STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
PARAGON CONSTRUCTION LLC
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L2122476848

v. **D&O No. 18-09**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on February 19, 2018 at 10:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Byron Butcher and Ms. Leslie Butcher appeared and represented Paragon Construction, L.L.C. ("Taxpayer"). Staff Attorney, Mr. Marek Grabowski, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Mr. Nicholas Pacheco, appeared and testified on behalf of the Department.

The Hearing Officer took notice of all documents in the administrative file. Taxpayer Exhibits 1 – 2 and Department Exhibits A – F were admitted into the evidentiary record of the hearing without objection. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 26, 2017, the Department assessed the Taxpayer under Letter ID No. L2122476848 for gross receipts tax in the amount of $3,885.66, penalty in the amount of $777.14, and interest in the amount of $484.00 for the tax periods from January 1, 2013 through

December 31, 2013. The total assessment was for $5,146.79 after a nominal offset of $0.01. [*See* Administrative File].

2. On or about August 7, 2017, Taxpayer executed and filed a Formal Protest that was received by the Department's Protest Office on August 11, 2017. [*See* Administrative File].

3. Taxpayer's Formal Protest was accompanied by a copy of a Contract for Construction (Taxpayer Exhibit 1) and correspondence from the Executive Director of the Embudo Valley Library & Community Center dated June 28, 2017 (Taxpayer Exhibit 2). [*See* Administrative File].

4. On September 1, 2017, the Department acknowledged the receipt of Taxpayer's Protest under Letter ID No. L1865719088. [*See* Administrative File].

5. On October 16, 2017, the Department filed a Hearing Request in which it requested a scheduling hearing. [*See* Administrative File].

6. On October 17, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing that set a hearing to occur on November 3, 2017. [*See* Administrative File].

7. On November 3, 2017, a telephonic scheduling hearing occurred in reference to the above-captioned protest. The parties did not object that the hearing satisfied the 90-day hearing requirement under NMSA 1978, Section 7-1B-8 (2015). [*See* Administrative File].

8. On November 6, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing that set a hearing on the merits of Taxpayer's protest for February 19, 2018. [*See* Administrative File].

9. Mr. Byron Butcher is the managing member of Paragon Construction, LLC (Taxpayer). [Testimony of Mr. Butcher].

10. Mr. Butcher holds licenses in general and electrical contracting. [Testimony of Mr. Butcher].

11. Ms. Leslie Butcher is Taxpayer's bookkeeper and has handled all of Taxpayer's accounting and financial functions during all times relevant to Taxpayer's protest. [Testimony of Ms. Butcher].

12. Ms. Butcher does not have any formal training or expertise in tax accounting. [Testimony of Ms. Butcher].

13. Mr. Butcher and Ms. Butcher are married. [Testimony of Mr. Butcher].

14. Taxpayer is engaged in the construction business. [Testimony of Mr. Butcher; Testimony of Ms. Butcher].

15. In March of 2012, Taxpayer entered into a Contract for Construction (hereinafter "Contract") with the Embudo Valley Library (hereinafter "Library"). The Contract provided for the construction of a new, 3,000 sq. ft., library in Dixon, New Mexico. [Testimony of Ms. Butcher; Testimony of Mr. Butcher; Dept. Ex. A; Dept. Ex. B; Dept. Ex. E; Taxpayer Ex. 1; Taxpayer Ex. 2].

16. The Contract provided that Taxpayer would be compensated the sum of $45,000.00, not including gross receipts tax, for its performance under the Contract. [Testimony of Mr. Butcher; Testimony of Ms. Butcher; Taxpayer Ex. 1; Dept. Ex. E].

17. The Contract was never modified and represented the entire agreement of the parties during all times relevant to Taxpayer's protest. [Testimony of Mr. Butcher; Taxpayer Ex. 1, Art. 17; Dept. Ex. E, Art. 17)].

18. The Contract provided that it should not be construed to create a contractual relationship of any kind between any persons or entities other than the Library and Taxpayer. [*See* Dept. Ex. E, Art. 17; Taxpayer Ex. 1, Art. 17)].

19. The Library compensated Taxpayer for gross receipts tax associated with Taxpayer's compensation under the Contract. [Testimony of Mr. Butcher].

20. The compensation due under the Contract did not represent the actual cost of construction. Rather, the Contract amount only represented the fee to Taxpayer for its services. [Testimony of Mr. Butcher; Testimony of Ms. Butcher].

21. A significant portion of the funds actually expended to construct the library were provided by an anonymous donor (hereinafter "Donor"). [Testimony of Ms. Butcher; Dept. Ex. B; Taxpayer Ex. 2].

22. The Donor required, as a condition of the contribution, that residents of the area be employed in the construction of the new library. [Testimony of Ms. Butcher; Testimony of Mr. Butcher; Dept. Ex. B; Taxpayer Ex. 2].

23. In order to satisfy the condition of the Donor, Taxpayer agreed to "self-perform" as much work as possible, and minimize the use of subcontractors. This plan was intended to maximize employment of local individuals on the project consistent with the Donor's condition. [Testimony of Mr. Butcher; Testimony of Ms. Butcher; Taxpayer Ex. 2; Dept. Ex. D].

24. The Library assisted Taxpayer with identifying local individuals for work on the project. Qualified individuals were thereafter employed by Taxpayer on a temporary basis (hereinafter "Employees"). Employees were not employed by the Library. [Testimony of Mr. Butcher; Taxpayer Ex. 2; Dept. Ex. B].

25. Taxpayer was liable for all expenses associated with its Employees. [Testimony of Mr. Butcher; Testimony of Ms. Butcher].

26. The Library agreed to compensate Taxpayer for all payroll expenses, including fees, and withholdings due for the Employees. [Testimony of Ms. Butcher; Dept. Ex. A; Dept. Ex. B; Taxpayer Ex. 2].

27. The arrangement, whereby Employees would be employed by Taxpayer, would permit employees to be insured under Taxpayer's worker's compensation insurance and enjoy other benefits associated with employment. [Testimony of Mr. Butcher; Testimony of Ms. Butcher; Dept. Ex. A; Taxpayer Ex. 2].

28. Employees submitted time sheets to the Library's bookkeeper, Ms. Felicity Fonseca (now its executive director), as a matter of convenience, because Mr. Butcher was not always present at the construction site. The Library would then transmit the timesheets to Taxpayer. [Testimony of Mr. Butcher; Testimony of Ms. Butcher].

29. Taxpayer would compile timesheets and calculate payroll expenses. It then transmitted its payroll expenses back to the library for payment, either in the form of an email detailing the amount due for payroll, or in the form of an invoice. The library in response would then remit payment to Taxpayer. [Testimony of Mr. Butcher; Testimony of Ms. Butcher].

30. Taxpayer's practice was to submit separate invoices for services performed under the Contract and payroll. [Testimony of Ms. Butcher].

31. The Library subsequently compensated Taxpayer for the costs of Taxpayer's Employees separately from the fees for performance under the Contract. [Testimony of Mr. Butcher].

32. Paychecks to Employees were drawn on Taxpayer's financial account, bearing Taxpayer's name. [Testimony of Mr. Butcher].

33. The Library made payments to Taxpayer for services under the contract and payroll expenses from January 11, 2013 through August 5, 2013. [*See* Administrative File, Form 1099 Detail (Attachment to Formal Protest].

34. For 2013, the Library reported a total amount of $66,223.28 paid to Taxpayer on Form 1099. Of the total amount paid, $52,378.28 was payroll expenses. The remainder was for services performed under the Contract. [*See* Dept. Ex. A; Dept. Ex. D; Form 1099 Detail (Attachment to Formal Protest)].

35. Taxpayer's 2013 Schedule C claimed wages as an expense in the amount of $67,532.00. [Testimony of Mr. Pacheco; Dept. Ex. C, Line 26].

36. In 2013, Taxpayer paid a total sum of $67,532.00 in wages as reported on Forms W-2. The sum paid corresponds with the amount claimed as an expense in Taxpayer's Schedule C. [Testimony of Mr. Pacheco; Dept. Ex. D; Dept. Ex. C, Line 26].

37. The Contract and other correspondence supplied by Taxpayer failed to establish that Taxpayer was an agent authorized to contractually bind the Library as principal with respect for any matters, including employment and payroll matters. [Testimony of Mr. Pacheco; Dept. Ex. E; Dept. Ex B].

38. Funds remitted to Taxpayer by the Library for payroll expenses were specifically intended as compensation for that purpose. [Testimony of Ms. Butcher].

39. Taxpayer did not seek consultation from any competent tax counsel or accountant regarding the question of whether receipts intended to compensate it for payroll expenses would be subject to gross receipts taxes. [Testimony of Ms. Butcher].

40. Although contemplated after-the-fact, Taxpayer did not consider at the time it entered into the Contract with the Library, whether its relationship with the Library might establish a disclosed agency relationship. [Testimony of Ms. Butcher].

41. As of February 19, 2018, Taxpayer's liability under the assessment was $3,885.66 in gross receipts tax, $777.14 in penalty, and $573.00 in interest for a total amount due of $5,235.80. [Testimony of Mr. Pacheco; Dept. Ex. F].

DISCUSSION

The principal issue in this protest is whether Taxpayer is liable for gross receipts tax on receipts from the Library which were intended as compensation for payroll expenses. Taxpayer asserted that such receipts should be excluded from gross receipts because it received them as an agent on behalf of a principal in a disclosed agency capacity.

Burden of Proof.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment from which this protest arises is presumed correct and the burden is on Taxpayer to overcome the presumption. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. 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) encompasses 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, 134 P.3d 785, 791 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

For that reason, a taxpayer carries the burden to present countervailing evidence or legal argument to show that it is entitled to an abatement of an assessment. *See N.M. Taxation &*

Revenue Dep't v. Casias Trucking, 2014-NMCA-099, ¶8, 336 P.3d 436 ."Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*, 2003-NMCA-021, ¶13.

"Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d 474.

Gross Receipts Tax and Reimbursed Expenditures in New Mexico.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), the term "gross receipts" is defined to mean the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. The term "engaging in business" is further defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." *See* NMSA 1978, Section 7-9-3.3 (2003).

Accordingly, there is a statutory presumption that *all* receipts of a person engaged in business in New Mexico are taxable. *See* NMSA 1978, Section 7-9-5 (2002). In this protest, Taxpayer does not dispute that compensation for services it provided under its Contract were subject to gross receipts.

The central dispute in this protest arises from separate payments intended to compensate Taxpayer for payroll expenses which were not addressed in the Contract. In support of its position that those receipts should not be taxed, Taxpayer relies on NMSA 1978, Section 7-9-3.5 (A) (3) (f) which provides an exclusion from gross receipts for "amounts received solely on behalf of another in a disclosed agency capacity." Regulation 3.2.1.19 (C) (1) NMAC, which implements the statute, further provides:

> The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by Section 7-9-3.5 NMSA 1978, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.

In considering the application of the statutory exclusion, *MPC Ltd.*, 2003-NMCA-21, ¶36, construed Regulation 3.2.1.19 (C) NMAC to mean:

> (1) the agent [taxpayer] has the authority to bind the principal . . . to an obligation . . . created by the agent [taxpayer], and (2) the beneficiary of that obligation . . . is informed by contract that he or she has a right to proceed against the principal . . . to enforce the obligation.

Consequently, the general rule may be summarized in the following manner. Reimbursement of expenditures in connection with the performance of a service are considered to be gross receipts subject to tax. *See id.* However, reimbursements may be excluded from

gross receipts if the expense is incurred by an "agent on behalf of the principal while acting in a disclosed agency capacity." *Id.*

Taxpayer asserted that it was a disclosed agent of the Library because the Library was ultimately responsible for the payment of its payroll expenses, and because Taxpayer's Employees were aware of that arrangement. The Hearing Officer will first address the issue of disclosure which requires "making known something that was previously unknown; a revelation of facts." *See Black's Law Dictionary*, 531 (9th ed. 2009).

Mr. Butcher candidly acknowledged that he did not have specific discussions with Taxpayer's Employees concerning the arrangement for the Library to compensate Taxpayer for its payroll expenses. On the other hand, Mr. and Ms. Butcher expressed that there was some degree of common knowledge for those involved in the project concerning the manner in which the construction was being funded, and the Taxpayer further suggested that the arrangement was evident from the Library serving as the initial depository for Employee timesheets.

Although Employees may have submitted timesheets to the Library, and even if they had additional knowledge concerning the facts by which their work was being funded, mere awareness is not sufficient to show that the Employees knew that they could enforce a payroll obligation against the Library. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶38, 133 N.M. 217, 62 P.3d 308. Rather, the law requires an affirmative disclosure to the Employee of the agency relationship. *See id.* at ¶37. Addressing a comparable scenario in which a taxpayer similarly asserted common knowledge in support of a disclosed agency relationship, the Court of Appeals recently recognized, while applying *MPC* to the facts of that case, that "[t]axpayer fails to direct us to any specific communication between it and its managers that supports its claims. An actual, affirmative statement disclosing the agency relationship is

necessary." *See Bogle Management Co., Inc. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-35641, dec. at 18 - 19 (N.M. Ct. App. Dec. 5, 2017) (non-precedential).

Rather, the evidence established that Taxpayer employed the Employees, their paychecks were issued in the name of Taxpayer, it withheld taxes and other payroll fees on their behalf, it provided their worker's compensation insurance, and it never made an affirmative disclosure to the Employee of an agency relationship.

The evidence suggests there was no disclosure in this matter because the parties never actually contemplated the formation of an agency relationship within the definition of Regulation 3.2.1.19 (C) NMAC, which leads to the second issue of discussion.

"An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal." *See* Regulation 3.2.1.19 (C) (1) NMAC. The initial source of such authority, should it exist in this matter, may originate from the Contract itself. However, the Contract specifically stated that neither the Contract nor any of the documents referenced therein could be construed as creating a contractual relationship of any kind between persons or entities other than the Library and Taxpayer. [*See* Dept. Ex. E.6, Art.17]. In other words, the parties' intended to prohibit third parties, such as the Employees, from acquiring, asserting, or enforcing rights under the Contract. This prohibition clearly precludes third parties, such as Taxpayer's Employees, from asserting claims directly against the Library for any matter arising under the Contract, including payroll disputes, contradicting the definition of "agency relationship."

Therefore, the Contract exemplifies an intention to avert creation of an agency relationship in that no third party could acquire rights under the contract which could then be enforced against either party. Applied to this scenario, the Taxpayer's Employees' have no rights

under the Contract to proceed against the Library to enforce any purported payroll obligation. *See Benz v. Town Ctr. Land, Ltd. Liab. Co.*, 2013-NMCA-111, ¶31, 314 P.3d 688 (the purpose, meaning, and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive).

Although the Contract fails to establish the existence of an agency relationship, Mr. Butcher explained that there may be other communications, either written or verbal, which potentially address this issue. However, Taxpayer did not seek to introduce evidence of such communications and admitted that the Contract was effective during all times relevant to the protest and that it was never amended.

The Hearing Officer is prohibited from engaging in speculation with concern for the substance or legal effect of such communications, but notes that the parties did not intend for their Contract to be casually modified. The Contract stated that it represented "the entire and integrated Agreement between the parties and supersede[d] prior negotiations, representations or agreements, either written or oral[,]" which could only be modified if agreed upon in writing by both parties. *See* Dept. Ex. E.6, Art. 17; Dept. E.1, Art. 1, ¶B.

Likewise, correspondence from the Library's former bookkeeper, who now serves as its Executive Director, corroborates Taxpayer's narrative of its arrangement with the Library, but also fails to establish the existence of a disclosed agency relationship within Regulation 3.2.1.19 (C) NMAC.

Despite the foregoing, Taxpayer asserted that Example 4 at Regulation 3.2.1.19 (C) (7) should apply in its favor. However, reliance on Example 4 is misplaced. Example 4 provides the following scenario (while the example refers to parties "X" and "Y", the Hearing Officer has

substituted such designations for clarification. Every occurrence of "X" has been substituted for "Taxpayer," and "Y" for "Library"):

> [Taxpayer] contracts with [Library] to perform administrative functions relating to the employment relationship between [Library] and its workers. [Library] pays [Taxpayer] the costs for [Library]'s employees' payroll, payroll taxes, worker's compensation, contributions to employee benefits and healthcare and other amounts [Taxpayer] pays to or on behalf of [Library]'s workers. [Library] separately pays [Taxpayer] a two percent (2%) fee for the administrative services. [Library] or [Taxpayer] recruits workers, selects them for work assignments, establishes their rate of pay, assigns their schedule, instructs them when and where to work, assigns them their duties, supervises and monitors the performance of their duties, authorizes leaves of absence, handles worker's complaints, union grievances or disputes, and disciplines, lays off or terminates the workers. [Taxpayer] issues payroll checks, with [Taxpayer] as payor. The checks are distributed by [Library] to workers. [Taxpayer] also secures worker's compensation coverage for the workers, calculates, withhold and submits payroll taxes to appropriate taxing authorities, calculates and makes contributions to union health, pension and welfare benefit trust funds for workers, funds unemployment insurance contributions and responds to unemployment compensation claims, and processes garnishment orders. [Taxpayer] can require [Library] to post a bond or other security for the payment of payroll. [Library] agrees to indemnify [Taxpayer] against worker's claims for non-payment of wages, any claims arising from the acts of worker at the work site, grievances by unions representing the worker arising from acts of [Library], wage and hour claims, tax claims, and failure of [Library] to provide training to workers. [Taxpayer] has no gross receipts from the amount representing the payroll, payroll taxes, worker's compensation and benefits; this amount is not subject to the gross receipts tax. The additional two percent (2%), however is [Taxpayer]'s fee for performing services and is subject to tax.

The scenario described in Example 4, were it to potentially apply, initially requires that the Library, not the Taxpayer, employ the Employees. However, the undisputed evidence in this protest established that Taxpayer employed the Employees. For that reason, Example 4 is not analogous to the facts in this protest.

Taxpayer also asserted that it encountered a similar issue in reference to one or more reporting periods in 2012, but that the Department resolved that issue to its satisfaction without need to protest. Taxpayer provided no further evidence with respect to the issues arising in 2012 or how they were resolved, but suggested that the current protest should be resolved in a similar manner. However, without evidence establishing what transpired in 2012, further consideration would require impermissible speculation.

Since there is nothing in the record to establish that Taxpayer had the power or authority as an agent to bind the Library in its interactions with third parties, and because there was no actual disclosure of such authority or power, the Taxpayer failed to establish that it was acting as the Library's disclosed agent. *See Bogle Management Co., Inc. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-35641, dec. at 19 (N.M. Ct. App. Dec. 5, 2017) (non-precedential).

Therefore, Taxpayer's receipts for payroll expenses should not be excluded from gross receipts because they were not received solely on behalf of another in a disclosed agency capacity.

Penalty and 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." *See* 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, 206 P.3d 135, 143 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of Section 7-1-67 also

makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer until Taxpayer satisfies the gross receipts tax principal.

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:

> 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.*, 2009-NMSC-013, ¶22.

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." Although the Hearing Officer was persuaded that Taxpayer's underreporting and underpaying of the gross receipts taxes was not intentional in this case or in bad faith, Taxpayer was nevertheless civilly negligent under Regulation 3.1.11.10 (B) & (C) NMAC because Taxpayer failed to take action to report and pay the appropriate amount of taxes when required through an erroneous belief that tax was not due for receipts received as compensation for payroll. This erroneous belief constitutes

negligence subject to penalty under Section 7-1-69. *See El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't.*, 1989-NMCA-070, ¶9-11, 108 N.M. 795, 779 P.2d 982.

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 engaged in any formal consultation or study of the issue before engaging in the activity giving rise to the assessment, or subsequent to any reporting or payment obligations. *See C & D Trailer Sales v. Taxation & Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697, 604 P.2d 835 (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. Additionally, there was no evidence that might arguably support abatement of penalty under Regulation 3.1.11.11 NMAC. Consequently, Taxpayer is liable for both penalty and interest.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was timely held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer was engaged in business for the purposes of NMSA 1978, Section 7-9-3.3 (2003). As such, all of Taxpayer's receipts are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

D. Taxpayer did not establish it was a disclosed agent and thus, did not meet the requirements under NMSA 1978, Section 7-9-3.5(A) (3) (f) or Regulation 3.2.1.19 (C) NMAC in order to exclude from gross receipts tax its compensation for payroll expenses. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶36, 133 N.M. 217, 62 P.3d 308.

E. Taxpayer did not overcome the presumption of correctness, including the assessed penalty and interest, that attached to the assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638.

F. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction in failing to accurately report gross receipts during the relevant period met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

G. 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).

H. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

For the foregoing reasons, the Taxpayer's protest is **DENIED**. As of February 19, 2018, Taxpayer's liability under the assessment was $3,885.66 in gross receipts tax, $777.14 in penalty, and $573.00 in interest for a total amount due of $5,235.80.

DATED: March 15, 2018

Chris Romero
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. If an appeal is not timely 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 proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On March ___, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner:

First Class Mail *Interagency Mail*