

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

**IN THE MATTER OF THE PROTEST OF
FRANK'S ELECTRIC LLC
TO ASSESSMENTS ISSUED UNDER
LETTERS ID NOs. L0106696752, L1180438576, L0643567664, L1717309488, L0375132208,
L1058791472, L1217073200, L0680202288, L1753944112, L0623988784, L0411766832,
L2132533296, L0010215472, L1485508656, L1083957296, L0948637744, L0547086384,
L2022379568**

No. 16-05

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 30, 2015 before Brian VanDenzel, Esq., Interim Chief Hearing Officer, in Santa Fe. At the hearing, Frank Zamora, owner of Frank's Electric LLC ("Taxpayer") appeared, along with Taxpayer employee AnnaBeth Del Canto. Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibits #1-2 were admitted into the record. Department Exhibits A-C were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 5, 2015¹, under letter id. no. L0106696752, the Department assessed Taxpayer for \$914.98 in penalty and \$116.41 in interest for the CRS reporting period ending on May 31, 2012.

¹ The dates of assessments in these findings of fact are out of order so that the reporting periods at issue are in sequential order.

2. On August 5, 2015, under letter id. no. L1180438576, the Department assessed Taxpayer for \$1,135.90 in penalty and \$385.76 in interest for the CRS reporting period ending on June 30, 2012.

3. On August 5, 2015, under letter id. no. L0643567664, the Department assessed Taxpayer for \$653.30 in penalty and \$185.47 in interest for the CRS reporting period ending on July 31, 2012.

4. On August 5, 2015, under letter id. no. L1717309488, the Department assessed Taxpayer for \$599.30 in penalty and \$168.81 in interest for the CRS reporting period ending on August 31, 2012.

5. On August 5, 2015, under letter id. no. L0375132208, the Department assessed Taxpayer for \$593.60 in penalty and \$147.29 in interest for the CRS reporting period ending on November 30, 2012.

6. On July 8, 2015, under letter id. no. L1058791472, the Department assessed Taxpayer for \$1,759.43 in gross receipts tax, \$443.80 in penalty, \$146.98 in interest, \$259.93 in withholding tax, \$65.60 in penalty, and \$21.72 in interest for the CRS reporting period ending on February 28, 2013.

7. On July 15, 2015, under letter id. no. L1217073200, the Department assessed Taxpayer for \$1,030.50 in gross receipts tax, \$1,030.50 in penalty, and \$340.92 in interest for the CRS reporting period ending on March 31, 2013.

8. On July 15, 2015, under letter id. no. L0680202288, the Department assessed Taxpayer for \$2,258.18 in gross receipts tax, \$451.60 in penalty, and \$132.52 in interest for the CRS reporting period ending on June 30, 2013.

9. On July 15, 2015, under letter id. no. L1753944112, the Department assessed Taxpayer for \$1,346.29 in gross receipts tax, \$1,164.80 in penalty, and \$304.74 in interest for the CRS reporting period ending on August 31, 2013.

10. On August 11, 2015, under letter id. no. L0623988784, the Department assessed Taxpayer for \$23.02 in penalty for the CRS reporting period ending on September 30, 2013.

11. On July 15, 2015, under letter id. no. L0411766832, the Department assessed Taxpayer for \$22.65 in gross receipts penalty and \$18.32 in withholding tax penalty for the CRS reporting period ending on January 31, 2014.

12. On July 8, 2015, under letter id. no. L2132533296, the Department assessed Taxpayer for \$15.41 in withholding tax penalty and \$2.67 in withholding tax interest for the CRS reporting period ending on March 31, 2014.

13. On July 8, 2015, under letter id. no. L0010215472, the Department assessed Taxpayer for \$76.88 in withholding tax penalty and \$9.28 in withholding tax interest for the CRS reporting period ending on September 30, 2014.

14. On July 15, 2015, under letter id. no. L1485508656, the Department assessed Taxpayer for \$47.44 in gross receipts tax penalty and \$5.73 in interest for the CRS reporting period ending on September 30, 2014.

15. On July 8, 2015, under letter id. no. L1083957296, the Department assessed Taxpayer for \$96.74 in withholding tax penalty and \$11.70 in interest for the CRS reporting period ending on October 31, 2014.

16. On July 15, 2015, under letter id. no. L0948637744, the Department assessed Taxpayer for \$96.88 in gross receipts tax penalty and \$11.72 in interest for the CRS reporting period ending on October 31, 2014.

17. On July 8, 2015, under letter id. no. L0547086384, the Department assessed Taxpayer for \$63.24 in withholding tax penalty and \$7.41 in interest for the CRS reporting period ending on January 31, 2015.

18. On July 15, 2015, under letter id. no. L2022379568, the Department assessed Taxpayer for \$56.96 in gross receipts tax penalty and \$6.67 in interest for the CRS reporting period ending on January 31, 2015.

19. On July 20, 2015, Taxpayer protested the Department's assessments, arguing that it should not be liable for assessed penalty because it had detected and reported its errors to the Department.

20. On August 17, 2015, the Department's protest office acknowledged receipt of a valid protest.

21. On October 6, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

22. On October 6, 2015, the Administrative Hearings Office sent Notice of Telephonic Scheduling Conference, scheduling this matter for a scheduling hearing on November 5, 2015, within 90-days of the Department's acknowledgment of receipt of a valid protest.

23. A Scheduling Hearing in fact occurred on November 5, 2015, where a merits hearing date of November 30, 2015 was selected. The parties did not object that conducting the scheduling conference satisfied the 90-day hearing requirement under NMSA 1978, Section 7-1B-8 (A) (2015).

24. On November 6, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on November 30, 2015.

25. The only issue at protest is whether the Department's assessments of penalty should be abated in light of Taxpayer's arguments at protest.

26. Taxpayer is engaged in the electrical business and is located in Albuquerque, NM.

27. Taxpayer had previously been subject to Department audit and assessment of an outstanding tax liability.

28. As a result of that audit, Taxpayer engaged the services of numerous bookkeepers and accountants who helped develop an accounting and tax reporting system.

29. During the relevant periods, Taxpayer filed and paid CRS taxes in accord with the protocols developed by the various bookkeepers and accountants it had employed over the years.

30. On or about April of 2015, Taxpayer hired AnneBeth Del Canto as its bookkeeper.

31. Ms. Del Canto detected that the system Taxpayer had developed resulted in the underreporting and paying CRS taxes during certain periods during the relevant time.

32. Ms. Del Canto brought that to the attention of Frank Zamora, Taxpayer's owner.

33. Mr. Zamora directed Ms. Del Canto to correct the problem, including amending previously filed returns, because he wanted to ensure that Taxpayer was compliant with all of its tax obligations.

34. Taxpayer did not intentionally or willfully fail to pay the gross receipts tax and withholding taxes when due.

35. Ms. Del Canto spoke with a Department employee in Albuquerque about preparing amended returns for the periods with an outstanding liability, which Ms. Del Canto submitted on Taxpayer's behalf.

36. Ms. Del Canto also improved Taxpayer's accounting system going forward.

37. After receiving the amended returns, the Department issued assessments to Taxpayer, as described in findings of fact #1-18.

38. After Taxpayer's protest, Department Protest Auditor Sonya Varela did make a series of adjustments and credits to certain periods on Taxpayer's account, which resulted in the abatement of penalty for the reporting periods ending in February 2014, September 2014, October 2014, January 2015, and February 2015. [Taxpayer Ex. 3-1].

39. As of the date of hearing, Taxpayer owed \$559.26 in assessed gross receipts and withholding tax, \$5,739.61 in penalty, and \$1,364.67 in interest for a total tax liability of \$7,663.54. [Department Ex. B].

DISCUSSION

Taxpayer agrees that it owes assessed tax principal. However, Taxpayer argues that penalty should be abated because the errors it made were not intentional, because it detected and self-reported its error to the Department, and because Taxpayer believed under 3.1.11.11 (A) NMAC it was misled by the accounting system its previous accountants and bookkeepers had developed over the years.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See NMSA 1978, §7-1-3 (X) (2013)*. Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50,

¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

When a taxpayer fails to pay taxes due to the State because 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 twenty 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 actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Regulation 3.1.11.10 NMAC 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." Although certainly Taxpayer's underreporting and paying of the CRS taxes was not intentional in this case, Taxpayer was nevertheless civilly negligent under Regulation 3.1.11.10 (B) & (C) NMAC because Taxpayer failed to take action to report and pay the appropriate amount of CRS taxes when required through inadvertent error. Inadvertent error constitutes negligence subject to penalty under Section 7-1-69. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶9-11, 108 N.M. 795.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: “[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds.” Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds that when Taxpayer failed to report and pay CRS taxes. *See C & D Trailer Sales v. Taxation and Revenue Dep’t*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer “relied on any informed consultation” in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty in this case.

The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. That regulation establishes eight indicators of nonnegligence where penalty may be abated. Based on the argument of Taxpayer and the evidence presented, only two factors under Regulation 3.1.11.11 NMAC are potentially pertinent in this proceeding:

- A. the taxpayer proves the taxpayer was affirmatively misled by a department employee;
- ...
- D. the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer’s liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer’s reliance on an agent;

In argument, Taxpayer asserted that under 3.1.11.11 (A) NMAC it was affirmatively misled by its own accountants and bookkeepers who developed Taxpayer’s accounting system. However, this regulation only applies to instances where a taxpayer is misled by a Department employee, not their own employee. 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. It is the duty of Taxpayer to determine what CRS taxes need to be reported and paid. Unless a specific Department employee affirmatively told Taxpayer that the gross receipts taxes and withholding taxes were not due on the relevant CRS returns, which there is no evidence of in this protest, Taxpayer’s employees own failings in developing an accurate tax reporting system does not abrogate Taxpayer of its responsibility to file and pay the tax nor does under 3.1.11.11 (A) NMAC provide any relief to Taxpayer.

The other factor potentially relevant in this case is found under Regulation 3.1.11.11 (D) NMAC, where civil negligence penalty may be abated if Taxpayer reasonably relied on the advice of competent tax counsel or accountant after full disclosure of all relevant facts. Here, the only evidence is that the accountants and bookkeepers helped developed Taxpayer’s tax reporting system. There is no evidence that the accountants or bookkeepers Taxpayer used were competent tax counsel or accountants, what information was provided to them as part of developing the system, or what advice those accountants or bookkeepers provided to Taxpayer about the system. When an accounting system at large is insufficient or inadequate, that can be a basis for imposition of penalty in New Mexico. See *El Centro Villa Nursing Center*, 1989-NMCA-070, ¶11. Given a taxpayer’s duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of its actions, a taxpayer cannot “abdicate this responsibility [to learn of tax obligations] merely by appointing an accountant as its agent in tax matters.” *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795.

Taxpayer next argued that because it detected and corrected its own errors, penalty should be abated. The Court of Appeals recently considered and rejected a similar argument in *N.M.*

Taxation & Revenue Dep't v. Exerplay, Inc., 2014 N.M. App. Unpub. LEXIS 421 (Unpublished, non-precedential summary reversal). Under the statute, at the time of the issuance of an assessment, penalty is calculated from the date the tax was due. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dep't*, 2012-NMCA-010, ¶10. In this case, the tax was due at the time the CRS returns were originally filed until Taxpayer amended those returns to include the additional outstanding liabilities it had subsequently discovered. Therefore, the Department's imposition of penalty was legally supported. For the foregoing reasons, Taxpayer's protest **IS DENIED.**

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the Department's assessments, and jurisdiction lies over the parties and the subject matter of this protest.
- B. The hearing was timely set within 90-days of protest under NMSA 1978, Section 7-1-24.1 (2013).
- C. Taxpayer did not overcome the presumption of correctness, including the assessed penalty, that attached to the assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.
- D. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction in failing to include gross receipts tax and withholding tax liabilities on its CRS returns during the relevant period met the definition of civil negligence under Regulation 3.1.11.10 NMAC. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds that would allow for abatement of penalty under Section 7-1-69 (2007).
- E. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

For the foregoing reasons, the Taxpayers' protest **IS DENIED. IT IS ORDERED** that the Taxpayer is liable for the assessed penalty. As of the date of the hearing, Taxpayer owed \$559.26 in assessed gross receipts and withholding tax, \$5,739.61 in penalty, and \$1,364.67 in interest for a total tax liability of \$7,663.54.

DATED: February 18, 2016.

Brian VanDenzen
Interim Chief Hearing Officer
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have 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 Rule 12-601 NMRA.* If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper.