

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

**IN THE MATTER OF THE PROTEST OF
CORE-MARK MIDCONTINENT, INC.
CRSCIG 02-002724-00-9
TO ASSESSMENT ISSUED UNDER
LETTER ID L0247382400**

No. 08-05

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 23, 2008, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Catarina Wong, Director of Tax Operations & Governmental Affairs represented Core-Mark Midcontinent, INC. ("Core-Mark"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 19, 2007, the Department assessed Core-Mark \$46,376.88 in penalty and \$950.72 in interest for late payment of the cigarette tax for period ending on October 31, 2007.
2. Core-Mark sells packages of cigarettes in New Mexico. Core-Mark is a distributor licensed to sell cigarettes. See Exhibit D.
3. As a distributor, Core-Mark must purchase stamps from the Department. See NMSA 1978, Section 7-12-7 (2006).
4. Cigarette tax stamps are sold by the Department in numbered rolls, and each stamp has a serial number. See NMSA 1978, Section 7-12-7(C) (2006).

5. The tax stamps must be affixed to the cigarette packages as set out in NMSA 1978, §7-12-5 (2007).

6. A tax stamp has a specific cigarette tax value pursuant to the Cigarette Tax Act. See NMSA 1978, Section 7-12-2(K) (2007).

7. On October 2, 2007, October 10, 2007, October 23, 2007 and October 31, 2007, Core-Mark placed orders for the stamps and charged the payment of stamps. See Exhibit D.

8. A distributor may be required to pay for the stamps at the time the order is placed.

9. Core-Mark was not required to pay for the stamps at the time the orders were placed.

10. If the order for stamps is made and the payment is charged, payment for the tax stamps is required to be made on or before the 25th day of the month following the month in which the sale of stamps by the Department is made. See NMSA 1978, 7-12-7(F) (2006) and Exhibit D.

11. The purchase order for New Mexico cigarette stamps provides that payment must be made by the 25th day of the month following the month in which the cigarette stamp was purchased. See Exhibit D.

12. On November 25, 2007, Core-Mark's payment for tax stamps was due. November 25, 2007 was a Sunday. Therefore, the payment was due on the November 26, 2007.

13. If the due date for a payment falls on Saturday, Sunday or a legal state or national holiday, the performance of the act shall be considered timely if it is performed

on the next succeeding day which is not a Saturday, Sunday or a legal state or national holiday. See Section 7-1-77 (1965).

14. On November 27, 2007, Core-Mark mailed by Federal Express a payment for cigarette tax in the amount of \$22,318,843.82. See Exhibit D.

15. At the hearing, Ms. Wong testified that Core-Mark was not disputing that it was negligent by not mailing the payment earlier.

16. Ms. Wong testified that Core-Mark could have paid the cigarette tax payment earlier considering that the November payment was due around the Thanksgiving holiday.

17. Core-Mark has an excellent record of paying the cigarette tax in a timely manner.

18. On December 27, 2007, Core-Mark filed a written protest to the Department's assessment.

19. On June 16, 2008, Core-mark issued a check in the amount of \$47,327.60 to the Department in payment of the penalty and interest assessed. This amount was paid under protest.

DISCUSSION

The issue to be decided is whether Core-Mark is liable for penalty and interest for the late payment of the cigarette tax. Core-Mark raises one argument in its Protest. It argues that it is a good taxpayer and it has a history of always paying the cigarette tax in a timely manner. As part of its argument, Core-Mark explained that its internal auditing procedures required all checks in a certain amount to be signed by two officers of Core-Mark. Because of the Thanksgiving holiday, the officers who were required to

sign the checks were not available and this delayed the processing of the check. At the hearing, Core-Mark did not dispute that it was negligent and that it had made a mistake in not making the payment by the 26th of November.

Burden of Proof. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, §7-1-17(C) (2007); *MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003-NMCA-21, ¶ 13, 133 N.M. 217, 62 P.3d 308. Section 7-1-3(V) 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 assessment issued to Core-Mark is presumed to be correct, and it is Core-Mark’s burden to present evidence and legal argument to show that it is entitled to an abatement.

Assessment of Interest. Section 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that 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).

NMSA 1978, §7-1-67 (2007).

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). The legislature has directed the Department to assess interest whenever taxes are not timely paid. The assessment of interest is not designed to punish

taxpayers, but to compensate the state for the time value of unpaid revenues.

Core-Mark argues that because it has a good payment history with the Department it should not be assessed interest. The Department's own Request for Hearing states that Core-Mark has an excellent record for diligent and timely payment. Unfortunately, there is no statutory or regulatory provision that permits the Hearing Officer to abate the interest portion of the assessment.

Assessment of Penalty. Section 7-1-69 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, "in the case of failure, due to negligence or disregard of rules and regulations" to pay taxes due to the state. Regulation 3.1.11.10 NMAC defines "negligence" 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.

Regulation 3.1.11.10 NMAC (2001).

The negligence penalty is imposed when a careless error is made by the taxpayer, regardless of the intentions of the taxpayer or whether the taxpayer has an excellent payment history with the Department. Core-Mark benefited from charging and not paying for the stamps at the time it ordered the stamps. However, by delaying payment around the time of a holiday, Core-Mark made a careless error; albeit, the error was rectified quickly.

Holidays are difficult times for taxpayers because employees are on vacation. In this case, Ms. Wong testified that a second signature was needed and the necessary

officer who signed the check was on vacation. Ms. Wong testified that nothing prevented Core-Mark from paying the cigarette tax prior to the due date considering the due date was near a holiday.

The Hearing Officer notes that Core-Mark believes that this mistake would not have occurred had the Department permitted Core-Mark to make its payment by electronic means or by wire transfer. Core-Mark would like the Department to have the technology to accept cigarette tax payments by electronic means.

CONCLUSIONS OF LAW

1. Core-Mark filed a timely written protest to the penalty, and interest assessed under Letter IDL0247382400, and jurisdiction lies over the parties and the subject matter of this protest.

2. Core-Mark failed to properly pay the cigarette tax due and owing on the due date pursuant to NMSA 1978, §7-12-7(F) (2006).

3. For the foregoing reasons, Core-Mark's protest IS DENIED.

DATED November 25, 2008.