

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

**IN THE MATTER OF THE PROTEST OF
REXBRUN CORPORATION; ID NO. 02-274842-00 3
TO NOTICE OF ASSESSMENT OF PENALTY AND
INTEREST ISSUED UNDER LETTER ID L1413562880**

No. 06-04

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 8, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. Rexbrun Corporation ("Taxpayer") was represented by its accountant, Laura Krawiecki. 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. On September 26, 2004, Linda Krawiecki, the Taxpayer's accountant, filed the Taxpayer's CRS return for the August 2004 reporting period. The return was filed electronically using the Department's CRS-NET online reporting system and payment was made by means of an electronic check in the amount of \$9,221.68.
3. Ms. Krawiecki received a confirmation from CRS-NET confirming receipt of the Taxpayer's return and electronic check.

4. The electronic payment information was then transmitted, without any editing or re-keying of the information by the Department, from the CRS-NET system to Wells Fargo Bank New Mexico, N.A., the Taxpayer's bank.

5. On October 8, 2004, Wells Fargo notified the Department that it had rejected the electronic payment request because the bank could not identify the account number. The nine-digit account number listed in Wells Fargo's rejection notice was the same as the Taxpayer's ten-digit account number, with the exception of one omitted number. Department Exhibit B.

6. On October 13, 2004, after receiving notice that the bank would not honor the Taxpayer's electronic payment, the Department assessed the Taxpayer for the amount of CRS taxes reported on the Taxpayer's August 2004 CRS return, plus interest and penalty. The following statement appeared on the face of the assessment: "Interest continues to accrue on the unpaid principal of the tax due."

7. On October 24, 2004, Ms. Krawiecki filed a written protest to the assessment.

8. The protest letter stated: "Attached is a copy of the Electronic Check confirmation for the GR Tax return due under this Assessment," and noted "Enc: 2" at the bottom of the letter.

9. Only one enclosure was included with the protest letter, which was a print out from the Department's CRS-NET system summarizing the information received from the Taxpayer for the August 2004 reporting period. Department Exhibit A.

10. The second enclosure should have been a print out of a computer screen from the CRS-NET system asking the Taxpayer to verify the bank routing number and the account

number for the Taxpayer's account at Wells Fargo. The print out of this screen shows the correct bank account number for the Taxpayer but does not have a date indicating the reporting month to which the screen pertains. Taxpayer Exhibit 1.

11. On November 15, 2004, the Department sent Ms. Krawiecki a letter acknowledging receipt of the Taxpayer's protest and stating: "The issues you raise are being reviewed and Alexis Lotero will contact you or your authorized representative if any additional information is needed."

12. The Department's November 15, 2004 also advised the Taxpayer that interest and penalty on any amount of tax determined to be due at the conclusion of the protest would continue to accrue during the pendency of the protest.

13. Ms. Krawiecki was responsible for reconciling the Taxpayer's bank statements and was aware that the \$9,221.68 payment of the Taxpayer's August 2004 CRS returns had never cleared the Taxpayer's bank account.

14. Even with this knowledge, Ms. Krawiecki made no attempt to follow up with the Department to determine why the October 13, 2004 assessment had been issued or to contact the Taxpayer's bank to determine why the tax payment for the August 2004 reporting period had not cleared the Taxpayer's account.

15. Because the Department's protest office was backlogged, Alexis Lotero, the protest officer assigned to the Taxpayer's case, did not contact Ms. Krawiecki until January 2006. At that time, Ms. Lotero sent Ms. Krawiecki a letter explaining that the Taxpayer's electronic payment of CRS taxes for the August 2004 reporting period had been rejected by the Taxpayer's bank.

16. On January 21, 2006, after receiving Ms. Lotero's letter, Ms. Krawiecki sent the Department a paper check to replace the rejected electronic check.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the penalty and interest that accrued on its late payment of CRS taxes between September 27, 2004, the due date for August 2004 CRS taxes, and January 21, 2006, the date the taxes were paid. NMSA 1978, § 7-1-17 NMSA 1978 provides that any assessment of taxes made 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 presumption of correctness applies to the assessment of penalty and interest at issue in this case, and it is the Taxpayer's burden to present evidence and legal arguments to support an abatement.

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 provisions of the statute are mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). With limited exceptions that do not apply here, the New Mexico Legislature has

directed the Department to assess interest whenever taxes are not timely paid. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, NMSA 1978, § 7-1-13(E).

In this case, an error made by the Taxpayer's accountant or the Taxpayer's bank caused the electronic check submitted in payment of the Taxpayer's August 2004 CRS taxes to be rejected. As a result, the Department did not receive the payment by the statutory due date. Sixteen days later, on October 13, 2004, the Department sent the Taxpayer an assessment for the taxes due. Although Ms. Krawiecki testified that she did not understand the basis for the assessment, it should have put her on notice that something had gone wrong with the Taxpayer's electronic payment. This was confirmed when Ms. Krawiecki reconciled the Taxpayer's monthly bank statements and found that the funds intended to pay the Taxpayer's August 2004 CRS taxes had not been transferred to the State and were still in the Taxpayer's bank account.

Ms. Krawiecki believes that she fulfilled any duty the Taxpayer had to the State when she filed a protest to the Department's assessment. She maintains that the Taxpayer had no obligation to follow up with its bank or with the Department to determine what happened to the August 2004 tax payment. Ms. Krawiecki misunderstands the nature of New Mexico's self-reporting tax system, which places the duty on taxpayers to accurately determine and pay their taxes by the statutory due date. NMSA 1978, § 7-1-13; *See also*, *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). Once she received the Department's assessment and confirmed that the August 2004 payment had not cleared the bank, Ms. Krawiecki had an

obligation to insure that those funds were properly transferred. As set out in NMSA 1978, § 7-1-13.4, the obligation to resubmit the rejected payment was on the Taxpayer, not the Department:

When an electronic payment transaction is reversed...neither the department nor the fiscal agent of New Mexico is obligated to resubmit the transaction or check for payment. If the reversal or dishonoring causes the final payment of taxes to be not timely, then the provisions of Section 7-1-67 and 7-1-69 NMSA 1978 apply.

Section 7-1-67 requires the payment of interest whenever a tax is not paid “on or before the day on which it becomes due.” The Department’s October 13, 2004 assessment notified the Taxpayer that “[i]nterest continues to accrue on the unpaid principal of the tax due.” The same notice appeared in the Department’s November 15, 2004 acknowledgment letter, which advised the Taxpayer that “interest on any amount of tax determined to be due at the conclusion of your protest will continue to accrue at a rate of .041% per day until such liability has been paid.” Given these warnings, the Taxpayer has no grounds to complain about the accrual of interest resulting from its accountant’s decision not to follow up on the Department’s assessment.

Assessment of Penalty. NMSA 1978, § 7-1-69 provides that when a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and regulations, a penalty shall be added to the amount of the underpayment, calculated as follows:

two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid.

As with interest, the amount of penalty is calculated “from the date the tax was due,” not the date the taxpayer receives an assessment or the date the taxpayer is contacted by the Department after filing a protest. For purposes of § 7-1-69, the term “negligence” is defined as follows:

- 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.

Based on the evidence presented, it is not clear whether the error that led to the rejection of the Taxpayer's electronic check was made by its accountant or by its bank. In either case, the error was made by an agent of the Taxpayer and the Taxpayer is liable for that error. *See, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989) (a taxpayer cannot abdicate responsibility for payment of taxes by the appointment of an agent). The Taxpayer is also liable for the additional penalty that accrued as a result of Ms. Krawiecki's inaction in failing to follow up with the Department or the Taxpayer's bank once she determined that the State had not received the Taxpayer's August 2004 tax payment. Given the facts of this case, such inaction clearly constitutes negligence.

CONCLUSIONS OF LAW

- A. The Taxpayer filed a timely protest to the penalty and interest assessed under Letter ID L1413562880, and jurisdiction lies over the parties and the subject matter of this protest.
- B. Pursuant to NMSA 1978, § 7-1-67, the Taxpayer is liable for payment of the interest that accrued from the first day following the day on which its August 2004 CRS taxes became due in September 2004 until the date the taxes were paid in January 2006.
- C. Pursuant to NMSA 1978, § 7-1-69, the Taxpayer was negligent in failing to pay its August 2004 CRS taxes in a timely manner and penalty was properly assessed.

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

DATED March 22, 2006.