

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

**IN THE MATTER OF THE PROTEST OF
TIERRA RESOURCES INTERN INC,
TO ASSESSMENT ISSUED UNDER
ID NO. L0327318848**

No. 13-25

DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 23, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Legal Counsel, and Mr. Aaron Rodriguez, Staff Attorney. Ms. Sonya Varela, Auditor, also appeared on behalf of the Department. Tierra Resources Intern, Inc. (Taxpayer) appeared for the hearing by and through its President, Mr. Anthony Filyk, and its Vice-President, Ms. Margaret Filyk. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico in 2012.
2. Employers with a certain amount of withholding are supposed to file their withholding returns electronically. *See* NMSA 1978, § 9-11-6.4. *See also* 3.1.4.18 NMAC.
3. The Taxpayer paid its withholding tax on time and filed a paper withholding tax return. After receiving some communication from the Department, the Taxpayer re-filed its return electronically.

4. On February 14, 2013, the Department assessed the Taxpayer for penalty for the tax period ending on December 31, 2012 for late filing of the return. The assessment was for \$900.00 in penalty.
5. On May 5, 2013, the Taxpayer filed a request for extension of time to file protest.
6. On May 7, 2013, the Taxpayer filed a formal protest.
7. On May 13, 2013, the Department granted a retroactive extension of time to file and acknowledged its receipt of the protest.
8. On June 20, 2013, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
9. The Taxpayer consulted its accountant about its return and provided a check to be submitted with its return. The accountant submitted the return and payment on behalf of the Taxpayer.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty for the tax period ending in December 2012, due to its failure to file withholding tax reports on time by electronic transmission.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is

presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is not liable for the penalty.

Filing of the Return.

Generally, a taxpayer is liable for penalty "in the case of failure...to file by the date required a return[.]" NMSA 1978, § 7-1-69 (A). Generally, "the payment of any tax or the filing of any return may be accomplished by mail." NMSA 1978, § 7-1-13 (B). However, the Department has the authority to require some taxpayers to file their returns electronically. *See* NMSA 1978, § 9-11-6.4.

The Taxpayer argues that it filed its return by mail and made its tax payments on time. The Department argues that the Taxpayer was required to file electronically and that its return was not filed until the return was submitted electronically. The Taxpayer's electronic return was filed approximately one month after it filed its paper return. The Taxpayer argues that it should not be subject to penalty when it filed a return on time. The Taxpayer explained that it filed its return again electronically after being notified of the need to do so by the Department. The Department argued that it mailed several letters in previous years to the Taxpayer that informed it of its obligation to file electronically. The Taxpayer explained that it never received any of those letters and was unaware that it should be filing electronically until after it filed its 2012 return by mail.

Generally, form is not favored over substance. *See Rauscher, Pierce, Refsnes, Inc. v. Taxation and Revenue Dep't.*, 2000-NMCA-065, ¶22, 129 N.M. 404. *See Wakeland v. N.M. Dep't. of Workforce Solutions*, 2012-NMCA-121, ¶19. *See also In the Matter of Cable Family Trust*, 2010-NMSC-017, ¶39, 148 N.M. 127. Given the fact that the Taxpayer's paper return was filed by the due date, that its paper return was sufficient to inform the Department of its tax

liability, and that it re-filed its return electronically when directed to do so by the Department shortly after filing its return by mail, the Taxpayer did not fail to file by the date required. To hold otherwise in this instance would be to exalt form over substance. However, the Taxpayer is now sufficiently on notice that it is required to file its returns electronically, and should understand that filing by mail will not be accepted in the future. *See* 3.1.4.18 (F) NMAC. Nothing in this decision should be construed to prevent the Taxpayer from making a formal request for an exemption from electronic filing. *See* 3.1.4.18 NMAC.

Negligence.

Penalty for failure to file is only permitted when there is “negligence or disregard of department rules and regulations[.]” NMSA 1978, § 7-1-69 (A). Generally, when a taxpayer relies on advice from an accountant, the taxpayer is not negligent or in disregard of the rules and regulations. *See* 3.1.11.11 NMAC (D). *See also El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

The Taxpayer explained that it was using an accountant for its tax filing and payments. The Department argued that the accountant was merely acting as an agent for the Taxpayer, and that the Taxpayer did not rely on any advice from the accountant. The Taxpayer explained that it was communicating with its accountant about its tax return and its payments. The Taxpayer discussed the return with the accountant and sent the accountant a check to be included for payment of its tax liability when the return was filed. The accountant also indicated that it was sorting out a problem with the Department, and that the Taxpayer did not need to do anything on it because the accountant was close to being done with it. After the Taxpayer learned that it should be filing electronically, the Taxpayer inferred that the accountant had been referring to this

electronic filing requirement as the problem he had been working out with the Department for more than a year.

Based upon the totality of the circumstances in this case, I find that the Taxpayer was not merely using the accountant as agent for filing its returns. The Taxpayer was regularly discussing its returns and payments with the accountant, and was relying on the accountant's advice when he indicated that the return and payments would, and consequently should, be sent in by mail. Therefore, the Taxpayer was not negligent for purposes of the penalty statute even if it failed to file its return on time. *See* 3.1.11.11 NMAC.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of penalty for the 2012 return issued under Letter ID number L0327318848, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer did not fail to file its return by the date required.
3. Even if the Taxpayer had failed to file its return by the date required, the Taxpayer was not negligent because it was relying on advice from its accountant.

For the foregoing reasons, the Taxpayer's protest is **GRANTED and the penalty is hereby ABATED.**

DATED: September 23, 2013.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 20__ in the following manner:

First Class Mail

Tierra Resources Intern, Inc.
Anthony Filyk, President
8416 Rancho Colina Way, NW
Albuquerque, NM 87120-5811

Interoffice Mail

Nelson Goodin
Taxation and Revenue Department, Legal
1100 S. St. Francis
Santa Fe, NM 87504
