

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

IN THE MATTER OF THE PROTEST  
OF LAUREN CONSTRUCTORS, INC.  
ID NO. 02-033970-00 4  
ASSESSMENT NO. 2214130

No. 98-50

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on September 18, 1998, before Margaret B. Alcock, Hearing Officer. Lauren Constructors, Inc. ("Taxpayer") was represented by Alan Davis, its controller. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is a corporation with its principal offices in Abilene, Texas.
2. The Taxpayer performs construction services throughout the southeastern United States and in portions of the southwest.
3. The Taxpayer pays taxes on an accrual basis.
4. In January 1996, the Taxpayer began a construction project for Navajo Refining ("Navajo") in Artesia, New Mexico.
5. When the Taxpayer submitted its bid to Navajo, the Taxpayer did not include the cost of New Mexico gross receipts tax.
6. Navajo informed the Taxpayer that it would be subject to payment of gross receipts tax on its construction receipts at the time the construction project was completed.

7. On January 22, 1996, Alan Davis, the Taxpayer's controller, called the Department and spoke with a Department employee.

8. Mr. Davis explained that the Taxpayer was performing construction services in New Mexico and that Navajo had told the Taxpayer it would owe gross receipts tax on its construction receipts when the project was completed. The Department employee told Mr. Davis this information was correct.

9. Mr. Davis did not obtain the employee's name or take any notes of the January 22, 1996, telephone conversation.

10. Mr. Davis did not review New Mexico's tax statutes and regulations himself, nor did he consult with a professional tax advisor concerning the Taxpayer's liability for gross receipts tax on the New Mexico project.

11. During the construction project, the Taxpayer reported and paid withholding taxes to the State of New Mexico.

12. The Taxpayer did not report or pay gross receipts tax when it received progress payments from Navajo. Instead, the Taxpayer waited until the end of the project to report gross receipts tax on its total receipts from the project.

13. In 1997, the Taxpayer was audited by the Department.

14. Following the audit, the Department informed the Taxpayer that it should have paid gross receipts tax on progress payments when received. As a result of waiting until the end of the project to pay tax on these payments, the Taxpayer became liable for penalty and interest for late payment of tax under Sections 7-1-67 and 7-1-69 NMSA 1978.

15. On January 30, 1998, the Department issued Assessment No. 2214130 for withholding, compensating and gross receipts tax due for the audit period, plus penalty and interest.

The assessment included \$17,941.17 of penalty and \$18,338.78 of interest attributable to the Taxpayer's late payment of gross receipts tax on its progress payments.

16. On February 6, 1998, the Taxpayer filed a written protest to the assessment of penalty and interest.

17. The Department subsequently abated the \$17,941.17 penalty assessment.

### DISCUSSION

The sole issue presented is whether the Taxpayer is liable for interest on its late payment of gross receipts tax on progress payments received in connection with construction services performed for Navajo Refinery in Artesia, New Mexico.

**Burden of Proof.** Section 7-1-17(C) NMSA 1978 provides that any assessment of tax 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 tax 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 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).

The reason for a late payment of tax does not 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.

**Estoppel.** The Taxpayer argues that it should be excused from paying interest attributable to its late payment of tax on progress payments because the Taxpayer reasonably relied on erroneous advice received from the Department. In effect, the Taxpayer is raising the argument of estoppel, *i.e.*, that the error of the Department's employee estops the Department from assessing the interest required by Section 7-1-67 NMSA 1978.

(a) **Estoppel Based on Statute.** Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: where the taxpayer acted according to a regulation or where the taxpayer acted according to a revenue ruling addressed to the taxpayer. The Taxpayer in this case did not seek a ruling from the Department. Nor is there a regulation advising construction companies not to pay gross receipts tax on progress payments. To the contrary, Regulation 2 NMAC 2.11.11, which has been in effect since 1975, states:

#### **REPORTING OF PROGRESS PAYMENTS.**

A contractor who receives progress payments or other consideration for services performed on and materials provided for a construction project as defined in Section 7-9-3(C) must report such payments or other consideration as gross receipts.... If the contractor is an accrual basis

taxpayer, any amounts which the contractor earned or billed or to which the contractor became entitled during a particular month must be reported as receipts for that month as required by Section 7-9-11.

There is no statutory basis for estoppel under Section 7-1-60.

(b) **Estoppel Based “Right and Justice”**. Estoppel is rarely applied against the state and then only in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State of New Mexico, Human Services Department*, 37 N. M. St. B. Bull. 20, 958 P.2d 98, 102 (1998). For estoppel to apply, the party seeking it must show: (1) lack of knowledge of the true facts in question; (2) detrimental reliance on the other party's conduct; and (3) that its own reliance was reasonable. *Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

In this case, Mr. Davis testified that he did not know New Mexico's gross receipts tax reporting requirements and relied on the Department to provide him with that information. For purposes of equitable estoppel, however, the requirement of lack of knowledge includes the lack of means by which knowledge might be obtained by the party asserting estoppel. *See, Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 698, 858 P.2d 66, 74 (1993). Here, the Department's regulations provided specific instructions concerning payment of gross receipts tax on progress payments received by construction contractors. Although Mr. Davis testified he did not have copies of New Mexico's gross receipts tax statutes and regulations, copies are readily available from the Department.

New Mexico has a self-reporting tax system and taxpayers have a statutory obligation to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, Section 7-1-13 NMSA 1978. While the Department makes every effort to give correct advice to taxpayers who

contact the Department, the ultimate responsibility for payment of tax remains with the taxpayer. A taxpayer is not entitled to rely on the oral advice of an unidentified Department employee as a substitute for making its own independent review of the statutes and regulations or consulting with a qualified tax professional. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (in light of New Mexico's statute providing for estoppel, taxpayer's reliance on the oral representations of a Department employee was not reasonable).

There is also some question as to whether the advice received by the Taxpayer was really incorrect. It is impossible to evaluate the accuracy of advice without knowing what information was provided by the Taxpayer. Mr. Davis did not have any notes to refresh his memory, and there was no testimony concerning the details of his conversation with the Department's employee. There is no way to know whether Mr. Davis specifically told the employee that Navajo would be making progress payments during the course of the project. Without this information, the employee could have assumed that payment would be received upon completion of the project. Given that scenario, the advice received by the Taxpayer would have been correct.

Based on the evidence, the Taxpayer has not met its burden of showing that the Department's assessment was incorrect or that the doctrine of equitable estoppel should be applied to estop the Department from enforcing collection of interest due on the late payment of gross receipts tax.

#### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to Assessment No. 2214130 and jurisdiction lies over the parties and the subject matter of this protest.
2. Interest was properly assessed against the Taxpayer pursuant to the provisions of Section 7-1-67 NMSA 1978.

3. The Taxpayer's reliance on the oral advice of an unidentified Department employee does not support a finding of estoppel under Section 7-1-60 NMSA 1978 to estop the Department from collecting interest due to the state under Section 7-1-67 NMSA 1978.

4. The Taxpayer's reliance on the oral advice of an unidentified Department employee does not support application of the doctrine of equitable estoppel to estop the Department from collecting interest due to the state under Section 7-1-67 NMSA 1978.

The Taxpayer's protest is DENIED.

DONE, this 23<sup>rd</sup> day of September 1998.