

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
PRECISION EYE CENTER, PC,  
TO ASSESSMENT ISSUED UNDER  
LETTER ID NO. L1561388288**

**No. 15-43**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on November 20, 2015 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Kenyon Schlenker, CPA, appeared for the hearing on behalf of Precision Eye Center, PC (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 July 26, 2006, the Department assessed the Taxpayer for gross receipts tax and interest for the tax periods from January 31, 2002 through June 30, 2005. The assessment was for \$63,619.42 tax and \$19,299.24 interest. No penalty was assessed.
2. On August 25, 2006, the Taxpayer filed a formal protest letter.
3. On June 9, 2015, the Administrative Hearings Office first learned of the protest when the Department filed a Request for Hearing and asked that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On June 10, 2015, the Hearings Office issued a notice of hearing. As the protest was made in 2006, the current statutory requirement that a protest be set within 90 days of the protest did not apply.

5. On November 13, 2015, the Department requested a continuance of the hearing.
6. On November 17, 2015, the order was issued that denied the request for continuance.
7. The parties stipulated to the relevant facts at the hearing. The parties explained that they have been communicating regularly since the request for hearing was made, and that they have exchanged numerous documents and evidence. The parties are commended on their preparation and professionalism.
8. The Taxpayer was entitled to deduct part of its gross receipts pursuant to its timely acceptance of a nontaxable transaction certificate (NTTC).
9. The Taxpayer was entitled to deduct part of its gross receipts for payments from insurance companies.
10. Some of the items included in the assessment were determined not to be gross receipts, such as postage reimbursements.
11. The final proposed numbers for the assessment were available on the date of the hearing.
12. Mr. Schlenker requested additional time to review the numbers with the Taxpayer and to file any further exceptions. The request was granted. The Taxpayer was given until December 4, 2015 to file any additional evidence and argument. The Department was given until December 18, 2015 to file its response to any additional submissions.
13. The Taxpayer filed a timely supplemental argument. The Taxpayer argued that it should be entitled to take additional deductions for the sales of glasses during the 2005 tax period due to a change in the law that occurred that year.
14. The Department filed a timely response and conceded that the Taxpayer could take that deduction and submitted its reworked and final assessment numbers. The Department indicated that the tax owed was \$26,055.26 and that the interest owed as of December 2, 2015 was \$24,505.35. Interest continues to accrue until the tax principal is paid.

15. The Taxpayer also objected to the hearing as it was conducted in 2015 when the protest was filed in 2006. The Taxpayer argued that some consideration for the significant delay should be given and that interest should be reduced.
16. Mr. Dillon explained that the Taxpayer was allowed to claim some additional credits, which it had not taken in the tax periods. Mr. Dillon explained that the credits served to further reduce the taxable receipts and served to mitigate some interest.

### **DISCUSSION**

The parties stipulated that the Taxpayer owed the gross receipts tax and interest. The parties, through their diligence and hard work, determined the correct amount of gross receipts, and the assessment was adjusted accordingly. The Taxpayer argues that the lateness of the hearing should further reduce the interest.

#### **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 interest.

#### **Timeliness of the Hearing.**

In 2006, there was not a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24 (2003). Currently, a hearing must be set within ninety days of the receipt of the protest. *See* NMSA 1978, § 7-1B-8 (2015). However, there is no statutory or regulatory authority for the Hearing Officer to dismiss a previously filed protest for unreasonable and

unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. Another taxpayer previously argued that the Department denied it the statutory right to a prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13 (holding that public officers' failure to timely carry out their duties is not a defense to an action by the state and that the statute does not provide a remedy for failure to set a hearing promptly). *See also Kmart Properties, Inc. v. Taxation and Revenue Dep't.*, 2006-NMCA-026, ¶ 54, 139 N.M. 177 (noting that tardiness in performing duties is not a defense to an action taken by the state). As there was not a statutory or regulatory violation in failing to refer the Taxpayer's protest for such an extended period of time, there is no administrative remedy that can be granted.

#### **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 Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. 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. There is no statutory provision for the reduction of interest when the Department does not timely refer a protest for hearing. *See* NMSA 1978, § 7-1-67.

#### **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely written protest to the Notice of Assessment of issued under Letter ID number L1561388288, and jurisdiction lies over the parties and the subject matter of this protest.

B. The parties stipulated that the Taxpayer owed some gross receipts taxes and interest.

C. The parties stipulated that the amounts of the original assessment should be reduced as the Taxpayer was entitled to claim certain deductions and credits.

D. The assessment of tax is partially abated. Of the originally assessed \$63,619.42, the Taxpayer only owes \$26,055.26. The remaining \$37,564.16 is **HEREBY ABATED**.

E. The request for hearing was made significantly later than the protest, but there is no administrative remedy for unreasonable delays. *See* NMSA 1978, § 7-1B-8 (2015). *See also* 3.1.8.8 and 3.1.8.9 NMAC. *See also Ranchers-Tufco*, 1983-NMCA-126, ¶ 12. *See also Kmart*, 2006-NMCA-026, ¶ 54.

F. Interest was properly assessed, and there is no statutory provision for reduction of interest based on unreasonable delays. *See* NMSA 1978, § 7-1-67. The amount of interest assessed is partially abated in correlation to the amount of tax to which it applied was also abated. As of December 2, 2015, the amount of interest owed was \$24,505.35. Interest continues to accrue until the tax principal is paid.

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

DATED: December 31, 2015.

*Dee Dee Hoixie*  
\_\_\_\_\_  
DEE DEE HOXIE  
Hearing Officer  
Administrative Hearings Office  
Post Office Box 6400  
Santa Fe, NM 87502