

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

**IN THE MATTER OF THE PROTEST OF
NEW MEXICO STATE UNIVERSITY,
OFFICE OF BUSINESS AND FINANCE
ID. NO. 01-507888-00 4, PROTEST TO
ASSESSMENT NO. 2092065**

NO. 98-14

DECISION AND ORDER

This matter came on for formal hearing on March 11, 1998, before Gerald B. Richardson, Hearing Officer. New Mexico State University, Office of Business and Finance, hereinafter, "NMSU", was represented by Jennifer Taylor, Assistant Vice President for Business and Finance. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. NMSU is a taxpayer which is required to make its payments of tax in accordance with the special payment provisions of Section 7-1-13.1 NMSA 1978.
2. Taxpayers who are required to make payment in accordance with the provisions of Section 7-1-13.1 are required to make payment by any of four listed methods, any of which will meet the requirement that the tax payment funds will be immediately available to the state on or before the due date for the tax payment. One of the authorized methods under Section 7-1-

13.1(B) is payment by automated clearinghouse transaction, hereinafter, "ACH payment", to allow deposit and fund availability to the state on or before the due date.

3. NMSU's payment of taxes for the October, 1996 tax period was due on Monday, November 25, 1996.

4. NMSU uses the ACH payment method to pay its taxes to the Department.

5. NMSU uses Sunwest Bank, now Nations Bank, as its bank. Sunwest Bank provided NMSU a computer system so that NMSU can communicate directly with Sunwest Bank for purposes of initiating ACH payments. Sunwest Bank then transmits the payment information through the Federal Reserve system which makes the transfer of funds into the state's bank account. ACH payments take one business day to occur through the Federal Reserve system.

6. On Friday, November 22, 1996 at 3:03 P.M., NMSU initiated an ACH payment transaction with Sunwest Bank to make a payment of \$382,139.44 to the Department in payment of its October, 1996 tax liability. At the time the transaction was made, NMSU's computer terminal indicated that the transmission had been made to Sunwest Bank. At the time the transaction was made, Sunwest Bank's computer system was functional and receiving transactions.

7. NMSU and Sunwest Bank have a backup system in place to ensure that transmissions actually occur as indicated on the system because, although rare, on occasion there may be a problem in the transmission caused by such things as power surges, problems in the telephone lines, etc. The backup system requires that transmitters follow their transmission up with a fax to the bank requesting confirmation of the transmission.

8. On Monday, November 25, 1996 at 8:55 A.M., NMSU faxed its transmission confirmation to Sunwest Bank.

9. On Monday, November 25, 1996 at 8:38 P.M., Sunwest faxed a message to NMSU informing NMSU that the transmission had not been received. NMSU and Sunwest Bank do not know the reason for the failed transmission.

10. On Tuesday, November 26, 1996 at 9:32 A.M., NMSU re-transmitted its ACH payment transmission to Sunwest Bank

11. On Tuesday, November 26, 1996 at 10:55 A.M., NMSU received a fax from Sunwest Bank confirming that the transmission had been received.

12. The state received payment of NMSU's October, 1996 tax payment on November 27, 1996.

13. As a result of the late payment of taxes by NMSU, on December 11, 1996, the Department issued Assessment No. 2092065, assessing NMSU penalty in the amount of \$7,642.79 and interest in the amount of \$4,776.74 for October, 1996 reporting period.

14. On February 24, 1997, NMSU filed a written request with the Department, requesting a retroactive extension of time of additional 60 days beyond the normal 30 days provided by statute, to file an administrative protest to Assessment No. 2092065. By the same letter, NMSU protested the assessment.

15. On March 7, 1997, the Department granted NMSU's request for a retroactive extension of time, granting an additional 60 days for the filing of its protest.

DISCUSSION

The issues to be determined are whether NMSU is liable for penalty and interest on its late payment of taxes. The assessment of interest will be addressed first.

NMSU argues that interest should not be assessed because it feels it acted reasonably in attempting to pay its taxes in a timely manner, it made a good faith effort to rectify the problem as quickly as it became aware of it, and that as another state-supported institution, it makes little sense to require the shifting of funds between two state institutions when considering the facts and circumstances of this case.

Section 7-1-67(A) NMSA 1978 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 Section 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 not paid in a timely manner. Interest is imposed any time that taxes are not paid when they are due, and for the period of time that they are unpaid. Because Section 7-1-67 imposes what can be characterized as a strict liability standard anytime taxes are not paid in a timely manner and because the tax payment was concededly late, the assessment of interest must stand.

The Department argues that the imposition of penalty was proper in this case because NMSU or its agent, Sunwest Bank was negligent in failing to make timely payment of tax in accordance with the requirements of Section 7-1-13.1 and accordingly , penalty was properly

imposed pursuant to Section 7-1-69. Specifically, Section 7-1-69(A)(1995 Repl. Pamp.) 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 a willful or fraudulent intent) for failure to timely pay tax. Taxpayer "negligence" for purposes of assessing penalty 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.

NMSU argues that it was not negligent in the circumstances of this case because it exercised ordinary business care and prudence which taxpayers would exercise in like circumstances. Although I have some concerns about the prudence of waiting until the last possible day to make payment of tax when there are numerous things which can go wrong with an ACH tax payment, all of the previous administrative decisions where negligence was found involved some sort of human error which caused the failure in the timely payment. In this case, the problem with the payment was caused by some failure in the electronic transmission between NMSU and its bank. Whether the problem was caused by a power surge, or some temporary problem with the telephone lines, we will never know. What we do know is that both NMSU's computer system and the Bank's computer system were functioning properly at the time of the transmission and that when NMSU made the transmission, the message it got in its computer screen indicated that the transaction had been made. Thus, to any reasonable person, it would appear that the transmission had been successful. Given the unusual circumstances of this case in which we have the rare

occurrence of a problem in the transmission lines by which the payment was effectuated, we have no human error, and we have a system which gave all indications that it was functioning properly and that the transaction had been effectuated, I believe that NMSU exercised that degree or ordinary business care and prudence which was reasonable under the circumstances and that they were not negligent for purposes of Section 7-1-69. Because NMSU was not negligent, the assessment of penalty must fail.

CONCLUSIONS OF LAW

1. NMSU filed a timely, written protest to Assessment No. 2092065 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Because NMSU's payment of tax was not made on or before the due date in accordance with Section 7-1-13.1 NMSA 1978, interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.

3. Because NMSU was not negligent in failing to make timely payment of tax pursuant to Section 7-1-69(A) NMSA 1978, the assessment of penalty is improper.

For the foregoing reasons, NMSU's protest IS HEREBY GRANTED IN PART AND DENIED IN PART. THE DEPARTMENT IS HEREBY ORDERED TO ABATE THE PENALTY PORTION OF ASSESSMENT NO, 2092065.

DONE, this 18th day of March, 1998.