

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

**IN THE MATTER OF THE PROTEST OF
DYANNA TAYLOR
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0488890432**

No. 13-24

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on September 4, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Dyanna Taylor (“Taxpayer”) appeared *pro se*. Staff Attorney Kathleen Carlow appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Mary Griego appeared as a witness for the Department. Other than referencing documents contained in the Hearing Bureau’s administrative file, which are all part of the record of this proceeding, neither party tendered any exhibits. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer was a victim of the Madoff investment funds fraudulent scheme.
2. Taxpayer consulted with accountants about how to address the significant financial losses she suffered from the Madoff fraud. Accountants advised Taxpayer to do a loss carry-back for her Madoff financial losses over previous personal income tax years.
3. Because of this loss carry-back process over multiple tax years, Taxpayer needed to amend her 2005 federal and state personal income tax returns.

4. At some unspecified point shortly before December 14, 2009, Taxpayer filed an amended 2005 state personal income tax return showing an increased income tax liability. Taxpayer paid this additional \$1,344.00 in state personal income tax liability at the time she filed the amended return. **[Taxpayer's December 16, 2009 Protest Letter]**.

5. On December 14, 2009, the Department assessed Taxpayer \$264.20 in penalty and \$430.62 in interest for a total assessment of \$694.825 for the personal income tax reporting period ending December 31, 2005. **[Letter id. no. L0488890432]**.

6. On December 16, 2009, Taxpayer submitted a protest letter. In that letter, Taxpayer explained how she had been a victim of the Madoff fraud and followed the advice of her accountants to amend her tax returns to reflect a loss carry-back for multiple tax years.

7. On January 22, 2010, the Department abated the assessed penalty. **[Taxpayer's January 26, 2010 Amended Protest Letter]**.

8. On January 26, 2010, Taxpayer submitted an amended protest letter to the Department, acknowledging that the Department had abated penalty but continuing to protest the assessment of interest because she had been an unknowing victim of Madoff's fraud and because of her previous record of tax compliance. **[Taxpayer's January 26, 2010 Amended Protest Letter]**.

9. On February 19, 2010, the Department acknowledged receipt of Taxpayer's January 26, 2010 amended protest letter. Although unnecessary in light of Taxpayer's timely and clear December 16, 2009 protest letter, out of abundance of caution, the Department also granted Taxpayer a retroactive extension of time in which to file a protest.

10. On May 6, 2013, the Department requested a hearing in this matter.

11. On May 7, 2013, the Hearing Bureau issued Notice of Administrative Hearing, scheduling this matter for September 4, 2013.

DISCUSSION

Taxpayer suffered significant financial losses as a victim of Madoff's extensive fraud. In order to try to recover some small amount of her losses, accountants advised Taxpayer to amend multiple years of personal income tax returns in order to claim a carry-back theft loss. For reasons that Taxpayer was unable to explain at hearing, claiming this carry-back theft loss increased Taxpayer's 2005 state personal income tax liability. Taxpayer paid this additional liability when she filed her 2005 amended state income tax return at some unspecified point before December 14, 2009. On December 14, 2009, the Department assessed Taxpayer for penalty and interest on the increased 2005 state personal income tax liability. Taxpayer timely protested that assessment. After reviewing Taxpayer's protest letter articulating that she was a victim of Madoff's fraud, the Department abated penalty in this case. Taxpayer continues to protest the assessment of interest because she had been an unknowing victim of Madoff's fraud and because of her previous record of tax compliance.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed correct. *See also Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431. Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Consequently, Taxpayer must establish that she is entitled to abatement of the assessed 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, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, 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 *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary).

Moreover, unlike the penalty statute, NMSA 1978, Section 7-1-69 (B) (2007), the interest statute under Section 7-1-67 does not provide a general exception for a mistake of law made in good faith and on reasonable grounds. The seven specific exceptions to the imposition of interest articulated under Section 7-1-67 (A) are not applicable in this protest. Since the Legislature created a general exception under the penalty statute but choose not to do so under the interest statute, it is clear that the Legislature intended interest to be mandatory regardless of the reason for a taxpayer’s non-payment of the tax when due, unless a taxpayer falls under one of the narrow, articulated exceptions that do not apply in this case.

The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the personal income tax was due but not paid on April 15, 2006 until when Taxpayer paid the taxes with her amended 2005 personal income tax returns.

Taxpayer’s situation as an unfortunate victim of Madoff’s fraud is sympathetic. Probably in recognition that Taxpayer was a victim in this matter, the Department determined Taxpayer was not

civilly negligent and rightfully exercised its authority to abate the assessed penalty. However, because the Department lacks statutory authority to abate interest regardless of Taxpayer's sympathetic circumstances, Taxpayer is liable for the assessed interest. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment, as that statute's use of the word "shall" makes imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

For the foregoing reasons, Taxpayer's protest **IS DENIED**. Taxpayer owes \$430.62 in interest under the assessment.

DATED: September 18, 2013.

Brian VanDenzen, Esq.,
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630