City of Albuquerque

Office of Internal Audit

FOLLOW-UP OF LODGERS TAX AUDIT
DEPARTMENT OF FINANCE AND
ADMINISTRATIVE SERVICES
AUDIT #07-102
OCTOBER 18, 2011

INTRODUCTION

The Office of Internal Audit performed a follow-up of Audit No. 07-102, Lodgers Tax – Department of Finance and Administrative Services (DFAS). This follow-up is to report on the progress made by DFAS management in addressing our findings and recommendations. Our follow-up procedures rely on the department providing the status of the recommendation.

Our follow-up is substantially less in scope than an audit. Our objective is to report on the status of corrective action in regards to our findings and recommendations. We limited our scope to actions taken to address our audit recommendations from the date of our final report, November 28, 2007 through October 11, 2011.

BACKGROUND INFORMATION

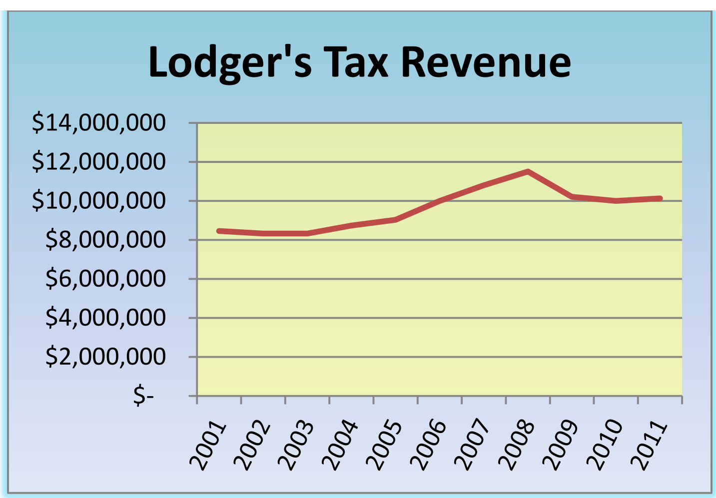
A five percent tax is collected by lodging facilities located within the Albuquerque City limits for rooms rented 30 days or less. The lodging facilities remit the tax collected to the City on a monthly basis. As of September 2011, the City had 163 lodging facilities. These facilities included hotels, motels, bed and breakfasts, RV parks, hostels and apartment complexes.

New Mexico state law allows up to 50% of Lodger's Tax proceeds to be used for debt service. The City uses 50% of the tax to pay off the debt incurred in building the original Convention Center and the large addition to it. The other 50% is used to promote Albuquerque tourism and conventions. Currently, this funding is spent on contracts with the Albuquerque Convention and Visitors Bureau (ACBV), Hispano Chamber of Commerce, Indian Cultural Center, American Indian Chamber of Commerce and SMG Management.

LODGER'S TAX REVENUE FY2001-2011

Fiscal Year	Lodger's Tax Revenue	Increase (Decrease)	% Increase (Decrease)
2011	10,122,386	127,679	1.28%
2010	9,994,707	(215,882)	(2.11%)
2009	10,210,589	(1,291,761)	(11.23%)
2008	11,502,350	704,672	6.53%
2007	10,797,678	801,949	8.02%
2006	9,995,729	976,523	10.83%
2005	9,019,206	288,859	3.31%
2004	8,730,347	404,278	4.86%
2003	8,326,069	7,037	.08%
2002	8,319,032	(129,086)	(1.53%)
2001	8,448,118	N/A	N/A

Source: FY10 Comprehensive Annual Financial Report (Tax Rvenue). FY11 provided by DFAS-Treasury, unaudited



SUMMARY

DFA-Treasury fully implemented all four of the findings in the original audit.

The status of the recommendations is identified by the symbols in the following legend:

Fully Implemented Partially Implemented Not implemented Resolved

Recommendation #1 DFAS – Treasury Division should:

- Collect $29,885 in penalties and back taxes from the facilities tested.
- Impose late penalties and interest, if applicable, on facilities that do not have their payment paid and posted to the City's subsidiary account by the 25th of each month as required by the Lodgers Tax Ordinance.
- Review the Lodgers Tax Ordinance and verify compliance with all aspects of the Ordinance.

Response: DFAS concurred with the recommendation and:

- Would attempt to be more diligent in monitoring lodgers tax payment receipts and posting to the general ledger according to the Lodgers Tax Ordinance.
- By June 30, 2008, DFAS would investigate various methods to step up the collection efforts, including, but not limited to, contracting with a collection agency and implementing an amnesty program.
- DFAS would prepare a letter/invoice to lodging establishments who were audited and concluded to owe Lodgers back tax and penalties in the amount of $29,885. The letters would be sent out by November 30, 2007.

Fully Implemented

Status Reported by DFAS: DFAS-Treasury sent out letters for collections in late November 2007 through February 2008. The status of the collections on establishments audited by Internal Audit in 2007 are as follows:

Establishment	Amount Owed	Paid	Business Status	Collection Status
Facility A	$ 2,810	No	Another business took over	Another hotel operating the facility
Facility B	No findings noted in original audit			
Facility C	8,678	No	Out of business	Out of business
Facility D	5,219	Yes	In business	N/A- amount paid
Facility E	4,245	No	Out of business	Out of business
Facility F	4,111	No	Out of business	Out of business
Facility G	5,243	No	In business	Called and faxed letter on 9/20/11.
Facility H	529	No	In business	Called and faxed letter on 9/20/11.
Facility I	$ 500	Yes	In business	N/A-amount paid

In the last three years (FYs 09, 10 and 11), Treasury has concentrated its efforts on establishments who have a high amount of delinquency payments and liens. Treasury has collected approximately $212,000 in delinquent taxes from establishments who have liens and payments plans.

Since late 2008, Treasury restructured its collection efforts and has decreased delinquency rates. Treasury follows up with those establishments that are delinquent by phone and a delinquency letter is mailed out every month. It is estimated that delinquency rates are as follows:

FY2010 – 2.60% for Lodger's Tax & Hospitality Fee (includes payments, penalties and liens).
FY2011 – 2.80% for Lodger's Tax & Hospitality Fee (includes payments, penalties and liens).

OIA Note: *The delinquency rates presented above include Hospitality Fee information. Facilities pay the 5% Lodger's Tax and a 1% Hospitality Fee at the same time. DFAS – Treasury then allocates the appropriate amount to each fund. While the initial audit did not include Hospitality fee, it does not significantly impact the delinquency rates presented above because Lodger's Tax and the Hospitality Fee are paid together.*

All liens are being worked in conjunction with an Assistant City Attorney. Treasury, with advice from Legal has put some delinquent establishments on payment plans.

Treasury's experience has been 95% of lodger's tax/hospitality fee payments are posted on the 25th day of the month. However, Treasury implements the "mailbox rule" when determining if payments are delinquent.

The NM Supreme Court case entitled Cortez v. Cortez, 145 NM 642, 203 P.3d 857 (2009), contains a detailed discussion of the "mailbox rule". This rule provides that a check, properly addressed with postage prepaid, constitutes payment at the moment it is deposited into the mail, provided the parties either have a custom of payment by mail or have expressly authorized payment by mail. See, 60 Am.Jur.2d Payment Section 11, 17 (2007). Other jurisdictions recognize instances where the act of mailing a check constitutes delivery of payment. See Werne v. Brown, 955 P.2d 1053, 1055, Colo.Ct. App. 1998) (holding that the timely mailing of a payment before the expiration of a thirty day period cured a default).

Applying the mailbox rule, a lodgers tax payment sent via US Mail with postage prepaid can constitute payment at the time of mailing if the parties have established a pattern of mailing payments. City Treasury has clearly established the practice of accepting payments by mail. Given lodgers tax payments are due on the 25th of every month and given the applicability of the mailbox rule, it is likely a payment might be mailed on the 25th day of the month, arrive in our office three to four business days later, and would be considered timely made under the mailbox rule. It is clear there is a contradiction between the mailbox rule, which NM Courts recognize and enforce, and our Lodger's Tax/Hospitality Fee Ordinance requirement that payments be posted by the 25th day of the month.

Treasury mails letters notifying facilities of penalties owed after invoices are mailed out on a monthly basis. A spreadsheet keeps track of all delinquencies and liens filed on a monthly basis and provides status updates for each delinquent establishment. The delinquency report (Delinquent Lodger's Tax/Hospitality Fee Payment Report) is provided to the Lodger's Advisory Board at each month's meeting.

OIA Note: *DFA-Treasury provided copies of the collection letters that were sent to the establishments in 2007 and 2008. OIA received documentation to support the FY10 and FY11 delinquency rates and the collection amounts reported for FYs 09, 10 and 11.*

Recommendation #2 DFAS-Treasury should retain documentation of the required annual audits performed.

Response: DFAS concurred with the recommendation and would ensure that subsequent annual lodgers audits documentation would be retained in both hard and electronic version form.

Fully Implemented

Status Reported by DFAS: DFAS-Treasury conducted audits for 2008, 2009 and 2010 and will be starting another audit on November 1, 2011. All copies of audits have been sent to the New Mexico DFAS – Local Government Division as required by State Statute §3-38-17.1 NMSA 1978.

OIA Note: *DFAS-Treasury provided documentation of the three audits that satisfied the requirement for 2008, 2009 and 2010. The results of these audits were reported to New Mexico DFAS – Local Government Division.*

Recommendation #3: DFAS should ensure proper separation of duties for collecting and posting revenue, and reviewing delinquent accounts. Treasury should consider eliminating the mailing of payments directly to Treasury and require facilities to use the lockbox provider.

Response: DFAS concurred with the recommendation and would attempt to ensure proper separation of duties for collecting and posting revenue and reviewing delinquent accounts. Treasury received 93% of lodgers payments through lockbox. The other 7% are delivered to Treasury in person or by mail. Treasury implemented a process that assigned a finance technician to log in lodger payment checks received prior to transferring to another finance technician for payment processing at the Point of Sale system. The finance technician who logged in the check payment would then ensure the payment was posted and indicate in the log the date of posting.

Fully Implemented

Status Reported by DFAS: DFAS-Treasury has implemented separation of duties for collecting/posting revenue and collection of delinquent accounts. Currently, the process is as follows:

1. *Treasury Supervisor* – Performs billing every month.
2. *Finance Technician* – Receives and logs in payments as received from lockbox and in Treasury. Prepares documentation for processing at Point of Sale, if received in Treasury, otherwise payments are processed through lockbox.
3. *Accountant II* – Prepares monthly delinquency reports and contacts each delinquent establishment by phone and a certified letter.
4. *Assistant City Attorney* – Follows up on all liens and litigation.
5. *City Treasurer* – Reports delinquencies/liens and revenue history to Lodger's Tax Advisory Board and Administration.

Currently, Treasury receives approximately 85% of Lodger's Tax/Hospitality Fee payments through lockbox. The other 15 % of payments are delivered to Treasury in person or by mail by various accounting firms who manage multiple hotels.

Recommendation #4: DFAS Treasury should ensure that delinquency notices are sent in accordance with Treasury's procedures manual. Late payments should be assessed a penalty and interest, if applicable, as required by the Ordinance.

Response: DFAS concurred with the recommendation and would attempt to evaluate the process and develop a plan by December 31, 2007 to ensure delinquency notices are sent in accordance with Treasury's procedure manual and Lodgers Tax Ordinance.

Fully Implemented

Status Reported by DFAS: In the last three years, Treasury has concentrated its efforts on establishments who have a high amount of delinquency payments and liens. Treasury has collected approximately $212,000 in delinquent taxes from establishments who have liens and payment plans.

Since late 2008, Treasury restructured its collection efforts and has decreased delinquency rates. Treasury follows up with those establishments that are delinquent by phone and a delinquency letter is mailed out every month. It is estimated that delinquency rates are as follows:

FY2010 – 2.60% for Lodger's Tax & Hospitality Fee (includes payments, penalties and liens).
FY2011 – 2.80% for Lodger's Tax & Hospitality Fee (includes payments, penalties and liens).

All liens are being worked in conjunction with an Assistant City Attorney. Treasury, with advice from Legal has put some delinquent establishments on payment plans.

A spreadsheet keeps track of all delinquencies and liens filed on a monthly basis and provides status updates for each delinquent establishment. The Delinquent Lodger's Tax/Hospitality Fee Report is provided to the Lodger's Advisory Board at each month's meeting.

OIA Note: *DFAS-Treasury provided the current Delinquent Lodger's Tax/Hospitality Fee Reports. The report documents collection activities (ie. phone calls, letters, attorney contact, etc.) on delinquent accounts. During the follow-up, Treasury updated its Lodger's Tax and Hospitality Fee Procedures to reflect the current process that is in place. The procedures state that Treasury runs a delinquent report 5-7 business days after the due date. Treasury then follows up with research and sends delinquent demand letters to include penalty and interest via certified mail within three days to the delinquent establishments.*