

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

**IN THE MATTER OF THE PROTEST OF
CRAWFORD CHEVROLET, INC.**

**ID No. 02-104565-00-8, TO ASSESSMENT
OF PENALTY ISSUED UNDER LETTER
ID L0637693440**

No. 06-10

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 19, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Crawford Chevrolet (“Taxpayer”) was represented by Margaret Marino, its office 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. During calendar year 2004, the Taxpayer’s average monthly payment of gross receipts, compensating, and withholding taxes exceeded \$25,000. As a result, the Taxpayer was required to pay its 2005 CRS taxes according to the special payment methods set out in NMSA 1978, § 7-1-13.1.

3. The CRS Filer’s Kit the Department mails to CRS taxpayers every six months includes information concerning special payment requirements. In addition, the Department has issued Publication FYI-401, which contains a detailed explanation of special payment procedures. That publication is posted on the Department’s web site and also can be requested in printed form.

4. The Taxpayer's office manager did not read the CRS Filer's Kit or check the information available on the Department's web site. As a result, she was not aware that the Taxpayer was required to mail its monthly check in payment of 2005 CRS taxes so that the Department received the check one banking day before the statutory due date.

5. For most months during 2005, the office manager mailed the Taxpayer's CRS payment early enough to meet the special payment requirements.

6. In October 2005, the office manager delayed mailing the check for the September 2005 reporting period and the payment for that month's taxes was one day late.

7. On November 8, 2005, the Department issued an assessment under Letter ID. No. L0637693440, assessing the Taxpayer for \$460.80 of penalty resulting from the Taxpayer's failure to follow the special payment requirements of NMSA 1978, § 7-1-13.1.

8. On December 7, 2005, the Taxpayer filed a written protest to the assessment.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the ten percent negligence penalty imposed by NMSA 1978, § 7-1-69(A) for failure to pay tax "in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so...." The Taxpayer acknowledges that its payment of CRS taxes for the September 2005 reporting period was late, but maintains that penalty should be waived because it was not notified that it was subject to the special payment requirements set out in the statute.

The Taxpayer's argument is based on a misunderstanding of New Mexico's self-reporting tax system. It is up to the Taxpayer—not the Department—to determine the Taxpayer's obligation for taxes due to the state and to pay those taxes in a timely manner. *See*, NMSA 1978, § 7-1-13(B); *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976),

cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977). In *Vivigen, Inc. v. Minzner*, 117 N.M. 224, 228, 870 P.2d 1382 (Ct. App. 1994), the court of appeals rejected an argument very similar to that raised by the Taxpayer in this case, noting that:

Vivigen seems to be complaining that the Department did not definitively tell it that it needed to pay compensating taxes on out-of-state purchases so that it could have avoided taxes, interest, and penalties for compensating taxes accrued from and after February 1989. *Any necessary notice, however, was provided by New Mexico statutes.* (emphasis added).

Here, New Mexico's tax statutes and regulations, as well as the information contained in the CRS Filer's Kit and Publication FYI-401, gave the Taxpayer notice of its obligation to use the special payment methods set out in § 7-1-13.1. The Taxpayer was not entitled to wait for the Department to notify it of this obligation before penalty accrued on late payments.

The Taxpayer also asks that penalty be waived because it has a history of timely payment. This is not something the Department 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....

NMSA 1978, § 7-1-69 governs the imposition of penalty and does not give the Department or its hearing officer authority to waive penalty based on a taxpayer's past reporting history.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the Department's assessment of penalty, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer had a legal obligation to pay its 2005 CRS taxes using the special payment methods set out in NMSA 1978, § 7-1-13.1, and the fact that the Taxpayer did not receive personal notice of this obligation did not excuse it from compliance.

C. Because the Taxpayer did not pay its CRS taxes for the September 2005 reporting period within the time frame required by NMSA 1978, § 7-1-13.1, penalty was properly imposed.

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

DATED June 21, 2006.