

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

**IN THE MATTER OF THE PROTEST OF
PAULINE GEE
TO ASSESSMENT ISSUED UNDER LETTER
ID NO.s L1121969472 & L0585098560**

No. 13-9

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on April 4, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Ms. Pauline Gee (“Taxpayer”) appeared pro se. Staff Attorney Ida Luján appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Andrick Tsabetsaye appeared as a witness for the Department. Department Exhibits A-I were admitted into the record. Taxpayer did not tender any exhibits. All exhibits are more thoroughly described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Through the Department’s CSPAN Tape Match program with the Internal Revenue Service, the Department detected that Taxpayer reported Schedule C business income in 2008 and 2009 that Taxpayer did not report to the Department as gross receipts.
2. On October 1, 2012, the Department sent Taxpayer a Notice of Limited Scope Audit Commencement. [Department Ex. A].

3. On October 12, 2012, under letter identification number L1121969472, the Department assessed Taxpayer \$851.22 in gross receipts tax, \$170.24 in penalty, and \$128.24 in interest for the CRS reporting period ending December 31, 2008. [Department Ex. B].

4. On October 12, 2012, under letter identification number L0585098560, the Department assessed Taxpayer \$681.73 in gross receipts tax, \$136.35 in penalty, and \$71.59 in interest for the CRS reporting period ending December 31, 2009. [Department Ex. C].

5. On October 28, 2012, Taxpayer protested the Department's assessments. [Department Ex. D].

6. On November 6, 2012, the Department acknowledged receipt of Taxpayer's protest. [Department Ex. E].

7. In 2008 and 2009, Taxpayer was self employed. Taxpayer sold firewood, fruit, vegetables, and arts/crafts at roadside locations throughout Rio Arriba County, New Mexico. During that period, Taxpayer also performed occasional baby-sitting services.

8. Taxpayer was unaware of her gross receipts tax obligations in 2008 and 2009.

9. In 2008 and 2009, Taxpayer did not consult with the Department, any tax professional, or any other person about her potential gross receipts tax obligations on her self-employed business receipts.

10. In 2008 and 2009, Taxpayer was not registered as a business with the Department, did not have a CRS identification number, and did not prepare CRS returns or pay gross receipts taxes.

11. At the protest hearing, Taxpayer acknowledged she was liable for the assessed gross receipts tax in 2008 and 2009. In light of this concession, the protest was limited to the penalty and interest portions of the assessments.

12. In not submitting gross receipts tax in 2008 and 2009, Taxpayer was negligent through her inattention and indifference.

13. Taxpayer did not demonstrate that her failure to pay gross receipts resulted from a mistake of law made in good faith and on reasonable grounds or any of the nonnegligence factors that would allow for the abatement of penalty.

14. Since receiving the assessments, Taxpayer has consulted with her brother, whom also operates a small business as a construction contractor, about her gross receipts tax obligations.

15. As of the date of hearing, Taxpayer owed \$851.22 in 2008 gross receipts tax, \$170.24 in penalty, and \$140.82 in interest for a total of \$1,162.35. For tax year 2009, Taxpayer owed \$681.73 in gross receipts tax, \$136.35 in penalty, and \$81.66 in interest for a total of \$899.80. Taxpayer's total outstanding liability as of the date of hearing was \$2,062.15.

[Department Ex. H].

DISCUSSION

Taxpayer conceded at the hearing that she was liable for the assessed gross receipts taxes for the 2008 and 2009 assessments. Taxpayer argued that the assessed penalty and interest be abated because she was unaware at the time of her gross receipts tax obligations and because of financial hardships that the penalty and interest imposed on her small business.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of taxes issued in this case are presumed to be correct. By definition, under NMSA 1978, Section 7-1-3(X) (2009), "tax" includes the amount of interest and penalty relating to the imposed tax. Consequently, the presumption of correctness includes the assessment of penalty and interest. *See* Regulation 3.1.6.13 NMAC (01/15/01); *See also, Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. 16, 17,

558 P.2d 1155, 1156 (N.M. Ct. App. 1976) (finding that the presumption of correctness attached to the assessment of civil negligence penalty). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that Taxpayer is entitled to abatement, in full or in part, of the assessments issued against her. *See TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessments are correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

Although Taxpayer conceded the gross receipts tax issue, a brief discussion of the Gross Receipts and Compensating Tax Act (NMSA 1978, Section 7-9-1 *et seq.*) is warranted given some of Taxpayer's later questioning of the Department's witness, Protest Auditor Andrick Tsabetsaye. For the privilege in engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). NMSA 1978, Section 7-9-3.3 (2003) defines "engaging in business" as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." Absent a specific exemption or deduction, gross receipts tax is imposed both the on the proceeds of the selling of tangible personal property and from selling a service. *See* NMSA 1978, Section 7-9-3.5 (2007). Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2002).

In this case, Taxpayer was engaged in the business of selling tangible personal property in the form of firewood, fruit, and miscellaneous arts and crafts in 2008 and 2009. Taxpayer also performed babysitting services during that period. Taxpayer derived a direct benefit from the sale of products and babysitting services. Under the Gross Receipts and Compensating Tax, as discussed above, all of Taxpayer's receipts from these sales and services in 2008 and 2009 were subject to gross receipts tax. Therefore, even if she was unaware of her gross receipts tax liabilities at the time, Taxpayer properly conceded that she was liable for the assessed gross receipts tax in 2008 and 2009.

Turning to the assessment of interest, when a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Section 7-1-67 (2007) (italics for emphasis). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977) (finding that the Legislature's choice of the words "shall" or "must" in a statute makes application of that statute mandatory rather than discretionary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. Regardless of the reason why Taxpayer did not pay her gross receipts taxes in 2008 and 2009, the Department has no discretion under NMSA 1978, § 7-1-67 (2007) and must assess interest against Taxpayer from the time the tax was due but not paid until such time as the tax is paid.

Taxpayer also indicated in testimony during the hearing that she believed filing a protest stopped the accrual of interest pending the outcome of the protest. While NMSA 1978, § 7-1-67 (2007) does allow the tolling of interest in limited circumstances not applicable to this protest, nothing in that statute allows for the tolling of accrual of interest pending a protest. In the

Department's November 6, 2012 acknowledgement of protest letter (admitted into the record as Department Ex. E), the Department informed Taxpayer that both interest and penalty would continue to accrue during the protest. The Department further informed Taxpayer that she could stop the accrual of interest and penalty by paying the assessed tax principal and claiming a refund for any amounts later resolved in her favor because of her protest. Because the tax principal was not paid, interest continues to accrue under NMSA 1978, § 7-1-67 (2007) throughout the protest process.

Taxpayer also argued for the abatement of penalty. When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) 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 twenty percent of the tax due but not paid. (*italics added for emphasis*)

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional.

Regulation 3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue, 139 N.M. 498, 503, 2006 NMCA 50, 16, 134 P.3d 785, 790 (N.M. Ct. App. 2006) (Department regulations interpreting a statute are presumed proper and are to be given substantial weight). Inadvertent error meets the legal

definition of “negligence” under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989).

There is no evidence that Taxpayer made any effort in 2008 or 2009 to consult with the Department, a tax professional, or any other source about her potential tax liabilities on her small business income¹. While Taxpayer may not have been aware of the gross receipts tax requirements in 2008 and 2009, that lack of knowledge meets the definition of negligence under Regulation 3.1.11.10 (C) NMAC (1/15/01) because it demonstrates “inattention” or “indifference.” Moreover, under New Mexico's self-reporting tax system, every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *See 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). Under *Tiffany Construction Co.*, failure to do reasonable research into what the tax law requires meets the definition of negligence. *See id.*

Without making reasonable efforts to research the matter or consult with a tax professional, Taxpayer cannot show that her failure to pay gross receipts resulted from a good faith mistake of law on reasonable grounds. *See NMSA 1978, § 7-1-69 (B) (2007)* (allowing for abatement of penalty only upon a showing of mistake of law made in good faith and on reasonable grounds). Taxpayer also did not establish any of the non-negligence factors under Regulation 3.1.11.11 NMAC (01/15/01) that might allow the abatement of penalty. Consequently, because Taxpayer was negligent in failing to pay gross receipts tax when due, the Department lacks authority to abate penalty and instead must assess civil penalty under NMSA 1978, § 7-1-69 (2007).

In summary, the Department’s assessments of 2008 and 2009 gross receipts taxes, penalty, and interest were legally required. Taxpayer’s financial hardships in paying the assessments is not

¹ Since receiving the assessments, Taxpayer has consulted with her brother, whom is a construction contractor operating his own small business. However, that consultation occurred three-years after the relevant period and therefore is not relevant to the civil penalty analysis which focuses on a taxpayer’s failure to pay a tax when due.

grounds for the Department to abate any portion of the assessments under Regulation 3.1.6.14 NMAC (01/15/01). As discussed extensively at the hearing, Taxpayer is always free to attempt to arrange a payment plan for the assessed taxes, penalty, and interest. Indeed, Mr. Tsabetsaye indicated at the hearing that he could assist Taxpayer in starting the process of setting up a payment plan.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer conceded liability for the assessed 2008 and 2009 gross receipts taxes. In those years, Taxpayer was a person engaged in business under NMSA 1978, § 7-9-3.3 (2003) and Taxpayer had gross receipts from her sale of tangible personal property and from her sale of babysitting services presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

C. Under NMSA 1978, § 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessments. Interest continues to accrue until the tax principal is satisfied.

D. Under Regulation 3.1.11.10 (C) NMAC (1/15/01), Taxpayer was negligent and thus liable for civil penalty pursuant to NMSA 1978, § 7-1-69 (2007). *See Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976).

E. Under Regulation 3.1.6.14 NMAC (01/15/01), entitled to substantial weight under *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 139 N.M. 498, 503, 2006 NMCA 50, 16, 134 P.3d 785, 790 (N.M. Ct. App. 2006), the Department may not abate otherwise legally required assessments based on Taxpayer's inability to pay.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. For tax year 2008, Taxpayer owes \$851.22 in gross receipts tax, \$170.24 in penalty, and \$140.82 in interest (as calculated as of the date of hearing). For tax year 2009, Taxpayer owes \$681.73 in gross receipts tax, \$136.35 in penalty, and \$81.66 in interest (as calculated as of the date of hearing). Pursuant to NMSA 1978, Section 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: April 11, 2013.

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