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

IN THE MATTER OF THE PROTEST OF
**RANDALL SUMMERS** **NO. 01-09**
ID NO. 02-432215-00 6, PROTEST TO
ASSESSMENT NO. 2540949

## DECISION AND ORDER

This matter came on for formal hearing on May 17, 2001 before Gerald B. Richardson, Hearing Officer. Mr. Randall Summers, hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. The Taxpayer is a race track consultant.

2. In the spring of 1996, the Taxpayer was engaged by Pojoaque Tribal Enterprises, Inc. ("PTE") to consult with them on the operation of their newly acquired racetrack, the Downs of Santa Fe, during the summer racing season. The Taxpayer worked for PTE for three days a week from May 1 through Labor Day weekend, returning to his home in Tucson for the periods in between.

3. At the end of the summer racing season, PTE asked the Taxpayer to stay on, at which time, the Taxpayer became an employee of PTE rather than an independent contractor.

4. PTE issued the Taxpayer a 1099 form for 1996, reflecting the $24,925 it had paid him as a consultant. He was issued a W-2 form reflecting the wages he was paid by PTE.

5. The Taxpayer was not aware of the New Mexico gross receipts tax and he neither registered with the Department to pay gross receipts taxes, nor did he report and pay gross receipts taxes on the amounts he received from PTE for performing consulting services.

6. In April, 1997, the Taxpayer took his 1099 form and W-2 form to H&R Block in Santa Fe to have his income taxes prepared for the 1996 tax year. H&R Block prepared the Taxpayer's federal and state income tax returns. The $24,925 that the Taxpayer received from PTE as a consultant was reported to the Internal Revenue Service ("IRS") on Federal Schedule C as gross receipts from the Taxpayer's consulting business.

7. H&R Block never informed the Taxpayer about his obligations under the New Mexico Gross Receipts and Compensating Tax Act.

8. In the Spring of 2000, the Department provided the Taxpayer with a notice of a limited scope audit under its C-Span program, asking the Taxpayer to justify the discrepancy between his gross receipts reported on his 1996 Federal Schedule C and his failure to report gross receipts to the Department.

9. On June 14, 2000, the Department issued Assessment No. 2540949 to the Taxpayer, assessing $1,466.18 in gross receipts tax, $146.62 in penalty and $806.40 in interest for the January through December reporting periods based upon his failure to report and pay tax on his 1996 receipts from performing consulting services in New Mexico.

10. On June 16, 2000, the Taxpayer filed a protest to Assessment No. 2540949.

11. Since the issuance of the Assessment, the Taxpayer has paid the tax principal portion of the assessment and does not contest that portion of the Assessment.

## DISCUSSION

The issues to be determined herein are whether the Taxpayer is liable for penalty and interest on the Assessment at issue. The Taxpayer does not dispute that he had gross receipts from performing consulting services in New Mexico which are subject to the gross receipts tax.

The imposition of penalty is governed by the provisions of NMSA 1978, Section 7-1-69(A), which imposes a penalty of two percent per month, up to a maximum of ten percent:

> 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,....

This statute imposes penalty based upon negligence (as opposed to a willful or fraudulent intent) for failure to timely pay tax. Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by the Taxpayer to underreport taxes. What remains to be determined is whether the Taxpayer was negligent in failing to report his taxes properly. Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC 1.11.10 (formerly TA 69:3) 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.

In this case the Taxpayer's failure to report and pay taxes was based upon Mr. Summer's lack of knowledge about New Mexico taxes. New Mexico has a self-reporting tax system which requires that taxpayers voluntarily report and pay their tax liabilities to the state. Because of this, the case law is well settled that every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions, and the failure to do so has been held to amount to negligence for purposes of the imposition of penalty pursuant to Section 7-1-69 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).

The Taxpayer argues that he should be excused from the imposition of penalty because he went to H&R Block to have his income taxes prepared and they never informed him about his gross receipts tax liability on his consulting income. Regulation 3 NMAC 3.1.11.11 provides for a number of situations which are indications that a taxpayer was not negligent. One of them covers situations where one has received professional tax advice. It provides that a taxpayer may not be negligent where:

> The taxpayer proves that failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts;….

This provision would not apply in this case. Although the Taxpayer provided full disclosure of all relevant facts H&R Block would have needed to know that the Taxpayer had gross receipts received as an independent contractor engaging in business in New Mexico, the Taxpayer has failed to prove that he received any advice from H& R Block about gross receipts taxes. Admittedly, he went to them for assistance with reporting his income taxes and that is the assistance he received. In the absence of proof that they also advised him that he was not subject to gross receipts tax, the Taxpayer has failed to prove that he relied upon such advice.

Although the imposition of penalty is intended to penalize taxpayers who fail to report and pay taxes in a timely manner, there are sound policy reasons behind the imposition of penalty. A self-reporting tax system relies upon taxpayers accurately reporting their tax liabilities to the government. There are insufficient government resources to audit every taxpayer periodically to otherwise assure tax compliance. The imposition of penalty provides taxpayers with an incentive to understand the tax consequences of their actions and to accurately report their taxes. Otherwise, if

the only consequence of an audit and determination of underpayment of tax was the payment of the tax which was owed, it would always advantage a taxpayer to simply underreport taxes and to pay them if they were found out.

The Taxpayer also objects to the payment of interest because of the lengthy delay between the time he reported the consulting income and the issuance of the assessment at issue. 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 Section 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 does not 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.

It should be further noted, that although there was a significant delay involved in the issuance of the Department's assessment, it was issued within the statute of limitations for assessing tax. Section 7-1-18(D) provides for a six-year statute of limitations for the assessment of tax when there has been an underreporting of tax by 25% or more. In this case, because the Taxpayer failed to report tax on 100% of his gross receipts, the assessment was timely.

## CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2540949 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was negligent in failing to report or pay gross receipts taxes on his gross receipts from performing consulting services and the imposition of penalty was proper.

3. The Taxpayer failed to prove that he relied on the advice of a lawyer or accountant in failing to report and pay gross receipts tax on his gross receipts from performing consulting services.

4. The imposition of interest was proper.

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

DONE, this 15th day of June, 2001.