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

IN THE MATTER OF THE PROTEST OF
RACHELLE L. SHAW, DDS, PC **No. 02-28**
ID NO. 02-428382-00 7
ASSESSMENT NO. 2768421

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 13, 2002, before Margaret B. Alcock, Hearing Officer. Rachelle L. Shaw, D.D.S., P.C. ("Taxpayer") was represented by its attorney, Daniel M. Faber. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 29, 2002, the Department issued Assessment No. 2768421 to the Taxpayer for $10,150.12 of CRS taxes, plus penalty and interest, due for the October 2001 reporting period.

2. On April 24, 2002, the Taxpayer filed a written protest to the assessment of penalty and interest.

3. As grounds for its protest, the Taxpayer stated that its bank had mistakenly dishonored the Taxpayer's $10,150.12 check in payment of the October 2001 taxes. The bank had subsequently explained its error to the Department and asked the Department to resubmit the check. The Taxpayer maintained that the Department's failure to resubmit the check absolved the Taxpayer of liability for interest and penalty on its late payment.

4. No supplemental statement of grounds for the protest was ever filed by the Taxpayer.

5. After the protest was filed, the Department abated the penalty assessed against the Taxpayer.

6. On July 16, 2002, the Department filed a request for hearing on the Taxpayer's protest of the assessment of interest.

7. On July 17, 2002, a certified letter was mailed to the Taxpayer notifying the Taxpayer that a formal hearing to consider its protest was scheduled for November 16, 2002 at 9:00 a.m. in the offices of the New Mexico Taxation and Revenue Department in Santa Fe.

8. On July 18, 2002, a second certified letter was mailed to the Taxpayer changing the date of the hearing to November 13, 2002.

9. On July 25, 2002, Daniel M. Faber entered his appearance on behalf of the Taxpayer.

10. The administrative hearing on the Taxpayer's protest convened on November 13, 2002, at 9:00 a.m. Daniel M. Faber appeared on behalf of the Taxpayer. Mr. Faber did not bring any witnesses with him to the hearing. Bridget A. Jacober appeared on behalf of the Department, with her witness, Sylvia Sena.

11. At the outset of the hearing, Mr. Faber stated that the only evidence he had to present on behalf of the Taxpayer was the sworn affidavit of the Taxpayer's office manager.

12. Ms. Jacober objected to admission of the affidavit, stating that Mr. Faber had not discussed the affidavit with her and had not provided her with a copy of the affidavit until immediately before the hearing. Ms. Jacober said the Department would not stipulate to the facts set out in the affidavit or agree to its admission.

DISCUSSION

The sole issue presented is whether the Taxpayer is liable for the interest assessed by the Department for the October 2001 reporting period. Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 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 thereto." *See also*, *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the Department's assessment of interest is presumed to be correct and it is the Taxpayer's burden to come forward with evidence and legal argument to establish that interest is not due.

The only evidence the Taxpayer tendered at the November 13, 2002 hearing was the sworn affidavit of the Taxpayer's office manager. The Department's attorney objected to the admission of the affidavit, stating that the Taxpayer had never asked the Department to stipulate to the facts in the affidavit and had not provided the Department with a copy of the affidavit until immediately before the hearing.

The Department's objection to admission of the affidavit was sustained for two reasons. The first reason was that admitting the office manager's affidavit would deprive the Department of its right to cross-examination. Section 7-1-24(G) NMSA 1978 states that administrative tax hearings "shall be conducted so that both complaints and defenses are amply and fairly presented." Department Regulation 3.1.8.8 NMAC provides: "Every party shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing...." *See also*, *State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989):

> In conducting quasi judicial hearings an administrative body is not required to observe the same evidentiary standards applied by a court, nevertheless administrative adjudicatory proceedings involving substantial rights of an applicant must adhere to fundamental principles of justice and procedural due process.

Hearsay is generally admissible in an administrative hearing. *Bransford v. State Taxation and Revenue Department*, 1998-NMCA-077 ¶ 18, 25 N.M. 285, 960 P.2d 827 (Ct.App. 1998). In this case, however, where hearsay was the only evidence presented, the prejudice to the party deprived of the right to cross-examination outweighed any probative value that evidence might have.

Which leads to the second reason for refusing admission of the Taxpayer's affidavit. New Mexico follows the legal residuum rule, which holds that an administrative decision based solely on inadmissible hearsay cannot stand. *Chavez v. City of Albuquerque*, 1997-NMCA-111, ¶ 5, 124 N.M. 239, 947 P.2d 1059. As stated in *Chavez*, 1997 NMAC-111 ¶ 4:

> Although an administrative agency may consider evidence that would not be admissible under the rules of evidence, the legal residuum rule requires that the agency's decision be supported by some evidence that would be admissible under the rules. Otherwise the agency's decision is not considered to be supported by substantial evidence.

See also, Young v. Board of Pharmacy, 81 N.M. 5, 9, 462 P.2d 139, 143 (1969) (hearsay evidence is not competent to support a finding in an administrative agency hearing). Here, the *only* evidence tendered by the Taxpayer was the sworn affidavit of its office manager, which is inadmissible hearsay. This affidavit, standing alone, could not support a decision in the Taxpayer's favor. Admission of the affidavit would serve no evidentiary purpose in the absence of other, admissible evidence that would meet the requirements of the legal residuum rule.

In any event, based on a review of the argument raised in the Taxpayer's protest, there appears to be no legal basis for granting the relief requested. The Taxpayer's written protest was filed on April 24, 2002. Section 7-1-24(A) NMSA 1978 provides that a taxpayer may supplement

the statement of grounds supporting its protest "at any time prior to ten days before any hearing conducted on the protest or, if a scheduling order has been issued, in accordance with the scheduling order." The Taxpayer in this case never filed a supplemental statement of grounds for its protest. Accordingly, the only issue before the hearing officer is the issue set out in the Taxpayer's April 24, 2002 protest, *i.e*., that the Department's failure to resubmit the Taxpayer's dishonored check relieved the Taxpayer of any liability for accrued interest.

Even assuming the Taxpayer's allegations concerning its bank's wrongful dishonor and the Department's failure to resubmit the check are true, the argument raised in the Taxpayer's protest is answered by the following provisions of Section 7-1-13.4 NMSA 1978:

> C. When an electronic payment transaction is reversed...or a check is dishonored by the taxpayer's financial institution, neither the department nor the fiscal agent of New Mexico is obligated to resubmit the transaction or check for payment. If the reversal or dishonoring causes the final payment of taxes to be not timely, then the provisions of Section 7-1-67 and 7-1-69 NMSA 1978 apply.

Section 7-1-67 NMSA 1978 is the statute governing the imposition of interest and states, 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. In this case, the Taxpayer failed to make timely payment of CRS taxes due for the October 2001 reporting period. Although this failure was

not intentional, the fact remains that the $10,150.12 tax payment was still in the Taxpayer's account and was not available to the state during the period at issue. For this reason, interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2768421, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer failed to meet its burden of proving that the Department's assessment of interest for the October 2001 reporting period was incorrect.

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

DATED: November 14, 2002.