

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

IN THE MATTER OF THE PROTEST
OF JAVIER PADIAL
ID. NO. 02-339524-00 9
ASSESSMENT NO. 2136436

98-44

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 14, 1998, before Margaret B. Alcock, Hearing Officer. Javier Padial appeared on his own behalf. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, 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. During 1994, Mr. Padial was a member of a band that regularly performed at the High Mesa Inn in Santa Fe.
2. The band members worked as independent contractors and were not employees of the hotel.
3. The High Mesa Inn issued a separate check to each band member in payment of services rendered. At the end of the year, the hotel issued Mr. Padial a Form 1099 showing the amount of income he had earned during the year.
4. Mr. Padial reported and paid state and federal income tax on his 1994 income from High Mesa Inn.

5. Mr. Padial was not aware that a self-employed person is liable for gross receipts tax on his business income and was not given proper advice on this issue by his tax advisor.

6. In 1997, the Department received information from the Internal Revenue Service concerning Mr. Padial's 1994 business income. When the Department investigated, it found that Mr. Padial was not registered with the Department for payment of gross receipts tax.

7. On May 18, 1997, the Department issued Assessment No. 2136436 to Mr. Padial for calendar year 1994 in the amount of \$667.94 gross receipts tax, \$66.80 penalty and \$258.83 interest.

8. On June 10, 1997, Mr. Padial filed a written protest to the Department's assessment of penalty and interest.

9. At the August 14, 1998 hearing, the Department stipulated that Mr. Padial was not negligent in failing to report gross receipts tax on his 1994 income and agreed to abate the \$66.80 of penalty assessed against Mr. Padial.

10. At the August 14, 1998 hearing, Mr. Padial produced receipts showing he has paid \$80.00 on the assessment. The record was left open to allow the Department to confirm that these payments were properly applied and to update the interest currently due on the assessment.

11. Following the hearing, Debbie V. Martinez, Tax Accounts Auditor, submitted information that there is a balance of \$587.94 tax principal and \$370.58 interest remaining on Assessment No. 2136436. The interest figure is updated through August 25, 1998.

DISCUSSION

The sole issue presented is whether Mr. Padial is liable for interest on his underpayment of gross receipts tax on business income earned during calendar year 1994.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of tax 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 tax 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, 105, 560 P.2d 167, 169 (1977). Even taxpayers who contact the Department before tax is due and obtain a formal extension of time to pay the 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.

Mr. Padial asks the Department to consider that his failure to pay gross receipts tax was unintentional and that he made every effort to comply with pertinent tax laws. The Department has

taken this into account by abating the \$66.80 negligence penalty assessed against Mr. Padial. The reason for a late payment of tax does not, however, affect the imposition of interest. Unlike the assessment of penalty, the assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. 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. Accordingly, the Department does not have authority to abate the assessment of interest against Mr. Padial.

CONCLUSIONS OF LAW

1. Mr. Padial filed a timely written protest to Assessment No. 2136436 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 Mr. Padial for unpaid gross receipts tax due on income he earned during 1994.

For the foregoing reasons, Mr. Padial's protest IS DENIED.

Dated August 19, 1998.