

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

**IN THE MATTER OF THE PROTEST
OF JUSTO F. AND JESSIE P. CORDOVA
TO ASSESSMENT OF PENALTY AND
INTEREST ISSUED UNDER LETTER
ID NO. L1252667392**

No. 07-20

DECISION AND ORDER

An administrative hearing on the above-referenced protest was held on November 7, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Justo and Jessie Cordova (“Taxpayers”) represented themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayers filed timely federal and New Mexico personal income tax returns for the 1999 tax year.
2. The Internal Revenue Service (“IRS”) subsequently disallowed some of the itemized deductions the Taxpayers claimed on their federal return, resulting in an additional income tax liability for the 1999 tax year.
3. The Taxpayers do not recall receiving a notice from the IRS concerning the adjustment to their federal return and did not amend their 1999 New Mexico personal income tax return to report the additional state tax liability resulting from the IRS adjustment.
4. New Mexico’s personal income tax form uses federal adjusted gross income as the starting point for reporting state tax and does not require disclosure of the itemized deductions

taken on the federal return. For this reason, the Department had no way of detecting the error in the Taxpayers' reporting of itemized deductions at the time they filed their state income tax return in April 2000.

5. It was not until 2003 that the Department received information from the IRS concerning its adjustment to the Taxpayers' 1999 federal income tax return, which increased the amount of state income tax due for that year.

6. On August 29, 2003, the Department assessed the Taxpayers for \$709.00 of additional 1999 income tax, plus \$357.84 of interest and \$70.90 of penalty.

7. On September 4, 2003, the Taxpayers filed a written protest to the assessment of interest and penalty.

DISCUSSION

The Taxpayers question their liability for the interest and penalty that accrued on their underpayment of 1999 personal income tax between April 2000, the original due date of the tax, and August 2003, the date the Department issued its assessment. The Taxpayers maintain that it was the Department's responsibility to notify them of their additional tax liability and that interest and penalty should not begin to accrue until the date they received actual notice of the error in their calculation of 1999 personal income tax.

Burden of Proof. NMSA 1978, § 7-1-17(C) provides that any assessment of tax 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 assessment issued to the Taxpayers is presumed to be correct, and it is the Taxpayers' burden to present evidence and legal argument to show that they are entitled to an abatement.

Assessment of Interest. When a taxpayer fails to make timely payment of taxes due to the state, NMSA 1978, § 7-1-67 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 begins to run from the original due date of the tax, not the date the Department notifies the taxpayer of the underpayment. In this case, the Taxpayers underreported their 1999 income tax liability by \$709. Although the error was unintentional, the fact remains that the Taxpayers have had the use of money legally due to the state. For this reason, interest was properly assessed for the period beginning on April 16, 2000, the first day following the due date for payment of their 1999 income taxes.

Assessment of Penalty. When a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and regulations, NMSA 1978, § 7-1-69(A) imposes a penalty of two percent per month "from the date the tax was due," not to exceed ten percent of the outstanding tax liability. As with interest, the amount of penalty is calculated *from the date the tax was due*, not the date the taxpayer is notified of the underpayment.

The term "negligence" is defined in Regulation 3.1.11.10 NMAC to include "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, the Taxpayers do not know why their itemized deductions were disallowed and have not pursued the matter with the IRS. There is no evidence that they ever discussed the deductions claimed with their tax preparer, who Mr. Cordova acknowledged was inexperienced. Instead, it appears that the Taxpayers simply assumed that the returns had been prepared correctly. This meets the definition

of negligence set out in Department regulations and New Mexico case law. *See, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989) (a taxpayer cannot abdicate responsibility for payment of taxes merely by appointing an accountant as its agent in tax matters).

Timing of Assessment. The Taxpayers question why the Department took so long to notify them of their 1999 personal income tax liability. Mr. Cordova testified that he would have paid the additional tax if he had been alerted sooner and believes that the Department is responsible for the interest that accrued between April 2000 and August 2003 (penalty stopped accruing when it reached its maximum of 10 percent in August 2000). This argument is based on a misunderstanding of New Mexico's self-reporting tax system. It is the obligation of taxpayers—not the Department—to accurately determine their tax liabilities and report those liabilities to the state in a timely manner. *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).

No government has sufficient resources to audit every taxpayer to determine whether he or she has fully complied with the tax laws. Although the Department performs periodic “tape matches” that compare information reported to the IRS with information reported to New Mexico, there is some delay before the federal tape match information is made available to the state. In this case, the Department did not receive information concerning the adjustment to the Taxpayers' 1999 federal income tax return until 2003. The Department's assessment was issued a few months later and was well within the statutory time frame set out in NMSA 1978, § 7-1-18, which gives the Department three years from the end of the calendar year in which a tax is due to

issue an assessment. 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, § 7-1-67 requires interest to be paid from the first day following the day on which the tax was due until the tax is paid.

CONCLUSIONS OF LAW

A. The Taxpayers filed a timely protest to the Department's assessment of interest and penalty, 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 NMSA 1978, § 7-1-67, the Taxpayers are liable for interest on their underpayment of 1999 personal income tax from April 16, 2000 until the date the tax is paid.

D. Pursuant to NMSA 1978, § 7-1-69, the Taxpayers are liable for the penalty that accrued on their underpayment of 1999 personal income tax from April 16, 2000 until the date the penalty reached its maximum of ten percent.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

DATED November 9, 2007.