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

IN THE MATTER OF THE PROTEST OF
ROCHELLE B. YOUNG **No. 14-30**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L1866622416 and L0524445136

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 26, 2014 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Enrolled Agent Daryl A. McDowell appeared for Rochelle B. Young ("Taxpayer"). Staff Attorney Peter Breen appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits 1-3 and Department Exhibits A-D were admitted into the record, as described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 8, 2014, the Department assessed Taxpayer $1,812.00 in personal income tax principal, $362.40 in penalty, and $92.99 in interest for a total assessment of $2,267.39 for the reporting period ending December 31, 2011. [Letter id. no. L1866622416].

2. On January 8, 2014, the Department assessed Taxpayer $3,182.00 in personal income tax principal, $572.76 in penalty, and $68.51 in interest for a total assessment of $3,823.27 for the reporting period ending December 31, 2012. [Letter id. no. L0524445136].

3. On February 26, 2014, Taxpayer timely protested both assessments.

4. On April 22, 2014, the Department requested a hearing in this matter.

5. On April 23, 2014, the Hearings Bureau issued Notice of Administrative Hearing, scheduling this matter for May 7, 2014.

6. On May 6, 2014, Taxpayer moved to continue the scheduled hearing.

7. On May 6, 2014, the Department opposed Taxpayer's request for continuance given the late filing of the motion.

8. On May 7, 2014, the Department appeared for the scheduled hearing. Taxpayer did not appear for the hearing. This hearing was set and occurred within 90-days of protest.

9. On May 7, 2014, over the Department's objection, a Continuance Order and Amended Notice of Administrative Hearing was issued, rescheduling this matter for a hearing on June 26, 2014 at 9:00 a.m. That order warned that future continuances were unlikely.

10. On June 26, 2014, Taxpayer again moved to continue the scheduled hearing due to Taxpayer's representative's flight troubles. At 9:00 a.m., the hearing went on the record telephonically to check on Taxpayer's representative's status and at what time he could appear. While Taxpayer proposed resetting until the following day, the matter could not be rescheduled the following day because of another scheduled hearing. The matter went into recess until 1:00 p.m. later that day.

11. During the relevant period, tax years 2011 and 2012, Taxpayer was an officer for the Public Health Service ("PHS"). [Taxpayers Ex. #3].

12. There is no evidence on the record whether Taxpayer as a PHS officer was detailed by proper authority for duty either with the army or the navy.

13. As a member of PHS, Taxpayer claimed an exemption from New Mexico income tax under NMSA 1978, Section 7-2-5.11 (2007) in both years.

14. In 2010, the Department's "Instructions for PIT-ADJ Schedule of Additions and Deductions/Exemptions" stated that pay from members of "active duty military service in the armed forces of the United States" may be listed on line 15 of the PIT-ADJ and may be exempted from state income tax. The Department's instructions further indicated that "armed forces" includes the Army, Navy, Air Force, Marine Corps, and Coast Guard. [Department Ex. B].

15. In addition to the instruction identified in FOF #14, in its 2011 and 2012 "Instructions for PIT-ADJ Schedule of Additions and Deductions/Exemptions" the Department added an express instruction that the "[p]ay, wages or salaries paid by the U.S. Public Health Services does not qualify for the exemption." [Department Ex. C & D].

16. As of the date of hearing, for the personal income tax year ending on December 31, 2011, Taxpayer owed $1,812.00 in personal income tax, $362.40 in penalty, and $119.04 in interest. [Department Ex. A].

17. As of the date of hearing, for the personal income tax year ending on December 31, 2012, Taxpayer owed $3,182.00 in personal income tax, $636.40 in civil penalty, and $114.29 in interest. [Department Ex. A].

DISCUSSION

There is one issue at protest: As an officer of the PHS, was Taxpayer entitled to her claimed exemption under NMSA 1978, Section 7-2-5.11 (2007) from New Mexico personal income tax in 2011 and 2012.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments of tax issued in this case are presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013).Under

Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and 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). Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431. Moreover, "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 740 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447, 451.

Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1 to 36. Unless otherwise exempted by law, a tax is imposed "upon the net income of every" New Mexico resident. NMSA 1978, § 7-2-3 (1981). NMSA 1978, Section 7-2-12 (2003) requires any resident or any person deriving income from New Mexico to file a state income tax return. There is no genuine dispute—or contrary evidence—that Taxpayer was a New Mexico resident during tax years 2011 and 2012. Therefore, unless otherwise exempted or deductible, Taxpayer's income was subject to New Mexico personal income tax in 2011 and 2012.

Taxpayer claimed an exemption from New Mexico personal income tax under Section 7-2-5.11. Under Section 7-2-5.11, "[a] salary paid by the United States to a taxpayer for active duty service in the *armed forces of the United States* is exempt from state income taxation." (emphasis added). Taxpayer's argument focused largely on the phrase "active duty," but the crux of the exemption is not that phrase but rather what constitutes "armed forces of the United States."

While Taxpayer's representative repeatedly suggested that the Department had no federal authority to support its exclusion of PHS members from the exemption, federal law in fact provides the operative definition for "armed forces of the United States." Title 10 of the United States Code contains the Armed Forces law of the United States, and begins with Subtitle A, the General Military Law of the United States. Under the definitional section of the General Military Law of the United States, 10 U.S.C. § 101(a) (4) (2013), "armed forces" means "the Army, Navy, Air Force, Marine Corps, and Coast Guard." PHS members are not included in the federal definition of armed forces under 10 U.S.C. § 101(a)(4). Under 10 U.S.C. § 101(a) (5), Congress addressed the broader concept of "uniformed services", and in so doing, listed armed forces distinctly from the PHS. Specifically, 10 U.S.C. § 101(a) (5) reads

> [t]he term "uniformed services" means—
> (A) the armed forces;
> (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and
> (C) the commissioned corps of the Public Health Service.

By not including PHS in the specific definition of "armed forces" under 10 U.S.C. § 101(a) (4), and by separately and distinctly listing PHS members from members of the armed forces in the definition of the broader term "uniformed services" under 10 U.S.C. § 101(a) (5), Congress did not intend PHS members to be included in the definition of armed forces.

There is no doubt that members of PHS provide a valuable public service. However, that fact of worthy service does not establish that PHS members are legally eligible for the Section 7-2-5.11 exemption. Again, under *Wing Pawn Shop*, ¶16, exemptions from taxation must be narrowly and strictly construed and a taxpayer must clearly establish the right to such exemption. Questions of statutory construction begin with the plain meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12. In *Wood*, ¶12 (internal quotations and citations omitted),

the Court of Appeals stated that

> the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.

Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120.

Under Section 7-2-5.11, the New Mexico Legislature used the phrase "armed forces of the United States," which as discussed, has a federal law definition under 10 U.S.C. § 101(a) (4). The New Mexico Legislature could have chosen the broader term "uniformed services," which would have included PHS members as defined by 10 U.S.C. § 101(a) (5). Instead, the Legislature chose the narrower phrase "armed forces." Given the New Mexico's Legislature's use of "armed forces of the United States" rather than the "uniformed services of the United States", and the distinct definition for armed forces under 10 U.S.C. § 101(a) (4) that does not include the PHS, Taxpayer has not established her right as a member of the PHS to claim the Section 7-2-5.11 exemption.

Consistent with this federal definition of "armed forces" and the New Mexico Legislature's use of that phrase under Section 7-2-5.11, in all of its "Instructions for PIT-ADJ Schedule of Additions and Deductions/Exemptions" for the relevant period, the Department informed taxpayers that armed forces included the Army, Navy, Air Force, Marine Corps, and Coast Guard. The Department's instructions also specifically informed Taxpayer that members of PHS do not qualify for the exemption under Section 7-2-5.11.

Taxpayer argues that Regulation 3.3.1.9 (D) (5) NMAC establishes that PHS members are part of the armed forces for the purposes of New Mexico personal income tax. Regulation 3.3.1.9 NMAC is entitled "Residency." Regulation 3.3.1.9 (D) (5) NMAC specifically reads that

> [f]or purposes of this section, "armed forces" means all members of the army of the United States, the United States navy, the marine corps, the air force, the coast guard, all officers of the public health service detailed by proper authority for duty either with the army or the navy, reservists placed on active duty, and members of the national guard called to active federal duty.

However, there are two basic reasons why this regulation does not apply to Taxpayer's claim for exemption under Section 7-2-5.11. First, by the very language of Regulation 3.3.1.9 (D) (5) NMAC, that definition only applies to that specific regulatory section addressing residency. Residency is not at issue in this case. There is no evidence that the basis of Taxpayer's residency in New Mexico in this matter comes from the Regulation 3.3.1.9 (D) NMAC's prohibition on determining residency solely based on presence in New Mexico under military orders, which is the purpose of that regulatory section. Secondly, even if that section arguably did apply beyond a question of residency, Taxpayer did not establish under Regulation 3.3.1.9 (D) (5) NMAC that she was "detailed by proper authority for duty either with the army or the navy." The Department cites the United States Coast Guard Board of Review case, *US v. Braud*, 28 C.M.R. 692, 159 CMR LEXIS 214, for the same principle.

The remaining authority cited by Taxpayer was of limited value. Taxpayer tendered a personnel manual of the Department of Health and Human Services addressing withholding tax, residency, and the Soldier's and Sailor's Civil Relief Act of 1940 (now called the Servicemembers Civil Relief Act). However, the United States Code has far more authoritative value than a DHS personnel manual. The United States Code is federal law. And the issue in this matter is not one of withholding tax, residency, or compliance with the Servicemembers Civil

Relief Act as discussed in the manual[1]. The fact that PHS members are expressly covered under the Servicemembers Civil Relief Act does not mean that PHS members are members of the armed forces for all federal purposes, especially in light of the clear definition of "armed forces" under 10 U.S.C. § 101 (a) (4) (2013), the General Military Law of the United States.

Taxpayer's representative's claim—presented without any supporting authority—that it is commonly held wisdom that the Department of Defense's includes PHS members in its definition of "active duty, armed forces", does not alter the federal definition of "armed forces" under 10 U.S.C. § 101 (a) (4) (2013). Regardless of commonly held wisdom regarding PHS within the Department of Defense, the Department of Defense is governed by the United States Code, in particular the General Military Law of the United States articled in Title 10. Taxpayer provided no authority to support its argument about various withholding compacts. Moreover, despite Taxpayer's arguments, the Department was not arbitrary or discriminatory because it was applying the federal definition of armed forces under 10 U.S.C. § 101 (a) (4) (2013).

In summary of the exemption issue, the Department relied on federal law's definition of "armed forces" under 10 U.S.C. § 101 (a) (4) (2013) in determining that Taxpayer as an officer in the PHS did not meet the statutory requirements for an exemption under Section 7-2-5.11. Under the *Wing Pawn Shop*, ¶16, standard where the exemption under Section 7-2-5.11 must be narrowly construed, Taxpayer was unable to establish a right to an exemption under Section 7-2-5.11.

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 (2013) (italics for emphasis). Under the statute, the

[1] Under Regulation 3.3.1.9 (D) NMAC, New Mexico in fact complies with the requirement of Servicemembers Civil Relief Act that residency/domicile cannot come solely from a member of the military's presence in New Mexico under orders.

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. Further, when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word "shall", Section 7-1-69 requires that civil penalty be added to the assessment. Here, Taxpayer was civilly negligent in light of the 2011 and 2012 "Instructions for PIT-ADJ Schedule of Additions and Deductions/Exemptions" that unambiguously stated that PHS members did not qualify for the claimed exemption. *See* Regulation 3.1.11.10 NMAC (defining negligence to include inattention and failure to exercise ordinary care and prudence). Taxpayers' protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set in compliance with NMSA 1978, Section 7-1-24.1 (A) (2013).

B. Under NMSA 1978, Section 7-2-3 (1981), Taxpayer was a New Mexico resident subject to New Mexico personal income tax in 2011 and 2012.

C. Taxpayer was not entitled to claim an exemption of her PHS income because the Section 7-2-5.11 exemption only applies to members of "armed forces of the United States" Under federal law, 10 U.S.C. § 101 (a) (4) (2013), "armed forces of the United States." means only the Army, Navy, Air Force, Marine Corps, and Coast Guard.

D. Regulation 3.3.1.9 (D) (5) NMAC does not apply to Taxpayer's claim for the exemption because there is no issue of residency in this case and because Taxpayer did not

present evidence that she as a PHS officer was detailed by proper authority for duty either with the army or the navy.

E. Under NMSA 1978, Section 7-1-67 (2013)'s mandatory shall language, Taxpayer is liable for accrued interest under the assessments. . *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24.

F. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inattention and lack of prudence in the fact of clear contrary instructions satisfied Regulation 3.1.11.10 NMAC's definition of civil negligence.

For the foregoing reasons, Taxpayers' protest **IS DENIED.** As of the date of hearing, for the personal income tax year ending on December 31, 2011, Taxpayer owed $1,812.00 in personal income tax, $362.40 in penalty, and $119.04 in interest. For the personal income tax year ending on December 31, 2012, Taxpayer owed $3,182.00 in personal income tax, $636.40 in civil penalty, and $114.29 in interest.

DATED: July 25, 2014.

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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), 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. Either party filing an appeal shall file a courtesy copy of the appeal with the Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.