

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

**IN THE MATTER OF THE PROTEST OF
ALAN UFFENHEIMER,
TO THE DENIAL OF REFUND
LETTER ID NO. L0267090240**

No. 13-34

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 24, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Counsel, and Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Alan Uffenheimer (Taxpayer) appeared for the hearing and represented himself. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico in 2005 and 2006.
2. The Department determined that Taxpayer was a non-filer on gross receipts tax for 2005 and 2006.
3. On April 28, 2010, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005.
4. On April 28, 2010, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006.
5. On August 20, 2010, the Department partially abated the assessment for 2005 because the Taxpayer provided non-taxable transaction certificates (NTTCs).

6. On August 20, 2010, the Department partially abated the assessment for 2006 because the Taxpayer provided NTTCS.
7. At some point in 2010 after he was assessed, the Taxpayer went to the Department's office in Albuquerque, New Mexico and spoke to an employee there about the amnesty program. The employee did not know the specifics of the program. The employee advised the Taxpayer that she would look into it and would get back in touch with the Taxpayer. The employee never contacted the Taxpayer, and the Taxpayer took no other action.
8. The Taxpayer's bank account was levied by the Department on March 5, 2012. The amount seized pursuant to the levy was sufficient to satisfy the outstanding assessments for gross receipts tax, penalty, and interest for 2005 and 2006.
9. On May 14, 2012, the Taxpayer filed a request for refund on the amount of penalty and interest seized by the levy.
10. On May 29, 2012, the Department denied the request for refund.
11. On June 22, 2012, the Taxpayer filed a formal protest letter.
12. On July 29, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
13. One July 31, 2013, the Department refiled its Request for Hearing and provided a more current address for the Taxpayer.

DISCUSSION

The issue to be decided is whether the Taxpayer is entitled to a refund of the penalty and interest that was seized by levy to satisfy assessments for 2005 and 2006.

Burden of Proof.

Although the protest in this case is for a denial of refund, the denial was based on the fact that the funds were seized pursuant to assessments. Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that he is entitled to an abatement of penalty and interest.

Assessment of Penalty.

Generally, a taxpayer is subject to penalty when a tax is not paid when it is due, and the failure to pay is caused by negligence. *See* NMSA 1978, § 7-1-69 (A). The Taxpayer argued that he should have been able to deduct his gross receipts, but admitted that he did not have NTTCs to support his claim for deductions. The Taxpayer disputed that he was negligent in paying his gross receipts taxes for 2005 and 2006. The Taxpayer argued that he did not know that he owed additional tax until the assessments were made in 2010.

A taxpayer’s lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). *See also* 3.1.11.10 NMAC (indicating that erroneous belief is negligence for purposes of penalty assessment). The gross receipts tax was not paid when it was due in 2005 and in 2006 because the Taxpayer erroneously believed that he did not owe any additional taxes. Therefore, penalty was properly assessed.

Consequently, the Taxpayer is not entitled to a refund of the penalty. *See* NMSA 1978, § 7-1-26 (allowing refunds only when an amount paid was in excess of a taxpayer's liability).

Assessment of Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the gross receipts tax was not paid when it was due, interest was properly assessed. Consequently, the Taxpayer is not entitled to a refund of the interest. *See* NMSA 1978, § 7-1-26.

Amnesty.

The Taxpayer argued that he should have been granted amnesty from penalty and interest under the New Mexico Tax Relief program that was in effect in 2010. The Taxpayer argued that talking to a Department employee should have been sufficient to grant him amnesty.

The Department argued that the Taxpayer's testimony was not credible. The Department pointed out that the New Mexico Tax Relief program did not go into effect until June 7, 2010 and ended September 30, 2010. The Taxpayer claimed that he inquired about the amnesty program in January or February of 2010. The Taxpayer objected to the Department's exhibit "E" because he felt that it was not accurate. Exhibit "E" is the press release that announced the beginning of the New Mexico Tax Relief program. The press release indicates that the program began on June 7, 2010 and would end on September 30, 2010. The Taxpayer later admitted that he must have inquired about the amnesty program sometime after he was assessed in April 2010.

In light of all of the evidence, I do not find the Taxpayer's testimony to be credible. The Taxpayer still felt that he should have been granted amnesty.

The Department pointed out that the Taxpayer did not apply for amnesty and was not eligible for the amnesty program. To qualify for the amnesty program in 2010, a taxpayer must not have been assessed for the taxes on which the taxpayer was requesting relief from penalty and interest. *See* NMSA 1978, § 7-1-11.1 (2010). The amnesty program began in June 2010, and the Taxpayer was assessed in April 2010. Therefore, the Taxpayer was not eligible for the amnesty program in 2010 because he had already been assessed. Moreover, the Taxpayer never filed an application for amnesty when the program was available.

Estoppel.

The Taxpayer also argued that the employee was negligent in failing to contact him again after saying she would check on the amnesty program and get back to him. The Taxpayer argued that the employee's negligence should be sufficient to grant him amnesty. This is essentially an argument for equitable estoppel. Estoppel may be found against the state where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140. In addition, the party seeking estoppel must demonstrate "affirmative misconduct on the part of the government." *See In re Kilmer*, 2004-NMCA-122, ¶ 27, 136 N.M. 440. Affirmative misconduct is something more than mere negligence. *See id.* The Taxpayer's argument is without merit, and estoppel does not apply.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the denial of refund issued under Letter ID number L0267090240, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was properly assessed for gross receipts tax, penalty, and interest for 2005 and 2006.

3. As the penalty and interest were properly assessed, the Taxpayer is not entitled to a refund of the funds levied and seized for payment of the penalty and interest.

4. The Taxpayer did not apply for amnesty in 2010. Even if the Taxpayer had applied for amnesty when it was available, he would not have been granted amnesty because he was not eligible for amnesty as he had already been assessed.

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

DATED: November 6, 2013.

Dee Dee Hoxie

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