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

IN THE MATTER OF THE PROTEST OF
ROBERT PINEDA **No. 00-38**
ID NO. 01-185712-00 9
ASSESSMENT NO. 2248950

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 16, 2000 at 9:00 a.m. before Margaret B. Alcock, Hearing Officer. Robert Pineda ("Taxpayer"), who arrived at the hearing one hour late, represented himself. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a certified public accountant engaging in business in New Mexico.

2. In 1996 or 1997, the Taxpayer represented a client in an administrative protest to a gross receipts tax assessment. Gail MacQuesten, an attorney with the Department's Legal Services Bureau, was assigned to represent the Department in that proceeding.

3. In the course of the protest, Ms. MacQuesten became aware of the following facts concerning the Taxpayer's client: the client was a construction contractor who had been assessed over $100,000 in unreported gross receipts tax; the client maintained no business records; the client had not filed any gross receipts tax returns during the audit period at issue; the client had not filed any personal income tax returns during the audit period at issue.

4. During an informal conference with Ms. MacQuesten, the client indicated that the Taxpayer was a long-time advisor of the client.

5. After learning that the Taxpayer had advised the client for some time, and had not been hired just to represent the Taxpayer in the audit and protest proceedings, Ms. MacQuesten began to question why the client did not maintain adequate business records and failed to file required state tax returns.

6. Ms. MacQuesten had a number of meetings with the Taxpayer and his client, during which the Taxpayer acknowledged that his client should have reported gross receipts tax on his business income.

7. Because of her concern that the Taxpayer, a certified public accountant, had not advised his client concerning the need to maintain routine business records or file required tax returns, Ms. MacQuesten decided to refer the matter to Anita Williams, the audit manager of the Department's Office of Inspector General.

8. After speaking with Ms. MacQuesten, Ms. Williams checked the Department's data base to determine whether the Taxpayer had been filing tax returns.

9. Ms. Williams discovered the following facts concerning the Taxpayer's reporting history:

(a) In 1983, the Taxpayer registered his accounting firm for payment of gross receipts, compensating and withholding taxes, which are reported under New Mexico's Combined Reporting System (CRS).

(b) Between January 1991 and December 1993, the Taxpayer filed CRS-1 returns with the Department reporting monthly receipts in the range of $1,100 to $1,500.

(c) Between January 1994 and July 1995, the Taxpayer continued to file CRS-1 returns, although the amount of the receipts reported dropped significantly.

(d) The CRS-1 returns for April, June and July 1995, and the checks used to pay the taxes shown on those returns, were signed by the Taxpayer.

(e) In August 1995, the Taxpayer stopped filing CRS-1 returns.

(f) As of May 1997, the Taxpayer had 20 nonfiled tax periods.

10. Ms. Williams, who is a certified public accountant, found the Taxpayer's reporting history troubling for a number of reasons. First, she noted that the amount of gross receipts reported for the 1991-1993 period was unusually low for a certified public accountant with an active practice. During the 1993-1994 period, the amount of gross receipts reported was even lower and would not have been sufficient to support the business. Although the Taxpayer stopped reporting gross receipts tax completely in August 1995, he continued to engage in business, as evidenced by his representation of the client in Ms. MacQuesten's case and by his business listing in the Yellow Pages of the 1997 telephone directory. Based on these facts, Ms. Williams determined that further investigation was necessary.

11. The Department's collection unit had been working with the Taxpayer for some time in connection with unpaid taxes, and Ms. Williams issued subpoenas to the banks listed on the Taxpayer's financial records.

12. Using the bank records, Ms. Williams created worksheets of all deposits made to the Taxpayer's bank accounts during the period January 1995-December 1996. The worksheets listed each deposit by month and year, together with the source of the deposit as shown on the Taxpayer's deposit slips.

13. The deposits were broken down as follows:

(a) Some deposits were clearly related to receipts from accounting services provided by the Taxpayer. For example, one deposit slip stated "City of Taos audit" while another

stated “for tax preparation”. These deposits were listed on the worksheets under a column labeled “Gross Receipts”.

(b) Some deposits were identified as being for “Nopal Painting”. At one time, Nopal Painting had been registered with the Department for payment of gross receipts tax and had listed the Taxpayer as an owner. The business retired its registration number several years prior to the notations appearing on the Taxpayer’s bank deposit slips.

(c) There were deposits made almost daily from someone named “Edwin Fernandez” and from Mr. Fernandez’s company, “Mr. Tax”.

(d) A few deposits were identified as “loans” or “construction loans”.

(e) Many deposits could not be traced to a specific source and were listed as “Unidentified”.

14. Based on the worksheets, Ms. Williams concluded that the Taxpayer had substantially understated his gross receipts for the period January 1995-December 1996.

15. Ms. Williams also determined that the amount of gross receipts the Taxpayer reported on his 1991 CRS-1 returns was substantially lower than the business income reported on Schedule C to his 1991 federal income tax return, a copy of which had been provided with his bank records. The 1991 Schedule C reported gross receipts of $166,000; the CRS-1 returns the Taxpayer filed with the Department reported gross receipts of only $14,831.

16. Ms. Williams attempted to compare the Taxpayer’s income tax returns for later years with his gross receipts tax reporting, but discovered that the Taxpayer had not filed any New Mexico personal income tax returns for 1993, 1994, 1995 or 1996.

17. Ms. Williams notified the Taxpayer of her review of his bank records and asked him to explain the nature of his bank deposits in relation to his gross receipts tax reporting.

18. On June 27, 1997, the Taxpayer responded with a letter stating that none of the deposits made to his bank accounts constituted business income subject to gross receipts tax. The Taxpayer enclosed schedules of his gross receipts for the period at issue. The receipts shown on the schedules were quite low and did not match the bank deposits.

19. On October 6, 1997, Ms. Williams wrote the Taxpayer again, informing him that his schedule of gross receipts could not be processed without CRS-1 returns and further stating that she was unable to reconcile his bank deposits with the schedule he had provided. She asked him to provide an explanation for each category of deposits identified in the worksheets, along with business records and loan documents to verify the nature of the deposits.

20. Ms. Williams concluded her letter as follows:

> Please provide all of the information requested to identify your deposits...no later than October 31, 1997. If you do not comply with this request, I will assess gross receipts tax and personal income tax on all of the deposits I am questioning.
>
> If you have any questions or wish to discuss these issues with me, please feel free to call me directly at the telephone number above.

21. The Taxpayer did not provide Ms. Williams with the documents she requested.

22. On April 28, 1998, the Department issued Assessment No. 2248950 to the Taxpayer in the total amount of $105,782.73, representing $58,116.93 gross receipts tax, $29,058.51 penalty, and $18,607.29 interest for reporting periods January 1995-December 1996. The penalty portion of the assessment was made pursuant to Section 7-1-69(B) NMSA 1978 (1996), which imposed a 50 percent civil penalty for failure, with intent to defraud the state, to pay when due any amount of tax required to be paid.

23. On May 26, 1998, the Taxpayer filed a protest to the Department's assessment, asserting that the bank deposits on which the assessment was based did not represent business

income but represented loans, proceeds from the sale of personal assets, and gifts. The Taxpayer's protest letter requested time "to analyze the records and present a more accurate amount" of tax due.

24. On June 16, 1998, the Department acknowledged receipt of the Taxpayer's protest.

25. On June 21, 2000, the Department's attorney filed a Request for Hearing with the hearing officer.

26. On June 29, 2000, a notice of hearing was mailed to the Taxpayer by certified mail, return receipt requested, informing the Taxpayer that a formal hearing on his protest to Assessment No. 2248950 would be held on August 24, 2000 at 9:00 a.m.. The notice was received by the Taxpayer on July 3, 2000.

27. On August 22, 2000, three days before the scheduled hearing, George E. Adelo, Esq. filed an entry of appearance on behalf of the Taxpayer and asked that the formal hearing be rescheduled.

28. On August 23, 2000, the hearing officer mailed Mr. Adelo a letter by certified mail, return receipt requested, informing him that the hearing on the Taxpayer's protest to Assessment No. 2248950 had been rescheduled for November 16, 2000 at 9:00 a.m. The green receipt card returned to the Department by the Post Office establishes that Mr. Adelo received the notice on or before August 28, 2000.

29. Sometime in August 2000, the Taxpayer filed CRS-1 returns for several years of nonfiled tax periods, including the tax periods at issue in this protest. The returns reported minimal gross receipts for each reporting period.

30. Because the Taxpayer did not include payment with the CRS-1 returns he filed, the Department's computer system generated an additional $12,000 of assessments against the Taxpayer based on the amounts reported on those returns.

31. The Taxpayer did not file a protest to the $12,000 of assessments issued after he filed CRS-1 returns in August 2000.

32. The Taxpayer did not notify the protest auditor assigned to his case that he had filed CRS-1 returns covering the period at issue in his protest to Assessment No. 2248950, nor did the Taxpayer inquire as to whether the returns would have any effect on that protest.

33. Between the date the protest was filed on May 26, 1998 and the date the hearing on the Taxpayer's protest was held on November 16, 2000, the Taxpayer did not provide any records to the Department to establish that the deposits made to his bank accounts represented loans, the sale of personal assets or gifts.

34. The Department never abated or made any adjustments to Assessment No. 2248950.

35. On November 16, 2000 at 9:00 a.m., a hearing was held on the Taxpayer's protest to Assessment No. 2248950. The Department appeared at the hearing through its counsel, Bruce J. Fort. Neither the Taxpayer nor his attorney were present at the commencement of the hearing.

36. The Department proceeded to present evidence to establish the correctness of the 50 percent civil fraud penalty assessed against the Taxpayer pursuant to Section 7-1-69(B) NMSA 1978 (1996).

37. At approximately 10:00 a.m., after the Department had presented testimony from two of its three witnesses, the Taxpayer arrived at the hearing.

38. The Taxpayer said his attorney told him the hearing was scheduled for 10:00 a.m. and also stated that he intended to withdraw his protest and enter into a payment agreement for taxes due.

39. When the hearing officer asked the Taxpayer to confirm that he wished to withdraw his protest to Assessment No. 2248950, totaling $105,782.73, plus accrued interest, the Taxpayer stated that he was not willing to withdraw his protest to that assessment. The Taxpayer said he thought the hearing concerned the $12,000 of assessments issued after he filed CRS-1 returns in August 2000.

40. The Taxpayer did not explain why he thought a hearing was being held on assessments he had never protested and which were not listed on either of the hearing notices. The Taxpayer's only explanation was that he probably wasn't paying enough attention to the notices issued by the hearing officer.

41. The hearing officer allowed the Department to continue with its case, and the Taxpayer was given the opportunity to cross-examine the Department's final witness.

42. The Taxpayer was given the opportunity to present evidence to establish that Assessment No. 2248950 was incorrect, but stated that he was not prepared to present any evidence or arguments in support of his protest.

43. At the conclusion of the hearing, the record was left open for 10 days to give the Taxpayer time to submit a motion setting out grounds to justify reopening the hearing.

44. On November 22, 2000, the Taxpayer's attorney submitted a letter to the Department's attorney asking that the hearing be reopened. The Department's attorney forwarded this letter to the hearing officer. On December 4, 2000, the Department filed its response to the Taxpayer's request.

45. By letter dated December 13, 2000, the hearing officer denied the Taxpayer's request to reopen the hearing on Assessment No. 2248950.

DISCUSSION

There is a statutory presumption that any assessment of taxes made by the Department is correct. Section 7-1-17(C) NMSA 1978; *Mears v. Bureau of Revenue*, 87 N.M. 240, 241, 531 P.2d 1213, 1214 (Ct. App. 1975). When challenging a Department assessment, it is the taxpayer's burden to present evidence to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Having failed to present any evidence at the hearing on his protest to Assessment No. 2248950, the Taxpayer has not met his burden of proving that the Department's assessment of gross receipts tax and interest is incorrect.

The presumption of correctness does not apply to the Department's assessment of the 50 percent civil penalty for failure to pay tax with the intent to defraud the state. Section 7-1-78 NMSA 1978 provides that in any proceeding involving the issue of whether a 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." Section 7-1-78 does not specify the standard or degree of proof required. 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, 292, 693 P.2d 575, 579 (1982). This is the standard applied in this case.

The penalty at issue was imposed pursuant to the version of Section 7-1-69(B) NMSA 1978 in effect during the audit period, which provided as follows:

> 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.

In *State v. Long*, 1996-NMCA-011 ¶6, 121 N.M. 333, 335, 911 P.2d 227, 229, the court of appeals construed a similar statute governing criminal tax fraud to include "all willful attempts to evade taxes, including willful failure to file returns if that results in evasion of taxes and willful failure to pay taxes required by New Mexico law if that is motivated by an intent to evade." Because an individual's intent is seldom subject to proof by direct evidence, intent may be proved by circumstantial evidence. *State v. Pisio*, 1995-NMCA-9, 119 N.M. 252, 259, 889 P.2d 860, 867, *cert. denied*, 119 N.M. 168, 889 P.2d 203 (1995). *See also, State v. Motes*, 118 N.M. 727, 729, 885 P.2d 648, 650 (1994) (intent is rarely established by direct evidence and almost always inferred from other facts).

The evidence presented by the Department is more than sufficient to establish the Taxpayer's intent to defraud the state of gross receipts tax. The Taxpayer is a certified public accountant who is knowledgeable about state taxes. In 1983, the Taxpayer registered with the Department for payment of gross receipts tax and filed CRS-1 returns until July 1995. There is no question that the Taxpayer was aware of the gross receipts tax and knew the tax applied to his receipts from performing accounting services.

Beginning in August 1995, the Taxpayer stopped reporting or paying gross receipts tax to the Department. There is no evidence the Taxpayer relied on a bookkeeper or any other third party to file his returns. At the hearing, the Department introduced copies of the Taxpayer's CRS-1 returns for April, June and July 1995, as well as copies of the checks used to pay the taxes shown on those returns. Both the returns and the checks were signed by the Taxpayer. This evidence supports the conclusion that the Taxpayer was well aware of the fact that no CRS-1 returns were filed with the Department after July 1995.

The Taxpayer continued to engage in business as a certified public accountant during the period he failed to file CRS-1 returns with the Department. The telephone Yellow Pages for 1997 list the Taxpayer's name and number under the category "Accountants—Certified Public." During the time the Taxpayer was not filing returns, he was actively representing a client in an administrative proceeding before the Department. An assessment had been issued against the Taxpayer's client based on the client's failure to file CRS-1 returns for his construction business. In the course of the administrative proceeding, the Taxpayer acknowledged to the Department's attorney that his client should have filed CRS-1 returns to report his business receipts. At the same time, the Taxpayer failed to file CRS-1 returns on his own business income.

It is also significant that the Taxpayer did not file personal income tax returns for tax years 1993, 1994, 1995 and 1996. Although the Taxpayer's personal income tax liability is not at issue in this protest, New Mexico courts have held that when a person accused of fraud in a criminal proceeding admits the act which constitutes the crime, but denies having the required mental state, evidence of another, nearly identical, act is admissible to show intent and knowledge. *State v. Nguyen*, 1997-NMCA-037 ¶10, 123 N.M. 290, 293, 939 P.2d 1098, 1101. *See also, State v. McCallum*, 87 N.M. 459, 461, 535 P.2d 1085, 1087 (Ct. App.) *cert. denied*, 87 N.M. 457, 535 P.2d 1083 (1975) (in a case involving several counts of fraud based on unfinished construction contracts, evidence of other uncompleted contracts was relevant to show fraudulent intent). The same rule would apply in a civil fraud proceeding. In this case, there is no question that a certified public accountant such as the Taxpayer would be aware of the legal duty to file personal income tax returns. The Taxpayer's failure to file personal income tax returns serves as further evidence that the Taxpayer's failure to file CRS-1 returns was motivated by an intent to defraud the state of taxes due.

Finally, there is evidence the Taxpayer either failed to maintain or refused to produce books and records to establish his gross receipts tax liability to the state. Section 7-1-10(A) NMSA 1978 provides that "every taxpayer shall maintain books of account or other records in a manner that will permit the accurate computation of state taxes..." Section 7-1-11(C) NMSA 1978 provides that "taxpayers shall upon request make their records and books of account available for inspection at reasonable hours to the secretary or the secretary's delegate..." Twice during 1997, the Department's auditor wrote the Taxpayer asking him to identify each category of bank deposits listed in her worksheets and to provide business records, including loan documents, to verify the nature of the deposits. The Taxpayer failed to produce the requested documents. In May 1998, the Taxpayer filed a protest to the Department's assessment, asserting that the bank deposits represented loans, proceeds from the sale of personal assets, and gifts. The Taxpayer's protest letter requested time "to analyze the records and present a more accurate amount" of tax due. As of the date of the November 16, 2000 hearing on the protest, the Taxpayer still had not provided any records to verify the source of his bank deposits for the audit period.

In *State v. Martin*, 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977), overruled on other grounds by *State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994), the court was asked to determine whether an attorney's chronic failure to keep adequate business records and file required returns was sufficient evidence to support his conviction for attempting to evade payment of gross receipts tax. The court held that it was, stating: "The absence of procedures and the lack of method of doing business shows a conscious pattern of reckless disregard of any obligation to comply with the law and consequently a reasonable inference of intent not to pay or correctly report proper taxes and income." In this case, the Taxpayer's failure to comply with the statutory requirement that taxpayers maintain and produce sufficient records to

allow the Department to accurately compute taxes due to the state is simply one more indication of his intent to evade the payment of tax.

Taken as a whole, the evidence presented by the Department establishes that the Taxpayer's failure to pay gross receipts tax due for the period January 1995-December 1996 was attributable to an intent to defraud the state of those taxes.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2248950, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer has not met his burden of proving that the Department's assessment of gross receipts tax and interest is incorrect.

3. The Department has met its burden of proving that the Taxpayer's failure to pay the gross receipts tax reflected in Assessment No. 2248950 was motivated by an intent to defraud the state, and the Taxpayer is subject to the 50 percent penalty imposed pursuant to Section 7-1-69(B) NMSA 1978 (1996).

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

DATED December 13, 2000.