STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
RUSSELL AND ANNE FARRELL **No. 17-21**
TO ASSESSMENTS
ISSUED UNDER LETTER
ID NOs. L0853448064 and L2023538048

DECISION AND ORDER

A protest hearing occurred in the above captioned matter on March 24, 2017 at 11:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Russell and Anne Farrell, appeared representing themselves *pro se* ("Taxpayers"). Staff Attorney, Peter Breen, appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Thomas Dillon, appeared as a witness for the Department. Department Exhibit A was admitted into the record without objection and is described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 23, 2009, the Department assessed Taxpayers for the amounts of $3,178.44 in gross receipts tax, $635.68 in penalty, and $819.83 in interest for a total amount due of $4,633.95 under Letter ID No. L2023538048 for the reporting period ending December 31, 2006.

2. On June 23, 2009, the Department assessed Taxpayers for the amounts of $3,359.48 in gross receipts tax, $671.90 in penalty, and $1,369.28 in interest for a total amount

due of $5,400.66 under Letter ID No. L0853448064 for the reporting period ending December 31, 2005.

3. On July 16, 2009, Taxpayers executed a Formal Protest which was received by the Department's Protest Office on July 17, 2009.

4. On July 21, 2009, the Department acknowledged the receipt of the Taxpayers' protest.

5. There was no apparent activity in the matter between 2009 and 2016 leading Taxpayers to presume that the matters subject of the protest had been concluded and that further collection activity was precluded by the applicable statute of limitations. [Testimony of Mr. Farrell].

6. On January 23, 2017, the Department requested a hearing in the matter subject of the Taxpayers' protest. The Department's request brought Taxpayers' protest to the attention of the Administrative Hearings Office for the first time. Before that date, the Administrative Hearings Office had no knowledge of the protest and no statutory obligation to set a hearing.

7. On January 25, 2017, the Administrative Hearings Office issued a Notice of Administrative Hearing setting a hearing on the merits of Taxpayers' protest for February 16, 2017.

8. On February 1, 2017, Taxpayers requested a continuance of the hearing on the merits scheduled for February 16, 2017. The Department did not oppose the request.

9. On February 13, 2017, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing setting a hearing on the merits of Taxpayers' protest for March 24, 2017.

10. On March 9, 2017, the Administrative Hearings Office issued a Notice of Reassignment of Hearing Officer for Administrative Hearing assigning the undersigned Hearing Officer to preside in this protest.

11. For a period of 12 years ending in 2010, Mr. Farrell was an agent for Greyhound. At all relevant times, Greyhound was a bus transportation entity engaged in the business of interstate and intrastate transportation of passengers and freight. [Testimony of Mr. Farrell].

12. In the stated capacity, Mr. Farrell managed Greyhound operations in Gallup, New Mexico which included selling tickets for interstate and intrastate passenger bus travel and occasional freight transportation. [Testimony of Mr. Farrell].

13. Greyhound compensated Mr. Farrell exclusively in the form of commissions. Mr. Farrell was not employed by Greyhound nor was he compensated in wages. [Testimony of Mr. Farrell].

14. Commissions paid to Mr. Farrell consisted of a percentage of sales from passenger bus travel, freight transportation, and vending machines. [Testimony of Mr. Farrell].

15. The amount of the commissions Greyhound paid to Mr. Farrell was approximately 10 percent per sale. [Testimony of Mr. Farrell].

16. Greyhound paid Mr. Farrell commissions on an almost-daily basis. [Testimony of Mr. Farrell].

17. Mr. Farrell did not know about the obligation to report and pay gross receipts taxes for compensation he received from Greyhound in the form of commissions. Consequently, Mr. Farrell did not report his commissions as gross receipts, assert any claims to deductions, or pay gross receipts tax. [Testimony of Mr. Farrell].

18. Greyhound reported the total sum of commissions paid to Mr. Farrell in 2005 and 2006 on Forms 1099. [Testimony of Mr. Farrell].

19. Mr. Farrell was not able to produce any documents to illustrate what he received in commissions for the years in protest, nor was he able to produce documents that could allocate the sources of the commissions, such as whether they arose from the sale of tickets for interstate or intrastate passenger travel, interstate or intrastate freight transportation, sales from vending machines, or other sources. [Testimony of Mr. Farrell].

20. Mr. Farrell discarded all records he retained for 2005 and 2006 after he believed their retention was no longer necessary as a result of the passage of time. Mr. Farrell unsuccessfully attempted to obtain records from the U.S. Internal Revenue Service and Greyhound. Mr. Farrell was informed that neither entity possessed records relevant to his requests. [Testimony of Mr. Farrell].

21. Mr. Farrell did not rely on the advice of a tax professional regarding the nonpayment of gross receipts taxes on the commissions he received from Greyhound during the relevant periods of time. [Testimony of Mr. Farrell].

22. Mrs. Farrell was included in the assessment and protest because she filed her taxes jointly with Mr. Farrell. [Testimony of Mrs. Farrell].

23. As of the date of hearing, Taxpayers' combined liability for the periods ending December 31, 2005 and 2006 was $6,537.92 in gross receipts tax, $1,307.59 in penalty, and $3,903.73, for a total amount of $11,749.24. [Testimony of Mr. Dillon; Dept. Ex. A].

DISCUSSION

Based on the evidence presented and the arguments of the parties, the issues under consideration may be best summarized as follows: 1) whether the Taxpayers are entitled to relief under the applicable statute of limitations; 2) whether the Taxpayers are entitled to relief as a result of perceived prejudice from a seven-year delay between filing their formal protest and a hearing on the merits; 3) whether the Taxpayers have established entitlement to an applicable deduction from gross receipts; and 4) whether they are grounds to abate penalty or interest in this matter.

Statute of Limitations and/or Unreasonable Delay

By the time the Administrative Hearings Office initially acquired knowledge of this protest, upon the Department filing its Hearing Request on January 23, 2017, Taxpayers' protest had been pending more than seven years. A Notice of Administrative Hearing was entered and served on the parties on January 25, 2017 with a hearing on the merits scheduled to occur on February 16, 2017. The hearing on the merits was thereafter continued to March 24, 2017 upon the request of the Taxpayers.

Mr. Farrell testified that because of the lack of apparent activity from 2009 to 2016, he developed an assumption that the statute of limitations would preclude further efforts by the Department to collect the assessed principal, penalty, and interest subject of this protest, or in the alternative, that the matter had been resolved. Based on his assumptions, Mr. Farrell said he discarded records that may have potentially been relevant to overcoming the Department's presumption of correctness. Although Mr. Farrell did not cite any legal authority in support of his assumption, the Hearing Officer will briefly address Mr. Farrell's claim.

NMSA 1978, Section 7-1-18 (C) provides "[i]n case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required *may be assessed at any time within seven years from the end of the calendar year in which the tax was due*, and no proceeding in court for the collection of such tax without the prior assessment thereof shall be begun after the expiration of such period." In this case, Mr. Farrell admitted that he failed to file a required return which in turn provided the Department with seven years to assess Taxpayers from the end of the calendar year in which the tax was due. The years at issue in this protest were 2005 and 2006. The assessments, both dated June 23, 2009, were timely and within the period required by Section 7-1-18 (C).

NMSA 1978, Section 7-1-19 then provides that "[n]o action or proceeding shall be brought to collect taxes administered under the provisions of the Tax Administration Act and due under an assessment or notice of the assessment of taxes after the later of either *ten years from the date of such assessment or notice* or, with respect to undischarged amounts in a bankruptcy proceeding, one year after the later of the issuance of the final order or the date of the last scheduled payment." In the present matter, the Department remains within the ten-year period provided by Section 7-1-19 because the assessments were issued within the last 10 years.

Although somewhat disconcerting, the delay from 2009 to 2016 does not bar the Department's efforts to collect an outstanding liability in this case. Although the reason for the Department's delay in requesting a hearing in this matter is unclear, New Mexico courts have applied the general rule of tardiness in administrative hearings under the Tax Administration Act: the "tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests." *See Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-026, 139 N.M. 177, 131 P.3d 27 (Ct. App. 2001); *See*

also Matter of Ranchers-Tufco Limestone Project, 1983-NMCA-126, 100 N.M. 632, 674 P.2d 522 (Ct. App. 1983). Collection of taxes is the enforcement of public right/interest, and therefore, despite the tardiness of its actions, the Department still had an obligation to enforce a public right or protect a public interest under the rationale of *Kmart Props., Inc.*

Moreover, there is no compelling evidence that Taxpayers suffered any prejudice to the presentation of its protest as a result of the delay. *See In re Ranchers-Tufco Limestone Project Joint Venture*. Taxpayers were obligated to retain records under NMSA 1978, Section 7-1-10. Absent some affirmative declaration from the Department that there was no further need to retain the records, it was unreasonable for Taxpayers to discard documents with knowledge that their protest had not been formally concluded. *See* Regulation 3.1.5.15 (I) NMAC (requiring that all records maintained under Section 7-1-10 continue to be preserved unless the Department has provided in writing that the records are no longer required.).

Contrary to the Taxpayers contentions, the Department is within the statute of limitations and authorized to pursue collection of the taxes, under the facts of this case, despite the inexplicable delay.

Potentially Applicable Deductions from Gross Receipts

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of tax issued in this case are presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Taxpayers have

the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services in New Mexico. *See* NMSA 1978, Section 7-9-3.5. For the purpose of the Gross Receipts and Compensating Tax Act, "gross receipts" includes the total commissions or fees derived from selling services. *See* NMSA 1978, Section 7-9-3.5 (A) (2) (b).

If a taxpayer asserts entitlement to an exemption or deduction from gross receipts, then the burden is on the taxpayer to prove the entitlement to the asserted exemption or deduction. *See Public Service Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

In this protest, Mr. Farrell was engaged in selling services as an agent for Greyhound. Mr. Farrell was an independent contractor and compensated solely in the form of commissions. Greyhound reported the compensation paid to Mr. Farrell on Forms 1099. Mr. Farrell candidly acknowledged that he did not know that gross receipts taxes could be owed on commissions from Greyhound and admitted that he never filed any returns reporting his commissions as gross receipts.

Despite the foregoing admissions, Mr. Farrell's testimony and arguments were construed as asserting the right to the following-discussed deductions.

(1) Deductions for commissions paid to travel agents.

Mr. Farrell asserted the potential application of the deduction for commissions of travel agents at NMSA 1978, Section 7-9-76 which provides:

> **7-9-76. Deduction; gross receipts tax; travel agents' commissions paid by certain entities.**
>
> Receipts of travel agents derived from commissions paid by maritime transportation companies and interstate airlines, railroads and passenger buses for booking, referral, reservation or ticket services may be deducted from gross receipts.

The evidence in this case established that Mr. Farrell derived commissions paid by an interstate passenger bus company for booking, reservation, or ticket services. However, the Department argued that Mr. Farrell was not a "travel agent" because he acted on behalf of Greyhound. The Department claimed that although "travel agent" is not defined in the statute or by our courts, the term should be construed as requiring a fiduciary relationship between the travel agent and the consumer. Because such a relationship did not exist under the facts of this protest, the Department asserted that Mr. Farrell was not eligible for the deduction for commissions paid to a travel agent. Although the Department indicated it would supplement its argument with citations to supporting authority, no authority was cited.

However, the Hearing Officer declined to make a finding on the question of whether Mr. Farrell qualified as a "travel agent" under the circumstances of this case. Whether or not Mr. Farrell qualified for the deduction as a "travel agent," there remained a lack of evidence to clearly establish the amount of the deduction to which Mr. Farrell could be entitled.

As previously discussed, Mr. Farrell candidly admitted that he did not possess records that would establish the nature or amount of the asserted deduction. His efforts to obtain records from third parties were unsuccessful. Mr. Farrell suggested that he previously possessed records that might establish his right to claim the deduction and the amount of such claim, but he discarded them under the impression that the issue subject of this protest had resolved itself. Mr. Farrell credibly testified to the best of his ability, but presented no reliable evidence that could establish the amount of any deduction to which he could have been entitled under Section 7-9-76.

For example, Mr. Farrell did not present evidence to establish how much compensation Greyhound reported on Forms 1099 for the years in protest, nor did he establish the percentage of those commissions that could be attributed to the receipts of a travel agent from commissions paid by Greyhound for booking, reservation, or ticket services. Mr. Farrell said that the amounts reported by Greyhound on his Forms 1099 were the total amounts of commissions paid by Greyhound, but not all of the commissions arose from the sales of tickets for passenger bus travel. Commissions also included sales on behalf of Greyhound for the transportation of freight as well as nominal commissions from vending machine sales. Neither commissions for the transportation of freight nor commissions from sales from vending machines are addressed by Section 7-9-76.

(2) Deduction for intrastate transportation and services in interstate commerce.

The next deduction, although not expressly addressed at the hearing, was addressed in Taxpayers' formal written protest. NMSA 1978, Section 7-9-56, provides:

> **7-9-56. Deduction; gross receipts tax; intrastate transportation and services in interstate commerce.**

> A. Receipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property, including any special or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce under a single contract.
>
> B. Receipts from handling, storage, drayage or packing of property or any other accessorial services on property, which property has moved or will move in interstate or foreign commerce, when such services are performed by a local agent for a carrier or by a carrier and when such services are performed under a single contract in relation to transportation services, may be deducted from gross receipts.
>
> C. Receipts from providing telephone or telegraph services in this state that will be used by other persons in providing telephone or telegraph services to the final user may be deducted from gross receipts.

Although Mr. Farrell did not contend that he was engaged in the actual transportation of passengers or freight, the Hearing Officer considered whether Mr. Farrell was performing a special or extra service reasonably necessary in connection with the transportation of persons and property in interstate commerce under a single contract. The deduction provided in Section 7-9-56 (A) has been construed as being limited to receipts from the actual transportation of persons and property, activities in which Mr. Farrell did not engage. Rather, Mr. Farrell sold tickets and received commissions on those sales. It was then Greyhound which engaged in the actual transportation of persons or property.

In *Spillers v. Commissioner of Revenue,* 1970-NMCA-097, 82 N.M. 41, 475 P.2d 41, *cert. denied,* 82 N.M. 81, 475 P.2d 778 (1970), Spillers Moving and Storage Company acted as a resident agent for Bekins Van Lines, an interstate carrier of household goods. Spillers received twenty percent of Bekins' transportation proceeds for "booking" or initiating orders for Bekins. The New Mexico Court of Appeals upheld the Department's imposition of gross receipts tax on Spillers' commissions and rejected Spillers' claim to the deduction provided in Section 7-9-56

(A) (then codified at NMSA 1953, Section 72-16A-14 (I) (Supp. 1967)). The court acknowledged that "the receipts in question are transactions related to interstate commerce." *Id.*, 82 N.M. at 43, 475 P.2d at 43. The court nonetheless found that Spillers merely initiated the order for interstate transportation while Bekins was the entity that actually transported the goods:

> The Commissioner contends that the language of the statute is not broad enough to permit deduction of receipts not resulting from act or acts of actual transportation. We agree with this interpretation.

While Mr. Farrell's services may have been necessary to Greyhound's operations, just as Spillers' services were necessary to Bekins' operations, those services do not come within the deduction provided in Section 7-9-56(A) for "[r]eceipts from transporting persons or property from one point to another in this state...." *See also*, *McKinley Ambulance Service v. Bureau of Revenue*, 92 N.M. 599, 601, 592 P.2d 515, 517 (Ct. App. 1979) (to deduct receipts under Section 7-9-56(A), *the receipts must be from transporting persons from one point to another in New Mexico*; the transportation must have been in interstate commerce; and the transportation must have been under a single contract (emphasis added)).

Mr. Farrell also does not qualify for the deduction provided in Section 7-9-56 (B). That deduction applies to receipts from "handling, storage, drayage or packing of property or any other accessorial services on property" which moved or will move in interstate commerce. Mr. Farrell said he was compensated solely for ticket sales for passengers, freight, and vending machines. He did not derive receipts from handling, storage, drayage or packing of property or any other accessorial services on property which moved in interstate commerce. Accordingly, the deduction in Section 7-9-56 (B) is not applicable to Mr. Farrell's receipts.

This analysis is consistent with Regulation 3.2.214.9 (A) NMAC, which the Department promulgated to implement Section 7-9-56. That regulation provides that "[c]ommissions to a

person in New Mexico for originating interstate transportation of persons are not deductible pursuant to either Section 7-9-56 NMSA 1978 or Section 7-9-66 NMSA 1978. Such commissions are a fee for service rendered in New Mexico." This regulation clearly precludes the deduction of the commissions paid by Greyhound under Section 7-9-56. *See Chevron U.S.A., supra.*

For the stated reasons, Mr. Farrell did not establish an entitlement to seek a deduction from gross receipts from commissions paid by Greyhound under Section 7-9-56. To the extent a colorable claim could have been asserted, Mr. Farrell, for the reasons previously discussed, was unable to produce sufficient evidence to clearly establish the amount of the deduction to which he could have been entitled.

(3) Deductions for receipts derived from commissions.

The Hearing Officer also considered application of NMSA 1978, Section 7-9-66, which is also referenced in Regulation 3.2.214.9 (A) NMAC. Section 7-9-66 provides:

> **7-9-66. Deduction; gross receipts tax; commissions.**
>
> A. Receipts derived from commissions on sales of tangible personal property which are not subject to the gross receipts tax may be deducted from gross receipts.
>
> B. Receipts of the owner of a dealer store derived from commissions received for performing the service of selling from the owner's dealer store a principal's tangible personal property may be deducted from gross receipts.
>
> C. As used in this section, "dealer store" means a merchandise facility open to the public that is owned and operated by a person who contracts with a principal to act as an agent for the sale from that facility of merchandise owned by the principal.

In this protest, Mr. Farrell was not deriving commissions on sales of tangible personal property nor was deriving commissions received for performing the service of selling a principal's tangible personal property.

Regulation NMAC 3.2.225.9 (A) NMAC provides additional guidance. It states that "[r]eceipts from commissions for services rendered in New Mexico paid to nonemployee agents of freight companies, bus transportation firms and the like are subject to the gross receipts tax." This regulation clearly addresses Mr. Farrell's relationship with Greyhound. *See Chevron U.S.A., supra.*

In conclusion, Mr. Farrell is not entitled to seek a deduction from gross receipts from commissions paid by Greyhound under Section 7-9-66. Once again, to the extent a colorable claim could have been asserted, Mr. Farrell was unable to produce sufficient evidence to clearly establish the amount of the deduction to which he could have been entitled.

Interest and Penalty

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Section 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayers

from the time the tax was due but not paid until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and the Department is without legal authority to abate it.

With concern for penalty, when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to 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 twenty percent of the tax due but not paid.

(*italics* added for emphasis).

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence" even if, like here, Mr. Farrell's actions or inactions were unintentional.

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayers were negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC because of Taxpayers' inaction in failing to pay gross receipts tax when due resulting from an erroneous belief that the income derived from commissions did not give rise to gross receipts tax obligations.

In instances where a taxpayer might fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Further, Regulation 3.1.11.11 NMAC

establishes several examples of non-negligence in which penalty may be abated. Taxpayers did not present any facts that would tend to establish a good-faith mistake of law or non-negligence entitling them to an abatement of penalty.

Mr. Farrell admitted that he did not seek the assistance of a tax professional and simply did not realize that he was obligated to report gross receipts from commissions. Mr. Farrell's candor was commendable.

The Department did not allege that the Taxpayers' inaction was with the intent to evade or defeat a tax. Rather, Taxpayers' inaction was the result of inadvertence, erroneous belief, or inattention. Nevertheless, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 NMAC does not provide grounds for abatement of the penalty in this case. Therefore, Taxpayers did not overcome the presumption of correctness and failed to establish that they are entitled to an abatement of penalty in this matter.

Taxpayer expressed frustration with the fact that interest had been accruing from 2009 to 2016, a period during which there was minimal apparent activity in the matter. Although Taxpayers' frustration with the delay is justifiable, both assessments at issue in this protest notified the Taxpayers that "[i]f payment is made within 10 days from the date of this demand, no further interest or penalty will accrue. *If no payment is made within the 10 days, penalty and interest will accrue from the date of the assessment*." (Emphasis added).

Although Taxpayers availed themselves of their right to file a protest, the mere filing of a protest did not toll the accrual of interest or penalty. Instead, Taxpayers remained silent for more than seven years with actual notice that interest and penalties were accruing. In this regard, Taxpayers had to exercise some degree of diligence. Taxpayers could not sit on their rights hopeful that the matter would eventually succumb to the statute of limitations.

Based on the foregoing, the Taxpayers' protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely written protest to the assessments issued under Letter ID Nos. L0853448064 and L2023538048 and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayers' burden to come forward with evidence and legal argument to establish that they were entitled to an abatement.

C. Under Section 7-1-67, Taxpayers are liable for interest under the assessments.

D. Taxpayers were negligent in failing to report gross receipts and pay gross receipts taxes when due for the tax years covered by the assessments. Consequently, the assessment of penalty was proper under Section 7-1-69.

E. Taxpayers did not establish what, if any, portion of reportable gross receipts were deductible under NMSA 1978, Section 7-9-76, Section 7-9-56, or any other provision of law.

F. As of the date of hearing, the outstanding amounts in protest were $6,537.92 in gross receipts tax, $1,307.59 in penalty, and $3,903.73 in interest, for a total amount of $11,749.24.

For the foregoing reasons, Taxpayers' protest **IS DENIED.**

DATED: April 28, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.