

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

**IN THE MATTER OF THE PROTEST OF
EASTER SEALS EL MIRADOR,
TO THE DENIAL OF REFUND
LETTER ID NO. L1456642880**

No. 13-35

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 24, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Aaron Rodriguez, Staff Attorney, and Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Easter Seals el Mirador (Taxpayer) appeared for the hearing by and through its Controller, Mr. Michael Easley. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a non-profit organization. The Taxpayer was required to file its monthly returns electronically beginning in 2011.
2. The Taxpayer continued to file paper returns, and failed to file electronically from approximately September 2011 through September 2012.
3. The Department notified the Taxpayer by letter for several months in 2011 that it was required to file electronically. The Department explained that they were providing a grace period for compliance.
4. After the grace period expired, the Department issued the Taxpayer notices that their returns that were filed by mail were rejected and that the Taxpayer needed to file electronically.

5. Sometime in September or October 2012, the Department assessed the Taxpayer for penalty for failing to file its returns electronically.
6. When the Taxpayer was assessed, the Taxpayer refiled all of the returns from the assessment electronically. The Taxpayer is now filing electronically, as required.
7. The Taxpayer did not realize that it was required to file electronically until it received the assessment. During 2011, the Taxpayer was employing a Director of Finance. The Director's job duties included filing the returns and dealing with correspondence from the Department.
8. The Director no longer works for the Taxpayer. The former Director failed to comply with the electronic filing requirements on behalf of the Taxpayer.
9. The Taxpayer paid the assessed penalty.
10. The Taxpayer requested a refund of the payment on the penalty on May 8, 2013.
11. The Department denied the request for refund on May 16, 2013.
12. The Taxpayer filed a formal protest to the denial of refund on June 14, 2013.
13. On October 8, 2013, 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 entitled to a refund of an assessed penalty.

Burden of Proof.

Although the protest in this case is for a denial of refund, the denial was based on the fact that the payment made was pursuant to an assessment. 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 show that it is entitled to an abatement of penalty.

Assessment of Penalty.

Generally, a taxpayer is liable for penalty "in the case of failure...to file by the date required a return[.]" NMSA 1978, § 7-1-69 (A). Generally, "the payment of any tax or the filing of any return may be accomplished by mail." NMSA 1978, § 7-1-13 (B). However, the Department has the authority to require some taxpayers to file their returns electronically. *See* NMSA 1978, § 9-11-6.4. When a taxpayer is required to file electronically, "the taxpayer may not file future returns by mail or any method other than electronically." 3.1.4.18 (F) NMAC (2010). There was no dispute that the Taxpayer was required to file its returns electronically. The Taxpayer explained that it did not know of this requirement until it was assessed for penalty because its former Director of Finance failed to communicate this requirement to anyone.

A taxpayer's lack of knowledge is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). However, when a taxpayer's belief is based on the advice of a competent accountant, the taxpayer is not negligent and application of penalty is inappropriate. *See C&D Trailer Sales v. Taxation and Revenue Dept.*, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979). The burden is on the taxpayer to prove that a failure to file a return properly was caused by reasonable reliance on the advice of a competent accountant after a full disclosure of all relevant facts. *See* 3.1.11.11 (D) NMAC (2001). The Taxpayer admitted that it was not relying on advice from an accountant or an attorney at the time that it failed to file its returns electronically. The Taxpayer was relying on its Director to file its returns properly. Reliance on an employee as an agent for filing returns does not excuse the failure to properly file. *See id.* Therefore, the exception does not apply, and the penalty

was properly assessed. Consequently, the Taxpayer is not entitled to a refund of the penalty. *See* NMSA 1978, § 7-1-26 (allowing refunds only when an amount paid was in excess of a taxpayer's liability).

Hardship.

The Taxpayer explained that the penalty assessed caused it severe financial hardship. The Taxpayer emphasized its non-profit status, and explained that donations have been scarce in this tough economy. The Taxpayer explained that the large amount of the penalty strained its financial resources, and that it may not be able to continue operating as it has in the past due to this hardship. Unfortunately for the Taxpayer, the statute provides no legal relief in such a situation. Penalty must be assessed when there is a negligent failure to file a return properly. *See* NMSA 1978, § 7-1-69. A taxpayer's inability to pay and financial hardship are not valid reasons to abate the penalty. *See* 3.1.11.9 NMAC (2001).

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the denial of refund issued under Letter ID number L1456642880, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was properly assessed for penalty for failing to file its returns electronically as required.
3. As the penalty was properly assessed, the Taxpayer is not entitled to a refund for its payment of the penalty.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: November 5, 2013.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.