

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

**IN THE MATTER OF THE PROTEST OF
HAMMOND FLOORS
ID NO. 02-132542-00-1
ASSESSMENT NOS. 2699226 through
269238, 2699654 and 2701216**

No. 02-17

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 29, 2002, before Margaret B. Alcock, Hearing Officer. Hammond Floors, a sole proprietorship, was represented by its owner, Robert Duran ("Taxpayer"). The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, 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. The Taxpayer's monthly withholding taxes are reported and paid by a payroll company.
3. The Taxpayer's monthly gross receipts taxes are reported and paid by an employee hired to run the store and manage the office while the Taxpayer is out in the field.
4. Beginning in 1996 and continuing through 1999, the Taxpayer was having cash flow problems and failed to file his monthly gross receipts tax returns or to pay the taxes due.
5. As a result of these nonfiled periods, the Department selected the Taxpayer for audit in October 1999.

6. After receiving the Department's audit notice, The Taxpayer filed his back tax returns for periods through the end of 1998 and entered into an installment agreement to pay the taxes due. The Taxpayer's returns were filed during the 1999 tax amnesty program, which authorized the state to waive penalty and interest on payments made during the three-month amnesty period.

7. Because the returns indicated there might be problems with the Taxpayer's reporting method and his allocation of income to the correct reporting period, the Department decided to proceed with its audit of tax reporting periods January 1996 through June 1999.

8. In May 2000, while the audit was still ongoing, the Taxpayer stopped filing his current gross receipts tax returns or paying the taxes due. The payroll company retained by the Taxpayer continued to report and pay his withholding taxes in a timely manner.

9. In September 2000, the Department completed its audit, which concluded that the Taxpayer underpaid gross receipts taxes for certain months of the audit period and overpaid taxes for other periods. With penalty and interest, the Taxpayer had an outstanding tax liability of \$68,348.14 and a credit for overpaid taxes of \$28,631.57.

10. In late September 2000, the Department sent its audit workpapers to the Taxpayer for his review. On the workpaper showing the credit for overpaid taxes, the Department's audit supervisor wrote "Overpayment/offset to audit", indicating that the \$28,631.57 credit would be applied against the Taxpayer's \$68,348.14 liability. The supervisor's cover letter explained that the Taxpayer would have to file a claim for refund to receive credit for the taxes the Taxpayer had overpaid during the audit period and enclosed a refund application.

11. The Taxpayer and his office manager did not understand the audit workpapers and incorrectly believed that the \$28,631.57 credit was the amount that would be left over after the audit

liability was paid in full. The Taxpayer returned the refund application to the Department, expecting to receive a cash refund of \$28,631.57.

12. On October 12, 2000, the Taxpayer's office manager wrote a letter to the Department's audit supervisor confirming her understanding that the Taxpayer would not owe additional taxes as a result of the audit and would receive a refund of \$28,631.57. The letter further stated: "As per your advice, we will not pay any further payment until we have received the refund."

13. The audit supervisor did not respond to the office manager's letter or correct the Taxpayer's misunderstanding concerning the results of the audit and the \$28,631.57 credit.

14. The Department subsequently assessed the Taxpayer for approximately \$40,000 of gross receipts tax, penalty and interest for reporting periods January 1996 through June 1999. This amount represented the tax liability of \$68,348.14 found for the audit period, less the \$28,631.57 credit.

15. The Taxpayer did not understand why he was being billed for \$40,000 when he thought he was entitled to a \$28,631.57 refund. In November 2000, the Taxpayer and his office manager met with the Department's auditor, who went over the audit findings with them, explained the basis for the assessment, and explained that the \$28,631.57 credit for overpaid taxes had already been applied to offset the tax liability found for the audit period.

16. From November 2000 through February 2001, the Taxpayer's business was in the process of moving its physical location and his business income was disrupted. During this period, the Taxpayer continued to be delinquent in reporting and paying current gross receipts taxes to the state.

17. In April 2001, the Department's auditor, who had been promoted to the position of collection supervisor, had another meeting with the Taxpayer to discuss the fact that the Taxpayer

had not made any payments on the outstanding audit liability and had failed to report or pay gross receipts taxes since May 2000.

18. During the April 2001 meeting, the Taxpayer argued that the audit findings were wrong and that he had not received proper credit for payments he made under the 1999 tax amnesty program. The Department agreed to reconsider its position that the Taxpayer's misallocation of receipts reported on the returns filed during the amnesty period precluded the waiver of penalty and interest.

19. At the April meeting, the Department's auditor warned the Taxpayer that he was delinquent in filing current gross receipts tax returns and that he needed to bring those filings up-to-date. The Taxpayer ignored the warning and continued his pattern of nonfiling.

20. In March or April 2001, the Taxpayer hired an attorney to review the audit and represent him in negotiations for an adjustment of penalty and interest.

21. In July 2001, the Department and the Taxpayer's attorney reached an agreement concerning the Taxpayer's amnesty payments. The principal balance of the audit assessment remained the same, but the assessment of penalty and interest was reduced by approximately \$18,000.

22. In August 2001, the Taxpayer filed back gross receipts tax returns for the period May 2000 through July 2001. Although the returns showed taxes due in the amount of \$16,461.22, no payment accompanied the returns.

23. On September 11, 2001, the Department issued its own assessments for the amount of tax principal shown on the taxpayer's late-filed returns, plus penalty and interest.

24. Because the Taxpayer maintained that he stopped filing returns based on his initial misunderstanding of the audit findings and the audit supervisor's failure to respond to the Taxpayer's October 12, 2000 letter, the Department agreed to abate the assessment of penalty.

25. On October 11, 2001, the Department received the Taxpayer's written protest to the assessment of interest on his nonpayment of gross receipts taxes for the period May 2000 through July 2001. The Taxpayer did not dispute the assessment of tax principal.

26. As of the July 29, 2002 administrative hearing, the Taxpayer had made one payment on the undisputed portion of the Department's assessments, which covered tax due for the July 2001 reporting period. The Taxpayer still has not paid the \$15,447.60 of tax principal due for reporting periods May 2000 through June 2001.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for interest assessed on his failure to pay gross receipts taxes due for reporting periods May 2000 through July 2001. The Taxpayer argues that the Department's decision to abate penalty establishes his right to an abatement of interest. He also maintains that he should be excused from payment of interest because the Department misled him to believe that he was entitled to a refund and did not need to report or pay gross receipts taxes until the refund was received.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 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 Department's assessment

of interest is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement.

Section 7-1-67(A) NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, **interest shall be paid** to the state on that 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.

In this case, the Taxpayer argues that the Department's abatement of penalty establishes his right to an abatement of interest on the same grounds. Interest and penalty are not the same, however, and the fact that the Department abated penalty does not justify the abatement of interest. Section 7-1-69(A) NMSA 1978 imposes a penalty whenever a taxpayer's failure to pay tax is due to negligence or disregard of the Department's rules and regulations. In contrast, the imposition of interest pursuant to Section 7-1-67(A) NMSA 1978 is not a penalty designed to punish taxpayers, but is a means of compensating the state for the time value of unpaid revenues. The issue of negligence is not relevant to the taxpayer's liability for 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. *See*, Section 7-1-13(E) NMSA 1978.

The Taxpayer has also raised the issue of estoppel, arguing that he was misled by the Department. At the administrative hearing, the Taxpayer testified that he stopped reporting and paying gross receipts taxes in May 2000 because the Department's audit supervisor told him to do

so. He then admitted that the audit supervisor actually spoke to the Taxpayer's office manager, who relayed the information to the Taxpayer. When asked when this advice was given to the office manager, the Taxpayer said it was around the time the audit workpapers were sent to the Taxpayer in September 2000. The Taxpayer did not explain how his failure to file gross receipts tax returns in May, June, July and August 2000 was attributable to advice received in late September 2000. When questioned on this point, the Taxpayer changed his testimony, insisting that the tax returns were filed on a timely basis and only payment was withheld pending receipt of the refund the Taxpayer was expecting. Finally, the Taxpayer said he thought the office manager was filing timely returns and only discovered she was not after receiving the Department's assessments.

The Taxpayer's testimony on this issue is not credible. While it seems clear that the Taxpayer was initially confused by the audit workpapers he received in September 2000, this could not have been the reason he stopped filing gross receipts tax returns the previous May. Nor does it explain why he did not start filing his returns again after he met with the Department's auditor in November 2000 and the auditor explained that the \$28,631.57 credit had already been applied to the Taxpayer's audit liability and was not available to offset current taxes. In April 2001, the auditor met with the Taxpayer a second time and advised him that he needed to bring his reporting current. The Taxpayer took no action. Based on the evidence, it appears that the Taxpayer's failure to file gross receipts tax returns was due to cash flow problems and not to any advice he received from the Department. This is especially likely given the Taxpayer's testimony that he experienced some financial difficulties during the period at issue and that the change of his store location in late 2000 and early 2001 was particularly disruptive to his business.

The Taxpayer has failed to meet his burden of showing that the Department's assessment of interest was not in accordance with New Mexico law or is barred by estoppel. Although the

Taxpayer admits collecting gross receipts taxes from his customers, he failed to report or pay those taxes to the Department. The Taxpayer had use of the state's funds during the fifteen-month period at issue and continues to retain use of those funds today. Accordingly, interest was properly assessed pursuant to Section 7-1-67(A) NMSA 1978. Interest will continue to accrue until the tax principal is paid in full.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 2699226 through 269238, 2699654 and 2701216, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer failed to pay gross receipts tax due for the periods May 2000 through July 2001, and interest was properly assessed pursuant to Section 7-1-67(A) NMSA 1978.
3. The Department is not estopped from enforcing collection of the interest assessed against the Taxpayer.

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

DATED July 31, 2002.