

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

**IN THE MATTER OF THE PROTEST OF
EXERPLAY, INC.,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0972088784, L1751672272, L2045830608,
L0099673552, L1173415376, and L0636544464**

No. 14-27

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 22, 2014, before Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Ms. Mary Griego, Auditor, also appeared on behalf of the Department. Mr. Ray Jecklin, a contract employee of Exerplay, Inc. (Taxpayer), appeared for the hearing and represented the Taxpayer. 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. On February 12, 2014, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax period ending on May 31, 2013. The assessment was for \$0.00 tax, \$117.06 penalty, and \$14.19 interest. **[L0972088784]**
2. On January 17, 2014, the Department assessed the Taxpayer for withholding tax, penalty and interest for the tax period ending on June 30, 2013. The assessment was for \$625.62 tax, \$189.36 penalty, and \$21.98 interest. **[L1751672272]**

3. On February 12, 2014, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax period ending July 31, 2013. The assessment was for \$0.00 tax, \$154.52 penalty, and \$17.30 interest. **[L2045830608]**
4. On February 12, 2014, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax period ending August 31, 2013. The assessment was for \$0.00 tax, \$130.83 penalty, and \$14.16 interest. **[L0099673552]**
5. On February 12, 2014, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax period ending September 30, 2013. The assessment was for \$0.02 tax, \$97.44 penalty, and \$9.81 interest. **[L1173415376]**
6. On February 12, 2014, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax period ending October 31, 2013. The assessment was for \$0.00 tax, \$65.27 penalty, and \$4.83 interest. **[L0636544464]**
7. On March 6, 2014, the Taxpayer filed a formal protest letter.
8. On March 31, 2014, the Taxpayer filed an information authorization form for Mr. Jecklin and another contract employee and indicated that the protest and hearing paperwork should be sent to Mr. Jecklin.
9. On April 2, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
10. On April 3, 2014, the Hearings Bureau issued notice of hearing. The hearing date was set within ninety days of the protest.
11. In mid May 2013, the Taxpayer hired Mr. Jecklin as a contract employee, and he was placed in charge of the Taxpayer's payroll.

12. Mr. Jecklin was aware that the Taxpayer was filing its monthly gross receipts and withholding returns timely.
13. Mr. Jecklin believed that the accountant was supposed to pay the monthly withholding and gross receipts tax when the returns were filed.
14. The Taxpayer intended for Mr. Jecklin to handle the payment of its withholding tax through its payroll process.
15. Withholding taxes were not paid by the Taxpayer from May through October 2013 due to this miscommunication.
16. The Taxpayer was filing its monthly returns and was reporting its tax liability accurately for those months.
17. The Taxpayer audited its accountants and discovered that there was too much money in the payroll account. The Taxpayer worked with Mr. Jecklin and its accountant to figure out why there were excess funds in the payroll account.
18. The Taxpayer realized that the withholding tax payments had not been made for several months. In December 2013, the Taxpayer paid all of the withholding tax liabilities for those months.
19. In January and February 2014, the Department assessed the Taxpayer with tax, penalty, and interest for those months.
20. The Department abated the tax and adjusted the penalty and interest from the assessment for the tax period ending June 30, 2013 when it confirmed that the tax had already been paid at the time of the assessment. Therefore, the only assessment with any outstanding tax liability is for the tax period ending September 30, 2013. The amount of tax still outstanding is \$0.02.

21. The Taxpayer argued that the penalty was too steep and inappropriate. The Taxpayer argued that it was the first time it made a mistake like this, that it discovered and corrected the mistake on its own, and that the penalty was too severe. The Taxpayer conceded that interest was appropriate.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty for the tax periods from May 2013 through October 2013.

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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. 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 entitled to an abatement of penalty.

Assessment of Penalty.

The Taxpayer argued that the penalty assessed was too steep. The Taxpayer argued that a lesser penalty should have been imposed in light of the circumstances. The Department argued that the Taxpayer was negligent and that the penalty was appropriate because the Taxpayer failed to pay its withholding tax when it was due.

Penalty is added to the amount assessed when a tax is not paid when it is due. *See* NMSA 1978, § 7-1-69 (2007). Generally, an assessment is effective when a taxpayer files a return showing a tax liability. *See* NMSA 1978, § 7-1-17 (2007). Generally, penalty may be

collected concurrently with the tax due without assessment or separate proceedings. *See* NMSA 1978, § 7-1-30. However, recent caselaw has found that penalty does not come into existence when the due date occurred and the tax liability remained unpaid. *See Gea Integrated Cooling Tech. v. State Taxation and Revenue Dep't.*, 2012-NMCA-010, ¶ 8. Penalty is added to the amount assessed by the Department, and “assessment is the specific point in time that the statutory penalty is triggered and thereby applied.” *Id.* at ¶ 9. The statutory formula for calculating percentage of penalty from the time of the tax due date is merely a mathematical formula and does not mean that penalty began on the due date. *See id.*

A taxpayer’s self-assessment does not have the same effect as an assessment by the Department. *See Sonic Indus. v. State*, 2000-NMCA-087, ¶ 35, 129 N.M. 657 (holding that the statute of limitations would be meaningless if the taxpayer’s self-assessment had the same effect as an assessment by the Department), *rev’d on other grounds Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212. Penalty applies at the specific time of the assessment by the Department. *See Gea Integrated Cooling Tech.*, 2012-NMCA-010, ¶ 9. The amount of tax assessed to the Taxpayer by the Department for each month other than June and September 2013 was \$0.00. The assessment for June 2013 was later adjusted to \$0.00 since the Taxpayer had already paid the tax prior to the assessment. For September 2013, the amount was \$0.02. The Department assessed penalty using the mathematical formula of two percent per month from the due date of the tax until it was paid in December 2013. *See* NMSA 1978, § 7-1-69 (A) (1) (2007). However, penalty was not triggered until the assessments were made, and there was no tax liability outstanding at the time of the assessments except for \$0.02 for September. Therefore, the amount of penalty assessed is incorrect.

The purpose of applying a penalty is to deter and to punish. *See Gea Integrated Cooling Tech.*, 2012-NMCA-010, ¶ 13. Penalty seeks to deter taxpayers from failing to pay or to file, and punishes the failure to do so. *See id.* at ¶ 14. Having a penalty that increases in amount for up to a certain number of months is designed to encourage taxpayers to pay off their obligations sooner. *See id.* Even under the statute, when a taxpayer promptly pays an assessment, no additional penalty is applied between the time of the assessment and the time of the payment. *See* NMSA 1978, § 7-1-69 (E). By applying the penalty to the amount of the tax outstanding at the time of the assessment, the Department is able to maximize the amount of penalty owed on unpaid taxes in a manner consistent with the purpose of punishing taxpayers for unpaid taxes. *See Gea Integrated Cooling Tech.*, 2012-NMCA-010, ¶ 14. However, the statute provides for a \$5.00 penalty even when the tax is paid. *See* NMSA 1978, § 7-1-69.

Penalty is to be added to the amount assessed in an amount equal to the greater of either two percent of the amount of tax due but not paid on time or a minimum of \$5.00. *See* NMSA 1978, § 7-1-69 (A) (2007). Penalty is applied at the time of the assessment by the Department. *See Gea Integrated Cooling Tech.*, 2012-NMCA-010. Since penalty applies to the assessment made by the Department, the penalty in this case applies to \$0.00 and \$0.02. Two percent of \$0.00 and of \$0.02 is less than \$5.00. Therefore, the greater penalty of \$5.00 should apply. *See* NMSA 1978, § 7-1-69.

Assessment of Interest.

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). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 1977-NMSC-010, ¶ 4, 90 N.M. 103. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the

time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed. The Taxpayer also conceded that interest was appropriate.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of withholding tax, penalty, and interest for the tax periods from May through October 2013 issued under respective Letter ID numbers L0972088784, L1751672272, L2045830608, L0099673552, L1173415376, and L0636544464, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer conceded that it owed interest.
3. Penalty was improperly assessed on the amount of tax that was unpaid when it was due rather than the amount of tax unpaid at the time of the assessment.
4. Because the tax liability at the time of the assessment was \$0.00 or \$0.02 in every month assessed, the greater penalty was \$5.00. Therefore, the total amount of penalty owed is \$5.00 for each assessment, which is a total of \$30.00.
5. Penalty assessed in excess of \$30.00 is **HEREBY ABATED**.

For the foregoing reasons, the Taxpayer's protest is **GRANTED IN PART and is DENIED IN PART**.

DATED: July 2, 2014.

Dee Dee Hoxie

DEE DEE HOXIE
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