

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

IN THE MATTER OF THE PROTEST  
OF **ROBERT AND CAROL WELSH**,  
PROTEST TO ASSESSMENT NOS. 563705, 563706  
AND 563707.

No. 96-11

**DECISION AND ORDER**

This matter came on for formal hearing on February 26, 1996 before Gerald B. Richardson, Hearing Officer. Robert and Carol Welsh (hereinafter "Taxpayers") were represented by their son, Robin Welsh. The Taxation and Revenue Department (hereinafter "Department") was represented by Bruce J. Fort, Esq.

Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayers were residents of New Mexico during tax years 1989, 1990 and 1991.
2. The Taxpayers operated a coin operated laundry business in New Mexico during tax years 1989-1991.
3. The Taxpayers reported and paid gross receipts taxes to the Department upon their coin operated laundry business during tax years 1989-1991.
4. The Department has requested of the Taxpayers that they file personal income tax returns for tax years 1989-1991.
5. The Taxpayers have not filed New Mexico personal income tax returns with the Department for tax years 1989-1991.
6. The Taxpayers are unwilling to provide their business records to the Department

for tax years 1989-1991 for purposes of determining their actual personal income tax liability for those tax years.

7. The Department was unable to obtain any information from the Internal Revenue Service as to the amount of the Taxpayers' federal adjusted gross income for tax years 1989-1991.

8. It is the policy of the Department to try to get taxpayers to self-report their personal income taxes. In cases where a taxpayer will not self report, the Department will try to obtain information from the Internal Revenue Service as to what income was reported to the Internal Revenue Service for income tax purposes.

9. When the Department has been unsuccessful at getting taxpayers to self-report for personal income tax purposes, and when the Department has been unsuccessful at obtaining information from the Internal Revenue Service as to a taxpayer's federal adjusted gross income, the Department will estimate a taxpayer's New Mexico income tax liability. In cases where the Department has information about a taxpayer's gross receipts, the Department will use ten percent of gross receipts as an estimate of a taxpayer's net income from the operation of the business for purposes of calculating a taxpayer's personal income taxes.

10. Assessment Nos. 563705, 563706 and 563707 are estimated assessments which estimated that ten percent of the Taxpayers' gross receipts from the operation of their coin operated laundry business was net income to the Taxpayers from the operation of their business during tax years 1989-1991.

11. On December 20, 1993, the Department issued Assessment Nos. 563705, 563706 and 563707 to the Taxpayers in the respective amounts of \$21,042.66, \$27,641.77 and \$20,957.32 of personal income tax, interest and penalty for tax years 1989, 1990 and 1991.

12. On January 18, 1994, the Taxpayers timely filed a written protest with the Department to Assessment Nos. 563705, 563706 and 563707.

## **DISCUSSION**

This case involves the propriety of the Department's estimated assessments of the Taxpayers' 1989-1991 personal income taxes. The Department had contacted the Taxpayers and requested that they file their income tax returns, but the Taxpayers have failed to do so. The Department was also unable to obtain information from the Internal Revenue Service which would have provided a basis to calculate New Mexico personal income taxes based upon the Taxpayers' federal income tax filings. The Taxpayers also refused to provide their business tax records so that the Department could audit them to determine their income tax liability. The only remaining information the Department had available to determine the Taxpayer's taxable income were the monthly gross receipts tax returns filed by the Taxpayers for their coin operated laundry business during the years in question. Using this information, the Department estimated that ten percent of the Taxpayer's gross receipts were received by the Taxpayers as income from their business and issued estimated assessments on this basis.

The Taxpayers argued that the Department's assessments were improper because the starting point for calculating New Mexico taxable income is federal adjusted gross income<sup>1</sup> and not the Taxpayers' gross receipts. While it is true that New Mexico's income tax scheme does piggyback on federal adjusted gross income, the Taxpayers have declined to provide that information to the Department and apparently have not filed tax returns with the IRS either, since that information was not available from the IRS. It was explained to Mr. Welsh at the hearing that there is a presumption of correctness which attaches to any assessment of tax by the Department pursuant to Section 7-1-17(C) NMSA 1978 and that this placed the burden on the Taxpayers to come forward with some evidence

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<sup>1</sup> this is a correct characterization. See, definitions of "base income" and "net income", Section 7-2-2(B) and (N) NMSA 1978.

as to why the assessments were incorrect. In spite of this, Mr. Welsh provided no factual evidence whatsoever concerning his income or lack thereof, and testified that he would not allow the examination of his business records by the Department for purposes of establishing what income he and his wife received from their business. Thus, at this juncture, the correctness of the amount of taxes assessed by the Department remains un rebutted and is therefore established.

Additionally, 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 . . . ." In applying these provisions, Judge Sutin noted that:

The taxpayer has a duty to provide the commissioner with books and records upon which to establish a standard for taxation as provided by law. If he fails to do so, he cannot complain of the best methods used by the commissioner.

***Archuleta v. O'Cheskey***, 84 N.M. 428, 504 P.2d 638 (Ct.App. 1972), Sutin, J., specially concurring. Thus, having failed to provide evidence as to the amount of the Taxpayer's federal adjusted gross income for the tax years at issue, the Taxpayer may not argue with the method used by the Department to estimate its income for New

Mexico tax purposes.

The Taxpayers also argue that states have no power to tax the income of residents because this power would be repugnant to the federal constitution and laws. The Taxpayer has cited to no cases in support of this position, but cites to Amendment XVIII of the United States Constitution, which established the prohibition on the manufacture, sale of transportation of intoxicating liquors as an example where the power to enforce the amendment was specifically given to the states in Section 2 of the Amendment. The Taxpayer argues that the implication of the express grant of power in the Eighteenth Amendment is that for states to have an enumerated power, the power must be expressly granted in federal law.

This inference is simply incorrect and is rebutted by the express language of Amendment X of the federal constitution. Specifically, it provides:

[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Thus, unless there is an express *prohibition* on the State's power to impose an income tax, the Tenth Amendment preserves the power to the States. The Taxpayer has not pointed out any such prohibition on the power of states to impose an income tax nor is this decision maker aware of any. Additionally, the power of states to impose an income based tax upon their residents has been established in the jurisprudence of the federal courts since at least 1920, when the U.S. Supreme Court upheld that power in ***Maguire v.***

**Trefry**, 253 U.S. 12, 64 L. Ed. 739, 40 S. Ct. 417 (1920).

Having failed to present evidence or legal argument to rebut the presumption of correctness which attaches to the Department's assessments, the Taxpayers' protest is hereby denied.

**CONCLUSIONS OF LAW**

1. The Taxpayers filed a timely, written protest to Assessment Nos. 563705, 563706 and 563707 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayers have the obligation to maintain adequate records upon which the Department can determine their tax liability and to make such records available to the Department.

3. When a Taxpayer refuses to make such records available to the Department, the Department may use other reasonable means to determine the Taxpayer's liability.

4. The Taxpayers failed to rebut the presumption of correctness which attached to the Department's assessments of tax.

5. New Mexico has the power to impose a tax upon the income of its residents domiciled in New Mexico.

For the foregoing reasons, THE TAXPAYERS' PROTEST IS HEREBY DENIED.

DONE, this 28th day of March, 1996.