

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

**IN THE MATTER OF THE PROTEST OF
ANN LODGE, PH.D,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L1650802048 and L1771666816**

No. 13-14

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 2, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Legal Counsel. Ms. Sylvia Sena, Auditor, also appeared on behalf of the Department. Dr. Ann Lodge (Taxpayer) appeared for the hearing and represented herself. 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 as a psychologist and was providing contract services to the Los Lunas School District in 2005 and 2006.
2. The Taxpayer failed to file gross receipts tax with the Department for 2005 and 2006.
3. On July 9, 2009, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005. The assessment was for \$4,319.48 tax, \$863.90 penalty, and \$1,766.99 interest.
4. On July 9, 2009, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006. The assessment was for \$4,212.56 tax, \$842.52 penalty, and \$1,093.50 interest.
5. On July 15, 2009, the Taxpayer filed a formal protest letter.

6. On February 8, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
7. The Notice of Hearing was mailed to the parties from the Hearings Bureau on February 8, 2013.
8. The Taxpayer mistakenly believed that her services were exempt or deductible from the gross receipts tax.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax periods ending in December 2005 and December 2006, due to her failure to file and to pay gross receipts tax, and whether the Department's actions were timely.

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 she is not liable for the tax and is entitled to an abatement of penalty and interest.

Statute of Limitations to Assess.

The Taxpayer argued that the assessments in 2009 were too late and that it was unfair to allow the Department to assess so many years after the fact. 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). Consequently, the assessment as to the 2006 gross receipts tax was

timely. The Department may also assess no more than seven years after the end of the calendar year in which the tax was due if the taxpayer failed to file a return. *See* NMSA 1978, § 7-1-18 (C). The Taxpayer admitted that she did not file gross receipts tax returns for the 2005 and 2006 reporting periods. Therefore, the assessment as to the 2005 gross receipts tax was timely.

Gross Receipts Tax.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). The Taxpayer's services to the Los Lunas School District were subject to the gross receipts tax. It is the responsibility of the taxpayer, who is in the position to know the details of her business activities, to determine accurately and to report her tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. At the hearing, the Taxpayer did not dispute that she was providing services.

The Taxpayer argued that her services were exempt or deductible from the gross receipts tax because they were health services provided in a rural area. The Taxpayer cited to a House Bill that was codified in 2007. The House Bill created some new statutes and amended others. *See generally* NMSA 1978, § 7-2-18.22 (2007) (providing an income tax credit to rural health care practitioners), and § 7-9-77.1 (2007) (expanding the gross receipts tax deduction for certain medical and health care services). The Department argued that the changes made in 2007 were inapplicable to the Taxpayer's gross receipts tax liability from 2005 and 2006. The Taxpayer conceded that the law was not in effect at the time her gross receipts tax liability occurred.

The Department also argued that the gross receipts tax deduction would not apply because the Taxpayer was not being paid by an agency of the United States government. *See* NMSA 1978, § 7-9-77.1 (allowing a deduction from gross receipts for some health care services when the receipts are from payments by the U.S. government or an agency thereof). The

Taxpayer admitted that she was not receiving payments from the U.S. government and was being paid by the Los Lunas School District.

The Taxpayer failed to establish that she was exempt from gross receipts tax and failed to establish that she was entitled to a deduction from gross receipts tax during 2005 and 2006.

Therefore, the assessment of gross receipts tax is presumed to be correct.

Assessment of Penalty.

A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). Therefore, the penalty was properly assessed.

Assessment 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 was advised at the hearing that while the tax principal remains unpaid, the interest will continue to accrue.

Timeliness of the Hearing.

The Taxpayer also argued that the Department was negligent in bringing the protest to hearing since the Department took no action on the Taxpayer's case from July 2009 until September 2012. The Taxpayer pointed out that she lost the opportunity to secure evidence and owed more interest than she would have if this matter had been resolved in 2009. The

Department sent the protest acknowledgement letter in July 2009. The Department again contacted the Taxpayer in reference to the protest in September 2012. The Department then filed the Request for Hearing on February 8, 2013. The Taxpayer argues that the delay of nearly four 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 indicated that the delay was "unfortunate".

It is the Department's responsibility to "*promptly* set a date for hearing". NMSA 1978, § 7-1-24 (D) (emphasis added). The Department's delay in referring the Taxpayer's protest for hearing for almost four years was unreasonable and unjustified. Moreover, the Taxpayer was prejudiced by the delay since interest continued to accrue. However, there is not at present a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24. The Department pointed out that the statute is being amended to address this issue. 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 an extended period of time, there is no administrative remedy that can be granted by the Hearing Officer.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L1650802048 and L1771666816, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was properly assessed for gross receipts tax, penalty, and interest for 2005 and 2006.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: May 30, 2013.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 2013 in the following manner:

First Class Mail

Ann Lodge, Ph.D
500 Rodeo Rd., #1810
Santa Fe, NM 87505

Interoffice Mail

Nelson Goodin
Taxation and Revenue Department, Legal
1100 S. St. Francis
Santa Fe, NM 87504
