

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

IN THE MATTER OF THE PROTESTS OF

ABDUL AL-KASIR

No. 06-14

ID No. 02-403814-00-8

ASSESSMENT ISSUED UNDER LETTER ID NO. L0538793984

GAS FOR LESS

ID No. 02-464211-00-8

ASSESSMENT ISSUED UNDER LETTER ID NO. L0404576256

SUPER SAVE

ID No. 02-941381-00-8

ASSESSMENT ISSUED UNDER LETTER ID NO. L1145919488

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 2, 2006 and then continued to August 23, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Abdul Al-Kasir, doing business as Gas for Less and Super Save, was represented by his attorney, Louis J. Vener. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

**Gas For Less, 1700 Bridge Boulevard SW
Albuquerque, New Mexico**

1. Beginning in March 2001, Abdul Al-Kasir leased property located at 1700 Bridge Boulevard SW in Albuquerque, New Mexico, from Kenneth and Alfred Mondragon. The lease term ended February 28, 2006, with renewal options. (Dept. Ex. B at B5.6).

2. The lease specified that Mr. Al-Kasir could use the premises only for conducting the business of a retail gasoline station, grocery store, and U-Haul dealership and provided that he could not “assign or sublease any interest in the Premises” without the landlord’s prior written consent. (Dept. Ex. A at B5.6-B5.7).

3. In March 2001, Mr. Al-Kasir filed an “Application for Business Tax Identification Number” with the Taxation and Revenue Department stating that he was the owner and sole proprietor of the business operating at 1700 Bridge Boulevard SW under the name “Gas for Less.” Mr. Al-Kasir described the nature of his business as “Gas sell” and listed the start date as April 1, 2001. (Dept. Ex. B at B 11.5).

4. Effective April 1, 2001, the City of Albuquerque issued a business registration certificate for the business located at 1700 Bridge Boulevard SW to Mr. Al-Kasir DBA Gas For Less. (Dept. Ex. B at B11.7).

5. Mr. Al-Kasir filed quarterly gross receipts tax returns under the name Gas for Less for reporting periods beginning April 2001 and ending June 2002. Mr. Al-Kasir’s signature appears on the CRS returns with the title “Manager.” The checks accompanying the returns were also signed by Mr. Al-Kasir. (Dept. Ex. B at B11.8 to B11.12).

6. Beginning in May 2001, Mr. Al-Kasir maintained a bank account at New Mexico Educators Federal Credit Union under the name “Abdul W. Al-Kasir/DBA Gas for Less” using the address at 1700 Bridge Boulevard SW. (Dept. Ex. B at B5.9 to B5.42).

7. Mr. Al-Kasir maintained a second bank account at New Mexico Educators Federal Credit Union under the name “Abdul W. Al-Kasir/DBA Gas for Less” using the address

of the Super Save service station at 6102 Central Avenue, SW in Albuquerque. (Dept. Ex. A at B5.93 to B5.109).

8. At some point, Mr. Al-Kasir allowed Ray Arun, who had been employed at the Super Save service station on Central Avenue, to take over at least some of the day-to-day operation of Gas For Less. (Dept. Ex. B at B11.6; Taxpayer Ex. 1).

9. Mr. Al-Kasir knew that Mr. Arun was in the country illegally and could not obtain a business license in his own name. (Al-Kasir Testimony).

10. Mr. Al-Kasir did not enter into a sublease or other formal contract with Mr. Arun, who operated Gas For Less under Mr. Al-Kasir's name and business license. (Dept. Ex. B at B11.6; Taxpayer Ex. 1, Answer, Crossclaim and Counterclaim ¶ 2).

11. On May 15, 2002, Mr. Al-Kasir canceled the CRS ID number for Gas For Less. (Dept. Ex. B at B10.2, GN1.1).

**Super Save, 6102 Central SW
Albuquerque, New Mexico**

12. In 1995, Tri-Peaks, Inc. was the owner and operator of a gas station and convenience store located at 6102 Central SW in Albuquerque. (Dept. Ex. A at B3.1; Al-Kasir Testimony).

13. In 1997, Abdul Al-Kasir bought out the other shareholders and became the sole owner of Tri-Peaks. (Al-Kasir Testimony).

14. Mr. Al-Kasir retired Tri-Peaks' CRS ID number with the Department effective January 1, 1999. (Dept. Ex. A at DN1.1).

15. On May 1, 1999, Tri-Peaks entered into a lease agreement with Said Guermali to rent the gas station and convenience store, with all equipment and inventory, for \$2,800 for the

first three months and \$3,000 thereafter. The lease term was for one year with the option to renew on an annual basis. (Taxpayer Ex. 3; Dept. Ex. A at B5.2).

16. Effective April 1, 1999, Said Guermali registered the gas station business located at 6102 Central SW with the Department under “Guermali & Taibi,” but retired this CRS registration effective June 1, 1999. (Dept. Ex. A at DN1.1).

17. Effective June 1, 1999, Mr. Guermali registered the gas station business located at 6102 Central SW with the Department under the name “Guermali Inc.,” but retired this second CRS registration effective July 3, 1999. (Dept. Ex. A at DN1.1)

18. In July 1999, Mr. Al-Kasir transferred the property at 6102 Central SW out of the corporation, Tri-Peaks, Inc., and into his individual name. (Al-Kasir Testimony).

19. Effective July 16, 1999, Mr. Al-Kasir registered the gas station located at 6102 Central SW with the Department as a sole proprietorship doing business under the name “Super Save.” On the registration application, Mr. Al-Kasir described the business as “Gas station/ convenience store/sale & repair used cars/U-Haul rental.” (Dept. Ex. A at DN1.1, B10.1).

20. Mr. Al-Kasir filed quarterly CRS reports for reporting periods July 1999 through December 2000 under the Super Save registration. (Dept. Ex. A at GN1.1).

21. On September 3, 1999, the Department issued 100 Type 2 nontaxable transaction certificates (“NTTCs”) to Super Save. On April 4, 2000, Mr. Al-Kasir executed one of Super Save’s Type 2 certificates to a third party gasoline distributor. (Dept. Ex. A at DN1.1)

22. On November 1, 2000, Mr. Al-Kasir entered into a Real Estate Lease with Smoker’s Co-op Corporation to lease the commercial property located at 6102 Central SW “known as the Super Save Gas Station together with the Mini-mart, excepting the used car lot

and storage area and the U-Haul Business.” The lease agreement was signed by Abdul Al-Kasir as landlord and by Samir Summa, president of Smoker’s Co-op Corporation, as tenant. (Dept. Ex. A at B5.3).

23. On February 5, 2001, Mr. Al-Kasir sent a letter to Kewa Gas, Limited, stating that Mr. Kasir had leased the gas station located at 6102 Central SW to Smoker’s Co-op Corporation, doing business as Super Save, and advising Kewa that “I will no longer be responsible for further gasoline purchases at the described location.” (Dept. Ex A at B11.2; Taxpayer Ex. 3).

24. Effective November 1, 2000, Mr. Al-Kasir retired his CRS ID number for Super Save. (Dept. Ex. A at DN1.1, B10.1).

25. Smoker’s Co-op registered with the Department for payment of CRS taxes in August 2000. Effective November 1, 2000, the corporation updated its CRS registration to add the Super Save gas station. (Dept. Ex. A at DN1.2).

26. Smoker’s Co-op never retired its CRS ID number, but the last CRS report filed under this number was for reporting period January 2001. (Dept. Ex. A at DN1.2)

27. The check issued to the Department in payment of Smoker’s Co-op’s CRS tax liability for the January 2001 reporting period was signed by Samir Summa and was drawn on the same bank account used by Mr. Al-Kasir in making CRS payments to the Department during the 1999 and 2000 tax years. (Dept. Ex. A at DN1.2).

28. Beginning in November 2000, the name on one of Mr. Al-Kasir’s accounts at New Mexico Educators Federal Credit Union changed from (Dept. Ex. A at B5.83):

Abdul W. Al-Kasir
DBA Super Save
6102 Central Ave SW
Albuquerque NM 87105

to:

Abdul W. Al-Kasir
Samir Z Y Summa
DBA Super Save
6102 Central Ave SW
Albuquerque NM 87105

29. In January 2000, Mr. Al-Kasir signed a check to Kewa Gas, Ltd., a third party gasoline distributor, from another account at New Mexico Educators Federal Credit Union. In November 2000, Mr. Summa signed a check to Kewa Gas from the same account. The name shown on the checks for that account was "Super Save Food Mart & Gas." (Dept. Ex. A at B11.7 to B11.8)

30. On May 29, 2001, Mr. Al-Kasir signed two checks made out to Kewa Gas from a third account at New Mexico Educators Federal Credit Union where the name on the checks was "Gas For Less/Super Save." One check had the notation "For Gas For Less," and the second check had the notation "For Super Save Gas." (Dept. Ex. A at B11.5).

31. On June 20, 2001, Mr. Al-Kasir signed another check to Kewa Gas from the "Gas For Less/Super Save" account with the notation "For Super Save Gas." (Dept. Ex. A at B11.4).

32. In October 2002, Mr. Al-Kasir again registered the Super Save gas station with the Department under his name as sole proprietor. (Dept. Ex. A at GN1.1).

The Department's Audit

33. In January 2003, the Department sent letters of intent to audit to Mr. Al-Kasir: one to the location of Gas For Less at 1700 Bridge Boulevard SW and one to the location of Super Save at 6102 Central SW. (Dept. Ex. A at B8; Dept. Ex. B at B8).

34. On January 31, 2003, Mr. Al-Kasir met with the auditor and they agreed that the auditor would contact him in April 2003 to set up an appointment to come to his place of business and review his records to determine if all gross receipts taxes had been paid. (Dept. Ex. A at B4.1 to B4.2).

35. At that time, Mr. Al-Kasir maintained that he did not operate the service stations during most of the audit period and provided a copy of the May 1, 1999 lease agreement between Tri-Peaks and Said Guermali and a copy of the November 1, 2000 real estate lease between Mr. Al-Kasir and Smoker's Co-op Corporation. . (Dept. Ex. A at B4.1 to B4.2).

36. In early April 2003, the auditor made several telephone calls to schedule an appointment with Mr. Al-Kasir, who told the auditor that his family had just been killed in Iraq and he needed another month to deal with the situation. . (Dept. Ex. A at B4.2).

37. The auditor called again in May and was referred to Mr. Al-Kasir's attorney, Robert Fiser. The auditor set up an appointment with Mr. Fiser, who subsequently canceled the meeting when Mr. Al-Kasir failed to provide Mr. Fiser with the records requested by the Department. (Dept. Ex. A at B4.3).

38. In June 2003, the Department issued a subpoena to Mr. Al-Kasir for the records she needed to conduct the audit, including bank statements, invoices or bills from vendors, cash register tapes and daily sales reports, journals, general ledgers, financial statements, leases or other contracts, and federal and state income tax returns filed for the audit period. (Dept. Ex. A at B5.9 to B5.11).

39. On June 17, 2006, Mr. Al-Kasir provided copies of his federal income tax returns for tax years 1999-2001 and bank statements for the periods January-December 2000 and October and November 2001. A cover letter from Mr. Fiser stated that most of the requested records were unavailable. (Dept. Ex. A at B5.13).

40. Each of Mr. Al-Kasir's federal income tax returns included a Schedule C (Profit or Loss From Business) listing the following gross receipts from Super Save, 6102 Central SW in

Albuquerque, and stating the nature of the business as the sale of gasoline (Dept. Ex. A at F6.1 to F6.37):

1999 Gross Receipts, Schedule C	\$ 593,626	(page F6.3)
2000 Gross Receipts, Schedule C	\$1,607,086	(page F6.17)
2001 Gross Receipts, Schedule C	\$ 837,839	(page F6.30)

41. Mr. Al-Kasir's income tax returns did not report any income from wages or from the lease or rental of real property. (Dept. Ex. A at F6.1 to F6.37).

42. On his 1999 and 2000 returns, Mr. Al-Kasir listed his occupation as "sole proprietor." On his 2001 return, he listed his occupation as "service station." (Dept. Ex. A at F6.2, F.6.15 and F.6.28).

43. Because Mr. Al-Kasir had not provided any invoices, cash register tapes, journals, ledgers or other records from the two service stations, the auditor had to rely on Mr. Al-Kasir's bank statements and tax returns, information obtained from the Department's records, and information obtained from third parties in order to determine the amount of gross receipts taxes due for the audit period. (Dept. Ex. A at GN1.2, DN1.3, Akers Testimony).

44. For 1999, the auditor calculated taxes based on the gross receipts reported on Schedule C to Mr. Al-Kasir's 1999 federal income tax return; for 2000 and 2001, the auditor calculated taxes based on the deposits reflected on Mr. Al-Kasir's bank statements; for 2002, the auditor calculated taxes based on the average retail price of gasoline as reported by AAA of New Mexico multiplied by the number of gallons of gasoline sold to Super Save and Gas For Less by third party distributors. (Dept. Ex. A at DN1.3, Akers Testimony).

45. On July 3, 2003, the auditor sent Mr. Al-Kasir the first draft of her audit work papers for the Super Save service station, noting that the gross receipts were "largely estimated

based on bank deposits, the federal 1040 returns and third party information due to the lack of records provided” and asking Mr. Al-Kasir to contact her if he had any questions. Mr. Al-Kasir did not respond to this letter or provide additional records. (Dept. Ex. A at B5.117, Akers Testimony).

46. On July 3, 2003, the auditor sent Mr. Al-Kasir the first draft of her audit work papers for the Gas For Less service station, noting that the gross receipts were “largely estimated based on bank deposits and third party information due to the lack of records provided” and asking Mr. Al-Kasir to contact her if he had any questions. Mr. Al-Kasir did not respond to this letter or provide additional records. (Dept. Ex. B at B5.43, Akers Testimony).

47. On November 10, 2003, the Department sent Mr. Al-Kasir letters transmitting copies of the final draft of both audits, stating: “Please note that this is not a formal assessment. You have ten (10) working days from the date of this letter to contact our office to schedule a district level conference, or should you have any questions about the audit please call (505) 841-6251 before November 25, 2003. If we do not hear from you prior to this date, a formal assessment will be generated and mailed out.” Mr. Al-Kasir did not respond to these letters. (Dept. Exs. A and B, left side of audit file).

48. On December 16, 2003, the Department assessed Gas for Less under Letter ID L0404576256 for \$132,046.11 of gross receipts tax, plus interest, for reporting periods March 31, 2001 through June 30, 2002. (Record Proper).

49. On December 16, 2003, the Department assessed Abdul Al-Kasir under Letter ID L0538793984 for 353,644.84 of gross receipts tax, plus penalty and interest, for reporting periods June 30, 1999 through September 30, 2002. (Record Proper).

50. On December 16, 2003, the Department assessed Super Save under Letter ID L1145919488 for \$69,535.12 of gross receipts tax, plus penalty and interest, for reporting periods September 30, 2002 through June 30, 2003. (Record Proper).

51. On January 13, 2004, Mr. Al-Kasir filed written protests to the Department's assessments. (Record Proper).

52. At the administrative hearing held on August 23, 2006, Mr. Al-Kasir acknowledged that he was responsible for the operation of the Super Save gas station from October 2002 through June 2003, and withdrew his protest to the assessment issued to Super Save under Letter ID L1145919488.

DISCUSSION

The issues to be decided are: (1) whether Abdul Al-Kasir is the person responsible for payment of gross receipts taxes on sales of gasoline from the Gas For Less service station during the period April 2001 through June 2002 and the Super Save service station during the period July 1999 through September 2002; and (2) whether the auditor was entitled to use alternative methods of reconstructing the gross receipts of the two service stations.

Burden of Proof. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C). *See also, MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308. Accordingly, it is Mr. Al-Kasir's burden to come forward with evidence and legal argument to show that he is not liable for the gross receipts taxes assessed by the Department.

Ownership and Operation of Service Stations. Gas For Less. The Department assessed Mr. Al-Kasir for gross receipts taxes on the sale of gasoline from the Gas For Less

service station during the period April 1, 2001 through June 30, 2002. Mr. Al-Kasir maintains that he did not operate the service station during this period of time. As set out in detail in the findings of fact, there is substantial evidence to establish that Mr. Al-Kasir was the party responsible for the taxes assessed. This evidence includes Mr. Al-Kasir's registration of Gas For Less with the City of Albuquerque and the Taxation and Revenue Department; his filing of CRS returns under the Gas For Less name and CRS number; his maintenance of at least two bank accounts under the name Gas For Less; and his May 29, 2001 check to Kewa Gas, Ltd. with the handwritten notation "For Gas For Less."

Mr. Al-Kasir maintains that after he leased the gas station from the Mondragons he turned it over to Ray Arun,¹ who operated the station until June 2003, when Mr. Al-Kasir had him evicted. Mr. Al-Kasir acknowledges, however, that he did not enter into a sublease or other formal contract with Mr. Arun. In addition, the terms of Mr. Al-Kasir's lease agreement prohibited him from assigning or subleasing "any interest in the Premises" without the landlord's prior written consent. There is no evidence that such consent was requested or obtained.

At the administrative hearing, Mr. Al-Kasir introduced several documents related to a 2004 lawsuit filed in the Second Judicial District Court by Joe's Moving, Inc. In that lawsuit, the plaintiff alleged that defendants Ray Arun and his girlfriend, Grace Montes, were operating the Gas For Less service station and allowed gasoline to become mixed with the station's diesel fuel, resulting in damage to the plaintiff's truck engines. In support of its suit, the plaintiff obtained an affidavit from Olivia Miera, stating that she was employed by Ray Arun and Grace Montes as a

¹ Mr. Arun's name appears under various spellings in the documents submitted at the hearing. This decision adopts the spelling shown under Mr. Arun's signature on Taxpayer Ex. 3.

cashier at Gas For Less during November and December 2002, when the incident occurred. Ms. Miera's affidavit further states that Ms. Montes visited the station at least once daily to take custody of the cash in the register and give Ms. Miera instructions and that the licenses and permits displayed on the wall behind the cash register were issued to Ms. Montes.

There are several problems with this evidence. First, Ms. Miera's affidavit pertains to facts as they existed in November and December 2002, five to six months after the end of the audit period. There is nothing to indicate whether the statements in the affidavit are applicable to the operation of Gas For Less between April 2001 and June 2002, the period at issue in this protest. Second, Ms. Miera's affidavit is contradicted by the Answer, Crossclaim and Counterclaim filed by Grace Montes, which is included in Taxpayer's Exhibit 1. Paragraph 2 of Ms. Montes' answer states:

Defendant Grace Montes denies that she was the authorized operator of the retail gas station known as "Gas-4-Less", located at 1700 Bridge Boulevard, Southwest, in the city of Albuquerque, New Mexico, and affirmatively asserts that the lessee of the gas station was Abdul Al-Kasir who retained and allowed Ray Aarum to operate the gas station, which at all times material was operated under the license of Abdul Al-Kasir.

Ms. Montes' assertions are confirmed by a February 10, 2003 letter Mr. Al-Kasir's attorney sent to Ray Arun in connection with a subsequent eviction proceeding. The letter, a copy of which appears at page B11.6 of Department Exhibit B, states as follows:

On July 1, 2001, Abdul agreed to permit you to operate the business as your own enterprise; you agreed to obtain your own business licence and to pay all taxes during your tenure as a sub-tenant. It appears that you operated under Abdul's name and licence after that. On December 22, 2002, the Department of Tax and Revenue required Abdul to pay penalties for late registration. Other licences are in the name of Abdul Al-Kasir.

At the administrative hearing, Mr. Al-Kasir testified that Mr. Arun was “not legal” and could not obtain a business license in his own name, something Mr. Al-Kasir presumably knew because he had employed Mr. Arun to work at the Super Save station on Central Avenue. Even after Mr. Arun took over the day-to-day operation of Gas For Less, Mr. Al-Kasir continued to file quarterly CRS returns using the CRS ID number the Department issued to him as sole proprietor of Gas For Less and identifying himself as “Manager.” This evidence supports the conclusion that, regardless of any private agreement between Mr. Al-Kasir and Mr. Arun, the Gas For Less service station was operated under Mr. Al-Kasir’s name and business license during the audit period, and he is responsible for gross receipts taxes on the sale of gasoline from that station. *See, Continental Inn v. New Mexico Taxation and Revenue Department*, 113 N.M. 588, 591, 829 P.2d 946, 949 (Ct. App. 1992) (contracts between a taxpayer and a third party regarding the payment of taxes cannot shift the taxpayer’s legal incidence of the tax as between the state and the taxpayer).

Super Save. At the August 23, 2006 hearing, Mr. Al-Kasir acknowledged that he was responsible for the operation of the Super Save gas station from October 2002 through June 2003. The matter still at issue is whether Mr. Al-Kasir was responsible for operation of the station during the earlier period July 1999 through September 2002. Mr. Al-Kasir maintains that he does not owe gross receipts taxes for this period because the station was leased to Said Guermali from May 1999 until approximately September 2000 and was leased to Smoker’s Co-op Corporation from November 2000 through September 2002. The evidence does not support Mr. Al-Kasir’s assertions.

Lease to Said Guermali. Mr. Al-Kasir provided a copy of a lease agreement entered into on May 1, 1999 between Tri-Peaks, Inc. and Said Guermali, under which Mr. Guermali was to rent the gas station and convenience store located at 6102 Central Avenue SW in Albuquerque for a period of one year, with the option to renew on an annual basis. Effective April 1, 1999, Mr. Guermali registered the business for payment of CRS taxes under “Guermali & Taibi,” but retired this CRS registration effective June 1, 1999. He then registered the business under the name “Guermali Inc.,” but retired this second CRS registration effective July 3, 1999.

In July 1999, Mr. Al-Kasir transferred the property at 6102 Central SW out of the name Tri-Peaks, Inc. and into his individual name. Effective July 16, 1999, Mr. Al-Kasir registered a business located at 6102 Central SW for payment of CRS taxes. The business was identified as Mr. Al-Kasir’s sole proprietorship doing business under the name “Super Save.” The nature of the business was described as “Gas station/convenience store/sale & repair used cars/U-Haul rental.” Mr. Al-Kasir subsequently filed quarterly CRS reports for reporting periods July 1999 through December 2000 under the Super Save registration. In September 1999, Mr. Al-Kasir obtained 100 Type 2 NTTCs under the Super Save name; in April 2000, Mr. Al-Kasir executed one of these NTTCs to a third party gasoline distributor. In January 2000, Mr. Al-Kasir signed a check drawn on an account at New Mexico Educators Federal Credit Union to Kewa Gas, Ltd., a third party gasoline distributor. The name shown on the check was “Super Save Food Mart & Gas.”

Mr. Al-Kasir testified that after he turned the Super Save gas station over to Mr. Guermali in May 1999, he went back to teaching computer science, which was his original profession. He also testified that he received regular lease payments from Mr. Guermali. Mr.

Al-Kasir's 1999 and 2000 federal income tax returns do not show any wage income or income from the lease of real property. The only income reported on those returns is business income from the Super Save gas station.

Based on the evidence in the record, the lease between Tri-Peaks and Said Guermali was terminated in July 1999 when Mr. Al-Kasir transferred the property located at 6102 Central Avenue SW from Tri-Peaks to himself in his individual capacity. Beginning on July 16, 1999, the date Mr. Al-Kasir registered Super Save for payment of CRS taxes, Mr. Al-Kasir was the owner and operator of the business and is liable gross receipts taxes on sales of gasoline from the station.

Lease to Smoker's Co-op Corporation. Mr. Al-Kasir maintains that Smoker's Co-op Corporation operated the Super Save gas station from November 2000 to September 2002 and that he had no involvement with the business during that period. There is evidence in the record that Smoker's Co-op entered into a lease of Super Save in November 2000. There is also evidence, however, that Mr. Al-Kasir continued to operate the business after that date.

This evidence includes the fact that both Mr. Al-Kasir and Samir Summa, the president of Smoker's Co-op, paid Super Save expenses with checks drawn on Mr. Al-Kasir's bank accounts at New Mexico Educators Federal Credit Union. Beginning with the November 2000 bank statement, the name on one of these accounts was changed from "Abdul W. Al-Kasir/DBA Super Save" to "Abdul W. Al-Kasir/Samir Summa/DBA Super Save." In May and June 2001, Mr. Al-Kasir signed checks printed with the name "Gas For Less/Super Save" to Kewa Gas, Ltd. In each case, there was a hand written notation that the payment was "For Super Save Gas." Although Mr. Al-Kasir testified that he was not involved with the Super Save station after

November 2000, the only income reported on his 2001 federal income tax return was business income identified on Schedule C as receipts from sales of gasoline at Super Save. The amount of gross receipts reported for the business was \$837,839, substantially higher than the lease payments Mr. Al-Kasir was to receive under his lease agreement with Smoker's Co-op.

Mr. Al-Kasir has not met his burden of proving that he was not operating the Super Save service station during the period November 2000 through September 2002, and the Department's decision to assess Mr. Al-Kasir for gross receipts taxes due for these reporting periods was justified.

Audit Methodology. NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." NMSA 1978, 7-1-11(D) states:

D. If the taxpayer's records and books of account do not exist or are insufficient to determine the taxpayer's tax liability, if any, the department may use any reasonable method of estimating the tax liability, including but not limited to using information about similar persons, businesses or industries to estimate the taxpayer's liability.

Department Regulation 3.1.5.8 under § 7-1-10 sets out several alternative audit methods that may be used when a taxpayer's records are insufficient:

C. Alternative methods which may be used by the department include, but are not limited to:

- (1) bank deposit method;
- (2) documents and records of persons other than the taxpayer;
- (3) federal returns and other government reports;
- (4) cost of sales markup—weighted percentage;
- (5) net worth analysis;
- (6) industry comparison; and
- (7) provisional assessment of taxes based on best available information....

D. Any one, or a combination, of the methods listed above or other methods may be used for taxpayer records reconstruction or verification.

In this case, Mr. Al-Kasir failed to provide adequate business records to the Department, even after being served with a formal subpoena and after being given numerous opportunities to provide additional records during the course of the administrative protest. Because no invoices, cash register tapes, journals, ledgers or similar records were available for the two service stations subject to audit, the auditor had to rely on alternative methods to determine the amount of gross receipts generated during the audit period.

Use of Bank Deposit Method. For 1999, the auditor calculated the tax based on the gross receipts reported on Schedule C to Mr. Al-Kasir's 1999 federal income tax return. The auditor selected this method because no other records were provided for 1999. For 2000 and 2001, the auditor calculated the tax based on the deposits made to the bank accounts Mr. Al-Kasir maintained under the names of the two service stations. The auditor selected this method because these deposits were substantially higher than the gross business receipts reported on Mr. Al-Kasir's 2000 and 2001 federal income tax returns. At the administrative hearing, Mr. Al-Kasir testified that he had other sources of income and the deposits made to his bank accounts were not taxable receipts. He made no attempt, however, to identify the source of the individual deposits listed on the bank statements, nor did he provide any documents to substantiate his claim that these receipts were not subject to gross receipts tax.

In *Torridge Corp. v. Commissioner of Revenue*, 84 N.M. 610, 612, 506 P.2d 354, 356 (Ct. App. 1972), *cert. denied*, 84 N.M. 592, 506 P.2d 336 (1973), the New Mexico Court of Appeals upheld the Department's use of the bank deposit method to calculate gross receipts taxes when adequate records are not available:

We conclude that the bank deposit method is a reasonable method of reconstruction of records, regardless of what the reasons are for not having records. After the audit and the notice of assessment of taxes is delivered to taxpayer, taxpayer must carry the burden of proof in order to negate the presumption of correctness.

The court also approved the use of test months to estimate business receipts:

The 'test months' method was used for the audit period, January 1, 1968 to March 31, 1971. The test months were used to determine gross receipts subject to tax. There is evidence that the test months method is acceptable practice. Although there is conflicting evidence, the Commissioner could draw the inference from the evidence of the auditor, that the gross receipts were the amount computed by use of the test months and bank deposit methods. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 504 P.2d 638 (Ct. App.), decided November 30, 1972. The Commissioner's decision, that the taxpayers failed to establish the inaccuracy of the gross receipts ascertained by the audit, is supported by evidence. Accordingly, the presumption of correctness of the assessments for January 1, 1968 to March 31, 1971, has not been overcome.

Here, Mr. Al-Kasir has not met his burden of showing that the funds deposited in the bank accounts he maintained under the names of Super Save and Gas For Less did not represent taxable receipts from those businesses.

Use of Industry Comparison. In determining gross receipts taxes for the 2002 tax year, the auditor had no first-hand information available since Mr. Al-Kasir did not provide federal income tax returns, bank statements or any other records for that year. For this reason, the auditor relied on an industry comparison and calculated gross receipts tax based on the average retail price of gasoline as reported by AAA of New Mexico, multiplied by the number of gallons of gasoline sold to Super Save and Gas For Less by third party distributors. This approach is specifically authorized by NMSA 1978, § 7-1-11(D), which states that when records are not available, the Department may use "information about similar persons, businesses or industries to estimate the taxpayer's liability."

Mr. Al-Kasir maintains that Super Save and Gas For Less sold gasoline at a lower price than other gas stations in Albuquerque and that use of AAA's average retail price results in a significant over-estimation of his gross receipts. Mr. Al-Kasir did not produce any evidence to establish the actual price charged by Super Save and Gas For Less during the audit period. Even for the period October 2002 through June 2003, during which Mr. Al-Kasir acknowledged he was responsible for operation of the Super Save station, he has no cash register tapes, invoices, general ledgers or other records from which any inference can be drawn concerning the price at which gasoline was sold. That being the case, Mr. Al-Kasir has not met his burden of proving that the auditor's estimates were incorrect. As Judge Sutin stated in his specially concurring opinion in *Archuleta v. O'Cheskey*, 84 N.M. 428, 504 P.2d 638 (Ct.App.1972): "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."

CONCLUSIONS OF LAW

A. Abdul Al-Kasir filed timely written protests to the assessments issued under Letter ID Nos. L0538793984, L1145919488 and L0404576256, and jurisdiction lies over the parties and the subject matter of this protest.

B. Mr. Al-Kasir was the person responsible for the operation of the Super Save and Gas For Less service stations during the periods at issue in this protest, and he is responsible for gross receipts taxes on sales from those stations.

C. The Department's alternative methods of calculating Mr. Al-Kasir's gross receipts tax liability was in conformance with New Mexico statutes and regulations.

D. Mr. Al-Kasir did not present sufficient credible evidence to overcome the presumption of correctness that attaches to the Department's assessments.

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

DATED September 6, 2006.