

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

**IN THE MATTER OF THE PROTEST OF
SPIRIT HALLOWEEN
TO ASSESSMENT
ISSUED UNDER LETTER ID NO. L0268530224**

No. 17-18

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on March 13, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Noreen Scott appeared *pro se* for Spirit Halloween (“Taxpayer”). Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Amanda Carlisle appeared as a witness for the Department.

Ms. Scott informed the Hearing Officer and the Department that her attorney was not able to appear at the hearing. The Hearing Officer informed the parties that no attorney had filed an entry of appearance on behalf of the Taxpayer. The Hearing Officer inquired whether Ms. Scott had an expectation that an attorney would be present for the hearing on Taxpayer’s behalf. Ms. Scott said that her attorney told her that he was unavailable to appear. The Hearing Officer further inquired whether it was Ms. Scott’s intention or desire to proceed without an attorney, and if so, whether she was comfortable in doing so. Ms. Scott expressed a desire to proceed without counsel and said she was comfortable continuing on her own behalf.

Department Exhibit A was admitted into the record. Taxpayer did not proffer any exhibits. 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 March 7, 2016, under Letter ID No. L0268530224, the Department assessed Taxpayer for \$269,816.99 in gross receipts tax, \$53,963.39 in penalty, and \$39,791.69 in interest for the CRS reporting periods from January 1, 2009 to December 31, 2012.
2. On May 20, 2016, Taxpayer protested the assessment. The Formal Protest was received by the Department's Protest Office on May 24, 2016.
3. On June 13, 2016, the Department's protest office acknowledged receipt of a valid protest of the assessment.
4. On July 26, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.
5. On July 26, 2016, the Administrative Hearings Office sent Notice of Telephonic Scheduling Conference, setting this matter for scheduling on August 16, 2016, a date within 90-days of the Department's acknowledgment of receipt of a valid protest.
6. A telephonic scheduling hearing occurred on August 16, 2016. The parties did not object that the hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).
7. On August 22, 2016, the Administrative Hearings Office sent a Second Notice of Telephonic Scheduling Conference and Notice of Reassignment of Hearing Officer, setting this matter for scheduling on December 9, 2016. The matter was reassigned to the undersigned Hearing Officer.
8. A second telephonic scheduling hearing occurred on December 9, 2016. The parties agreed that the hearing in this matter should be set for March 13, 2017.

9. On December 9, 2016, the Administrative Hearings Office sent a Scheduling Order and Notice of Administrative Hearing, which among establishing various deadlines, set a hearing on the merits in this protest for March 13, 2016.

10. Robert and Noreen Scott are married. [Testimony of Ms. Scott].

11. In 1995, Robert Scott was employed fulltime when he began Spirit Halloween as a seasonal pop-up store. He began with one store optimistic that it might generate enough profit to pay for their children's educational expenses. [Testimony of Ms. Scott].

12. At all times relevant to this protest, Mr. Scott concentrated his fulltime efforts on the business. He no longer maintained fulltime outside employment. [Testimony of Ms. Scott].

13. As of the present time, Taxpayer has expanded to more than 15 stores in four states, including New Mexico. [Testimony of Ms. Scott].

14. At all times relevant to this protest, except for the assistance of a bookkeeper, Mr. Scott maintained sole responsibility for all aspects of the business. [Testimony of Ms. Scott].

15. Ms. Scott was not initially directly involved in the business because she maintained fulltime employment until her retirement in July of 2014. [Testimony of Ms. Scott].

16. Over the years, the Scott children have gone to school and have assumed more responsibility for the business. Today, the business is operated primarily by the Scott children and Ms. Scott. [Testimony of Ms. Scott].

17. Mr. Scott is retired. He suffers from a serious high blood pressure condition that has affected his eyesight and which continues to pose an ongoing and serious threat to his vision, in addition to his overall wellbeing. For the last 3 to 4 years, Mr. Scott has regularly received injections in his eyes intended to reduce or manage the negative consequences of his condition.

Those consequences have included persistent internal bleeding in Mr. Scott's eyes. [Testimony of Ms. Scott].

18. The onset of Mr. Scott's medical condition occurred during the years at issue in Taxpayer's protest and grew in severity. [Testimony of Ms. Scott].

19. Mr. and Mrs. Scott's children presently handle the day-to-day operations of the business. Ms. Scott and her children, to the largest extent possible, try to limit Mr. Scott's exposure to the business in order to also minimize the associated stresses of operating the business. [Testimony of Ms. Scott].

20. At no time prior to the Department bringing this issue to Taxpayer's attention did Ms. Scott have any reason to believe that Mr. Scott was having medical problems. To the extent any health issues were apparent to him, Mr. Scott kept them to himself. [Testimony of Ms. Scott].

21. Taxpayer does not contest the gross receipts tax liability. Taxpayer only contests the imposition of penalty and interest. [Testimony of Ms. Scott].

22. Ms. Scott spoke highly of the Protest Auditor, and indicated that she does not dispute the accuracy of the amounts due as calculated by the Protest Auditor. [Testimony of Ms. Scott].

23. During all relevant periods of time, Mr. Scott was primarily responsible for the business' gross receipts tax reporting and payments. Although the business employed a bookkeeper, she was not responsible for gross receipts tax reporting. [Testimony of Ms. Scott].

24. Mr. and Mrs. Scott also employed the services of a certified public accounting firm. However, the certified public accountant only handled Mr. and Mrs. Scott's income tax matters, and not gross receipts tax reporting. [Testimony of Ms. Scott].

25. Ms. Scott did not know if Mr. Scott's medical condition rendered him unable to prepare and submit Taxpayer's reports and payment, or unable to procure the services of another to assist in that regard. [Testimony of Ms. Scott].

26. Due to the seasonal nature of the business, gross receipts are usually reported only for the months of September and October. [Testimony of Ms. Scott].

27. Ms. Scott has researched Taxpayer's records. She determined that the records were not kept in good order and various records were even inadvertently destroyed. Despite poor record keeping, Ms. Scott was able to reconstruct the business records upon which gross receipts taxes should have been paid and was confident that her figures were accurate. [Testimony of Ms. Scott].

28. Ms. Scott determined that in 2010, Taxpayer filed its return, but the check remitting payment to the Department was never negotiated. [Testimony of Ms. Scott].

29. Ms. Scott believed, although she could not be absolutely certain, that the check was not cashed because around the same period of time, Taxpayer suspected the possibility of fraudulent activity on its business account. It closed the account on which the check was written and opened a new account. Regardless of the underlying issue, Ms. Scott acknowledged that no one noticed that the payment to the Department had not been completed. [Testimony of Ms. Scott].

30. Ms. Scott acknowledged that she could not explain why no payment was made in 2011, except that her Husband's health may have been a factor in addition to the business' rapid growth. [Testimony of Ms. Scott].

31. Outstanding penalty and interest have been calculated based on the gross receipts that were earned in New Mexico only. Receipts from Taxpayer's business activities in other

states are excluded from the calculation utilized to identify the amount of penalty and interest due in this protest. [Testimony of Ms. Carlisle; Dept. Ex. A].

32. As of March 13, 2017, Taxpayer owed \$234,789.17 in gross receipts tax, \$50,808.95 in penalty, and \$45,479.92 in interest. [Dept. Ex. A].

DISCUSSION

Taxpayer agreed that it owed the assessed tax principal in this case. The only remaining issues are the Department's assessment of civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) and interest under NMSA 1978, Section 7-1-67 (2007). Taxpayer requested that interest and penalty be abated in order to facilitate the payment of the uncontested tax principal. Although Taxpayer, by and through Ms. Scott, presented very sympathetic circumstances, the Hearing Officer must base a decision in this matter solely on the facts and law and must not be influenced by sympathy or prejudice.

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 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, 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). In this case, in cooperation with Ms. Scott, the Department has adjusted the assessment to more accurately reflect the amount of tax, penalty and interest due. Those

amounts, as of the date of this hearing, were \$234,789.17 in gross receipts tax, \$50,808.95 in penalty, and \$45,479.92 in interest. [Dept. Ex. A].

Assessment of Interest

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, Section 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, the Department is without legal authority to abate it, and the Hearing Officer is without legal authority to grant the requested relief.

Assessment of 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 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 (A), (B), and (C) NMAC because Taxpayer failed to take action to report and pay appropriate gross receipts on its CRS system returns in the reporting periods pertinent to its business activities from 2009 through 2012.

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). Mr. and Mrs. Scott employed the services of a certified accounting firm for income tax purposes. However, Mr. Scott retained all responsibility over gross receipts tax reporting for the Taxpayer. There was no evidence on which to find that Mr. Scott consulted with his CPA regarding gross receipts taxes or

that he reasonably relied on the advice of competent tax counsel that gross receipts taxes were not due. 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 Taxpayer's testimony, 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.

The periods from 2009 to 2012 saw the onset of a serious medical condition for Mr. Scott. An extreme case of high blood pressure, described by Ms. Scott, has caused him to experience internal bleeding in his eyes that has affected his vision and which continues to threaten his eyesight. Mr. Scott for the last 3 to 4 years has undergone injections in his eyes to manage his eyesight, and Ms. Scott credibly testified that the threat posed to Mr. Scott's vision and overall wellbeing is persistent and ongoing. The condition has caused him to retreat entirely from the business he established more than 20 years ago, and his family's efforts to sequester him from anything that might exacerbate his condition are prevalent. The medical condition Ms. Scott described unquestionably comes within the sort of condition contemplated by Regulation 3.1.11.11 (B) NMAC in that Mr. Scott has been disabled because of injury or prolonged illness.

However, Regulation 3.1.11.11 (B) NMAC requires more in order to abate penalty. A Taxpayer must also demonstrate an inability to procure the services of another person to prepare the return. In this case, Ms. Scott acknowledged that she did not know whether Mr. Scott's condition rendered him unable to procure the services of another person to prepare the returns or

assist with making payments. Ms. Scott acknowledged that, to the extent Mr. Scott knew he was having medical issues, he kept his condition from her and their children. However, there is no indication that Mr. Scott lacked the necessary mental or physical capacity to manage Taxpayer's CRS tax obligations, or that he was unable to seek or procure the assistance of others. As previously stated, Ms. Scott acknowledged she and her spouse already employed the services of a certified public accounting firm and the Taxpayer employed a bookkeeper. However, rather than avail himself of the services of others already at his disposal, the evidence established that Mr. Scott retained CRS tax reporting obligations for himself. 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.

Taxpayer did not establish it was entitled to an abatement of assessed penalty under Regulation 3.1.11.11 (B) NMAC because the evidence failed to demonstrate that Mr. Scott either lacked the capacity to satisfy Taxpayer's CRS tax obligations, or lacked the ability to procure the services of another to assist him in satisfying Taxpayer's CRS tax obligations. For the reasons stated, there is no basis on which to abate the penalty assessed in this matter.

During closing arguments, the Department addressed facts in the record that might be construed as suggesting that Ms. Scott could be eligible for the benefit of innocent spouse relief under NMSA 1978, Section 7-1-17.1 (2003) and Regulation 3.1.12.13 NMAC. However, the issue of whether or not Ms. Scott is eligible for relief under Section 7-1-17.1 is not before the Hearing Officer in this protest.

Since the Taxpayer does not contest the principal tax due, and there is no basis to abatement of penalty and interest in this protest, Taxpayer's protest must be 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. A 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, Section 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. Scott did not establish that he was unable to attend to Taxpayer's CRS tax obligations or that he was unable to procure the services of another to assist him with handling the CRS returns.

G. Taxpayer did not overcome the presumption of correctness on the assessed interest under NMSA 1978, Section 7-1-67 (2007) which requires that interest 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.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. As of March 13, 2017, Taxpayer owed \$234,789.17 in gross receipts tax, \$50,808.95 in penalty, and \$45,479.92 in interest.

DATED: April 10, 2017



Chris Romero
Hearing Officer
Administrative Hearings Office
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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