

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

**IN THE MATTER OF THE PROTEST OF  
SANTA FE HOTEL LTD. PARTNERSHIP  
TO ASSESSMENT ISSUED UNDER LETTERS  
ID NO. L1354364288 and L0817493376**

**No. 25**

**AMENDED  
DECISION AND ORDER**

*This Amended Decision and Order supersedes the initial Decision and Order that was issued on June 12, 2014. The Amended Decision and Order is entered to correct a clerical error in the Findings of Fact.*

A hearing was held on the above captioned matter on March 27, 2014, before Richard Jacquez, Esq., Hearing Officer, in Santa Fe. Mr. Paul Margetson, General Manager, Santa Fe Hotel LTD Partnership (“Taxpayer”) appeared *pro se*. The Taxation and Revenue Department of the State of New Mexico (“Department”) was represented by Elena Romero Morgan, Staff Attorney, Taxation and Revenue Department. Protest Auditor Sonya Varela appeared as a witness for the Department. In addition to the documents contained in the Administrative File articulated during the beginning of the hearing, Taxpayer Exhibit #1, Letter Prepared by Mr. Margetson, Department Exhibit A, Filing History for Taxpayer and Department Exhibit B, Letter to Taxpayer Dated December 18, 2007, are admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On October 16, 2008, under letter identification number L0817493376, the Department assessed the Taxpayer for \$1,610.93 in penalty on untimely payment of gross

receipts, \$11.00 in interest for untimely gross receipts payments, \$3.49 in penalty for untimely paid compensating tax, and \$0.02 in interest for untimely paid compensating tax.

2. On October 16, 2008, under letter identification number L1354364288, the Department assessed the Taxpayer for \$80.42 in penalty for untimely paid withholding tax, and \$0.53 in interest for untimely paid withholding tax.

3. On February 25, 2009, the Taxpayer protested the Department's assessment.

4. On March 16, 2009, the Department acknowledged the receipt of the Taxpayer's protest and granted the Taxpayer a retroactive extension to file a protest to the assessments issued on October 16, 2008.

5. On November 5, 2013, the Department requested a hearing in this matter.

6. On November 7, 2013, the Hearings Bureau mailed of Notice of Administrative Hearing setting the hearing for March 27, 2014.

7. On December 18, 2007, the Department sent a letter to the Taxpayer advising the Taxpayer that effective January 1, 2008, the Taxpayer would be subject to the special tax payer provisions outlined in NMSA 1978, Section 7-1-13.1 (B) (2005).

8. As a "Special Payment" taxpayer, the Taxpayer was required to pay taxes at least one business day before the due date directly to the Department in Santa Fe if paying by check drawn against a New Mexico bank. *See* NMSA 1978, Section 7-1-13.1 (B) (2005).

9. For the combined reporting system reporting period ending August 31, 2008, taxes were due for a "Special Payment" taxpayer if paid by check drawn against a New Mexico bank on or before September 24, 2008.

10. In paying its tax liability under the combined reporting system for August 1, 2008 through August 31, 2008 reporting period, the Taxpayer hand delivered its return and tax

payment to the Department on September 25, 2008. The payment was made by check drawn on a New Mexico financial institution.

11. For the periods beginning January 1, 2008 through August 31, 2008, of the combined reporting system reporting period, the Taxpayer personally delivered a check for payment of taxes on the 25<sup>th</sup> day of each month.

## **DISCUSSION**

The sole issue to be determined is whether the Taxpayer should be held liable for penalty and interest for failing to make timely payment of taxes under the special payment provisions of Section 7-1-13.1.

### **Presumption of Correctness and Burden of Proof.**

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. 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 (X). Any penalty assessed is also presumed to be correct. 3.1.6.13 NMAC (1/15/01). Consequently, the Taxpayer has the burden to overcome the assessment and establish that he or she was not required to pay the assessment. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

### **Assessment of Penalty.**

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

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. (*italics added for emphasis*)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's failure to act timely meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Regulation §3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

Mr. Margetson explained that since the Taxpayer was incorporated in 1991, all Combined Reporting System ("CRS") reports were prepared internally and reviewed by a certified public account for accuracy. Mr. Margetson testified that on the 25<sup>th</sup> day of each month he would hand delivery both the CRS reports and payment to the Department. Mr. Margetson explained that from January 2008 through August 2008, no one from the Department ever advised him that his payments were late when he hand delivered the CRS reports and payments on the 25<sup>th</sup> day of each month.

Ms. Varela testified that on December 17, 2007, the Department mailed a letter to the Taxpayer advising the Taxpayer that effective January 1, 2008, the Taxpayer would be required to follow the provisions set forth in in NMSA 1978, Section 7-1-13.1 (B) (2005). Mr. Margetson testified that he did not recall ever receiving the letter. However, Mr. Margetson testified that as the general manager for the Taxpayer all correspondence would come across his desk and then he

would distribute all mail to the appropriate individual. Ms. Varela testified that upon reviewing the annotations of the Taxpayer's account, there was no record of the December 17, 2007, letter being undeliverable or returned to the Department.

While the Hearing Officer understands the Taxpayer's argument that any of the Department's employees who accepted the CRS report and payment could have easily explained to him that his payment needed to be delivered on the 24<sup>th</sup> day of each month, this does not relieve the Taxpayer of the special payment tax provisions. Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. The Department mailed notice to the Taxpayer prior to the special payment provisions taking effect, and there was no reason for the Department to believe that the Taxpayer did not receive the notice letter. Furthermore, the fact that the Taxpayer made previous payments on the 25<sup>th</sup> day of each and was not assessed any penalty or interest for making a late payment is irrelevant to the issue before the Hearing Officer.

As the Taxpayer payment history shows, the Taxpayer certainly did not intentionally fail to timely pay the taxes in this instance. However, civil penalty is imposed for negligence as opposed to an intentional act or omission. The Taxpayer's failure to deliver the check to Santa Fe on the day it was due falls within the definition of negligence because it qualifies as "inadvertence." See *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989).

The Taxpayer presented no evidence under Regulation §3.1.11.11 NMAC (1/15/01) to demonstrate nonnegligence. As such, the Department is legally required by statute to impose penalty.

## CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the assessment of penalty and interest under Assessment letter identification numbers L0817493376 and L1354364288, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is liable for civil penalty because inadvertence qualifies as negligence under the civil penalty provision.

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

DATED: June 13, 2014

*Richard Jacquez*

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RICHARD JACQUEZ

Hearing Officer

Taxation & Revenue Department

Post Office Box 630

Santa Fe, NM 87504-0630