

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

IN THE MATTER OF THE PROTEST OF
JUDITH A. HOUSLEY,
ID. NO. 01-181871-00 9, PROTEST TO
ASSESSMENT NOS. 2238427
THROUGH 2232862

NO. 99-28

DECISION AND ORDER

This matter came on for formal hearing on September 10, 1999 before Gerald B. Richardson, Hearing Officer. Judith A. Housley, hereinafter, "Taxpayer" was represented by David G. Housman, Esq., appearing on behalf of David N. Hernandez, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. At the close of the hearing the parties were granted additional time to submit written legal arguments. The Department submitted its Statement of Authorities on October 4, 1999 and the matter was considered submitted for determination at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 13, 1998, the Department issued the following provisional or estimated assessments to the Taxpayer, assessing gross receipts tax, penalty and interest as follows:

<u>Assmt. No.</u>	<u>Reporting Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2232846	7-88 through 12-88	\$ 341.85	\$ 170.93	\$ 470.04	\$ 982.82
2232847	1-89 through 6-89	\$3,870.00	\$1,935.00	\$5,031.00	\$10,836.00
2232848	7-89 through 12-89	\$3,870.00	\$1,935.00	\$4,740.00	\$10,545.75
2232849	1-90 through 6-90	\$3,870.00	\$1,935.00	\$4,450.50	\$10,255.50
2232850	7-90 through 12-90	\$4,050.00	\$2,025.00	\$4,353.75	\$10,428.75
2232852	1-91 through 6-91	\$4,050.00	\$2,025.00	\$4,050.00	\$10,125.00

2232852	7-91 through 12-91	\$4,140.00	\$2,070.00	\$3,829.50	\$10,039.50
2232853	1-92 through 6-92	\$4,140.00	\$2,070.00	\$3,519.00	\$ 9,729.00
2232854	7-92 through 12-92	\$4,140.00	\$2,070.00	\$3,208.50	\$ 9,418.50
2232855	1-93 through 6-93	\$4,140.00	\$2,070.00	\$2,898.00	\$ 9,108.00
2232856	7-93 through 12-93	\$4,140.00	\$2,070.00	\$2,587.50	\$ 8,797.50
2232857	1-94 through 6-94	\$4,140.00	\$2,070.00	\$2,277.00	\$ 8,487.00
2232858	7-94 through 12-94	\$4,140.00	\$2,070.00	\$1,966.50	\$ 8,176.50
2232859	1-95 through 6-95	\$4,140.00	\$2,070.00	\$1,656.00	\$ 7,866.00
2232860	7-95 through 12-95	\$4,140.00	\$2,070.00	\$1,345.50	\$ 7,555.50
2232861	1-96 through 6-96	\$4,140.00	\$2,070.00	\$1,035.00	\$ 7,245.00
2232862	7-96 through 12-96	\$4,140.00	\$2,070.00	\$ 724.50	\$ 6,934.50
2232863	1-97 through 6-97	\$4,140.00	\$2,070.00	\$ 414.00	\$ 6,624.00
2232864	7-97 through 12-97	\$4,140.00	\$2,070.00	\$ 103.50	\$ 6,313.50

2. On April 10, 1999 the Taxpayer filed a protest to Assessment Nos. 2232847 through 2232862.

3. Subsequent to the Department's Assessments, the Taxpayer filed returns reporting gross receipts and gross receipts taxes for the reporting periods of July, 1988 through December, 1997. The Department has agreed to accept the amounts the Taxpayer self assessed in those returns as reflecting the amount of gross receipts tax the Taxpayer owes for those periods of time and will adjust the assessments at issue accordingly. To the amounts of tax the Taxpayer self-assessed, the Department added interest and a 50% penalty. The Taxpayer disputes the amount of penalty. The total amount of taxes, penalty and interest the Department now contends is owing for the reporting periods of July, 1988 through December, 1997 is \$30,125.12 in gross receipts tax, \$15,062.44 in penalty and \$23,838.36 in interest.

4. The Taxpayer first registered her business with the Department and obtained a taxpayer identification for her business in 1982. The Taxpayer's business was that of a handwriting analyst.

5. Because the Department has purged its records for years 1982 through 1988, it does not have a copy of the Taxpayer's application for a tax identification number nor does it

have any record of the Taxpayer's filings for gross receipts tax purposes between 1982 and 1988 with one exception, explained in the next finding.

6. The Department does have a record that the Taxpayer filed a return on January 10, 1989 for the January, 1988 through June, 1988 reporting period, reporting a gross receipts tax liability of \$357.75. The Department's records further indicate that no payment was made at the time the return was filed. The Department's records indicate that on February 1, 1989 it issued Assessment No. 1117070, assessing \$357.75 in gross receipts tax, \$35.78 in penalty and \$26.83 in interest for the January through June, 1988 reporting period. The Department's records also indicate that subsequently, the Taxpayer paid \$543.60 to pay off that liability, together with accrued interest and penalty.

7. On May 1, 1992, the Taxpayer wrote to the Department to protest Assessment No. 1117070 and the Department's lien, filed on September 4, 1991 to secure that assessment. On May 21, 1992, the Department responded to the Taxpayer, informing her that because Section 7-1-24 of the New Mexico statutes requires that protests be filed within 30 days, that her protest was untimely. The Taxpayer had paid the liability assessed by Assessment No. 1117070 sometime in September, 1991, but the Department failed to remove the lien until the Taxpayer complained to the Department some eight months later.

8. On September 25, 1991, the Taxpayer filled out a Department Form RP-32A to request the cancellation of Taxpayer Identification No. 01181871009, which was the identification number for the business named Judith A. Housley & Associates. In the application form, Ms. Housley requested cancellation of the identification number on the basis that the business had stopped doing business in New Mexico on June 12, 1988. She requested that the identification be retired effective June 30, 1988. This date coincides with the ending date of the

reporting period of the last return Ms. Housley filed with the Department prior to the issuance of the assessments at issue herein.

9. The business named Judith A. Housley & Associates did not cease doing business in New Mexico on June 30, 1988. The Taxpayer operated a business under that name in New Mexico continuously from 1982 through 1997.

10. Prior to issuing the assessments at issue herein, the Department had no records to indicate that the Taxpayer reported or paid gross receipts tax upon her receipts from engaging in business in New Mexico for the reporting periods of July, 1988 through December, 1997.

11. Because of the lack of reporting history on the Taxpayer, in issuing its provisional or estimated assessments, the Department used other information to estimate the Taxpayer's taxable gross receipts. The Department had obtained a loan application filled out by Ms. Housley on August 31, 1997. In that loan application, Ms. Housley represented a monthly income of \$12,000 per month from employment as a forensic document examiner.

12. When asked, as part of the discovery process in the instant protest, to provide all books of account, including general ledgers, receipts, payment records, balance sheets and profit and loss statements for calendar years 1993 through 1997, the Taxpayer responded that there were none.

13. The Taxpayer was able to produce her customer billing records for 1996, 1997 and 1998. Those records demonstrated that the Taxpayer had a very good understanding of the operation of New Mexico's gross receipts tax. In general, the Taxpayer's billings to her customers reflected a charge to her customers of approximately 5.9% which was variously designated as "gross receipts", "NM gross receipts" and "New Mexico Gross Receipts Tax". However, in a billing to the New Mexico Public Defender Department, the Taxpayer charged no

gross receipts tax on copies of enlarged documents she prepared for the customer. New Mexico does not impose a gross receipts tax on the value of tangible personal property sold to governmental agencies. Additionally, when billing out of state clients, the Taxpayer did not charge gross receipts tax for services performed out of state. New Mexico does not impose a gross receipts tax on services performed out of state.

13. Ms. Housley's occupation when she first registered her business with the Department in 1982 was a handwriting analyst. She understood when she first registered her business that she was registering for the purpose of paying gross receipts tax.

14. Ms. Housley testified that she changed her occupation from a handwriting analyst to a forensic document examiner or a handwriting identification expert on June 12, 1988.

15. Ms. Housley was informed by Shannon Sandberg, the Department employee she dealt with when she canceled the business registration for her business as a handwriting analyst in July of 1991, that if she resumed her business or started a new business, she would need to apply for a new tax identification number to register her present business as a forensic document examiner.

16. Ms. Housley did not inform Ms. Sandberg that she was still engaging in business in New Mexico as a forensic document examiner at the time she canceled her tax identification with the Department.

17. Ms. Housley never obtained a new taxpayer identification number or business registration with the Department for any business of any nature after canceling her registration with the Department for her business named Judith A. Housley & Associates. She did not obtain a new registration because she claimed that she did not have the money to pay gross receipts taxes on the gross receipts of her business.

18. Ms. Housley admitted that she was aware, during the period of 1991 through 1997 that she had an obligation to register her business with the Department and to report and pay gross receipts tax on her taxable gross receipts from engaging in business in New Mexico.

19. During years 1991 through 1997, the Taxpayer advertised her services in the New Mexico Bar Bulletin.

20. Ms. Housley charged her customers gross receipts tax during the periods of 1988 through 1997.

21. For tax year 1993, Ms. Housley filed a Federal Schedule C with the Internal Revenue Service (IRS) reporting that she had \$35,532 in gross receipts from her business as a graphoanalyst.

22. For tax year 1994, Ms. Housley filed a Federal Schedule C with the IRS reporting that she had \$54,808 in gross receipts from her business as a graphoanalyst.

23. For tax year 1995, Ms. Housley filed a Federal Schedule C with the IRS reporting that she had \$62,700 in gross receipts from her business as a graphoanalyst.

24. For tax year 1996, Ms. Housley filed a Federal Schedule C with the IRS reporting that she had \$42,301 in gross receipts from her business as a graphoanalyst.

25. Even when the Taxpayer received payment of a billing from a customer to whom she had charged gross receipts tax on her professional fees, the Taxpayer made no attempt to report or pay gross receipts tax on her receipts from that customer.

26. The Taxpayer admitted that even in months when she could have made payment of taxes, she did not report or pay gross receipts taxes to the Department because she was not registered with the Department and she was afraid to file for fear of alerting the Department to the non-payment of her tax obligations.

27. Although the Ms. Housley claimed that she could not afford to pay gross receipts tax on her gross receipts, in 1996 she spent \$2,700 on a jacuzzi and \$8,000 on home improvements. In that year, she also financed a new sunroom on her house for \$33,800, for which she pays \$326.45 per month.

28. Ms. Housley cancelled her tax registration and identification number with the Department with the intention of defrauding the State of New Mexico of the payment of gross receipts taxes.

29. Ms. Housley cancelled her tax registration and identification number with the Department with the intention of evading or defeating the payment of gross receipts taxes.

30. Ms. Housley failed to report and pay gross receipts tax to the Department from her receipts from engaging in business in New Mexico with the intention of defrauding the State of New Mexico of the payment of gross receipts taxes.

31. Ms. Housley failed to report and pay gross receipts tax to the Department from her receipts from engaging in business in New Mexico with the intention of evading or defeating the payment of gross receipts taxes.

DISCUSSION

The issue to be determined herein is whether the Taxpayer is liable for the penalty assessed. The Taxpayer has agreed to the amount of tax and interest as reflected in the Department's adjustments of the assessments as set forth in Finding No. 3.

The Taxpayer was assessed a penalty in the amount of 50% of the tax assessed for tax years 1988 through 1997. The penalty statute was amended during the years covered by the Department's assessments. For the 1988 through 1996 tax years, the Taxpayer was assessed penalty pursuant to § 7-1-69(B) NMSA 1978 which provided:

In the case of failure, with intent to defraud the state, to pay when due any amount of tax required to be paid, there shall be added to the amount fifty percent of the tax or a minimum of twenty-five dollars (\$25.00), whichever is greater, as penalty.

This provision was amended by Laws 1997, ch. 67, § 8, effective July 1, 1997, to read:

In the case of failure, with willful intent to evade or defeat any tax, to pay when due any amount of tax required to be paid, there shall be added to the amount fifty percent of the tax or a minimum of twenty-five dollars (\$25.00), whichever is greater, as penalty.

Section 7-1-69(C) NMSA 1978 (1998 Repl. Pamp.)

The first matter to be determined is the effect of the statutory amendment. The amendment to the statute changed the basis for imposition of the 50% penalty from establishing an intent to defraud the state to establishing a willful intent to evade or defeat any tax. The Taxpayer argues that by this amendment, the legislature intended to lower the standard for imposing the 50% penalty from applying only to instances where fraud can be proven to cover instances where a more generalized intent to evade or defeat a tax can be proven.

The Taxpayer cites to no authority for her argument that the legislature was intending to lower the standard for imposing the 50% penalty. I, for one, have a difficult time discerning any significant difference between the two provisions. I find it significant, however, that at all relevant times to this case, the language in the statutory provision which imposes a criminal felony penalty for failure to pay tax, was essentially the same as adopted in the 1997 amendment to the civil penalty. Specifically, § 7-1-72 NMSA 1978 provides :

Any person who willfully attempts to *evade or defeat any tax* or the payment thereof is, in addition to other penalties provided by law, guilty of a felony and, upon conviction thereof, shall be fined not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or imprisoned not less than one year nor more than five years, or both such fine and imprisonment, together with the costs of prosecution. (emphasis added).

Because both the civil and criminal penalties for tax evasion now require a willful intent to evade or defeat the payment of tax, a more probable legislative intent for the amendment at issue is that the legislature was merely conforming the language for the imposition of the civil and the criminal penalties for tax evasion. This conclusion is further supported by common sense. To interpret the 1997 amendment as the Taxpayer does, to impute a legislative intent to lower the standard as to the grounds for imposing the 50% penalty, when that standard is essentially the same as the one contained in the criminal penalty statute, would suggest that the legislature had always intended a lower standard to impose criminal penalties upon tax evaders than to impose civil penalties.

Prior to considering the evidence and whether it meets the standards for imposing the 50% tax evasion penalty, the burden of proof and the standard of proof should be discussed.

Section 7-1-78 of the Tax Administration Act provides as follows:

In any proceeding involving the issue of whether any person has been guilty of fraud or corruption, the burden of proof in respect of such issue shall be upon the director or the state.

Although § 7-1-69(C) NMSA 1978 (1998 Repl. Pamp.) does not specifically use the words “fraud” or “corruption”, it is the successor to § 7-1-69(B), which did refer to defrauding the state. As noted above, the amended provision, which imposes a steep penalty for failure to pay tax with willful intent to evade or defeat the payment of such tax, should not be read to change the standard for imposition of the penalty and can fairly be characterized as a fraud penalty.

Although § 7-1-78 does not specify the standard or degree of proof required for the state to meet its burden of proof, the common law rule in New Mexico is that proof of fraud in a civil action

must be established by clear and convincing evidence. *First National Bank in Albuquerque v. Abraham*, 97 N.M. 288, 291, 693 P.2d 575 (1982).

There are no New Mexico cases decided under either version of New Mexico's civil tax evasion penalty to guide us in determining whether the evidence in this case is sufficient to support the imposition of the 50% penalty. The Taxpayer argues that in this absence, we should look to federal cases interpreting what must be established to support a criminal conviction of attempting to evade or defeat tax under § 7201 of the Internal Revenue Code, 26 USCA § 7201. Specifically, Taxpayer relies upon *Speis v. United States*, 317 U.S. 492 (1943) and *Sansone v. United States*, 380 U.S. 343 (1965) for the proposition that the mere failure to file tax returns, without some affirmative act of evasion, is insufficient to establish a violation of § 7201. In *Speis*, the Court suggested various affirmative acts, such as the keeping of double books, making false bookkeeping entries or false supporting documents, destruction of books or records, concealment of assets or sources of income, as examples which would meet the requirement of an affirmative act of evasion. In this case, the Taxpayer argues that there is only evidence of the Taxpayer's omission to file returns, and no evidence of the sorts of affirmative acts required under the federal cases and thus no basis for the imposition of the 50% penalty.

The basis for the Court's decision requiring affirmative acts to support a conviction for tax evasion in *Speis* was that the Court was trying to distinguish between §§ 145(a) and 145(b) of the Internal Revenue Code of 1939. Section 145(a) made the willful failure to pay tax when due punishable as a misdemeanor, and Section 145(b) made the willful attempt to evade or defeat a tax a felony. The Court concluded that to support a conviction of the more serious felony offense, affirmative acts to evade the tax are required.

Speis and its federal progeny are distinguishable on the basis that New Mexico's criminal sanctions are structured quite differently than those the Court was construing. New Mexico does not provide for a misdemeanor penalty corresponding to the federal misdemeanor penalty for mere failure to file a return.

Additionally, New Mexico's courts have rejected similar entreaties by taxpayers to follow the federal caselaw with regard to the imposition of statutory penalties for failure to report and pay taxes, whether the penalties be civil or criminal. In *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989), the Court of Appeals rejected the taxpayer's arguments that New Mexico should look to the federal caselaw applying the federal civil penalty for failure to report or pay taxes due to willful neglect when interpreting the application of New Mexico's statute imposing a civil penalty for negligent failure to report or pay taxes or to file a return. Even more pertinent to the case at hand is the Court of Appeals decision in *State v. Long*, 121 N.M. 333, 911 P.2d 227 (Ct. App. 1995) cert. denied, 212 N.M. 119, 908 P.2d 1387 (1996). In that case, the state prosecuted an attorney for tax evasion under § 7-1-72. The attorney was the sole shareholder and director of a professional corporation and was the sole person responsible for filing gross receipts tax reports. He was charged with tax evasion based upon the fact that during 1990, his corporation had gross receipts in excess of \$95,000 and the attorney admitted that he did not file gross receipts returns or pay gross receipts taxes for that year even though he was aware of the requirement to do so and he charged the tax when billing his clients. The attorney made the precise argument raised herein when challenging his conviction under § 7-1-72 for the willful attempt to evade or defeat tax or its payment. He argued that the mere failure to file returns, without evidence of an affirmative act such as those listed in *Speis*, was insufficient to support a conviction under § 7-1-72.

The Court of Appeals expressly declined to follow federal case law. It found that the Defendant had willfully failed to file returns and pay taxes and that this was sufficient to establish the willful evasion of the payment of taxes in violation of § 7-1-72. *State v. Long*, 121 N.M. at 334-336.

Given the close similarity of the language of the criminal sanction found at § 7-1-72 and the civil penalty at issue herein found at § 7-1-69(C) NMSA 1978 (1998 Repl. Pamp.) and my previous determination that the 1997 amendment of § 7-1-69 did not change the standard for imposing the 50% penalty, *State v. Long* clearly supports the conclusion that the evidence in this case is sufficient to establish a violation of either version of the 50% penalty provisions at issue herein. As in *State v. Long*, we have a sophisticated taxpayer who clearly understood the obligation to report and pay gross receipts taxes on her receipts. In both instances, the taxpayers charged their customers gross receipts tax and failed to file reports of their gross receipts or pay over the taxes they collected. In this instance, we have even more evidence to support a conclusion that the Taxpayer willfully intended to evade tax. Although Ms. Housley attempted to explain her cancellation of her tax registration and identification number with the Department as something she was required to do when she changed her occupation from a hand-writing analyst to a forensic document examiner, I find nothing in the Department's statutes, regulations or on the application form to cancel the identification number to indicate such a requirement. The form (Department Exhibit 6) makes no reference to occupation. It asks for the name of the taxpayer's business and Ms. Housley, by signing the application, declared that the business named Judith A. Housley & Associates stopped doing business on June 12, 1998, when in fact she continued to do business under that name for all of the tax periods in question. I find it more than mere coincidence that Ms. Housley filled out this application at the same time, September,

1991, when she was attempting to clear up an assessed liability and obtain a release of the Department's lien securing that liability. Ms. Housley was aware at the time she canceled her tax identification number that she was still engaging in business and was subject to tax, yet she made no attempt to obtain a new identification number at the time she canceled her old number. Even if some sort of affirmative act to evade tax were required to establish the basis for the imposition of the penalty at issue herein, Ms. Housley's cancellation of her number under the circumstances outlined would meet such a requirement. Under the facts of this case, the Department has met its burden of proving by clear and convincing evidence the basis for the imposition of the 50% penalty imposed under either § 7-1-69(B) or its subsequent version, § 7-1-69(C).

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest to the assessments at issue herein and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Department has established by clear and convincing evidence that the imposition of the 50% penalty imposed under § 7-1-69(B) NMSA 1978, as it applied during tax years 1988 through June, 1997 and § 7-1-69(C) NMSA 1979, effective July 1, 1997, was proper.

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

DONE, this 28th day of November, 1999.