

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

IN THE MATTER OF THE PROTEST OF  
**LOS ALAMOS PUBLIC SCHOOLS**  
ID. NO. 01-503297-00 3, PROTEST TO  
ASSESSMENT NOS. 2062637 & 2062638

**NO. 98-23**

**DECISION AND ORDER**

This matter came on for formal hearing on March 2, 1998 before Gerald B. Richardson, Hearing Officer. The Los Alamos Public Schools, hereinafter, "Taxpayer" was represented by Mr. Hugh Miller, Business Manager for the Schools. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Because of the size of its monthly tax payments under the Department's Combined Reporting System ("CRS"), under which taxpayers report and pay gross receipts tax, compensating tax, and income withholding tax to the Department, the Taxpayer is required, pursuant to Section 7-1-13.1 to make its tax payments under any of five approved payment methods, all of which ensure that the funds are immediately available to the state on or before the due date for the tax payment.
2. The Taxpayer has elected to make its payments by automated clearinghouse transaction, ("ACH payment").
3. The Taxpayer's tax payment for the May, 1996 reporting period under the CRS system in the amount of \$77,284.46 was due on June, 25, 1996.
4. The payment was made by ACH payment, and was deposited in the account of the state of New Mexico on July, 19, 1996.

5. As a result of the late payment of taxes for the May, 1996 reporting period, on August 21, 1996, the Department issued Assessment No. 2062638, assessing \$3,091.38 in penalty and \$966.06 in interest for a total of \$4,057.44.

6. Taxpayers who are subject to the special payment provisions of Section 7-1-13.1 and who make payment by ACH payment or other electronic means are required to file a return explaining how the tax payment is to be applied. The return is due on the same due date as the tax payment.

7. For the June, 1996 reporting payment, the Taxpayer submitted its tax payment of \$25,527.65 by ACH payment and the payment was made in a timely manner. The Taxpayer failed to file a return, however, explaining how the tax payment was to be applied until August 9, 1998, which was late.

8. As a result of the filing of a late return for the June, 1996 reporting period, on August 21, 1996, the Department issued Assessment No. 2062637, assessing \$510.55 in penalty.

9. On October 2, 1996, the Taxpayer requested that the Department grant a retroactive extension of time to file a protest to Assessment Nos. 2062637 and 2062638. The Taxpayer's letter of October 2, 1996 also protested the two assessments.

10. On October 29, 1996 the Department granted the Taxpayer's request for an extension of time to file a protest to the two assessments.

11. When Mr. Miller was hired as business manager in January of 1995, the Taxpayer had an antiquated computer system to handle its accounting. There were also problems with employee retention. As a result of these factors, the Taxpayer had a lot of financial accounting problems.

12. Mr. Miller attempted to rectify these problems. The Taxpayer got a new computer system with a new general accounting software package in July of 1995. Part of the software package was supposed to handle generating all of the figures needed for reporting New Mexico taxes.

13. Even though the Taxpayer had a new computer system and software, the Taxpayer continued to experience financial accounting problems, primarily due to operating problems with the computer software.

14. In addition to the reporting periods of May and June, 1996, the Taxpayer was late in making payments or in filing returns, or both for the reporting periods of February, March, November and December of 1995; July and August of 1996 and February, 1997.

15. The Taxpayer's late payment for the May, 1996 reporting period was due to the fact that the computer system did not give timely and accurate information in order to determine the amount of tax to be reported in a timely manner. No reason was given for the late filed return for June, 1996.

### DISCUSSION

The sole matter being protested by the Taxpayer is the assessment of penalty for the reporting periods of May and June, 1996. With respect to the matter in protest, Section 7-1-17(C) NMSA 1978 provides that there is a presumption of correctness which attaches to any assessment of tax by the Department. The presumption of correctness attaches to the assessment of penalty as well as tax. *Tiffany Construction Company 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)). Thus, the burden of proof is on the Taxpayer to overcome the presumption of correctness.

The imposition of penalty is governed by the provisions of NMSA 1978, Section 7-1-69(A)(1995 Repl. Pamp.), 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 a willful or fraudulent intent) for failure to pay tax or file a return by the due date. 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 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, the Taxpayer argued that it should not be considered negligent because it made a good faith effort to comply with the statutory requirements for timely payment and reporting of taxes. The Taxpayer cited to its efforts to rectify problems which occurred in the past with respect to timely reporting and payment of taxes, especially the addition of new computers and software which were supposed to generate accurate and timely information for tax reporting purposes. The Taxpayer also argued that the imposition of penalty would serve no public purpose since it would only operated to take resources out of the school classrooms.

With respect to the first argument, the Taxpayer has failed to overcome the presumption of correctness. While the Taxpayer's efforts to improve its computer and accounting system are laudable, the evidence demonstrated that the problems with its late reporting were ongoing, long after the new computer and software were installed. There was not enough evidence for this fact finder to determine exactly why these problems occurred and continued to occur several times more in 1996 and again in 1997 after the new systems were installed, but the fact that they continued to occur does indicate some lack of action to rectify the ongoing problems.

As to the Taxpayer's second argument, that as a public school district, the imposition of penalty would serve no public purpose and would act to the detriment of the public because it would remove resources from classrooms, I am not aware of any authority which would allow for different rules to be imposed upon taxpayers who are public entities than for those who are not. The statutes make no distinction based upon the public or private character of taxpayers, nor does the caselaw. This would be a tax policy matter for the legislature to address, and apparently, it

has not seen fit to do so. In the absence of any authority for the distinction the Taxpayer would draw, the law must be applied in an even handed manner, and negligence by a public taxpayer is no less culpable than negligence by a private taxpayer.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest, pursuant to Section 7-1-24 NMSA 1978 to Assessment Nos. 2062637 and 2062638 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer failed to present sufficient evidence to overcome the presumption of correctness of the assessment of penalty for late payment or late reporting of taxes.

3. There is no exception or different standard for the imposition of penalty with respect to taxpayers who are public entities as opposed to private entities.

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

DONE, this 22<sup>nd</sup> day of April, 1998.