

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

IN THE MATTER OF THE PROTEST  
OF *S & J ENTERPRISES, INC.*,  
I.D. NO. 01-863367-00 6, PROTEST TO  
ASSESSMENT NO. 1874545.

No. 95-08

**DECISION AND ORDER**

This matter was heard by Julia Belles, Hearing Officer, on September 18, 1995. S & J Enterprises, Inc. (hereinafter "Taxpayer") was represented by its bookkeeper Torey Mees. The Taxation and Revenue Department (hereinafter "Department") was represented by Bridget A. Jacober, Special Assistant Attorney General.

Based upon the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

**FINDINGS OF FACT**

1. The Taxpayer is a corporation which engages in commercial construction in New Mexico.
2. On February 18, 1994, the Department notified the Taxpayer that it had been selected for audit.
3. The audit started on April 28, 1994.
4. The auditor requested information about certain nontaxable transaction certificates and also requested various documentation.
5. On April 29, 1994, the auditor finished preliminary work at the Taxpayer's office.
6. In May, the auditor left the state to conduct a required out-of-state audit.
7. The Department recommenced the audit on July 14, 1994.
8. The audit was expanded an additional three years because the Department's auditor determined that the Taxpayer underreported its tax liability by more than 25%.
9. Between July 14, 1994 and October 21, 1994, the Taxpayer and the Department had

continual and numerous contacts about, among other things, certain nontaxable transaction certificates.

10. On November 24, 1994, the Department issued Notice of Assessment of Taxes and Demand for Payment No. 1874545, assessing \$19,420.53 in gross receipts tax, \$26.40 in compensating tax, \$1,942.06 in penalty and \$3,438.11 in interest for the reporting period January 1, 1988 through December 31, 1993.

11. The Taxpayer timely paid the assessment on November 22, 1994 and the payment was received by the Department on November 28, 1994.

12. On December 7, 1994 the Taxpayer filed a written protest of the Department's imposition of interest on the assessment for the period from June 1994 until November 24, 1994.

### **DISCUSSION**

The Taxpayer disputes the interest that was calculated on the assessment for the time period from June, 1994 through November 24, 1994. Section 7-1-17(C) NMSA (1995 Repl.) provides that there is a presumption of correctness which attaches to any assessment of tax by the Department. "Tax" is defined to include the amount of interest related to any tax. Section 7-1-3(U) NMSA (1995 Repl.). Therefore, the presumption of correctness attaches to the assessment of interest as well. Thus, the Taxpayer has the burden of proving that the assessment of interest is incorrect.

The Taxpayer attempted to correctly report its taxes, pay its taxes and cooperate with all aspects of the audit. This case arises from a miscommunication between the Taxpayer and the auditor. The audit started on April 26, 1994 and continued through April 29, 1994. The auditor left on April 29, 1994, after asking the Taxpayer to find certain documents. The Taxpayer was left with the impression that the auditor would return on May 2, 1994 to review those documents and finish the audit. The Taxpayer spent considerable time and effort to have those documents ready for the auditor. The auditor, however, left to conduct an out-of-state audit. The audit was

resumed on July 14, 1994. At that time, the Department requested additional information from the Taxpayer. The field work for the audit continued through October 21, 1994. This additional time was needed because the audit was expanded to encompass three more years because of the Taxpayer's underreporting of its liability. This caused the Taxpayer to research and locate additional information and additional nontaxable transaction certificates. The assessment issued November 24, 1994.

A review of these facts does not indicate any unreasonable delay. The Department determined that the audit needed to be expanded an additional three years. This resulted in an audit covering six years of the Taxpayer's records. Time was also needed so that the Taxpayer could find certain nontaxable transaction certificates, as well as supply missing information on other nontaxable transaction certificates. After the audit was completed, the auditor's supervisor reviewed her work to determine that the audit and the auditor's actions and calculations were proper. There was nothing unusual or unreasonable in the time that elapsed. While the Taxpayer could have saved a few months of interest accrual if the Department had issued its assessment earlier, there is no provision in Section 7-1-67 NMSA 1978 (1995 Repl.), the statutory provision governing the imposition of interest, which allows for any circumstances where the accrual of interest is abated. It simply provides that "interest shall be paid" on any unpaid tax from the day on which it became due, until it is paid. The legislature's choice of the word "shall" indicates a legislative intent that the act is mandatory rather than discretionary. *Security Trust v. Smith*, 93 N.M. 35, 596 P.2d 248 (1979). Thus, the legislature has mandated that interest be imposed on any unpaid taxes, regardless of the circumstances surrounding their nonpayment.

Additionally, the Taxpayer's argument misapprehends the nature of our self-reporting tax system. The responsibility to ensure the proper and timely reporting and payment of taxes lies with the taxpayer. This responsibility does not shift to the Department merely because it audited the Taxpayer to determine whether the Taxpayer had properly fulfilled its responsibility liability. If

the Taxpayer had properly determined and reported taxes in the first place, there would be no interest at issue. Although it would be best if a taxpayer's audit liability could be determined expeditiously, there was nothing unreasonable about the length of time elapsed during the audit of the Taxpayer. The audit covered six years and the Taxpayer was given time to obtain missing information on some nontaxable transaction certificates.

#### **CONCLUSIONS OF LAW**

1. The Taxpayer timely filed a written protest, pursuant to Section 7-1-24 NMSA 1978 (1995 Repl.), to the interest portion of assessment No. 1874545 and, therefore, jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's delay in issuing Assessment No. 1874545 was not unreasonable under the facts and circumstances of this case.

3. The Department's delay in issuing Assessment No. 1874545 is not a valid defense to the imposition of interest on unpaid taxes and the interest was properly imposed.

For the foregoing reasons, the Taxpayer's protest is hereby denied.

Done, this 5th day of October, 1995.