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

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WPS, INC.

v.

AHO No. 23.12-066A, D&O No. 24-07

TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On March 5, 2024, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference hearing on the merits of the protest to the assessment. The Taxation and Revenue Department (Department) was represented by Timothy Williams, Staff Attorney, and Lizette Rivera, Auditor, also appeared. WPS, Inc. (Taxpayer) was represented by its C.O.O., Adam Telanoff, who appeared for the hearing. Mr. Telanoff and Ms. Rivera testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's Exhibits #1 (letter) and #2 (return), and the Department's Exhibit A (letter)¹ were admitted.

The main issue to be decided is whether the Taxpayer is liable for the penalty assessed. The Hearing Officer considered all of the evidence and arguments presented by both parties. Because the Taxpayer's return was filed late, the Hearing Officer finds in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 6, 2023, the Department issued a notice of assessment to the Taxpayer for the tax period ending December 31, 2022. The assessment was for withholding tax penalty of \$15,746.20, no tax principal or interest were assessed. [Admin. file L1322994800].

2. On April 11, 2023, the Taxpayer filed a timely written protest to the assessment. [Admin. file protest].

¹ Exhibit #1 and Exhibit A are the same letter. Exhibit #1 has a received stamp and a handwritten note. Exhibit A has a section of a sentence highlighted.

1 3. On June 26, 2023, the Department acknowledged its receipt of the protest.
2 [Admin. file L1097460592].

3 4. On December 19, 2023, the Department filed a request for hearing with its answer
4 to the protest with the Administrative Hearings Office. [Admin. file request].

5 5. On January 12, 2024, the first telephonic scheduling hearing was conducted,
6 which was within 90 days of the request as required by statute. [Admin. file].

7 6. The Taxpayer is a California corporation that serves as a payroll processor for
8 over 145,000 employers, servicing more than 5 million employees, in multiple states, including
9 New Mexico. [Testimony of Mr. Telanoff²].

10 7. The Taxpayer uses a major payroll processing software to calculate the payroll
11 and taxes due. [Testimony of MR. Telanoff].

12 8. Basically by clicking a button in the software program, the Taxpayer pays the
13 payroll, sends a tax payment, and files the tax returns in each state. [Testimony of Mr. Telanoff].

14 9. The software program generates reports for the payroll and tax payments, and it
15 creates a file that is automatically saved in an archive folder when it files a return. [Testimony of
16 Mr. Telanoff].

17 10. The Taxpayer generally double-checks that the payroll and tax payments have
18 come out of the correct accounts and checks the archive folder. [Testimony of Mr. Telanoff].

19 11. If a file for a return is not displayed in the archive folder, the Taxpayer will take
20 additional steps to ensure that a return was filed. If the file for a return is displayed, the

² The Department generally objected to much of Mr. Telanoff's testimony as he was not the person who actually dealt with the filing and payment of this tax period. Mr. Telanoff explained that the Taxpayer deals with thousands of payroll processes across multiple jurisdictions every month. The objection was overruled, as rules of evidence do not apply and Mr. Telanoff oversees the department that deals with monthly taxes in multiple jurisdictions. Mr. Telanoff was familiar with the business practices and processes that the Taxpayer uses, as well as having researched and familiarized himself with the details of this particular tax period based upon the Taxpayer's regularly kept business records.

1 Taxpayer believes that the software program has successfully filed that return. [Testimony of
2 Mr. Telanoff].

3 12. For the December 2022 period³, the Taxpayer followed its usual process.
4 [Testimony of Mr. Telanoff].

5 13. The tax was paid electronically and was paid on time⁴. [Testimony of Mr.
6 Telanoff; Testimony of Ms. Rivera].

7 14. The software showed a file for a return in the archive folder. [Testimony of Mr.
8 Telanoff].

9 15. The return was not filed successfully when the tax was paid. [Exhibit 1; Exhibit
10 A; Testimony of Ms. Rivera; Testimony of Mr. Telanoff].

11 16. On March 13, 2023, the Department notified the Taxpayer that their payment had
12 been received but that their return had not been filed. [Exhibit A].

13 17. The Taxpayer received notice of the lack of return on March 24, 2023. [Exhibit
14 1; Testimony of Mr. Telanoff].

15 18. On March 24, 2023, the Taxpayer took additional steps to file the return. [Exhibit
16 2; Testimony of Mr. Telanoff].

17 19. This is the first instance of which Mr. Telanoff is aware when the software
18 program has shown a file for a return in the archive folder, but the return was not successfully
19 filed. [Testimony of Mr. Telanoff].

20 20. Because the return was filed approximately two months late, the Department
21 assessed the Taxpayer for penalty based on the percentage of the tax originally due until the
22 filing date. [Testimony of Ms. Rivera; L1322994800].

³ All references to the tax payment and return filing are for this tax period and are regarding the New Mexico taxes.

⁴ Generally, the tax and return are due the following month, which would be January 2023 for this tax period.

1 **DISCUSSION**

2 **Burden of proof.**

3 “The taxpayer shall have the burden of proof, except as otherwise provided by law.”
4 22.600.3.24 (B) NMAC (2020). Assessments by the Department are presumed to be correct. *See*
5 NMSA 1978, § 7-1-17 (2023). *See El Centro Villa Nursing Ctr. v. Taxation and Revenue*
6 *Department*, 1989-NMCA-070, 108 N.M. 795. *See also Archuleta v. O’Cheskey*, 1972-NMCA-
7 165, ¶11, 84 N.M. 428. *See also N.M. Taxation & Revenue Dep’t v. Casias Trucking*, 2014-
8 NMCA-099, ¶8. The presumption extends to the assessment of penalty and interest. *See* 3.1.6.13
9 NMAC (2001). “The effect of the presumption of correctness is that the taxpayer has the burden of
10 coming forward with some countervailing evidence tending to dispute the factual correctness of the
11 assessment”. 3.1.6.12 (A) NMAC (2001). *See Gemini Las Colinas, LLC v. N.M. Taxation &*
12 *Revenue Dep’t*, 2023-NMCA-039. *See also* 22.600.1.18 and 22.600.3.24 NMAC.

13 **Assessment of penalty.**

14 When a return is not filed by the due date, “there *shall* be added to the amount assessed a
15 penalty”. NMSA 1978, § 7-1-69 (A) (2021) (emphasis added). The word “shall” indicates that the
16 assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
17 *Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The penalty is two percent of the tax
18 liability established in a late-filed return per month or any fraction of a month, but penalty is capped
19 at 20 percent of the tax liability. *See* NMSA 1978, § 7-1-69 (A). However, no penalty is owed
20 when the failure to pay the tax “results from a mistake of law made in good faith and on reasonable
21 grounds.” NMSA 1978, § 7-1-69 (B). A mistake of law is a mistake about the legal effect of a
22 known fact. *See State v. Hubble*, 2009-NMSC-014, ¶ 22, 146 N.M. 70 (quoting from dictionary).
23 The Taxpayer failed to present any evidence to establish that its failure to file the return when it was

1 due was based on a mistake of law made in good faith and on reasonable grounds. *See* NMSA
2 1978, § 7-1-69.

3 If a taxpayer is not negligent, a penalty may be excused. *See* 3.1.11.11 NMAC (2001)
4 (listing several factors that indicate non-negligence). Negligence includes “inadvertence,
5 indifference, thoughtlessness, carelessness, erroneous belief or inattention.” 3.1.11.10 (C) NMAC
6 (2001). The Taxpayer argued that it was not negligent because it relied on its software program to
7 file the tax return, and the software program showed that it filed a return. Essentially, the Taxpayer
8 is using the software program as its agent for filing its tax return. “[F]ailure to make a timely filing
9 of a tax return, however, is not excused by the taxpayer’s reliance on an agent”. 3.1.11.11 (D)
10 NMAC. Therefore, the Taxpayer failed to overcome the presumption of correctness on the penalty
11 assessment. *See* NMSA 1978, § 7-1-17. *See also* 3.1.6.12 and 3.1.6.13 and 3.1.11.10 and 3.1.11.11
12 NMAC. *See also Gemini Las Colinas, LLC, 2023-NMCA-039.*

13 The Taxpayer also argued that no penalty was due because it immediately filed the return
14 when it received notice of the lack of return in Exhibit 1. The Taxpayer argued that subsection F of
15 the statute provides five business days from the date that notice is received before penalty will be
16 applied when a taxpayer makes an electronic payment of tax. *See* NMSA 1978, § 7-1-69 (F). The
17 Taxpayer misreads the statute, which allows five days from receipt of notice when the electronic
18 “payment does not include all of the information required by the department pursuant to the
19 provisions of Section 7-1-13.1”. *Id.* The information required under Section 7-1-13.1 is not related
20 to the filing of a tax return. *See* NMSA 1978, § 7-1-13.1 (2005) (regarding the method of
21 payments). Therefore, Exhibit A is not a notice contemplated by this subsection. *See* NMSA 1978,
22 § 7-1-69 (F). Moreover, subsection F acknowledges that a penalty may be imposed by subsection

1 A, but it does not allow an additional penalty under subsection F when one has already been
2 imposed by subsection A. *See id.*

3 CONCLUSIONS OF LAW

4 A. The Taxpayer filed a timely written protest of the Department's assessment, and
5 jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8
6 (2019).

7 B. The first hearing was timely set and held within 90 days of the request for hearing.
8 *See id.* *See also* 22.600.3.8 NMAC (2020).

9 C. Because the Taxpayer failed to file the tax return when it was due, penalty was
10 owed. *See* NMSA 1978, § 7-1-69.

11 D. The Taxpayer failed to provide evidence that it was not negligent when it relied
12 on its software as its agent to file the return and failed to provide evidence that it made a mistake
13 of law based on good faith and reasonable grounds. Consequently, the Taxpayer failed to
14 overcome the presumption of correctness, and the penalty stands as assessed. *See id.* *See also*
15 NMSA 1978, § 7-1-17. *See also* 3.1.6.12 and 3.1.6.13 and 3.1.11.10 and 3.1.11.11 NMAC. *See*
16 *also Gemini Las Colinas, LLC, 2023-NMCA-039.*

17 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
18 Taxpayer is liable for \$15,746.20 in penalty.

19 DATED: April 12, 2024.

20 *Dee Dee Hoxie*

21 _____
22 Dee Dee Hoxie
23 Hearing Officer
24 Administrative Hearings Office
25 P.O. Box 6400
Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On April 12, 2024, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16 *First Class Mail and Email*

First Class Mail and Email

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19 *Intentionally Blank*