

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

IN THE MATTER OF THE PROTEST  
OF **STEVEN R. BONE**,  
ID. NO. 02-318402-00 7, PROTEST  
TO ASSESSMENT NO. 2073732

No. 96-29

**DECISION AND ORDER**

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on December 20, 1996. Mr. Steve Bone, hereinafter, "Taxpayer," represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department," was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer operated a small, one-person business, which performed home remodelling services.
2. The Taxpayer moved to New Mexico five years ago and until the assessment under protest was issued by the Department, the Taxpayer was not aware of New Mexico's gross receipts tax which is imposed upon the privilege of engaging in business.
3. The Taxpayer went to H&R Block every year to have his state and federal taxes prepared. As part of preparing Mr. Bone's federal income tax return, H&R Block prepared a Federal Schedule C, reporting the Taxpayer's income and expenses from his remodelling business.
4. H&R Block never informed the Taxpayer about New Mexico's gross receipts tax and never inquired of the Taxpayer why there was no expense reported for gross receipts taxes paid to New Mexico.
5. The Taxpayer never contacted the Department, prior to the issuance of the assessment at issue, to determine whether there were any tax consequences beyond the responsibility for income

taxes, which arise as a result of engaging in business in New Mexico.

6. The Department and the Internal Revenue Service have entered into an agreement which allows the two taxing agencies to share information they possess about taxpayers.

7. As a result of information the Department received from the Internal Revenue Service, the Department determined that the Taxpayer had gross income from engaging in business in New Mexico upon which the Taxpayer had not reported or paid gross receipts taxes.

8. The Department does not contend that there was any underpayment of New Mexico income taxes by the Taxpayer.

9. As a result of the information received from the Internal Revenue Service, on September 26, 1996 the Department issued Assessment No. 2073732 to the Taxpayer, assessing \$3091.74 in gross receipts taxes, \$309.12 in penalty and \$1,085.29 in interest for the period of January, 1993 through December, 1995.

10. In response to the assessment, the Taxpayer promptly contacted the Department to determine its basis and to find out what remedies were available.

11. On October 22, 1996 the Taxpayer filed a timely, written protest to Assessment No. 2073732.

12. The Taxpayer has paid the tax principle portion of Assessment No. 2073732 and does not dispute his liability for that portion of the assessment. The Taxpayer does dispute his liability for the penalty and interest portion of the assessment.

## DISCUSSION

The issues to be determined are whether the Department's assessment of penalty and interest in the circumstances of this case was proper. The Taxpayer is upset because he never knew about New Mexico's gross receipts tax and that by engaging in business, he was liable for gross receipts tax upon the receipts generated by his business activities. The Taxpayer had to borrow money in order to pay the tax principle portion of the assessment and to pay penalty and interest as well would be a great hardship. The Taxpayer also feels that it is unfair to be assessed penalty and interest because it took the Department so long to bring it to his attention that he was subject to gross receipts taxes on his business activities.

The imposition of penalty is governed by the provisions of NMSA 1978, § 7-1-69(A) (1995 Repl. Pam.), which imposes a penalty of two percent per month, up to a maximum of ten percent: In the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, 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,....

This statute imposes penalty based upon negligence (as opposed to fraud) for failure to timely pay tax.

Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by the Taxpayer to underreport taxes. What remains to be determined is whether the Taxpayer was negligent in failing to report its taxes properly. Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation TA 69:3 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.

In this case, the Taxpayer's failure to report and pay taxes was based upon the Taxpayer's lack of knowledge about New Mexico taxes. New Mexico has a self-reporting tax system which requires that taxpayers voluntarily report and pay their tax liabilities to the state. Because of this, the case law is well settled that every person is charged with the reasonable duty to ascertain the possible tax

consequences of his actions, and the failure to do so has been held to amount to negligence for purposes of the imposition of penalty pursuant to NMSA 1978, § 7-1-69. *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).

The Taxpayer's argument that the Department should have notified him about his obligation to pay gross receipts taxes, or at least notify him sooner than it did, fails to understand that our self-reporting tax system places the burden of knowledge about the tax consequences of our actions upon taxpayers rather than on the taxing authorities. A self-reporting tax system relies upon taxpayers, who have the most accurate and direct knowledge of their activities so as to make a judgment about taxability, to accurately report their tax liabilities to the government. There are insufficient government resources to audit every taxpayer periodically to otherwise assure tax compliance. The imposition of penalty provides taxpayers with an incentive to understand the tax consequences of their actions and to accurately report their taxes. Otherwise, if the only consequence of an audit and determination of underpayment of tax was the payment of the tax which was owed, it would always advantage a taxpayer to simply underreport taxes and to pay them if they were found out.

In this case, Mr. Bone failed to inquire of the tax authorities if he might have any tax liability in addition to income tax, on his business activities. The time to make such inquiry is at the time of commencement of a business. If that had been done, the Taxpayer would have understood his tax obligations and he could have done what most businesses do with respect to the gross receipts tax, which is to pass the cost of the tax on to the customer at the time the goods or services are invoiced. Although Mr. Bone did consult with a tax advisor, H&R Block, this was not done until year end. Because Mr. Bone was not aware of gross receipts taxes, he did not know to inquire of H&R Block about any business tax liability and he received no advice from them about any taxes other than

income taxes.<sup>1</sup> Thus, although reliance upon the advice of tax counsel or an accountant can be a defense to the imposition of penalty under TA Regulation 69:4, there was no evidence in this case that Mr. Bone received any advice with regard to gross receipts taxes so as to obviate the imposition of penalty.

In this case, although the Taxpayer acted in good faith, with no intention to avoid the payment of taxes, the Taxpayer was negligent in failing to take such action as was required to determine his business tax liability. Because the Taxpayer was negligent, penalty was properly imposed.

NMSA 1978, § 7-1-67(A) addresses the imposition of interest on tax deficiencies and provides as follows:

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)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to § 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus, it doesn't matter why taxes were unpaid. Interest is imposed for the period of time that they are unpaid.

The Taxpayer's argument essentially conceives of interest as a penalty imposed to punish a taxpayer for the late payment of taxes. This argument misapprehends the nature of the assessment of interest. Interest is imposed to compensate the state for the lost value of having tax revenues at the time they are required to be paid. Those tax revenues could have been invested by the state and

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<sup>1</sup> H&R Block is widely known as an income tax preparation service. In all probability, it was H&R Block's understanding that they were being engaged only for purposes of preparing the Taxpayer's income tax returns. Nonetheless, it makes one question the competency of their service that they failed to inquire of the Taxpayer why he had no business expense for gross receipts taxes given the broad applicability of the gross receipts tax to nearly all business activities in New Mexico.

interest earned upon those revenues, until the state needed to use the money to meet its obligations. While one may disagree with the rate of interest set by the legislature, as being excessive in comparison with market rates of interest, that is a matter within the sound discretion of the legislature, and the Department is without authority to substitute its own judgment for that of the legislature in setting the rate of interest to be imposed. Because the Taxpayer was late in making payment of the gross receipts taxes assessed in this case, interest was properly imposed.

#### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to Assessment No. 2073732, pursuant to NMSA 1978, § 7-1-24 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer was negligent in failing to determine the tax consequences of engaging in business in New Mexico and penalty was properly imposed for failing to timely report and pay gross receipts taxes.

3. The Taxpayer was late in paying gross receipts taxes upon his receipts from engaging in business in New Mexico and interest was properly imposed.

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

DONE, this 27th day of December, 1996.