

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

**IN THE MATTER OF THE PROTEST OF
CITY OF ALBUQUERQUE,
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0350215728**

No. 17-13

AND

**IN THE MATTER OF THE PROTEST OF
MID-REGION COUNCIL OF GOVERNMENTS
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0503546160**

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 17, 2017 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Mr. Juan Trujillo, Auditor, and Mr. Justin Snee, Network Supervisor, also appeared as witnesses on behalf of the Department. Mr. William Zarr, attorney on behalf of the City of Albuquerque (the City) and on behalf of Mid-Region Council of Governments (Mid-Region) (collectively, Taxpayers), appeared for the hearing. Ms. Cilia Aglialoro, Ms. Marsha Sanchez, Ms. Lori Grimm, and Mr. David Piersoll also appeared as witnesses for the Taxpayers. The parties jointly requested on the record at the hearing that the City's protest be consolidated with Mid-Region's protest because they involved the same issue, the same facts, and the same witnesses. The request was granted.

The Taxpayers' exhibits 1 through 10 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 October 17, 2016, the Department assessed the City for penalty and interest on gross receipts taxes and on withholding taxes for the tax return filed for the tax period ending August 31, 2016. The assessment was for \$7,864.70 penalty and \$42.98 interest on gross receipts taxes, and \$13,179.35 penalty and \$72.02 interest on withholding taxes.
2. On January 5, 2017, the City filed a formal protest letter.
3. On October 17, 2016, the Department assessed Mid-Region for penalty and interest on withholding taxes for the tax period ending August 31, 2016. The assessment was for \$252.16 penalty and \$1.38 interest.
4. On January 13, 2017, Mid-Region filed a formal protest letter.
5. On February 3, 2017, the Department filed Requests for Hearing asking that the Taxpayers' protests be scheduled for a formal administrative hearing.
6. On February 6, 2017, the Hearings Office issued notices of hearing. The hearing dates were set within ninety days of the protest. The hearings were set on the same date, one immediately following the other.
7. The Taxpayers' protests and hearings were consolidated on the record at the parties' request.
8. For the tax period ending August 31, 2016, gross receipts tax and withholding tax were required to be paid no later than September 26, 2016, which was a Monday.
9. The City acts on behalf of Mid-Region every month for purposes of making Mid-Region's withholding tax payments. Mid-Region then reimburses the City. So, Mid-Region's tax payments are made to the Department from the City's bank accounts.

10. The City uses the same process for making Mid-Region's tax payments as it does its own.
11. Ms. Sanchez works for the accounting department of the City.
12. On Thursday, September 22, 2016, Ms. Sanchez received totals from her department regarding the Taxpayers' gross receipts taxes and withholding taxes (collectively, the taxes) for the tax period ending August 31, 2016.
13. Ms. Sanchez generated the appropriate forms for setting up electronic fund transfer (EFT) payments of the taxes and forwarded the completed forms to her supervisor for final approval.
14. The supervisor is responsible for transmitting the forms for EFT payment to the financial institution (the bank) via digital/electronic means through an Automated Clearing House (ACH). The EFT payment is sent to the ACH through the City's software program (PeopleSoft).
15. Ms. Sanchez received an email from the supervisor that indicated that the EFT payment had been sent through PeopleSoft to the ACH for the bank on September 22, 2016.
16. On September 26, 2016, Ms. Sanchez printed out the City's bank statements for Friday and Monday. Ms. Sanchez reviewed the statements and noticed that the EFT payments for the taxes were not reflected in the statements.
17. Ms. Sanchez immediately notified Ms. Grimm about the discrepancy.
18. Ms. Grimm works for the City as a business analyst and provides support for the PeopleSoft program in the treasury department.
19. Ms. Grimm investigated why the EFT payments for the taxes were not appearing on the bank statements.

20. Ms. Grimm found that the PeopleSoft program confirmed that it attempted to make the EFT requests to the bank's ACH. However, the City had not received a confirmation of receipt of the EFT requests from the bank.
21. Ms. Grimm contacted technical support and the bank. She learned that PeopleSoft tried to transmit the EFT requests to the bank's ACH. However, PeopleSoft failed to connect to the bank's server. The bank's server did not show any communication attempt from PeopleSoft.
22. PeopleSoft will transmit a notice when an action has been completed, but will not transmit a notice when an action fails.
23. Mr. Piersoll explained that a notice for a failed action would require new code to be written into the PeopleSoft program. The Taxpayer had been using the PeopleSoft program for EFT payments successfully for several months. The Taxpayer had no reason to undertake the complicated and time-consuming measure of writing new code until the error occurred.
24. Ms. Grimm resubmitted the EFT requests to the bank's ACH and received a confirmation from the bank on September 26, 2016.
25. The bank transferred the funds from the City's account into the Department's account after midnight on September 27, 2016.
26. In addition to the capability of making EFT payments, the City had the ability to make direct wire transfers of funds and to issue paper checks.

27. The City could have written a check and delivered it in person to the Department on September 26, 2016. The City could have made a direct wire transfer to the Department, which would have made the funds immediately available on September 26, 2016.
28. The City did not use either of these alternative methods because it did not realize that it needed to do so. The City knew that its account and the Department's account were at the same bank. Previous EFT payments from the City to the Department frequently posted on the same date that the EFT request for payment was transmitted.
29. The City communicated with the bank about why the EFT payment occurred on September 27, 2017 instead of the date it was requested, which was September 26, 2017.
30. The City learned that general EFT payments will occur within 24 hours of the request, but did not realize that it needed to take special action on its account at the bank to guarantee that same-day transfers would occur.

DISCUSSION

The issue to be decided is whether the Taxpayers are liable for penalty and interest. The Taxpayers contend that the late payments were caused by a computer error, through no fault of the Taxpayers. The Taxpayers argue that they timely noticed the error and took steps to ensure that the taxes were paid on time. The Taxpayers argue that they were not negligent. The Department argues that the Taxpayers cannot delegate their duty of payment to a software program or to a bank. The Department argues that the Taxpayers' failure to ensure that the funds were available to the Department on the due date is negligence.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessments issued to the Taxpayers are presumed to be correct, and it is the Taxpayers’ burden to present evidence and legal argument to show that they are entitled to an abatement.

Assessment of Penalty.

Penalty “*shall* be added to the amount assessed” when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word “shall” indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are presumed to be correct and it is a taxpayer’s burden to show that the assessment was not correct. *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070. It is a taxpayer’s responsibility to make payments, whether they are done electronically or in another fashion. *See* NMSA 1978, § 7-1-13.1 (2005). If the payment fails to go through, and the tax is paid late, the payment is subject to penalty and interest. *See id.* *See also* NMSA 1978, § 7-1-13.4 (2000). All payment methods, including electronic payments, require that the “funds are immediately available to the state on or before the due date”. NMSA 1978, § 7-1-13.1 (B). Several factors may be considered in determining that a taxpayer was not negligent, such as relying on the advice of an accountant or a prolonged illness. *See* 3.1.11.11 NMAC. Negligence includes inadvertence, erroneous belief, and the failure to exercise ordinary business care and

prudence. *See* 3.1.11.10 NMAC (2001). Penalty may be assessed even when the failure to pay is based on an inadvertent error or unintentional failure to pay the tax when it was due. *See id.* *See also Grogan v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-033, ¶ 32-35, 133 N.M. 354. *See also Arco Materials, Inc. v. Taxation and Revenue Dep't*, 1994-NMCA-062, ¶ 14, 118 N.M. 12 *rev'd on other grounds by Blaze Constr. Co v. Taxation and Revenue Dep't*, 1995-NMSC-110, 118 N.M. 647.

It was undisputed that the taxes were paid late since the funds were not available to the Department until September, 27, 2016, and the taxes were due on September 26, 2016. The Taxpayers cite no authority for distinguishing between an inadvertent error caused by a person and an inadvertent error caused by a machine. The Taxpayers admitted that the City had alternative means of making payments, at least one of which would have made the funds immediately available to the Department on September 26, 2016. The Taxpayers admitted that they did not use any of those alternative means because they held the erroneous belief that the EFT would occur on the same day that it was requested. Based upon the totality of the evidence, the Taxpayers failed to overcome the presumption of correctness. Therefore, the penalty was properly assessed.

Assessment of Interest.

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). Again, 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.

CONCLUSIONS OF LAW

A. The Taxpayers filed timely written protests to the Notices of Assessment issued under Letter ID numbers L0350215728 and L0503546160, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayers' failure to pay their taxes on the due date was an inadvertent error based on the erroneous belief that the EFT would go through on the same date of the request. Inadvertent errors are considered negligence. Therefore, penalty was properly assessed. *See* NMSA 1978, § 7-1-69 and § 7-1-13.1. *See also* 3.1.11.10 NMAC (2001).

C. The taxes were not paid when due, so interest was properly applied. *See* NMSA 1978, § 7-1-67.

For the foregoing reasons, the Taxpayers' protests **are DENIED**.

DATED: March 16, 2017.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
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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. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.