

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

**IN THE MATTER OF THE PROTEST OF
COMMODORE ADVANCED SCIENCES, INC.
ID NO. 01-852750-00-7
DENIAL OF CLAIM FOR REFUND**

No. 02-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 4, 2002, before Margaret B. Alcock, Hearing Officer. Commodore Advanced Sciences, Inc. ("Taxpayer") was represented by Evangeline J. Tinajero, its vice president of human resources. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in business in New Mexico and is registered with the Department for payment of gross receipts, compensating and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
2. Pursuant to Section 7-9-11 NMSA 1978, CRS taxes for the September 2000 reporting period were due on or before October 25, 2000.
3. The Taxpayer paid \$105,404.76 of its September 2000 CRS taxes on November 28, 2000, more than one month late.
4. In November 2000, the Department assessed the Taxpayer \$3,435.66 of interest and penalty that had accrued on the Taxpayer's outstanding tax balance between October 26, 2000 and November 25, 2000.

5. By the time the Taxpayer paid the \$105,404.76 of tax principal on November 28, 2000, a second month of interest and penalty had accrued, bringing the total amount of interest and penalty due on the Taxpayer's late payment of its September 2000 CRS taxes to \$6,851.31.

6. At the time the Department's first assessment was received by the Taxpayer, the employee in charge of accounting matters was a temporary employee hired from an agency.

7. On December 1, 2000, the employee made out and mailed a \$3,435.66 check to cover the first assessment of interest and penalty to the New Mexico Department of Labor instead of the New Mexico Taxation and Revenue Department.

8. On December 20, 2000, the Department of Labor called the Taxpayer and notified the employee that it had received a \$3,435.66 check that appeared to have been issued in error.

9. The employee did not follow up on this telephone call and did not inform anyone else of the problem.

10. In January 2001, the temporary employee was replaced with a full-time employee. The new employee discovered that the interest and penalty check had been made out to the Department of Labor instead of the Taxation and Revenue Department.

11. The employee called the Department of Labor and arranged for the check to be returned to the Taxpayer.

12. On February 19, 2001, the Taxpayer issued a new check to the Taxation and Revenue Department in the amount of \$6,851.32, representing the original interest and penalty plus the additional interest and penalty that had accrued after the Taxpayer received the Department's original notice.

13. On June 28, 2001, the Taxpayer filed a claim for refund of the \$6,851.32 of interest and penalty the Taxpayer had paid to the Department.

14. On July 11, 2001, the Department denied the Taxpayer's claim for refund.
15. On August 16, 2001, the Taxpayer filed a written protest to the denial of its claim for refund.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the \$6,851.31 of interest and penalty assessed on the Taxpayer's late payment of CRS taxes due for the September 2000 reporting period. The Taxpayer does not dispute that its tax payment was late, but maintains that it should be excused from payment of interest and penalty because: (1) it not fair to hold the Taxpayer responsible for the errors made by its temporary employee; (2) since 1994, the Taxpayer has made all other CRS payments in a timely manner and has paid over \$1,500,000 to the state; and (3) the Taxpayer has been a New Mexico corporation in good standing since 1977.

Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax. During the period at issue, this statute provided, 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,

B. Interest due to the state under Subsection A or D of this section shall be at the rate of fifteen percent a year, computed at the rate of one and one-fourth percent per month or any fraction thereof;

Subsection A determines the period for which interest is due, and Subsection B directs that the interest be calculated at a rate of 1¼% for each month—or fraction of a month—that the payment is late.¹ The same statutory scheme applies to the imposition of penalty. Section 7-1-69(A) NMSA 1978 imposes a penalty of “two percent per month or any fraction of a month” that payment is late. Because the

Taxpayer's payment of its September 2000 CRS taxes was one month and three days late, the Taxpayer was liable for two months' interest and penalty.

The Taxpayer has not disputed its liability for the tax principal of \$105,404.76. Nor has the Taxpayer provided any information to explain why the tax was paid late. Instead, the Taxpayer argues that it should not be held responsible for its temporary employee's error in sending the check intended to pay the first month of accrued interest and penalty to the New Mexico Department of Labor. What the Taxpayer fails to realize is that this error had no effect on the Taxpayer's liability. Pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978, neither interest nor penalty may be imposed on the amount of unpaid interest and penalty assessed against a taxpayer. In this case, accrual of all interest and penalty stopped November 28, 2000, the date the tax principal was paid. As of that date, the Taxpayer owed \$6,851.31 of interest and penalty to the state. The subsequent errors made by the Taxpayer's temporary employee did nothing to increase this amount.

The Taxpayer also argues that interest and penalty should be waived based on its past reporting history and the fact that it is a good corporate citizen. These are not factors the Department can consider. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

¹ The 2000 legislature amended Section 7-1-67, effective January 1, 2001, by deleting the language requiring interest to be computed "at the rate of one and one-fourth percent per month or any fraction thereof" and replacing it with a directive that interest be computed "on a daily basis." *See* 2000 N.M. Laws, ch. 28, § 11.

The state legislature has not granted the Department or its hearing officer authority to waive the interest and penalty imposed by Sections 7-1-67 and 7-1-69 NMSA 1978. Nor is the hearing officer authorized to make exceptions to the law based on a taxpayer's standing in the community or its past reporting history.

CONCLUSIONS OF LAW

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

2. The Taxpayer was late in paying CRS taxes due to the state, and interest and penalty was properly assessed pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978.

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

DATED April 18, 2002.