STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
NEW MEXICO FOOD DISTRIBUTORS INC.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0651829040

IN THE MATTER OF THE PROTEST OF
LOS CUATES RESTAURANT
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0487178032 and L1560919856

IN THE MATTER OF THE PROTEST OF
LOS CUATES RESTAURANT
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1281552176 and L0207810352

IN THE MATTER OF THE PROTEST OF
LITTLE ANITA'S MEXICAN FOOD
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0038465328 and L2085285680

IN THE MATTER OF THE PROTEST OF
LITTLE ANITA'S MEXICAN FOOD
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0139890480 and L1213632304

v.

Decision and Order No. 18-31

CASE NUMBERS 18.09-212A, 18.09-213A, 18.09-214A, 18.09-215A, 18.09-216A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred on the above captioned matters on September 27, 2018 before Brian VanDenzen, Esq., Chief Hearing Officer of the Administrative Hearings Office, in Santa Fe. At the hearing, Controller Robb Haltom, CPA, a bone fide employee of NM Foods Distributors, Inc. Los Cuates Restaurant, Los Cuates Restaurant, Little Anita's Mexican Food, and Little Anita's Mexican Food ("Taxpayers"), appeared representing Taxpayers. Staff

Attorney Ken Fladagar appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Veronica Galewaler appeared as a witness for the Department. As a preliminary matter, the parties agreed that these protests of affiliated companies and involving the exact same legal and factual issues should be consolidated. As such, the protests were consolidated. Taxpayer Exhibits #1-3 were admitted into the record. Department Exhibits A through M were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 16, 2018, under letter id. no. L0651829040, the Department assessed New Mexico Food Distributors, Inc., CRS #02-095813-00-7, for $68.44 in withholding tax penalty and $0.47 in interest for the CRS reporting period ending on May 31, 2018.

2. On July 16, 2018, under letter id. no. L0487178032, the Department assessed Los Cuates Restaurant, CRS #03-220744-00-1, for $17.07 in withholding tax penalty and $0.12 in interest for the CRS reporting period ending on May 31, 2018.

3. On July 16, 2018, under letter id. no. L1560919856, the Department assessed Los Cuates Restaurant, CRS #03-220744-00-1, for $246.91 in gross receipts tax penalty and $1.68 in interest for the CRS reporting period ending on May 31, 2018.

4. On July 16, 2018, under letter id. no. L0207810352, the Department assessed Los Cuates Restaurant, CRS #02-938020-00-0, for $37.56 in withholding tax penalty and $0.26 in interest for the CRS reporting period ending on May 31, 2018.

5. On July 16, 2018, under letter id. no. L1281552176, the Department assessed Los Cuates Restaurant, CRS #02-938020-00-0, for $495.15 in gross receipts tax penalty and $3.38 in interest for the CRS reporting period ending on May 31, 2018.

6. On July 16, 2018, under letter id. no. L0207810352, the Department assessed Little Anita's Mexican Food, CRS #01-889925-00-0, for $44.28 in withholding tax penalty and $0.30 in interest for the CRS reporting period ending on May 31, 2018.

7. On July 16, 2018, under letter id. no. L0038465328, the Department assessed Little Anita's Mexican Food, CRS #01-889925-00-0, for $391.54 in gross receipts tax penalty and $2.68 in interest for the CRS reporting period ending on May 31, 2018.

8. On July 16, 2018, under letter id. no. L039890480, the Department assessed Little Anita's Mexican Food, CRS #03-247446-00-6, for $14.91 in withholding tax penalty and $0.10 in interest for the CRS reporting period ending on May 31, 2018.

9. On July 16, 2018, under letter id. no. L1213632304, the Department assessed Little Anita's Mexican Food, CRS #03-247446-00-6, for $128.11 in gross receipts tax penalty and $0.88 in interest for the CRS reporting period ending on May 31, 2018

10. On July 18, 2018, the Department received all of Taxpayers protests for each respective assessment.

11. On July 23, 2018, the Department's protest office acknowledged receipt of all the respective protests and found them to be valid protests.

12. On September 4, 2018, the Department filed requests for hearings in these consolidated protests with the Administrative Hearings Office.

13. On September 5, 2018, the Administrative Hearings Office sent Notice of Administrative Hearing, Trailing Docket, scheduling these matters for merits hearings on September 27, 2018.

14. NM Foods Distributors, Inc. has an accounting department (composed of nine employees) that is responsible for the monthly filing and payment of the gross receipts tax and compensating tax for all of its related entities, including all of the taxpayers assessed in this case.

15. Robb Haltom, CPA, is the Controller for Taxpayers and runs the accounting department.

16. One employee in the accounting department, Taxpayers' Accounting Assistant[1], was trained to and responsible for the monthly filing and payment of gross receipts tax.

17. Taxpayers' Accounting Assistant had a successful history of filing and paying monthly gross receipts tax for Taxpayers while at the accounting department for at least a year and half.

18. No other employee in the accounting department had been trained to prepare, file, and pay the returns other than Mr. Haltom, CPA, and the Accounting Assistant.

19. Mr. Haltom, CPA, was out of the office on vacation from June 21 through June 25, 2018. [Taxpayer Ex. #3].

20. Taxpayers' Accounting Assistant was in charge of the accounting department in the absence of Mr. Haltom, CPA.

21. Like every other month, Taxpayers' Accounting Assistant was responsible for filing and paying the gross receipts taxes for the CRS reporting period ending on May 31, 2018, due on June 25, 2018 while Mr. Haltom, CPA was out of the office on leave.

22. At some unspecified point in early June of 2018, the Accounting Assistant was diagnosed with T-Cell Lymphoma.

[1] The name of the specific employee is contained in the testimony and in the exhibits that are part of the administrative record in this matter. However, in order to protect the confidential medical information of that employee (and that employee's family), that employee's name will not be included in this public decision and order. Instead, that employee will be referred to only as Taxpayer's Accounting Assistant.

23. While Mr. Haltom, CPA, was out on his scheduled vacation from June 21-25th, 2018, Taxpayers' Accounting Assistant required an emergency surgery.

24. After the surgery, Taxpayers' Accounting Assistant never returned to work and passed away 16-days later due to complications related to Lymphoma. [Taxpayer Ex. #1, Certificate of Death].

25. Taxpayers' Accounting Assistant's last day of work before the emergency surgery and subsequent death was June 21, 2018. [Taxpayer Ex. #2].

26. On June 26, 2018, the day that Mr. Haltom, CPA, returned to the office from his vacation, he immediately filed and paid the respective gross receipts taxes for the CRS reporting period ending on May 31, 2018 for each of the Taxpayers.

27. It is undisputed that each CRS return related to payment of gross receipts tax was filed and paid one-day after the June 25, 2018 CRS filing deadline.

28. Taxpayers use a third-party payroll service that separately submits and pays withholding taxes each month.

29. At the hearing, the undisputed, uncontested evidence presented through testimony of the Department's witness was that Taxpayers had in fact timely reported and paid all withholding taxes through its third-party payroll provider for the CRS reporting period ending on May 31, 2018.

30. No evidence or argument was presented supporting abatement of interest in this case, leaving the only issue in dispute the abatement of penalty.

DISCUSSION

Taxpayers in this protest seek abatement of the assessed penalties in this matter because they argue they were not negligent for the one-day delay in filing and paying gross receipts taxes

for the CRS reporting period ending on May 31, 2018 in light of the medical tragedy that occurred with Taxpayers' Accounting Assistant around the filing deadline. Despite the tragic and unexpected death of the employee responsible for paying the tax, the Department still maintained that Taxpayers were liable for the assessed penalties in this matter.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayers have the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* 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 assessments 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). Accordingly, it is Taxpayers' burden to present some countervailing evidence or legal argument to show that he is entitled to an abatement, in full or in part, of the assessments issued against him. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

CRS returns are the method by which taxpayers report and pay their gross receipts taxes, their compensating tax, and their withholding taxes. The deadline for filing and payment of CRS taxes, including the relevant gross receipts tax returns, is the 25th day of the month following the taxable activity. *See* NMSA 1978, § 7-9-11. Thus, the return and taxes at issue in this case for the reporting period ending on May 31, 2018 were due on June 25, 2018. There is no dispute that

Taxpayers in fact filed and paid their CRS-gross receipts tax return one day late, on June 26, 2018, potentially subjecting Taxpayers to penalty and interest.

While Taxpayers did not contest the imposition of interest, it is worth noting that 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, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayers for the one-day untimely filing and payment of the gross receipts tax.

Turning to the disputed civil penalty issue, 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, NMSA 1978 Section 7-1-69

(2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(*italics* added for emphasis).

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 Energy Corp.*, ¶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."

In this case, Taxpayers argued that they were not negligent, as that term is used by Regulation 3.1.11.10 NMAC. This is a strong argument because it cannot be said that Taxpayers failed to act with ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances. Taxpayers had a trained employee responsible for filing and payment of the monthly CRS gross receipts tax returns, including during the week that Mr. Haltom, CPA, was out on vacation. This shows an expected degree of ordinary business care. Even if Taxpayers may have known at some unspecified earlier point in the month of June that Taxpayers' Accounting Assistant had been diagnosed with cancer that would require chemotherapy treatment, the unexpected emergency surgery the week Mr. Haltom, CPA was out on vacation and the subsequent absence from work and death 16-days later would nevertheless be unexpected even for a reasonably prudent person. Cancer is terrifying illness and there are many tragic stories of shorts periods between diagnosis and death. But there are also many stories of successful treatments that put cancer into remission for an extended period of time. In this case, the quick period of time from diagnosis, to unexpected emergency surgery, to death, simply did not leave sufficient time for any reasonable person or business to comes to terms with the illness, let alone plan prudent alternatives. For these same reasons, it cannot be said that Taxpayers were negligent under Regulation 3.1.11.10 (C) NMAC because the delay in reporting and paying the gross receipts tax was not due to "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

The only possible grounds that Taxpayers might arguably meet the regulatory definition of negligence is under Regulation 3.1.11.10 (B) NMAC for inaction. But even if Taxpayers are arguably negligent under the definition of that term pursuant to Regulation 3.1.11.10 NMAC, Regulation 3.1.11.11 (B) NMAC nevertheless provides clear grounds for abatement of penalty in this case:

> the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of the injury or illness.

Taxpayers presented clear evidence that Taxpayers' Accounting Assistant was unable to prepare, file, and pay the required taxes because of her emergency procedure that occurred the week Mr. Haltom, CPA, was out on leave. Taxpayers' Accounting Assistant never returned to work. Immediately upon his return from leave, Mr. Haltom, CPA, filed and paid Taxpayers' gross receipts taxes, one day after they were due.

The Department argues that the resolution of this protest is controlled by a previous decision and order issued by the Administrative Hearings Office, *In the Matter of the Protest of Gail Stefl*, Decision and Order No. 15-15 (May 5, 2015; non-precedential). It is certainly true, like in the cited case and others, that in cases of a long-term illness not resulting in complete debilitation or death, the Administrative Hearings Office has occasionally rejected the application of Regulation 3.1.11.11 (B) NMAC because some the taxpayers in some of those still had sufficient time or ability to arrange for a third party to file and pay taxes on their behalf. *See In the Matter of the Protest of M&M Stores, Inc.* Decision and Order No. 16-25 (June 7, 2016; non-precedential); *See also In the Matter of the Protest of Jimmy Stuart*, Decision and Order No. 16-22 (May 31, 2016; non-precedential). However, unlike those cases, this situation did not deal with an extended illness but a sudden onset, emergency terminal condition. The unexpected

terminal illness resulting in death in less than a month's time that occurred in this case is a not a situation where Taxpayers could reasonably be expected to procure the services of another person, employee, or entity to file and pay their taxes within a week of the emergency surgery. Given the short period of time where anyone was aware of the diagnosis (which was no more than a month) and Taxpayers' Accounting Assistant's emergency surgery that occurred during the one-week period where the manager was out of the office on leave, this is the quintessential example of when Regulation 3.1.11.11 (B) NMAC requires abatement of penalty.

Despite the Department's argument, the fact that Taxpayers used a payroll service for filing and payment of their withholding taxes does not mean they could have easily retained that same firm within the one-week between Taxpayers' Accounting Assistant's emergency surgery and the deadline for filing and payment of gross receipts taxes. There is no evidence that the payroll firm had any knowledge or expertise in gross receipts tax. Nor is there any indication that even if the payroll company had such expertise, that it had access to the necessary set of records from five different entities need to prepare and file those returns within a matter of days in the absence of both Taxpayers' Accounting Assistant and Mr. Haltom, CPA. It is simply unreasonable to expect that in this circumstance, where the responsible employee had an emergency surgery that prevented her return to work within that week or until she passed away 16-days later, Taxpayers (or any reasonably prudent person or business) should have hired or trained another person or firm within one week to prepare, file, and submit the CRS returns from five related entities in the restaurant business. Taxpayer is entitled to abatement under Regulation 3.1.11.11 (B) NMAC.

Moreover, the evidence at hearing was that Taxpayers timely filed and paid their withholding taxes through their third-party payroll company. Thus, since that tax was timely

filed and paid, Taxpayer has overcome the presumption of correctness that attached to the assessed withholding tax penalty and interest. Despite the withholding tax assessment representing a trivial amount and despite the fact that evidence the Department itself presented showed that the withholding taxes were timely reported and paid, the Department tried to reestablish the correctness of the withholding tax penalty assessment.

As part of this effort to reestablish the correctness of the assessments, the Department presented convoluted testimony and evidence that at the time of the automatic generation of the assessments, Gentax's assessment calculations were inaccurate for the purposes of correctly identifying which tax program and tax liability remained outstanding[2]. The Department argued that the incorrect amounts listed in the assessment for withholding taxes should simply be added into the assessment related to gross receipts tax. However, rather than reestablishing the correctness of the assessment, the Department's evidence and strained argument to disregard the original withholding assessments because of errors in the automated Gentax calculation and assessment process further undermines the reliability of all the assessments issued in this case. But in any event, since Taxpayer established entitlement to abatement of penalty under Regulation 3.1.11.11 (B) NMAC and since the evidence established that withholding taxes were timely reported and paid, all penalties from all tax programs at issue, as well as the assessed interest from the timely paid withholding taxes, in this protest shall be abated.

CONCLUSIONS OF LAW

A. Taxpayers filed timely, written protests to the Department's assessments, and jurisdiction lies over the parties and the subject matter of this protest.

[2] Gentax is the Department's computer system for administration of taxes.

B. The hearing was timely set and held within 90-days of the acknowledged receipt of valid protests under NMSA 1978, Section 7-1B-8 (2015).

C. Because Taxpayers' withholding tax returns and payments for the CRS reporting period ending on May 31, 2018 were timely filed and paid by the third-party payroll company before the statutory deadline contained under NMSA 1978, Section 7-9-11, no assessed penalty under NMSA 1978, Section 7-1-69 or interest under NMSA 1978, Section 7-1-67 is due or owing.

D. Taxpayers gross receipts return and payments for the CRS reporting period ending on May 31, 2018 were filed one-day after the statutory deadline contained under NMSA 1978, Section 7-9-11.

E. Pursuant to the mandatory interest provision of NMSA 1978, Section 7-1-67 (2013), Taxpayers owe interest for the untimely filing and payment of gross receipts tax for the CRS reporting period ending on May 31, 2018. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

F. With respect to the civil negligence penalty pursuant to NMSA 1978, Section 7-1-69 (2007), Taxpayers overcame the presumption of correctness and established that they were not negligent as that term is defined by Regulation 3.1.11.10 NMAC and thus not subject to civil negligence penalty.

G. Even if Taxpayers were arguably negligent as that term is defined by Regulation 3.1.11.10 NMAC, Taxpayers established nonnegligence under Regulation 3.1.11.11 (B) NMAC, also entitling them to abatement of all assessed civil negligence penalty in this matter.

H. After Taxpayer overcame the presumption of correctness regarding the assessed penalty, the Department failed to reestablish the correctness of its assessments. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't,* 2003-NMCA-21, ¶13, 133 N.M. 217.

For the foregoing reasons, the Taxpayers protest **IS GRANTED**. The Department is ordered to abate the assessed penalty under all assessments issued in these consolidated cases and abate interest on all assessments related to withholding tax. Taxpayers are still required to pay the uncontested $8.62 in interest on the assessments related to gross receipts taxes, as required by the mandatory provisions of NMSA 1978, Section 7-1-67.

DATED: October 18, 2018.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. 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

On October 18, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interdepartmental Mail*

INTENTIONALLY
BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502