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

IN THE MATTER OF THE PROTEST OF
STEPHEN R. FINGADO **No. 14-12**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L 0169310528

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on October 31, 2013, before Richard M. Jacquez, Esq., Tax Hearing Officer, in Santa Fe. Mr. Stephen R. Fingado ("Taxpayer") appeared *pro se*. Staff attorney Cordelia Friedman, represented the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Mary Griego appeared as a witness for the Department. Taxpayer Exhibits 1-1 through 1-6 were admitted into the record. Department Exhibits A-G were admitted into the record. All exhibits are more thoroughly described in the Administrative Protest Hearing Exhibit Log. On October 31, 2013, Ms. Friedman filed a Submission of Additional Authority with a copy of *Holt v. New Mexico Department of Taxation & Revenue*, 2002-NMSC-034, 133 N.M. 11, 59 P.3d 491. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 25, 2012, the Department assessed Taxpayer in personal income tax in the amount of $394.00 in principal, $78.80 in interest and $46.30 in interest for tax year 2008. [Letter id. no. L0169310528]

2. On July 14, 2012, Taxpayer protested the assessment for tax year 2008.

3. On August 9, 2012, the Department acknowledged Taxpayer's protest. [Letter id. no. L1263644992]

4. On August 5, 2013, the Department requested a hearing in this matter.

5. On August 7, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for October 31, 2013.

6. On January 11, 2012, the Department sent Taxpayer a Notice of Limited Scope Audit Commencement –2008 Unreported New Mexico Income. [Taxpayer Exhibit 1-2].

7. The Notice of Limited Scope Audit Commencement identified two income sources for Taxpayer based on information provided to the Department by the Internal Revenue Service (IRS). The income sources were from CAPS Inc. and Tempur Production USA, LLC.

8. On March 11, 2012, Taxpayer sent a Records Request to the Department requesting copies of the information provided to the Department by the IRS as indicated in the Notice of Limited Scope Audit Commencement. [Taxpayer Exhibit 1-2].

9. On March 14, 2012, the Department sent Taxpayer a Notice of Extension to Provide Records and a Request for Additional Information. [Department Exhibit B-3 and B-2; Taxpayer Exhibit 1-6].

10. On or about March 17, 2012, the Department requested copies of Taxpayer's W-2's, 1099s and/or all other income source documents for tax year 2008. The Department also advised Taxpayer that his Adjusted Gross Income, filing status and/or number of exemptions was not consistent with his federal return per information provided to the Department by the IRS. [Taxpayer Exhibit 1-6]

11. Taxpayer was employed by CAPS Inc. and Tempur Production USA, LLC for the tax period at issue.

12. Taxpayer was employed in Bernalillo County, New Mexico for the tax period at issue.

13. Taxpayer was an employee for tax year 2008. He earned wage income from CAPS Inc. and Tempur Production USA, LLC.

DISCUSSION

Burden of Proof

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, Taxpayer has the burden to overcome the assessment of personal income tax. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

The first issue raised by Taxpayer is pursuant to NMSA 1978, Section 7-2-12 "residents who are required to file federal income tax returns are required to file returns with the Department." Taxpayer argued that since he had not federal tax liability and was not required to file a federal return for tax year 2008, he had no requirement to file a personal income tax return with the Department for tax year 2008.

Department's Authority to Determine Tax Liability

The first issue to address is the Department's authority to determine Taxpayer's tax liability. In *Holt v. New Mexico Department of Taxation & Revenue*, 2002-NMSC-34, ¶ 4, 133 N.M. 11, our State Supreme Court held, "As a general matter, the State of New Mexico has the authority to assess and collect taxes without federal supervision." *See Dep't of Revenue v. Arthur*, 153 Ariz. 1, 734 P.2d 98, 100 (Ct. App. 1986) ("The State of Arizona's power to tax is independent of the Constitution of the United States."). In *Arthur*, the United States Supreme Court expressed, "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in

respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods. *Citing to Mich. Cent. R.R. Co. v. Powers,* 201 U.S. 245, 292-93, 50 L. Ed. 744, 26 S. Ct. 459, (1906); *accord Weed v. Comm'r of Revenue*, 489 N.W.2d 525, 529 (Minn. Ct. App. 1992) (relying on *Power*s, and holding, "The state need not rely on a constitutional amendment for the power to tax. The states possess the powers of a sovereign."). The Hearing Officer is not persuaded by Taxpayer's argument.

Evidence and Documents to Establish Income

Taxpayer argued that any evidence or documents obtained by the Department from the IRS to establish his income was obtained illegally. 26 U.S.C. § 6103 (d) sets forth that any information disclosed to a State agency must be made by a written request to the IRS. Taxpayer requested such information and the Department responded stating such records would be held by the IRS. Taxpayer argued that such a response supports his argument that the Department did not formally request such information.

The Hearing Officer is not persuaded by Taxpayer's argument. First, § 6103 places the duty on the IRS to disclose information legally to State agencies. Taxpayer has indicated that he did not file a Federal or State tax return for TY08. Any information provided by the IRS to the Department would be information from provided by Taxpayer's employer, not the Taxpayer. Therefore, Taxpayer does not have standing to argue that the IRS disclosed information from his employer in violation of § 6103.

Taxpayer argued that Department issued him a Notice of Assessment of Taxes and Demand for Payment which Taxpayer claims to be based on false information. The Notice of Assessment provides an "Explanation of Liability" which claims that the assessment arises from a full review of your period(s) ending 12/31/2008 Personal Income Tax Return. Taxpayer

argued that he never filed a Personal Income Tax Return for the period ending 12/31/2008, and therefore the Notice of Assessment is false on its face.

Ms. Griego testified that the Department receives information from the IRS electronically via computer and the information is stored electronically at the "date warehouse". The Department retains the information in its ordinary course of business. The Department is then able to extract information that is needed based on the types of projects being conducted. Ms. Griego testified that the Department had information regarding Taxpayer indicating that he had two income sources for TY08. The Department sent Taxpayer copies of these documents as requested pursuant to a public records request. (Taxpayer Exhibits 1-3 and 1-4). Taxpayer questioned how the printout of a Tax Transcript from the IRS was dated "Request Date 3-28-13" and "Response Date 3-28-13", yet the Audit Commencement Letter was dated much earlier (January 11, 2012). The Hearing Officer finds no issues with the dates. Ms. Griego explained that information is stored electronically, and since Taxpayer requested copies of documents on March 11, 2013, the Department requested the Account Transcript on March 28, 2013. There is nothing in the record to suggest that the documents were available to the Department prior to January 11, 2012, when the Limited Scope Audit Letter was mailed.

Taxpayer next argues that the documents relied upon to show his source of income is hearsay. During an informal administrative hearing, the formal rules of evidence, including the hearsay rules, do not strictly apply. Even if the hearsay rules did apply, the documents showing income sources are copies of a regularly maintained business record of the Department, and as such, would likely be a recognized exception to the hearsay rule under either the regularly maintained business records exception or under the catch-all exception as having sufficient indicia of reliability.

The legal residuum rule requires that an agency's administrative decision be "supported by some evidence that would admissible under the rules" of evidence. *Chavez v. City of Albuquerque*, 124 N.M. 239, 241, 1997 NMCA 111, 947 P.2d 1059, 1061 (N.M. Ct. App. 1997). As the New Mexico Court of Appeals explained in *Anaya v. New Mexico State Personal Board*, 107 N.M. 622, 626, 762 P.2d 909, 913 (N.M. Ct. App 1988),

> [t]he legal residuum rule does not require that all evidence considered by the administrative agency be legally admissible evidence, but only "that an administrative action be supported by *some* evidence that would be admissible in a jury trial" *Duke City Lumbar Co. v. New Env'tl Improvement Bd., 101 N.M. at 295, 681 P.2d at 721*.

As mentioned above, the exhibits would survive a hearsay objection as one of two possible exceptions to the hearsay rules, and thus would be admissible in a jury trial, satisfying the *Duke City* and *Chavez* standard. Furthermore, even if the documents would not survive a hearsay objection, it is hardly the only piece of evidence supporting an administrative decision in this case. Taxpayer testified that during TY08 he was employed by Tempur Production, a private company within Bernalillo County, New Mexico. Taxpayer testified that his wages are calculated as a salary, he received a pay check from his employer and that his employer deducts a percentage of his salary from his paycheck to pay for health benefits and social security. Taxpayer testified that for TY08 no money was withheld from his paycheck for taxes and he could not recollect if he completed a W-4 form for TY08. The Hearing Officer is not persuaded by Taxpayer's argument. The documents showing income sources for the Taxpayer in TY08 are admissible and can be used by the Department to determine his tax liability.

Taxpayer's Income is Wages and Taxpayer is an Employee.

Taxpayer argues he did not receive wages because he did not fit the definition of an employee as set forth in § 3402 (c) of the IRC. § 3401 IRC defines "Wages" as follows:

> (a) For purposed of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash.

Taxpayer's argument focuses on his claim that he does not fit the definition of an employee, and since he is not an employee, he cannot receive wages. § 3402 IRC defines "Employee" as follows:

> (c) For the purpose of this chapter, the term "employee" *includes* an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also *includes* an officer of a corporation. (Emphasis added)

Taxpayer misreads § 3402 (c) believing that only the examples listed are employees. § 7701 IRC defines "includes and including" as follows:

> (c) The term "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

Thus, the word "includes" as used in the definition of "employee" is a tern of enlargement, not of limitation. It clearly makes federal employees and officials a part of the definition of "employee," which generally includes private citizens. *See United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985) (calling the instructions Latham wanted given to the jury "inane," the court said, "[the] instruction which indicated that under 26 U.S.C. § 3401(c) the category of 'employee' does not include privately employed wage earners is a preposterous reading of the statute. It is obvious within the context of [the law] the word 'includes' is a term

of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others..." *Sullivan v. United States,* 788 F.2d 813, 815 (1st Cir. 1986) (the court rejected Sullivan's attempt to recover a civil penalty for filing a frivolous return, stating "to the extent [he] argues that he received no 'wages'... "because he was not an 'employee' within the meaning of 26 U.S.C. § 3401(c), that contention is meritless. . . . The statute does not purport to limit withholding to the persons listed therein.") *Peth v. Breitzmann,* 611 F. Supp. 50, 53 (E.D. Wis. 1985) (the court rejected the taxpayer's argument "that he is not an 'employee' under I.R.C. § 3401(c) because he is not a federal officer, employee, elected official, or corporate officer," stating, "[he] mistakenly assumes that this definition of 'employee' excludes all other wage earners." The Hearing Officer finds that Taxpayer is an employee and received wages.

Taxpayer is a citizen subject to Taxation.

Taxpayer argues that he is not a citizen subject to its jurisdiction, upon whom Congress has the authority to impose a graduated income tax, as defined in 26 CFR Section 1.1-1 (c) because he was born in one of the union American States and not a territory over which the United States is sovereign. Taxpayer's argument once again focuses on his contention that he does not have any federal tax liability, which has already been addressed in this decision. However, the Fourteenth Amendment to the United States Constitution defines the basis for United States citizenship, stating that

> "[a]ll persons born or naturalized in the United States,
> and subject to the jurisdiction thereof, are citizens of
> the United States and of the State wherein they reside."

The Fourteenth Amendment therefore establishes simultaneous state and federal citizenship. The claim that Taxpayer is not a citizen of the United States but instead is a citizen of a sovereign state and not subject to federal taxation has been uniformly rejected by the courts.

United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987), cert. denied, 485 U.S. 1022 (1988) (the court found Ward's contention that he was not an "individual" located within the jurisdiction of the United States to be "utterly without merit" and affirmed his conviction for tax evasion. *United States v. Sileven*, 985 F.2d 962 (8th Cir. 1993) (the court rejected the argument that the district court lacked jurisdiction because the taxpayer was not a federal citizen as "plainly frivolous". *United States v. Gerads*, 999 F.2d 1255, 1256 (8th Cir. 1993) (the court rejected the Gerads' contention that they were "not citizens of the United States, but rather 'Free Citizens of the Republic of Minnesota' and, consequently, not subject to taxation" and imposed sanctions "for bringing this frivolous appeal based on discredited, tax-protestor arguments."

Requirement to File a Federal Return

Section 7-2-12 in its entirety states:

> A. Every resident of this state and every individual deriving income from any business transaction, property or employment within this state and *not* exempt from tax under the Income Tax Act who is required by the laws of the United States to file a federal income tax return shall file a complete tax return with the department in form and content as prescribed by the secretary.

In Taxpayer Exhibit 1-6, Taxpayer stated that he did not receive any federal gross income above the threshold amount so as to trigger any requirement to file a federal income tax return under 26 U.S.C. § 6012 for tax year 2008. Therefore, Taxpayer argues that he is not required to file a New Mexico personal income tax return for tax year 2008. However, at the hearing Taxpayer testified that the basis for not having any federal tax liability was procedural, and not based on any amount of income. Taxpayer did not present any evidence to show that he is not required to file a federal income tax turn.

Assessment of Interest

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). 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.*, ¶22, 32, 133. 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 NMSA 1978, § 7-1-67 (2007) and must assess interest against Taxpayer from the time the tax was due but not paid until such time as the tax is paid in full.

Assessment of 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 meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional. In instances where a taxpayer might otherwise fall under the definition of civil negligence subject to penalty, NMSA 1978, § 7-1-69 (B) (2007) provides a limited exception: "No 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."

Regulation 3.1.11.10 NMAC (1/15/01) 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." Inadvertent error meets the legal definition of "negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989).

Taxpayer did not show that the failure to pay personal income tax for tax year 2008 resulted from a good faith mistake of law on reasonable grounds under NMSA 1978, § 7-1-69 (B) (2007). Taxpayer also did not establish any of the non-negligence factors under Regulation 3.1.11.11 NMAC (01/15/01) that might allow the abatement of penalty. Consequently, the Department must assess civil penalty under NMSA 1978, § 7-1-69 (2007).

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the assessment for 2008 personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not present sufficient evidence to overcome the presumption of correctness under NMSA 1978, §7-1-17 (2007). *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. Taxpayer is liable for the payment of $394.00 in personal income tax, $78.80, in penalty, and any accrued interest until the tax principal is satisfied under NMSA 1978, Section 7-1-67 (2007).

DATED: April 14, 2014

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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25 (1989), 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. *See* NMRA,12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with Hearings Bureau contemporaneous with the Court of Appeals filing.