**STATE OF NEW MEXICO**
**ADMINISTRATIVE HEARINGS OFFICE**
**TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF**
**CORE** **No. 17-03**
**TO THE ASSESSMENT ISSUED UNDER**
**LETTER ID NO. L1384973872**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 7, 2016 before Hearing Officer Ignacio V. Gallegos, Esq. The Taxation and Revenue Department (Department) was represented by Mr. Marek Grabowski, Staff Attorney. Mr. Nicholas Pacheco, Auditor, also appeared as a witness for the Department. Mr. Ted Krejdovsky, CPA for CORE (Taxpayer), appeared telephonically representing Taxpayer for the hearing, and as a witness. Mr. Mark Simmons, Chief Operating Officer and Chief Financial Officer for Taxpayer also appeared telephonically as witness for the Taxpayer. The Hearing Officer took notice of all documents in the administrative file. Taxpayer presented Exhibits 1.1, 1.2 and 2. The Department presented Exhibits A through H. The exhibits were admitted upon stipulation of parties. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On May 17, 2016, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax periods from March 31, 2010 through October 31, 2015. The assessment was for $81,827.86 tax, $9,294.97 interest, and $16,273.74 penalty.
2. On July 28, 2016, the Taxpayer filed a formal protest letter, received by the Department on August 1, 2016. The protest was timely.
3. On August 8, 2016, the Department acknowledged receipt of the formal protest.

4. On September 29, 2016 the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

5. On September 30, 2016, the Administrative Hearings Office issued a notice of hearing.

6. On October 27, 2016, a telephonic scheduling hearing was held. The parties agreed that the telephonic hearing satisfied the 90-day requirement of the statute.

7. On October 27, 2016, a scheduling order and notice was issued.

8. On November 8, 2016, the Administrative Hearings Office issued an Order Granting Stipulated Continuance and Amended Notice of Administrative Hearing.

9. On December 7, 2016 a hearing on the merits took place.

10. The Taxpayer is the Consortium on Reading Excellence Inc., or CORE.[1]

11. The Taxpayer was providing services in New Mexico during the tax periods.

12. The Taxpayer did not claim a deduction or an exemption applied.

13. Taxpayer is a company that provides educational services across the United States, and operates in approximately twenty states in any given year.

14. The Taxpayer filed Corporate Income Tax returns for its income in New Mexico.

15. The Taxpayer conceded that it owed gross receipts tax and interest, but disputed the penalty owed. The Taxpayer argued that some of the assessment was beyond the statute of limitations and that the penalty should be abated because Taxpayer was not given notice, therefore was unaware of New Mexico's unique gross receipts tax for services, and the non-payment was a result of non-negligence.

[1] Documents admitted into evidence also refer to the Taxpayer as "Consortium on Reaching Excellence." See Footnote 2.

16. Taxpayer claimed by reference to its correspondence with Alma Amador, Department's Auditor (Taxpayer's Exhibit 2) that it did business almost exclusively with Bureau of Indian Education schools, suggesting that doing business with such schools was somehow exempt. Taxpayer provided no evidence of tax-exempt transactions to support a finding that its transactions were somehow exempt or subject to deduction during the tax periods at issue.

17. Taxpayer's Chief Operating Officer and Chief Financial Officer Mark Simmons (COO/CFO) has a master's of science degree in Accounting and Finance.

18. Taxpayer outsourced payroll for New Mexico-based employees to another company, CTS, a corporate services provider, to handle the corporate filings with the New Mexico Secretary of State. Evidence presented did not support a finding that CTS filed reports of gross receipts during the contested tax periods. Evidence presented did not support a finding that CTS was a competent tax counsel or an accountant capable of providing tax advice.

19. Taxpayer engaged Bregante and Company, a company with many years of experience, to file corporate income taxes for federal and state income tax returns. The relationship was established before Mr. Krejdovsky (Taxpayer CPA) was hired with the company. Research into particular state taxation issues is not something that Bregante and Company does, and Taxpayer CPA was not contracted to do research into tax obligations for Taxpayer.

20. Taxpayer CPA uses a tax software called Lacerte in preparing Taxpayer's corporate tax filings, and this software is relied upon by Bregante and Company. The evidence

provided was not sufficient to find that the Lacerte software is a competent tax counsel or an accountant capable of giving advice.

21. At no time did Taxpayer inquire with or seek advice from the New Mexico taxing authority, a local tax professional, an out-of-state tax professional with knowledge of New Mexico tax laws, or its hired service providers to determine if Taxpayer was in compliance with New Mexico tax laws.

22. Taxpayer COO/CFO first acknowledged notice of a gross receipts tax due upon receipt of a letter, dated September 17, 2015 from Department Audit Supervisor Duane Spitzer (Taxpayer's Exhibit 1).

23. Taxpayer COO/CFO acknowledged that the Registration Certificate (Exhibit B), dated in 2008, would have been a document obtained by Taxpayer in 2008, and it refers to "Gross Receipts, County Gross Receipts, Municipal Gross Receipts, Compensating and Withholding Taxes." Taxpayer should have known of an obligation to review its tax filing requirements when it obtained the Registration Certificate in 2008.

24. Taxpayer COO/CFO did not recall receipt of the Registration Certificate (Exhibit C), dated 2010, on behalf of the Taxpayer.

25. Taxpayer COO/CFO acknowledged that the letter (Exhibit D) from Taxpayer's accounting manager, Daphne Simmons, was authentic and referenced the CRS number assigned to Taxpayer.[2]

26. Taxpayer COO/CFO acknowledged that he signed the Non-filer notice (Exhibit E), in 2014, with the same CRS number for Taxpayer, but believed it to be solely for Workers

[2] It should be noted that in the letter Exhibit D, the taxpayer name is "CORE" and "Consortium on Reaching Excellence" and in other documents it is named "Consortium on Reading Excellence, Inc." (Exhibit B, Exhibit C, Exhibit E, and Exhibit G). The decision herein applies to each of these variations of the Taxpayer's name.

Compensation fees. Taxpayer and Taxpayer COO/CFO should have known of an obligation to review its tax filing requirements when it received a Non-filer notice in 2014.

27. Taxpayer COO/CFO did not inquire with tax professionals at any time about the Non-filer notice (Exhibit E), since it appeared to him to be a simple form.

28. Taxpayer COO/CFO acknowledged that the Withholding Tax payment stub (Exhibit F) was unfamiliar to him, but did not doubt its authenticity because CTS was the company hired to file payroll taxes. CTS did not ever discuss the contents of the tax filing with COO/CFO.

29. Taxpayer COO/CFO testified that he never received a CRS-1 Filer's Kit, an example of the front page is Exhibit H.

30. Taxpayer COO/CFO and Taxpayer CPA testified credibly, and appeared genuinely unaware of the gross receipts tax requirements of New Mexico before September 17, 2015. Taxpayer did not act or omit action in order to avoid a tax.

31. Despite the genuine lack of awareness, the Taxpayer should have known to inquire about gross receipts tax obligations as early as its first CRS registration in 2008.

32. Department witness Nicholas Pacheco, protest auditor, testified that the CRS-1 Filing Kit is sent to every business registered with the Taxation and Revenue Department twice a year to the address on file with the Department. The Department does not keep records of those mailings. Evidence is sufficient to find that the Department sent CRS-1 Filing Kits during the contested timeframes to the Taxpayer.

33. Department witness Nicholas Pacheco testified that if a business non-filer has underreported gross receipts of 100%, the Department will audit and assess up to seven years of past due taxes.

34. The Taxpayer was a non-filer of gross receipts, therefore the underreported gross receipts was 100%. Evidence presented shows no gross receipts tax filings for the Taxpayer.

35. Department witness Nicholas Pacheco was unable to determine why the Taxpayer was not audited and assessed earlier than 2015.

36. The Department advised that it had not prepared an updated list of liabilities. Interest will accrue until the tax principal is paid.

## DISCUSSION

The issues to be decided are whether the Taxpayer is liable for the assessment of penalty, interest and tax during the reporting periods. Taxpayer raised the issue of whether the assessment was within the statute of limitations. Taxpayer conceded that it owed tax and interest, but later argued against imposition of tax, interest, and penalty.

**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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. 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.

**Gross receipts tax.**

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-4. Gross receipts tax applies to the total amount of money received from selling property or services. *See* NMSA 1978, § 7-9-3.5. It was undisputed that the Taxpayer was providing services. Therefore, the Taxpayer was subject to the gross receipts tax. The Taxpayer also conceded that it owed tax, but sought to have assessment limited to tax periods that were not beyond the statute of limitations, and sought to have penalties abated for non-negligence.

**Assessment of Penalty.**

The Taxpayer conceded its failure to pay its gross receipts taxes. The Taxpayer explained that it was not aware of the gross receipts tax on services, and believed that it is a tax unique to New Mexico. The Taxpayer explained that it was not trying to evade its taxes; it just was never brought to awareness of the tax.

Penalty "*shall* be added to the amount assessed" when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word "shall" indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are presumed to be correct and it is a taxpayer's burden to show that the assessment was not correct. *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070. It is a taxpayer's responsibility to make payments, whether they are done electronically or in another fashion. *See* NMSA 1978, § 7-1-13.1 (2005). Negligence includes inadvertence. *See* 3.1.11.10 (C) (2001). Under the statute and regulations, an honest mistake is tantamount to inadvertence, and is subject to penalty. *See id.*

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 when Taxpayer failed to report and pay CRS taxes. *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. That regulation establishes eight indicators of non-negligence where penalty may be abated. Based on the argument of Taxpayer and the evidence presented, only two factors under Regulation 3.1.11.11 NMAC are potentially pertinent in this proceeding:

> A. the taxpayer proves the taxpayer was affirmatively misled by a department employee;
> …
> D. the 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 the taxpayer's reliance on an agent;

Taxpayer asserted that it was never informed by the Department that it would be subject to gross receipts tax over the entire course of doing business in New Mexico, a colorable argument under 3.1.11.11 (A) NMAC. However, this regulation only applies to instances where a taxpayer is affirmatively misled by a Department employee, not simply uninformed. 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. It is the duty of Taxpayer to determine what CRS (Combined Reporting System) taxes need to be reported and paid. Unless a specific Department employee affirmatively told Taxpayer that the gross receipts taxes and withholding taxes were not due on the relevant CRS returns, which there is no evidence of in this protest, Taxpayer's own failings in developing an accurate tax reporting system does not abrogate Taxpayer of its responsibility to file and pay the tax nor does 3.1.11.11 (A) NMAC provide relief to Taxpayer.

The other factor potentially relevant in this case is found under Regulation 3.1.11.11 (D) NMAC, where civil negligence penalty may be abated if Taxpayer reasonably relied on the advice of competent tax counsel or accountant after full disclosure of all relevant facts. Here, the only evidence is that the accountants and companies the Taxpayer outsourced its responsibilities to did not inform Taxpayer that a gross receipts tax obligation existed. There is no evidence that the Taxpayer's outsourced agents, accountants, employees, or CPA were ever tasked with gathering information to ensure full compliance or that Taxpayer fully disclosed all relevant facts to those capable of giving advice. Given a taxpayer's duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of its actions, a taxpayer cannot "abdicate this responsibility [to learn of tax obligations] merely by appointing an accountant as its agent in tax matters." *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795.

Taxpayer next argued that the list found in NMAC 3.1.11.11 is not exclusive, citing the non-precedential decision of Kidz Karousel, Inc. d/b/a Children's Orchard, Decision and Order No. 01-15, and there should be a finding of non-negligence because the taxpayer was never made

aware of the obligation. The Hearing Officer in that Decision and Order determined that "the eight scenarios set out in 3.1.11.11 NMAC are only examples. There are many situations that will support a finding of nonnegligence. The ultimate question is whether a taxpayer has exercised ordinary business care and prudence with respect to its obligation to timely report and pay taxes." This is consistent with the Department's definition of negligence, NMAC 3.1.11.10 (A), which refers to the ordinary degree of prudence and business care. Nothing in the record indicates that Taxpayer exercised ordinary business care and prudence in determining its New Mexico tax obligations. Therefore, the Department's imposition of penalty was legally supported and properly assessed.

**Assessment of Interest.**

Through documents in the Administrative Record, and at the hearing, Taxpayer acknowledged that the underlying tax and interest was not at issue. However, in closing arguments, Taxpayer's representative requested that the interest assessed should be reduced. 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). Again, the word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

**Notice.**

Taxpayer, without reference to authority, contends that because Taxpayer was not informed by the State of New Mexico Taxation and Revenue Department of the obligation to submit CRS-1 forms and pay gross receipts tax on services provided in New Mexico, he should

be excused from the assessed penalty. NMSA 1978 Section 7-1-4.2 is the "New Mexico taxpayer bill of rights." Within that document are several enumerated rights afforded all New Mexico taxpayers. Among those rights is "A. the right to available public information and prompt and courteous tax assistance." There was no allegation or fact in evidence to support a finding that information about the state gross receipts tax was not publicly available. "[E]very 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.

**Statute of Limitations.**

Taxpayer contends that the assessment should have been made earlier, challenging the statute of limitations, and asserting that the late-received notice of the tax obligations has led to high interest and penalty. Again, the assessment bears the presumption of correctness. The Taxpayer presented no evidence to justify its position that the Department was under an obligation to limit the tax interest and penalty consequences to the Taxpayer. The reporting period at issue is March 31, 2010 through October 31, 2015. The Department initiated its assessment on May 17, 2016. NMSA 1978 § 7-1-18 allows the Department authority to assess taxes up to three years "from the end of the calendar year in which payment of the tax was due" with several enumerated exceptions extending that three-year limit. The Department applies the non-filer exception under NMSA 1978 § 7-1-18 (C): "In case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required may be assessed at any time within seven years from the end of the calendar year in which the tax was due." The Department's secondary position applies the exception under NMSA 1978 § 7-1-18 (D): "If a taxpayer in a return understates by more than twenty-five percent the amount of liability for any tax for the period to which the return relates, appropriate

assessments may be made by the department at any time within six years from the end of the calendar year in which payment of the tax was due."

Under both extended time limit scenarios, the assessment bears the presumption of correctness, and Taxpayer has not undercut the presumption with evidence that it did not understate its CRS-1 returns. Nevertheless, to exemplify, we apply the law to the oldest of the reporting periods assessed. The gross receipts tax period of March 31, 2010, under the quarterly filing frequency, would have come due by April 25, 2010, the end of which year is within the extended six-year (25% underreported) and seven-year (non-filer 100% underreported) limitations. The Department properly assessed the Taxpayer for the tax periods from March 31, 2010 through October 31, 2015 and the assessment dated May 17, 2016 was within the extended limits of the statute.

## CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the assessment of penalty issued under Letter ID number L1384973872, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was held within 90 days of the protest. *See* NMSA 1978, § 7-1B-8 (A) (2015).

C. The Taxpayer conceded that it owed gross receipts tax. *See* NMSA 1978, § 7-9-4.

D. The assessment was not beyond the statute of limitations. *See* NMSA 1978, § 7-1-18 (A) and (D).

E. The Taxpayer was properly assessed for penalty and interest. *See* NMSA 1978, § 7-1-67 and § 7-1-69.

F. The assessment is still outstanding as to $81,827.86 tax, $9,294.97 interest, and $16,273.74 penalty. Interest continues to accrue until the tax principal is paid.

G. Failure to pay the assessment will cause the Taxpayer to become a delinquent taxpayer under Section 7-1-16 NMSA 1978.

For the foregoing reasons, the Taxpayer's protest **is DENIED**. Taxpayer is ordered to pay the assessment of $81,827.86 gross receipts tax, $9,294.97 interest, and $16,273.74 penalty.

DATED: January 3, 2017.

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Ignacio V. Gallegos, Esq.
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

**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 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.