

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

**IN THE MATTER OF THE PROTEST OF
COMPUTER SQUARE, INC.
d/b/a CSI TECHNOLOGY GROUP,
TO THE ASSESSMENT ISSUED UNDER
ID NO. L0228075136**

No. 12-22

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 20, 2012, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Ms. Ida Lujan, Staff Attorney. Mr. Tom Dillon, Auditor, and Ms. Lizzy Vedamanikam, Protest Office Manager, also appeared on behalf of the Department. Computer Square, Inc. ("Taxpayer") appeared for the hearing through its employee and Director, Mr. Joseph Britt, and represented itself. Mr. Britt and Ms. Vedamanikam testified at the hearing. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico selling software licenses and services in 2001 through 2006.
2. The Taxpayer filed gross receipts tax returns with the Department for the tax periods from July 1, 2001 through September 30, 2002. The returns were filed in March 2003 and again in October 2003.
3. In March 2003, the Taxpayer paid the tax principal when its returns were filed. In April 2003, the Taxpayer paid applicable penalty and interest on the returns.

4. In June 2003, the Taxpayer filed amended returns, claiming zero gross receipts tax liability and requested a refund for amounts paid on July 2001 through September 2002 gross receipts tax. The Taxpayer was acting on advice from its accountant and believed that its gross receipts were exempt from New Mexico tax based on a ruling the Department had issued on a different taxpayer.
5. In November 2003, the Department requested additional information from the Taxpayer regarding its claim for refund.
6. In November 2003, the Taxpayer responded to the request and provided more information to the Department.
7. In March 2004, the Department issued a refund to the Taxpayer.
8. The Department began an audit on the Taxpayer in November 2006 and issued an audit report in April 2007. The Department determined that the Taxpayer had underreported its gross receipts tax by more than 25% for the tax periods from June 30, 2001 through September 30, 2006.
9. The Department determined that the ruling relied upon by the Taxpayer did not apply to the Taxpayer and that the 2004 refund was issued in error.
10. On May 15, 2007, the Department assessed the Taxpayer for gross receipts tax and interest for the tax periods from June 30, 2001 through September 30, 2006. The assessment was for \$21,756.33 tax and \$14,491.98 interest.
11. On June 13, 2007, the Taxpayer filed a formal protest letter.
12. On July 3, 2007, the Department sent a letter acknowledging receipt of the Taxpayer's protest.

13. On March 21, 2012, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
14. On March 27, 2012, a notice of hearing was issued for July 10, 2012.
15. On June 13, 2012, the Taxpayer filed a request for continuance of the hearing set for July 10, 2012.
16. On June 29, 2012, an order granting the request for continuance was issued.
17. On July 2, 2012, an amended notice of hearing was issued for September 20, 2012.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax and interest for the tax periods from June 30, 2001 through September 30, 2006, whether the Department's actions were timely, and whether interest was calculated correctly.

The parties presented evidence and made their arguments based solely on the tax period from July 2001 through September 2002. However, the assessment included tax periods through September 2006. All of the evidence relied upon regarding the assessment period from September 2002 through September 2006 came solely from the documents submitted as exhibits by the parties.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is

presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is not liable for the tax and is entitled to an abatement of interest.

Gross Receipts Tax.

The Taxpayer withdrew its protest as to whether it should have been paying gross receipts tax. However, the Taxpayer challenged the Department's timeliness in assessing the Taxpayer and in setting the hearing.

Statute of Limitations.

The Taxpayer argued that the Department's assessment was not timely because it occurred in 2007 and was issued more than three years after the Department had issued a refund on the tax from July 2001 through September 2002. The Department did not respond to this argument at the hearing. However, the audit report was submitted as an exhibit by the Taxpayer, and it indicates that the Department's position was that the Taxpayer underreported its tax liability by more than 25% from October 1, 2001 through September 30, 2006.

Generally, the Department may not assess more than three years after the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18 (A). However, the Department may assess no more than six years after the end of the calendar year in which the tax was due if the taxpayer underreported its tax liability by more than 25%. *See* NMSA 1978, § 7-1-18 (D).

The Taxpayer was subject to quarterly reporting, and the tax for each quarter was due the month following the end of the quarter. *See generally* NMSA 1978, § 7-9-11. The audit report indicates that the Department determined that the Taxpayer reported its gross receipts tax for the tax period ending on September 30, 2001 in excess of the amount of tax actually due and there was no amount from that tax period included in the assessment. The audit report also indicates

that the Department determined that the Taxpayer filed zero gross receipts tax reports for the tax periods from October 1, 2001 through September 30, 2002. The audit report also indicates that the Taxpayer filed zero gross receipts tax reports for the period ending in March 2003, the period ending in September 2003, and the period ending in June 2004. Therefore, the Department concluded that the Taxpayer had underreported its tax liability for all of those tax periods by 100%. Per the audit report, the Department's determination of gross receipts tax owed for the period ending in December 2001 was \$2,380.95, for the period ending in March 2002 was \$4,285.71, for the period ending in June 2002 was \$1,904.76, for the period ending in September 2002 was \$952.38, for the period ending in March 2003 was \$11,407.29, for the period ending in September 2003 was \$587.14, and for the period ending in June 2004 was \$238.10. The assessed amounts for all of these tax periods totals \$21,756.33, which was the amount of gross receipts tax indicated in the assessment issued in May 2007.

The Taxpayer did not present any evidence to rebut the presumption of correctness as to the tax periods ending in March 2003, September 2003, and June 2004. The tax due from the June 2004 period was due in 2004, and the Department's assessment on it was within the three years from the end of the year in which the tax was due. *See* NMSA 1978, § 7-1-18 (A). Therefore, the assessment for the June 2004 tax period was within the general statute of limitations. *See id.* The tax owed from March and September 2003 tax periods was due in 2003. Because the Taxpayer failed to rebut the presumption of correctness as to the 2003 tax periods, the Department's determination that the taxes were underreported by more than 25% stands. Therefore, the Department's assessment as to the 2003 tax periods was timely because it occurred within six years of the end of the year in which the tax was due. *See* NMSA 1978, § 7-

1-18 (D). Consequently, the assessment of the total \$12,232.53 of gross receipts tax for 2003 and 2004 was timely.

The Taxpayer presented evidence sufficient to rebut the presumption of correctness as to the October 2001 through September 2002 tax periods. The Taxpayer explained that there were returns filed in March 2003 for those tax periods that showed tax liabilities, and that taxes were paid at that time. The Taxpayer also made payments in April 2004 for the applicable penalty and interest on those tax periods. The Taxpayer subsequently filed amended returns in June 2003 that claimed zero tax liabilities for those tax periods and requested a refund. The Taxpayer also re-filed the original returns showing the tax liabilities in October 2003. Mr. Britt could not explain exactly why the original returns were filed again in October 2003, and could only say that the Taxpayer was following the advice of its accountant and was responding to requests from the Department regarding its refund request. Again, the audit report acknowledged that a return showing an excessive tax liability was filed with respect to the tax period ending in September 2001. The Taxpayer's testimony indicated that this return, which was acknowledged as received by the Department, was filed at the same time as the other returns. The Department also acknowledged, through the testimony of its witness, that payments were received in March and April 2003 with respect to the tax periods from July 2001 through September 2002. The payments for these tax periods were due in 2001 and in 2002. The returns filed by the Taxpayer for each of these tax periods show a tax liability in excess of the amount determined to be owed by the Department in its audit report. Therefore, the Taxpayer did not underreport its tax liability for those tax periods, and the Department was required to assess within three years of the end of the year in which the tax was due. *See* NMSA 1978, § 7-1-18 (A) and (D). The due dates were in 2001 and 2002, so the final dates to assess were the end of the year in 2004 and 2005. The

assessment occurred in 2007, and was, therefore, not timely. The assessment of the total of \$9,523.80 for tax periods from October 1, 2001 through September 30, 2002 was improper as it was barred by the statute of limitations.

The Taxpayer also argues that the Department was negligent in bringing the protest to hearing since the Department took no action on the Taxpayer's case from July 2007 until February 2012. The Department sent the protest acknowledgement letter in July 2007. The Department again contacted the Taxpayer in reference to the protest in February 2012. The Department then filed the Request for Hearing on March 21, 2012. The Taxpayer argues that the delay of nearly five years from filing of protest to the Department's request for hearing was an unreasonable amount of time. The Department argues that there is not a statute of limitations for conducting the hearing. The Department also argues that the Taxpayer was equally negligent since it did not contact the Department and inquire about its hearing. The Department admitted that the delay was unreasonable, but argued that the delay was not willful. The Department argued that the delay was the result of the case slipping through the cracks or being overlooked for some period of time.

The Department is incorrect in asserting that it was the Taxpayer's responsibility to follow up on having a hearing. The Taxpayer is not required to do anything other than file the protest in a timely fashion. *See* NMSA 1978, § 7-1-24. In fact, it is the Department's responsibility to "*promptly* set a date for hearing". NMSA 1978, § 7-1-24 (D) (emphasis added). Moreover, the Department's acknowledgement letter indicated that it would review the issues and contact the Taxpayer for more information or to set a conference or hearing. The Department's delay in referring the Taxpayer's protest for hearing for almost five years was unreasonable and unjustified. However, there is not a strict statutory deadline or time frame

within which a hearing must be held. *See* NMSA 1978, § 7-1-24. Additionally, there is no statutory or regulatory authority for the Hearing Officer to dismiss a protest for unreasonable and unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. Hearing officers are also unable to grant equitable remedies. *See AA Oilfield Service v. New Mexico State Corp. Comm 'n*, 118 N.M. 273, 881 P.2d 18 (1994) (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). As there was not a statutory or regulatory violation in failing to refer the Taxpayer's protest for such extended period of time, there is no administrative remedy that can be granted.

Assessment of Interest.

The Taxpayer argues that the Department should be precluded from collecting interest on the gross receipts tax because the Department granted the refund in 2004, which caused the Taxpayer to believe that it did not owe gross receipts tax in the subsequent years. This is essentially an argument for equitable estoppel. Estoppel may be found against the state where 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-011, ¶ 17, 125 N.M. 140, 958 P.2d 98. In addition, the party seeking estoppel must demonstrate "affirmative misconduct on the part of the government." *See In re Protest of Kilmer*, 2004-NMCA-122, ¶ 27, 136 N.M. 440, 99 P.3d 690. Again, hearing officers have no authority to grant equitable remedies, such as estoppel. *See AA Oilfield Service*, 118 N.M. 273. The Taxpayer was also relying on advice from its accountant. A taxpayer's mistaken belief that it did not owe tax, when the belief is based on the advice of a competent accountant, is not negligent and application of penalty is inappropriate. *See C&D Trailer Sales v. Taxation and Revenue Dept.*, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979). *See also* 3.1.11.11 (D) NMAC (2001). No penalty was assessed against the Taxpayer. However, there is not a similar provision for the excusal of interest.

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed.

The Taxpayer also argued that if interest is owed, it should not be calculated to begin until after the assessment date in 2007 or until the Department took some action on the protest in 2012. The Taxpayer also made arguments stemming from the refund of the 2001 and 2002 tax periods and when interest should accrue on those assessments. The Department also indicated that the Taxpayer might be entitled to some credit for interest already paid on those assessments since the Taxpayer paid some interest in April 2003. As those assessments were barred by the statute of limitations, the arguments are moot and the Taxpayer is not entitled to credit against any interest still outstanding since it accrued against tax liabilities from subsequent months. Interest accrues from “the first day following the day on which the tax becomes due” and continues to accrues until the tax is paid. NMSA 1978, § 7-1-67. The tax was due on April 25, 2003 from the period ending in March 2003, was due on October 25, 2003 for the period ending in September 2003, and was due on July 25, 2004 for the period ending in June 2004. *See* NMSA 1978, § 7-9-11 (indicating the due dates for gross receipts tax). Therefore, interest began to accrue on April 26, 2003 on the \$11,407.29 owed, began to accrue on October 26, 2003 on the \$587.14 owed, and began to accrue on July 26, 2004 on the \$238.10 owed. Taxpayer was advised at the hearing that while the tax principal remains unpaid, the interest will continue to accrue.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of gross receipts taxes for tax periods from June 30, 2001 through September 30, 2006 issued under Letter ID number L0228075136, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer presented sufficient evidence to overcome the presumption of correctness on part of the assessment, and showed that it filed returns showing gross receipts tax liability in excess of what was actually owed for the tax periods from July 1, 2001 through September 30, 2002.

3. The Department failed to show the correctness of the assessment for tax periods from July 1, 2001 through September 30, 2002 after the presumption was overcome, and failed to assess Taxpayers within three years of the end of 2002. *See* NMSA 1978, § 7-1-18 (A). Therefore, the assessment of gross receipts tax and interest for the tax periods from June 30, 2001 through September 30, 2002 is barred by the statute of limitations.

4. The assessment of gross receipts tax is ABATED by \$9,523.80 for the tax periods from October 1, 2001 through September 30, 2002. The interest assessed on the tax for those tax periods is also ABATED.

5. The Taxpayer failed to overcome the presumption of correctness as to the assessment of gross receipts tax in the amount of \$12,232.53 for the tax periods ending in March 2003, September 2003, and June 2004.

6. Interest was properly assessed on the tax liabilities for the tax periods relating to March 2003, September 2003, and June 2004. Interest began to accrue on the tax on the days following their due dates, which were in April 2003, October 2003, and July 2004 respectively.

For the foregoing reasons, the Taxpayer's protest is **GRANTED IN PART AND DENIED
IN PART.**

DATED: October 17, 2012.

DEE DEE HOXIE
Hearing Officer
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