

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

**IN THE MATTER OF THE PROTEST OF  
LINDA DURAN  
ID NO. 02-498464-00 7  
ASSESSMENT NOS. 3952406 and 3952407**

**No. 03-12**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held July 2, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Linda Duran ("Taxpayer") represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During the period January through December 1999, the Taxpayer was a resident of Texas and worked as speech pathologist in both Texas and New Mexico.
2. Prior to 1999, the Taxpayer worked as an employee for a school district in Anthony, New Mexico. In 1999, the Taxpayer's status changed to that of independent contractor, which allowed the Taxpayer to receive more money for her services than she could receive as an employee.
3. Although the Taxpayer had worked as an independent contractor in Texas for several years and had registered her business in Texas, it did not occur to her that she should register her business with New Mexico after she began working as an independent contractor in New Mexico.

4. The Taxpayer did not realize that she was required to pay New Mexico gross receipts tax on her receipts from performing services as an independent contractor in New Mexico and did not report or pay gross receipts tax on this income.

5. The Taxpayer did not consult with an accountant or with the Department concerning her liability for taxes, but just assumed that receipts from services performed for a school district would not be subject to tax.

6. As part of an information-sharing program with the Internal Revenue Service, the Department was notified of the business income reported on Schedule C to the Taxpayer's 1999 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department and had not reported or paid gross receipts tax on this income.

7. On October 31, 2002, the Department mailed two assessments to the Taxpayer in the following amounts:

<i>Assessment</i>	<i>Report Period</i>	<i>Tax</i>	<i>Penalty</i>	<i>Interest</i>
3952406	01/99-06/99	\$1,770.00	\$177.00	\$871.57
3952407	07/99-12/99	\$1,770.00	\$177.00	\$738.76

8. On November 21, 2002, the Taxpayer filed a written protest to the assessments.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for the interest and penalty assessed on her late payment of gross receipts taxes for the period January through December 1999. The Taxpayer maintains that penalty and interest should be abated or reduced for the following reasons: (1) she paid the tax principal within one month of the date she received the Department's assessment, and her liability for penalty and interest should be limited to that one-month period; (2) the Department was at fault for waiting almost three years to notify her of her liability; (3) she was a Texas resident in 1999 and did not know that receipts from performing services as an independent

contractor for a New Mexico public school district was subject to gross receipts tax; and (4) she is a single mother and payment of the assessment will be a financial hardship.

**Burden of Proof.** NMSA 1978, § 7-1-17 provides that any assessment of tax by the Department is presumed to be correct. NMSA 1978, § 7-1-3 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 Department’s assessment of penalty and interest is presumed to be correct, and it is the Taxpayer’s burden to present evidence showing she is entitled to an abatement.

**Accrual of Interest and Penalty.** NMSA 1978, § 7-1-67 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....

The Taxpayer argues that gross receipts tax on her 1999 receipts did not “become due” until October 31, 2002, the date the Department issued its assessment. This is clearly incorrect. Department Regulation 3.1.10.18 NMAC under NMSA 1978, § 7-1-67 states that “interest on the unpaid portion of a tax indebtedness shall begin to accrue on the day following the date on which payment of the tax is required by law.” NMSA 1978, § 7-9-11 requires taxes imposed by the Gross Receipts and Compensating Tax Act “to be paid on or before the twenty-fifth day of the month following the month in which the taxable event occurs.” *See also*, NMSA 1978, § 7-1-13(A) (“Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to tax until payment is made”).

The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Here, the state was entitled to receive payment of the Taxpayer's gross receipts taxes on the statutory due date. By failing to make timely payment of those taxes, the Taxpayer retained the use of money that legally belonged to the state. For this reason, interest was properly assessed from the original due date of the tax until the date it was paid. The same rationale applies to the assessment of penalty. NMSA 1978, § 7-1-69(A) imposes penalty "in the case of failure due to negligence or disregard of rules and regulations...to pay when due the amount of tax required to be paid..." As set out in NMSA 1978, § 7-9-11, quoted above, gross receipts tax is required to be paid on or before the twenty-fifth day of the month following the month in which the taxable event occurs, and this is the date from which penalty begins to accrue.

**Delay in Assessment.** The Taxpayer questions why the Department took so long to notify her of her gross receipts tax liability. By the time she received the Department's assessment in October 2002, the penalty had reached its statutory maximum of 10 percent and substantial interest had accrued. The Taxpayer testified that she would have paid the gross receipts tax if she had been alerted sooner, and believes the Department is at fault for the accrual of additional penalty and interest.

This 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 tax liabilities and accurately report those liabilities to the state. *See*, NMSA 1978, § 7-1-13(B); *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). There are insufficient government resources available for the Department to continually audit every citizen to determine whether he or she has fully complied with state tax laws. Although the Department performs periodic "tape matches"

that compare information reported to the IRS with information reported to New Mexico, there is some delay before the federal tape match information is made available to the Department. Section 7-1-18(C) NMSA 1978 gives the Department seven years to assess taxes relating to any period for which required returns were not filed. The October 2002 assessment issued to the Taxpayer was well within the time limits provided by the New Mexico Legislature.

**Lack of Knowledge of New Mexico Law.** The Taxpayer testified that she was a Texas resident in 1999 and did not realize that she was subject to New Mexico gross receipts tax on her receipts from performing services as an independent contractor in New Mexico. The Taxpayer also admitted that she did not consult with an accountant or with the Department concerning her liability for taxes, but just assumed that receipts from services performed for a school district would not be subject to tax.

Lack of knowledge of the state's tax laws is not a defense to the assessment of interest or penalty. NMSA 1978, § 7-1-67 states that when any tax is not paid on or before the day on which it becomes due, "interest shall be paid to the state." 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.

New Mexico law also holds that penalties are properly imposed in cases where the taxpayer's failure to pay tax is based on negligence, which is defined to include inadvertent error, erroneous belief, or a lack of knowledge of the law. *See*, Regulation 3.1.11.10 NMAC; *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds by Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994) (penalties may be assessed based on the taxpayer's inadvertent error or unintentional failure

to pay the tax due.); *Vivigen, Inc. v. Minzner*, 117 N.M. 224, 231-232, 870 P.2d 1382, 1389-1390 (Ct. App. 1994) (penalty was properly imposed when taxpayer's failure to pay the tax resulted from CFO's lack of knowledge of state tax law). In this case, the Taxpayer testified that her failure to pay tax was attributable to her lack of knowledge of New Mexico's tax laws and her erroneous belief that receipts from services performed for public school districts was not subject to tax. This constitutes negligence for purposes of NMSA 1978, § 7-1-69.

**Financial Hardship.** Finally, the Taxpayer asks the Department to consider the fact that she is a single mother and has limited financial resources to pay the assessment. These factors are not something the Department can consider. Regulation 3.1.6.14 NMAC specifically states that the Secretary "may not compromise a taxpayer's liability because of the taxpayer's inability to pay." Nor does the Hearing Officer have authority to relieve a taxpayer of his or her statutory liability for tax, penalty or interest. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

The Legislature has not granted the Department or its Hearing Officer the authority to abate or adjust tax assessments based on the personal situations of individual taxpayers.

### CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 3952406 and 3952407, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer's payment of gross receipts taxes for the period January through December 1999 was late, and interest was properly assessed from the original due date of the tax to the date payment was made.

3. The Taxpayer's lack of knowledge of New Mexico's tax laws comes within the definition of negligence in NMSA 1978, § 7-1-69, and penalty was properly assessed on the Taxpayer's late payment of gross receipts taxes from the original due date of the tax to the date payment was made.