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

IN THE MATTER OF THE PROTEST OF
SHANE AND KIM MCGREW, **No. 10-15**
TO ASSESSMENTS ISSUED UNDER
ID NO. L0637696384

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 16, 2010, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Ms. Ida Lujan, Special Assistant Attorney General. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Shane McGrew and Mrs. Kim McGrew ("Taxpayers") appeared for the hearing and represented themselves. The Hearing Officer took notice of all documents in the administrative file. Taxpayers were granted until September 17, 2010 to provide an additional account and routing number. The Department was asked to search its database for the account number provided and to provide the results no later than September 20, 2010. Both parties were given a deadline of September 24, 2010 to provide written final arguments. All evidence and arguments were submitted by the deadlines. Taxpayer #1, an affidavit from Mrs. McGrew; Taxpayer #2, a decision and order; Taxpayer #3, an IRS webpage; Taxpayer #4, the 2001 PIT filing instructions; and Taxpayer #5, the 2001 federal extension of time to file were admitted at the hearing. TRD "A", the assessment letter L0637696384; TRD "B", the protest letter; TRD "C", the acknowledgement of protest; TRD "D", the auditor's letter of June 5, 2009; TRD "E", the auditor's letter of July 20, 2009; TRD "F", the log history; TRD "G", the TRIMS documents; TRD "H" the Gentax document; and TRD "I", the copy of the

check on the 2003 payment were admitted at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayers were residents of New Mexico in 2001.
2. Taxpayers filed their 2001 Personal Income Tax (PIT) joint return with the Department by mail on October 15, 2002.
3. The Department determined that Taxpayers were a non-filer for the 2001 and 2003 tax years.
4. On June 13, 2008, the Department notified Taxpayers of a Limited Scope Audit for PIT years 2001 and 2003.
5. Taxpayers communicated with the Department by telephone several times in June and July of 2008. Taxpayers believed that there were required to keep their tax records for three years and had disposed of most of the documents relating to the 2001 tax year in 2005.
6. The Department determined that there was not any tax due for PIT 2003 because a payment was located in its database. The Department determined tax, penalty, and interest were due for PIT 2001.
7. On July 30, 2008, the Department assessed the Taxpayers for personal income tax, penalty, and interest for 2003 tax year in letter L1720433024. The assessment was for $504.00 tax, $0.00 penalty, and $0.00 interest. The assessment also showed a credit in the exact amount of the tax, so the amount due was $0.00.

8. On July 30, 2008, the Department assessed the Taxpayers for personal income tax, penalty, and interest for the 2001 tax year in letter L0637696384. The assessment was for $361.00 tax, $72.20 penalty, and $321.43 interest.

9. The Department calculated the penalty using a 20% cap.

10. On August 12, 2008, Taxpayers filed a formal protest letter.

11. On September 16, 2008, the Department issued the acknowledgement of protest, and detailed in its letter that Ms. Bernardo had been assigned to the case, that she would review the file and contact Taxpayers if additional information were required. The letter also indicated that an informal conference may be scheduled for further discussion and that a formal hearing would be scheduled if necessary.

12. On June 5, 2009, Ms. Bernardo issued a letter to Taxpayers giving her evaluation of the assessment and protest. Ms. Bernardo advised that if she did not hear from Taxpayers by June 22, 2009, the matter would be set for a formal hearing.

13. On July 20, 2009, Ms. Bernardo issued a letter to Taxpayers and advised that the matter would be set for a formal hearing.

14. Taxpayers did not respond to either of Ms. Bernardo's letters. At that point, Taxpayers felt frustrated by their interactions with the Department, including the failure of Department employees to return their calls and to respond in a timely manner. Taxpayers did not want to communicate any further with the Department outside of the formal hearing, which they had been told would be set.

15. Ms. Bernardo checked the Department's databases for the 2001 tax year using the account information from the 2003 payment that had been located. The Department changed its database from TRIMS to GENTAX in October 2002, the month that Taxpayers filed their

tax return for 2001. Ms. Bernardo was unable to locate a payment from that account in either database. Ms. Bernardo indicated that another person actually checked the TRIMS database because she did not have access to that database.

16. On May 25, 2010, the Department filed a Request for Hearing asking that the Taxpayers' protest be scheduled for a formal administrative hearing.

17. On September 16, 2010, at the hearing, Taxpayers indicated that their 2001 payment could have been made from three different accounts that they had active at that time, one of which was the same as the one Ms. Bernardo had already checked. Taxpayers still had the information on another one of the accounts, but did not have information on the third account because it was closed.

18. Taxpayers were given a deadline of September 17, 2010 by 5:00 PM to provide the information on the account. Taxpayers provided the information timely.

19. Ms. Bernardo was instructed to check the database for a payment using the provided account and to submit the results of her search no later than 5:00 PM on September 20, 2010. Ms. Bernardo did so and provided a statement that no payment using that account was found in the database. Ms. Bernardo also indicated that she had done an additional check for payment by entering the amount of $361, the amount of tax that was due. Ms. Bernardo limited the search by amount to payments made between October 1, 2002 and November 1, 2002. Ms. Bernardo did not find a payment for the amount of $361 during that time.

DISCUSSION

The issue to be decided is whether the Taxpayers are liable for personal income tax, penalty, and interest for the 2001 tax year, due to a failure to file a return.

Bias.

The Department objected to the Hearing Officer on the basis of bias. The Department argued that the Hearing Officer asked a question about penalty that was improper because it expanded the scope of the Taxpayers' protest. The Department also argued that it was improper for the Hearing Officer to accept evidence after the hearing and to instruct Ms. Bernardo to search the database for the payment using the account number provided after the hearing. The Department argued that this conduct was advocating on behalf of the Taxpayers and demonstrated bias. The question of bias goes to whether there is an indication that an average person would be tempted to try a case with bias for or against the issues presented. *See Reid v. N.M. Bd. Of Examiners in Optometry*, 92 N.M. 414, 589 P.2d 198 (1979).

It is the duty of the hearing officers to conduct fair and impartial hearings. *See* 3.1.8.9 NMAC (2001). Taxpayers were protesting the assessment, including the assessment of penalty and interest. A question about the penalty is directly related to the protest on the assessment of penalty. *See State v. Sedillo*, 76 N.M. 273, 414 P.2d 500 (1966) (holding that asking questions of a witness is not an indication of partiality). *See also Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 31, 123 N.M. 239, 938 P.2d 1384 (holding that intelligent, pertinent questions are not an indication of prejudice or bias). A hearing officer is required to decide cases based on the facts and the law, but is not limited to a word-for-word consideration of the parties' arguments. *See TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2000-NMCA-083, ¶ 19, 129 N.M. 539, 10 P.3d 863, *rev'd on other grounds TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2003-NMSC-007, 133 N.M. 447, 64 P.2d 474 (filed December 19, 2002). Moreover, when a party is aware of an issue and is given the opportunity to be heard on that issue, there is not an indication of prejudice or bias. *See id.* at ¶ 20. A hearing is fair and there is not bias even when a hearing officer

draws a conclusion that the parties did not argue so long as that conclusion is based on the record. *See Kmart Properties, Inc. v. N.M. Taxation and Revenue Dep't.*, 2006-NMCA-026, ¶ 57, 139 N.M. 177, 131 P.3d 27 (filed November 27, 2001), *rev'd on other grounds Kmart Properties, Inc. v. N.M. Taxation and Revenue Dep't.*, 2006-NMSC-006, 139 N.M. 172, 131 P.3d 22 (filed December 29, 2005). Evidence may be considered whether it was elicited by the parties or whether it was elicited by the fact-finder. *See Las Cruces*, 1997-NMCA-031, ¶ 32. Remarks made during the course of a proceeding and opinions expressed on the facts presented are not ordinarily considered to be bias. *See U.S. West Communs., Inc. v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 44, 127 N.M. 254, 980 P.2d 37. *See also Las Cruces*, 1997-NMCA-031 at ¶ 24 (outlining instances of what is bias and what is not).

It is within the hearing officers' purview to require the production and inspection of documents. *See* 3.1.8.9 (B) (3) NMAC (2001). Nothing limits this power to a pre-hearing time frame. *See id.* The Department could have applied to the Hearing Officer for an order requiring the Taxpayers to provide additional discovery prior to the hearing. *See* 3.1.8.13 NMAC (2001). The Department did not do so. The Department argued that Taxpayers could have responded to the June 5, 2009 and to the July 20, 2009 letter, but did not do so. Taxpayers explained that they were not volunteering any information to the Department after the protest was filed because they had already had several fruitless conversations with Department employees and they expected the case to be set for a formal hearing. Taxpayers also indicated that they were not asked for any other specific information by the Department, but that they would have provided specific information had it been requested. TRD "D" and "E" support the Taxpayers' testimony that there were not asked to provide any specific information. TRD "D" actually tells the Taxpayers that they have two options, to withdraw their protest or to be set for a formal hearing. TRD "D" also tells the Taxpayers that if

they take no other action by June 22, 2009 that the matter will be set for a hearing. TRD "E" likewise does not ask Taxpayers to provide any information. It only advises them that the matter will be set for formal hearing. At the time Ms. Bernardo was instructed to make a further inspection of the database using the provided account number, Taxpayers had already provided sufficient evidence to overcome the presumption of correctness. Affording the Department the opportunity to rebut the Taxpayers' evidence can hardly be construed as advocating on behalf of the Taxpayers. Moreover, "government also has a duty to advance the public's interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a law suit." *State ex. rel. CYFD v. George F.*, 1998-NMCA-119, fn 1, 125 N.M. 597, 964 P.2d 158. The objections are overruled. There was not an indication of bias by asking questions relevant to the protest and by requiring the production and inspection of documents.

Computation of Penalty.

The Department seeks to impose a penalty of up to 20% under NMSA 1978, § 7-1-69 (2008). The assessment was issued for taxes due in 2001. The applicable penalty statute in effect for 2001 was capped at a maximum penalty of 10%. *See* NMSA 1978, § 7-1-69 (2001). At a maximum penalty of 10%, the penalty provision had been exhausted for 2001 before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Ms Bernardo testified that the Department had assessed a 20% cap because the assessment was issued after the effective date of the 2008 amendment. Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for tax year 2001 was subject to the 10% penalty cap pursuant to NMSA 1978, Section 7-1-69 (2001). *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (holding that a modified penalty regulation would not apply retroactively when the regulation was enacted after the applicable tax year). Both the 2001

and the 2008 versions of Section 7-1-69 require that the penalty be calculated by month from the date that the tax was due until the cap is reached, not from the date of the assessment or the date that the law changed. As there is not any indication the legislature intended for the change to apply retroactively, the penalty that was required on tax due in April 2001 and for the months thereafter until the cap was met, will apply. However, based on the totality of the evidence in this case, this issue is moot.

Statute of Limitations.

Taxpayers argued that the Department's assessment was not timely because it occurred more than three years after the tax was due. *See* NMSA 1978, § 7-1-18 (A). The Department argued that it had seven years from the end of the year in which the tax is due to make an assessment. *See* NMSA 1978, § 7-1-18 (C). The Taxpayers were assessed in 2008 for the 2001 tax year. The parties agreed that the PIT for the 2001 tax year was due on April 15, 2002.

Generally, the Department may not assess more than three years after the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18 (A). However, the Department may assess no more than seven years after the end of the calendar year in which the tax was due if the taxpayer failed to file a return. *See* NMSA 1978, § 7-1-18 (C). Therefore, the timeliness of the assessment hinges on whether or not the Taxpayers filed a return.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Therefore, the assessment issued to the Taxpayers is presumed to be correct, and it is the Taxpayers' burden to present evidence and legal argument to show that they are not liable for the tax and are entitled to an abatement of penalty and interest. *See* 3.1.6.12 NMAC (2001). When a taxpayer presents evidence sufficient to rebut the presumption, the burden shifts to the

Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308 (filed October 2, 2002).

Filing of the Return.

Taxpayers presented evidence, both by affidavit and testimony, that they filed their 2001 PIT return on October 15, 2002. Taxpayers also presented evidence that they had an extension of time to file from the IRS for the 2001 tax year. The Department argued that Taxpayers were required to show that the return was received by the Department in order to overcome the presumption of correctness based on Regulation 3.1.4.10 (C) NMAC (2007). The Department again seeks to impose a regulation on the Taxpayers that was not in effect at the time their tax was due. Taxpayers' actions are expected to conform to the rules, regulations, and statutes that were in force at the time that the tax principal was due. *See Kewanee*, 114 N.M. at 790. Taxpayers established that they relied upon the 2001 PIT instructions. Taxpayers also established that they have changed how they file their returns, and now mail everything to the Department through certified mail so that they can show receipt and have begun filing online.

Returns may be filed by mail, both under the current statute and the statute in effect in 2001. *See* NMSA 1978, § 7-1-13 (2007 and 1994). All authorized mailings are timely if they are mailed on or before the date on which they are due. *See* NMSA 1978, § 7-1-9 (1997). Regulation 3.1.4.10 (C) NMAC (2000) dealt with determining timeliness when a postmark was illegible and when a delivery service other than the United States Postal Service was used. The parties agreed that the 2001 tax was due on April 15, 2002. Taxpayers received an extension of time to file their 2001 tax return from the IRS. It was undisputed by the parties that the extension went to October 15, 2002. It was also undisputed that the extension of time to file did not extend the time to pay the tax. The Department recognized extensions from the IRS to serve as

extensions to file New Mexico income tax returns as well. *See* NMSA 1978, § 7-1-13 (E) (1994).

The party relying on service by mail has the burden of proving that the mailing was done. *See Myers v. Kapnison*, 93 N.M. 215, 216, 598 P.2d 1175, 1176 (Ct. App. 1979). "A properly addressed letter that is mailed is presumed to be received." *Garmond v. Kinney*, 91 N.M. 646, 647, 579 P.2d 178, 179 (1978). Taxpayers provided evidence that they filed their return by mail on October 15, 2002. I found Taxpayers to be entirely credible on this issue. Taxpayers were able to articulate that the return was properly addressed, that they had followed the PIT 2001 instructions on mailing, and that they had deposited the return in a mailbox. Taxpayers also indicated that they mailed their federal return at the same time, using the same mailbox, and that their federal return had been processed. The Taxpayers presented sufficient evidence on the issue of the filing of the return to overcome the presumption of correctness.

The burden then shifted to the Department to show that the return was not received. *See State Farm Fire and Casualty Co. v. Price*, 101 N.M. 438, 443, 684 P.2d 524, 529 (Ct. App. 1984) (holding that the presumption that a properly addressed letter was received may be rebutted by evidence that the letter was not received). *See also MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13. The Department focused on showing that the payment was not made, but failed to show that the return was not received. Ms. Bernardo indicated that a 2001 return did not appear in the database for Taxpayers. However, Ms. Bernardo also admitted that she had no idea what is done with returns once they are received, and was not even able to say how, when, and whether or not returns are entered into the database. Taxpayers pointed out that Ms. Bernardo indicated that the Department was in the midst of changing its database from TRIMS to GENTAX in October 2002, which was the very month that Taxpayers filed their

return. Taxpayers argued that it was likely that the Department had made a mistake in processing their return, especially in light of the fact that the Department was still indicating that a 2003 PIT return was not filed even after the Department located the payment made with the 2003 return. Ms. Bernardo conceded that the transition from TRIMS to GENTAX was not a flawless one. Based upon the totality of the evidence, Taxpayers established that they filed their 2001 PIT return by mail on October 15, 2002, and the Department failed to rebut that evidence.

CONCLUSIONS OF LAW

1. Taxpayers filed a timely written protest to the Notice of Assessment of 2001 personal income taxes issued under respective Letter ID number L0637696384, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayers presented sufficient evidence to overcome the presumption of correctness, and showed that they filed their 2001 PIT return in October 2002.

3. The Department failed to show the correctness of the assessment after the presumption was overcome, and failed to assess Taxpayers within three years of the end of 2002. *See* NMSA 1978, § 7-1-18 (A). Therefore, the assessment is barred by the statute of limitations.

For the foregoing reasons, the Taxpayers' protest **IS GRANTED**. The Department is ordered to abate the assessment against Taxpayers.

DATED: October 14, 2010.