

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

**IN THE MATTER OF THE PROTEST OF
SPELMAN INVESTMENTS
TO DENIAL OF REFUND
ISSUED UNDER LETTER
ID NO. L0668837168**

No. 17-49

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 14, 2017 before David Buchanan, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, owners Mark Spelman and Janice Spelman appeared and testified at the hearing for Spelman Investments (“Taxpayer”). Staff Attorney, David Mittle, appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Nicholas Pacheco appeared and testified as a witness for the Department. Taxpayer Exhibit #1 and Department Exhibits A – D were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer filed a request for refund for \$14,746.07 in penalty paid for the Combined Reporting System (CRS) reporting periods from May 2014 through July 2016 on February 15, 2017.
2. The Department denied the refund request on April 11, 2017.
3. Taxpayer filed a formal protest of the refund denial on July 10, 2017.
4. The Department acknowledged receipt of a valid protest on July 27, 2017.

5. The Department filed a request for hearing in this matter with the Administrative Hearings Office on September 11, 2017.

6. On September 11, 2017, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a hearing on October 3, 2017.

7. On October 2, 2017, Taxpayer filed a request for continuance of the hearing. Taxpayer waived the requirement that the hearing be held within 90 days of the protest. The Department did not object.

8. On October 3, 2017, the Administrative Hearings Office issued an Order Granting Continuance and Notice of Administrative Hearing continuing the hearing to November 14, 2017.

9. Mark Spelman and Janice Spelman are co-owners of Spelman Investments. The business manages rental properties in Ruidoso, New Mexico. Mrs. Spelman performed all record keeping and tax filing for the business. **[Testimony of Mrs. Spelman]**

10. Prior to May 2014, Mrs. Spelman filed and paid all CRS taxes online for Taxpayer. All returns were filed and payments were made on the same website at the same time. The online filing system changed to the TAP system in May 2014. In the new TAP system, payments were made on one webpage, but returns were filed separately on another webpage.

[Testimony of Mrs. Spelman]

11. Mrs. Spelman used the TAP system to pay CRS taxes for Taxpayer from May 2014 through July 2016. **[Testimony of Mrs. Spelman; attachments to Protest]**

12. Mrs. Spelman did not file the related returns for Taxpayer from May 2014 through July 2016. **[Testimony of Mrs. Spelman].**

13. Mrs. Spelman's intent was to pay the required taxes and to file the returns properly, but she did not realize that she was not filing the returns properly under the new TAP system. **[Testimony of Mrs. Spelman]**

14. Returns must be filed so that the State can properly allocate funds to the jurisdictions where the business is located. **[Testimony of Mr. Pacheco].**

15. The Department sent a letter by regular mail to Taxpayer at the proper address on August 11, 2014 advising that CRS returns for May 2014 had not been filed and asking Taxpayer to contact the Department. **[Department Exhibit A-1]**

16. Neither Mr. or Mrs. Spelman recalled receiving the letter of August 11, 2014. **[Testimony of Mr. Spelman; Testimony of Mrs. Spelman]**

17. The Department sent a letter by regular mail to Taxpayer at the proper address on November 13, 2014 advising that CRS returns for May 2014, June 2014, July 2014 and August 2014 had not been filed and asking Taxpayer to contact the Department. **[Department Exhibit B-1]**

18. Neither Mr. or Mrs. Spelman recalled receiving the letter of November 13, 2014. **[Testimony of Mr. Spelman; Testimony of Mrs. Spelman]**

19. The Department sent a letter by regular mail to Taxpayer at the proper address on February 23, 2015 advising that CRS returns for May 2014, June 2014, July 2014, August 2014, September 2014, October 2014 and November 2014 had not been filed and asking Taxpayer to contact the Department. **[Department Exhibit C-1]**

20. Neither Mr. or Mrs. Spelman recalled receiving the letter of February 23, 2015. **[Testimony of Mr. Spelman; Testimony of Mrs. Spelman]**

21. The Department sent a letter by regular mail to Taxpayer at the proper address on July 16, 2015 advising that CRS returns for May 2014, June 2014, July 2014, August 2014, September 2014, October 2014, November 2014, December 2014, January 2015, February 2015, March 2015 and April 2015 had not been filed and asking Taxpayer to contact the Department.

[Department Exhibit D-1]

22. Neither Mr. or Mrs. Spelman recalled receiving the letter of July 16, 2015.

[Testimony of Mr. Spelman; Testimony of Mrs. Spelman]

23. Mrs. Spelman acknowledged that they get a lot of mail. She testified that if they did receive the letters, they were not sent by certified mail and she did not open them.

[Testimony of Mrs. Spelman]

24. Sandra Whitten with the Department contacted Mr. Spelman by telephone in July 2016. Ms. Whitten advised Mr. and Mrs. Spelman that they had not been filing the required returns. Ms. Whitten walked Mrs. Spelman through the TAP system, showed her how to properly file returns and assisted her with setting up the system properly. **[Testimony of Mrs. Spelman]**

25. Taxpayer filed all returns for May 2014 through July 2016 immediately after being contacted by Ms. Whitten and learning of the issue. **[Testimony of Mrs. Spelman;**

Attachments to Protest]

26. Mr. Spelman contacted Department employee Danny Pogan regarding the penalty. Mr. Pogan advised that they should probably pay the penalty and then file for a refund. Mr. Pogan indicated that the request would probably be denied, but then they could file a protest. Mr. Pogan indicated that he did not think there would be a problem. **[Testimony of Mr.**

Spelman]

27. Mr. Spelman drove to Santa Fe and paid the penalty in person. **[Testimony of Mr. Spelman].**

DISCUSSION

It was apparent at the conclusion of the hearing in this protest that there was minimal dispute of the material facts in this matter. Taxpayer paid the required taxes, but did not file the related CRS returns after the Department's computer system changed in 2014. The Department sent four letters by regular mail after May 2014. Taxpayer either did not receive or did not open the letters. Taxpayer corrected the issue and filed the CRS returns after being notified of the error by telephone. Taxpayer paid the penalty, but then requested a refund.

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). In this case, the penalty was assessed by the Department and the Taxpayer paid the penalty. The assessment of penalty by the Department 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 a refund.

Penalty "*shall* be added to the amount assessed" when a return is not filed by the date required regardless of whether a tax is due. *See* NMSA 1978, § 7-1-69 (A) (2007). 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.

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. *See* NMSA 1978, § 7-1-13 (2013). Negligence includes the failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is required; or inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention. *See* 3.1.11.10 NMAC (2001). Regulation 3.1.11.11 NMAC (2001) sets forth several specific facts that may indicate that a taxpayer was not negligent: A. being affirmatively misled by a Department employee; B. a disability or prolonged illness prevented the ability to prepare a return; C. physical damage to records or place of business caused a delay in filing a return or paying a tax; D. reasonable reliance on the advice of competent tax counsel or an accountant; E. filing of an amended return; F. IRS abatements of federal penalty on income tax returns; G. participation in production of oil and gas from a state or federal property; or G. good faith doubt by an out-of-state business that there is a nexus with New Mexico. 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, 108 N.M. 795. *See also Grogan v. N.M. Taxation and Revenue Dep’t*, 2003-NMCA-033, ¶ 32-35, 133 N.M. 354. *See also Arco Materials, Inc. v. Taxation and Revenue Dep’t*, 1994-NMCA-062, ¶ 14, 118 N.M. 12 *rev’d on other grounds by Blaze Constr. Co v. Taxation and Revenue Dep’t*, 1995-NMSC-110, 118 N.M. 647.

Taxpayer did not file the CRS returns at the required times. The failure to file the returns was based on the inadvertent error of the Taxpayer due to the changes to the Department’s

computer system. However, Taxpayer was notified in writing four times by the Department of the failure to file the required returns. There is no requirement that the Department send such notifications by certified mail. The notices were mailed to the proper address for the Taxpayer. The Hearing Officer was persuaded by the testimony presented at the hearing that Taxpayer did not open the letters from the Department because they were not certified letters. Such inaction demonstrates that Taxpayer did not exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances. None of the indicators of non-negligence set forth in Regulation 3.1.11.11 NMAC were evident in this case. While Taxpayer may have intended to properly file the required tax returns and in fact timely paid the taxes, Taxpayer was negligent by failing to timely file the required returns. The penalty was properly assessed against the Taxpayer.

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).
- C. Taxpayer did not establish that it was entitled to a refund of the penalty for CRS periods from May 2014 through July 2016.

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

DATED: December 15, 2017.



David Buchanan
Hearing Officer
Administrative Hearings Office
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Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), 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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. 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 be preparing the record proper.