

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

**IN THE MATTER OF THE PROTEST OF
CHRISTOPHER MARTIN
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0038227328 and L0589976960**

No. 10-08

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 13, 2010, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Peter Breen, Special Assistant Attorney General. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Ms. Lisa Perry and Ms. Amiee Rivera appeared as interpreters for Mr. Dillon. Mr. Christopher Martin ("Taxpayer") appeared for the hearing and represented himself. The Hearing Officer took notice of all documents in the administrative file. The parties agreed to waive the 30-day limit on the decision. Taxpayer was granted until May 7, 2010 to provide an affidavit from his tax preparer. The Department was granted until May 14, 2010 to respond to any items submitted by Taxpayer after the hearing. The Taxpayer submitted Taxpayer "A", a letter dated 4/19/10; and Taxpayer "B", an affidavit from FWH Financial after the hearing. They were submitted timely. Copies were forwarded to Mr. Breen. The Department did not respond to the documents. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was engaged in business in New Mexico as a handyman and doing odd jobs in 2005 and 2006.
2. Taxpayer failed to file gross receipts tax with the Department for 2005 and 2006.

3. The Department determined that Taxpayer was a non-filer on gross receipts tax for 2005 and 2006 through the Schedule C of his federal tax form, which was reported to the Department as a mismatch through the Combined Reporting System.
4. On June 30, 2009, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005. The assessment was for \$3,493.10 tax, \$698.62 penalty, and \$1,424.35 interest.
5. On June 30, 2009, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006. The assessment was for \$3,140.18 tax, \$628.04 penalty, and \$812.37 interest.
6. On July 31, 2009, Taxpayer filed a request for extension of time to file protest and a letter indicating his intent to protest.
7. On August 17, 2009, the Department granted an extension of time to file until September 28, 2009.
8. On September 19, 2009, Taxpayer filed a formal protest letter.
9. On November 23, 2009, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
10. Taxpayer was using a tax preparer from California. Taxpayer and his tax preparer did not realize that gross receipts tax applied to services rendered in the State of New Mexico.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax periods ending in December 2005 and December 2006, due to his failure to file gross receipts tax reports.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that he is not liable for the tax and is entitled to an abatement of penalty and interest.

Gross Receipts Tax.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). Taxpayer’s handyman services are subject to the gross receipts tax. It is the responsibility of the taxpayer, who is in the position to know the details of his business activities, to determine accurately and to report his tax liabilities to the Department. *See* NMSA 1978, § 7-1-13. At the hearing Taxpayer did not dispute that he was providing services and that the receipts from the services were taxable. Taxpayer did not deliberately or maliciously fail to pay his taxes. Taxpayer testified that he is willing to pay the taxes that he owes, and has engaged in managed audits for the tax years subsequent to 2006. Once Taxpayer realized that he was required to pay gross receipts for his business, he immediately acted to get his filing into compliance

Assessment of Penalty.

Taxpayer argues that the Department should be precluded from collecting penalty and interest on the gross receipts tax for 2005 and 2006, because it should have known of the discrepancy prior to 2009 and should have notified him of his obligation in a timelier manner. Taxpayer also argued that the Department should allow him to engage in a managed audit for 2005 and 2006,

which would allow him to avoid the penalty and interest. A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). However, when a taxpayer's belief is based on the advice of a competent accountant, the taxpayer is not negligent and application of penalty is inappropriate. *See C&D Trailer Sales v. Taxation and Revenue Dept.*, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979). The burden is on the taxpayer to prove that a failure to pay a tax or to file a return was caused by reasonable reliance on the advice of a competent accountant after a full disclosure of all relevant facts. *See* 3.1.11.11 (D) NMAC (2001). Although it is clear from Taxpayer's testimony and from Taxpayer "B" that Taxpayer's accountant did not know of the gross receipts tax requirement, there is no evidence that the possibility of the tax was ever discussed prior to the assessment. Therefore, the failure to pay and to file was not caused by reliance on advice on that subject; rather, it was caused by ignorance on the part of both Taxpayer and his accountant. Therefore, the exception does not apply, and the penalty was properly assessed.

Computation of Penalty.

On both of the assessments issued in this matter, the Department seeks to impose a penalty of up to 20% under NMSA 1978, § 7-1-69 (2008). The assessments were issued for taxes due in 2005 and 2006. The applicable penalty statute in effect for both 2005 and 2006 was capped at a maximum penalty of 10%. *See* NMSA 1978, § 7-1-69 (2003). At a maximum penalty of 10%, the penalty provision had been exhausted for both 2005 and 2006 before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Mr. Dillon testified that the Department had assessed a 20% cap because the date that the assessments were issued was after the effective date of the 2008 amendment. Mr. Dillon also explained that even applying a 20% cap, the penalty would have been

exhausted for 2005 and 2006 before the 2008 amendment went into effect. Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for tax years 2005 and 2006 were subject to the 10% penalty cap pursuant to NMSA 1978, Section 7-1-69 (2003). *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (holding that a modified penalty regulation would not apply retroactively when the regulation was enacted after the applicable tax year).

Assessment of Interest.

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due.

NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See 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. Because the gross receipts tax was not paid when it was due, interest was properly assessed. Taxpayer was advised at the hearing that while the tax principal remains unpaid, the interest will continue to accrue.

Timeliness of Assessment.

The Department has seven years from the end of the year in which the tax is due to make an assessment when the taxpayer failed to file any return. *See* NMSA 1978, § 7-1-18 (C). Although Taxpayer feels that the Department should have known that he owed the liability earlier, the statute governs the timeliness of an assessment. Taxpayer was assessed in 2009 for the 2005 and 2006 tax years. Therefore, the assessment was made in a timely manner. *See id.* Although it clear that Taxpayer is an honest person who did not intend to cheat the State, it is also clear that Taxpayer owed gross receipts tax for 2005 and 2006 and is required to pay penalty and interest on the amount due.

Managed Audits.

The Department may enter into managed audit agreements with taxpayers, which would allow the taxpayer to avoid penalty and interest. *See* NMSA 1978, § 7-1-11.1. Managed audits are entered into solely at the discretion of the secretary or his/her delegate. *See* NMSA 1978, § 7-1-11.1 (E). The Department does not allow managed audits for periods of time that have already been assessed. The Department pointed out that Taxpayer was able to engage in managed audits for other tax years because the assessments for 2005 and 2006 put Taxpayer on notice of his obligations for subsequent tax years.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L0038227328 and L0589976960, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer was properly assessed for gross receipts tax and interest for 2005 and 2006.

3. The assessment of penalty for 2005 and 2006 is capped at a maximum of 10%. Therefore, the penalty owed on the assessment in L0038227328 for 2005 is reduced to \$349.31, and the penalty owed on the assessment in L0589976960 for 2006 is reduced to \$314.02.

For the foregoing reasons, the Taxpayer's protest is **GRANTED IN PART AND DENIED IN PART.**

DATED: June 2, 2010.