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

IN THE MATTER OF THE PROTEST OF
JULIA M. SANTOS **No. 02-04**
ID NO. 02-404765-00-1
ASSESSMENT NO. 2514756

DECISION AND ORDER

A formal hearing on the above-referenced protest was held January 14, 2002, before Margaret B. Alcock, Hearing Officer. Julia M. Santos ("Taxpayer"), now known as Julia M. Griswold, represented herself. 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 1996, the Taxpayer provided home health care services as an independent contractor for Catholic Charities in Albuquerque.

2. The Taxpayer was also caring for her fiancé, Louis Griswold, who became her husband in 1997. Mr. Griswold was seriously ill and required 24-hour-a-day care. He subsequently passed away in March 2001.

3. Throughout the period at issue, the Taxpayer spent virtually every hour she was not working for Catholic Charities caring for Mr. Griswold, which left her both physically and mentally exhausted.

4. The Taxpayer was not aware that New Mexico gross receipts tax was due on her income from Catholic Charities.

5. At the end of 1996, the Taxpayer gave all her financial information to a certified public accountant and asked him to prepare her state and federal income tax returns.

6. The Taxpayer did not ask the accountant who prepared her 1996 income tax returns whether she owed any other type of tax on her business income, nor did the accountant volunteer any information concerning the New Mexico gross receipts tax.

7. In 1999, the Department received information from the Internal Revenue Service concerning the business income reported on the Taxpayer's 1996 federal income tax return. When the Department investigated, it found the Taxpayer was not registered with the Department and had never paid gross receipts tax on this income.

8. On April 9, 2000, the Department issued Assessment No. 2514756 to the Taxpayer in the total amount of $1,104.85, representing $667.08 gross receipts tax, $66.72 penalty and $371.05 interest for the period January through December 1996.

9. On June 23, 2000, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the Department's assessment.

10. In August 2000, the Taxpayer paid the $667.08 of tax principal and withdrew her protest to this portion of the assessment. The Taxpayer continues to protest the assessment of penalty and interest.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty and interest on her late payment of gross receipts tax for reporting periods January through December 1996. The Taxpayer believes the Department waited too long to notify her of her liability for gross receipts tax and that the Department—not the Taxpayer—is responsible for the accrued penalty and interest. The Taxpayer further argues that she should be excused from payment of penalty and interest because she

relied on the advice of her accountant and because she was physically and mentally exhausted by the need to provide 24-hour-a-day care for her fiancé.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 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." *See also*, *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the assessment of penalty and interest paid by the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence showing she is entitled to an abatement of these amounts.

Delay in Assessment. The Taxpayer questions why the Department took so long to notify her of her gross receipts tax liability. By the time she received the Department's assessment in April 2000, the penalty had reached its statutory maximum of 10 percent and substantial interest had accrued. The Taxpayer testified that she would have paid the gross receipts tax if she had been alerted sooner, and believes the Department is at fault for the accrual of penalty and interest.

The Taxpayer's arguments are based on a misunderstanding of New Mexico's self-reporting tax system. 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 those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). There are insufficient resources available for the Department to continually audit every citizen to determine whether he or she has fully complied with the state's tax laws. Although the Department performs periodic "tape matches" that compare information reported to the IRS with information reported to New Mexico, there is some delay before the federal tape match information is made available to the Department.

Section 7-1-18(C) NMSA 1978 gives the Department seven years to assess taxes relating to any period for which required returns were not filed. The April 2000 assessment issued to the Taxpayer was well within the time limits provided by the New Mexico Legislature. For this reason, abatement of penalty and interest is not warranted.

Negligence Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, when a taxpayer fails "due to negligence or disregard of rules and regulations" to report or pay taxes in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

> A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
>
> B. inaction by taxpayers where action is required;
>
> C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent. The arguments raised by the Taxpayer focus on the following examples in the regulation:

> B. the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of the injury or illness;
>
> C. ...
>
> D. the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent;....

Reliance on the Advice of an Accountant. The Taxpayer argues that she was not negligent because her accountant failed to advise her that gross receipts tax was due on her 1996 business income. Regulation 3.1.11.11(D) NMAC provides that a taxpayer will not be considered negligent if the taxpayer's failure to file returns or pay tax was caused by reasonable reliance on the advice of a qualified professional "as to the taxpayer's liability after full disclosure of all relevant facts...." While it is true that the Taxpayer in this case relied on her accountant to prepare her 1996 income tax returns, she never asked the accountant if there were any other taxes due in connection with the business income reported on her federal return. Given these facts, the Taxpayer cannot claim that her failure to report and pay gross receipts tax was an informed decision based on her accountant's advice. The Taxpayer neither requested nor received advice from her accountant concerning the gross receipts tax, and there is no basis to excuse the Taxpayer from payment of penalty under Regulation 3.1.11.11(D) NMAC.

Burden of Caring for Fiancé. During 1996, the Taxpayer was caring for her fiancé, Louis Griswold, who became her husband in 1997. Mr. Griswold was seriously ill and required 24-hour-a-day care. He subsequently passed away in March 2001. Throughout the period at issue, the Taxpayer spent virtually every hour she was not working for Catholic Charities caring for Mr. Griswold, which left her both physically and mentally exhausted. The issue is whether these circumstances are sufficient to establish nonnegligence.

Regulation 3.1.11.11(B) NMAC provides that a taxpayer will not be considered negligent if the taxpayer is disabled because of injury or prolonged illness and demonstrates an inability to either prepare a return or procure the services of another person to do so. Although these facts are somewhat different than those in this case, the eight scenarios set out in Regulation 3.1.11.11 NMAC are only examples. The ultimate question is whether a taxpayer's failure to report or pay tax was

negligent, not whether the situation exactly mirrors the hypothetical facts described in the Department's regulations. While this is a close case, it appears that the Taxpayer's failure to report and pay gross receipts tax was primarily attributable to the physical and mental stress of caring for her fiancé, rather than to a negligent inattention to her business and tax obligations. For this reason, imposition of penalty is not warranted.

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, 560 P.2d 167 (1977). 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. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues; issues of negligence or nonnegligence are simply not relevant. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, Section 7-1-13(E) NMSA 1978.

Here, the Taxpayer failed to pay gross receipts tax due to the state. Although this failure was clearly not intentional, the fact remains that the Taxpayer—not the state—had use of those tax funds during the six-year period at issue. Section 7-1-67 NMSA 1978 requires interest to be paid for any period of time during which the state is denied the use of the funds to which it is legally entitled. Accordingly, interest was properly assessed against the Taxpayers and there is no basis for abatement.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2514756, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was not negligent in failing to report gross receipts tax during the period at issue.

3. The Taxpayer was late in paying gross receipts taxes due to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the $66.72 of penalty assessed. The Taxpayer remains liable for the payment of interest.

DATED January 15, 2002.