

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

**IN THE MATTER OF THE PROTEST  
OF JDAP, Inc.  
TO ASSESSMENT ISSUED UNDER  
LETTER ID NO. L1281599872**

**No. 09-06**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on July 14, 2009, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Cordelia Friedman, Special Assistant Attorney General. JDAP, Inc. was represented by Roland Richter, President of JDAP, Inc. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. JDAP, Inc. (“Taxpayer”) is a New Mexico corporation and was incorporated on July 25, 2002.
2. Roland Richter is President of JDAP, Inc., and is hereinafter also referred to as Taxpayer.
3. The Department assessed Taxpayer on June 16, 2008, in gross receipts tax in the amount of \$8,449.87 in principal, \$1,521.00 in penalty and \$578.14 in interest for a total of \$10,549.01 for tax period ending August 31, 2007.
4. The Department assessed Taxpayer on June 16, 2008, in withholding tax in the amount of \$636.94 in principal, \$114.66 in penalty and \$43.58 in interest for a total of \$795.18 for tax period ending August 31, 2007.

5. On December September 15, 2008, Taxpayer filed a written protest to the assessment issued on June 16, 2008 in gross receipts and withholding taxes on the combined reporting system return (“CRS”) for tax period ending August 31, 2007, which was accepted by the Department under a retroactive extension of time granted pursuant to NMSA 1978, Section 7-1-24 (2003).

6. Taxpayer testified that he failed to timely file the CRS return and the payment for tax period ending August 31, 2007.

7. Taxpayer filed the CRS return and paid the gross receipts and withholding taxes for tax period ending August 31, 2007 on or about June 11, 2008.

8. In April 2008, Taxpayer was aware that the check for gross receipts and withholding taxes, made payable to the Department, had not been deposited by the Department.

9. In his protest letter, Taxpayer protested the assessment of penalty and interest, but at the hearing Taxpayer testified that he was only protesting the assessment of penalty. Audio Recorder 5:50-5:58; 8:46-9:10.

10. Taxpayer received a letter from the Department dated April 24, 2008, L1135413632, stating that there was an overpayment of taxes paid for tax period ending February 29, 2008. Taxpayer Exhibit 1.

11. There was an error in the processing of the CRS return and payment of tax for tax period ending February 29, 2008, which led to the overpayment.

12. Once the error was corrected, Taxpayer did not have an overpayment of tax for tax period ending February 29, 2008.

## **DISCUSSION**

The issue to be determined is whether Taxpayer is liable for the civil penalty assessed on the late filing of his CRS return and failure to pay the withholding and gross receipts tax for tax

period ending August 31, 2007. Taxpayer maintains that penalty should not be imposed because the Department notified him that he had an overpayment for a later tax reporting period. Taxpayer argues that the April 24, 2008 letter from the Department misled him into believing that his prior returns were in order. Taxpayer also argues that the penalty should be abated because as soon as he became aware that he had not paid his taxes, he filed the CRS return and paid the taxes promptly.

**Burden of Proof.** NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-3 (2009) 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, 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 principal tax, but also to penalty and interest, and it is Taxpayer’s burden to present evidence and legal arguments to justify an abatement.

**The relationship between the presumed overpayment and the failure to timely file the CRS return and timely make the payment.**

Taxpayer argues that he interpreted the April 24, 2008 letter from the Department to mean that the Department had completed a thorough review of his CRS returns, and determined that Taxpayer’s gross receipts and withholding taxes were properly paid and were in order. Because of this understanding, Taxpayer argues that he is not liable for the penalty. While it is understandable that the April 24, 2008 letter could be interpreted to mean that Taxpayer had no liabilities, only an overpayment; Taxpayer should not have interpreted the letter in this manner since he was aware, as of April 2008 that the check for the 2007 tax period had not been

deposited. Taxpayer took no steps to ascertain why the check had not been deposited or whether he had a tax liability for the tax period ending August 31, 2007.

**Civil Penalty.** NMSA 1978, Section 7-1-69 (2007), governs the imposition of penalty. Subsections A and A(1) of the statute imposes a penalty of two percent per month, up to a maximum of twenty percent, if a taxpayer fails due to negligence or disregard of rules and regulations to pay taxes in a timely manner. The Department's regulation defining negligence for purposes of assessing penalty is Regulation 3.1.11.10. NMAC. It states as follows:

- 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.

Whether a taxpayer has acted negligently for purposes of the penalty imposed by §7-1-69 (2007), is determined as of the date the taxes were due. At the time the gross receipts taxes were due, Taxpayer believed, although erroneously, that he had mailed the CRS return and the accompanying payment to the Department. Even though Taxpayer eventually filed the CRS return and paid his taxes, it was inadvertence, carelessness or erroneous belief or inattention that caused him not to do so in a timely manner. This falls within the definition of negligence.<sup>1</sup>

**Overpayment.**

In addition, the issue of applying overpayments to earlier tax liabilities is well settled in law. As the Department stated in its April 24, 2008 letter, if the taxpayer wanted the overpayment applied to a tax liability, the taxpayer was required to fill out the Application for Tax Refund.

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<sup>1</sup> Effective January 1, 2008, paragraph (A)(1) of §7-1-69 (2007) was amended to state that the penalty amount shall "not exceed twenty percent of the tax due but not paid." Prior to the amendment, §7-1-69 (2003) stated that the penalty amount shall "not exceed ten percent of the tax due but not paid." Because the maximum amount of penalty had not accrued as of January 1, 2008, the new provision applying an additional five months of penalty applies.

Taxpayer did not fill out the Application for Tax Refund because he did not believe that he had an overpayment of \$6,323.51 for tax period ending February 29, 2008. Taxpayer believed that the Department's letter was sent to him in error. Indeed, after further research the Department correctly applied the overpayment to the tax period ending February 29, 2008.

NMSA 1978, Sections 7-1-26 (2007) and 7-1-29 (2003) requires taxpayers to request a refund of any overpayments made. Taxpayers are generally not permitted to correct reporting errors in earlier months by adjusting the gross receipts or withholding tax reported on a later month's return. The New Mexico Court of Appeals addressed this issue in *Amoco Production Co. v. New Mexico Taxation & Revenue Department*, 118 N.M. 72, 75, 878 P.2d 1021, 1024 (Ct. App. 1994). The Court stated that "a tax is not paid simply when monies are deposited with the State." Each tax payment must be properly identified to the month in which the taxable transaction occurred. This is the only way the Department can determine whether tax on that transaction was paid correctly and on time. The court noted that NMSA 1978, Section 7-1-29 (2003) only authorizes the Department to either refund overpayments of tax, or to credit them against *future* tax liabilities, not past tax liabilities. *Amoco*, 118 N.M. at 75, 878 P.2d at 1024. Accordingly, the gross receipts and withholding tax liability resulting from the failure to file the CRS return and pay the taxes is subject to the negligence penalty imposed by §7-1-69(A) (2007).

#### CONCLUSIONS OF LAW

A. JDAP, Inc. filed a timely written protest to the penalty and interest assessed under Letter ID L1281599872, and jurisdiction lies over the parties and the subject matter of this protest.

B. JDAP, Inc. failed to timely pay the gross receipts and withholding tax due and owing on the due date as set forth in NMSA 1978, Section 7-9-11 (1966), and it is liable for the interest assessed by the Department.

C. JDAP, Inc. was negligent in failing to timely file the CRS return and failed to timely pay the gross receipts and withholding tax due and owing on the due date as set forth in NMSA 1978, Section 7-9-11 (1966), and it is liable for the penalty assessed by the Department.

For the foregoing reasons, JDAP, Inc.'s protest IS DENIED.

DATED: November 3, 2009