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

IN THE MATTER OF THE PROTEST OF
BILL AND SHERRI McCONNELL 98-57
ID. NO. 02-288997-00 3
ASSESSMENT NO. 2189371

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 30, 1998, before Margaret B. Alcock, Hearing Officer. Bill and Sherri McConnell appeared on their own behalf. The Taxation and Revenue Department ("the Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. At the end of the hearing, the record was kept open to allow the parties time to provide additional information to the Department. The matter was submitted for decision on November 17, 1998. Based on the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1994, both the McConnells worked for Blinds Direct Factory Showroom in Albuquerque, New Mexico.

2. Sherri McConnell worked as office manager for Blinds Direct performing secretarial and bookkeeping services.

3. Blinds Direct withheld federal and state income taxes, social security taxes, and Medicare taxes from a portion of its payments to Mrs. McConnell.

4. Bill McConnell worked as a salesperson for Blinds Direct.

5. Mr. McConnell was required to cover the showroom two days a week. If he was unable to work on an assigned day, he could arrange for someone else to take his place.

6. Mr. McConnell was not paid for the time he spent in the showroom, but any customers who called or came in were treated as Mr. McConnell's customers and he was paid a commission on any sales contracts he subsequently entered into with those customers.

7. Mr. McConnell was not told how to deal with customers and was not given a set script to follow.

8. Mr. McConnell also performed installation services for Blinds Direct. He installed blinds for his own customers as well as the customers of other salespeople who did not want to do installation work.

9. Blinds Direct gave Mr. McConnell a list of the orders that came in and he contacted the customer to arrange a convenient time to deliver and install the blinds.

10. No one went with Mr. McConnell to supervise his work.

11. Customers were charged $5.00 per bracket for installation: Blinds Direct kept 25 cents per installed bracket and paid Mr. McConnell the balance of $4.75.

12. Blinds Direct issued one monthly check to Mr. McConnell that included both sales commissions and payment for installation work.

13. When Mr. McConnell was hired by Blinds Direct, he understood he would be working as an independent contractor rather than as an employee.

14. Blinds Direct did not withhold income taxes or social security taxes from the payments it made to Mr. McConnell.

15. Mr. and Mrs. McConnell did not receive federal Forms W-2 or 1099 from Blinds Direct at the end of 1994, although they called several times requesting these documents.

16. Robert Millner, who had acted as Blinds Direct's accountant in the past, declined to perform any further work for the company. The company made no other arrangements to issue required tax forms to its employees and independent contractors.

17. Because Mr. Millner had access to the payroll records of Blinds Direct, the McConnells engaged him to prepare their 1994 income tax returns.

18. Using Blinds Direct's payroll register, Mr. Millner prepared a federal Form 4852, *Substitute for Form W-2, Wage and Tax Statement*, for Sherri McConnell listing wages of $6,968.00 and showing $406.01 federal income tax withheld, $432.02 social security tax withheld, $101.04 medicare tax withhold, and $97.20 New Mexico income tax withheld.

19. Mr. Millner reported $6,968.00 in wages on Line 7 of the McConnells' federal Form 1040, *Wages, salaries, tips, etc*. He reported the $4,875.00 balance of Mrs. McConnell's income from Blinds Direct on Schedule C-EZ, *Net Profit from Business*.

20. Mr. Millner reported Bill McConnell's $39,662.00 of income from sales commissions and installation work on a separate Schedule C, *Profit or Loss from Business,* and deducted $6,670.00 for car expenses.

21. Mr. Millner also prepared Schedules SE, *Self-Employment Tax*, for both Sherri and Bill McConnell.

22. The McConnells reviewed and signed the 1994 federal Form 1040 prepared by Mr. Millner. They did not question the method Mr. Millner used to report their income or ask why a portion of Mrs. McConnell's income was shown as wages while another portion was shown as business income.

23. The McConnells did not ask their accountant whether they had any liability for New Mexico gross receipts tax on their business income and he did not offer them any advice on this subject.

24. On November 9, 1997, the Department mailed the McConnells a notice of assessment of $3,899.23 in gross receipts tax, penalty and interest due on the business income reported on their 1994 federal income tax return.

25. On December 1, 1997, the McConnells filed a protest to the assessment based on their position that they worked for Blinds Direct as employees rather than as independent contractors.

26. At the hearing held September 30, 1998, the Department stated that it would abate the gross receipts tax, penalty and interest assessed on the $4,875.00 listed as business income on Sherri McConnell's Schedule C-EZ, provided the McConnells filed amended 1994 state and federal income tax returns to reflect their position that this income was actually employee wages and should have been reported as such on their 1994 returns.

27. The hearing officer set the following schedule for the parties to supplement the record: (1) On or before November 2, 1998, the Department's counsel was to inform the hearing officer, in writing, whether the McConnells had filed amended 1994 income tax returns acceptable to the Department; (2) on or before November 12, 1998, the McConnells were to file any response they wished to make to the information submitted by the Department.

28. On November 2, 1998, Monica M. Ontiveros, counsel for the Department, filed a letter stating that she had not received any amended returns from the McConnells. The letter further stated that Ms. Ontiveros called Mr. McConnell that day and was told the McConnells were still working on the amended returns.

29. On November 10, 1998, the McConnells sent a draft of an amended 1994 federal income tax return to Ms. Ontiveros. The return had not been filed with the Internal Revenue Service and was not signed by Mr. McConnell. No amended state income tax return was submitted.

30. On November 16, 1998, Ms. Ontiveros notified the hearing officer that the Department could not accept the McConnells' proposed amended return because the return subtracted $6,968.00 of Sherri McConnell's income—the amount reported as wages on their original 1994 federal return—from their adjusted gross income. In fact, the McConnells' adjusted gross income should have been increased by $345.00, the amount of self-employment tax Sherri McConnell reported on the original 1994 return.

31. Ms. Ontiveros' letter stated that she had discussed the matter with Mrs. McConnell, who said that she and her husband would consult with an accountant. The parties agreed that the McConnells would have until November 17, 1998 to notify the hearing officer whether they would be filing amended federal and state income tax returns for 1994.

32. On November 17, 1998, the McConnells notified the hearing officer that they had decided not to file amended returns.

DISCUSSION

The issue presented is whether Sherri and Bill McConnell are liable for gross receipts tax on the income they reported as business income on their 1994 federal income tax return. In the event the McConnells are liable for gross receipts tax, a secondary issue is whether they are liable for the full amount of interest and penalty assessed by the Department.

I BURDEN OF PROOF.

Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84

N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Moreover, where an exemption from tax is claimed, the exemption is strictly construed in favor of the taxing authority. *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *Rock v. Commissioner*, 83 N.M. 478, 479, 493 P.2d 963, 964 (Ct. App. 1972). Section 7-1-3(U) 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 to the assessment. Accordingly, it is the McConnells' burden to establish that the Department's assessment of gross receipts tax, penalty and interest on their 1994 income is incorrect.

II EMPLOYEE V. INDEPENDENT CONTRACTOR. The McConnells maintain that they worked for Blinds Direct as employees, rather than as independent contractors, and are therefore entitled to the exemption from gross receipts found in Section 7-9-17 NMSA 1978, which states:

> Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

The Department takes the position that the McConnells were independent contractors whose self-employment income did not qualify for the exemption provided in Section 7-9-17. The Department further argues that the McConnells are required to treat their income in a consistent manner: they cannot report their compensation from Blinds Direct as business income for income tax purposes while reporting the same income as employee wages for gross receipts tax purposes.

In determining whether a person is an employee or an independent contractor, the principal consideration is the right to control. The relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the results, and not the details of the performance, the worker is usually considered to be an independent contractor. *Burruss v. B.M.C. Logging Co.*, 38 N.M. 254,

31 P.2d 263 (1934). A more recent pronouncement of this rule can be found in *Harger v. Structural Services, Inc.*, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In that case, the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

> The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: (1) direct evidence of control; (2) the right to terminate the employment at will, by either party, without liability; (3) the right to delegate the work or to hire and fire assistants; (4) the method of payment, whether by time or by the job; (5) whether the party employed engages in a distinct occupation or business; (6) whether the work is part of the employer's regular business; (7) the skill required in the particular occupation; (8) whether the employer supplies the instrumentalities, tools or the place of work; (9) the duration of a person's employment and whether that person works full-time or regular hours; and (10) whether the parties believe they have created the relationship of employer and employee, insofar as this belief indicates an assumption of control by one and submission to control by the other. *Benavidez v. Sierra Blanca Motors*, 125 N.M. 235, 238, 959 P.2d 569, 572 (Ct. App. 1998). While all of the above factors may be considered, it is the totality of the circumstances that should determine whether the employer has the right to exercise essential control over a particular worker.

The Department has adopted Regulation 3 NMAC 2.17.7 (formerly GR 17:1) setting out the following criteria to determine whether a worker qualifies as an employee:

> 7.1 In determining whether a person is an employee, the department will consider the following indicia:
>
> 1. is the person paid a wage or salary;

2. is the "employer" required to withhold income tax from the person's wage or salary;

3. is F.I.C.A. tax required to be paid by the "employer";

4. is the person covered by workmen's compensation insurance;

5. is the "employer" required to make unemployment insurance contributions on behalf of the person;

6. does the person's "employer" consider the person to be an employee;

7. does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion').

> 7.2 If all of the indicia mentioned in 3 NMAC 2.17.7.1 are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

A second regulation under Section 7-9-17 deals specifically with commissioned salespersons. Regulation 3 NMAC 2.17.10 (formerly GR 17:5) states:

> A salesperson who sells for a company on a commission basis is not an employee of the company where the company exercises no direct control over the details of performance of the salesperson's duties beyond general statements about the scope and nature of the salesperson's obligations under the contract between the salesperson and the company. In addition, where commissions paid to a salesperson are not subject to withholding taxes or social security taxes, the salesperson is not considered an employee of the company. Therefore, receipts from commissions paid to such salesperson for selling property in New Mexico are subject to the gross receipts tax.

A. Application of Law to Bill McConnell. Applying the factors set out in the Restatement (Second) of Agency and the Department's regulations to the evidence presented at the hearing leads to the conclusion that Mr. McConnell was not an employee entitled to claim the exemption provided in Section 7-9-17 NMSA 1978. The relevant facts include:

- Mr. McConnell was required to cover the Blinds Direct showroom only two days a week; the other three days he set up his own appointments to meet with customers. If McConnell was unable to work in the showroom on an assigned day, he could arrange for someone else to take his place.

- Mr. McConnell was not paid for the time he spent in the showroom. Instead, Mr. McConnell used the time to obtain leads and was paid a commission on any sales contracts he subsequently entered into with the customers who called or came in while he was in the showroom.

- Mr. McConnell was not told how to deal with customers and was not given a set script to follow.

- Salespeople for Blinds Direct were given the opportunity to perform installation services, but were not required to do so. Mr. McConnell elected to install blinds for his own customers, as well as the customers of other salespeople who did not want to do installation work.

- Blinds Direct gave Mr. McConnell a list of the orders that came in and he contacted the customer directly to arrange a convenient time to deliver and install the blinds. No one went with Mr. McConnell to supervise his work.

- Customers were charged $5.00 per bracket for installation: Blinds Direct kept only 25 cents per installed bracket and turned the balance of $4.75 over to Mr. McConnell.

- Mr. McConnell spent a substantial amount of time out of the office, using his own automobile to carry out his sales and installation work. For 1994, Mr. McConnell claimed a $6,670.00 deduction for car expenses, stating that he drove 23,000 miles for business purposes during that year.

- Blinds Direct issued one monthly check to Mr. McConnell that included both sales commissions and payment for installation work. Blinds Direct did not withhold income taxes or social security taxes from the payments it made to Mr. McConnell.

- When Mr. McConnell was hired by Blinds Direct, he understood he would be working as an independent contractor rather than as an employee. In 1994 he reported and paid self-employment taxes to the federal government and reported his income and business deductions on Schedule C of his federal Form 1040.[1]

The totality of the circumstances surrounding Mr. McConnell's sales and installation activities establishes that Blinds Direct did not exercise the control of an employer over his time and physical activities, nor did it control his means of accomplishing his work. Rather, Mr. McConnell was

[1] As discussed in detail under Part II(B), this factor is of particular importance in determining whether a person is acting as an employee for purposes of state tax reporting.

engaged to obtain a particular result—the sale and installation of the company's products. Mr. McConnell engaged in these activities as an independent contractor.

B. Application of Law to Sherri McConnell. Sherri McConnell was an employee of Blinds Direct with regard to at least a portion of her income. She worked as office manager for Blinds Direct, performing both secretarial and bookkeeping services. She testified that she was required to work in the office Monday through Friday from 9:00 a.m. to 6:00 p.m. and was paid compensation of $9.00 an hour. Blinds Direct withheld federal and state income taxes, social security taxes, and medicare taxes from $6,968.00 of its $11,843.00 payments to Mrs. McConnell. Sherri McConnell was an employee of Blinds Direct with regard to this portion of her income, which was reported as wages on Line 7 of the McConnells' 1994 federal income tax return.

There remains some question concerning the $4,875.00 Mrs. McConnell reported as business income. Although she was the office manager and performed bookkeeping duties for Blinds Direct, Mrs. McConnell had no explanation for the company's failure to withhold taxes from approximately 40 percent of her compensation. The McConnells reviewed and signed their 1994 federal income tax return, but did not ask their accountant (who was also the former accountant for Blinds Direct) why he had reported this portion of her income as business income, rather than as employee wages. Nor is there any indication they tried to contact Mr. Millner after this issue was raised in the context of the Department's gross receipts tax assessment.

There is another discrepancy between Mrs. McConnell's testimony and the information contained in her 1994 income tax return. Mrs. McConnell testified that she worked forty hours a week and was paid $9.00 per hour. If she worked full time during 1994, this should have resulted in income of approximately $18,720.00, rather than the $11,843.00 reported on the McConnells' federal return. While it is certainly possible that Mrs. McConnell started work in the middle of the year, there was no

testimony to this effect. If Mrs. McConnell did not work a regular or full-time schedule throughout the year, this could affect the determination of her status as an employee.

Given the unexplained discrepancies in the evidence, it would be my conclusion that the McConnells have not met their burden of showing that the Department's assessment of gross receipts tax on $4,875.00 of Sherri McConnell's income was incorrect. Nonetheless, the Department stipulated that it would treat all of Mrs. McConnell's income as employee compensation not subject to gross receipts tax if the McConnells amended their 1994 income tax returns to conform to this position.[2] Because the McConnells declined to do so, the Department argues that the McConnells have effectively waived their right to claim Sherri McConnell's income as employee compensation and are bound by the manner in which they elected to treat their income on their 1994 income tax returns.

New Mexico law holds that a taxpayer must treat transactions uniformly for all purposes within the tax laws. A taxpayer may not claim to be an independent contractor for purposes of filing federal income tax returns and claim to be an employee exempt from filing state gross receipts tax returns for the same period. The first case to address the requirement of consistency in state tax reporting was *Co-Con, Inc. v. Bureau of Revenue*, 87 N.M. 118, 529 P.2d 1239 (Ct App., 1974), *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974). Co-Con, Inc. was a wholly owned subsidiary of Universal Constructors, Inc. During the audit period, pieces of construction equipment were used by both companies without regard to which corporation held legal title to the equipment. Each corporation attributed a value to the other corporation's use of the owner corporation's equipment and reflected that value as "gross rentals" for federal income tax purposes. The Department treated the rental income reported on the federal returns of Co-Con, Inc. and Universal Constructors, Inc. as gross receipts from leasing property in New Mexico and assessed gross receipts tax on this amount. The corporations argued

that they did not have gross receipts from equipment rental. The Court of Appeals upheld the assessments, finding that the corporations' treatment of the transactions as rentals for federal income tax purposes was binding for state tax purposes. As the court stated:

> Taxpayers must treat transactions uniformly for all purposes within the tax scheme and not attempt to show, first, a lease for federal purposes and second, a non-taxable event for state tax purposes. We find ample evidence in the record to indicate that taxpayers engaged in leasing, both by intent and within the scope of the statutory definition.

Id., 87 N.M. at 121-122.

In *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 559 P.2d 420(Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977), the Court of Appeals upheld an assessment of gross receipts tax against Mr. Stohr's compensation from performing carpentry work for various individuals. Mr. Stohr argued that these amounts were wages exempt from gross receipts tax under Section 72-16A-12.5 NMSA 1953, the predecessor to Section 7-9-17 NMSA 1978. The court noted that during the audit period Mr. Stohr filed self-employment tax returns for social security purposes and filed federal Schedule C's reporting his compensation as business income. In determining Mr. Stohr liable for gross receipts tax, the court examined the indicia of employment found in the Department's regulation, which were the same as those found in current Regulation 3 NMAC 2.12.7. The court then stated:

> The ***controlling*** factor, however, is that the taxpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer must not attempt to show one scheme for federal tax purposes and a nontaxable event for purposes of state gross receipts taxes. (citations omitted, emphasis added).

[2] In her November 16, 1998 letter to the hearing officer, Ms. Ontiveros estimated that this would reduce the McConnells' gross receipts tax liability by approximately $500.00.

Thus, the court found that the manner in which Mr. Stohr reported his compensation for federal purposes controlled the determination of whether that compensation could be considered wages exempt from gross receipts taxes.

The most recent case to address the need for consistency in filing state and federal returns is *Sutin, Thayer & Browne v. Revenue Division of the Taxation and Revenue Department***,** 104 N.M. 633, 725 P.2d 833 (Ct. App. 1985), *cert. denied,* 102 N.M. 293, 694 P.2d 1358 (1986). The issue in that case was whether the Sutin firm could claim a wage deduction on its state corporate income tax return that exceeded the wage deduction claimed on its federal return. The Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, enacted a new jobs tax credit to provide employers with an incentive to create new jobs. Under that act, a corporation could either claim a federal tax deduction for the wages paid to its employees or elect a jobs credit for wages paid to certain new employees. The Sutin firm elected to claim the jobs credit on its federal return. Because New Mexico did not have a similar jobs credit, the Sutin firm claimed a deduction for all of the wages paid to new employees on its New Mexico return. The Department disallowed the deduction, arguing that a taxpayer cannot claim the federal credit on its federal return and then add in the wage deduction it forfeited on its federal return when calculating state taxable income. The court upheld the Department's position, noting that, "[A] taxpayer who makes an election for federal purposes is bound by that election in calculating the amount of its state taxes." *Id*., 104 N.M. at 636.

The foregoing cases establish that a taxpayer may not treat a taxable transaction one way for federal tax purposes and a different way for state tax purposes. In this case, the McConnells claim that their 1994 federal and state income tax returns are incorrect and do not accurately reflect the true character of Mrs. McConnell's compensation. Although they have been given the opportunity

and, in fact, have an obligation[3] to file amended federal and state income tax returns, they have declined to do so. Under these circumstances, the McConnells are bound by their method of reporting Mrs. McConnell's compensation to the federal government and are not entitled to claim the exemption provided in Section 7-9-17 NMSA 1978.

III ASSESMENT OF PENALTY AND INTEREST

Having determined that the McConnells are liable for the Department's assessment of gross receipts tax, it is necessary to address their protest to the assessment of penalty and interest. The McConnells object to the Department's delay in notifying them of their gross receipts tax liability. Under the Tax Administration Act, the Department has three years from the end of the calendar year in which a payment of tax was due to issue an assessment. Section 7-1-18(A) NMSA 1978. The Department's November 9, 1997 assessment of gross receipts tax, penalty and interest for the period January-December 1994 was within this three-year assessment period. The McConnells have not cited any authority that would preclude the Department from enforcing a timely assessment on the basis of unfair delay.

New Mexico has a self-reporting tax system that relies upon 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. There are insufficient government resources to audit every taxpayer periodically to assure tax compliance. Every person is therefore charged with the reasonable duty to ascertain the possible tax consequences of his action. *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). In this

[3] Tax reporting, even when it does not distort income or result in tax savings, is not a matter of convenience or selecting a method that simplifies reporting requirements. Tax returns are supposed to accurately reflect the transactions being reported.

case, it was the McConnells' responsibility to determine whether their business activities created a gross receipts tax liability to the state.

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

> A. If any tax imposed is not paid on or before the day on which it becomes due, ***interest shall be paid*** to the state on such 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. The reason for a late payment of tax is irrelevant to the imposition of interest. 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. Section 7-1-13(E) NMSA 1978. In this case, the McConnells failed to pay gross receipts taxes when due and interest was properly assessed.

B. **Assessment of Penalty**. Section 7-1-69 NMSA 1978 (1995 Repl.Pamp.) governs the imposition of penalty during the periods at issue in this protest. Subsection A 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...

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC 1.11.10 (formerly GR 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 McConnells' failure to pay gross receipts tax was based on their inattention to the requirements of New Mexico's tax laws. Although the McConnells did not intentionally fail to pay tax, they were negligent in not taking the action required to correctly determine their tax liability to the state. In particular, they were negligent in failing to question their accountant concerning the method he used to report their 1994 income and the state tax consequences of such reporting.

Finally, it should be noted that the penalty imposed by Section 7-1-69(A) reaches a maximum of 10 percent after five months from the original due date of the tax. The delay in issuing the assessment did not affect the McConnells' liability for penalty, which was the same in November 1997 as it would have been in June 1995, five months after the liability was established.

CONCLUSIONS OF LAW

1. The McConnells filed a timely, written protest to Assessment No. 2189371 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Bill McConnell was not an employee of Blinds Direct and is not entitled to claim the exemption from gross receipts tax provided in Section 7-9-17 NMSA 1978.

3. Because the McConnells reported $4,875.00 of Sherri McConnell's income and all of Bill McConnell's income as nonemployee compensation and as income from operating a business, they are not entitled to claim this amount as wages, salary or commissions from employment for

purposes of claiming an exemption from gross receipts tax pursuant to Section 7-9-17 NMSA 1978.

4. Pursuant to Section 7-1-67(A) NMSA 1978, interest was properly assessed against the McConnells on the late payment of gross receipts tax on their 1994 business income.

5. Pursuant to Section 7-1-69(A) NMSA 1978, the McConnells were negligent in failing to report gross receipts tax due for the period January-December 1994 and penalty was properly imposed.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

Done this 9th day of December 1998.