
2 own forms in place of NTTCs would eliminate the department’s ability to control the
3 “dispensing of, accounting for, and revoking of a buyer’s authority to use the
4 NTTCs[,]” which is necessary for enforcing buyer registration requirements and for
5 “closely scrutinizing the deductions claimed.” *Id.* ¶ 21. This Court concluded that
6 because the “Blanket Exemption Certificate” submitted by the corporation “was not
7 in a form prescribed by the [d]epartment and would require revamping of the
8 [d]epartment’s processing and verification procedures[,]” it was insufficient to support
9 the corporation’s claimed deduction. *Id.* ¶¶ 20, 22.

10 {17} The present case is distinguishable from *Proficient Food Co.* Here, both NTTCs
11 provided by Visions are the Department’s issued and serially numbered for
12 verification purposes. The NTTCs are properly completed containing the required
13 information and properly executed. Acceptance of the NTTCs to support Taxpayer’s
14 deduction would not disrupt the Department’s ability to scrutinize the deduction or to
15 ensure Visions’ compliance with buyer registration requirements. It would not require
16 the Department to alter its verification and processing procedures.

17 {18} Moreover, the Department does not dispute that Taxpayer’s transactions were
18 nontaxable under Section 7-9-48. The Department does not dispute that Visions
19 mistakenly issued Taxpayer a Type 2 NTTC, which Taxpayer timely submitted to the

1 Department, or that Visions attempted to correct its error by issuing the Type 5 NTTC
2 which would have established Taxpayer's claimed deduction had been timely issued.
3 Rather, the Department appears to be arguing that Taxpayer's deduction that is
4 otherwise allowable, should be disallowed here because Taxpayer had the wrong form
5 at the right time and the right form at the wrong time. This argument exalts form over
6 substance.

7 {19} Tax statutes must "be given a fair, unbiased, and reasonable construction,
8 without favor or prejudice to either the taxpayer or the [s]tate, to the end that the
9 legislative intent is effectuated and the public interests to be subserved thereby are
10 furthered." *Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97, 476
11 P.2d 67. Provisions for tax exemptions or deductions must be construed narrowly but
12 must also be construed *reasonably*. *Id.* Section 7-9-48, at issue here, allows a seller
13 to deduct sales of services to a buyer who resells the services in the ordinary course
14 of business where the buyer delivers an NTTC to the seller, and the resale is subject
15 to the gross receipts tax. "[T]he purpose of deductions or exemptions for sales for
16 resale in the ordinary course of business is to prevent double taxation." *Pub. Serv. Co.*
17 *of N.M. v. Taxation & Revenue Dep't*, 2007-NMCA-050, ¶ 34, 141 N.M. 520, 157
18 P.3d 85.

1 {20} Here, the Department seeks to collect doubly on the receipts for Taxpayer's
2 resold services. Taxpayer's transactions were nontaxable under Section 7-9-48.
3 Taxpayer sold her services to Visions, who resold them in the regular course of
4 business. Visions delivered NTTCs to Taxpayer to support the claimed deduction, and
5 Visions paid the gross receipts tax on the services upon their resale. The fact that
6 Visions initially issued the incorrect type of NTTC should not entitle the Department
7 to collect double taxation in direct contravention with the purpose of the statute.
8 Visions corrected its error and issued Taxpayer the correct type of NTTC. Had any of
9 Taxpayer's attempts to contact the Department for clarification on the requested
10 documentation been successful, Visions may have had the opportunity to correct its
11 error prior to the expiration of Taxpayer's deadline. We do not believe that reversing
12 the Bureau's determination would reflect a fair or reasonable construction of the Act
13 or the deductions provided for therein where Taxpayer established her entitlement to
14 the claimed gross receipts tax deduction. *See Proficient Food Co.*, 1988-NMCA-042,
15 ¶ 22 (stating that this Court does "not favor a rule which exalts [sic] form over
16 substance").

17 **CONCLUSION**

18 {21} For the foregoing reasons, we affirm.

1 {22} **IT IS SO ORDERED.**

2

3

M. MONICA ZAMORA, Judge

4 **WE CONCUR:**

5

6 **JAMES J. WECHSLER, Judge**

7

8 **JONATHAN B. SUTIN, Judge**