

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

**IN THE MATTER OF THE PROTEST OF
SALOMON L. RAEL, TO ASSESSMENTS OF 2000
& 2001 PERSONAL INCOME TAX ISSUED UNDER
LETTER ID NOS. L1396921600 & L0340497664**

No. 07-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 7, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Salomon L. Rael represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 2004, the IRS notified Salmon L. Rael via federal forms 4549, titled “Income Tax Examination Changes” (which is generally referred to as a Revenue Agent Report) that it had conducted an examination of his 2000 and 2001 tax reporting and determined that he failed to report \$19,789 of nonemployee compensation and \$9,893 of wages for the 2000 tax year and \$28,045 of nonemployee compensation for the 2001 tax year.
2. The Revenue Agent Reports (“RAR”) were not signed, but identified the federal agent who made the adjustments as “Mr. Parizek” and provided his employee identification number.
3. In 2006, pursuant to a 1988 Agreement on Coordination of Tax Administration (which is a public record of the Department), the IRS provided the Department with information

concerning the unreported wages and nonemployee compensation Mr. Rael received during the 2000 and 2001 tax years.

4. On September 8, 2006, the Department assessed Mr. Rael for \$808 of New Mexico personal income tax, plus interest and penalty, for the 2000 tax year and \$664 of New Mexico personal income tax, plus interest and penalty, for the 2001 tax year.

5. Mr. Rael filed a written protest to the assessments, raising various legal challenges to the method by which the Department obtained the information used to determine his tax liability for the 2000 and 2001 tax years. Mr. Rael did not deny that he earned the income on which the Department's assessments were based.

DISCUSSION

The issue to be decided is whether Salomon Rael is liable for the assessments of New Mexico personal income tax issued against him for the 2000 and 2001 tax years. Mr. Rael challenges the Department's assessments on the following grounds: (1) the RARs issued by the IRS were legally deficient because they were not signed under penalties of perjury as required by 26 U.S.C. § 6065; (2) the Department acted illegally in obtaining information concerning his 2000 and 2001 income because the Department failed to submit an individual, written request for that information as required by 26 U.S.C. § 6103(d); and (3) the Department cannot rely on the IRS's "naked assessment" of federal tax to support the assessment of state tax.

In *Stockton v. State, Taxation and Revenue Department*, Ct. App. Docket No. 26,041 (filed April 20, 2007), the New Mexico Court of Appeals addressed and rejected the same arguments Mr. Rael raises concerning the requirements of 26 U.S.C. §§ 6065 and 6103(d). This decision is binding law in New Mexico and no further discussion of these issues is required.

Mr. Rael also argues that the Department cannot rely on the IRS's "naked assessment" of federal tax to support the assessment of state tax. In support of his argument, Mr. Rael relies on statements in federal case law that the usual presumption of correctness does not apply to notices of deficiency involving unreported income when the IRS introduces no direct evidence to support its determination and the taxpayer challenges the deficiency on the grounds that it is arbitrary. *See, e.g., Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir.1991). In *Portillo*, a subcontractor filed a tax return reporting income that was substantially lower than the income attributed to him on the general contractor's Form 1099. Although neither party was able to fully document the payments at issue, the IRS assessed the subcontractor on the higher income figure, taking the position that it was the subcontractor's burden to establish that the assessment was incorrect. The Fifth Circuit Court of Appeals disagreed, finding that the IRS acted arbitrarily when it issued the assessment without any factual basis for accepting the sworn statement of the general contractor over the sworn statement of the subcontractor.

In the later case of *Parker v. Commissioner*, 117 F.3d 785 (5th Cir. 1997), the Fifth Circuit refused to apply the holding in *Portillo* to a situation where the taxpayers failed to file income tax returns based on "tax protester rhetoric and legalistic gibberish." *Id.* at 787. There, the court upheld the IRS's assessment of more than \$80,000 in back taxes and penalties based on 1099 and W-2 forms submitted by third-party payors. In rejecting the taxpayers' argument that the IRS was not entitled to rely on this third-party information and had issued a "naked assessment," the court clarified the scope of its holding in *Portillo* as follows:

Portillo did not hold that the IRS must conduct an independent investigation in all tax deficiency cases. In this case, the Commissioner has not *arbitrarily* found the third-party forms credible: the Parkers never filed a Form 1040 or any other document in which they swore that they did not receive the payments in question.

The Commissioner has no duty to investigate a third-party payment report that is not disputed by the taxpayer. (Emphasis in the original).

Id. See also, *Miner v. Commissioner*, 2003 WL 403060 (U.S.Tax Ct. 2003) (IRS reasonably determined nonfiler taxpayer's income based on information returns received from third-parties); *White v. Commissioner of Internal Revenue*, 1997 WL 617036 (U.S.Tax Ct. 1997) (taxpayer's assertion that IRS erred in relying on reports from third-party payors in determining the deficiencies in dispute, standing alone, carries no weight).

The federal court's analysis in *Parker* is similar to that applied under New Mexico law. As the Court of Appeals found in *Grogan v. New Mexico Taxation & Revenue Department*, 133 N.M. 354, 357-358 (Ct. App. 2002):

The Department's assessment is presumed to be correct. NMSA 1978, § 7-1-17(C) (1992); *Carlsberg*, 116 N.M. 247 at 249, 861 P.2d at 290. "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." 3.1.6.12(A) NMAC 2001.

See also, *MPC Ltd. v. New Mexico Taxation and Revenue Department*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308. Mr. Rael's repeated assertions that it is the Department's burden to prove the correctness of its assessments against him have no support in New Mexico law. Mr. Rael has the most accurate and direct knowledge concerning the nature and source of his income during the years at issue. By failing to come forward with any evidence to dispute the factual basis for the Department's assessments, he failed to meet his burden of proof in this case.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely protest to the Department's assessments of personal income tax, and jurisdiction lies over the parties and the subject matter of this protest.

B. Information concerning Mr. Rael's 2000 and 2001 income was properly disclosed to the Department by the Internal Revenue Service.

C. There is no requirement that information transmitted by the IRS to state taxing authorities be signed by an IRS agent under penalty of perjury.

D. Mr. Rael failed to meet his burden of proving that the information the Department received from the IRS concerning his 2000 and 2001 income is incorrect.

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

DATED June 12, 2007.