STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
THAT'S THE KEY **No. 16-04**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1370695728

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 11, 2016 before Brian VanDenzen, Esq., Interim Chief Hearing Officer, in Santa Fe. At the hearing, Stephanie and Max Blea appeared for That's the Key ("Taxpayer"). Acting Chief Legal Counsel Julia Belles appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Veronica Galewaler appeared as a witness for the Department. Department Exhibits A-E were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 7, 2015, under letter id. no. L1370695728, the Department assessed Taxpayer for $1,574.21 in gross receipts tax, $314.84 in penalty, and $221.43 in interest for the CRS reporting periods between January 1, 2009 and December 31, 2011. [Dept. Ex. A].

2. On October 9, 2015, Taxpayer protested the Department's assessment, asking that the Department "remove the penalty and interest" portion of the assessment. [Dept. Ex. B].

3. On October 20, 2015, the Department's protest office acknowledged receipt of a valid protest. [Dept. Ex. C].

4. On November 23, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

5. On November 24, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on January 11, 2016, within 90-days of the Department's acknowledgment of receipt of a valid protest.

6. Taxpayer is a family-run locksmith business that performs re-keying services for realtors and other real estate companies.

7. Mr. Max Blea is the locksmith while his wife Ms. Stephanie Blea manages the books and billings of the business. Taxpayer did not use any other bookkeeper or accountant during the relevant period.

8. Through its Schedule C mismatch program with the IRS, the Department detected that Taxpayer had reported business income on its Federal Schedule C that was not reported on its CRS returns in New Mexico.

9. During the assessed period, Taxpayer performed re-keying services for Fannie Mae and Freddie Mac.

10. Taxpayer's income from Freddie Mac and Fannie Mae receipts was the discrepancy discovered by the Department between Taxpayer's CRS filings and federal income tax returns, which led to the assessment described in finding of fact #1.

11. Ms. Blea believed that Fannie Mae and Freddie Mac were government agencies exempt from paying gross receipts tax.

12. Taxpayer did not consult with any tax professionals or the Department about its tax obligations vis-à-vis the Freddie Mac and Fannie Mae receipts and whether its receipts from those entities were exempt.

13. Taxpayer did not pay gross receipts taxes when due on its Freddie Mac and Fannie Mae receipts.

14. Taxpayer did not intentionally or willfully fail to pay the gross receipts tax on the Freddie Mac and Fannie Mae receipts; rather, Taxpayer erroneously believed that it did not have to pay gross receipts tax on its Freddie Mac and Fannie Mae receipts.

15. Taxpayer acknowledged in its protest letter and at hearing that it was liable for the assessed gross receipts tax principal, leaving only the assessed penalty and interest at issue in this protest.

16. Taxpayer paid the assessed gross receipts tax principal before the protest hearing.

17. As of the date of hearing, Taxpayer owed $326.57 in penalty and $228.01 in interest for a total outstanding liability of $554.58. [Dept. Ex. A].

DISCUSSION

Taxpayer agrees that it owed the assessed tax principal and made payment extinguishing that liability before the hearing. The only remaining issues are the Department's assessment of civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) and interest under NMSA 1978, Section 7-1-67 (2007).

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and

interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

Interest.

Taxpayer conceded that it owed the assessed gross receipts tax principal in this case, which was not paid when initially due. When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24. The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. In this case, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from when the tax was originally due until Taxpayer paid the gross receipts tax principal in this matter.

Penalty.

When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

> 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.

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp* , ¶22 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was negligent under Regulation 3.1.11.10 (B) & (C) NMAC because Taxpayer failed to take action to report and pay gross receipts on its filed CRS system returns for the Fannie Mae and Freddie Mac receipts because of its erroneous belief that they were exempt.

Taxpayer's main argument for the abatement of penalty is that it was simply unaware of the requirement that it had to pay gross receipts tax on the services it rendered to Fannie Mae and Freddie Mac. As found at the hearing, Taxpayer failure to pay the gross receipts tax in this instance stems from an honest lack of knowledge of the requirements rather than from any willful intent to evade or defeat the tax. However, under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. In New Mexico a lack of knowledge of the requirements of taxation, inadvertent error, and/or erroneous belief constitutes the civil negligence subject to penalty under Section 7-1-69. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795 (inadvertent error constitutes civil negligence).

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds that gross receipts tax did not apply to the Freddie Mac and Fannie Mae receipts. Taxpayer did not consult with any tax professional, accountant, Department employee, statute, or regulation before deciding that no taxes were due on the Fannie Mae and Freddie Mac receipts. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty in this case. The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC, none of which are applicable to the facts of this protest. The Department's assessment of penalty and interest in this matter was appropriate and Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not overcome the presumption of correctness on the assessed penalty and interest under NMSA 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3 (X) (2013), Regulation 3.1.6.13 NMAC, and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

D. Under NMSA 1978, Section 7-1-67 (2007)'s mandatory "shall" lanuage, Taxpayer is liable for accrued interest under the assessment. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24.

E. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction and erroneous belief in not paying the assessed gross receipts tax met the definition of civil negligence under Regulation 3.1.11.10 NMAC. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795.

F. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds that would allow for abatement of penalty under Section 7-1-69 (2007).

G. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

For the foregoing reasons, the Taxpayers' protest **IS DENIED**. **IT IS ORDERED** that the Taxpayer is liable for the assessed penalty and interest totaling $554.58.

DATED: February 10, 2016.

Brian VanDenzen
Interim Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may being preparing the record proper.