

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

IN THE MATTER OF THE PROTEST OF
JEZLAINE, LTD., I.D. NO. 02-066559-00 8,
PROTEST TO PARTIAL DENIAL OF CLAIM FOR
INVESTMENT CREDIT AND TO APPLICATION
OF INVESTMENT CREDIT.

No. 96-20

DECISION AND ORDER

This matter came on for formal hearing on July 9, 1996 before Gerald B. Richardson, Hearing Officer. Jezlaine, Ltd. (hereinafter "Taxpayer") was represented by Mr. Robb Haltom, its Chief Financial Officer. The Taxation and Revenue Department (hereinafter "Department") was represented by Margaret B. Alcock, 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 an S corporation in the business of manufacturing jewelry which was established in Albuquerque, New Mexico in 1986.
2. Commencing in 1993, the Taxpayer started to purchase equipment used in its manufacturing processes from out of state.
3. Although compensating tax was due on the value of equipment purchased by the Taxpayer out of state, no compensating tax was reported or paid to the Department on the Taxpayer's original monthly tax returns for the reporting periods of January, 1993 through August of 1994 because the Taxpayer was not aware of the compensating tax and of its responsibility to report and pay such tax on the value of equipment purchased out of state.
4. In 1994, Mr. Haltom was hired as the Chief Financial Officer for the Taxpayer. Mr. Haltom was aware of New Mexico's compensating tax and began filing and reporting such tax

for future periods. Mr. Haltom also learned about the Investment Credit which can be applied against compensating tax payable on the value of qualified equipment used in a taxpayer's manufacturing business.

5. On November 15, 1994, the Taxpayer filed an application for investment credit with the Department for the period of January 1, 1994 through December 31, 1994 in the amount of \$9,815.24.

6. On November 15, 1994, the Taxpayer filed an application for investment credit with the Department for the period of January 1, 1993 through December 31, 1993 in the amount of \$15,276.14.

7. On December 5, 1994, the Department partially allowed and partially denied the Taxpayer's claim for investment credit for 1994, and it allowed a credit in the amount of \$4,291.61.

8. On December 5, 1994, the Department partially allowed and partially denied the Taxpayer's claim for investment credit for 1993, and it allowed a credit in the amount of \$12,016.68.

9. On December 14, 1994, the Taxpayer filed a written protest with the Department to the partial denial of its 1993 and 1994 claims for investment credit.

10. On December 13, 1994, the Taxpayer filed amended monthly returns for the periods of January, 1993 through August, 1994 reporting compensating tax due for those reporting periods and claiming an offsetting investment credit for the amount of compensating tax reported to be due, resulting in the payment of no additional taxes to the Department.

11. On April 20, 1995, the Department wrote the Taxpayer informing it that its claim for investment credit for 1993 had been adjusted to allow a claim in the amount of \$14,991.17 and that it had been applied against the compensating tax due as reported on the Taxpayer's amended returns for 1993, plus penalty and interest, in the amount of \$7,578.38 and refunding the balance of \$7,412.79.

12. On April 20, 1995, the Department wrote the Taxpayer informing it that its claim for investment credit for 1994 had been adjusted to allow a claim in the amount of \$9,815.24 and that it had been applied against the compensating tax due as reported on the Taxpayer's amended returns for 1994, plus penalty and interest, in the amount of \$4,623.93 and that the remaining balance of the Taxpayer's investment credit for 1994 was \$5,047.27.

13. On April 27, 1995, the Taxpayer wrote the Department protesting the manner in which the Department applied its investment credits for 1993 and 1994.

14. The Department and the Taxpayer have resolved all disputes concerning the Taxpayer's protest to the partial denial of its applications for investment credit and to the way that the Department applied the Taxpayer's allowable investment credit except that the Taxpayer continues to dispute the deduction of penalty and interest attributable to the late payment of compensating tax from its allowable investment credits for 1993 and 1994.

15. The amount of interest and penalty which the Department deducted from the Taxpayer's allowable investment credit for 1993 is \$1,190.73 in interest and \$580.70 in penalty.

16. The amount of interest which the Department deducted from the Taxpayer's allowable investment credit for 1994 is \$332.32. No penalty was assessed because Regulation TA 69:4¹ recognizes that when a Taxpayer, without action by the Department, files an amended return reflecting additional tax due and payment accompanies the amended return, that this is grounds for not imposing penalty.

17. With respect to the interest deducted from the Taxpayer's allowable investment credit, interest was imposed from the date that compensating taxes would have been due with respect to each month's return until December of 1994 when the Taxpayer filed its amended returns and satisfied the compensating tax liability by applying a portion of its allowable investment

¹ Now found at 3 NMAC 1.11.11

credit to the satisfaction of the liability for compensating taxes.

DISCUSSION

This issue to be determined herein is whether the Department properly deducted penalty and interest from the investment credit it allowed the Taxpayer for 1993 and 1994.

The Taxpayer argues that in this case, since the amount of the allowable investment credit was at all times more than sufficient to pay all of the compensating tax for which the Taxpayer was liable upon the value of the equipment the Taxpayer purchased out of state, that there was never any unpaid compensating tax to which penalty and interest should be applied. In making this argument, the Taxpayer also relies upon the definition of "tax" found a Section 7-1-2(U) NMSA 1978, which includes the credits in the definition.

The Taxpayer's arguments are not supported either by the language of the various statutory provisions applicable to this matter nor by interpretations of these provisions by the courts of this state. The Taxpayer has admitted that it did not pay and report compensating tax in 1993 and much of 1994 at the time its monthly returns for such tax were due. The compensating tax was imposed upon the value of the property as of the time of its acquisition or introduction into New Mexico. *See*, Section 7-9-7 NMSA 1978. The taxes imposed by the Gross Receipts and Compensating Tax Act are to be paid on or before the twenty-fifth day of the month following the month in which the taxable event occurs. *See*, Section 7-9-11 NMSA 1978. Thus, the compensating taxes were due by the twenty-fifth day of the month following the month in which the Taxpayer acquired the property from out of state. *See, also*, Section 7-1-13(A), ". . . Taxes are due on and after the date on which their payment is required until payment is made."

The Taxpayer argues that since the state had the use of the money for which the Taxpayer could have claimed an investment credit, that this constitutes a "payment" of tax. This argument ignores the fact that no application for the investment credit was made by the Taxpayer until November 15, 1994, and the Taxpayer did not seek to apply that credit until it filed its amended

returns which reported compensating tax due for prior periods and applied the investment credit to those liabilities. These amended returns were not filed until December of 1994, which was anywhere from three to twenty-three months after the compensating tax was due. How could the Department know that a "payment" of compensating tax had been made when there had been no return from the Taxpayer reporting that compensating tax was even due? Additionally, Section 7-9A-8 requires that taxpayers apply to the Department for an investment credit and that once the Department approves the credit, that taxpayers act to claim the credit against taxes due the state of New Mexico. How could the Department know that the Taxpayer's unknown compensating tax liability had been paid by an investment credit where there had been no application for or approval of such an investment credit nor had there been a claim made by the Taxpayer to apply the credit against the unknown compensating tax liability? The Taxpayer's argument ignores the fact that New Mexico has a self-reporting tax scheme which places the responsibility upon taxpayers to timely report and pay their taxes and also requires taxpayers to apply for any credits they wish to receive.

Recently, the New Mexico Court of Appeals rejected a very similar argument that an overpayment of tax for one reporting period, which had not been reported as an overpayment and for which no refund claim had been filed by the taxpayer, amounted to a "payment" of taxes which had been underreported by a taxpayer for other reporting periods. In that case the taxpayer had sought to offset unreported overpayments of tax for some reporting periods against underpaid taxes for other reporting periods, in order to reduce the amount of interest payable the Department. In response to this argument the court stated:

Taxpayer contends that, because the State had Taxpayer's money on deposit, the tax was paid. We disagree. The entire statutory scheme indicates that a tax is not paid simply when monies are deposited with the State. Rather, the applicable statutes and Department instructions enacted pursuant to them indicate that, in most instances when taxes are paid, a taxpayer is required to provide the following information to the State: the taxpayer's identity, the tax period to which the monies are to be applied and the tax program to which the monies are to be applied.

(citations omitted)

Amoco Production Company v. New Mexico Taxation and Revenue Department 118 N.M. 72, 75-76, 878 P.2d 1021 (Ct. App. 1994). Thus, this decision establishes that taxes are not "paid" until the taxpayer files a return which identifies which taxes are being reported and paid and which reporting period the payment applies to. As in the *Amoco* case, until the Taxpayer filed returns showing that compensating tax was due for prior periods and had applied for the investment credit and requested that it be applied to its declared liability for compensating taxes, the compensating taxes were not paid.

Section 7-1-67(A) governs the imposition of interest. In pertinent part, it provides: 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, . . . until it is paid. . . .

Section 7-1-69(A) governs the imposition of penalty. In pertinent part, it provides: In the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid . . . there shall be added to the amount as penalty 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 ten percent of the tax due but not paid;

Both of these provisions impose interest and penalty from the date the tax was due, until the tax is paid. Since the Taxpayer did not pay the compensating tax until it filed its amended returns and applied its allowable investment credit to payment of the tax, the interest and penalty was properly charged by the Department and deducted from the Taxpayer's allowable credit.

The Taxpayer also argued that because the definition of "tax" found at Section 7-1-3(U) NMSA also refers to credits, that this supports their argument that the available investment

credits amounted to a payment of tax. The statutory definition of tax does not support this argument. Section 7-1-3(U) provides as follows:

"tax" means the total amount of each tax imposed and required to be paid, withheld and paid or collected and paid under provision of any law made subject to administration and enforcement according to the provisions of the Tax Administration Act, and, unless the context otherwise requires, includes the amount of any interest or civil penalty relating thereto; *"tax" also means any amount of any credit, rebate or refund paid or credited by the department* under any law subject to administration and enforcement under the provisions of the Tax Administration Act to any person *contrary to law* and includes, unless the context requires otherwise, the amount of any interest or civil penalty relating thereto; (emphasis added).

As can be seen from the above definition, the credits referred to are those which (1) have been paid or credited by the Department and (2) were paid or credited contrary to law. In this case, the credits were not paid or credited by the Department until after they were applied for by the Taxpayer and approved by the Department so they cannot act as a payment of tax prior to the time such credits were approved. Additionally, nobody has argued that the Taxpayer was granted these credits contrary to law. Thus, these credits do not qualify as a "tax" under this definition.

CONCLUSIONS OF LAW

1. The Taxpayer filed timely, written protest to both the Department's partial denial of its applications for investment credits and to the Department's deduction of penalty and interest from the Taxpayer's allowable investment credits and jurisdiction lies over the subject matter and the parties to this protest.

2. The Taxpayer did not pay the compensating taxes due upon the introduction into the state of property until it filed returns reporting such compensating tax liability and applying its investment credits to the payment of its compensating tax liability.

3. Interest and penalty were properly imposed by the Department for late payment of compensating taxes by the Department and were properly deducted from the Taxpayer's investment credits.

For the foregoing reasons, the Taxpayer's protests **ARE HEREBY DENIED.**

DONE, this 7th day of August, 1996.