

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

**IN THE MATTER OF THE PROTEST OF  
EDWIN L. & LUCINDA A. SHELLENBERGER  
TO DENIAL OF CLAIM FOR REFUND OF INTEREST  
PAID ON 1999 PERSONAL INCOME TAX ASSESSMENT**

**No. 04-15**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on December 6, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Edwin L. and Lucinda A. Shellenberger ("Taxpayers") were represented by Edwin L. Shellenberger. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayers are residents of Albuquerque, New Mexico.
2. In March 2000, Edwin Shellenberger prepared a 1999 New Mexico Personal Income Tax return ("PIT-1") for his wife and himself and filed it with the Department.
3. On Line 5 of their 1999 Form PIT-1, the Taxpayers reported federal adjusted gross income of \$60,543.
4. On Line 6 of Form PIT-ADJ, *Schedule of Additions and Deductions*, the Taxpayers claimed a \$6,000 deduction for persons age 65 and older. This deduction was

then carried over to Line 9 of the Taxpayer's PIT-1, resulting in a \$6,000 decrease in their New Mexico taxable income.

5. The Department's 1999 PIT instruction packet included line-by-line instructions for completing Forms PIT-1 and PIT-ADJ. The instructions for Line 6 of the PIT-ADJ (at page 16) advised taxpayers as follows:

If you are 65 or older...you may be eligible for a deduction of up to \$8,000 based on your filing status and federal adjusted gross income (from line 5 of Form PIT-1). From the table below, find the column that corresponds to your filing status and the row that includes your federal adjusted gross income. Read across to the amount in the last column to determine the amount of any deduction available. On a joint return, if both husband and wife were 65 or older or blind at the end of the tax year, the amount shown in the table would apply to each taxpayer.

6. As set out in the table on page 16 of the instruction packet, the deduction of \$6,000 (\$3,000 each) claimed by the Taxpayers in this case was only available to taxpayers whose federal adjusted gross income was between \$42,000 and \$45,000. Taxpayers whose federal adjusted gross income exceeded \$51,000 were not entitled to claim any deduction.

7. Mr. Shellenberger did not take the time to read the instructions pertaining to the over-65 deduction when completing the Taxpayers' 1999 tax return and did not ask his wife or anyone else to review the return to be sure it was prepared correctly.

8. Because the Taxpayers' 1999 federal adjusted gross income exceeded the \$51,000 income limit for claiming the over-65 deduction, the Department disallowed the \$6,000 deduction the Taxpayers claimed on Line 6 of Form PIT-ADJ.

9. On October 27, 2000, and again on July 20, 2001, the Department mailed the Taxpayers an assessment for \$381 of additional personal income tax due as a result of the Taxpayers' disallowed deduction, plus interest and penalty.

10. The Taxpayers' address had been incorrectly entered into the Department's computer system as 8513 Northgate Drive NE, Albuquerque, NM 87111. The Taxpayer's correct address in Albuquerque is 8513 Northridge Drive NE, Albuquerque, NM 87111.

11. As a result of this error, the Taxpayers did not receive the assessments issued in 2000 and 2001.

12. In February 2003, the Department's February 18, 2003 Statement of Account was delivered to the Taxpayers, although it also had the incorrect address of Northgate Drive.

13. After receiving the Statement of Account and becoming aware of the assessment issued against them, the Taxpayer contacted the Department to determine the basis for the liability.

14. On March 5, 2003, the Taxpayers paid the assessment in full, including \$381.00 of tax principal, \$164.38 of interest, and \$38.10 of penalty.

15. On September 18, 2003, the Taxpayers filed an Application for Tax Refund requesting a refund of the \$202.48 of interest and penalty paid on the assessment.

16. On October 2, 2003, the Department denied the Taxpayer's refund claim.

17. On October 7, 2003, the Department abated the \$38.10 penalty assessed against the Taxpayers, which effectively granted their request for refund of that amount.

18. On December 28, 2003, the Taxpayers filed a written protest to the denial of their request for refund of the \$164.38 of interest paid on the Department's assessment.

### **DISCUSSION**

The issue to be decided is whether the Taxpayers are liable for payment of the \$164.38 of interest that accrued on the Taxpayers' underpayment of 1999 personal income tax between April 15, 2000, the original due date of the tax, and March 5, 2003, the date the additional tax was paid. The Taxpayers maintain that interest should not be imposed because the Department mailed its original assessment to the wrong address, and the Taxpayers did not learn of their liability for additional tax until February 2003. In effect, the Taxpayers argue that interest should not begin to accrue until the date they received actual notice of their error in calculating the amount of 1999 personal income taxes due to the state.

NMSA 1978, § 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid.... (emphasis added).

It is a well settled rule of statutory construction that the word "shall" indicates that the provisions of the statute are mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). *See also*, NMSA 1978, § 12-2A-4(A) of the Uniform Statute and Rule Construction Act (the words "shall" and "must" express a duty, obligation, requirement or condition precedent). With limited exceptions that do not apply here, the New Mexico Legislature has directed the Department to assess interest whenever taxes are not

timely paid. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, NMSA 1978, § 7-1-13(E).

The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. In this case, the Taxpayers made a mistake when they claimed a \$6,000 deduction on their 1999 Form PIT-ADJ. Although this was an honest mistake made without any intent to defraud the government, the fact remains that the State of New Mexico would have received an additional \$381 tax payment if the Taxpayers had completed their return correctly. As a result of the Taxpayers' error, they—rather than the state—had the use of this money for the three-year period between April 16, 2000, the day following the original due date of the tax, and March 5, 2003, the day the additional tax was paid. While the Taxpayers argue that the 15 percent interest rate set out in NMSA 1978, § 7-1-67 is excessive in comparison with current market rates, that is a matter within the sound discretion of the legislature. The Department has no authority to substitute its judgment for that of the legislature when assessing interest on late payments of tax.

The Taxpayers also argue that the Department's error in sending its assessment to the wrong address should excuse the Taxpayers from the payment of interest. This argument is based on a misunderstanding of New Mexico's self-reporting tax system. Taxpayers have a legal obligation to report and pay their taxes on or before the statutory due date. NMSA 1978, § 7-1-13; *See also*, *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). When a

taxpayer fails to make timely payment of taxes due to the state, NMSA 1978, § 7-1-67(A) imposes interest “*from the first day following the day on which the tax becomes due...until it is paid.*” The language of the statute makes it clear that interest on an underpayment of tax begins to run from the original due date of the tax—not the date the taxpayer receives notice of the underpayment.

The Department is charged with enforcing the state’s tax laws. NMSA 1978, § 7-1-10 requires the Department to assess any taxpayer who is liable for tax in excess of \$10.00, and NMSA 1978, § 7-1-18(A) gives the Department three years from the end of the calendar year in which the tax was originally due to issue the assessment. In this case, the Department had until December 31, 2003 to notify the Taxpayers of their liability for 1999 income tax, which was due on April 15, 2000. While it is certainly regrettable that the Department’s key entry error delayed delivery of the Department’s assessment of additional tax, the Taxpayers received actual notice of their liability within the time frame provided by the legislature. Nothing in § 7-1-18 or § 7-1-67 allows for the abatement of interest when the Department issues its assessment at the end—rather than at the beginning—of the three-year limitations period. In either case, Section § 7-1-67(A) requires interest to be paid from the first day following the day on which the tax was due until the day it is paid.

### **CONCLUSIONS OF LAW**

1. The Taxpayers filed a timely, written protest to the denial of their claim for refund of interest assessed and paid on their underpayment of 1999 personal income tax, and jurisdiction lies over the parties and the subject matter of this protest.

2. Pursuant to NMSA 1978, § 7-1-67(A), the Taxpayers are liable for payment of the \$164.38 of interest that accrued between April 16, 2000, the day following the original due date of their 1999 income tax, and March 5, 2003, the day the additional \$381 of tax was paid.

3. The Taxpayers received actual notice of the Department's assessment within the three-year limitations period set out in NMSA 1978, § 7-1-18(A), and the Department's initial error in sending the assessment to the wrong address does not affect the accrual of interest on the Taxpayers' underpayment of tax.

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

DATED December 9, 2004.