

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

**IN THE MATTER OF THE PROTEST OF
RED MESA CONSTRUCTION
ID No. 02-173903-00 0
ASSESSMENT NO. 2727667**

No. 03-03

DECISION AND ORDER

The Decision and Order originally issued in this matter on December 5, 2002, is withdrawn and the following Decision and Order is substituted therefor.

A formal hearing on the above-referenced protest was held January 27, 2003, before Margaret B. Alcock, Hearing Officer. Red Mesa Construction was represented by its owner, Kevin Van Slooten ("Taxpayer"). The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the period January through December 1999, the Taxpayer owned a construction business that was registered with the Department for payment of gross receipts tax.
2. For tax year 1999, the Taxpayer reported the income from his construction business on Schedule C, *Profit or Loss from Business*, to his federal income tax return.
3. As part of an information-sharing program with the Internal Revenue Service, the Department was notified of the business income reported on Schedule C to the Taxpayer's 1999 federal income tax return. When the Department compared this income to the amount of gross receipts reported to New Mexico for purposes of the gross receipts tax, it found a discrepancy of approximately \$55,000.

4. On December 16, 2001, the Department issued Assessment No. 2727667 to the Taxpayer, assessing him for \$3,295.88 gross receipts tax, \$329.60 penalty and \$1,132.96 interest for reporting periods January through December 1999.

5. The "Taxpayer Remedies" included with the assessment informed the Taxpayer that he could dispute his liability for the assessed tax by mailing a written protest to P. O. Box 1671, Santa Fe, New Mexico, within 30 days of the date of the assessment.

6. On January 2, 2002, the Taxpayer mailed a written protest to \$215.75 of the tax principal and all of the penalty and interest assessed to P. O. Box 25128, Santa Fe, New Mexico, the address of the Department's Revenue Processing Division. The Taxpayer included a check for \$3,080.13 to cover the undisputed portion of the assessment.

7. The Taxpayer subsequently learned that the Department's Protest Office had not received his protest.

8. On April 16, 2002, the Taxpayer sent a second copy of his protest letter to the Department, but mailed it to an address that the United States Postal Service found to be undeliverable. The Department finally received the Taxpayer's protest letter on May 6, 2002.

9. On June 3, 2002, the Protest Office sent the Taxpayer a letter acknowledging receipt of his protest and providing him with the name, address, and telephone number of the auditor assigned to review the case. The Department's letter advised the Taxpayer to contact the auditor if he had any questions concerning the status of his protest.

10. Immediately prior to the January 27, 2003 hearing, the Taxpayer produced documentation to support his protest to the tax principal assessed, and the Department agreed to adjust the assessment to reflect this new information.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the interest and penalty assessed on his late payment of gross receipts tax for reporting periods January through December 1999. The Taxpayer raises two arguments in support of his protest: (1) he was not negligent in failing to pay the tax due because he reasonably relied on a tax accounting service to prepare his returns; and (2) the Department waited an unreasonable period of time to respond to his protest.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 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." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the Department's assessment of penalty and interest is presumed to be correct, and it is the Taxpayer's burden to present evidence showing he is entitled to an abatement of these amounts.

Negligence Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month or any fraction of a month, up to a maximum of ten percent, that a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes or file required tax reports in a timely manner. Negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

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

Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including instances where the taxpayer proves that the failure to pay tax “was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer’s liability after full disclosure of all relevant facts.”

In this case, the Taxpayer maintains that he comes within the above-referenced exception to the definition of negligence because he relied on his accounting service to insure that his taxes were properly paid. The Taxpayer concedes, however, that he has no knowledge concerning the education or qualifications of the owner of the accounting service, but assumes the owner was competent in tax matters because he held himself out as a tax preparer. The Taxpayer said he could not remember what information he provided to his tax preparer during 1999. The Taxpayer also testified that he does not know why a portion of his New Mexico construction receipts were omitted from his 1999 gross receipts tax returns. There is nothing to indicate that the Taxpayer or his tax preparer made a conscious decision to exclude those receipts based on an analysis of New Mexico law. Instead, the Taxpayer characterized the omission as an oversight or, possibly, as a mathematical error.

A taxpayer’s reliance on a tax professional must be active and informed—not passive and unaware—in order to support a finding that the taxpayer’s failure to pay tax was not negligent for purposes of Section 7-1-69(A) NMSA 1978. A taxpayer’s responsibility for payment of taxes due to the state cannot be delegated to a third party and then forgotten. As the Court of Appeals held in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

A finding of nonnegligence requires proof that the taxpayer engaged in “informed consultation” concerning the specific liability at issue. *See, e.g., C&D Trailer Sales v. Taxation and Revenue Department*, 93 N.M. 697, 700, 604 P.2d 835, 838 (Ct. App. 1979) (penalty upheld where there was no evidence that the taxpayer “relied on any informed consultation” in deciding not to pay tax); *Phillips Mercantile v. New Mexico Taxation and Revenue Department*, 109 N.M. 487, 491, 786 P.2d 1221, 1225 (Ct. App. 1990) (penalty upheld where there was no evidence that the failure to pay tax was the result of diligent protest “based on informed consultation and advice”).

Here, as in the cases cited above, there is no evidence that the Taxpayer’s underpayment of gross receipts tax was the result of informed consultation or reasonable reliance on the advice of a qualified tax professional. Accordingly, the Taxpayer has failed to meet his burden of proving that he is not liable for the negligence penalty assessed by the Department.

Interest. Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

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).

The legislature’s use of the word “shall” indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Section 7-1-67 NMSA 1978 requires interest to be paid for any period of time during which the state is denied the use of the funds to which it is legally entitled.

Delay in Responding to Protest. At the administrative hearing, the Taxpayer argued that the Department's June 3, 2002 response to his January 2, 2002 protest letter was not timely and should excuse him from payment of penalty and interest. The Taxpayer provided no authority for his assertion. *Cf., In re Ranchers-Tufco Limestone Project Joint Venture*, 100 N.M. 632, 635, 674 P.2d 522, 525 (Ct. App.), *cert. denied*, 100 N.M. 505, 672 P.2d 1136 (1983) (the general rule is that tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests).

In addition to the absence of legal authority, there is no factual evidence to support the Taxpayer's argument. At the administrative hearing, the Taxpayer acknowledged that his January 2, 2002 protest was not sent to the address he was instructed to use in the "Taxpayer Remedies" included with his assessment. The Department presented evidence that when the Taxpayer sent a second copy of his protest letter to the Department in April 2002, he mailed it to an unknown address and the United States Postal Service found the letter to be undeliverable. As a result of these errors, the Department's Protest Office did not receive the Taxpayer's protest letter until May 6, 2002. The Protest Office sent the Taxpayer an acknowledgement less than 30 days later and provided him with the name, address and telephone number of the auditor assigned to his protest. Based on this evidence, there was no undue delay in responding to the Taxpayer's protest.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to Assessment No. 2727667, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was negligent in failing to pay gross receipts tax due for the period January through December 1999, and penalty was properly imposed pursuant to Section 7-1-69 NMSA 1978.

3. The Taxpayer was late in paying gross receipts taxes due to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

4. There was no undue delay in the Department's response to the Taxpayer's protest, nor would such a delay justify abatement of the penalty and interest assessed.

For the foregoing reasons, The Taxpayer's protest is DENIED.

DATED January 29, 2003.