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

IN THE MATTER OF THE PROTEST OF **No. 10-09**
STEVE ORTIZ d/b/a STEVE ORTIZ EQUIPMENT AND MECHANICAL
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0371439488

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 8, 2010, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Mr. Thomas Dillon also appeared and testified on behalf of the Department. Mr. Steve Ortiz appeared and represented his business and himself ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer operates a sole proprietorship restaurant remodeling business in Albuquerque, New Mexico.

2. In 2006 Taxpayer performed services for J&R Construction and McComas Restaurant Supply but did not obtain a nontaxable transaction certificate ("NTTC") from either company.

3. As part of an information-sharing program with the Internal Revenue Service ("IRS') known as the "Tape-Match Program", the Department was notified of the business income reported on Schedule C to the Taxpayer's 2006 Federal income tax return.

4. The Department found a discrepancy between Taxpayer's Schedule C IRS filing and Taxpayer's 2006 New Mexico State Combined Reporting System ("CRS") returns.

5. On June 3, 2009, the Department sent Taxpayer a notice that it was conducting a limited scope audit of his 2006 Schedule C Gross Receipts tax reporting because of the mismatch between Taxpayer's Schedule C 2006 IRS return and Taxpayer's 2006 CRS state return. (Department Exhibit A)

6. The Department mailed the notice to Taxpayer's acknowledged address, which is the same address that Taxpayer listed in his letter of protest. (Department Exhibit A)

7. The Department's notice advised Taxpayer that in order to establish that the gross receipts were deductible and therefore the gross receipts tax not owed, he must be in possession of all NTTCs required to support his deductions for 2006 within 60 days from the date of the notice.

8. The Department's notice also advised that the NTTCs must be dated no later than the end of the 60 day period (response date) and if on the response date the NTTCs were not in his possession and properly executed that the "DEDUCTIONS RELATING TO THE NTTCs WILL BE DISALLOWED."

9. The notice also required that the NTTCs be sent to the Department by the response date, which expired on August 2, 2009. (Department A)

10. The June 3, 2009 notice explained the amount reported on the Schedule C 2006 IRS return and the amount reported on Taxpayer's 2006 CRS state return. (Department Exhibit A)

11. Upon receiving the Department's notice of limited scope audit for 2006, Taxpayer turned the notice over to his accountant, Mr. Pete Montoya.

12. Taxpayer relied on his accountant to take all necessary steps to address the limited scope audit.

13. On July 13, 2009, the Department mailed a reminder notice of limited scope audit to the same address, again informing Taxpayer that any NTTCs required to support his claimed deductions for 2006 be executed and in his possession on or before the listed response date of August 2, 2009 and that failure to so provide the documentation to the Department would result in the deductions being disallowed. (Taxpayer Exhibit 1)

14. On the August 2, 2009 Taxpayer did not possess the relevant NTTCs for 2006.

15. On August 3, 2009, the Department mailed a notice of potential assessment to the same address, again informing Taxpayer that the discrepancy between Schedule C 2006 IRS return and Taxpayer's 2006 CRS state return remained unresolved and that if the Department did not receive documentation to support the deductions by August 18, 2009 Taxpayer would be assessed gross receipts taxes based on the discrepancy. (Taxpayer Exhibit 1)

16. Taxpayer, without reviewing any documentation from the Department other than to note it concerned an audit, turned all documentation to Mr. Montoya.

17. In September 2009 in response to telephone calls from a Department employee, Taxpayer met with his accountant. The accountant advised Taxpayer to obtain the relevant NTTCs from J&R Construction and McComas Restaurant Supply.

18. Taxpayer contacted the two companies and received the requested Type 6 NTTCs to support the deduction of his receipts for 2006.

19. Taxpayer delivered to the Department the Type 6 NTTC from McComas Sales Co. Inc dated October 19, 2009 and the Type 6 NTTC from J&R Construction dated October 13, 2009.

20. On October 23, 2009, the Department assessed the Taxpayer for $3,919.32 gross receipts tax, $783.87 penalty, and $1,062.92 interest for 2006 under letter ID number L0371439488 for tax year ending December 31, 2006. (Department Exhibit B)

21. By letter received by the Department's Protest office on November 4, 2009; Taxpayer timely protested the assessment. (Department Exhibit C)

22. By letter dated November 6, 2009, the Department acknowledged receipt of the protest and acknowledging Taxpayer's request for hearing. (Department Exhibit D).

23. On November 17, 2009, Thomas Dillon, CPA, with the Department's Protest Office mailed to Taxpayer, at the same address, an acknowledgement of receipt of the NTTCs and a denial by the Department to allow Taxpayer's claim of deduction and therefore abate the assessment as Taxpayer did not possess the NTTCs at the time the services were performed in 2006 and because the Taxpayer did not possess the NTTCs within 60-days of the notice of limited scope audit for 2006. (Taxpayer Exhibit 1)

DISCUSSION

The primary issue in this case is whether Taxpayer's failure to have the NTTCs from J&R Construction and from McComas Restaurant Supply in his possession within the 60-day period provided in the Department's limited audit notice forecloses him from deducting his receipts for services he performed for the companies in 2006 under NMSA 1978, §7-9-48 (2000) based on the sale of a service for resale. An additional issue is whether the Department having already

received the gross receipts taxes for the services from the companies supplying the NTTCs amounted to double taxation when charged to Taxpayer. Taxpayer acknowledges that he should owe a fine based on the lateness of his obtaining the NTTCs but seeks abatement of the gross receipts tax and therefore the other charges based on the tax already being paid by other taxpayers. The Department argues that the Taxpayer is precluded from claiming the deduction under NMSA 1978, §7-9-48 (2000) for 2006 as Taxpayer failed to possess the relevant NTTCs both at the time Taxpayer rendered the services and within 60-days of the notice of the limited scope audit.

Burden of Proof. NMSA 1978, §7-1-17(C) (2007) provides that any assessment of tax by the Department is presumed to be correct. Regulation 3.1.6.12 (A) NMAC explains that once an assessment is mailed to a taxpayer that the presumption of correctness attaches and that therefore the taxpayer has the burden of submitting evidence to dispute the correctness. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). Also NMSA 1978, §7-1-3 NMSA (2009) defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). *See also*, Regulation 3.1.6.13 NMAC (2001). Accordingly, the presumption of correctness applies to the assessment of principal tax, to the penalty and interest, and it is Taxpayer's burden to present evidence and legal argument to establish that they are not liable for the gross receipts tax and are entitled to an abatement of interest and penalty.

Gross Receipts Tax. NMSA 1978, §7-9-4 (1990) imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. There is a statutory presumption that all receipts of a persons/entity engaging in business in New Mexico are subject to the gross receipts tax. NMSA 1978, §7-9-5 (2002). Pursuant to NMSA 1978, §7-9-3.5 (A) (1) (2007), gross receipts

"means the total amount of money…received…from performing services in New Mexico." The definition of "engaging in business" is very broad including "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA, 1978, § 7-9-3.3 (2002). The statute makes no distinction between activities engaged in by large corporations and activities engaged in by small "mom and pop" operations.

As this protest involves a deduction from the tax, Taxpayer has the burden of overcoming the assessment by establishing that he was entitled to the deduction pursuant to NMSA 1978, §7-9-48 (2000) for 2006.. In *Wing Pawn Shop v. Taxation and Revenue Department,* 111 NM 735, 740, 809 P.2d 649, 654 (Ct. App. 1991) ¶29 -32, the court explained,

> 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…taxation is the rule and the claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.

See also *Security Escrow Corp. v. Taxation and Revenue Department,* 107 NM 540, 543, 760 P.2d 1306, 130 (Ct. App. 1988) §18-20. Where a party claiming a right to a tax deduction fails to follow the method prescribed by statute or regulation, he waives his right thereto. *See Proficient Food v. New Mexico Taxation & Revenue Department,* 107 N.M. 392, 397, 758 P.2d 806, 811 (Ct. App.), *cert denied,* 107 N.M. 308, 756 P.2d 1203 (1988). The evidence submitted by Taxpayer was insufficient to overcome the statutory presumption and by failing to follow the method prescribed by statute, Taxpayer waived his right to claim the deduction.

NTTC Requirement for claimed Deduction. The Gross Receipts and Compensating Tax Act provides several deductions from gross receipts for taxpayers who meet the statutory

requirements set by the legislature. The Taxpayer is seeking to qualify for the deduction provided in NMSA 1978, §7-9-52 (2000), which states:

> A. Receipts from selling a construction service may be deducted from gross receipts *if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate* to the person performing the construction service. (emphasis added)

This statute allows a taxpayer to deduct its receipts from performing services as a subcontractor if, and only if, the general contractor provides the taxpayer with an NTTC. The requirements of NMSA 1978, §7-9-52 are very specific. If the subcontractor fails to obtain an NTTC from the general contractor, there is no basis for the deduction.

Also, NMSA **1978, §7-9-48 (2000**) states,

> Receipts from selling a service for resale may be deducted from gross receipts ...if the sale is made to a person who delivers a nontaxable transaction certificate to the seller....

This statute also allows a taxpayer to deduct its receipts from performing services if the seller claiming the deduction receives a NTTC from the buyer of that seller's service at the time of the sale or transaction. The provisions of NMSA 1978, §7-9-48 are also very specific. If the seller fails to obtain a NTTC from the buyer of the service, there is no basis for the deduction.

The requirements for obtaining NTTCs are set out in NMSA 1978, §7-9-43 (2005), which provides:

> All nontaxable transaction certificates...should be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. If the seller or lessor is not in possession of the required nontaxable transaction certificates within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department, deductions claimed by the seller or lessor that require

> delivery of these nontaxable transaction certificates shall be disallowed.

While taxpayers "should" have possession of required NTTCs at the time of the transaction at issue, the statute provides taxpayers audited by the Department a second chance to obtain these NTTCs. Taxpayers who rely on this provision must recognize, however, that they run the risk of having their deductions disallowed if they are unable to meet the 60-day deadline set by the legislature. The reason why a taxpayer does not obtain an NTTC is irrelevant. The language of the statute is mandatory: if a seller is not in possession of required NTTCs within 60 days from the date of the Department's notice, "deductions claimed by the seller ... that require delivery of these nontaxable transaction certificates *shall be disallowed."* (emphasis added).

Taxpayer failed to possess NTTCs by deadlines allowed by the Department. Taxpayer questioned whether or not he received all notifications from the Department as to the necessity of obtaining the NTTCs and supplying them to the Department. The evidence established that all documentation sent by the Department to Taxpayer was mailed to Taxpayer's acknowledged address. Additionally, Taxpayer's exhibit 1 established that he received the reminder of limited scope audit, the notice of potential assessment and the denial of deduction based on untimely submission of the NTTCs. While Taxpayer obtained the proper NTTCs from J&R Construction and McComas Restaurant Supply and did submit them to the Department, Taxpayer did not obtain the NTTCs until well over two months after the August 2, 2009 deadline. Additionally, the Department provided Taxpayer a third opportunity to submit the necessary NTTCs to avoid an assessment for gross receipts taxes in its notice of potential assessment allowing Taxpayer through August 18, 2009 to provide the necessary documentation. Taxpayer actually obtained the NTTC from McComas

Restaurant Supply approximately two months after the August 18th deadline and obtained the NTTC from J&R Construction just short of two months after this deadline.

The 60-day statutory deadline and the additional extension allowed in the notice of potential assessment for Taxpayer to obtain the NTTCs, after notice of the limited audit, served as Taxpayer's statutory extension to obtain the NTTCs that he should have already possessed at the time of the work being completed by him. Regardless of his reasoning for the non-possession of a required NTTC, NMSA 1978, §7-9-43 (2005) provides no further extension of time. The fact that the Department allowed a third opportunity to submit the NTTCs does not negate the mandatory language of NMSA 1978, §7-9-43 (2005), which requires that the deduction "shall be disallowed" and does not allow the Department any leeway in granting a deduction in instances of untimely possession of a required NTTC.

While Taxpayer relied on his accountant to respond to the Department's request for documentation, ultimately it was Taxpayer's responsibility to ensure that he complied with his statutory tax obligations by obtaining the proper NTTCs to support his claim for a deduction for services rendered by him. Every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions. *Tiffany Construction Co. v. Bureau of Revenue,* 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied,* 90 N.M. 255, 561 P.2d 1348 (1977). The incidence of the gross receipts tax is on the seller, and it was the responsibility of Taxpayer to timely respond to the Department's letters and to determine whether he had the documentation needed to support his claim of deductions. The Taxpayer's failure to obtain the NTTCs within the 60-day period provided in NMSA 1978, §7-9-43 (2005) leaves the Department no choice but to disallow his deductions.

Double Taxation. Taxpayer argues that the taxes had properly been paid to the Department by the end users of his services and that it is inherently wrong for the Department to collect taxes twice for the same services and that therefore he should not be charged for a tax that had already been paid.

New Mexico courts have held that there is no prohibition against double taxation. See *New Mexico State Board of Public Accountancy v, Grant*, 61 NM 287, 299 P.2d 464 (1956); *Amarillo-Pecos Valley Truck Line, Inc. V. Gallegos,* 44 NM 120, 99 P.2d 447 (1940) and *State ex rel. Attorney General v. Tittmann,* 42 NM 76, 75 P.2d 702 (1938). See also *Ft. Smith Lumber Co. v. Arkansas,* 251 U.S. 532 (1920). Further, New Mexico courts in construing the New Mexico Gross Receipts and Compensating Tax Act have held that there is no double taxation where the two taxes complained of are imposed on the receipts of different taxpayers. See *House of Carpets, Inc. v. Bureau of Revenue*, 87 NM 747, 507 P.2d 1078 (Ct. App. 1973) and *New Mexico Sheriffs v. Police Association v. Bureau of Revenue,* 85 NM 565, 514 P.2d 616 (Ct. App. 1973). In *New Mexico Sheriffs* the court determined that "if there were double taxation, such would not necessarily be arbitrary and capricious" and further that there was no double taxation as the tax was being paid by two different taxpayers not by one taxpayer paying tax twice on the same items.

When an individual/company sells services to another, the seller is the entity liable for the gross receipts tax on the sale. The buyer has no obligation to report or pay tax on the seller's receipts. When the buyer charges its clients, here the ultimate users of the services, the buyer is the entity liable for gross receipts on those transactions – neither the seller of the original services nor the ultimate user has any obligation to report or pay tax on the buyer's receipts. Although the practice is for a buyer to pass the cost of the gross receipts tax to the ultimate user, it does not change the responsibility for the tax. The seller remains responsible to the state for payment of the tax on the

sale of his services and the buyer is responsible to the state for payment of the tax on the sale of its services except if the service provider legally obtains the necessary NTTCs

Recognizing the responsibility and problems inherent in the taxing of transactions when ownership passes, the legislature has provided a number of statutory deductions from gross receipt tax. NMSA 1978, §7-9-48 allows under certain prescribed conditions, a deduction for the sale of services for resale. Taxpayer when selling services for resale as opposed to using the items in the performance of its own services is eligible to obtain NTTCs from his buyers. Timely obtaining the NTTCs from his buyers would enable Taxpayer to deduct from the sale of services those services covered by the NTTCs and eliminate the gross receipts tax on these sales. The legislature has provided the means for the tax to be assessed one time, namely by using nontaxable transaction certificates. By not having availed himself of the means for avoiding the tax in question, Taxpayer is left with the presumption of taxability.

Civil Penalty. NMSA 1978, §7-1-69 (2003, prior to amendments through 2007) governs the imposition of penalty. NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007), in effect prior to January 1, 2008 states,

> A. Except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of t ax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, 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 ten percent of the tax due but not paid.

NMSA 1978 Sec. 7-1-69 (2003, prior to the amendments through 2007) provides that when a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and

regulations, a penalty "shall be added" to the amount of the underpayment. The term "negligence" as used in Sec. 7-1-69 is defined in Regulation 3.1.11.10 NMAC (2001) as:

> (A) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
> (B) inaction by taxpayers where action is required;
> (C) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Whether Taxpayer acted negligently for purposes of the civil penalty imposed by §7-1-69 (2003, prior to amendments through 2007), is determined as of the date the taxes were due. Taxpayer had notice of the limited scope audit, of the necessity of obtaining NTTCs to claim a deduction of gross receipts taxes. Taxpayer had a subsequent reminder notice of the audit and the conditions for disallowance of a requested deduction. Taxpayer also had a third notice explaining that without additional documentation within the time period that an assessment would be issued. Taxpayer failed to pursue obtaining and submitting the necessary NTTCs with the ordinary care and prudence that a reasonable taxpayer would exercise under like circumstances after being notified of the audit and the potential responsibility for payment of gross receipts taxes. Taxpayer did not act to pursue resolution of the request for NTTCs when action was required. Taxpayer completed the formal protest (Department Exhibit C) knowing there was a claim for taxes based on non-payment of gross receipts for failure to timely submit NTTCs to obtain a deduction. Taxpayer erroneously did not read the documentation sent by the Department and believed that by turning it over to his accountant that he had no further responsibility and that his accountant would take care of the matter. This action meets the definition of negligence set out in Department regulations and in New Mexico case law. See *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, P.797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.).

While Taxpayer testified that he relied on his accountant to take care of the audit, the evidence was insufficient to establish non-negligence on the part of Taxpayer pursuant to Regulation 3.3.11.11 (D) NMAC. There is no evidence that Taxpayer had any specific discussions with his accountant concerning gross receipts taxes owed to the state. Other than leaving the paperwork with the accountant, Taxpayer did not pursue a finalization of the audit. Taxpayer did not establish that the failure to timely respond to the request for NTTCs was caused by the reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts as the evidence established that Taxpayer did not read the documentation sent by the Department and did not pursue a timely response to the Department's requests.

In the assessment for the tax year 2006 and the acknowledgment letter of November 6, 2009 from the Department to Taxpayer, the Department notified Taxpayer that penalty will be assessed at a rate of 2% per month (to a maximum of 20%) on the principal amount of tax due until such tax is paid. (Department Exhibits B and D) Taxpayer certainly, had sufficient notice that a penalty would be assessed due to non-payment of the principal tax due.

Imposing a civil penalty on Taxpayer's liability was correct. The Department's calculation of the penalty however is not correct. The Department imposed a twenty percent (20%) civil penalty on the principal of the gross receipts tax. (Department Exhibit B). The amount of negligence penalty added to the underlying principal tax liability by the Department is not in accordance with the meaning of NMSA 1978, §7-1-69 (2003, prior to amendments through 2007). §7-1-69 (A)(1) provides that if the tax required to be paid when due is not paid, the Department may add civil penalty in an amount "…**not to exceed** ten percent of the tax due but not paid." As the effective date of the legislative change as to the maximum penalty amount capped at 20%, under NMSA 1978, §7-1-69 (2007), was January 1, 2008, and the taxes at issue are 2006, the total amount of penalty

assessed to taxpayer is determined to be 10% of the principal amount. There was no retroactivity provision within this statute allowing for an additional civil penalty of ten percent (10%) to be applied to past due principal tax balances due as of January 1, 2008 that had already exceeded the maximum rate applied.

This determination is based on *Phelps Dodge Corp. v. Revenue Division of the Taxation and Revenue Dept of the State of New Mexico,* 103 NM 20, 702 P.2d 10 (Ct. App. 1985), which following *Worman v. Echo Ridge Homes Cooperative, Inc.* 98 NM 237, 647 P.2d 870 (982) states, "new legislation must not alter the clear language of a prior statute if it is to be applied retroactively." Additionally, in *State v. Padilla,* 78 NM 702, 437 P.2d 163 (Ct. App. 1968), affirmed in *Psomas v. Psomas,* 99 NM 606, 661 P.2d 884 (1982), the court stated, "it is presumed that statutes will operate prospectively only, unless an intention on the part of the legislature is clearly apparent to give them retroactive affect." In *Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) the New Mexico Supreme Court declined to retroactively apply a modified penalty regulation enacted after the applicable tax year. See also *Karpa v. Commission of Internal Revenue,* 909 F.2d 784 (1990) and *Bradbury Stamm Construction v. Bureau of Revenue,* 70 NM 226, 373 P.2d (1962). The statute does not express the intent by the Legislature to apply the 2008 amendment to the statute retroactively. Therefore in the absence of such intent by the Legislature, the statute operates prospectively only.

Interest. NMSA 1978, § 7-1-67 (2007) governs the imposition of interest on the late payments of tax and provides, in pertinent part:

> A. If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid* to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The use of the word "shall" indicates that the provisions of the statute are mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). With limited exceptions that do not apply here, the New Mexico Legislature has directed the Department to assess interest whenever taxes are not timely paid until such time as the principal tax is paid in full. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Here, the Taxpayer failed to pay gross receipts tax due to the state. In effect, the Taxpayer had a loan of state funds during the time taxes were owed but not paid. Therefore continuing interest is due until such time as the principal tax due is paid. The statutory rate is mandatorily set by the legislature, and neither the Department nor its hearing officer has the authority to adjust interest based on the financial or personal situations of individual taxpayers. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775 (the legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform).

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest to the assessment of gross receipts tax issued under Letter ID No. L0371439488 and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer failed to meet his burden of proving that his income reported on Schedule C of his 2006 Federal income tax return is not subject to New Mexico gross receipts tax; accordingly, the amount of $61,451.00, being the difference between what was reported on his schedule C federal tax return and on his New Mexico CRS state return, is subject to New Mexico gross receipts tax.

3. The amount of civil penalty added to the principal tax shall not exceed ten percent (10%) as provided in §7-1-69(A)(1) (2003, prior to amendments through 2007) and any amounts added or assessed in excess of the ten percent (10%) should be abated.

4. Interest was correctly added and assessed to the principal amount of tax, and continues to accrue until the principal tax is paid in full.

For the foregoing reasons, the Taxpayers' protest **IS GRANTED IN PART AND DENIED IN PART:** The Department is ordered to abate ten percent (10%) of the penalty amount for tax year 2006 unless it has already done so.

DATED: June 16, 2010.