

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

**IN THE MATTER OF THE PROTEST OF
SIPAPU RECREATION DEV. II, LLC.
TO ASSESSMENT ISSUED UNDER LETTER
ID NOs. L14373577856, L0399836032, L1742013312,
L0668271488, L1205142400, L0131400576, L2077557632**

No. 10-21

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 29, 2010 and again on October 14, 2010, before Brian VanDenzen, Hearing Officer. At both hearings, the Taxation and Revenue Department ("Department") was represented by Ida Lujan, Special Assistant Attorney General. Ms. Silvia Sena appeared as a witness on behalf of the Department. Mr. James Coleman, managing partner of Sipapu Recreation Development II LLC (Taxpayer) appeared pro se at both hearings. Department Exhibits A1-A7, B, C, D, F, G, H, I, J, and K are admitted into the record. The Department withdrew Exhibits E1 & E2. Department L is not admitted into the record as it is a series of communications related to settlement discussion between the Department and the Taxpayer. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. Taxpayer is a limited liability corporation that owns and operates Sipapu Ski and Summer Resort in southern Taos County, New Mexico.
2. Mr. James Coleman has been the managing member/partner for Taxpayer since 2000.

3. From 2000 until March 2008, which encompassed 86 gross-receipts reporting periods, Taxpayer had always filed and paid its monthly gross-receipts taxes on time.

4. Ms. Dara Nichols, a paid bookkeeper for Taxpayer, was responsible for the filing and payment of New Mexico gross receipts taxes for a 4-year period of time beginning in 2004.

5. Ms. Nichols was not a certified public accountant or tax professional, but she did have previous business experience working as an accountant.

6. Until 2008, Ms. Nichols had a history of satisfactory and trustworthy completion of accounting with the Taxpayer, including the timely filing and payment of New Mexico gross receipts taxes.

7. Based on her satisfactory and timely performance of her duties in filing taxes, paying taxes, and reconciling the various accounts during the three-years preceding 2008, Ms. Nichols had earned the trust of Taxpayer.

8. During 2008, Ms. Nichols maintained an outward appearance of successful compliance with her job duties: she showed up on time, performed her duties, maintained a professional and competent attitude, and assured her supervisor, partner Jesse McBain, that she was continuing to comply with her tax obligations. Mr. McBain also visually observed Ms. Nichols setting aside other work at the end of the month when the taxes were due. Since Ms. Nichols had earned Taxpayer's trust, Taxpayer took her assurances that she was complying with the necessary accounting obligations at face value.

9. Since three partners, Mr. Coleman, Mr. McBain, and Mr. Jimbo Alley (last name uncertain—it could be Gallie), shared check signing responsibilities depending on who was available and in the office, Mr. McBain assumed based on Ms. Nichols continuing assurances

that New Mexico gross receipts taxes had been completed and paid, that one of the other two partners actually signed the check for the New Mexico gross receipts tax payments.

10. Taxpayer assumed that all appropriate New Mexico gross receipts taxes filings and payments had been made in 2008 based on their history of previous compliance, their trust in Ms. Nichols' previous job performance, and Ms. Nichols' continuing verbal assurances that she had completed her obligations.

11. Despite the Taxpayer's assumption at that time, it is now undisputed that Taxpayer failed to timely file and pay New Mexico gross receipts taxes in 2008 during required monthly reporting period ending on March 31st, April 30th, August 31st, November 30th, and December 31st.

12. In January 2009, Mr. Coleman attempted to make a large purchase with a credit card that he believed based on reviewing his credit card statement had a credit limit of \$24,000. When Mr. Coleman's transaction was declined by the credit card company, Mr. Coleman called the credit company. The credit card company informed Mr. Coleman that his credit limit had been reduced to \$3,100 because no payments had been received. Ms. Nichols was responsible for payment of the credit cards.

13. Mr. Coleman investigated the matter further and determined that Ms. Nichols had altered and/or fabricated Mr. Coleman's credit card statements to make it appear like she had properly paid the credit card balance and to make it appear that the credit limit remained at \$24,000 rather than the reduced \$3,100 credit limit.

14. Based on these discrepancies, which suggested to Mr. Coleman either fraud or embezzlement of funds, Mr. Coleman relieved Ms. Nichols of her duties with Taxpayer on February 3, 2009.

15. Taxpayer hired Ms. Jennifer Baker as a new accountant to deal with all immediate accounting obligations at the time of her hiring. Ms. Baker immediately prepared, filed, and paid the requisite gross receipts taxes for the gross receipts reporting period ending on January 31, 2009. Taxpayer has timely reported every gross receipts obligation since January 31, 2009 through the time of the hearing in this matter.

16. Because of their concern that Ms. Nichols may have embezzled funds and to determine whether there were any other unknown outstanding obligations, Taxpayer hired two forensic accountants in February 2009 to reconcile all bank statements and statements of account going back to 2007.

17. Taxpayer's forensic accountants determined that Ms. Nichols destroyed many records related to the Taxpayer's accounts, making it extremely time-consuming for Taxpayer to reconcile the accounts and determine what if any outstanding obligations from that time period remained.

18. Taxpayer's forensic accountants determined that Ms. Nichols had deceptively entered checks for March 2008 and April 2008 gross receipts payments into Taxpayer's internal account management system, but those checks never cleared the banks.

19. Taxpayer's forensic accountants believed that Ms. Nichols had taken funds based on her elaborate and deceptive accounting schemes discovered during the reconstruction.

20. However, to date, the Taxpayer has not discovered any missing or unaccounted for money. Since there is now no evidence of theft, Mr. Coleman now believes that Ms. Nichols was deceptive simply to hide her bad job performance in 2008 and keep her job.

21. In early May 2009, just as the forensic accountants were beginning the process of reconciling the 2008 bank statements and accounts, the Department contacted Taxpayer by phone

to inform Taxpayer about the outstanding gross receipts tax obligations in March, April, August, September, October, November, and December 2008.

22. Taxpayer's forensic accountants quickly verified through bank reconciliation that checks listed in Taxpayer's internal accounting software for the gross receipts tax payments in March and April 2008 never cleared the bank. Additionally, Taxpayer verified that no filings or payments were made for the periods ending in August, September, October, November, and December 2008.

23. Taxpayer filed all the missing CRS-1 reports on May 12, 2009.

24. On May 26, 2009, the Department issued seven assessments for unpaid principal gross receipts tax, penalty, and interest.

25. Taxpayer timely protested the seven-assessments on June 3, 2009 and again on June 10, 2009.

26. At the hearing on June 29, 2010, the Department found an error in the total amount of taxes due listed on these seven assessments because apparently the Department incorrectly had credited some withholding tax payments against the outstanding gross receipts tax principal. The Department believed that the Taxpayer's actual gross receipts taxes due exceeded the amounts listed on the notices of assessment.

27. The June 29, 2010 hearing was stayed to give the Department and the Taxpayer more time to reconcile the apparent discrepancy between the lower amount of principal tax due under the assessments and the higher amount the Department was requesting during that hearing.

28. On July 13, 2010, the Taxpayer and the Department reached a stipulation amending and increasing the total amount of gross receipt tax principal due. No new assessment was issued. [Department K, ¶10]

29. On July 13, 2010, the Taxpayer and the Department reached a stipulation amending and increasing the total amount of interest due on outstanding gross receipt tax. No new assessment was issued. [Department K, ¶11]

30. On July 13, 2010, the Taxpayer withdrew his protest as to tax principal and interest. [Department K, ¶12]

31. On July 13, 2010, Taxpayer and the Department stipulated that the only remaining issue for a determination during the protest is the assessment of civil penalty. [Department K, ¶13]

32. That matter was reconvened on October 14, 2010 for further testimony, presentation of exhibits, and closing arguments.

DISCUSSION

Based on the stipulation of the parties, the only issue to be decided in this case is whether the Taxpayer is liable for payment of civil penalty for gross receipts tax periods ending March 31, April 30, August 31, September 30, October 31, November 30, and December 31, 2008 when a previously trusted account-manager/bookkeeper responsible for the filing and payment of gross receipt taxes affirmatively misled Taxpayer about the status of those filings and payments, altered and/or forged statements of accounts during that period of time, and destroyed relevant account records during that period of time. Because the Taxpayer has demonstrated that it exercised the degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances, and because Taxpayer has demonstrated indicators of non-negligence, civil penalty for these reporting periods is abated.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, §7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish that he was not required to pay the tax principal, interest, and penalty. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Assessment of Penalty.

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, NMSA 1978, Section 7-1-69(A) (2007) imposes a penalty of two percent per month “from the date the tax was due,” not to exceed twenty percent of the outstanding tax liability. The term “negligence” is defined in Regulation §3.1.11.10 NMAC (1/15/01) 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.

Regulation §3.1.11.11 NMAC (1/15/01) provides instances of nonnegligence where no penalty should be assessed against a taxpayer under the civil penalty statute. Of particular relevance is Regulation §3.1.11.11 (C) NMAC (1/15/01), which establishes non-negligence when

“the taxpayer shows that physical damage to the taxpayer’s records or place of business caused a delay in filing a return or making payment of tax.”

Analysis

While much of the hearing was spent focused on the indicators of non-negligence under regulation §3.1.11.10 NMAC (1/15/01), the facts of this case suggest that the first issue to consider is whether the Taxpayer was even negligent, and thus liable for civil negligence penalty. As relevant to the facts of this case, regulation §3.1.11.10 NMAC (1/15/01) defines negligence as “failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances.”

The analysis of this question begins with the most basic issue presented to all fact-finders: the credibility of the witnesses and its role in determining the weight of the evidence. In this case, the testimony of Mr. Coleman was extremely credible. Mr. Coleman was forthwith in admitting any perceived faults and in responding with candor to any questions suggesting a possible negative inference about the Taxpayer’s business practices. At all times, Mr. Coleman was cooperative with the Department and made every effort to be agreeable with the Department, even to the point of stipulating to amount of total tax due above what was legally required by the Department’s seven notices of assessment.

In response to Mr. Coleman’s cooperation, including his voluntary stipulation to pay more principal tax than Taxpayer was legally compelled under the seven notices of assessment, the Department asserted in closing argument that the Taxpayer is “shoe-string operation” that does not take its accounting and tax-paying obligations seriously and that Taxpayer’s failure to

report and pay gross receipts tax occurred “every month.” These two Department allegations against the Taxpayer are simply not supported by the record. In discussing why these allegations are unsupported, it becomes apparent that rather than being negligent under the regulatory definition, the Taxpayer was the victim of deceptive accounting practices that even a reasonable taxpayer exercising ordinary business care and prudence could not have detected in time to pay the required monthly gross-receipts taxes at issue in this case.

Rather than missing every month of payments, as the Department suggests in closing argument, in ten years or so, the Taxpayer properly filed and paid its required New Mexico gross receipt taxes for all but seven-months in 2008. Those seven-months of missed payments in 2008 are directly attributable to the deceptive and arguably-fraudulent actions of one bad employee, Ms. Nichols. Ms. Nichols had earned Taxpayer’s trust by satisfactorily and timely executing her duties as an accountant for the Taxpayer for the three years preceding 2008. In 2008, Ms. Nichols was supervised by another partner, Mr. Jesse McBain. Mr. McBain was satisfied that Ms. Nichols was filing and paying the required New Mexico gross receipts tax during 2008 because when he would ask her, she would assure him that it was taken care. Given her history of performance that had earned her the Taxpayer’s trust, Mr. McBain had no reason to doubt Ms. Nichols assurances that she had taken care of the taxes.

Only later, it became apparent that in 2008 Ms. Nichols had abused her position of employment with deceptive, inaccurate, and arguably-fraudulent accounting practices. Upon learning of this bad employee’s intentional altering and/or forging of bank statements, destruction of records, and elaborately deceptive accounting practices, Taxpayer promptly fired Ms. Nichols. In addition to replacing Ms. Nichols with a new internal business accountant,

Taxpayer also hired two forensic accountants to reconstruct what occurred, correct Ms. Nichols' errors, omissions, and misrepresentations, and reconcile Taxpayer's accounting. The action of hiring two forensic accountants, which most certainly required a substantial unplanned financial commitment from the Taxpayer, is hardly indicative of the "shoe-string operation" the Department suggests, but rather supports the Taxpayer's contention that the Taxpayer in general takes its accounting obligations and taxpaying obligations seriously.

While it may be easy in hindsight to suggest that Taxpayer should have maintained much closer supervision of Ms. Nichols in 2008, at the time there was no basis for Taxpayer to do so. Ms. Nichols had earned a basic level of trust in her job performance based on three prior years of successful tax filings, tax payments, and account management. It would be one thing if Taxpayer provided no supervision to Ms. Nichols based on this trust, but the evidence in this case established that Mr. McBain continued to supervise her during 2008. While supervising her, Mr. McBain recalled and observed that Ms. Nichols would tell him near the end of every month that she needed to set aside other work to make sure the New Mexico gross receipt taxes were completed. And as part of his supervisory role, Mr. McBain would ask whether the New Mexico gross receipt taxes had been completed, to which Ms. Nichols assured him that they had been completed. Mr. McBain's visual observation of Ms. Nichols setting aside other work to prepare the New Mexico gross receipt taxes, Ms. Nichols affirmative assurances in response to Mr. McBain's inquiries about the taxes, and Ms. Nichols own past satisfactory performance would have likely caused any reasonably prudent taxpayer to believe that Ms. Nichols had acted appropriately by filing and paying the taxes when due.

The Taxpayer's closing argument—that the Department expects perfection rather than ordinary business care by a reasonable taxpayer as required under Regulation §3.1.11.10 NMAC (1/15/01)—is compelling. No business is immune from the deceptive and arguably fraudulent actions of a bad employee. As we have all unfortunately learned from reading the newspaper over the past ten-years, even model Fortune 500 companies relying on many internal checks and balances in accounting practices as well as high priced outside professional accounting firms have been the victim of clever and deceptive accountants, employees, managers, and executives.

In a perfect world, such deception would immediately be caught and addressed. But in this real world case, it is difficult to accept that at the time of Ms. Nichols' deceptive conduct, a reasonable taxpayer using ordinary business care would have been able to detect Ms. Nichols' fraudulent actions any sooner than when Taxpayer detected it in 2009. Ms. Nichols convincingly altered and/or forged bank statements in order to hide her failure in performing her work obligations. Ms. Nichols was hiding and destroying records that might otherwise have shown her deception. Ms. Nichols was falsely assuring her supervisor when questioned by him about her ongoing obligations. The forensic accountants later learned that the checks for the March and April 2008 gross-receipts taxes had been entered into the Taxpayer's internal account management system, but had never cleared the bank, suggesting again that Ms. Nichols devised a highly deceptive system designed to hide her job failings. That is, even if Mr. McBain had decided that Ms. Nichols' verbal assurances that the taxes had been completed were insufficient and he decided to conduct his own independent review, Ms. Nichols had rigged that potential internal review by entering the checks into the internal account system in such a way to suggest she had taken care of the outstanding taxes.

The Department argues that this case is no different than *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989) wherein the New Mexico Court of Appeals held a taxpayer liable for penalty based on the negligent actions of its agent. However, *El Centro* is distinguishable from the facts of this matter as *El Centro* dealt with inadvertent error in that taxpayer's accounting system. The facts of this case do not involve inadvertent error, but the intentional acts of deception (if not fraudulent acts) of an agent designed to hide her poor job performance from the Taxpayer. In other words, the question of negligence in this case is not related to inadvertence, but to whether the Taxpayer exercised "the degree of ordinary business care and prudence which reasonable taxpayers would exercise in similar circumstances."

The Department further argues that two other Decisions and Orders are relevant to the determination in this case: *Matter of the Protest of Rio Rancho Pharmacy*, No. 97-05 ("Rio Rancho Pharmacy"), and *Matter of the Protest of G.M. and Bernice Thompson*, No 98-19 ("Thompson"). In *Rio Rancho Pharmacy*, tax penalty was properly assessed against a taxpayer, even though the taxpayer's initial failure to file and pay gross receipts tax was caused by her non-negligent prolonged illness, when taxpayer nevertheless failed to timely act upon learning of the delinquent tax obligation after recovering from her various conditions. *Rio Rancho Pharmacy* dealt specifically with the application of the injury or prolonged illness non-negligence factor articulated under §3.1.11.11(B) NMAC (1/15/01), a factor not at issue in the present controversy. Consequently, since *Rio Rancho Pharmacy* addressed a non-negligence factor that is not at issue in the present controversy, it is of limited persuasive value to this case. Further, *Thompson* is not particularly relevant to the present controversy because the penalty issue in *Thomson* dealt with the reasonableness (or lack thereof) of the taxpayer's reliance on a certified public

accountant (Ms. Nichols, a bookkeeper, was not an accountant for the purposes of the non-negligence factor), another non-negligence factor not at issue in the present controversy.

Taxpayer argues that this matter is similar to a Decision and Order issued by the Department in the *Matter of the Protest of Sandia Oil Company*, No. 01-01 (“*Sandia Oil*”). The Department argued that the matter at hand is distinguishable from *Sandia Oil* because Taxpayer did not make as detailed inquiries with the accountant in this matter as the taxpayer in *Sandia Oil* made of the accountant at issue in that case.

While the Decision and Order of another hearing officer has no precedential or controlling authoritative weight, the *Sandia Oil* decision is persuasive in support of the Taxpayer’s argument for abatement of penalty because the facts are so similar. In *Sandia Oil*, a long-time trusted employee-accountant became depressed and failed to timely file and pay New Mexico gross receipts taxes. This *Sandia Oil* employee-accountant maintained an outward appearance of remaining current on the tax obligations by speaking often of preparing and filing returns, by visually working on returns, and by assuring the managing partner of *Sandia Oil* that other partners were signing the appropriate tax checks. When asked if she needed assistance by the managing partner, the *Sandia Oil* employee-accountant declined the invitation for help. Later, when it became apparent that the *Sandia Oil* employee-accountant had failed to timely file and pay taxes, the *Sandia Oil* employee-accountant stopped going to work and stopped cooperating with Sandia Oil Company’s efforts to investigate what happened further. In *Sandia Oil*, the hearing officer ultimately abated much of the penalty against the taxpayer because the hearing officer found that the taxpayer acted in accord with the degree of ordinary business care and prudence which reasonable taxpayers would have exercised under similar circumstances.

The evidence in this matter is quite similar to the facts of *Sandia Oil*. However, some additional facts in this matter actually strengthen this Taxpayer's claim for abatement even more so than the taxpayer in *Sandia Oil*. Like the accountant in *Sandia Oil*, Ms. Nichols was a long-time, trusted employee-accountant who had timely prepared, filed, and arranged payment of the required gross-receipts taxes. Like the accountant in *Sandia Oil*, Ms. Nichols maintained the outward appearances of continuing compliance based on her statements to Taxpayer that at the end of the month she had to set aside other work to complete the taxes. Like the accountant in *Sandia Oil*, Ms. Nichols provided verbal assurances to her supervisor Mr. McBain that she had completed the taxes. While Taxpayer never asked if Ms. Nichols needed any assistance with completing her work, unlike in *Sandia Oil*, Taxpayer did not notice any signs of physical illness, mental illnesses, or other change in mood/attitude/morale that might affect Ms. Nichols work performance and prompt such an inquiry. Similar to the accountant in *Sandia Oil* who drew checks corresponding to the owed taxes but never submitted them, Ms. Nichols deceptively entered information into the Taxpayer's internal accounting system indicating that checks had been drawn to pay the taxes even though such checks never cleared the bank.

However, more egregiously than the accountant in *Sandia Oil*, Ms. Nichols also actively and intentionally altered and/or forged bank statements and destroyed business records in her effort to cover-up her own job failings, making Ms. Nichols' deception even more difficult to detect than the deception found in *Sandia Oil*. Since the taxpayer in *Sandia Oil* was found to be unable to detect the deception of his accountant while exercising the degree of ordinary business care and prudence which reasonable taxpayers would exercise under similar circumstances, and since Ms. Nichols employed even more sophisticated deceptive and fraudulent practices to hide her own non-compliance from the Taxpayer in the current matter, the Taxpayer in the current

matter was even less likely to detect Ms. Nichols' failure to pay taxes under the "exercising the degree of ordinary business care and prudence which reasonable taxpayers would exercise under similar circumstances" negligence definition than the taxpayer in *Sandia Oil*.

In sum, the Taxpayer has credibly demonstrated sufficient facts to show that Taxpayer exercised the degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances. Once the Taxpayer overcomes this initial threshold, the burden then shifts to the Department to show the correctness of the assessed penalty. Other than its unsupported allegations that the Taxpayer runs a "shoe-string operation" and missed payments every month, the Department did not meet this burden to show the correctness of the assessed penalty. Because the evidence established that Ms. Nichols' intentionally deceptive and fraudulent business accounting practices caused Taxpayers' failure to timely file and pay taxes during the seven-months in question in 2008, and because a reasonable taxpayer exercising ordinary degree of business care under similar circumstances could not have detected Ms. Nichols' deception any sooner than Taxpayer did in the present case, the Taxpayer was not by definition negligent under regulation §3.1.11.10 NMAC (1/15/01), and thus not subject to civil penalty under NMSA 1978, Section 7-1-69(A) (2007). Consequently, penalty should be abated in full.

Moreover, even for the sake of argument that the Taxpayer was negligent because Taxpayer did not exercise the degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances, the Taxpayer still has a compelling defense under the nonnegligence factors that supports the abatement of penalty under regulation §3.1.11.11(C) NMAC (1/15/01).

There does not appear to be any case-law (and neither party cites to any case-law) defining what is meant by physical damage to records under Regulation §3.1.11.11 (C) NMAC (1/15/01). A narrow reading of that regulation seems to suggest that the non-negligence factor is related to instances of catastrophic damage to a taxpayer's place of business. However, there is no readily apparent logical distinction between a catastrophe such as a fire causing the damage/destruction of business records and the damage/destruction of records as the result of the willful bad conduct of an agent because in both instances, the result is the same: damage to business records that was beyond the reasonable control of the taxpayer.

The Department argued in closing that the Taxpayer failed to show that any business records were destroyed because it did not produce those records during the hearing. Rather than helping the Department's claim, the absence of these destroyed records during the hearing actually supports the otherwise credible and believable testimony of the Taxpayer that Ms. Nichols hid and destroyed business records: it is difficult for the Taxpayer to produce a record that has been hidden or destroyed.

The Taxpayer's credible testimony is that Ms. Nichols actively altered, forged, hid, and destroyed relevant statements of account and business records for 2008 in an attempt to hide her poor job performance, and this hiding and destruction of records interfered with Taxpayer's ability to first detect that there was any problem and second to later reconstruct and reconcile his accountants. But for this altering, forging, hiding, and destruction of records, it is certainly possible if not likely based on the Taxpayer's past successful history of filing and payment of taxes that Taxpayer would have detected the problem and corrected it by timely filing and paying gross receipts taxes during the relevant seven-month period in 2008. Ms. Nichols hiding and destruction

of records certainly qualifies as “physical damage to the taxpayer’s records... caus(ing) a delay in filing a return or making payment of tax” under Regulation §3.1.11.11 (C) NMAC (1/15/01).

Therefore, the civil penalty should also be abated pursuant to this regulation.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest to Assessment Nos. # ID NOs. L14373577856, L0399836032, L1742013312, L0668271488, L1205142400, L0131400576, L2077557632, and jurisdiction lies over the parties and the subject matter of this protest.
2. Taxpayer exercised the degree of ordinary business care and prudence which reasonable would exercise under similar circumstances.
3. Taxpayer is not negligent and subject to civil penalty under NMSA 1978, Section 7-1-69(A) (2007).

For the foregoing reasons, the Taxpayer's protest **IS GRANTED**. The Department is ordered to abate all civil penalty assessed against the Taxpayer.

DATED: December 20, 2010.