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

IN THE MATTER OF THE PROTEST OF
LMR COMPUTING TECHNOLOGIES **No. 07-07**
NM ID NO. 02-499985-00-7, TO ASSESSMENTS
ISSUED UNDER LETTER ID NOS. L2029534208,
L1491590144 and L0724556800

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on April 26, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. LMR Computing Technologies, a sole proprietorship, was represented by its owner, Lee Reeves ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In July 2002, the Taxpayer established a sole proprietorship in Farmington, New Mexico, operating under the name LMR Computer Technologies.

2. New Mexico businesses are required to report gross receipts, compensating, and withholding taxes on a combined Form CRS-1; in January 2003, the Taxpayer made his first gross receipts tax payment for the six-month period ending December 31, 2002.

3. After seeing how much paperwork was involved in running a new business, the Taxpayer decided to hire Jackson Hewitt Tax Service in Farmington to advise him on tax matters related to his business.

4. In January 2003, the Taxpayer provided Sonya, the Jackson Hewitt employee assigned to his account, with his "quick books" and other records showing his receipts from the business.

5. After reviewing this material, Sonya advised the Taxpayer to begin making estimated tax payments and gave him the amounts he needed to pay each quarter. The Taxpayer followed Sonya's advice and made regular quarterly payments to the Department.

6. The Taxpayer did not file any CRS-1 returns during 2003.

7. In early 2004, the Taxpayer met with Sonya to go over the information needed to file his 2003 income tax returns. For the first time, Sonya brought up the subject of the New Mexico gross receipt tax and asked the Taxpayer for his paperwork on these taxes.

8. At that point, the Taxpayer realized that the estimated tax payments he had been making to the Department only applied to state income tax and not to the gross receipts tax.

9. When the Taxpayer asked Sonya to prepare gross receipts tax returns for prior periods, she advised him to wait until she completed his 2003 income tax return.

10. Sonya did not finish the Taxpayer's income tax return by the April 15th deadline and told the Taxpayer she was filing for an extension to August 15, 2004 and he didn't need to do anything until then.

11. Sonya left Jackson Hewitt in April 2004 without completing the Taxpayer's income tax returns or delinquent gross receipts tax returns.

12. In August 2004, the Taxpayer called Jackson Hewitt again and learned that Sonya had left the company.

13. The Taxpayer's account was reassigned to another Jackson Hewitt employee who prepared the Taxpayer's 2003 income tax returns and also prepared his CRS-1 returns for reporting periods ending June 30, 2003, December 31, 2003, and June 30, 2004. The Taxpayer filed these returns in August 2004 and paid the amount of tax principal due.

14. Upon receipt of the Taxpayer's three past-due CRS-1 returns in August 2004, the Department assessed the Taxpayer for interest and penalty on the late payment.

15. On August 27, 2004, the Taxpayer filed a written protest to the assessments of interest and penalty.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the interest and penalty assessed by the Department. The Taxpayer does not dispute his liability for the tax principal, but maintains that it is unfair to assess him interest and penalty when he attempted to take the steps necessary to insure compliance with the state's tax laws and was misled by his tax advisor.

Burden of Proof. NMSA 1978, § 7-1-17(C) 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." For this reason, the presumption of correctness of an assessment of taxes also applies to the assessment of interest and penalty. *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

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 any tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on such 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.

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 until payment is made. *See*, NMSA 1978, §§ 7-1-13(E) and 7-1-67(A). Here, the Taxpayer failed to pay gross receipts taxes due for reporting periods January 2003 through June 2004. As a result, the Taxpayer—rather than the state—had the use of these revenues during the 18-month period at issue. Accordingly, interest was properly assessed and there is no basis for abatement.

Assessment of Penalty. NMSA 1978, § 7-1-69 imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes 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. Subsection D of the regulation provides as follows:

> D. the taxpayer proves that the failure to pay tax or to file a return 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; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent.

The Taxpayer argues that by hiring a tax service to advise him concerning his tax obligations, he has established his lack of negligence under the above regulation. The Taxpayer also relies on *Kidz Karousel, Inc.*, a 2001 administrative decision of the Department's Hearing Officer, which found that the taxpayer was not liable for the negligence penalty under the facts of that case.[1] There, Kidz Karousel's owners engaged the services of an attorney and a certified public accountant to advise them concerning business procedures and to insure that the corporation filed all tax forms required by New Mexico law. The owners also hired a payroll service to file the corporation's monthly CRS returns. What they failed to realize, and their attorney and CPA failed to advise them, was that the payroll service was only reporting withholding taxes. Eighteen months later, the owners discovered that their gross receipts taxes had not been paid. Instead of relying on the CPA who had previously misled them, they promptly notified the Department themselves and filed amended CRS returns to report the back taxes.

While the facts in *Kidz Karousel* bear some similarity to the facts of this case, there are also important differences. The most significant difference for purposes of Regulation 3.1.11.11(D) is that *Kidz Karousel* did not involve a failure to file required tax returns.

[1] Although these decisions are posted on the Department's web site and provide general guidance concerning positions taken in past cases, they do not serve as legal precedent for future cases.

Throughout the period at issue, Kidz Karousel's payroll service was filing timely (although incomplete) CRS returns on behalf of the corporation. In contrast, no CRS returns were filed by the Taxpayer in this case. Although the Taxpayer testified that he thought the estimated payments he was making covered his gross receipts tax liability, there is no evidence that he ever questioned Jackson Hewitt to determine why they had not prepared CRS returns for his signature (nor is there any evidence that he had authorized Jackson Hewitt to sign such returns on his behalf). The Taxpayer's protest letter states that he filed the initial CRS return for his business in January 2003. Accordingly, he was familiar with the forms required to report and pay gross receipts taxes to the state and should have taken steps to insure that subsequent returns were being filed in a timely manner.

Another difference between the two cases is the Taxpayer's failure to take prompt action to correct his tax reporting once he discovered that no CRS returns had been filed for the previous twelve months. In *Kidz Karousel*, the owners rejected their CPA's belated offer to help them with their gross receipts tax reporting and went directly to the Department to insure the problem was corrected as soon as possible. Here, the Taxpayer allowed his tax service to delay the filing of his back CRS returns by an additional six months. At the administrative hearing, the Taxpayer testified that he would have "pushed harder" if he had known that interest and penalty were accruing on his liability. Timely tax reporting should not depend on whether a taxpayer believes he will be penalized for failing to comply with the state's tax laws. Once the Taxpayer knew that he was delinquent in reporting gross receipts taxes to the state, his failure to take affirmative action to bring himself into compliance meets the definition of negligence set out in the Department's regulation (*i.e.*, a failure to exercise that degree of ordinary business care and

prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; and inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention).

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessments of interest and penalty issued under Letter ID Nos. L2029534208, L1491590144 and L0724556800, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to Section 7-1-67 NMSA 1978, the Taxpayer is liable for interest on the late payment of gross receipts taxes.

C. Pursuant to Section 7-1-69 NMSA 1978 and the Department's regulations, the Taxpayer was negligent in failing to file CRS returns during the period at issue and to insure prompt filing of those returns once he discovered his delinquent gross receipts tax liability; accordingly, penalty was properly imposed.

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

DATED April 30, 2007.