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

IN THE MATTER OF THE PROTEST OF
BROKEN ARROW INDIAN ARTS, INC. NO. 97-46
ID. NO. 02-010634-00 3, PROTEST TO
ASSESSMENT NO. 1777618

DECISION AND ORDER

THIS MATTER came on for formal hearing on December 9, 1997 before Gerald B. Richardson, Hearing Officer. Broken Arrow Indian Arts, Inc., hereinafter, "Taxpayer", was represented by Patricia Tucker, Esq. 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 Taxpayer was a New Mexico corporation which operated a retail sales establishment located on the plaza, in Taos, New Mexico, during the period from January 1, 1988 through May 31, 1993. The Taxpayer derived its income from sales of Indian art items, including jewelry, Kachinas, and other artwork.

2. On its gross receipts tax returns for the periods from January 1, 1988 through May 31, 1993, the Taxpayer reported its sales receipts and claimed a deduction for a portion of those receipts. The Taxpayer took these deductions in reliance on Section 7-9-55 NMSA 1978, for sales to out-of-state buyers.

3. On audit, deductions claimed were disallowed on the grounds that these receipts were from sales which did not qualify as out-of-state sales.

4. On March 25, 1994 the department mailed Assessment No. 1777618 to the Taxpayer. The assessment assessed $53,365.14 in gross receipts tax, $5,336.54 in penalty and $27,681.67 in interest for the reporting periods January 1, 1988 through May 31, 1993.

5. On April 25, 1994 the taxpayer filed a timely, written protest to Assessment No. 1777618, contesting the entire assessment.

6. Following an informal conference between the parties and the Taxpayer's submission of additional documentation, a revised audit report was issued. The Department allowed deductions for receipts from sales made to customers who made their purchase by credit card and for which the customer's name could be linked with a shipping document which showed shipment to an out-of-state address. The Department also allowed deductions for other sales which could be linked to shipping documents showing an out-of-state address. No adjustments to the assessment were allowed, however for sales by cash or check. Certain deductions taken for receipts from repairs were also not allowed.

7. After the adjustments made by the Department, the assessment was reduced to the following amounts: $5,321.27 in gross receipts tax, $532.17 in penalty and $4,908.46 in interest computed through December 15, 1997. Because of the Department's adjustments to the assessment, which reduced the percentage of underreported taxes, the Department could no longer assess for the extended period of limitation on the assessment of tax pursuant to Section 7-1-18(D) NMSA 1978. Accordingly, the assessment period represented by the reduced assessment is January of 1991 through May of 1993.

8. The Taxpayer no longer contests the adjusted amount of tax and interest, but does protest the imposition of penalty under the reduced assessment.

9. The sales at issue are sales made to customers who purchased merchandise from the Taxpayer at the Taxpayer's business who requested that the merchandise be shipped to an out-of-state address and who paid for the purchase by cash or check at the time of the purchase transaction.

10. The Department's auditor, when auditing the Taxpayer prior to the Department's issuance of the assessment at issue, concluded that with respect to the Taxpayer's sales to customers who requested that merchandise be shipped out-of-state, that two transactions occurred. The first was the sale of goods where title or risk of loss passed in New Mexico and the second transaction was a contract for the shipment of goods to the buyer.

DISCUSSION

The sole issue to be determined herein is whether penalty was properly assessed against the Taxpayer under the circumstances of this case. The Taxpayer no longer contests that tax was due on its cash transactions where the customer requested shipment of the merchandise to an out-of-state location.

The imposition of penalty is governed by the provisions of NMSA 1978, Section 7-1-69(A)(1995 Repl. Pamp.), which imposes a penalty of two percent per month, up to a maximum of ten percent:

> 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 or to file by the date required a return regardless of whether any tax is due,....

This statute imposes penalty based upon negligence (as opposed to fraud) for failure to timely pay tax. Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by the Taxpayer to underreport taxes. 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 3 NMAC 1.11.10 (formerly 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.

The Taxpayer argues that it was not negligent in failing to pay tax on the transactions at issue because it believed that those sales were subject to the deduction provided at Section 7-9-55 NMSA 1978 for transactions in interstate commerce based upon Regulation 55:10 (now codified at 3 NMAC 2.55.12.2) and Ruling 450-89-10.

Regulation 55:10 provided in pertinent part:

> Receipts of New Mexico sellers from sale of property to nonresidents of New Mexico who accept delivery of the property in New Mexico or where transfer of title or risk of loss passes to the nonresident buyer in New Mexico are not receipts from transactions in interstate commerce and are not deductible under Section 7-9-55.

Ruling 450-89-10 provides as follows:

> X is engaged in the business of selling tangible personal property at retail. An out-of-state purchaser selects an item at X's place of business in New Mexico and requests that it be shipped to, and delivered at the purchaser's home out of New Mexico. X estimates the packing and shipping costs and the customer pays for the merchandise and the packing and shipping charges. X packs the item and arranges for shipping with the U.S. Postal Service or a common carrier such as UPS. X pays the shipper for shipping and insurance. If the shipment is lost or damaged, the shipper reimburses

> X for the lost or damaged goods and X in turn refunds that amount to the out-of-state purchaser.
> X inquires concerning whether or not X's receipts from the above transaction is subject to the gross receipts tax.
>
> Since delivery of the property occurs outside of New Mexico *and since both risk of loss and title to the property pass to the purchaser outside of New Mexico*, X's receipts are deductible under the provisions of Section 7-9-55 NMSA 1978. (emphasis added).

It is apparent from both the ruling and the regulation, that whether risk of loss and transfer of title occurs in New Mexico or out of state is pivotal in determining whether the transaction qualifies for deduction under Section 7-9-55.

In this case, although the Taxpayer was represented at the formal hearing by very competent counsel, the Taxpayer declined to send any witnesses to provide any evidence to be considered in determining this protest. There is a presumption of correctness which attaches to any assessment of tax pursuant to Section 7-1-17(C) NMSA 1978. The presumption of correctness also attaches to any penalty assessed pursuant to Section 7-1-69. ***Tiffany Construction Co. v. Bureau of Revenue***, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977). This means that the duty rests upon a taxpayer to present evidence tending to dispute the factual correctness of the assessments and to overcome this presumption. ***Champion International Corp. v. Bureau of Revenue***, 88 N.M. 411, 540 P.2d 1300 (Ct. App. 1975). In this case, the Taxpayer failed to present evidence to dispute the presumption of correctness of the penalty assessment. We have no evidence to establish where title and risk of loss passed for the transactions at issue to establish whether the Taxpayer could have reasonably concluded that the transactions qualified for deduction, nor do we have any evidence to establish that the Taxpayer was aware of and relied upon either the regulation or

ruling cited by counsel. In the absence of such evidence the assessment of penalty is presumed to be correct and the assessment must be upheld.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest to Assessment No. 1777618 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The presumption of correctness which applies to the assessment of taxes pursuant to Section 7-1-17(C) NMSA 1978, also applies to the assessment of penalty.

3. By failing to present evidence with respect to the assessment of penalty, the Taxpayer has failed to rebut the presumption of correctness which applied to the penalty assessment and the assessment must be upheld.

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

DONE, this 31st day of December, 1997.