

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

**IN THE MATTER OF THE PROTEST OF
EL TERRERO CONSTRUCTION LLC
TO DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L0828922672**

v.

Case Number 18.05-109R, D&O No. 18-22

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing on the above captioned protest occurred on June 27, 2018 before Irma Gonzalez, Esq., Hearing Officer, in Santa Fe, New Mexico. Ms. Christine DuBois, Assistant Office Manager, and Ms. Norma Elizondo, Officer Manager, appeared on behalf of El Terrero Construction, LLC (“Taxpayer”). The Taxation and Revenue Department (“Department”) was represented by Mr. Peter Breen, Staff Attorney. Ms. Veronica Galewater, Auditor, appeared as a witness for the Department. The Hearing Officer took notice of all documents in the administrative file. The Department did not present evidence in the form of testimony or exhibits. Taxpayer did not seek to admit any exhibits during its presentation of evidence. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 22, 2018, the Department denied Taxpayer’s claim for refund of \$2,119.81.00 for the Combined Reporting System period ending December 31, 2017. The refund denial was issued under Letter ID No. L0828922672.

2. On March 23, 2018, Taxpayer filed a protest of the Department's denial of claim for refund. In said protest, Taxpayer requested that the penalty and interest for the December 2017 filing period in the amount of \$ 2,119.81 be forgiven.

3. On April, 4, 2018, the Department acknowledged receipt of the formal protest.

4. On April 4, 2018, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

5. On June 5, 2018, the Administrative Hearings Office issued the Notice of Administrative Hearing scheduling this matter for June 27, 2018, within 90 days of the Department's receipt of the protest.

6. Ms. Dubois has been employed by Taxpayer since 2012. In 2016, Ms. Dubois became the Assistant Office Manager.

7. Ms. Dubois is responsible for paying the gross receipt taxes on or before the 25th of each month.

8. For the reporting period in question, Ms. Dubois gathered all the necessary paperwork to pay the taxes, and Ms. Dubois was under the impression that she had met the deadline. However, she later discovered that she had in fact missed the deadline by one day.

9. Ms. Dubois emphasized that she was short staffed during this time period.

10. Ms. Dubois acknowledged that she made a mistake, but is devastated by the error, and asked for the penalty to be forgiven.

11. The Department recognized that Ms. Dubois was forthright and frank, however, it emphasized that there is a penalty for negligence.

DISCUSSION

An assessment was not issued in this case. Therefore, no presumption of correctness attaches under NMSA 1978, Section 7-1-17 (C) (2007). Nevertheless, Taxpayer still has the burden of establishing it is entitled to the claimed refund at issue. *See* Regulation 3.1.8.10 (A) NMAC; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through “lens of presumption of correctness” and applied the principle that deductions underlying the claim for refund are to be construed narrowly).

Taxpayer conceded that it failed to pay its gross receipts tax in a timely manner for the period ending December 31, 2017. However, Taxpayer requested that the penalty and interest be forgiven because it was mistake as a result of being understaffed, and not intentional. Ms. Dubois explained that she gathered all the necessary documents to pay the taxes, and believed that she had met the deadline, but later discovered that she missed it by one day.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4 (2010). It is a taxpayer’s responsibility to make payments, whether they are done electronically or in another fashion. *See* NMSA 1978, Section 7-1-13.1 (2005). Penalty “*shall* be added to the amount assessed” when a tax is not paid on time due to negligence. *See* NMSA 1978, Section 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.

Section 7-1-69 (A) requires that the penalty be added whenever the failure to file is due to negligence or disregard of Department rules and regulations, but without any intent to evade or defeat the tax. Regulation 3.1.11.10 NMAC defines negligence as 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, or inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

There is no evidence to suggest that Taxpayer's failure to timely pay its gross receipts tax for the period ending December 31, 2017 was in any way an attempt to evade or defeat the tax. However, Taxpayer was candid that the mistake was made based on the erroneous belief that the taxes had been timely paid. Penalty may be assessed even when the failure to pay a tax or file a return is based on an inadvertent error or unintentional failure to pay the tax or file the return when it was due. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795. As a result of Taxpayer's erroneous belief, Taxpayer was negligent, and failed to timely pay the taxes for the period ending December 31, 2017.

Taxpayer did not meet its burden that it is entitled to the refund. Albeit Taxpayer's mistake was unintentional, Taxpayer was negligent nevertheless for failure to timely pay the taxes for the period ending December 31, 2017. Consequently, the Department properly required Taxpayer to pay \$2113.81 in penalty and interest, and in turn, denied Taxpayer's claim for the refund. In sum, Taxpayer is not entitled to the refund because Taxpayer paid the penalty and interest as a result of its own negligence.

CONCLUSIONS OF LAW

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

B. Taxpayer's failure to timely file the required returns was due to Taxpayer's negligence and penalty was properly assessed by the Department under NMSA 1978, Section 7-1-69 (2007). *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795.

C. Taxpayer did not establish that it was entitled to a refund of the penalty and interest for the CRS period ending December 31, 2017.

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

DATED: July 31, 2018

Irma Gonzalez

Irma Gonzalez, Esq.
Hearing Officer
Administrative Hearings Office
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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

I hereby certify that I mailed the foregoing Order to the parties listed below this 31st day of July 2018 in the following manner:

First Class Mail

Interdepartmental State Mail

INTENTIONALLY BLANK

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