

Opinion No. 58-126

June 13, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: Charles B. Barker, Attorney, Bureau of Revenue, Capitol Building, Santa Fe, New Mexico

QUESTION

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Under what conditions may the Commissioner of Revenue waive the penalty and interest on taxes levied with reference to the following:

- a. Emergency School Tax
- b. Compensating or Use Tax
- c. Severance Tax
- d. Income Tax
- e. Gasoline and Motor Vehicle Tax
- f. Succession Tax.

CONCLUSION

See Opinion.

OPINION

ANALYSIS

We note that you have taken the position under Article IV, Section 32 of the New Mexico Constitution, that once the tax, penalty and interest has been established as a debt of the state, there is no power in the Commissioner to waive either the penalty or interest. We are of the opinion that this is the correct construction of the law.

In order to determine whether there is any discretion in the charging of the penalty and interest, we shall briefly review each tax in the order set forth above.

a) **EMERGENCY SCHOOL TAX**

§ 72-16-22, N.M.S.A., 1953 Comp., provides for a penalty and interest where, upon examination of the return it is found that the tax paid is incorrect. The interest is mandatory and therefore must be paid and can not be forgiven. If no intent to evade the tax is found the 10% penalty is mandatory. If there is intent to evade the tax, the 50% penalty is mandatory. Neither of these can be forgiven by the Commissioner.

§ 72-16-24, N.M.S.A., 1953 Compilation provides for cases where there is a failure to make a return and in this case both penalty and interest provided must be charged and cannot be forgiven. § 72-16-25, N.M.S.A., 1953 Compilation provides for cases where the return filed is unsatisfactory and in such case the penalty and interest must be charged. There is no discretion as to these charges in case of an unsatisfactory return. There was added to this section by Chapter 192, Laws of 1937, another provision reading as follows:

"If any taxpayer fails to file his return, accompanied by a remittance of the tax due thereon on the day the same is required to be filed, such taxpayer may be subject to a penalty of 10% of the tax plus 1% for each month of such delay."

It is apparent that this provision applies in case of a late return and in such case the Commissioner **may** charge the penalty and interest. In this case alone there is discretion and such interest and penalty may be waived. This is the only case which allows for discretion.

§ 72-16-27, N.M.S.A., 1953 Compilation provides for a procedure for the correction of any errors in charging and of course if the Commissioner finds when acting under this section that there was an error in charging, he can correct the same. However, this would not allow the forgiving of the mandatory penalty and interest which is rightly due.

b) **COMPENSATING TAX.**

§ 72-17-10, N.M.S.A., 1953 Compilation provides for penalty and interest in case, upon examination there is found additional tax due and the language is mandatory and does not allow for discretion on the part of the Commissioner of Revenue.

§ 72-17-12 provides for penalty and interest in case of failure to file a return and no discretion is allowed as to the interest and penalty in cases where this section applies.

§ 72-17-13 provides for penalty and interest in cases where the filed return is unsatisfactory, and such must be charged. In this provision there is a discretionary provision like that found in § 72-16-24 for cases of late returns. This would allow for discretion on the part of the Commissioner in cases where there is a failure to file the return on the due date.

§ 72-17-15 provides for administrative correction of errors in making assessments upon proper hearing and what has hereto been said under § 72-16-27 above would likewise apply to the Compensating tax.

c) **SEVERANCE TAX.**

§ 72-18-15, N.M.S.A., 1953 Compilation provides for an interest penalty for Severance Tax Delinquency and is mandatory, and as there is no discretion allowed to the Commission with reference to this charge, it must be collected when there is a delinquency.

d) **INCOME TAX.**

§§ 72-15-39 and 72-15-40, N.M.S.A, 1953 Compilation provide for penalty and interest and the condition of these charges. When these conditions are present, the interest and penalty must be charged and there is no authority in the Commissioner to waive the same inasmuch as they become a debt due the State and thus controlled by the aforementioned Constitutional provision.

e) **GASOLINE TAX.**

§ 64-26-14, N.M.S.A., 1953 Compilation, 1957 p.s. provides for penalty for non-payment of gasoline tax. There is a specific proviso in this statute which provides for the waivers for the penalty of interest in case of failure to pay the tax. Any time this proviso is complied with, the penalties and interest could be waived by the Commissioner.

f) **SUCCESSION TAX.**

§ 31-16-2. N.M.S.A., 1953 Compilation provides for interest due on succession tax from date due until paid. This provision does not authorize a waiver of the interest by the Commission and must be collected.

We believe that the above set forth the conditions under which the Commissioner can waive interest and penalty on the listed taxes. It is only within these conditions that such can be waived.