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

**IN THE MATTER OF THE PROTEST OF**
**TORRANCE COUNTY COUNSELING, LLC,** **No. 14-46**
**TO ASSESSMENTS ISSUED UNDER**
**ID NOS. L1534778832 and L0743375824**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 22, 2014 and November 21, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Torrance County Counseling, LLC (Taxpayer) appeared by and through its owner, Ms. JoAnn Del Curto, for the hearing and was represented by its attorney, Ms. Patricia Tucker. 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. On March 31, 2014, the Department assessed the Taxpayer for gross receipts tax and interest for the tax period from January 31, 2008 through July 31, 2010. The assessment was for $45,474.89 tax and $7,432.99 interest. No penalty was assessed.
2. On March 31, 2014, the Department assessed the Taxpayer for gross receipts tax and interest for the tax period from June 30, 2008 through June 30, 2013. The assessment was for $42,439.73 tax and $2,691.70 interest. No penalty was assessed
3. On June 9, 2014, the Taxpayer filed a formal protest letter to the assessments.
4. On August 6, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
5. On August 7, 2014, the Hearings Bureau issued a notice of hearing. The hearing date was set within ninety days of the protest.

6. On August 22, 2014, the hearing was commenced. The parties requested a continuance of the hearing because the Taxpayer had just retained counsel and wanted to amend the issues of the protest.

7. The testimony commenced, and the parties were instructed that any party who testified on August 22, 2014 must be available for further testimony and cross-examination when the hearing was recommenced.

8. The delay of the hearing was attributable to the Taxpayer.

9. On August 27, 2014, the Hearings Bureau sent amended notices of hearing. The hearing was set to recommence on October 23, 2014.

10. On September 30, 2014, the Taxpayer's attorney filed a request for continuance.

11. The request was granted. On October 6, 2014, the Hearings Bureau sent second amended notices of hearing. The hearing was set to recommence on November 21, 2014. The delay of the hearing was again attributable to the Taxpayer.

12. The Taxpayer filed gross receipts taxes for the 2005 and 2006 tax years.

13. Later, the Taxpayer learned of deductions to which it was entitled. On February 23, 2007, the Taxpayer filed for refunds on the 2005 and 2006 tax years based on those deductions.

14. The Taxpayer included payments made by Medicaid in its deductions at that time.

15. On July 27, 2007, the Department issued a letter to the Taxpayer advising that a recent change in law would affect the Taxpayer. This letter was regarding a double penalty option that had been repealed.

16. The refunds were granted. The Department issued a Notice of Refund to the Taxpayer with a check and a warrant remittance on September 14, 2007.

17. The Taxpayer filed its gross receipts tax for the following tax years, from 2008 through 2013, with deductions. The deductions claimed were the same as those claimed in the request for refund, and the deductions also included payments made by Medicaid.

18. The Taxpayer abandoned the arguments that the assessment was incorrect and that it was entitled to the deductions.

19. The Taxpayer conceded that the Medicaid payments were not eligible for the deduction and should have been included in the taxable gross receipts.

20. The Taxpayer argued that the letter on the double penalty and the refund granted in 2007 were tantamount to a ruling and argued that the Department was estopped from collecting against the Taxpayer.

## DISCUSSION

The issue to be decided is whether the Department is estopped from assessing for tax and interest for the tax periods from January 31, 2008 through July 31, 2010, and June 30, 2008 through June 30, 2013.

**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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. 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 entitled to an abatement of the assessment.

**Estoppel.**

The Taxpayer argued that the Department was estopped from assessing because the Department issued the Taxpayer a refund in 2007 for the same deductions that were subsequently claimed by the Taxpayer from 2008 through 2013. The Taxpayer argued that the refund notice, check, warrant remittance, and letter about double penalty all served to satisfy the requirements of a ruling. The Department argues that the refund is not a ruling as it does not meet the requirements of a ruling.

The Department can be estopped from taking action against a taxpayer when the party's action or inaction was due to a regulation in effect at the time or a ruling addressed to the party personally in writing by the secretary that was in effect at the time that the liability arose. *See* NMSA 1978, § 7-1-60 (1993). Rulings must meet certain criteria. *See id. See also* NMSA 1978, § 9-11-6.2 (1995). To be effective, a ruling must be reviewed by the attorney general or other legal counsel of the Department and the ruling must reflect that such review was done. *See* NMSA 1978, § 9-11-6.2 (C). A ruling must be signed by the secretary and by counsel to show that such a review took place. *See* 3.1.2.8 NMAC (2000). Rulings are also required to be written statements that interpret specific statutes. *See* NMSA 1978, § 9-11-6.2 (B) (2). The refund and other documents relied upon by the Taxpayer are not a ruling as they do not meet the criteria required; they do not indicate review by counsel and do not interpret the statute on the deduction. *See id.* A letter from the Department that states a conclusion does not meet the requirements for estoppel. *See In re Kilmer*, 2004-NMCA-122, ¶ 43, 136 N.M. 440. Therefore, statutory estoppel does not apply.

Hearing officers are also unable to grant equitable remedies. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). Moreover, equitable estoppel against the state is disfavored, especially in cases involving taxes. *See Taxation and Revenue Dep't v. Bien Mur Indian Market*, 1989-NMSC-015, ¶9-10, 108

N.M. 228. Equitable estoppel will not apply against the state when it would be contrary to the requirements of statute. *See Kilmer*, 2004-NMCA-122, ¶ 26. The party asserting estoppel must show a lack of knowledge of the essential facts in question, that the party reasonably relied upon the other's conduct, and that the reliance was detrimental. *See Johnson and Johnson v. Taxation and Revenue Dep't*, 1997-NMCA-030, ¶ 28, 123 N.M. 190. Generally, statements of opinion on matters of law do not give rise to estoppel when the facts are known to both parties. *See Rainaldi v. Pub. Employees Ret. Bd.*, 1993-NMSC-028, ¶ 16, 115 N.M. 650. In this case, the Taxpayer had knowledge of the essential facts, specifically that it was including payments made by Medicaid in its deductions. Therefore, it does not appear that equitable estoppel would apply even if it were available as an administrative remedy.

**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 Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

## CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notices of Assessment of gross income taxes issued under Letter ID numbers L1534778832 and L0743375824, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer abandoned its argument and conceded that it was not entitled to the deductions claimed with respect to payments made by Medicaid.

C. The Department did not issue a ruling to the Taxpayer by granting a refund. *See* NMSA 1978, §§ 7-1-60 and 9-11-6.2.

D. Therefore, the Department was not estopped from assessing the Taxpayer. *See* NMSA 1978, § 7-1-60.

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

DATED: December 29, 2014.

*Dee Dee Hoxie*

DEE DEE HOXIE
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