

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

IN THE MATTER OF THE PROTEST OF
LENYA REESE
d/b/a St. Francis Birth and Family Center
ID No. 02-351575-00 9
ASSESSMENT NO. 2205272

99-21

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 14, 1999, before Margaret B. Alcock, Hearing Officer. Lenya Reese appeared on her on behalf. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During calendar year 1994, Lenya Reese owned a business known as St. Francis Birth & Family Center.
2. At the time the business was set up, Ms. Reese's accountant registered St. Francis Birth & Family Center for payment of gross receipts tax as a corporation
3. Although no steps were ever taken to incorporate the business, which was operated as a sole proprietorship, Ms. Reese filed gross receipts tax returns under the corporate tax identification number obtained by her accountant.
4. In 1997, the Department received information from the IRS concerning Ms. Reese's business income as reported on Schedule C of her 1994 federal income tax returns.

5. When the Department investigated, it determined that no gross receipts tax reports had been filed in 1994 for a business registered in Ms. Reese's name. The Department did not check the records of corporate taxpayers because income from corporations should not be reported on Schedule C of the owners' federal income tax returns.

6. On January 2, 1998, the Department mailed Ms. Reese a notice of assessment of \$1,811.81 in gross receipts tax, penalty and interest due on the business income reported on Schedule C of her 1994 federal income tax return.

7. On January 8, 1998, Ms. Reese filed a protest to the Department's assessment, explaining that her business was registered with the Department as a corporation and had reported and paid gross receipts tax under the corporate identification number.

8. After checking the corporate identification number provided by Ms. Reese, the Department determined that the amount reported as gross receipts from the business during 1994 was less than the amount of business income Ms. Reese reported on her 1994 Schedule C.

9. This reporting discrepancy represented insurance payments Ms. Reese received during 1994 but which she erroneously believed were not subject to gross receipts tax.

10. The Department adjusted its assessment to reflect the tax reported under the corporate identification number and determined that Ms. Reese was still liable for \$445.29 gross receipts tax, \$49.34 penalty and \$255.43 interest.

DISCUSSION

At the hearing, Ms. Reese acknowledged that she underreported her 1994 gross receipts by \$7,124.88. The matter at issue is whether the Department correctly calculated the tax, penalty and interest due on this underpayment.

The Department's method of calculating tax, penalty and interest is set out on a worksheet introduced as Exhibit B. The Department first determined the amount by which receipts were either underreported or overreported during each month of 1994. It then calculated tax, interest and penalty for each of the nine months in which there was an underreporting of receipts. The Department did not offset or credit Ms. Reese with any interest or penalty for the three months in which receipts were overreported.

Ms. Reese maintains she should receive a credit for the overreported months. This could be done by applying the amount of overpayment in one month against any underpayment in the next month, thereby reducing the tax, penalty and interest due for the underreported months. Alternatively, the Department could credit the taxpayer with interest on any overpayments of tax. The interest due the taxpayer on overpayments would then offset the taxpayer's liability for interest on underpayments of tax in other months. While these methodologies have a certain logic, they are contrary to the legislature's statutory scheme for payment of interest.

With respect to overpayments of tax, no refund or credit can be made by the Department until the taxpayer files a written claim for refund. *See*, Regulation 3 NMAC 1.9.8. No interest is due on overpaid taxes unless the Department fails to refund the taxes within one hundred and twenty days of the date the claim for refund is filed. *See*, Section 7-1-68(D)(5) NMSA 1978. In contrast, payment of interest on underpayments of tax "shall be paid to the state on such amount from the first day following the day on which the tax becomes due....". Section 7-1-67(A) NMSA 1978. In short, New Mexico's statutory scheme for the payment and reporting of taxes treats overpayments and underpayments differently. In *Amoco Production Company v. New Mexico Taxation and Revenue Department*, 118 N.M. 72, 878 P.2d 1021 (Ct. App. 1994), the court of appeals confirmed that this statutory scheme does

not allow the offsetting of overpayments against underpayments in order to reduce the amount of interest due to the state.

Ms. Reese's second argument is that she should not be liable for interest or penalty on her 1994 underpayments of tax because the Department granted her a refund of tax in 1995. Ms. Reese mailed the Department a check for \$138.74 sometime in 1995. The payment was not accompanied by a tax return, nor did Ms. Reese indicate what tax period or assessment the payment was intended to cover. At that time, the Department had not received the IRS information which was later used to determine Ms. Reese's underreporting of receipts during 1994. Accordingly, the Department notified Ms. Reese of a potential overpayment of tax and requested that she either file a return to which the payment could be applied or file a claim for refund. Ms. Reese filed a claim for refund and received a check from the Department in the amount of \$138.74.

Ms. Reese believes that by granting her claim for refund in 1995, the Department was representing that she had no tax liability for prior periods. At the time the refund was made, however, the Department had no way of knowing that Ms. Reese had failed to report gross receipts tax on a portion of her business income. New Mexico has a self-reporting tax system and it is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, Section 7-1-13, NMSA 1978. While the Department makes every effort to advise taxpayers of the status of their accounts, the ultimate responsibility for payment of tax remains with the taxpayer. In this case, the Department's 1995 refund was based on Ms. Reese's own self-reporting of gross receipts tax—the refund did not represent a determination that that her reporting was correct.

CONCLUSIONS OF LAW

1. Lenya Reese filed a timely, written protest to Assessment No. 2205272, and jurisdiction lies over the parties and the subject matter of this protest.

2. Ms. Reese is not entitled to offset overpayments of tax in one month against underpayments in another month, nor is she entitled to interest on the overpayments.

3. The Department's 1995 refund of tax did not constitute a final determination of Ms. Reese's gross receipts tax liability for prior periods, and the Department is not estopped from assessing Ms. Reese interest and penalty on later discovered underpayments of tax for prior periods.

4. Ms. Reese is liable for tax, interest and penalty in the amounts shown on the Department's Exhibit B.

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

DATED May 12, 1999.