

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

**IN THE MATTER OF THE PROTEST OF
MORIARTY MUNICIPAL SCHOOLS
ID NO. 01-505589-00-2
ASSESSMENT NO. 2525829**

No. 00-31

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 30, 2000, before Margaret B. Alcock, Hearing Officer. Moriarty Municipal Schools ("Taxpayer") was represented by Dr. Elna Stowe, its Superintendent. The Taxation and Revenue Department ("Department") was represented by Lewis Terr, Esq. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a New Mexico school district registered with the Department for payment of withholding taxes, which are reported to the Department on Form CRS-1.
2. The Taxpayer was required to report and pay withholding taxes for the March 2000 report period on or before April 25, 2000.
3. On February 7, 2000, the Taxpayer hired Priscilla Stidham as its pay manager.
4. The departing pay manager worked with Ms. Stidham to file the Taxpayer's February 2000 withholding taxes. The March 2000 reporting period was the first reporting period Ms. Stidham handled on her own.
5. On March 31, 2000, Ms. Stidham filled out the Taxpayer's CRS-1 return for the March reporting period and took it to Ellen Gove, her supervisor. Ms. Gove signed the return in her capacity as Director for Business and Finance.

6. When Ms. Stidham mailed the Taxpayer's March tax payment to the Department, she failed to include the CRS-1 return with the payment. The Department received the Taxpayer's payment in the amount of \$31,481.69 on April 4, 2000.

7. Some time in April 2000, Ms. Stidham realized she had not included the CRS-1 form with the Taxpayer's March payment.

8. Ms. Stidham called the Department to ask what she should do. Ms. Stidham did not seek the advice of her supervisor, Ms. Gove, nor did Ms. Gove check to be sure Ms. Stidham had properly reported and paid the Taxpayer's March withholding taxes.

9. After several days of "telephone tag", Ms. Stidham finally spoke with a Department employee who told Ms. Stidham to send the March CRS-1 form to the Department.

9. On April 27, 2000, two days after the due date, Ms. Stidham both mailed and faxed the Taxpayer's March CRS-1 return to the Department.

10. On May 5, 2000, the Department issued Assessment No. 2525829 to the Taxpayer, assessing a late-filing penalty for report period March 2000 in the amount of \$629.63.

11. On May 23, 2000, Ms. Stidham filed a written protest to the assessment of penalty.

DISCUSSION

The sole issue to be decided is whether the Department correctly assessed a late-filing penalty against the Taxpayer. While the Taxpayer does not dispute that its March 2000 CRS-1 return was filed two days after the statutory due date, it protests the Department's assessment of penalty on the following grounds: (1) the statutes do not authorize imposition of penalty for late filing when the tax payment was received on time; (2) the penalty should be limited to the minimum five-dollar penalty; (3) the Taxpayer was not negligent in failing to file its return on time; and (4) penalty should not be assessed against a public entity.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. 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. Accordingly, the presumption of correctness applies to the Department's assessment of penalty, and it is the Taxpayer's burden to come forward with evidence to show that the assessment was incorrect.

Statutory Authority to Impose Penalty. The imposition of penalty is governed by Section 7-1-69(A) NMSA 1978, which states:

A. Except as provided in Subsection B of this section, in the case of failure due to negligence or disregard of rules and regulations, but without intent to evade or defeat any tax, to pay when due any amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether any tax is due, there shall be added to the amount as penalty the greater of:

(1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid;

(2) two percent per month or any fraction of a month from the date the return was required to be filed multiplied by the tax liability established in the late return, not to exceed ten percent of the tax liability established in the late return; or

(3) a minimum of five dollars (\$5.00), but the five-dollar (\$5.00) minimum penalty shall not apply to taxes levied under the Income Tax Act or taxes administered by the department pursuant to Subsection B of Section 7-1-2 NMSA 1978.

The Taxpayer argues that this language does not authorize imposition of a penalty for late filing when the tax payment has been received on time. This is clearly incorrect. The statute imposes penalty in the case of failure "to pay when due any amount of tax required to be paid...or to file by the date required a return regardless of whether any tax is due" (emphasis added). The statute is written in the disjunctive: the imposition of penalty for late filing is independent of the penalty for

late payment. *See, State v Dunsmore*, 119 N.M. 431, 433, 891 P.2d 572, 574 (Ct. App. 1995) (the use of the disjunctive “or” indicates that the statute may be violated by any of the enumerated methods).

The Taxpayer also relies on Regulation 3 NMAC 1.11.8.2, which states that penalty “shall be collected in the same manner as and concurrently with, the amount of tax to which it relates, in accordance with Section 7-1-30.” Section 7-1-30 NMSA 1978 states:

Any amount of civil penalty and interest may be collected in the same manner as, and concurrently with, the amount of tax to which it relates, without assessment or separate proceedings of any kind.

The Taxpayer reads these provisions to mean that no penalty may be collected if the underlying tax has already been paid. This is too narrow a reading of the statute. Section 7-1-30 NMSA 1978 is simply intended to relieve the Department from the administrative burden of issuing separate assessments to reflect each month’s accrual of interest and penalty on unpaid taxes. It also provides that interest and penalty *may* be collected in the same manner and at the same time as the underlying tax. The word “may” is permissive, not mandatory. *See, Montano v. Los Alamos County*, 1996-NMCA-108, ¶5, 926 P.2d 307 (it is a canon of statutory construction that the words “shall” and “will” are mandatory and “may” is permissive or directory). Section 7-1-30 NMSA 1978 cannot be construed to deprive the Department of the ability to collect penalty once the tax principal has been paid. To do so would mean that any taxpayer could avoid the statutory penalty for late payment or late filing by making immediate payment of just the principal portion of an assessment. This would lead to an absurd result and is clearly not the intent of the statute.

Five Dollar Minimum Penalty. The Taxpayer maintains it should have been assessed the minimum five-dollar penalty under Subsection (A)(3) of Section 7-1-69 NMSA 1978, rather than the two percent late-filing penalty under Subsection (A)(2). The statute provides that in the case of

failure to either pay tax on time or file a return on time there shall be added as penalty the *greater* of three alternative amounts. The first penalty amount, set out in Subsection (A)(1), applies to late payment and is equal to two percent of the unpaid tax multiplied by the number of months, or fraction thereof, the payment is late. The second penalty amount, set out in Subsection (A)(2), applies to late filing and is equal to two percent of the tax reported on the late return multiplied by the number of months, or fraction thereof, the return is late. The third penalty amount, set out in Subsection (A)(3), is a minimum amount of five dollars. Applying the statute to the facts of this case, the three alternative penalties that could have been assessed against the Taxpayer are:

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| Penalty for Late Payment (2 percent of unpaid tax): | \$ -0- |
| Penalty for Late Filing (2 percent of tax reported): | \$629.63 |
| Minimum Penalty | \$ 5.00 |

The *greater* of the three penalty amounts is the two percent late-filing penalty imposed by Subsection (A)(2) of Section 7-1-69 NMSA 1978, not the five dollar minimum penalty imposed by Subsection (A)(3).

Negligence. The Taxpayer argues that it should not be liable for the penalty assessed because its failure to file the March 2000 return on time was not due to negligence. The term "negligence" is defined in Regulation 3 NMAC 1.11.10 as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

The Taxpayer's failure to file a timely return was due to Ms. Stidham's inadvertent failure to include the return with the payment and her inaction in failing to timely correct the oversight. At the hearing, Dr. Stowe suggested that Ms. Stidham's failure to mail the return as soon as she discovered the problem

was attributable to her inability to reach someone from the Department until two days after the filing deadline. First, I note that Ms. Stidham did not testify at the hearing, and Dr. Stowe's account of Ms. Stidham's efforts to reach the Department is hearsay. Ms. Stidham's protest letter states that once she realized she had not sent the CRS-1 form with the payment, "I contacted the Taxation and Revenue Department. After playing 'telephone tag' for many days, finally I was able to speak with Andre." The fact that Ms. Stidham was not immediately able to make personal contact with someone from the Department does not negate her original negligence in failing to include the return with the payment. Nor does it explain why Ms. Stidham did not consult with her supervisor, Ms. Gove, especially after Ms. Stidham's initial attempt to reach the Department was unsuccessful. I also believe there was at least some negligence on the part of Ms. Gove in failing to insure that Ms. Stidham, a new employee, followed the proper procedures in reporting and filing the Taxpayer's March withholding taxes. The various actions and inactions underlying the Taxpayer's failure to file its March 2000 return in a timely manner support a finding of negligence.

Imposition of Penalty Against a Public Entity. Finally, the Taxpayer asks the Department to either abate or reduce the penalty based on the Taxpayer's status as a public school. The Taxpayer misunderstands the scope of the Department's authority. The Department is charged with enforcing the laws as written by the Legislature and has no authority to change or override those laws. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶¶ 022, 961 P.2d 768, 774-775, the New Mexico 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.

In this case, Section 7-1-69(A) NMSA 1978 governs the imposition of penalty. The statute does not exempt government or nonprofit entities, nor does it provide for reduced penalties against these entities. The Department may not rewrite the language of the statute to excuse the Taxpayer from payment of the statutorily-mandated penalty for failure to file a timely return..

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2525829 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 against the Taxpayer was properly issued in accordance with the provisions of Section 7-1-69(A) NMSA 1978.
3. The Department does not have authority to abate or reduce the penalty assessed against the Taxpayer based on the Taxpayer's status as a public school.

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

DATED November 13, 2000.