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

IN THE MATTER OF THE PROTEST OF
PARAGON ACQUISITION, INC., **No. 11-15**
TO ASSESSMENTS ISSUED UNDER
ID NO. L0509436992

DECISION AND ORDER

A formal hearing on the above-referenced protest was held June 16, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Tonya Noonan Herring, Staff Attorney. Mr. Andrick Tsabetsaye, Auditor, also appeared on behalf of the Department. Paragon Acquisition, Inc. (Taxpayer) failed to appear for the hearing. The Taxpayer filed motions and arguments prior to the hearing. The Taxpayer filed exhibits by mail prior to the hearing. The exhibits were received after the hearing. The Department was granted until July 8, 2011 to respond to the exhibits that were received after the hearing. The Department responded timely with written arguments, motions, and objections. All exhibits from both parties are admitted for purposes of the record. 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 for the tax periods from January 2004 through October 2009.
2. The Taxpayer failed to pay gross receipts tax to the Department from January 2004 through October 2009. The Taxpayer filed gross receipts tax returns for the tax periods, but the Taxpayer either reported and deducted the entire amount of gross receipts or filed

zero gross receipts for the applicable tax periods. Both methods of reporting resulted in claims of zero gross receipts tax liability.

3. The Department determined that the Taxpayer had understated its gross receipts tax liability by more than 25% for the applicable tax periods.

4. On June 1, 2010, the Department assessed the Taxpayer for gross receipts tax and interest for the tax period from January 31, 2004 through October 31, 2009. The assessment was for $158,298.78 in tax principal, and $56,946.13 in interest. No penalty was assessed.

5. On June 14, 2010, the Taxpayer filed a formal protest by letter.

6. On March 14, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

7. On March 23, 2011, a notice of hearing was issued for a hearing date on April 14, 2011.

8. On March 23, 2011, the Department emailed the Hearing Bureau and requested a continuance of the April 14, 2011 setting.

9. The request was denied by email on March 23, 2011.

10. On March 30, 2011, the Taxpayer filed a Request to Continue the April 14, 2011 setting and Request to Appear by Telephone. The Taxpayer requested that the hearing be reset for June 16, 2011.

11. On March 30, 2011, the Department filed its Response opposing the Taxpayer's Request for Continuance and to Appear by Telephone.

12. On April 4, 2011, the Request for Continuance was granted, and the hearing was reset for June 16, 2011 as the Taxpayer had requested. The Request to Appear by Telephone was denied.

13. On April 15, 2011, the Taxpayer filed a letter expanding the scope of its protest.

14. On June 14, 2011, the Taxpayer filed a letter that said it did not intend to appear for the hearing, a Motion for Summary Judgment, a Stipulation of Facts with a list of exhibits, and a written argument. The Taxpayer represented that the exhibits were attached, but none were actually attached.

15. The Taxpayer had paid the assessment in full prior to June 14, 2011.

16. On June 16, 2011, the hearing was held and the Taxpayer failed to appear. The Department advised that they had not received the documents submitted by the Taxpayer on June 14, 2011. Copies were provided to the Department at that time. The Department was given the opportunity to respond to the Taxpayer's motion and to present evidence.

17. It was ordered at the hearing that the Taxpayer would not be able to present further evidence or argument since the Taxpayer had failed to appear for the hearing.

18. On June 21, 2011, a package was received by the Hearings Bureau from the Taxpayer. The package was postmarked June 14, 2011. The package contained duplicates of the documents that had been submitted on June 14, 2011. The package also contained the exhibits which were referred to in the June 14, 2011 documents. A copy of the documents was sent to the Department's attorney.

19. On June 22, 2011, an Order was issued allowing the Department additional time to respond to the Taxpayer's exhibits and to submit additional evidence and argument. A deadline of July 8, 2011 was given for submission of final arguments and evidence from the Department.

20. On July 1, 2011, the Taxpayer filed a letter apologizing for its failure to send copies to the Department's attorney, but asserting that Ms. Herring already had copies of the documents from pre-hearing discovery and communications. The Taxpayer also

requested copies of the exhibits submitted by the Department at the hearing. The letter was forwarded to the Department's attorney on that date.

21. On July 6, 2011, the Department filed a Motion to Reconsider and in Response to the Taxpayer's exhibits.

22. Both parties filed additional documents after July 8, 2011. An Order was issued on July 14, 2011 reminding the parties that the record had been closed to the Taxpayer on June 16, 2011 and to the Department on July 8, 2011 and that no further documents would be considered in rendering the decision in this matter.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax and interest for the tax periods from January 31, 2004 through October 31, 2009 due to its understating of its gross receipts tax liability by more than 25% and whether estoppel applies.

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

Failing to Appear for the Hearing.

The Department argued that the Taxpayer's failure to appear for the hearing should preclude the admission of the Taxpayer's exhibits. There is no regulation that governs what

action should be taken if a taxpayer fails to appear for a hearing. *See* 3.1.8.8 through 3.1.8.16 NMAC. The statute that governs tax hearings is also silent on this issue. *See* NMSA 1978, § 7-1-24. A taxpayer may, nevertheless, be found to be delinquent for failing to appear at the hearing "unless the taxpayer makes payment of the total amount of all taxes assessed". NMSA 1978, § 7-1-16 (C). The Taxpayer made such a payment, and the Department confirmed at the hearing that the assessment had been paid in full. Therefore, Section 7-1-16 (C) does not apply to the Taxpayer, and the Taxpayer cannot be found to be delinquent for failing to appear for the hearing because its assessment was already paid in full. The Department argued that failing to appear for the hearing is fatal to the Taxpayer's case based on a decision and order in another case. The decision and order relied upon by the Department has different facts and it clearly cites Section 7-1-16 as part of the basis for that decision. Again, Section 7-1-16 is inapplicable in this case.

Hearing officers are charged with conducting fair and impartial hearings and have the power necessary to accomplish this duty. *See* 3.1.8.9 NMAC. Hearing officers have discretion in fashioning remedies for parties' failures to comply with orders, including the disallowance of the presentation of evidence. *See* 3.1.8.14 NMAC. Because the Taxpayer failed to appear for the hearing, it was ordered that any evidence, arguments, and objections filed by the Taxpayer after the June 16, 2011 hearing would not be considered. However, the Taxpayer is entitled to receive copies of the exhibits presented by the Department at the hearing. The Taxpayer requested copies of those exhibits in its July 1, 2011 letter. The request for copies of the exhibits was granted.

Due process.

The Department argued that it was denied its due process by the Taxpayer's failure to appear and by the Taxpayer's failure to provide the Department with copies of the documents

filed on June 14, 2011. The Department also argued that the Motion for Summary Judgment was improper because it did not follow the civil rules of procedure. The Department acknowledged that the rules do not actually apply to the hearing, but argued that they should be used in this case to effectuate due process and to prevent the Taxpayer from circumventing the denial of its Motion to Appear by Telephone. The Department also argued that the documents received by the Hearings Bureau on June 22, 2011 were precluded from admission by the order at the hearing, which disallowed further evidence from the Taxpayer.

Because the package that contained the exhibits was postmarked on June 14, 2011, it is deemed to have been submitted on that date. *See generally* NMSA 1978, § 7-1-9 (1997) (indicating that mailings are timely when they are mailed on the due date). Therefore, the exhibits were not precluded by the hearing order that prohibited the admission of further evidence or argument from the Taxpayer. Due process requires an opportunity to be heard in a meaningful time and meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976). *See also State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989) (holding that in an administrative hearing due process is flexible and should conform to the demands of a particular situation). The Department, as an agency of the State of New Mexico, does not have a constitutional right to due process. *See City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶12, 123 N.M. 428, 941 P.2d 509 (noting that the government does not have constitutional rights to fair hearings). However, government entities are guaranteed fair hearings by statute. *See id.* at ¶ 13. *See also* 3.1.8.9 NMAC. *See also* NMSA 1978, § 7-1-24. Rules of civil procedure do not apply to the hearing, but hearings must be conducted so that both sides have ample and fair opportunity to be heard. *See* NMSA 1978, § 7-1-24 (I). The government's right to a fair hearing is comparable to an individual's constitutional right to due process. *See U.S.*

West Communications, Inc. v. NM State Corp. Comm'n., 1999-NMSC-016, ¶18, 127 N.M. 254, 980 P.2d 37. *See also Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, fn. 3, 123 N.M. 239, 983 P.2d 1384.

The Taxpayer should have provided copies to the Department. Nonetheless, the Department has been afforded a meaningful opportunity to be heard on the documents because copies were provided to the Department by the Hearings Bureau, and the Department was given an opportunity to respond to those documents. The Department availed itself of that opportunity, and made objections and arguments about those documents at the hearing and in its Motion and Response filed on July 6, 2011. Regardless of whether a motion would be entertained under the civil rules, hearing officers are required to rule upon all motions submitted by either party. *See* 3.1.8.16 NMAC. Therefore, the objections are overruled. The Department was afforded ample opportunity to be heard as required by statute, and the Department's Motion for Reconsideration is denied. The Taxpayer's Motion for Summary Judgment will be considered.

Admission of Exhibits.

The Department objected to the admission of the Taxpayer's exhibits. The Department argued that the Taxpayer's exhibits should not be admitted because they are irrelevant and because the Taxpayer did not adequately explain what the purpose or significance of each exhibit was. The Taxpayer referenced specific exhibits in its Stipulation of Facts, which was filed with the Motion for Summary Judgment. I find that the exhibits are relevant and have been referenced to specific points of the Taxpayer's proposed facts and arguments.

The Department also argued that some of the exhibits should not be admitted because they are redundant since they are the same as some of the exhibits submitted by the Department. Hearing officers may exclude evidence if it is unduly repetitious. *See* 3.1.8.10 NMAC. I find

that the few exhibits submitted by both parties are not unduly repetitious, and those exhibits will be admitted.

The Department also argued that the exhibits were unauthenticated because there was no testimony and there were no affidavits submitted. The rules of evidence do not apply to the hearing, but hearing officers may require reasonable substantiation of evidence when its accuracy or truth is in reasonable doubt. *See* NMSA 1978, § 7-1-24 (H). The veracity of the exhibits did not seem to be at issue. Rather, the issue was the way the Taxpayer interpreted the documents and the legal meaning of the documents. Moreover, several of the Taxpayer's exhibits were copies of documents promulgated by the Department. Despite the Taxpayer's failure to provide testimony or affidavits, I find that the exhibits do not require any further substantiation for purposes of this hearing. Therefore, the objections are overruled. The Taxpayer's exhibits are admitted.

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). It is the responsibility of taxpayers, who are in the position to know the details of their business activities, to determine accurately and to report their tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. The Taxpayer did not dispute in its protest that it was providing services and that the receipts from the services were taxable.

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.

Time Period of Assessment.

The Taxpayer argued that the assessment period should not have gone back to 2004. The Department has six years from the end of the year in which the tax was due to make an assessment when a taxpayer understates his/her tax liability by more than 25 percent. *See* NMSA 1978, § 7-1-18 (D). The Taxpayer was assessed in 2010 for the tax periods from January 2004 through October 2009. The Taxpayer filed returns for those tax periods indicating that it had zero gross receipts tax liability. Therefore, the Taxpayer understated its tax liability by more than 25 percent. As a result, the assessment was timely. *See id.*

Estoppel.

The Taxpayer argued that it had contacted employees of the Department in 2004 and had determined that its gross receipts were not taxable. On February 18, 2004, the Taxpayer filed an application for refund for the December 2003 and January 2004 tax periods. On April 15, 2004, the Department issued a letter to the Taxpayer requesting amended returns for the tax periods on the refund claim. On June 17, 2004, the Department issued another letter to the Taxpayer again requesting amended returns, a copy of non-taxable transaction certificates, and a detailed explanation of how the Taxpayer's services are re-sold. On July 14, 2004, the Taxpayer filed amended returns for tax periods from November 2003 through May 2004. The amended returns served to report and deduct its gross receipts, which left a zero tax liability. The Taxpayer was issued a refund on June 10, 2005. The warrant was from the Department of Finance and Administration and was dated June 8, 2005, but the check was dated June 10, 2005. A letter

from the Department was also issued and indicated that the refund warrant was enclosed pursuant to the Taxpayer's application for refund.

The Taxpayer argued that the 2005 refund served as a ruling by the Department. The Taxpayer argued that it relied upon the refund when filing its returns for the tax periods in question. The Taxpayer argued that Section 7-1-60, therefore, estops the Department from assessing the tax for the tax periods from January 2004 through October 2009. The Department argued that the refund issued in 2005 did not constitute a ruling. The Department argued that it was, therefore, not estopped from assessing the Taxpayer. The Department also argued that the Taxpayer did not rely on the 2005 refund when it was incorrectly reporting its gross receipts tax liability. To the extent that the Taxpayer's arguments might encompass equitable estoppel, they are overruled as hearing officers cannot grant equitable estoppel. *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).

For statutory estoppel to apply, a taxpayer must establish that their actions were done "in accordance with any ruling addressed to the party personally and in writing by the secretary". NMSA 1978, §7-1-60 (1993). Rulings must be written statements of the secretary that interpret the statutes to which they relate. *See* NMSA 1978, § 9-11-6.2 (B) (1995). In order to be effective, rulings must be reviewed by the attorney general or the Department's legal counsel and the fact of the review must be indicated on the ruling. *See* NMSA 1978, § 9-11-6.2 (C) (1995). The Taxpayer argued that Section 9-11-6.2 does not apply because it is a regulation that improperly restricts the "any ruling" language in Section 7-1-60. The Taxpayer argued that the refund notice from the

Department that accompanied the refund warrant was a ruling. The Department argued that Section 9-11-6.2 does apply and that the refund notice was not a ruling under that section.

The Taxpayer is incorrect in characterizing Section 9-11-6.2 as a regulation. Section 9-11-6.2 is a statute and it governs what constitutes a ruling by the Department. *See* NMSA 1978, § 9-11-6.2 (1995). *See also State ex rel. Quintana v. Schnedar*, 115 NM 573, 855 P.2d 562 (1993) (noting that provisions of a statute must be read together with other statutes in material parts). *See also Gutierrez v. W. Las Vegas Sch. Dist.*, 2002-NMCA-068, ¶ 15, 132 N.M. 372, 48 P.3d 761 (noting there is a presumption that the Legislature knows and considers existing statutory law when it enacts new statutes). The letter issued by the Department with the refund warrant merely informed the Taxpayer that the refund had been issued. The letter did not constitute a ruling because it did not interpret any statute and was not reviewed by legal counsel or the attorney general. *See* NMSA 1978, § 9-11-6.2 (1995). Moreover, the Department makes a compelling and persuasive argument that the Taxpayer did not rely on the 2005 refund as a ruling because the Taxpayer was understating its gross receipts tax liability for more than a year before the refund was issued. The Taxpayer did not base its gross receipts reporting on the 2005 refund because it was reporting its gross receipts in the same manner prior to the 2005 refund, and the 2005 refund was not a ruling under the statutes. Therefore, the Department is not estopped from making the assessment. The Taxpayer's Motion for Summary Judgment is denied.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment for tax periods from January 2004 through October 2009 issued under Letter ID number L0509436992, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was properly assessed for gross receipts tax and interest for tax periods from January 2004 through October 2009.

3. The Department was not statutorily estopped from making the assessment.

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

DATED: August 1, 2011.