

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

**IN THE MATTER OF THE PROTEST OF  
TENT ROCK INC.  
TO ASSESSMENTS ISSUED UNDER  
LETTER ID NOS. L1814693328 and L0740951504**

**No. 14-11**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on January 23, 2014, before Monica Ontiveros, Hearing Officer. Originally, this matter was assigned to Dee Dee Hoxie, hearing officer. At the hearing, the Taxation and Revenue Department (“Department”) was represented by Peter Breen, attorney for the Department. Ms. Sonya Varela, protest auditor, appeared as a witness for the Department. Tent Rock Inc. (“Taxpayer”) was represented by its office manager, Molly White, who appeared at the appointed time. There were no exhibits introduced into the record.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On November 8, 2013, the Department assessed Taxpayer in gross receipts tax in the amount of \$861.56 in penalty and \$49.88 in penalty for withholding tax for the tax period ending February 28, 2013. Letter Id No. L0740951504.
2. On November 8, 2013, the Department assessed Taxpayer in gross receipts tax in the amount of \$318.14 in penalty and \$1.31 in interest and \$25.66 in penalty and \$.11 cents in interest for withholding tax for the tax period ending July 31, 2013. Letter Id No. L1814693328.
3. Taxpayer filed a protest to the assessments on November 14, 2013.

4. On December 30, 2013, the Department requested a hearing in this matter.
5. On December 31, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for January 23, 2014 before Dee Dee Hoxie, hearing officer.
6. Taxpayer has a history of always paying its combined reporting system<sup>1</sup> (CRS) taxes on a timely basis.
7. For the tax period ending February 28, 2013, Taxpayer paid its CRS taxes in a timely manner.
8. Taxpayer forgot to submit a CRS electronic return in a timely manner for the tax period ending February 28, 2013.
9. Taxpayer submitted a CRS electronic return for the tax period ending February 28, 2013 as soon as the Department notified Taxpayer that it had failed to properly file a return.
10. For the tax period ending July 31, 2013, Taxpayer filed a CRS electronic return in a timely manner.
11. Taxpayer forgot to submit a timely payment of its CRS taxes for the tax period ending July 31, 2013.
12. Taxpayer paid its CRS taxes for the tax period ending July 31, 2013 on August 27, 2013. The CRS taxes were due on Monday, August 26, 2013.

### **DISCUSSION**

The sole issue to be determined is whether the Department properly assessed Taxpayer for penalty and interest for the tax periods ending February 28, 2013 and July 31, 2013.

Taxpayer argued that because it has always paid its taxes in a timely manner, there should be a provision that allows forgiveness of penalty and/or interest for one mistake.

---

<sup>1</sup> The combined reporting system includes gross receipts and withholding taxes.

***Burden of Proof and Standard of Review.***

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-17(C) (2007). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See, TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See, MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶11, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40. Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct.

Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428, 431, 504 P.2d 638, 641. Taxpayer did not present evidence to rebut the presumption of correctness.

***Civil Penalty.***

Civil penalty is imposed when a taxpayer is "negligent" or disregards the Department's rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

(e)xcept 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 twenty percent of the tax due but not paid;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2007). The Department's regulation provides that "negligence" includes "failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention" for either failing to file a return on time or failing to make a payment on time. Regulation 3.1.11.10 NMAC (2001). Inadvertent error is defined as "negligence." *See El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶14, 108 N.M. 795, 799, 779 P.2d 982, 986.

Ms. White argued for legislative change. She argued that there should be a provision within the Tax Administration Act that allows for forgiveness of penalty and/or interest if there has been an omission or a mistake made by the taxpayer and if the taxpayer has an excellent history of paying and filing its returns. There is no provision within the Tax Administration Act that allows the forgiveness of penalty and/or interest if a taxpayer makes an error and if the taxpayer has an excellent paying and reporting history. There is no dispute that historically, Taxpayer has made payments and has filed its returns in a timely manner.

By Ms. White's own admission, Taxpayer made an inadvertent error in not filing and reporting Taxpayer's CRS February 2013 return and not paying its July 31, 2013 taxes when due in a timely manner. At the hearing, the Hearing Officer listed all of the indications of nonnegligence. Ms. White confirmed that there were no indications of nonnegligence that

applied to Taxpayer. See Regulation 3.1.11.11 NMAC (2001) defining indications of nonnegligence. Therefore, Taxpayer is liable for penalty for both the failure to file the return timely (February 2013 return) and the failure to pay the CRS payment timely (July 2013).

***Interest.***

New Mexico law is very clear on the imposition of interest when the principal amount of tax is unpaid when due, even if the payment is received one day late. Section 7-1-67(A) (2007) states that interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A) (2007). The word “shall” is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32, 206 P.3d 135, 143. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due for the July 2013 return, interest was properly assessed on the principal amount until the date it was paid. In this case, the principal amount was due on August 26, 2013 and it was paid on August 27, 2013. Therefore, Taxpayer owes the interest amount calculated through date of payment of the principal for the tax period ending July 31, 2013.

**CONCLUSIONS OF LAW**

- A. Taxpayer filed a timely written protest of the Notices of Assessment Letter Id Nos. L1814693328 and L0740951504 for gross receipts tax penalty and interest and withholding tax penalty and interest for the tax periods ending February 28, 2013 and July 31, 2013.
- B. Jurisdiction lies over the parties and the subject matter of this protest.

C. Taxpayer was negligent in not filing its CRS return for the tax period ending February 28, 2013; accordingly, it owes penalty.

D. Taxpayer was negligent in not paying its CRS taxes when due for the tax period ending July 31, 2013; accordingly, it owes penalty and interest.

E. Interest is due and owing on the principal amount of tax due until the date the principal was paid, even if the payment was made one day late.

F. The total amount due is \$911.44 for the tax period ending February 28, 2013 and \$345.22 for the tax period ending July 31, 2013.

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

DATED: April 3, 2014

---

Monica Ontiveros  
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 (1989), Taxpayer has 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* NMRA, 12-601 of the Rules of Appellate Procedure. 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.

