

**BEFORE THE HEARING OFFICER  
OF THE TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF  
RIVER SOURCE INC.  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L0850635072**

**No. 13-39**

**DECISION AND ORDER**

A protest hearing occurred on the above captioned matter on December 2, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Richard Schrader appeared pro se on behalf of River Source, Inc. (“Taxpayer”). Staff Attorney Aaron Rodriguez appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Jennifer Amanda Carlisle appeared as a witness for the Department. Taxpayer Exhibits 1-2 and Department Exhibits A-E were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Taxpayer formed in 1997. Taxpayer provides educational programs and outdoor scientific activities to schools and youth groups across New Mexico. With the assistance of students, Taxpayer’s work focuses on monitoring New Mexico watershed quality and promoting community stewardship of watersheds.
2. Except for CRS reporting periods ending in June and July 2010, Taxpayer has a timely history of CRS filings and payments from 1997 through the present day.
3. In June 2010, Taxpayer’s business manager left Taxpayer.

4. Taxpayer's new bookkeeper missed filing and paying CRS returns in June and July of 2010.

5. Taxpayer's new bookkeeper was not an attorney or accountant.

6. In January of 2012, the Department informed Taxpayer of the unpaid taxes in the June and July 2010 CRS reporting periods.

7. On March 7, 2012, Taxpayer filed its returns for the June 2010 CRS reporting period. On March 10, 2012, Taxpayer's payment for that period posted, satisfying the outstanding tax liability, including gross receipts and withholding tax principal, penalty, and interest, for the CRS reporting period ending on June 31, 2010. [**Taxpayer Ex. #2-5; Department Ex. C; Department Ex. D; Department Ex. E**].

8. On March 7, 2012, Taxpayer also filed its returns for the July 2010 CRS reporting period. Taxpayer self-reported \$1,857.64 in gross receipts tax liability and \$334.41 in withholding tax liability. [**Department Ex. D; Department Ex. B**].

9. On March 10, 2012, Taxpayer paid \$600.00 towards the July 2010 CRS reporting period tax liability, leaving an outstanding balance of \$1,349.17 in gross receipts tax and \$242.88 in withholding tax. [**Department Ex. B; Taxpayer Ex. 2-4**].

10. On March 23, 2012, the Department assessed Taxpayer for \$1,349.17 in the remaining outstanding balance of gross receipts tax, \$371.50 in penalty, and \$102.75 in interest for the CRS reporting period ending July 31, 2010. The Department also assessed Taxpayer \$242.88 in the remaining outstanding balance of withholding tax, \$66.88 in penalty, and \$18.50 in interest for the CRS reporting period ending July 31, 2010. [**Letter id. #L0850635072**].

11. Although Taxpayer was only assessed for the remaining outstanding balance of unpaid gross receipts and withholding tax principal liability, penalty was calculated to the

maximum 20% of the full amount of the original untimely paid \$1,857.64 gross receipts tax and \$334.41 in withholding tax for the July 2010 CRS reporting period.

12. On April 3, 2012, Taxpayer protested the assessment of July 2010 CRS taxes.

13. On April 16, 2012, the Department acknowledged receipt of Taxpayer's protest.

14. On July 26, 2013, the Department requested a hearing in this matter.

15. On July 29, 2013, the Hearings Bureau sent Notice of Administrative Hearing, scheduling a protest hearing in the above-captioned matter on December 2, 2013.

16. Taxpayer did not contest that it owed the assessed gross receipts and withholding tax for the July 2010 CRS reporting period.

17. At dispute in the hearing was \$438.38 in assessed penalty and \$122.36 in interest.

## **DISCUSSION**

Because of a change of staffing, Taxpayer did not file or pay gross receipts tax and withholding tax for the two CRS reporting periods ending in June and July 2010. When the Department first notified Taxpayer in 2012 of its potential deficiency, Taxpayer filed its CRS returns for both outstanding months in early March 2012. Taxpayer also made a payment of tax that totally extinguished its liability for the June 2010 CRS reporting period, and a partial payment reducing its liability for the July 2010 CRS reporting period. The Department issued an assessment for the remaining tax principal, penalty for the entire unreported tax liability, and interest for the July 2010 CRS reporting period. Taxpayer protested the assessment for the July 2010 CRS reporting period, asking that the \$438.38 in penalty and the \$122.36 in interest be forgiven in light of its history of compliance, the one-time filing error attributable to its change in staffing, and the financial impact that the penalty and interest might have on its work. with youth groups and schools.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. By definition under NMSA 1978, Section 7-1-3(X) (2009), “tax” includes the amount of interest and penalty relating to the imposed tax. Consequently, the presumption of correctness includes the assessment of penalty and interest. *See* Regulation 3.1.6.13 NMAC (01/15/01); *See also Tiffany Constr. Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶2, 90 N.M. 16 (finding that the presumption of correctness attached to the assessment of civil negligence penalty). Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

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 (use of the word “shall” in a statute indicates 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. Despite Taxpayer’s previous record of tax compliance, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the July 2010 CRS return was due and not paid until Taxpayer fully paid the tax principal.

Further, the Department has no authority to abate civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) in this case. 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, by its use of the word “shall”, Section 7-1-69 requires that civil penalty be added to the assessment. 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 meets the legal definition of “negligence.” *See Marbob*, ¶22.

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.” While there is no doubt that Taxpayer’s failure to file and pay for the July 2010 CRS reporting period was unintentional given the change of staffing at that time, it still met the definition of negligence because it demonstrated both inaction when action was required and inadvertent error. Inadvertent error meets the legal definition of “negligence” under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶10, 108 N.M. 795.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, NMSA 1978 Section 7-1-69 (B) (2003) provides a limited exception: “No 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 any mistake of law in good faith and on reasonable grounds, as the failure to file and pay the requisite CRS taxes stemmed from a change of staffing rather than any considered legal determination. Therefore, Taxpayer is not protected under Section 7-1-69 (B).

Under Regulation 3.1.11.11 NMAC, there are several situations where a taxpayer can show nonnegligence, none of which assist Taxpayer in this protest. Regulation 3.1.11.11 (D)

NMAC is the only factor potentially relevant on this record. In pertinent part, under Regulation 3.1.11.11 (D) NMAC, a taxpayer is nonnegligent when they demonstrate that the

failure to pay tax or file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant... the failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent.

Here, Taxpayer acknowledged that its new bookkeeper in June 2010 was not an attorney or an accountant. Moreover, under that regulation, reliance on an agent does not excuse the untimely filing of a tax return. Consequently, Regulation 3.1.11.11 (D) NMAC does not protect Taxpayer from civil penalty in this matter.

Taxpayer also argued that penalty and interest should be abated because the financial impact would interfere with its ability to provide students with an opportunity for outdoor scientific activities, especially because Taxpayer's funding has already decreased over the past several years. There is no doubt that Taxpayer provides commendable educational outdoor activities to New Mexico students and communities. Unfortunately, financial hardship is not grounds for the Department to abate any portion of the assessment under Regulation 3.1.6.14 NMAC (01/15/01). Under Section 7-1-17, the Department is required to assess any tax liability greater than \$25.00. And the mandatory nature of the interest and penalty statute does not allow for abatement of penalty and interest based on sympathy for the nature of Taxpayer's work or Taxpayer's otherwise compliant history of tax payments. Consequently, the Department has no choice but to assess penalty and interest in this matter. Taxpayer's protest is denied.

### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely, written protest to the assessment of taxes in the July 2010 CRS reporting period. Taxpayer did not contest the gross receipts tax and withholding tax principal

for the July 2010 CRS reporting period; Taxpayer only challenged the imposition of penalty and interest. Jurisdiction lies over the parties and the subject matter of this protest.

B. Under the mandatory “shall” language of NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. *See Marbob*, ¶22.

C. Although Taxpayer’s failure to file and pay appropriate taxes for the July 2010 CRS reporting period was unintentional, that inadvertence and that failure to act when required met the legal definition of civil negligence under Regulation 3.1.11.10 NMAC. *See also El Centro Villa Nursing Center*, ¶10.

D. Taxpayer did not establish any nonnegligence factors under Regulation 3.1.11.11 NMAC that might allow for abatement of penalty. In particular, since Taxpayer’s business manager was not an accountant or an attorney, and since reliance on an agent does not excuse the untimely filing of taxes, Regulation 3.1.11.11 (D) NMAC does not apply to Taxpayer.

E. Under the mandatory “shall” language of NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty. *See Marbob*, ¶22.

F. Under Section 7-1-17, the Department was required to assess Taxpayer for tax, penalty and interest. The Department lacks authority to abate penalty or interest because of Taxpayer’s history of compliance or financial hardship. *See Regulation 3.1.6.14 NMAC*.

For the foregoing reasons, Taxpayer’ protest **IS DENIED**. Taxpayer owes \$438.38 in penalty and \$122.36 in interest. Since Taxpayer has satisfied the assessed tax principal, interest is no longer accruing in this matter.

DATED: December 13, 2013.

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Tax Hearing Officer  
Taxation & Revenue Department

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