

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

**IN THE MATTER OF THE PROTEST OF  
MARK E. KILCOYNE  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L1528712576**

**No. 12-25**

**DECISION AND ORDER**

A protest hearing occurred on the above captioned matter on November 29, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Mark E. Kilcoyne (“Taxpayer”) appeared pro se. Staff attorney Peter Breen represented the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Mary Griego appeared as a witness for the Department. Department Exhibit A, an updated spreadsheet of Taxpayer’s liability as of the date of hearing, was admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On July 31, 2009 the Department assessed Taxpayer for \$210.00 in 2008 personal income tax, \$16.80 in penalty, and \$2.36 in interest for a then total assessment of \$229.16 under letter identification number L1528712576.
2. On August 11, 2009, Taxpayer submitted a letter of protest of the assessment.
3. On August 13, 2009, the Department acknowledged receipt of Taxpayer’s protest.
4. On September 13, 2012, the Department submitted a request for hearing on Taxpayer’s protest.
5. On October 4, 2012, the Department’s Hearings Bureau sent Notice of Administrative Hearing, scheduling the protest hearing for November 29, 2012.

6. As of the date of the hearing, Taxpayer owed \$210.00 in 2008 personal income tax, \$42.00 in penalty, and \$27.46 in interest.

### **DISCUSSION**

Taxpayer presented no evidence at the protest hearing in this matter. Taxpayer did argue at the hearing that the payment of all taxes is voluntary, and that he did not agree to pay any additional tax. At the hearing Taxpayer further argued that he has created a trust and attempted to designate the Department's witness Mary Griego as a trustee to assist him in this matter. In his protest letter, Taxpayer argued that the imposition of additional personal income tax, interest, and penalty was unwarranted because he relied on Department forms, instructions, and tax tables to calculate his initial 2008 personal income tax return.

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 of personal income tax. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). Since Taxpayer presented no evidence at hearing to support his claim in the protest letter that he owed no additional tax because he relied on Department forms, instructions, and tax tables to calculate his tax liabilities, Taxpayer failed to overcome the presumption of correctness of the Department's assessment. Consequently, Taxpayer is liable for the assessed \$210.00 personal income tax liability for tax year 2008.

Taxpayer's unsupported argument that the payment of tax is voluntary is without merit in light of federal and state legal authority. Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq.* Unless otherwise exempted by law, a tax is imposed "upon the net income of every" New Mexico resident. NMSA 1978, §7-2-3 (1981). This statutory scheme makes payment of income tax by New Mexico residents mandatory.

Further, in *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10<sup>th</sup> Cir. 1990), the Federal Court of Appeals for the 10<sup>th</sup> Circuit found meritless and frivolous a taxpayer's claim that payment of income tax is voluntary. *See also, United States v. Schiff*, 876 F.2d 272, 275 (2d Cir. 1989) (payment of income taxes is not optional; the average citizen knows that payment of income taxes is legally required); *McLaughlin v. United States*, 832 F.2d 986, 987 (7<sup>th</sup> Cir. 1987) (the notion that the federal income tax is contractual or otherwise consensual in nature has been repeatedly rejected by the courts). Similarly, the New Mexico Supreme Court characterized arguments questioning New Mexico's authority to tax the wages earned by its residents as frivolous and without merit. *See Holt v. New Mexico Department of Taxation & Revenue*, 133 N.M. 11, 18, 59 P.3d 491, 498 (N.M. 2002). This statutory and case law authority establishes that the payment of income tax is not optional, therefore Taxpayer's argument is without merit.

Equally meritless is Taxpayer's unsupported attempt to create a trust and designate a Department employee as a trustee in an effort to shield him from income tax liability. Taxpayer failed to establish factually the prima facie elements of any lawful trust. Moreover, Taxpayer cited no legal authority as to how the creation of this ostensible trust might affect his 2008 New Mexico personal income tax liabilities. Since Taxpayer did not present any evidence to overcome the presumption of correctness on the assessment, and since Taxpayer's other arguments are without merit, Taxpayer is obligated to pay the assessed \$210.00 in 2008 personal income tax.

Additionally, Taxpayer is liable for payment of interest. When a taxpayer fails to make timely payment of taxes due to the state, "interest shall be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Section 7-1-67 (2001). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See*

*State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. Thus, interest continues to accrue against Taxpayer until the tax principal is paid in full.

Taxpayer did challenge the imposition of penalty in his protest letter, arguing that he relied on Department forms, instructions, and tax tables to calculate his tax liability. When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid. (*italics* added for emphasis)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional.

Regulation 3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer did not file and pay the appropriate New Mexico personal income tax in 2008 when due. Taxpayer's inaction in failing to pay personal income tax when required meets the legal definition of "civil negligence" under the penalty statute.

In instances where a taxpayer or taxpayers might otherwise fall under the definition of civil negligence generally subject to penalty, NMSA 1978 §. 7-1-69 (B) (2003) provides a limited exception: “No penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds.” By Department Regulation 3.1.11.11 NMAC (1/15/01), there are several situations which can show a taxpayer’s or taxpayers’ nonnegligence. In such nonnegligent situations, the Department either may choose not to assess civil penalty or may abate civil penalty. Taxpayer presented no evidence in this case to support his protest letter challenge to the imposition of penalty, and therefore failed to establish any of the nonnegligence factors that might justify abatement of penalty. Consequently, Taxpayer is liable for penalty.

### **CONCLUSIONS OF LAW**

- A. Taxpayer filed a timely, written protest of the assessment for 2008 personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.
- B. Taxpayer presented no evidence at the protest hearing, and thus failed to overcome the presumption of correctness under NMSA 1978, §7-1-17 (2007). *See Archuleta v. O’Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).
- C. Taxpayer’s other unsupported arguments are without merit.
- D. Taxpayer was civilly negligent in not filing and paying appropriate 2008 personal income tax.

E. Taxpayer is liable for \$210.00 in 2008 personal income tax principal, \$42.00 in penalty, and \$27.46 in interest as of the date of hearing. Interest continues to accrue until the tax obligation is satisfied.

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

DATED: December 20, 2012.

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