

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

IN THE MATTER OF THE PROTEST OF
ARTHUR PINO
ID NO. 02-310267-00 5,
PROTEST TO ASSESSMENT NO. 2041086

No. 97-20

DECISION AND ORDER

This matter came on for hearing on May 5, 1997, before Ellen Pinnes, Hearing Officer. Arthur Pino ("the Taxpayer") appeared on his own behalf. The Taxation and Revenue Department ("the Department") was represented by Gail MacQuesten, Special Assistant Attorney General.

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

FINDINGS OF FACT

1. Pursuant to a contract with the United States Postal Service ("the Postal Service"), the Taxpayer works as a rural mail carrier in the area around Magdalena, New Mexico. The Taxpayer's entire route for mail delivery is within New Mexico.

2. Prior to the Taxpayer beginning this work for the Postal Service, his father contracted with the Postal Service to serve as the mail carrier for the area. The Taxpayer took over the contract upon his father's death.

3. The Taxpayer does not know how his father treated receipts under the Postal Service contract for tax purposes. However, the Taxpayer had previously been in business in New Mexico and had some familiarity with the state's gross receipts tax system. Based on that knowledge, he felt that his receipts under the Postal Service contract were probably subject to gross receipts tax.

4. When the Taxpayer began working as a contract mail carrier, he contacted the

Department to ask about registration for gross receipts tax purposes. The Department's representative told the Taxpayer that she did not think he was liable for gross receipts taxes on his work as a mail carrier. The Taxpayer questioned this advice and asked the representative to check further. She did not call him back.

5. The Taxpayer made several additional calls to the Department to verify the advice given to him on his first inquiry. Each time, he was told that his receipts as a mail carrier were not subject to gross receipts tax. Based on this information, the Taxpayer decided that the law must have changed since his earlier knowledge of it and that he was not subject to gross receipts taxes on receipts under his contract with the Postal Service.

6. The Taxpayer relied on the oral representations of the Department's representatives. He did not request a written ruling from the Department on the issue of whether he was liable for gross receipts taxes, nor did he review the applicable statutes or regulations.

7. On June 22, 1996, the Department issued assessment number 2041086 for gross receipts taxes in the amount of \$3,633.55 for the period from January 1993 through December 1995, plus penalty and interest.

8. The Taxpayer filed a timely protest of the assessment.

9. The Department has abated the penalty imposed in the original assessment.

10. The Department has also abated interest prior to the time the assessment was issued.

11. The assessment at issue in these proceedings is for gross receipts taxes of \$3,633.55 for 1993-95 and interest on that amount from July 1996. (See Department's Exhibit 1.)

DISCUSSION

Liability for Tax

When he became a contract mail carrier, the Taxpayer made repeated attempts to obtain a

tax identification number from the Department and to pay gross receipts taxes as required by law. Each time, he was told by representatives of the Department that he was not subject to gross receipts taxes. Some years later, the Taxpayer received an assessment from the Department for the taxes he had earlier been told he did not have to pay, plus penalty and interest.

The New Mexico Tax Administration Act imposes a penalty where a taxpayer fails to file a tax return or pay taxes due when such failure is due to the taxpayer's negligence or disregard of rules and regulations. §7-1-69(A) NMSA, 1978. Here, the Department determined that the Taxpayer was not negligent, as he contacted the Department several times to obtain a tax identification number and was told each time that he was not liable for gross receipts taxes.

On the same grounds, the Department has abated interest prior to the time the assessment was issued in 1996. Before that time, the Taxpayer had effectively been prevented from paying any taxes due, because he was unable to obtain a tax identification number from the Department.

The remaining amount of the assessment is for taxes due for 1993 through 1995 and interest from July 1996, after the assessment was issued. The Taxpayer challenges this assessment, feeling that he should not have to pay tax when the Department told him he was not liable for it.

The New Mexico Gross Receipts and Compensating Tax Act imposes a tax, known as the gross receipts tax, on the gross receipts of those who engage in business in this state. §7-9-4 NMSA, 1978. "Gross receipts" is defined as the amount of money or other consideration received from, among other things, selling services in New Mexico. §7-9-3(F) NMSA, 1978. The receipts of contract mail carriers are subject to gross receipts tax. See TRD Regulation GR 3(F):34.

The Taxpayer acknowledges that he was a contract carrier and not an employee of the Postal Service. Pursuant to §7-9-3(F) of the Gross Receipts and Compensating Tax Act and the Department's regulations pursuant to that statute, the Taxpayer's receipts were subject to gross receipts tax, and the Department's assessment for such taxes was proper.

Estoppel

The Taxpayer argues that, because his failure to pay the tax was based on representations by the Department that he was not required to pay, it is unfair to now make him pay the tax. In the Taxpayer's characterization, this would be requiring him to pay for the mistakes of others. This presents the issue of whether the Department should be estopped to collect the tax.

The Tax Administration Act, §7-1-60 NMSA, 1978, provides for estoppel against the Department if a taxpayer shows that his action or inaction was in accordance with either a regulation of the Department or a written ruling addressed to the party. Here, no written ruling was issued to the Taxpayer. He did not review the Department's regulations, and does not contend that his failure to pay tax was in accordance with any regulation. The Department is not estopped to collect the tax by virtue of §7-1-60.

Although the Taxpayer has not established grounds for statutory estoppel under §7-1-60, the Department may still be estopped to assess the tax if right and justice demand such action. Taxation & Revenue Department v. Bien Mur Indian Market Center, 108 N.M. 228, 770 P.2d 873 (1989). One of the elements the Taxpayer must show in order to establish an equitable estoppel is that he suffered harm as a result of reliance on the erroneous advice given to him by the Department's representatives. Gonzales v. Public Employees Retirement Board, 114 N.M. 420, 427, 839 P.2d 630 (Ct.App. 1992), cert. den. 8/14/92. There is no such showing here. The only harm suffered by the Taxpayer is to pay tax he was legally obligated to pay in the first place. Cf. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61 (1984) (detriment in not being able to keep money that was improperly paid in the first place is insufficient to establish estoppel).

The hearing officer is sympathetic to the Taxpayer's frustration upon receiving an assessment telling him he owes money to the Department, after he attempted several years ago to tell the Department the same thing and they repeatedly insisted that he was wrong. This is one of the rare circumstances in which the Taxpayer is not likely to be gratified at having the Department

now recognize that he was right. However, the situation presented here does not rise to the level of an estoppel. The Department, recognizing the special circumstances here, has abated penalty as well as interest prior to issuance of the assessment. It is not barred from collecting the tax itself.

Interest

Because the assessment of tax was correct, interest was properly assessed. The Department has abated interest that accrued before the assessment was issued, on the grounds that the Taxpayer was unaware of his liability for this tax as a result of the advice given to him by representatives of the Department. However, once the assessment was issued in 1996, the Taxpayer was made aware that the advice he had received was erroneous and that the tax was due. Interest is mandatory in these circumstances.

The Tax Administration Act 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*

§7-1-67 NMSA 1978 (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 fifteen per cent 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 by reimbursing it 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.

The Taxpayer here acted in good faith and attempted to comply with the requirements of the Gross Receipts and Compensating Tax Act. His reliance on the erroneous advice given to him has unfortunately left him with an unexpected tax bill. Under the circumstances, the Department has properly agreed to abate the penalty and part of the interest originally assessed against the Taxpayer. However, the remaining interest assessed is mandated by statute and cannot be abated.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest of Assessment No. 2041086. Jurisdiction thus lies over the parties and the subject matter of the protest.
2. The Department has abated the penalty assessed against the Taxpayer. The validity of the penalty therefore is not before the hearing officer for decision.
3. The Department has abated interest assessed prior to issuance of the assessment. The validity of such interest therefore is not before the hearing officer for decision.
4. The Taxpayer was subject to gross receipts taxes on receipts from work performed as a mail carrier under his contract with the Postal Service, and the assessment for such tax is proper.
5. Because such taxes were not paid at the time they were due, interest was properly imposed on the deficiency following issuance of the assessment.
6. The Department is not estopped to assess the tax plus interest from the time of the assessment.

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

DONE, this 19th day of May, 1997.