

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

**IN THE MATTER OF THE PROTEST OF  
ERROL CHAISSON  
TO ASSESSMENT NO. 433341**

**05-12**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on June 8, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Errol Chaisson represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. In October 1998, Errol Chaisson filed a joint 1997 New Mexico income tax return with this wife, Daria Chaisson, reporting a net tax liability for the 1997 tax year in the amount of \$21,651.
2. On August 27, 1999, the Chaissons filed an amended 1997 New Mexico income tax return. As result of adjustments made on the amended return, the Chaissons reported a refund due for the 1997 tax year in the amount of \$5,179 and requested that this amount be refunded directly to them.
3. On September 1, 1999, the Chaissons filed a second amended 1997 income tax return, this time showing a refund due for the 1997 tax year in the amount of \$5,315 and requesting that this amount be applied to tax year 1998.

4. The second amended return was accompanied by a cover letter from James Hanson, the Chaissons' California accountant, stating: "The above referenced taxpayer is filing an amended return for 1997. Please note that the taxpayer requests the overpayment of 1997 tax to be applied to 1998." The accountant's letter did not mention the first amended return filed three days earlier or alert the Department to the fact that the first amended return directed the taxpayers' refund to be made in cash, rather than applied against the next year's liability.

5. Sometime between September 7, 1999 and October 8, 1999, the Chaissons filed their original 1998 New Mexico income tax return, showing a tax liability of \$12,537 and payments of \$7,395 (income withholding) and \$5,315 (with a notation that this payment was from their 1997 amended return), resulting in a refund due of \$173.

6. On October 8, 1999, the Department sent the Chaissons a letter stating: "Our staff is reviewing your tax refund claim for the 1998 tax year and will require a copy of all W-2 forms applicable to the return."

7. On October 12, 1999, the Chaissons mailed copies of their 1998 W-2 forms to the Department.

8. In November 1999, the Chaissons received a check from the State of New Mexico in payment of the \$5,179 refund requested on their first amended 1997 income tax return filed on August 27, 1999.

9. Upon receipt of the state's check, Daria Chaisson faxed a copy to Kathy Johnson, who was an associate of James Hanson, the California accountant who filed the Chaissons' amended 1997 returns.

10. Ms. Johnson told Ms. Chaisson to go ahead and cash the \$5,179 refund check from the State of New Mexico, which was deposited into the Chaissons' account in November 1999.

11. Ms. Chaisson relied on her accountant to insure that the Chaissons' tax matters were handled properly, and Ms. Chaisson did not review her income tax returns to determine whether the refund check received from New Mexico correctly reflected the refund requested in the Chaissons' original and amended 1997 returns.

12. Ms. Johnson was distracted with personal matters and she, too, failed to check the Chaissons' 1997 New Mexico income tax returns to insure that the refund check had been issued in the correct amount. In any event, Ms. Johnson did not have a copy of the second amended return filed by James Hanson and was not aware that the Chaissons' second amended return asked that their 1997 refund be applied to their 1998 tax liability.

13. On March 20, 2000, the Department notified the Chaissons that it had no record of the \$5,315 reported as an estimated payment on their 1998 New Mexico income tax return and asked them to send verification of this payment.

14. Daria Chaisson referred the Department's notice to Kathy Johnson.

15. Ms. Johnson subsequently discovered that the estimated payment reported on the Chaisson's 1998 return was based on their second amended 1997 return, but that \$5,179 of this payment had been refunded to the Chaissons in November 1999 in response to the request made in their first amended 1997 return.

16. On May 20, 2000, Ms. Johnson faxed an explanation to Ms. Chaisson which concluded: "End result you owe the NM tax." (Emphasis in original).

17. Ms. Johnson spoke to Theresa Martinez, an employee of the Department, and asked that interest and penalty be waived on the underpayment resulting from the Chaissons' deposit of their \$5,179 cash refund for the 1997 tax year.

18. Ms. Martinez and Ms. Johnson subsequently traded telephone calls without making a connection. At some point, each party gave up attempting to reach the other, and there was no further communication between the parties until February 2002.

19. Between March 2000, when they were first notified that additional tax was due, and February 2002, the Chaissons did not make any payments on the principal of their 1998 tax liability.

20. On February 12, 2002, Ms. Johnson had a telephone conversation with Theresa Martinez and then sent an e-mail to Daria Chaisson confirming that the Chaissons owed \$5,179 in 1998 income taxes. Ms. Johnson said that she would "try to get your penalties and interest revoked."

21. On February 19, 2002, the Department mailed Assessment No. 433341 to Errol Chaisson in the total amount of \$8,164.79, representing a \$5,142.00 underpayment of tax principal due for the 1998 tax year, plus penalty of \$514.20 and interest of \$2,508.59.

22. On February 23, 2002, Ms. Johnson told Ms. Chaisson that she had not yet received a response from Theresa Martinez and was going to send her a letter.

23. On February 25, 2002, Ms. Johnson wrote a letter to Ms. Martinez asking that the assessed penalties and interest be waived because the Chaissons "did not know they owed this debt." Ms. Johnson's letter also stated that the Chaissons had been unemployed since November 2001 and would like to pay their tax liability in installments.

24. In September 2003, the Chaissons made their final payment on the tax principal assessed for the 1998 tax year.

### DISCUSSION

The issue to be decided is whether Errol Chaisson is liable for penalty and interest on his underpayment of 1998 income tax. The Chaissons believe that penalty and interest should be waived because the Department failed to apply their 1997 refund as an estimated payment against their 1998 tax liability. The Department maintains that the problem resulted from the conflicting instructions given on the Chaissons' amended 1997 income tax returns and that the Chaissons knew—or should have known—that their refund had not been applied to their 1998 liability at the time they cashed the Department's refund check in November 1999.

NMSA 1978, § 7-1-17 provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, § 7-1-3 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). Accordingly, the presumption of correctness applies to the assessment of interest in this case, and it is the taxpayer's burden to present evidence and legal arguments to justify an abatement.

*Assessment of Interest.* 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).

The Legislature's use of 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). 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.

In this case, the Chaissons' 1998 income taxes were due April 15, 1999. By the time the taxpayers filed their second amended 1997 return and requested that their 1997 refund be applied to 1998, the Chaissons' 1998 tax payment was already four-and-one-half months late. The fact that they obtained an extension of time to file their 1998 return did not excuse them from timely payment of the tax due. NMSA 1978, § 7-1-13(E), which sets out the rules applicable to extensions, states that "no extension shall prevent the accrual of interest as otherwise provided by law." As noted above, § 7-1-67 provides that interest accrues "from the first day following the day on which the tax becomes due, *without regard to any extension of time...until it is paid...*" (Emphasis added). In addition, during the period at issue in this protest, an overpayment for one reporting period could not be offset against tax due for another reporting period until the taxpayer requested and was granted a refund of the overpaid tax.<sup>1</sup> *See, Amoco Production Company v. New Mexico Taxation and Revenue Department*, 118 N.M. 72, 878 P.2d 1021 (Ct. App. 1994). For this reason, the Chaissons were premature in reporting their anticipated 1997 refund as an estimated payment on their 1998 return.

In November 1999, the Department granted the \$5,179 refund requested in the Chaissons' first amended 1997 tax return. At the time the taxpayers received and cashed the state's refund

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<sup>1</sup> Effective July 1, 2001, the Tax Administration Act was amended to allow an earlier offset of overpayments against underpayments in some limited circumstances. *See*, NMSA 1978, §§ 7-1-29(D) and (E), 7-1-67(A)(5).

check, they should have realized that this portion of the \$5,315 refund requested on their *second* amended return was no longer available to be applied against their 1998 tax liability.

Unfortunately, neither the Chaissons nor their accountant took the time to check the refund against their 1997 returns or verify that the estimated payment claimed on their 1998 return had actually been made. In their protest, the Chaissons fault the Department for failing to process their second amended return, which asked that their refund be applied to the following tax year, before processing their first amended return, which asked for the refund in cash. There is no basis for the Chaissons' complaint. New Mexico has a self-reporting tax system, and it is the obligation of taxpayers, who have the most direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, NMSA 1978, § 7-1-13(B); *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).

In this case, the Chaissons reported their 1997 income incorrectly on their original return. They made additional errors on their first amended return, misstating both the amount and the preferred method of receiving the refund. The Department is not responsible for these errors, nor is it responsible for the confusion that resulted from a second amended return being filed three days after the date of the first amended return. In the normal course of events, returns are processed in the order received. The cash refund sent to the Chaissons in November 1999 was correctly issued in response to the request made in their first amended return. Once the refund check was issued, it was not possible for the Department to comply with request made in the Chaissons' second amended return that this amount be applied against their 1998 tax liability.

The assessment of interest is designed to compensate the state for the time value of unpaid revenues. In this case, the Chaissons' 1998 tax payment was due in April 1999. Although the Chaissons obtained an extension of time to file their 1998 return, they did not make an estimated payment to cover their projected tax liability for that year. In September 1999, the taxpayers attempted to pay the tax due by filing a second amended 1997 return asking that their refund be applied to 1998, but this attempt was nullified in November 1999 when they cashed the refund check requested in their first amended return. Even after the Chaissons were notified in March 2000 that 1998 taxes were still outstanding, they failed to make any payments on their liability. Final payment of the Chaissons' 1998 taxes was not received by the Department until September 2003. In summary, the Chaissons had the use of money that legally belonged to the state from April 1999 until September 2003. Pursuant to NMSA 1978, § 7-1-67, interest is due for this period.

*Assessment of Penalty.* NMSA 1978, § 7-1-69 imposes a penalty of two percent per month, up to a maximum of ten percent, whenever a taxpayer fails "due to negligence or disregard of rules and regulations" to pay tax in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- 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. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, the Chaissons' failure to pay their 1998 taxes in a timely manner resulted from their failure to match the 1997 refund they received from the Department against their 1997 tax returns.



This inaction and inattention to their financial affairs constitutes negligence under the regulation.

Although Ms. Chaisson relied on her accountant to determine whether the refund was correct, New Mexico law is clear that a taxpayer's responsibility for payment of taxes due to the state cannot be delegated to a third party. As the Court of Appeals held in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

The Chaissons were also negligent in failing to pay the tax due once the Department sent them notice of the underpayment in March 2000. The taxpayers' argument that they were waiting to find out whether penalty and interest would be waived before making payment makes little sense. On May 20, 2000, Kathy Johnson sent Daria Chaisson a fax explaining the problem with the 1997 refund and stating: "End result you owe the NM tax." At that point, there was no question that the Chaissons were liable for payment of the tax principal—whether they also owed penalty and interest would have no effect on this liability. Delaying payment of the tax principal simply resulted in the accrual of additional interest. The February 25, 2002 protest letter Kathy Johnson filed on behalf of the taxpayers indicates that the real reason the Chaissons failed to pay their 1998 taxes when they first learned of the liability was because they had suffered financial reversals in the stock market and subsequently lost their employment due to lay offs. While this series of events was unfortunate, it does not excuse their late payment of the tax due or provide a basis for abating penalty.

## **CONCLUSIONS OF LAW**

A. Errol Chaisson filed a timely, written protest to the Department's assessment of interest and penalty, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-1-67, Mr. Chaisson is liable for payment of the interest that accrued on his underpayment of 1998 personal income tax.

C. Pursuant to NMSA 1978, § 7-1-69, Mr. Chaisson was negligent in failing to pay his 1998 income tax liability in a timely manner and penalty was properly assessed.

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

DATED June 16, 2005.