

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

IN THE MATTER OF THE PROTEST OF
B. R. GORDON CONSTRUCTION CO., INC.
ID. NO. 01-852364-00 1
ASSESSMENT NOS. 2090869 and 2117291

98-01

DECISION AND ORDER

This matter came on for formal hearing on January 13, 1998 before Margaret B. Alcock, Hearing Officer. B. R. Gordon Construction Company ("Taxpayer"), was represented by Paula Spooner, the Taxpayer's accountant. The Taxation and Revenue Department ("Department"), was represented by Frank D. Katz, Chief Counsel.

At the beginning of the hearing, the Taxpayer withdrew its protest to Assessment No. 2090869. At the close of the hearing, the Taxpayer's protest of Assessment No. 2117291 was submitted for determination. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a corporation doing business in New Mexico and is registered with the Department for payment of gross receipts, compensating and withholding taxes, which are reported under New Mexico's Combined Reporting System (CRS).

2. Because the Taxpayer's average monthly CRS tax payment during calendar year 1995 exceeded \$25,000, the Taxpayer was required to pay its 1996 CRS taxes according to the special payment procedures set forth in NMSA 1978, § 7-1-13.1.

3. During calendar year 1996, the Taxpayer's average monthly CRS tax payment dropped below \$25,000. As a result, the Taxpayer was not required to follow special payment procedures when paying its 1997 CRS taxes.

4. Not realizing that it was no longer required to comply with the provisions of § 7-1-13.1, the Taxpayer continued to pay its 1997 CRS taxes by means of an automated clearing house (ACH) transaction in accordance with Subsection B(1) of Section 7-1-13.1.

5. It was the Taxpayer's usual practice to initiate ACH transfers one day prior to the due date. Based on this practice, payment of the Taxpayer's January 1997 CRS taxes would have been called into the Taxpayer's bank on Monday, February 24, 1997.

6. The Taxpayer maintains a one-person office consisting of Ms. Spooner, who is responsible for the day-to-day management of the office, including payment of monthly CRS taxes.

7. Because Ms. Spooner was ill from Friday, February 21 through Monday February 24, 1997, the ACH transaction intended to pay the Taxpayer's January 1997 CRS taxes was not initiated until Tuesday, February 25, 1997.

8. The Department received payment of the Taxpayer's January 1997 CRS taxes on Wednesday, February 26, 1997, one day after the due date.

9. On March 1, 1997, the Department issued Assessment No. 2117291 to the Taxpayer assessing a penalty of \$241.77 and interest of \$151.11 on the late payment of the Taxpayer's January 1997 CRS taxes.

10. On March 10, 1997, the Taxpayer filed a timely protest of the assessment.

DISCUSSION

The issue to be determined is whether the Department properly assessed the Taxpayer penalty and interest on the late payment of the Taxpayer's January 1997 CRS taxes. The Taxpayer argues that its late payment of tax should be excused (1) because Ms. Spooner was ill on February 24, 1997, the day the ACH transaction should have been initiated; and (2) because the Department failed to notify the Taxpayer that it was no longer subject to the special payment provisions of § 7-1-31.1.

ASSESSMENT OF PENALTY

NMSA 1978, § 7-1-69 (1996 Supp.), governs the imposition of penalty during the period at issue in this protest. Subsection A 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...

Taxpayer "negligence" for purposes of assessing penalty pursuant to Subsection A of § 7-1-69 is defined in Regulation 3 NMAC 1.11.10 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.

The Taxpayer argues that its late payment of tax was not due to negligence but to the fact that Ms. Spooner was ill on Friday, February 21, 1997 and on Monday, February 24, 1997, the day the ACH transfer should have been initiated. Ms. Spooner testified that the Taxpayer maintained a one-person office and there was no one else to take over management of the office, including tax

payments, when she was out. The Taxpayer's failure to provide some back-up for Ms. Spooner indicates a failure to exercise that degree of ordinary business care and prudence which would be expected of reasonable taxpayers. It is entirely foreseeable that an employee may become ill or may be called away on an emergency. To have no mechanism for insuring that the office continues to run smoothly and that required tax payments are made in a timely manner amounts to negligence for purposes of § 7-1-69(A).

The Taxpayer further argues that its late payment was due to the Department's failure to notify the Taxpayer that it was no longer subject to the special payment provisions of § 7-1-13.1. Ms. Spooner testified that she would not have used an ACH transfer to pay the Taxpayer's January 1997 CRS taxes if she had known this method of payment was no longer required. First, it must be noted that § 7-1-13.1 does not require taxpayers to make payment by ACH transfer. Subsection B of § 7-1-13.1 gives taxpayers five different methods of meeting their payment obligations, including payment by federal wire transfer, check or cash. Even if the Taxpayer had been subject to the special payment provisions for 1997, Ms. Spooner had alternatives to the ACH transfer which would have resulted in timely payment, including payment by federal wire transfer or payment by cash. Second, the Department has no obligation to personally notify every CRS taxpayer as to whether its comes within the special payment provisions of § 7-1-13.1. New Mexico has a self-reporting tax system, and the responsibility to ensure timely reporting and payment of tax lies with the taxpayer. In this case, the taxpayer was clearly in the best position to know whether its average tax payment for the previous calendar year exceeded \$25,000. The Taxpayer's failure to make the calculation required by § 7-1-13.1 resulted from inattention to its tax responsibilities and not to any act or failure to act on the part of the Department.

The fact that the Taxpayer had an established practice of waiting until the last possible day to make payment of its CRS taxes also bears on the issue of ordinary business care. NMSA 1978, § 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 tax at the time a taxable transaction occurs, but are given until the statutory due date to make payment of the tax. The due date for taxes covered by the combined reporting system, *i.e.*, gross receipts, compensating and withholding taxes, is the twenty-fifth day of the month following the month in which the taxable incident occurred or 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 their liability for tax arises before payment is due. The Taxpayer in this case made a practice of waiting until the last possible day on which payment could be made before initiating its ACH transfer. While it is understandable that the Taxpayer would want the use of the monies needed to pay the tax for as long as possible, this practice provides no margin for error resulting from unscheduled events, such as Ms. Spooner's illness. Given the consequences of 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 and supports a conclusion of negligence with respect to the timely payment of taxes in this case.

ASSESSMENT OF INTEREST:

NMSA 1978, § 7-1-67 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 a 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. Thus, 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. Imposition of interest is not based on the intent of the taxpayer but simply on a determination that the payment was late. Regulation 3 NMAC 1.4.10.3.3 provides:

If the notice, return, application or payment other than payments specified by Section 7-1-13.1 is sent or delivered to the department by any means other than by mailing with the United States Postal Service, it must be received by the department on or before the due date....

In this case, payment of the Taxpayer's January 1997 CRS taxes was not received by the Department until February 26, 1997, one day after the due date. Interest was properly assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2117291 pursuant to NMSA 1978, § 7-1-24 and jurisdiction lies over the parties and the subject matter of this protest.

2. Pursuant to NMSA 1978, § 7-1-69(A), the Taxpayer was negligent in failing to make timely payment of its January 1997 CRS taxes and penalty was properly imposed.

3. Pursuant to NMSA 1978, § 7-1-67, interest was properly assessed against the Taxpayer for late payment of its January 1997 CRS taxes.

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

DONE, this 14th day of January 1998.