

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

**IN THE MATTER OF THE PROTEST OF
MAGDALENA CONSTRUCTION CO.
ID NO. 02-132968-00-0
ASSESSMENT NOS. 3970360-3970363**

No. 04-12

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 18, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey Loubet, Special Assistant Attorney General. Magdalena Construction Co., a sole proprietorship, was represented by its owner, Marc D. Chavez ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. From October 1989 through the end of 1999, the Taxpayer was engaged in the construction business in New Mexico.
2. The Taxpayer registered his business with the Department for payment of gross receipts, compensating, and withholding taxes, which the Taxpayer was required to pay monthly under the Department's combined reporting system ("CRS").
3. The Taxpayer reported total gross receipts of \$1,255 during the first four months of 1996. The Taxpayer did not file any CRS returns for the months of May through December 1996.
4. The Taxpayer failed to file any reports for the months of January through July 1997 and filed returns reporting zero gross receipts for the months of August through December 1997.

5. In 2002, pursuant to an information-sharing agreement with the Internal Revenue Service, the Department received information that the Taxpayer had reported business income of \$16,935 on Schedule C to his 1996 federal income tax return and business income of \$69,525 on Schedule C to his 1997 federal income tax return.

6. On December 9, 2002, based on the discrepancy between the business income reported on the Taxpayer's federal income tax returns and the business income reported on his New Mexico gross receipts tax returns, the Department issued the following assessments:

<i>Assessment</i>	<i>Report Period</i>	<i>GR Tax</i>	<i>Penalty</i>	<i>Interest</i>
3970360	01/96-06/96	\$ 479.29	\$ 47.93	\$ 459.63
3970361	07/96-12/96	\$ 479.29	\$ 47.93	\$ 423.08
3970362	01/97-06/97	\$1,967.69	\$196.77	\$1,592.53
3970363	07/97-12/97	\$1,967.69	\$196.77	\$1,443.28

7. On February 11, 2003, the Taxpayer filed a written protest to the assessment of penalty and interest, but the protest was rejected by the Department as untimely.

8. On March 5, 2003, the Taxpayer filed a request for a retroactive extension of time to file his protest, which was granted by the Department.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the interest and penalty assessed on his late payment of gross receipts tax for reporting periods January 1996 through December 1997. The Taxpayer raises two arguments in support of his protest: (1) the Department waited an unreasonable period of time to notify him of his tax liability; and (2) payment of interest and penalty will create a financial hardship for the Taxpayer.

Delay in Assessment. The Taxpayer questions why the Department took so long to notify him of his gross receipts tax liability. By the time he received the Department's assessment in

December 2002, the penalty had reached its statutory maximum of 10 percent and substantial interest had accrued. The Taxpayer testified that he would have taken steps to correct his underreporting of gross receipts tax if he had been alerted sooner, and believes the Department is at fault for the accrual of additional penalty and interest.

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 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.

NMSA 1978, § 7-1-18 sets out four different time periods within which the Department may assess unpaid taxes. In most cases, the Department has three years from the end of the calendar year in which payment of the tax was due to issue an assessment. In certain circumstances, however, the assessment period is extended: Subsection (B) of § 7-1-18 gives the Department ten years to issue an assessment when the taxpayer has filed a fraudulent return; Subsection (C) gives the Department seven years to issue an assessment when the taxpayer has failed to file a tax return; and Subsection (D) gives the Department six years to issue an assessment when the taxpayer has underreported his tax liability by more than twenty-five

percent. In *Taxation & Revenue Department v. Bien Mur Indian Market Center, Inc.*, 108 N.M. 228, 770 P.2d 873 (1989), the New Mexico Supreme Court held that the assessment periods set out in § 7-1-18 are mandatory and must be adhered to by the Department. As the court explained:

Section 7-1-17(A) makes assessment mandatory when a taxpayer owes more than ten dollars in unpaid taxes; the various provisions of Section 7-1-18 simply limit the number of years following the filing of a return during which the Department is authorized to exercise this mandate. *If the Department may make the assessment under one of the provisions in Section 7-1-18, Section 7-1-17(A) mandates the Department shall do so....* (emphasis added)

Id. 108 N.M. at 231-232, 770 P.2d at 876-877.

During the period at issue in this case, the Taxpayer's tax liability was underreported by more than twenty-five percent. In addition, the Taxpayer failed to file tax returns for several months. By his own actions, the Taxpayer made himself subject to the extended assessment periods set out in NMSA 1978, § 7-1-18(C) and (D). That being the case, there is no basis for the Taxpayer to complain that the Department waited too long to issue its assessment.

Financial Hardship. The Taxpayer asks that penalty and interest be waived because payment of these amounts will create a financial hardship for him. Unfortunately, this is not something the Department can consider. Department 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 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 supreme court held that "the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform"

and that an “administrative agency’s discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.”

The New Mexico Legislature has enacted very specific laws to govern the imposition of interest and penalty on late tax payments. NMSA 1978, § 7-1-67(A) states that if a tax is not paid “on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due...until it is paid.” (emphasis added). NMSA 1978, § 7-1-69(A) provides for the imposition of 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...or to file by the date required a return....” In this case, the Taxpayer has acknowledged that his gross receipts taxes were not paid on time. The evidence presented at the hearing also shows that the Taxpayer was negligent in failing to make timely payments and failing to even file a return for 19 of the 24 months at issue. Based on these facts, there is no legal basis for the Department to abate the penalty and interest assessed against the Taxpayer.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the penalty and interest assessed under Assessment Nos. 3970360-3970363, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer’s payment of gross receipts taxes due for the period January 1996 through December 1997 was late, and interest was properly assessed pursuant to the provisions of NMSA 1978, § 7-1-67.
3. The Taxpayer was negligent in failing to pay gross receipts tax due for the period at issue, and penalty was properly assessed pursuant to the provisions of NMSA 1978, § 7-1-69.

4. Because the Department's assessment was issued within the statutory time period allowed by NMSA 1978, § 7-1-18, there is no undue delay justifying the abatement of penalty and interest.

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

DATED August 19, 2004.