STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF **No. 16-57**
HILARIO LEOS & CHRISTINA LUCHETTI-LEOS
C&R NUTRITIONAL CLUB
TO ASSESSMENTS ISSUED UNDER LETTERS
ID NOs. L1112215088 and L1011551792

DECISION AND ORDER

A protest hearing occurred in the above captioned matter on November 30, 2016 at 1:00 p.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Hilario Leos and Christina Luchetti-Leos, now known as Christina Luchetti-Rael, appeared *pro se* for themselves and C&R Nutritional Club ("Taxpayers"). Staff Attorney, Melinda Wolinsky, appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Nicholas Pacheco, appeared as a witness for the Department. Taxpayers' Exhibits 1 through 6 and Department's Exhibits A through E were admitted into the record without objection, and are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 20, 2016, the Department assessed Taxpayers Hilario Leos and Christina Luchetti-Leos the amounts of $10,009.71 in gross receipts tax, $2,001.95 in penalty, and $1,510.05 in interest for a total amount due of $13,521.71 under Letter ID No. L1112215088 for the reporting periods from January 1, 2010 through December 31, 2012.

2. On July 20, 2016, the Department assessed Taxpayer C&R Nutritional Club the amounts of $5,223.24 in gross receipts tax, $1,044.64 in penalty, and $595.53 in interest for a

total amount due of $6,863.41 under Letter ID No. L1011551792 for the reporting periods from January 1, 2012 through December 31, 2012.

3. Taxpayer Christina M. Luchetti-Rael entered into a Short Term Payment Plan on August 23, 2016. **[Department Ex. A]**. Taxpayer Hilario Leos entered into a Short Term Payment Plan on August 23, 2016. Despite the date of his signature erroneously indicating August 22, 2016, Mr. Leos executed the plan on August 23, 2016. **[Department Ex. B]**. Department Ex. A and Department Ex. B shall hereinafter be referred to collectively as "Short Term Payment Plans".

4. The Short Term Payment Plans included the assessments for the periods from January 1, 2010 through December 31, 2011. **[Taxpayer Ex. 1]**.

5. The Short Term Payment Plans provided that by signing the agreements, the Taxpayers admitted conclusive liability for the taxes included in the plans, including penalty and interest, and agreed that the principal, interest, and penalty were not subject to future protest. **[Department Ex. B; Department Ex. C]**.

6. Taxpayers asserted they did not read the Short Term Payment Plans and were unaware of the conditions imposed with reference to future protests. Taxpayers claimed they were encouraged by an employee of the Department to execute the plans because the Department would allegedly view them in a more favorable light because they were making efforts to satisfy their tax liability.

7. On September 8, 2016, Taxpayers timely protested the assessments. Taxpayers' protest was limited to penalty and interest only. Taxpayer's did not protest the underlying gross receipts tax principal. **[Department Ex. D]**.

8. Despite the provisions of the Short Term Payment Plans, Taxpayers' intentions were to protest penalty and interest for the periods included in the plans in addition to the reporting periods in 2012 which were not subject of the plans. **[Department Ex. D]**.

9. On September 21, 2016, the Department acknowledged the receipt of a valid protest with respect to the 2012 assessments. By separate correspondence also dated September 21, 2016, the Department asserted that there was no right of protest with respect to the periods subject of the Short Term Payment Plans because the Taxpayers waived such right by executing the plans.

10. On November 2, 2016, the Department requested a hearing in this matter with respect to the above-captioned letter ID numbers covering 2010, 2011, and 2012. The Hearing Request indicated an amount of controversy consistent with penalty and interest for 2012 only.

11. On November 3, 2016, the Administrative Hearings Office issued Notice of Administrative Hearing, scheduling this matter for November 30, 2016.

12. A hearing on the merits occurred on November 30, 2016 within 90 days of the protest.

13. Taxpayers expressed the desire to call as a witness the Department employee who they claimed encouraged them to execute the Short Term Payment Plans. However, Taxpayers did not subpoena the witness to appear and testify and consequently, the witness was not present to testify at the hearing. Effort was nevertheless made to have the witness appear voluntarily by telephone but her telephonic appearance could not be arranged.

14. Taxpayers Hilario Leos and Christina Luchetti-Leos were married during the relevant periods of time and did business as C & R Nutritional Club.

15. During the relevant periods of time, they were engaged in the business of promoting and selling dietary supplements and derived income from such business in New Mexico.

16. During the relevant periods of time, the Taxpayers were not aware of their obligations to report gross receipts from business income or pay gross receipts taxes under the Gross Receipts and Compensating Tax Act.

17. Taxpayers utilized and relied on Yolanda Chavez, doing business as Loyalty Tax Service, to assist with preparing and filing their federal and state income taxes during the relevant periods of time. Taxpayers began utilizing her services in 2009.

18. Ms. Chavez, as provided in the correspondence included in the Taxpayers' protest, seemed to claim that Taxpayers were not required to pay New Mexico gross receipts taxes because they purchased their products in California and consequently paid sales tax in California. Ms. Chavez suggested that income derived from reselling the products in New Mexico only obligated the Taxpayers to report the proceeds from such activity as income for income tax purposes. Ms. Chavez provided no legal authority in her correspondence to support her opinion.

19. Taxpayers asserted that Ms. Chavez did not inform them of any gross receipts tax obligations.

20. Neither Ms. Chavez, nor Loyalty Tax Service, are registered with the State of New Mexico as a certified public accountant or registered public accountant.

21. Taxpayers made no independent inquiry of Ms. Chavez regarding her credentials or otherwise investigated her qualifications.

22. The evidence was insufficient to find that Ms. Chavez was a competent tax accountant.

23. As of the date of hearing, the outstanding amounts in protest for 2012 were $359.02 in interest, and $573.62 in penalty, for a total amount of $932.64. **[Department Ex. E]**.

24. The Department asserted that only 2012 was subject to protest.

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 in New Mexico. *See* NMSA 1978, Section 7-9-3.5. In this protest, Taxpayers were engaged in selling dietary supplements in New Mexico. Therefore, the Taxpayers were subject to the gross receipts tax. Taxpayers did not protest the assessed tax principal. The only issues in this protest are whether the civil negligence penalty and interest assessed as a result of the failure to timely pay the tax may be abated.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of tax issued in this case are presumed correct. 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). Taxpayers have the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

Taxpayers requested leniency from the Department with respect to the imposition of penalty and interest. Taxpayers asserted that they relied on the competence of Yolanda Chavez of Loyalty Tax Service in forming their belief that they had satisfied their tax reporting obligations for 2010, 2011, and 2012, and for that reason, interest and penalty should be abated as to all three years.

Despite the good faith intentions of the Taxpayers in this case, when a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *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 the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayers from the time the tax was due but not paid until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and Department is without legal authority to abate it despite the Taxpayers' good faith intentions.

With concern for 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).

As discussed above, 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" even if, like here, Taxpayers actions or inactions were unintentional.

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, Taxpayers were negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC in 2010, 2011, and 2012 because of their inaction in failing to pay gross receipts tax when due resulting from their erroneous belief that the income derived from their business venture did not give rise to gross receipts tax obligations.

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." Further, in relevant part to this protest, Regulation 3.1.11.11 (D) NMAC (emphasis added) allows for abatement of penalty when a "taxpayer *proves* that the failure to pay a tax… 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." Black's Law Dictionary, 22 (9th ed. 2009), defines "accountant" as "a person authorized under applicable law to practice public accounting."

Here, Taxpayers relied on the advice of Yolanda Chavez of Loyalty Tax Service to assist them in satisfying their tax obligations. However, there was no evidence that Ms. Chavez was a competent accountant as that term is utilized in Regulation 3.1.11.11 (D) NMAC. There was no evidence presented to suggest that Ms. Chavez is a CPA or other licensed accounting professional through the State of New Mexico Regulation and Licensing Department, nor is there any indication that Ms. Chavez identifies herself as a CPA on her letterhead or the signature line of her letter to the Department. [**Department Ex. D**]. Ms. Chavez did not appear to testify, and her letter admitted into the record as part of Taxpayers' protest in Department Ex. D is silent as to her credentials. Taxpayers made no separate inquiry into Ms. Chavez's credentials and simply assumed she was qualified based on the fact that she held herself out as providing a tax service.

Despite Taxpayers' sincerity, they were not diligent in determining whether Ms. Chavez was qualified, credentialed, or competent in the area of New Mexico gross receipts tax. Because tax preparers are not a licensed or regulated industry in New Mexico, without more specific information about Ms. Chavez' particular credentials, there is insufficient evidence on this record to make a competency determination.

Although Decisions and Orders of the Administrative Hearings Office and its predecessor, the Administrative Hearings Bureau, are not precedential, one previous Decision and Order of the Hearings Bureau is highly persuasive in this matter given its similar facts. *In the Matter of the Protest of Red Mesa Construction*, No. 03-03, the taxpayer had no knowledge about the qualifications of the accounting service it used but assumed that the accounting service was competent simply because the accounting service held itself out as a tax preparer. In rejecting that taxpayer's claim for abatement of civil negligence penalty in that matter, the hearing officer stated that "[a] taxpayer's reliance on a tax professional must be active and

informed—not passive and unaware—in order to support a finding that the taxpayer's failure to pay tax was not negligent…" In other words, without actively investigating the person's base of competency, a taxpayer cannot determine whether the person is "competent" or whether it is "reasonable" to rely on the advice of that person for the purposes of Regulation 3.1.11.11 (D) NMAC.

That logic extends to the facts of this protest: without some active consideration of Ms. Chavez's qualifications and competency, it was not "reasonable" for Taxpayers to rely exclusively on her in assuming that they had satisfied their tax obligations under the Gross Receipts and Compensating Tax Act. Therefore, Regulation 3.1.11.11 (D) NMAC does not provide a basis to abate penalty in this matter.

Moreover, without evidence of a detailed consultation with Ms. Chavez about the nature of their business, her credentials, and her experience with the New Mexico Gross Receipts and Compensating Tax Act, Taxpayers did not demonstrate that they made a mistake of law in good faith and on reasonable grounds under Section 7-1-69 (B). *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).

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. Generally, a taxpayer cannot "abdicate this responsibility 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, Taxpayers conduct was not in bad faith or 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 in this case. Therefore, Taxpayers have not overcome the presumption of correctness and failed to establish that they are entitled to an abatement of penalty in this matter.

As previously discussed, Taxpayers' intentions when presenting their protest were to seek abatement of interest and penalty with respect to 2010, 2011, and 2012. However, the reporting periods for 2010 and 2011 were subject of the Short Term Payment Plans. Consequently, the Department asserted the contractual provisions of the Short Term Payment Plans precluded protest of principal, interest, or penalty for those years.

The Hearing Officer declines to make a finding on the question of whether Taxpayers can withdraw from the Short Term Payment Plans because such ruling is moot in light of the substantive analysis above. That is, Taxpayers failed to establish any substantive basis to allow abatement of penalty and interest for any of the years in which they sought relief. Moreover, having already determined that the Taxpayers are not entitled to abatement of interest or penalty, permitting the Short Term Payment Plans to be set aside as Taxpayers suggest would not provide the relief they desire. In contrast, Taxpayers would forfeit the benefits of the Short Term Payment Plans while remaining liable for the unpaid principal, interest, and penalty now subject of the

plans. This could create a scenario that is more detrimental, rather than beneficial, to Taxpayers' interests.

Taxpayers are therefore liable for the assessed penalty and interest for 2012 and shall continue to adhere to the terms and conditions provided in the Short Term Payment Plans addressing 2010 and 2011. Taxpayers' protest is denied.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely written protest to the assessments issued under Letter ID Nos. L1112215088 and L1011551792 and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing on the merits conducted on November 30, 2016 met the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015).

C. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayers' burden to come forward with evidence and legal argument to establish that they were entitled to an abatement.

D. Under Section 7-1-67, Taxpayers are liable for interest under the assessments.

E. Taxpayers were negligent in failing to report gross receipts and pay gross receipts taxes when due for the tax years covered by the assessments. Consequently, the assessment of penalty was proper.

F. The Taxpayers failed to establish non-negligence under 3.1.11.11 (D) NMAC and *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795; therefore, penalty was properly assessed.

G. As of the date of hearing, the outstanding amounts in protest for 2012 were $359.02 in interest, and $573.62 in penalty, for a total amount of $932.64.

H. The amounts due for 2010 and 2011 are established in the Short Term Payment Plans.

For the foregoing reasons, Taxpayers' protest **IS DENIED.**

DATED: December 16, 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 (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 Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.