

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

IN THE MATTER OF THE PROTEST OF
JAMES C. ELLIS, ESQ.
ID. NO. 02-096130-00 8, PROTEST TO
ASSESSMENT NO. 2044140

NO. 98-42

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on July 6, 1998. James C. Ellis, Esq., hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is an attorney whose law offices are located in Albuquerque, New Mexico.
2. The Taxpayer has been in practice since 1981.
3. The Taxpayer is conscientious about ensuring that gross receipts taxes are reported and paid in a timely manner every month and has an excellent record of timely payment with the Department.
4. The process followed every month by the Taxpayer with respect to the payment of gross receipts taxes is that the Taxpayer's Certified Public Accountant

prepares the taxpayer's monthly CRS return, which is the return upon which gross receipts tax, compensating tax and withholding tax are reported to the Department. The return is prepared to leave ample time for Mr. Ellis to sign and mail in the return before the due date. The accountant sends the prepared return together with an envelope pre-addressed to the Department to the Taxpayer's office manager. A check in the amount of the tax due is prepared and after Mr. Ellis has signed the return, the return and check are mailed to the Department. The mailing is accomplished in one of two ways. Either the mail is picked up by the postman when he makes his daily mail delivery to the Taxpayer's office in the morning or it is taken by Mr. Ellis' secretary and deposited in a post office drop box.

5. The Taxpayer followed these same procedures when filing its CRS report for the January, 1995 reporting period. That return reported that the Taxpayer owed \$657.09 in gross receipts tax for that period. The Taxpayer enclosed check no. 6742, dated February 20, 1995, in the amount of \$657.09 with its return and mailed it to the Department.

6. The Department has no record of receiving the Taxpayer's original return and payment for the January, 1995 reporting period.

7. Check no. 6742 never cleared the Taxpayer's checking account.

8. The Taxpayer's accountant reconciles the Taxpayer's checking account on a monthly basis and provides copies of those reconciliations to the Taxpayer.

9. On March 13, 1995, the Taxpayer's accountant provided the Taxpayer with a reconciliation of the Taxpayer's checking account showing that check no. 6742 had not cleared the Taxpayer's account. The listing of check no. 6742 was included with

the listing of all outstanding checks. The listing provides the check number, the date written and the amount, but does not list who the payee of the check is or otherwise point out that the check was to the Department for payment of taxes.

10. The Taxpayer continued to receive monthly checking account reconciliations which listed check no. 6742 as outstanding for the next year. Sometime in May or early June, of 1996, the Taxpayer's accountant brought it to the attention of the Taxpayer that the check to the Department remained outstanding. The Taxpayer then prepared a duplicate return, issued another check in the amount of \$657.09 and mailed them to the Department.

11. After receiving the Taxpayer's duplicate return and payment for the January, 1995 reporting period, on June 27, 1996 the Department issued Assessment no. 2044140, assessing \$65.70 in penalty and \$131.42 in interest for the late payment of taxes for the January, 1995 reporting period.

12. Although the Taxpayer had an excellent reporting history with the Department, the Department never notified or attempted to notify the Taxpayer that it had not received a return and payment from the Taxpayer for the January 1995 reporting period.

13. The Department has a policy to notify Taxpayers under the Combined Reporting System ("CRS") who fail to file returns after they fail to report for two or more reporting periods.

14. On July 1, 1996, the Taxpayer filed a written protest of Assessment no. 2044140 with the Department, protesting the imposition of penalty and interest.

15. The Department has abated the penalty portion of Assessment no. 2044140.

DISCUSSION

The sole issue to be determined herein is whether the Taxpayer is liable for the interest assessed for the late payment of taxes. The Taxpayer argues that no interest should be owing on several grounds. First, the Taxpayer relies upon its history of timely payment of taxes and the fact that it handled the payment of taxes for the January 1995 reporting period in the same manner as it always has for other reporting periods as evidence that it did send the payment to the Department along with its return, which should be treated as a timely payment of tax. Secondly, the Taxpayer relies upon the fact that it discovered the fact that its check had never cleared itself, with no notice from the Department, and took it upon itself to submit an additional return and payment to the Department. Since the Department would not have issued the subject assessment but for the Taxpayer's own actions, the Taxpayer argues that it should not be assessed interest. Finally, as will be explained in more detail below, the Taxpayer argues that Section 7-1-67(a)(3) requires that interest can only be imposed for periods after the Department has made a demand for payment, and since there was no such demand in this case, the assessment of interest is invalid.

Prior to addressing these arguments, it should be noted that Section 7-1-17(C) NMSA provides that there is a presumption of correctness which attaches to any assessment of tax. "Tax" is defined at Section 7-1-3(U) to include, "the amount of any interest or civil penalty relating thereto", unless the context of the statute construed requires otherwise. Because there is nothing in Section 7-1-17(C) to suggest that interest

assessed was not included in the presumption of correctness of an assessment, the presumption attaches to the assessment of interest. This means that the burden of proof is on the Taxpayer to show that the assessment of interest is improper or incorrect.

Section 7-1-67(A) NMSA 1978 (1993 Repl. Pamp.)¹ imposes interest, “[I]f any tax is not paid on or before the day on which it becomes due,....” Section 7-1-13(B) provides that “the payment of any tax or the filing of any return may be accomplished by mail.” The definitions of “paid”, “pay” and “payment” found in the Tax Administration Act are singularly unhelpful. “Paid” is defined to include the term “paid over”, “pay is defined to include the term “pay over” and “payment” is defined to include the term “payment over”. Section 7-1-3 (J)(K) and (L), respectively. A common sense approach to the issue of payment would indicate that a payment must be delivered in order to be considered to be made. Thus, the delivery of a negotiable instrument, such as a check, with sufficient funds such that the check will be honored, would constitute payment. This approach is supported by Regulation 3 NMAC 10.2.2 which provides that “If a mailing is not received by the department, the contents of the mailing are not timely.” In this case, there was no timely payment of tax because although I do not doubt that the Taxpayer wrote a check for which sufficient funds for payment existed and mailed that check to the Department, the Taxpayer has not met its burden of proving that the check was actually delivered to and received by the Department. The Taxpayer’s excellent record of timely payment notwithstanding, it is undisputed that the check was never cashed, and the Department has no record of receiving the check or the Taxpayer’s original return. All of this is consistent with the fact that the

¹ The 1993 version of the statute is cited because that was the one in effect at the time the interest began to accrue based upon the nonpayment of tax. The statute has not been amended in any way material to the

Department never received the check. We will probably never know what happened to the Taxpayer's original check. It might have been lost by the Department, but it is equally possible that it was lost by the postal authorities who the Taxpayer entrusted to deliver the check and return. Because the burden of proof is upon the Taxpayer and we have no proof of delivery to the Department, it must be concluded that the taxes owing were not paid when they were due, thus providing the basis for the assessment of interest.

The Taxpayer asks that its excellent record of timely payment of taxes be taken into account with regards to the imposition of interest for this one incident of late payment. While the Taxpayer's record of timely payment is laudable and as mentioned before, I have no doubt that the Taxpayer also mailed the payment in issue in a timely manner, the imposition of interest is governed by statute and this decision maker does not have the discretion to disregard the dictates of the statute. Specifically, Section 7-1-67(A) provides that:

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)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to Section 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes with only three exceptions to the imposition of interest countenanced by the statute. Those are provided for in subparagraphs 1, 2 and 3 of Section

issues raised in this matter since that version. Unless otherwise noted, all statutory citations herein will be

7-1-67(A). The applicability of exception 3 will be discussed below, but none of the exceptions allow for the consideration of a taxpayer's payment record for other reporting periods.

The Taxpayer argues that it falls within the exception to the imposition of interest provided at Section 7-1-67(A)(3), which provides:

if demand is made for payment of any tax including accrued interest, and if such tax is paid within ten days after the date of such demand, no interest on the amount so paid shall be imposed for the period after the date of the demand.

The Taxpayer argues that this exception is applicable because it brought to the Department's attention the fact that its first check had never been cashed and that the taxes had not been paid, with no demand for payment ever coming from the Department, itself. The Taxpayer then argues that this exception requires that no interest be charged because the statute should be read to forgive the imposition of interest whenever taxes are paid without the necessity of a demand for payment from the Department.

While it is undisputed that in this case, the Department never made a demand for the payment of the tax prior to its payment by the Taxpayer, the language of the statute does not support the construction given it by the Taxpayer. There is no language in the provision which forgives the imposition of interest *before* a demand for payment has been made. What the statute does, by its unambiguous wording, is to forgive the imposition of interest *after* a demand for payment has been made. Section 7-1-67(B) provides that:

Interest due to the state under Subsection A or D of this section shall be at the rate of fifteen percent a year, computed at the rate of one and one-fourth percent per month ***or any fraction thereof.*** (emphasis added)

to the 1993 replacement pamphlet.

By imposing interest calculated on a monthly basis, or any fraction of a month, even a payment that is a fraction of a month late, such as even one day or one thirtieth of a month, carries an entire month's interest. What the third exception to the imposition of interest under Section 7-1-67 does is to prohibit the imposition of interest for what, at most, is a ten day period, running from the date the demand for payment is made until ten days thereafter. This tax policy basis underlying such an exception to the imposition of interest is obvious. It encourages taxpayers to promptly pay their taxes after a demand for payment is made and it protects such conscientious taxpayers from the imposition of an additional month's interest if they act quickly to pay their liability. It has no applicability in this case, however, because no demand for payment was ever made by the Department. While it may be small consolation to Mr. Ellis, who has acted forthrightly in how he has handled the payment of taxes for his business, by paying the taxes when he did, without demand from the Department, he has potentially saved himself from the accrual of even more interest which would have accrued had the Department ever gotten around to questioning the absence of a payment and return for the January, 1995 reporting period and assessed the tax within the seven year statute of limitations which would apply.²

The Taxpayer also relies upon a confidential Decision and Order issued by this hearing officer on February, 14, 1992 which granted a taxpayer's protest of the assessment of interest where the Department had no record of receiving the taxpayer's check which the taxpayer claimed to have mailed to the Department. In that case, the

² Section 7-1-18 (C) provides that in the case of the failure by a taxpayer to file any required return, the tax relating to the period for which the return was required may be assessed within seven years from the end of the calendar year in which the tax was due, which in this case would have given the Department until December 31, 2002 to assess tax and applicable interest.

Taxpayer testified that it mailed both its check and return to the Department in a timely manner and provided evidence to establish that the check had been written to the Department and that sufficient funds were in place for the check to be honored, just as the facts in this case established. What distinguished that case from this case, however, was that although the Department had no record of receiving the check, its records did reflect that it received the Taxpayer's return. Additionally, because the tax involved was personal income tax, the Taxpayer was also able to establish that it mailed both its federal return and check to cover those taxes on the same day its state return was mailed. The fact that the Department had received the return eliminated the possibility that the return had been lost in the mail and not received by the Department. The fact that the federal return and payment had also been mailed in an identical and timely manner corroborated the Taxpayer's testimony about its payment of its New Mexico liability. Under those facts, I concluded that it was more likely than not that the Department had received, but lost the Taxpayer's check. Thus, the Taxpayer was able to meet its burden of proving timely payment. As noted earlier, while I do not doubt that Mr. Ellis' office mailed the return and payment to the Department in a timely manner in this case, I had no proof to indicate that the Department had received the payment and return.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest, pursuant to Section 7-1-24 NMSA 1978, to Assessment No. 2044140 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Because the Department never received the Taxpayer's original payment of its taxes for the January, 1995 reporting period, those taxes were not paid when they were due.

3. Because the Taxpayer's taxes for the January, 1995 reporting period were not paid when due, interest was properly imposed pursuant to Section 7-1-67(A) NMSA 1978.

4. The exception to the imposition of interest for unpaid taxes found at Section 7-1-67(A)(3) has no applicability to the facts of this protest.

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

DONE, this 6th day of August, 1998.