

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

IN THE MATTER OF THE PROTEST  
OF CENTEX AMERICAN GYPSUM  
D/B/A CENTEX CORPORATION  
ID. NO. 01-192519-001  
PROTEST OF REFUND OFFSET

98-30

**DECISION AND ORDER**

This matter came on for formal hearing on May 18, 1998, before Margaret B. Alcock, Hearing Officer. Centex Corporation ("Centex") was represented by Janet Erickson, CPA, the taxpayer's Senior Tax Accountant. The Taxation and Revenue Department ("Department"), was represented by Monica M. Ontiveros, Special Assistant Attorney General. Prior to the hearing, the parties entered into a Stipulation of Facts providing certain background information. Based on the stipulation and the additional evidence and legal arguments presented at the hearing, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Centex Corporation is a corporation doing business in New Mexico.
2. In December 1995, Centex filed a New Mexico consolidated corporate income tax return for tax year April 1, 1994 through March 31, 1995 showing a refund due in the amount of \$128,946.00. The Department approved the refund.
3. Before issuing the refund payment to Centex, the Department determined that Centex had outstanding liabilities for penalty and interest on the late payment of estimated corporate income tax payments for prior tax years.

4. The Department reduced Centex's \$128,946.00 refund for the April 1, 1994 through March 31, 1995 tax year by the amount of penalty and interest the Department determined to be due for prior years. On May 15, 1996, the Department mailed Centex the balance of the refund. The Department also provided Centex with a document entitled "Disposition of Credit Worksheet" showing the offset that had been made, together with a copy of "Taxpayer Remedies" explaining how Centex could protest the Department's action.

5. On May 28, 1996, Centex mailed a letter to the Department "to protest the assessment of penalties and interest" on the late payment of estimated taxes and the Department's offset of Centex's refund against that assessment.

6. Prior to the hearing on this matter, the parties stipulated that the amount still in controversy is \$8,882.74, representing penalty and interest on the late payment of estimated income tax payments due in September 1993 and December 1993.

7. During fiscal year April 1, 1993 through March 31, 1994, Centex was required to make any estimated income tax payments due to New Mexico under Section 7-2A-9.1 NMSA 1978 (1993 Repl. Pamp.) on June 15, 1993, September 15, 1993, December 15, 1993 and March 15, 1994.

8. Estimated tax payments were due if Centex "reasonably" expected its tax liability for the year to be \$5,000 or more.

9. Centex did not make an estimated payment on June 15, 1993 because Centex anticipated being able to deduct a large net operating loss and did not reasonably expect to have any New Mexico income tax liability for fiscal year April 1, 1993 through March 31, 1994.

10. On August 10, 1993, the Omnibus Reconciliation Act of 1993 ("Revenue Reconciliation Act"), Pub. L. No 103-66, Section 13224, 107 Stat. 312, 485-486 (1993) was enacted by Congress and signed into law.

11. Section 13224 of the Revenue Reconciliation Act required assistance received from the Federal Savings and Loan Insurance Corporation with respect to certain losses to be treated as compensation. As a result of this provision, which was made effective March 4, 1991, Centex could no longer claim an income tax deduction for its net operating losses.

12. Section 13001(d) of the Revenue Reconciliation Act waived penalties under Section 6655 of the Internal Revenue Code for any period prior to March 16, 1994 when those penalties were attributable to underpayments created or increased by any provision of the Act.

13. After the Revenue Reconciliation Act was enacted on August 10, 1993, Centex knew it would be unable to carry forward its net operating losses and would have a New Mexico income tax liability for fiscal year April 1, 1993 through March 31, 1994 in excess of \$5,000.

14. Centex did not make an estimated payment of New Mexico corporate income tax in September 1993 or in December 1993.

15. On March 15, 1994, Centex made its first estimated payment for fiscal year April 1, 1993 through March 31, 1994 in the amount of \$131,000.00. This payment included the estimated payment of \$32,598.75 due September 15, 1993 and the estimated payment of \$32,598.75 due December 15, 1993.

16. The amount at issue in this protest represents the following amounts of penalty and interest on the late payment of estimated tax due in September and December 1993:

September 1993 Payment:	\$3,259.88 penalty + \$2,444.88 interest =	\$5,704.76
December 1993 Payment:	\$1,955.93 penalty + \$1,222.44 interest =	<u>\$3,178.37</u>

## **DISCUSSION**

The issue in dispute is whether Centex is liable for penalty and interest on the late payment of estimated income tax payments due September 15, 1993 and December 15, 1993. Centex argues that Section 3001(d) of the Revenue Reconciliation Act, in conjunction with Department Regulations TA 69:3 (now 3 NMAC 1.11.10) and TA 69:4 (now 3 NMAC 1.11.11) exempted Centex from imposition of penalty and interest on any underpayment of estimated tax due prior to March 16, 1994. Centex also questions whether it was proper for the Department to offset the refund from Centex's 1995 corporate income tax return against tax liabilities that had not been previously assessed.

### **I. Waiver of Penalties Under Section 3001(d).**

The parties agree that Centex was not required to make an estimated payment on June 15, 1993 because, at that time, Centex reasonably believed its income tax liability to New Mexico for fiscal year April 1, 1993 through March 31, 1994 would not exceed \$5,000. After the enactment of the Revenue Reconciliation Act on August 10, 1993, Centex knew it would be unable to carry forward its net operating losses and would have a New Mexico income tax liability in excess of \$5,000. Centex nonetheless failed to make estimated payments due to New Mexico on September 15, 1993 and December 15, 1993.

Centex argues that the waiver of penalties provision in Section 3001(d) of the Revenue Reconciliation Act prohibits the Department from assessing penalty and interest on Centex's late payments. Section 3001(d) states:

(d) WAIVER OF ESTIMATED TAX PENALTIES. No addition to tax shall be made under section 6654 or 6655 of the Internal Revenue Code of 1986 for any period before April 16, 1994 (March 16, 1994, in the case of a corporation), with respect to any underpayment to the extent such underpayment was created or increased by any provision of this chapter.

Section 6654 of the Internal Revenue Code ("IRC") deals with additions to tax for failure by an individual to pay estimated federal income tax. Section 6655 deals with additions to tax for failure by a corporation to pay estimated federal income tax. Neither of these sections has any bearing on penalty and interest imposed for failure to make timely estimated tax payments under state law.

The administration and enforcement of state taxes is not governed by federal law. In *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989), the New Mexico Court of Appeals refused to apply the standard of negligence used to impose penalty under the IRC, finding that the provisions of the federal statute were inconsistent with the provisions of Section 7-1-69(A) NMSA 1978. *See also, State v. Long*, 121 NM 333, 911 P.2d 227 (Ct. App.), *cert. denied*, 121 N.M. 119, 908 P.2d 1387 (1995) (in tax cases, New Mexico courts follow federal law only to the extent they find that law persuasive).

New Mexico has also rejected the argument that the state's use of information contained in a taxpayer's federal income tax return for purposes of calculating state income tax binds the state to the provisions of federal income tax law. In *In re Rates & Charges of Mountain States Telephone & Telegraph Co.*, 104 N.M. 36, 43, 715 P.2d 1332, 1339 (1986), the New Mexico Supreme Court found that New Mexico's Corporate Income Tax Act does not incorporate or adopt the Internal Revenue Code and Treasury Regulations, noting:

New Mexico taxpayers are not instructed to prepare their state returns by following the provisions of the Internal Revenue Code, inserting the words

"New Mexico" or "state" at appropriate points, but simply are required to use the single figure calculated to be their federal taxable income as the starting point for calculating state income tax.

The court of appeals reached a similar conclusion in *Sutin, Thayer & Browne v. Revenue Division of the Taxation and Revenue Department*, 104 N.M. 633, 635, 725 P.2d 833, 835, (Ct. App. 1984), *cert. denied*, 102 N.M. 293, 694 P.2d 1358 (1985), upholding the Department's denial of a request for refund based on a federal income tax credit not recognized under state law.

With regard to Centex's estimated corporate income tax payments for fiscal year April 1, 1993 through March 31, 1994, New Mexico law specifically provides that any taxpayer who fails to pay estimated tax when due "shall be subject to the interest and penalty provisions of Sections 7-1-67 and 7-1-69 NMSA 1978 on the underpayment." Section 7-2A-9.1(C) NMSA 1978 (1993 Repl. Pamp.). The provision in Section 3001(d) of the Revenue Reconciliation Act waiving federal penalties under IRC Section 6655 has no effect on Centex's liability for penalty and interest under New Mexico law.

## **II Regulation TA 69:4**

Centex relies on the indications of non-negligence set out in Department Regulation TA 69:4 (now 3 NMAC 1.11.11) to argue that Centex should not be liable for the penalty imposed under Section 7-1-69 NMSA 1978 (1993 Repl. Pamp.).<sup>1</sup> Specifically, Centex relies on the sixth item listed under TA 69:4:

The following situations may indicate that a taxpayer has not been negligent or in disregard of rules and regulations and the Secretary will consider these circumstances in deciding whether to assess civil penalty as

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<sup>1</sup> Regulation TA 69:4 addresses the imposition of penalty and has no application to interest due on late payments under Section 7-1-67, NMSA 1978 (1993 Repl. Pamp.).

provided by Section 7-1-69, or whether to abate civil penalty as provided in Section 7-1-28:

....

6 with regard to income tax returns only, the Internal Revenue Service abates federal penalty originally assessed for the same or similar reason as the New Mexico penalty....

Centex acknowledges that no federal penalty was assessed or abated in connection with Centex's failure to pay estimated federal income taxes due September 15 and December 15, 1993. Centex nonetheless argues that Section 3001(d) of the Revenue Reconciliation Act should be treated as a preemptive abatement of penalties otherwise due to the federal government.

There is clearly a difference between a situation where the IRS imposes a penalty for late payment that is subsequently abated upon further investigation of the facts and a situation where Congress prohibits the IRS from imposing penalty without regard to the reason for the late payment. In the first situation, the abatement is based on the IRS' determination that the taxpayer was not liable for penalty in the first place. In the second situation, Congress has exercised its legislative authority to suspend the enforcement of a penalty for which taxpayers otherwise would be liable. Only the first scenario supports a finding of non-negligence under item 6 in TA 69:4. The second scenario simply illustrates an exercise of federal policy that the state of New Mexico has not chosen to follow.

It should also be noted that this case does not involve penalties imposed in connection with an income tax return as required by TA 69:4. Under Section 7-1-69(A), a penalty may be imposed for a failure "to pay when due any amount of tax required to be paid...*or* to file by the date required a return...." (emphasis added). Here, penalties were imposed for the failure to make timely estimated income tax payments, not for the failure to file a corporate income tax return.

Regulation TA 69:4 applies when the IRS abates a penalty previously assessed in connection with an income tax return. It does not apply when Congress legislatively prohibits the imposition of penalty in connection with estimated income tax payments.

### **III Regulation TA 69:3**

Centex argues that, regardless of the applicability of TA 69:4, Centex's actions do not come within the following definition of "negligence" set out in Regulation TA 69:3 (now 3 NMAC 1.11.10):

- 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.

At the hearing, Centex was represented by Janet Erickson, its senior tax accountant. Ms. Erickson testified that she was not employed by Centex during 1993 and does not know what discussions took place concerning Centex's liability for New Mexico estimated income tax payments. Ms. Erickson did not present any evidence to indicate that Centex's failure to make estimated payments in September and December 1993 was attributable to anything other than its erroneous belief that Section 3001(d) of the Revenue Reconciliation Act applied to estimated payments required under state as well as federal law. This erroneous belief comes within the definition of negligence set out in TA 69:3.

### **IV. Offset of 1995 Refund Against Unassessed Liabilities.**

At the time the Department applied Centex's refund to its liability for penalty and interest on the late payment of estimated income tax payments, there was no outstanding assessment

against Centex. Although the computer-generated information (referred to as a "Return Inquiry") provided to the taxpayer indicated the existence of an assessment, the assessment number and assessment date were shown as zeros. Gay Romero, an auditor in the Department's protest office, explained that by the time the information was entered into the Department's computer records, the accrued penalty and interest had already been paid by the refund offset and so no assessment number was assigned to the liability. It was not until October 1996 that the Department assigned Assessment No. 2075722 to Centex's refund offset. Centex questions the Department's authority to apply Centex's tax refund for one period to an unassessed liability for a prior period.

Centex's claim for refund of taxes overpaid during the tax year April 1, 1994 through April 1, 1995 was made under Subsection G of Section 7-1-26 NMSA 1978 (1995 Repl. Pamp.), which provides that the filing of a fully completed original corporate income tax return that shows a balance due the taxpayer constitutes the filing of a claim for refund. With regard to the payment of refunds, Subsection C of Section 7-1-29 NMSA 1978 (1995 Repl. Pamp.) provides:

In the discretion of the secretary, any amount of tax due to be refunded may be offset against any amount of tax for the payment of which the person due to receive the refund is liable.

Section 7-1-13(A) NMSA 1978 (1995 Repl. Pamp.) states:

Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to the tax until payment is made. Taxes are due on and after the date on which their payment is required until payment is made.

In this case, Centex became liable for payment of estimated corporate income taxes on September 15 and December 15, 1993. On the day following each due date, Centex also became liable for interest and penalty for late payment. Section 7-2A-9.1(C) NMSA (1993 Repl. Pamp.)

(any taxpayer that fails to pay estimated tax when due "shall be subject to the interest and penalty provisions of Sections 7-1-67 and 7-1-69 NMSA 1978 on the underpayment.")

In March 1994, Centex made the tax payments originally due in September and December 1993. Centex remained liable for accrued penalty and interest on the late payment. It was not necessary for the Department to issue an assessment for the liability to exist. An assessment does not create a tax liability—it merely serves as a demand for payment of the liability. *See*, Section 7-1-17(A) NMSA 1978 (1995 Repl. Pamp.). Based on the authority granted to the secretary in Subsection C of Section 7-1-29 NMSA 1978 (1995 Repl. Pamp.), there was nothing improper in the Department's offset of Centex's refund against an unassessed tax liability.

### **CONCLUSIONS OF LAW**

1. Centex filed a timely, written protest to the action taken by the Department to offset Centex's refund against penalty and interest for which Centex was liable, and jurisdiction lies over the parties and the subject matter of this protest.

2. The provisions of Section 3001(d) of the Revenue Reconciliation Act waiving penalties under IRC Section 6655 for failure to make estimated income tax payments due under federal law does not excuse Centex from payment of penalty and interest imposed for late payment of estimated income tax payments due under New Mexico law.

3. Centex was negligent in failing to make estimated tax payments due to New Mexico in September and December 1993 and penalty was properly imposed under Section 7-1-69 NMSA 1978 (1993 Repl. Pamp.).

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

DONE, this 26<sup>th</sup> day of May 1998.