

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

IN THE MATTER OF THE PROTEST OF
ZIA PRINTING, ID. NO. 01-151068-00 4,
PROTEST TO ASSESSMENT NO. 1918795.

No. 96-19

DECISION AND ORDER

This matter came on for formal hearing on June 25, 1996 before Gerald B. Richardson, Hearing Officer. Zia Printing (hereinafter "Taxpayer") was represented by its owner, Ms. Sue Bollinger. The Taxation and Revenue Department (hereinafter "Department") was represented by Gail MacQuesten, Special Assistant Attorney General.

Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a sole proprietorship which operates a printing operation in Albuquerque, New Mexico.
2. In January of 1994, Ms. Bollinger received a telephone call from an employee of the Department informing her that the Department had no record of receiving monthly tax filings from the Taxpayer for the reporting periods of November of 1989 and April of 1990 and asking her if she had filed returns for those periods. This was the first time that Ms. Bollinger had been informed by the Department that there was a problem with missing returns. Ms. Bollinger informed the caller that she would locate her returns and payment records and send them in to the Department.
3. Several days later the Taxpayer received a form letter from the Department informing it that repeated notices have been sent regarding the Taxpayer's failure to file returns for the November 1989 and April 1990 periods and requesting returns should be filed immediately or the Department will take action to issue estimated assessments and file liens and seize property of

the Taxpayer.

4. On January 31, 1994, Ms. Bollinger wrote to the Department in response to the phone call and letter. She had been able to locate its April 1990 return and the cancelled check and enclosed them in her letter and informed the Department that she was still researching her old files to find the return and cancelled check for the November 1989 reporting period.

5. On April 15, 1994, Ms. Bollinger wrote the Department, enclosing a copy of the Taxpayer's November, 1989 return and informing the Department that she had not been able to locate a copy of her cancelled check but that she was still looking.

6. There were numerous conversations between Ms. Bollinger and Department employees between early 1994 and early 1995 concerning the missing returns, and Ms. Bollinger's efforts to locate her November 1989 return and cancelled check. Ms. Bollinger was never informed that penalty and interest would be accruing on any unpaid liability which may exist with respect to her November 1989 return and that the interest accrual was nearly equal to the tax.

7. On April 6, 1995, the Department issued Assessment No. 1918795 to the Taxpayer assessing \$858.66 in gross receipts tax (the amount reported by the Taxpayer on its November, 1989 return); penalty in the amount of \$85.87 and interest in the amount of \$676.19 for the November, 1989 reporting period.

8. Sometime thereafter, Ms. Bollinger had a conversation with a Department employee named Julia. Ms. Bollinger was still hoping to locate her cancelled check to resolve this matter. Julia was the first Department employee to inform Ms. Bollinger that interest was continuing to accrue at 15% per year on the tax principal portion of the liability and that she needed to file a protest to protect her right to dispute the tax liability and that she should pay the tax to prevent the further accrual of interest. Shortly, thereafter, on June 7, 1995 the Taxpayer paid the tax principal portion of Assessment No. 1918795 and mailed a written protest to the penalty and interest portion of the assessment.

9. On August 30, 1995, the Department acknowledged the Taxpayer's protest to Assessment No. 1918795.

10. During December of 1989, when the Taxpayer's November, 1989 return and tax payment was due the Taxpayer was in the process of switching checking accounts. The Taxpayer has never been able to locate the cancelled check which would have accompanied her November 1989 return, but she has determined that there is a gap in the cancelled checks on the checking account which was subsequently closed.

11. During late 1989 and early 1990 Ms. Bollinger was also suffering from a slipped disc in her neck. She was in a lot of pain, missed work and, in general, was not as on top of her business as she usually is. This may account for why she never noticed that her tax payment check did not clear her account.

12. With the exception of the November, 1989 return, the Taxpayer has a good record of timely payment and reporting of taxes.

DISCUSSION

The first matter which must be addressed is my jurisdiction to decide this matter. This is because Section 7-1-24 NMSA 1978 provides for a 30 day time frame for taxpayers to file a protest to an assessment. This was not done in this case. Nonetheless, the Department acknowledged the Taxpayer's protest, giving the Taxpayer every indication that the protest had been accepted as a valid protest. Section 7-1-24 also allows for the Secretary to grant a retroactive extension of time to file a protest if a taxpayer requests an extension within 60 days of the assessment. In this case, the Taxpayer's protest letter was filed within 60 days of the Assessment and since the Department acknowledged the protest as valid, the Department's acknowledgement will be treated as an effective grant of extension of time to protest the assessment. Thus, jurisdiction lies to determine this matter.

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

- 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)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to Section 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus it doesn't matter why taxes were unpaid. Interest is imposed for the period of time that they are unpaid.

While nothing can be done within the confines of the law with respect to the imposition of interest, this case is nonetheless troubling. I believe that this case is an example of how the

Department creates many of the protests it must handle or at least exacerbates the situation and makes it more difficult to resolve these matters.

While nothing herein is intended to imply that the burden is on any other person than the Taxpayer to ensure that taxes are reported and paid in a timely manner, and in this case, the Taxpayer also failed to notice that a check for over \$800 dollars failed to clear its account, I still fail to see why it should take over four years for the Department to contact the Taxpayer and inquire as to why no return was filed for a certain period. The sooner such matters are discovered and dealt with, the easier it is for everyone. A taxpayer can more readily find the records or documentation to respond to the Department's inquiry and there is no accumulation of significant amounts of interest. I also find it disturbing that Ms. Bollinger had numerous conversations with the Department's collectors for over a year before anyone explained to her that interest was still accumulating on this liability. I don't blame Ms. Bollinger for being upset about how this matter was handled.

Penalty is imposed when a taxpayer fails to timely file a return or pay tax when due as a result of taxpayer negligence. In this case Ms. Bollinger testified that she prepares the tax return and mails it with payment every month. Ordinarily, there is no problem with taxes being paid in a timely manner. We will never know what happened in this case. It could have been that Ms. Bollinger somehow failed to mail the return and payment, due in part to her disability from her slipped disc, but the fact that she had her copy of the return and there was a missing check in her records would indicate that she probably made out the check and mailed the return as would be her normal course of activity. On the other hand, we have the Department, which had no record of receiving the return or payment. However, the Department's records also indicated that it had no return or payment from the Taxpayer for April of 1990 and the Taxpayer was able to produce her cancelled check showing that the Department received and cashed her check, so the Department's records are not without error either. Then, there was also a third party involved in

this transaction, the U.S. Postal Service. They could have lost the return and payment even though the Taxpayer timely mailed it. We will never know what really happened in this case. I happen to believe that Ms. Bollinger followed her normal procedures and mailed the check and return to the Department in a timely manner. I suspect that the return was lost in processing, either by the postal authorities or within the Department. Under these circumstances, I do not find that the Taxpayer was negligent and penalty should be abated.

CONCLUSIONS OF LAW

1. The Department granted an extension of time for the filing of a protest in this matter when it acknowledged the Taxpayer's untimely protest as a valid protest, and the acknowledgement occurred within the time frame that the Department is allowed to grant extensions of time for protesting matters. Thus, the Taxpayer's protest is timely and jurisdiction lies over the parties and the subject matter of this protest.

2. Because there was no proof of timely payment of tax, interest was properly imposed in this matter.

3. The Department's failure to notify a taxpayer that it had not received payment of tax does not shift the burden from the taxpayer to timely report and pay taxes when due.

4. The Taxpayer was not negligent in failing to timely pay taxes under the circumstances of this case and penalty should be abated.

For the foregoing reasons, the Taxpayer's protest IS HEREBY GRANTED IN PART AND DENIED IN PART. The Department IS HEREBY ORDERED TO ABATE THE PENALTY PORTION OF ASSESSMENT NO. 1918795.

DONE, this 22nd day of July, 1996.