

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

**IN THE MATTER OF THE PROTEST OF
LAWRENCE AND EARNESTINE MITCHELL,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0312750400 and L1386492224**

No. 13-26

DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 23, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Legal Counsel, and Mr. Aaron Rodriguez, Staff Attorney. Ms. Sonya Varela, Auditor, also appeared on behalf of the Department. Mr. Lawrence Mitchell and Ms. Earnestine Mitchell (Taxpayers) appeared for the hearing and represented themselves. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayers filed and paid their personal income taxes for 2009.
2. The Taxpayers did not file a claim for refund or credit for the 2009 tax year.
3. The Department issued a refund to the Taxpayers for the 2009 tax year. The Department cited a calculation error as the reason for the refund.
4. The Taxpayers filed and paid their personal incomes taxes for 2010.
5. The Taxpayers did not file a claim for refund or credit for the 2010 tax year.
6. The Department issued a refund to the Taxpayers for the 2010 tax year. The Department cited a calculation error as the reason for the refund.

7. The Department determined in December 2011 that it had erroneously granted refunds for the 2009 and 2010 tax years to the Taxpayers.
8. On January 20, 2012, the Department assessed the Taxpayers for personal income tax and interest for the tax period ending on December 31, 2009. The assessment was for \$1,000.00 tax and \$56.46 interest. No penalty was assessed.
9. On January 20, 2012, the Department assessed the Taxpayers for personal income tax and interest for the tax period ending on December 31, 2010. The assessment was for \$663.00 tax and \$13.64 interest. No penalty was assessed.
10. On February 9, 2012, the Taxpayers filed a formal protest letter.
11. The Taxpayers paid the tax principal and a small part of the interest.
12. On May 21, 2013, the Department filed a Request for Hearing asking that the Taxpayers' protest be scheduled for a formal administrative hearing.
13. On May 22, 2013, the Hearings Bureau mailed notice of the hearing to the parties.

DISCUSSION

The issue to be decided is whether the Taxpayers are liable for interest for the tax periods ending in December 2009 and December 2010.

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 Taxpayers' burden to present evidence and legal argument to show that they are not liable for the tax and interest.

Assessment of Interest.

The Taxpayers argued that they paid the tax on time, did not claim a refund or credit, and should not have to pay interest. The Taxpayers have already paid back the amount of tax principal assessed, and indicated that they did not have a problem paying that tax. The Department admitted that the Taxpayers never filed a claim for refund or credit for the years in question. The Department spontaneously, for unknown reasons, sent the Taxpayers a refund in 2009 and again in 2010. The Department later determined that it applied a special needs adopted child credit to the Taxpayers. The Taxpayers explained that they had filed for that credit in prior years, but did not apply for it in 2009 or 2010 because their child was living independently. The Taxpayers also expressed their surprise at the Department's actions since they were required to file a certification for the credit each year that it was claimed, and prior claims had been denied when they neglected to include that certification. The Taxpayers did not file any certifications on the credit for the 2009 and 2010 tax years, as their child was living independently. The Department, nevertheless, argues that the Taxpayers owe interest because the tax was not paid when it was due.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See 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.

Generally, “tax” includes the amount of a refund or a credit granted by the Department. *See* NMSA 1978, § 7-1-3 (X) (defining tax). However, the refund or credit must be granted by the Department “under any law subject to administration and enforcement under the provisions of the Tax Administration Act to any person contrary to law[.]” *See id.* This means that the refund must be made pursuant to the Tax Administration Act (TAA), and includes refunds that the Department should not have granted because the taxpayer claiming the refund was not actually entitled to the refund. *See id.* In this case, the refund was not made pursuant to the TAA. The TAA prohibits the Department from making any refund “to any person unless as the result of a claim made by that person[.]” NMSA 1978, § 7-1-26 (D). The Taxpayers never made any claims for refunds in 2009 and 2010, and the Department admitted that there were no claims. Therefore, the unsolicited refunds in this case do not meet the definition of tax, and interest does not apply to them. *See* NMSA 1978, § 7-1-67 (A) (applying interest only to tax that is not paid).

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely written protest to the Notice of Assessment of 2009 and 2010 interest on personal income tax issued under respective Letter ID numbers L0312750400 and L1386492224, and jurisdiction lies over the parties and the subject matter of this protest.
2. The refunds issued to the Taxpayers for the 2009 and 2010 tax years were not made pursuant to the TAA because they were not made pursuant to a claim for refund.
3. The unsolicited refunds for 2009 and 2010 are not tax as defined by the statute, and are not subject to interest.

For the foregoing reasons, the Taxpayers' protest is **GRANTED and the assessment of interest is hereby ABATED.**

DATED: September 24, 2013.

Dee Dee Hoxie

DEE DEE HOXIE
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, the parties 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* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 20__ in the following manner:

First Class Mail

Lawrence and Earnestine Mitchell
8413 Corte Del Viento NW
Albuquerque, NM 87120-5939

Interoffice Mail

Nelson Goodin
Taxation and Revenue Department, Legal
1100 S. St. Francis
Santa Fe, NM 87504