

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

**IN THE MATTER OF THE PROTEST OF
STELLA OWENS
TO THE REFUND DENIAL OF 2001 NEW
MEXICO PERSONAL INCOME TAX**

No. 03-07

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 8, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Stella Owens ("Taxpayer") represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a resident of El Paso, Texas, and is an employee of the United States Custom Service.
2. During 2001, the Taxpayer was assigned and worked as a senior inspector at the Santa Teresa Port of Entry located in southern New Mexico.
3. The Customs Service withheld \$905.62 of New Mexico personal income tax from the wages it paid to the Taxpayer during 2001.
4. In February 2002, the Taxpayer filed a New Mexico personal income tax return, Form PIT-1, claiming a refund of the entire amount of New Mexico personal income tax withheld by the Customs Service. The Taxpayer attached a Form PIT-B to her return that reported the wages she earned in New Mexico under the column "Total Federal Income" but failed to allocate that income to New Mexico.
5. On May 3, 2002, the Department sent the Taxpayer a notice denying all but \$16.00 of the personal income tax refund she claimed for 2001. The notice stated that the Department had

adjusted the Taxpayer's return by reallocating her New Mexico wages to New Mexico on Form PIT-B.

6. On May 16, 2002, the Taxpayer filed a written protest to the Department's denial of her claim for refund.

7. The Taxpayer has been told by other Customs Service employees working at the Santa Teresa Port of Entry that they filed New Mexico personal income tax returns claiming a refund of New Mexico taxes withheld by the Customs Service and received a refund from the Department.

DISCUSSION

The issue presented is whether the Taxpayer, a Texas resident employed by the United States Customs Service and performing services as a customs inspector within the State of New Mexico, is liable for payment of New Mexico personal income tax on the wages she earned in New Mexico.

Income Taxation of Nonresidents. NMSA 1978, § 7-2-3 states:

A tax is imposed at the rates specified in the Income Tax Act upon the net income of every resident individual and upon the net income of every nonresident individual employed or engaged in the transaction of business in, into or from this state, or deriving any income from any property or employment within this state.

During 2001, the Taxpayer was a nonresident individual who was employed and derived income from employment within the State of New Mexico. While the Taxpayer argues that New Mexico is prohibited from taxing the wages of nonresident federal employees working within the state, she acknowledges that she cannot provide any legal authority in support of her position. There is clear legal authority, however, to support the Department's position that her wages are subject to tax.

In *Lung v. O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed*, 450 U.S. 961 (1981), the New Mexico Supreme Court upheld New Mexico's right to tax the wages of Texas residents who were employed by the federal government at White Sands Missile Range. The court specifically rejected the same argument made by the Taxpayer in this case, *i.e.*, that New Mexico does

not have authority to tax the income of federal employees working on federal property within the state. The court also rejected the argument that New Mexico had not provided sufficient services to the out-of-state residents to subject them to New Mexico tax, stating:

[P]laintiffs present evidence that New Mexico has in fact spent very little money on their behalf. We find such an inquiry necessarily incomplete and unpersuasive. The power to tax does not rest on a measurable economic duty of the State toward its citizens, but on less tangible benefits, on the "fruits of civilization." *J.C. Penney Co.*, at 466, 61 S. Ct. at 250, quoting *Compania de Tabacos v. Collector*, 275 U.S. 87, 100, 48 S. Ct. 100, 105, 72 L. Ed. 177 (1927) (Holmes, J., dissenting). The opportunity to exercise "intelligence, skill, and labor while employed in the State of New Mexico" has been held to be sufficient benefit to support an income tax. *Jackling v. State Tax Commission*, 40 N.M. 241, 248, 58 P.2d 1167, 1171 (1936). Under this test, plaintiffs have a sufficient nexus with New Mexico to be taxed.

94 N.M. at 804, 617 P.2d at 1319. At the administrative hearing, the Taxpayer failed to provide any facts or legal authority that would override the supreme court's holding in *Lung*. Accordingly, that decision is binding precedent in New Mexico and is dispositive of the Taxpayer's challenge to the tax imposed on her New Mexico wages.

Inconsistent Treatment of Taxpayers. At the administrative hearing, the Taxpayer and Ernesto Vasquez, another Customs Service employee, testified that while they were denied a refund of New Mexico income tax withheld on their wages, other co-workers who filed in the same way received the refunds they claimed. The Taxpayer questions why her refund was denied while the refunds of other, similarly situated taxpayers were granted.

First, it must be noted that the testimony concerning the Taxpayer's co-workers is hearsay. Because the Taxpayer refused to identify the Santa Teresa employees who received income tax refunds, the Department was unable to verify this information. Even assuming the information is correct, however, the fact that other taxpayers' erroneous claims escaped detection by the Department does not relieve the Taxpayer from her obligation to pay taxes due to the state. In *Skinner v. New Mexico State*

Tax Commission, 66 N.M. 221, 223-4, 345 P.2d 750, 752 (1959), the New Mexico Supreme Court made the following observation in connection with a challenge to a property tax assessment:

In New Mexico, it has long been the rule that a taxpayer who is not assessed more than the law provides has no cause for complaint in the courts in the absence of some well-defined and established scheme of discrimination or some fraudulent action, (citations omitted). The taxpayer's remedy is to have the assessing authority raise the value on the property claimed to be valued too low to a level with his own, (citations omitted).

See also, Appelman v. Beach, 94 N.M. 237, 608 P.2d 1119, *cert. denied*, 449 U.S. 839 (1980). There is no evidence of systematic discrimination or fraud in this case. Accordingly, the proper way to remedy the inconsistent treatment of employees working at the Santa Teresa Port of Entry is to reassess any employees who received erroneous refunds, not to refund taxes the Taxpayer clearly owes to the State.

Policy Considerations. Finally, the Taxpayer raises several policy arguments as to why New Mexico should not impose income tax on the wages of nonresident federal employees. These arguments cannot be considered by the hearing officer, but must be addressed to the New Mexico Legislature. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following statement concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

As currently written, New Mexico's tax laws require every nonresident individual who is employed or derives income from employment in New Mexico to pay tax on that income. The Department is not authorized to substitute its judgment for that of the Legislature or to excuse the Taxpayer from payment of taxes legally due to the state.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of her claim for refund of New Mexico income tax for tax year 2001.

2. As a nonresident deriving income from services performed for her employer within the State of New Mexico, the Taxpayer is subject to New Mexico personal income tax on that income.

3. The Taxpayer is not entitled to a refund of New Mexico income tax withheld from her wages during 2001.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED May 14, 2003.