

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

IN THE MATTER OF THE PROTEST OF
DIANE GONZALES
ID. NO. 02-360716-00 5, PROTEST TO
ASSESSMENT NO. 2233049

NO. 99-04

DECISION AND ORDER

This matter came on for formal hearing on January 19, 1999 before Gerald B. Richardson, Hearing Officer. Diane Gonzales, hereinafter, "Taxpayer", represented herself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Javier Lopez, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer worked as a home health provider for an elderly woman in Taos for part of 1994.
2. The Taxpayer was not aware of New Mexico's gross receipts tax and its applicability to persons engaged in the business of providing services in New Mexico.
3. The Taxpayer had her 1994 personal income taxes done by a certified public accountant. The Taxpayer's income from providing home health services was reported as income from self-employment on federal Schedule C of the Taxpayer's 1994 federal income tax return.
4. The Taxpayer's accountant did not inform her about New Mexico's gross receipts tax or its applicability to her receipts from providing home health services.

5. The Department has an information sharing agreement with the Internal Revenue Service (IRS) whereby the IRS provides the Department with information concerning the federal tax reporting by New Mexico residents.

6. As a result of this agreement, the IRS provided the Department information about the Taxpayer's 1994 self-employment income.

7. As a result of this information and the fact that the Department had no record that the Taxpayer had reported or paid gross receipts tax upon her receipts from providing home health services, on March 13, 1998, the Department issued Assessment No. 2233049 ("the assessment") to the Taxpayer.

8. The assessment assessed \$614.64 in gross receipts tax, \$61.44 in penalty and \$334.20 in interest for the period of January, 1994 through December, 1994.

9. On April 11, 1998, the Taxpayer filed a protest to the assessment. The Taxpayer protested the imposition of penalty and interest and did not protest the gross receipts tax assessed.

10. The Taxpayer is unemployed and is unable to pay the assessment.

11. The Department has abated the penalty portion of the assessment.

DISCUSSION

The Taxpayer disputes the assessment on the grounds that she is financially unable to pay the assessment. She is presently unemployed and has no way to make payments towards the assessment.

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

- 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).

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 and no exceptions to the imposition of interest are countenanced by the statute. Thus, it doesn't matter why taxes were not paid in a timely manner. Interest is imposed any time that taxes are not paid when they are due, and for the period of time that they are unpaid.

The Taxpayer asks the Department to abate the assessment of interest because she is unable to pay it, and as it continues to accrue, it becomes even more difficult or impossible to pay. The Taxpayer also asks for abatement of the tax principal for the same reason, inability to pay, even though she does not dispute that the tax was properly imposed upon her receipts from performing home health services. The fact that a taxpayer does not have the financial ability to pay an assessment does not provide the Department with a basis for abating the assessment. Section 7-1-20 NMSA 1978 is the provision of the Tax Administration Act which sets out the Department's authority to compromise assessments of tax. It 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.

In this case, there is no basis to find that there is a good faith doubt as to the Taxpayer's liability for the tax. The Taxpayer has admitted that there is a legal basis to assess the gross

receipts tax, and Section 7-1-67 contemplates no exception to the imposition of interest when taxes were not paid when they were due. Thus, the Department has no legal authority under Section 7-1-20 to compromise the assessment. Additionally, Article IV, § 32 of the New Mexico Constitution prohibits the release of any debt owing to the state except by the payment of the debt or by a proper proceeding in court. Thus, there is simply no basis to compromise or release the assessment of tax and interest regardless of whether Ms. Gonzales is ever able to pay the assessment.¹

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2233049 and jurisdiction lies over both the parties and the subject matter of this protest.
2. Interest was properly imposed for the failure to pay gross receipts taxes when they were due.
3. Gross receipts tax was properly imposed upon the Taxpayer's receipts from performing home health services in New Mexico in 1994.
5. There is no good faith doubt about the Taxpayer's liability for gross receipts tax and interest under the facts of this case and so the Department lacks the authority to compromise the assessment pursuant to § 7-1-20 NMSA 1978.
6. Inability to pay is no defense to a proper assessment of tax and interest.

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

DONE, this 27th day of January, 1999.

¹ Although the Constitution prohibits the forgiveness of any debts owing the state, the Legislature has limited the Department's authority to take actions to enforce and collect tax debts. Section 7-1-19 NMSA 1978 prohibits the Department from taking any action to collect taxes due under an assessment after ten years from the date of the assessment.