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

IN THE MATTER OF THE PROTEST OF
ADOBE ROSE BED AND BREAKFAST **No. 10-12**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L2077512576

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 20, 2010, before Brian VanDenzen, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Mr. Tom Dillon appeared as a witness on behalf of the Department. Mr. Clent D. Schoonover (Taxpayer) appeared pro se. In addition to the documents contained in the Administrative File, Department A, the Audit, is admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the relevant time period, Taxpayer was the sole proprietor and owner of Adobe Rose Bed and Breakfast ("B&B"), a 6-bedroom bed and breakfast just outside of the city limits of Artesia, New Mexico.

2. Taxpayer's business was the first business that Mr. Schoonover attempted to operate.

3. Taxpayer began operating this business sometime on or shortly before 2004.

4. Taxpayer's primary customer was federal law enforcement agents on assignment as instructors at the Federal Law Enforcement Training Center.

5. These federal law enforcement agents would usually stay at the B&B for a period of time exceeding thirty-days.

6. Because of Taxpayer's uncertainty as to whether he needed to pay gross receipts taxes on customers staying more than thirty-days at the B&B, Taxpayer contacted the Department to seek guidance in 2004.

7. Taxpayer spoke on the phone with Department employee, Mr. Joe Bellicini.

8. Mr. Bellicini of the Department advised the Taxpayer that any guest staying more than thirty-days would be considered a lessee paying rent, and therefore not subject to gross-receipts taxes.

9. Mr. Bellicini of the Department did not reduce this opinion to writing.

10. Taxpayer relied on this advice in good-faith and did not impose gross-receipts taxes to guests staying more than thirty-days at the B&B.

11. Taxpayer did impose gross-receipts taxes to guests staying less than thirty-days at the B&B.

12. On November 24, 2008, Mr. Bellicini, by that time Audit Supervisor with the Department, informed the Taxpayer that he had been selected for audit by the Department.

13. At all times, the Taxpayer acknowledges that the audit was conducted professionally and courteously.

14. As part of that audit, the Department determined that the Taxpayer had no Tenant-Landlord relationship with any of the guests of the B&B under NMSA 1978, Section 7-9-53(B), and that therefore all moneys received by guests who stayed at the B&B for more than thirty-days were taxable gross receipts.

15. The Taxpayer informed auditor Dan Pogan that Mr. Bellicini of the Department had previously advised him that income earned from guests staying more than 30-days at the B&B would be treated as rental income not subject to gross receipts taxes.

16. The next day, Auditor Dan Pogan informed the Taxpayer that Mr. Bellicini of the Department had confirmed providing inaccurate advise to the Taxpayer.

17. In an email of May 11, 2009, Mr. Bellicini of the Department indicated that the Department had no basis to dispute Taxpayer's claim that an "employee of the Department advised that the taxpayer that renting rooms for greater than 30 days were deductible gross receipts." As such, Mr. Bellicini of the Department recommended that the imposition of penalty be waived in assessing the Taxpayer.

18. On May 14, 2009, the Department assessed the Taxpayer for $18,299.56 in gross receipts taxes and $4,069.89 in interest for unpaid gross-receipts taxes for a period from January 31, 2005 through October 31, 2008.

19. As per Mr. Bellicini's recommendation, the Department did not assess the Taxpayer for a negligence penalty under NMSA 1978, Section 7-1-69 (2003).

20. Protest Auditor Thomas Dillon accepted the Taxpayer's position that he was orally misled by a Department employee, and consequently in recognition of that error, the Department did not assess penalty against the Taxpayer.

21. Protest Auditor Dillon believes that the Taxpayer was morally wronged in this situation because, based on the Department's erroneous advice, Taxpayer did not have an opportunity to impose gross receipts tax on his customers whom stayed for more than 30-days.

22. Protest Auditor Dillon personally sympathized with the Taxpayer's circumstance, and said that if the law allowed him to do so, he would waive the tax principal and interest

assessed against the Taxpayer because to the Taxpayer's inability to impose gross receipts tax on these customers during the relevant period of time.

23. Taxpayer priced the rate of the room without imposing gross receipts taxes on customers staying at the B&B for more than 30-days.

24. Taxpayer filed an undated formal letter of protest.

25. The Department, through counsel, took the position that the Taxpayer's undated protest letter was timely filed.

DISCUSSION

The issue in this case is whether the Taxpayer is liable for unpaid gross receipts taxes and interest for tax periods January 31, 2005 through October 31, 2008 when he in good-faith relied on the erroneous oral statements of Department employee Mr. Joe Bellicini that no gross receipts taxes were due for income on receipts from B&B guests whom stayed more than 30-days, and consequently Taxpayer did not impose gross receipts tax on the Taxpayer's long-term guests during this relevant period of time. Moreover, in addition to his fairness argument related to his reliance on Mr. Bellicini's erroneous advice, Taxpayer also argues that Mr. Bellicini also had a conflict of interest when he later signed off as the supervisor of the audit conducted on the Taxpayer in this matter.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, §7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish

that he was not required to pay the tax principal, interest, and penalty. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Assessment of Interest

Separate from any issues about the inaccurate advice provided by the Department to the Taxpayer, the Taxpayer does not dispute during this protest that he was in fact and in law statutorily required to pay gross receipts tax during the relevant tax periods for receipts of renters at the B&B. *See* NMSA 1978, Section 7-9-53 (B) (1998) and Regulation 3.2.211.8(F) NMAC [5/31/01].

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 (2003). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory regardless of the explanation or justification provided by a taxpayer. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977).

Assessment of Penalty.

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, NMSA 1978, Section 7-1-69(A) (2007) imposes a penalty of two percent per month "from the date the tax was due," not to exceed twenty percent of the outstanding tax liability. The term "negligence" is defined in Regulation §3.1.11.10 NMAC (1/15/01) to include "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

Regulation §3.1.11.11 NMAC (1/15/01) provides instances of nonnegligence where no penalty should be assessed against a taxpayer under the civil penalty statute. Likely in recognition of this regulation and in accord with Mr. Bellicini's recommendation, the Department did not attempt to assess any civil penalty against the Taxpayer in this matter. *See* Regulation §3.1.11.11(A) NMAC (1/15/01).

Statutory and Equitable Estoppel

While the evidence establishes that the Taxpayer was lawfully assessed for unpaid principal gross receipts tax and interest, Taxpayer nevertheless argues that under basic principles of fairness, accountability, and justice, the principal gross receipts tax and interest should be abated because he relied in good faith on Departmental employee Mr. Bellicini's erroneous advice that collection of gross receipts taxes were unnecessary for renters staying for more than 30-days at the B&B. While the pro se Taxpayer did not use the terms estoppel or equity, his fairness argument falls squarely under the rubric of those legal concepts.

A. Statutory Estoppel.

Under NMSA 1978, Section 7-1-60 (1993), the State is estopped from acting against a taxpayer only when a complaining taxpayer can show that the complaining taxpayer's

> action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary, unless the ruling had been rendered invalid or had been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose. *id*.

In sum, the statute only prohibits the Department from acting in two circumstances: when the taxpayer acted according to a regulation or when the taxpayer acted according to a written revenue ruling by the Secretary specifically addressed to the taxpayer.

In this case, the Taxpayer did not receive a written revenue ruling from the secretary specifically addressed to him. Nor did the Taxpayer act in accord with any regulation. Consequently, statutory estoppel pursuant to NMSA 1978, § 7-1-60 (1993) does not bar the Department from assessing unpaid gross receipts and interest on the Taxpayer.

B. Equitable Estoppel.

Aside from statutory estoppel, the Taxpayer's fairness, accountability, and conflict of interest arguments also form the basis of a claim for equitable estoppel against the Department.

As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *See Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 770 P.2d 873 (1989).

Moreover, like in the present protest, equitable estoppel generally does not apply against the State when a taxpayer relied on the oral advice of a Department employee. *See Bien Mur Indian Market* at 231, 876; *See also*, *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 28, 136 N.M. 440, 447, 99 P.3d 690, 697 (N.M. Ct. App. 2004); *Rainaldi v. Public Employees Retirement Board,* 115 N.M. 650, 658-59, 857 P.2d 761, 769-70 (1993) (estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute); *Trujillo v. Gonzales,* 106

N.M. 620, 622, 747 P.2d 915, 917 (1987) (county not estopped by promises of county commissioners made outside of a legally called board meeting and individual had no right to rely on those oral representations).

In determining whether estoppel is appropriate, the conduct of both parties must be considered. *See Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992). *See also*, *Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

There are three factors that must be considered about the party to be estopped, in this case the Department. First, did that Department's conduct amount to either a false representation or a concealment of material facts? *See id.* In this case, the Department conceded that Mr. Bellicini's advice was an unknowing but nevertheless false representation to the Taxpayer about the Taxpayer's tax obligations. The second factor is whether the Department had actual or constructive knowledge of the true facts. *See id.* Again, in its May 11, 2009 email, the Department did not dispute that a Department employee knew that the Taxpayer was asking about whether renting rooms for more than 30-days were deductible gross receipts. The third factor is whether the party had an intention or expectation that the other party would act on the representations at issue. *See id.* Whenever the Department in any manner informs a taxpayer that no tax is due, it follows through basic common sense that the Department expects that taxpayer to act in accord with that representation. That is why, as Mr. Breen indicated, Department employees are trained that if there is any doubt about whether the amount is subject to tax, Department employees are to error on the side of indicating that the tax is due until clearly shown otherwise.

As to the party claiming estoppel, there are also three factors to consider. *See id.* The first factor is whether the Taxpayer had a lack of knowledge of the true facts. *See id.* In this case, the

Taxpayer indicated the B&B was his first business and he lacked knowledge about his tax obligations, which is why he contacted the Department. The second factor is whether the Taxpayer detrimentally relied on the adverse party's representations or concealment of facts. *See id.* In this case, the Taxpayer did not impose gross receipts tax onto his long-terms guests when he otherwise would have but for the Department's erroneous advice.

The final factor to consider is whether the Taxpayer's reliance was reasonable. The Taxpayer's detrimental reliance on Mr. Bellicini's oral statements was not reasonable. As mentioned, relating to this reasonable factor, estoppel is disfavored when the reliance is on an oral statement of a Departmental employee over the telephone. While it reasonable for a taxpayer to rely on the written consideration of a formal revenue ruling, it is less reasonable to rely on the oral statements of one of the hundreds of Department employees of various expertise and training, whom over the phone may not have time to obtain all the necessary facts or may not be presented fully with all the relevant facts before responding to a taxpayer's inquiries.

Moreover, New Mexico has a self-reporting tax system, and taxpayers have a statutory obligation to determine their own tax liabilities and accurately report those liabilities to the state. *See* Section 7-1-13 NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue,* 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct.App.1976). The statute at issue in this case, NMSA 1978, Section 7-9-53 (B) (1998) is not particularly difficult to understand. In relevant part, NMSA 1978, Section 7-9-53 (B) (1998) reads that "(r)eceipts received by hotels, motels, rooming houses, campgrounds, guest ranches, trailer parks or similar facilities…." except for receipts received from trailer parks for rental of a trailer space for at least one month "…are not receipts from leasing real property for the purposes of this section" and thus are not subject to the exemption at issue in this case. In

light of this fairly direct statutory mandate, it is not reasonable to solely rely on the oral representations of a Department employee.

If there is any question in a taxpayer's mind about his or her tax obligations, or if the taxpayer receives oral advise from a Department employee that appears to contradict a clear statutory mandate, a taxpayer is always free to consult with a qualified tax professional such as a C.P.A. or a licensed attorney. The Taxpayer in this instance, despite acknowledging that he was uncertain about his tax obligations because it was his first attempt to operate a small business, choose not to consult with a qualified tax professional about his tax obligations as part of operating his new business. A qualified tax professional in this case, in addition to possibly providing the Taxpayer with accurate advice regarding his tax liabilities, would have provided the Taxpayer with an additional layer of liability protection through such things like malpractice insurance and other professional licensure obligations.

Although the Taxpayer may not have been reasonable in his reliance on Mr. Bellicini's erroneous advice under this final factor, the Taxpayer still may have a claim of estoppel in the interest of right and justice for three reasons. First, there seems to be no dispute between that parties that the Taxpayer in this specific case is suffering a moral wrong. The Department's Protest Auditor Mr. Dillon acknowledged that the Taxpayer in this matter was "morally…wronged" by the inaccurate Department advice before the taxes at question were due, thus preventing the Taxpayer from imposing gross receipts tax on his long-term renters. Because of this, Department's Protest Auditor Mr. Dillon further stated that if the law allowed him to do so, he would abate the tax principal and interest in this matter. Moreover, Mr. Breen in his closing argument acknowledged that this protest is an "ugly" situation. It is difficult to fathom a situation where a strict application of the law should apply when

both parties in an adversarial process concede that the outcome of that strict application, while technically legal, may nevertheless be ugly or a moral wrong.

Secondly, based on the erroneous advice at the time when the B&B was still solvent, the Taxpayer calculated room rates for his long-term customers without any amount set aside for gross receipts. Unfortunately, as a practical matter the Taxpayer is no longer in business running the B&B because financial difficulties mandated the sale of that business in 2010 at a significant loss. Consequently, the Taxpayer is no longer in a position to recoup and collect the outstanding tax principal and interest at stake in this protest as part of the regular course of his business, making the Taxpayer's situation even more difficult.

Finally, as the Taxpayer's argues, the Department compounded the original mistake by allowing Mr. Bellicini, the employee that originally provided the Taxpayer with the erroneous advice, to supervise and approve the later audit. Rather than trying to minimize his error, Mr. Bellicini candidly and admirably acknowledged his earlier mistake both to the auditors and to his supervisors (in fact, Mr. Bellicini actually recommended that no penalty be imposed against the Taxpayer). While there is no statute directly on point compelling any Department action, common sense dictates that as soon as Mr. Bellicini reported his previous error to the Department, the Department should have removed Mr. Bellicini from any role in the Taxpayer's audit. The Department's failure to do so, despite the obvious potential appearance of a conflict, undermines the Taxpayer's confidence in the legitimacy of the Department's later actions. Even though there is no actual evidence of impropriety by the Mr. Bellicini or Department, the appearance of a conflict alone by the Department allowing Mr. Bellicini to continue supervising the audit certainly increases the appearance of unfairness suffered by the Taxpayer under the "right and justice demand it" standard articulated in *Bien Muir*. However, beyond playing a part

in the equity analysis, there is no actionable statute, regulation, or ethical rule that would grant the Taxpayer's proposed remedy of abatement of otherwise properly assessed tax, penalty, and interest in the event of an appearance of a conflict.

C. Equitable Estoppel Unavailable as an Administrative Remedy.

The Taxpayer's protest certainly presents a sympathetic and unfortunate situation. Even the Department's protest auditor admitted that the Taxpayer is suffering a moral wrong in this protest and the Department's attorney acknowledged that this is an "ugly" protest. The problem is that despite any inclination towards sympathy for the Taxpayer in this protest, equitable estoppel does not appear to be a possible remedy in an administrative protest hearing before the Department.

The adjudicative functions of an administrative agency like the Department are considered by New Mexico courts to be "quasi-judicial" powers. According to the New Mexico Supreme Court, the quasi-judicial powers of an administrative agency do not include the authority to grant equitable relief to a party before the agency. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 279, 881 P.2d 18, 24 (1994). Since equitable estoppel is a form of equitable relief, it is not a remedy pursuant to *AA Oilfield Service* that may be granted during this administrative protest hearing before the Department under the Tax Administration Act regardless of the merits of the Taxpayer's claim for equitable relief. Under *AA Oilfield Service,* it appears that only the judiciary may rule on the Taxpayer's broader claim for equitable relief.

Despite sympathy for the Taxpayer's fairness and accountability argument, the Department's assessment of principal tax and interest is statutorily supported. Rather than

attempting to minimize his error, Mr. Bellicini took the action of specifically bringing the error in this case to the attention of his supervisors, asking the Department to not impose penalty against the Taxpayer. Although the Taxpayer may take no consolation from it, the Department's determination to not impose penalty in the amount of $1,829.96, where it otherwise might be entitled to do so but for the errors, is in itself a real consequence for the Department's error.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest to Assessment No. # L2077512576, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is liable for tax principal and interest for gross receipts during tax reporting periods from January 31, 2005 through October 31, 2008.

3. Equitable estoppel is not a remedy available in this quasi-judicial administrative proceeding before the Department.

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

DATED: September 27, 2010.