

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

**IN THE MATTER OF THE PROTEST OF
ARCA
ID NO. 01-504153-00 0
ASSESSMENT NO. 2735423**

No. 03-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 13, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. ARCA ("Taxpayer") was represented by Darrell Rasband, its in-house accountant. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a nonprofit organization engaged in the business of providing services to developmentally disabled individuals. Most of the Taxpayer's services are performed for the State of New Mexico.
2. The Taxpayer is registered with the Taxation and Revenue Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
3. The Taxpayer was required to report and pay CRS taxes due for the October 2001 reporting period on or before November 25, 2001.
4. The accounts payable bookkeeper responsible for reporting and paying the Taxpayer's monthly CRS taxes was on leave during November 2001, and no arrangements were made to have another employee cover her duties.

5. As a result of the bookkeeper's absence, the Taxpayer's October 2001 CRS taxes were not reported and paid until December 17, 2001.

6. With the exception of the October 2001 reporting period, the Taxpayer, which has been operating for more than 17 years, has an exemplary tax reporting history.

7. On January 17, 2002, the Department issued Assessment No. 2735423 to the Taxpayer in the total amount of \$769.46, representing \$498.68 penalty and \$270.78 interest on the late payment of the Taxpayer's October 2001 CRS taxes.

8. On January 23, 2002, the Taxpayer filed a written protest to the Department's assessment.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the \$769.46 of interest and penalty assessed on the Taxpayer's late payment of CRS taxes due for the October 2001 reporting period. 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 assessment issued to the Taxpayer are presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument showing that it is entitled to an abatement.

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

A. If a tax imposed is not paid on or before the day on which it becomes due, interest shall be paid to the state on that 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....

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. In this case, the Taxpayer's late payment of CRS taxes denied the State the use of funds to which it was legally entitled. Pursuant to Section 7-1-67 NMSA 1978, interest was properly assessed for the period between the statutory due date for those taxes and the date payment was received.

Assessment of 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. Taxpayer 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.

New Mexico case law confirms that penalties may properly be assessed even when a taxpayer's late payment is based on inadvertent error or unintentional failure to pay the tax due. *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds* by *Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795,

797-798, 779 P.2d 982, 984-985 (Ct. App. 1989). In this case, the Taxpayer's late payment was due to its failure to make arrangements for another employee to cover the duties of its accounts payable bookkeeper when she was on leave. This qualifies as negligence under the definitions set out in the Department's regulation and New Mexico case law.

Waiver. While not disputing that its tax payment was late, the Taxpayer asks the hearing officer to waive the Department's assessment of interest and penalty because: (1) it is a nonprofit corporation and could use the funds for a better purpose; and (2) for over 17 years, the Taxpayer has made all other CRS payments in a timely manner. These are not factors the hearing officer can consider. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

Sections 7-1-67 and 7-1-69 NMSA 1978 govern the imposition of interest and penalty. These statutes do not exempt nonprofit organizations, nor do they give the Department or its hearing officer authority to waive interest or penalty based on a taxpayer's past reporting history. In this case, there is simply no legal basis for abating the assessment issued against the Taxpayer.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2735423, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was late paying CRS taxes due to the state, and interest and penalty was properly assessed pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978.

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

DATED May 13, 2003.