

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

**IN THE MATTER OF THE PROTEST OF
MICO SERVICES, LLC,
TO ASSESSMENTS ISSUED UNDER
ID NO. L2025293376**

No. 12-05

DECISION AND ORDER

A formal hearing on the above-referenced protest was held January 17, 2012, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Legal Counsel. Ms. Sonia Varela, Auditor, also appeared on behalf of the Department. Mico Services, LLC (Taxpayer) appeared for the hearing and was represented by and through its accountant, Mr. Jimmy Waechter, CPA, and its President, Mr. Johnny Vega, and its Office Manager, Ms. Deanna Stratton. The Hearing Officer took notice of all documents in the administrative file. The parties stipulated to several facts. Taxpayer #1, #2, and #3 were admitted. Mr. Waechter, Mr. Vega, and Ms. Stratton testified at the hearing. 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 in April 2010 and was required to file its gross receipts monthly. The April 2010 filing was due no later than May 25, 2010.
2. The Taxpayer filed its April 2010 monthly return and remitted payment in full for gross receipts tax and for withholding tax by mailing the documents to the Department on May 11, 2010. Mailing was the filing method regularly used by the Taxpayer.

3. In February 2011, the Taxpayer was preparing its annual income tax return. At that time, the Taxpayer noticed that the check remitted for its April 2010 gross receipts tax had not been cashed.
4. The Taxpayer immediately contacted the Department and inquired about the status of its April 2010 return and payment. The Department advised the Taxpayer that they did not show a return or payment for that month.
5. The Taxpayer placed a stop-payment on the check, re-filed the April 2010 report, and remitted another check for the tax. The payment and re-filed report were done within two days of when the Taxpayer learned that the Department did not have a record of the April 2010 report.
6. On March 9, 2011, the Department assessed the Taxpayer for penalty and interest for the tax period ending on April 30, 2010. The assessment was for gross receipts tax penalty of \$6,598.98, withholding tax penalty of \$560.52, gross receipts tax interest of \$1,034.54, and withholding tax interest of \$87.87.
7. On March 8, 2011 and on March 28, 2011, the Taxpayer filed formal protest letters.
8. On August 23, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty and interest on gross receipts tax and on withholding tax for the tax period ending in April 2010 due to negligence.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17.

Tax includes, by definition, the amount of tax principal imposed and, unless the context

otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to rebut that presumption. When a taxpayer presents evidence sufficient to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep’t.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308 (filed October 2, 2002).

Assessments of Penalty and Interest.

Penalty may be assessed when a taxpayer fails to pay a tax when it is due, even if the failure is due to negligence. *See* §7-1-69 NMSA 1978 (2008). Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A).

Therefore, the threshold question is whether the tax was paid when it was due.

Timeliness of Payment.

Returns and payments may be filed by mail. *See* NMSA 1978, § 7-1-13 (2007). All authorized mailings are timely if they are mailed on or before the date on which they are due. *See* NMSA 1978, § 7-1-9 (1997). The party relying on service by mail has the burden of proving that the mailing was done. *See Myers v. Kapnison*, 93 N.M. 215, 216, 598 P.2d 1175, 1176 (Ct. App. 1979). “A properly addressed letter that is mailed is presumed to be received.” *Garmond v. Kinney*, 91 N.M. 646, 647, 579 P.2d 178, 179 (1978).

I found the Taxpayer’s witnesses to be very credible. The Department did not present any evidence at the hearing. The parties stipulated that the Taxpayer properly mailed its return and payment for April 2010 on May 11, 2010, which was before its due date. The Taxpayer also explained that it regularly files its returns and is very diligent in paying its taxes in a timely

manner. Consequently, there was sufficient evidence to overcome the presumption of correctness and to show that the Taxpayer did pay its April 2010 tax liability by its due date.

The burden then shifted to the Department to show that the return and payment were not received. *See State Farm Fire and Casualty Co. v. Price*, 101 N.M. 438, 443, 684 P.2d 524, 529 (Ct. App. 1984) (holding that the presumption that a properly addressed letter was received may be rebutted by evidence that the letter was not received). *See also MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13. The Department argued that if a mailing is not received by the Department its contents are not timely under Regulation 3.1.4.10 (C). Regulation 3.1.4.10 (C) (2) NMAC (2000) indicates that a mailing not received by the Department is not timely. However, the same subsection goes on to explain that an improperly addressed mailing that is never received by the Department will not be credited with its original postmarked date. *See id.* *See also State ex rel. Quintana v. Schnedar*, 115 NM 573, 855 P.2d 562 (1993) (noting that provisions of a statute must be read together with other statutes in material parts). *See also Johnson v. NM Oil Conservation Com'n*, 1999-NMSC-021, 127 NM 120 (holding that canons of construction that apply to statutes also apply to rules and regulations). The stipulation was that the return and payment were properly mailed. Moreover, the Department presented no evidence to show that the Taxpayer's April 2010 return and payment were not received. The only credible evidence presented that might go to show that the return and payment were not received was the fact that the Taxpayer's check had not been cashed by February 2011. However, the Taxpayer explained that it was not unusual for checks to the Department to remain outstanding for several months. The Department presented no evidence on its payment processing.

The Department argued that the Taxpayer was negligent since it did not inquire about the outstanding check until February 2011. The Department argued that the Taxpayer did not

exercise ordinary business care. The Taxpayer explained that it keeps track of outstanding checks on a monthly basis, but that the checks are listed only by number and amount, and not by payee. The Taxpayer also explained that it writes between 200 and 250 checks each month on average. The amounts of the checks are frequently in the range of the check that was written to the Department for the April 2010 tax period, and that it typically has 100 to 150 checks that are listed as outstanding on every monthly statement. The Taxpayer explained that it is not usual for several checks to remain outstanding for several months. Given the unique facts of this case, the Taxpayer was not negligent and did exercise ordinary business care.

Based upon the totality of the evidence, the Taxpayer's April 2010 return and payment were made before their due date by timely, proper mailing. The Department failed to overcome the presumption that the Taxpayer's properly mailed return and payment were received. Therefore, penalty and interest should not be assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of penalty and interest on gross receipts tax and on withholding tax for the April 2010 tax period under Letter ID number L2025293376, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer presented sufficient evidence to overcome the presumption of correctness, and showed that they filed their report and made payment in full for the April 2010 tax period by mailing them to the Department on May 11, 2011.
3. The Department failed to show the correctness of the assessment after the presumption was overcome. Therefore, the assessment was improper.

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

DATED: February 14, 2012.

DEE DEE HOXIE
Hearing Officer
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