

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

**IN THE MATTER OF THE PROTEST OF
DANIEL C DE BACA
TO NOTICE OF ASSESSMENT OF INTEREST
ISSUED UNDER LETTER ID NO. L1903548927**

No. 05-20

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 22, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Daniel C de Baca ("Taxpayer") represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a resident of Santa Fe, New Mexico.
2. On April 13, 2002, the Taxpayer filed his 2001 New Mexico personal income tax return with the Department.
3. In 2005, the Department ran a "tape match" to compare the information reported on the Taxpayer's 2001 New Mexico income tax return with information the Department received from the Internal Revenue Service concerning the income reported on the Taxpayer's 2001 federal return.
4. As a result of the tape match, the Department discovered a discrepancy between the income the Taxpayer reported on his federal and New Mexico returns, resulting in an underreporting of New Mexico income tax for 2001.

5. On April 1, 2005, the Department sent the Taxpayer a “Tapematch Mismatch Advisement Letter” notifying him of the amount of estimated tax, penalty, and interest due as a result of the discrepancy.

6. On April 7, 2005, the Taxpayer paid the additional tax principal shown on the advisement letter.

7. On April 11, 2005, the Department assessed the Taxpayer for \$294 of additional 2001 personal income tax, plus interest. No penalty was assessed.

8. The same day, the Taxpayer filed a written protest to the assessment, stating that he had already paid the amount of tax principal shown, but was protesting the assessment of interest.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the full amount of interest that accrued on his underpayment of 2001 personal income tax between April 2002, the original due date of the tax, and April 2005, the date the additional tax was paid. The Taxpayer maintains that the Department waited too long to issue its assessment and believes he should be required to pay only one year’s accrued interest. The Taxpayer also argues that the 15 percent interest rate is too high and does not reflect market rates.

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....

B. Interest due to the state...*shall be* at the rate of fifteen percent a year, computed on a daily basis.... (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). *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 Taxpayer underreported his 2001 taxable income. Although the error was unintentional, the fact remains that if the Taxpayer had completed his return correctly, the State of New Mexico would have received an additional \$294 tax payment in April 2002. Instead, the Taxpayer—rather than the state—had the use of this money for the three-year period between April 2002 and April 2005, the date the additional tax was paid. Although the Taxpayer believes the 15 percent rate of interest is too high, that is the statutory rate set by the Legislature, and the Department does not have discretion to change it by rule or regulation.

The Taxpayer also complains that the Department took too long to notify him of his liability for additional tax. New Mexico has a self-reporting tax system, however, and the law places the duty on taxpayers to accurately determine and pay their taxes by 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). 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 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, 2005 to notify the Taxpayer of his liability for additional 2001 income tax, which was due on April 15, 2002. Nothing in § 7-1-18 or § 7-1-67 provides 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 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

A. The Taxpayer filed a timely, written protest to the assessment of interest issued under Letter ID L1903548927, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Department's assessment was issued within the three-year limitations period provided in NMSA 1978, § 7-1-18.

C. Pursuant to the statutory requirements of NMSA 1978, § 7-1-67, the Taxpayer is liable for interest on the amount of his underpaid tax at the rate of 15 percent a year, calculated from the first day following the day on which his 2001 personal income tax became due and continuing until the date the tax was paid.

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

DATED September 27, 2005.