

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

**IN THE MATTER OF THE PROTEST OF
ALAMO TRUE VALUE HOME CENTER
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1733458560**

No. 09-02

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 19, 2008, before Brian VanDenzen, Hearing Officer. Alamo True Value Home Center ("Taxpayer") was represented by Mr. Doug Nelson, partner. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico operating a retail hardware store in Alamogordo and also as a construction contractor building homes in the Alamogordo and Las Cruces.
2. The Taxpayer was registered with the Department for payment of gross receipts, compensating and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS").
3. The Department performed an audit for a period beginning January 1, 2000 through December 31, 2005, using an accepted thirty-day statistical technique.
4. The audit is admitted into the record by stipulation as Department A.
5. Regarding the Gross Receipts Tax, the audit revealed that the Taxpayer did not have all the necessary non taxable transaction certificates for deductions and that deductions were made for sales to customers where no statutory permissible deduction was allowed.
6. Regarding the Gross Receipts Tax, the audit also revealed that the Taxpayer did not report some home sales in a timely fashion because the sales were reported in the wrong county.

7. Regarding the Compensating Tax, the audit revealed that the Taxpayer did not report purchases of out-of-state vendors not registered with New Mexico and purchased items from inventory for use without paying tax when purchased.

8. The audit found that there were no exceptions to the Withholding Tax or the Corporate Income Tax during the period.

9. Based on its findings during the audit, on March 26, 2007 the Department assessed the Taxpayer for \$51,181.04 in Gross Receipts Tax, \$9,396.99 in Compensating Tax, and \$7.00 in Withholding Tax, for a total of \$60,585.03 in tax principle.

10. At the time of the audit, the Department also assessed the Taxpayer a gross receipts tax negligence penalty of \$5181.34, which is 10% of the total unpaid gross receipts tax.

11. At the time of the audit, the Department also assessed the Taxpayer a compensating tax negligence penalty of \$939.88, which is 10% of the total unpaid gross receipts tax.

12. At the time of the audit, the Department also assessed the Taxpayer a withholding tax negligence penalty of \$0.70, which is 10% of the total unpaid gross receipts tax.

13. At the time of the audit, the Department also assessed interest on the Taxpayer for outstanding tax payment.

14. At the time of the audit, the Department gave the Taxpayer a credit of \$41,473.03 against the outstanding assessment.

15. On April 12, 2007 the Taxpayer filed a written protest to the assessment of penalty.

16. On August 8, 2008, the parties filed a Request for Hearing with the Hearing Bureau.

17. On August 13, 2008, the Hearing Bureau sent Notice of Administrative Hearing to the parties.

18. At the hearing, Mr. Doug Nelson testified.

19. The Taxpayer used a C.P.A. out of El Paso, TX who did not fully understand compensating tax issues in New Mexico.

20. The Taxpayer relied on the C.P.A. to provide accurate information about the compensating tax.
21. The Taxpayer's El Paso C.P.A. made accounting errors.
22. The Taxpayer subsequently switched to an Alamogordo C.P.A.
23. The Taxpayer's software system was not sophisticated enough to distinguish between non-taxable transactions and taxable sales.
24. The Taxpayer suggested that an error rate of 1.6 to 1.9 is small considering nearly 10-million in sales.
25. The Taxpayer argues that imposition of penalty in this situation is unduly harsh.
26. Sylvia Sena testified as a witness on behalf of the Department.
27. Ms. Sena is a Senior Tax Auditor for the Taxation and Revenue Department.
28. Ms. Sena, in addition to 13-years of experience with Taxation and Revenue Department, has a masters degree in business and a bachelor's of science in accounting.
29. Ms. Sena reviewed the audit in this case, relying on her professional training and experience.
30. Ms. Sena highlighted the essential findings of the audit, including explaining the sampling technique.
31. Ms. Sena indicated that there is in fact software available that can distinguish between distinguish between non-taxable transactions and taxable sales.
32. Ms. Sena provided a more update summary of the taxes due, penalty, and interest due at the time of the hearing.
33. Ms. Sena included a maximum of 20% penalty in her update.
34. The Department of Taxation and Revenue argued at the end of the hearing that the correct amount of the negligence penalty to be applied to the underpayment of tax was 20% percent, pursuant to NMSA 1978, Section 7-1-69 (2008).

35. In 2007 the legislature changed the maximum negligence penalty amount under NMSA 1978, Section 7-1-69 to a cap of no more than 20%. The effective date of this statutory change to the negligence penalty amount was January 1, 2008.

36. Prior to this change on January 1, 2008, the maximum negligence penalty that could be applied pursuant to Section 7-1-69 was capped at 10%.

37. On January 21, the hearing officer requested that both parties submit further analysis on whether the application of a 20% negligence penalty in this matter was an impermissible retroactive application of NMSA 1978, Sec. 7-1-69.

38. The Department responded to the Hearing Officer's request on Friday, February 13, 2009. That letter is admitted into the record as Department C.

39. Department C states in pertinent part that "[t]he Department has abated the additional 10% penalty assessment that was made in this case pursuant to 2007 N.M. Laws (R.S.) ch. 45 §4."

40. The Taxpayer did not respond directly to the Hearing Officer's request, but did send a letter to the Department arguing that the penalty amount was inaccurate. This analysis should have occurred during the hearing while cross-examining Ms. Sena.

DISCUSSION

There are two issues to be decided in this matter. First, whether the Taxpayer is liable for the interest and penalty assessed on the Taxpayer for errors and late payments of Gross Receipts, Compensating, and Withholding Tax; and second, whether the amended penalty statute applies to the Taxpayer, and thereby raise the maximum cap on the penalty from 10% to 20%.

I. The Taxpayer is Liable for Penalty and Interest for errors and late Payments of Gross Receipts, Compensating, and Withholding Tax.

The Taxpayer does not dispute that there were errors and late payments of Gross Receipts, Compensating, and Withholding Tax. The Taxpayer does not dispute the assessed tax principle. However, the Taxpayer argues that it should be excused from payment of penalty because: (1) the majority of the penalty applies to a misfiling rather than non-payment of the tax principle; (2) the accounting firm employed by the Taxpayer made a clerical error by filing the gross receipts tax in the wrong jurisdiction. The accounting firm employed by the Taxpayer also failed to advise the Taxpayer on reporting compensating tax for equipment purchased outside of New Mexico. Consequently, errors in reporting gross receipts tax and errors in compensating tax made in this instance were a result of the Taxpayer's reliance on the professional advice of the Taxpayer's accounting firm; (3) because the Taxpayer lacked software sophisticated enough to properly distinguish between taxable and non-taxable transactions, the Taxpayer did not collect gross receipt taxes on certain transactions that normally the Taxpayer would have passed on to the customer. The Taxpayer believes that paying penalty and interest on a tax principle that would typically be passed on directly to the customer is too harsh.

Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax. During the period at issue, this statute provided, 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,

B. Interest due to the state under Subsection A or D of this section shall be at the rate of fifteen percent a year, computed on a daily basis;

Subsection A determines the period for which interest is due, and Subsection B directs that the interest be calculated at a rate of 15% per year, computed on a daily basis.

Section 7-1-69(A) NMSA 1978 governs the imposition of civil penalty "in the case of failure (to pay tax) due to negligence or disregard of department rules and regulations". In such a circumstance, where the Taxpayer fails to pay when due the amount of tax required to be paid, this statute provided, in pertinent part:

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(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 ten percent of the tax due but not paid;

(2) two percent per month or any fraction of a month from the date the return was required to be filed multiplied by the tax liability established in the late return, not to exceed ten percent of the tax liability established in the late return.

Under that same section, “no penalty shall be assessed against a Taxpayer if the failure to pay an amount when due results from a mistake of law made in good faith and on reasonable grounds.” See Section 7-1-69(B). Since there is no allegation or proof of a mistake of law in good faith and on reasonable grounds, Section 7-1-69(B) does obviate the imposition of the civil penalty. Since any civil penalty assessed by the Department is presumed to be correct under Section 7-1-17, the burden is on the Taxpayer to demonstrate that failure to pay or report the tax when due did not result from the Taxpayer’s negligence. See §3.1.11.8 NMAC.

Regulation §3.1.11.10 NMAC defines negligence as a failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; or inaction by taxpayers where action is required; or inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In El Centro Villa Nursing Center v. Taxation and Revenue Department, 108 N.M. 795 (Ct. App. 1989), the New Mexico Court of Appeals held that Section 7-1-69(A) is designed specifically to penalize a taxpayer's *unintentional* failure to pay tax. The court noted that New Mexico's penalty statute is stricter than the federal statute and found that federal law on tax penalties is not applicable in determining whether a penalty is due under New Mexico law. While the taxpayer in this case presents numerous instances of unintentional failure to pay the tax when due, the justifications provided by the Taxpayer are the exact instances of unintentional failure to pay tax that is to be penalized under that statute.

Regulation §3.1.11.11 NMAC identifies indicators of the Taxpayer's nonnegligence. The only potential indicator of nonnegligence applicable to the evidence on this record is paragraph D, which reads that:

the taxpayer proves that the failure to pay tax or file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent.

Like in the present controversy, the Taxpayer in El Centro claimed their reliance on their accountant provided a basis for their failure to pay the tax when due. In rejecting the taxpayer's claim of nonnegligence, the court held that the taxpayer's reliance on its accountant did not provide grounds for abating penalty for failure to pay gross receipts tax, stating: "We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters." id. at 799. In this case, the Taxpayer did not introduce any evidence from the Taxpayer's out-of-state accountant, such as the type of advice the accountant provided, the reason the accountant thought the advice was accurate, and the relevant facts surrounding the Taxpayer's reliance on the accountant's advice. Since the assessment is presumed correct, the Taxpayer had the burden of presenting such evidence to establish nonnegligence under the Regulation. Like in El Centro, the Taxpayer's reliance on an out of state accountant does not abate the penalty for failure to pay.

II. The Taxpayer is only subject to a maximum penalty of 10%.

The rule on penalty, whether under the old or amended statute, is only applied at the time the tax is due but not paid. According to the plain language of the §7-1-69 NMSA, it appears that it is not relevant when the Taxpayer was assessed, but only when the tax was due and not paid. In the absence of clear language in the statute specifying retroactivity (which does not exist in this instance), the pertinent inquiry to determine the maximum percentage of penalty under either the old or amended version of NMSA 1978,

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Section 7-1-69 (2008) is not the date of assessment, but the date when the principle tax was due but not paid. If that date was before January 1, 2008, then the Taxpayer is only subject to a maximum penalty up to 10%, but if that date is on or after January 1, 2008 then the Taxpayer is subject to a maximum penalty up to 20%. In this case, the tax that the Taxpayer failed to timely pay was due before January 1, 2008. Consequently, the old version of §7-1-69 NMSA applies in this case, thereby capping the total penalty at 10%.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of the Taxpayer's refund claim, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was late in paying CRS taxes due to the state, and interest and penalty was properly assessed pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978.

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

DATED May 24, 2011.