

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

**IN THE MATTER OF THE PROTEST OF
TOM GROWNEY EQUIPMENT, INC.
ID NOS. 01-136687-00 7 and 01-723611-00-8
ASSESSMENT NOS. 2775926, 2776653,
3866896 and 3861992**

No. 03-05

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 8, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Tom Growney Equipment, Inc. ("Taxpayer") was represented by Bruce Higgins, its general manager. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in business in New Mexico and is registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
2. Because the Taxpayer's average monthly payment of gross receipts, compensating and withholding taxes exceeds \$25,000, the Taxpayer is required to pay these taxes using one of the special payment methods set out in Section 7-1-13.1 NMSA 1978.
3. Prior to the February 2002 reporting period, the Taxpayer elected to make its monthly CRS tax payment by means of an automated clearing house ("ACH") transfer.
4. ACH transfers must be initiated by the Taxpayer. Each month, the Taxpayer's general manager called National Data, a company providing ACH electronic debit services, with

instructions concerning the amount and date on which the ACH payment should be made to the Department.

5. The Taxpayer also maintains a business location in Texas, and in January 2002, the Taxpayer began paying taxes it owed to Texas electronically over the internet.

6. Texas provided the Taxpayer with a booklet that the Taxpayer's general manager studied and used to successfully complete electronic payment of taxes owed to Texas for the December 2001 reporting period.

7. The Taxpayer's accounting staff encouraged the general manager to start filing the Taxpayer's New Mexico CRS taxes electronically. One staff member went to the Department's web site and obtained the password needed to electronically report and pay CRS taxes due to New Mexico.

8. On March 20, 2002, five days before the statutory due date, the Taxpayer's general manager accessed the Department's web site in order to electronically report and pay CRS taxes due for the February 2002 reporting period.

9. The Department's web site includes instructions on making electronic payments over the internet. Under the heading "How are payments made?" the instructions state:

You may also pay by electronic check whereby you authorize the State of New Mexico Taxation and Revenue Department to debit your checking account in the amount you specify.

The Automatic Clearing House Deposit and Federal Wire Transfer payment methods are only for taxpayers who make special arrangements with their bank to have funds transferred electronically to the Taxation and Revenue Department on a specified date. **You must initiate this Payment.** (Emphasis in the original.)

The instructions also contain the following warning:

Please note that CRS-NET transactions are subject to unavoidable internet connection failure. As with paper returns, it is the taxpayer's responsibility to

ensure that reports and payments are received in a timely fashion. Always retain your transaction number. If you are unsure or wish to verify the successful submission of your return, use the View Summary Button from the Success Screen or the Review Prior Report Option from the Password Entry Screen.

10. Although the Taxpayer's general manager intended to pay the Taxpayer's February 2002 taxes by electronic check, he clicked on the box for ACH payments.

11. The general manager did not read the Department's instructions and did not understand that in order to make an ACH payment, he would have to initiate the payment with National Data in the same way he had in each previous month. Instead, the general manager assumed the Department would initiate the ACH transaction because this was the way it was done in Texas.

12. The general manager did not check the "Success Screen" referenced in the Department's instructions, even though the Taxpayer's liability exceeded \$50,000 and this was the first time the general manager had attempted to pay New Mexico taxes using the internet.

13. The general manager did not check with the Taxpayer's accounting department to insure that the electronic payment had gone through successfully.

14. The Taxpayer's March 2002 bank statement indicated that the February tax payment had not been debited from the Taxpayer's account, but no one on the Taxpayer's accounting staff alerted the general manager to this fact.

15. On April 18, 2002, the general manager attempted to pay the Taxpayer's March 2002 CRS taxes online. Again, the general manager erroneously clicked "ACH" as the method of payment and again, failed to verify the payment on the Success Screen or check with the Taxpayer's accounting department to insure that the payment went through.

16. On April 26 and April 30, 2002, the Department issued Assessment Nos. 2775926 and 2776653 to the Taxpayer for CRS taxes, penalty and interest reported but not paid for the February 2002 reporting period.

17. On May 10, 2002, the Taxpayer's general manager called National Data and initiated an ACH transfer of the tax principal due for the February and March 2002 reporting periods. The same day, the Taxpayer filed a written protest to the penalty and interest assessed for February 2002.

18. On June 10, 2002, the Department issued Assessment Nos. 3866896 and 3861992 to the Taxpayer for penalty and interest due on the late payment of CRS taxes due for the March 2002 reporting period.

19. On June 20, 2002, the Taxpayer filed a written protest to the assessment of penalty and interest for the March 2002 reporting period.

20. At the May 8, 2003 hearing on the Taxpayer's protest, the Taxpayer's general manager stated that the Taxpayer was no longer disputing its liability for the interest assessed by the Department and that the only matter remaining to be decided was the assessment of penalty.

DISCUSSION

The issue to be determined is whether the Taxpayer is liable for the penalty assessed on its late payment of CRS taxes for the February and March 2002 reporting periods. Section 7-1-17 NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Section 7-1-3 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." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the presumption of correctness applies to the

assessment of penalty at issue in this case, and it is the Taxpayer's burden to present evidence and legal arguments to support an abatement.

Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month or any fraction of a month, up to a maximum of ten percent, that a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes or file required tax reports in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

New Mexico case law confirms that penalty is properly assessed even when a taxpayer's late payment is based on inadvertent error or unintentional failure to pay the tax due. *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds by Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797-798, 779 P.2d 982, 984-985 (Ct. App. 1989).

In this case, the Taxpayer's late payment of CRS taxes was attributable to negligence. First, the Taxpayer's general manager failed to read the Department's instructions concerning electronic payments. Instead, the general manager simply assumed that the New Mexico system for electronic payments was the same as that used by Texas. Given the general manager's acknowledgment that he is not entirely comfortable with today's computer technology, and the fact that he had never tried using New Mexico's electronic payment system prior to March 2002, his failure to carefully read the

instructions or to verify the success of the transaction by accessing the “Success Screen” referenced in the Department’s instructions was negligent.

At the administrative hearing, the general manager argued that the Department’s instructions concerning electronic payments are not clear and would not have helped him in any event. This argument is refuted by the instructions themselves, which clearly state that while payment by electronic check authorizes the Department to initiate the transaction, payment by ACH transfer must be initiated by the Taxpayer. At a minimum, this should have put the general manager on notice that there is a distinction between electronic checks and ACH transfers and caused him to clarify that distinction by calling the telephone number provided in the Department’s instructions.

The general manager’s argument concerning the Department’s instructions also fails to address the additional indications of negligence in this case, *i.e.*, the general manager’s failure to check with his accounting department to insure the electronic payment went through (which would have alerted him to the problem prior to the due date for the February reporting period) and the accounting staff’s failure to notify the general manager that the February tax payment never cleared the Taxpayer’s bank account (which would have alerted him to the problem prior to his April 18, 2003 attempt to pay taxes due for the March reporting period). Again, the fact that March 2002 was the first time the Taxpayer had attempted to make payment over the internet should have led the general manager to proceed with more care, particularly in light of the explicit warning in the Department’s instructions that “it is the taxpayer’s responsibility to ensure that reports and payments are received in a timely fashion.”

Finally, the Taxpayer asks the hearing officer to waive or reduce the penalty based on the Taxpayer’s exemplary reporting history and the substantial amount of CRS taxes it has paid to the state over the years. These are not factors the hearing officer can consider. In *State ex rel. Taylor v.*

Johnson, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

In this case, the Legislature has directed the imposition of penalty whenever a late payment results from the taxpayer's negligence. The Legislature has not granted the Department or its hearing officer authority to waive the penalty based on a taxpayer's past reporting history. Because the Taxpayer's late payment of its February and March 2002 CRS taxes was due to negligence, there is no basis for abating the penalty assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 2775926, 2776653, 3866896 and 3861992, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer's failure to timely pay its February and March 2002 CRS taxes was due to negligence and penalty was properly assessed pursuant to Section 7-1-69 NMSA 1978.

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

DATED May 13, 2003.