

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

IN THE MATTER OF THE PROTEST
OF CONNIE SCHAEKEL
ID. NO. 02-318456-00 6
ASSESSMENT NOS. 2179170-2179173 & 2180004

98-29

DECISION AND ORDER

This matter came on for formal hearing on May 14, 1998 before Margaret B. Alcock, Hearing Officer. Connie Schaeckel appeared on her own behalf. The Taxation and Revenue Department ("Department") was represented by Frank D. Katz, Chief Counsel. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 1993 and 1994, Ms. Schaeckel worked part-time as an independent contractor setting up sales displays. Ms. Schaeckel chose to limit her hours of work in order to spend more time with her young daughter.

2. Although Ms. Schaeckel consulted an accountant concerning her tax liabilities, she was given incorrect advice and did not report or pay gross receipts tax on her receipts from working as an independent contractor.

3. On September 27, 1997, the Department issued four assessments of gross receipts tax, penalty and interest to Ms. Schaeckel:

Assessment No.	Report Period	Tax	Penalty	Interest
2179172	June 1993	\$308.74	\$30.87	\$192.96
2179170	December 1993	\$308.74	\$30.87	\$169.81
2179173	June 1994	\$284.43	\$28.44	\$135.10
2179171	December 1994	\$284.43	\$28.44	\$113.77

On October 3, 1997, the Department issued Assessment No. 2180004 for the 1994 reporting period in the amount of \$615.38 gross receipts tax, \$61.56 penalty, and \$296.15 interest.

4. Ms. Schaekel paid the tax principal assessed. On October 24, 1997, she filed a protest to the assessment of penalty and interest.

5. The Department subsequently abated the penalty based on Ms. Schaekel's reliance on the erroneous advice of her accountant.

DISCUSSION

At issue is whether Ms. Schaekel is liable for the interest assessed on her underpayment of gross receipts tax. Ms. Schaekel testified that she had to borrow money to pay the tax principal and that it will be a financial hardship for her to pay the additional assessment of interest. After her divorce, Ms. Schaekel made a conscious decision to limit her hours of work, and consequently her income, in order to spend more time with her daughter. She believes that she is being penalized for this choice and will have to obtain full-time work and place her daughter in day care in order to pay off the assessment.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). 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." Accordingly, the presumption of correctness of an assessment of taxes also applies to the assessment of interest. *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 1978 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.

Ms. Schaekel asks the Department to consider that the assessment of interest will create a financial hardship and may limit her ability to work a part-time schedule in order to spend time with her daughter. The Department is required to apply the law even-handedly and cannot make exceptions based on individual circumstances. 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 or on the fact that payment will create a hardship. *See*, Regulation 3 NMAC 1.6.14.

CONCLUSIONS OF LAW

1. Ms. Schaekel filed a timely, written protest to Assessment Nos. 2179170-2179173 & 2180004 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. Pursuant to Section 7-1-67 NMSA 1978, interest was properly assessed against Ms. Schaekel for the late payment of gross receipts tax due on income she earned as an independent contractor during 1993 and 1994.

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

DONE, this 19th day of May 1998.