

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

**IN THE MATTER OF THE PROTEST OF
M & M STORES INC.**

No. 16-25

**TO ASSESSMENTS ISSUED UNDER LETTER
ID NO. L0799385648, L1873127472, L1496557616, L0959686704, L0530950192,
L1604692016, L1067821104, L2141562928, L0006662192, L1083689008, L1922936880,
L0597272624, L1671014448 and L0178106416**

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 25, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Murad Hijazi appeared for M&M Stores, Inc. (“Taxpayer”) *pro se*. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Veronica Galewaler appeared as a witness for the Department. Taxpayer Exhibit #1 and Department Exhibits A 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 October 8, 2015, under letter id. no. L0799385648, the Department assessed Taxpayer for \$1,176.41 in gross receipts tax, \$235.28 in penalty, and \$50.57 in interest for the CRS reporting period ending March 31, 2014.
2. On October 8, 2015, under letter id. no. L1873127472, the Department assessed Taxpayer for \$2,515.23 in gross receipts tax, \$503.00 in penalty, and \$101.50 in interest for the CRS reporting period ending April 30, 2014.

3. On October 8, 2015, under letter id. no. L1496557616, the Department assessed Taxpayer for \$2,752.14 in gross receipts tax, \$550.40 in penalty, and \$104.50 in interest for the CRS reporting period ending May 31, 2014.

4. On October 8, 2015, under letter id. no. L0959686704, the Department assessed Taxpayer for \$2,691.41 in gross receipts tax, \$538.28 in penalty, and \$94.01 in interest for the CRS reporting period ending June 30, 2014.

5. On October 8, 2015, under letter id. no. L0530950192, the Department assessed Taxpayer for \$2,778.62 in gross receipts tax, \$555.70 in penalty, and \$91.58 in interest for the CRS reporting period ending July 31, 2014.

6. On October 8, 2015, under letter id. no. L1604692016, the Department assessed Taxpayer for \$2,606.46 in gross receipts tax, \$521.29 in penalty, and \$79.27 in interest for the CRS reporting period ending August 31, 2014.

7. On October 8, 2015, under letter id. no. L1067821104, the Department assessed Taxpayer for \$2,488.81 in gross receipts tax, \$497.76 in penalty, and \$69.14 in interest for the CRS reporting period ending September 30, 2014.

8. On October 8, 2015, under letter id. no. L2141562928, the Department assessed Taxpayer for \$2,440.19 in gross receipts tax, \$488.00 in penalty, and \$61.97 in interest for the CRS reporting period ending October 31, 2014.

9. On October 8, 2015, under letter id. no. L0006662192, the Department assessed Taxpayer for \$2,134.72 in gross receipts tax, \$426.90 in penalty, and \$48.78 in interest for the CRS reporting period ending November 30, 2014.

10. On October 1, 2015, under letter id. no. L1083689008, the Department assessed Taxpayer for \$1,999.67 in gross receipts tax, \$325.44 in penalty, and \$39.37 in interest for the CRS reporting period ending December 31, 2014.

11. On October 1, 2015, under letter id. no. L1922936880, the Department assessed Taxpayer for \$1,892.90 in gross receipts tax, \$265.02 in penalty, and \$32.52 in interest for the CRS reporting period ending January 1, 2015.

12. On October 1, 2015, under letter id. no. L0597272624, the Department assessed Taxpayer for \$1,724.69 in gross receipts tax, \$206.94 in penalty, and \$25.66 in interest for the CRS reporting period ending February 28, 2015.

13. On October 1, 2015, under letter id. no. L1671014448, the Department assessed Taxpayer for \$2,482.87 in gross receipts tax, \$248.30 in penalty, and \$30.20 in interest for the CRS reporting period ending March 31, 2015.

14. On October 1, 2015, under letter id. no. L0178106416, the Department assessed Taxpayer for \$2,139.84 in gross receipts tax, \$171.20 in penalty, and \$20.93 in interest for the CRS reporting period ending April 30, 2015.

15. On October 20, 2015, Taxpayer protested the assessments, asking for abatement of penalty because of a hospitalization.

16. On October 28, 2015, the Department's protest office acknowledged receipt of a valid protest of the assessments.

17. On December 9, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

18. On December 10, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on January 25, 2016, within 90-days of the Department's acknowledgment of receipt of a valid protest.

19. Taxpayer operates three gas stations and convenience stores in Albuquerque.

20. Mr. Murad Hijazi is Taxpayer's manager and accountant.

21. Mr. Hijazi is responsible for preparing and paying Taxpayer's CRS returns.

22. Although Mr. Hijazi files the monthly CRS returns, Taxpayer engages the service of a tax preparer annually, presumably to handle its income tax obligations.

23. Taxpayer did not dispute that it owed the assessed gross receipts tax principal and interest. The only issue at protest is Taxpayer's request for abatement of penalty based on Mr. Hijazi's medical condition.

24. In 2013 or 2014, Mr. Hijazi developed a chronic back pain that doctors believed might be indicative of a very serious, potentially terminal, medical condition. Under the supervision of medical professionals, Mr. Hijazi underwent significant medical testing, observation, and procedures to determine the exact nature of the condition¹.

25. Attached to Taxpayer's protest was Mr. Hijazi's medical history report from Presbyterian hospital showing that Taxpayer:

- a. Underwent a diagnostic-surgical procedure related to a back condition on August 21, 2014.
- b. Underwent a whole body radiology imaging on November 12, 2014.

¹ To the extent possible, specifics about Taxpayer's medical condition and treatment will not be identified to protect medical privacy in this publicly available document. However, it is clear that it was a legitimate and potentially serious medical condition that required ongoing treatment and diagnostic procedures. The medical records Taxpayer submitted, although not extensive, are part of the non-public administrative record of this proceeding in the event of an appeal to the Court of Appeals.

- c. Underwent a diagnostic-surgical procedure related to a back condition on March 6, 2015.
26. Mr. Hijazi was on a prescription pain medication at that time.
27. Mr. Hijazi reported that because of the stress of the situation including the possibility of suffering a terminal illness and the pain he was suffering during this period, he let Taxpayer's business obligations slip.
28. Mr. Hijazi did continue to work to ensure basic operations of Taxpayer's business in terms of payroll, ordering/maintaining sufficient inventory, and depositing money from the convenience stores into the bank.
29. Mr. Hijazi acknowledged that he retained his mental faculties throughout this time.
30. Mr. Hijazi finally received a conclusive diagnosis at the end of 2014 (which thankfully did not entail the feared terminal condition that originally was a possibility), undertook a course of treatment to address the back pain, and stabilized.
31. When Mr. Hijazi's medical condition had stabilized in 2015, he returned his focus back on Taxpayer's business
32. On November 3, 2015, Dr. Bernard Agbemadzo submitted a letter on behalf of Mr. Hijazi describing Mr. Hijazi's course of treatment since September of 2014 and reporting that as of the date of letter Mr. Hijazi was stable and doing well.
33. As of the date of hearing, Taxpayer owed \$31,858.16 in gross receipts tax, \$6,234.65 in penalty, and \$1,162.62 in interest. [Dept. Ex. A].

DISCUSSION

Taxpayer agrees that it owed the assessed tax principal and interest in this case. The only issue is the Department's assessment of civil negligence penalty under NMSA 1978, Section 7-1-69 (2007), which Taxpayer argues should be abated because of Mr. Hijazi's medical situation in 2014.

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 (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 was negligent under Regulation 3.1.11.10 (B) & (C) NMAC because Taxpayer failed to take action to report and pay appropriate gross receipts on its CRS system returns in the reporting periods between March 31, 2014 and April 30, 2015.

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 taxes were not due and owing. *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, the only factor

under Regulation 3.1.11.11 NMAC potentially pertinent is subsection B, which reads

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.

Mr. Hijazi clearly suffered from sustained and prolonged pain and the stress of an unclear diagnosis for over a year, with the possibility of a terminal illness. Thankfully, Mr. Hijazi was not diagnosed with a terminal condition and has recovered well. Such chronic pain and stress related to the ongoing medical treatment undoubtedly impacted his ability to focus at work and perform all essential work functions, meeting the prolonged injury or illness portion of Regulation 3.1.11.11 (B) NMAC.

But that is not enough under Regulation 3.1.11.11 (B) NMAC to abate penalty, as a Taxpayer must also demonstrate an inability to procure the services of another person to prepare the return. In this case, Mr. Hijazi acknowledged that he did work during this period of the medical conditions to ensure the basic functioning of his businesses, including handling bank deposits, managing inventory, and payroll. If Mr. Hijazi had sufficient mental capacity and time to complete these essential business functions to ensure continuing operations, there is no clear reason why he could not similarly complete the equally important task of managing Taxpayer's CRS tax obligations. Even if Mr. Hijazi did not have the time or energy to complete the monthly CRS returns after completing these other essential tasks, this evidence of him able to work on these other tasks strongly suggests that Taxpayer still had sufficient time and resources to secure the services of another person to complete the CRS returns. Indeed, Taxpayer acknowledged it already annually employed the services of a tax preparer. Mr. Hijazi did not present any reason why Taxpayer could not have temporarily used the services of that tax preparer to assist with the CRS returns while he focused on his medical condition. This analysis of this issue is consistent

with a number of other Decision and Orders (non-precedential but persuasive) issued on this subject. *See* S.J. Tile Company, No. 16-23; Jimmy Stuart, No. 16-22; Gail Stefl, No. 15-15; Promoco, No. 11-06; Sandia Oil Company No. 01-01; Gregory and Shirley Hale, No. 01-02; BR Gordon Construction Co., No. 98-01; and Rio Rancho Pharmacy, No. 97-05. *Cf.*, Tafoyas Store, No. 97-43.

Although Mr. Hijazi's situation was quite sympathetic, Taxpayer did not establish it was entitled to an abatement of assessed penalty under Regulation 3.1.11.11 (B) NMAC because the evidence showed that Mr. Hijazi was able to work enough to satisfy basic operational needs and thus had either the capacity to take care of the CRS tax obligations or the ability/time/resources to procure the services of another to handle the CRS returns. Therefore, 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 the Department's acknowledged receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).
- C. Taxpayer did not overcome the presumption of correctness on the assessed penalty 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 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction/inattention in not paying gross receipts tax met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

E. 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. Regulation 3.1.11.11 (B) NMAC does not allow for abatement of penalty in this protest because Mr. Hijazi was able to work enough to satisfy basic operational needs and thus either had the capacity to take care of the CRS tax obligations directly or the ability/time/resources to procure the services of another to handle the CRS returns.

For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that the Taxpayer is liable for \$31,858.16 in gross receipts tax, \$6,234.65 in penalty, and \$1,162.62 in interest.

DATED: June 7, 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 (2015), 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.