

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

IN THE MATTER OF THE PROTEST OF
ROADRUNNER INDUSTRIAL WORKS, INC.

I.D. No. 02-208406-00 1

Assessment Nos. 2011493 and 2011494

No. 96-26

DECISION AND ORDER

This matter came on for hearing on October 15, 1996 before Ellen Pinnes, Hearing Officer. Roadrunner Industrial Works, Inc. ("the Taxpayer") was represented by Merrill Robinson, its president and part owner, and Carol Robinson, its secretary and part owner. The Taxation and Revenue Department ("the Department") was represented by Frank D. Katz, Special Assistant Attorney General.

Based upon the evidence and arguments presented, IT IS HEREBY DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer, a corporation, is a small family-owned business that rents and sells equipment, including equipment used in construction, as well as selling services for use in construction.
2. On March 9, 1996, three assessments (Nos. 2011492, 2011493, and 2011494) were issued to the Taxpayer. Assessment No. 2011494 was for corporate franchise taxes for 1992 and 1993. Assessment Nos. 2011492 and 2011493 were for gross receipts taxes for the periods of January through June 1992 and June 1992 through June 1995, respectively. Interest and penalties on unpaid taxes were included in each assessment.
3. The Taxpayer filed a timely protest of the assessments by a letter from its attorney

dated March 28, 1996.

4. The Department acknowledged receipt of the protest of Assessment Nos. 2011493 and 2011494 by letter dated April 16, 1996. By a separate letter on or about the same date (not included in the record here), the Department advised the Taxpayer's attorney that the protest of Assessment No. 2011492 was not being accepted because the taxpayer had substantially paid that assessment, and that the appropriate procedure as to that assessment was to submit a claim for refund.

5. The Taxpayer has paid Assessment No. 2011494, for franchise taxes, and has withdrawn its protest of that assessment.

6. In the course of its business, the Taxpayer rented equipment to persons engaged in the construction business and to governmental entities. In some instances, the rental of equipment included the services of an equipment operator. In the latter situation, a higher fee was charged per unit of time, to cover the services of the operator as well as the rental of the equipment itself.

7. The Taxpayer accepted non-taxable transaction certificates (NTTCs) from the lessees, did not collect from the lessees the amount of the applicable gross receipts tax on the transactions at issue, and did not remit the tax to the Department.

8. Representatives of at least some of the governmental entities to which the Taxpayer leased equipment advised the Taxpayer that it could accept NTTCs for the transactions at issue.

9. A representative of another equipment rental yard advised the Taxpayer that it could not accept NTTCs for the transactions at issue.

10. The Taxpayer was uncertain as to whether receipts from these transactions were deductible for purposes of the gross receipts tax. It therefore contacted the Department on three separate occasions to inquire as to whether it could properly accept NTTCs for these transactions. These contacts were made by Merrill Robinson, the president of the company, by Carol Robinson, his wife and the secretary of the company, and by their oldest son.

11. The advice received by the Taxpayer from the Department pursuant to these inquiries varied somewhat. The contradictory nature of the information prompted the Taxpayer to make repeated inquiries.

12. All of these contacts were oral. No written record of any of the contacts was made by the Taxpayer.

13. The Taxpayer did not at any time submit a written inquiry to the Department regarding the circumstances in which it could properly accept NTTCs and deduct receipts from gross receipts for tax purposes.

14. The Department was not asked for and did not issue any written ruling or other written response to the Taxpayer's inquiries.

15. Based on the information received from the Department, the Taxpayer believed that it could properly accept the NTTCs for the transactions at issue and that the transactions were not subject to gross receipts tax.

16. The Taxpayer at all times acted in good faith.

17. The Taxpayer does not challenge the assessment for gross receipts taxes. Although the Taxpayer believed that it could accept the NTTCs and that the transactions were not subject to the tax, it now concedes that the transactions were taxable.

18. The only remaining issue presented by this protest is whether interest and penalties were properly assessed against the Taxpayer.

DISCUSSION

Interest

Section 7-1-67 NMSA 1978 provides for the imposition of interest on tax deficiencies:

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 ... until it is paid

B. Interest due to the state under Subsection A ... *shall be at the rate of fifteen percent a year* (Emphasis added.)

It is a well settled rule of statutory construction that the word "shall" is mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The New Mexico legislature has expressly reiterated this general rule in § 12-2-2(I) NMSA 1978 (in construing statutory provisions, the words "shall" and "must" are to be construed as mandatory unless this would be inconsistent with manifest legislative intent or repugnant to the context of the statute).

Section 7-1-67 requires that interest, at the rate of 15% per year, be imposed on the amount of any unpaid taxes. No exceptions to this rule are provided for. Interest is intended to compensate the state for the time-value of money which was not paid when it was due. It may be unpleasant to pay interest on monies owed, particularly where the taxpayer is for some time unaware of the existence of the debt, as was the case here. However, interest is not a penalty for late payment. It is, rather, a means of making a creditor whole through reimbursement for not having had the use of the money during the time it remained unpaid. While the interest rate imposed here may seem high, that rate has been set by the legislature in the statute, and both the Department and the hearing officer lack the authority to reduce it.

Penalties

The Tax Administration Act calls for the imposition of penalties where a taxpayer, "due to negligence or disregard of rules and regulations, but without intent to defraud", fails to pay tax. § 7-1-69(A) NMSA 1978. The penalty is at the rate of two percent per month, up to a maximum of 10% of the unpaid tax.

The Department's regulations state that "negligence" within the meaning of § 7-1-69 means:

- 1) failure to exercise the degree of ordinary care and prudence that a reasonable taxpayer would exercise in similar circumstances,
- 2) inaction where action is required,
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief, or inattention.

The Taxpayer here was aware that a question existed as to whether it could accept NTTCs

for the transactions at issue.¹ The Taxpayer itself was uncertain as to whether the receipts from these transactions were properly deductible. It received conflicting information from some of its lessees and from at least one other taxpayer in the same type of business. When the Taxpayer contacted the Department for clarification, it apparently was given varying advice by the Department's representatives who responded on the three separate occasions on which the Taxpayer requested clarification.² Although the information received by the Department was somewhat inconsistent, the Taxpayer believed that the Department's position was that the transactions were properly deductible for gross receipts tax purposes.

The Taxpayer did not simply ignore the issue of its possible tax liability. Rather, it attempted to resolve the uncertainty about its acceptance of NTTCs by repeatedly contacting the Department for clarification.

Counsel for the Department argued that the Taxpayer should have submitted a written request and sought a written ruling on its situation. This, of course, would have been the better course of action. However, the Taxpayer and its representatives here are not attorneys. They are and have been in the business of renting construction equipment and providing services, such as welding and equipment operation, on construction projects. It is unlikely that the usual procedure in operations such as the Taxpayer's is to document scrupulously all interactions either among its personnel or with outside entities, or to ensure that the substance of telephone conversations is reduced to writing. The submission of a written request for a tax ruling, while good practice, would no doubt not spring immediately to the Taxpayer's mind as a way of addressing the uncertainty regarding its tax liability.

¹ Deductions from gross receipts are permitted for receipts from the sale of tangible personal property or construction services to a construction contractor or the sale of tangible personal property to a government entity. §§7-9-51, 7-9-52, 7-9-54 NMSA 1978. The transactions here were leases rather than sales and thus did not qualify for the deductions. See TRD Regulation GR 52:18.

² It has not been shown that any advice given by the Department was erroneous. Each inquiry was made by a different person acting on the Taxpayer's behalf, and the questions may have varied sufficiently that Department personnel interpreted them differently and thus gave dissimilar answers.

The Taxpayer was not negligent in failing to pay the tax at issue. While it misinterpreted the applicable rules and regulations, it did not disregard them. The penalty provided for by § 7-1-69(A) therefore does not apply here.

CONCLUSIONS OF LAW

1. By its attorney's letter of March 28, 1996, the Taxpayer filed a timely protest of Assessment Nos. 2011493 and 2011494. Jurisdiction thus lies over the parties and the subject matter of the protest.
2. The Taxpayer does not contest Assessment No. 2011493 insofar as it is for gross receipts taxes owed. The validity of those taxes therefore is not before the hearing officer for decision.
3. The Taxpayer failed to pay gross receipts taxes owed for the period at issue and interest was properly imposed on the deficiency at the statutory rate.
4. The Taxpayer's failure to pay the taxes owed was not due to negligence or disregard of rules and regulations, and penalties should be abated.
5. The Taxpayer has withdrawn its protest of Assessment No. 2011494, and the validity of those taxes is not before the hearing officer for decision.

For the foregoing reasons, the Taxpayer's protest IS HEREBY GRANTED IN PART AND DENIED IN PART. The Department IS HEREBY ORDERED TO ABATE THE PENALTY PORTION OF ASSESSMENT NO. 2011493.

Done this 13th day of November, 1996.