

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

IN THE MATTER OF THE PROTESTS OF
**MARK SISSON, D/B/A/ INDUSTRIAL
PRECISION INSTRUMENTS**, ID. NO.
02-073892-00 7, PROTEST TO ASSESSMENT
NO. 2092127 AND **MARK SISSON, D/B/A/
ABC BUILDERS**, ID. NO. 02-205335-00 0,
PROTEST TO ASSESSMENT NO. 2089978

NO. 98-39

DECISION AND ORDER

This matter came on for formal hearing on July 13, 1998 before Gerald B. Richardson, Hearing Officer. Mark Sisson, the owner of Industrial Precision Instruments, and of ABC Builders, represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Monica 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. Industrial Precision Instruments was a sole proprietorship, located in Hobbs, New Mexico, which repaired metering devices used in the oil and gas industry. It ceased doing business in December, 1992.
2. ABC Builders is a sole proprietorship engaged in general contracting located in Hobbs, New Mexico.

3. In 1996 the Department audited Industrial Precision Instruments and ABC Builders. Neither business had complete records and the Department auditor resorted to using the bank records, Schedule C of Mr. Sisson's federal personal income tax returns, building permits, invoices and the gross receipts tax filings by the businesses to conduct the audits.

4. With respect to Industrial Precision Instruments, the Department's audit disallowed \$6,107.73 in deductions claimed from gross receipts tax because the Taxpayer did not have a proper non-taxable transaction certificate to support its claim of deduction. The Department's audit also concluded that the business had underreported gross receipts during the audit period by \$21,851.78.

5. Based upon the Department's audit findings, on December 13, 1996 the Department mailed Assessment No. 2092127 to Industrial Precision Instruments, assessing \$1,431.25 in gross receipts tax, \$153.34 in penalty and \$2,654.11 in interest for the reporting periods of January, 1990 through December, 1992.

6. On January 8, 1997, Mr. Sisson filed a timely, written protest of Assessment No. 2092127 with the Department, protesting penalty and interest only. .

7. With respect to ABC Builders, the Department's audit concluded that the business had underreported gross receipts during the audit period by \$263,344.49.

8. Based upon the Department's audit findings, on December 2, 1996 the Department mailed Assessment No. 2089978 to ABC Builders, assessing \$14,185.50 in gross receipts tax, \$1,451.50 in penalty and \$5,209.33 in interest for the reporting periods September, 1992 through June, 1996.

9. On January 8, 1997 Mr. Sisson mailed the Department a letter purporting to protest the penalty and interest portion of Assessment No. 2989978. That letter became a timely protest to the assessment when, on February 17, 1997 the Department granted Mr. Sisson a retroactive extension of time to file a protest to Assessment No. 2089978.

10. Mr. Sisson is presently paying \$400 per month, in accordance with an installment agreement with the Department, to pay the unprotested tax principal portions of the two assessments under protest. Mr. Sisson cannot afford to pay more than he is presently paying.

DISCUSSION

The only issues to be determined herein is whether the Department properly assessed penalty and interest with respect to its assessments against ABC Builders and Industrial Precision Instruments. Mr. Sisson believes that the amount of tax principal assessed against his businesses was higher than it should have been, but he acknowledged that he did not have the business records or other documentation to establish this and so he determined that it would not be productive to protest the tax principal of those two assessments. He is presently making payments, pursuant to an installment agreement with the Department, to pay those liabilities. His protest of the penalty and interest is really based upon his position that he cannot afford to pay more than he is at present, that his underreporting of tax was unintentional, and he is asking for forgiveness of the penalty and interest on that basis.

While I have no doubt whatsoever that Mr. Sisson is a person of good character who did not intentionally underreport his taxes, and I am not unsympathetic to the

hardship the payment of the interest and penalties, in addition to the tax principal, places on Mr. Sisson and his family, this does not provide a basis for the abatement of the interest and penalties assessed, as will be further explained below.

Section 7-1-20 NMSA 1978 is the provision of the Tax Administration Act which governs the Department's authority to compromise taxes which have been assessed. In pertinent part, it provides that:

A. At any time after the assessment of any tax, if the secretary *in good faith is in doubt of the liability for the payment thereof*, the secretary may, with the written approval of the attorney general, compromise the asserted liability for taxes by entering with the taxpayer into a written agreement that adequately protects the interest of the state. (emphasis added)

Thus, the Department's authority to compromise taxes must be based upon a good faith doubt as to a taxpayer's liability under the law for the payment of the taxes at issue. Regulation 3 NMAC 1.6.14, makes it clear that a taxpayer's inability to pay, or the expediency of compromising taxes to dispose of litigation is not a basis for the compromise of taxes if there is not a good faith doubt as to the legal basis for the tax assessment. It provides:

The secretary may compromise the assessed liability of a taxpayer by entering into a written closing agreement only if and when there is a good faith doubt as to the liability. The written agreement must adequately protect the interests of the state and be approved by the attorney general. The secretary may not compromise a taxpayer's liability because of the taxpayer's inability to pay. The secretary may not compromise a taxpayer's liability solely because of the threat of litigation or as an expedient means of disposing of a controversy unless the secretary has a good faith doubt as to the liability.

Nor can this Hearing Officer abate tax liabilities based upon a taxpayer's inability to pay. If any relief can be granted, it must be upon the basis of a legal infirmity in the basis of the assessed liability. It must also be noted that Section 7-1-17(C) NMSA 1978 provides for a presumption of correctness, which attaches to any assessment of tax by the Department. Thus, it is incumbent upon a protesting taxpayer to prove that the assessment is either incorrect or not in accordance with law. Because Mr. Sisson does not dispute the correctness of the underlying tax assessment nor the manner of calculating the amount of interest or penalty assessed, the only other basis to set aside the assessments of penalty and interest is if they are not in accordance with law.

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.

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 timely pay tax. Thus, there is no contention that the failure to report and pay taxes was based upon any conscious attempt by Mr. Sisson to underreport taxes. What remains to be determined is whether Mr. Sisson's businesses were negligent in failing to report their taxes properly. Taxpayer "negligence" for purposes of assessing penalty 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.

In this case the Taxpayer's failure to report and pay taxes properly was based upon Mr. Sisson's failure to have sufficient systems for accounting for his business revenues so as to fully report his taxable gross receipts and his apparent lack of understanding about the necessary documentation (non-taxable transaction certificates) necessary to support deductions claimed from tax. Section 7-1-10 NMSA 1978 provides in pertinent part that, "every taxpayer shall maintain books of account or other records in a manner that will permit the accurate computation of state taxes..." New Mexico also has a self-reporting tax system which requires that taxpayers voluntarily and accurately report and pay their tax liabilities to the state. Because of this, the case law is well settled that every person is

charged with the reasonable duty to ascertain the possible tax consequences of his actions, and the failure to do so has been held to amount to negligence for purposes of the imposition of penalty pursuant to Section 7-1-69 NMSA 1978. *Tiffany Construction Co. 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). In this case several grounds exist for determining that the underpayment of taxes was based upon negligence for purposes of the imposition of penalty. Mr. Sisson's own protest letters acknowledge that the underpayment of taxes was a "blunder on my part." That alone is an admission of inadvertence, inattention or lack of ordinary business care sufficient to establish negligence. Mr. Sisson's failure to understand the statutory requirements for claiming a deduction from tax and his failure to maintain adequate business systems to accurately keep track of his revenues for tax reporting purposes also amounts to negligence. Thus, adequate grounds exist to support the assessment of penalty in this case.

Although the imposition of penalty is intended to penalize taxpayers who fail to report and pay taxes in a timely manner, there are sound policy reasons behind the imposition of penalty. A self-reporting tax system relies upon taxpayers accurately reporting their tax liabilities to the government. There are insufficient government resources to audit every taxpayer periodically to otherwise assure tax compliance. The imposition of penalty provides taxpayers with an incentive to understand the tax consequences of their actions and to accurately report their taxes. Otherwise, if the only consequence of an audit and determination of underpayment of tax was the payment of the tax which was owed, it would always advantage a taxpayer to simply underreport taxes and to pay them if they were found out. None of this is meant to imply that Mr. Sisson

underreported taxes in any manner intended to take advantage of the limited resources of the state to audit taxpayers and with any intention to escape legitimate taxation. It merely demonstrates the policy behind the legislature's enactment of a penalty provision to provide an incentive to taxpayers to ensure the proper reporting and payment of taxes.

CONCLUSIONS OF LAW

1. Mr. Sisson filed timely, written protests to Assessment Nos. 2089978 and 2092127 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Interest was properly imposed pursuant to Section 7-1-67 NMSA 1978 for the late payment of gross receipts taxes.

3. Mr. Sisson was negligent in failing to properly report the taxes for ABC Builders and Industrial Precision Instruments and penalty was properly imposed pursuant to Section 7-1-69 NMSA 1978.

For the foregoing reasons, Mr. Sisson's protests ARE HEREBY DENIED.

DONE, this 15th day of July, 1998.