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

IN THE MATTER OF THE PROTEST OF
PPR HEALTHCARE STAFFING **No. 14-15**
TO ASSESSMENT ISSUED
UNDER LETTER ID NO. L0688056640

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 24, 2014, before Monica Ontiveros, Hearing Officer. At the hearing, the Taxation and Revenue Department ("Department") was represented by Elena Morgan, attorney for the Department. Ms. Milagros Bernardo, protest auditor, appeared as a witness for the Department. PPR Healthcare Staffing ("Taxpayer") was represented by Joe Marino, Senior Vice-President of PPR Talent Management Group who appeared at the appointed time. A letter dated September 24, 2012, Exhibit D, was introduced by the Department.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 5, 2012, the Department assessed Taxpayer in gross receipts tax in the amount of $202,678.74 in principal, $43,136.73 in penalty and $49,440.12 in interest for the tax period from January 31, 2006-November 30, 2011. Letter Id No. L0688056640.

2. Taxpayer filed a protest to the assessment on November 5, 2012.

3. On June 18, 2013, the Department requested a hearing in this matter.

4. On June 20, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for August 29, 2013.

5. Taxpayer requested a continuance on August 23, 2013. The hearing was reset for February 24, 2014.

6. Taxpayer also does business as Professional Placement Resources Talent Management Group which is based in Jacksonville, Florida. Taxpayer operates in 48 states.

7. During the tax period from January 31, 2006 through November 30, 2011, Taxpayer did not file its gross receipts returns or pay gross receipts taxes for services it provided.

8. The services provided in New Mexico by Taxpayer were temporary healthcare recruiting and staffing services in different medical settings.

9. Taxpayer protested only penalty and admitted liability to both the principal and interest portions of the assessment. Protest Letter; (CD 03:32-3:36).

10. In 2006, Marley Harris, was the controller for Taxpayer. (CD 30:20-31:00).

11. Mr. Marino was not employed by Taxpayer in 2006 but he believes that Ms. Harris conducted due diligence in determining whether Taxpayer owed taxes in New Mexico. (CD 30:20-31:00).

12. Mr. Marino believes that the "due diligence" performed by Ms. Harris meant that she surveyed all the states in which Taxpayer was doing business and identified which states Taxpayer owed taxes.

13. Ms. Harris determined that Taxpayer did not owe taxes in New Mexico but owed taxes in the State of Washington. (CD 30:20-31:00).

14. Ms. Harris is a certified public accountant but is no longer employed by Taxpayer.

15. In Taxpayer's letter, Ms. Jenenne Hollister, controller for Taxpayer, stated that in "communications with a new client in 2009 we became aware of the New Mexico Gross Receipts Tax and our responsibility to pay this tax." Exhibit D.

16. Taxpayer took no action in paying its taxes between 2009 and 2011.

17. In 2011, Taxpayer entered into a payment plan with the Department to pay the principal and interest portions of the assessment only after it received a notice from the Department that it had a tax liability. (CD 11:20-12:02).

DISCUSSION

The sole issue to be determined is whether Taxpayer was negligent in not paying gross receipts tax. Taxpayer argued that it was not negligent because the controller, a certified public accountant, in 2006 performed due diligence in ascertaining whether Taxpayer owed any taxes.

Burden of Proof and Standard of Review.

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-17(C) (2007). Any penalty assessed is also presumed to be correct. 3.1.6.13 NMAC (1/15/01). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See, TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. When a taxpayer presents sufficient evidence 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, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶11, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, Taxpayer has the burden to show that the Department's assessment is incorrect. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶7, 84 N.M. 428, 431, 504 P.2d 638, 641.

Civil Penalty.

Civil penalty is imposed when a taxpayer is "negligent" or disregards the Department's rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

> (e)xcept as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the **amount of tax required to be paid**, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or **to file by the date required a return** regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:
>
> (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 twenty percent of the tax due but not paid;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2007). The Department's regulation provides that "negligence" includes "failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention" for either failing to file a return on time or failing to make a payment on time. Regulation 3.1.11.10 NMAC (1/15/01). Inadvertent error is defined as "negligence." *See El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶14, 108 N.M. 795, 799, 779 P.2d 982, 986.

The regulations provide exceptions to the negligence definition. After reviewing the exceptions or indications of nonnegligence found in regulation 3.1.11.11 NMAC (1/15/01), Mr. Marino argued that because the controller, Ms. Harris, a CPA, performed due diligence in ascertaining whether any taxes were owed in New Mexico that paragraph D of the regulation applied. Regulation 3.1.11.11(D) provides that:

> (t)he taxpayer proves that the failure to pay tax or to 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 taxpayer's reliance on an agent;

To meet this regulation, it requires Taxpayer prove that it reasonably relied on the advice of a competent accountant and that the competent accountant provided incorrect tax advice. The term "reasonable reliance" is a factual determination made by the Hearing Officer. It requires evidence that the taxpayer acted reasonably or acted in a "(f)air, proper or moderate under the circumstances" and the person exercised reliance or a "(d)ependence or trust" on the advice of a competent accountant. *Black's Law Dictionary*, 1379, 1404 (9th ed. 2009). This indication, as with the other indications of nonnegligence, are in keeping with the holding in *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, where the court stated that "(u)nder the statutory definition of negligence, it is inappropriate to impose a penalty where the taxpayer as acted reasonably in failing to report income or to pay taxes." *Id.* at ¶6. The court also held that a taxpayer is not relieved of his or her duty to ascertain the possible tax consequences of his action or inaction by abdicating this responsibility by merely appointing an accountant to act as an agent in tax matters. *Id.* at ¶14. Thus, in reading the regulation and *El Centro Villa,* the hiring of an accountant by itself is insufficient to prove that a taxpayer is nonnegligent. The taxpayer must act reasonably and he or she must have relied on the accountant's incorrect tax advice.

The Hearings Bureau has ruled in numerous cases that reasonable reliance on a CPA may be a reason for abatement of penalty especially when it seems clear from the evidence that the accountant provided "incorrect tax advice." *See, Carlos Chavez Formerly dba Mayan Construction,* Decision and Order No. 12-09 (the accountant failed to review the work of Taxpayer's employee and failed to properly advise Taxpayer of time deadlines), *Jesus Hernandez,* Decision and Order No. 11-16 (the accountant stated in a letter that he had provided taxpayer with incorrect advice), *Wal-Mart,* Decision and Order No. 06-07 (taxpayer relied on in-house tax accountants to form a subsidiary company to reduce state tax liability), *Children's Orchard,* Decision and Order No. 01-05 (taxpayer hired an accountant to give them advice to assist them in making sure their taxes were properly paid) and *Eileen P. Cahoon,* Decision and Order No. 98-38 (taxpayer relied on her accountant's advice in not providing a timely NTTC). *But see, Marilyn Stock,* Decision and Order 05-04 (taxpayer was not granted a refund of the penalty amount she paid even though she had relied on her CPA who used the wrong tax table in determining her tax liability).

In this case, Taxpayer was able to prove that Ms. Harris was a CPA and that sometime in 2006, Ms. Harris conducted some sort of review of all the states Taxpayer was doing business in, to determine where it owed taxes. Ms. Harris determined that Taxpayer owed taxes in the State of Washington but not in the State of New Mexico. Mr. Marino was not employed by Taxpayer in 2006 and he was unable to testify as to the type of review that was conducted by Ms. Harris other than to state that Taxpayer conducted "due diligence" in determining whether it owed taxes. There is insufficient evidence to show that the advice or "due diligence" performed by Ms. Harris meets the requirement that the accountant provide incorrect tax advice.

Even assuming there is sufficient evidence to prove that Taxpayer relied on the advice in 2006 of a competent CPA, there is not sufficient evidence to prove that the reliance was reasonable. There is no evidence to show why Ms. Harris believed that Taxpayer did not owe any gross receipts taxes. Was Ms. Harris' belief based on a factual error or a legal error? There is no explanation provided by Taxpayer as to how Ms. Harris formed this belief. It also does not explain why Taxpayer in 2009, when it became aware that it owed gross receipts taxes, failed to contact the Department to inquire about how to file and pay gross receipts taxes. It wasn't until Taxpayer was audited in 2011 that Taxpayer came forward to pay its gross receipts taxes. It is also interesting to note that in its letter dated September 24, 2012, signed by the controller, Ms. Hollister, she never mentions that Taxpayer had failed to pay gross receipts returns because Taxpayer had relied on Ms. Harris' advice. Instead Ms. Hollister states that they Taxpayer failed to pay gross receipts taxes because of the economy. All of these facts reviewed together indicate that Taxpayer was unable to meet its burden by proving that it reasonable relied on the advice of a competent CPA.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest of the Notice of Assessment Letter Id No. L0688056640 for gross receipts tax penalty for the tax periods ending January 31, 2006 through November 30, 2011.

B. Jurisdiction lies over the parties and the subject matter of this protest.

C. There was insufficient information to find that the certified public accountant provided incorrect tax advice to Taxpayer in 2006.

D. Taxpayer did not reasonably rely on the incorrect tax advice of the accountant.

E. Taxpayer was negligent in not filing its CRS returns for the tax periods ending January 31, 2006 through November 30, 2011; accordingly, it owes penalty.

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

DATED: April 28, 2014

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25 (1989), Taxpayer has 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* NMRA, 12-601 of the Rules of Appellate Procedure. 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.