

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

**IN THE MATTER OF THE PROTEST OF
NEW MEXICO ORTHOPEDIC ASSOCIATION
LETTER ID NO. L1855091152, L0512913872 and L1586655696**

No. 13-37

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 26, 2013, before Richard M. Jacquez, Hearing Officer. New Mexico Orthopedic Association (“Taxpayer”) was represented by Mr. Dupuy Bateman, Interim Financial Director. The Taxation and Revenue Department (“Department”) was represented by Nelson Goodin, Chief Legal Counsel. Ms. Amanda Carlisle, Protest Auditor appeared as a witness for the Department. By stipulation, Taxpayer’s Exhibits 1-3 and Department Exhibits A-F were admitted into the record. All exhibits are more thoroughly described in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a New Mexico corporation registered with the Department for payment of gross receipts tax and withholding taxes, which are reported to the Department on Form CRS (Combined Reporting System).
2. The Taxpayer was required to report and pay gross receipts taxes for February, March and April 2003.
3. On February 27, 2013, Mr. Carbajal, Chief Executive Officer and Chief Financial Officer for the Taxpayer abruptly resigned his positions.
4. One of Mr. Carbajal’s duties was to prepare and file CRS returns for gross

receipts taxes due from the Taxpayer.

5. The Taxpayer's gross receipts taxes were calculated as part of the revenue generating process and payment of gross receipts taxes were sent via wire transfer.

6. On March 15, 2013, the Taxpayer paid gross receipts taxes in the amount of \$79,766.36 for the month of February 2013. On April 8, 2013, the Taxpayer paid gross receipts taxes in the amount of \$100,065.32 for the month of March 2013. On May 16, 2013, the Taxpayer paid gross receipts taxes in the amount of \$79,766.36 for the month of April 2013. (Taxpayer Exhibit 1)

7. The Taxpayer paid all gross receipts taxes on or before taxes were due for February, March and April 2013.

8. Mr. Dupuy Bateman was hired as Interim Financial Director for the Taxpayer in April 2013.

9. On June 3, 2013, the Taxpayer received notice from the Department that the Taxpayer had made an overpayment to the Department. Mr. Bateman received the notice approximately one week later.

10. Mr. Bateman investigated the reason for the overpayment and discovered that the Taxpayer had sent payment to the Department for gross receipts taxes due for February, March and April of 2013, but had failed to file CRS returns for all three months.

11. Mr. Bateman went on the Department's website to file the CRS returns online and noticed that penalties were being applied. Mr. Bateman was confused since he knew payment of the gross receipts taxes had been paid on time.

12. On June 14, 2013, Mr. Bateman contacted a personal acquaintance, Mr. David

Robbins, Administrative Services Division (ASD) Director for the Department, regarding the Taxpayer's failure to file the CRS returns. Mr. Bateman was referred to speak with Ms. Charlene Trujillo, Deputy Director of Revenue Processing for the Department. Ms. Trujillo referred Mr. Bateman to an employee with the Department. (Taxpayer Exhibit 3)

13. Mr. Bateman was advised by the Department's employee to file the CRS returns and file a protest to any assessed penalties.

14. On June 14, 2014, the Taxpayer filed CRS reports for February, March and April 2013.

15. On July 5, 2013, Mr. Bateman filed a written protest to the assessment of penalty.

16. On July 8, 2013, the Department issued Assessment No. L1855091152 to the Taxpayer, assessing a late-filing penalty for report period February 2013, in the amount of \$4,785.99.

17. On July 8, 2013, the Department issued Assessment No. L0512913872 to the Taxpayer, assessing a late-filing penalty for report period March 2013, in the amount of \$4,002.62.

18. On July 8, 2013, the Department issued Assessment No. L15866545696 to the Taxpayer, assessing a late-filing penalty for report period April 2013, in the amount of \$1,846.28.

DISCUSSION

The sole issue to be decided is whether the Department correctly assessed a late-filing penalty against the Taxpayer. While the Taxpayer does not dispute that its February, March and April 2013 CRS returns were filed after the statutory due date, it protests the Department's

assessment of penalty because no employee from the Department informed, recommended or asked the Taxpayer to enter into a managed audit to avoid the assessment of penalties.

Burden of Proof. Section 7-1-17(C) NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Section 7-1-3(U) NMSA 1978 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. Accordingly, the presumption of correctness applies to the Department's assessment of penalty, and it is the Taxpayer's burden to come forward with evidence to show that the assessment was incorrect.

Statutory Authority to Impose Penalty. The imposition of penalty is governed by Section 7-1-69(A) NMSA 1978, which states:

A. Except as provided in Subsection B of this section, in the case of failure due to negligence or disregard of rules and regulations, but without intent to evade or defeat any tax, to pay when due any 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 any tax is due, there shall be added to the amount as penalty 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 twenty percent of the tax due but not paid;

(2) two percent per month or any fraction of a month from the date the return was required to be filed multiplied by the tax liability established in the late return, not to exceed twenty percent of the tax liability established in the late return; or

(3) a minimum of five dollars (\$5.00), but the five-dollar (\$5.00) minimum penalty shall not apply to taxes levied under the Income Tax Act or taxes administered by the department pursuant to Subsection B of Section 7-1-2 NMSA 1978.

Negligence. Based on the evidence presented the Taxpayer's failure to file the CRS returns was negligent. The term "negligence" is defined in Regulation 3 NMAC 1.11.10 as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Upon the resignation of the Taxpayer's CEO/CFO the Board of Physicians, who oversaw the CEO/CFO failed to exercise ordinary business care and prudence to make sure that the CRS returns were filed on time. In addition, upon the hiring of Mr. Bateman in April 2013, the Board of Physicians failed to advise Mr. Bateman that one of his duties would be to file the CRS returns for gross receipts taxes. Mr. Bateman was not made aware of the requirement to file CRS returns for gross receipts until after the Department sent a notification of overpayment to the Taxpayer. The various actions and inactions underlying the Taxpayer's failure to file its February, March and April 2013 returns in a timely manner support a finding of negligence. There was insufficient evidence offered during the hearing indicating that any legally recognizable indications of non-negligence were present. Regulation 3.1.11.11 NMAC (2001).

Failure to Advise Taxpayer of Managed Audit. The Taxpayer argued that they are not liable for penalty because the Department failed to advise the Taxpayer to enter into a managed audit. If a taxpayer enters into a managed audit agreement with the Department, penalty and interest are not due. NMSA 1978, Sections 7-1-69(G) (2) (2007) and 7-1-67(A) (4) (2007). There are very precise prerequisites that must exist prior to the Department agreeing to enter into a managed audit with a taxpayer. NMSA Section 7-1-11.1 (2001); Department Publication FYI-404, *Managed Audits for Taxpayers*.

Mr. Bateman testified that he was not aware of the requirements for a managed audit and was relying upon information from an account with REDW that the Taxpayer would be eligible for a managed audit. Mr. Bateman acknowledged that he was not aware of any statute or regulation which would require the Department to advise the Taxpayer of applying for a managed audit. Ms. Carlisle testified that information regarding a managed audit is public information and is available on the Department's website. Therefore, the managed audit provisions do not apply to the Taxpayer.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to assessment Letter ID Nos. L1855091152, L0512913872 and L1586655696 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's assessment of penalty against the Taxpayer was properly issued in accordance with the provisions of Section 7-1-69(A) NMSA 1978.

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

DATED December 2, 2013

Richard M. Jacquez

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