

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

**IN THE MATTER OF THE PROTEST OF
ROSE ANN MATHEWS
TO ASSESSMENTS ISSUED UNDER
ID NOS. L1610557504 and L0056916032**

No. 10-18

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 5, 2010, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Peter Breen, Special Assistant Attorney General. Ms. Sylvia Sena, Auditor, also appeared on behalf of the Department. Ms. Rose Ann Mathews ("Taxpayer") appeared for the hearing and represented herself. The Hearing Officer took notice of all documents in the administrative file. The parties agreed to waive the 30-day limit on the decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was engaged in business in New Mexico as a counselor in 2005 and 2006.
2. Taxpayer failed to file gross receipts tax with the Department for 2005 and 2006.
3. The Department determined that Taxpayer was a non-filer on gross receipts tax for 2005 and 2006 through the Combined Reporting System.
4. On March 15, 2010, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2005. The assessment was for \$1,281.97 tax, \$256.39 penalty, and \$559.55 interest.

5. On March 15, 2010, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax period ending on December 31, 2006. The assessment was for \$1,477.90 tax, \$295.58 penalty, and \$424.12 interest.
6. The Department applied a 20% penalty cap.
7. On March 18, 2010, Taxpayer filed a formal protest.
8. On May 27, 2010, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
9. On September 18, 2010, Taxpayer filed additional grounds to the formal protest.
10. Taxpayer did not know that she had to pay gross receipts tax. Taxpayer is willing to pay the taxes that she owes, and has engaged in managed audits for the tax years subsequent to 2006.
11. Taxpayer protests the assessment of penalty and interest
12. Taxpayer protests the amount of gross receipts tax calculated. Taxpayer was engaged in business in Valencia County, New Mexico, but was charged the gross receipts tax rate for the city of Belen, New Mexico.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for gross receipts tax, penalty, and interest for the tax periods ending in December 2005 and December 2006, due to her failure to file gross receipts tax reports.

Burden of Proof.

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 she is not liable for the tax and is entitled to an abatement of penalty and interest. *See* 3.1.6.12 NMAC (2001). When a taxpayer presents evidence sufficient to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308 (filed October 2, 2002).

Gross Receipts Tax.

Services performed within the State of New Mexico are subject to the gross receipts tax. *See* 3.2.1.18 (A) NMAC (2003). Taxpayer's counseling services were subject to the gross receipts tax. It is the responsibility of the taxpayer, who is in the position to know the details of her business activities, to determine accurately and to report her tax liabilities to the Department. *See* NMSA 1978, § 7-1-13.

Prior to the hearing, the Department took the position that the Taxpayer was conducting business in Belen, New Mexico during the applicable tax years. The gross receipts tax rate is higher in Belen than it is in Valencia County, New Mexico. At the hearing, the Department conceded that the Taxpayer was engaged in business in Valencia County, New Mexico and was not engaged in business in the city of Belen, New Mexico. During the hearing, Ms. Sena testified that the amount of gross receipts tax due was recalculated based on the Valencia County tax rate. Ms. Sena also testified that the penalty and interest were recalculated based on the new gross receipts tax total, and she announced the new totals at the hearing.

Assessment of Penalty.

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).

Computation of Penalty.

The Department objected to the Hearing Officer's question about penalty because the Taxpayer did not specifically raise the issue of how the penalty was calculated in the protest. Taxpayer protested the assessment, and specifically protested the assessment of penalty and interest. A question about how the penalty is calculated is directly related to the protest on the assessment of penalty. In order to determine whether a protest should be granted or not, evidence that is relevant must be admitted. *See* 3.1.8.10 NMAC (2001). A hearing officer is required to decide cases based on the facts and the law, but is not limited to a word-for-word consideration of the parties' arguments. *See TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2000-NMCA-083, ¶ 19, 129 N.M. 539, 10 P.3d 863, *rev'd on other grounds TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2003-NMSC-007, 133 N.M. 447, 64 P.2d 474 (filed December 19, 2002). Moreover, under the Taxpayer Bill of Rights, taxpayers have "the right to abatement of an assessment of taxes determined to have been incorrectly, erroneously or illegally made[.]" NMSA 1978, § 7-1-4.2 (I) (2003).

On both of the assessments issued in this matter, the Department seeks to impose a penalty of up to 20% under NMSA 1978, § 7-1-69 (2008). The assessments were issued for taxes due in 2005 and 2006. The applicable penalty statute in effect for both 2005 and 2006 was capped at a maximum penalty of 10%. *See* NMSA 1978, § 7-1-69 (2003). At a maximum penalty of 10%, the penalty provision had been exhausted for both 2005 and 2006 before the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008). Ms. Sena testified that the Department had

assessed a 20% cap because the date that the assessments were issued was after the effective date of the 2008 amendment. Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for tax years 2005 and 2006 were subject to the 10% penalty cap pursuant to NMSA 1978, Section 7-1-69 (2003). *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (holding that a modified penalty regulation would not apply retroactively when the regulation was enacted after the applicable tax year). Both the 2003 and the 2008 versions of Section 7-1-69 require that the penalty be calculated by month from the date that the tax was due until the cap is reached, not from the date of the assessment or the date that the law changed. As there is not any indication the legislature intended for the change to apply retroactively, the 10% penalty cap will apply.

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.

Timeliness of Assessment.

The Department has seven years from the end of the year in which the tax is due to make an assessment when the taxpayer failed to file any return. *See* NMSA 1978, § 7-1-18 (C). Although Taxpayer feels that the Department should have notified her before 2010, the statute governs the timeliness of an assessment. Taxpayer was assessed in 2010 for the 2005 and 2006 tax years. Because the Taxpayer was a non-filer, the assessment was made in a timely manner.

Although it is clear that Taxpayer is an honest person who did not know she had to pay gross receipts tax and did not intend to cheat the State, it is also clear that Taxpayer owed gross receipts tax for 2005 and 2006 and is required to pay penalty and interest on the amount due.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of 2005 and 2006 gross receipts taxes issued under respective Letter ID numbers L1610557504 and L0056916032, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer owes gross receipts tax, penalty, and interest for 2005 and 2006.

3. The appropriate gross receipts tax rate is the Valencia County, New Mexico rate. The Department improperly applied the Belen, New Mexico rate in the assessments.

4. Assessment of penalty is capped at a total of 10% because the penalty was exhausted at the 10% cap under NMSA 1978, Section 7-1-69 (2003) before the January 1, 2008 effective date of the 20% revision under NMSA 1978, Section 7-1-69 (2008) and was exhausted before the issuing of the respective assessments.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND IS DENIED IN PART.**

DATED: October 20, 2010.