

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

IN THE MATTER OF THE PROTEST OF
M&R JANITORIAL SERVICES
ID. NO. 02-225747-00 0, PROTEST
TO ASSESSMENT NOS. 1908153, 1908154,
AND 1902077 THROUGH 1902089

NO. 97-14

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on April 11, 1997. M&R Janitorial Services, hereinafter, "Taxpayer", was represented by its owners, Ron and Mary Bouchard. The Taxation and Revenue Department, hereinafter, "Department", was represented by Donald F. Harris, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in the business of performing cleaning services exclusively for the federal government at Kirtland Air Force Base. Specifically, the Taxpayer cleans base housing for final inspection after the military family previously assigned to the quarters has vacated quarters.

2. The Taxpayer commenced its business in 1986.

3. At the time the Taxpayer commenced business, Mr. and Mrs. Bouchard did not make inquiry with the Department or consult a tax professional about whether it would be liable for gross receipts tax upon its receipts from performing services for the federal government. The Taxpayer was simply not aware of its responsibility to report and pay gross receipts taxes upon its gross receipts and it did not do so.

4. Sometime in 1989, Mr. and Mrs. Bouchard's son commenced a business of his own and in getting set up, he learned that he would be responsible for paying gross receipts taxes

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to the Department upon his receipts from engaging in business. Because Mr. Bouchard was involved in helping his son get set up in business, when he learned of his son's responsibility for paying gross receipts taxes Mr. Bouchard realized that his business might also be liable for gross receipts taxes upon its receipts.

5. Sometime in 1989, Mr. Bouchard spoke with an employee of the Department, Mr. Tom McKinney and asked whether the Taxpayer was liable for gross receipts taxes upon its receipts for performing services entirely upon a federal military reservation for the federal government. Mr. McKinney said he didn't think the Taxpayer was subject to gross receipts tax but he wasn't entirely sure of the answer and that he would look into the matter and contact Mr. Bouchard.

6. Mr. McKinney attempted to contact Mr. Bouchard on several occasions at Mr. Bouchard's place of employment (Mr. Bouchard also worked for the Social Security Administration), but Mr. Bouchard's supervisor would not let Mr. Bouchard take Mr. McKinney's calls. Mr. Bouchard would attempt to call Mr. McKinney back, but Mr. McKinney and Mr. Bouchard never managed to speak about the Taxpayer's obligation for gross receipts taxes. Thus, Mr. Bouchard never received a firm answer from the Department as to whether or not it was subject to gross receipts upon its activities.

7. On February 15, 1995 the Department issued Assessment Nos. 1902077 through 1902089 and 1908153 and 1908154 to the Taxpayer assessing \$5,318.09 in gross receipts tax, \$3,773.48 in interest and \$595.34 in penalty for a total of \$9,686.91 for the reporting periods of January 1986 through June of 1992.

8. On May 15, 1995 the Taxpayer mailed a letter to the Department protesting the

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assessments and requesting a retroactive 60 day extension of time to file its protest to the assessments.

9. On June 22, 1995 the Department granted the Taxpayer's request for a retroactive extension of time to file its protests.

DISCUSSION

The issue to be determined is whether the Taxpayer may be excused from paying gross receipts tax, penalty and interest due to its failure to understand that its activities for the federal government were subject to gross receipts tax and based upon the fact that the Taxpayer was never told by the Department that its activities were subject to tax. The Taxpayer does not now dispute that its activities are subject to gross receipts tax, but it wishes to be excused from payment of tax, penalty and interest based upon its lack of knowledge that taxes were owing at the time the tax was required to be reported and paid.

Although I have no doubt that the Taxpayer did not know or understand that its activities were subject to tax and that there was no intentional failure to pay taxes, this does not and cannot excuse the Taxpayer's failure to pay tax. New Mexico has a self-reporting tax system. This means that the responsibility to accurately and timely pay taxes is placed upon taxpayers. It has been well established in New Mexico law that every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), cert. denied 90 N.M. 255, 561 P.2d 1348 (1977).

In this case, the Taxpayer did not make any inquiry about its potential tax responsibilities

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at the time it commenced business. It was not until some three years later that it made such inquiry. It never made inquiry of a private tax professional. When it made inquiry with the Department, the employee informed the Taxpayer that it was not sure of the answer and that the employee would get back to the Taxpayer with the answer. The Department's employee attempted to make further contact with the Taxpayer, but was unsuccessful, through no fault of the Department. Thus, the Taxpayer was never misled by the Department and when the Department was unsuccessful in communicating the answer about taxability to the Taxpayer, it was incumbent upon the Taxpayer to take further action to find out if taxes were owing. This, the Taxpayer did not do. In any event, it is no defense to an assessment of tax that a taxpayer did not know or understand that its activities were taxable.

The imposition of penalty is governed by the provisions of NMSA 1978, Section 7-1-69(A) NMSA 1978 (1995 Repl. Pamp.), which imposes a penalty of two percent per month, up to a maximum of ten percent:

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 or to file by the date required a return regardless of whether any tax is due,....

This statute imposes penalty based upon negligence (as opposed to fraud) for failure to timely pay tax. Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by the Taxpayer to underreport taxes. What remains to be determined is whether the Taxpayer was negligent in failing to report its taxes properly. Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation TA 69:3 as:

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

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- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference thoughtlessness, carelessness, erroneous belief or inattention.

In this case the Taxpayer's failure to report and pay taxes was based upon the Taxpayer's lack of knowledge about New Mexico taxes. As noted previously, New Mexico has a self-reporting tax system which requires that taxpayers voluntarily report and pay their tax liabilities to the state. Because of this, the case law is well settled that every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions, and the failure to do so has been held to amount to negligence for purposes of the imposition of penalty pursuant to Section 7-1-69 NMSA 1978. *Tiffany Construction Co., supra.*

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

- 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.* (emphasis added)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to Section 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus, it doesn't matter why taxes were unpaid. Interest is imposed for the period of time that they are unpaid.

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CONCLUSIONS OF LAW

1. The Taxpayer's filed a timely, written protest to the above-referenced assessments and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer's failure to understand that it was subject to gross receipts tax upon its receipts from performing services for the federal government does not excuse it from liability for payment of such taxes.

3. The Taxpayer was negligent in failing to take action to determine the tax consequences of its actions and penalty was properly imposed for failure to timely report and pay gross receipts taxes.

4. The Taxpayer failed to timely report and pay gross receipts taxes upon its receipts from performing services in New Mexico and interest was properly imposed.

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

DONE, this 18th day of April, 1997.