

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
UNITED DRILLING, INC.
ID NO. 02-047054-00 1; TO NOTICE OF
ASSESSMENT OF PENALTY AND INTEREST
ISSUED UNDER LETTER ID NO. L0103614976**

No. 05-19

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 13, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Bruce J. Fort, Special Assistant Attorney General. United Drilling, Inc. (“Taxpayer”) was represented by Michael Andrews, a certified public accountant with Gilmore, Gannaway, Andrews, Smith & Company, LLC. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a corporation doing business in New Mexico.
2. Because the Taxpayer’s average monthly payment of gross receipts, compensating and withholding taxes (“CRS taxes”) exceeds \$25,000, the Taxpayer is required to pay its CRS taxes using one of the four payment methods set out in NMSA 1978, § 7-1-13.1. These payment methods are designed to insure that tax funds are immediately available to the state on or before the due date.
3. The Taxpayer has elected to make its monthly CRS tax payments by means of automated clearing house (“ACH”) transfers and has delegated responsibility for making the

monthly transfers to Gilmore, Gannaway, Andrews, Smith & Co., LLC (“GGAS”), a firm of certified public accountants.

4. Payment of CRS taxes for the October 2004 reporting period was due on or before Thursday, November 25, 2004. Because state offices were closed on both November 25 and 26, 2004, the due date for the October payment was Monday, November 29, 2004, as explained in Department Regulation 3.1.4.10 NMAC.

5. On November 17, 2004, Sue, a GGAS employee, transmitted the information necessary for the state’s fiscal agent to initiate an ACH transfer of \$59,447.87 on the effective entry date in payment of the Taxpayer’s CRS taxes for the October 2004 reporting period.

6. On November 24, 2004, the state’s fiscal agent presented the ACH item in the amount of \$59,447.87 to the First National Bank at Roswell (“the Bank”) for payment.

7. On November 26, 2004, the Bank rejected the payment because the account number provided was incorrect and did not belong to the Taxpayer.

8. When GGAS received the Taxpayer’s bank statement in late November 2004, Sue noticed that the \$59,447.87 ACH transfer had not cleared the Taxpayer’s account, but assumed this was because it had been made so close to the statement’s closing date.

9. Upon receiving the next bank statement in December, Sue again noticed that the ACH transfer had not cleared the Taxpayer’s account.

10. In late December 2004, Sue called the Department’s Roswell office and spoke to Joe Salgado. In response to Sue’s inquiry, Mr. Salgado checked the Department’s system and told her that the Taxpayer had no outstanding liability for the October 2004 reporting period.

11. On January 11, 2005, the Department issued an assessment under Letter ID L0103614976 assessing the Taxpayer for \$59,447.87 of CRS taxes due for the October 2004 reporting period, plus interest and penalty.

12. After the Taxpayer received the assessment, Sue called Joe Salgado in the Department's Roswell office. As a result of that conversation, Sue understood that the interest and penalty could be abated if the Bank sent the Department a letter stating that the rejected ACH payment resulted from the Bank's error rather than the Taxpayer's error.

13. Sometime in February 2005, Sue contacted the Bank and asked its president and managing officer to write a letter explaining the reason for the rejected payment. She also asked the Bank to issue a cashier's check to the Department in the amount of \$59,447.87. The Bank complied with Sue's request and delivered the cashier's check and letter of explanation to GGAS's offices in Roswell.

14. The Bank's letter explained that the ACH information submitted contained an incorrect account number and could not be processed. It further explained that this same error had appeared on previous ACH transfers, but the error was caught and manually corrected by the Bank. Unfortunately, the employee who usually processed ACH transactions was absent on November 26, 2004 and her replacement was unable to correct the error on the ACH transfer initiated in payment of the Taxpayer's October 2004 CRS taxes.

15. On March 4, 2005, GGAS mailed a check for the full amount of tax principal shown on the Department's January 11, 2005 assessment to the Department by certified mail.

16. After receiving the check and the letter from the Bank, the Department informed GGAS that there was no legal basis for abating the interest and penalty assessed against the Taxpayer.

17. On April 8, 2005, GGAS filed a written protest of interest and penalty on behalf of the Taxpayer.

DISCUSSION

The sole issue to be determined is whether the Taxpayer is liable for the interest and penalty assessed on its late payment of CRS taxes for the October 2004 reporting period. In its protest letter, the Taxpayer maintained that penalty and interest should be abated because the Bank, rather than the Taxpayer, was at fault for the rejected ACH payment. At the administrative hearing, the Taxpayer's CPA acknowledged that the error did not originate with the Bank, but with GGAS, whose employee entered the wrong account number when transmitting the information necessary to authorize the ACH payment. The CPA argued, however, that interest and penalty should be suspended as of the date that GGAS's employee was told by the Department that the Taxpayer had no outstanding liability for the October 2004 reporting period. He also asked the Hearing Officer to waive the assessment of penalty and interest based on the Taxpayer's exemplary reporting history.

NMSA 1978, § 7-1-17 provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, § 7-1-3 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the

presumption of correctness applies to the assessment of penalty and interest at issue in this case, and it is the Taxpayer's burden to present evidence and legal arguments to support an abatement.

Assessment of Interest. NMSA 1978, § 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest shall be paid to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid....

The Legislature's use of the word "shall" indicates that the provisions of the statute are mandatory rather than discretionary. *Gandy v. Wal-Mart Stores*, 117 N.M. 441, 442, 872 P.2d 859, 860 (1994) (under rules of statutory construction, the words "shall" and "will" are mandatory). With limited exceptions that do not apply here, the New Mexico Legislature has directed the Department to assess interest whenever taxes are not timely paid. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, NMSA 1978, § 7-1-13(E).

The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. With regard to taxpayers subject to the special payment requirements of NMSA 1978, § 7-1-13.1, the Legislature has mandated that tax funds must be made immediately available to the state on or before the statutory due date. In this case, the error made by the Taxpayer's accounting firm denied the state the use of tax revenues to which it was legally entitled for a period of more than three months. During this period, the Taxpayer—rather than the state—had the use of this money, and interest was

properly assessed from the original due date of the tax until the date that payment was received in March 2005.

Assessment of Penalty. NMSA 1978, § 7-1-69(A) governs the imposition of penalty.¹ Subsection A imposes a penalty of two percent per month or any fraction of a month, up to a maximum of ten percent, that a taxpayer fails “due to negligence or disregard of rules and regulations” to pay taxes or file required tax reports in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Here, the cause of the late payment was the inadvertent error made by GGAS’s employee when she entered the Taxpayer’s account number and her inattention in failing to catch the error in subsequent months. New Mexico case law confirms that penalties may properly be assessed even when a taxpayer’s late payment is based on inadvertent error or unintentional failure to pay the tax due. *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds* by *Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797-798, 779 P.2d 982,

¹ As discussed at the administrative hearing, the penalty imposed by Subsection F of § 7-1-69 when electronic payments are submitted without required information does not apply in this case because the Department never requested corrected information from the Taxpayer.

984-985 (Ct. App. 1989). Based on both regulation and case law, the negligence penalty was properly assessed.

The Taxpayer's CPA maintains that the accrual of interest and penalty should be suspended as of the date in December 2004 when GGAS was advised that the Department's system did not show a liability for the October 2004 reporting period. Although it appears that GGAS was given incorrect information, it subsequently received corrected information in the form of the Department's January 11, 2005 assessment. GGAS received the assessment in mid-January, only two or three weeks after Sue, GGAS's employee, spoke to Joe Salgado in the Department's Roswell office. Nonetheless, Sue waited until sometime in February 2005 to contact the Bank to determine the cause of the rejected payment and waited until early March 2005 before sending payment of the outstanding tax principal to the Department. Given these circumstances, there is no basis for suspending the accrual of interest or penalty.

As its final argument, the Taxpayer asks that penalty be waived based on its exemplary reporting history. This is not something the Department can consider. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. See *State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

In this case, the Legislature has directed the imposition of interest on late tax payments and the imposition of penalty whenever the late payment results from the taxpayer's negligence. The

Legislature has not granted the Department or its hearing officer authority to waive penalty or interest based on equitable grounds, including a taxpayer's past reporting history.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessment of interest and penalty issued under Letter ID L0103614976, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-1-67(A), the Taxpayer is liable for payment of the interest that accrued between the due date of its October 2004 CRS taxes and the date payment was made in March 2005.

C. Pursuant to NMSA 1978, § 7-1-69(A), the Taxpayer is liable for penalty on the underpayment of taxes that resulted from GGAS's use of an incorrect account number on the ACH information provided to initiate payment of the Taxpayer's 2004 CRS taxes.

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

DATED September 16, 2005.