

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

**IN THE MATTER OF THE PROTEST OF  
DEBBIE GARCIA (INGRAM)  
ID NO. 02-404284-00 6  
ASSESSMENT NO. 2488014**

**No. 00-35**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held November 20, 2000, before Margaret B. Alcock, Hearing Officer. Debbie Garcia Ingram ("Taxpayer") represented herself. The Taxation and Revenue Department ("Department") was represented by David C. Iglesias, the Department's Chief Counsel. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During 1996, 1997 and 1998, the Taxpayer worked as an independent contractor for the Cibola County DWI Program.
2. At the end of each year, the Taxpayer received a Form 1099 reporting her income from working for the DWI program.
3. The Taxpayer was not familiar with Form 1099 and did not know how her income should be reported on her state and federal income tax returns. For this reason, the Taxpayer went to H&R Block to prepare her returns.
4. H&R Block completed the Taxpayer's income tax returns for the years at issue, reporting her 1099 income on Schedule C to federal Form 1040.
5. The Taxpayer was not aware that New Mexico law required her to pay gross receipts tax, as well as income tax, on her receipts from working as an independent contractor.

6. The Taxpayer never asked the person at H&R Block who prepared the Taxpayer's income tax returns whether she owed any other type of tax on her income, nor did H&R Block volunteer any information concerning the New Mexico gross receipts tax.

7. In 1999, 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.

8. On February 5, 2000, the Department assessed the Taxpayer gross receipts tax, penalty and interest on her receipts from performing services as an independent contractor during the period January 1996 through December 1998.

9. After receiving the assessment, the Taxpayer went back to H&R Block and asked why she was being assessed tax on income she had already reported on her state and federal income tax returns.

10. The person she spoke with told her that in addition to income tax, she should have been paying gross receipts tax on the business income reported on Schedule C to her Form 1040.

11. On February 14, 2000, the Taxpayer filed a written protest to the Department's assessment of penalty and interest.

## **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for the penalty and interest imposed by the Department. The Taxpayer did not protest her liability for tax principal, but maintains it is unfair to assess her penalty and interest because neither the Department nor H&R Block told her that she was required to pay gross receipts tax on her income. The Taxpayer also contends that it is unfair

to assess her penalty and interest when other people working for the Cibola County DWI Program have not paid gross receipts tax on their income.

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 she is entitled to an abatement of these amounts.

**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. 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, interest is due on the underpayment.

**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 her receipts was due to her lack of knowledge of New Mexico law. The Taxpayer's belief that the Department should have notified her of her liability for gross receipts tax is based on a misunderstanding of New Mexico's self-reporting tax system.

Although the Department makes a continuing effort to educate taxpayers through workshops, regulations, instructions and other publications, the Department is not omniscient, and cannot be expected to know when a particular individual starts a business or undertakes some other income-producing activity that is subject to the gross receipts tax. For this reason, the law charges every individual with the reasonable duty to ascertain the possible tax consequences of his or her actions.

*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 no tax is due has been held to constitute negligence for purposes of Section 7-1-69 NMSA 1978. *Id.*

The Taxpayer's argument that she was not negligent because H&R Block failed to advise her of her 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 H&R Block to prepare her state and federal income tax returns for the years 1996-1998, she never asked whether there might be other taxes due in connection with the business income reported on her federal return. Given these facts, the Taxpayer cannot claim that her failure to file gross receipts tax returns was an informed decision based on advice received from her tax advisor. The Taxpayer neither requested nor received advice from H&R Block concerning the gross receipts tax until after the Department’s assessment was issued. Accordingly, there is no basis to excuse the Taxpayer from payment of penalty under Regulation 3 NMAC 1.11.11.

Finally, the Taxpayer argues that it is unfair to impose penalty and interest on her when other people working for the Cibola County DWI Program have not paid gross receipts tax on their income. The Taxpayer presented no evidence to support her contention that her co-workers have not paid taxes due to the state. Nor has the Taxpayer cited to any authority which holds that a taxpayer is excused from the legal duty to pay taxes simply because there may be other taxpayers who have failed to obey the state’s tax laws. In the area of property taxation, it has long been the rule that a taxpayer who is not assessed more than the law provides has no cause for complaint in the courts in the absence of some well-defined and established scheme of discrimination or some fraudulent action. *Appelman v. Beach*, 94 N.M. 237, 608 P.2d 1119, *cert. denied*, 449 U.S. 839 (1980). There is no evidence of that here. If the Taxpayer believes someone has unfairly avoided the payment of gross receipts tax, she is welcome to forward that person’s name to the Department for investigation.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to Assessment No. 2488014, and jurisdiction lies over both the parties and the subject matter of this protest.

2. 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.

3. The Taxpayer was negligent in failing to determine the tax consequences of engaging in business as an independent contractor for the Cibola County DWI Program, and penalty was properly assessed pursuant to Section 7-1-69 NMSA 1978.

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

DATED December 4, 2000.