

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

**IN THE MATTER OF THE PROTEST OF
STEVE AND SHEILA LAMBERT
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L #0366612032**

No. 13-04

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 13, 2012, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Esq., attorney for the Department. Ms. Amanda Carlisle, protest auditor, appeared as a witness for the Department. Steve and Sheila Lambert (“Taxpayers”) appeared at the appointed time. This matter was originally set for hearing on February 16, 2012. Taxpayers requested a continuance on February 13, 2012, which the Department did not oppose. On February 15, 2012, the request for continuance was granted. A second hearing was set for June 21, 2012. Taxpayers requested a continuance because they were evacuated from their home because of the Little Bear fire in Ruidoso. The matter was continued a second time and reset for September 13, 2012. Taxpayer introduced into the record without objection: Exhibit #A, – 2007 Federal and State Returns (5 pages); Exhibit #B – Letter from Mr. Goodin (2 pages); Exhibit #C – Letter from the South Dakota Retirement System; and Exhibit #D – Notice of Limited Scope Audit (3 pages). The Department introduced into the record without objection: Exhibit #1 – Print Screen or notations; Exhibit #2 – Print Screen or notations; and Exhibit #3 – Client Research income source information.

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. On September 1, 2011, the Department assessed Taxpayers in personal income tax in the amount of \$2,659.09, \$531.80 in penalty and \$388.63 in interest for tax year 2007. Letter Id No. 366612032.
2. On October 13, 2011, Taxpayers requested an extension of time to file a protest. They also filed a protest at the same time they requested an extension of time to file a protest.
3. On October 26, 2011, the Department granted Taxpayers an extension of time to file a protest and the Department acknowledged the protest. Letter Id No.1495693888.
4. On November 21, 2011, the Department requested a hearing in this matter.
5. On November 22, 2011, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for February 16, 2012.
6. Taxpayers requested a continuance on February 13, 2012, which the Department did not oppose.
7. On February 15, 2012, the request for continuance was granted.
8. On March 2, 2012, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for June 21, 2012.
9. On June 21, 2012, Taxpayers requested a continuance because they were being evacuated from their home because of the Little Bear fire in Ruidoso.
10. The matter was continued a second time and reset for September 13, 2012.
11. On March 16, 2011, Taxpayers received a Notice of Limited Scope Audit from the Department indicating that Taxpayers had underreported their income to the federal government and had failed to report any income to New Mexico. Exhibit #D.

12. The Notice of Limited Scope Audit indicated that the amount of unreported income to New Mexico was \$68,928.00 and the amount of principal tax owed to New Mexico was \$3,150.00. Exhibit #D.

13. Taxpayers moved to New Mexico from South Dakota in the fall of 2006. They did not have employment when they moved to New Mexico.

14. For tax year 2007, Taxpayers were full time residents.

15. Ms. Carlisle testified that Taxpayers filed a timely return, contrary to what was indicated on the Notice of Limited Scope Audit. (Audio File; 24:00-26:33).

16. Taxpayers filed a New Mexico income tax return for tax year 2007 reporting the federal adjusted gross income of \$44,674.00 as the amount on line 7 of the New Mexico income tax return. Exhibit #A, pages A-1 and A-3.

17. The amount of unreported income on both the federal return and the state return for tax year 2007 was \$45,204.00. Exhibit #D.

18. The sources of income which were not reported on the federal return and the New Mexico return were \$35,975.78 in retirement income from the South Dakota retirement system and \$9,228.22 in interest income. Exhibit #3.

19. Ms. Carlisle testified that the unreported sources of income were \$39,975.78 from the South Dakota retirement system and \$8,561.00 in interest income. (Audio file; 21:48-26:33).

20. Taxpayers withdrew their retirement income from the South Dakota retirement system on March 15, 2007 and they did not report the retirement income on their federal return because they believed that the retirement income had been taxed. Exhibit #C.

21. The South Dakota retirement system refunded to Taxpayers \$35,975.78 in retirement income less \$7,195.16 in federal tax. Exhibit #C.

22. At the time Taxpayers filed their federal and state returns, they believed that their retirement income should not be taxed because it was earned in South Dakota, which does not have an income tax.

23. Taxpayers were required to report the retirement income on their federal and state income tax returns despite federal tax being withheld from the retirement income.

24. For tax year 2007, Taxpayers received interest income in the following amounts:
\$45.00 in interest income from Metropolitan Life Insurance Company;
\$8,561.00 in interest income from First Bank and Trust; and
\$624.00 in interest income from AXA Equitable.

Exhibit #3. There is an additional amount of \$114.00 listed as interest income on Exhibit #3. There was no testimony how this amount ties to the unreported income.

25. The total income received by Taxpayers for tax year 2007 that was not reported on lines 8a-10 of the federal return was \$9,230.00 plus \$35,975.78 for a total of \$45,205.78. (There is a slight rounding discrepancy of \$1.78 in Taxpayers' favor.)

26. Taxpayers had \$572.00 in state income tax withheld from their wages and a payment of \$39.00 was made by Taxpayers when they filed their 2007 returns. Exhibit A, pages A3-A4. The payment is noted in the Department's print screen or notations. Exhibit #2.

27. No other amounts of income tax were reported as being withheld from Taxpayers' wages.

28. Ms. Carlisle testified that the assessment was based on \$89,878.00 of corrected adjusted gross income and that \$3,150.00 was the amount of principal tax due. (Audio File; 26:33).

29. The Department's assessment is based on a principal amount of tax of \$2,659.00, which takes into account the amount of tax withheld of \$572.00 and the payment made of \$39.00 for a total of principal tax of \$3,270.00. {Assessment-\$2,659.00 assessed amount plus payment of \$39.00 plus withheld amount of \$572.00 = \$3,270.00}

30. The principal tax due on the assessment of \$3,270.00 is a different amount than the principal tax due stated on the Notice of Limited Scope Audit of \$3,150.00. Exhibits #D and #2. {Notice of Limited Scope Audit-\$3,150.00 (tax due)-\$572.00 (withheld)-\$39.00 (payment) = \$2,539.00 (remaining principal tax due)}.

31. There is no evidence why there is a difference of \$120.00 between the assessed principal amount of tax and the amount of tax listed in the Notice of Limited Scope Audit.

32. The 2007 tax table indicates that the correct tax on New Mexico Taxable Income of \$68,978.00 is \$3,150.00. In reviewing the 2007 tax table there is no principal amount of tax listed of \$3,270.00. The Hearing Officer took judicial notice of the 2007 tax table which is available on the Department's website. The 2007 tax table is made part of the record.

33. At the hearing Taxpayers acknowledged that they should have reported the unreported income of \$45,205.78.

34. The exemption amount for Taxpayers for tax year 2007 is \$20,900.00 and it is undisputed. Exhibit #D.

35. Prior to the hearing, Taxpayers were told that one half of the penalty would be (or might be) abated. No abatements were made by the Department of one half of the penalty amount or of \$265.90.

36. Mr. Lambert lost his job in 2011 and he moved to Arizona while his wife stayed in New Mexico until their house sold. The house never sold. Mr. Lambert found employment in Ruidoso in 2012. He has since moved back to New Mexico.

DISCUSSION

During the hearing, Taxpayers admitted that they now understand that they owe personal income tax based on the unreported income. (Audio File; 9:24). Taxpayers argued that they did not understand how the Department calculated the amount of principal tax due and they argued that it was not clear whether the Department gave them credit for the amount of tax withheld of \$572.00 and the amount of tax paid of \$39.00. (Audio File; 13:16).

Burden of Proof and Standard of Review.

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. Accordingly, it is Taxpayers' burden to present evidence and legal argument to show that they are entitled to an abatement, in full or in part, of the assessment issued against them. NMSA 1978, Section 7-1-17(C) (2007) provides that any assessment of taxes made by the Department is presumed to be correct. *See, TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See, MPC Ltd. v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

New Mexico Income Tax.

Section 7-2-3 provides that “(a) tax is imposed at the rates specified in the Income Tax Act [7-2-1 NMSA 1978] upon the net income of every resident individual ...” NMSA 1978, Section 7-2-3 (1981). There is no issue that Taxpayers were resident individuals during the 2007 tax year. “Net income” is defined as “base income” adjusted to exclude specific amounts, which are not taxed, such as the standard deduction allowed by the federal government. NMSA 1978, Section 7-2-2(N) (1) (2010). In addition, “base income” incorporates the federal definition of adjusted gross income. NMSA 1978, Sections 7-2-2(A) and (B) (2010). Thus, the retirement and interest income that Taxpayers received while residents of New Mexico is subject to New Mexico tax. *See, Alarid v. Secretary of NM Taxation and Revenue*, 118 N.M. 23, 878 P.2d 341 (Ct. App. 1994).

At the hearing, Taxpayers did not dispute that they owed tax on the retirement and interest income that they failed to report to New Mexico. (Audio File; 9:24). Taxpayers testified that they had recently moved to New Mexico from South Dakota in the fall of 2006 and they believed that because federal income tax had been withheld from the retirement income that they did not need to report the amount of retirement income of \$35,975.78 that they received on March 15, 2007. Exhibit #C. The South Dakota retirement system refunded to Taxpayers \$35,975.78 in retirement income less \$7,195.16 in federal tax. Exhibit #C. The interest income that they received in 2007 was also not reported. Mr. Lambert thought that perhaps the distribution of some of the interest income occurred in a prior year. He presented no evidence to substantiate this fact. (Audio File; 14:47).

Calculation of Income Tax Due.

The sole issue is the calculation of the amount of principal tax owed by Taxpayers. At the hearing Taxpayers complained that they were not sure how the Department arrived at the

amount of tax owed and that the Notice of Limited Scope Audit and the Notice of Assessment had different amounts of principal tax owed.

The principal amount of tax due is \$2,539.00, which is different than the assessed amount. The Notice of Limited Scope Audit indicates that the total New Mexico tax due was \$3,150.00 which was confirmed by Ms. Carlisle. Exhibit #D. The Department assessed Taxpayer for a principal amount of tax of \$2,659.00, which is different than the principal tax due stated on the Notice of Limited Scope Audit. Exhibits #D and #2. $\{ \$3,150.00 \text{ (tax due)} - \$572.00 \text{ (withheld)} - \$39.00 \text{ (payment)} = \$2,539.00 \text{ (principal amount of tax due)} \}$. There is no evidence why there is a difference of \$120.00 between the assessed principal amount of tax and the amount of tax listed in the Notice of Limited Scope Audit. The 2007 tax table indicates that the correct tax on New Mexico Taxable Income of \$68,978.00 is \$3,150.00. In reviewing the 2007 tax table there is no principal amount of tax listed of \$3,270.00. The Hearing Officer took judicial notice of the 2007 tax table which is available on the Department's website. The Department confirmed at the hearing that the amount of principal tax due was \$3,150.00. (Audio File; 24:31-26:33).

The amount of principal tax due is calculated by determining the amount of unreported income. Even if you calculate the unreported income, this calculation does not add up to a principal amount of tax of \$3,270.00. The amount of unreported income for purposes of the New Mexico return was \$45,204.00 (\$35,975.78 in retirement income and \$9,228.22 in interest income). Exhibits #D, #3 and testimony from Ms. Carlisle Audio File 26:33. There was some conflicting testimony by the Department regarding the correct amount of unreported interest income. The Hearing Officer decided that the most likely amount of unreported interest income was \$9,228.22.

For tax year 2007, the sources of unreported interest income included the following amounts: \$45.00 in interest income from Metropolitan Life Insurance Company; \$8,561.00 in interest income from First Bank and Trust; and \$624.00 in interest income from AXA Equitable. Exhibit #3. The total income received by Taxpayers for tax year 2007 that was not reported on lines 8a-10 of the federal return for tax year was \$9,230.00 plus \$35,975.78 for a total of \$45,205.78. (There is a slight rounding discrepancy of \$1.78 in Taxpayers' favor.) The only amounts discussed by the Department as being unreported were \$35,975.78 in retirement income, \$45.00 in interest income from Metropolitan Life Insurance Company and \$8,561.00 in interest income from First Bank and Trust. Thus, the Department's own presentation of evidence does not substantiate the principal amount of tax assessed or \$3,270.00.

There is no dispute that Taxpayers filed a New Mexico income tax return for tax year 2007 reporting the federal adjusted gross income of \$44,674.00 on their New Mexico return. Exhibit #A, pages A3-A4. There is also no dispute as to the exemption amount claimed by Taxpayers. The Department does not dispute that \$572.00 in state income taxes was withheld from Taxpayers' wages and that a payment of \$39.00 was made to the Department. The payment is noted in the Department's print screen or notations and the Department acknowledged the payment at the hearing. Exhibit #2.

Therefore, the amount of unreported income is \$45,204.00 and the amount of principal tax due is \$3,150.00.

Civil Penalty.

Prior to the hearing, Taxpayers were told that one half of the penalty would be (or might be) abated. No abatements were made by the Department of one half of the penalty amount or of \$265.90. The Court of Appeals has ruled that the 20% percent penalty may be imposed if the

date of assessment is post January 1, 2008. *See, GEA Integrated Cooling v. New Mexico Taxation and Revenue Dept*, 2012-NMCA-010, 268 P. 3d 48. The Notice of Assessment was issued post January 2008. Therefore, the Department may impose a penalty of 20% percent, irrespective of any conversations Taxpayers had with the Department's employees.

Civil penalty is imposed when a taxpayer is "negligent" or disregards the Department's rules and regulations. Section 7-1-69(A) states that:

(e) xcept as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, 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;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2007).

The Department's regulation provides that "negligence" includes "failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." *See* Regulation 3.1.11.10 NMAC (2001).

Taxpayers' reasons for failing to report correctly fall within the definition of "negligence." Mr. Lambert testified that he lost his job in 2011. He was forced to move to Arizona while his wife stayed in New Mexico until their house sold. The house was never sold. Eventually, Mr. Lambert found employment in Ruidoso. Taxpayers also testified that they believed that the tax had already been withheld so therefore they did not have to include the unreported amounts as income. There was a third argument related to a nonexistent credit from

the State of South Dakota. However, since South Dakota does not have an income tax there is no credit to be given for a tax that was never paid.

No testimony or evidence was offered indicating that any legally recognizable indications of non negligence were present. *See* Regulation 3.1.11.11 NMAC (2001) defining non negligence. Taxpayers' reasons for underreporting their income fall within the definition of "negligence."

CONCLUSIONS OF LAW

- A. Taxpayers filed a timely written protest of the Notice of Assessment Letter Id No. 366612032 for personal income taxes, in the amount of \$2,659.09 in principal, \$531.80 in penalty and \$388.63 in interest for tax year 2007.
- B. The Department proved by a preponderance of the evidence that Taxpayers failed to report income in the amount of \$45,204.00 for tax year 2007.
- C. Taxpayers were full time residents for tax year 2007.
- D. The amount of principal tax due is \$3,150.00 less the amount of tax withheld and any payments made.
- E. To the extent that there is a discrepancy between the amount of principal tax due of \$3,150.00, less the amount of tax withheld and any payments made, Taxpayers only owe the remaining balance of principal tax, plus penalty and interest.
- F. Taxpayers were negligent in underreporting tax to the State of New Mexico and owe penalty.

For the foregoing reasons, the Taxpayers' protest **IS PARTLY DENIED AND PARTLY GRANTED.**

DATED: February 25, 2013

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25 (1989), the Taxpayers have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final. A party filing an appeal shall file a courtesy copy of the appeal with the Hearings Bureau contemporaneously with the filing of the Notice with the Court of Appeals so that the Hearings Bureau may prepare the record proper.

CERTIFICATE OF SERVICE

On February 26, 2013, a copy of the foregoing Decision and Order was mailed via certified mail #7008 0500 0001 4688 4997 to Steve and Sheila Lambert located at P.O. Box 1296, Alto, NM 88312-1296, and delivered through interoffice mail to Peter Breen, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.

John Griego