

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
ALBERTSON'S FUEL CENTER #990
ID No. 01-773247-00-6; TO PENALTY ASSESSED
UNDER ASSESSMENT NOS. 4089509-4089553**

No. 06-03

DECISION AND ORDER

On January 30, 2006, the parties filed a motion asking the undersigned Hearing Officer to vacate the administrative hearing scheduled on the above-referenced protest and decide this matter based on the Stipulations and Admissions of Fact set forth in the parties' motion. The motion was granted on January 31, 2006, at which time the matter was submitted for decision. Based on the facts presented by the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 23, 2003, the New Mexico Taxation and Revenue Department ("Department") issued an audit assessment to Albertson's Fuel Center #990 ("Taxpayer") under assessment numbers 4089509 through 4089553 in the total amount of \$518,750.53, consisting of gross receipt tax, compensating tax, penalty, and interest, in the amounts set forth below:

Gross Receipts Tax	\$249,766.75
Compensating Tax	<u>72,223.09</u>
Total Tax Principal	\$321,989.84
Penalty	\$ 32,199.14
Interest	<u>164,561.55</u>
Total Assessment	\$518,750.53

2. The Taxpayer paid \$350,000 on July 22, 2003 to stop the accrual of interest.
3. The Department abated \$6,046.56 in compensating tax and related penalty and interest in the amounts of \$604.82 and \$3,402.94.

4. By letter dated July 22, 2003, the Taxpayer requested a 60-day extension of time to file a protest.
5. By letter dated August 1, 2003, the Department granted the Taxpayer's request for an extension to file a written protest until September 21, 2003.
6. The Taxpayer filed a formal protest on September 19, 2003.
7. By letter dated October 8, 2003, the Department's Protest Office acknowledged receipt of the the Taxpayer's protest.
8. On November 8, 2005, the Department filed a Request for Hearing with the Department's Hearing Bureau.
9. On November 15, 2005, the Hearing Officer issued a Notice of Administrative Hearing scheduling a formal hearing on the Taxpayer's protest for 1:30 p.m. on January 31, 2006.
10. The sole issue raised in the Taxpayer's protest is whether the Department's penalty assessment is in accordance with New Mexico law.
11. On January 25, 2006, Robert S. Overstreet, the Taxpayer's manager for state and local tax matters, sent an overnight letter to the Hearing Officer stating that the Taxpayer would be unable to appear at the administrative hearing on its protest and asking the Hearing Officer to consider various facts and arguments set out in his letter.
12. On January 26, 2006, the Hearing Officer faxed a letter to Mr. Overstreet and the Department's attorney explaining that Mr. Overstreet's letter was not an acceptable substitute for the Taxpayer's appearance at the administrative hearing for the following reasons:

Mr. Overstreet's letter makes a number of factual allegations. For example, his letter states that "all that is presented in the record is a detailed description of the taxpayer's high level of compliance with statutes and regulations, the taxpayer's timely and accurate remittance of tax and the timely responses in regard to audit requests of the department." I have nothing to substantiate these allegations. Mr.

Overstreet must understand that the only documents I have in my file are the following:

- The Department's June 23, 2003 assessment;
- The Taxpayer's July 22, 2003 request for an extension of time to file its protest;
- The Department's August 1, 2003 letter granting the extension;
- The Taxpayer's September 19, 2003 Formal Protest;
- The Department's November 8, 2005 Request for Hearing; and
- The Hearing Officer's November 8, 2006 Notice of Administrative Hearing.

I do not have a copy of the Department's audit report or any of the correspondence between the parties. If the Taxpayer believes these documents are relevant to its protest, the documents must be offered into evidence as exhibits at the administrative hearing. Any testimony concerning the exhibits must be given under oath and will be subject to cross-examination by the other side. Administrative tax hearings are quasi-judicial proceedings which are required to follow certain procedures in order to insure the due process rights of both parties and establish an adequate record for any appeal that might be filed with the New Mexico Court of Appeals. Mr. Overstreet's letter does not meet these procedural requirements.

13. On January 30, 2006, the parties filed a joint motion asking the Hearing Officer to vacate the January 31, 2006 hearing and decide this matter based on a stipulation of facts set forth in the parties' motion, which are the same facts set out in Findings of Fact 1 through 10, above.

14. On January 31, 2006, the Hearing Officer granted the parties' motion.

DISCUSSION

As the parties have stipulated, the sole issue to be determined is whether the Department's assessment of penalty on the Taxpayer's underpayment of gross receipts and compensating tax is in accordance with New Mexico law.

Burden of Proof. Section 7-1-17 NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Section 7-1-3 NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the

presumption of correctness applies to the assessment of penalty at issue in this case, and it is the Taxpayer's burden to present evidence and legal arguments to support an abatement.

Applicable Law. NMSA 1978, § 7-1-69 governs the imposition of penalty. Subsection A imposes a penalty of two percent, up to a maximum of ten percent, for each month that a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes due to the State of New Mexico in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989), the New Mexico Court of Appeals upheld this interpretation of the term "negligence" and rejected the taxpayer's argument that inadvertent or human error does not support the imposition of penalty under § 7-1-69:

It is apparent from the taped proceedings that taxpayer's advocate, its accountant, did not understand the meaning of the term "negligence," either generally or as specifically defined in Regulation 69:3. He admitted that taxpayer's accounting system failed in December 1983 and November 1984 ... but stated that this was due to "human error," which he did not characterize as negligence. Taxpayer continues the misconception about when failure to pay tax can be penalized under Section 7-1-69(A) by disregarding any accepted definition of negligence and asserting that it is unfair to penalize a taxpayer for inadvertent error.

The court concluded that "Section 7-1-69(A) is designed specifically to penalize unintentional failure to pay tax." *Id.* See also, *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16,

878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds by Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994).

Application of the Law to the Facts. In order to prevail in this protest, the Taxpayer must provide factual evidence and legal authority to establish that its failure to pay \$315,943.28 of gross receipts and compensating tax (the original assessment amount minus the subsequent abatement of \$6,046.56) was not the result of negligence as defined in the above-referenced regulations and case law. As discussed below, the Taxpayer has failed to meet its burden of proof on this issue.

The parties' January 30, 2006 stipulation of facts is limited to a recitation of the date and amount of the Department's assessment and the dates that various documents were filed. It does not include any facts to explain why the Taxpayer failed to pay the assessed tax in a timely manner or why this failure does not constitute negligence. Although Mr. Overstreet's January 25, 2006 letter to the Hearing Officer included some factual allegations concerning the Taxpayer's compliance rate, these allegations are not admissible as evidence. As the Hearing Officer explained to the Taxpayer in her January 26, 2006 letter, administrative tax proceedings are quasi-judicial proceedings that must meet certain requirements. One of those requirements is that an administrative decision must be based, at least in part, on evidence that would be admissible under the rules of evidence for district courts. As the New Mexico Court of Appeals held in *Chavez v. City of Albuquerque*, 1997-NMCA-111, ¶ 4, 124 N.M. 239, 947 P.2d 1059:

Although an administrative agency may consider evidence that would not be admissible under the rules of evidence, the legal residuum rule requires that the agency's decision be supported by some evidence that would be admissible under the rules. Otherwise the agency's decision is not considered to be supported by substantial evidence.

See also, Young v. Board of Pharmacy, 81 N.M. 5, 9, 462 P.2d 139, 143 (1969) (hearsay evidence is not competent to support a finding in an administrative agency hearing). Here, the statements made

in Mr. Overstreet's letter are inadmissible hearsay and do not meet the requirements of the legal residuum rule. The stipulation of facts submitted by the parties does not endorse these statements, nor does it include any other facts bearing on the issue of negligence. In effect, the stipulation accomplishes nothing and leaves the Taxpayer in exactly the same position it was before, *i.e.*, without any facts to support its case. Based on the limited record submitted by the parties, the Taxpayer has failed to meet its burden of proof.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to Assessment Nos. 4089509-4089553, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer did not present sufficient evidence to support its claim of non-negligence and failed to meet its burden of proof in this matter.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED February 1, 2006.