

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

**IN THE MATTER OF THE PROTEST OF
JIMMY STUART
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0985627696**

No. 16-22

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 5, 2016 before David Buchanan, Esq., Hearing Officer Supervisor, in Santa Fe. Jimmy Stuart (“Taxpayer”) appeared for the hearing and represented himself. Taxpayer testified on his own behalf at the hearing. Staff Attorney Sherri Trevino, Esq. appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Department Exhibit A (Spreadsheet of Liabilities as of May 5, 2016) was admitted into the record. Protest Auditor Thomas Dillon appeared and testified as a witness for the Department. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 11, 2015, under letter id. no. L0985627696, the Department assessed Taxpayer for \$7,359.31 in withholding tax, \$1,471.87 in penalty, and \$992.88 in interest for a total assessment of \$9,824.06 for the CRS reporting periods between January 1, 2010 and December 31, 2012.
2. On February 15, 2016, Taxpayer protested the Department’s assessment.
3. On February 25, 2016, the Department’s protest office acknowledged receipt of a valid protest.

4. On April 5, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

5. On April 6, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on May 5, 2016, within 90-days of the Department's acknowledgment of receipt of a valid protest.

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

7. Taxpayer is self-employed and performs contracted services for other businesses.

8. Taxpayer was responsible for reporting and paying New Mexico combined reporting system ("CRS") taxes.

9. Taxpayer did not report or pay CRS taxes for work he performed as a business during the relevant period.

10. Taxpayer had assistance filing his tax returns during the relevant period. He did not consult with a tax professional regarding CRS taxes during the relevant period. Taxpayer consulted with lay individuals who were engaged in similar work instead of consulting a tax professional.

11. In 2012, Taxpayer learned from a tax professional with Tax Aid that he needed to get a CRS number and pay CRS taxes. Taxpayer started paying CRS taxes in 2012.

12. Taxpayer supported his wife and daughter while they were in college during the relevant period. Taxpayer accumulated student loan and credit card debt during that time.

13. Taxpayer's wife graduated from college in 2013, but was diagnosed with cancer on her first day of work after graduation.

14. Taxpayer acknowledged his liability for the assessed tax. Taxpayer is seeking to abate the assessed penalty and interest due to financial hardship.

15. Taxpayer contacted a Department employee who discussed a hardship program, but Taxpayer was advised that he did not qualify because he had an active CRS number.

16. As of May 5, 2016, the remaining amounts due for the assessment in question were \$6,609.31 in tax, \$1,471.87 in penalty and \$1,073.92 in interest for a total remaining amount of \$9,155.10. *See Exhibit A.*

DISCUSSION

Taxpayer agrees that he owes the assessed tax principal. The only issue in this protest is whether any of the interest under NMSA 1978, Section 7-1-67 (2013) or penalty under NMSA 1978, Section 7-1-69 (2007) must be abated because of Taxpayer's claimed economic hardship.

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).

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.

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.*, 2009-NMSC-013, ¶22 (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." In this case, Taxpayer would be determined negligent under all three of those definitions.

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 gross

receipts tax did not apply to it when Taxpayer failed to report and pay gross receipts tax on its CRS returns. *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;
- B. the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of injury or illness.

Under 3.1.11.11 (A) NMAC, Taxpayer was advised by a Department employee about a possible “hardship” program, but was then advised that he did not qualify. However, the information was provided by the Department employee after the assessment was made. Therefore, Taxpayer was never “affirmatively misled by a department employee” about his need to report and pay his taxes as required under subsection A. 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 presented evidence that his wife was diagnosed with cancer in 2013. Section 3.1.11.11 (B) NMAC would not be applicable in this instance because it was Taxpayer’s wife

and not Taxpayer himself who became ill; the illness occurred after the relevant reporting period; and Taxpayer was able to obtain assistance with filing his taxes during that time period. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

Taxpayer also discussed the possibility that he could obtain assistance through certain programs that were mentioned by the Department employee. The Hearing Officer is aware that in the past there have been Tax Amnesty programs that came from specific Legislative action that may have provided the Taxpayer with certain relief. However, those programs were authorized for a defined, limited period of time that has now expired. There is currently no statutory provision that allows for Tax Amnesty.

Taxpayer claimed undue financial hardship as a basis to abate both interest and penalty. Taxpayer indicated that abating interest and penalty would allow him to pay the taxes due and meet his other debt obligations. Despite the Hearing Officer's sympathy with the Taxpayer's position, New Mexico law does not provide a statutory or regulatory provision for abatement of interest or penalty for undue financial hardship. The Department is required to assess a taxpayer for any tax liability exceeding \$25.00. *See* § 7-1-17 (A). NMSA 1978, Section 7-1-20 (1995) only allows the Department to compromise on a tax assessment when it has a "good faith doubt" to the liability. That section does not contain any financial hardship exception. Regulation 3.1.6.14 NMAC (01/15/01) does not allow the Department to abate otherwise legally required assessments based on Taxpayer's ability to pay. For the foregoing reasons, Taxpayer's protest **IS DENIED**.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessment, 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 7-1B-8(A) (2015).

C. Taxpayer did not overcome the presumption of correctness, including the assessed interest or 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, § 7-1-67 (A), Taxpayer is liable for interest because interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due and the assessment of interest is mandatory, not discretionary.

E. 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 payment of tax 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).

F. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

G. Inability to pay is not grounds for abatement of an assessed tax liability under Regulation 3.1.6.14 NMAC (01/15/01).

H. Interest is due on the amount of unpaid principal tax and continues to accrue on the unpaid principal amount until the principal amount of tax due is paid.

For the foregoing reasons, the Taxpayers' protest **IS DENIED. IT IS ORDERED** that the Taxpayer is liable for the outstanding assessment amounts of \$6,609.31 in tax, \$1,471.87 in penalty and \$1,073.92 in interest. The interest amount is calculated through May 5, 2016.

DATED: May 31, 2016.

David Buchanan

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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 be preparing the record proper.