

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

**IN THE MATTER OF THE PROTEST OF
GARCIA'S KITCHEN; ID NO. 02-275783-00 0
TO NOTICE OF REFUND OFFSET DATED
NOVEMBER 10, 2004, LETTER ID I0297378304**

No. 05-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 11, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Garcia Enterprises, Inc., d/b/a Garcia's Kitchen ("Taxpayer") was represented by Frankie Arthur, its bookkeeper. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in business in New Mexico and is registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
2. During calendar year 2003, the Taxpayer's average monthly payment of gross receipts, compensating, and withholding taxes exceeded \$25,000.
3. On December 15, 2003, the Department notified the Taxpayer that due to the increase in its monthly tax payments, it was now required to submit its 2004 CRS taxes using one of the special payment methods set out in NMSA 1978, § 7-1-13.1. Enclosed with the letter was Department publication FYI-401, a 28-page booklet explaining special payment procedures.

4. The Department mailed its December 15, 2003 notice to the Taxpayer at 3601 Juan Tabo, NE, Albuquerque, NM 87111, which is the location of one of the Taxpayer's restaurants and was also the address shown on the Taxpayer's registration with the Department.

5. Although the Taxpayer had merged with another company in 2003 and moved its business headquarters to a location separate from its restaurant, the Taxpayer did not notify the Department of the address change until June 2004.

6. The Taxpayer's bookkeeper, who was located at the company's new address, never received the Department's December 15, 2003 notice or the FYI-401 publication.

7. Instructions concerning special payment methods is also contained in the CRS Filer's Kit that the Department regularly sends out to all CRS taxpayers.

8. The Taxpayer's bookkeeper thought she understood the payment procedures applicable to the Taxpayer's CRS taxes and did not take the time to read the instructions in the CRS Filer's Kit concerning the special payment methods required by NMSA 1978, § 7-1-13.1.

9. During 2004, the bookkeeper continued to mail the Taxpayer's monthly payments to the Department on or before the statutory due date in accordance with the provisions of NMSA 1978, § 7-1-13.

10. Because NMSA 1978, § 7-1-13.1 requires checks of special payment taxpayers to be received by the Department at least one banking day *prior* to the statutory due date, the Taxpayer's CRS payments for several months during 2004 were late, resulting in assessments of penalty and interest.

11. On September 7, 2004, the Taxpayer filed a claim for refund of \$1,281.26 of CRS taxes that were overpaid as a result of changes to the Taxpayer's accounting software.

12. On November 10, 2004, the Department notified the Taxpayer that the refund had been granted, but was being offset against outstanding assessments of penalty and interest resulting from the Taxpayer's failure to follow the special payment provisions in NMSA 1978, § 7-1-13.1.

13. On December 1, 2004, the Taxpayer filed a written protest to the refund offset..

DISCUSSION

The issue to be decided is whether the Taxpayer's \$1,281.26 refund was properly offset against the outstanding liability for interest and penalty assessed as a result of the Taxpayer's failure to follow the special payment procedures set out in NMSA 1978, § 7-1-13.1. Pursuant to NMSA 1978, § 7-1-29(C), the Department has discretion to offset any amount of tax to be refunded "against any amount of tax for which the person due to receive the refund is liable." Accordingly, if the assessments of interest and penalty against the Taxpayer were valid, the Department's offset of the Taxpayer's refund was also valid.

The Taxpayer acknowledges that it was subject to the special payment provisions of § 7-1-13.1 during 2004, but challenges the assessment of penalty and interest resulting from its failure to follow those provisions. The Taxpayer maintains that it should be excused from compliance with § 7-1-13.1 for the period prior to the date it received actual notice of its statutory obligations from the Department. There are several problems with the Taxpayer's argument. First, the evidence shows that the Department notified the Taxpayer of the special payment provisions by a notice dated December 15, 2003. The notice was mailed to the Taxpayer at 3601 Juan Tabo, NE, Albuquerque, NM 87111, which is the location of one of the Taxpayer's restaurants and was also the address shown on the Taxpayer's registration with the Department.

NMSA 1978, § 7-1-9 states that notices are effective if mailed to the taxpayer “at the last address shown on his registration certificate or other record of the department.” Although the Taxpayer moved its business headquarters as a result of a 2003 merger, the Taxpayer failed to notify the Department of this change of address until June 2004, well after the Department’s December 15, 2003 notice was mailed.

In any event, the Department was not required to notify the Taxpayer of the change in its payment status, but did so only as a courtesy. New Mexico has a self-reporting tax system, and 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). In *Vivigen, Inc. v. Minzner*, 117 N.M. 224, 228, 870 P.2d 1382 (Ct. App. 1994), the court of appeals rejected the taxpayer’s argument that the Department’s delay in completing its audit should excuse Vivigen from its legal liability for taxes due to the state, noting that:

Vivigen seems to be complaining that the Department did not definitively tell it that it needed to pay compensating taxes on out-of-state purchases so that it could have avoided taxes, interest, and penalties for compensating taxes accrued from and after February 1989. *Any necessary notice, however, was provided by New Mexico statutes.* (Emphasis added).

In this case, New Mexico’s tax statutes and regulations, as well as the information contained in the CRS Filer’s Kit, gave the Taxpayer notice of its legal obligation to use the special payment methods set out in § 7-1-13.1. The Taxpayer was not entitled to wait for the Department to notify it of this obligation before penalty and interest on its late payments began to accrue.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the Department's offset of the Taxpayer's refund against its outstanding tax liabilities, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer had a legal obligation to pay its 2004 CRS taxes using the special payment methods set out in NMSA 1978, § 7-1-13.1, and the fact that it never received notice of this obligation did not excuse it from compliance.

C. Because the Taxpayer did not pay its 2004 CRS taxes using the methods required by NMSA 1978, § 7-1-13.1, its payments were late and interest and penalty were properly assessed.

D. Pursuant to NMSA 1978, § 7-1-29(C), the Department was authorized to offset the Taxpayer's refund against its outstanding liabilities for interest and penalty.

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

DATED May 16, 2005.