

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

**IN THE MATTER OF THE PROTEST OF
WAGNER EQUIPMENT CO.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0183582512, L1257324336, L0720453424,
L1794195248, L0452017968 L1525759792 and L0467091248**

D&O No. 18-36

v.

Case Number 18.10-258A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On November 8, 2018, Hearing Officer Ignacio V. Gallegos, Esq. conducted a merits hearing in the matter of the tax protest of Wagner Equipment Co. pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Attorney Robert J. Muehlenweg appeared on behalf of Wagner Equipment Co. (“Taxpayer”), accompanied by Candace Murray Waddell, Controller for Taxpayer. Staff Attorney Regina Ryanczak, appeared, representing the opposing party in the protest, the Taxation and Revenue Department (“Department”), along with Protest Auditor Veronica Galewaler.

Ms. Waddell and Ms. Galewaler testified at the hearing. Taxpayer’s Exhibits 1, 2, 3, and 4 were admitted into the record without objection. The Department’s Exhibits A and B were admitted without objection. The Hearing Officer took administrative notice of all documents contained in the administrative file. All exhibits are more fully described in the Administrative Exhibit Log.

The main issue presented before this tribunal in this protest is whether Wagner Equipment Co. was negligent in failing to file CRS-1 returns for seven consecutive months reporting withholding taxes, upon the sudden retirement of a key employee. After making findings of fact in this matter and discussing the arguments and the pertinent legal authority in more detail, this tribunal ultimately concludes/rules that the Department prevails in this protest because the Taxpayer was unable to show the omission was non-negligence.

FINDINGS OF FACT

1. On July 11, 2018, the Department issued seven Assessment letters to Taxpayer, assessing penalty in the aggregate amount of \$47,047.19 for the withholding tax reporting periods ending November 30, 2017, December 31, 2017, January 31, 2018, February 28, 2018, March 31, 2018, April 30, 2018, and May 31, 2018, under the Withholding Tax Act, NMSA 1978, Section 7-3-1 *et seq.* [Letter ID # L0183582512; L1257324336; L0720453424; L1794195248; L0452017968; L1525759792; L0467091248].

2. On August 2, 2018, Taxpayer filed a protest of the Department's assessment of penalty. In the protest letter, Taxpayer provided a rationale to support of the requested abatement of penalty, indicating that a change of staff caused the omission of filing timely returns. The protest letter was stamped as received by the Department protest office on August 9, 2018. [Administrative file].

3. On August 27, 2018, the Department acknowledged receipt of the formal protest. [Letter ID # L1458306864].

4. On October 17, 2018, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing, alleging the amount in controversy of \$46,977.19. [Administrative File].

5. On October 18, 2018, the Administrative Hearings Office issued the Notice of Administrative Hearing scheduling this matter for November 8, 2018, within 90 days of the Department's receipt of the protest. [Administrative file].

6. On October 30, 2018, Attorney Robert J. Muehlenweg filed an entry of appearance on behalf of Taxpayer. [Administrative file].

7. On November 8, 2018 a hearing was held at the Administrative Hearings Office, in the Wendell Chino Building, Suite 269, in Santa Fe, New Mexico, a total of 73 days from when the protest was acknowledged by the Department.

8. Ms. Waddell is Controller for Taxpayer. In her position, she is tasked with oversight of the accounting department, which is responsible for payroll and payroll taxes. The office in Aurora, Colorado has three employees. The compensation supervisor handles the payroll. There are typically between 300 and 350 employees in New Mexico in any given month. The department handles reporting in Colorado, New Mexico and Texas. [Testimony of Ms. Waddell].

9. In October of 2017, the compensation supervisor, a veteran employee of 34 years, gave notice that she would be retiring in two weeks. The notice set in motion a hurried attempt to transition the veteran employee's job functions to other employees. The Taxpayer set about attempting to make task lists, identifying the compensation supervisor's duties, and training other employees on how to do those tasks. [Testimony of Ms. Waddell].

10. In order to provide additional time for the retiring employee to engage in providing procedures for the replacement employee, the Taxpayer negotiated a contract with the retiring employee to work part-time from home. Under the contract, the Taxpayer provided the retired employee with a laptop computer, an internet connection, and a cell phone so that they would be able to communicate with her in the transitional months. [Testimony of Ms. Waddell].

11. Another employee, a veteran employee of 17 years, was vetted and eventually promoted to the position vacant due to the retirement. Before becoming the official replacement compensation supervisor in February of 2018, the replacement compensation supervisor was being cross-trained and took over responsibilities gradually. The retired employee, on contract, was difficult to glean information from, and was not able to provide written procedures or a task list, despite weekly meetings and regular phone contact. The contract expired in April of 2018. [Testimony of Ms. Waddell].

12. The payroll taxes were paid, but no returns were filed in the timeframes at issue here. Ms. Waddell did not recall ever seeing a paper printout of a return in the documents left behind by the retired employee. [Testimony of Ms. Waddell].

13. Ms. Waddell was unaware if anyone called the Department to inquire if they were completing their reporting properly. Taxpayer did not consult with a Certified Public Accountant (CPA) to determine whether it complied with New Mexico tax regulations. [Testimony of Ms. Waddell].

14. The payroll taxes were paid using the Taxpayer Access Point (TAP) system provided by the Department. After each payment was made, the Department sent and the Taxpayer received a confirmation email. Nowhere on the email does the confirmation email state that returns are also required, or that no return was filed. [Testimony of Ms. Waddell].

15. The Taxpayer became aware of the omission on their own, when a different department noticed an unexplained credit to the Taxpayer's TAP account. The credit resulted from the Department not knowing how to credit payments related to non-filing of required returns. The Taxpayer filed returns for the periods at issue *en masse* on June 27, 2018. [Testimony of Ms. Waddell; Testimony of Ms. Galewaler; Department Exhibit A-1 through A-7].

16. Any person who logged into the TAP system account for Taxpayer should have been able to see the credit each time the person logged in to the TAP system. The TAP system has a function that creates big, red notifications if something is amiss. [Testimony of Ms. Galewaler].

17. Once the correction takes place, the notifications go away, and there is no way to know if anyone ever saw it, or to seek it out after the fact. There is no way to know if the payroll supervisor ever saw this notification of credit balance, and Ms. Galewaler could not see any red notifications on this account, since the proper adjustments had already been made by the time it got to protest. [Testimony of Ms. Galewaler].

DISCUSSION

The sole issue in this protest is whether to abate assessed penalties resulting from Taxpayer's failure to timely file withholding tax returns on the CRS-1 combined form from November 2017 through May 2018. Taxpayer indicated that timely payments were made, but acknowledged that the returns were late. Taxpayer asserts that abatement is appropriate because Taxpayer was not negligent, although not perfect,

and explained that they did the best they could under the unforeseen circumstances to ensure timely tax compliance.

Burden of Proof

Under NMSA 1978, Section 7-1-17 (C), 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, Section 7-1-3 (Y). 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-050, ¶16, 139 N.M. 498, 134 P.3d 785 (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, 504 P.2d 638. Taxpayer must show that it is entitled to the abatement of civil penalties that is the basis of its tax protest.

Assessment of penalty for failure to file a return under NMSA 1978, Section 7-1-69.

Taxpayer conceded that the returns for November 2017 through May 2018 Withholding Tax were filed late, on June 27, 2018. The payments were timely. Taxpayer asserts that penalties assessed under NMSA 1978, Section 7-1-69 (A) should be abated because it acted in good faith and without negligence. Taxpayer asserted that although it was not perfect, it acted reasonably, as a business would under similar circumstances.

The law requires that “in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax ... there shall be added to the amount assessed a penalty.” NMSA 1978, Section 7-1-69. Penalties are assessed when a taxpayer does not pay taxes when due, and in instances in which a taxpayer fails to file a tax return.

The Hearing Officer notes that the imposition of penalty is mandatory by virtue of the Legislature’s use of the term “shall” in Section 7-1-69 (A), which establishes that an act is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206

P.3d 135. In this instance, the Department was obligated to assess a penalty for each month, or fraction of a month, Taxpayer's returns were late.

Section 7-1-69 (B) provides a limited exception to imposition of civil penalties: “[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.” The entirety of the evidence shows that Taxpayer did not intentionally evade or defeat payment of tax. In fact, the Taxpayer paid taxes timely.

The question of whether Taxpayer made “a mistake of law made in good faith and on reasonable grounds” is one of reliance after inquiry. Here, the Taxpayer was unable to present evidence that it consulted with Department representatives. Taxpayer was unable to present evidence that it consulted with a CPA to seek guidance. Taxpayer's only evidence suggested that since they had been in compliance before the veteran employee retired, that the best way to continue that trend was to seek information from her. A taxpayer cannot “abdicate” their tax responsibilities “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.

The Department relied on Taxpayer's negligence in timely paying to support the assessment of penalty. 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.” The Department's initial determination that the Taxpayer was negligent for its “inaction” by not submitting timely returns was proper. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795 (Erroneous belief and inadvertent error meets the legal definition of “negligence” under the penalty statute).

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, the regulations provide guidance for abatement of civil negligence penalty under

Regulation 3.1.11.11 NMAC. Taxpayer provided no evidence that fits into the list of the non-negligence indications.

Arguing that the concept of negligence is one which does not require fitting the conduct into the regulatory checklist, the Taxpayer's evidence relied on what a reasonable person might do in a similar situation, in an attempt to overcome the presumption of negligence. The evidence that Taxpayer kept its retired employee under contract to provide part-time assistance remotely to give guidance and assist with tasks is certainly a step in the right direction. Nevertheless, Taxpayer's evidence did not show that it sought assistance from any other source. Taxpayer did not consult with the Department, or a CPA of its own choice, nor did it explore the TAP reporting system to gain a better understanding of what had been done, and what was to be expected.

The purpose of applying a penalty is to deter and to punish. *See Gea Integrated Cooling Tech. v. State Taxation & Revenue Dep't.*, 2012-NMCA-010, ¶ 13, 268 P.3d 48. The imposition of civil penalties for the late filing of seven consecutive months of withholding tax returns is an error that justifies such imposition, if for no other reason than to prevent it occurring with this Taxpayer in the future.

In this protest, with the evidence presented, the Taxpayer did not overcome the presumption of correctness in the Department's assessments of penalties, and it provided no grounds to abate the civil negligence penalties.

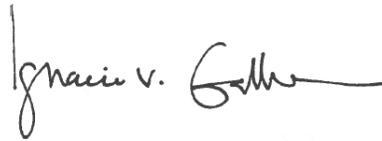
CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the Department's Assessment of penalty, 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's evidence did not overcome the presumption of correctness that attached to the assessed penalty 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.

D. Taxpayer's failure to timely report withholding taxes was due to Taxpayer's negligence, and penalty was properly assessed by the Department under NMSA 1978, Section 7-1-69 (2007). *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795.

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

Dated: November 20, 2018.



Ignacio V. Gallegos
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 (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

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 20th day of November 2018 in the following manner:

First Class Mail

Interdepartmental State Mail

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502
PH: (505)827-0466
FX: (505)827-9732