

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

IN THE MATTER OF THE PROTEST
OF GARY AND FELIZ TIXIER
ID. NO. 02-341719-00 6
ASSESSMENT NO. 2155190

98-27

DECISION AND ORDER

This matter came on for formal hearing on April 21, 1998, before Margaret B. Alcock, Hearing Officer. Gary and Feliz Tixier were represented by Gary Tixier. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the years 1994, 1995 and 1996, Gary Tixier worked as an independent contractor selling securities and insurance. Mr. Tixier received a commission on his sales.
2. Mr. Tixier was also involved in a separate business involving art displays.
3. During the years at issue, Mr. Tixier reported his commissions from selling securities and insurance to the Internal Revenue Service on a Schedule C to Federal Form 1040, Profit or Loss from Business. Mr. Tixier filed a separate Schedule C to report the income from his art display business.
4. It did not occur to Mr. Tixier that he should be paying gross receipts tax on the commissions he received from selling securities.
5. Mr. Tixier hired an accountant to prepare his 1994, 1995 and 1996 Federal Forms 1040. Mr. Tixier did not have any discussions with the accountant concerning the New Mexico

gross receipts tax, nor did the accountant inform Mr. Tixier that he should be paying gross receipts tax on his commissions.

6. On July 7, 1997, as a result of information obtained from Mr. Tixier's Schedule C to his 1994, 1995 and 1996 income tax returns, the Department issued Assessment No. 2155190 for the period January 1994 through December 1996 in the amount of \$2,011.92 gross receipts tax, \$201.24 penalty and \$574.76 interest. The Department's assessment represents gross receipts tax on Mr. Tixier's income from selling securities but does not include his income from his art display business or from selling insurance.

7. On July 21, 1997, Mr. Tixier filed a letter protesting the Department's assessment of penalty and interest. Mr. Tixier has paid the assessment of tax principal.

DISCUSSION

At issue is whether Mr. Tixier is liable for interest and penalty assessed on his underpayment of gross receipts tax during the period January 1994 through December 1996. Mr. Tixier protests the assessment on several grounds, including his belief that the gross receipts tax on commissions earned by securities brokers is unfair, that securities brokers are at a disadvantage because they are unable to pass the tax on to their customers, and that the tax is unevenly enforced. More specifically, Mr. Tixier argues that he should not be liable for penalty and interest because he was not notified of his tax liability in a timely manner and payment of penalty and interest will create a hardship on himself and his wife.

Fairness of Gross Receipts Tax. Mr. Tixier's primary concern with the Department's assessment is his belief that the gross receipts tax on securities brokers is unfair. This issue must be addressed by the legislature. Mr. Tixier concedes that he owes the gross receipts tax under the law

as it is now written. The Department is charged with enforcing New Mexico's tax laws as passed by the legislature. The Department has no authority to ignore or modify the law.

Inability to Separately Charge Gross Receipts Tax. Mr. Tixier also argues that the tax on securities brokers is unfair because they are not able to pass the cost of the gross receipts tax on to their clients.¹ Mr. Tixier's argument is based on a misunderstanding of New Mexico's tax system. New Mexico does not have a sales tax that is charged to and collected from the final consumer. New Mexico has a gross receipts tax that is imposed directly on the seller of goods and services. Section 7-9-4 NMSA 1978 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. As a practical matter, the tax is simply part of the seller's cost of doing business. Although it is a common practice for sellers to pass the cost of the gross receipts tax on to the buyer, the seller's ability to separately charge or obtain reimbursement of the tax does not affect the seller's legal obligation to pay tax to the state.

Selective Enforcement. Mr. Tixier believes that the gross receipts tax is being selectively enforced and that he was unfairly singled out by the Department. Tom Dillon, an auditor in the Department's protest office, testified that Mr. Tixier was assessed as the result of a tape match that compared the business income Mr. Tixier reported for federal income tax purposes with the business income Mr. Tixier reported for New Mexico gross receipts tax purposes. Mr. Dillon testified that every New Mexico taxpayer whose federal Schedule C income exceeds the income on which gross receipts tax has been paid will receive an inquiry from the Department. The Schedule C tape match is performed by computer. There is no indication that anyone at the Department selectively targeted Mr. Tixier for assessment.

¹ Mr. Tixier maintains that tax cannot be added to his commission because the securities industry is federally regulated, but did not provide the specific federal statute or regulation that pertains to this issue.

Mr. Tixier also questions whether large brokerage houses are being asked to pay gross receipts tax on their commissions. Although Mr. Tixier has the impression that only small independent securities brokers are being assessed the tax, he admitted that he has not conducted a comprehensive survey. In fact, the only securities firm that he knows has not been paying gross receipts tax is the securities firm for which he works. This testimony does not present a basis for a finding of discrimination or selective enforcement.

Delay in Assessment. Mr. Tixier argues that he should not be penalized for the Department's failure to notify him of his gross receipts tax liability in a timely manner. Under the Tax Administration Act, the Department has three years from the end of the calendar year in which a tax is due to issue an assessment. Section 7-1-18(A) NMSA 1978. The Department's July 16, 1997, assessment of gross receipts tax, penalty and interest for the period January 1994 through December 1996 was well within this three-year assessment period. Mr. Tixier has not cited any authority that would preclude the Department from enforcing a timely assessment on the basis of unfair delay.

New Mexico has a self-reporting tax system that relies upon 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. There are insufficient government resources to audit every taxpayer periodically to assure tax compliance. Every person is therefore charged with the reasonable duty to ascertain the possible tax consequences of his action. *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, it was Mr. Tixier's responsibility to determine whether his business activities created a tax liability to the state, and he cannot shift this responsibility to the Department.

Hardship. Mr. Tixier asks the Department to consider that the assessment of interest and penalty will create a financial hardship on himself and his wife, who has been ill for several years.

While unfortunate, this fact does not provide the Department with a basis for abating the assessment. Section 7-1-20 NMSA 1978 provides that the Secretary of the Department may compromise an assessed tax when he has a good faith doubt as to the taxpayer's liability for payment of the tax. The Secretary may not abate an assessment based on the taxpayer's inability to pay the tax. Regulation 3 NMAC 1.6.14.

Statutory Basis for the Department's Assessment of Interest and Penalty. 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. 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.

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...

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.

In this case, Mr. Tixier's failure to pay gross receipts tax was based on his inattention to the requirements of New Mexico's tax laws and his erroneous belief that commissions on the sale of securities were not subject to tax. Although Mr. Tixier hired an accountant to prepare his federal income tax returns, he did not make any inquiry as to whether there might be other taxes due in connection with the income reported as business income on Schedule C of his Federal Forms 1040. Thus, although reliance on the advice of a competent tax advisor can be a defense to the imposition of penalty under Regulation 3 NMAC 1.11.11(4), there is no evidence that Mr. Tixier sought or received

any advice with regard to his gross receipts tax liability for the years in question. Although Mr. Tixier acted in good faith, with no intention to avoid the payment of taxes, he was negligent in failing to take such action as was required to determine his tax liability to the state. For this reason, penalty was properly imposed under Section 7-1-69(A).

CONCLUSIONS OF LAW

1. Mr. Tixier filed a timely, written protest to Assessment No. 2155190, 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 Mr. Tixier on his underreporting of gross receipts tax during the period January 1994 through December 1996.

3. Pursuant to Section 7-1-69(A) NMSA 1978, Mr. Tixier was negligent in underreporting gross receipts tax during the period January 1994 through December 1996 and penalty was properly assessed.

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

DONE, this 29th day of April 1998.