

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

**IN THE MATTER OF THE PROTEST OF  
JAMES H. AVANT TO ASSESSMENT OF  
PERSONAL INCOME TAX ISSUED  
UNDER LETTER ID L1105433856**

**No. 07-10**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on June 5, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. James H. Avant (“Taxpayer”) represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On September 7, 2006, the Department assessed the Taxpayer for 1999 New Mexico personal income taxes in the amount of \$2,230, plus penalty and interest.
2. On September 27, 2006, the Department received the Taxpayer’s written protest in the form of a brief that set out various legal arguments concerning the validity of the federal income tax which, by extension, would affect the validity of New Mexico’s income tax.
3. The Taxpayer has not denied that he earned the income on which the Department’s assessment was based, nor has he challenged the method by which the Department calculated his personal income tax liability on that income.

**DISCUSSION**

The issue to be decided is whether James Avant is liable for New Mexico personal income tax on his 1999 income. Mr. Avant’s protest raises a number of arguments challenging the validity

of the federal income tax, which is the starting point for determining his liability for New Mexico personal income tax. Mr. Avant does not challenge the factual basis for the Department's assessment, *i.e.*, that he received compensation for services performed in New Mexico during the 1999 tax year.

The arguments raised in Mr. Avant's protest are not new, but are canned recitations of various arguments from the tax protester movement, all of which have been universally rejected by both state and federal courts. At the administrative hearing, the Department's attorney presented a thorough analysis of the legal authority Mr. Avant cites in his brief. Her review establishes that most of his arguments are based on fragmentary quotes taken out of context from court decisions completely unrelated to personal income tax. The Department also noted the voluminous body of case law on the issues raised by Mr. Avant, including *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10<sup>th</sup> Cir. 1990) a decision from the Tenth Circuit Court of Appeals that summarily disposed of many of the same legal arguments presented here:

[T]he following arguments alluded to by the Lonsdales are completely lacking in legal merit and patently frivolous: (1) individuals ("free born, white, preamble, sovereign, natural, individual common law 'de jure' citizens of a state, etc.") are not "persons" subject to taxation under the Internal Revenue code; (2) the authority of the United States is confined to the District of Columbia; (3) the income tax is a direct tax which is invalid absent apportionment...; (4) the Sixteenth Amendment to the Constitution is either invalid or applies only to corporations; (5) wages are not income; (6) the income tax is voluntary; (7) no statutory authority exists for imposing an income tax on individuals; (8) the term "income" as used in the tax statutes is unconstitutionally vague and indefinite; (9) individuals are not required to file tax returns fully reporting their income; and (10) the Anti-Injunction Act is invalid.

*See also, In re Becraft*, 885 F.2d 547, 548 (9<sup>th</sup> Cir. 1989) (the Sixteenth Amendment authorized a non-apportioned direct income tax on United States citizens); *Coleman v. Commissioner*, 791 F.2d 68, 70 (7<sup>th</sup> Cir. 1986) (wages are income, and the tax on wages is constitutional); *United States v. Schiff*, 876 F.2d 272, 275 (2d Cir. 1989) (payment of income taxes is not optional; the average citizen knows that

payment of income taxes is legally required); *McLaughlin v. United States*, 832 F.2d 986, 987 (7<sup>th</sup> Cir. 1987) (the notion that the federal income tax is contractual or otherwise consensual in nature has been repeatedly rejected by the courts).

More recently, the New Mexico Supreme Court characterized arguments questioning New Mexico's authority to tax the wages earned by its residents as "manifestly without merit." *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34 ¶ 3, 133 N.M. 11, 59 P.3d 491. The court noted that the United States Supreme Court, "as well as every circuit of the United States Court of Appeals, has recognized that employment wages are taxable income." *Id.* at ¶ 14. The *Holt* decision definitively held that compensation earned by New Mexico residents is subject to New Mexico's personal income tax:

Through its plain language, Section 61(a) includes "compensation for services" in its definition of gross income. Our conclusion that compensation for services equals wages earned from employment is confirmed by state statute. Section 7-2-2(C) states that "'compensation' means wages, salaries, commissions and any other form of remuneration paid to employees for personal services." The plain language of Section 7-2-2(C) and Section 7-2-3 specifically indicates that employment wages and salaries are taxable income....

2002 NMSC 34, ¶ 12. Based on the court's decision in *Holt*, which is binding law in New Mexico, there is no need for further analysis of Mr. Avant's arguments concerning New Mexico's right to tax his 1999 income, with one exception.

The only issue not addressed in *Holt* is Mr. Avant's contention that Congress's 1990 repeal of 26 U.S.C. §§ 6361-6365 curtailed the states' ability to collect individual income taxes from their residents. This contention is based on a misunderstanding of the referenced statutes, which were designed to encourage states to conform their personal income tax structure to that of the federal government. In furtherance of this goal, Congress passed the Federal-State Tax Collection Act of 1972, codified at 26 U.S.C. §§ 6361-6365. The Act provided that a state with a "qualified state

individual income tax," *i.e.*, a tax closely conforming to the model of the federal income tax, could enter into an agreement to have those taxes collected and administered by the federal government. As noted in W. Hellerstein, *Symposium on State and Local Taxation*, 39 Vand. L. Rev. 1033, 1055 n. 31 (May 1986), none of the states chose to enter into such an agreement, and the Act was repealed in November 1990. *See*, Public Law 101-508, Title XI, § 11801(a)(45), 104 Stat. 1388-522.

In *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984), the Postal Service challenged California's enforcement of state withholding tax laws by arguing that Congress intended states to use the provisions for collecting state tax liabilities found in 26 U.S.C. §§ 6361-6365 and that California could not take direct collection action against the Postal Service. The United States Supreme Court rejected this argument, finding that "nothing in that statute, which permits States to use the summary collection procedures of the Internal Revenue Service, limits the power of States to use any other available procedure." 467 U.S. 512, 525 n.22. *See also*, *Michigan Central Railroad Co. v. Powers*, 201 U.S. 245, 292-293 (1906) (with respect to state taxation, the state has the freedom of a sovereign, both as to objects and methods). These decisions confirm that neither the 1972 enactment nor the 1990 repeal of §§ 6361-6365 had any effect on New Mexico's authority to collect personal income tax from its residents.

#### **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely, written protest to the assessment of 1999 personal income taxes issued under Letter ID No. L1105433856, and jurisdiction lies over the parties and the subject matter of this protest.

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

C. Mr. Avant failed to meet his burden of proving that the Department's assessment of personal income tax for the 1999 tax year was incorrect or that it violated the United States Constitution or any federal or state statute.

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

DATED June 11, 2007.