

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

IN THE MATTER OF THE PROTEST OF
SANTA FE STONE CORPORATION
NM ID NO. 02-268016-00 0, PROTEST TO
ASSESSMENT NOS. 2106186 THROUGH 2106193

No. 00-39

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on September 13, 2000. Santa Fe Stone Corporation, hereinafter, "Taxpayer", was represented by Mr. Burke Denman, President. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, Special Assistant Attorney General. The Taxpayer requested that the decision not be issued until mid-December and the Department agreed to extending the time period for the issuance of the decision. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 7, 1997, the Department issued Assessment Nos. 2106186 through 2106193 ("the Assessments") to the Taxpayer assessing gross receipts tax, penalty and interest for the reporting periods of April, 1996 through November, 1996.
2. On February 24, 1997 the Taxpayer filed a timely, written protest to the Assessments. The protest requested relief from the assessment of penalty and interest, only.

3. The total amount of tax assessed was \$30,381.85. The amount of interest assessed was \$1,746.55 with interest continuing to accrue until the tax principal is paid. The total amount of penalty assessed was \$2,736.18.
4. Since the assessments were issued, the Taxpayer has paid \$4,019.88 in tax principal.
5. The Department has abated the penalty portion of the assessment.
6. In April or May of 1996, the Taxpayer hired a new bookkeeper, who was responsible for reporting and paying taxes on behalf of the Taxpayer.
7. In December, 1996, the Taxpayer discovered that the bookkeeper had been embezzling substantial amounts of money from the Taxpayer. The Taxpayer also discovered that although the bookkeeper had been preparing books and reports to indicate that taxes were being paid to the Department, that those payments were not, in fact, made. Upon learning this information, the Taxpayer terminated the employment of the bookkeeper.
8. On August 6, 1999, the Department's Protest Office mailed the Taxpayer a letter informing it of the passage of the Tax Amnesty Act which authorized the Secretary of the Department to waive penalty and interest under certain conditions during a 90 day period declared by the Secretary. The letter further informed the Taxpayer that the amnesty period would run from August 16, 1999 through November 12, 1999 and requested that the Taxpayer inform the Department if it wished to withdraw its protest to take advantage of the amnesty program.
9. The Taxpayer received the amnesty letter, but it was filed away and not brought to the attention of Mr. Denman. The Taxpayer did not take any action to participate in the tax amnesty program.

DISCUSSION

The sole issue to be determined herein is whether there is any basis for granting the Taxpayer relief from the interest which was assessed and the additional interest which has accrued with respect to the tax reports which were filed late and without payment of the taxes which were owing. The Taxpayer did not contest the amount of tax which was assessed and the Department has already abated the penalty which had been assessed.

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

- 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.)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to §7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus, it doesn't matter why taxes were not paid in a timely manner. Interest is imposed any time that taxes are not paid when they are due, and for the period of time that they are unpaid.

The Taxpayer also asked if there was any way that it could take advantage of the amnesty program, since, had Mr. Denman been made aware of the amnesty program by his employees, he would have withdrawn his protest. He explained that he only protested the interest and penalty in hope that some relief could have been afforded in taking into

consideration the most unfortunate circumstances, employee embezzlement, which had caused the taxes not to be reported and paid in the first place.

While I am not unmindful of the regrettable circumstances this Taxpayer finds itself in, with respect to the enforcement of taxes and the related penalty and interest, the Department (and this decision maker) is bound to apply the statutes as they are written. The Tax Amnesty Act, Laws 1999, Ch. 10 provided as follows:

- C. The secretary of taxation and revenue is authorized to waive, *during the amnesty period only*, the interest and penalty provisions under Sections 7-1-67 and 7-1-69 NMSA 1978.... (Emphasis added.)

Under Subsection B. of the Tax Amnesty Act, the Secretary was authorized “to declare an amnesty period of no more than ninety days”. Pursuant to the Secretary’s declaration, the amnesty period ran from August 16 through November 12, 1999. The amnesty period has now expired and the Secretary’s authority, pursuant to the Tax Amnesty Act, to waive interest has also now expired. Because there are no other provisions which would allow this Taxpayer to be granted relief from the interest which has been assessed and accrued, the Taxpayer’s protest must be denied.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest, pursuant to §7-1-24 NMSA 1978, and jurisdiction lies over both the parties and the subject matter of this protest.
2. The imposition of interest pursuant to §7-1-67 NMSA 1978 is mandatory whenever taxes are not paid when they are due, regardless of why they were not paid.
3. Because the amnesty period under the Tax Amnesty Act has expired, the Department is without authority to grant amnesty beyond the amnesty period.

For the foregoing reasons, the Taxpayer’s protest IS HEREBY DENIED.

DONE, this 14th day of December, 2000.