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

**IN THE MATTER OF THE PROTEST OF**
**CLEAN RITE JANITORIAL SERVICE LLC** **No. 17-43**
**TO THE ASSESSMENT ISSUED UNDER**
**LETTER ID NO. L2090747184**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 8, 2017 before Hearing Officer Irma Gonzalez. Mr. Kyle Stovell appeared *pro se* for Clean Rite Janitorial (Taxpayer). The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Mr. Thomas Dillon, Auditor, appeared as a witness for the Department. The Hearing Officer took notice of all documents in the administrative file. The Department's Exhibit A was stipulated to by Taxpayer. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On March 31, 2017, the Department assessed Taxpayer for gross receipts tax, penalty, and interest for the tax periods from January 31, 2011 through June 30, 2016. The assessment was for $45,343.04 tax, $4,303.64 interest, and $9,051.82 penalty.
2. On May 18, 2017, Taxpayer timely filed a formal protest letter. Taxpayer conceded that it owed tax and interest, but protested the penalty.
3. On June 27, 2017, the Department acknowledged receipt of the formal protest.
4. On August 7, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

5. On August 9, 2017, the Administrative Hearings Office issued the Notice of Administrative Hearing scheduling this matter for September 8, 2017, within 90 days of the Department's receipt of the protest.
6. Mr. Kyle Stovell and his wife are the owners of Taxpayer.
7. Taxpayer does not have a formal system of accounting or internal controls. **[Department Ex. A-1].**
8. Mr. Stovell does not have any background or knowledge of tax matters.
9. Taxpayer uses the total deposits each month per the bank statements as gross receipts including tax for CRS reporting. **[Department Ex. A-2].**
10. The total annual bank deposits agreed with the gross sales reported on Taxpayer's NM corporate income tax returns and Taxpayer's CRS-1 filings with minimal discrepancies. **[Department Ex. A-2].**
11. Taxpayer provides janitorial services in the areas of Farmington, Bloomfield, Kirtland, Aztec, and the Navajo Nation.
12. Taxpayer has been providing janitorial services for Raytheon Missile Systems (Raytheon) since 2008. Raytheon's facility is located in New Mexico on the Navajo Nation. Raytheon is not an Indian tribe or a member thereof.
13. From 2008 to 2011, Taxpayer paid the New Mexico gross receipts tax and Navajo sales tax for services provided to Raytheon.
14. In 2011, Taxpayer received a letter from Raytheon's tax counsel indicating that it reviewed the tax laws and found that Taxpayer was exempt from paying the New Mexico gross receipts tax and that Raytheon would only pay the Navajo sales tax in the future.

15. Taxpayer submitted Raytheon's letter to Mr. Kenneth Chipman for review. Mr. Chipman owned Chipman Accounting. Mr. Chipman is an accountant not a Certified Public Accountant (CPA). Taxpayer described Chipman Accounting as bookkeepers.
16. Mr. Chipman agreed with Raytheon's review of the law and approved Taxpayer's plan to claim an exemption for the New Mexico gross receipts, and to pay only the Navajo sales tax.
17. Mr. Chipman has since had a stroke and was unable to testify at the hearing.
18. Taxpayer is no longer in possession of the letter from Raytheon.
19. After the audit, Raytheon agreed to pay the tax and interest owed. However, Raytheon refused to pay the penalty.
20. Taxpayer argued that the penalty should be abated because he relied on the advice of Mr. Chipman and Raytheon. Taxpayer argued further that he has is an honest business owner, has always been tax compliant, and is not trying to evade paying taxes.
21. The evidence provided was not sufficient to find that Mr. Chipman is competent tax counsel or accountant capable of giving advice.
22. The evidence provided was not sufficient to find that it was reasonable for Taxpayer to rely on the advice of Raytheon's tax counsel.
23. As of the date of the hearing, for the tax periods from January 31, 2011 through June 30, 2016, Taxpayer owed $9,051.82 in penalty and $762.05 in interest.

## DISCUSSION

The issue to be decided is whether Taxpayer is liable for the assessment of penalty. Taxpayer conceded that it owed tax and interest, but argued against the imposition of penalty.

Taxpayer argued further that he is an honest business owner, has always been tax compliant, and is not trying to evade paying taxes.

***Burden of Proof***

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17 (C) (2007). Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." 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). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

***Gross Receipts Tax***

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-4 (2010). To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. NMSA 1978 § 7-9-5 (A) 2002. Gross receipts tax applies to the total amount of money received from selling property or services. *See* NMSA 1978, § 7-9-3.5 (2010). Under Regulation 3.2.4.9(D) (3) (a), receipts from performing services, other than construction or telecommunication services, in New Mexico in Indian country which are sold to a person who is not an Indian tribe or member thereof are subject to the gross receipts tax.

It was undisputed that Taxpayer was providing janitorial services to Raytheon in New Mexico on the Navajo Nation. Furthermore, there was no evidence to suggest that Raytheon is an Indian tribe or member thereof. Therefore, the services Taxpayer provided Raytheon in New Mexico on the Navajo Nation were subject to the gross receipts tax.

***Assessment of Penalty***

Taxpayer conceded its failure to pay its gross receipts taxes. However, Taxpayer argued that it has always been tax complaint and was not trying to evade paying taxes. Taxpayer emphasized that he relied on Mr. Chipman's approval of its tax plan to pay the Navajo sales tax, but not the New Mexico gross receipts tax. Taxpayer argued that he also relied on the advice from Raytheon's tax counsel that it was not required to pay the New Mexico gross receipts tax.

Penalty "*shall* be added to the amount assessed" when a tax is not paid on time due to negligence. *See* NMSA 1978, § 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. It is a taxpayer's responsibility to make payments, whether they are done electronically or in another fashion. *See* NMSA 1978, § 7-1-13.1 (2005). 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 the present case, Taxpayer did not have a formal system of accounting or internal controls. Instead, Taxpayer used the total deposits each month per the bank statements as gross receipts. Albeit the total annual bank deposits agreed with the Taxpayer's tax returns, Taxpayer's lack of an accounting system or internal controls suggests that Taxpayer did not have any checks

or balances to alert Taxpayer of any unusual items that needed to be examined for tax purposes. Thus, the evidence was insufficient to establish that Taxpayer exercised a sufficient degree of ordinary business care and prudence to establish nonnegligence under Regulation 3.1.11.10.

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." The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. Based on the argument of Taxpayer and the evidence presented, only one factor under Regulation 3.1.11.11 NMAC (emphasis added) is pertinent in this proceeding:

> D. 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.

Taxpayer argued that it relied on the advice of Mr. Chipman and Raytheon that it was exempt from the New Mexico gross receipts tax and only required to pay the Navajo sales tax. Taxpayer claims that Raytheon's tax counsel sent a letter, which stated that it reviewed the tax laws, and found that Taxpayer was only required to pay the Navajo sales tax, but not the New Mexico gross receipts tax. However, Taxpayer did not provide a copy of this letter at the hearing. That being said, if Raytheon did in fact send a letter to Taxpayer, Taxpayer admitted the letter was from Raytheon's tax counsel. A reasonable inference can be made that Raytheon's tax counsel was protecting the interests of Raytheon rather than Taxpayer. Accordingly, it was not reasonable for Taxpayer to rely on the advice of Raytheon's tax counsel.

With regard to Mr. Chipman, Taxpayer claims that he provided Raytheon's letter to Mr. Chipman for review. According to Taxpayer, Mr. Chipman agreed with Raytheon's review of the tax laws and that Taxpayer was exempt from paying the New Mexico gross receipts tax. However, Taxpayer acknowledged that Mr. Chipman was an accountant not a CPA. In addition, there was no evidence of Mr. Chipman's credentials. In particular, there is no evidence of Mr. Chipman's experience in gross receipts tax in general or specifically for services provided on Indian Country in New Mexico for a non-Indian. It also cannot be overlooked that Taxpayer described Chipman Accounting as bookkeepers rather than accountants. The record is essentially devoid of evidence to establish that Mr. Chipman is competent tax counsel or an accountant capable of giving advice. Consequently, it was not reasonable for Taxpayer to rely on the advice of Mr. Chipman.

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. It is the duty of Taxpayer to determine what gross receipts taxes need to be reported and paid. Given a taxpayer's duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of its actions, a taxpayer cannot "abdicate this responsibility [to learn of tax obligations] merely by appointing an accountant as its agent in tax matters." *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795.

Taxpayer did not have an accounting system. Taxpayer admitted it had no understanding of the tax obligations of providing services to a non-Indian in New Mexico on Indian country. There was no evidence that Taxpayer inquired with or sought the advice from the New Mexico taxing authority or a tax professional to determine if Taxpayer was in compliance with New Mexico tax

laws. There was no evidence to suggest that it was reasonable to rely on Mr. Chipman's advice. In sum, nothing in the record indicates that Taxpayer exercised ordinary business care and prudence in determining its New Mexico tax obligations. Therefore, the Department's imposition of penalty was legally supported and properly assessed.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessment of penalty issued under Letter ID number L2090747184, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was held within 90 days of the protest. *See* NMSA 1978, § 7-1B-8 (A) (2015).

C. Taxpayer conceded that it owed gross receipts tax. *See* NMSA 1978, § 7-9-4 (2010).

D. Taxpayer was properly assessed for penalty and interest. *See* NMSA 1978, § 7-1-67 and § 7-1-69 (2007).

E. Taxpayer did not overcome the presumption of correctness, including the assessed penalty, that attached to the assessment under NMSA 1978, § 7-1-17 (C) (2007).

F. Taxpayer was negligent in failing to report gross receipts tax during the period at issue. *See* Regulation 3.1.11.10 NMAC.

G. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds that would allow for abatement of penalty under NMSA 1978, § 7-1-69 (2007).

H. Taxpayer did not establish that Mr. Chipman is competent tax counsel or accountant capable of giving advice.

I. Taxpayer did not establish that it was reasonable for Taxpayer to rely on the advice of Raytheon's tax counsel.

J. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty in this protest.

K. The assessment is still outstanding as to $762.05 interest and $9,051.82 penalty.

For the foregoing reasons, the Taxpayer's protest **is DENIED**. Taxpayer is ordered to pay the assessment of $762.05 interest and $9,051.82 penalty.

DATED: October 11, 2017

*Irma Gonzalez*

Irma Gonzalez, Esq.
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

I hereby certify that I mailed the foregoing Order to the parties listed below this 11th day of October, 2017 in the following manner: