

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

**IN THE MATTER OF THE PROTEST OF
CHARLES E. BECKNELL
ID NO. 02-417311-00 8
ASSESSMENT NOS. 3936950-3936951**

No. 04-14

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 1, 2004, before Margaret B. Alcock, Hearing Officer. After listening to the evidence presented, the Hearing Officer continued the hearing until September 16, 2004 to give Charles Becknell ("Taxpayer") time to provide the Department with additional documentation. At both hearings, the Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General, and the Taxpayer represented himself. Based on the evidence and arguments presented by the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a New Mexico resident.
2. During the 1999 tax year, the Taxpayer performed consulting services as an employee of the University of California.
3. The Taxpayer also worked as the executive director of The Success Institute of America, Inc. ("Institute"), a nonprofit organization he set up to assist children and young people.

4. The Institute entered into several contracts to perform training and other services for other nonprofit organizations involved in working with children.
5. The Taxpayer performed some of the services required under those contracts; the Institute hired outside subcontractors to perform other services.
6. At the end of each tax year, the Institute issued federal 1099s to its subcontractors reporting the amount of income paid to them during the year.
7. The Institute initially paid New Mexico gross receipts taxes on its receipts from performing services for other entities.
8. When the Taxpayer subsequently learned that the Institute was exempt from gross receipt tax, he applied for and received a refund of the taxes previously paid.
9. The Taxpayer was not aware that his individual business receipts were subject to New Mexico's gross receipts tax, and he did not report or pay gross receipts tax on this income.
10. The Taxpayer hired a bookkeeper who was not a trained accountant to prepare his 1999 personal income tax returns.
11. The bookkeeper did not understand the distinction between income the Taxpayer received on behalf of the Institute and income the Taxpayer received in his individual capacity.
12. As a result, the \$65,303 of business income reported on Schedule C of the Taxpayer's 1999 federal income tax return included receipts of the Institute as well as the Taxpayer's individual receipts.

13. The income the Taxpayer earned as an employee of the University of California was not included on his Schedule C, but was correctly listed as wage income on his Form 1040.

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

15. On September 20, 2002, the Department issued Assessment Nos. 3936950 & 3936951 in the total amount of \$5,854.25, representing gross receipts tax, penalty, and interest on the business income reported on the Taxpayer's 1999 federal return.

16. On October 17, 2002, the Taxpayer filed a written protest to the Department's assessments.

17. On November 1, 2002, the Department's protest office sent a letter to the Taxpayer acknowledging receipt of his protest. The letter advised the Taxpayer that interest on the amount of tax principal in dispute would continue to accrue during the protest and advised the Taxpayer as follows: "You may make payment on a protested assessment to stop the accrual of interest and penalty. Upon resolution of the protest, you may claim a refund for any portion of the protested assessment resolved in your favor."

18. The Taxpayer did not make any payment of the tax principal assessed in order to stop the accrual of additional interest.

19. Following the initial hearing on his protest in July 2004, the Taxpayer provided documentation to establish that \$4,000 of the income reported on his Schedule C was income

from performing services outside New Mexico, and the Department abated the tax, penalty, and interest assessed on this amount.

20. The Taxpayer also provided copies of three 1099s the Institute issued to outside subcontractors for the 1999 tax year: one for \$5,710; one for \$1,300; and one for \$3,000. The Department refused to accept the 1099s as evidence that this amount of income should be deducted from the business receipts shown on the Taxpayer's 1999 Schedule C.

DISCUSSION

The issue presented is whether the Taxpayer is liable for gross receipts tax, interest and penalty on the business income reported on Schedule C of his 1999 federal income tax return.

The Taxpayer argues that he is entitled to an abatement of all or part of the assessment because:

- (1) The Success Institute of America, his nonprofit organization, was exempt from gross receipts tax and had received a refund of the gross receipts taxes it erroneously paid to the Department;
- (2) a portion of the work performed under the Institute's contracts was performed by outside subcontractors and not by the Taxpayer; and
- (3) the Department took too long to schedule a hearing on the Taxpayer's protest, resulting in the accrual of additional penalty and interest.

Taxation of the Institute's Gross Receipts. The Taxpayer argues that he should not be liable for gross receipts tax because his nonprofit organization was exempt from tax under NMSA 1978, § 7-9-29. Although the Institute initially paid gross receipts taxes on its receipts, the Department subsequently refunded those taxes. The Taxpayer questions why the Department has now assessed him on those same receipts. What the Taxpayer fails to realize is that he and his nonprofit organization are separate taxable entities. The fact that the Institute is

exempt from gross receipts tax on its receipts does not mean that the Taxpayer is exempt from tax on income he receives from performing services in his individual capacity.

Payments to Subcontractors. The \$65,303 of business income reported on the Taxpayer's 1999 Schedule C closely corresponds to the \$65,891 of income represented by the contracts the Institute entered into to perform services for other nonprofit entities. The testimony of the Taxpayer, who was a credible witness, together with the contracts themselves, support the conclusion that the Taxpayer's bookkeeper mistakenly included the full amount of the Institute's 1999 income on the Taxpayer's individual federal income tax return. That being the case, the Taxpayer is entitled to an abatement of any gross receipts tax assessed on income the Institute paid for the services of independent contractors other than the Taxpayer.

At the July 1, 2004 hearing, the Taxpayer acknowledged that he performed the work required under at least some of the Institute's contracts, including its May 25, 1999 and November 1, 1999 contracts with New Mexico Advocates for Children & Families, which represented total receipts of \$33,470. The Taxpayer also provided copies of 1099s showing that the Institute paid \$10,010 to three outside subcontractors during 1999, and the Taxpayer is entitled to an abatement of tax on this amount. Although the Taxpayer maintains that additional payments were made to other subcontractors hired to perform services for the Institute, he has been unable to provide any evidence of those payments.

NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." In this case, neither the Taxpayer's nor the Institute's 1999 financial records were sufficient to establish how much the Institute paid to outside subcontractors, with the exception of the

\$10,010 reflected on the three 1099s. In the absence of such evidence, the Taxpayer has not met his burden of overcoming the presumption of correctness that attaches to the Department's assessments. *See*, NMSA 1978, § 7-1-17(C); *see also*, *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972).

Delay in Scheduling a Hearing. The Taxpayer points out that he requested a hearing on his liability for the gross receipts tax assessed by the Department in his original protest letter, which was filed on October 17, 2002. The Taxpayer believes that the almost two-year delay between the date of that letter and the date of the administrative hearing entitles him to an adjustment of the penalty and interest that have accrued since October 2002.

NMSA 1978, § 7-1-69(A) imposes a negligence penalty of two percent per month, up to a maximum of ten percent, for a taxpayer's failure to pay taxes in a timely manner. Based on this statutory formula, penalty stops accruing five months after the due date of the tax. Here, the penalty assessed against the Taxpayer reached its maximum of ten percent prior to the date of the Department's assessment, and no additional penalty accrued as a result of the Department's delay in handling the Taxpayer's protest.

NMSA 1978, § 7-1-67(A) provides that if a tax is not paid on or before the due date, "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." 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 gross receipts taxes due to the state. Although this failure was

clearly not intentional, the fact remains that the state has been denied the use of funds to which it is legally entitled.

In *In re Ranchers-Tufco Limestone Project Joint Venture*, 100 N.M. 632, 635, 674 P.2d 522, 525 (Ct. App.), *cert. denied*, 100 N.M. 505, 672 P.2d 1136 (1983), the New Mexico Court of Appeals rejected the argument that a taxpayer who does not receive a prompt hearing is relieved of his tax obligations to the state. It should also be noted that the Department's November 1, 2002 letter acknowledging receipt of the Taxpayer's protest specifically advised him that interest would continue to accrue during the pendency of the protest and gave him the option of making a payment of tax principal to stop the accrual of interest. The Taxpayer decided not to make such a payment, preferring to wait for the outcome of the hearing. Given these facts, there is no basis for abating the interest imposed by NMSA 1978, § 7-1-67(A).

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 3936950 & 3936951, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Department's refund of gross receipts taxes paid by the nonprofit organization established by the Taxpayer has no bearing on the Taxpayer's individual liability for gross receipts tax.
3. The Taxpayer met his burden of proving that he did not receive \$10,010 of the income on which he was assessed, and he is entitled to an abatement of the gross receipts tax, penalty and interest assessed on that amount.
4. The Taxpayer failed to meet his burden of proving that he is entitled to an abatement of the remaining tax, penalty, and interest assessed against him.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the gross receipts tax, penalty, and interest assessed on the \$10,010 paid to outside subcontractors performing services for the Taxpayer's nonprofit organization. The Taxpayer remains liable for the remaining tax, penalty, and interest assessed against him.

DATED September 21, 2004.