

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

**IN THE MATTER OF THE PROTEST OF
EMILY W. METZLOFF,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1087927856**

No. 16-52

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 1, 2016 before Hearing Officer Chris Romero, Esq. The Taxation and Revenue Department (Department) was represented by Ms. Melinda Wolinsky, Staff Attorney. Mr. Nicholas Pacheco, Auditor, also appeared and testified on behalf of the Department. Ms. Emily W. Metzloff (Taxpayer), appeared for the hearing. The Taxpayer testified and represented herself. The Department's exhibits "C" and "D" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. 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 29, 2016, the Department assessed the Taxpayer for gross receipts tax in the amount of \$1,384.84, penalty in the amount of \$276.96, and interest in the amount of \$123.17, for the tax periods from January 1, 2012 through December 31, 2013.
2. By correspondence dated August 16, 2016, David J. Blesy, CPA (hereinafter "Mr. Blesy"), requested on behalf of the Taxpayer that the Department waive the assessed penalty. The Department received the correspondence on August 22, 2016 and construed the correspondence as a formal protest. The correspondence was admitted as Dept. Ex. C.
3. Dept. Ex. C indicates that Mr. Blesy is a certified public accountant.

4. The Department acknowledged the Taxpayer's receipt of a valid protest on August 29, 2016.

5. On October 11, 2016, the Department filed a Request for Hearing requesting that the Taxpayer's protest be scheduled for a formal administrative hearing.

6. On October 12, 2016, the Hearings Office issued a Notice of Administrative Hearing setting a hearing on the merits for November 1, 2016, a date within 90 days of the receipt of the protest.

7. Taxpayer did not protest the assessment of principal or interest. The only issue protested was the assessment of the civil negligence penalty.

8. During the reporting periods at issue, the Taxpayer provided editing services for out-of-state internet clients. Taxpayer edited text for publication on the internet.

9. Taxpayer's clients compensated her for her services and issued Forms 1099. Taxpayer's clients did not withhold taxes or pay unemployment insurance on her behalf.

10. Taxpayer's income taxes were prepared by Mr. Blesy. He is a certified public accountant in New York and referred to Taxpayer by her father. Mr. Blesy has prepared Taxpayer's income taxes for many years.

11. Taxpayer resided in New Mexico during the reporting periods at issue.

12. The retainer agreement between Taxpayer and Mr. Blesy, admitted as Dept. Ex. D, indicated that Mr. Blesy has been under retainer to provide services to Taxpayer since December 22, 2009.

13. In response to the assessment issued by the Department, Mr. Blesy indicated in his correspondence, dated August 16, 2016, that "[b]ecause we were not aware of this tax, and

therefore could not properly advise our client with regard to filing of form CRS-1, we respectfully request that the \$276.96 penalty on the enclosed assessment be abated.” *See* Dept. Ex. C.

14. Taxpayer’s interactions with Mr. Blesy were limited to exchanging documents, and recalled talking with him on the telephone on only one occasion.

15. Taxpayer and Mr. Blesy never discussed the issue of New Mexico gross receipts taxes.

16. Taxpayer has never consulted with a tax professional based in New Mexico.

17. Taxpayer did not know that gross receipts tax would apply to the compensation she received for her editing services.

18. A Schedule C mismatch revealed that the Taxpayer reported income on Schedule C that was not reported for the purpose of the gross receipts tax during the reporting periods at issue.

DISCUSSION

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services. *See* NMSA 1978, Section 7-9-3.5. It was undisputed that the Taxpayer was providing services in New Mexico as an editor for online entities. Therefore, the Taxpayer was subject to the gross receipts tax. Taxpayer has paid the assessed tax and interest. The only issue in this protest is whether the civil negligence penalty assessed pursuant to NMSA 1978, Section 7-1-69 and Regulation 3.1.11.11 (A) NMAC may be abated.

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 assessment. *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, Section 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). Therefore, the assessment of a civil negligence penalty is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that she is entitled to an abatement of the penalty.

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 meet 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 that a 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 all three definitions. Taxpayer failed to exercise a degree of ordinary business care and prudence which a reasonable taxpayer would exercise under like circumstances with regard for understanding her gross receipts tax obligations. As a result, Taxpayer failed to take action to report and pay gross receipts, a failure which was caused in part by carelessness or inattention.

In instances where a taxpayer might fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception in that “[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 her when she failed to report and pay gross receipts tax. *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 non-negligence where penalty may be abated. Based on the argument of Taxpayer and the evidence presented, only one factor under Regulation 3.1.11.11 NMAC is potentially applicable in this proceeding:

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;

Taxpayer retained Mr. Blesy, a certified public accountant, to assist with her tax filings. According to Dept. Ex. D, Mr. Blesy was under retainer since December 22, 2009. Employing a licensed C.P.A. meets the baseline competency requirement necessary to find reasonable reliance on that accountant's advice.

The problem in this case is that the evidence did not establish that Taxpayer actually relied on Mr. Blesy for purposes other than preparing her personal income tax returns. If her intention was to rely on Mr. Blesy for additional purposes, such as understanding or fulfilling her tax obligations under New Mexico's Gross Receipts and Compensating Tax Act, then that reliance was patently unreasonable.

Knowing that Mr. Blesy was based in New York, Taxpayer did not inquire into whether Mr. Blesy had any knowledge or experience with New Mexico's gross receipts tax. The Taxpayer explained that her interactions with Mr. Blesy were limited to exchanging documents, and recalled talking with him on the telephone on only one occasion. If the Taxpayer had made additional inquiry, Taxpayer and Mr. Blesy could have been alerted to the issue and could have acted accordingly. Instead, Mr. Blesy admitted that he did not know about the New Mexico gross receipts tax and was unable to properly advise the Taxpayer regarding her gross receipts tax responsibilities.

It is the Taxpayer's duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of her 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. Although the task may seem formidable, the Department provides a variety of publications available at no cost intended to provide general guidance on various topics, including gross receipts taxes. See *FYI-105*

Gross Receipts & Compensating Taxes: An Overview at www.tax.newmexico.gov/forms-publications.aspx.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. In contrast, there was no dispute that the issue giving rise to this protest was the result of Taxpayer's inadvertence, erroneous belief, or inattention. In other words, Taxpayer did not act with bad intentions. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty.

For the foregoing reasons, Taxpayer's protest is **DENIED**.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Assessment issued under Letter ID number L1087927856, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing occurred within 90 days of the Department's receipt of the protest satisfying the 90-day hearing requirement of NMSA 1978, Sec 7-1B-8.

C. The Taxpayer was engaged in business as an independent contractor and was providing services. The Taxpayer was subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-3.5 and Section 7-9-4.

D. The Taxpayer failed to prove that she was not negligent; therefore, penalty was properly assessed. *See* NMSA 1978, Section 7-1-69.

E. The Taxpayer failed to overcome the presumption of correctness. *See* NMSA 1978, Section 7-1-17.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: November 14, 2016



Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25, 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. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.