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

IN THE MATTER OF THE PROTEST OF
LARKSPUR, LLC TO ASSESSMENTS
ISSUED UNDER L1098995328, L0562124416,
L0025253504 and L1518179968. **No. 09-03**

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 16, 2009, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Patrick Edward Preston, Special Assistant Attorney General. Larkspur LLC, ("Taxpayer") was represented by its attorney, Ms. Tracy T. Howell, Sommer, Udall, Hardwick, Ahern & Lyatt, LLP. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was engaged in the business of construction of residential four-plexes during and prior to the assessment tax periods.

2. On May 10, 2006, auditor for the Department notified Taxpayer of a possible audit. (Department Exhibit G)

3. On June 9, 2006 Taxpayer was mailed by first class and certified mail, a letter from the Audit Supervisor of the Audit and Compliance Unit of the Department notifying Taxpayer that it was selected for a tax audit for the time periods of October 1, 2003 through May 31, 2006 and that included in the audit would be Gross Receipts and Withholding taxes notifying Taxpayer of records to bring to the audit set for July 7, 2006. (Department Exhibit F and G)

4. On August 18, 2006, Mr. Irv Abrams, then accountant for Taxpayer, met with Department's auditor supplying documentation requested. (Department's Exhibit G)

5. On September 13, 2006, Taxpayer notified the Department's auditor that Mr. Eric Mulata, Vice President of Finance, was the contact person for all future communications regarding the audit. (Department Exhibit G).

6. On November 15, 2006, Mr. Mulata, on behalf of Taxpayer, met with the Department's auditor and provided necessary documentation. He also discussed taxpayer's reliance on its accountant, Mr. Abrams, in determining prior tax liability; arguing that the penalty should be waived based on Taxpayer's reliance on its independent accountant. (Department Exhibit G)

7. On January 5, 2007 the Department's auditor requested that the Department, pursuant to NMSA 1978, § 7-1-69 (2003), waive all penalties for the audit period from October 2003 through June 2006 as the auditor opinioned that Taxpayer had "relied on the reasonable advice and services of independent accountant. (Taxpayer Exhibit 1)

8. The penalties assessed for unpaid taxes for the tax period of October 1, 2003 through June 30, 2006 were waived by the Department.

9. On June 26, 2007, the Audit and Compliance Division of the Department received the completed CRS forms from Taxpayer for the months of July 2006, August 2006, September 2006 and October 2006 indicating that gross receipts taxes and withholding taxes were owed. None of the reported taxes due for these months was paid. The documentation reveals that the documents were originally faxed from Irv Abrams &Associates on June 21, 2007. (Department Exhibit H)

10. Taxpayer acknowledges that the taxes as indicated on the CRS Reports are due, owing, not paid and does not contest the assessment of gross receipts taxes, withholding taxes or the related interest assessed under L1098995328, L0562124416, L0025253504 and L1518179968.

11. On July 31, 2007, the Department issued the following assessments of gross receipts tax, withholding tax, plus accrued interest and penalty to Taxpayer:

Letter ID	Reporting Period	Tax Due	Penalty
L1098995328	July 2006	$410,697.18	$40,980.52
L0562124416	August 2006	$ 16,490.34	$ 1,579.65
L0025253504	September 2006	$ 43,980.84	$ 4,330.29
L1518179968	October 2006	$ 2,691.29	$ 205.30

(Department Exhibits A, B, C, D & I)

12. There is no additional penalty to be added to the above amount as the maximum penalty is charged based on NMSA 1978, § 7-1-69 (2003, prior to amendments through 2007), which at the time of the assessments was capped at 10%. The total amount of penalty in dispute is $47,095.76.

13. Taxpayer disputes only the assessment of penalty for the owed taxes. On August 14, 2007, Counsel for Taxpayer, filed a formal written protest to the assessment of penalties requesting that such penalties be abated based on taxpayer reliance on the advice of its accountant. (Department Exhibit B)

14. On August 31, 2007, a letter acknowledging the protest was mailed to counsel for Taxpayer. This letter included the contact person for the Department, explaining the possibility of informal conference and formal hearing. (Department Exhibit C)

DISCUSSION

The sole issue to be determined is whether Taxpayer is liable for the $47,095.76 negligence penalties assessed in connection with its late filing of and non-payment of CRS taxes for the July 2006 through October 2006 reporting periods. The Taxpayer does not dispute that the filings were late or that the taxes have not been paid but maintains that it should be excused from payment of the penalty based on that fact that the Department's auditor had waived the penalties assessed for the

reporting periods of October 2003 through June 2006. Taxpayer argued that the same argument applied for subsequent tax periods.

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); *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. NMSA 1978, § 7-1-3 (V) (2003) defines tax to mean not only the total amount of tax imposed and required to be paid but also, "unless the context otherwise requires, includes the amount of any interest or civil penalty relating thereto." See *GTE Southwest Inc. v. Taxation & Revenue,* 113 NM 610, 830 P.2d 162 (Ct. App. 1992) and *El Centro Villa Nursing Center v. Taxation and Revenue Dept.,* 108 NM 795, 779 P.2d 982 (Ct. App. 1989).

Therefore the assessments issued to Taxpayer are presumed to be correct and it is Taxpayer's burden to present evidence and legal argument establishing that it is entitled to the abatement of the penalty. See *Grogan v. New Mexico Taxation & Revenue,*2003-NMCA-033, 133 NM 354, ¶ 12, 62 P.3d 1236. ("The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made."). Once the presumption of correctness is rebutted, however, the burden shifts to the Department to show the correctness of the assessed tax. *MPC Ltd. V. New Mexico Taxation and Revenue Department,* 2003 NMCA 21, ¶ 13, 133 NM 217, 62 P.3d 308.

Penalty due for failure to pay tax. NMSA 1978 § 7-1-69 (2003), the relevant statute in effect prior to January 1, 2008 and the statute pertinent to the assessment of penalty for taxes owed prior to January 2008, states in regard to the imposition of a penalty for failure to file and to pay tax due and provides in pertinent part:

> A. Except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid.

§ 7-1-69 (2003), provides that when a taxpayer fails to pay taxes due to the state 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 is defined in Regulation 3.1.11.10 NMAC (2001) 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.

See, *Grogan v. New Mexico Taxation & Revenue,* 2003-NMCA-033, ¶ 32, 133 NM 354,62 P.3d 1236. ("A Taxpayer is subject to a penalty for failure to pay gross receipts taxes 'due to negligence or disregard of the rules and regulations, but without intent to evade or defeat a tax.") Taxpayer claims there are two relevant periods and that the abatement of a penalty for the initial audit period requires the abatement of the penalty for the audit period of concern here. While there are two periods discussed in regard to the penalty assessments only one is of relevance in this matter which is the penalty assessment for non-filing and non-payment of taxes for July 2006 through October 2006. Taxpayer submitted Exhibit 1, establishing that the Department's auditor determined that Taxpayer had reasonably relied on its independent accountant in its calculation of its gross receipts tax liability with the Department's auditor requesting that the penalty be waived for the initial audit period ending in June 2006. Taxpayer claims that based on that prior abatement that the penalties assessed

for late filing and non payment of gross receipts and withholding taxes due for the months of July 2006 through October 2006 should also be waived based on the same theory of reasonable reliance on its independent accountant in the calculation of its tax liability. However Taxpayer presented no evidence establishing reasonable reliance on its independent counsel but rather relied on the prior abatement by the auditor. The Department's witness, Ms. Sena, testified that the prior audit period penalty assessment was waived based on reasonable reliance but such does not overcome the presumption of correctness of the present penalty assessment for the periods covered by the current assessments. See *Grogan v. New Mexico Taxation & Revenue,*2003-NMCA-033, ¶ 12, 133 NM 354,62 P.3d 1236. ("Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.")

The Department claimed that the assessment was proper based on Taxpayer knowing as early as May 2006 and certainly in June 2006 that the Department was auditing Taxpayer in regard to its reporting of its gross receipts and withholding taxes. The Department claims that with such knowledge, Taxpayer had an obligation thereafter to ensure that it was properly reporting and paying its taxes. Further in November 2006, Taxpayer was aware that taxes were owed for the initial audit period. The Department further established that Taxpayer filed the CRS reports in June 2007 for July through October of 2006 and did not pay the taxes although acknowledging that such taxes were due. Here, taxpayer had notice of a possible audit in May 2006 and in June 2006 was mailed notification of the audit and made aware that the Department would be auditing for the period from October 2003 through May 2006. There was no evidence to establish that Taxpayer took steps to ascertain the correctness of the taxes involved in the initial audit and therefore Taxpayer assumed the risk in failing to correctly report and pay the gross receipts and withholding taxes for the period of these assessments. Taxpayer simply assumed that the returns had been prepared correctly even after being notified of the

audit. Taxpayer failed to exercise that degree of ordinary business care and prudence that a reasonable taxpayer would exercise under like circumstances of being notified that an audit was being conducted for the three years prior to the current assessment period.

Further, there was no evidence to establish that Taxpayer actively pursued resolution of the assessment when action was required but rather Taxpayer relied on the prior abatement to argue for a subsequent abatement of penalty. Taxpayer completed the formal protest (Department Exhibit B) but did nothing to establish reasonable reliance and therefore a legal basis for the abatement of the penalty. Taxpayer failed to inquire and research about the reporting period from July through October after being put on notice of the audit. Taxpayer erroneously believed that the prior abatement of a penalty was sufficient to establish that the current penalty should be abated. This error meets the definition of negligence set out in Department regulations and in New Mexico case law. There was no evidence only argument that Taxpayer should not be held liable for the penalty based on its reliance that the prior abatement of penalty had been awarded. Under § 7-1-69 (2003), a taxpayer must make a showing of reasonable reliance. Having been notified of the audit, substantial evidence exists that it was not reasonable for Taxpayer to rely on the prior abatement to establish that the subsequent penalty should be abated.

A taxpayer's reliance on a tax professional must be active and informed - not passive and unaware - in order to support a finding that the taxpayer's failure to pay tax was not negligent for purposes of NMSA 1978, §7-1-69 (A) (2003). A taxpayer's responsibility for payment of taxes due cannot just be delegated to a third party and forgotten. See *El Centro Vila Nursing Center. V. Taxation and Revenue Department,* 108 NM 795, ¶ 799, 779 P.2d 982, ¶ 986 (Ct., App. 1989) ("every person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or action] *Tiffany Constr. Co. V. Bureau of Revenue,* 90 NM at 17, 558 P.2d at 1156.

We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters."

A finding of non-negligence requires proof that the taxpayer engaged in "informed consultation" concerning the specific liability at issue. See *C & D Trailer Sales v. Taxation and Revenue Dept.*, 93 N.M. 697, 699, 604 P.2d 835, 837 (Ct. App. 1979) (a taxpayer's mere belief that he is not liable to pay taxes is tantamount to negligence within the meaning of the statute with penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, P.797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.);

Taxpayer bears the burden to show that it was not negligent or in disregard of the Department's rules and regulations in failing to report and pay taxes. Having failed to present evidence to rebut the presumption of correctness as to the penalty assessed, the protest must fail. Taxpayer's argument that it should be able to rely on an abatement, by an auditor, of a prior penalty assessment fails to overcome the presumption that the penalty assessment for the months of July through October 2006 is correct. See *Phillips mercantile Co. Taxation & Revenue,* 109 NM 487, P. ¶ 35, 786 P.2d 1221, ¶ 35 (Ct. App. 1990) ("Phillips failed to present any competent evidence negating the inference that it was negligent in failing to pay the compensating tax assessed. Accordingly, assessment of a negligence penalty pursuant to Section 7-1-69(A) was proper" with the penalty upheld as there was no evidence that the failure to pay was the result of diligent protest "based on informed consultation and advice") and *Sonic Industries v. State of New Mexico and John Chavez,, Secretary of Taxation and Revenue,* 2000-NMCA-087, 129 NM 657, 11 P.3d 1219 .

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments of penalty issued under L1098995328, L0562124416, L0025253504 and L1518179968, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer's failure to timely file and pay CRS gross receipts and withholding taxes for the months of July 2006 through October 2006 was negligent and penalty was properly assessed pursuant to NMSA 1978 § 7-1-69 (2003).

For the foregoing reasons, the protest of Larkspur LLC IS DENIED.

Dated: August 7, 2009.