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

**IN THE MATTER OF THE PROTEST OF**
**MALCOLM SERVICES, INC.** **No. 02-14**
**ID NO. 01-766199-00-4**
**ASSESSMENT NO. 2603212**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 16, 2002, before Margaret B. Alcock, Hearing Officer. Malcolm Services, Inc. ("Taxpayer") was represented by James W. Ricci, CPA. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. The record was left open until May 31, 2002 to allow the parties to submit additional written argument. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. The Taxpayer is a family-owned corporation located in Albuquerque, New Mexico.

2. Since the 1940s, the Taxpayer has been engaged in the business of towing and retrieving vehicles of all types.

3. The Taxpayer files annual corporate income tax returns for the fiscal year August 1 through July 31.

4. For the year ending July 31, 1998, the Taxpayer had a New Mexico corporate income tax liability of $6,489.

5. A substantial portion of the Taxpayer's 1998 tax liability was attributable to gain from the sale of equipment. This sale was a one-time event that occurred during the last ten days of the tax year.

6. When the tax attributable to the sale of equipment is factored out, the Taxpayer's tax liability for the year ending July 31, 1998 was $3,945.

7. For the year ending July 31, 1999, the Taxpayer had a New Mexico corporate income tax liability of $3,435.

8. For the year ending July 31, 2000, the Taxpayer had a New Mexico corporate income tax liability of $8,017.

9. Section 7-2A-9.1 NMSA 1978 of the Corporate Income and Franchise Tax Act requires every taxpayer to make estimated payments during its taxable year if its tax liability can reasonably be expected to be $5,000 or more.

10. Based on its reading of Department regulations, the Taxpayer believed it was excused from this requirement if its tax liability for the two preceding years was less than $5,000. For this reason, the Taxpayer did not make any estimated payments during the tax year ending July 31, 2000.

11. The Department's reading of the pertinent statutes and regulations differed from the Taxpayer's reading, and the Department concluded that the Taxpayer was required to make estimated payments during the year ending July 31, 2000.

12. On November 25, 2000, the Department issued Assessment No. 2603212 to the Taxpayer in the total amount of $1,125.24, representing penalty and interest due on the Taxpayer's failure to make quarterly estimated payments during the year ending July 31, 2000.

13. On November 28, 2000, the Taxpayer filed a written protest to the Department's assessment.

## DISCUSSION

The issue presented is whether the Taxpayer is liable for interest and penalty resulting from its failure to make quarterly estimated payments of corporate income tax during the tax year ending July 31, 2000. This issue is governed by Section 7-2A-9.1 NMSA 1978 which provides, in pertinent part:

> A. Every taxpayer shall pay estimated corporate income tax to the state of New Mexico during its taxable year if its tax after applicable credits for such taxable year can reasonably be expected to be five thousand dollars ($5,000) or more....
>
> C. Every taxpayer to which Subsection A of this section applies that fails to pay the estimated tax when due...shall be subject to the interest and penalty provisions of Sections 7-1-67 and 7-1-69 NMSA 1978 on the underpayment.

The Department maintains that the Taxpayer could reasonably have expected its tax liability to exceed $5,000 for the year ending July 31, 2000 and was therefore required to make quarterly estimated payments. The Taxpayer argues that Department Regulation 3.4.9.10 NMAC excuses a corporation from this requirement if its tax liability for the two preceding years was less than $6,000.

Regulation 3.4.9.10 NMAC to Section 7-2A-9.1 NMSA 1978 reads as follows:

> **3.4.9.10 Estimated tax; reasonable expectation.**
>
> A. Any corporation filing separately or any group of corporations filing on a combined or consolidated basis that has a liability of $6,000 or more under the corporate income tax in either of the two immediately preceding taxable years is presumed to reasonably expect to have a corporate income tax liability of $5,000 or more for the taxable year. The taxpayer may rebut the presumption by showing that liability in the two immediately preceding years exceeded $6,000 because of extraordinary events.
>
> B. Any corporation or group of corporations filing on a combined or consolidated basis which has a corporate income tax liability exceeding $5,000 for a taxable year is presumed to have reasonably expected to owe estimated tax, unless the taxpayer demonstrates that the corporate income tax

> liability was the result of an extraordinary event or series of events which could not have been anticipated in the ordinary course of business planning. The fact that the taxpayer's normal business was more profitable than planned is not such an extraordinary event or series of events.

The Taxpayer reads Subsection A of the regulation to mean that a corporation with a tax liability of less than $6,000 in the two immediately preceding years is not required to make estimated payments for the current year.[1] The Taxpayer asserts that this safe harbor provision applies even if the corporation could, in fact, have anticipated that its tax liability for the current year would exceed $5,000. The Department maintains that Subsections A and B create two separate, independent presumptions. Subsection A relies on prior reporting history to create a presumption that a corporation whose tax liability exceeded $6,000 in either of the preceding two years could reasonably expect its liability for the current year to exceed $5,000. Subsection B relies on current reporting to create a presumption that a corporation whose liability exceeds $5,000 could reasonably expect to owe estimated tax for that year. In each case, the corporation can overcome the presumption by demonstrating that the excess liability was the result of an extraordinary, unanticipated event.

The interpretation of a regulation by the agency charged with administering it is entitled to be accorded substantial weight. *Klumker v. Allred*, 112 N.M. 42, 47, 811 P.2d 75, 80 (1991); *see also, State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989). In this case, there is nothing unreasonable or illogical in the Department's interpretation of Regulation 3.4.9.10. In contrast, the Taxpayer's interpretation conflicts with the

[1] Although the Taxpayer's liability for the year ending July 31, 1998 exceeded $6,000, the Department stipulated that the Taxpayer's sale of equipment was an extraordinary event and that the tax attributable to gain on the sale should be excluded in determining the Taxpayer's tax liability for purposes of Subsection A of the regulation.

express terms of Section 7-2A-9.1 NMSA 1978, which requires a corporation to make estimated payments "if its tax after applicable credits for such taxable year can reasonably be expected to be five thousand dollars ($5,000) or more...." The Taxpayer's position that Subsection A of Regulation 3.4.9.10 NMAC excuses a corporation from making estimated payments—even when the corporation can anticipate that its tax liability for the current year will exceed $5,000—is directly contrary to this statutory provision. The Taxpayer's argument reads language into Subsection A that is not there (*i.e*, that a tax liability of less than $6,000 in the prior two years creates a negative presumption that the corporation could *not* reasonably anticipate a liability of $5,000 or more in the current year) and completely ignores the existence of Subsection B of the regulation. The Taxpayer is mistaken in concluding that the regulation creates alternative grounds to excuse a corporation from payment of estimated tax.

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). 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). In this case, the only basis for abating the Department's assessment of interest and penalty would be evidence that the Taxpayer could not have reasonably expected its tax liability for the year ending July 31, 2000 to exceed $5,000. The Taxpayer declined to submit any evidence on this issue, choosing instead to rely on its erroneous interpretation of Regulation 3.4.9.10 NMAC. Accordingly the statutory presumption of correctness that attaches to the Department's assessment has not been overcome.

## CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 2603212, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was required to make quarterly estimated payments of corporate income tax during its tax year ending July 31, 2000.

3. The Taxpayer is liable for interest and penalty resulting from its failure to make quarterly estimated payments of corporate income tax during its tax year ending July 31, 2000.

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

DATED June 3, 2002.