

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

IN THE MATTER OF THE PROTEST  
OF KIDS LOVE TO DANCE  
ID. NO. 02-033119-00 3  
ASSESSMENT NO. 2000952

98-26

**DECISION AND ORDER**

This matter came on for formal hearing on April 24, 1998, before Margaret B. Alcock, Hearing Officer. Kids Love to Dance, a proprietorship, was represented by Pamela Turman, its owner. The Taxation and Revenue Department ("Department"), was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Ms. Turman established her business, Kids Love to Dance, in the mid-1980s.
2. Kids Love to Dance is engaged in the business of providing dance lessons to pre-schoolers. The lessons are sold to the parents of the children and the classes are held at various churches and preschools in Albuquerque.
3. Once a year, Kids Love to Dance organizes an annual performance and sells costumes for the performance to the children's parents.
4. At the time Ms. Turman started her business, she was presented with NTTCs by churches and other nonprofit preschools and day care centers where the dance lessons were provided.
5. Ms. Turman did not understand the use of NTTCs and called the Department for information.

6. Ms. Turman was told that an NTTC would allow her to deduct her receipts when calculating gross receipts tax and was told how to fill out the CRS-1 returns used to report gross receipts, compensating and withholding tax to the Department.

7. Ms. Turman does not have a clear recollection as to whether she told the Department employee with whom she spoke that she was accepting Type 9 NTTCs for selling dance lessons to the parents of children attending preschools run by nonprofit entities.

8. Ms. Turman did not consult with an accountant or other tax professional concerning her payment of gross receipts tax or the proper use of NTTCs.

9. Ms. Turman did not attend any of the gross receipts tax workshops periodically offered by the Department.

10. Each NTTC form issued by the Department shows the type of NTTC at the top of the form and gives an explanation of the permitted use of each type of NTTC on the back.

11. The NTTC form Ms. Turman accepted from nonprofit organizations reads: “09 Governmental Agencies and Organizations” at the top. The back of the NTTC states that Type 9 certificates may be issued by governmental agencies and 501(c)(3) organizations “for the purchase of TANGIBLE PERSONAL PROPERTY ONLY. These certificates may not be used for the purchase of services....”

12. In 1995, Kids Love to Dance was audited by the Department.

13. The Department’s auditors disallowed the deductions Ms. Turman had taken for receipts from selling dance lessons and costumes to parents of children attending nonprofit preschools that had provided her with a Type 9 NTTC. The deductions were disallowed for two reasons: (a) because a Type 9 NTTC does not support a deduction for receipts from selling services to nonprofit

organizations; and (b) because Ms. Turman's sales were made to the parents of the preschool children and not to the organizations issuing the NTTCS.

14. On February 14, 1996, the Department issued Assessment No. 2000952 in the amount of \$15,150.46, representing \$9,774.31 gross receipts tax, \$977.44 penalty and \$4,398.71 interest.

15. On February 22, 1996, Ms. Turman filed a written protest of the Department's assessment of interest and penalty. Ms. Turman paid the assessment of tax principal.

### **DISCUSSION**

At issue is whether Ms. Turman is liable for interest and penalty assessed on her underpayment of gross receipts tax during the period January 1989 through June 1995. Ms. Turman argues that the assessment of penalty and interest is excessive. She maintains that an assessment of this magnitude should be assessed only for criminal activity and not for an inadvertent failure to pay tax based on a misunderstanding of the law. Ms. Turman also believes the Department should do more to inform small business owners of their tax obligations.

Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Section 7-1-3(U) NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." Thus, the presumption of correctness of an assessment of taxes also applies to the assessment of interest and penalty. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

**Assessment of Interest.** Section 7-1-67 NMSA governs the imposition of interest on late payments of tax and provides, in pertinent part:

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).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. The reason for a late payment of tax is irrelevant to the imposition of interest. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. Section 7-1-13(E) NMSA 1978.

In this case, Ms. Turman mistakenly failed to pay tax on a portion of her gross receipts. During the period at issue, Ms. Turman had the use of tax revenues that should have been paid to the state. Ms. Turman now owes interest for the period that she had the use of this money. While it could be argued that the rate of interest is excessive in comparison with current market rates, that is a matter within the sound discretion of the legislature. The Department does not have authority to substitute its own judgment for that of the legislature in setting the rate of interest to be imposed.<sup>1</sup>

**Assessment of Penalty.** Section 7-1-69 NMSA 1978 (1995 Repl.Pamp. and 1996 Supp.) governs the imposition of penalty during the periods at issue in this protest. Subsection A 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...

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<sup>1</sup> It should also be noted that the 15 percent interest rate charged by the state is still less than the interest rate charged on many credit cards.

The statute imposes penalty based on negligence (as opposed to fraud) for failure to timely pay tax.

There is no contention on the part of the Department that Ms. Turman's failure to pay gross receipts tax was the result of bad faith or fraud. Had the Departments' auditors concluded that Ms. Turman's behavior was fraudulent, the Department would have assessed the 50 percent fraud penalty under Subsection C of Section 7-1-69, rather than the 10 percent negligence penalty under Subsection A.

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC

1.11.10 (formerly GR 69:3) as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Ms. Turman's underreporting of tax was due to her erroneous belief that she was entitled to deduct receipts from dance lessons and costumes sold to the parents of her students and her inattention to the information found on the back of the NTTCs she accepted from nonprofit churches and preschools.

The NTTC form Ms. Turman received from nonprofit organizations has typed across the top of the front side: "09 Governmental Agencies and Organizations." The back of the NTTC explains the use of each type of NTTC. Under Type 9 it states:

Type 9 certificates may be issued by GOVERNMENTAL AGENCIES and 501(c)(3) ORGANIZATIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY. These certificates may not be used for the purchase of services or for the lease of property.

Ms. Turman testified that she did not read the back of the NTTC form. Although Ms. Turman called and spoke with someone at the Department about NTTCs in general, her testimony did not establish

that she discussed the specific nature of her business or the fact that she had accepted Type 9 NTTCs for selling dance lessons and costumes to the parents of preschoolers. Given Ms. Turman's admitted lack of memory concerning the details of her discussions with the Department, there is insufficient evidence to conclude that Ms. Turman was misled by the Department concerning her liability for gross receipts tax. There is very clear evidence, however, that Ms. Turman could have discovered the error in her reporting if she had taken the time to read the back of the NTTC form issued by the Department. Her failure to do so, and her erroneous belief that she could accept NTTCs from organizations that were not the buyers of the dance lessons and costumes she sold, constitutes negligence for purposes of Section 7-1-69(A).

Ms. Turman believes it is the Department's responsibility to notify small business owners of their tax liabilities. Ms. Turman misapprehends the nature of New Mexico's self-reporting tax system. It is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978; *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). Nonetheless, the Department does make an effort to educate taxpayers concerning New Mexico's tax laws. Every six months, the Department mails a CRS-1 Filer's Kit to registered gross receipts taxpayers. The kit contains an overview of the law, including a discussion of NTTCs, and detailed filing instructions. Information concerning the use of NTTCs is printed on the back of every NTTC form issued. The Department also conducts regular gross receipts tax workshops. The Department can only make information available to taxpayers; it is up to the taxpayers to make use of the resources offered.

#### **CONCLUSIONS OF LAW**

1. Ms. Turman filed a timely, written protest to Assessment No. 2000952, and jurisdiction lies over the parties and the subject matter of this protest.

2. Pursuant to Section 7-1-67(A) NMSA 1978, interest was properly assessed against Ms. Turman on her underreporting of gross receipts tax during the period January 1989 through June 1995.

3. Pursuant to Section 7-1-69(A) NMSA 1978, Ms. Turman was negligent in underreporting gross receipts tax during the period January 1989 through June 1995, and penalty was properly assessed.

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

DONE, this 27<sup>th</sup> day of April 1998.