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

IN THE MATTER OF THE PROTEST OF
QUANTUM CORPORATION,
ID. NO. 02-937837-00 8, No. 96-24
PROTEST TO ASSESSMENT NOS.
1882465 AND 1968349

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on October 1, 1996. Quantum Corporation, hereinafter, "Taxpayer," was represented by Robert D. Gorman, Esq. The Taxation and Revenue Department, hereinafter, "Department," was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a New Mexico corporation whose business is to acquire buildings, through lease agreements, which it remodels and customizes for purposes of conducting bingo games. It then enters into "Bingo Lease" agreements with non-profit operations who conduct bingo games during specified periods or "sessions" pursuant to the bingo lease agreements. The Taxpayer also operates a snack bar operation in those buildings during the bingo sessions.

2. The Bingo Lease agreements describe the "premises" leased by describing the name of the bingo hall building and giving its street location. The premises are described to include the equipment located on the premises. The premises specifically exclude a designated amount of square footage for the snack bar area.

3. The operation of bingo games is regulated by the Bingo and Raffle Act which is administered by the New Mexico Regulation and Licensing Department. The Taxpayer is not licensed to conduct bingo games under the Bingo and Raffle Act, but the non-profit entities, hereinafter "bingo

operators" which enter into Bingo Lease agreements with the Taxpayer are licensed to do so.

4. The Regulation and Licensing Department limits the amount of rent that bingo operators may pay for bingo sessions to $100 per session. The Regulation and Licensing Department does not regulate the rent that bingo licensees may pay for the rental of bingo equipment. In order to adequately compensate the Taxpayer for providing the premises and equipment to the bingo operators the Bingo Lease provides for rental payments of $150 per session, broken down into $100 per session for rent for the premises and $50 for rent for equipment. The lease does not identify or otherwise specify what is "equipment" under the lease.

5. The Taxpayer leases three buildings in Albuquerque which it customized for purposes of conducting bingo games. Those bingo halls are called Casino Park, Freeway 7 and Route 66.

6. The Regulation and Licensing Department limits bingo licensees to five bingo sessions per week and no more than two sessions per day. The Taxpayer, to maximize its rental revenues, has found that what works best is to seek to have seven bingo operators per building, with four sessions per week per operator.

7. The bingo halls are large open spaces, with tables and folding chairs set up for bingo patrons. There is a bingo flashboard which shows the numbers pulled out from the blower machine, which tumbles the balls upon which the bingo call numbers are written. There are television monitors which display the balls and call numbers as they are pulled from the blower machine. There are counters from which pull tabs are sold. There is a manager's office, which is available for use by each bingo operator during its bingo session. Each bingo operator has a floor safe which is located in the manager's office for its exclusive use. Each building also has a public address system and speakers. There are secure storage closets at each bingo hall, with the bingo operators having exclusive access to their storage closets in which they can store all of their bingo supplies.

8. The Taxpayer operates a snack bar in each bingo hall during bingo sessions. Each bingo lease agreement specifically excludes from the premises leased the square footage allocated for

operation of the snack bar. The snack bars are staffed by employees of the Taxpayer.

9. The Taxpayer enters into a Bingo Lease agreement with each bingo operator for a one year term. The lease term is further limited to specified "sessions," which range in length from two and one half hours to twenty-five minutes. The rent of $150 per session is the same regardless of the length of the session. The bingo operator is given access to the bingo hall one-half hour before and after each session for purposes of setting up and closing their bingo operation. Bingo operators may also make reasonable requests to the Taxpayer for access at other times. Each bingo operator is given a building key and the alarm code for the building.

10. The bingo leases establish a management committee, consisting of the managers of each bingo operator, as well as a representative from the Taxpayer. The management committee may set policies for the building. The bingo leases also provide that the Taxpayer, in its sole discretion may also establish building policies and in the event of a conflict or inconsistency between the policy set by the building committee and the Taxpayer, the Taxpayer's policy will control.

11. Under the bingo leases, rent is due for all designated sessions during the lease term even if a bingo operator does not actually use the building for the operator's designated sessions.

12. The bingo leases prohibit the bingo operators from assigning or subletting their interest under the lease and prohibit them from making alterations, improvements or additions to the premises without the written consent of the Taxpayer.

13. The bingo leases require the bingo operators to allow the Taxpayer to enter the premises at any time. The leases impose no restrictions on the purposes for which the Taxpayer may enter the premises.

14. Under the bingo leases, the costs of utilities and janitorial supplies are equally divided, in pro-rata shares, between the various bingo operators and the Taxpayer, as operator of the snack bar. The Taxpayer handles the payment of these expenses and obtains pro-rata reimbursement of these expenses from the various bingo operators.

15. The bingo operators are limited in their use of the bingo halls under the bingo lease agreements. The operators may only use the premises for operating bingo sessions and related services. The operators may not permit their children or their employees children under the age of 14 in the building. Operators may not allow food or drink to be brought into the building from the outside. The operators and their employees are prohibited from adjusting the heating or air conditioning systems and must refer requests to adjust those systems to the Taxpayer. Shopping carts and bicycles are not allowed in the building. Operators may not permit solicitation to be conducted in the bingo halls.

16. The bingo operators are required to carry public liability insurance covering bodily injury and property damage liability arising from the use of the bingo halls.

17. The bingo operators at the Route 66 bingo hall desired that a security camera system be purchased and installed in the bingo hall. The Taxpayer secured a loan and with the loan proceeds it purchased a security camera system and had it installed. The Taxpayer charges each bingo operator a proportionate share of the cost of purchase and financing the security camera system and obtains reimbursement of those costs in monthly increments from the bingo operators.

18. The bingo operators are required to provide security guards for their bingo sessions.

19. The bingo lease provides that the lease shall not be deemed an asset of the lessee as a result of an assignment for the benefit of creditors, the adjudication of bankruptcy, the appointment of a receiver or the issuance of various writs or other court orders against the lessee or the lessee's property.

20. The Taxpayer was advised by its attorney, Peter Lindborg, that it was not liable for gross receipts tax upon its rental receipts from the bingo operators because such receipts were exempt from taxation as receipts from the lease of real property.

21. An employee of the Taxpayer had a telephonic discussion with an unknown Department employee and was advised that the receipts from the lease of real property are exempt from

gross receipts tax. It was also explained that to the extent that equipment is a fixture to real property, receipts from leasing such equipment would also be exempt as receipts from the lease of real property. The Taxpayer never sought a written ruling from the Department with regard to its taxability under the specific terms of the bingo lease agreements with the bingo operators.

22. The Taxpayer did not report or pay gross receipts tax upon its receipts under the terms of the bingo lease agreements.

23. The Taxpayer was audited by the Department.

24. The Taxpayer's business location, since it started business in 1984 is 5700 Harper, NE, Suite 390, Albuquerque, NM 87103.

25. Mr. Rick Archuleta owns both the Taxpayer and Mentor Corporation. Mentor Corporation's mailing address, since 1978, has been PO Box 343, Albuquerque, NM 87103.

26. On December 28, 1994, the Department mailed the Taxpayer Assessment No. 1882465 using PO Box 343, Albuquerque, NM 87103 as the mailing address for the Taxpayer.

27. The Taxpayer never received the copy of Assessment No. 1882465 mailed on December 28, 1994.

28. The Taxpayer learned of Assessment No. 1882465 when it received a billing notice from the Department which was postmarked on January 5, 1995 which was mailed to the Taxpayer at the 5700 Harper address.

29. Assessment No. 1882465 assessed $58,947.07 in gross receipts tax, $5,894.71 in penalty and $42,998.86 in interest for the reporting period of January 1, 1988 through December 31, 1991.

30. The Taxpayer requested an extension of time to protest Assessment No. 1882465 and was granted an extension of time until March 28, 1995 by the Department.

31. On March 23, 1995 the Taxpayer filed a written protest to Assessment No. 1882465 with the Department.

32. The Department later adjusted Assessment No. 1882465 to reduce the gross receipts tax assessed to $49,093.86, to reduce the penalty to $4,909.39 and reduce the interest (through the assessment date) to $42,317.05.

33. On October 30, 1995 the Department mailed Assessment No. 1968349 to the Taxpayer, assessing $73,223.86 in gross receipts tax, $7,322.40 in penalty and $ 25,340.47 in interest.

34. On November 12, 1995 the Taxpayer filed a written protest to Assessment No. 1968349 with the Department.

35. The Department's registration records at the time that Assessment No. 1882465 was mailed to the Taxpayer reflected that the Taxpayer's mailing address was PO Box 343, Albuquerque, NM 87103.

36. On March 8, 1990, the Taxpayer mailed the Department a registration change request which reflected the Taxpayer's current mailing address to be PO Box 343, Albuquerque, NM 87103. The registration change request was signed by Dave Hill, whose title was listed as "Bookkeeper."

37. The Department had no record of receiving anything from the Taxpayer subsequent to the March 8, 1990 registration change request which requested that the Department change its records to reflect a different address for the Taxpayer than the PO Box 343 address.

38. The Taxpayer uses the 5700 Harper address when filing its monthly CRS-1 returns with the Department.

DISCUSSION

The primary issue for determination herein is whether the Taxpayer's rental receipts from the bingo operators are receipts from the lease of real property, which are deductible from gross receipts tax pursuant to Section 7-9-53 NMSA 1978 or whether they are receipts from granting a license to use real property, which receipts would be subject to tax.

Section 7-9-53(A) provides in pertinent part as follows:

> Receipts from the sale or lease of real property and from the lease of a manufactured home as provided in Subsection B of this section, ... may be deducted from gross receipts.

Although "lease" is not defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978, "leasing" is defined as follows:

> "leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, *except that the granting of a license to use property is the sale of a license and not a lease*; (emphasis added).

Section 7-9-3(J) NMSA 1978. Although the definition of leasing appears to be quite broad, the inclusion of language specifically excepting licenses makes it clear that mere licenses to use property do not amount to a lease of property. Licenses are not defined under the Gross Receipts and Compensating Tax Act. In the absence of a statutory definition, the term "license" is to be given its ordinary meaning. ***New Mexico Sheriffs and Police Ass'n v. Bureau of Revenue***, 85 N.M. 565, 514 P.2d 616 (Ct. App. 1973).

The distinction between a lease of real property and a license to use real property is discussed at 49 Am Jur 2d, Landlord and Tenant §21, wherein it is stated:

> Whether an instrument is a license or a lease depends on the intention of the parties as ascertained from the instrument itself. A license is an agreement which merely entitles a party to use the land of another for a specific purpose, subject to the management and control retained by the owner; a license conveys no interest in the land, is ordinarily not assignable, and may be contracted for or given orally. In contrast, a lease conveys an interest in land, must be in writing in order to comply with the statute of frauds, and transfers possession of the land. Exclusive possession of the leased premises is essential to the character of a lease; if the instrument does not grant possession, but grants only the privilege to use the premises under the owner, the instrument is a license, not a lease. There must be a conveyance of a definite space in order for a lease, rather than a license to exist; both the extension and the location of the space within the lessor's premises must be specified. In addition, a lease may also be distinguished from a license in that the terms of a lease is limited to endure for a definite and ascertained period, however short or long the period may be.

Examining the Bingo Lease Agreement at issue herein, it appears that there are elements indicating both the existence of a lease and the existence of a license, making the determination of this issue a difficult task.

The Bingo Lease Agreement calls itself a "lease," but that is not determinative in itself. This is because the character of the instrument is not to be determined by its form but from the intention of the

parties as shown by the contents of the instrument. ***Transamerica Leasing v. Bureau of Revenue***, 80 N.M. 48, 450 P.2d 934 (Ct. App. 1969). The elements of this agreement which are consistent with its characterization as a lease of real property follow. There is a conveyance of a definite space, the bingo hall, less the square footage for the snack bar area. There is also a definite term to the lease, one year, although it is broken down into rather short sessions, ranging from a little over one hour (including set up and break down time) to several hours at a time during each week of the lease term. In this regard, the Department argues that the fact that the property is leased during these short "sessions" is a factor which indicates a license rather than a lease. Although I must admit that I find it conceptually difficult to conceive of a lease of real property for such short periods of time, I found nothing in my research to support this conclusion, and in fact, the Court of Appeals decision in ***Strebeck Properties, Inc. v. Bureau of Revenue***, 93 N.M. 262, 599 P.2d 1059 (Ct. App. 1979) indicates that one can "lease" a coin operated washing machine by paying for a wash cycle, although this case dealt with a lease of tangible personal property rather than a lease of real property. Thus, I am unable to conclude that the short nature of the sessions precludes consideration of the bingo leases as leases. Other factors indicating a lease are that the bingo operators are liable for rent regardless of whether they actually use the bingo hall during their allotted sessions, that the bingo operators are required to carry public liability insurance for damages arising from their use of the bingo halls, and the bingo operators are required to provide their own security guards during their bingo sessions.

There are also factors which are indicative of a license rather than a lease, however. Perhaps the most significant factor in determining whether a lease or a license exists is whether the tenant's possession of the premises is exclusive. As stated in 49 Am Jur 2d ***Landlord and Tenant***, §22:

> The lessee's possession of the leased premises is essential to the character of a lease. To create a leasehold estate, the tenant must be vested with exclusive possession of the property to the lessee, even against the owner of the fee. In addition, there is authority for the view that although a person may be in possession of the premises, he or she is not a "lessee" unless he or she also has exclusive control of the premises.

In determining the existence of a lease or a license with respect to real property, New Mexico's courts

have based their determination on the issue of the exclusivity of possession. ***Cutter Flying Service, Inc. v. Property Tax Department***, 91 N.M. 215, 572 P.2d 943 (Ct. App. 1977), involved the determination of whether certain leasehold interests acquired by airlines and airport operators from the City of Albuquerque were subject to ad valorem taxation as interests in real property or whether they were personal property exempt from taxation. The court ruled that for areas where the tenants had exclusive possession, such as an airline's ticket counter, baggage handling counter and operations space the tenants interests were leasehold interests in real property and were subject to tax, but for areas used jointly with other airlines such as passenger gates and holding areas, baggage claim areas, runways and ground areas used for parking, taxiing, loading and unloading aircraft, the tenants held mere licenses to use property, which were not subject to taxation. ***Id.*** 91 N.M. at 219-220. Similarly, in a case involving the same deduction at issue herein for receipts from leasing real property, the Court of Appeals ruled that the taxpayer's receipts from companies pursuant to agreements which provided for the use of space in the taxpayer's department stores for the purpose of retailing certain items were not deductible because there were licenses to use property and not leases of real property. ***S.S. Kresge Company v. Bureau of Revenue***, 87 N.M. 259, 531 P.2d 1232 (Ct. App. 1975).

In this case, although the Taxpayer argues that the bingo operators are given exclusive possession of the premises during their sessions, the facts show otherwise. The bingo leases require the bingo operators to allow the Taxpayer to enter the premises at any time and impose no restrictions (such as a limited right of entry for purposes of inspecting the premises) on the Taxpayer's right of entry. In fact, the Taxpayer has its employees in the bingo halls during the bingo operator's sessions because the Taxpayer's employees manage the snack bar during the sessions. The Taxpayer admitted that its employees would have access to areas other than just the snack bar during sessions, such as the restrooms in the building.

The issue of control of the premises is also indicative of a license rather than a lease of the bingo halls. The Taxpayer manages the building, ensuring that utility bills are paid and janitorial

supplies are stocked and provided, and it obtains a pro-rata reimbursement from each bingo operator. The Taxpayer admitted that if a water pipe burst in the building, it would be responsible for taking care of the situation. Under the Bingo Lease Agreements, the Taxpayer retains substantial control over the bingo halls. The agreements limit the use of the buildings to conducting bingo and related services. Children are not allowed in the building, nor may the operators allow their customers to bring food and drink into the building from outside. Shopping carts and bicycles are not allowed in the building. The bingo operators cannot make any alterations or improvements to the bingo halls without the Taxpayer's consent. The bingo operators cannot even adjust the heating or cooling systems in the building, but must request any adjustments through the Taxpayer. Also, although the bingo operators form a management committee to set building policies, those policies are subject to and subservient to any policies determined by the Taxpayer. Thus, the Taxpayer retains a substantial amount of control over the bingo halls even during the bingo sessions.

The Bingo Lease Agreements also provide that the lease is not to be considered an asset of the bingo operator which could be assigned to creditors or treated as an asset of the operator in the event of a bankruptcy. This provision is consistent with the concept that licenses are terminable or revocable, in contrast to a lease which, because it constitutes an interest in real property during its term, would qualify as an asset of a debtor.

Weighing the indicia of a lease against the indicia of a license to use the property, I find that the absence of exclusive possession and control of the bingo halls by the bingo operators indicative of a license to use property rather than the lease of real property, and therefore the Taxpayer's receipts from rental of the bingo halls are subject to gross receipts. Having determined this, the subsidiary issue of whether the portion of the rent attributable to the rental of equipment is subject to tax need not be determined, because this issue turned on the Taxpayer's contention that 85 percent of the equipment rental receipts were for equipment which could be considered a fixture to the real estate being leased, which would also render those receipts deductible pursuant to Section 7-9-53(A) NMSA 1978.

The next issue to be determined is whether the amounts that the Taxpayer received from the bingo operators to reimburse it for the cost of purchasing and installing a video surveillance system in the Route 66 bingo hall are gross receipts which are subject to tax. Apparently, the bingo operators decided that they wanted a video surveillance system which they could use during their bingo sessions. The building management committee met and determined which system they wanted. The Taxpayer agreed to purchase and install the system and to recoup its costs for doing so by spreading each bingo operator's share of the cost over time, receiving monthly payments to repay those costs. The Taxpayer purchased the system from a vendor and had it installed in the building.

The Taxpayer argues that because the bingo operators are responsible for providing security and since the video camera system is for the purposes of satisfying their obligation to provide security and is for their benefit, that the payments to the Taxpayer were received by the Taxpayer as an agent for the operators in satisfying their obligation to the vendor of the system.

The gross receipts tax "is imposed on any person engaging in business in New Mexico." Section 7-9-4(A) NMSA 1978 (1995 Repl. Pamp.). The tax is imposed upon gross receipts, which means "the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico, from selling services performed outside New Mexico the product of which is initially used in New Mexico or from performing services in New Mexico." Section 7-9-3(F) NMSA 1978 (1995 Repl. Pamp.). There is a presumption that all receipts of a person engaging in business are subject to the gross receipts tax. Section 7-9-5 NMSA 1978 (1995 Repl. Pamp.). The taxpayer therefore has the burden of overcoming this presumption that all of its receipts are subject to tax.

There is no statutory exclusion in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978 for money received as reimbursement for business expenses. The courts have recognized a common law exception, however, to exclude from gross receipts amounts which are received in the capacity of a trustee or agent. *See,* ***Westland, Corp. v. Commissioner of Revenue,*** 83

N.M. 29, 33, 487 P.2d 1099 (Ct. App.), ***cert. denied***, 83 N.M. 22, 487 P.2d 1092 (1971).

The issue of determining when a taxpayer's reimbursed expenses qualify for the agency exception to the imposition of gross receipts tax is a difficult one which has been the subject of extensive discussion by our courts in recent years. *See,* ***Carlsberg Management Co. v. New Mexico Taxation and Revenue Department***, 116 N.M. 247, 861 P.2d 288 (Ct. App. 1993), and ***Brim Healthcare, Inc. v. State, Taxation and Revenue Department***, 119 N.M. 818, 896 P.2d. 498 (Ct. App. 1995). The ***Carlsberg*** case involved a determination of whether a property management company which managed apartments in a federally subsidized rent program on behalf of the apartment owner was liable for gross receipts tax upon its reimbursements of employment expenses incurred with respect to employees retained to manage and operate the apartments. The rule adopted by the court in its decision is if a party only receives money either as an advance for future payment of or reimbursement for past payment of *another's* employment related obligations, then an agency relationship exists sufficient to avoid taxation of those funds as gross receipts. ***Id***. at 251, 861 P.2d at 292. In that case, the court then examined the contractual agreement between the apartment owner and the management company (the taxpayer), looking at the degree of control retained by the owner with respect to the taxpayer's payment of employee related expenses. Because the apartment rents were federally subsidized, there were extensive federal requirements which the court concluded left the taxpayer with no discretion concerning the timing of payroll, the wages to be paid, etc. The court also concluded that the broad indemnification clause in the contract requiring the owner to pay the taxpayer for these employment expenses was an indication that the payment of wages to these on-site employees was ultimately the duty of the owner and not the manager. Based on these considerations, the court concluded that an agency relationship existed and that the taxpayer was not subject to gross receipts taxes upon its reimbursements of employee related expenses.

In the ***Carlsberg*** decision, the Court of Appeals was careful to limit its holding based upon the facts of that case and left for another day its ruling on a "less-pervasive agency relationship." ***Id.*** at

252, 862 P.2d at 293. That day arrived on May 1, 1995 when the Court of Appeals issued its decision in ***Brim Healthcare***. That case also involved the reimbursement of employee related expenses, but in the context of a taxpayer providing hospital management services and key hospital employees, rather than apartment management services involving employees who operate and maintain the apartment complexes. The court found the facts in ***Brim Healthcare*** to be distinguishable from those in ***Carlsberg*** and found that no agency relationship existed with respect to the employees, but found, rather, that the employees were Brim Healthcare employees and that rather than being a mere conduit for funds to be paid to third parties, Brim was receiving payments from the hospitals for its own account and then expending them to meet its own responsibilities. ***Id.***, 896 P.2d at 500. It based this conclusion upon the degree of control which the management company retained over the employees and the employment costs at issue, the lack of an agency designation in the contract which had existed in ***Carlsberg,*** and the absence of the broad indemnification clause in the contract which had existed in ***Carlsberg***. In deciding ***Brim***, the court also went on to carefully analyze the California authority upon which it had relied in deciding ***Carlsberg***. That analysis revealed that the determinative factor in determining taxability was whether the personnel for whom the cost reimbursements were received were actually employees of the client of the taxpayer (in which case, the reimbursements were treated as merely receipts of an agent as a conduit of funds for the principal client) or whether the personnel were employees of the taxpayer and the reimbursements were received as a cost of performing the taxpayer's contractual obligations for the client, and were taxable gross receipts. ***Id.***, 896 P.2d at 500-502.

I fail to see the applicability of the agency theory to the facts of this case. In the first place, the bingo lease agreements only require that the bingo operators provide security *guards* during their respective sessions. See, paragraph 17(d) of the Bingo Lease Agreement. They are not obligated to provide security camera systems, and the fact that the system at issue was only for the Route 66 bingo hall and the other halls did not have such systems provides further support for this interpretation.

Additionally, the system was purchased by the Taxpayer and there was no evidence presented that the vendor of the system had any knowledge or information that the system was for the benefit of anyone other than the Taxpayer. Thus, there was no disclosure of an agency relationship to the vendor at the time of the purchase.

Even if we apply the agency analysis applied by the court in the ***Carlsberg*** and ***Brim Healthcare*** decisions to the case at hand, it is apparent that the Taxpayer was not a mere conduit of funds for the payment of the bingo operators' obligations to the vendor of the system, but that the Taxpayer was receiving reimbursement for the payment of its own obligations with respect to its purchase of the video camera system. Under these circumstances, the Taxpayer's receipts are simply receipts from the sale of the video camera system to the bingo operators which would be subject to gross receipts tax.

The next issue to be determined is the validity of the portion of Assessment No. 1882465, which assesses taxes, penalty and interest for January through December, 1988. The basis for the Taxpayer's argument that the assessment for 1988 is invalid is that although the Notice of Assessment was mailed on December 28, 1994, the Taxpayer did not receive a copy of the assessment until early January, 1995. The Taxpayer argues that the assessment is not effective until it is mailed or delivered to the Taxpayer, that because the assessment was mailed to an improper address and it was not delivered to the Taxpayer until 1995, that the assessment of taxes for 1988 was barred by the operation of Section 7-1-18 NMSA 1978, the statute of limitations on the assessment of tax by the Department.

The pertinent provision of Section 7-1-18, subsection D, provides as follows:

> 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 was due.* (emphasis added).

In this case, since the Taxpayer failed to report any gross receipts tax on the basis of its erroneous belief that its receipts were deductible, the six year statute of limitations period is applicable. If the assessment cannot be considered as valid until it was actually received by the Taxpayer, then all

amounts assessed for the January through November, 1988 reporting periods would be beyond the statute of limitations.[1]

In this case, the Department mailed the assessment to the Taxpayer using a PO Box 343, Albuquerque, New Mexico 87103 address (the "post office" address). Although the Mr. Archuleta, the president of the Taxpayer, uses that address for another corporation he owns, I found his testimony to be quite credible when he testified that he did not receive the Department's mailing of the assessment, and only found out about it when he received the Department's billing notice the following month. Because of the short notice that the Department had that the Taxpayer was raising this statute of limitations issue, the Department was unable to locate a copy of the Taxpayer's original registration request to the Department, from which it could be ascertained which address the Taxpayer used when initially registering with the Department. The Department was able to produce a registration change request from the Taxpayer, however, dated March 8, 1990, which used the post office address. The Department also produced other evidence that the Department's registration records at the time the assessment was mailed indicated the post office address as the Taxpayer's address.

Section 7-1-17(B)(2) provides as follows:

> Assessments of tax are effective ... 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; (emphasis added).

Thus, an assessment is effective if it is mailed, and actual receipt of that mailing is not required under this provision. To determine if the mailing at issue was a proper mailing to render the assessment effective, reference to Section 7-1-9(A) NMSA 1978 is necessary. It provides as follows:

> Any notice required or authorized by the Tax Administration Act to be given by mail is effective if mailed or served by the secretary or the secretary's delegate to the taxpayer or person *at the last address shown on his registration certificate or other record of the department. ...* (emphasis added).

[1] Since the December, 1988 return would not have been due until January 25, 1989, pursuant to Section 7-9-11 NMSA 1978, assessment for that period would not be barred.

In this case, the Department apparently had two addresses for the Taxpayer, since it sent the billing notice to the 5700 Harper address which was the Taxpayer's business location address and was also the address the Taxpayer used when filing its monthly tax returns. Nonetheless, the post office address was the last address on the most recent registration record the Taxpayer provided to the Department and was a proper address for the Department's mailing. Having determined that the Department's mailing was proper, and the mailing was done within the applicable six year statute of limitations, the assessment for 1988 was proper.

The final issue to be determined is whether the assessment of penalty was proper. The imposition of penalty is governed by the provisions of Section 7-1-69(A) NMSA 1978 (1990 Repl. Pamp.), which provides as follows:

> In the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid ..., there shall be added to the amount two percent per month or a fraction thereof...not to exceed ten percent of the tax...as penalty,....

This statute imposes penalty based upon negligence (as opposed to fraud) for failure to timely pay tax. Thus, the good faith of the Taxpayer in fairly reporting its taxes is not at issue. What remains to be determined is whether the Taxpayer was negligent in failing to report its taxes properly. Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation TA 69:3 as:

1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
2) inaction by taxpayers where action is required;
3) inadvertence, indifference thoughtlessness, carelessness, erroneous belief or inattention.

In this case the Taxpayer's failure to report and pay tax with respect to its receipts from its bingo operators for rental of the bingo hall and equipment was based upon advice the Taxpayer had received from its attorney, that the receipts were not subject to tax under Section 7-9-53(A). The Taxpayer's also received similar advice over the telephone from an unidentified Department employee. Regulation 3NMAC 1.11.11 (formerly Regulation 69:4) provides a list of situations which may indicate

that a taxpayer has not been negligent for purposes of the imposition of penalty. Number 4 provides:

the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent;

In this case, the attorney providing the Taxpayer the advice was also the attorney who prepared the bingo lease agreements. On that basis it is fair to assume that he would have been fully informed of all relevant facts regarding the nature of the arrangements between the Taxpayer and the bingo operators with respect to the rental of the bingo halls. In these circumstances, the Taxpayer's reliance on the advice of its attorney was quite reasonable and negates any inference of negligence in the Taxpayer's failure to report tax with respect to its rental receipts. For this reason the penalty attributable to the Taxpayer's failure to report its rental receipts should be abated.

CONCLUSIONS OF LAW

1. The Taxpayer filed timely protests to Assessment Nos. 1882465 and 1968349 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer's receipts from renting of bingo hall space to various bingo operators under the terms of the Bingo Lease Agreements are receipts from granting a license to use real property and are not receipts from leasing real property. As such, said receipts are not deductible pursuant to Section 7-9-53(A) NMSA 1978.

3. The Taxpayer's receipts from the rental of bingo hall equipment are not deductible as receipts from the lease of fixtures to real property pursuant to Section 7-9-53(A) NMSA 1978.

4. The Taxpayer's receipts from the bingo operators for their pro-rata share of the cost of a video camera system were not received while acting as an agent of the bingo operators and such receipts are subject to gross receipts tax.

5. The Department properly mailed Assessment No. 1882465 to the Taxpayer at the address in the Department's registration records for the Taxpayer, and said assessment is effective even

if the Taxpayer did not receive the copy of the assessment which was so mailed.

6. The portion of Assessment No. 1882465 which assesses tax for the reporting periods of January through November, 1988 is not barred by the application of Section 7-1-18 NMSA 1978.

7. The Taxpayer was not negligent in failing to report gross receipts tax upon its rental receipts from the bingo operators received pursuant to the Bingo Lease Agreements and penalty on that portion of the tax assessed should be abated.

For the foregoing reasons, the Taxpayer's protest is hereby granted in part and denied in part.

DONE, this 28th day of October, 1996.