

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

IN THE MATTER OF THE PROTEST OF
WOLF CORPORATION
ID NO. 01-148959-00-6
ASSESSMENT NO. 2509007

No. 00-20

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 10, 2000, before Margaret B. Alcock, Hearing Officer. Wolf Corporation ("Taxpayer") was represented by Sheila Burns, its Controller. 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. The Taxpayer is a corporation engaged in business in New Mexico.
2. Due to the large dollar volume of the Taxpayer's business, the Taxpayer is required to pay its monthly gross receipts, compensating and withholding taxes, which are reported under New Mexico's Combined Reporting System (CRS), according to the special payment procedures set out in Section 7-1-13.1 NMSA 1978.
3. Section 7-1-13.1 NMSA 1978 requires taxpayers whose average monthly tax payments during the preceding calendar year equaled or exceeded \$25,000 to pay their current taxes in accordance with one of five different payment methods set out in Subsection B of Section 7-1-13.1. Each of these payment methods is designed to insure that funds are immediately available to the state on or before the tax due date.
4. During the period at issue, the Taxpayer's usual method of paying its monthly CRS taxes was to hand-deliver a check drawn on a New Mexico bank to the Department's Santa Fe office

one banking day prior to the due date. This method of payment complies with the requirements of Subsection B(4) of Section 7-1-31.1.

5. The Taxpayer's CRS taxes for the February 2000 reporting period were due on or before March 25, 1995, which was a Saturday. Payments made by check drawn on a New Mexico bank had to be received by the Department on or before Friday, March 24, 2000.

6. On March 24, 2000, Sheila Burns, the Taxpayer's controller, prepared the Taxpayer's February 2000 CRS return and wrote out a check to cover the taxes due for that period.

7. March 24th was an unusually busy day for Ms. Burns, and she lost track of time. When she remembered that she still had to deliver the Taxpayer's February tax payment to the Department, it was already after 5:00 p.m.

8. Ms. Burns delivered the Taxpayer's check to the Department at 10:00 a.m. the following Monday, March 27, 2000. Ms. Burns was aware the payment was late according to the special payment requirements of Section 7-1-13.1 and pointed this out to the Department employee who accepted the check.

9. On March 31, 2000, the Department issued Assessment No. 2509007 to the Taxpayer in the total amount of \$2,723.06, representing \$1,675.73 of penalty and \$1,047.33 of interest due on the late payment of the Taxpayer's February 2000 CRS taxes.

10. On April 18, 2000, the Taxpayer filed a written protest to the Department's assessment of penalty and interest.

DISCUSSION

The Taxpayer does not dispute that its February 2000 CRS taxes were paid one day late under the special payment provisions set out in Section 7-1-13.1 NMSA 1978. Nor does the Taxpayer dispute that the Department's assessment was made in accordance with the provisions of New Mexico law governing imposition of penalty and interest on late tax payments. Instead, the Taxpayer asserts that the law as applied in this situation is excessively harsh and asks the hearing

officer to exercise “judicial discretion” to relieve the Taxpayer of at least some portion of the assessment.

The Taxpayer misunderstands the scope of the hearing officer’s authority. The term “judicial discretion” has been defined as “the option which the judge may exercise between the doing and the not doing of a thing, the doing of which can not be demanded as an absolute right of the party asking it to be done.” *State v. Hargrove*, 81 N.M. 145, 147, 464 P.2d 564, 566 (Ct. App. 1970). Judicial discretion may not be exercised to override valid laws passed by the legislature. As the New Mexico Supreme Court stated in *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994): “If the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices.” *See also, State ex rel. Coll v. Johnson*, 1999 NMSC-036, 990 P.2d 1277 (it is not the province of the court to question the wisdom, policy, or justness of legislation enacted by the legislature). In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the supreme court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. *See, e.g., Chalamidas v. Environmental Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit)*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984) (stating that an "agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue*, 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct. App. 1972).

In this case, Section 7-1-67 NMSA 1978 governs the imposition of interest and Section 7-1-69 NMSA 1978 governs the imposition of penalty on the Taxpayer’s late payment of tax. The Taxpayer acknowledges that the Department’s assessment was made in accordance with these statutes. The

Taxpayer's request that the hearing officer override the provisions of Sections 7-1-67 and 7-1-69 NMSA 1978 to relieve the Taxpayer of the statutorily-mandated consequences of its failure to timely pay its February 2000 CRS taxes is not a request the hearing officer has the authority to grant.

The Taxpayer asserts that restricting the power of courts and administrative agencies to mitigate penalties assessed against a taxpayer violates the balance of power between the different branches of government. This issue has already been addressed in the context of criminal penalties. In *State v. Mabry*, 96 N.M. 317, 321, 630 P.2d 269, 273 (1981), the defendant challenged mandatory sentencing guidelines imposed by the legislature, arguing that denying the courts the right to suspend sentences violated the doctrine of separation of powers. The court rejected the defendant's argument as follows:

[T]his Court does not sit as a super-legislature with the power to uphold or strike down the laws of the state based upon our own judgment as to the wisdom and propriety of such laws. *See In re McCain*, 84 N.M. 657, 506 P.2d 1204 (1973). So long as the Legislature acts within the parameters of its constitutional powers and limitations, this Court is powerless to intercede. *Id.*

Thus the scope of our review is here limited to whether the Legislature had the power to enact these statutes. It has long been recognized in this state that it is solely within the province of the Legislature to establish penalties for criminal behavior. *See State v. Archibeque*, 95 N.M. 411, 622 P.2d 1031 (1981); *State v. Holland*, 91 N.M. 386, 574 P.2d 605 (Ct. App. 1978).

See also, State v. Michael V. 107 N.M. 305, 756 P.2d 585 (Ct. App. 1988) (the fixing of penalties is a legislative function and the trial court has authority to impose only what has been authorized by the legislature). If the courts do not have the power to alter criminal penalties set by the legislature, it is clear that an administrative hearing officer does not have the power to alter civil tax penalties imposed by the legislature. The hearing officer is limited to construing the tax statutes as written and applying those statutes in accordance with legislative intent. The hearing officer may not rewrite the language of the statutes or second-guess the wisdom of the legislature's enactments.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2509007 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's assessment of penalty and interest against the Taxpayer was issued in accordance with the provision of Sections 7-1-67 and 7-1-79 NMSA 1978.

3. The hearing officer does not have authority to override the provisions of Sections 7-1-67 and 7-1-69 NMSA 1978 to relieve the Taxpayer of the statutory consequences of its failure to timely pay taxes due to the state.

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

DATED July 17, 2000.