

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

**IN THE MATTER OF THE PROTEST OF
RICARDO D. ROMERO
TO ASSESSMENTS ISSUED UNDER LETTERS
ID NOS. L1853810736, L0561809456 and L1635551280**

No. 16-06

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on February 3, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Ricardo D. Romero (“Taxpayer”) appeared along with witness Caroline Romero. Staff Attorney Peter Breen appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Department Exhibit A was admitted into the record, a spreadsheet of liabilities as of the hearing date. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 1, 2015, under letter id. no. L1853810736, the Department assessed Taxpayer for \$719.94 in gross receipts tax, \$143.98 in penalty, and \$63.37 in interest for the CRS reporting periods between January 1, 2012 and December 31, 2012.
2. The Department issued two other assessments under letter id numbers L0561809456 and L1635551280 for the CRS reporting periods from January 1, 2012 through June 30, 2012 and July 1, 2012 through December 31, 2012 respectively. The Department stated these assessments were made in error and were duplicative of the assessment identified in finding of fact #1. The cumulative total of these two erroneous assessments equaled the

assessment issued on October 1, 2015. In light of that concession, assessments under letter id. no.'s L0561809456 and L1635551280 will not be addressed further.

3. On November 16, 2015, Taxpayer protested the Department's assessments.

4. On November 18, 2015, the Department's protest office acknowledged receipt of a valid protest.

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

6. On December 29, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on February 3, 2016.

7. The February 23, 2016 hearing occurred within 90-days of the Department's acknowledgment of receipt of a valid protest.

8. Taxpayer began his sole proprietorship business as a real estate appraiser in 2012.

9. Taxpayer had no experience with CRS returns or gross receipts tax.

10. Taxpayer did not consult with a tax professional or with any Department employee, other than to obtain an ID number.

11. Caroline Romero prepared Ricardo Romero's personal income tax returns in 2012.

12. Because Taxpayer and Ms. Romero were unaware of the requirements of gross receipts tax, Taxpayer did not file CRS returns or pay gross receipts tax in 2012.

13. Taxpayer did not intentionally or willfully fail to pay the gross receipts tax in 2012.

14. In 2013, Taxpayer learned of the requirements to file CRS returns and pay gross receipts tax, and began doing so at that time.

15. As of the date of hearing, Taxpayer owed \$719.94 gross receipts tax, \$143.98 in penalty and \$65.34 in interest for a total outstanding liability of \$929.26. [Dept. Ex. A].

DISCUSSION

Taxpayer agrees that it owed the assessed tax principal. The only issue is whether civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) may be abated based on Taxpayer's lack of knowledge of the requirement to file CRS returns and pay gross receipts tax in 2012, and unintentional failure to do so.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is 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).

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See NMSA 1978, § 7-9-4 (2002)*. Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), the term "gross receipts" includes the performance of a service, like performing real estate appraisals. Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2003).

Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that

all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (2002). Taxpayer was a New Mexico business engaged in performing real estate appraisal services. All of Taxpayer's receipts during the audit period are presumed subject to gross receipts tax. *See* § 7-9-3.3 and § 7-9-5. Since Taxpayer presented no evidence it was entitled to an exemption or deduction, all of Taxpayer's receipts in 2012 are subject to gross receipt tax during the relevant period. However, as Taxpayer acknowledged, Taxpayer did not understand this requirement in 2012 and thus through lack of knowledge did not file CRS returns or pay gross receipts taxes that year.

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 did not intentionally fail to pay taxes 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 inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

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 when Taxpayer failed to report and pay CRS taxes in 2012. *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.

Taxpayer’s main argument is that penalty should be abated because he and Ms. Romero lacked knowledge about the requirement to pay gross receipts tax in 2012. 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. Taxpayer’s mistaken belief and inadvertent error in not filing 2012 CRS returns and paying the gross receipt tax due at that time require imposition of civil negligence penalty under Section 7-1-69. *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶9-11, 108 N.M. 795 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 and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).
- C. Taxpayer did not overcome the presumption of correctness on the assessed tax, penalty, and interest under NMSA 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3 (X) (2013), Regulation 3.1.6.13 NMAC, and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.
- D. Under NMSA 1978, Section 7-1-67 (2007)'s mandatory "shall" language, Taxpayer is liable for accrued interest under the assessment. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24.
- E. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction and inadvertent error in not paying the assessed gross receipts tax met the definition of civil negligence under Regulation 3.1.11.10 NMAC. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795.
- F. 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).
- G. 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 as of the date of hearing, Taxpayer was liable for \$719.94 gross receipts tax, \$143.98 in penalty and \$65.34 in interest for a total outstanding liability of \$929.26.

DATED: February 18, 2016.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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 be preparing the record proper.