

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

IN THE MATTER OF THE PROTEST OF
JOHN F. GILLIAM JR., AND MARTHA L. GILLIAM
PROTEST TO ASSESSMENT NOS. 718277 AND 718278

NO. 02-33

DECISION AND ORDER

This matter came on for formal hearing on May 20, 1998 before Gerald B. Richardson, Hearing Officer. John F. Gilliam Jr., and Martha L. Gilliam, hereinafter, "Taxpayers", were represented at the hearing by Mr. John F. Gilliam Jr. The Taxation and Revenue Department, hereinafter, "Department", was represented by its Chief Counsel, Frank D. Katz, Special Assistant Attorney General. The instant matter involves the Taxpayers' protest to assessments of personal income tax. The hearing on this matter was consolidated for hearing at the same time as the hearing of two other protests by the Taxpayers, those being a protest to a gross receipts tax assessment and a protest to various Department levies. The hearing record was left open for 45 days for the Taxpayers to present additional information and arguments to be considered in determining their protests. Based upon information provided by the Taxpayers subsequent to the hearing, the gross receipts tax assessment was abated by the Department and that protest is now moot. The Taxpayers' protest to the Department's levies was resolved by Decision and Order No. 98-35. On June 14, 1998, Mr. Gilliam wrote the Hearing Officer, requesting transcripts of the hearing conducted on May 20th. On June 16, 1998, the Hearing Officer responded to Mr. Gilliam, informing him that there are no written transcripts of the hearing, but that the Department does make audio tapes of the hearing, which constitute the official record of the hearing. The Hearing Officer sent copies of the original tapes in response to Mr. Gilliam's

request. On July 22, 1998, the Taxpayers submitted additional legal authority in support of their income tax assessment. The Hearing Officer was also informed by Mr. Katz that the Taxpayer was making records available with respect to the gross receipts tax assessment and that the Department would be sending one of its auditors to inspect those records and determine whether the gross receipts tax assessment should be adjusted. Sometime thereafter, Mr. Katz, an exempt state employee, was removed from his job by Governor Johnson. The matter was then assigned to David Iglesias, the succeeding Chief Counsel. Mr. Iglesias took no action on the matter to the knowledge of the Hearing Officer and after he resigned from the Chief Counsel position, the Department's legal file was missing and never found. Additionally, the original tapes of the hearing, which had been given to the Legal Department's support staff for copying and transmittal to Mr. Gilliam, were missing and never found. The matter languished until the matter was assigned to new counsel for the Department, Bruce J. Fort, Special Assistant Attorney General. On October 3, 2001, he filed a Request for Hearing, seeking to have the matter reheard because of the missing tape record. The legal file was reconstructed from the Hearing Officer's pleadings file and Mr. Gilliam provided the copies of the tapes which had been provided to him, allowing the hearing record to be reconstructed. Because the record was able to be reconstructed, there was no need for a new evidentiary hearing. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 15, 1997, the Department mailed Assessment No. 718277 to the Taxpayers assessing personal income tax, penalty and interest for the 1994 tax year in the total amount of \$7,872.

2. On August 15, 1997, the Department mailed Assessment No. 718278 to the Taxpayers assessing personal income tax, penalty and interest for the 1995 tax year in the total amount of \$7,233.72.

3. The Department's assessments were provisional or estimated assessments because the Taxpayers failed to file, report and pay personal income taxes to the Department for tax years 1994 and 1995.

4. The Department's assessments were calculated by taking the amount of personal income tax reported and paid to the Department by the Taxpayers for the 1993 tax year and grossing it up by 50%, and then calculating the interest and penalty to be applied in accordance with the statutes governing the imposition of penalty and interest.

5. On September 11, 1997, the Taxpayers filed a protest to Assessment Nos. 718277 and 718278.

6. Mr. Gilliam is the sole proprietor of a printing business located in Albuquerque, New Mexico known as USA Printing.

7. Mr. Gilliam deposits the payments he receives from performing printing jobs for his customers in the business account of USA Printing.

8. Mr. Gilliam wrote checks on the USA Printing business account to cover business expenses. He also regularly wrote checks on the USA Printing business account made payable to his personal checking account and deposited those checks in his personal account.

9. Mr. Gilliam regularly writes checks on his personal account to cover his personal expenses such as his mortgage payment, grocery bills, etc.

10. Mr. Gilliam sometimes also draws cash out of the USA Printing business checking account.

11. The Internal Revenue Service (“IRS”) has not issued assessments for personal income tax to the Taxpayers for tax years 1994 and 1995.

12. Although he was given the opportunity to do so, Mr. Gilliam presented no evidence to dispute the factual correctness of the amount of the Department’s assessments, instead relying upon his legal arguments as to the Department’s authority to assess the taxes.

DISCUSSION

At the close of the formal hearing, the Taxpayers were given the opportunity to submit written argument within 45 days of the hearing in support of their protest. Taxpayers were also given the opportunity to produce business and personal bank statements and check registers in order to challenge the factual correctness of the amount of the Department’s assessments. Taxpayers did submit written argument, in the form of a pleading captioned “Motion for Abatement”, which was accepted as their legal argument. Taxpayers failed to present any records to dispute the correctness of the amount of the Department’s assessments.

Section 7-1-17(C) NMSA 1978 provides that “Any assessment of taxes or demand for payment made by the department is presumed to be correct.” “Tax” is defined at Section 7-1-3(U) NMSA 1978 to include the amount of any interest and penalty relating to taxes assessed pursuant to the provisions of the Tax Administration Act unless the context of the statutory provision requires otherwise. Thus, the presumption of correctness also attaches to the interest and penalty portions of assessments unless there is something in the context of the statute at issue to indicate otherwise. Because of the presumption of correctness, the burden of proof is upon any taxpayer protesting an assessment to present evidence contesting the factual correctness of the assessment or legal arguments challenging the legal basis of the assessment which clearly overcome the presumption of correctness. *Archuleta v. O’Cheskey*, 84 N.M. 428, 504 P.2d 638

(Ct. App. 1972). Taxpayers having failed to present any evidence whatsoever to dispute the amount of the Department's assessment have failed to meet their burden of proof in this case and the presumption of correctness that attaches to the Department's assessments establishes the factual correctness with respect to the amount of the assessments.

The Taxpayers, however, have presented legal arguments to contest the validity of the Department's personal income tax assessments. The first argument they raise is that they are not "individuals" or "persons" upon whom the income tax is imposed. Section 7-2-3 NMSA 1978 is the statute imposing New Mexico's personal income tax. It provides:

A tax is imposed at the rates specified in the Income Tax Act upon the net income of *every resident individual* and upon the net income of every nonresident individual employed or engaged in the transaction of business in, into or from this state, or deriving any income from any property or employment within this state. (emphasis added.)

Section 7-2-2 of the Income Tax Act defines "Individual" and "person" follows:

- I. "individual" means *a natural person*, an estate, a trust or a fiduciary acting for a natural person, trust or estate:
- R. "person" means any *individual*, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, joint venture, syndicate of other association; "person" also means to the extent permitted by law, any federal, state or other governmental unit or subdivision or agency, department or instrumentality thereof; (emphasis added.)

Mr. Gilliam claims that he operates his printing enterprise as a "private", independent contractor and citizen, not as an individual or person as defined above in the Income Tax Act. In support of this argument he argues that the above definitions speak "in terms of artificial entities and forms of doing business, which have been created by legislative acts or charters. The petitioner, as a private citizen, is not such said legislative or congressional creation." Taxpayer's Motion for Abatement, p. 15. Although some of the entities defined under the definitions of "individual"

and “person” are artificial entities, such as trusts and corporations, which are creatures of the law, the definition of an individual also includes the term “*natural* person” (emphasis added), and “person” is defined to include an “individual”. Natural persons are not created by laws. They are born of their mothers. Thus, regardless of the fact that Mr. Gilliam is a private citizen, he is also a natural person, as that term is commonly understood, and as such, he is an “individual” upon whom the legislature intended to impose an income tax pursuant to its enactment of § 7-2-3 NMSA 1978.

The second argument raised by the Taxpayers is that because New Mexico’s personal income tax “piggy-backs” on the federal income tax¹, and because there has been no assessment of income tax by the IRS against the Taxpayers for the 1994 and 1995 tax years, that the Department cannot make its own independent determination of the Taxpayer’s federal adjusted gross income for purposes of assessing New Mexico personal income tax. This argument is rejected as well. This issue was recently addressed and determined adversely to the Taxpayers’ position by the New Mexico Supreme Court in *James A. Holt and Terri L. Holt vs. New Mexico Department of Taxation & Revenue*, 2002-NMSC-034, NMSBB Vol. 41, No. 51, Dec. 19, 2002, at pp. 18-24. Because it is a recent decision which the Taxpayers may have difficulty locating, a copy of the decision will be included with this decision when it is mailed to the Taxpayers. The Department has the authority and indeed, the obligation, to correctly determine² the Taxpayers’ income tax liability to the state.

¹ The starting point for calculating an individual’s New Mexico personal income taxes begins with the individual’s federal adjusted gross income. *See*, § 7-2-2(A) and (B) NMSA 1978.

² In this case, the Department was forced to estimate the Taxpayers’ income tax obligation because the Taxpayers chose not to make their financial records available to the Department from which it could make a more precise determination.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely, written protest, pursuant to § 7-1-24 NMSA 1978, to Assessment Nos. 718277 and 718278 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayers are “natural persons” and thus “individuals” who are subject to the imposition of personal income tax pursuant to the Income Tax Act [Chapter 7, Article 2 NMSA 1978].

3. The Taxpayers failed to present evidence to overcome the presumption of correctness which attaches, pursuant to § 7-1-17(C) NMSA 1978, to Assessment Nos. 718277 and 718278 and therefore those assessments are presumptively correct.

4. The Department may determine the Taxpayers’ federal adjusted gross income and thus the Taxpayers’ New Mexico taxable income regardless of whether the Taxpayers have been assessed federal income tax for the same tax periods by the IRS.

For the foregoing reasons, the Taxpayers’ protest IS HEREBY DENIED.

DONE, this 30th day of December, 2002.