

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

IN THE MATTER OF THE PROTEST OF  
*MARGARET'S UPHOLSTERY*,  
ID NO. 01-0884561-00 4,  
PROTEST TO ASSESSMENT NO. 1876402

97-11

**DECISION AND ORDER**

This matter came on for hearing on February 27, 1997, before Ellen Pinnes, Hearing Officer. Margaret's Upholstery ("the Taxpayer") was represented by Margaret Stokes, its owner, and by Marilyn Stokes, Margaret's daughter and the bookkeeper for the business. The Taxation and Revenue Department ("the Department") was represented by Margaret B. Alcock, Special Assistant Attorney General.

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

**FINDINGS OF FACT**

- 1) Assessment No. 1876402 was issued on December 4, 1994, for \$2,460.04 in gross receipts tax, plus penalty and interest.
- 2) The Taxpayer filed a timely protest of the assessment by a letter from Marilyn Stokes dated December 20, 1994.
- 3) The assessment is for gross receipts taxes on sales of magnets by the Taxpayer during the period from January through December 1988. This portion of the Taxpayer's business was handled by Margaret Stokes's husband. Mr. Stokes died shortly before the assessment was issued.
- 4) Mr. Stokes acted as distributor for the magnets in New Mexico. He purchased the magnets from a supplier and resold them. Some of these sales were to distributors in New Mexico who again resold the magnets, while others were to customers outside New Mexico.

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5) Prior to the hearing, the Taxpayer provided additional information to the Department, on the basis of which the Department adjusted the assessment to accept that receipts from sales to customers outside New Mexico were properly deducted from gross receipts. This adjustment reduced the amount of underpaid tax by more than half.

6) The revised assessment is for \$976.56 in gross receipts tax, plus penalty and interest. (See Ex. 1.)

7) The Taxpayer did not have non-taxable transaction certificates (NTTCs) to support deductions of receipts from sales for resale to distributors in New Mexico. Apparently Mr. Stokes was unaware that he was required to have NTTCs in his possession in order to take the deduction. Marilyn Stokes also was unaware of this requirement. If Mr. Stokes did have any NTTCs to support the deductions, they could not be located in order to be presented to the Department in response to the assessment.

8) The Department stated that the revised assessment represented an understatement of more than twenty-five percent of the tax due for 1988. The Taxpayer did not dispute this.

#### DISCUSSION

##### ***Requirement for non-taxable transaction certificates to support deductions taken***

The New Mexico Gross Receipts and Compensating Tax Act ("the Act") provides that receipts from sales of tangible personal property may be deducted from gross receipts if an NTTC is delivered by the buyer to the seller. §7-9-47 NMSA 1978. The Department's regulations reiterate that, in order to qualify for the deduction, a taxpayer must receive an NTTC. TRD Regulation GR 47:1.

The Act sets out, in §7-9-43 NMSA 1978, the requirements as to when a taxpayer must

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have NTTCs in its possession in order to substantiate the deduction. That section has been amended since the period at issue in this case. In 1988, the statute provided that the taxpayer must have NTTCs at the time the transaction occurred. N.M. Laws 1983, ch. 220, §7(A). This requirement is set out in the Department's current regulations. GR 43:1(A)(1).

Here, the Taxpayer did not present to the Department NTTCs substantiating the deductions taken, nor was there any showing that the Taxpayer had such certificates in its possession at the time the transactions occurred. It appears that the sales at issue were sales for resale that would have qualified for a deduction if an NTTC had been given to the Taxpayer by the purchasers. However, the statute is clear that no deduction may be taken unless a properly executed NTTC is given to the Taxpayer and is in the Taxpayer's possession at the required time.

Because this requirement was not satisfied here, the Taxpayer was properly assessed for gross receipts taxes on receipts from these sales.

***Limitation period***

Unless special circumstances are present, the Department may not assess underpaid taxes after three years from the end of the calendar year in which the tax was due. §7-1-18(A) NMSA 1978. If a taxpayer has understated its tax liability by more than twenty-five percent of the total tax due for the period at issue, that limitation period is extended to six years. §7-1-18(D).

The assessment here relates to taxes for January through December of 1988. Tax returns for these periods would have been due between February, 1988, and January, 1989. §7-1-11 NMSA 1978. The Taxpayer did not dispute that the assessment represented an underpayment of tax exceeding twenty-five percent of total tax liability. The six-year limitation period in §7-1-18(D) therefore applies. The Department had until the end of 1994 to issue an assessment

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as to taxes due in 1988, and did so in December of 1994. The assessment therefore is not barred by the statute of limitations.

***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 therefore was properly imposed on the tax deficiency here.

***Penalty***

The Tax Administration Act provides that a penalty will be imposed in certain circumstances when a taxpayer does not pay tax at the time it is due. The penalty is not based simply on failure to make payment on time. Rather, such failure must be due to negligence or disregard of rules and regulations. §7-1-69(A) NMSA 1978. The Department's regulations

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define "negligence" to mean: 1) failure to exercise reasonable business care and prudence, 2) inaction where action is required, or 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention. Regulation TA 69:3. The Taxpayer has the burden of presenting evidence negating the existence of negligence. Regulation TA 69:1.

Here, it appears that the Taxpayer was simply unaware of the legal requirements pertaining to the use of NTTCs and the taking of deductions from gross receipts. All taxpayers have a reasonable duty to be aware of the requirements imposed on their operations by the tax laws of this state. See *Tiffany Construction Company, Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct.App. 1976), cert. den. 90 N.M. 255, 561 P.2d 1348 (1977). The failure of the Taxpayer here to familiarize itself with the requirements pertaining to the use of NTTCs and the taking of deductions from gross receipts constituted negligence and/or disregard of rules and regulations, and the penalty authorized by §7-1-69(A) was properly imposed by the Department.

#### CONCLUSIONS OF LAW

1) The Taxpayer filed a timely protest of Assessment No. 1876402. Jurisdiction thus lies over the parties and the subject matter of this protest.

2) The Taxpayer improperly deducted certain receipts from gross receipts and failed to pay applicable gross receipts tax thereon, and the Department's assessment for such unpaid tax is proper.

3) Because the Taxpayer did not pay the tax owed at the time it was due, interest was properly imposed on the deficiency at the statutory rate.

4) The Taxpayer's failure to pay the tax was due to negligence and/or disregard of applicable rules and regulations, and penalties were properly imposed on the unpaid amounts.

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Done this 27th day of March 1997.