

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

**IN THE MATTER OF THE PROTEST OF
KATHLEEN FRANKLIN,
TO ASSESSMENTS ISSUED UNDER
LETTER ID NOS. L1869522384, L0527345104,
L1601086928, and L1229352400**

No. 14-38

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 23, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Ms. Theresa Carmichael, CPA, appeared on behalf of and represented Kathleen Franklin (Taxpayer) at the hearing. 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. On January 13, 2014, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the tax period ending on December 31, 2010. The assessment was for \$3,051.00 tax, \$610.20 penalty, and \$263.05 interest.
2. On January 13, 2014, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the tax period ending on December 31, 2011. The assessment was for \$3,053.00 tax, \$610.60 penalty, and \$157.90 interest.
3. On January 13, 2014, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the tax period ending on December 31, 2012. The assessment was for \$3,240.00 tax, \$583.20 penalty, and \$71.11 interest.

4. On January 31, 2014, the Taxpayer filed a formal protest letter to the assessments.
5. On February 24, 2014, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the tax period ending on December 31, 2009. The assessment was for \$2,783.00 tax, \$556.60 penalty, and \$354.70 interest.
6. On April 1, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest filed January 31, 2014 be scheduled for a formal administrative hearing.
7. On April 1, 2014, the Hearings Bureau issued a notice of hearing. The hearing date was set within ninety days of the protest.
8. On April 22, 2014, the Taxpayer requested a continuance of the hearing.
9. On April 22, 2014, the request for continuance was granted, and the delay of the hearing was attributable to the Taxpayer.
10. On April 23, 2014, an amended notice of hearing was issued.
11. On May 19, 2014, the Taxpayer filed a formal protest letter to the assessment on the 2009 tax year and requested that the protest be consolidated with the protest filed on January 31, 2014.
12. On June 5, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest on the 2009 tax year be scheduled for a formal administrative hearing.
13. On June 6, 2014, the request to consolidate the protests was granted and an amended notice of hearing was issued. The hearing was set within ninety days of the protest filed on May 19, 2014.
14. On July 17, 2014, the Taxpayer requested a continuance of the hearing.
15. On July 21, 2014, the request for continuance was granted, and the delay of the hearing was attributable to the Taxpayer.

16. On July 24, 2014, the Hearings Bureau sent amended notices of hearing.
17. The Taxpayer filed timely PIT returns for the tax years in question. The Taxpayer claimed an exemption on her personal income tax for the tax years in question.
18. The Taxpayer was working as a commissioned officer with the United States Public Health Service (PHS) and was on active duty.
19. The PHS is a branch of the United States military.
20. The PHS is an unarmed branch of the military.
21. The PIT return instructions for the 2009 and 2010 tax years included a definition of “armed forces”. The PIT return instructions for the 2011 and 2012 tax years also included a definition of “armed forces”. However, the 2011 and 2012 PIT instructions also specified that PHS is excluded from the exemption.
22. The Taxpayer was relying on advice from her accountant when she claimed the exemptions.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for tax, penalty, and interest for the tax years of 2009, 2010, 2011, and 2012.

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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,

and it is the Taxpayer's burden to present evidence and legal argument to show that she is entitled to an abatement of the assessment.

Armed forces exemption.

A tax is levied on the personal income of every resident. *See* NMSA 1978, § 7-2-3 (1981). Salary paid by the United States “for active duty service in the armed forces of the United States is exempt from state income taxation.” NMSA 1978, § 7-2-5.11 (2007). The Taxpayer argued that she was entitled to the exemption as an active duty officer for PHS. *See* 5 U.S.C. § 8331 (2012) (defining military service to include service in the armed forces as well as in the PHS). The burden is on the Taxpayer to prove that she is entitled to the exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where 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.” *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

“Armed forces” is not defined by the statute. *See* NMSA 1978, § 7-2-5.11. *See also* NMSA 1978, § 7-1-3 (2013) and § 7-2-2 (2010). However, a definition for “armed forces” occurs in a regulation under the Income Tax Act. *See* 3.3.1.9 NMAC (2010). The definition relates to residency and includes all members of the army, navy, marines, air force, coast guard, “and all officers of the public health service *detailed by proper authority* for duty either *with the army or the navy*”. 3.3.1.9 (D) (5) NMAC (2010) (emphasis added). As the regulation

specifically addresses situations concerning residency when a person is deployed, it is not clear that the regulation would apply. Federal law also defines “armed forces” as “the Army, Navy, Air Force, Marine Corps, and Coast Guard” and defines “uniformed services” as “the armed forces, [and] the commissioned corps of public health service”. 5 U.S.C. § 2101 (1979). *See also* 10 U.S.C. § 101 (2013).

The Department argued that the Taxpayer does not meet the federal definition of “armed forces” and that the exemption does not apply. The Department argued that the statute only allows for the exemption for members of the “armed forces” and that the legislature specifically chose the language on “armed forces” as opposed to “uniformed services”. The Taxpayer argued that the legislature provided for New Mexico to conform to all laws and regulations of the federal government that affect the military. *See* NMSA 1978, § 20-1-2 (1987). The Taxpayer argued that the laws of the federal government provide that members of PHS are considered the same as commissioned officers of the Army during a time of war. *See* 42 USC § 213. The Taxpayer argued that the U.S. has been in a state of war since it was declared in 1990 because the declaration was never terminated. The Taxpayer argued that she was, therefore, entitled to be treated as a member of the Army and should be entitled to the exemption.

During a time of war, members of PHS are entitled to all privileges afforded to commissioned Army officers under any law of the U.S. *See* 42 USC § 213. The title and sections of U.S. law to which a PHS member is entitled in time of war are specified in another section. *See* 42 USC § 213a. The New Mexico income tax exemption does not appear on that list. *See id.* Although the Taxpayer presented an interesting argument, it is ultimately not persuasive. The term “armed forces” does not include PHS for purposes of the New Mexico income tax exemption. Therefore, the assessments were proper.

Assessment of Penalty.

The Taxpayer argued that she should not have to pay penalty. The Taxpayer argued that she reasonably relied on advice from her accountant in claiming the exemption. A taxpayer may be entitled to abatement of penalty when the taxpayer relied on advice of counsel or an accountant, or in various other circumstances. *See* 3.1.11.11 NMAC (2001). The Department argued that penalty should not be abated. The Department argued that the Taxpayer did not provide full disclosure to her accountant because she did not tell her accountant that she was not in the “armed forces”. The Department also argued that it was negligent for the Taxpayer to rely on her accountant’s advice when the instructions for the 2011 and 2012 returns specified that PHS was not entitled to the exemption. The Department argued that the accountant was not, therefore, competent, and that reliance on an incompetent accountant could not excuse penalty.

The Taxpayer provided sufficient evidence to establish that she disclosed all of the facts related to her active duty service with PHS. The accountant is the one who alerted the Taxpayer to the exemption and advised her to take it. The accountant mistakenly believed that service in the PHS was entitled to the exemption. The Taxpayer relied on the accountant’s advice. The accountant erred in failing to review the PIT return instructions for 2011 and 2012, but an error does not automatically and irretrievably strip an accountant of competence. The Taxpayer’s accountant was reasonably competent and made a very interesting and nuanced argument to support the Taxpayer’s position that her service in the PHS was actually service in the “armed forces”. Although the Taxpayer’s accountant was ultimately found to be mistaken, the Taxpayer was not unreasonable in relying on her accountant’s advice. Consequently, the Taxpayer was not negligent. Therefore, penalty is abated pursuant to Regulation 3.1.11.11 NMAC.

Assessment of Interest.

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 Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed timely written protests to the Notices of Assessment of 2009, 2010, 2011, and 2012 personal income taxes issued under Letter ID numbers L1229352400, L1869522384, L0527345104, and L1601086928, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was not entitled to the “armed forces” exemption for her service in the PHS. Therefore, the Taxpayer was properly assessed.
3. The Taxpayer reasonably relied upon the advice of her accountant when she claimed the exemption. Therefore, the Taxpayer was not negligent, and penalty is ABATED.

For the foregoing reasons, the Taxpayer's protest is **GRANTED in part and DENIED in part**.

DATED: December 5, 2014.

Dee Dee Hoxie

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