

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

**IN THE MATTER OF THE PROTEST OF
EDUARDO A. CASTREJON, MD,
ID NO. 02-031345-00 4
PROTEST TO ASSESSMENT NOS.
1780484 AND 1780485**

No. 94-02

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on October 6, 1994. Dr. Castrejon represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Dr. Castrejon is a family practitioner with practices in both Las Cruces and Anthony, New Mexico.
2. Because of the demands of his medical practice, Dr. Castrejon entrusts the bookkeeping and accounting work required by his business to employees and his accountant.
3. In the normal course of affairs, Dr. Castrejon's accountants prepare his monthly CRS-1 returns. Dr. Castrejon's employees then prepare a check in the amount of the taxes due and bring the return and the check to Dr. Castrejon for his signatures.
4. For the February, 1990 and May 1990 reporting periods, although Dr. Castrejon's accountants prepared the monthly returns, Dr. Castrejon's employees failed to prepare a check and the returns were not filed or the taxes paid in a timely manner.

5. Dr. Castrejon first became aware that his returns were not filed or taxes paid for the February and May 1990 reporting periods when he was notified of that fact by the Department by letter dated January 19, 1994.

6. After researching his records to determine what had happened, Dr. Castrejon located the missing reports, promptly filed them with the Department and paid the unpaid taxes.

7. On March 30, 1994 the Department issued Assessment No. 1780485 assessing \$97.13 in penalty and \$582.79 in interest for the February, 1990 reporting period.

8. On March 30, 1994 the Department issued Assessment No. 1780484 assessing \$171.44 in penalty and \$964.37 in interest for the May, 1990 reporting period.

9. On April 15, 1994 Dr. Castrejon filed a written protest to the two assessments.

DISCUSSION

The ultimate issue to be determined herein is whether the Department's delay of almost four years in notifying Dr. Castrejon of his failure to file reports and pay taxes for two reporting periods can be taken into account to offset penalty and interest assessed by the Department during the period of time between the due date for the taxes and the date they were paid. Dr. Castrejon is a conscientious, hard working businessman who sincerely attempts to comply with the many requirements and regulations concerning operating a business and a medical practice. Due to the heavy demands of his profession, he entrusts the accounting and bookkeeping duties to his staff or accountants. He did not notice that his staff failed to bring tax returns and checks for him to sign for the two non-filed months. As soon as the matter was brought to his attention by the

Department, some four years later¹, Dr. Castrejon acted promptly to pay the unpaid taxes and file the non-filed returns. Dr. Castrejon asserts that it is unfair to assess penalty and interest for such a long period when if he had been notified of the missing reports earlier, he would have paid the taxes sooner and mitigated the continued accrual of interest and penalty.

Before determining if penalty and interest may be mitigated, it must be determined that they were properly imposed. Penalty was assessed pursuant to Section 7-1-69(A) NMSA 1978 (1993 Repl. Pamp.) which provides in pertinent part:

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, or to file by the date required a return regardless of whether any tax is due, there shall be added to the amount as penalty the greater of:

(1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid;....

TA Regulation 69:3 defines taxpayer negligence for purposes of Section 7-1-69(A) as follows:

- 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, the failure to pay tax was negligent under either definitions two or three. Although

¹ The evidence at the hearing was inconclusive as to whether the Department had attempted to notify Dr. Castrejon previously about the non-filed months. The Department has an automated collection system where such notices are supposed to be sent, but it does not maintain a record of such notices being sent and so, was unable to prove that it had attempted to notify Dr. Castrejon prior to its notice of January 19, 1994. It is possible that notices were sent and either lost in the mails or not brought to the Dr.'s attention by his staff. In any event, I found Dr. Castrejon entirely credible in his testimony that he, personally, had not received any notice prior to the Department's notice of January 19, 1994.

the negligence was on the part of Dr. Castrejon's employees, they were acting as his agents. Ultimately, Dr. Castrejon is responsible for the payment of the taxes and he cannot abdicate that responsibility by appointing an accountant or an employee in tax matters. *El Centro Villa Nursing Home v. Taxation and Revenue Dept.*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Thus, penalty was properly assessed against Dr. Castrejon. It should also be noted that penalty reached the statutory maximum of ten percent within five months of the due date for the taxes.

With respect to interest, it is imposed pursuant to Section 7-1-67(A), NMSA 1978 (1993 Repl. Pamp.), which provides in pertinent part:

If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be imposed* on such amount from the first day following the day on which the tax becomes due ... until it is paid....(emphasis added)

Subsection B of the same statute sets the statutory interest rate at fifteen percent per year, computed at one and one-quarter percent per month.

It is noteworthy that the legislature chose to use the word, "shall" with respect to the imposition of interest. It is a well established rule of statutory construction that "shall" indicates something mandatory in statutory use unless such a construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. *Security Trust v. Smith*, 93 N.M. 35, 596 P.2d 248 (1979). There being nothing in the statute to indicate to the contrary, Section 7-1-67 mandates the imposition of interest whenever tax is not paid, from the due date, until it is paid. There are no exceptions or mitigating circumstances contemplated by the wording of the statute. Thus, it is clear that interest was properly imposed in the circumstances of this case.

This brings us to Dr. Castrejon's argument that the Department's delay in notifying him compels an abatement of interest and penalty. Although I am sympathetic with his desire to minimize his liability by promptly making payment of his unpaid tax liability, his argument misapprehends the nature of our self-reporting tax system. The responsibility to ensure the proper and timely reporting and payment of taxes lies with the taxpayer under our system. From a tax policy standpoint, it undoubtedly enhances taxpayer compliance to promptly notify taxpayers when returns are not filed. The Department has an automated computer collection system which is supposed to do just that. I doubt whether we will ever be able to determine where the breakdown in that system occurred in this case, whether it was the Department, the U.S. Mail, or employees in the Dr. Castrejon's office. Nonetheless, the system's failure to timely notify Dr. Castrejon does not act to shift the responsibility for the proper reporting and payment of taxes away from Dr. Castrejon. There is nothing in the language of either Section 7-1-69 or 7-1-67 to indicate that there are any circumstances which shift the responsibility to timely report and pay taxes away from the taxpayer. Thus, although I can empathize with Dr. Castrejon's concerns that he was not promptly notified of the problem with his tax reports, the law does not afford the remedy which he seeks.

CONCLUSIONS OF LAW

1. Dr. Castrejon filed a timely, written protest to the Department's assessments, pursuant to Section 7-1-24, NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.
2. Dr. Castrejon and/or his agents and employees were negligent in failing to timely

report and pay taxes for the February and May, 1990 reporting periods, and penalty was properly assessed pursuant to Section 7-1-69(A), NMSA 1978 (1993 Repl. Pamp.)

3. Interest was properly assessed against Dr. Castrejon pursuant to Section 7-1-67, NMSA 1978 (1993 Repl. Pamp.) for the late payment of taxes for the February and May, 1990 reporting periods.

4. The Department's delay in notifying Dr. Castrejon of his failure to report and pay taxes does not mitigate the imposition of interest or penalty imposed because the failure to notify a taxpayer of a tax delinquency does not shift the responsibility for the proper payment and reporting of taxes from the taxpayer.

For the foregoing reasons, the protest is hereby denied.

Done, this 4th day of November, 1994.