

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

**IN THE MATTER OF THE PROTEST OF
SARAH HUNTER TO ASSESSMENT OF
PENALTY AND INTEREST ISSUED UNDER
LETTER ID NO. L1473775232**

No. 08-03

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 22, 2008, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Mr. Peter A. Breen, Attorney in the Legal Services Bureau. Ms. Andrea Umpleby, Protest Auditor, also appeared for the Department. Ms. Sarah Hunter (“Taxpayer”) represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 2005, the Taxpayer filed a timely New Mexico personal income tax return for the 2004 tax year, reporting her federal adjusted gross income to be \$12,180.00.
2. In completing her 2004 federal income tax return, which is used as the basis for calculating tax due to New Mexico, the Taxpayer reported her gross income to be \$41,748.21.
3. The tape match system revealed the discrepancy between the federal and state returns. The discrepancy occurred because the Taxpayer did not include income she received from her ex-husband’s retirement pension on her New Mexico return.
4. As a result of the error on her New Mexico return, the Taxpayer had underreported her 2004 New Mexico income tax by \$1,126.00.

5. The Taxpayer contacted the Department regarding her retirement income for the tax year 2003 in March 2004.

6. The Taxpayer erroneously believed that if state taxes were not withheld then they were not owed. The Taxpayer also believed that her taxes might have been withheld from her ex-husband's portion of the retirement income.

7. On April 4, 2007, the Department notified the Taxpayer of the commencement of a Limited Scope Audit on her 2004 New Mexico income tax return. On April 27, 2007, the Department assessed the Taxpayer for the additional \$1,126.00 of tax due for 2004, plus penalty and interest on that amount.

8. On April 13, 2007, the Taxpayer paid the principal tax amount to stop the accrual of interest. The Taxpayer also made a subsequent payment of \$77.00, leaving an outstanding balance of \$371.23 as of the date of the hearing.

9. On April 23, 2007, the Taxpayer filed a written protest to the Department's assessment, as she feels that she did not owe the tax, and therefore did not owe penalty and interest. If it is found that the tax was owed, the Taxpayer does not dispute the amount of tax principal or the computation of penalty and interest.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the Department's assessment of tax, penalty, and interest on her underpayment of 2004 New Mexico income tax. At the administrative hearing, the Taxpayer did not protest the amount of tax, penalty, and interest. The Taxpayer is protesting that the tax was owed and whether penalty and interest are appropriate.

Burden of Proof. Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that she is not liable for the tax and is entitled to an abatement of penalty and interest.

Estoppel. The Taxpayer maintains that she should not be required to pay the tax, penalty, and interest. Taxpayer claims that she contacted the Department in regards to her 2003 return on the issue of her retirement income, and that the Department advised in writing that if the tax was not withheld then it was not owed. Taxpayer relied on this information for her 2004 return. Taxpayer admits that she later learned this was incorrect, or had changed, and has filed recent returns correctly. The Taxpayer is essentially raising an estoppel issue, arguing that the Department should be estopped from enforcing the collection of tax, penalty, and interest that would otherwise be due.

Estoppel is rarely applied against the state, and then only in exceptional circumstances where there is “a shocking degree of aggravated and overreaching conduct or where right and justice demand it.” *Wisznia v. State of New Mexico, Human Services Department*, 1998-NMSC-11, ¶17, 125 N.M. 140, 958 P.2d 98. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied*, 114 N.M. 227, 836 P.2d 1248 (1992).

New Mexico has a self-reporting tax system, and it is up to taxpayers to determine their tax liabilities and accurately report those liabilities to the state. NMSA 1978, § 7-1-13. Income, including

retirement income, is taxable in New Mexico. NMSA 1978, § 7-2-3 and 3.3.11.13 NMAC. New Mexico bases its definition of adjusted gross income on the federal definition. NMSA 1978, § 7-2-2A.

The Taxpayer claims that she did not include the retirement income based on written documents from the Department that said if the tax was not withheld it was not owed. The Taxpayer did not produce any such documents. The Taxpayer explained that she was unable to produce the documents because they had been lost or stolen during numerous break-ins at her home. Despite her misfortune, the burden is still on the Taxpayer to prove that these documents exist. The Taxpayer's testimony on these documents is dubious, especially in light of the plain directions on the face of her 2004 New Mexico personal income tax return. Line 5 requires the amount of her federal adjusted gross income and notes that it is from line 37 of federal form 1040. Line 37 from her 2004 federal tax return, form 1040, has been filled in with \$41,748.21. Line 5 of her 2004 New Mexico return has been filled in with \$12,180.00. It is highly unlikely that the Department advised the Taxpayer in writing to ignore the plain instructions on the return. Furthermore, any documents from the Department would only be in reference to inquiries the Taxpayer made on her 2003 tax liability, and would not apply to her 2004 taxes.

The facts presented in this case do not support a finding of estoppel. The Taxpayer was on notice that she was required to report her federal adjusted gross income on her New Mexico tax return. The Taxpayer ignored the explicit instructions on her 2004 New Mexico tax return when she filled in Line 5.

Withholding. The Taxpayer asserts that it was responsibility of the entity that paid the retirement benefits to withhold the tax. Employers are required to withhold state income tax in most cases. NMSA 1978, § 7-3-3. However, a person paying a pension or annuity to someone who lives in

New Mexico is defined to be a “payor” and not an “employer”. NMSA 1978, § 7-3-2. Payors are only required to withhold when the person receiving the pension benefit requests in writing that they do so. NMSA 1978, § 7-3-3. There is no evidence that the payor in this case was obligated to withhold. Furthermore, the payor supplied the Taxpayer with Form 1099-R for 2004 showing that no state tax was withheld. Therefore, the Taxpayer was on notice that no state taxes had been withheld on the retirement benefits she received.

Tax owed. The Taxpayer asserts that the tax owed on her retirement benefits was withheld from her ex-husband’s portion of the retirement income. The Taxpayer claims that the proof is held by the payor and/or by the Department, where she did not have access to it. Again, the burden is on the Taxpayer to prove that the assessment is not correct. The Taxpayer’s testimony on this subject is highly speculative and involves an assumption that her tax must have been withheld from her ex-husband’s payments. The Taxpayer has not provided any actual proof that the taxes she owed had already been paid by another party.

Assessment of Penalty. When a taxpayer fails to pay taxes owed to the state as a result of negligence or disregard of rules and regulations, a penalty “shall be added” to the amount of the underpayment. NMSA 1978, § 7-1-69. Negligence, by definition, includes both “inadvertence” and “erroneous belief or inattention.” 3.1.11.10 NMAC. In this case, the Taxpayer erroneously believed that she was not liable for tax on her retirement income if it was not withheld. This error meets the definition of negligence set out in Department regulations and in New Mexico case law. *See C & D Trailer Sales v. Taxation and Revenue Dept.*, 93 N.M. 697, 699, 604 P.2d 835, 837 (Ct. App. 1979) (a taxpayer's mere belief that he is not liable to pay taxes is tantamount

to negligence within the meaning of the statute); *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.).

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 word “shall” indicates that the assessment of interest is mandatory, not discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). 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 made a mistake on her 2004 tax return based on a misunderstanding. Nevertheless, the State of New Mexico would have received an additional \$1,126 payment if the Taxpayer had completed her return correctly. As a result of the Taxpayer’s mistake, the state was deprived of the use of this money for the period between the original due date in April 2005 and the date the final tax payment was made in 2007. For this reason, interest was properly assessed.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessment of tax, penalty, and interest issued under Letter ID No. L1473775232, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-2-3 and 3.3.11.13 NMAC, the Taxpayer is liable for the tax owed on the retirement income she received in 2004.

C. Pursuant to NMSA 1978, § 7-1-69, the Taxpayer is liable for the penalty that accrued.

D. Pursuant to NMSA 1978, § 7-1-67, the Taxpayer is liable for the interest that accrued between the due date of her 2004 personal income taxes in April 2005 and the date the principal tax was paid in 2007.

- E. The Department is not estopped from collecting the tax, penalty, and interest.
- F. The Taxpayer failed to prove that the payor was required to withhold the tax.
- G. The Taxpayer failed to prove that the tax had already been paid by another party.

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

DATED: October 8, 2008.