

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

**IN THE MATTER OF THE PROTEST OF
HYUNDAI CORPORATION (USA)
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0930844208**

No. 17-28

DECISION AND ORDER

A protest hearing occurred in the above captioned matter on May 15, 2017 at 10:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Jason Jaebeom Kim and Mr. Jae Hahn both appeared for Hyundai Corporation USA (“Taxpayer”). Only Mr. Hahn testified as a witness for Taxpayer. Staff Attorney, Richard Peneer, appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor, Veronica Galewaler, appeared as a witness for the Department. Department’s Exhibits A and B were admitted into the record without objection, and are described in the Administrative Exhibit Log. The Taxpayer did not seek to introduce any exhibits. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 12, 2016, the Department issued a Notice of Assessment of Taxes and Demand for Payment for \$14,933.88 in withholding tax penalty, and \$244.82 in withholding tax interest for a total amount of \$15,178.70. The assessment covered the tax reporting period ending June 30, 2016 under Letter ID No. L0930844208.
2. Taxpayer submitted a formal protest to the assessment. The Department’s Protest Office received the Taxpayer’s protest on October 4, 2016. [Dept. Ex. B].
3. The Department acknowledged the Taxpayer’s protest on October 19, 2016.

4. The Department submitted a Hearing Request to the Administrative Hearings Office on November 28, 2016.

5. The Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference on November 28, 2016 in which a scheduling hearing was noticed for December 16, 2016.

6. A scheduling hearing occurred on December 16, 2016. The parties did not object that the hearing satisfied the requirement that a hearing be held within 90 days of the Taxpayer's protest.

7. The Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing on December 19, 2016. A hearing on the merits of Taxpayer's protest was noticed for April 28, 2017 at 10 a.m.

8. The Administrative Hearing Office entered an Amended Notice of Administrative Hearing on February 13, 2017. The amended notice reset the hearing on the merits of Taxpayer's protest for May 15, 2017 at 10 a.m.

9. On February 15, 2017, Taxpayer requested permission to appear telephonically. The Department did not concur with the Taxpayer's request.

10. The Administrative Hearings Office entered an Order Denying Request for Telephonic Appearance on March 8, 2017.

11. In addition to other responsibilities of employment, Mr. Hahn is familiar and knowledgeable with Taxpayer's information technology configuration. [Testimony of Mr. Hahn].

12. As of April 21, 2016, the Taxpayer had been able to access the Department's website to download forms, access information, and perform other functions. Taxpayer had not

experienced any difficulties up to that date with accessing the Department's website. [Testimony of Mr. Hahn].

13. Between the dates of April 21, 2016 and July 28, 2016, Taxpayer made various modifications to its internal computer network. [Testimony of Mr. Hahn].

14. Unbeknownst to Taxpayer, the modifications restricted Taxpayer's access to various government websites, including the Department's taxpayer access website. [Testimony of Mr. Hahn].

15. Ms. S. Kim was employed by Taxpayer. She was responsible for submitting the Taxpayer's return and payment for the period ending June 2016. [Testimony of Mr. Hahn].

16. Despite having technical issues with accessing the Department's website through Taxpayer's network, Ms. Kim erroneously believed that the deadline for Taxpayer to make payment for the reporting period at issue was July 31, 2016. [Dept. Ex. B].

17. Mr. Hahn was notified that Ms. Kim was having difficulty accessing the Department's website through Taxpayer's network. Mr. Hahn unsuccessfully attempted to resolve the network issue. [Testimony of Mr. Hahn].

18. On or about July 28, 2016, when the network issue had not been resolved, Taxpayer determined that it would be required to submit its payment to the Department through another computer network. Ms. Kim was authorized to submit Taxpayer's payment from her personal home computing network. [Testimony of Mr. Hahn].

19. The amount of Taxpayer's payment was \$746,694.00. [Testimony of Mr. Hahn].

20. Ms. Kim's understanding that Taxpayer's payment was due on the last day of the month was incorrect. Taxpayer's return and payment for the reporting period ending June 30, 2016 was due on July 25, 2016. Due to the amount of the payment, it should have also been

initiated a few days before the due date in order to assure the Department received the payment before the deadline. [Testimony of Ms. Galewaler].

21. As a result of the untimely payment, the Department assessed penalty and interest. As of May 15, 2017, Taxpayer's liability was \$14,933.88 in penalty only. [Testimony of Ms. Galewaler; Dept. Ex. A].

22. Ms. Kim is no longer employed by Taxpayer and did not testify at the hearing. [Testimony of Mr. Hahn].

23. It was unknown whether Ms. Kim sought the advice of anyone employed by, or affiliated with, the Taxpayer in determining when Taxpayer's payments were due to the Department. [Testimony of Mr. Hahn].

24. Taxpayer's network issues were resolved in March of 2017. [Testimony of Mr. Hahn].

DISCUSSION

The only issues in this protest are whether the civil negligence penalty and interest assessed as a result of the failure to timely pay tax may be abated. Taxpayer did not dispute the fact that its payment was late. Rather, the Taxpayer requested leniency with respect to the imposition of penalty and interest.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment of tax issued in this case is 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, §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 assessment 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). Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

Assessment of Interest

Despite the good faith intentions of the Taxpayer in this case, 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 the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the tax was due but not paid until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and Department is without legal authority to abate it despite the Taxpayer’s good faith intentions.

Assessment of Penalty

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*).

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence" even if, like here, Taxpayer's actions or inactions were unintentional.

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, Taxpayer was negligent under Regulation 3.1.11.10 (A) and (C) NMAC because it relied on an erroneous belief that its tax payment for June 2016 was due on July 31, 2016. It submitted its payment on July 28, 2016. The actual deadline, however, was July 25, 2016. NMSA 1978, Section 7-3-6 provides "Taxes withheld under the provisions of the Withholding Tax Act must be paid on or before the twenty-fifth day of the month following the month when the taxes were required to be withheld."

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Further, in relevant part to this protest, Regulation 3.1.11.11 (D) NMAC (emphasis added) allows for abatement of penalty when a "taxpayer *proves* that the failure to pay a tax... was caused by *reasonable reliance* on the advice of *competent* tax counsel or *accountant* as to the taxpayer's liability after full disclosure of all relevant facts." Black's Law Dictionary, 22 (9th ed. 2009), defines "accountant" as "a person authorized under applicable law to practice public accounting."

In this case, there was no evidence that Ms. Kim relied on the advice of competent tax counsel or an accountant. Ms. Kim did not testify at the hearing and Mr. Hahn did not know how she erroneously determined that the due date for the Taxpayer's payment was the last day of the month.

Although the evidence established that Taxpayer was also having internal network issues that restricted its access to the Department's online filing system, the Hearing Officer was not persuaded that Taxpayer's network issues were the cause of the late payment. The cause of the late payment was apparent from the protest letter, admitted as Department Exhibit B, in which Ms. Kim stated "[t]he reason I paid late is because due to being new the [sic] New Mexico's Taxation System, I thought that payment was due on the last day of the month." She goes on to state "...I thought the payment date was flexible until the end of the month." Finally, she states "Now I know that both report and payment is due on the 25th day and I am certain there will be no penalties charged to us in the future."

The Hearing Officer found Ms. Kim's statements in the protest letter to be trustworthy and reliable. Ms. Kim spoke in an individual and representative capacity on a subject in which she had personal knowledge. Her statements were also made against her own personal interests. She went on, quite sympathetically, to explain: "The amount is very large and it will cause our company financial hardship and it will also affect my job position."

Despite the Ms. Kim's sympathetic circumstances, it is apparent that the late payment resulted from her erroneous belief that payment was due on the last day of the calendar month, not the Taxpayer's network issue.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. In contrast, there was no dispute that the issue giving rise to this protest was the

result of Taxpayer's inadvertence, erroneous belief, or inattention. In other words, Taxpayer's conduct was not in bad faith or with bad intentions. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty in this case. Therefore, Taxpayer did not overcome the presumption of correctness and failed to establish that it was entitled to an abatement of penalty in this matter.

Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer's filed a timely written protest to the assessment issued under Letter ID No. 0930844208 and jurisdiction lies over the parties and the subject matter of this protest.

B. The scheduling hearing conducted on December 16, 2016 met the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015).

C. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it is entitled to an abatement.

D. Under NMSA 1978, Section 7-1-67, Taxpayer is liable for interest under the assessment.

E. Taxpayer was negligent in failing to report and pay taxes when due for the tax period covered by the assessment. Consequently, the assessment of penalty was proper.

F. The Taxpayer failed to establish non-negligence under 3.1.11.11 (D) NMAC and *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795; therefore, penalty was properly assessed.

G. As of the date of hearing, the outstanding amount in protest for the period ending June 2016 was \$14,933.88 in penalty.

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

DATED: June 14, 2017



Chris Romero
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.

