

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

**IN THE MATTER OF THE PROTEST
REDROCK FOODS, LTD.
NM ID NO. 02-258838-00 8, TO DENIAL OF
CLAIM FOR REFUND ISSUED UNDER
LETTER ID L1968004608**

No. 06-16

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 30, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Bruce J. Fort, Special Assistant Attorney General. Redrock Foods, Ltd. was represented by Julian Josephson, one of its partners. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Redrock Foods, Ltd. (“Redrock”) is a California limited partnership that owns 14 Burger King restaurants in New Mexico.
2. When Redrock began doing business in New Mexico in 1995, its Durango, Colorado, office had responsibility for payment of New Mexico gross receipts taxes.
3. The Durango office was managed by one of Redrock’s partners, who had been an employee of the partnership prior to 1995 and was familiar with the business.
4. In late 2002 or early 2003, there was a breakdown in management in the Durango office, resulting in the nonpayment of Redrock’s New Mexico gross receipts taxes beginning in February 2003.

5. Because the other partners had given the Durango partner almost total autonomy in his sphere of operation, they were not aware that required tax payments were not being made.

6. Over time, the other partners began receiving notices from their franchisor and various governmental agencies indicating that there was a problem in the Durango office.

7. In early 2004, the other partners closed the Durango office and transferred responsibility for payment of taxes to an office in California.

8. The problem with Redrock's New Mexico gross receipts tax reporting was not discovered until June 2004.

9. Beginning in June 2004, Redrock timely reported and paid gross receipts taxes due for May 2004 and all subsequent reporting periods. At the same time, Redrock approached its lender for a loan commitment to pay back taxes due for reporting periods February 2003 through April 2004.

10. On August 16, 2004, Michael Wells, Redrock's vice president and chief financial officer, sent a letter to Carolyn Konz, an employee in the Department's Audit and Compliance Division, stating that Redrock was ready to proceed with a payment plan.

11. Mr. Wells' letter said that in arranging for a loan commitment to repay the back taxes, he determined that Redrock's lender would not agree to the payment of penalty.

Mr. Wells concluded:

Therefore, we are requesting that you waive all of the penalties and we will begin the payment plan as soon as our lender permits, but no later than September 15, 2004. We appreciate your assistance in this matter and assure it was never Redrock Foods intention not to pay the New Mexico Sales Tax.

12. On August 20, 2004, Carolyn Konz had a telephone conversation with Mr. Wells and told him that if Redrock could arrange for a short-term payment plan, she was “pretty sure” the penalty could be abated.

13. On August 26, 2004, Mr. Wells mailed Ms. Konz a signed copy of Redrock’s payment plan, together with a check for \$100,000 as a down payment.

14. In his transmittal letter Mr. Wells stated: “We understand that you are continuing to work on getting the penalties abated or reduced and that when that occurs we will receive a new payment plan with adjusted dollar amounts.”

15. On November 18, 2004, Shannon Baxter, a supervisor in the Department’s Audit and Compliance Division, called Mr. Wells and told him that the Department would not be able to abate the penalty associated with Redrock’s late payment of gross receipts tax.

16. On May 24, 2005, Julian Josephson, one of Redrock’s partners, notified Carolyn Konz that Mr. Wells had left the company due to health problems and requested “an abatement of penalties regarding the Short Term Payment Plan we entered into with you on August 25, 2004.” Mr. Josephson further stated: “My hope is that you have been successful in having your department agree to an abatement of the penalty.”

17. By June 2005, Redrock had paid all amounts assessed by the Department, including the penalty, which the partners paid from their own funds.

18. After the final payment was made, Mr. Josephson continued to send letters to the Department concerning the abatement of penalty.

19. On September 16, 2005, the Department advised Mr. Josephson to file a formal claim for refund of the penalty.

20. On September 28, 2005, Redrock filed an application for refund of the \$98,696.04 of penalty it had paid to the Department.

21. On December 16, 2005, the Department denied Redrock's claim for refund.

22. On January 26, 2006, Redrock filed a written protest to the Department's denial of its claim for refund.

DISCUSSION

The sole issue to be decided is whether Redrock is entitled to a refund of the \$98,696.04 of penalty associated with the late payment of its gross receipts taxes for reporting periods February 2003 through April 2004. NMSA 1978, § 7-1-69(A) governs the imposition of penalty and provides that when a taxpayer fails to pay taxes as a result of negligence or disregard of rules and regulations, a penalty "shall be added" to the amount of the underpayment. The term negligence as used in § 7-1-69(A) 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.

In this case, Redrock concedes that its failure to pay New Mexico gross receipts taxes for the period at issue was the result of a breakdown in its Durango office "due to insufficient supervision and tardy management." This situation meets the definition of negligence.

At the administrative hearing, Mr. Josephson argued that he and the remaining partners acted reasonably in allowing the Durango partner to operate without supervision or outside oversight. Mr. Josephson pointed out that the Durango partner had a personal stake in the success of the partnership; that before becoming a partner he was a mid-level manager and was familiar with the operation of the business; and that he had successfully managed the Durango office for several years before problems developed. These arguments might be persuasive if the negligence of the current partners were the matter at issue. It is not. The taxpayer in this case is the partnership, which is liable for the actions of all of its partners and employees. The fact that some partners may have acted responsibly does not absolve Redrock from liability for the negligence of the partner and employees located in the Durango office. It is also clear that, however trustworthy the Durango partner appeared to be, ordinary business care and prudence required the remaining partners to perform some periodic review of his activities.

Redrock next raises an argument of estoppel, contending that Michael Wells, its former vice president and chief financial officer, discussed the abatement of penalty with Carolyn Konz, an employee in the Department's Audit and Compliance Division. Mr. Josephson acknowledges, however, that there was no firm commitment made by the Department. During a telephone conversation with Mr. Wells in August 2004, Ms. Konz said she was "pretty sure" the penalty could be abated if Redrock entered into a short-term payment plan. The Department's computer journal shows that two months later, in November 2004, a supervisor in the Audit and Compliance Division spoke with Mr. Wells

and told him that the Department would not be able to abate the penalty. These facts do not provide a basis for estoppel.

Finally, Mr. Josephson asks the hearing officer to waive or reduce the penalty based on Redrock's exemplary reporting history and the substantial amount of CRS taxes it has paid to the state over the years. Unfortunately, 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 Redrock's late payment of its gross receipts taxes was due to negligence, there is no basis for abating the penalty.

CONCLUSIONS OF LAW

A. Redrock filed a timely, written protest to the refund denial issued under Letter ID L1968004608, and jurisdiction lies over the parties and the subject matter of this protest.

B. Redrock was negligent in failing to make timely payment of New Mexico gross receipts taxes for reporting periods February 2003 through April 2004, and penalty was properly imposed pursuant to NMSA 1978, § 7-1-69.

C. The Department did not agree to abate the penalties assessed against Redrock and there is no basis for a finding of estoppel.

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

DATED September 14, 2006.