

**TITLE 3: TAXATION**  
**CHAPTER 1: TAX ADMINISTRATION**  
**PART 11: PENALTIES**

**3.1.11.1 ISSUING AGENCY:** Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630  
[3/15/96; 3.1.11.1 NMAC - Rn, 3 NMAC 1.11.1, 1/15/01]

**3.1.11.2 SCOPE:** This part applies to all taxpayers, their agents and representatives and all persons required to submit a return or information to the taxation and revenue department under any tax, tax act or other law administered and enforced pursuant to the Tax Administration Act.  
[3/15/96, 10/31/96; 3.1.11.2 NMAC - Rn, 3 NMAC 1.11.2, 1/15/01]

**3.1.11.3 STATUTORY AUTHORITY:** Section 9-11-6.2 NMSA 1978.  
[3/15/96; 3.1.11.3 NMAC - Rn, 3 NMAC 1.11.3, 1/15/01]

**3.1.11.4 DURATION:** Permanent.  
[3/15/96; 3.1.11.4 NMAC - Rn, 3 NMAC 1.11.4, 1/15/01]

**3.1.11.5 EFFECTIVE DATE:** 3/15/96, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[3/15/96, 10/31/96; 3.1.11.5 NMAC - Rn & A, 3 NMAC 1.11.5, 1/15/01]

**3.1.11.6 OBJECTIVE:** The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Tax Administration Act.  
[3/15/96; 3.1.11.6 NMAC - Rn, 3 NMAC 1.11.6, 1/15/01]

**3.1.11.7 DEFINITIONS:** [Reserved.]  
[3/15/96; 3.1.11.7 NMAC - Rn, 3 NMAC 1.11.7, 1/15/01]

**3.1.11.8 ASSESSMENT AND PROTEST OF PENALTY:**

A. Civil penalty is assessed by the secretary or delegate in the manner provided for issuing assessments in Paragraph 7-1-17B(2) NMSA 1978 and any regulations thereunder. Any assessment of civil penalty or demand for payment made by the department is presumed to be correct under Subsection 7-1-17C NMSA 1978.

B. Civil penalty shall be collected in the same manner as, and concurrently with, the amount of tax to which it relates, in accordance with Section 7-1-30 NMSA 1978.

C. A taxpayer who has been assessed civil penalty and who believes that the taxpayer has been neither negligent nor in disregard of rules or regulations has available all the legal remedies in the Tax Administration Act that are available for any assessed taxpayer, whether for tax, taxes, interest or penalty.

D. The effect of the presumption of correctness of assessment of civil penalty is that the taxpayer has the burden of coming forward with some evidence showing that the assessment made by the department is not correct. When not correct, the assessment shall be abated by the secretary or secretary's delegate as provided by Section 7-1-28 NMSA 1978.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.11.8 NMAC - Rn & A, 3 NMAC 1.11.8, 1/15/01]

**3.1.11.9 COMPROMISE BY SECRETARY:** The secretary may compromise the assessment of civil penalty by entering into a written closing agreement if and when the secretary has a good faith doubt of the taxpayer's liability. The secretary may not compromise the civil penalty because of the taxpayer's inability to pay. The secretary may not compromise the civil penalty solely because of the threat of litigation. The secretary may not compromise the civil penalty solely as an expedient means of disposing of a controversy.  
[11/5/85, 8/15/90, 10/31/96; 3.1.11.9 NMAC - Rn & A, 3 NMAC 1.11.9, 1/15/01]

**3.1.11.10 NEGLIGENCE:** Taxpayer "negligence" under Subsection 7-1-69A NMSA 1978 means:

- 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. inadvertance, indifference, thoughtlessness, carelessness, erroneous belief or inattention.
- [11/5/85, 8/15/90, 10/31/96; 3.1.11.10 NMAC - Rn & A, 3 NMAC 1.11.10, 1/15/01]

**3.1.11.11 INDICATIONS OF NONNEGLIGENCE:** The following situations may indicate that a taxpayer has not been negligent or in disregard of rules and regulations and the secretary will consider these circumstances in deciding whether to assess civil penalty as provided by Section 7-1-69 NMSA 1978, or whether to abate assessed civil penalty as provided by Section 7-1-28 NMSA 1978:

- A. the taxpayer proves the taxpayer was affirmatively misled by a department employee;
  - B. the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of the injury or illness;
  - C. the taxpayer shows that physical damage to the taxpayer's records or place of business caused a delay in filing a return or making payment of tax;
  - D. the taxpayer proves that the failure to pay tax or to file a return 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; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent;
  - E. a taxpayer, within twelve months of the filing of a return by the original due date or by the extended due date and without action of the secretary or delegate, files an amended return reflecting tax due or additional tax due and full payment of any tax due accompanies the amended return;
  - F. with regard to income tax returns only, the internal revenue service abates federal penalty originally assessed for the same or similar reason as the New Mexico penalty. If the taxpayer, however, without requesting and receiving an extension of time in which to file under the provisions of Subsection 7-1-13E NMSA 1978, has failed to timely file and pay additional income tax due within the time required in Subsection 7-1-13C NMSA 1978, the penalty will be assessed;
  - G. with regard to oil and gas tax returns only, the taxpayer receives final approval from the appropriate government agency of the taxpayer's participation in production from a state or federal property and pays all oil and gas taxes due on production from the property attributable to the taxpayer no later than the twenty-fifth day of the second month following the month in which the approval is received; or
  - H. with regard to an out-of-state business when a good faith doubt exists as to whether the taxpayer has established nexus with New Mexico and whether the state has jurisdiction over the taxpayer and its transactions into New Mexico for current or prior reporting periods, the business volunteers to enter into an agreement with the department to register, report and pay gross receipts tax, corporate income tax or franchise tax or to collect and remit compensating tax as an agent under the provisions of Section 7-9-10 NMSA 1978.
- [11/5/85, 1/4/88, 5/24/90, 9/20/93, 2/9/95, 3/15/96, 4/15/98; 3.1.11.11 NMAC - Rn & A, 3 NMAC 1.11.11, 1/15/01]

**3.1.11.12 FAILURE TO FILE A RETURN:** If a taxpayer does not file a return on the date on which payment of tax is due, as required by Subsection 7-1-13B NMSA 1978, the minimum penalty of \$5.00 imposed by Section 7-1-69 NMSA 1978 will apply only once per return, regardless of the number of tax programs included in the return.

[11/5/85, 8/15/90, 10/31/96; 3.1.11.12 NMAC - Rn & A, 3 NMAC 1.11.12, 1/15/01]

**3.1.11.13 FRAUDULENT RETURN FILED WHEN NO TAX IS DUE:** When a taxpayer files a return with intent to defraud the state by making a claim for a tax credit or rebate, and no amount of tax is required to be paid on the return, the provisions of Section 7-1-69 NMSA 1978 will not apply. Nothing in Section 3.1.11.13 NMAC, however, shall be construed to prohibit criminal prosecution of such person for false statement and fraud under Section 7-1-73 NMSA 1978.

[11/5/85, 8/15/90, 10/31/96; 3.1.11.13 NMAC - Rn & A, 3 NMAC 1.11.13, 1/15/01]

**3.1.11.14 APPLICATION OF PENALTY PROVISIONS TO GOVERNMENTS:**

A. Penalty with respect to the unpaid portion of a tax indebtedness or with respect to the failure to file a return by the date required is due to the state of New Mexico when the tax indebtedness is owed by any agency, institution, instrumentality or political subdivision of the state of New Mexico.

B. To the extent permitted by the constitution, treaties and laws of the United States, penalty with respect to the unpaid portion of a tax indebtedness or with respect to the failure to file a return by the date required is due to the state of New Mexico when the tax indebtedness is owed by any other state, any Indian tribe, nation or pueblo, the United States, any alien government or any agency, institution, instrumentality or political subdivision of any of the foregoing.

C. Section 3.1.11.14 NMAC is retroactively applicable on July 1, 1992.  
[7/3/92, 10/31/96; 3.1.11.14 NMAC - Rn & A, 3 NMAC 1.11.14, 1/15/01]

**3.1.11.15 APPLICATION OF PENALTY UPON EXPIRATION OF EXTENSION:** Penalty for failing to file a required return or, if tax is due, to pay tax by an extended due date will be computed beginning with the first day following the extended due date.

[9/20/93, 10/31/96; 3.1.11.15 NMAC - Rn, 3 NMAC 1.11.15, 1/15/01]

**3.1.11.16 DEFINITION OF BAD CHECK:** A bad check is a check or draft to the order of the department which the bank, as drawee, dishonors upon presentment by the department. "Dishonor" means the bank refuses to pay the amount of the check to the order of the department. The burden is on the taxpayer to prove that the taxpayer was not responsible for the bank's dishonoring of the check. "Bank" includes any financial institution upon which a check or draft is drawn.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.11.16 NMAC - Rn, 3 NMAC 1.11.16, 1/15/01]

**3.1.11.17 IMPOSITION OF PENALTY ON BAD CHECKS:**

A. A penalty in the amount of twenty dollars (\$20.00) will be imposed under Section 7-1-70 NMSA 1978 for each instance in which a check tendered to the department is not paid upon presentment. This penalty is in addition to any penalty imposed under Section 7-1-69 NMSA 1978.

B. This version of Section 3.1.11.17 NMAC is applicable January 1, 1995.  
[7/19/67, 11/5/85, 8/15/90, 10/28/94, 10/31/96; 3.1.11.17 NMAC - Rn & A, 3 NMAC 1.11.17, 1/15/01]

**3.1.11.18 WILLFUL ATTEMPT TO EVADE OR DEFEAT TAX**

A. **"WILLFUL ATTEMPT TO EVADE OR DEFEAT" DEFINED:**

(1) As used in the Tax Administration Act, the term "willful attempt to evade" or "willful attempt to evade or defeat" means conscious awareness of the obligation to pay taxes coupled with either reckless disregard for, or gross negligence with respect to, whether the tax obligation is paid. A willful attempt to evade or a willful attempt to evade or defeat may occur either with respect to the obligation to report or the obligation to pay.

(2) A willful attempt to evade or defeat may include, but is not limited to:

(a) engaging in business while not filing tax returns coupled with the knowledge that the business is subject to tax;

(b) filing tax returns without payment for an extended period of time while staying in business and paying other creditors;

(c) knowingly completing false tax returns or claiming exemptions, deductions, credits or other reductions of taxable amounts or taxes to which the taxpayer knows he is not entitled;

(d) hiding or transferring assets to hinder collection activity of the department; or

(e) advising or counseling any of the foregoing in the course of one's business as an attorney, accountant, bookkeeper, business consulting firm or tax preparer.

(3) The following are examples of a willful attempt to evade or defeat a tax or to cause or attempt to cause the evasion of another's tax.

(a) A is the primary shareholder, controlling officer and sole employee of B, a closely held corporation. B is engaged in an on-going business and, on its billings to its customers, separately states and collects an amount denominated "gross receipts tax". B has not filed monthly gross receipts returns for eight consecutive months. B, however, has received frequent notices from the department and has received telephone calls from department personnel requesting that the returns be filed for the non-filed months and any tax due be paid. As a

result of the frequent contact from the department, B files the gross receipts tax returns, each of which shows tax due, but refuses to pay the outstanding tax, penalty and interest due and does not protest the tax due. B is willfully evading or defeating the gross receipts tax due and A is willfully causing B to evade that tax.

(b) C is the primary shareholder and controlling officer of D, a corporation. D hires the services of a professional accounting firm. The firm prepares D's tax returns and forwards them to C. C receives the returns but simply stores them. D never files the tax returns or pays the taxes due. C has willfully caused the evasion of D's taxes.

(c) B keeps C's books. C is a corporation. E is the primary shareholder and controlling officer of C. B prepares the tax returns for C and drafts checks for E to sign. E signs the returns and the checks. B never sends the returns or checks to the department but endorses the checks to himself. B intercepts all mail and telephone calls from the department. When E becomes aware of what B is doing, E promptly contacts the department to make arrangements for the filing of the returns and payment of the taxes. Making the payments, however, proves unfeasible and C goes out of business. B has willfully caused C to evade its taxes but E has not.

(d) L is an attorney who is familiar with business and tax law and is the primary shareholder in PC, a professional corporation. PC has reported and paid gross receipts tax in the past. PC stops reporting and paying gross receipts tax; L is aware of this. L has willfully caused the evasion of PC's taxes.

(e) N is the primary shareholder and controlling officer of C, a corporation. C is assessed a substantial amount of tax as the result of an audit. N causes C to cease operations. N's brother, M, who has also worked in the business forms a new corporation D. D takes over C's business and assets, including C's customer lists, employees and goodwill. D operates at C's place of business, with strictly cosmetic changes in signs and stationery. Both N and M know of C's tax obligations and intended the change in form to strip the tax liability from the on-going business. Both N and M have willfully caused C to evade taxes.

(f) O is a company that researches tax liens. It contacts businesses with tax trouble as indicated by the existence of tax liens. It advises businesses in the use of techniques to avoid holding balances in bank accounts, thereby defeating any levy by the department on the business's bank accounts. O is willfully causing or attempting to cause another to evade or defeat taxes owed and may be assessed for the amount its clients acting owe in tax.

(4) The following examples illustrate situations which do not give rise to a willful attempt to evade or defeat tax.

(a) G is the primary shareholder and principal officer of C, a corporation. C is audited and is assessed a substantial amount of tax. C had never reported or paid gross receipts tax because G erroneously believed C's business was exempt from gross receipts tax. C files bankruptcy under Chapter 11 and attempts to resolve the tax liability under the bankruptcy laws. While in bankruptcy, C reports and pays its current gross receipts tax obligations. Regardless of the outcome of the bankruptcy proceedings, G has not willfully caused C to evade tax.

(b) H owns C, a corporation. C encounters considerable cash flow problems. It becomes obvious that C is insolvent. C files three monthly tax returns without payment before going out of business. H has not willfully caused C to evade tax.

**B. BURDEN OF PROOF:**

(1) The department has the burden of proving tax evasion or the causing or attempting to cause another to evade tax.

(2) In a protest before a department hearing officer pursuant to Section 7-1-24 NMSA 1978, the hearing officer must find by a preponderance of the evidence that either the taxpayer or other person who has been assessed for causing or attempting to cause the evasion of another's tax knew of the obligation to pay tax. The issue of whether the taxpayer or the other person actually knew of the obligation to pay tax can be proved by reasonable inference from circumstantial evidence, and notwithstanding testimony to the contrary which the hearing officer finds not credible.

(3) The issue of whether the taxpayer or other person exercised gross negligence or willful disregard for whether taxes were paid is an objective standard to be determined by the facts and circumstances.

**C. INTEREST CONTINUES TO RUN ON ORIGINAL PRINCIPAL OF TAX ATTEMPTED TO BE EVADED:** Although interest does not run ordinarily on penalty pursuant to Subsection 7-1-67D NMSA 1978, interest continues to run on the penalty imposed under Section 7-1-72.1 NMSA 1978 to the extent of the unpaid principal of the underlying tax liability because Section 7-1-72.1 NMSA 1978 specifically authorizes the assessment of penalty and interest upon the tax which was evaded or attempted to be evaded.

[6/15/98; 3.1.11.18 NMAC - Rn & A, 3 NMAC 1.11.18, 1/15/01]

**3.1.11.19** [RESERVED]

[3.1.11.19 NMAC - N, 1/31/05; A, 11/30/05; Repealed, 1/31/08]

**HISTORY OF 3.1.11 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 67-1, Tax Administration Act, 7/19/67, filed 7/28/67.

R.D./OGAD Rule No. 1985, Regulations Pertaining to the Tax Administration Act, filed 11/5/85.

TRD Rule TA-90, Regulations Pertaining to the Tax Administration Act, Sections 7-1-1 to 7-1-82 NMSA 1978, filed 8/15/90.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 1.11, Tax Administration - Penalties, filed 3/4/96.

3.1.11 NMAC, Tax Administration - Penalties, filed 1/4/2001.