

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
GENCON CORPORATION
ID NO. 01-857270-00 7
ASSESSMENT NO. 2722846**

No. 02-16

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 17, 2002, before Margaret B. Alcock, Hearing Officer. Gencon Corporation ("Taxpayer") was represented by Michael Clute, its president. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a commercial construction company located in Las Cruces, New Mexico.
2. Because the Taxpayer's average monthly payment of gross receipts, compensating and withholding taxes, which are reported under the Department's combined reporting system ("CRS"), exceeds \$25,000, the Taxpayer is required to pay these taxes using one of the four payment methods set out in Section 7-1-13.1 NMSA 1978. These payment methods are designed to insure that tax funds are immediately available to the state on or before the due date.
3. The Taxpayer has elected to make its monthly CRS tax payment by means of an automated clearing house ("ACH") transfer. The Taxpayer is responsible for making the arrangements necessary to insure that its ACH payment is received by the Department on or before the due date.

4. Department Publication FYI-401, *Special Payment Methods*, informs taxpayers that in order for an ACH payment to be timely, the taxpayer must authorize the transfer at least one banking day before the due date. The publication warns taxpayers that Saturdays, Sundays and national bank holidays are not banking days.

5. The tax return and payment of CRS taxes for the October 2001 reporting period were due on or before Monday, November 26, 2001.

6. On Tuesday, November 20, 2001, the Taxpayer filed its CRS-1 tax return for the October 2001 reporting period on line.

7. Pursuant to its normal procedures, the Taxpayer should have initiated the ACH payment of these taxes on Friday, November 23, 2001.

8. Because the Taxpayer's office was closed for the Thanksgiving holiday on Thursday, November 22, 2001 and Friday, November 23, 2001, the payment was not initiated on time.

9. On Saturday, November 24, 2001, one of the Taxpayer's employees realized that the Taxpayer's October 2001 CRS taxes needed to be paid by the following Monday and called the Taxpayer's clearing house to initiate the ACH transfer.

10. The person handling the transaction for the clearing house incorrectly advised the Taxpayer that the payment would be posted on Monday, November 26, 2001.

11. The Taxpayer's ACH payment was not posted to the Department's account until Tuesday, November 27, 2001.

12. As a result of the late payment of taxes for the October 2001 period, the Department issued Assessment No. 2722846 assessing the Taxpayer penalty and interest pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978.

13. On December 5, 2001, the Taxpayer filed a written protest to the assessment of penalty and interest.

14. On February 11, 2002, the Taxpayer paid the interest due on the late payment, but stated that it wished to continue with its protest of the assessment of penalty.

DISCUSSION

The sole issue to be determined is whether the Taxpayer is liable for the penalty assessed on its late payment of CRS taxes for the October 2001 reporting period. The Taxpayer does not dispute that its tax payment was late, but maintains that it should be excused from the penalty because (1) it was misled by an employee of the clearing house the Taxpayer used to make its ACH payment; and (2) because the Taxpayer has an exemplary reporting history and has always made every effort to insure that its taxes are paid on time and in full.

Section 7-1-17 NMSA 1978 provides that any assessment of taxes made by the Department is presumed to be correct. Section 7-1-3 NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the presumption of correctness applies to the assessment of penalty at issue in this case, and it is the Taxpayer's burden to present evidence and legal arguments to support an abatement.

Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month or any fraction of a month, up to a maximum of ten percent, that a taxpayer fails "due to negligence or disregard of rules and regulations" to pay taxes or file required tax reports in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

New Mexico case law confirms that penalties may properly be assessed even when a taxpayer's late payment is based on inadvertent error or unintentional failure to pay the tax due. *Arco Materials, Inc. v. Taxation & Revenue Department*, 118 N.M. 12, 16, 878 P.2d 330, 334 (Ct. App. 1994) *rev'd on other grounds by Blaze Construction Co. v. Taxation & Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797-798, 779 P.2d 982, 984-985 (Ct. App. 1989).

In this case, the Taxpayer argues that it should be excused from the negligence penalty because an employee of the clearing house the Taxpayer used to make its ACH payment advised the Taxpayer that the payment would be posted to the Department's account on Monday, November 26, 2001. The fact that the Taxpayer received erroneous advice from the agent it chose to make the ACH transfer does not provide a basis for abating penalty. The law is clear that a principal is bound by the acts of its agent. *Marchman v. NCNB Texas Nat'l Bank*, 120 N.M. 74, 92, 898 P.2d 709, 727 (1995).

In addition, the evidence in this case shows that the Taxpayer's late payment was also attributable to the errors of its own employees.

The first error occurred as a result of the Thanksgiving holiday. The Taxpayer closed its offices on both Thursday, November 22nd and Friday, November 23rd, and none of its employees remembered that the ACH transfer to pay the Taxpayer's October CRS taxes had to be made that Friday. The second error occurred when an employee of the Taxpayer attempted to correct the first error by initiating the ACH transfer on Saturday, November 24th. The Department's Publication FYI-401 sets

out detailed instructions on the special payment methods required by Section 7-1-13.1 NMSA 1978.

Page 9 of the publication states as follows:

Timely Filing and ACH Payments. For the ACH payment to be timely, the Department must have access to the funds on or before the tax return's filing due date. This means you must authorize the transfer at least one banking day before the tax return's filing due date.

Remember to consider Saturdays, Sundays and bank holidays when you determine the filing due date.... For example, if Christmas falls on a Monday, the due date for November CRS taxes becomes Tuesday, December 26th. To ensure timely payment you need to initiate the ACH deposit no later than Friday, December 22.

These instructions should have put the Taxpayer's employees on notice that an ACH transfer initiated on Saturday would not post to the Department's account until the following Tuesday, which is what happened in this case. While the Taxpayer places the blame for its late payment on incorrect information provided by its clearing house, the Taxpayer's employees were equally negligent in forgetting to make the ACH transfer in the first place and in failing to carefully read the Department's instructions, which would have alerted them to the fact that the information received from the clearing house was wrong.

It must be noted that it is the Taxpayer's practice to wait until the last possible day to make the ACH transfer necessary to pay its monthly CRS taxes. Although taxpayers become liable for tax at the time the taxable transaction occurs, they are not required to pay that tax until the statutory due date. Section 7-1-13 NMSA 1978. With regard to CRS taxes, the due date is the 25th day of the month following the end of the month in which the taxable transaction occurs. Section 7-9-11 NMSA 1978. In effect, taxpayers are given a 25-day grace period to report and pay taxes due for the previous month. While it is certainly permissible for a taxpayer to wait until the last possible day to make its tax payment, thereby retaining use of the tax funds for its own benefit, this strategy does not leave any margin for error. If a problem occurs in transmitting the payment, there is often no time left to take

corrective action and insure the payment is delivered to the Department by the statutory due date. Given the substantial amounts of penalty and interest that can result from a late payment of tax, this strategy does not qualify as prudent business practice.

Here, the Taxpayer filed its CRS-1 tax return for the October 2001 reporting period on Tuesday, November 20, 2001. At that point in time, the Taxpayer knew the amount of tax due to the state and could have initiated the ACH transfer necessary to pay the tax that same day. Instead, the Taxpayer chose to hold on to the tax funds for a few extra days. It failed, however, to make arrangements to insure that the ACH transfer would be made on Friday, even though the office was closed for the Thanksgiving holiday. When attempting to correct this oversight, the Taxpayer's employee failed to read the Department's instructions carefully enough to realize that an ACH transfer initiated on Saturday would not post to the Department's account until the following Tuesday. Although not intentional, the Taxpayer's late payment of its October 2001 CRS taxes was negligent and justifies imposition of penalty under Section 7-1-69 NMSA 1978.

As its final argument, the Taxpayer asks that penalty be waived based on its exemplary reporting history and the fact that it is a good corporate citizen. These are not factors the Department can consider. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the New Mexico Supreme Court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

In this case, the Legislature has directed the imposition of penalty whenever a late payment results from the taxpayer's negligence. The Legislature has not granted the Department or its hearing

officer authority to waive the penalty based on equitable grounds, including a taxpayer's past reporting history. Because the Taxpayer's late payment of its October 2001 CRS taxes was due to negligence, there is no basis for abating the penalty assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Department Assessment No. 2722846, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer's failure to make timely payment of its October 2001 CRS taxes was negligent, and penalty was properly assessed pursuant to Section 7-1-69 NMSA 1978.

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

DATED July 18, 2002.