

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

IN THE MATTER OF THE PROTEST OF
ROBERT A. WOODS CONSTRUCTION, INC.
I.D. NO. 01-887807-00 5, PROTEST
TO ASSESSMENT NO. 1832030.

No. 95-05

DECISION AND ORDER

This matter came on for hearing on August 3, 1995 before Gerald B. Richardson, Hearing Officer. Robert A. Woods Construction, Inc. (hereinafter "Taxpayer") was represented by Mr. John M. Moloney, accountant for the Taxpayer. The Taxation and Revenue Department (hereinafter "Department") was represented by Bridget A. Jacober, Esq.

Based upon the evidence and arguments presented, **IT IS DECIDED AND ORDERED** as follows:

FINDINGS OF FACT

1. Since at least January of 1994, the Taxpayer has been subject to the requirements of Section 7-1-13.1 NMSA 1978, which imposes special tax payment requirements upon taxpayers whose average tax payment during the previous calendar year for certain groups of taxes equalled or exceeded \$25,000.

2. In paying its tax liability under the combined reporting system for the June 1 through June 30, 1994 reporting period, the Taxpayer hand delivered its return and tax payment in the amount of \$25,426.39 to the Department on Monday, July 25, 1994. The payment was made by check drawn on a New Mexico financial institution.

3. The normal due date for taxes paid under the combined reporting system is the 25th day of the month following the month in which the taxable event occurred.

4. Section 7-1-13.1 requires that for those taxpayers who are subject to its special payment provisions and who choose to make payment with a check drawn on any New Mexico financial institution, the Department must receive that check at least one banking day prior to the due date.

5. In order for the Taxpayer's tax payment of July 25th 1995 to have been timely, the Department would have had to receive the payment on Friday, July 22, 1994, which is one banking day prior to the normal due date of July 25, 1994.

6. Mr. John Moloney was hired as the Taxpayer's accountant in April of 1994. He received only one week of training on the financial and accounting systems of the Taxpayer from his predecessor. The predecessor did not inform Mr. Moloney that the Taxpayer was subject to the special payment provisions of Section 7-1-13.1. The predecessor informed Mr. Moloney that the Taxpayer's taxes were due on the 25th of the month and that he usually drove over the Department's office a few days prior each month to file the Taxpayer's return and make payment of taxes.

7. At the time Mr. Moloney was hired the Taxpayer's financial statements were six months behind being current. Mr. Moloney focused his attention during the first months on the job getting the financial statements up to date. Although Mr. Moloney was generally aware of the special payment provisions for taxpayers whose average monthly tax payments equal or exceed \$25,000, Mr. Moloney never made the calculations to determine whether the Taxpayer was subject to the special payment provisions of Section 7-1-13.1.

8. On July 29, 1994, the Department issued to the Taxpayer Assessment No. 1832030, assessing penalty in the amount of \$508.53 and interest in the amount of \$317.83 based upon the Taxpayer's late payment of taxes for the June, 1994 reporting period.

9. On August 12, 1994, the Taxpayer filed a written protest to Assessment No. 1832030.

10. The Taxpayer has dropped its protest of the interest portion of Assessment No. 1832030.

DISCUSSION

The sole issue to be determined is whether the Taxpayer should be held liable for penalty for failing to make timely payment of taxes under the special payment provisions of Section 7-1-13.1. Penalty is imposed pursuant to Section 7-1-69 NMSA 1978 (1993 Repl. Pamp.). Two parts of that statute are relevant for our discussion here. Subsection C specifically addresses the imposition of penalty for failure to make payment in accordance with Section 7-1-13.1, and provides as follows:

In the case of failure to pay the amount of tax required to be paid in accordance with Section 7-1-13.1 NMSA 1978 in the manner required by that section, there shall be added to the amount due a penalty of two percent of the amount due except that, if a penalty is required to be imposed by this subsection and a penalty is also required to be imposed under Subsection A of this section, the penalty shall be imposed and collected pursuant to Subsection A of this section only.

Subsection A is the general penalty provision which applies when there has been a failure to make a timely payment or report of taxes due to taxpayer negligence. It provides in relevant part:

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 . . . there shall be added to the amount as penalty the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid; . . .

The interplay of these two subsections of Section 7-1-69 is somewhat puzzling. Subsection C applies to the specific situation which occurred in this case, the failure to make payment in accordance with Section 7-1-13.1. However, it directs that penalty be imposed, instead, under Subsection A, when Subsection A is applicable. The one thing that is clear from

the reading of the two subsections in *pari materia*, is that the legislature intended that only one penalty be imposed upon taxpayers who fail to comply with Section 7-1-13.1. The standard to be applied in determining whether penalty should be imposed is less than clear. Subsection C simply mandates the imposition of penalty for failure to make payment in accordance with Section 7-1-13.1 and does not qualify the imposition of penalty upon the existence of taxpayer negligence or any other condition which might provide some sort of excuse for noncompliance. It provides, however, that if penalty is required to be imposed under Subsection A, that penalty is imposed under the standards of Subsection A, which looks to whether taxpayer negligence was involved. These two subsections can be harmonized if a requirement of taxpayer negligence is imposed before penalty is applied to taxpayers who have failed to comply with Section 7-1-13.1 and that will be the approach applied in this case.

Taxpayer negligence is defined in regulation TA 69:3 to mean:

- 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.

Under the facts of this case there is ample evidence of taxpayer negligence. First, there was the failure of the Taxpayer's former accountant and employee to adequately train Mr. Moloney about the applicability of the special payment provisions to the Taxpayer's monthly tax payments. We also have Mr. Moloney's admission that, because of the press of other matters, he never made the calculations to determine if the special payment provisions applied to his employer. Given that Mr. Moloney admitted to knowing about the special payment provisions for taxpayers with large monthly liabilities and given the fact that the payment at issue herein exceeded \$25,000, Mr. Moloney should have at least had some question as to whether his employer fell within the category of taxpayers who are subject to Section 7-1-13.1. Mr. Moloney's failure to determine whether Section 7-1-13.1 applied would qualify as negligence under at least the second and third definitions of negligence in TA 69:3. Since Mr. Moloney was acting as an employee of the Taxpayer, any negligence by him would also be attributable to the Taxpayer. Additionally, the delegation of the tax payment and reporting responsibilities by the Taxpayer to its accountant does not insulate the Taxpayer from the consequences of negligent omissions on the part of the Taxpayer's accountant. *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct.App. 1989).

Finally, the Taxpayer argues that its previous excellent record for timely payment and reporting of taxes should be taken into consideration in determining whether penalty should be applied. While the Taxpayer's record with respect to the payment of taxes is commendable and

demonstrates compliance with the law, the Taxpayer's payment record with respect to tax payments is simply irrelevant to the instant matter. What is at issue is whether the failure to make timely payment in this instance was due to taxpayer negligence. The Taxpayer's former reporting history is neither at issue, or probative of whether negligence existed with respect to the late payment at issue herein.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1832030 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was subject to the special payment provisions of Section 7-1-13.1 for the June, 1994 reporting period.

3. The Taxpayer failed to comply with the special payment provisions of Section 7-1-13.1 in making payment of its taxes for the June, 1994 reporting period.

4. The Taxpayer was negligent in failing to provide its new accountant, Mr. Moloney with proper training concerning its tax payment and reporting requirements pursuant to Section 7-1-13.1.

5. The Taxpayer's accountant was negligent in failing to determine that the special payment requirements of Section 7-1-13.1 applied to the Taxpayer.

6. The negligence of the Taxpayer's accountant, as an employee of the Taxpayer, is attributable to the Taxpayer.

7. Because of Taxpayer negligence in failing to make proper payment of taxes for the June 1994 reporting period, penalty was properly imposed pursuant to Section 7-1-69 NMSA 1978.

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

DONE, this 21ST day of August, 1995.