

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

IN THE MATTER OF THE PROTEST OF
LUIS TAMAYO & AMANDA LLERENA
ID. NO. 02-348748-00 8
ASSESSMENT NOS. 2183277, 2234967,
2234966, 2234965 and 2234964

98-33

DECISION AND ORDER

This matter came on for formal hearing on May 27, 1998 before Margaret B. Alcock, Hearing Officer. Luis Tamayo appeared on behalf of himself and his wife, Amanda Llerena. Sam Adelo acted as a Spanish language interpreter for Mr. Tamayo. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Mr. Tamayo and Ms. Llerena came to the United States from Ecuador.
2. In order to comply with the employment requirements to establish a legal permanent residence in the United States, Mr. Tamayo and Ms. Llerena obtained work cleaning homes. They performed this work as independent contractors rather than as employees.
3. In order to insure that he and his wife would be in compliance with all tax laws, Mr. Tamayo consulted with an accountant.
4. Mr. Tamayo and Ms. Llerna reported their receipts from performing cleaning services as business income on Schedule C to their federal income tax returns. Based on

incorrect advice received from their accountant, Mr. Tamayo and Ms. Llerna did not report or pay New Mexico gross receipts tax on these receipts.

5. On October 17, 1997, the Department issued Assessment No. 2183277 to Mr. Tamayo and Ms. Llerna for \$665.66 gross receipts tax, \$66.56 penalty and \$299.54 interest due on their cleaning receipts for the period January through December 1994.

6. On October 24, 1997, Mr. Tamayo filed a written protest to the assessment of penalty and interest.

7. Realizing that he might be liable for gross receipts tax on income earned in subsequent years, Mr. Tamayo contacted the Department and asked the Department to determine his tax liability for 1995 and 1996.

8. On March 18, 1998, the Department issued the following assessments:

Assessment No.	Report Period	Tax	Penalty	Interest
2234967	Jan.-June 1995	\$386.64	\$38.66	\$154.66
2234966	July-Dec. 1995	\$386.64	\$38.66	\$125.66
2234965	Jan.-June 1996	\$361.34	\$36.13	\$ 90.34
2234964	July-Dec. 1996	\$361.34	\$36.13	\$ 63.23

9. On March 31, 1998, Mr. Tamayo filed a written protest to the penalty and interest assessed for 1995 and 1996.

10. The Department subsequently abated all penalties assessed based on the taxpayers' reliance on the erroneous advice of their accountant.

DISCUSSION

The sole issue in this case is whether Mr. Tamayo and Ms. Llerna are liable for interest on their underpayment of gross receipts tax during the period January 1994 through December 1996.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972).

Section 7-1-3(U) NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." Accordingly, the presumption of correctness of an assessment of taxes also applies to the assessment of interest. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

Assessment of Interest. Section 7-1-67 NMSA 1978 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 regard to any extension of time or installment agreement, until it is paid.... (emphasis added)

Mr. Tamayo asks the Department to consider that his failure to pay gross receipts tax was unintentional and that he made every effort to comply with pertinent tax laws by engaging an accountant to advise him. The Department has taken this into account by abating the negligence penalties assessed against Mr. Tamayo and his wife. The reason for a late payment of tax does not, however, affect the imposition of interest. Unlike the assessment of penalty, the assessment

of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Even taxpayers who contact the Department before a tax is due and obtain a formal extension of time to pay the tax are liable for interest from the original due date of the tax to the date payment is made. Section 7-1-13(E) NMSA 1978. 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.

Mr. Tamayo also asks the Department to consider that the assessment of interest will create a financial hardship on his family. The Department is required to apply the law even-handedly and cannot make exceptions based on individual circumstances. Section 7-1-20 NMSA 1978 provides that the Secretary of the Department may compromise an assessed tax when he has a good faith doubt as to the taxpayer's liability for payment of the tax. The Secretary may not abate an assessment based on the taxpayer's inability to pay the tax or on the fact that payment will create a hardship. *See*, Regulation 3 NMAC 1.6.14. Accordingly, the Department has no authority to abate interest in this case.

CONCLUSIONS OF LAW

1. Mr. Tamayo filed timely written protests to Assessment Nos. 2183277, 2234967, 2234966, 2234965 and 2234964 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. Pursuant to Section 7-1-67 NMSA 1978, interest was properly assessed against Mr. Tamayo and Ms. Llerna for the late payment of gross receipts tax due on income they earned during the period January 1994 through December 1996.

For the foregoing reasons, the Taxpayers' protest IS HEREBY DENIED.

DONE, this 6th day of June 1998.