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

IN THE MATTER OF THE PROTEST OF
MCDANNALD ENTERPRISES, D/B/A/ COW PALACE **NO. 00-11**
NM ID. NO. 01-133761-00 3, PROTEST TO
DENIAL OF CLAIM FOR REFUND

DECISION AND ORDER

This matter came on for formal hearing on March 23, 2000 before Gerald B. Richardson, Hearing Officer. McDannald Enterprises, d/b/a/ Cow Palace, was represented by J.C. Robinson, Esq. of Robinson, Quintero and Lopez, P.C. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Cow Palace was a bar and restaurant owned and operated by Jerry and Harlene McDannald in Cliff, New Mexico which operated under New Mexico Retail Dispenser's Liquor License No. 108.

2. The McDannalds were experiencing financial difficulties and in July of 1995 they agreed to sell their business, the liquor license, property and improvements to Robert G. Blair and Russel Tharp, who were engaged in a joint venture to purchase and resell the assets of McDannald Enterprises.

3. In order to transfer ownership of a liquor license, a tax clearance from the Department must be obtained pursuant to Section 7-1-82 NMSA 1978.

4. When a tax clearance was sought to transfer the McDannalds' liquor license, the Department determined that no monthly CRS-1 returns reporting or paying gross receipts taxes had been filed by the McDannalds from June, 1994 through August, 1995.

5. On January 10, 1996 the Department issued Assessment No. 1992577 to McDannald Enterprises in the amount of $9,590.02 in gross receipts tax, $945.87 in penalty and $1,317.75 in interest for a total of $11,853.64 for the reporting periods June, 1994 through August, 1995.

6. The Department's assessment was a provisional or estimated assessment, since McDannald Enterprises had not filed returns for the assessment period. The assessment was estimated by using the average of the three reporting periods in which McDannald Enterprises had reported the highest amount of gross receipts during the years 1989, 1990 and 1992. Those months were November, 1989, May, 1990 and September, 1992. In each of those months, McDannald Enterprises reported gross receipts of between $11,000 and $12,000. During those three years McDannald Enterprises gross receipts were in the range of $4,000 to $12,000 per month.

7. The Department's assessment failed to take into account that the gross receipts of McDannald Enterprises, as reported, declined substantially from the levels of 1989-1992.

8. Department's methodology in estimating the gross receipts of McDannald Enterprises during the assessment period does not conform to generally accepted accounting practices for projecting estimated receipts.

9. In order for the sale and transfer of the McDannald's liquor license to be consummated, Mr. Tharp paid Assessment No. 1992577 together with the interest which had accrued to the date of payment.

10. Shortly after the sale and transfer of the property and assets of McDannald Enterprises to Messrs. Blair and Tharp, the McDannalds moved from New Mexico. They left no business records or other information from which the actual gross receipts of their business could be determined for the period covered by the Department's provisional assessment.

11. On August 3, 1998, Mr. Tharp, as the owner and successor to the Cow Palace filed a claim for refund with the Department, requesting a refund of $12,052.45, the amount he paid to satisfy Assessment No. 1992577.

12. On December 15, 1998, the Department denied Mr. Tharp's claim for refund on the basis that he had not provided sufficient information to establish that the Cow Palace was not operating during the period for which refund of taxes was claimed.

13. On December 29, 1998, counsel for Mr. Tharp filed a protest to the Department's denial of the claim for refund.

14. At the hearing, evidence was produced that the total gross receipts reported by McDannald Enterprises for the last 12 months for which reports were filed with the Department, June, 1993 through May, 1994, amounted to $43,520.38. That would represent an average of $3,626.70 in gross receipts per month.

15. When average gross receipts of $3,626.70 are projected out for the period covered by Assessment No. 1992577, June 1994 through August, 1995, the local gross receipts tax rate is applied and interest to the date the assessment was paid and penalty are applied, it would result in an estimated assessment of $3,071.40 in gross receipts tax, $307.13 in penalty and $614.00 in interest for a total estimated assessment of $3,992.53.

DISCUSSION

The issue to be determined herein is whether Mr. Tharp, as successor to the Cow Palace and McDannald Enterprises, is entitled to a refund of any portion of the amount paid to satisfy the Department's provisional assessment and to obtain the tax clearance for the sale of Liquor License No. 108. Admittedly, the Department used a methodology to estimate the amount of gross receipts of the Cow Palace for the periods for which returns were not filed which produced an assessment which was high. This is done to protect the interests of the state in obtaining all taxes it is owed. This procedure is also followed to provide leverage over taxpayers who have not filed returns to get them to file returns based upon actual receipts. When returns are filed, provided the Department believes the amounts reported are credible, the assessment can then be adjusted to reflect a taxpayer's actual receipts. In this case, because it appears that the McDannalds did not keep business records from which their actual receipts could be determined, both the Department and the McDannalds' successor are left to come up with some means to reasonably estimate the receipts.

While assessments by the Department are entitled to a presumption of correctness pursuant to § 7-1-17(C) NMSA 1978, in this case, the presumption of correctness was overcome when the Department admitted that its method of creating the provisional assessment did not conform to generally accepted accounting principles for projecting the receipts of a business. Additionally, the presumption of correctness was overcome by demonstrating that the Department's methodology failed to take into account the decline in the receipts of the Cow Palace during the years subsequent to the periods the Department used in calculating its provisional assessment. It appears that a far more reasonable method to calculate the Cow Palace's receipts is that contained in Department's Exhibit B, which averaged the Cow Palace's reported receipts for the last twelve months for which receipts were reported and projected them over the next fifteen months for which reports were not filed. Mr. Tharp concurs that this is a reasonable methodology to calculate the gross receipts tax liability of the Cow Palace for the periods covered by the Department's provisional assessment. There being no evidence of any other method which would be more accurate, it is concluded that Mr. Tharp, as successor to McDannald Enterprises, d/b/a/ the Cow Palace, is entitled to a refund of the difference between his refund claim in the amount of $12,052.45 and the $3,992.53 shown on the Department's Exhibit B, or $8,059.92.

CONCLUSIONS OF LAW

1. Mr. Tharp filed a timely, written protest to the Department's denial of his claim for refund and jurisdiction lies over both the parties and the subject matter of this protest.

2. Mr. Tharp overcame the presumption of correctness which attached to Assessment No. 1992577.

3. A more reasonable estimate of the gross receipts of McDannald Enterprises d/b/a/ the Cow Palace is contained in Department's Exhibit B.

For the foregoing reasons, the Taxpayer's protest IS HEREBY PARTIALLY GRANTED AND PARTIALLY DENIED.

IT IS HEREBY ORDERED THAT THE DEPARTMENT GRANT THE CLAIM FOR REFUND IN THE AMOUNT OF $8,059.92.

DONE, this 30th day of March, 2000.