TAX & REV V. CLOUTIER

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
Plaintiff-Appellant,
v.
MARIA CLOUTIER and ROBERT CLOUTIER,
Defendants-Appellees.

IN THE MATTER OF THE PROTEST OF MARIA CLOUTIER and ROBERT CLOUTIER.

NO. 30,096

COURT OF APPEALS OF NEW MEXICO

January 3, 2012

APPEAL FROM THE TAXATION AND REVENUE DEPARTMENT, Monica Ontiveros, Hearing Officer

COUNSEL

Gary K. King, Attorney General, Carolyn A. Wolf, Special Assistant Attorney General, Santa Fe, NM, for Appellant

Maria and Robert Cloutier, Albuquerque, NM, Pro Se Appellees

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, LINDA M. VANZI, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

Garcia, Judge.

The Taxation and Revenue Department (Department) appeals from the order of its hearing officer concerning penalties due by Maria and Robert Cloutier (Taxpayers) in connection with gross receipt taxes for the tax years 2005 and 2006. We reverse.

Prior to January 1, 2008, NMSA 1978, Section 7-1-69(A) (2003) (amended 2007) provided that a penalty of two percent per month or any fraction of a month would be added to the amount of an assessment if a taxpayer failed to file a tax return or to pay taxes when due because of negligence of disregard of Department rules or regulations, but without intent to evade or defeat a tax. The statute then provided a maximum penalty of ten percent. Section 7-1-69(A)(1) (2003). In 2007, the Legislature amended Section 7-1-69 to increase the maximum penalty to twenty percent effective January 1, 2008. 2007 N.M. Laws, ch. 45, §§ 4, 16; NMSA 1978, § 7-1-69(A) (2007).

On November 3, 2008, the Department issued two assessments to Taxpayers for gross receipt taxes due in 2005 and 2006, including interest and a twenty percent penalty. Taxpayers protested the assessments. The hearing officer denied the protest, but reduced the penalty to ten percent based upon the application of the 2007 amendment to Section 7-1-69.

The Department appealed the hearing officer's order and filed its brief in chief on April 15, 2010. After Taxpayer did not file an answer brief, the Court notified Taxpayer by order on September 9, 2010, that the case would be submitted to a panel for decision based on the brief in chief.

The Court has addressed the same issue raised in this appeal in *GEA Integrated Cooling Technology v. New Mexico Taxation and Revenue Department*, 2011-NMCA-__, __ N.M. __, __ P.3d __ (No. 30,790, Dec. 8, 2011), in which we considered the briefs of the parties and conducted oral argument. In *GEA Integrated Cooling Technology*, we held that the date of the assessment under Section 7-1-69 determines the maximum penalty that the Department is to apply. *GEA Integrated Cooling Technology*, 2011-NMCA-__, ¶ 10. In that case, the department issued an assessment in 2009 for gross receipts taxes due in 2006 and 2007. *Id.* ¶ 2. Thus, we held that the 2007 amendment and the twenty percent maximum penalty applied to the assessment. *Id.* ¶ 15. Based on *GEA Integrated Cooling Technology*, we reach the same result in this case.

CONCLUSION

We partially reverse the decision of the hearing officer regarding the assessments for the tax years 2005 and 2006 to the extent that they imposed the ten percent maximum penalty. The 2007 amendment to Section 7-1-69 was in effect at the time the Department issued its assessment on November 3, 2008, and the Department correctly imposed a twenty percent maximum penalty for the assessments made for the 2005 and 2006 tax years.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge