

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

**IN THE MATTER OF THE PROTEST OF
HARRY'S ROADHOUSE
ID NO. 02-204206-00-7
ASSESSMENT NO. 2608481**

No. 02-25

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 21, 2002, before Margaret B. Alcock, Hearing Officer. Harry's Roadhouse ("Taxpayer") was represented by its owner, Harry Shapiro. The Taxation and Revenue Department ("Department") was represented by Peter Breen, 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. In 2000, the Taxpayer hired a bookkeeper who was responsible for reporting and paying the Taxpayer's monthly CRS taxes, which are due on or before the 25th day of the month following the month in which the taxable event occurs.
3. Pursuant to Section 7-1-13(B) NMSA 1978, a return and payment are timely if they are mailed on or before the due date.
4. The Taxpayer's bookkeeper was late in preparing the CRS return for the October 2000 reporting period, which was due on November 27, 2000 since November 25, 2000 was a Saturday.

5. Because it was too late to mail the October 2000 return and payment by the statutory due date, the Taxpayer's owner hand-delivered them to the Department on Tuesday, November 28, 2000.

6. On December 15, 2000, the Department issued Assessment No. 2608481 to the Taxpayer, which included \$293.27 of penalty and \$183.29 of interest on the late payment of the Taxpayer's October 2000 CRS taxes

7. On January 18, 2000, the Taxpayer mailed a written protest to the Department, protesting the assessment of penalty and interest. The protest was accepted as timely after the Taxpayer applied for and was granted a retroactive extension of time to file a protest beyond the 30-day period set out in Section 7-1-24 NMSA 1978.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the interest and penalty assessed on its late payment of CRS taxes for the October 2000 reporting period. The Taxpayer does not dispute that its return and payment were not mailed or delivered to the Department by the statutory due date. The Taxpayer nonetheless maintains that it should be excused from payment of penalty and interest for the following reasons: (1) the state did not lose any revenue as a result of the Taxpayer's late payment because the Department received the Taxpayer's hand-delivered payment on the same day that it would have received a timely payment mailed on the statutory due date; (2) the Taxpayer should be given the benefit of the amendment to Section 7-1-67 NMSA 1978 which became effective January 1, 2001 and requires interest on late payments to be calculated on a daily—rather than a monthly—basis; and (3) the Taxpayer has had an exemplary reporting history over a period of ten years and should be allowed one mistake without having to pay the penalty and interest imposed by New Mexico's tax statutes.

Burden of Proof. 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 showing it is entitled to an abatement.

Assessment of Interest. Section 7-1-67 NMSA 1978 governs the imposition of interest.

During the period at issue, the statute provided, 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....

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 for each month—or fraction of a month—that taxes are not timely paid and has provided no exceptions to the mandate of the statute.

In this case, the Taxpayer raises two arguments in support of its protest to the assessment of interest. First, the Taxpayer argues that no interest is due because the Department received the late payment the Taxpayer hand-delivered on November 28, 2000 on the same day that it would have received a timely payment mailed on November 27, 2000. This is undoubtedly true. It does not change the fact that the Taxpayer failed to pay its October 2000 CRS taxes by the statutory due date.

Accordingly, interest was properly assessed under Section 7-1-67(A) NMSA 1978. Despite the Taxpayer's plea for equity, the Department's hearing officer is required to apply the state's tax laws as written. As the New Mexico Supreme Court stated in *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994): "If the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the Legislature's policy choices." The same rule applies to administrative hearing officers.

Second, the Taxpayer argues that it should be given the benefit of the Legislature's 2000 amendment to Section 7-1-67 NMSA 1978, which deleted the language requiring interest to be computed "at the rate of one and one-fourth percent per month or any fraction thereof" and replaced it with a directive that interest be computed "on a daily basis." *See* 2000 N.M. Laws, ch. 28, § 11. Although the Legislature could have made this change effective immediately, it chose not to do so. Instead, § 15 of the law specifically states that the old rate of interest applies to reporting periods ending on or before January 1, 2001, and the new rate of interest applies to reporting periods beginning on or after January 1, 2001. The Department is bound by the Legislature's clear statement on this issue. Interest on the Taxpayer's late payment of taxes for the October 2000 reporting period was properly computed on a monthly basis.

Assessment of Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month or any fraction of a month, up to a maximum of ten percent, that a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes or file required tax reports in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;

- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

New Mexico case law confirms that penalty is properly assessed even when a taxpayer's late payment is based on inadvertent error or unintentional failure to pay the tax due. *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds by Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797-798, 779 P.2d 982, 984-985 (Ct. App. 1989).

In this case, the Taxpayer's late payment of CRS taxes was due to the negligence of its bookkeeper, who failed to prepare the return and payment in time to meet the statutory due date. The Taxpayer asks the hearing officer to waive or reduce the penalty based on the Taxpayer's exemplary reporting history and the substantial amount of CRS taxes it has paid to the state over the last ten years. These are not factors the hearing officer 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....

In this case, the Legislature has directed the imposition of penalty whenever a late payment results from the taxpayer's negligence. The Legislature has not granted the Department or its hearing officer authority to waive the penalty based on equitable grounds, including a taxpayer's past

reporting history. Because the Taxpayer's late payment of its October 2000 CRS taxes was due to negligence, there is no basis for abating the penalty assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2608481, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was late in paying its October 2000 CRS taxes to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.
3. The Taxpayer was negligent in failing to pay its October 2000 CRS taxes on time, and penalty was properly assessed pursuant to Section 7-1-69 NMSA 1978.

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

DATED October 22, 2002.