

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

**IN THE MATTER OF THE PROTESTS OF
V. PHILLIP AND PEGGY J. SOICE**

**TO COLLECTION OF PENALTY AND INTEREST
FOR TAX YEARS 1998-2001;**

No. 06-12

**TO DENIAL OF CLAIM FOR REFUND OF TAXES
PAID FOR TAX YEARS 1998-2000; and**

**TO DENIAL OF CLAIM FOR REFUND OF PENALTY
AND INTEREST PAID FOR TAX YEARS 2002-2003**

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 27, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Bruce J. Fort, Special Assistant Attorney General. Phillip and Peggy Soice (“Taxpayers”) were represented by Phillip Soice. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayers were residents of New Mexico during tax years 1998-2003.
2. During those years, Phillip Soice had wage income from an S corporation of which he was the sole shareholder.
3. The W-2 forms the corporation issued to Mr. Soice were prepared by Rick Moore, the corporation’s and the Soices’ certified public accountant.
4. Mr. Soice erroneously believed that the wages reported on his W-2 forms included nontaxable contributions to his Savings Incentive Match Plan for Employees (“SIMPLE”)

retirement account and subtracted the amount of those contributions from the income he reported on his federal income tax returns for tax years 1998-2003.

5. Because New Mexico uses federal adjusted gross income as the starting point for reporting New Mexico income, Mr. Soice's erroneous deduction was carried over to his New Mexico personal income tax returns for those years.

6. Mr. Soice did not check with Rick Moore, the certified public accountant who prepared Mr. Soice's W-2 forms, to verify whether his assumption concerning the wages reported on those forms was correct.

7. When preparing his 2004 personal income tax returns in April 2005, Mr. Soice was unable to reconcile the wages reported on his W-2 with his previous assumption concerning his SIMPLE contributions and called Rick Moore to determine how the wages had been calculated.

8. As a result of his conversation with Mr. Moore, Mr. Soice learned that the SIMPLE contributions had not been included in the wages reported on his W-2 forms and that the income tax returns he had filed for the previous six tax years were incorrect.

9. Mr. Soice then worked with Mr. Moore to prepare corrected federal and state income tax returns for tax years 1998-2003.

10. On July 22, 2005, Mr. Soice sent a letter to the Department transmitting amended New Mexico personal income tax returns and checks in the following amounts:

Tax Year 1998	\$ 505
Tax Year 1999	\$ 501
Tax Year 2000	\$ 537
Tax Year 2001	\$ 553
Tax Year 2002	\$ 703
Tax Year 2003	\$ 810

Mr. Soice's letter explained that: "Confusion with respect to the inclusion of the SIMPLE contribution in the W-2 for those years led me to erroneously deduct it on my personal tax forms."

11. After receiving the Taxpayers' amended returns, the Department mailed the Taxpayers statements of account for penalty and interest on their late payment of personal income taxes for tax years 1998-2003.

12. On September 28, 2006, Rick Moore sent a letter to the Department concerning the notices for tax years 1998 and 2000; on October 26, 2005, he sent a second letter concerning the notices for tax years 2002 and 2003.

13. In his letters, Mr. Moore stated that the Internal Revenue Service ("IRS") had refunded the Taxpayers' payment of federal income taxes for tax years 1998-2001 because the time for collecting additional federal tax had expired by the time the Taxpayers' amended returns were filed. Mr. Moore indicated his belief that the Taxpayers should be entitled to a refund of state taxes on the same grounds and asked whether the rules for state taxes were different than the rules for federal taxes. He also asked the Department to consider abating penalty and interest since the Taxpayers amended their returns voluntarily.

14. On November 10, 2005, the Department responded to Mr. Moore's letters, explaining the Department's position as follows:

Penalty and interest are assessed on tax that is due as described in Section 7-1-67 and Section 7-1-69 NMSA 1978. The Department does not have the authority, based on the circumstances described in your letter, to abate any of the penalty and interest charges you were assessed.

In response to Mr. Moore's inquiry concerning differences between federal and state statutes governing refunds of tax based on a statute of limitations, the Department enclosed copies of NMSA 1978, § 7-1-18, which sets out the time limitations on the Department's ability to assess taxes, and NMSA 1978, § 7-1-26, which sets out the requirements for claims for refund.

15. In December 2005, the Taxpayers filed a claim for refund of the additional personal income taxes they paid for tax years 1998-2001. As grounds for the refund, the Taxpayers asserted that those taxes were not due at the time they filed their amended returns in July 2005 because the statute of limitations for the Department to assess those taxes had expired.

16. In January 2006, Rick Moore had a telephone conversation with Roberta DeHerrera, a supervisor in the Department's income tax unit, which receives an average of 2,500 taxpayer calls per week.

17. Mr. Moore informed Ms. DeHerrera that the IRS had refunded the Taxpayers' additional income tax payments for 1998-2001. Ms. DeHerrera then advised Mr. Moore that if the IRS had adjusted the Taxpayers' returns, they could amend their New Mexico returns a second time to reflect this adjustment.

18. Ms. DeHerrera later reviewed the Taxpayers' correspondence with the IRS and determined that no refund of New Mexico taxes was due because the federal refund was based on a federal statute of limitations and not on any adjustment to the income reported on the Taxpayers' amended returns.

19. Rick Moore misinterpreted Ms. DeHerrera's advice and did not understand that the Taxpayers could not refile personal income tax returns using their original income figures unless the IRS had adjusted the Taxpayers' amended returns back to those original figures.

20. As a result of this misunderstanding, Mr. Moore advised the Taxpayers that they could obtain a refund of 1998-2001 New Mexico taxes by filing new amended returns that restated the erroneous figures reported on their original returns. The Taxpayers correctly concluded that filing such returns would be fraudulent and declined to do so.

21. Mr. Soice subsequently called Ms. DeHerrera to discuss the matter, at which time she referred him to her supervisor, Gale Kessler.

22. Ms. Kessler spoke with Mr. Soice in late January and again in early February 2006, after which she reviewed the Taxpayers' filing history and the other documents relating to the Taxpayers' amended returns for tax years 1998-2003.

23. On March 1, 2006, Ms. Kessler sent the Taxpayers a detailed, three-page letter denying their claim for refund of taxes paid for 1998-2001. Ms. Kessler explained that because the Taxpayers voluntarily paid the taxes at issue based on their own self-assessment, and not on any action or assessment by the Department, the statute of limitations set out in NMSA 1978, § 7-1-18 did not apply.

24. Ms. Kessler further explained that in the absence of evidence that the income taxes paid were not, in fact, due to the state, there was no basis for the cabinet secretary or anyone else in the Department to refund those taxes.

25. Finally, Ms. Kessler's March 1, 2006 letter set out the legal basis for the Department's position that the Taxpayers were liable for penalty and interest on their late payment of personal income taxes.

26. On March 15, 2006, the Taxpayers filed a written protest to the denial of their claim for refund of additional personal income taxes paid for tax years 1998-2001.

27. Up until March 2006, the Department had not interpreted Rick Moore's letters of inquiry concerning the statements of account sent to the Taxpayers as a formal protest under NMSA 1978, § 7-1-24.

28. Because the Taxpayers' account was not considered to be in protest, the Department began to take collection action against the Taxpayers, prompting them to pay the \$541.59 of penalty and interest assessed for tax years 2002 and 2003.

29. On January 12, 2006, the Taxpayers mailed their payment, together with a letter stating that the payment was being made "despite our continued protest (see letters of September 28, 2005 from Rick Moore, CPA and December 13, 2005 from V. Phillip Soice) of the assessment of penalty and interest."

30. The Department's protest office subsequently reviewed the Taxpayers' file and, on March 3, 2006, notified them that the Department would accept Rick Moore's September 28, 2005 letter as a protest of the penalty and interest associated with the amended returns the Taxpayers filed in July 2005. Although Mr. Moore's September 28, 2005 letter only referenced notices for tax years 1998 and 2000, the Department accepted his letter as a formal protest to the penalty and interest related to tax years 1998-2001.

31. Because the Taxpayers had already paid the penalty and interest assessed for tax years 2002 and 2003, the protest office advised them to file a claim for refund for those years.

32. On March 14, 2006, the Taxpayers filed a claim for refund of the penalty and interest paid for tax years 2002 and 2003.

33. Also on March 14, 2006, the Taxpayers wrote a letter to the Department's protest office asking for a response to eight questions.

34. An auditor from the Department's protest office and one of the Department's attorneys subsequently met with the Taxpayers for an informal conference. During this meeting, the Department responded to all of the Taxpayers' inquiries, except for their request that the Department provide copies of New Mexico court cases concerning the meaning of the word "shall" and the term "mistake of law."

35. On April 25, 2006, the Department denied the Taxpayers' claim for refund of the penalty and interest they had paid for tax years 2002 and 2003.

36. On April 30, 2006, the Taxpayer filed a protest to the Department's denial of their claim for refund.

37. At the administrative hearing held on July 27, 2006, the Taxpayers withdrew their protest to the denial of their claim for refund of additional tax principal paid for the 2001 tax year. The Taxpayers conceded that pursuant to the provisions of NMSA 1978, § 7-1-18(A), the Department had until December 31, 2005 to assess taxes due for that year and the 2001 personal income taxes they paid in July 2005 were still within this limitations period.

ISSUES PRESENTED

Issue I. Whether the Taxpayers are entitled to a refund of the personal income taxes they voluntarily reported and paid for tax years 1998-2000 based on their argument that, at the time their amended returns were filed in July 2005, the limitations period set out in NMSA 1978, § 7-1-18(A) would have prevented the Department from assessing the Taxpayers for those tax years.

Issue II. If they are not entitled to a refund of additional taxes paid for the 1998-2000 tax years, whether the Taxpayers are entitled to an abatement of penalty and interest on those taxes based on their arguments that: (a) the time for the Department to assess taxes for those years had

expired, and (b) penalty and interest should not be charged when the Taxpayers voluntarily reported and paid the additional taxes due without prompting from the Department.

Issue III. Whether the Taxpayers are entitled to an abatement of the penalty and interest assessed on their late payment of 2001 taxes, as well as a refund of the penalty and interest paid on their late payment of 2002 and 2003 personal income taxes, based on the fact that the Taxpayers voluntarily reported and paid the additional taxes without prompting from the Department.

Issue IV. Whether the actions (or inaction) of Department employees violated the taxpayer bill of rights set out in NMSA 1978, § 7-1-4.2 and, if so, whether this entitles the Taxpayers to an award of costs and fees under NMSA 1978 § 7-1-29.1.

DISCUSSION

Issue I. Refund of Taxes Paid for 1998-2000 Tax Years. A. Personal income taxes for the 1998-2000 tax years were still due and owing to the state in July 2005. The Taxpayers maintain that at the time they filed their amended returns in July 2005, no taxes were due for the 1998-2000 tax years because the Department could no longer assess taxes for those years. In support of their argument, the Taxpayers cite to NMSA 1978, § 7-1-18(A) which states as follows:

A. Except as otherwise provided in this section, no assessment of tax may be made by the department after three years from the end of the calendar year in which payment of the tax was due, and no proceeding in court for the collection of such tax without the prior assessment thereof shall be begun after the expiration of such period.

There is no dispute that when the Taxpayers filed their amended tax returns, the Department could not have issued its own assessment for tax years 1998-2000. This does not mean, however, that those taxes were no longer due to the State of New Mexico. NMSA 1978, § 7-1-13(A) provides:

A. Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to tax until payment is made. Taxes are due on and after the date on which their payment is required until payment is made.

Personal income taxes are due on April 15 of the year following the close of each taxable year. *See*, NMSA 1978, § 7-2-12(A). Pursuant to § 7-1-13(A), those taxes continue to be due “until payment is made.” Nothing in § 7-1-18 indicates that the expiration of the period within which the Department may assess taxes for a particular year serves to forgive or extinguish those taxes. In fact, it would be beyond the legislature’s authority to enact such a provision.

Article IV, Section 32 of the New Mexico Constitution states: “No obligation or liability of any person...owing to the state...shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court.” In interpreting this provision, the New Mexico Supreme Court has consistently held that while the legislature may limit the time within which an agency may take affirmative action to collect money due to the state, the legislature does not have the power to release or extinguish the underlying debt. *See, State ex rel. Public Employees Retirement Association v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500; *Gutierrez v. Gutierrez*, 99 N.M. 333, 657 P.2d 1182 (1983); *State v. Montoya*, 32 N.M. 314, 255 P. 634 (1927); *Asplund v. Alarid*, 29 N.M. 129, 219 P. 786 (1923); *Board. of Education v. McRae*, 29 N.M. 85, 88, 218 P. 346, 347 (1923). In this case, the fact that the Department could not assess taxes for the 1998-2000 tax years did not extinguish the Taxpayers’ liability for those taxes, which were still due and owing to the state at the time the Taxpayers filed their amended returns in July 2005.

B. The Taxpayers' amended returns were valid assessments. NMSA 1978, § 7-1-

17(B) states that assessments of tax are effective:

- (1) when a return of a taxpayer is received by the department showing a liability for taxes;
- (2) when a document denominated "notice of assessment of taxes," issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted...; or
- (3) when an effective jeopardy assessment is made as provided in the Tax Administration Act.

Regulation 3.1.6.10 NMAC further explains that when a tax return is submitted by a taxpayer and received by the Department, "this self-assessment constitutes an effective assessment under Section 7-1-17 NMSA 1978." Turning to § 7-1-18, subsection A states that "no assessment of tax may be made *by the department* after three years from the end of the calendar year in which payment of the tax was due..." (emphasis added). The statute does not limit a taxpayer's right to voluntarily self-assess and pay his or her outstanding tax liability to the state, which is what the Taxpayers did in this case. The amended personal income tax returns the Taxpayers filed in July 2005 constituted valid assessments of tax under § 7-1-17(B)(1) and the Department's regulations.

C. The Department does not have the authority to refund taxes without a good faith doubt that the taxes are due or evidence that the payment of tax was erroneous. The Taxpayers insist that NMSA 1978, §§ 7-1-20 and 7-1-29 give the Department (or its secretary) the authority to grant the Taxpayers' refund claim. The Taxpayers are mistaken. Section 7-1-20 allows the Department's secretary, with the written approval of the attorney general, to compromise a taxpayer's asserted liability for taxes when the secretary "in good faith is in doubt

of the liability for the payment thereof.” Section 7-1-29(A) gives the secretary or her delegate the authority to refund “any overpayment of tax determined...to have been erroneously made.”

Section 7-1-29(F) also allows the Department to issue a refund of “an overpayment of tax.” In this case, however, there is no doubt that the Taxpayers owed the taxes they reported on their amended income tax returns. In his letter transmitting those returns to the Department, Mr. Soice acknowledged that “confusion with respect to the inclusion of the SIMPLE contribution in the W-2 for those years led me to erroneously deduct it on my personal tax forms.” Mr. Soice confirmed this statement under oath at the administrative hearing. Based on this evidence, there was no overpayment of the Taxpayers’ 1998-2000 personal income taxes, and no refund is due.

Issue II. Abatement of Penalty and Interest for the 1998-2000 Tax Years. The Taxpayers maintain that they are entitled to an abatement of penalty and interest on their late payment of 1998-2000 taxes because the time for the Department to assess tax for those years had expired and because penalty and interest should not be charged when the Taxpayers voluntarily reported and paid the additional taxes due without prompting from the Department.

A. Based on the Taxpayers’ self-assessment of 1998-2000 taxes, the Department has ten years to collect the penalty and interest associated with those taxes. As discussed under Issue I, above, the amended personal income tax returns the Taxpayers filed in July 2005 constituted valid assessments of tax under § 7-1-17(B)(1). Once a tax has been assessed, NMSA 1978, § 7-1-30 authorizes the Department to collect the penalty and interest associated with that tax without the need for a further assessment, stating:

Any amount of civil penalty and interest may be collected in the same manner as, and concurrently with, the amount of tax to which it relates, without assessment or separate proceedings of any kind.

Because the Department's collection of penalty and interest for the 1998-2000 tax years was based on the Taxpayers' own self-assessments, and not on assessments issued by the Department, the limitations period set out in § 7-1-18(A) does not apply. Pursuant to NMSA 1978, § 7-1-19, the Department has ten years from the date of an assessment to collect taxes due to the state. Although the Taxpayers argue that the limitations period set out in § 7-1-19 should not apply to the type of assessments defined in § 7-1-17(B)(1), they have not provided any legal authority to support their position.

B. A taxpayer's voluntary payment of tax is not a basis for abating penalty and interest. (1) *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 assessment of interest is 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). While subsections (A)(1) through (A)(7) of § 7-1-67 set out some exceptions to the general rule, none of those exceptions include a waiver of interest on taxes voluntarily paid by a taxpayer, except in cases where the taxpayer has entered into a managed audit agreement with the Department. There is no contention that the Taxpayers paid their overdue personal income taxes pursuant to a managed audit agreement.

The assessment of interest is intended to compensate the state for the time value of unpaid revenues. In this case, the Taxpayers underreported their taxable income for the 1998-2000 tax years. If they had completed their returns correctly, the State of New Mexico would have received an additional \$1,543 between April 1999 and April 2001. As a result of the Taxpayers' error, these funds were not made available to the state until July 2005, and interest was properly imposed. Although the Taxpayers question whether the statutory interest rate accurately reflects the time value of money, that is a matter of opinion. The state's interest rate is higher than the prime rate, but lower than the rate charged by many credit card companies. In the end, it is up to the legislature to set the interest rate to be assessed on the late payment of taxes due to the State of New Mexico. Pursuant to NMSA 1978, § 7-1-67(B), that rate is 15 percent per year.

(2) *Assessment of Penalty.* NMSA 1978, § 7-1-69(A) provides that when a taxpayer fails to pay taxes as a result of negligence or disregard of rules and regulations, a penalty "shall be added" to the amount of the underpayment. The term "negligence" as used in § 7-1-69(A) 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, Mr. Soice made an erroneous assumption that led him to change the wage income reported on his W-2 form. This erroneous belief resulted in the underpayment of personal income taxes due to the state. Mr. Soice decided to change his W-2 without consulting the certified public

accountant who had prepared the form on behalf of Mr. Soice's wholly-owned S corporation. This decision does not demonstrate the degree of ordinary business care and prudence which a reasonable taxpayer would be expected to exercise. The errors that led to the Taxpayers' underpayment of 1998-2000 personal income taxes meet the definition of negligence set out in Department regulations and in New Mexico case law. *See, El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.). For this reason, penalty was properly imposed and there is no legal basis for an abatement.

Issue III. Abatement of Penalty and Interest for the 2001-2003 Tax Years. This issue concerns the Taxpayers' protest to the Department's notices of penalty and interest on their late payment of 2001 taxes, and their protest to the Department's denial of their claim for refund of the penalty and interest they paid for tax years 2002 and 2003. These protests raise the same arguments previously addressed under Issue II, above, and no further discussion is necessary.

Issue IV. Allegations Concerning Violations of Taxpayer Bill of Rights. The Taxpayers maintain that the Department violated the taxpayer bill of rights set out in NMSA 1978, § 7-1-4.2, and that this entitles them to an award of costs under NMSA 1978, § 7-1-29.1. They argue that the Department did not respond to their inquiries quickly enough, gave them incorrect advice, and took unwarranted collection action against them. In particular, the Taxpayers allege that the Department employed deceptive wording in its letters and encouraged the Taxpayers to file fraudulent tax returns. These allegations are unfounded.

A. The Information Provided to the Taxpayers was Correct. On September 28 and October 26, 2005, Rick Moore wrote to the Department asking that penalty and interest on the

Taxpayers' late payment of personal income taxes be abated. On November 10, 2005, the Department responded to Mr. Moore's letters, explaining that "the Department does not have the authority, based on the circumstances described in your letter, to abate any of the penalty and interest charges you were assessed." At the administrative hearing, Mr. Soice maintained that the Department worded its letter in a deceptive manner. He argued that while "the Department" may not have the authority to abate penalty and interest, the secretary of the Department does have such authority under NMSA 1978, §§ 7-1-20 and 7-1-28.

As previously discussed under Issue I, § 7-1-20 allows the secretary to enter into a compromise agreement when there is a good faith doubt as to a tax liability, while § 7-1-29 authorizes refunds when there is evidence that a tax has been overpaid. Similarly, § 7-1-28 authorizes the abatement of an assessment that was "incorrectly, erroneously or illegally made." In this case, the Taxpayers acknowledge that the amended returns they filed in July 2005 corrected errors made on their original returns. They also acknowledge that the income reported on their amended returns was accurate. That being the case, there is no legal basis for the Department—or its secretary—to compromise, refund or abate the taxes, penalty and interest related to those returns. The information provided to the Taxpayers in the Department's November 10, 2005 letter was correct and did not violate the taxpayer bill of rights.

The Taxpayers' allegation that the Department instructed them to file fraudulent returns is based on a miscommunication between Roberta DeHerrera, a supervisor in the Department's income tax unit, and Rick Moore, the Taxpayer's accountant. Ms. DeHerrera testified that when she spoke to Mr. Moore in January 2006, she advised him that *if the IRS had adjusted the Taxpayers' returns*, they could amend their New Mexico returns a second time to reflect this

adjustment. Ms. DeHerrera later reviewed the Taxpayers' correspondence with the IRS and determined that no refund of New Mexico taxes was due because the federal refund was based on a federal statute of limitations and not on any adjustment to the income reported on the Taxpayers' returns.

Unfortunately, Mr. Moore misinterpreted Ms. DeHerrera's advice and told the Taxpayers they could obtain a refund of 1998-2001 taxes by filing new amended returns that restated the erroneous figures reported on their original returns. The Taxpayers correctly concluded that filing such returns would be fraudulent and declined to do so. At this point, there is no way to determine what caused the miscommunication between Mr. Moore and Ms. DeHerrera because Mr. Moore was not present to testify at the administrative hearing. Based on Ms. DeHerrera's testimony, which I find to be credible, the advice she gave Mr. Moore was correct.

B. The Department Responded to the Taxpayers' Inquiries Within a Reasonable Time Period. The Taxpayers contend that the Department failed to respond to their inquiries in a timely manner. This complaint must be viewed in context. More than 750,000 personal income tax returns are filed with the Department each year (plus amended returns filed for prior years). Ms. DeHerrera testified that the income tax unit receives an average of 2,500 telephone calls per week, or 10,000 calls per month. Given this volume, the Department responded to the Taxpayers inquiries within a reasonable period of time. The Department responded to Mr. Moore's September 28 and October 26, 2005 letters on November 10, 2005—six weeks after the date of the first letter and two weeks after the date of the second letter. Gale Kessler responded to Mr. Soice's telephone inquiries within 30 days of her conversations with him in late January and early February 2006.

The three-page letter Ms. Kessler wrote to the Taxpayers on March 1, 2006 contained a comprehensive analysis of their case and laid out the Department's position in some detail, including copies of pertinent tax statutes. The Taxpayers believe this information should have been provided to them immediately upon the Department's receipt of Mr. Moore's letters in September and October of 2005. They also complain that the Department failed to respond to their request for copies of New Mexico court cases concerning the meaning of the word "shall" and the term "mistake of law." The Taxpayers have an unrealistic view of the Department's resources and responsibilities. Section 7-1-4.2(F) entitles taxpayers to "an explanation of the results of and the basis for audits, assessments or denials of refunds." This does not mean that every taxpayer is entitled to a detailed written analysis of his tax liability or to have the Department engage in legal research on his behalf. A taxpayer who believes that his situation merits this level of examination must engage the services of a tax advisor to assist him. *See*, § 7-1-4.2(B) (taxpayers have "the right to be represented or advised by counsel or other qualified representatives at any time in administrative interactions with the department"). In this case, Ms. Kessler's March 1, 2006 letter not only met, but clearly exceeded, the Department's responsibilities under the taxpayer bill of rights.

On the issue of collections, the delay in the Department's acknowledgment of the Taxpayers' protest of penalty and interest can be traced to the ambiguous nature of Mr. Moore's September 28, 2006 letter. Although Mr. Soice characterized Mr. Moore's letter as a "protest" in his January 2006 correspondence with Secretary Goodwin, the letter itself appears to be in the nature of a request for information, not a formal protest of the Department's action. The Department reasonably could have refused to accept the September 28, 2005 letter as a timely

protest and required the Taxpayers to pay all of the penalty and interest associated with their July 2005 returns and file a claim for refund. Instead, the Department agreed to reconsider Mr. Moore's letter and ultimately gave it a liberal interpretation, even going so far as to accept it as a protest of tax years not specifically referred to in the letter itself. The Department's attempt to accommodate the Taxpayers does not constitute a violation of the taxpayer bill of rights.

C. An Award of Costs to the Taxpayers is not Warranted in this Case. Even if a violation of the taxpayer bill of rights had occurred, § 7-1-4.2 is silent as to any remedy. At the administrative hearing, Mr. Soice suggested that an appropriate form of relief would be an award of costs and fees to the Taxpayers under NMSA 1978, § 7-1-29.1. That statute provides for an award of reasonable costs incurred in connection with an administrative proceeding if the taxpayer is the prevailing party. In this case, the Taxpayers are not the prevailing party. Accordingly, the issue of costs is moot.

CONCLUSIONS OF LAW

A. The Taxpayers filed timely protests to the Department's statements of account for penalty and interest and the Department's denial of the Taxpayers' claims for refund, and jurisdiction lies over the parties and the subject matter of this protest.

B. The expiration of the limitations period set out in NMSA 1978, § 7-1-18 does not extinguish a liability for outstanding taxes, and the Taxpayers' personal income taxes for the 1998-2000 tax years were still due and owing to the state in July 2005.

C. The amended personal income tax returns the Taxpayers filed in July 2005 constituted valid assessments of tax under NMSA 1978, § 7-1-17(B)(1).

D. The Taxpayer's error in completing their 1998-2003 income tax returns resulted in the late payment of New Mexico tax, and interest is due on the amount of the late payment.

E. The Taxpayers' error in completing their 1998-2003 income tax returns was negligent, and the ten percent negligence penalty is due on the amount of the underreported tax.

F. Pursuant to NMSA 1978, §§ 7-1-19 and 7-1-30, the Department has ten years from the date the Taxpayers' amended returns were filed in July 2005 to collect the penalty and interest associated with those returns.

G. Because the taxes reported on the Taxpayers' amended returns correctly stated their liability to the state, there is no legal basis for the Department (or its secretary) to compromise, refund or abate the additional taxes paid by the Taxpayers or the penalty and interest associated with those taxes.

H. The Department did not violate the taxpayer bill of rights.

I. The Taxpayers are not entitled to an award of costs or fees.

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

DATED August 10, 2006.