

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

**IN THE MATTER OF THE PROTEST OF  
AIDA LUZ GONZALES, ID NO. 03-013580-00-0  
TO ASSESSMENTS ISSUED UNDER LETTER  
ID NOS. L0052677632, L0364806656, L0980713984,  
L1593344512 and L1184530944**

**07-02**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on January 23, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Susanne Farr, Special Assistant Attorney General. Aida Luz Gonzales (“Taxpayer”) represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During the years 2001, 2002, and 2003, the Taxpayer performed services as an independent contractor for the Boys and Girls Club (“B&GC”) in Santa Fe, New Mexico.
2. At the end of each year, the B&GC issued a Form 1099 to the Taxpayer listing the income she was paid during the previous year.
3. The Taxpayer reported this income as business income on Schedule C of her federal income tax returns for the 2001, 2002 and 2003 tax years.
4. On occasion, the Taxpayer purchased art supplies on behalf of the B&GC. On those occasions, she used a Type 9 nontaxable transaction certificate (“NTTC”), which allows vendors to sell tangible personal property to certain nonprofit organizations without having to charge the organization for gross receipts tax.

5. The Taxpayer did not read the Department's instructions concerning the use of Type 9 NTTCs, which state: "These certificates may not be used for the purchase of services." Nor did the Taxpayer read the notice that appears in the Department's personal income tax instructions, which reads, in part:

NOTE: IF YOU ARE SELF-EMPLOYED, RUN A BUSINESS OUT OF YOUR HOME, OR WORK FOR SOMEONE ELSE BUT DO NOT HAVE WAGE TAXES WITHHELD, you may be required to register with the Department for gross receipts tax.

As a result, the Taxpayer did not charge or pay gross receipts tax on her receipts from selling services to the B&GC.

6. In 2004, the Department received information from the Internal Revenue Service concerning the business income reported on the Taxpayer's 2001 federal income tax return.

7. On June 8, 2004, after determining that the Taxpayer had not reported this income for gross receipts tax purposes, the Department assessed the Taxpayer for \$890.20 of gross receipts tax, plus interest, for the six-month reporting period ending on December 31, 2001.

8. On June 12, 2004, the Taxpayer filed a written protest to the assessment. She subsequently paid the full amount of tax principal due, but continued to dispute her liability for the assessment of interest.

9. On September 27, 2004, the Department assessed the Taxpayer for additional gross receipts taxes due for the 2002 and 2003 reporting periods, plus interest and penalty.

10. The Taxpayer paid the tax principal assessed and filed timely protests to the assessment of interest and penalty.

11. In early 2005, the Taxpayer received some collection calls at the B&GC.

12. On April 7, 2005, the Taxpayer met with one of the Department's revenue agents and told him that she had protested the Department's assessments of penalty and interest. The revenue agent entered this information into the Department's computers, after which all collection calls stopped.

13. Following the April 2005 meeting, the revenue agent mailed the Taxpayer an updated Statement of Account that listed the reporting periods ending on June 30, 2002, December 31, 2002, June 30, 2003, and December 31, 2003 and showed that \$607.47 of interest and penalty was due for these reporting periods. The Statement of Account did not list the amount of interest due on the Department's first assessment for the reporting period ending June 30, 2001.

14. In September 2006, an auditor in the Department's protest office faxed the Taxpayer a statement that included all reporting periods under protest, including the amount due for the 2002 and 2003 reporting periods and an additional \$358.03 of interest due for the reporting period ending June 30, 2001.

### **DISCUSSION**

The issue to be determined is whether the Taxpayer is liable for the interest and penalty assessed on her late payment of 2001, 2002, and 2003 gross receipts taxes. The Taxpayer maintains that interest and penalty should not be imposed because the Department failed to give her adequate notice concerning the gross receipts tax and she did not learn of her liability for additional tax until 2004. She further argues that she should be excused from payment because the Department made erroneous collection calls and sent her a statement of account that did not list one of the five reporting periods for which she was assessed.

*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....

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). *See also*, NMSA 1978, § 12-2A-4(A) of the Uniform Statute and Rule Construction Act (the words "shall" and "must" express a duty, obligation, requirement or condition precedent).

When a taxpayer fails to make timely payment of taxes due to the state, NMSA 1978, § 7-1-67(A) imposes interest "*from the first day following the day on which the tax becomes due...until it is paid.*" The language of the statute makes it clear that interest on an underpayment of tax begins to run from the original due date of the tax—not the date that the Department notifies the taxpayer of the underpayment. The assessment of interest is designed to compensate the state for the time value of unpaid revenues. 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, the Taxpayer—rather than the state—had the use of her unreported gross receipts taxes for the period between the original due date of those taxes and the date when the taxes were paid. For this reason, interest was properly assessed.

*Assessment of Penalty.* NMSA 1978, § 7-1-69(A) 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 that the taxpayer is notified of the underpayment.

The term “negligence” as used in § 7-1-69(A) is defined in Regulation 3.1.11.10 NMAC to include “inadvertence...erroneous belief or inattention.” In this case, the Taxpayer’s failure to pay gross receipts tax was due to her lack of knowledge of New Mexico law and her erroneous belief that services performed for a nonprofit organization are not taxable. This meets the definition of negligence set out in Department regulations and in New Mexico case law. *See, Vivigen, Inc. v. Minzner*, 117 N.M. 224, 231, 870 P.2d 1382, 1389 (Ct. App. 1994) (penalty was properly imposed when taxpayer’s CFO acknowledged that the failure to pay the tax resulted from her lack of knowledge of state tax law). Accordingly, penalty was properly assessed.

*Self-Reporting Tax System.* The Taxpayer argues that she should be excused from payment of penalty and interest because the Department failed to provide her with sufficient notice that she was liable for the gross receipts tax. This argument misunderstands the nature of New Mexico’s self-reporting tax system, which places the duty on taxpayers to accurately determine and pay taxes due to the state. 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). In *Vivigen, supra*, 117 N.M. at 228, 870 P.2d at 1386, the court rejected an argument very similar to the argument raised by the Taxpayer here, 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.

Every person is presumed to know the law, *State v. Tower*, 133 N.M. 32, 34, 59 P.3d 1264, 1266 (Ct. App. 2002), and ignorance of the law is not an excuse, *First Central Service Corp. v. Mountain Bell Telephone*, 95 N.M. 509, 512, 623 P.2d 1023, 1026 (Ct. App. 1981). In this case, New Mexico's Gross Receipts and Compensating Tax Act provided the Taxpayer with legal notice of her obligation to report and pay gross receipts taxes to the state. While it is unfortunate that the Taxpayer was not aware of the law and did not see the Department's various instructions concerning the gross receipts tax, this does not excuse her from timely payment of the tax. Nor does it excuse her from the penalty and interest that accrued on her late payment.

*Abuse of Process.* The Taxpayer also argues that she should be excused from payment of penalty and interest because the Department engaged in an "abuse of process." The fact that the Department made a few collection calls—which stopped as soon as the Taxpayer alerted one of the Department's revenue agents to her protest—and provided the Taxpayer with a statement of account that did not include one of the five reporting periods for which she had been assessed, does not constitute an abuse of process. *See, DeVaney v. Thriftway Marketing Corp.*, 124 N.M. 512, 518, 953 P.2d 277, 283 (1997), *cert. denied*, 524 U.S. 915 (1998) (discussing elements of the tort of malicious abuse of process). Nor do these actions form a basis for abating the penalty and interest assessed on the Taxpayer's late payment of gross receipts taxes.

## CONCLUSIONS OF LAW

A. The Taxpayer filed timely, written protests to the assessment of interest and penalty issued under Letter ID Nos. L0052677632, L0364806656, L0980713984, L1593344512 and L1184530944, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-1-67(A), the Taxpayer was liable for payment of the interest that accrued from the first day following the day on which her gross receipts taxes became due until the date the taxes were paid.

C. Pursuant to NMSA 1978, § 7-1-69(A), the Taxpayer was negligent in failing to report and pay her gross receipts taxes in a timely manner, and penalty was properly assessed from the date the tax was due until the penalty reached its maximum of ten percent.

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

DATED February 7, 2007.