

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

**IN THE MATTER OF THE PROTEST OF
EAST MOUNTAIN SPEECH PATHOLOGY
ID NO. 02-166667-00-9
ASSESSMENT NO. 2253832**

No. 01-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 17, 2001, before Margaret B. Alcock, Hearing Officer. East Mountain Speech Pathology ("Taxpayer") was represented by Ellen Tracy, its owner. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Since 1990, the Taxpayer has been engaged in business in Albuquerque, New Mexico.
2. The Taxpayer is registered with the Department for payment of gross receipts, compensating and withholding taxes, which are reported under the Department's combined reporting system ("CRS").
3. The Taxpayer is registered as a "six-month filer", which means she is required to file CRS reports for the six-month periods January-June and July-December of each year.
4. The Taxpayer's CRS return and payment of CRS taxes for the period January-June 1997 were due on or before July 25, 1997.

5. The Taxpayer generally pays her bills by the 5th of each month. The Taxpayer takes her payments to the nearest Post Office and deposits them in the Post Office building itself or in the mail boxes outside.

6. Because the Taxpayer's CRS taxes are due only twice each year on the 25th of January and July, payment of those taxes does not fit within the Taxpayer's normal bill paying schedule.

7. For the six-month period July-December 1997, the reporting period following the period at issue, the Taxpayer's CRS return and check were dated January 16, 1998, but were not mailed until January 29, 1998, four days past the due date.

8. The Department has no record of ever receiving the Taxpayer's original CRS return or payment for the January-June 1997 reporting period.

9. The Taxpayer believes she mailed her CRS return and check for the January-June 1997 reporting period prior to the July 25, 1997 due date because she has a copy of the return in her business records and a carbon copy of the check she wrote to pay the taxes shown on that return.

10. The Taxpayer has no specific recollection of mailing the return and payment of CRS taxes for the January-June 1997 reporting period.

11. The Taxpayer pays her CRS taxes from a bank account which is separate from the account used to pay the Taxpayer's other bills. When the Taxpayer receives a payment for services, she withholds more than the stated amount of gross receipts tax and deposits it in this account. She also deposits any refunds or unexpected payments she receives in this account.

12. During the period at issue, the Taxpayer did not balance the checkbook for her separate tax account on a regular basis. She would sometimes wait as much as three years before

balancing the checkbook and evaluating whether she should withdraw some of the funds to invest or use for other purposes.

13. Because the Taxpayer let months and even years go by without balancing the checkbook for the account used to pay CRS taxes, the Taxpayer did not realize the check written to pay her CRS taxes for the January-June 1997 reporting period was never cashed.

14. Sometime in early 1998, the Taxpayer contacted the Department concerning another, unrelated tax matter. During that telephone call, the Taxpayer was told that the Department had no record of receiving a CRS return or payment for the January-June 1997 reporting period.

15. Following this telephone call, the Taxpayer submitted a CRS return for the January-June 1997 reporting period. Based on the figures shown on the return, the Department issued Assessment No. 2253832 to the Taxpayer on May 15, 1998 for gross receipts tax, penalty and interest due for that period.

16. On June 13, 1998, the Taxpayer paid the tax principal assessed and filed a written protest to the assessment of penalty and interest.

17. The Department subsequently abated the penalty portion of Assessment No. 2253832.

DISCUSSION

The sole issue to be determined is whether the Taxpayer is liable for the \$168.35 of interest assessed for the late payment of CRS taxes due for the six-month period January-June 1997. The Taxpayer maintains her payment was timely because she mailed a CRS return and a check covering the taxes shown on that return on or before the July 25, 1997 due date. The Taxpayer also objects to the length of time it took the Department to notify her that her payment had not been received.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3(X) NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Because there is nothing in Section 7-1-67 NMSA 1978 to suggest that interest assessed on late payments should not be included within the statutory definition of “tax”, the presumption of correctness applies to the assessment of interest issued to the Taxpayer, and it is the Taxpayer’s burden to show that the assessment is improper or incorrect.

Payment of Taxes. Section 7-1-67(A) NMSA 1978 requires interest to be paid to the state whenever “any tax is not paid on or before the day on which it becomes due....” Section 7-1-13(B) NMSA 1978 provides that “the payment of any tax or the filing of any return may be accomplished by mail.” Department Regulation 3.1.4.10(B)(2) NMAC states that “[i]f a mailing is not received by the department, the contents of the mailing are not timely.” Only after a payment is delivered to the Department does timeliness become an issue. Once delivery is established, Section 7-1-9(B) NMSA 1978 provides that the payment will be considered timely if the payment was mailed on or before the due date.

In this case, the Taxpayer maintains she mailed payment of her January-June 1997 CRS taxes before the July 25, 1997 due date. Although the Taxpayer testified in some detail concerning her regular practice of paying bills by the 5th of each month, she admitted that CRS taxes were “out of sync” with that schedule and were paid at a different time out of a different bank account. The only evidence she presented to establish timely mailing of her January-June 1997 taxes was the fact that there are copies of a CRS return and check covering the taxes at issue in her business records.

Evidence introduced concerning payment of the Taxpayer's taxes for the following six-month period, however, shows that while she signed her CRS return and check for that period on January 16, 2001, they were not mailed until January 29, 2001, four days past the statutory due date. There was also undisputed testimony that the Taxpayer has no specific recollection of mailing her payment for the January-June 1997 reporting period, that she has no Post Office receipt to establish mailing, that her check for that reporting period was never cashed, and that the Department has no record of receiving either a CRS return or a payment for that period. Given this evidence, the Taxpayer has failed to meet her burden of proving that her payment was timely, and interest was properly imposed.

Delay in Issuing the Assessment. The Taxpayer argues that even if her CRS taxes were not paid on time, she should not be liable for interest because the Department took more than ten months to notify her that her original return and check had not been received. The Taxpayer's argument is based on a misunderstanding of New Mexico's self-reporting tax system. It is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their liability for tax and pay that liability to the state. *See*, Section 7-1-13(B) NMSA 1978. In this case, the Taxpayer would have known there was a problem with payment of her January-June 1997 CRS taxes if she had balanced her checkbook in a timely manner. While the Taxpayer is required to keep track of the accounts of only one business, the Department is charged with administration of more than 40 different tax acts and receives thousands of tax filings each month. It is not reasonable for the Taxpayer to expect the Department to constantly monitor her individual tax account and immediately notify her if a return or payment is missing for a specific reporting period. Pursuant to Section 7-1-18(A) NMSA 1978, the Department has three years from the end of the calendar year in which a tax is due to determine that an underpayment exists and issue an assessment. The Department's May 15,

1998 assessment was well within the statutory limitations period provided by the New Mexico Legislature.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2253832, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer failed to meet her burden of proving that payment of CRS taxes for the January-June 1997 reporting period was timely, and interest was properly imposed pursuant to Section 7-1-67(A) NMSA 1978.
3. The Department's assessment was issued within the statutory period provided in 7-1-18 NMSA 1978 and was a valid assessment against the Taxpayer.

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

DATED September 18, 2001.