

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

IN THE MATTER OF THE PROTEST
OF *LEICA, INC.*, I.D. NO. 02-064481-00-7
ASSESSMENT NO. 1651584.

No. 96-02

DECISION AND ORDER

This matter was scheduled for hearing before Julia Belles, Hearing Officer, on December 11, 1995. Rather than conduct an evidentiary hearing, the matter was submitted for decision based upon stipulated facts, exhibits and written argument. The Taxpayer (Taxpayer) was represented by Gary K. McKnight, Corporate Controller, and the Taxation and Revenue Department (Department) was represented by Bridget A. Jacober, Special Assistant Attorney General. Based upon the evidence and arguments presented, **IT IS DECIDED AND ORDERED** as follows:

FINDINGS OF FACT

1. The Taxpayer is corporation which does business in New Mexico.
2. In 1992 the Multistate Tax Commission (MTC) conducted a sales tax audit on the Taxpayer for the period of November 1, 1988 through December 31, 1991.
3. When the audit was concluded, the MTC sent the results of its audit to the Department. The Department then sent Notice of Assessment No. 1651584. This notice was sent on March 31, 1993 and assessed \$13,793.38 in taxes, \$5,312.09 in interest and \$1,381.95 penalty.
4. On April 30, 1993, the Taxpayer filed a written protest against the assessment.
5. The Department acknowledged receipt of the protest on May 21, 1993 and advised the Taxpayer that interest on the taxes would accrue until the taxes were paid.
6. The Taxpayer called on the Department on June 30, 1993 to discuss the protest

and was informed the issues in the protest would be addressed in 3 to 4 months.

7. The Taxpayer did not make any further attempts to contact the Department after June 30, 1993.

8. On May 5, 1995, the Department responded to the issues in the Taxpayer's protest.

9. The Taxpayer responded on May 16, 1995 and requested that part of the interest be abated because of the length of time the Department took in responding to its protest. This was the first time the Taxpayer contacted the Department since the June 30, 1993 telephone call.

10. On June 7, 1995, the Department wrote the Taxpayer and informed it of an error the Department had made in addressing an issue concerning an invoice and also informed the Taxpayer that the interest could not be abated.

11. The Taxpayer paid the amount of the taxes assessed on June 16, 1995 and indicated that it still wished to protest the interest assessed.

DISCUSSION

The Taxpayer disputes the interest that was calculated on the assessment for the time period June 1993 through June 1995. Section 7-1-17(C) NMSA 1978 (1995 Repl.) provides that there is a presumption of correctness which attaches to any assessment of taxes by the Department. "Tax" is defined to include the amount of interest related to any taxes. Section 7-1-3(U) NMSA 1978 (1995 Repl.). Therefore, the presumption of correctness attaches to the assessment of interest as well. Thus, the Taxpayer has the burden of proving that the assessment of interest is incorrect.

The Taxpayer attempted to correctly report its taxes, pay its taxes and cooperate with all aspects of the audit. This case arises from the length of time it took the Department to respond to the issues the Taxpayer raised in its protest. The Taxpayer filed a written protest on April 13, 1993. The Department acknowledged the protest and warned the Taxpayer that the interest on the taxes would accrue until the taxes were paid. On June 30, 1993, the Taxpayer called the

Department to find out what action, if any, was taken on its protest. The Department responded that the issues would be addressed in about three to four months. The Taxpayer did not make any other attempts to contact the Department and follow up on its protest until it received the Department's May 5, 1995 letter. The Taxpayer paid the taxes assessed on Assessment No. 1651584 on June 16, 1995 but protested the interest that accrued between June 1993 and June 1995. The Taxpayer asked that interest be abated because it took the Department two years to respond to its protest.

A review of these fact does not indicate that the interest on Assessment No. 1651584 should be abated. The Taxpayer was warned in June of 1993 that the interest on its taxes would accrue until the taxes were paid. The Department did not respond to the Taxpayer's protest for two years. However, the Taxpayer did not make any attempts to contact the Department during that time and discuss the status of its protest even though it knew that the interest would accrue until it paid the taxes. The length of time it took the Department to evaluate the Taxpayer's protest is not a reason to abate the interest, especially when the Taxpayer was warned that the interest would continue to accrue. "The general rule is that tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests (citations omitted)." *Matter of Ranchers-Tufco Limestone Project*, 100 N.M. 632, 635 (App. 1983). Since the collection of interest on tax deficiencies is a public right, this rule is applicable to this case as well and the Taxpayer is entitled to no relief from the imposition of interest. Further, there is no provision in Section 67-1-67 NMSA 1978 (1995 Repl.), the statutory provision governing the imposition of interest, which allows for any circumstances where the accrual of interest is abated. It simply provides that "interest shall be paid" on any unpaid tax from the day on which it became due, until it is paid. The legislature's choice of the word "shall" indicates a legislative intent that the act is mandatory rather than discretionary. *Security Trust v. Smith*, 93 N.M. 35 (1979). Thus, the legislature has mandated

that interest be imposed on any unpaid taxes, regardless of the circumstances surrounding their nonpayment.

Additionally, the Taxpayer's argument misapprehends the nature of our self-reporting tax system. The responsibility to ensure the proper and timely reporting and payment of taxes lies with the taxpayer. This responsibility does not shift to the Department merely because it audited the Taxpayer to determine whether the Taxpayer had properly fulfilled its obligation to properly report and pay taxes. If the Taxpayer had properly determined and reported taxes in the first place, there would be no interest at issue. Although it would be best if a taxpayer's protest could be resolved expeditiously, the Taxpayer was warned that the interest on its taxes would accrue until the liability was paid and the Taxpayer made no effort to follow up on its protest when it did not hear back from the Department in the time frame suggested by the Department. Under these circumstances, interest was properly assessed.

CONCLUSIONS OF LAW

1. The Taxpayer timely filed a written protest, pursuant to Section 7-1-24 NMSA 1978 (1995 Repl.), to the interest portion of Assessment No. 1651584 and, therefore, jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer protested the taxes assessed in Assessment No. 1651584 on April 30, 1993 and did not pay its tax liability until June 16, 1995 after the Department responded to the issues raised in its protest.

2. The Department's delay in responding to the Taxpayer's protest is not a valid defense to the imposition of interest on unpaid taxes and the interest was properly imposed.

For these reasons, the Taxpayer's protest is hereby denied.

Done this 4th day of January, 1996.