

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

IN THE MATTER OF THE PROTEST OF  
**RIO RANCHO PHARMACY, I.D. No.**  
02-045862-00 2, PROTEST TO  
Assessment Nos. 1958951, 1958952  
and 1958953, Docket No. 96-04-28

No. 97-05

**DECISION AND ORDER**

This matter came on for hearing on January 9, 1997 before Ellen Pinnes, Hearing Officer. Rio Rancho Pharmacy ("the Taxpayer") was represented by its president, Jaime Sirgany, R.Ph. The Taxation and Revenue Department ("the Department") was represented by Frank D. Katz, Special Assistant Attorney General.

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

**FINDINGS OF FACT**

1. The Taxpayer, Rio Rancho Pharmacy, does business as a pharmacy in Rio Rancho, New Mexico.
2. The assessments at issue, Nos. 1958951, 1958952 and 1958953, involve taxes owed by Rio Rancho Pharmacy for the months of December 1992, January 1993 and February 1993. The taxes underlying the assessments were those required to be reported in the CRS-1 return, which is used to report gross receipts, compensating, and withholding taxes.
3. The Department did not receive timely CRS-1 tax reports or tax payments from Rio Rancho Pharmacy for these three months.
4. Assessments for these taxes, with penalty and interest, were originally issued to the Taxpayer in February and March 1995. (*See* Department Exhibits 1 through 3.) Those

assessments were based on estimates by the Department, as the Department at that time had not received tax reports from the Taxpayer for these months. The estimated amounts were significantly higher than the tax amounts ultimately determined to be due.

5. The Taxpayer determined the actual amount of tax owed for each month and paid the taxes in 1995.

6. After the taxes were paid, the Department on September 7, 1995 issued Assessment Nos. 1958951, 1958952 and 1958953 for penalty and interest on the amount of tax determined to be due, in lieu of the earlier assessments based on estimated amounts. Thus, the assessments at issue here are for penalty and interest only and not for the taxes themselves. The penalty amounts are \$692.45 for December 1992, \$503.12 for January 1993, and \$819.97 for February 1993.

7. The precise date on which the Taxpayer paid the taxes due for December 1992 through February 1993 is not established in the record. Payment was made at some time between March 1995, when the original assessments were issued, and September 1995, the date of the revised assessments.

8. The Taxpayer filed a timely protest of the assessments by its letter dated September 10, 1995.

9. The Taxpayer originally protested imposition of both interest and penalty. At the hearing, the Taxpayer sought clarification from the hearing officer regarding imposition of interest, and withdrew its protest of the interest. The Taxpayer continues to protest the penalty imposed.

10. The Taxpayer maintained its financial and tax data, along with other information pertaining to its business operations, in a computerized records system. That system listed checks as having been issued for payment of the taxes due with the CRS-1 report, at the time those payments were due.

11. The Taxpayer does not have copies of either the returns or the checks for December 1992 through February 1993 or for other months in 1992 which are not at issue here. The checks

shown as having been issued for payment of taxes due for December 1992 through February 1993 were never cashed and did not clear the Taxpayer's bank account.

12. The Taxpayer's president and pharmacist, Jaime Sirgany, R.Ph., was responsible for overseeing accounting and tax work done by the Taxpayer's employees who handled these tasks. It was Ms. Sirgany who reconciled checks issued by the Taxpayer and those that cleared the company's bank account.

13. The Taxpayer's bookkeeper who handled federal and state tax payments appeared to Ms. Sirgany to be handling her job competently. However, while this staff member was on vacation in 1992, Ms. Sirgany became aware that there were discrepancies in the reporting and payment of the company's federal tax obligations.

14. The bookkeeper was injured in a serious accident in late 1992 or early 1993, leaving her bedridden and no longer able to work.

15. Ms. Sirgany also had a serious accident in the fall of 1992. Due to injuries suffered in the accident and to Ms. Sirgany's pregnancy, she was unable to work full-time at the Taxpayer's premises for approximately a year, from late 1992 to late 1993. During this time, she did some work from her home based on paperwork delivered to her there. One of the tasks she handled during this time was attempting to correct problems with the Taxpayer's federal tax payments.

16. Following Ms. Sirgany's return to work at the pharmacy in late 1993, she became aware that the balance in the company's bank account was higher than it should have been, indicating that some checks issued were not clearing the bank.

17. The Taxpayer has had significant difficulties with its computerized records systems, due to power outages and other problems. Large amounts of data have been lost from the system, with extensive work being required on the part of the Taxpayer to go manually through hard copy records and reconstruct both financial/administrative and patient care records.

18. The Taxpayer began a process of reviewing and reconstructing its records in early

1994. A certified public accountant (CPA) was hired to review financial records and correct errors. It is not clear whether this CPA was part of the firm earlier used by the Taxpayer to handle its accounting matters, or whether the Taxpayer hired a new accountant at this time. It took some months for the accountant to complete the review and identify which of the Taxpayer's checks had not cleared the bank.

19. In reconstructing records lost due to computer failures, the Taxpayer gave priority to reconstruction of pharmacy and medical records relating to patient care. Reconstruction of financial records was delayed while the Taxpayer devoted its efforts primarily to the recreation of patient care records.

20. Recreating financial records pertaining to payment of gross receipts taxes entailed going manually through cash register tapes and compiling the information.

21. Ms. Sirgany acknowledged that she was aware of problems with tax reporting and payments, but that due to the extensive difficulties the Taxpayer was experiencing with record-keeping on both financial and patient care information and her own disability, she was "overwhelmed" and unable to deal with everything at once. In setting priorities for what would be dealt with first, she chose to give precedence to patient care rather than to tax payment.

## DISCUSSION

### *Penalty*

The New Mexico Tax Administration Act provides that a penalty will be imposed in certain circumstances when a taxpayer does not file a return or pay tax at the time it is due. The penalty is not based simply on failure to file a return or make payment on time. Rather, such failure must be due to negligence or disregard of rules and regulations. NMSA 1978, § 7-1-69(A).

The amount of the penalty is two percent of the tax, for each month from the date on which it was due, up to a maximum of ten percent. Section 7-1-69(A)(1). Thus, the penalty is imposed for a maximum of five months, regardless of how long the tax remains unpaid after its due date.

Regulation TA 69:4 (3 NMAC 1.11.11) lists some situations which may indicate a lack of negligence or disregard of rules and regulations and thereby excuse a late filing or payment, so that no penalty will be imposed. Among these situations are taxpayer disability due to injury or prolonged illness, and damage to a taxpayer's records.

The Department acknowledged here that at least part of the Taxpayer's delay in filing returns and paying taxes due may have been excused due to the accidents in which Ms. Sirgany and the Taxpayer's bookkeeper were injured and the computer problems experienced by Rio Rancho Pharmacy. However, the Department contended that even if a portion of the delay in payment by Rio Rancho Pharmacy was excused, the delay was too long to be fully justified. Accordingly, the Department argued, even if the Taxpayer's original failure to file its returns and pay taxes owed for December 1992 through February 1993 was excused under § 7-1-69, the penalty became effective at a later time when the excuse was no longer valid.

This case presents a difficult decision. It is uncontested that the Taxpayer suffered various setbacks that interfered with its timely submission of tax returns and payments. These setbacks included the injuries and pregnancy of Ms. Sirgany which rendered her unable to work full-time or to be present at the business premises for approximately a year, from late 1992 through late 1993, as well as injuries to the bookkeeper who handled tax reporting tasks.

Moreover, Ms. Sirgany was not immediately aware that the taxes owed to the state for December 1992 through February 1993 had not been paid, because the Taxpayer's records showed checks as having been issued for these payments. Although Ms. Sirgany at some point realized that not all checks issued were clearing the company's bank account, she initially did not focus on the checks issued in payment of CRS-1 taxes for the months at issue here.

The business has experienced repeated problems with its computerized record keeping systems. When these problems occurred, requiring extensive reconstruction of computer data from hard copy through a manual process, the Taxpayer properly gave first priority to efforts to reconstruct

patient care data rather than administrative items. However, while the Taxpayer acted properly in giving precedence to recreation of pharmacy and medical information, it was also required to make reasonable efforts to do what was necessary to meet its tax reporting and payment obligations. The record does not establish that this was done.

Ms. Sirgany was aware of problems with making accurate and timely tax payments by early 1993, as indicated by her March 3, 1993 letter to the Internal Revenue Service (Ex. A). Although there is no indication in this letter that Ms. Sirgany knew of any discrepancies involving state rather than federal taxes, it is clear that she had notice that tax payment was an area of difficulty for the Taxpayer.

Because earlier discrepancies had related to payment of federal taxes, and because the Taxpayer's records showed timely submission of state tax payments, Ms. Sirgany may have had no reason to realize that checks issued to the Department in payment of state taxes were among those that had not cleared the bank. She therefore may not have had any reason to focus on those checks when the Taxpayer attempted to determine which checks were causing the discrepancy in the company's bank balance.

However, the record indicates that the uncashed checks would have been identified well before the Taxpayer ultimately paid the overdue taxes. Ms. Sirgany testified that the Taxpayer began reconstructing tax and financial records in early 1994 and that the process took a period of some months. Yet tax payments for the months at issue were not made until some time in 1995, after the Department issued estimated assessments in February and March of that year. While a portion of the delay in submitting returns and payments for December 1992 through February 1993 appears to have been excused under § 7-1-69, the delay lasted beyond that period.

The Taxpayer was clearly in a difficult position. It is not surprising that, as a small business person struggling against not only its competitors in the market but a number of unforeseen difficulties in the form of personal injuries and computer breakdowns, Ms. Sirgany had difficulty

complying with the requirements of the tax system. It appears that the Taxpayer's failure to file its tax returns and payments for the period at issue here initially was not negligent or due to disregard of applicable rules and regulations, but was instead due to factors beyond the Taxpayer's control.

However, at a certain point, non-payment was no longer justified by these factors. Adequate time had passed to correct errors made by the Taxpayer's bookkeeper, and Ms. Sirgany herself had long since returned to work on a full-time basis. Computer records were reconstructed and an accountant had completed review of financial records and identified those checks that had not cleared the bank. Thus, by some time in 1994, the Taxpayer was aware that the tax payments it believed had been made for December 1992 through February 1993 had not been received by the Department. Yet no action was taken to make the payment until March 1995 or later, after the Department had issued assessments to the Taxpayer for the missing payments.

Ms. Sirgany testified that she was "overwhelmed" by the many problems facing the company and was unable to address all of them promptly. She also noted that payments of tax, penalty and interest imposed a financial burden on the company. The hearing officer is sympathetic to these difficulties. It is clear that Ms. Sirgany has had the poor fortune to experience considerable setbacks through no fault of her own.

However, it appears that, at some point, the Taxpayer chose to delay payment of its tax obligations and to focus instead on other business needs. While the delay in payment may have been excused even as late as some time in 1994, any such excuse ceased by the time the accountant identified those checks that hadn't cleared the bank. The Taxpayer's failure to make payment at that time was negligent or in disregard of applicable rules and regulations, and the penalty authorized by § 7-1-69(A) was properly imposed.

It is not clear exactly when the penalty became applicable. Nor is the precise date on which the Taxpayer paid the taxes established in the record, though it was no earlier than March 1995.

The maximum penalty accrues after a period of five months.<sup>1</sup> It appears that at least five months passed between the latest date on which the Taxpayer's late payment was excused under § 7-1-69 and the date on which payment was made. The maximum ten percent penalty was therefore properly imposed.

### ***Interest***

At the hearing in this matter, the Taxpayer withdrew its protest insofar as it related to interest imposed on late payment of taxes. The following is set out to clarify the issue of interest for the Taxpayer.

NMSA 1978, § 7-1-67 provides for the imposition of interest on tax deficiencies:

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 ... until it is paid ... .

B. Interest due to the state under Subsection A ... *shall be at the rate of fifteen percent a year* ... . (Emphasis added.)

It is a well settled rule of statutory construction that the word "shall" is mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The New Mexico legislature has expressly reiterated this general rule in NMSA 1978, § 12-2-2(I) (in construing statutory provisions, the words "shall" and "must" are to be construed as mandatory unless this would be inconsistent with manifest legislative intent or repugnant to the context of the statute).

Section 7-1-67 requires that interest, at the rate of 15% per year, be imposed on the amount of any unpaid taxes. No exceptions to this rule are provided for. Interest is intended to compensate the state for the time-value of money which was not paid when it was due. It may be unpleasant to pay interest on monies owed, particularly where the taxpayer is for some time unaware of the existence of the debt, as was the case here. However, interest is not a penalty for late payment. It is, rather, a

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<sup>1</sup> The penalty applies for each month or fraction thereof in which the tax is due but not paid. NMSA 1978, § 7-1-69(A)(1).

means of making a creditor whole through reimbursement for not having had the use of the money during the time it remained unpaid. While the interest rate imposed here may seem high, that rate has been set by the legislature in the statute, and both the Department and the hearing officer lack the authority to reduce it.

#### CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest of Assessment Nos. 1958951, 1958952 and 1958953. Jurisdiction thus lies over the parties and the subject matter of this protest.

2. The Taxpayer does not contest these assessments insofar as they are for interest based on late payment of tax. The validity of interest imposed therefore is not before the hearing officer for decision.

3. The Taxpayer failed to pay gross receipts and other taxes required to be reported on the CRS-1 reporting form for December 1992 through February 1993, at the time those taxes were due.

4. The Taxpayer's failure to pay the taxes was negligent and/or in disregard of applicable rules and regulations, and penalties were properly imposed on the unpaid amounts.

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

DONE, this 10th day of February, 1997.