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

IN THE MATTER OF THE PROTEST OF **No. 10-13**
GEA INTEGRATED COOLING TECHNOLOGY
NM CRS ID. NO. 02-330522-003
PROTEST TO ASSESSMENT ISSUED
UNDER LETTER ID. NO. 1178774912

DECISION AND ORDER

This matter came on for determination before Gerald B. Richardson, Hearing Officer, upon a Joint Stipulation of Facts, and the briefs of the parties, and the matter was considered submitted for determination upon the filing of the briefs on Sept. 21, 2010. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. GEA Integrated Cooling Technology ("Taxpayer") was represented by Adam W. Chase, Esq. Based upon the stipulated facts and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a Colorado based company that builds and renovates cooling towers for power plants.

2. During the audit period, June 30, 2003 to May 31, 2008, the Taxpayer was engaged to work on projects by Public Service Company of New Mexico at sites in New Mexico. The work was turnkey engineering, design and building of air cooling towers for power plants. The materials used were manufactured to the Taxpayer's specifications by out-of-state manufacturers and then delivered to the New Mexico work site for incorporation into the construction project.

3. The Department began an audit of the taxpayer on July 16, 2008 for tax periods beginning June 30, 2003 and ending on May 31, 2008. After the audit started, GEA reported $519,622.42 in gross receipts taxes and submitted payment of that amount on August 22, 2008.

4. On September 21, 2009, the Department issued as assessment to the Taxpayer for the audit period in the amount of $841,792.93, representing $587,068.34 in gross receipts tax, $117,413.66 penalty and $137,310.93 interest.

5. After allowing offsets in the amount of $35,989.37, the Department ultimately determined that Taxpayer still owed $31,456.55 in tax principal. Taxpayer paid that tax principal on January 6, 2010.

6. The Department determined the amount of penalty as follows. The Taxpayer had accrued $490,802.60 in tax liabilities over various tax periods between June 1, 2006 and July 1, 2007. The applicable 10% limit on the accrual of penalty at 2% per month on that unpaid tax had been reached before January 1, 2008 for all tax owed during that period. On January 1, 2008, the amendment to Section 7-1-69(A) NMSA 1978 became effective, raising the limit on the accrual of penalty from 10% to 20%. After that effective date, the Department resumed adding penalty in the amount of 2% per month for five months until the new maximum of 20% was reached on the unpaid tax liabilities accrued during periods prior to January 1, 2008.

7. After the effective date of the amendment to Section 7-1-69(A) NMSA 1978, increasing the maximum penalty to 20%, the Taxpayer accrued additional gross receipts tax liabilities in the amounts of $23,703.64 in February 2008, $2,182.13 in March 2008 and $34,387.60 in April 2008. The Taxpayer and the department agree that the 20% limitation on penalty applied to the unpaid portion of the post-January 1, 2008 tax liability.

8. The Department assessed interest at 15% simple interest rate on the principal amount of the tax due up through January 1, 2008. For the period after January 1, 2008, the Department assessed interest at the lower interest rate on the unpaid balance of tax owed as set pursuant to the amendment to the statute imposing interest on unpaid tax liabilities, Section 7-1-67 NMSA 1978, as amended in Laws 2007, ch. 45, § 2.

9. The sole issue for determination in this protest is whether the Department correctly applied the increase in the maximum penalty limitation from 10% to 20% pursuant to Section 7-1-69(A)(1) and (2) NMSA 1978, as amended by Laws 2007, ch. 45, § 4, to the Taxpayer's tax liabilities accrued prior to January 1, 2008 but not paid until after that date. All other issued raised in the Taxpayer's protest have been withdrawn.

DISCUSSION

The only issue remaining to be determined in this matter is whether the Department properly assessed penalty at the maximum rate of 20% of the underlying gross receipts tax liability assessed against the Taxpayer for reporting periods between June 1, 2006 and July 1, 2007. This question arises because Section 7-1-69(A) NMSA 1978, the statutory provision governing the imposition of penalty when tax is not paid when due, was amended by Laws 2007, ch. 45, § 4, to raise the maximum penalty which can be imposed from 10% of the unpaid tax to 20% of the unpaid tax. The amendment became effective on January 1, 2008. Laws 2007, ch. 45, § 16.

Essentially, the Taxpayer argues that because the tax periods for which tax was not paid when due occurred prior to the effective date of the statutory amendments raising the maximum amount of penalty which could be imposed, that the prior version of the statute, which limited penalty to a maximum of 10% should apply. Taxpayer argues that to apply the later version of the statute would amount to giving the amended statute retroactive effect. Both parties agree that statutes are presumed to operate prospectively only, unless an intention on the part of the legislature is clearly apparent to give them retroactive effect. *See,* State v. Padilla, 78 N.M. 702, 703, 437 P.2d 163, 164 (Ct. App. 1968). The Department does not argue that there is anything in the legislative record to indicate that the statutory amendment was intended to operate retroactively. Rather, it argues that it is not applying the amended statute retroactively. It is simply applying the version of the statute which is applicable under the circumstances.

Section 7-1-69(A) NMSA 1978 is the statute governing the imposition of penalty in this matter. I will set forth, in pertinent part, the language as amended by Laws 2007, ch. 45, § 4, which was identical to the language of the prior version, save the increase in the maximum amount of penalty to 20% from the prior maximum of 10%.

> 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 tax required to be paid, ...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 when 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;
> (2) two percent per month or any fraction of a month from the date the return was required to be filed multiplied by the tax liability established in the late return, not to exceed twenty percent of the tax liability established in the late return; ....

The Taxpayer has cited to this Hearing Officer two prior decisions, made by other hearing officers at the Department, in which the issue of which version of Section 7-1-69 applied, and thus which maximum rate of penalty was applicable, was determined adversely to the Department's position in those cases and in this one. In both cases decided, the tax periods for which tax was due but unpaid occurred prior to the effective date of the amendment to Section 7-1-69, but the taxes were assessed after the effective date of that amendment. In both cases, the Department assessed penalty under the amended statute, imposing a maximum penalty of 20% of the unpaid tax.

In the first of those decisions, *In the Matter of the Protest of Alamo True Value Home Center,* No. 09-02, July 2, 2009, the Hearing Officer stated,

> The rule on penalty, whether under the old or amended statute, *is only applied at the time the tax is due but not paid.* According to the plain language of the § 7-1-69 NMSA, *it appears that it is not relevant when the Taxpayer was assessed, but only when the tax was due and not paid.* In the absence of clear language in the statute specifying retroactivity (which does not exist in this instance), *the pertinent inquiry to determine the maximum percentage of penalty under either the old or amended version of NMSA 1978, Section 7-1-69 (2008) is not the date of assessment but the date when the principle tax was due but not paid.* If that date was before January 1, 2008, then the Taxpayer is only subject to a maximum penalty up to 10%, but if that date is on or after January 1, 2008, then the Taxpayer is subject to a maximum penalty up to 20%. (Emphasis added).

Similarly, in *In the Matter of the Protest of Maria and Robert Cloutier,* No. 09-05, October 28, 2009, the Hearing Officer struck down the Department's attempt to impose the maximum 20% penalty on taxes which were due but unpaid. The Hearing Officer ruled that the amended statute was not applicable, "because it was not effective until January 1, 2008, well after the due date of gross receipts tax being due", and there was no retroactivity provision in the amended statute making it applicable in instances where the maximum 10% penalty had already been reached.

While the circumstances of the above cited protests are indistinguishable from those in this case, in terms of the taxes being due and unpaid when the earlier version of the penalty statute was in effect, yet the penalty was assessed after the effective date of the amended penalty statute, this decision maker is not persuaded that those decisions were correctly decided. In the best circumstances, it would be preferable if the Department's hearing officers made consistent determinations as to applicable law. I believe that it is my role, however, as decision-maker, to make my own determination of how the law should be applied under the circumstances of matters that come before me. When I believe that an error in applying the law has been made, it is my responsibility to apply it correctly in matters assigned to me. In this instance, I believe that the decisions above are in error with respect to their determination as to *when and how*, rather than *whether*, penalty is to be applied with respect to unpaid taxes.

I agree that both versions of Section 7-1-69(A) look to whether a taxpayer has been negligent or in disregard of department rules and regulations in failing "to pay when due the amount of tax required to be paid" in determining *whether* penalty should be applied. Both decisions, however, disregard the clear language in Section 7-1-69(A), found in both the amended and prior versions of that provision, as to *when and how* penalty is actually imposed on a taxpayer. When and how penalty is imposed is addressed by the language of the statute which follows the language about whether a taxpayer was negligent in failure to pay tax when due. This language provides that where there has been a failure to pay tax due to negligence or disregard of department rules and regulations, "there shall be added *to the amount assessed* a penalty...." (Emphasis added). Thus, penalty is imposed only when there has been an amount of unpaid tax which has already been assessed. Section 7-1-17(B) NMSA 1978 informs as to when there has been an assessment of taxes. "Tax" is defined to include "the amount of any interest or civil penalty relating thereto", unless the context of the law requires otherwise. Section 7-1-3 (X) NMSA 1978. Section 7-1-17 (B) provides:

> B. Assessments of tax are effective:
>
> (1) when a return of a taxpayer is received by the department showing a liability for taxes;
>
> (2) when a document denominated "notice of assessment of taxes", issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the

> nature and amount of the taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer; or
>
> (3) when an effective jeopardy assessment is made as provided in the Tax Administration Act.

Thus, the only way that penalty is actually imposed upon a taxpayer is when either the taxpayer itself has filed a return showing a liability for taxes and the taxpayer fails to pay that liability (a self assessment of taxes) or when the Department issues an assessment of penalty as part of a "notice of assessment of taxes" or a jeopardy assessment. This makes perfect sense. This is because under both the previous statute and the amended Section 7-1-69(A), the calculation of the amount of penalty to be imposed is calculated as a percentage of the amount of tax which was not paid at the time the tax was due, multiplied by 2% per month for a maximum of five months under the prior statute or a maximum of ten months under the amended law, depending upon when the unpaid taxes are actually paid. Unless there has been an assessment of tax by the Department or a self assessment by a taxpayer, there is no way of knowing what the amount of unpaid tax is for purposes of calculating how much penalty is to be imposed. Thus, it is clear that penalty is not imposed at the time the taxes were due but unpaid. It is only imposed at the time that the amount of unpaid taxes has been determined. In this case and in the two decisions decided by the other hearing officers, that time occurred *after* the effective date of the statutory amendment. Because the two administrative decisions relied upon by the Taxpayer disregard the plain language of Section 7-1-69 as to *when and how* penalty is calculated and imposed, I believe that they are erroneous in their conclusion that the date of assessment is irrelevant to determining which version of Section 7-1-69(A) should be applied when taxes which are due have not been paid.

In this case, there is nothing to indicate that the Taxpayer filed a return showing a liability for the taxes which were assessed in this matter prior to the commencement of the Department's audit. If the Taxpayer had done so, and had done so prior to January 1, 2008, the applicable penalty would have maximized at 10% of the unpaid taxes. The taxes were assessed as a result of an audit by the Department, which was commenced on July 16, 2008, and the assessment was issued on September 21, 2009, well after the effective date of the amendments to Section 7-1-69(A) NMSA 1978. Although the

Taxpayer may have filed returns self assessing the same taxes assessed by the Department assessment when it reported $519,622.42 in gross receipts taxes and submitted payment of that amount, that occurred on August 22, 2008, also well after the effective date of the amendments to Section 7-1-69(A) NMSA 1978. Thus, the amended version of Section 7-1-69(A) applies. Since the amended version was not applied to determine the amount of penalty assessed and contested in this matter until well after the effective date of the amended statute, it has not been applied retroactively, and the maximum applicable penalty would be 20% in this matter.

This conclusion that the amended version of Section 7-1-69(A) was not retroactively applied is also supported by a review of New Mexico case law. In Bradbury & Stamm Construction Co. V. Bureau of Revenue, 70 N.M. 226, 372 P.2d 808 (1962), the Court was called upon to determine the interest rate to be applied to a claim for refund of overpaid tax, where the overpayment occurred prior to a change of the statute specifying the amount of interest to be paid by the state on refunded taxes. In that case, the statutory amendment lowered the amount of interest which was payable. The Bureau of Revenue paid interest at the higher rate until the effective date of the statutory amendment and at the lower rate thereafter. In that case, the taxpayer contested the application of the lower rate for periods after the statute was amended, arguing that because the amount of tax due was based on circumstances occurring before the statutory amendment, the higher rate of interest should apply to the refunded taxes for all periods until the taxes were refunded. In ruling against the taxpayer, the Court relied on the general rule applicable to statutory interest on tax refunds that where there has been a change of law changing the statutory rate after the cause of action accrues, the interest should be allowed at the old rate before the amendment takes effect and the new rate after the effective date. Following this rule, the Court found that applying the new rate only after its effective date would not be giving the statutory amendment a retroactive effect. Similarly, in this case, the new penalty maximum was only applied after the effective date of the statutory change, and it was not applied retroactively.

Howell v. Heim, 118 N.M. 500, 882 P.2d 541 (1994) involved the application of a new regulation rather than an amended statute. In that case, because of a shortage of funding, the state promulgated a new regulation which limited the duration of state

funded general assistance disability benefits to twelve months, where previously there had been no limit on their duration. The plaintiffs argued that in applying this regulation, the state agency had taken into account months of disability benefits granted before the regulation's enactment in making its determination as to when twelve months of benefits had been granted, requiring the cessation of benefits. The Plaintiffs argued, that by doing so, the state was giving retroactive effect to the regulation in contravention of due process. The trial court agreed with the plaintiffs and the state appealed from that ruling. In overruling the trial court, the Court stated that:

> A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties or affixes new disabilities to past transactions. *Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque,* 111 N.M. 608,616, 808 P.2d 58, 66 (Ct.App. 1991), Cert. denied, 113 N.M. 524, 828 P.2d 957 (1992). "However, a statute does not operate retroactively merely because some of the facts or conditions which are relied upon existed prior to the enactment." Id.

Id. at 506, 882 P.2d at 547. Thus, the Court concluded that there was no retroactive application of the regulation, even though it took into account periods of time prior to its promulgation. Similarly, in this case, even though the Department considers the facts and circumstances surrounding the Taxpayer's nonpayment of taxes in determining whether the imposition of penalty is proper, the amended percentage rate was only applied when the penalty was assessed, which occurred after the effective date of the statutory amendment.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the assessment issued under letter ID. No. 1178774912 and therefore jurisdiction exists over the parties and the subject matter of this protest.

2. Section 7-1-69(A)(1) and (2) NMSA 1978, as amended by Laws 2007, ch. 45, § 4 applies to the calculation of the amount of penalty in this matter because the penalty was assessed subsequent to the effective date of that amendment.

3. There has been no retroactive application of Section 7-1-69(A)(1) and (2) NMSA 1978, as amended by Laws 2007, ch. 45, § 4 to the Taxpayer under the circumstances of this case.

FOR THE FOREGOING REASONS, THE TAXPAYER'S PROTEST IS HEREBY DENIED.

Dated:_____