

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

**IN THE MATTER OF THE PROTEST OF
MICRO-TREAT, INC.**

No. 02-27

ID NO. 02-442270-00 3

**ASSESSMENT NOS. 2672560 through 2672631,
2673370, 2674225, and 2674226**

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 23, 2002, before Margaret B. Alcock, Hearing Officer. Micro-Treat, Inc. was represented by its president, Greg Murray. 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. In 1993, Greg Murray formed a partnership with one of his friends in Midland, Texas.
2. The partnership engaged in the business of treating oil wells with a naturally occurring bacteria that breaks down the build up of substances in oil wells and increases the production of oil.
3. In April 1994, the partnership was terminated and the business was incorporated in Texas under the name Micro-Treat, Inc. The business continued to operate out of Midland, Texas.
4. At the time Micro-Treat began business, Greg Murray met with the Texas Comptroller to determine whether the company would have any liability for Texas sales tax. Mr. Murray was told that there was a special deduction for his type of business and no sales tax would be due.

4. In 1994, Micro-Treat began servicing a few oil wells in Oklahoma, and Mr. Murray called the tax authorities in Oklahoma to determine whether Micro-Treat had any liability for sales tax in that state.

5. Mr. Murray was told that he would owe both state and county taxes on his activities in Oklahoma. Based on this information, Micro-Treat began reporting and paying taxes on its Oklahoma sales.

6. In 1994, Micro-Treat began servicing oils wells in New Mexico, and Mr. Murray called the New Mexico Taxation and Revenue Department to determine whether the company had any liability for tax in New Mexico.

7. Mr. Murray gave the Department the same information he had provided to the tax authorities in Texas and Oklahoma, *i.e.*, that Micro-Treat was a Texas company engaged in treating oil wells to increase the production of oil from those wells. Mr. Murray told the Department employee who took his call that he had a contract to treat two oil wells in New Mexico and asked whether he would owe any taxes to New Mexico.

8. The Department employee then asked Mr. Murray whether Micro-Treat's sales were made to other Texas companies. Mr. Murray told her that all of Micro-Treat's contracts were with companies located in Texas.

9. Based on this response, the Department employee incorrectly advised Mr. Murray that he would not owe any taxes to New Mexico. As a result, Micro-Treat did not report or pay gross receipts taxes on its receipts from treating oil wells in New Mexico.

10. Sometime in the summer of 2000, Mr. Murray was discussing his business with a friend who was also engaged in the oilfield service business. The friend advised Mr. Murray that receipts from treating oil wells in New Mexico were subject to New Mexico gross receipts tax.

11. After this discussion, Mr. Murray called the Department to determine whether he should be paying tax on his New Mexico receipts. The employee who took Mr. Murray's call said she did not know the answer to his question but would have a supervisor call him back.

12. Three days later, Mr. Murray still had not received a response from anyone at the Department. Mr. Murray called the Department again and spoke to another employee who told him that she did not know whether his receipts from treating oil wells were subject to tax in New Mexico.

13. Mr. Murray was finally transferred to a supervisor who correctly informed him that Micro-Treat's receipts from treating oil wells in New Mexico were subject to New Mexico gross receipts tax. The supervisor subsequently sent Mr. Murray a letter confirming her advice.

14. Upon learning that his business was subject to tax in New Mexico, Mr. Murray began filing gross receipts tax returns with the Department. After retrieving his records for earlier years, Mr. Murray filed 75 separate returns reporting back taxes due for reporting periods April 1994 through June 2000.

15. At the time the returns were filed, Mr. Murray paid some, but was unable to pay all, of the tax principal due to New Mexico.

16. In June 2001, the Department assessed Micro-Treat for the amount of unpaid tax principal, plus penalty and interest on its late payment of gross receipts taxes for reporting periods April 1994 through June 2000.

17. On July 12, 2001, Micro-Treat filed a written protest to the assessment of penalty and interest.

DISCUSSION

The issue to be decided is whether Micro-Treat is liable for penalty and interest on its late payment of gross receipts tax for reporting periods April 1994 through June 2000. Mr. Murray believes his company should be excused from payment of penalty and interest because its failure to pay tax to New Mexico was based on incorrect advice Mr. Murray received from a Department employee.

Burden of Proof. Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 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). Accordingly, the assessment of penalty and interest paid by Micro-Treat is presumed to be correct, and it is the taxpayer’s burden to present evidence showing it is entitled to an abatement of these amounts.

Assessment of Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails “due to negligence or disregard of rules and regulations” to report or pay taxes in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation

3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including the situation where “the taxpayer proves the taxpayer was affirmatively misled by a department employee.”

Based on the evidence presented at the hearing in this case, a Department employee gave Mr. Murray incorrect advice concerning his company’s liability for gross receipts tax. Although there is no indication that the employee intended to mislead the taxpayer or acted with any malice, the fact remains that her incorrect advice was the cause of Mr. Murray’s failure to file timely gross receipts tax returns. The Department maintains that taxpayers cannot meet the requirements of Regulation 3.1.11.11 NMAC without some documentary proof of their conversations with the Department. The regulation does not require this type of proof. A taxpayer’s sworn testimony is evidence and, if credible, carries just as much weight as documentary evidence. I found Mr. Murray to be a credible witness and accept his testimony that he was affirmatively misled by a Department employee. For this reason, the negligence penalty assessed against Micro-Treat should be abated.

Interest. Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If any tax imposed is not paid on or before the day on which it becomes due, ***interest shall be paid*** to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The legislature’s use of the word “shall” indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute.

The fact that Micro-Treat is entitled to an abatement of penalty because it was misled by a Department employee does not mean that Micro-Treat also is entitled to an abatement of interest. Interest and penalty are not the same. Section 7-1-69(A) NMSA 1978 imposes a penalty whenever a taxpayer's failure to pay tax is due to negligence or disregard of the Department's rules and regulations. In contrast, the imposition of interest pursuant to Section 7-1-67(A) NMSA 1978 is not a penalty designed to punish taxpayers, but is a means of compensating the state for the time value of unpaid revenues. The issue of negligence is not relevant to the taxpayer's liability for interest. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, Section 7-1-13(E) NMSA 1978.

Here, the taxpayer failed to pay gross receipts tax due to the state. Although this failure was clearly not intentional, the fact remains that Micro-Treat—not the state—had use of those tax funds during the six-year period at issue. Section 7-1-67 NMSA 1978 requires interest to be paid for any period of time during which the state is denied the use of the funds to which it is legally entitled. Accordingly, interest was properly assessed against Micro-Treat and there is no basis for abatement.

CONCLUSIONS OF LAW

1. Micro-Treat filed a timely, written protest to Assessment Nos. 2672560 through 2672631, 2673370, 2674225, and 2674226, and jurisdiction lies over the parties and the subject matter of this protest.
2. Micro-Treat was affirmatively misled by a Department employee and was not negligent in failing to report gross receipts tax during the period at issue.
3. Micro-Treat was late in paying gross receipts taxes due to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

For the foregoing reasons, Micro-Treat's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the penalty assessed against the taxpayer. Micro-Treat remains liable for the payment of interest.

DATED November 4, 2002.