

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

**IN THE MATTER OF THE PROTEST OF  
PAMELA W. KELLY  
ID NO. 02-939717-00-0  
ASSESSMENT NOS. 4103748-4103753;  
4104147 and 4104148**

**No. 04-13**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on August 30, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Pamela W. Kelly ("Taxpayer") represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer, who grew up in New Mexico, moved to California in 1987.
2. While in California, the Taxpayer used the services of a California accountant to prepare her state and federal income tax returns.
3. The Taxpayer's accountant was not a certified public accountant, but was an enrolled agent under a federal program that licenses individuals to represent taxpayers before the Internal Revenue Service.
4. In 1999, the Taxpayer moved back to New Mexico and began work as an independent contractor performing services for the Museum of New Mexico Foundation.
5. 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 and did not report or pay gross receipts tax on this income.

6. In early 2000, the Taxpayer mailed a copy of New Mexico's personal income tax instruction booklet to her accountant in California. The Taxpayer informed her accountant that she was now a resident of New Mexico and asked him to prepare her income tax returns and advise her of her state and federal tax liability.

7. The California accountant was not aware of the New Mexico gross receipts tax and did not have any discussions with the Taxpayer concerning her liability for this tax.

8. In 2003, during a discussion with a co-worker, the Taxpayer learned of the existence of the New Mexico gross receipts tax.

9. The Taxpayer consulted with a New Mexico accountant who advised her of her liability for gross receipts tax on her earnings as an independent contractor.

10. After learning of her tax liability, the Taxpayer voluntarily filed returns and paid the gross receipts tax due for reporting periods January 1999 through December 2002.

11. On July 25 and 28, 2003, the Department assessed the Taxpayer for penalty and interest due on her late payment of gross receipts tax.

12. On September 3, 2003, pursuant to a retroactive extension of time granted by the Department, the Taxpayer filed a written protest to the Department's assessments.

## **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for penalty and interest on her late payment of gross receipts tax for reporting periods January 1999 through December 2002. The Taxpayer asks the Department to excuse her from the payment of penalty and interest because she relied on the advice of her accountant and because she voluntarily came forward to pay the taxes due as soon as she discovered her liability.

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 assessment of penalty and interest paid by the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence showing she is entitled to an abatement of these amounts.

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

A. If a tax imposed 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, 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, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. In this case, the Taxpayer failed to pay her gross receipts taxes in a timely manner because she was unaware that tax was due. Although the Taxpayer acted promptly to correct her error once it was discovered, the fact remains that the state was deprived of the use of funds to which it was legally entitled during the period from the original due date of the tax until it was paid. For this reason, interest was properly assessed pursuant to NMSA 1978, § 7-1-67.

**Assessment of Penalty.** NMSA 1978, § 7-1-69(A) imposes a penalty of two percent per month, up to a maximum of ten percent, whenever a taxpayer fails “due to negligence or disregard of

rules and regulations” to pay taxes or file required tax reports 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 instances where the taxpayer proves that the failure to pay tax “was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer’s liability after full disclosure of all relevant facts.”

In this case, the Taxpayer argues that she was not negligent because her accountant failed to advise her that gross receipts tax was due on her earnings as an independent contractor. The Taxpayer’s accountant was an enrolled agent licensed to represent taxpayers before the Internal Revenue Service. While enrolled agents are generally knowledgeable about federal taxes, there is no indication that the Taxpayer’s out-of-state accountant had any expertise in New Mexico’s tax laws or had been engaged to determine whether the Taxpayer was in compliance with those laws. Instead, the evidence shows that the Taxpayer asked her accountant to advise her concerning her state and federal *income tax* liability.

A taxpayer’s responsibility for payment of taxes due to the state cannot be delegated to a third party. As the Court of Appeals held in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not

inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

Here, the Taxpayer's reliance on her California accountant to prepare her state and federal income tax returns does not establish a basis for abating the negligence penalty for failure to pay gross receipts tax. Although the reporting error was due to the Taxpayer's lack of knowledge of New Mexico tax law, and not to any intent to cheat the state, New Mexico courts have held that even inadvertent error constitutes negligence for purposes of § 7-1-69. *See, El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69(A) is designed specifically to penalize unintentional failure to pay tax.). For this reason, penalty was properly imposed.

#### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to the penalty and interest assessed under Assessment Nos. 4103748-4103753, 4104147 and 4104148, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was late in paying gross receipts taxes due to the state, and interest was properly assessed pursuant to NMSA 1978, § 7-1-67.
3. The Taxpayer was negligent in failing to report gross receipts taxes due to the state, and penalty was properly assessed pursuant to NMSA 1978, § 7-1-69.

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

DATED September 1, 2004.