

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

IN THE MATTER OF THE PROTEST
OF JOHNNY GRIEGO
ID # 02-317419-00 6
DENIAL OF CLAIM FOR REFUND

No. 00-16

DECISION AND ORDER

A formal hearing on the above-referenced protest was held June 5, 2000, before Margaret B. Alcock, Hearing Officer. Johnny Greigo ("Taxpayer") represented himself. 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. For the last 18 years, the Taxpayer has worked as an independent contractor providing bulk mail delivery services to the United States Post Office.
2. Each year, the Taxpayer reported and paid federal and state income tax on his business income.
3. The Taxpayer was not aware that New Mexico law required him to report and pay gross receipts tax on his receipts from selling services to the Post Office.
4. The Taxpayer never asked the accountant who prepared the Taxpayer's annual income tax returns whether he owed any other type of tax on his business income, nor did the accountant volunteer any information concerning the New Mexico gross receipts tax.

5. In 1997, the Department received information from the Internal Revenue Service concerning the business income reported on the Taxpayer's federal income tax returns. When the Department investigated, it found the Taxpayer was not registered with the Department and had never paid gross receipts tax on this income.

6. The Department subsequently assessed the Taxpayer for gross receipts tax, penalty and interest on his receipts from performing services for the Post Office during tax periods January 1993 through May 1998.

7. The Taxpayer paid the assessments in full with money he borrowed by mortgaging his house.

8. In October 1998, the Taxpayer filed a claim for refund of the \$17,376.95 of penalty and interest he had paid on the assessments.

9. On October 15, 1998, the Department denied the claim for refund.

10. On November 2, 1998, the Taxpayer filed a written protest to the Department's denial of his claim for refund of penalty and interest.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the penalty and interest he paid on the Department's assessment of tax on his receipts from performing services for the Post Office. The Taxpayer does not dispute his liability for the tax principal, but maintains it is unfair to assess him penalty and interest because the Department, the Post Office and his accountant all failed to notify him of his liability for the tax. The Taxpayer also believes the state's tax burden is too heavy and it is unfair to assess him penalty and interest on his unpaid gross receipts tax when he has already paid income tax on the same receipts and has been charged gross receipts tax on his purchase of supplies for the truck used in his business.

Section 7-1-17(C) NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3(U) 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 of penalty and interest paid by the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence showing he is entitled to a refund of these amounts.

Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails “due to negligence or disregard of rules and regulations” to pay taxes in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3 NMAC 1.11.10 as:

- 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.

Here, the Taxpayer's failure to pay gross receipts tax on his receipts from the Post Office was due to his lack of knowledge of New Mexico law. The Taxpayer's argument that the Post Office or the Department should have notified him of his liability for gross receipts tax misapprehends the nature of New Mexico’s self-reporting tax system. It is the obligation of taxpayers, who have the most direct knowledge of their business activities, to determine their tax liabilities and accurately report those liabilities to the state. *See, Section 7-1-13(B) NMSA 1978; Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348

(1977). A taxpayer's lack of knowledge or erroneous belief that he does not owe taxes has been held to constitute negligence for purposes of Section 7-1-69 NMSA 1978. *Id.*

The Taxpayer's argument that he was not negligent because his accountant failed to advise him of his gross receipts tax liability raises a more difficult issue. Regulation 3 NMAC 1.11.11 sets out several situations that may indicate a taxpayer has not been negligent, including "reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts...." Although the Taxpayer relied on his accountant to prepare his federal income tax returns for the years 1993-1998, he never asked the accountant whether there might be other taxes due in connection with the business income reported on his federal return. Given these facts, the Taxpayer cannot claim that his failure to file gross receipts tax returns was an informed decision based on his accountant's advice. The Taxpayer neither requested nor received advice from his accountant concerning the gross receipts tax, and there is no basis to excuse the Taxpayer from payment of penalty under Regulation 3 NMAC 1.11.11.

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. The reason for a late payment of tax is

irrelevant to the imposition of interest. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. Section 7-1-13(E) NMSA 1978.

In this case, the Taxpayer failed to pay gross receipts taxes in a timely manner. Although it is clear the Taxpayer is an honest person who had no intent to cheat the state, it is also clear the taxes were due and owing. Under the provisions of Section 7-1-67 NMSA 1978, imposition of interest is mandatory. While the rate of interest imposed on late payments may be high when compared to current market rates, the Department does not have authority to substitute its own judgment for that of the legislature. Similarly, the Department does not have authority to excuse the Taxpayer from payment of interest or penalty based on the Taxpayer's belief that New Mexico imposes too heavy a tax burden on its citizens. The Taxpayer must address these arguments to the legislature.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of his claim for refund and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was negligent in failing to determine the tax consequences of engaging in business as an independent contractor for the Post Office, and penalty was properly assessed pursuant to Section 7-1-69 NMS 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. Because penalty and interest were properly imposed against the Taxpayer, there is no basis for granting the Taxpayer's claim for refund of these amounts.

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

DATED June 14, 2000.