

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

**IN THE MATTER OF THE PROTEST OF
CHAMISA HILLS FAMILY DENTAL
TO ASSESSMENTS
ISSUED UNDER LETTERS
ID NOS. L1561627952, L1024757040, L2098498864 and L0051678512**

v.

D&O No. 18-04

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned protest on December 20, 2017 at 2:00 p.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Ms. Valerie Borrego, C.P.A., appeared representing Chamisa Hills Family Dental (“Taxpayer”). Ms. Sandra Candelaria appeared as a witness for Taxpayer. Staff Attorney, Ms. Cordelia Friedman, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor, Ms. Veronica Galewaler, appeared as a witness for the Department. Taxpayer Exhibits 1-0-2, 1-1 to 1-21, 2-1 to 2-3, 3-1 to 3-3, 4, and Department Exhibits A to C and E to I were admitted into the evidentiary record, and are described in the Administrative Exhibit Log. Taxpayer Exhibits 1-0-1, 5, 6-2 to 6-5, and 7 were not admitted into the evidentiary record, but were accepted as part of the record of the hearing.

With specific regard for Taxpayer Exhibit 7, the parties stipulated that the record of the hearing and the evidentiary record would remain open for Taxpayer’s submission of an audio recording. The audio recording was received by the Administrative Hearings Office on December 27, 2017 at which time the record closed. The recording was identified as Taxpayer

Exhibit 7. The Hearing Officer reviewed Taxpayer Exhibit 7 in its entirety and found that it was not relevant to the issues at hand and excluded it from the evidentiary record.

Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 17, 2017, the Department assessed Taxpayer the amounts of \$209.99 in gross receipts tax penalty, \$0.07 in gross receipts tax interest, \$92.80 in withholding tax penalty, and \$0.03 in withholding tax interest for a total assessment and amount due of \$302.89 under Letter ID No. L1561627952 for the reporting period ending March 31, 2016.

2. On August 17, 2017, the Department assessed Taxpayer the amounts of \$19.12 in gross receipts tax, \$642.47 in gross receipts tax penalty, \$0.80 in gross receipts tax interest, \$14.54 in withholding tax, \$488.75 in withholding tax penalty, and \$0.61 in withholding tax interest for a total assessment and amount due of \$1,166.29 under Letter ID No. L1024757040 for the reporting period ending June 30, 2016.

3. On August 17, 2017, the Department assessed Taxpayer the amounts of \$589.60 in gross receipts tax, \$628.00 in gross receipts tax penalty, \$18.70 in gross receipts tax interest, \$308.01 in withholding tax, \$328.09 in withholding tax penalty, and \$9.72 in withholding tax interest for a total assessment and amount due of \$1,882.17 under Letter ID No. L2098498864 for the reporting period ending September 30, 2016.

4. On August 17, 2017, the Department assessed Taxpayer the amounts of \$1,560.25 in gross receipts tax, \$574.00 in gross receipts tax penalty, \$33.85 in gross receipts tax interest, \$1,588.94 in withholding tax, \$584.57 in withholding tax penalty, and \$34.46 in withholding tax

interest for a total assessment and amount due of \$4,376.07 under Letter ID No. L0051678512 for the reporting period ending December 31, 2016.

5. On August 23, 2017, Taxpayer, by and through Ms. Borrego, C.P.A., executed a Formal Protest of the assessments which was received in the Department's Protest Office on August 28, 2017.

6. The Department acknowledged Taxpayer's Formal Protest on September 18, 2017 under Letter ID No. L2087402800.

7. On October 25, 2017, the Department filed a Hearing Request with the Administrative Hearings Office.

8. The Administrative Hearings Office entered and served a Notice of Administrative Hearing on October 26, 2017 setting a hearing on the merits of Taxpayer's protest for November 14, 2017.

9. Taxpayer failed to appear for the properly noticed hearing on November 14, 2017. The Administrative Hearings Office entered a Decision and Order which denied Taxpayer's protest for that reason.

10. The hearing of November 14, 2017, for which Taxpayer did not appear either in person or through an authorized representative, was held within 90 days of Taxpayer's protest.

11. On November 20, 2017, Taxpayer, by and through Ms. Borrego, requested that the Decision and Order denying Taxpayer's protest for its failure to appear be set aside. The Department did not oppose the request.

12. On November 29, 2017, the Administrative Hearings Office entered and served its Order Setting Aside Decision and Order and Notice of Administrative Hearing. A hearing on the merits of Taxpayer's protest was scheduled to occur on December 20, 2017.

13. In or about May of 2016, Dr. John Candelaria purchased a dental practice from Dr. Frank Montoya. [Testimony of Ms. Candelaria].

14. The practice is known as Chamisa Hills Family Dental. [Testimony of Ms. Candelaria].

15. Dr. Candelaria and Ms. Candelaria are married. [Testimony of Ms. Candelaria].

16. The office manager¹ (hereinafter "Manager") under the previous owner was highly regarded and recommended to Taxpayer, which continued to employ her in the same capacity. [Testimony of Ms. Candelaria].

17. Manager was responsible for Taxpayer's daily business operations, which among other tasks, included reporting and paying withholding and gross receipts taxes. [Testimony of Ms. Candelaria].

18. Taxpayer did not require Manager to complete any training or instructional programs in reference to New Mexico tax reporting or payment requirements during her employment. [Testimony of Ms. Candelaria].

19. Taxpayer also utilized the services of a certified public accountant whose functions were limited to compiling CRS-1 information that Manager would then reference in order to complete CRS-1 reports and payments to the Department. [Testimony of Ms. Candelaria; Taxpayer Ex. 2].

¹ Taxpayer identified its office manager by name on the record of this proceeding. It is unnecessary, however, for the purpose of this Decision and Order, to identify or otherwise refer to Manager by name.

20. Taxpayer's certified public accountant was not responsible for making CRS-1 reports or accompanying payments on behalf of Taxpayer. Those tasks were delegated solely to Manager. [Testimony of Ms. Candelaria].

21. In or about May of 2017, Taxpayer identified various concerns in Manager's job performance. Ms. Candelaria alleged that Manager was not performing her employment responsibilities, and upon being confronted, Manager resigned. [Testimony of Ms. Candelaria].

22. After Manager resigned, Ms. Candelaria assumed office management functions for Taxpayer. [Testimony of Ms. Candelaria].

23. Taxpayer identified various deficiencies in Manager's job performance. Among the various deficiencies alleged were thousands of dollars in unpaid and delinquent bills owed by Taxpayer, failure to distribute statements for collecting payments for services rendered, discrepancies in time sheets for hours worked and leave taken, and failure to timely report and pay withholding and gross receipts taxes. [Testimony of Ms. Candelaria].

24. Taxpayer denied having notice of any issues in reference to its CRS reporting or payments until it received the Non-Filer Reminder dated May 18, 2017 under Letter ID No. L0125900080. [Testimony of Ms. Candelaria; Taxpayer Ex. 6-1; Dept. Ex. H].

25. The Non-Filer Reminder on May 18, 2017 represented the fourth notice the Department sent to Taxpayer. Each notice was sent by U.S. Mail and were also available through the Taxpayer Access Point (hereinafter "TAP"). The Non-Filer notices were dated June 9, 2016, September 15, 2016, September 24, 2016, and May 18, 2017. [Testimony of Ms. Galewaler, Dept. Exs. E; F; G; H; Taxpayer Ex. 6-1].

26. At or near the time Manager resigned, Taxpayer discovered numerous pieces of unopened mail. Manager had been solely responsible for handling Taxpayer's mail. [Testimony of Ms. Candelaria].

27. In addition to the notices provided by U.S. Mail, Taxpayer also received electronic notice through the TAP. Taxpayer should have observed an alert which would have directed it to the correspondence which was available in electronic form. [Testimony of Ms. Galewaler; Dept. Ex. C].

28. Any electronic correspondence in reference to Taxpayer's New Mexico tax reporting would have also been routed to Manager. [Testimony of Ms. Candelaria].

29. Taxpayer's CRS returns were untimely for all relevant reporting periods. All returns were submitted on July 27, 2017 and after the dates they were originally due. [Testimony of Ms. Galewaler; Dept. Ex. A].

30. Payments applied to the periods ending June 30, 2016, September 30, 2016, and December 31, 2016 were less than what was due for each period causing Taxpayer to incur penalties and interest. [Testimony of Ms. Galewaler; Dept. Ex. A; Taxpayer Ex. 1].

31. Taxpayer's payments for the period ending June 30, 2016 totaled \$5,622.46. The amount of tax principal due for the same period was \$5,656.12. The difference represented an underpayment in the total amount of \$33.66 that correlated with the total amount of tax assessed under Letter ID No. L1024757040. [Testimony of Ms. Galewaler; Taxpayer Ex. 1-1 to 1-3; Dept. Ex. A-2].

32. Taxpayer's payments for the period ending September 30, 2016 totaled \$3,883.10. The amount of tax principal due for the same period was \$4,780.21. The difference represented

an underpayment in the total amount of \$897.61 that correlated with the total amount of tax assessed under Letter ID No. L2098498864. [Testimony of Ms. Galewaler; Taxpayer Ex. 1-1; 1-5 to 1-7; Dept. Ex. A-3].

33. Taxpayer's payments for the period ending December 31, 2016 totaled \$5,126.16. The amount of tax principal due for the same period was \$8,275.35. The difference represented an underpayment in the total amount of \$3,149.19 that correlated with the total amount of tax assessed under Letter ID No. L0051678512. [Testimony of Ms. Galewaler; Taxpayer Ex. 1-1; 1-8 to 1-10; Dept. Ex. A-4].

34. In circumstances where Taxpayer made partial payment before the date it was due, the Department was unable to credit the payment appropriately because it was not accompanied by a proper tax return. Instead, the payment was held in suspense pending the return necessary to enable complete processing. [Testimony of Ms. Galewaler; Taxpayer Ex. B].

35. As of December 20, 2017, Taxpayer's liability under the assessments was \$3,558.88, although the sum due was expected to change depending on a credit balance that was pending on Taxpayer's account as of the date of the hearing. [Testimony of Ms. Galewaler; Dept. Ex. I].

36. Although Manager was highly recommended to Taxpayer, there was no evidence to establish that Manager had any expertise in tax accounting or was otherwise a competent tax accountant. [Testimony of Ms. Candelaria].

DISCUSSION

Taxpayer did not protest the gross receipts and withholding tax principal due under the assessments. Rather, Taxpayer's protest is directed at the imposition of associated penalty and

interest. Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Taxpayer has the burden to overcome the assessments. *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, Section 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

When a taxpayer fails to make timely or correct 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, Section 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 Taxpayer 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.

Taxpayer asserted that it had made timely partial payments despite the fact that the payments had not been accompanied by associated tax returns. However, the evidence established that even if partial payments were made in advance of the applicable due dates, the Department was unable to credit the funds appropriately unless Taxpayer also filed an associated return. Instead, the payments were held in suspense until Taxpayer filed its returns on July 27, 2017.

The evidence also established that those payments did not completely satisfy the amount of tax due. Ms. Galewaler credibly testified that in addition to Taxpayer's failure to file timely reports, Taxpayer also underpaid its tax obligation for each of the reporting periods subject of the protest. [See Taxpayer Ex. 1-1; Dept. Ex. A]. Assessment of interest is mandatory.

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, Taxpayers 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, Taxpayer was negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC because it failed to exercise reasonable precautions or utilize appropriate internal controls that could have enabled it to perceive irregularities with its tax reporting and payments. Understandably, Taxpayer expressed regret for placing so much confidence in Manager. Unfortunately, its omissions demonstrate an inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention resulting in a failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, as Taxpayer does in the present matter, 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.” Regulation 3.1.11.11 (D) NMAC which implements Section 7-1-69 (B) goes on to permit an abatement of penalty when “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[.]” Black’s Law Dictionary, 22 (9th ed. 2009), defines “accountant” as “a person authorized under applicable law to practice public accounting.”

Taxpayer in the present matter relied on a certified public accountant to compile the information that Taxpayer would utilize to complete its CRS-1 reports and payments. However, Taxpayer reserved the responsibility of filing and making payments for itself, and delegated the responsibility to Manager. There was no evidence that Manager was a competent accountant as that term is utilized in Regulation 3.1.11.11 (D) NMAC, nor was there any evidence to suggest that Taxpayer reasonably relied on the advice of its certified public accountant or Manager in underpaying its tax obligations.

Even if there was some scintilla of evidence to support a finding of reasonable reliance on the advice of competent tax counsel or accountant, the second portion of the cited regulation would nevertheless preclude abatement because failure to make a timely filing of a tax return is not excused by Taxpayer's reliance on an agent. *Id.* The evidence established that returns for every period at issue were filed late, in addition to establishing that the amounts paid for those periods were less than the amounts that were due.

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. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Generally, a taxpayer cannot "abdicate this responsibility merely by appointing an accountant as its agent in tax matters." *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795.

The Department did not allege that Taxpayer's inaction was with the intent to evade or defeat a tax and the Hearing Officer was persuaded that Taxpayer's conduct was not in bad faith or with bad intentions. However, *El Centro Villa Nursing* established that the civil negligence

penalty is appropriate in these circumstances and Regulation 3.1.11.11 (D) 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 it is entitled to an abatement of penalty and interest in this matter. For the foregoing reasons, Taxpayer's protest is **DENIED**.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessments issued under Letter ID Nos. L1561627952, L1024757040, L2098498864 and L0051678512 and jurisdiction lies over the parties and the subject matter of this protest.

B. Despite Taxpayer's failure to appear, the hearing on the merits conducted on November 14, 2017 met the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015). The Administrative Hearings Office promptly reset the hearing for December 20, 2017 upon the unopposed motion of the Taxpayer recognizing that decisions on the merits of a case are favored.

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

D. Under Section 7-1-67, Taxpayer is liable for interest under the assessments.

E. Taxpayer was negligent in failing to timely report and accurately pay gross receipts and withholding taxes when due for the tax periods covered by the assessments. Consequently, the assessment of penalty was proper under NMSA 1978, Section 7-1-69.

F. Taxpayer failed to establish non-negligence under 3.1.11.11 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 December 20, 2017, Taxpayer's liability under the assessments was \$3,558.88, although the sum due was expected to change depending on a credit balance that was pending on Taxpayer's account as of the date of the hearing.

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

IT IS ORDERED that Taxpayer is liable for the assessed penalty and interest. The Department is further ordered to provide Taxpayer an updated summary of outstanding penalty and interest as Department Ex. I represented an estimate of what was due as of the date of the hearing and was subject to change due to a pending credit which had not yet been applied.

DATED: January 24, 2018



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 timely 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 proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On January ____, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner: