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

IN THE MATTER OF THE PROTEST OF
KID'S KOUNTRY **No. 02-08**
ID NO. 02-103871-00-6
ASSESSMENT NOS. 2698908 & 2698909

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 8, 2002, before Margaret B. Alcock, Hearing Officer. Kid's Kountry was represented by Greg Sowards ("Taxpayer"), its owner. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. From January 1995 through April 2001 ("audit period"), the Taxpayer operated a day care facility in New Mexico.

2. In addition to providing meals and day care services to the general population of children, the Taxpayer provided meals and services to children covered by government programs administered by the New Mexico Children, Youth and Families Department ("CYF").

3. Under his agreement with CYF, the Taxpayer received payments for all or a portion of meals provided to children covered by the program, as well as payments for day care services provided to the children.

4. The Taxpayer did not understand that while sales of food to the government are not subject to gross receipts tax, sales of services to the government are taxed. As a

result of his misunderstanding of the law, the Taxpayer paid gross receipts tax on receipts paid directly by parents, but deducted all of his receipts from CYF.

5. The Taxpayer never consulted with an accountant or an attorney to insure that his taxes were being reported properly.

6. At some point during the audit period, CYF added language to its contracts that specifically notified contractors that they were subject to New Mexico gross receipts tax on payments received from CYF.

7. Although the Taxpayer read this language, he assumed that CYF was deducting the gross receipts tax from his payments because the warrant form used by CYF listed the payments under a column heading that read "Net Amount."

8. The warrant form did not indicate that gross receipts tax had been deducted from the Taxpayer's payments, nor did the Taxpayer call CYF to confirm that the agency was paying the gross receipts tax on his behalf.

9. During the audit period, the Taxpayer received a notice from the Department questioning whether he had filed gross receipts tax reports for certain months. The Taxpayer had, in fact, filed such returns and sent copies of his cancelled checks to the Department. When the Department later requested the same information, the Taxpayer refused to provide copies of his cancelled checks a second time.

10. The Taxpayer was irritated by this incident, which he termed as "harassment", and subsequently attached "post-it" notes to several returns inviting the Department to audit him. The Department did not respond to these notes.

11. In 2001, the Taxpayer was selected for audit under the Department's normal selection process.

12. The auditor determined that the Taxpayer had erroneously deducted his receipts from providing day care services to CYF. Because this resulted in the Taxpayer being more than 25 percent underreported, the auditor extended the audit back six years pursuant to the provisions of Section 7-1-18(D) NMSA 1978.

13. On September 12, 2001, the Department issued the following assessments of gross receipts tax, plus accrued interest, to the Taxpayer. No penalty was assessed.

Assmnt #	Reporting Periods	Gross Receipts Tax	Interest
2698908	Jan. 1995-Dec. 2000	$55,355.16	$25,087.51
2698909	Jan. 2001-April 2001	$ 4,512.36	$ 311.42

14. The Taxpayer paid the tax principal. On December 10, 2001, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the assessment of interest.

15. By the time payment of the underlying tax was made on Assessment 2698909, an additional $254.07 of interest had accrued. Accordingly, the total amount of interest in dispute is $25,653.00.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the interest assessed on his late payment of gross receipts tax on his receipts from providing day care services to CYF during the audit period. The Taxpayer believes that he should be excused from payment of interest for the following reasons: (1) CYF originally failed to notify him that he was liable for gross receipts tax on the payments he received and misled him by designating its payments as the “net amount” due to the Taxpayer; (2) the Department waited too long to audit the Taxpayer and unreasonably chose to extend its audit to six

years instead of limiting the audit to the normal three-year period; and (3) the 15 percent rate used to calculate interest is an unfair penalty on taxpayers.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 NMSA 1978 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 also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the Department's assessment of interest is presumed to be correct, and it is the Taxpayer's burden to present evidence showing he is entitled to an abatement.

Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

> A. If a tax imposed is not paid on or before the day on which it becomes due, **interest shall be paid** to the state on that 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 legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, Section 7-1-13(E) NMSA 1978.

In this case, the Taxpayer argues that he should be excused from payment of interest because it was the responsibility of CYF or the Department to insure he was

properly paying his gross receipts taxes. This argument is based on a misunderstanding of New Mexico's self-reporting tax system. It is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). If a taxpayer does not have adequate knowledge or information to complete his tax returns, he has an obligation to consult with a qualified accountant or attorney. In *Tiffany Construction, supra*, the court held that a taxpayer's mere belief that taxes are not owed, without further investigation, constitutes negligence.

Here, the Taxpayer complains that CYF did not properly advise him of his tax obligations and that the Department waited too long to respond to his requests for an audit. The evidence shows, however, that the Taxpayer ignored his own responsibility for determining his tax liability. From the time he began business in 1989 until the time he was audited in 2001, the Taxpayer never consulted with a tax advisor or engaged an accountant to audit the Taxpayer's records and insure he was in compliance with New Mexico's tax laws. When the Taxpayer read the language in CYF's contracts specifically notifying him of his liability for gross receipts tax on CYF payments, the Taxpayer made no further inquiry. He simply assumed, based on a column heading on a preprinted form, that CYF was paying the taxes on his behalf. Even though CYF's warrant form made no mention of gross receipts tax and did not show any deduction or withholding of tax, the Taxpayer never called CYF to confirm his belief that taxes were being paid. Given these facts, there is no basis for the Taxpayer's position that the state was responsible for his underpayment of gross receipts taxes.

The Taxpayer's next argument is that the Department should have limited its audit to three years instead of extending the audit back to 1995. This was not a matter within the Department's discretion. Section 7-1-18(D) NMSA 1978 states as follows:

> D. If a taxpayer in a return understates by more than twenty-five percent the amount of his liability for any tax for the period to which the return relates, appropriate assessments may be made by the department at any time within six years from the end of the calendar year in which payment of the tax is due.

The Taxpayer relies on the legislature's use of the word "may" to argue that the Department can choose whether to invoke its right to assess taxpayers for the full six-year period. This argument has already been addressed—and rejected—by the courts. In *Taxation & Revenue Department v. Bien Mur Indian Market Center, Inc.*, 108 N.M. 228, 231-232, 770 P.2d 873, 876-877 (1989), the New Mexico Supreme Court held as follows:

> Bien Mur argues that the Department nevertheless has discretion under Section 7-1-18 to go back either three years or six years in making an assessment.... We disagree. Section 7-1-17(A) makes assessment mandatory when a taxpayer owes more than ten dollars in unpaid taxes; the various provisions of Section 7-1-18 simply limit the number of years following the filing of a return during which the Department is authorized to exercise this mandate. If the Department may make the assessment under one of the provisions in Section 7-1-18, Section 7-1-17(A) mandates the Department shall do so when the amount owed is in excess of ten dollars.... Section 7-1-18(D) does not afford the Department discretion to go back only three years rather than six when making an assessment, and principles of estoppel do not affect the Department's application of the longer assessment period.

The Department is bound by this decision, and there is no legal basis for limiting the Department's assessment of unpaid tax or interest to three years.

Finally, the Taxpayer argues that the rate of interest imposed by Section 7-1-67 NMSA 1978 is too high and imposes an undue hardship on taxpayers. The fairness or unfairness of a statute passed by the legislature is not something the Department can consider. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-

775, the supreme court made the following observations concerning the power of administrative agencies:

> Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. See *State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.

The job of the Department's hearing officer is to determine whether the Department has properly applied the law as written. Neither the Department nor its hearing officer has authority to question the wisdom of the laws passed by the legislature or modify the application of those laws based on the financial or personal situations of individual taxpayers.

In this case, the Taxpayer failed to pay gross receipts tax due to the state. Although this failure was not intentional, the fact remains that the Taxpayer—not the state—had use of those tax funds during the six-year period at issue. Section 7-1-67 NMSA 1978 requires interest to be paid for any period of time during which the state is denied the use of the funds to which it is legally entitled. Accordingly, interest was properly assessed against the Taxpayers and there is no basis for abatement.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 2698908 & 2698909, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was late in paying gross receipts taxes due to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

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

DATED April 11, 2002.