

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

IN THE MATTER OF THE PROTEST OF
SOUTHWESTERN PUBLIC SERVICE COMPANY
ID. NO. 01-038632-00 7, PROTEST TO
ASSESSMENT NO. 1975329

NO. 97-29

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer. Southwestern Public Service Company, hereinafter, "Taxpayer", is represented by Paul R. Owen, Esq. of Campbell, Carr, Berge & Sheridan, P.A. The Taxation and Revenue Department, hereinafter, "Department", is represented by Margaret B. Alcock, Special Assistant Attorney General. By agreement of the parties, this matter is submitted for decision upon a stipulation of facts and briefs of the parties. Briefing was completed with the filing of the Taxpayer's Reply Brief on July 3, 1997 and the matter was considered submitted for decision at that time. Based upon the stipulated facts and the arguments submitted, IT IS DECIDED AND ORDERED as follows:

FINDINGS OF FACT

1. The Taxpayer is a corporation which engages in the provision of energy services in New Mexico.
2. Due to the large dollar volume of the Taxpayer's monthly gross receipts, the Taxpayer is required to make payment of its monthly gross receipts, compensating and withholding taxes which are reported under New Mexico's Combined Reporting System (CRS) according to the special payment procedures set forth in NMSA 1978, § 7-1-13.1 (1995 Repl. Pamp.).

3. Effective July 1, 1992, the Department adopted new formatting requirements for special payment taxpayers who elect to make payment according to subsection B(1) (automated clearinghouse transactions) or subsection B(2) (Fedwire transfers) of § 7-1-13.1.

4. Department Publication FYI-401 (formerly FYI-25K) provides instruction to special payment taxpayers concerning the requirements for making timely payment of tax under § 7-1-13.1.

5. The Taxpayer's common method of payment is to transfer the taxes due by wire transfer to the First Security Bank in Albuquerque, the fiscal agent bank for the State of New Mexico.

6. The Taxpayer has an excellent payment history of CRS taxes, and at no time previous to or since the payment at issue has the taxpayer submitted a late payment of its CRS taxes.

7. The Taxpayer's CRS taxes for the September, 1995 reporting period were due on or before October 25, 1995. Payment had to be received by First Security Bank in Albuquerque, the fiscal agent bank for the State of New Mexico, on or before October 25, 1995 with the information required by the Department.

8. The Taxpayer provided correct and timely instructions to its agent, Amarillo National Bank, to initiate a wire transfer for the payment of the Taxpayer's CRS taxes for the September, 1995 reporting period, to First Security Bank in Albuquerque.

9. On October 25, 1995, the Taxpayer, through its agent, Amarillo National Bank, initiated a wire transfer for the payment of its CRS taxes.

10. The October 25, 1995 wire transfer for the payment of the Taxpayer's CRS taxes was erroneously sent by Amarillo National Bank to an account at the First Security Bank in Albuquerque which account was held by an unrelated third party.

11. First Security Bank in Albuquerque, did not reject the October 25, 1995 wire transfer from Amarillo National Bank. Prior to the assessment at issue, the Department did not

inform the Taxpayer or Amarillo National Bank that the payment had not been received by First Security Bank in a manner which would satisfy the Department's requirements for the payment of CRS taxes by wire transfer.

12. One day later, on October 26, 1995, the Taxpayer received confirmation of the October 25 wire transfer and immediately gave instructions to Amarillo National Bank to initiate a new wire transfer to First Security Bank in Albuquerque, to the account to which the wire transfer for the payment of the Taxpayer's CRS taxes was required to be directed under the Department regulations and instructions governing the payment of CRS taxes by wire transfer.

13. On October 26, 1995, Amarillo National Bank informed First Security Bank that the October 25 wire transfer had been directed to the incorrect account, and instructed First Security Bank to credit the October 25 wire transfer to an account for the State of New Mexico, the account to which the wire transfer for payment of the Taxpayer's September, 1995 CRS taxes should have been directed.

14. On October 26, 1995, First Security Bank transferred the funds which had been sent to it by the October 25 wire transfer, and credited those funds to the State of new Mexico account into which the Taxpayer's payment of CRS taxes were required to be paid.

15. On October 26, 1995, the Taxpayer, through its agent, Amarillo National Bank, correctly paid its CRS taxes for the September, 1995 reporting period, through the above-described transfer of funds from the unrelated third party's account at First Security Bank of Albuquerque, to the account attributable to the State of New Mexico at First Security Bank of Albuquerque. The October 26 transaction satisfied the Taxpayer's principal CRS tax payment for the September, 1995 reporting period.

16. On November 10, 1995, the Taxpayer received Assessment No. 1975329 from the Department which assesses \$15,213.59 in penalty and \$9,508.50 in interest with respect to the late payment of the Taxpayer's CRS taxes for the September, 1995 reporting period.

17. On November 13, 1995 the Taxpayer mailed a written protest to the Department, protesting Assessment No. 1975329. This protest satisfied all statutory and regulatory requirements for the filing of a valid protest to the subject assessment.

18. On December 8, 1995, the Department acknowledged receipt of the Taxpayer's protest.

19. On April 1, 1996, the Department, through its tax auditor, responded to the Taxpayer's protest, and stated the Department's position that the assessment is correct and payable.

20. On April 11, 1996, the Taxpayer authorized Monte Brogdin of Amarillo National Bank to be its representative in connection with its protest of the subject assessment.

21. On April 15, 1996, the Taxpayer, through its designated representative, Monte Brogdin of Amarillo National Bank, requested a hearing on its protest of the subject assessment.

22. On May 24, 1996, the Taxpayer authorized Paul Owen, Esq., of Campbell, Carr, Berge & Sheridan, P.A., to be its authorized representative in connection with its protest of the subject assessment.

23. On July 8, 1996, Mr. Owen entered an appearance on behalf of the Taxpayer in connection with the Taxpayer's protest of the subject assessment.

24. In lieu of a formal hearing, the parties have agreed to submit this matter for determination upon stipulated facts and exhibits and briefs submitted by the parties.

DISCUSSION

The issues to be determined herein are whether the Department properly assessed the Taxpayer penalty and interest for the late payment of the Taxpayer's September, 1995 tax payment. Due to the large amount of taxes which the Taxpayer must report and pay each month to the Department, the Taxpayer is required to pay its taxes in accordance with the special payment procedures of NMSA 1978, §7-1-13.1. Subsection B of that statute provides that:

Taxpayers who are required to make payment in accordance with the provisions of this section shall make payment by one or more of the following means on or before the due date *so that funds are immediately available to the state on or before the due date....*(emphasis added).

There is no dispute in this case that because the Taxpayer's bank erroneously made the Taxpayer's tax payment by Fedwire transfer to an account not held by the state, that the tax payment was not made in a manner so that the funds were immediately available to the state on the tax due date. Subsection C of that same statute provides that:

If the taxes required to be paid under this section are not paid in accordance with Subsection B of this section the payment is not timely and is subject to the provisions of Sections 7-1-67 and 7-1-69 NMSA 1978.

Section 7-1-67 provides for the imposition of interest on untimely tax payments and Section 7-1-69 provides for the imposition of penalty when taxes are not timely paid. It is the application of those statutes to the Taxpayer under the circumstances of this case which is in dispute in this proceeding.

PENALTY

The Taxpayer disputes the imposition of the Department's assessment of penalty under the circumstances of this case, arguing that its late payment of tax was not due to negligence, relying upon the fact that the Taxpayer has not previously or since then been late in paying taxes, that it was an error by the Taxpayer's bank, and that the error was corrected the following day after the due date for the payment without any intervention by the Department to secure the payment of the Taxpayer's taxes.

Section 7-1-69 provides for the imposition of penalty for the failure to timely pay tax or the failure to file a return. With respect to the failure to timely pay tax, there are two subsections of Section 7-1-69 which may apply when there has been a failure to timely pay tax by taxpayers subject to the special payment provisions of Section 7-1-13.1. First, there is the general

negligence penalty provided by Subsection A, 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,....

NMSA 1978, § 7-1-69(A)(1995 Repl. Pamp.). Second, there is a specific penalty which applies to the special payment taxpayers who fail to make payment in accordance with § 7-1-13.1, which is provided in Subsection C, as follows:

In the case of failure to pay the amount of tax required to be paid in accordance with Section 7-1-13.1 NMSA 1978 in the manner required by that section, there shall be added to the amount due a penalty of two percent of the amount due except that, if a penalty is required to be imposed by this subsection and a penalty is also required to be imposed under Subsection A of this section, the penalty shall be imposed and collected pursuant to Subsection A of this section only.

NMSA 1978, § 7-1-69(C)(1995 Repl. Pamp.). The Department argues that Subsection C creates a *per se* standard of negligence and requires the imposition of a 2% penalty in any case where a special payment taxpayer has failed to meet the requirements of § 7-1-13.1 and that the Taxpayer would thus be subject to the penalty assessed because of its failure to meet the requirements of § 7-1-13.1 with respect to the payment at issue herein. The Department also argues, however, that the Taxpayer is liable for penalty under Subsection A, on the basis of negligence, thereby requiring the imposition of penalty under that Subsection only because of the provision in Subsection C to that effect.

This decision maker has previously discussed the interplay between Subsection A and Subsection C in the decision issued in the protest of *Robert A. Woods Construction, Inc.*, Decision and Order No. 95-05. In discussing the standard to be applied in determining whether penalty should be imposed upon a special payment taxpayer who fails to make payment in

accordance with § 7-1-13.1, I found the interplay between the two subsections to be puzzling, but that the one thing that was clear was that the legislature intended that only one penalty be imposed upon taxpayers who fail to comply with § 7-1-13.1, and that the two subsections could be harmonized if a requirement of taxpayer negligence is imposed before penalty is applied to taxpayers who have failed to comply with § 7-1-13.1. Upon further reflection, however, I have come to question that approach. While it is true that in construing conflicting statutes, wherever possible they should be harmonized, the approach taken in the *Robert A. Woods* decision overlooks another way in which the two subsections can be harmonized and its application violates other established principles of statutory construction.

The construction given to Subsection C, which read into that subsection a requirement of negligence violates established principles of statutory construction in the following manner. It has the effect of making Subsection C meaningless because Subsection A already imposes penalty for taxpayer negligence. A statute is to be construed so as to give effect to all of its provisions and so that no part of a statute is rendered surplusage or superfluous. *Katz v. New Mexico Department of Human Services*, 95 N.M. 530,, 624 P.2d 39 (1981). The other way to look at the approach taken in the *Robert A. Woods* decision is that it read language into Subsection C (a requirement of taxpayer negligence) which was not there. Courts should not read into a statute language which is not there, particularly if the statute makes sense as written. *Burroughs v. Board of County Commissioners of Bernalillo County*, 88 N.M. 303, 540 P.2d 233 (1975). Additionally, unless a contrary intent is clear, statutes are to be read and given effect as written, attributing to the words their plain meaning. *Waksman v. City of Albuquerque*, 102 N.M. 41, 690 P.2d 1035 (1984). The plain meaning of Subsection C is to impose a 2% penalty whenever a tax payment is not made in accordance with § 7-1-13.1 when that statute applies to the payment. The construction given Subsection C disregarded its plain meaning.

Subsections A and C can be harmonized and each can be given effect when we consider that in addition to the distinction in the standards applied for the imposition of penalty, they also impose different amounts of penalty, depending upon the circumstances of any given case. Subsection C imposes a flat penalty of 2% of the amount due. Subsection A imposes a late payment penalty of "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". This allows for the imposition of a 2% penalty each month that a tax is not paid due to negligence, until the penalty maximizes at 10%. Thus, if a special payment taxpayer fails to make timely payment, there would be a 2% flat penalty imposed under Subsection C. If, however, the taxpayer, through negligence, fails to correct its failure to make payment of the tax and neglects to pay the tax for the next six months as well, penalty would be imposed under Subsection A, only, and that penalty would maximize at the 10% statutory maximum.

Upon reconsideration, then, the imposition of penalty in this case is proper under the provisions of § 7-1-69(C). Even if penalty were imposed under Subsection A, on the basis of negligence, however, the imposition of penalty in this case would be proper.

Taxpayer "negligence" for purposes of assessing penalty pursuant to Subsection A of § 7-1-69 is defined in Regulation 3 NMAC 1.11.10 (formerly 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, it appears that the Taxpayer's payment was late in being deposited into the state's account due to an inadvertent error by the Taxpayer's bank, acting as its agent, which transmitted the payment to the bank account of an unrelated third party. Inadvertent error has been held to amount to negligence for purposes of the imposition of penalty and the fact that the error was committed by an agent for the Taxpayer does not insulate the Taxpayer from the consequences of

the error. *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Thus, the imposition of penalty pursuant to Subsection A was proper.

The Taxpayer argues that it should not be considered negligent because it argues that it acted with ordinary business care and prudence in the manner in which it handled its tax payment. In support of this argument, the Taxpayer points to the fact that it has a record of timely payment, both before and after the subject payment for which penalty was imposed. While this is certainly commendable, it is also what is required of this and every other taxpayer. I can find no language in the statute or the regulations which gives taxpayers one free late payment. Each payment is subject to the requirements of timely payment.

The issue of what constitutes ordinary business care bears further discussion. Section 7-1-13(A) provides as follows:

Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to tax until payment is made. Taxes are due on and after the date on which their payment is required until payment is made.

Thus, taxpayers are liable for taxes at the time a taxable transaction occurs, but they are given until the statutory due date to make payment of the tax. In the case of the taxes covered by the combined reporting system; gross receipts, compensating and withholding taxes, they are due on the twenty-fifth day of the month following the month in which the taxable incident occurred or when the taxes were required to be withheld. *See*, NMSA 1978, §§ 7-9-11 and 7-3-6. This provides taxpayers reporting taxes under the CRS system at least 25 days after they become liable for tax before the payment is due. During this period of time the Taxpayer had the use of these monies and chose not to make payment until the last possible day on which payment could be made. This is, of course, an entirely proper course of action. But it provides for no allowance for the type of inadvertent error which occurred with the transmittal of the payment in this case. Given the consequences of such an error, the payment of both penalty and interest for late

payment, it is at least arguable that waiting until the last day to make payment of taxes does not amount to the exercise of ordinary business care and prudence.

The Taxpayer has argued that the Department's Regulation TA 69:4, now found at 3 NMAC 1.1.11 provides a basis for finding that it was not negligent for purpose of imposition of penalty. Specifically, the Taxpayer relies upon the portion of the regulation which gives as one example of non-negligence where:

a taxpayer, within twelve months of the original filing of a return and without action of the Secretary or delegate, files an amended return reflecting tax due or additional tax due and payment accompanies the amended return.

The Taxpayer argues that since it caught its error in one day and corrected the error and made payment on the same day it caught the error, that it falls within the standard of the example.

This regulation does not apply to the late payment of taxes. By its own language, it applies to the filing of an amended return after the filing of an apparently erroneous return.

The Taxpayer has referred to a number of decisions which reflect that penalty has been abated as providing authority for the abatement of penalty in this case. In almost all of those cases, the Department abated penalty prior to the hearing on the other issues and the facts pertinent to the abatement of penalty are not even discussed in the decision. Whatever the reasons for the abatement of penalty, they were not in issue nor was the appropriateness of the imposition of penalty discussed in those decisions. In the case or two in which penalty was abated, there were facts which are clearly distinguishable from those in this case. The decision in which the facts are most analogous to the facts in this case, an unnamed decision which was attached as Exhibit H to the Taxpayer's Brief in Chief, the imposition of penalty was discussed and upheld. That case involved an error committed by a special payment taxpayer's bank in encoding an Automated Clearinghouse (ACH) payment, which is another method of electronically transferring funds. Because the ACH payment was improperly encoded, it was rejected by the state's fiscal agent bank. The Taxpayer's bank corrected the error and

retransmitted payment the day following the due date. In response to the taxpayer's protest of the imposition of penalty, the Decision and Order upheld the imposition of penalty, finding that the bank's inadvertent error was negligent and attributing the negligence of the agent bank upon the taxpayer for purposes of imposing penalty. Those facts are virtually indistinguishable from the instant case.

INTEREST

The Taxpayer also contests the amount of interest which was assessed in this case. The Department imposed a month's interest although the payment was only one day late. The Taxpayer argues that the Department may not read NMSA 1978, § 7-1-67 in that manner because it results in an unjust imposition of an usurious rate of interest.

The manner in which interest was imposed by the Department's assessment in this case is exactly what the statute mandates. NMSA 1978, § 7-1-67 (1995 Repl. Pamp.) governs the imposition of interest on late payments of tax. In pertinent part, it provides:

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 a regard to any extension of time or installment agreement, until it is paid....

B. Interest due to the state under Subsection A or D of this section shall be at the rate of fifteen percent a year, computed at the rate of one and one-fourth percent per month *or any fraction thereof*.

D. If any tax required to be paid in accordance with Section 7-1-13.1 NMSA 1978 is not paid in the manner required by that section, interest shall be paid to the state on the amount required to be paid in accordance with Section 7-1-13.1 NMSA 1978. If interest is due under this subsection and is also due under Subsection A of this section, interest shall be due and collected only pursuant to Subsection A of this section. (emphasis added).

The language of Subsection B is clear and unambiguous. Interest is computed at the rate of one and one quarter percent per month, "or any fraction thereof". Thus, an entire month's interest is

imposed on any fraction of a month in which the payment is late at the rate specified in the statute. While the Taxpayer contends that this is unreasonable and unjust, when statutes are unambiguous, there is no room to construe them or for courts to substitute their concept of what is reasonable and just for that of the legislature. *State v. Herrera*, 86 N.M. 134 (Ct. App. 1974). The language in the statute imposing a month's interest for "any fraction thereof" has been in the Tax Administration Act since its enactment in 1965. *See*, Laws 1965, Ch. 248, §68. Since that time, the Department has consistently interpreted the statute to impose a month's interest for any fraction of a month that a payment is late.¹ The administrative construction given a statute by the agency charged with its administration is entitled to great deference and the administrative interpretation will not be lightly overturned. *Perea v. Baca*, 94 N.M. 624, 614 P.2d 541 (1980). When an administrative construction is of long standing, as is the case here, it is to be given even greater weight. *Kenneth v. Schmoll*, 482 F.2d 90 (10th Cir., 1973). Thus, the assessment of one month's interest in this case even though the Taxpayer's payment was only one day late was in accordance with § 7-1-67 and was proper.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1975329 pursuant to NMSA 1978, § 7-1-24 and jurisdiction lies over the parties and the subject matter of this protest.

¹ Although this decision maker can only vouch that this has been the Department's interpretation since his employment began in 1978, it was understood at the time to be consistent with the Department's longstanding interpretation of Section 7-1-67.

2. NMSA 1978, § 7-1-69(C) imposes a penalty of 2% whenever a special payment taxpayer fails to make payment of tax required to be paid pursuant to § 7-1-13.1 in accordance with that statute, unless penalty is also required to be imposed pursuant to § 7-1-69(A).

3. The Taxpayer was negligent, pursuant to § 7-1-69(A), in failing to make timely payment of tax, and penalty was properly imposed.

4. One month's interest was properly assessed pursuant to § 7-1-67, to the Taxpayer for being one day late in paying its September, 1995 CRS taxes.

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

DONE, this 4th day of August, 1997.