

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

**IN THE MATTER OF THE PROTEST OF
JEANNIE L. MYERS
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0893691456**

No. 11-24

DECISION AND ORDER

A hearing was held on the above captioned matter on October 4, 2011 before Brian VanDenzen Esq., Hearing Officer, in Santa Fe. Ms. Jeannie L. Myers (“Taxpayer”) appeared *pro se* telephonically from Reserve, New Mexico. The Taxation and Revenue Department of the State of New Mexico (“Department”) was represented by Special Attorney General and Chief Legal Counsel, Nelson Goodin. Extern Jordan M. DeHann, a law student, was allowed to participate in the hearing pursuant to Rule 1-094. Protest Auditor Andrick Tsbatsaye appeared as a witness for the Department. In addition to the documents contained in the Administrative File articulated in the beginning of the hearing, Department Exhibit A (Taxpayer’s 2010 PIT Return) and Department Exhibit B (July 19, 2011 Letter of Andrick Tsbatsaye) are admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Since 2005, Taxpayer has been a full time resident of New Mexico on a fixed out-of-state retirement income.

2. In 2009, Taxpayer had a personal income tax liability of \$493, less than the \$500 minimum difference between income earned and wage withholdings that triggers imposition of penalty for failure to make estimated tax payments.

3. In tax year 2010 (“TY10”), Taxpayer remained on a fixed retirement income from the State of California that by itself resulted in personal income tax liability below \$500.

4. In TY10, Taxpayer accepted a temporary position with the Census Bureau.

5. Taxpayer set-up set wage withholding on her TY10 Census Bureau pay. The total of that wage withholding was \$21.00.

6. Taxpayer’s pay from this temporary position with the Census Bureau pushed her personal income tax liability above \$500 more than her wage withholding.

7. Taxpayer did not make any quarterly estimated tax payments for TY10.

8. For TY10, Taxpayer had a total personal income tax liability of \$742.00. Subtracting the \$21.00 of withholdings, Taxpayer’s personal income liability was \$721.00.

9. Taxpayer filed and paid her TY10 personal income taxes on April 14, 2011

10. On June 9, 2011, the Department assessed Taxpayer for \$12.28 in penalty for failure to make quarterly estimated payments.

11. On June 13, 2011, Taxpayer paid the assessed penalty in the amount of \$12.28, filed a protest to the assessment, and requested a refund for her \$12.28 payment.

12. On June 21, 2011, the Department acknowledged Taxpayer’s protest.

13. On August 24, 2011, the Department requested a hearing.

14. On August 26, 2011, the Hearing Bureau issued Notice of Administrative Hearing, scheduling the hearing for October 4, 2011.

DISCUSSION

Taxpayer protests the imposition of penalty for her failure to make quarterly estimated payments. There are two issues in this case: first, whether Taxpayer qualifies for an exception to the assessment of penalty for failure to make estimated quarterly tax payments under NMSA 1978, Section 7-2-12.2 (H) (2010), which is the basis of the Department FYI-320 form that Taxpayer relies upon; and second, whether Taxpayer's previous excellent payment history mandates equitable relief in this situation. While Taxpayer's situation is unfortunate, especially in light of her otherwise excellent payment history, no exception applies that allows the Department to abate penalty and the hearing officer lacks the authority to grant equitable relief based on previous payment history.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish that he or she was not required to pay the assessment. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Payment of Estimated Tax.

Under NMSA 1978, § 7-2-12.2 (2010), all individuals subject to income tax are required to make annual installment payments on their income tax either through withholdings or through estimated quarterly tax payments. In instances where a taxpayer fails to make required estimated tax payments, and no other exception applies, the legislature mandates by the use of the word

“shall” that the Department impose a penalty on that taxpayer. NMSA 1978, § 7-2-12.2(G) (2010).

NMSA 1978, § 7-2-12.2 (2010) applies to taxpayers whether their tax liability is more or less than \$500. Although Taxpayer repeatedly pointed out that her personal income tax liability in previous tax years did not exceed \$500, she still was required by statute to either have withholdings or make estimated tax payments even when her tax liability was less than \$500. Where the \$500 amount that Taxpayer references comes into play is determining whether a taxpayer’s failure to have an appropriate withholding or make estimated tax payments, as required by statute, is subject to a civil penalty. When the difference between the tax liability and the withholding is less than \$500, than a taxpayer’s failure to make estimated payments in violation of NMSA 1978, § 7-2-12.2 (2010) is nevertheless exempted from penalty under NMSA 1978, § 7-2-12.2(H)(1) (2010). In this case, Taxpayer’s tax liability for 2010 was \$742.00. Her withholding was only \$21, meaning that the difference between her withholding and her income tax liability exceeded \$500. Consequently, Taxpayer gets no shelter from penalty under NMSA 1978, § 7-2-12.2(H)(1) (2010).

The other exceptions mentioned under NMSA 1978, § 7-2-12.2(H) (2010) do not apply to Taxpayer. NMSA 1978, § 7-2-12.2(H)(2) (2010) does not apply in this situation because Taxpayer did have a tax liability in the previous year of \$493. NMSA 1978, § 7-2-12.2(H)(3) (2010) also does not apply because Taxpayer did not pay her 2009 tax liability through either withholding or estimated tax payments but through one-time payment when she filed her personal income tax return. There is no indication that the Secretary of the Department, pursuant to NMSA 1978, § 7-2-12.2(H)(4) (2010), determined that the underpayment did not result from “...negligence, or disregard of rules and regulations.” In fact, although not an intentional

oversight, Taxpayer did disregard the rules requiring withholding or estimated tax payments even before 2010 when her tax liability was below \$500.

Taxpayer's main argument in support of her position is a document she attached to her protest letter: FYI-320, a Department publication informing a taxpayer of when estimated tax payments are required. Taxpayer is correct that FYI-320 is somewhat confusing. However, reading FYI-320 in conjunction with the statute, the exceptions to penalty listed on FYI-320 do not apply to Taxpayer. Under the first exception to penalty under FYI-320, which tracks NMSA 1978, § 7-2-12.2(H)(2) (2010), Taxpayer did have a personal income tax liability the previous year, making her ineligible for that exception. Under the second exception listed on FYI-320, which tracks 1978, § 7-2-12.2(H)(3) (2010), Taxpayer did not either pay 100% her previous year's personal income tax liability or pay 90% of the current year's tax liability with withholding or estimated payment because in 2009 she made a lump sum payment with her tax filing and her withholding in 2010 did not meet or exceed 90% of her TY10 tax liability.

Since no exception applied to this situation, the Department imposed a penalty on Taxpayer for her failure to make quarterly estimated tax payments under NMSA 1978, § 7-2-12.2 (G) (2010). That penalty amount was calculated at \$12.28.

It is worth briefly discussing the amount of assessed penalty. The Department is compelled by the legislature to issue an assessment for any tax liability in excess of \$25.00. *See* NMSA 1978, Section 7-1-17 (A) (2007). The Department is prohibited by its own regulation to issue an assessment if the tax liability at issue is less than \$10.00. *See* 6.1.6.9 NMAC (1/15/01). The variance in the minimum levels needed to issue an assessment between the statutory and regulatory amount may come from the fact that the regulation has not been amended to reflect more recent statutory changes. However, as currently written, while the Department is prohibited

from assessing for a liability less than \$10.00 and is compelled to assess for a liability above \$25.00, the Department has the discretion to assess for a tax liability between \$10.00 and \$25.00. The Department chose to exercise its discretion in this case in assessing Taxpayer for penalty in the amount of \$12.28, an assessment that as discussed above is supported by statute.

Taxpayer's Request for Equitable Relief.

Taxpayer argued that given her excellent payment history, her inability to have California set up a New Mexico wage withholding, and her uncertainty as to whether her temporary employment would push her tax-liability above \$500, justice dictates that penalty be abated in this case even if the letter of the law says differently. Although Taxpayer uses the language of justice, what she is really arguing for is equitable relief.

However, unlike a court, the Hearing Officer generally lacks authority to consider equitable relief in an administrative hearing under the Tax Administration Act. The adjudicative functions of an administrative agency like the Department are considered by New Mexico courts to be “quasi-judicial” powers. According to the New Mexico Supreme Court, the quasi-judicial powers of an administrative agency do not include the authority to grant equitable relief to a party before the agency. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 279, 881 P.2d 18, 24 (1994). Further, the Department (including this Hearing Officer) lack authority to ignore the legislature’s mandate that penalty “shall” be imposed under NMSA 1978, § 7-2-12.2 (G) (2010). Taxpayer’s protest and claim for refund is denied.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest of the assessment of penalty under Letter No. # L8936914560, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer is liable for penalty under NMSA 1978, § 7-2-12.2 (G) (2010).
3. No exception under NMSA 1978, § 7-2-12.2(H) (2010) allows abatement of penalty.
4. The Hearing Officer lacks authority to grant equitable relief despite Taxpayer's past payment history.

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

DATED: October 11, 2011.

BRIAN VANDENZEN
Hearing Officer
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