

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

**IN THE MATTER OF THE PROTEST OF
PHILLIPS 66 COMPANY
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1110241072**

v.

Decision and Order No. 18-34
Case Number 18.08-206A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT.

DECISION AND ORDER

A hearing on the above captioned protest occurred on September 13, 2018 before Ignacio V. Gallegos, Hearing Officer, in Santa Fe, New Mexico. Michelle Schaffner, staff supervisor, Crude Regulatory Reporting, appeared by telephone on behalf of Phillips 66 Company (“Taxpayer”). The Taxation and Revenue Department (“Department”) was represented by Mr. Kenneth Fladager, Staff Attorney. Michelle Schaffner, Gavin Houser, and Nicole Eden appeared as witnesses for the Taxpayer. Ms. Veronica Galewaler, Auditor, and Maureen Pasquier, Oil and Gas Severance Tax Bureau, appeared as witnesses for the Department.

Taxpayer’s Exhibits 1, 2, 3, and 4 were admitted into the record without objection. The Department’s Exhibits A and B were admitted without objection. 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 July 16, 2018, the Department issued an Assessment letter to Taxpayer, assessing penalty in the amount of \$9,369.03 for the tax reporting period ending April 30, 2018, under the Oil and Gas Severance Tax Act, NMSA 1978, Section 7-29-1 *et seq.* [Letter ID # L1110241072].

2. On July 20, 2018, Taxpayer filed a protest of the Department's assessment of penalty. In the protest letter, Taxpayer provided documents in support of the requested abatement of the penalty, indicating that the tardiness of the payment was due to Departmental delay. [Administrative file].

3. On July 25, 2018, the Department acknowledged receipt of the formal protest. [Letter ID # L0674676528].

4. On August 27, 2018, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing. [Administrative File].

5. On August 28, 2018, the Administrative Hearings Office issued the Notice of Administrative Hearing scheduling this matter for September 13, 2018, within 90 days of the Department's receipt of the protest. [Administrative file].

6. On September 5, 2018, Michelle Schaffner, on behalf of Taxpayer, submitted a Motion for telephonic/videoconference hearing, indicating Department's concurrence with the request. [Administrative file].

7. On September 10, 2018, the Administrative Hearings Office issued an Order granting request for videoconference merits hearing. [Administrative file].

8. On September 11, 2018, Taxpayer submitted marked exhibits for the hearing as directed pursuant to the videoconference instructions. [Administrative file].

9. On September 13, 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 50 days from when the protest was acknowledged by the Department.

10. Ms. Schaffner, is the staff supervisor of the Third Party Crude Regulatory Reporting Group, for Taxpayer. Taxpayer was prepared to submit the tax return/report and payment on June 18, 2018 for the tax reporting period at issue in this case. On June 18, 2018, analyst Gavin Houser, attempted to upload the tax report for April 2018 to the Department's tax website. The Department's website rejected the report, indicating that there were invalid property and pool codes. [Testimony of Ms. Schaffner; Testimony of Mr. Houser; Taxpayer Exhibit 1-4 and 1-5].

11. On June 18, 2018, analyst Gavin Houser contacted the Department via email to report the issue he had experienced with filing the report. [Testimony of Ms. Schaffner; Testimony of Mr. Houser; Taxpayer Exhibit 1-4].

12. On June 20, 2018, Taxpayer received notice via email from Department employee Melanie Feldkamp, Tax Examiner Supervisor, that the Department was working to remedy the problem and gave the Taxpayer the expectation that the problems would be fixed by Thursday [June 21] or sooner, to allow taxpayers to submit returns on Friday, June 22, 2018. [Testimony of Ms. Schaffner; Taxpayer Exhibit 1-6].

13. Taxpayers were advised by a Department employee to submit an incomplete report, by omitting the lines causing errors. However, it was the testimony of Ms. Schaffner that the reporting system Taxpayer uses will not allow submission of incomplete or inaccurate reports, nor will the system generate a payment of the full amount to be paid when payment does not match the report. [Testimony of Ms. Schaffner].

14. On Friday, June 22, 2018, after the anticipated fix date had passed without a fix for this Taxpayer, Gavin Houser emailed the Department that he would go ahead and submit an incorrect report and payment according to their instructions. Shortly thereafter, just after the email had been sent, Department employee Mallory Miera sent an email asking Mr. Houser to call her. Mr. Houser and the Department employee spoke over the phone and she told him to wait on his submission because the Department was close to completion of the remedy for reporting errors. [Testimony of Ms. Schaffner; Taxpayer Exhibit 1-7, 1-8].

15. At 3:04 P.M. on Friday, June 22, 2018, taxpayer received notice that the Department's error had been corrected and the Taxpayer could submit the entire correct return. [Testimony of Ms. Schaffner, Taxpayer Exhibit 1-9].

16. Electronic [Automated Clearing House or ACH] payments are not processed the same day if submitted after 3:00 P.M., and do not get processed until the next business day. Yet, the Taxpayer

submitted the electronic payment for taxes immediately after the successful submission of the tax return, at 4:08 P.M., Central time, on June 22, 2018. [Testimony of Ms. Schaffner, Taxpayer exhibit 3-1].

17. The payment was due on or before June 25, 2018, and the State of New Mexico did not receive the funds until Tuesday, June 26, 2018, essentially one day late. [Testimony of Ms. Schaffner].

18. The Taxpayer is required to submit tax returns and payments electronically. Both returns and payments are due on the 25th day of the second month after the end of the reporting period. In this case, the April returns and payments were due June 25. [Testimony of Ms. Schaffner, Testimony of Ms. Pasquier].

19. The Department was aware of an issue affecting 25 to 50 taxpayers that in essence prevented electronic filing of a return that contained codes the Department's reporting system (Taxpayer Access Point or TAP) rejected for being invalid. [Testimony of Ms. Pasquier].

20. The Department sent instructions to each of the affected taxpayers in order to determine the cause of the problem and to resolve it. [Testimony of Ms. Pasquier].

21. The Department accepts not only ACH payments, but also paper checks, ACH Debit, and Fed Wire payments. [Testimony of Ms. Pasquier, Testimony of Ms. Galewaler].

22. The Taxpayer in this case was the only one that did not meet the payment deadline. [Testimony of Ms. Pasquier].

23. The TAP system assesses a penalty overnight. The statutory penalty is two percent per month, or any fraction of a month. The receipt of payments even one day late will result in the assessment of penalty equal to an entire month. [Testimony of Ms. Pasquier, Testimony of Ms. Galewaler].

24. Even if a payment is initiated before the due date, it may be received late, which will result in penalties. There is no discretion in assessing a penalty, but it can be abated if Taxpayer shows evidence of non-negligence. [Testimony of Ms. Galewaler].

25. Ms. Pasquier was informed by Ms. Miera that she asked Gavin Houser to call her because she had no contact information from him, and she wanted to inquire if Phillips 66 had additional error lines, when they were almost finished correcting the TAP error. [Testimony of Ms. Pasquier].

26. Ms. Pasquier was unaware if any departmental employee informed the Taxpayer not to pay or file their taxes. [Testimony of Ms. Pasquier].

27. There are other methods of payment, other than the one utilized by the Taxpayer, that will immediately credit the Department's account. Those methods require prior account setup with third party entities. The Taxpayer was not set up to pay using other methods of payment. [Testimony of Ms. Pasquier; Testimony of Ms. Galewaler; Testimony of Ms. Schaffner].

DISCUSSION

The sole issue in this protest is whether assessed penalties resulting from its failure to timely pay tax due for the monthly Oil and Gas Severance Tax return for the tax period ending April 30, 2018. Taxpayer acknowledges that the Department received the payment late by one day, on June 26, 2018, but asserts that abatement is appropriate because Taxpayer was not negligent and because Taxpayer was relying on information provided by the Department, when the Department was in the process of resolving a widespread reporting system error.

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 must show that it is entitled to the abatement of civil penalties that is the basis of its tax protest.

Assessment of Penalty

Taxpayer conceded that the payment for April 2018 Oil and Gas Severance Tax was received by the Department on June 26, 2018. The payment was due on or before June 25, 2018. Taxpayer 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, and documentary evidence to support its claim. The facts attested to were that the Taxpayer attempted to file and pay its April 2018 tax on June 18, 2018. Due to an error in the Taxpayer Access Point (TAP), the Taxpayer's return was rejected for having invalid property and pool codes. The Taxpayer had been using the same codes in prior reporting periods and they were not invalid. Taxpayer informed the Department of the reporting error and the Department acknowledged that the reporting problem was widespread, and there were between 25 and 50 taxpayers who reported experiencing similar problems.

Over the course of several days, the Department resolved the issues other taxpayers were experiencing. In the interim, the Department advised Taxpayer to file an incomplete report (omitting the erroneous codes) and pay the entire amount due (including payment for the codes with errors). On Friday, June 22, 2018 the Taxpayer indicated, via email from Gavin Houser, that it intended to proceed in the manner the Department advised it to report and pay. Immediately thereafter, Mr. Houser received an email that he should call a Department employee, Ms. Miera, which he did. The Department employee told him that the problem was almost fixed and advised him to withhold filing an incomplete report until the reporting issue was resolved. It was less than an hour later that the outstanding issues were resolved and the Taxpayer was able to file its complete April 2018 tax return. Once the return was filed, the Taxpayer took immediate steps to ensure full payment was delivered on time. Despite the request to pay being issued at 4:08 P.M, on June 22, 2018, the Department did not receive payment funds until June 26, 2018. Because the receipt of the payment was one day late, an entire month's worth of penalty was assessed.

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.” NMSA 1978, Section 7-1-69. 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.

It is undisputed that Taxpayer is required to submit electronic returns and electronic payments. The rule governing timeliness of such payments is Regulation 3.1.4.10 (I) NMAC. The regulation requires: “Payments... made or given by electronic payment, are timely if the result of the electronic payment is that the funds are available to the state of New Mexico on or before the last date prescribed for making the payment. *The date that an electronic payment was transmitted to the department is not an indicator of whether the payment was timely*” (emphasis added).

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, or fraction of a month, Taxpayer’s payment was late. “[I]n the case of failure due to negligence or disregard of department rules and regulations... there shall be added to the amount assessed a penalty” NMSA 1978, Section 7-1-69 (A).

The Department relied on Taxpayer’s negligence in timely paying 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.” The Department’s initial determination that the Taxpayer was negligent for not submitting timely payment could be inferred by the lateness of the payment, but the evidence presented shows the Taxpayer’s substantial reliance on Department employees’ directions.

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 provided evidence 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 this instance, the Taxpayer was prepared to make the payment by June 18, 2018. When the electronic TAP reporting and payment system would not accept the Taxpayer’s return, the Department took steps to ensure access to proper reporting tools, which proper tax payments are based upon. The Taxpayer presented evidence that it consulted at length with Department representatives, and was about to take the Department’s intermediate advice (to file an inaccurate return, with full payment), when it appeared a final solution was not within reach before the filing and payment deadline. Once the Taxpayer sent notice of its intent, a Department representative informed Taxpayer to disregard the earlier intermediate advice, so the Taxpayer withheld filing its inaccurate report and making its payment. Approximately one hour later, the underlying reporting issue was resolved, and the Taxpayer filed its complete return and initiated full payment. The Taxpayer provided documentation of the request for a phone call from the Department employee, and Department witnesses confirmed that the Department employee requested the call and spoke with the Taxpayer’s representative. 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 witnesses testified credibly on this subject. The Taxpayer was not negligent in following the Department’s employee’s advice.

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. In an attempt to prove the assessment of penalty was justified, the Department presented evidence that the Taxpayer had other methods of payment available to it to ensure timely receipt of their tax payment by the Department. However, the Taxpayer’s evidence showed it had not set up other methods of payment. The Department’s suggestion that the Taxpayer could have used other methods of payment does not substantially overcome the Taxpayer’s proven reliance on Departmental advice as detailed above.

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 the receipt of a single late payment after the Taxpayer followed the Department's employee's guidance, and it was the Department's reporting system error that caused the week-long delay.

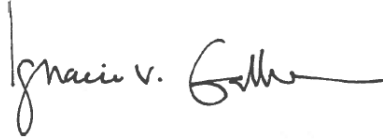
In this protest, the Hearing Officer was persuaded that the balance of substantial evidence supports the finding that Taxpayer acted without negligence, and relied on advice given by a Department employee. The assessment of penalty under the facts of this protest should be abated.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the Department's Assessment of penalty, and jurisdiction lies over the parties and the subject matter of this protest.
- B. A hearing was timely held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).
- C. Taxpayer presented substantial evidence to overcome the presumption of correctness that attached to the assessed penalty under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638.
- D. Taxpayer's failure to timely make payment was due to Taxpayer's reliance on advice of Department employees, and penalty was not properly assessed by the Department under NMSA 1978, Section 7-1-69 (2007). See *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795.
- E. The Taxpayer established one of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC that allows for abatement of penalty.
- F. Taxpayer established that it was entitled to abatement of the penalty for the Oil and Gas Severance Tax period ending April 30, 2018.

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

Dated: October 31, 2018.



Ignacio V. Gallegos
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 (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 October 2018 in the following manner:

First Class Mail

Interdepartmental State Mail

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