

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

**IN THE MATTER OF THE PROTEST OF
JESUS HERNANDEZ,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0158866496 and L1328230976**

No. 11-16

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 12, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Ida Lujan, Staff Attorney. Ms. Sylvia Sena, Auditor, also appeared on behalf of the Department. Mr. Jesus Hernandez (Taxpayer) appeared for the hearing and represented himself. Mr. Alejandro Macias appeared as a witness and translator on behalf of the Taxpayer. The Hearing Officer took notice of all documents in the administrative file. TRD exhibits "A" through "N" were admitted at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in providing services in New Mexico in 2005 and 2006.
2. The Taxpayer failed to file gross receipts tax with the Department for 2005 and 2006.
3. The Department determined that the 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 December 7, 2010, 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 \$1,254.38 tax, \$250.88 penalty, and \$584.40 interest.

5. On December 8, 2010, 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 \$1,540.76 tax, \$308.15 penalty, and \$486.93 interest.
6. On December 20, 2010, the Taxpayer filed a formal protest letter.
7. On June 8, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
8. The Taxpayer was using an accountant to determine his tax obligations. The Taxpayer trusted the accountant when the accountant said that all of the Taxpayer's taxes were being filed correctly.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty and interest for the tax periods ending in December 2005 and December 2006, due to his failure to file gross receipts tax reports. The Taxpayer did not dispute that he owed the gross receipts tax.

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 entitled to an abatement of penalty and interest.

Gross Receipts Tax.

Although the Taxpayer did not dispute that he owed gross receipts tax, he did raise the issue of how the gross receipts tax amount was calculated. The Taxpayer thought that some wages from 2005 were being included in the amount. However, the Department established that it was relying solely on the Schedule C amounts that were reported as income separate from any wages on the W-2. Therefore, the amount of the gross receipts tax is correct and did not include wages from the W-2.

Assessment of Penalty.

The Taxpayer argued that he should not owe penalty and interest on the gross receipts tax for 2005 and 2006 because he was relying on the advice he had received from his accountant in taking care of his 2005 and 2006 taxes. 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).

The Taxpayer established that he went to the accountant for all of his tax needs. Although the testimony suggested that the accountant engaged in some very questionable practices, it was also clear that the accountant was properly informed of the kind of business and services that the Taxpayer was engaged in performing. The accountant wrote a letter to the Department on December 14, 2010 and explained that he had negligently and without fraudulent intent failed to properly advise the Taxpayer about filing gross receipts tax. A copy of the accountant's letter was part of the administrative file. The Taxpayer explained that the accountant had refused to appear as a witness for the hearing. The Taxpayer also explained that the accountant had filed the Taxpayer's federal

and state income taxes and had told the Taxpayer that those filings would take care of all of the Taxpayer's tax obligations. Based upon the totality of the evidence, I find that the Taxpayer reasonably relied upon the advice of a licensed accountant and that the accountant had told the Taxpayer that the Taxpayer did not need to file anything other than federal and state income taxes even though the accountant knew that the Taxpayer was engaged in providing services in the state of New Mexico. Consequently, the Taxpayer was not negligent. Therefore, the assessment of penalty is not appropriate and is hereby abated.

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.

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 L0158866496 and L1328230976, 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 Taxpayer was not negligent because he relied on the advice of a licensed accountant and therefore the penalty should not have been assessed. The penalty assessment is **HEREBY ABATED.**

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

DATED: July 27, 2011.