

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

IN THE MATTER OF THE PROTEST OF
KENNETH G. ABBOTT d/b/a Abbott Designs
ID NO. 02-289380-00 6
ASSESSMENT NO. 2277758

99-16

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 15, 1999, before Margaret B. Alcock, Hearing Officer. Kenneth G. Abbott appeared on his own behalf. The Taxation and Revenue Department ("Department") was represented by Gail MacQuesten, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1995, while a resident of Texas, Kenneth Abbott entered into a contract to perform services for a company located in Albuquerque, New Mexico.
2. The buyer of Mr. Abbott's services wanted him on-site, and in May 1995, Mr. Abbott and his wife moved to Albuquerque and became New Mexico residents.
3. Mr. Abbott's wife was engaged in the business of selling uniforms and other clothing to restaurants.
4. After moving to New Mexico, Mrs. Abbott contacted the New Mexico Taxation and Revenue Department to register for payment of gross receipts tax on her receipts from selling tangible personal property in New Mexico.

5. The Department assigned Mrs. Abbott a combined reporting system ("CRS") tax identification number to be used for reporting gross receipts, compensating and withholding taxes and provided her with a CRS-1 Filer's Kit containing pertinent tax forms and instructions.

6. Mr. Abbott reviewed his wife's CRS-1 Filer's Kit, which explained that the gross receipts tax is a tax on persons engaged in business in New Mexico and is imposed on the gross receipts of persons who sell property in New Mexico, perform services in New Mexico, lease property employed in New Mexico or sell research and development services performed outside New Mexico when the product of the service is initially used in New Mexico. (Department Exhibit A, "What is the Gross Receipts Tax?").

7. The Filer's Kit also contained a discussion of business location, including instructions for persons who perform services in New Mexico but do not have a business location within the state. (Department Exhibit B, Column 1, Para. 7).

8. Mr. Abbott did not believe this information was sufficient to establish his obligation to report and pay gross receipts tax on his receipts from performing services in New Mexico and he did not register with the Department or file any gross receipts tax returns during 1995.

9. Mr. Abbott did not check with the Department or consult with a tax attorney or accountant to confirm his belief that he was not subject to gross receipts tax on his receipts from performing services in New Mexico.

10. In 1998, the Department discovered Mr. Abbott's failure to report gross receipts tax on his business income. On July 25, 1998, the Department issued Assessment No. 2277758 for tax periods January-December 1995 in the amount of \$3,466.28 tax principal, \$346.62 penalty and \$1,473.17 interest.

11. The Department subsequently abated a portion of the assessment based on evidence that some of Mr. Abbott's receipts were for services performed outside New Mexico.

12. On July 29, 1998, Mr. Abbott filed a written protest to the penalty portion of the assessment, stating that he was not protesting the taxes or interest.

DISCUSSION

The sole issue presented is whether Mr. Abbott is liable for penalty on his underpayment of gross receipts tax on receipts from services performed in New Mexico during 1995.¹

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption.

Archuleta v. O'Cheskey, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Section 7-1-3(U) NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto."

Accordingly, the presumption of correctness of an assessment of tax applies to the assessment of penalty. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

Assessment of Penalty. Section 7-1-69 NMSA 1978 (1995 Repl.Pamp. and 1996 Supp.) governs the imposition of penalty during the periods at issue in this protest. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent:

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....

¹ At the hearing, Mr. Abbott argued that the Department waited an unreasonable period of time before notifying him of his gross receipts tax liability and should give him credit for a portion of the interest accrued during this period. Mr. Abbott acknowledged that he never protested the assessment of interest. Accordingly, the hearing officer does not have jurisdiction to consider this issue.

The statute imposes penalty based on negligence, as opposed to fraud, for failure to timely pay tax. There is no contention on the part of the Department that Mr. Abbott's failure to report and pay gross receipts tax was the result of bad faith or fraud. What remains to be determined is whether he was negligent in failing to report his taxes properly.

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC

1.11.10 (formerly GR 69:3) as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, Mr. Abbott's failure to report gross receipts tax on receipts from performing services in New Mexico meets all three definitions of negligence.

New Mexico has a self-reporting tax system. It is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978 (1995 Repl. Pamp.). There are insufficient government resources to audit every taxpayer periodically to assure tax compliance. Every person is therefore charged with the reasonable duty to ascertain the possible tax consequences of his actions. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

Mr. Abbott attempts to shift this responsibility to the Department, arguing that the instructions in the CRS-1 Filer's Kit were incomplete because they did not specifically address the situation where a non-New Mexico resident enters into a contract to perform services for a New Mexico company. There is no merit in this argument. The Filer's Kit clearly states that the gross receipts tax is imposed on

"persons" engaged in business in New Mexico and applies to the receipts of "persons" who perform services in New Mexico. Nothing in this language suggests that the tax is limited to New Mexico residents. The section on business location confirms that persons who do not have a business location in New Mexico may still be subject to tax, stating:

If you have no business location or resident salesperson but are liable for gross receipts tax (for instance, because you lease property used in New Mexico *or perform a non-construction service in New Mexico*), you are liable for tax at the rate for out-of-state businesses which is the state gross receipts tax rate of 5.00%. Use the out-of-state business location code, 88-888. (emphasis added).

At a minimum, the instructions in the Filer's Kit provided sufficient information to cause a reasonably prudent person in Mr. Abbott's situation to investigate further. Mr. Abbott could have called the Department to determine whether services performed under contracts entered into by out-of-state residents were subject to gross receipts tax. Alternatively, he could have consulted with an accountant or a tax attorney. Mr. Abbott chose to do nothing. This choice evidences both a failure to exercise the degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances and a failure to act where action was required. It further evidences an indifference to the legal obligation imposed on taxpayers to ascertain the possible tax consequences of their actions. The negligence penalty was properly imposed under Section 7-1-69(A).

CONCLUSIONS OF LAW

1. Mr. Abbott filed a timely, written protest to the penalty portion of Assessment No. 2277758, and jurisdiction lies over the parties and the subject matter of this protest.
2. Mr. Abbott was negligent in failing to report gross receipts tax during the period January-December 1995 and penalty was properly assessed pursuant to Section 7-1-69(A).

For the foregoing reasons, the taxpayer's protest IS DENIED.

DONE, this 18th day of March 1999.

