

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

**IN THE MATTER OF THE PROTEST OF
HIGH DESERT BICYCLES INC.
TO REFUND DENIALS ISSUED ON
DECEMBER 4, 2017 AND JANUARY 10, 2018**

v.

Case Number 18.03-067R, D&O No. 18-23

NEW MEXICO TAXATION AND REVENUE DEPARTMENT.

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on June 1, 2018 before Ignacio V. Gallegos, Esq., Hearing Officer, in Santa Fe, New Mexico. Attorney Benjamin C. Roybal (Betzer, Roybal & Eisenberg P.C.), appeared at the hearing for High Desert Bicycles Inc. (“Taxpayer”). Staff attorney, Ms. Cordelia Friedman, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Mr. Vincent Hinman, co-owner and treasurer of Taxpayer appeared as a witness for the Taxpayer. Protest auditor, Ms. Veronica Galewaler, appeared as a witness for the Department.

Taxpayer Exhibits 1 through 4 were admitted into the record without objection. The Department proffered Exhibits A, C, D and E1-22 of which Exhibits A, C and D were admitted without objection. Department’s rebuttal Exhibit F was not proffered as evidence, and was not admitted. The Hearing Officer took administrative notice of all documents contained in the administrative file. 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 December 4, 2017, the Department issued a Full Refund Denial of the claimed refund the amount of \$1,579.67 arising from the Taxpayer’s Application for Refund, for payment

of assessed penalties paid for the tax periods between January 1, 2016 and January 31, 2016. [*See* Administrative File].

2. On January 10, 2018, the Department issued a Full Refund Denial of the claimed refund the amount of \$2,537.23 arising from the Taxpayer's Application for Refund, for payment of assessed penalties paid for the tax periods between June 1, 2014 and June 30, 2014. [*See* Administrative File].

3. On February 27, 2018, the Department received the Taxpayer's protest letter dated February 26, 2018. [*See* Administrative File].

4. On March 6, 2018, the Department acknowledged Taxpayer's protest. [*See* Administrative File].

5. On March 27, 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].¹ [It should be noted that the Department submitted the Hearing Request on March 27, 2018, yet within the document, it indicates that the protest was acknowledged April 9, 2018, an impossibility. Furthermore, within the Hearing Request the Department identified the matter arising from two letter ID numbers [L1514754864 and I0103705392], which letters were not made part of the record and do not correspond to the letter ID numbers identified by the Taxpayer as pertinent to the protest.]

¹ It should be noted that the Department submitted the Hearing Request on March 27, 2018, yet within the document, it indicates that the protest was acknowledged April 9, 2018, an impossibility. Furthermore, within the Hearing Request the Department identified the matter arising from two letter ID numbers [L1514754864 and I0103705392], which letters were not made part of the record and do not correspond to the letter ID numbers identified by the Taxpayer as pertinent to the protest.

6. On March 28, 2018, the Administrative Hearings Office issued a Notice of Administrative Hearing that set a hearing on the merits of Taxpayer's protest for June 1, 2018. [See Administrative File].

7. On June 1, 2018, a hearing was held at the Administrative Hearings Office, in the Wendell Chino Building, Suite 269, in Santa Fe, New Mexico, a total of 87 days from when the protest was acknowledged by the Department.

8. Taxpayer is a bicycle vendor and bicycle maintenance shop. [Testimony of Mr. Hinman].

9. Mr. Hinman is a co-owner and the treasurer of Taxpayer. [Testimony of Mr. Hinman],

10. Mr. Hinman's work duties include accounting, billing, writing company checks, payment and filing of gross receipts tax returns, as well as sales and maintenance responsibilities to customers. [Testimony of Mr. Hinman].

11. Mr. Hinman has been involved with Taxpayer for approximately fourteen and a half years. [Testimony of Mr. Hinman].

12. Before June of 2014 Mr. Hinman filled out the paper CRS-1 forms and submitted them to the Department with a check. [Testimony of Mr. Hinman].

13. Mr. Hinman handled the gross receipts taxes between June 2014 and October 2016. [Testimony of Mr. Hinman].

14. It was in that time period that the Taxpayer's accountant advised Mr. Hinman to begin filing using the online TAP system. [Testimony of Mr. Hinman].

15. After June of 2014, Taxpayer began using the web-based taxpayer access point (TAP) website run by the Department. [Testimony of Mr. Hinman].

16. When Mr. Hinman began using the TAP system, he first gathered information, attempted logging in, and he recalled having some difficulty. [Testimony of Mr. Hinman].

17. Mr. Hinman also called his accountant/bookkeeper, who referred him to the Department's help number. [Testimony of Mr. Hinman].

18. Mr. Hinman called the line and explained that he was having trouble logging in to the website. The tech at the other end of the line told him what to do, including that there was a way to make a payment without logging in. The conversation lasted ten to fifteen minutes, but Mr. Hinman's memory of the call was admittedly too distant in the past to remember all the details clearly. [Testimony of Mr. Hinman].

19. During the conversation, Mr. Hinman recalled that the tech walked him through the process of making a payment without logging in. He did not recall if he actually made a payment in that manner, during the conversation. Using the process described by the tech, he was able to make a payment and manually input the payment information. [Testimony of Mr. Hinman].

20. There is a "make a payment" option on the TAP website, where it opens a window that then asks for the same information he would fill out using the paper form. Mr. Hinman felt comfortable that he was given enough information to report correctly. [Testimony of Mr. Hinman].

21. Mr. Hinman did not recall any discussion where the tech told him of a need to file a report. [Testimony of Mr. Hinman].

22. Mr. Hinman did not receive notification that he was doing things improperly, so he believed that he was doing things properly. [Testimony of Mr. Hinman].

23. Upon submission of his payment, Mr. Hinman would receive a confirmation email indicating that his payment request had been received by the Department, which tells him to check

his bank account to make sure the payment went through successfully. [Testimony of Mr. Hinman; Taxpayer's Exhibit 1 and Exhibit 2].

24. The confirmation of payment email does not give any information about reporting. [Testimony of Mr. Hinman; Taxpayer's Exhibit 1 and Exhibit 2].

25. Mr. Hinman continued paying his taxes monthly in this manner until his accountant noticed that there was a problem in about October 2016. [Testimony of Mr. Hinman].

26. Mr. Hinman was surprised by this revelation, so he asked for the accountant's help to correct what was wrong. Mr. Hinman was surprised because he had not received notice from the Department that anything was wrong. [Testimony of Mr. Hinman].

27. Mr. Hinman did not realize until then that no reports were filed when he submitted the payments. [Testimony of Mr. Hinman].

28. Mr. Hinman, with the assistance of his accountant, submitted the CRS reports in November of 2016 in one batch. [Testimony of Mr. Hinman].

29. Mr. Hinman testified that he did not receive the Department's Notice of Assessment, dated December 22, 2016 for the reporting period of June 2014. He indicated that the document bears an incorrect address. [Taxpayer Exhibit 3; Testimony of Mr. Hinman].

30. Mr. Hinman testified that he did not receive the Department's Notice of Assessment, dated December 22, 2016 for the reporting period of January 2016. This document also bore an incorrect address. [Taxpayer Exhibit 4; Testimony of Mr. Hinman].

31. Mr. Hinman expressed surprise that the Taxpayer's access to the TAP website began in 2011, reiterating that he believed it was in 2014 when he began paying through the TAP website. [Testimony of Mr. Hinman].

32. The Department produced what it alleged to be the last paper CRS-1 tax return form received from the Taxpayer, dated in 2011, including a check that accompanied the return from the Taxpayer. The Department did not proffer the document [identified as Exhibit F] as an exhibit, and had not disclosed the document to Taxpayer previously. Exhibit F was not admitted. Mr. Hinman acknowledged that the handwriting was his, but maintained his belief that he continued to file gross receipts taxes on paper forms through the middle of 2014. [Testimony of Mr. Hinman].

33. The business changed locations from suite to suite in the same strip mall. [Testimony of Mr. Hinman].

34. Ms. Veronica Galewaler is a protest auditor with the Department. Ms. Galewaler has a Master's of Business Administration degree. She has worked for eleven years with the Department, in a variety of roles from the call center, to processing, and in the legal department protest office. [Testimony of Ms. Galewaler].

35. Ms. Galewaler identified current screenshots from the TAP website, which the Taxpayer could see upon bringing up the website and accessing Taxpayer's account. [Exhibit A1 through A3; Testimony of Ms. Galewaler].

36. Ms. Galewaler identified current TAP call center scripts that are used to advise callers and used to help people step by step. [Exhibit A1 through A3; Testimony of Ms. Galewaler].

37. The instructions are structured as answers to specific questions, such as "how do I file a return?" [Testimony of Ms. Galewaler].

38. Upon complete submission of a tax return, the TAP system generates a confirmation page, which, although not part of the script, taxpayers are advised to print up to keep for their records. [Testimony of Ms. Galewaler].

39. The call center process is to advise callers that there are two separate processes, first for making a payment, and second for filing a return. Ms. Galewaler testified that call center staff advise that both payment and filing confirmations are necessary to avoid issues. [Testimony of Ms. Galewaler].

40. Ms. Galewaler identified the TAP CRS Return information due February 25, 2016, which concerns the reporting period ending January 31, 2016. Ms. Galewaler identified this as one of the reporting periods at issue in this protest. [Department Exhibit C-1; 1Testimony of Ms. Galewaler].

41. Ms. Galewaler identified the TAP CRS Return information due August 1, 2014, which concerns the reporting period ending June 30, 2014. Ms. Galewaler identified this as one of the reporting periods at issue in this protest. [Department Exhibit C-2; 1Testimony of Ms. Galewaler].

42. Taxpayer's CRS-1 returns at issue in this protest were filed November 11, 2016 and November 14, 2016. [Department Exhibit C-1 and C-2].

43. Ms. Galewaler identified the TAP Taxpayer's registration information page. The page shows that in 2011 the Taxpayer was required to file monthly using the e-file system, and following July 1, 2011, the Department would no longer accept paper returns. After that time, the Department would not send the paper filer kits. [Department Exhibit D-1through D-3; Testimony of Ms. Galewaler].

44. The paper filer kit for the first half of 2011 would have been sent to the Taxpayer, and includes instructions for filing returns on page five. [Exhibit E1 through E22; Testimony of Ms. Galewaler].

45. Changes to address and other taxpayer information is required to be submitted to the Department by the taxpayer. [Testimony of Ms. Galewaler].

46. The manner that Taxpayer used to pay taxes resulted in the Department system placing the funds on hold, since they were paid without a report. When funds are placed on hold, the Department does not know what to do with them, since the Department does not know if they are payments to satisfy compensating tax due, gross receipts tax due, or withholding tax due. Once the returns were filed, the payments were applied to their respective categories. [Testimony of Ms. Galewaler].

47. In some cases, the Department will send out a “notice of overpayment” and an alert will show up on the TAP website when a Taxpayer logs in. Ms. Galewaler recalled seeing that an overpayment notice was sent, but did not have a copy, and could not recall clearly. [Testimony of Ms. Galewaler].

48. The same information that used to be provided to taxpayers in the filer’s kit [Exhibit E] is now available online through the Department website, not on the TAP website. [Testimony of Ms. Galewaler].

49. The call center scripts are guidelines, and it is possible that the call center operators do not follow them. Ms. Galewaler was not a witness to the call Mr. Hinman testified that he made, and could not provide evidence as to what happened on the particular call. [Testimony of Ms. Galewaler].

50. The payment request/confirmation email does not inform taxpayers that they are obligated to file a return. [Taxpayer Exhibit 1, Taxpayer Exhibit 2; Testimony of Ms. Galewaler].

51. Notices of overpayment are sometimes sent to taxpayers who make payments without filing returns. The Department did not have information which could show that a notice

of overpayment was sent to this Taxpayer for the timeframes at issue. Ms. Galewaler was unaware if the notice of overpayment contains a statement that would inform a taxpayer that no return was filed. [Testimony of Ms. Galewaler].

52. The call center is there because people have trouble, and the Department operators can help resolve issues. [Testimony of Ms. Galewaler].

53. It was the opinion of Ms. Galewaler that for a taxpayer to rely solely on the information provided by the call center operator would be unreasonable, since there are other means of ascertaining responsibilities under the tax laws. [Testimony of Ms. Galewaler].

54. Electronic filing has been mandatory since 2011 for most New Mexico gross receipts taxpayers, absent a waiver by the Secretary. [Testimony of Ms. Galewaler].

55. Notices, such as a notice of overpayment, are generated and populated by the Department's computer system, using parameters as determined by the Department, and if it appears on a TAP user's account, a letter should have also been printed and sent out. [Testimony of Ms. Galewaler].

DISCUSSION

The sole issue in this protest is whether Taxpayer is entitled to a refund after payment of assessed penalties resulting from its failure to timely file monthly Combined Reporting System (CRS) returns. Taxpayer does not dispute the untimeliness of the two filings, but asserts that refund of penalties paid is appropriate because Taxpayer was not negligent and because Taxpayer was relying on information provided by the Department through its call center, and over two years had not received any information from the Department that the method Taxpayer employed was improper.

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 (Y). 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.

Taxpayer’s claim for refund, after payment of the assessed penalty for late filing, is also viewed under the lens of a presumption of correctness. *See 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”). Consequently, Taxpayer must show that it is entitled to the abatement of civil penalties that is the basis of its claim for refund.

Assessment of Penalty

Taxpayer conceded its failure to make a timely report under NMSA 1978, Section 7-1-13 (B), but asserts that penalties assessed under NMSA 1978, Section 7-1-69 (A) should be abated because it acted in good faith and without negligence. Taxpayer relies on the facts attested to at the hearing to support its claim. The facts attested to were that the Taxpayer had difficulty logging in to the online tax portal (TAP), so he spoke with his accountant, who referred him to the Department’s telephone assistance line. Over the telephone, the Department employee informed the Taxpayer that there was a way to make payments without logging in to the Taxpayer’s account,

explained the process, and did not impress upon the Taxpayer that this process would not generate a tax return. Taxpayer relies on the non-negligence indications, as defined by Regulation 3.1.11.11, most notably, “(A) the taxpayer proves the taxpayer was affirmatively misled by a department employee.”

NMSA 1978, Section 7-1-69. Civil penalty for failure to pay tax or file a return.

The law requires that “in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax ... there shall be added to the amount assessed a penalty.” Penalties are assessed when a taxpayer does not pay taxes when due, and in instances in which a taxpayer fails to file a tax return. In instances in which the tax return is filed late, the basis for the penalty is the “tax liability established in the late return.” NMSA 1978, Section 7-1-69 (A).

The Hearing Officer notes that the imposition of penalty is mandatory by virtue of the Legislature’s use of the term “shall” in Section 7-1-69 (A), 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 for each month Taxpayer’s CRS-1 tax returns were late.

Section 7-1-69 (B) provides a limited exception to imposition of civil penalties: “[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.” Although there was no evidence that Taxpayer intentionally attempted to evade or defeat payment of tax by using the electronic TAP system, there is also no evidence that Taxpayer made a mistake of law made in good faith and on reasonable grounds. Taxpayer presented no evidence that it reviewed any statute or regulation, or consulted with an attorney or CPA, about whether Taxpayer was legally required

to file tax returns beyond simply making the payments. This is not an instance in which the Taxpayer made a reasonable mistake of law.

The Department relied on Taxpayer's negligence to support the assessment of penalty. 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." Generally, the Gross Receipts and Compensating Tax Act, NMSA 1978, Section 7-9-1 *et seq.* requires businesses engaged in selling goods or services for consideration to pay gross receipts tax and to file Combined Reporting System (CRS) returns. Regulation 3.2.2.15 NMAC requires that "[t]axpayers who are registered for gross receipts, governmental gross receipts, compensating or withheld income tax purposes must file a CRS-1 Combined Report Form for each reporting period whether or not any tax is due." It is clear that a failure to file a monthly tax return is "inaction by taxpayer where action is required," and the Department's initial determination that the Taxpayer was negligent for not filing returns was justified.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, the regulations provide guidance for abatement of civil negligence penalty under Regulation 3.1.11.11 NMAC. Taxpayer relies on the first indicator on the list of the non-negligence indications: "(A) the taxpayer proves the taxpayer was affirmatively misled by a department employee." In cases of estoppel, generally, a taxpayer is not entitled to rely on the oral advice of a Department employee as a substitute for conducting its own analysis of New Mexico's tax statutes and regulations. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989); *Kilmer v. Goodwin*, 2004-NMCA-122, ¶

122, 136 N.M. 440, 99 P.3d 690. The case at hand is not a case in which the Taxpayer is claiming estoppel, a disfavored remedy. The regulation does not place restraints on how the Taxpayer must prove that it was misled, apart from Regulation 3.1.6.12 NMAC (“unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.”). In this instance, the Taxpayer had no documentation of the phone call to the Department’s help line that took place four years previously, and the Taxpayer’s witness had a vague memory of the call. One thing stood out to the witness, and that was the method described by the operator of submitting taxes without logging into the TAP account, which Taxpayer then used monthly in submitting monthly tax payments. There was no evidence that the Taxpayer intended to evade or defeat a tax by using the process of making an electronic tax payment without logging into his TAP account. The fact that the Taxpayer employed the method of submitting electronic payments supports the Taxpayer’s position that it was his intent to pay the taxes. The existence of a script for operators at the Department’s help line [Exhibit A-3] validates the Taxpayer’s testimony. The Department’s inability to contradict the Taxpayer’s version of the phone call makes the balance of evidence fall to the Taxpayer’s favor. The Taxpayer’s witness testified credibly on this subject. The Taxpayer, having overcome the presumption of correctness in the assessment of penalty, the burden shifts to the Department to prove the assessment of penalty was justified. *See New Mexico Taxation & Revenue Dep’t. v. Whitener*, 1993-NMCA-161, 117 N.M. 130, 869 P.2d 829; *MPC Ltd. v. New Mexico Taxation & Revenue Dep’t.*, 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308.

The Department suggested that Taxpayer’s reliance on its employee’s guidance was unreasonable. The Department presented evidence that in years previous to the tax periods at issue, ending in 2011, it had sent out packets of filer’s kits with information which informed this Taxpayer of the need to file CRS-1 returns with monthly payments. The evidence showed that the

filer's kit [Exhibit E] that had been mailed to Taxpayers is now available online through the Department website, although not on the TAP website. The Taxpayer and Department agreed that no information was sent to Taxpayer informing him of the deficiency in filing CRS-1 returns, although Department emails were generated to confirm receipt of taxes paid [Exhibit 1 and 2]. The Taxpayer acted reasonably by calling his accountant, who referred him to the Department help line, and relying on the information given, then continuing with his belief by not being informed otherwise through Departmental notice.

The purpose of applying a penalty is to deter and to punish. *See Gea Integrated Cooling Tech. v. State Taxation & Revenue Dep't.*, 2012-NMCA-010, ¶ 13, 268 P.3d 48. It would be unfair to punish this Taxpayer by the imposition of civil penalties for late filing of returns after the Taxpayer followed the Department's employee's guidance, and then upon discovering that something was wrong, the Taxpayer, in good faith, took steps to remedy the deficiency in tax return reporting.

In this protest, the Hearing Officer was persuaded that the balance of substantial evidence supports the finding that Taxpayer acted without negligence, and relied on advice given by a Department employee. The assessment of penalty under the facts of this protest should have been abated, and the Taxpayer is entitled to a refund of the penalty paid. Taxpayer's protest is hereby granted.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the denials of refund issued by the Department, dated December 4, 2017 and January 10, 2018 and jurisdiction lies over the parties and the subject matter of this protest.

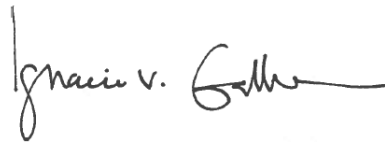
B. The Administrative Hearings Office held a hearing within the 90-day hearing requirement provided in NMSA 1978, Section, 7-1B-8 (A) and Regulation 22.600.3.8 (E).

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 establish non-negligence through substantial evidence entitling it to an abatement of assessed penalty. *See* NMSA 1978, Section 7-1-69 (B) and Regulation 3.1.11.11.

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

Dated: July 31, 2018.

A handwritten signature in black ink that reads "Ignacio V. Gallegos". The signature is written in a cursive style with a long horizontal flourish at the end.

Ignacio V. Gallegos
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 Decision and 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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