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

IN THE MATTER OF THE PROTEST OF PROMOCO TO ASSESSEMENTS ISSUED UNDER LETTER ID NO. 3919323, 3919324, 3919325, 3919326, 3919327 AND 3919328.

No. 11-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 14, 2010, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Promoco was represented by Mr. Phillip Roth, its sole proprietorship owner ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Between the years of 1995 and 1997, Promoco was a sole proprietorship business owned by Taxpayer.

2. Taxpayer leased advertising space at the Four Corners Regional Airport in Farmington and re-leased that space to others.

3. The advertising space included four foot by six foot display boxes and three foot by five foot free standing kiosks.

4. Taxpayer had an advertising lease and concession agreement with the City of Farmington. (Taxpayer Exhibit 1).

5. The agreement notified Taxpayer of the possibility that he would be responsible for sales tax for sales made or services rendered and was specifically subject to New Mexico law including its statutes and regulations.

6. In 1995, Taxpayer contacted an unidentified Department employee in Farmington and was told he did not have to collect gross receipts taxes after informing the employee that he was leasing space from the airport. Taxpayer received no documentation memorializing the conversation.

7. For the period between January 1, 1995 and December 31, 1997 Taxpayer did not collect gross receipts taxes and did not pay gross receipts taxes to the Department.

8. Taxpayer was subsequently contacted by another unidentified Department employee who notified him that he was responsible to collect gross receipts taxes, report and pay the tax for the leasing and re-leasing of advertising space at the airport.

9. From January 1, 2008 until the time he sold the business Taxpayer collected, reported and paid gross receipts tax.

10. On July 26, 2002 Taxpayer was mailed the following six separate assessments for the non-payment of gross receipts taxes plus accrued interest and penalty for the semi-annual filing periods from January 1, 1995 and December 31, 1997. (Department Exhibit B)

Letter ID	Reporting Period	Tax Due	Penalty	Interest
3919323	01/01/95 – 06/30/95	$ 622.82	$ 62.28	$ 660.86
3919324	07/01/95 – 12/31/95	$ 635.34	$ 63.53	$ 626.22
3919325	01/01/96 – 06/30/96	$ 616.41	$ 61.64	$ 561.56
3919326	07/01/96 – 12/31/96	$ 941.11	$ 94.11	$ 785.60
3919327	01/01/97 – 06/30/97	$ 712.48	$ 71.25	$ 542.46
3919328	06/30/97 – 12/31/97	$ 766.16	$ 76.62	$ 525.22

11. By letters dated August 30, 2002, taxpayer filed an individual protest for each assessment.

12. In his protest letters Taxpayer protested the tax liability because he claimed that

the responsibility for his failure to collect gross receipts tax from his customers was attributable to the inaccurate information provided by a Department employee in Farmington.

13. On September 30, 2002 the Department's Protest Office acknowledged receipt of Taxpayer's protests advising Taxpayer of procedural options and that interest will accrue until the liability is paid, that payment of the protested assessment will stop the accrual of interest and that in order not to be charged a maximum 10% penalty Taxpayer would have to proved he wasn't negligent in failing to pay the tax.

14. Taxpayer has suffered numerous health serious issues since 2000 and is on a fixed income making it more difficult for him to pay the tax liability now that had it been settled before or in 2002. Had the matter been settled before or in 2002 the substantial accumulation of interest for the unpaid 1995 through 1997 gross receipts taxes would have, arguably, been avoided.

DISCUSSION

The primarily issue to be decided, after jurisdiction, is whether Taxpayer is liable for the gross receipts taxes, civil penalty and continuing interest due to the non-reporting of gross receipts for leasing of advertising space in the airport in the tax periods from January 1, 1995 through December 31, 1997. Taxpayer argued that the Department waited an unreasonable period of time to initially notify him of the tax liability and waited an additional unreasonable period to thereafter take action after issuing the assessments and therefore the Department was at fault. The assessments were not issued until 2002 and thereafter no additional action was taken until 2009. Taxpayer claimed that had he been notified immediately he would have been in a much better position to pay the tax due. Taxpayer claimed that as the Department had not contacted him after 2002 he felt they had accepted his protest and therefore no tax was due.

Taxpayer also argued that he was given inaccurate information from the Department which caused him to fail to collect gross receipts taxes from his customers. Additionally, Taxpayer claimed that due to the unreasonable delay in notifying him of the tax liability and the inaction by the Department for seven years, after issuing the assessments; that payment of the tax liability, interest and penalty will create an extreme financial hardship which he will never be able to pay as he has limited means. Further he stated that the combined interest and penalty due are more than the original tax due.

Jurisdiction. The first matter which must be addressed is my jurisdiction to decide this matter. This is because NMSA 1978, §7-1-24 provides for a 30 day time frame for taxpayers to file a written protest against an assessment. Subsection B requires that the protest be filed within thirty days of the date of the mailing to the taxpayer by the Department of the notice of assessment. In this case the postmark date of the assessments was July 26, 2002. The protest letters from Taxpayer are all dated August 30, 2002. Nonetheless, the Department acknowledged the Taxpayer's protest, giving the Taxpayer every indication that the protests had been accepted as valid on September 30, 2002. Section 7-1-24 B also allows for the Secretary to grant a retroactive extension of time to file a protest if a taxpayer requests an extension within 60 days of the assessment. In this case, the Taxpayer's protest letter was filed within 60 days of the Assessment and since the Department acknowledged the protest as valid, the Department's acknowledgement will be treated as an effective grant of extension of time to protest the assessment. Thus, jurisdiction lies to determine this matter.

Burden of Proof. NMSA 1978, §7-1-17(C) (2007) provides that any assessment of tax by the Department is presumed to be correct. Regulation 3.1.6.12 (A) NMAC explains that once an assessment is mailed to a taxpayer that the presumption of correctness attaches and therefore the taxpayer has the burden with to dispute the correctness with evidence. Also NMSA 1978, §7-1-3 NMSA (2009) 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 *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). See also, Regulation 3.1.6.13 NMAC. Accordingly, the presumption of correctness applies to the assessment of principal tax, to the penalty and interest, and it is Taxpayer's burden to present evidence and legal argument to establish that he is not liable for the gross receipts tax and is entitled to an abatement of interest and penalty. This was also the law at the time the taxes were due but not paid.

Gross Receipts Tax Due. NMSA 1978, §7-9-4 (1990) imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. The definition of "engaging in business" is very broad including "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA, 1978, § 7-9-3.3 (2002). The statute makes no distinction between activities engaged in by large corporations and activities engaged in by individuals.

Pursuant to NMSA 1978, §7-9-3.5 A (1) (2007), gross receipts "means the total amount of money…received…from performing services in New Mexico." Regulation 3.2.1.17 A (1) NMAC states, "Receipts derived from the rental or leasing of property employed in New Mexico are subject to the gross receipts tax." Additionally, Regulation 3.2.1.18 N and O NMAC explain that receipts derived in regard to contracts to placement of advertising within the state are receipts from performing an advertising service in New Mexico and are subject to gross receipts tax.

In this case, Taxpayer, Taxpayer entered into a lease and concession agreement with the city of Farmington to lease its advertising display cases and free-standing advertising kiosks at

the airport after which Taxpayer would lease the space to its customers receiving compensation for the service. Because this activity is included in "engaging in an activity" with the result of receiving a monetary benefit and because Taxpayer was performing this service in New Mexico, Taxpayer was liable for gross receipts tax on the income he received from those services.

Interest Due on Unpaid Principal.

NMSA 1978 Section 7-1-67 (1995 Repl. Pamp.) governs the imposition of interest on late payments of tax and provides, in pertinent part:

> A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

NMSA 1978, Sec.7-1-67(A) (2007). The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977).

While the Department offered no explanation as to why its audit took so long and certainly it is a concern when the amount of time to issue the assessments was over five years from the end period of the tax liability, the Department's delay in issuing the assessments does not provide a defense to the imposition of interest. While the evidence established that Taxpayer acted in good faith and did not intend to avoid paying his proper share of taxes, Taxpayer's argument misapprehends the nature of interest. The legislature has directed the Department to assess interest whenever taxes are not timely paid. Interest is not a penalty and the assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for

interest from the original due date of the tax to the date the principal balance is paid in full. *See*, NMSA 1978, §7-1-13(E) (2007).

Interest must be assessed on tax that is due and unpaid, and continues to accrue until the principal amount of tax is paid. In the acknowledgment letter of September 30, 2002 the Department notified Taxpayer that interest would continue to accrue on any unpaid balances of principal. The letter also informed Taxpayer that he could pay the principal to stop the accrual of interest. Taxpayer had sufficient notice that interest would continue to accrue on any unpaid principal tax due. As the principal amount was not paid, interest on the tax is also due and owing.

Penalty due for failure to pay tax. NMSA 1978 Section 7-1-69 (1993 Repl. Pamp.) states in regard to the imposition of a penalty for failure to pay tax due and provides in pertinent part:

> A. in the case of failure due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid…there *shall be added* to the amount as penalty the greater of:: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid…(emphasis added).

The term "negligence" as used in Sec. 7-1-69 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.

The statute imposes a penalty based on negligence for failure to timely pay a tax due. The good faith of a Taxpayer is not an issue. What is to be determined is whether Taxpayer was negligent in failing

to report his taxes properly.

In this matter Taxpayer had notification when signing the lease agreement that he could be responsible for state sales tax. The information, as understood by Taxpayer, received from a Farmington Department employees was not correct. Thereafter taxpayer received the assessments from the department that taxes were due. Other than file his written protests to the assessments, Taxpayer failed to pursue his objections to the assessments with the ordinary care and prudence that a reasonable taxpayer would exercise under like circumstances upon being notified that taxes were due based on non-payment of gross receipts taxes. Taxpayer did not act to pursue resolution of the assessment when action was required. Taxpayer did not take action to ensure that the assessment was resolved arguing that the Department's lack of pursuing collection established that the Department had waived the requirement that he pay the liability. Taxpayer erroneously believed that he was not liable for tax based on the Department not sending any additional request for payment or not contacting Taxpayer. However by its acknowledgement of the protest, the Department notified Taxpayer that the way to avoid payment of a penalty would be to establish that he was not negligent in his failure to pay the tax liability.

In its letter the Department notified Taxpayer that penalty "will be assessed at a rate of 2% per month (to a maximum of 10%) on the principal amount of tax due until such tax is paid." Taxpayer certainly had sufficient notice that a penalty would be assessed due to non-payment of the principal tax due. This error meets the definition of negligence set out in Department regulations and in New Mexico case law. Taxpayer failed to carry his burden to establish that he was not negligent in not reporting and paying his gross receipts as he was unable to recall which Department employee he spoke with, had no documentation memorializing the conversation and

was unable to verify the information from the employee as to the circumstances of which the information was given. While unintentional, Taxpayer failed to pay the tax when due. Therefore Taxpayer is liable for the penalty assessment. *See*, *C & D Trailer Sales v. Taxation and Revenue Dept*., 93 N.M. 697, 699, 604 P.2d 835, 837 (Ct. App. 1979) (a taxpayer's mere belief that he is not liable to pay taxes is tantamount to negligence within the meaning of the statute); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, P.797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.).

Delay by Department in Issuing Assessments. Taxpayer asserts liability by the Department for the delay in notifying him of his gross receipts tax liability. By the time Taxpayer received the Department's assessment in July 2002, the penalty had reached its statutory maximum of 10% and substantial interest had accrued. The Taxpayer testified that if he had been notified immediately he would have been better able to pay the principal amount but now the penalty and interest are substantially more than what was originally owed and he believes the Department is at fault for the accrual of additional penalty and interest. Mr. Dillon, Protest Auditor for the Department, testified that he was unable to explain the long delay other than the heavy workload of the protest auditor initially handling the protest.

Although it is unfortunate that there was such a long lapse of time between the non-payment of gross receipts and when the Department issued its assessment, Taxpayer's argument does not take into account, as explained previously, New Mexico's self-reporting tax system. While the Department has the power to assess taxes when not properly reported, such does not shift the primary responsibility to accurately report and pay taxes, from the Taxpayer to the

Department. The legislature has placed the obligation on taxpayers, who have the more accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, NMSA 1978, §7-1-13(B) (2007). "Every Person is charged with the reasonable duty to ascertain the possible tax consequences of his action." *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). Therefore a taxpayer is bound to determine when his taxes are due, accurately report same to the Department and pay the taxes. It is not an excuse that the Taxpayer was unaware that he owed taxes.

Even though the mistake was not realized immediately, Taxpayer found out after December 1997 in conversation with another Department employee that he was required to pay gross receipts tax on his earnings. Taxpayer knew when the assessment was issued of his obligation and thereafter had a responsibility to make sure that the matter was settled. Because Taxpayer was a non-filer, the Department had no knowledge initially that Taxpayer might owe taxes. The fact that Taxpayer was a non-filer for income earned in New Mexico would be a reason for some delay in the Department knowing that any tax was owed and in particular gross receipts taxes.

NMSA 1978, §7-1-18 (1994) sets out four different time periods within which the Department may assess unpaid taxes. In most cases, the Department has three years from the end of the calendar year in which payment of the tax was due to issue an assessment. In certain circumstances, however, the assessment period is extended: Subsection (B) of §7-1-18 gives the Department ten years to issue an assessment when the taxpayer has filed a fraudulent return; Subsection (C) gives the Department seven years "from the end of the calendar year in which

the tax was due" to issue an assessment when the taxpayer has failed to file a tax return; and Subsection (D) gives the Department six years to issue an assessment when the taxpayer has underreported his tax liability by more than twenty-five percent. In *Taxation & Revenue Department v. Bien Mur Indian Market Center, Inc*., 108 N.M. 228, 770 P.2d 873 (1989), the New Mexico Supreme Court held that the assessment periods set out in § 7-1-18 are mandatory and must be adhered to by the Department. As the court explained:

> Section 7-1-17(A) makes assessment mandatory when a taxpayer owes more than ten dollars in unpaid taxes; the various provisions of Section 7-1-18 simply limit the number of years following the filing of a return during which the Department is authorized to exercise this mandate. *If the Department may make the assessment under one of the provisions in Section 7-1-18, Section 7-1-17(A) mandates the Department shall do so*.... (emphasis added)

Id. 108 N.M. at 231-232, 770 P.2d at 876-877.

Taxpayer attempted to accurately report and pay his tax liability. The taxes assessed in 2002 are for gross receipts owed in 1995, 1996 and 1997. While acknowledging that the burden is on Taxpayer to ensure that taxes are reported and paid in a timely manner and acknowledging the workload of protest auditors it does not appear reasonable that it took between four and a half and six and a half years for the Department to assess Taxpayer for the non-filing of gross receipts tax. Obviously, the sooner such matters are discovered and dealt with, the easier it is for everyone creating less accumulation of significant amounts of interest. It is reasonable that Taxpayer would be upset about how this matter was handled. However, noting that gross receipts were unpaid for a three year period as a result of non-filing, Section 7-1-18 C allows for an extended assessment period of seven years. Therefore if the earliest amount of tax unpaid was due June 1995, the assessment must be issued by December 31, 2002. The assessments were issued in July 2002. Therefore are assessments were issued within the statutorily mandated time period.

Inaction by the Department after receipt of Taxpayer's formal protest. Taxpayer

protested the assessment by mailings dated August 30, 2002. By letter dated September 30, 2002 the Protest Office of the Department acknowledged Taxpayer's protest. Taxpayer testified that he heard nothing from the Department from that time on until 2009 when Mr. Dillon contacted him regarding the tax liability. Taxpayer did not make any other attempts to contact the Department and follow up on his protest until receiving Mr. Dillon's letter in 2009. Taxpayer testified that based on the long delay he understood that the Department had accepted his protest and dismissed the assessments forgiving the liability. Mr. Dillon testified that the protest had been assigned to another protest auditor, that he received the file in 2009 and then contacted Taxpayer. Mr. Dillon testified that either party could have and should have followed up to finalize the matter earlier and that while it could be assumed that someone in the Department did not actively pursue finalization of the matter, Taxpayer also should have followed up to ensure he was fully complying with his legal responsibilities.

The protest acknowledgement letter from the Department does notify Taxpayer that the assigned protest auditor will contact Taxpayer if additional information is needed, that an informal conference may be scheduled and a formal hearing, if necessary. It further notifies Taxpayer that interest will continue to accrue until the principal amount of the tax is paid and that should Taxpayer have any "questions concerning the status" of his request he was provided a name and telephone number to call. No follow up was completed by either Taxpayer or the Department. While it would have been beneficial for the Department to have followed up with Taxpayer the responsibility was actually on Taxpayer to ensure he reported and paid the correct amount of tax so having received the protest acknowledgement and having received the assessments the onus was on Taxpayer to pursue finalization of the matter.

NMSA 1978, §7-1-19 states that the Department has ten years from the date of the assessment to collect taxes due the state and "no action or proceeding shall be brought to collect taxes" after that date. While there was no good reason provided why the period between the assessment and formal protest and subsequent contact with Taxpayer was approximately seven years, the law allows the Department a ten year period and the Department acted within the mandatory allowed time.

The evidence does not indicate that the interest on the assessments should be abated or waived. Taxpayer was warned in September 2002 that the interest on taxes owed would continue to accrue until the principal was paid. Taxpayer did not make any attempts to contact the Department after receiving the acknowledgement of his protest to discuss the status of his protest even though he had been notified that interest would continue to accrue. The Department, through Mr. Dillon, contacted Taxpayer in 2009 to pursue collection of the unpaid tax liability. The length of time it took the Department to proceed with Taxpayer's protest is not reason to abate or waive the interest, especially when Taxpayer had knowledge that interest continued to accrue. In this case it was the obligation of taxpayer to pursue resolution of the assessment once being notified that the Department assessed based on gross receipt taxes being due and not paid.

With respect to the delay in issuing the assessments and finalizing the investigation prior to hearing, it is noted that the Department's delay did not result in an accrual of additional penalty as the negligence penalty accrued at 2% of the unreported taxes per month maximizing at 10%. Therefore within five months of the month that the return was due the penalty had reached the 10% cap. Here the last reporting period was December of 1997 therefore any penalty on unpaid taxes would have maximized by May of 1998. Even had the Department completed its audit more

expeditiously, by the time the audit was completed, it is highly unlikely that the assessments would have been issued prior to May 1998.

Estoppel. The evidence established that Taxpayer was properly assessed for unpaid principal gross receipts tax, penalty and interest. Taxpayer claimed, however, that the principal, interest and penalty should be abated as he, in good faith, relied on information he obtained from a Department employee who told him that he did not need to collect or pay gross receipts. Taxpayer in effect argued that the Department should be stopped from collecting the tax, interest and penalty from him.

The adjudicative functions of an administrative agency like the Department are considered by New Mexico courts to be "quasi-judicial" powers. According to the New Mexico Supreme Court, the quasi-judicial powers of an administrative agency **do not** include the authority to grant equitable relief to a party before the agency, although a court may later do so after the administrative action is completed. *See AA Oilfield Service v. New Mexico State Corporation Commission,* 118 N.M. 273, 279, 881 P.2d 18, 24 (1994).

Even if the Department's administrative Hearing Officers had the authority to grant equitable relief, principals of equitable estoppels generally do not apply to the facts in this case. As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *See Kerr-McGee Nuclear Corp. v. Property Tax Division,* 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). Our courts have determined that estoppel will not be applied against a state governmental entity "unless there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't,* 1998-NMSC-11,

P17, 125 N.M. 140, 958 P.2d 98. Additionally, "Estoppel cannot lie against the state when the act sought would be contrary to the requirements express by statute." *Rainaldi v. Pub Employees Ret. Bd.,* 115 NM 650, 658-59, 857 P.2d 761, 769-70 (1993). In determining whether estoppel is appropriate, the conduct of both parties must be considered *Gonzales v. Public Employees Retirement Board,* 114 NM 420, 427, 839 P.2d 630, 637, *cert. denied,* 114 Nm 227, 836 P.2d 1248 (1992).

In the Matter of the protest of Val Kilmer and Joanne Whalley v. Jan Goodwin, Secretary, New Mexico Taxation and Revenue, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690, ¶27, the court sets out that an individual seeking to establish estoppel against the government must prove:

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury…the party seeking to establish estoppel must show that reliance was reasonable). In addition to these four factors the plaintiff must demonstrate 'affirmative misconduct on the part of the government.'"

In examining the conduct of both parties, the courts have been willing to grant estoppel when a party has relied on written representations but unwilling to grant estoppel when a party has relied solely on oral representations. *See Bien Mur Indian Ctr.,* 108 NM 228, 231, 770 P.2d 873, 876 (refusing to apply estoppel when only oral representations were made and relied on). Here, Taxpayer claimed that he relied on the oral representations of an employee of the Department's Farmington office although not being able to recall the name of the individual or having received anything in writing from the employee. The oral statements of a Department

employee do not give rise to estoppel. In *Bien Mur,* 108 N.M. at 231, 770 P.2d at 876, the court held that the taxpayer "did not act reasonably in relying on the oral representation of the Department." Also, *Rinaldi v. Public Employees Retirement Board,* 115 N.M. 650, 658-659, 857 P.2d 761, 769-770 (1993) (estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute).

Taxpayer was ignorant of the true facts in that he was required to pay gross receipts tax based on his re-leasing the advertising space at the airport. Taxpayer detrimentally relied on the employee's representations such that he would otherwise have collected the gross receipts tax from his customers. However as there was insufficient evidence as to exactly who Taxpayer spoke to and the exact verbal exchange the evidence did not establish that the reliance was reasonable or that there was "affirmative misconduct on the part of the government." Taxpayer did not meet his burden of establishing that estoppel is appropriate in this matter and even if he had been able to establish such New Mexico law does not allow such relief at an administrative proceeding.

Financial Hardship and Physical Disability. The Taxpayer asks that the tax, penalty and interest be waived as he is on a fixed income, he has had multiple health issues and because payment of these amounts will create an extreme financial hardship for him testifying that he will never be able to pay the debt now that the interest is significantly greater than the original principal owed. While certainly empathizing with Taxpayer, unfortunately, this is not something that the Hearing Officer can consider. Department Regulation 3.1.6.14 NMAC specifically states that the Secretary "may not compromise a taxpayer's liability because of the taxpayer's inability to pay." Nor does the Hearing Officer have authority to relieve a taxpayer of his statutory liability for

tax, penalty, or interest. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court held that "the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform" and that an "administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature."

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments of gross receipts tax issued under Letter ID No. 3919323 through 3919328 and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer failed to meet his burden of proving that income received during January 1995 through December 1997 is not subject to New Mexico gross receipts tax. Therefore, the amounts of $4,294.32 is subject to New Mexico gross receipts tax.

C. The amount of civil penalty added to the principal tax was correctly added and assessed, pursuant to NMSA 1978, §7-1-69(A)(1).

D. The Department's delay in issuing the assessments and in responding to Taxpayer's protest is not a valid defense to the imposition of interest on unpaid taxes and the interest was properly imposed. Interest continues to accrue pursuant to NMSA 1978, §7-1-67 until the principal is paid in full.

Dated: March 8, 2011.