IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

GEA INTEGRATED COOLING TECHNOLOGY,

Appellant,

vs.

No. 30,790
Taxation and Revenue Dept.
ADM-10-13

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Appellee.

IN THE MATTER OF THE PROTEST OF GEA INTEGRATED COOLING TECHNOLOGY

DEPARTMENT'S ANSWER BRIEF

Appeal of the Decision of the Taxation and Revenue Department's Hearing Officer
Gerald B. Richardson, Hearing Officer

GARY K. KING
Attorney General

Amy Chavez-Romero
Special Assistant Attorney General
New Mexico Taxation and
Revenue Department
Legal Services Bureau
P.O. Box 630
Santa Fe, New Mexico 87504-0630
Telephone: (505) 827-0048
Fax: (505) 827-0684

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal and Other State Cases

New Mexico Statutes and Regulations

Federal Statutes

INTRODUCTION

Taxpayer appeals a decision and order of the Department's Hearing Officer. In his decision and order, the Hearing Officer concluded that Taxpayer is subject to the amended, increased statutory penalty limitation that became effective January 1, 2008. The Department's position is that the Hearing Officer's decision and order properly applies the increased penalty limitation of 2008 to an assessment issued in 2009. The Department further maintains that the Hearing Officer's decision and order satisfies the intent of the Legislature in enacting the increased penalty limitation. Finally, although the Department and Hearing Officer adopted distinct approaches in applying the increased penalty limitation to determine the amount of the Taxpayer's penalty, both relied on the same principles. The Hearing Officer's analysis properly applies the same principles applied by the Department in its own prospective application of the penalty limitation.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

Taxpayer has filed this appeal pursuant to NMSA 1978, Section 7-1-25 (1989), of a decision and order issued by a Hearing Officer of the Taxation and Revenue Department ("Department") under NMSA 1978, Section 7-1-24 (J)(2003).

B. Statement of Facts and Proceedings

This appeal arises from a protest filed by GEA Integrated Cooling Technology ("Taxpayer") under Section 7-1-24, in which Taxpayer protested an assessment of tax penalty. Pursuant to Section NMSA 1978, Section 7-1-69 (2003), the Department applied a 10% limit on the accrual of penalty on tax liability that was unpaid up to January 1, 2008. [RP 2] After January 1, 2008, a new 20% penalty limitation became effective pursuant to NMSA 1978, Section 7-69 (2007), and the Department applied that penalty limitation to the unpaid liability. *Id.*

On September 21, 2009, the Department issued an assessment to Taxpayer for gross receipts tax, penalty and interest due. *Id.* Taxpayer protested the penalty assessment. [RP 7, 42] This matter was considered submitted for determination upon the filing of briefs on September 21, 2010. [RP 1]

The issue considered for determination was whether the Department correctly applied an increase in the maximum penalty limitation from 10% to 20% pursuant to NMSA 1978, Section 7-1-69 (A)(1) and (2), as amended by Laws 2007, ch. 45, § 4, to Taxpayer's tax liabilities accrued prior to January 1, 2008, but not paid until after that date. [RP 2] The Hearing Officer denied the protest, holding that the 20% penalty cap was properly applied to the calculation of penalty. [RP 8, 9]

ARGUMENT

Standard of review. The issue presented by Taxpayer is whether the Hearing Officer's interpretation was in accordance with the law, which is subject to a *de novo* standard of review. *Sonic Indus. v. State*, 2006-NMSC-38, ¶ 7, 140 N.M. 212, 141 P.3d 1266, *Bass Enterprises Production Co v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 10, 148 N.M. 516, 238 P.2d 885. The Court will give deference to an agency's reasonable interpretation of an application of the law. *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 25, 136 N.M. 630, 103 P.3d 554. Tax assessments of the Department are presumed correct. NMSA 1978, § 7-1-17 (C) (2007).

I. The Hearing Officer prospectively applied the 20% penalty cap to penalties assessed after January 1, 2008.

In 2007, the Legislature amended NMSA 1978, Section 7-1-67 (interest on deficiencies), Section 7-1-68 (interest on overpayments), and Section 7-1-69 (civil penalty for failure to pay tax or file a return). 2007 N.M. Laws, Ch. 45 §§ 2, 3, and 4. Section 16 of the act implementing these amendments states, "[t]he effective date of Sections 1 through 5 of this act is January 1, 2008." 2007 N.M. Laws, ch. 45, § 16 (A).

First, Section 7-1-67 was amended to change the interest rate to be paid by taxpayers when they underpaid taxes due from 15% per year, computed on a daily basis, to the rate established for individuals pursuant to 26 U.S.C. § 6621,

computed on a daily basis. 2007 N.M. Laws, ch. 45, § 2.[1] The applicable rate has ranged from 7% for the period January 1, 2008 through March 31, 2008 to 3% for the period January 1, 2011 through March 31, 2011. *See* "Table of Effective Interest Rates," Taxation and Revenue Department website, www.tax.state.nm.us.

The Legislature additionally increased the penalty to be imposed in Chapter 45, Section 4. Prior to the 2007 legislation, penalty was imposed at a rate of 2% of the unpaid tax per month up to a maximum of 10% of unpaid tax. Chapter 45, Section 4 increased the maximum to 20% of the unpaid tax.

In this case, the Department calculated Taxpayer's penalty by applying the pre-2007 version of Section 7-1-69 to tax that was due, but had not been paid before January 1, 2008. [RP 2] Since those taxes remained due and unpaid on January 1, 2008, the Department resumed the assessment of penalty at 2% per month up to an *additional* 10% penalty, applying the amended version of 7-1-69. [RP 2] The liability was also subject to split interest rates, 15% from the date originally due through December 31, 2007, and the rates established by 26 U.S.C. § 6621 after that date. [RP 2]

The Hearing Officer concluded that the Department did not retroactively apply the 2007 amendment to Section 7-1-69. [RP 7] The Hearing Officer

[1] NMSA 1978, Section 7-1-67 was amended in two bills enacted in the 2007 session, Chapter 45 and Chapter 262. Chapter 262, Section 4 amended Subsection A (4), changing the time to pay taxes found due in a managed audit from 30 days to 180 days, but did not change the interest rate. Chapter 262 (Senate Bill 203) was signed last and therefore, pursuant to NMSA 1978, Section 12-1-8 (1977) is compiled. However, because the two amendments to Section 7-1-67 do not conflict, the Department has been treating both Chapter 45, Section 3 and Chapter 262, Section 4 as law. *State v. Smith*, 2004-NMSC-32, ¶¶ 24-25, 136 N.M. 372, 379, 98 P.3d 1022, 1039.

reasoned that Section 7-1-69 specifically provides when and how penalty is imposed on a taxpayer. [RP 5] Both the 2007 version of the statute and the earlier version provide that a penalty shall be "*added* to the *amount assessed*." (Emphasis added.) *Id.* The Hearing Officer then explained that NMSA 1978, Section 7-1-17 (B) (2007) provides when taxes are assessed. *Id.*

> "B. Assessments of tax are effective:
> (1) when a return of a taxpayer is received by the department showing a liability for taxes;
> (2) when a document denominated "notice of assessment of taxes," issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for the tax is asserted, stating the nature and amount of taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer; or
> (3) when an effective jeopardy assessment is made as provided in the Tax Administration Act." [RP 5, 6]

The Hearing Officer reasoned that unless there has been an assessment of tax by the Department or a self-assessment by the taxpayer, there is no way of knowing what the amount of unpaid tax is for purposes of calculating how much penalty is to be imposed. [RP 6] Thus, the Hearing Officer found that penalty must be imposed at the time of the assessment. *Id.* The Hearing Officer concluded that if the tax is assessed after the effective date of the amendments to Section 7-1-69, penalty is properly applied up to 20% of tax principal as allowed by the law in effect at the time of the assessment. [RP 6, 7] The Hearing Officer observed that

since the new penalty maximum was only applied after the effective date of the statute change, it was not applied retroactively. *Id.*

Taxpayer argues that the Hearing Officer's application of the amended penalty cap is a retroactive application of the law. Taxpayer bases its argument on the assumption that the version of the law in effect on the date the taxpayer fails to make a timely payment or timely file a return is that version which must be applied.

The Hearing Officer's analysis, however, proves why the date of a missed filing or payment is not determinative of the penalty cap that applies. The Hearing Officer properly analyzes the language of the statute and observes that penalty is *added to the amount assessed*, and that at that time, the amount of penalty is determined. He concludes that the penalty cap must apply when the penalty is computed upon the assessment. He thus appropriately applies provisions regarding the calculation of penalty effective on the date the penalty is calculated.

In contrast, Taxpayer advocates application of the penalty cap that was effective on the date the taxpayer failed to timely file a return or timely pay tax. Taxpayer's approach requires an application of provisions regarding the calculation of the total amount of penalty on a date when the calculation of penalty would have been impossible.

In addition to interpreting the language of Section 7-1-69, the Hearing Officer applied the decision of the New Mexico Supreme Court in *Howell v. Heim*, 118 N.M. 500, 882 P.2d 541 (1994) to determine that application of the amended Section 7-1-69 to assessments after January 1, 2008 is a prospective, and not a retroactive, application of the amended statute. Citing *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct. App. 1991), the Court held that a statute or regulation is considered retroactive only "if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions." *Howell*, 118 N.M.at 506, 882 P.2d at 547. The Court further recognized, "a statute does not operate retroactively merely because some of the facts or conditions which are relied upon existed prior to the enactment." *Id.*

In *Howell*, the Court concluded that a regulation was not retroactively applied, even though it took into account periods of time prior to its promulgation. *Id.* Similarly, in this case, although the Department considers facts and circumstances surrounding Taxpayer's nonpayment of taxes in determining whether the imposition of penalty is proper, the amended penalty cap was only applied when the penalty was assessed, which occurred after the effective date of the statutory amendment. [RP 8] Thus, the application of the amended penalty

cap, like the application of the amended regulation in *Howell*, does not constitute a retroactive application.

Taxpayer alleges that the Department "is not merely 'consider[ing] the facts and circumstances surrounding Taxpayer's nonpayment of taxes in determining whether the imposition of penalty is proper,' but is requiring new obligations, imposing new duties and affixing new disabilities to past transactions." Taxpayer's argument is misplaced.

The Hearing Officer's application of the amended Section 7-1-69 to an assessment issued after January 1, 2008 does not impair vested rights acquired under prior law, impose new duties or affix new disabilities to past transactions. Any new requirements are imposed only with respect to penalty assessments issued *after* January 1, 2008. The Hearing Officer's application thus imposes the law in effect at the time, to an existing assessment. As the Hearing Officer explained in the context of the Court's decision in *Howell*, the application of the amended law to the 2009 assessment is not invalidated just because the assessment results from Taxpayer's failure to pay taxes before the effective date.

In addition to *Howell*, the Hearing Officer referenced the New Mexico Supreme Court's decision in *Bradbury & Stamm Construction Co.*, 70 N.M. 226, 372 P.2d 808 (1962) in support of the prospective nature of his application of the

increased penalty cap to the taxpayer's assessment.[2] *Bradbury & Stamm* illustrates the prospective application of an amended interest statute to an existing liability. In that case, the Department owed interest to a taxpayer on a refund for an overpayment made before a 1961 statute reduced the interest rate from 6% to 2%. *Id.*, 70 N.M. at 236-237, 372 P.2d at 815-816. Construing the 1961 statute as prospective only, the Court applied the amended interest rate to the existing liability from the effective date of the 1961 legislation until the Department paid the refund. *Id.*, 70 N.M. at 240, 372 P.2d at 818.

The Hearing Officer explained the relevance of the Court's holding in *Bradbury & Stamm* to this case. The Decision and Order states:

> In ruling against the taxpayer, the Court relied on the general rule applicable to statutory interest on tax refunds that where there has been a change of law changing the statutory rate after the cause of action accrues, the interest should be allowed at the old rate before the amendment takes effect and the new rate after the effective date. Following this rule, the Court found that applying the new rate only after its effective date would not be giving the statutory amendment a retroactive effect. Similarly, in this case, the new penalty maximum was only applied after the effective date of the statutory change, and it was not applied retroactively. [RP 7]

Taxpayer claims, however, that the holding in *Bradbury & Stamm* supports its position. Taxpayer states that in *Bradbury & Stamm,* the right of a taxpayer to

[2] *Bradbury & Stamm* involves a statute that imposes interest on the State for failure to timely pay a refund due to a taxpayer. However, the Court discusses the payment of interest by the State as a penalty on the State, just like the interest and penalty imposed on a taxpayer. *Id.* 70 N.M. at 238, 372 P.2d at 817. The retroactivity analysis is no different for interest on a refund and interest on a taxpayer's underpayment of tax and is imposed at the same rates in Section 7-1-67 and Section 7-1-68.

receive interest on a deficiency accrued on a daily basis, and the Court held that the taxpayer's right to interest payments that accrued *before* the effective date of the amendment was not effective. Thus, Taxpayer concludes that the Department is permitted to collect only 10% penalty.

Taxpayer's analysis stops short of applying the Court's entire conclusion. In addition to concluding that the *unamended* interest rate would apply with respect to interest payments that accrued *before* the effective date of the amended legislation, the Court held that the *amended* interest rate would apply to interest payments that accrued *after* the effective date of the amended legislation. *Bradbury & Stamm*, 70 N.M. at 240, 372 P.2d at 818. Construing the amended interest statute as prospective only, the Court applied the amended interest rate to the existing liability from the effective date of the 1961 legislation until the Department paid the refund. *Id.*

In *Bradbury & Stamm*, the applicable interest rate was determined by applying the rate derived from the laws in effect for each month that an overpayment existed. The initial date of Taxpayer's overpayment did not control the applicable interest rate. Similarly, in this case, the date of Taxpayer's initial failure to file its return or pay its taxes has no bearing on a determination of the applicable penalty cap.

The Hearing Officer held that while the 2% penalty and the appropriate penalty cap is associated with a failure to timely pay taxes or file a return, the penalty is assessed when the unpaid tax is assessed. Construing the 20% penalty cap as prospective only, application of this increased cap to a penalty assessment issued after January 1, 2008 comports with the Supreme Court's analysis in *Bradbury & Stamm.*

Other jurisdictions have likewise held that it is not a retroactive application to impose amended interest rates on tax outstanding at the time that the interest rate changes. In *Solowiejczyk v. Commissioner of Internal Revenue*, 85 T.C. 552 (U.S. Tax Court 1985), the Tax Court applied a statute, effective on December 31, 1984, that imposed an increased rate of interest on certain underpayment of taxes, to an underpayment that occurred on a 1978 tax return. The taxpayers contended that the statute was being retroactively applied. The court disagreed. "The event which subjects petitioners to the imposition of section 6621 (d) is not the filing of their 1978 tax return, but the existence, beyond the effective date of section 6621 (d), of an underpayment attributable to a valuation overstatement. We do not find that this constitutes a retroactive application of section 6621 (d)." *Id.* at 555. *See also Estate of Carberry v. Commissioner of Internal Revenue*, 933 F.2d 1124, 1129 (2nd Cir. 1991); *Gregory v. State of California*, 197 P.2d 728 (Cal. 1948) (it is not giving retroactive effect to a statute by holding that interest be computed from the

effective date of the statute on a tax refund obligation that existed prior to the effective date of the statute granting interest); *Group Health Cooperative v. City of Seattle,* 189 P.3d 216 (Wash. App. 2009)(relevant date for determining the interest rate to be applied is date when interest is computed, not tax period giving rise to the overpayment or deficiencies; statute is not retroactive merely because it relates to prior facts or transactions). The decisions of these jurisdictions further support the Hearing Officer's prospective application of the increased penalty limitation.

In light of the Hearing Officer's prospective application of the increased penalty cap, Taxpayer's assertion that a "deterrent" penalty cap "cannot be effected retroactively" is misplaced. Nevertheless, Taxpayer asserts that "deterrence requires knowledge of the potential punishment" and that "knowledge of the higher penalty is impossible . . . if the taxpayer failed to report or pay the tax long before the proposed amendment to Section 7-1-69 was even introduced in the Legislature." This argument is predicated on Taxpayer's incorrect assumption that a penalty or penalty cap only serves to deter a failure to pay tax or file a return on the first day the tax or return is due.

An increased penalty or penalty cap serves to deter a failure to pay taxes far beyond the first day a return or tax payment is due. In fact, a penalty rate and penalty cap serves to deter taxes every month until taxes are paid. Every month taxes are not paid, the taxpayer runs the risk that the penalty rate or penalty cap

could rise. In this case, Taxpayer assumed the same risk by failing to file or pay its taxes for several months after the date its return and taxes were initially due.

The Legislature may at any time revise the statutory penalty associated with the taxpayer's continued delinquency. *See Pierce et al. v. State of New Mexico*, 121 N.M. 212, 227, 910 P.2d 288, 302 (1995) (statutes establish current public policy subject to legislative revision rather than creating either contractual or vested rights). The Legislature exercised such power in 2007, but did not make the increased penalty effective immediately. In this case, the Legislature provided several months' notice to taxpayers that an increased penalty cap would become effective on January 1, 2008.

Although knowledge of the increase in the penalty cap would serve to deter taxpayers from continuing to delay filing their late returns into 2008, Taxpayer was not deterred and failed to file any return. Taxpayer's failure to file does not implicate the required application of the amended Section 7-1-69 to the assessment the Department issued in 2009.

The language of Section 7-1-69 requires that the amount of penalty be determined on the date of the assessment. Thus, the Hearing Officer prospectively applied the penalty cap effective on the date of the assessment. This application does not require new obligations, impose new duties or affix new disabilities to any past transaction, just because the assessment arises from Taxpayer's failure to

timely file a tax return or pay taxes prior to January 1, 2008. Thus, the Hearing Officer's application of the amended penalty cap to an assessment issued after January 1, 2008 is a prospective, and not a retroactive application of Section 7-1-69, as amended.

II. The Hearing Officer's interpretation supports legislative intent.

When interpreting a statute, the primary goal is to facilitate and promote the Legislature's purpose. *United Rentals Northwest, Inc. v. Yearout Mech., Inc.* 2010-NMSC-30, ¶ 17, 237 P.3d 728, 733. The primary indicator of legislative intent is the plain meaning of the statute. *State v. Johnson*, 2009-NMSC-49, ¶ 10, 147 N.M. 177, 218 P.3d 863. *See also* NMSA 1978, §12-2A-19 (1997). A court is not permitted to read language into a statute which is not there, particularly if it makes sense as written. *State ex rel. Barela v. New Mexico State Board of Education*, 80 N.M. 220, 453 P.2d 583 (1969). A plain language analysis of the words existing in Section 7-1-69 proves the Legislature intended to apply the amended penalty cap to penalty assessments issued after January 1, 2008.

In this case, the plain language of both the pre-2008 and post-2008 versions of Section 7-1-69 indicates the penalty shall be added to the amount assessed. Ultimately, the language of the statute contemplates that the penalty be added at the same time or after taxes are assessed. As such, penalties cannot be assessed before an assessment is issued, whether through a self-filed return or a

Department-issued assessment. Application of a statutory penalty limitation simply cannot occur before the taxes are assessed.

Legislative intent would be violated only if Taxpayer's argument for the determination of the statutory penalty based on the missed due date of a return or tax payment were applied. Taxpayer reads words into Section 7-1-69 which do not exist in order to conclude that a penalty cap must apply on the missed due date. Taxpayer assumes its application honors legislative intent because of the statute's imposition of penalties *from* the initial date of the taxpayer's failure to timely file or pay taxes. Yet, Taxpayer's assumption is not consistent with the language of the statute.

The language of Section 7-1-69 does not establish an intention to impose the applicable penalty cap on the date a return or tax payment is due. While Section 7-1-69 requires a calculation of penalty at two percent per month *from the date* the tax was due or the return was required to be filed, the statute does not provide that penalty shall be calculated *on the date a return or tax payment is due*. Rather, the statute explicitly provides that penalties are *added to the amount assessed* and that a 2% penalty rate is applied *per month* from the date the tax was due or the return was required to be filed.

Another signal of legislative intent is found in the plain language of the 2007 Act in which Section 7-1-69 was amended. The Act has an effective date of

January 1, 2008. *See* Laws 2007, ch. 45, § 16 (A). That effective date requires application of the 20% penalty cap to tax liabilities existing and tax assessments issued after January 1, 2008.

Taxpayer perceives the Legislature did not intend to permit some taxpayers to avoid the increased penalty cap effective in 2008 when those taxpayers filed returns in 2007, but failed to pay taxes until after 2008. Taxpayer states legislative intent is frustrated in a hypothetical situation where a taxpayer files a return without paying tax in 2007, but is still only subject to a 10% penalty cap for taxes that remain unpaid in 2008.

However, Taxpayer's hypothetical only further underscores the Legislature's intention to apply the 20% penalty cap to taxes assessed after January 1, 2008. It has long been held that the Legislature is presumed to know the law in existence at the time it enacts legislation. *Southwest Land Investment Inc. v. Hubbart*, 116 N.M. 742, 744, 867 P.2d 412, 414 (1993), *citing State ex rel. Maryland Casualty Co. v. State Highway Comm'n,* 38 N.M. 482, 488, 35 P.2d 308, 312 (1934). Thus, when the Legislature passed the 20% penalty cap with an effective date of January 1, 2008, it presumably knew that the 10% penalty cap would continue to apply to late returns filed before that date, even if the returns were unaccompanied by tax payments. The Legislature's intent, then, is to encourage the filing of returns and

the establishment of tax liabilities before January 1, 2008 by applying the 10% cap to the tax liabilities established in those returns.

If the Legislature intended to discourage the application of lower penalty cap to the liabilities taxpayers who filed returns in 2007, it would have added an emergency clause to Laws 2007, Chapter 45. An emergency clause would have immediately imposed the 20% cap on all assessments issued after the legislation was signed in 2007. Then, the 20% cap would have applied equally to those who failed to report their taxes in 2007 and those who failed to pay their taxes that same year.

Instead, the Legislature made the 20% cap effective January 1, 2008, deterring taxpayers from delaying to file their late returns past that date. On January 1, 2008, when the new penalty cap became effective, taxpayers were equally deterred from filing late returns and making late payments.

Finally, it is notable that the alleged difference in penalty associated with nonfiling and nonpayment before 2008, as Taxpayer discussed in its hypothetical, never impacted Taxpayer in this case. Taxpayer neither filed a return nor paid its tax liability before January 1, 2008. Therefore, Taxpayer's hypothetical scenario is of no consequence to the Hearing Officer's application of the amended penalty cap to the assessment the Department issued to Taxpayer in 2009.

The Hearing Officer's application of the 20% penalty cap to an assessment issued after January 1, 2008 is supported by a plain reading of Section 7-1-69 as amended in 2007 and its effective date. Legislative intent is thus supported by the Hearing Officer's decision and order.

III. The Hearing Officer's analysis properly applies the same principles relied upon by the Department in its own prospective application of the 20% penalty cap.

The Hearing Officer and the Department both conclude that the amended version of Section 7-1-69 must limit the imposition of Taxpayer's penalty to a maximum of 20% of its tax liability. While the Hearing Officer holds that the penalty cap in effect on the date of the assessment must be imposed, the Department applies the penalty cap in effect each month that taxes remain due but not paid. Despite this distinction in analysis, both the Hearing Officer and the Department reach the same conclusion based on the same key principles. The similarities in reasoning support both the Hearing Officer's and the Department's shared conclusion that the 20% penalty cap must be applied to Taxpayer's principal tax liability.

Both the Department and the Hearing Officer agree that the amount of the penalty and the penalty cap are not calculated on the initial date taxes are due. Both the Department's and the Hearing Officer's reasoning prove that the self-reporting nature of the tax system does not trigger a computation of the amount of

penalty on the first day a tax payment is late. On the date taxes become due, a taxpayer could not know the *total* amount of penalty to apply. Penalty accrues at the rate of 2% each month until the taxes are paid. Thus, it is not appropriate to compute the amount of penalty due or apply a penalty cap on the initial date that a taxpayer fails to file a return or pay taxes due. It is appropriate, however, to determine the amount of penalty imposed and to apply the effective penalty cap, *each month* taxes remain due but unpaid, as advocated by the Department, or on the date of the assessment, as held by the Hearing Officer.

Bradbury & Stamm and *Howell* support both the Hearing Officer's and the Department's shared conclusion that the application of the amended penalty cap to an existing liability is not a retroactive application of the law. *Bradbury & Stamm* illustrates that an amended interest statute is properly applied to an existing liability after the amended statute's effective date. Similarly, the Court in *Howell* held that application of an amended statute to an event arising from a previous circumstance is not a retroactive application of the law.

Both cases support the Hearing Officer's and the Department's applications of the amended penalty cap to events occurring after the effective date of the amended statute, although those events arose from Taxpayer's missed filing and tax payment deadlines. The Department applies the cap each month taxes remain due but unpaid after January 1, 2008. The Hearing Officer alternatively applies the

cap to assessments issued after January 1, 2008. Although those events arise from Taxpayer's initial failure to timely pay taxes or file a return, the application of the increased penalty cap on the dates of those events is not retroactive when those dates occur after January 1, 2008.

While the Hearing Officer and the Department reach different conclusions about which date the amended penalty cap applies, both agree that Taxpayer's application of the penalty cap on the initial due date of a tax return or payment is not permitted by the language of Section 7-1-69. Both agree that the application of the penalty cap comes after that date, and that application of the amended penalty statute to an existing liability is not a retroactive application of the law. The analyses of both the Hearing Officer and the Department are supported by the Courts' decisions in *Bradbury & Stamm* and *Howell*. The Hearing Officer, like the Department, concludes that the 20% penalty cap is properly applied to a tax liability existing prior to January 1, 2008, but assessed after that date. The Hearing Officer's analysis thus properly applies the same principles relied upon by the Department in its own prospective application of the 20% penalty cap.

CONCLUSION

The Hearing Officer applied the 20% penalty cap prospectively to penalty assessments issued after January 1, 2008. The 20% penalty cap is not applied retroactively because it does not impair vested rights acquired under prior law,

require new obligations or affix new disabilities to past transactions. Moreover, the Hearing Officer's interpretation supports legislative intent. The plain meaning of the amended Section 7-1-69 indicates the Legislature intended to apply the 20% penalty cap to penalty assessments issued after January 1, 2008. The Hearing Officer's application of the increased cap to a 2009 assessment honors such intent.

The Hearing Officer's decision and order and the methodology employed by the Department apply the 20% penalty cap to Taxpayer's liability. While the Hearing Officer and the Department's approaches in applying the 20% cap to the Taxpayer's liability are distinct in some respects, both agree that an application of the amended penalty cap on the initial due date of Taxpayer's return or tax payment is not permitted by the language of Section 7-1-69. Both apply the 20% penalty cap prospectively and rely on the same principles in effecting such a prospective application.

The Hearing Officer's application of the 20% penalty cap to Taxpayer's liability constitutes a proper implementation of the law. Therefore, the decision and order of the Department's Hearing Officer should be affirmed.

Respectfully submitted,

GARY K. KING
Attorney General

Amy Chávez-Romero

Amy Chavez-Romero
Special Assistant Attorney General
Taxation and Revenue Department
P.O. Box 630
Santa Fe, New Mexico 87504-0630
Telephone: (505) 827-0048
Fax: (505) 827-0684

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed by first class U.S. Mail, postage prepaid, a true and correct copy of the foregoing Answer Brief on the 8th day of April, 2011 to the following attorneys of record for Appellant:

Adam W. Chase
Hutchinson, Black & Cook, LLC
921 Walnut Street, Suite 200
Boulder, CO 80302

R. Tracy Sprouls
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103

Amy Chávez-Romero
Amy Chavez-Romero