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

**IN THE MATTER OF THE PROTEST OF**
**ALON USA, LP** **No. 15-04**
**TO ASSESSMENTS ISSUED UNDER LETTER**
**ID NOs. L1442489296**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 6, 2015, before Monica Ontiveros, Hearing Officer. Alon USA, LP ("Taxpayer") was represented by Scott Fuqua, Esq. Alyson Gregory Richter, Counsel for Taxpayer, and John T. Sharp, Tax Director for Taxpayer, also appeared as Taxpayer's representatives. The Taxation and Revenue Department ("Department") was represented by Elena Morgan, attorney for the Department. Mr. Tom Dillon, Protest Office Supervisor, Mr. Mutha Bala, Information Technology Manager, and Theresa Smith, Tax Examiner appeared as potential witnesses for the Department. The Department introduced into the record, without objection, Exhibits B, D, E (Answers to Interrogatories), and F (Answers to Interrogatories). Taxpayer introduced into the record, without objection, Exhibits 3 and 9. Both counsel decided to make only legal argument despite having the potential witnesses present. [01-06-15 CD 11:50-12:13].

In addition to the pleadings and filings referred to in the Findings, the record contains the following: two Certificates of Service filed on June 20, 2014; Motion for Protective Order and Order Striking Interrogatory No. 5 filed on August 1, 2014; Order Granting Department's Motion for Protective Order and Striking Interrogatory No. 5 (no date); Certificate of Service (no date); Certificate of Service filed on August 1, 2014; Unopposed Motion for Continuance filed on August 6, 2014; Stay of Interrogatory No. 5 and Similar Requests Pending Taxpayer's

Response and Hearing Officer's Ruling on the Department's Motion for Protective Order issued on August 7, 2014; Continuance Order, Scheduling Order and Amended Notice of Administrative Hearing issued on August 7, 2014; New Mexico Taxation and Revenue Department's Preliminary Witness and Preliminary Exhibit Lists filed on September 9, 2014; Taxpayer Alon USA, LP's Preliminary Witness and Exhibit Lists filed on September 11, 2014; Order Granting Motion for Protective Order and Striking Interrogatory issued on September 15, 2014; Certificate of Service filed on October 20, 2014; Notice of Reassignment of Hearing Officer for Administrative Hearing issued on December 12, 2014; Joint Prehearing Statement filed on December 22, 2014; Entry of Appearance filed on January 1, 2015; Department's Amended Joint Prehearing Statement filed on January 2, 2015; and two Stipulations filed on January 6, 2015.

Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On May 16, 2014, the Department assessed Taxpayer in combined fuel tax in the amount of $55,666.16 in penalty for tax period January 31, 2014. Letter Id No. L1442489296.

2. On May 30, 2014, Taxpayer filed its protest (protest letter dated May 5, 2014) to the assessment. Taxpayer filed a second protest on June 5, 2014 and amended the grounds for protest on September 11, 2014 (Exhibit 3).

3. The Department acknowledged the protest on June 3, 2014. Letter Id No. L0738714576.

4. On June 12, 2014, the Department requested a hearing in the protest of assessment Letter Id No. L1442489296.

5. On June 20, 2014, the Hearings Bureau issued and mailed a Notice of Administrative Hearing setting the hearing for August 22, 2014. A continuance was requested and the matter was rescheduled for January 6, 2015.

6. Taxpayer timely paid its January 2014 combined fuel taxes of $927,776.01 on February 25, 2014. Stipulation No. 1; Exhibit E-6, Answer No. 7.

7. The amount of tax liability of $927,776.01 was established no later than January 31, 2014.

8. The combined fuel tax return or report assumes that the tax liability and the tax due amounts are the same.

9. The amount of tax due on February 25, 2014 was $927,776.01.

10. Taxpayer filed its return for January 2014 on May 5, 2014. Exhibit B-1.

11. Tina Sandlin, tax staff for Taxpayer, prepared the January return for Taxpayer and believed that the January return was filed timely or filed on February 14, 2014. Exhibit E-6, Answer No. 7.

12. At the hearing Taxpayer's counsel stipulated that, "taxpayer, Alon USA, made an attempt to file the combined fuel tax report for January 2014. For reasons that are entirely unconnected to any problem technical or otherwise on behalf of the Taxation and Revenue Department, that filing was not made timely by February 25, 2014." [01-06-15 CD 17:05-19:42].

13. Prior to the stipulation, Taxpayer took the position that it believed that the reasons the return was not filed timely were that 1) "when Alon clicked "submit" in order to electronically submit the report on February 14, 2014, no submission actually occurred, or 2) there was an error with the Department's electronic filing system." Exhibit E-5, Answer No. 5.

14. The Department did not notify Taxpayer that it had not received the January 2014 return or report until sometime after April 30, 2014. Exhibit E-5, Answer No. 5.

15. Sometime after April 30, 2014, Taxpayer learned that the Department believed the January 2014 return had not been filed because of an informal conversation between Ms. Theresa Smith, a Department employee, and Ms. Sandlin. Protest Letter dated May 5, 2014; Exhibit E-5, Answer No. 5.

16. The option to generate the confirmation for the January return or report was not available and Taxpayer could not print a confirmation that it had filed its return. Exhibit 3-7.

17. Ms. Smith asked Ms. Sandlin to refile the January 2014 return. Exhibit E-6, Answer No. 7.

18. With a subsequent return, the March 2014 return, the Department could not locate it in its database even though Taxpayer had timely filed the March 2014 return on April 21, 2014. Exhibit E-5, Answer No. 5.

19. On April 30, 2014, the Department notified Taxpayer that it had not received the March 2014 return or report by issuing a Notice of Intent to Lien. Letter Id No. L1769448400 attached to Protest Letter dated May 5, 2014.

20. Taxpayer received a confirmation for the filing of the March 2014 return. Protest Letter dated May 5, 2014.

21. The Department acknowledged that the failure of the March 2014 return to appear in its records was an error in the Department's system. Exhibit E-5, Answer No. 6.

22. The indications of non-negligence do not apply to Taxpayer.

23. The Department placed Taxpayer's payment of $927,776.01 in an escrow account pending receipt of the return or report. Stipulation No. 2.

## DISCUSSION

The central issue is whether Taxpayer is liable for penalty for failure to timely file a return or report, even though it paid the tax due on time. Taxpayer made a number of arguments. It argued that that the penalty provision does not apply because there was no "liability." In the alternative, Taxpayer argued that if penalty applied then the maximum amount of penalty that applied was five dollars ($5.00) pursuant to NMSA 1978, Section 7-1-69(A)(3) (2007). The Hearing Officer rejects both of these arguments.

***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,§7-1-17(C) (2007). A civil penalty assessed is presumed to be correct under Section 7-1-17(C). 3.1.11.8 NMAC (1/15/01). 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. *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't,* 1989-NMCA-070, 108 N.M. 795; *Wing Pawn Shop v. Taxation and Revenue Department,* 1991-NMCA-024, 111 N.M. 735.

***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:

> (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…

(Emphasis added). NMSA 1978, §§7-1-69 (A) (2) and (3) (2007). The Department's regulation provides that, "negligence" includes "failure to exercise that degree of 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 (1/15/01). Inadvertent error is defined as "negligence." *See El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶14.

The regulations provide exceptions to the negligence definition. Taxpayer's counsel stated that none of the exceptions or indications of non-negligence found in regulation 3.1.11.11 applied to Taxpayer. [01-06-15 CD 20:56-21:08]. After reviewing the exceptions or indications of non-negligence found in regulation 3.1.11.11 NMAC (1/15/01), none of the exceptions apply to Taxpayer.

Taxpayer argued that because it paid its tax due on the due date, there was no tax liability established on the late return. In other words, the tax liability was "time bound" and once it was paid, it was extinguished. Taxpayer's counsel continued by arguing that since Taxpayer paid its tax due timely and the tax liability was extinguished, no penalty could be assessed because there was no amount of tax due on Taxpayer's return. See Exhibit 9-1. This argument fails to take into account the statutory meaning of the words "tax liability established in the late return" and

fails to acknowledge that at the point in time of the taxable event, Taxpayer had a tax liability of $927,776.01 regardless of when the tax due was paid.

Subparagraph (2) of Section 7-1-69(A) states that if a return is not filed timely, then a penalty of two percent shall apply from the date the return was required to be filed multiplied by the "tax liability established in the late return." The Tax Administration Act does not specifically define the words "tax liability"[1] and there is nothing on the return indicating a space or line for the "tax liability" amount. See Exhibit 9-1.

The Hearing Officer agrees with Taxpayer's counsel that the best definition, absent a specific definition, for the words "tax liability" is found in NMSA 1978, Section 7-1-13(A) (2007). In Section 7-1-13(A), "(t)axpayers are ***liable*** for tax at the time of and after the transaction or incident given rise to the tax until payment is made. Taxes are ***due*** on and after the date on which their payment is required until payment is made." Emphasis added. Regulation 3.1.4.10(A) NMAC (6/30/01) expounds further on the statutory definition by stating that, "(a) taxpayer becomes liable for tax as soon as the taxable event occurs; payment is not due, however, until on and after the date established by tax acts for the payment of tax." In addition, the regulation states that, "(i)f the tax is not paid when it becomes due or if a report is not filed when due because of negligence of the taxpayer or taxpayer's representative, the taxpayer will also become liable for penalty."

Therefore, Taxpayer's tax liability is the amount calculated at the time of the taxable event or in this case, events that occurred no later than January 31, 2014, and the amount of tax due is not determined until the payment becomes due or February 25, 2014. As an aside, the amount of tax liability and tax due may be the same. There are instances when the tax liability

[1] Chapter 7 uses the words "tax liability"approximately 91 times.

may be greater than the tax due, e.g., a tax liability reduced by a credit or an overpayment. The Hearing Officer is aware that the return only refers to the amount of tax due. But for purposes of the return or report, the amount of tax due is also the amount of the "tax liability." For purposes of determining "tax liability" it is not relevant when the tax due is paid. The only relevant inquiry is when was the taxable event and what was the tax liability established on the late return.

In reviewing the information provided at the hearing, there is no evidence that the amount of tax liability established by Taxpayer on its return was calculated in error. The penalty amount was calculated on the amount determined at the time of the taxable event in January 2014. The Department calculated the penalty amount based on the tax liability amount set out in Taxpayer's report of $927,776.01. Exhibit 9-1, line 16. There is no evidence that the penalty amount calculated is incorrect. Therefore, the amount of tax liability determined by the Department is correct, and the corresponding penalty amount is also correct.

Taxpayer's counsel argued that *Teco Invs., Inc. v. Taxation and Revenue Dep't*, 1998-NMCA-055, 125 N.M. 103 applied and not *Levenson v. Mobley*, 1987-NMSC-102, 106 N.M. 399 as the Department's counsel contended. Neither of these cases is dispositive of the issue. The Hearing Officer agrees with the Department's counsel in that *Teco* does not apply to this case. The facts in *Teco* are very different from this case and have nothing to do with the filing of a late return. In *Teco*, taxpayer paid compensating use tax but failed to pay gross receipts tax. The tax that was paid was paid timely and the tax paid was the same amount of tax due for the other tax program. In *Teco*, the court held that equitable recoupment could apply and penalty could be abated based on the fact that Taxpayer filed a timely return under the wrong tax program and made a timely payment, albeit, under the wrong tax program.

In the *Leveson* case, there was a federal tax issue of whether taxpayer's required inclusion of income was a "tax liability." In determining this answer, the court looked to the ***federal*** definition of "tax liability" as the "tax imposed by this chapter for the taxable year" pursuant to I.R.C. Sec. 26 (1986). *Levenson*, 106 N.M. 399, 402-403. While this case is somewhat instructive, it is not on point because the issue was one of defining a term within the Internal Revenue Code. In the case before the Hearing Officer, there are no federal tax issues.

Taxpayer argued in the alternative that the five dollar ($5.00) penalty found in Section 7-1-69(A)(3) should have been assessed since Taxpayer paid its tax due in a timely manner. Section 7-1-69(A)(3) provides that a five dollar ($5.00) penalty may apply when a taxpayer fails to file a return. This provision only applies when no tax is due or as Section 7-1-69(A)(3) provides, "regardless of whether a tax is due." Section 7-1-69(A) allows the Department to elect to impose the greater of the amount of the two percent (2%) per month of the amount of the tax liability or the minimum of five dollar ($5.00), whichever is greater. The minimum penalty of $5.00 is normally imposed if taxpayer has no taxable event, or zero income or receipts. In Taxpayer's case, since the two percent (2%) of Taxpayer's tax liability was greater than five dollars ($5.00), the Department elected to impose the greater amount.

In reviewing the file and the report at issue, the Hearing Officer took judicial notice of the instructions[2] for the combined fuel report. The Hearing Officer notes that the Instructions for the January return, Line 17, is confusing. Line 17 indicates that, "(t)he minimum penalty of $5.00 imposed for failure to timely file and pay the return, will apply once per return." This instruction should read that that the five dollar ($5.00) penalty is imposed for failure to timely

[2]The instructions and forms are public documents and can be found on the Department's website at www.tax.newmexico.gov/forms-publications.aspx.

file, which would be consistent with Section 7-1-69(A)(2) and (A)(3) and regulation 3.1.11.12 NMAC (1/15/01).

In conclusion, Taxpayer had a taxable event in January 2014 which created a tax liability of $927,776.01. The Department correctly used the tax liability amount to assess penalty calculated at two percent (2%). The tax liability was established in the late return filed on May 5, 2014.

## CONCLUSIONS OF LAW

A. Alon USA, LP filed a timely written protest to the Department's assessment issued under Letter Id No. L1442489296 and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set as required by NMSA 1978, Section 7-1-24.1(A) (2013).

C. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to an abatement.

D. Taxpayer failed to file its January 2014 report by February 25, 2014 and instead filed the January report on May 5, 2014.

E. Taxpayer was negligent in not filing its return or report in a timely manner.

F. The failure to file the return or report was not caused by the Department.

G. The penalty was calculated based on the amount of the tax liability of $927,776.01 which was created by a taxable event that occurred no later than January 31, 2014.

H. The tax liability of $927,776.01 was established as the amount of tax due on the return or report that was filed on May 5, 2014.

I. The tax liability existed regardless if the tax liability of $927,776.01 was paid on February 25, 2014.

J. The penalty was calculated in accordance with the law.

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

DATED: February 6, 2015.

Monica Ontiveros

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