

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

**IN THE MATTER OF THE PROTEST OF
GUGLIELMO & ASSOCIATES PLLC
TO THE ASSESSMENT ISSUED ON JANUARY 5, 2018**

AHO Case No. 18.03-052P

v.

D&O No. #18-18

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on May 16, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Ms. Eliza A. Guglielmo, Esq., appeared by video conference and telephone for Guglielmo & Associates PLLC (Taxpayer). Staff attorney, Mr. Peter Breen, 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 and 2 were admitted into the record without objection. The Department proffered Exhibits B and C of which only Exhibit C was admitted without objection. Exhibit B was excluded from the evidentiary record upon Taxpayer's objection because it was not previously disclosed as an exhibit prior to the hearing. Despite its exclusion from the evidentiary record, Exhibit B was accepted as part of the record of the hearing. All exhibits are more fully 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 January 5, 2018, the Department's Unclaimed Property Office issued an assessment asserting liability for penalty in the amount of \$4,900.00, and interest in the amount of \$4.21, arising from the failure to report, pay or deliver property within the time prescribed by the Uniform Unclaimed Property Act. The total assessment was \$4,904.21. [See Administrative File].

2. The purported value of the property subject of the underlying report and resulting assessment was \$783.48. [See Administrative File].

3. On January 29, 2018, Taxpayer submitted a protest of the assessment. The protest was received in the Department's Protest Office on February 2, 2018. [See Administrative File].

4. On February 7, 2018, the Department acknowledged Taxpayer's protest. [See Administrative File].

5. On March 9, 2018, the Department submitted a Hearing Request to the Administrative Hearings Office in which it requested a hearing on the merits of Taxpayer's protest. [See Administrative File].

6. On March 12, 2018, the Administrative Hearings Office issued a Notice of Administrative Hearing that set a hearing on the merits of Taxpayer's protest for April 2, 2018. [See Administrative File].

7. On March 26, 2018, Taxpayer submitted a request to appear at the hearing on the merits by videoconference. [See Administrative File].

8. On March 27, 2018, the Department filed a Motion for Continuance. [See Administrative File].

9. On March 29, 2018, Taxpayer waived the 90-day hearing requirement under NMSA 1978, Section 7-1B-8 (2015). [See Administrative File].

10. On April 2, 2018, the Administrative Hearings Office entered a Continuance Order and Amended Notice of Administrative Hearing setting a hearing on the merits of Taxpayer's protest to occur on May 16, 2018. [See Administrative File].

11. On April 26, 2018, Taxpayer filed an unopposed Motion for Plaintiff [sic] to Appear Via Video Conference. [See Administrative File].

12. On May 3, 2018, the Administrative Hearings Office entered an Order Granting Motion for [Taxpayer] to Appear Via Video Conference. [See Administrative File].

13. On May 4, 2018, Taxpayer filed Taxpayer's Argument to Waive Penalty and attached Taxpayer Exhibits 1 and 2. [See Administrative File].

14. Taxpayer is a creditor rights law firm engaging in debt collection activities in five western states, including New Mexico. Taxpayer is based in Tucson, Arizona. [Testimony of Ms. Guglielmo].

15. Taxpayer receives payments of funds from various sources each month that are deposited and maintained in a trust account consistent with the requirements imposed on law firms for the maintenance of third-party funds. [Testimony of Ms. Guglielmo].

16. In its regular course of business, Taxpayer received funds from sources that amounted to overpayments of funds due and owing. [Testimony of Ms. Guglielmo].

17. Accordingly, parties making such overpayments were entitled to refunds in the amounts overpaid. [Testimony of Ms. Guglielmo].

18. In some situations, funds could not be refunded because the remitter of such funds could not be located or because negotiable instruments issued to remitters were never negotiated. [Testimony of Ms. Guglielmo].

19. As such, Taxpayer maintained property that, as of the date relevant to the assessment, was unclaimed. [Testimony of Ms. Guglielmo].

20. On December 14, 2017, Taxpayer prepared a New Mexico Report of Unclaimed Property indicating a total remittance of \$783.48. [Testimony of Ms. Guglielmo; *See* Taxpayer Ex. 1].

21. The report was due on or before November 1, 2017. [Testimony of Ms. Galewaler; *See* NMSA 1978, Section 7-8A-7].

22. The report was made to the Department 49 days late. [*See* Assessment of January 5, 2018].

23. The lateness of the report occurred as a result of sudden and unanticipated employee turnover in Taxpayer's accounting staff. [Testimony of Ms. Guglielmo].

24. Taxpayer could not recall the specific dates that individual members of its accounting staff resigned and left Taxpayer's employment. Some resignations could have been received significantly prior to or after the November 1, 2017 deadline. [Testimony of Ms. Guglielmo].

25. Taxpayer discovered that it missed the deadline for filing the Report of Unclaimed Property after reviewing the calendar of at least one of the departed employees. [Testimony of Ms. Guglielmo].

26. Although Taxpayer's accounting staff was severely depleted or perhaps entirely departed, all calendared deadlines were accessible to Taxpayer, although any individual

requiring access to the calendar would be required to access the calendar with assistance from Taxpayer's information technology personnel. [Testimony of Ms. Guglielmo].

27. At no time under the circumstances did Taxpayer experience more than 24 to 48 hours of inaccessibility to the relevant calendar. [Testimony of Ms. Guglielmo].

28. Taxpayer took immediate action to remediate the loss of its accounting staff, but incurred various impediments resulting from the loss of accounting experience. [Testimony of Ms. Guglielmo].

29. Taxpayer does not dispute the untimeliness of its report, but denies it was negligent in failing to make a timely Report of Unclaimed Property. [Testimony of Ms. Guglielmo].

30. Taxpayer seeks that penalty be abated because it acted in good faith without negligence. [Testimony of Ms. Guglielmo].

31. As a result of the incident giving rise to the assessment, Taxpayer has employed new procedures. [Testimony of Ms. Guglielmo].

32. Taxpayer incurred one incident in 2014 in which it submitted a late Report of Unclaimed Property. However, the Department did not assess a penalty. [Testimony of Ms. Guglielmo; Testimony of Ms. Galewaler; *See Taxpayer's Argument to Waive Penalty*].

33. Penalty may not have been assessed in 2014 as a result of then-existing resources. Current resources enable the Department to assess penalty on a more consistent basis. [Testimony of Ms. Galewaler].

DISCUSSION

The solitary issue in this protest is whether Taxpayer is entitled to an abatement of assessed penalty resulting from its failure to timely file a New Mexico Report of Unclaimed Property. Taxpayer does not dispute the untimeliness of the filing, but asserts that abatement of penalty is appropriate because Taxpayer was not negligent and because Taxpayer has a history of timely filings.

Burden of Proof

Under NMSA 1978, Section 7-1-17 (C), 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, Section 7-1-3 (X). 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-050, ¶16, 139 N.M. 498, 134 P.3d 785 (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, 504 P.2d 638.

Assessment of Penalty

Taxpayer conceded its failure to make a timely report under NMSA 1978, Section 7-8A-7, but asserts that penalty should be abated because it acted in good faith and without negligence. Taxpayer relies on the following emphasized portions of the Uniform Unclaimed Property Act:

7-8A-24. Interest and penalties.

...

(b) Except as otherwise provided in Subsection (c) of this section, a holder who fails to report, pay or deliver property within the time prescribed by the Uniform Unclaimed Property Act (1995), or fails to perform other duties imposed by that act, shall pay to the administrator, in addition to interest as provided in Subsection (a) of this section, a civil penalty of one hundred dollars (\$100) for each day the report, payment or delivery is withheld, or the duty is not performed, up to a maximum of five thousand dollars (\$5,000).

...

(e) *The administrator for good cause may waive, in whole or in part, penalties under Subsections (b) and (c) of this section, and shall waive penalties if the holder acted in good faith and without negligence.*

(Emphasis Added)

The Hearing Officer notes that the imposition of penalty is mandatory by virtue of the Legislature's use of the term "shall" in Section 7-8A-24 (b), which establishes that an act is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d 135. In this instance, the Department was obligated to assess a penalty equivalent to \$100 per day for each day Taxpayer's report was late.

However, despite the mandatory imposition of penalty, Section 7-8A-24 (e) also provides the Department with discretion to waive penalty for good cause shown. In cases in which the Taxpayer acted in good faith and without negligence, the Department's discretion yields to a mandatory abatement of penalty, again by virtue of the word "shall."

In this protest, the Hearing Officer was not persuaded that the Taxpayer presented evidence sufficient to establish good cause or that it acted without negligence. Although the Hearing Officer acknowledges astonishment that failure to timely report the sum of \$783.48 in unclaimed property could result in a penalty of \$4,900.00 and nominal interest in the amount of \$4.21, the Hearing

Officer recognizes that the imposition of penalty at the rate of \$100 per day is *mandatory*, up to a maximum penalty of \$5,000.

Taxpayer's position in support of waiving penalty is unpersuasive. The Hearing Officer recognizes the probability that Taxpayer's failure to timely file its report was unintentional, and resulted neither from bad faith nor ill intention. However, that is insufficient to establish entitlement to a waiver of assessed penalty. Section 7-8A-24 (e) also requires that the Taxpayer act without negligence. Evidence in support of the good cause or non-negligence was insufficient.

Taxpayer claimed an unforeseen and extraordinary turnover in its accounting staff, yet Taxpayer was unable to establish how those circumstances caused it to miss a deadline that it simultaneously acknowledged was properly calendared and accessible to any person having a need to know. If upon a mass exodus of its accounting staff, there existed a period of time ranging from 24 to 48 hours in which Taxpayer lacked access to its relevant calendar, and if the Taxpayer filed the relevant report as soon as it discovered its oversight, then the testimony would correspondingly suggest that there was no effort to review the relevant calendar until 24 to 48 hours before the report was eventually prepared on December 14, 2017. By that time, more than 40 days had passed since the deadline. Contrary to Ms. Guglielmo's testimony, these facts are insufficient for finding that Taxpayer was not negligent. In contrast, it suggests that a significant period of time elapsed in which Taxpayer did not recognize a calendared filing deadline or take any action to satisfy that deadline.

Although neither party referenced Regulation 3.1.11.10 NMAC, the Department therein 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 the present case, Taxpayer may have had a formal system of tracking reporting deadlines, but the system failed when Taxpayer did not give it appropriate attention. This indicates a failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances, inaction by Taxpayer where action is required, and inadvertence, indifference, thoughtlessness, carelessness, or inattention.

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 which although not specifically applicable to the present matter, is nevertheless instructive: “[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.” Taxpayer has not presented sufficient evidence to establish that its failure to act in this regard was a mistake of law made in good faith and on reasonable grounds. The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. However, a thorough review of those factors fails to provide any basis for an abatement.

Since Taxpayer has failed to establish good cause or non-negligence, the Department is without discretion to abate penalty, and the assessment of penalty under the facts of this protest is mandatory. Taxpayer’s protest must be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessment dated January 5, 2018 and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer waived the 90-day hearing requirement provided in NMSA 1978, Section, 7-1B-8 (A).

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 entitlement to an abatement.

D. Taxpayer did not establish good cause or non-negligence entitling it to an abatement of assessed penalty. *See* NMSA 1978, Section 7-8A-24 (e).

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

DATED: June 20, 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 June 20, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner:

First Class Mail

Interagency State Mail