STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
AFFORDABLE CELLULAR **No. 17-16**
TO ASSESSMENT
ISSUED UNDER LETTER ID NO. L2089683504

DECISION AND ORDER

A protest hearing occurred in the above captioned matter on February 20, 2017 at 9:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Chanda Turley, appeared *pro se* for herself and Affordable Cellular ("Taxpayer"). Also appearing with the Taxpayer was her spouse, Brad Turley. Staff Attorney, Richard Pener, appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Milagros Bernadro, appeared as a witness for the Department. Taxpayer's Exhibit 1 and Department's Exhibits B through L were admitted into the record without objection, and are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 25, 2016, the Department assessed Taxpayer, Affordable Cellular, for the amounts of $60,600.48 in gross receipts tax, $12,120.10 in penalty, and $10,247.13 in interest for a total amount due of $82,967.71 under Letter ID No. L2089683504 for the reporting periods from January 1, 2009 through December 31, 2011. [Testimony of Ms. Bernardo; Dept. Ex. G].

2. On April 21, 2016, Taxpayer executed a Formal Protest which was received by the Department's Protest Office on April 28, 2016.

3. On May 5, 2016, the Department acknowledged the receipt of the Taxpayer's protest.

4. On June 16, 2016, the Department requested a hearing in the matter subject of the Taxpayer's protest.

5. On July 6, 2016, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference setting a telephonic scheduling hearing for July 22, 2016.

6. On July 22, 2016, a telephonic scheduling conference occurred in which the parties agreed that the hearing would satisfy the requirement that a hearing be held within 90 days of the Taxpayer's protest. The parties requested a second telephonic scheduling conference.

7. On July 25, 2016, the Administrative Hearings Office issued a Second Notice of Telephonic Scheduling Conference setting a telephonic scheduling hearing for November 17, 2016.

8. On August 8, 2016, counsel for the Department filed a Substitution of Counsel.

9. On September 29, 2016, the Administrative Hearings Office filed a Notice of Reassignment of Hearing Officer for Administrative Hearing reassigning the above-captioned protest to the undersigned Hearing Officer.

10. On October 3, 2016, counsel for the Department filed a Notice of Substitution of Counsel for Department.

11. On November 17, 2016, the parties participated in a telephonic scheduling conference and the Administrative Hearings Office entered a Notice of Administrative Hearing which set a hearing on the merits to occur on January 13, 2017.

12. On December 1, 2016, the Department filed a Certificate of Service indicating that the Taxpayer was served with the Department's First Set of Interrogatories and Requests for Production of Documents.

13. On December 15, 2016, the Administrative Hearings Office filed an Amended Notice of Administrative Hearing which moved the time of the hearing from 1 p.m. to 10 a.m. on January 13, 2017.

14. On January 6, 2017, the Department filed its Motion to Compel Discovery and its Motion for Continuance of Hearing of the Merits.

15. On January 11, 2017, the Administrative Hearings Office entered an Order on Motion to Compel and Motion for Continuance. The order required that Taxpayer respond to the outstanding discovery requests and continued the hearing on the merits to February 9, 2017.

16. Upon request of the Taxpayer, in consultation with counsel for the Department, the Administrative Hearings Office entered a Continuance Order and Amended Notice of Administrative Hearing on January 25, 2017. The hearing was continued to February 20, 2017.

17. During all relevant periods of time, Chanda Turley was doing business as Affordable Cellular. The objective of the business was to conduct indirect sales of goods and services on behalf of Cellco Partnership, DBA Verizon Wireless (Verizon) relating to cellular communications. [Dept. Ex. C; Testimony of Ms. Turley].

18. Taxpayer commenced conducting business in 1998. [Testimony of Ms. Turley].

19. Taxpayer purchased inventory for resale. Inventory included equipment and accessories. When Taxpayer made a sale, Taxpayer would collect gross receipts tax from the customer and remit those funds to the Department. [Testimony of Ms. Turley].

20. Taxpayer also sold services in the form of service agreements. Upon the sale of a service agreement, Verizon would compensate the Taxpayer in the form of non-employee compensation, also known as a commission. [Dept. Ex. C; Testimony of Ms. Turley].

21. On January 9, 2006, the Department issued a Notice of Limited Scope Audit indicating that Taxpayer would be subject to an audit for 2002 resulting from a Schedule C mismatch. [Testimony of Ms. Turley; Taxpayer Ex. 1].

22. The issue subject of the Notice of Limited Scope Audit was ultimately resolved to Taxpayer's satisfaction. On January 26, 2006, the Department issued a Notice of Limited Scope Audit Resolution. [Testimony of Ms. Turley; Dept. Ex. E].

23. Taxpayer did not recall any details beyond what was contained in the correspondence of January 26, 2006 [Dept. Ex. E]. She could not recall what information she provided to the Department to resolve the issue, and did not know why or on what facts the issue was ultimately resolved. [Testimony of Ms. Turley].

24. Taxpayer could not recall any conversations she had with any employee of the Department in reference to the issues subject of the Limited Scope Audit and its resolution in 2006. [Testimony of Ms. Turley].

25. Taxpayer retained the correspondence of January 26, 2006 [Dept. Ex. E] and continued conducting business in the same manner as previously operated. [Testimony of Ms. Turley].

26. Taxpayer did not consult with a tax professional regarding the taxability of the compensation Taxpayer received from Verizon. [Testimony of Ms. Turley].

27. A review of Department records did not indicate to Ms. Bernardo the basis for the resolution indicated in the correspondence of January 26, 2006 [Testimony of Ms. Bernardo; Dept. Ex. E; Taxpayer Ex. 1].

28. The Department has not issued any rulings directed to Taxpayer addressing the non-taxability of commissions from Verizon, nor are there any statutes or regulations providing that such commissions are non-taxable as gross receipts. [Testimony of Ms. Bernardo].

29. Taxpayer viewed the compensation from Verizon as income and indicated that the compensation was applied toward the operation of the business. She did not report such compensation to the Department as gross receipts for gross receipts tax purposes. [Testimony of Ms. Turley].

30. Taxpayer only paid gross receipts tax on the sale of goods. [Testimony of Ms. Turley].

31. The amount of compensation was reported by Verizon utilizing Form 1099-Misc with the amount for the given year indicated in Box 7 for "Nonemployee compensation". [Dept. Ex. C].

32. In 2010, Verizon reported non-employee compensation of $282,168.09. [Dept. Ex. C-00001]. In 2011, Verizon reported non-employee compensation of $266,105.43. [Dept. Ex. C-00002].

33. Taxpayer could not locate a Form 1099-Misc for 2009. However, non-employee compensation from Verizon would be included in the amount of $351,956.00 provided in Taxpayer's Schedule C for 2009. [Testimony of Ms. Turley; Dept. Ex. H-00003, Line 1].

34. Ms. Turley is presently employed as a manager for Affordable Cellular. Ms. Turley's ownership interest in the business concluded in 2012. [Testimony of Ms. Turley].

35. On September 12, 2015, the Department issued a Notice of Limited Scope Audit Commencement – 60 Day Notice. [Dept. Ex. F; Testimony of Ms. Turley]. The notice informed the Taxpayer of the Department's intentions to examine years 2009, 2010, and 2011 as a result of a Schedule C mismatch. [Testimony of Ms. Bernardo; Dept. Ex. F].

36. The source of the mismatch was identified as the non-employee compensation from Verizon that Taxpayer admitted she had not reported for gross receipts tax purposes. [Testimony of Ms. Bernardo].

37. The Notice of Limited Scope Audit Commencement – 60 Day Notice [Dept. Ex. F] was followed by the assessment giving rise to this protest. The Taxpayer acknowledged that she received the assessment. [Dept. Ex. G; Testimony of Ms. Turley].

38. As of the date of hearing, Taxpayer's asserted liability was $60,600.48 in gross receipts tax, $12,120.10 in penalty, and $12,523.06, for a total amount of $85,243.64. [Testimony of Ms. Bernardo; Dept. Ex. L].

DISCUSSION

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4. Gross receipts tax applies to the *total* amount of money received from selling property or services in New Mexico. *See* NMSA 1978, Section 7-9-3.5. In this protest, Taxpayer was engaged in selling goods and services in New Mexico. With respect to goods, Taxpayer sold equipment and accessories from its inventory, and as part of those transactions, collected a percentage of the sale as gross receipts tax and remitted it to the Department. Gross receipts taxes paid on receipts from the sale of goods is not in dispute in this protest.

With respect to non-employee compensation, or commissions, which Taxpayer received as compensation for acquiring service agreements on behalf of Verizon, the Taxpayer admitted that she did not view the compensation as receipts for gross receipts tax purposes. Instead, the Taxpayer viewed the compensation as income from Verizon. Despite Taxpayer's reference to income, Taxpayer did not assert that Taxpayer was employed by Verizon. Accordingly, the primary issue is whether or not the exclusion of such receipts for gross receipts tax purposes was permissible under law.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of tax issued in this case are presumed correct. 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). Taxpayers have the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

If Taxpayer asserts entitlement to an exemption or deduction, then the burden is on the Taxpayer to prove the entitlement to the asserted exemption or deduction. *See Public Service Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation*

and Revenue Dep't., 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

Gross Receipts Tax on Commissions

It was undisputed that the Taxpayer benefited from two primary streams of receipts. The first source was the sale of inventory or goods, also known as tangible property. The second source were the commissions that Verizon paid for the service agreement that the Taxpayer acquired on its behalf. In this protest, Taxpayer paid gross receipts taxes on the first source deriving from the sale of tangible property, but not on the second which were commissions from Verizon. However, as previously stated, gross receipts tax applies to the *total* amount of money received from selling property or services in New Mexico. *See* NMSA 1978, Section 7-9-3.5. For the purpose of the Gross Receipts and Compensating Tax Act, "gross receipts" includes the total commissions or fees derived from selling services. *See* NMSA 1978, Section 7-9-3.5 (A) (2) (b). In this protest, the service for which the Taxpayer was being compensated by commission was the service of procuring service agreements on behalf the Verizon.

Given the presumption of taxability in NMSA 1978, Section 7-9-5 that all receipts of a person engaging in business are subject to gross receipts tax, the Taxpayer carries the burden of demonstrating the application of an exemption or deduction to the commissions received from Verizon. In this protest, the Taxpayer did not identify any potentially applicable exemptions or deductions in the Gross Receipts and Compensating Tax Act.

Despite Taxpayer's lack of reliance on or reference to any specific exemption or deduction in the Gross Receipts and Compensating Tax Act, the Hearing Officer will briefly address some provisions which were considered but which were determined to be inapplicable in this protest.

NMSA 1978, Section 7-9-66 provides that the commissions from sales of tangible personal property may be deducted in specific circumstances. The evidence in this case established that the sole issue concerned the payment of gross receipts taxes on commissions deriving from the sale of services on behalf of Verizon, a third party. The commissions in this case did not arise from the sale of tangible property. At best, the services for which the Taxpayer was compensated might be considered to fall within the sale of intangible property.

The United States Supreme Court has described "intangible property" as "rights which are not related to physical things[,]" but "relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights." *See Curry v. McCanless*, 307 U.S. 357, 365 – 366 (1939).

The service agreements subject of this protest are intangible property consistent with *Curry*. They represent the legally enforceable agreement of the customer to pay money to Verizon in exchange for its agreement to provide services.

Accordingly, Regulation 3.2.225.8 (A) NMAC, which implements Section 7-9-66, provides that the receipts derived from commissions on sales of intangible property are not deductible under Section 7-9-66. Consequently, Section 7-9-66 does not apply or entitle the Taxpayer to deduction under the facts of this protest.

The Hearing Officer also considered the potential application of NMSA 1978, Section 7-9-38.1 which exempts receipts from the sale or provision of interstate telecommunications services subject of the Interstate Telecommunication Gross Receipts Tax Act. *See* NMSA 1978 Section 7-

9C-1 *et. seq*. However, the evidence did not establish that the Taxpayer provided an interstate telecommunications service as that term is defined at NMSA 1978, Section 7-9C-2.

The Hearing Officer made the same determination in reference to the potential application of NMSA 1978, Section 7-9-38.2 which exempts receipts from the sale or provision of certain telecommunications service. However, the evidence did not establish that the Taxpayer provided "mobile telecommunications services" or that she was a "home service provider" as those terms are defined at NMSA 1978, Section 7-9C-38.2 and 4 U.S.C. Section 124 of the federal Mobile Telecommunications Sourcing Act.

The Hearing Officer made the same determination in reference to the potential application of NMSA 1978, Section 7-9-48 which establishes a deduction for the sale of services for resale upon delivery of a nontaxable transaction certification. However, the evidence did not establish that the Taxpayer provided a service for resale or that she was the recipient of a nontaxable transaction certification for any of the transactions for which a commission was derived.

For the reasons stated, the commissions paid to Taxpayer by Verizon were taxable as gross receipts and were not subject of any statutory deduction or exemption. Accordingly, the Taxpayer is liable for the amounts reflected in the assessment as updated in Dept. Ex. L.

Statutory and Equitable Estoppel

The Taxpayer's testimony and arguments were interpreted as asserting that the Department should be estopped from assessing Taxpayer because of the manner in which Taxpayer's 2006 Limited Scope Audit was resolved. On January 9, 2006, the Department issued a Notice of Limited Scope Audit Commencement – 60 Day Notice. The issue identified in that notice concluded with the Notice of Limited Scope Audit Resolution dated January 26, 2006. Despite the inability of Taxpayer to recall the circumstances underlying the 2006 limited scope

audit and resolution, Taxpayer nevertheless asserted her impression that she was reporting and paying her gross receipts taxes correctly. Therefore, her impression was that she could continue conducting her business as she had done previously. Consequently, the Taxpayer essentially suggests that she relied on the Department's silence as acquiescence with the manner in which she was reporting her gross receipts tax obligation, rather than relying on any express communications by the Department.

NMSA 1978, Section 7-1-60 (1993) provides for statutory estoppel in certain circumstances. In pertinent part, under Section 7-1-60, the Department is estopped from acting when a taxpayer's actions were "in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary…" The evidence presented in this protest did not establish that the Taxpayer's actions, at the time the various transactions occurred, were in accordance with any regulation effective during the time the asserted liability arose or in accordance with any ruling addressed to Taxpayer personally in writing by the secretary. To the extent the Taxpayer asserted reliance on the correspondence indicating resolution of 2006 limited scope audit, that letter was insufficient to qualify as a basis for statutory estoppel. The correspondence merely states that "[b]ased on [the Department's] analysis of the information you have provided regarding your Notice of Limited Scope Audit Commencement – Schedule C Gross Receipts for tax year 2002, no further action will be taken by [the Department] regarding this matter."

Taxpayer could not recall what information was provided to the Department, which was referenced in the letter, or the substance of any other communications had with anyone from the Department during that period regarding that particular issue.

Taxpayer's argument may also be construed as asserting a claim for equitable estoppel. However, the availability of equitable estoppel for providing the relief the Taxpayer seeks is questionable in an administrative protest hearing. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 1994-NMSC-085, ¶18, 118 N.M. 273 (equitable remedies are not part of the "quasi-judicial" powers of administrative agencies). Even if it is available in this context, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving the assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr., Inc.*, 1989-NMSC-015, ¶9, 108 N.M. 22. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Bien Mur Indian Market*, ¶9. Oral statements not reduced to writing are generally not grounds to grant equitable estoppel. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440. Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

Under *Kilmer*, ¶26 (internal citations omitted), in order for a taxpayer to establish an equitable estoppel claim against the Department, a taxpayer must show that

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury.

The claimant must also show "affirmative misconduct on the part of the government." *id*., ¶27 (internal citations omitted). There is simply no evidence to suggest affirmative misconduct by any employee of the Department with whom the Taxpayer may have communicated at any time relevant to this protest.

Employee Versus Non-Employee Compensation

Although Ms. Turley does not expressly claim that she was an employee of Verizon, her perception that the receipts she received from Verizon in the form of commissions were "income" warrants a brief discussion of employee compensation versus non-employee compensation. The distinction is relevant because receipts from employment in the form of wages, salaries, and commissions are exempt from gross receipts tax under NMSA 1978, Section 7-9-17.

The Department has recognized several factors to consider when evaluating whether a person is an employee or independent contractor. *See* 3.2.105.7 (A) NMAC (2001). Four of the factors deal with: (1) whether the employer should be withholding tax from the pay; (2) whether the employer should be paying FICA; (3) whether the employer should cover the employee under workman's compensation; and (4) whether the employer should be paying unemployment insurance. *See* 3.2.105.7 (A) (2) (3) (4) (5). There was no indication that Verizon was doing any of the foregoing.

Another factor is whether the person was paid a wage or salary. *See* 3.2.105.7 (A) (1). The evidence established that the Taxpayer would be compensated for each service agreement it procured on behalf of Verizon. The Taxpayer, although describing the payment as "income" admitted that the payment could also be correctly characterized as a commission.

Another factor is whether Verizon considered the person to be an employee. *See* 3.2.105.7 (A) (6). Verizon's use of 1099s is an indication that it was treating the Taxpayer as an independent contractor rather than an employee. The payment is clearly categorized as non-employee compensation.

The final factor is whether the employer had a right to exercise control over the means of accomplishing a result or only over the result. *See* 3.2.105.7 (A) (7). The evidence did not

suggest whether Verizon exercised any control over either. Based upon the totality of the evidence, there is not sufficient proof that the Taxpayer was an employee rather than an independent contractor. Consequently, the Taxpayer is not entitled to the exemption provided in NMSA 1978, Section 7-9-17 for the receipts of employees.

Interest and Penalty

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, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayers from the time the tax was due but not paid until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and the Department is without legal authority to abate it.

With concern for 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).

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence" even if, like here, Taxpayer's actions or inactions were unintentional.

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, Taxpayers were negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC because of Taxpayer's inaction in failing to pay gross receipts tax when due resulting from their erroneous belief that the income derived from commission did not give rise to gross receipts tax obligations.

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." Further, in relevant part to this protest, Regulation 3.1.11.11 NMAC establishes several examples of non-negligence in which penalty may be abated. Taxpayer's arguments suggest the application of Regulation 3.1.11.11 (A) NMAC which is applicable when "the taxpayer proves the taxpayer was affirmatively misled by a department employee[.]" In this case, as discussed previously, there is simply no evidence on which to make such a finding.

Another potentially applicable indicator of non-negligence allows for abatement of penalty when a "taxpayer proves that the failure to pay a tax… 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." Black's Law Dictionary, 22 (9th ed. 2009), defines "accountant" as "a person

authorized under applicable law to practice public accounting." In this case, even after being subject to a Limited Scope Audit in 2006, the Taxpayer admitted that Taxpayer did not consult with a tax professional regarding the taxability of the compensation Taxpayer received from Verizon.

Since Taxpayer did not present any evidence to establish non-negligence under Regulation 3.1.11.11 NMAC, there is no basis for the abatement of penalty.

Moreover, Taxpayer did not demonstrate a mistake of law in good faith and on reasonable grounds under Section 7-1-69 (B). *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).

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.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. Rather, Taxpayer's inaction was the result of inadvertence, erroneous belief, or inattention. Nevertheless, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 NMAC does not provide grounds for abatement of the penalty in this case. Therefore, Taxpayer has not overcome the presumption of correctness and failed to establish that they are entitled to an abatement of penalty in this matter.

Based on the foregoing, the Taxpayer's protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely written protest to the assessment issued under Letter ID No. L2089683504 and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing conducted on July 22, 2016 satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015).

C. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayers' burden to come forward with evidence and legal argument to establish that they were entitled to an abatement.

D. Under Section 7-1-67, Taxpayers are liable for interest under the assessments.

E. Taxpayers were negligent in failing to report gross receipts and pay gross receipts taxes when due for the tax years covered by the assessments. Consequently, the assessment of penalty was proper.

F. The Taxpayers failed to establish non-negligence under 3.1.11.11 (D) NMAC and *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795; therefore, penalty was properly assessed.

G. As of the date of hearing, the outstanding amounts in protest were $60,600.48 in gross receipts tax, $12,120.10 in penalty, and $12,523.06, for a total amount of $85,243.64.

For the foregoing reasons, Taxpayers' protest **IS DENIED.**

DATED: March 29, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office 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. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.