

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
JOSEPH D. & REBECCA A. CHWIRKA  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L1922485808**

**No. 16-54**

**DECISION AND ORDER**

A hearing occurred in the above-captioned protest on November 17, 2016 at 10 a.m. before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. Rebecca A. Chwirka represented herself *pro se*. Her spouse, Joseph D. Chwirka is deceased. Mr. and Mrs. Chwirka are collectively referred to as “Taxpayers”. Ms. Chwirka appeared by telephone with the concurrence of the Department and prior permission of the Hearing Officer. Staff Attorney, Elena Morgan, appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Veronica Galewaler appeared as a witness for the Department. Taxpayer Exhibits #1, #2, #3, and #5 were admitted into the record without objection. Taxpayer Exhibit #4 was not admitted because it was illegible. Ms. Chwirka was allowed to resubmit Taxpayer Exhibit #4 after conclusion of the hearing. It was received and admitted without objection as Taxpayer Exhibit #5. Department Exhibit A was admitted into the record without objection. On November 28, 2016, the Department submitted an amendment to the first page of Department Exhibit A. The amendment was admitted as Department Exhibit A-1 Amended. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On August 10, 2016, under letter id. no. L1922485808, the Department assessed Taxpayers the amount of \$35.39 in underpayment penalty for Personal Income Tax for the tax reporting period ending December 31, 2015.
2. On August 23, 2016, the Department received Ms. Chwirka's Formal Protest of the assessment.
3. On September 9, 2016, the Department's protest office acknowledged receipt of a valid protest of the assessment.
4. On October 17, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.
5. On October 18, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on November 17, 2016 at 10 a.m.
6. On October 20, 2016, Ms. Chwirka requested permission to appear at the hearing by telephone. On October 21, 2016, counsel for the Department indicated that it did not oppose her request to appear by telephone. The Administrative Hearings Office entered an Order Permitting Telephonic Appearance on October 24, 2016.
7. The hearing on the merits occurred within 90-days of the Department's acknowledgment of receipt of a valid protest.
8. Taxpayers, Joseph D. and Rebecca A. Chwirka, were married for 36 years.
9. Until his illness and death, Mr. Chwirka had always prepared Taxpayers' income tax returns.
10. Taxpayers were never required to make estimated tax payments in previous tax years. Their annual payments were accomplished through withholdings.

11. In March of 2015, Mr. Chwirka was diagnosed with cancer.
12. While undergoing treatment for cancer, Mr. Chwirka maintained employment as long as he could during which time his income continued to be subject to income tax withholdings.
13. In October of 2015, Mr. Chwirka's health had deteriorated to the extent he could no longer continue working. He began to receive disability income. There were no withholdings from Mr. Chwirka's disability income.
14. Mr. Chwirka received disability income for October, November, and December of 2015.
15. Mr. Chwirka's condition continued to deteriorate and he died at his home on January 28, 2016. The cause of death was cholangiocarcinoma. He was 60 years old. [Taxpayer Ex. #2].
16. In 2016, after Mr. Chwirka died, Ms. Chwirka sought assistance from Karen Rademacher of Rademacher Professional Services to assist in preparing Taxpayers' 2015 income tax returns.
17. Taxpayers' New Mexico income tax liability for 2015 was \$4,669.00. Taxpayers' total payments and credits through withholding were \$2,304.00 resulting in an underpayment of tax in the amount of \$2,365.00. [Taxpayer Ex. #1; Department Ex. A-1 Amended]
18. Ms. Rademacher and Ms. Chwirka concluded that the underpayment occurred as a result of there not being any withholdings from the disability benefits that Mr. Chwirka received during the final three months of 2015. [Taxpayer Ex. #3]
19. Ms. Chwirka paid the tax due in the amount of \$2,365.00 on March 29, 2016. [Department Ex. A-1 Amended]

20. The Department assessed an underpayment penalty calculated as provided in Department Ex. A-2. The penalty assessed was \$35.39.

21. The Department assessed the underpayment penalty because Taxpayers had not made the required annual payment for 2015. The required annual payment was 90 percent of the tax liability for 2015 or 100 percent of the tax liability for 2014.

22. Taxpayers' liability for 2014 was \$7,365.00. [Department Ex. #A-1 Amended]. Taxpayers' liability for 2015 was \$4,669.00. [Taxpayer Ex. #1; Department Ex. #A-1 Amended]. Taxpayers' 2015 payments and credits, totaling \$2,304.00 [Taxpayer Ex. #1; Department Ex. #A-1 Amended], were less than 90 percent of Taxpayers' 2015 liability or 100 percent of Taxpayers' 2014 liability and resulted in an underpayment of more than \$1,000.00 for 2015.

## **DISCUSSION**

Ms. Chwirka does not protest the amount of New Mexico income tax due for 2015 nor did the Department assess interest in this matter. The only issue subject of this protest is the Department's assessment of underpayment penalty under NMSA 1978, Sec. 7-2-12.2 (2015), which Ms. Chwirka requested be abated because of the circumstances surrounding Mr. Chwirka's illness and death.

### **Burden of Proof**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, Sec. 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, Sec. 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 Taxpayers is presumed to be correct, and it is the Taxpayers' burden to present evidence and legal argument to show that the

penalty was improperly imposed or that Taxpayers are entitled to an abatement of penalty.

### **Estimated Tax.**

Taxpayers are required to make “the required annual payment in installments through either withholding or estimated tax payments.” NMSA 1978, Sec. 7-2-12.2 (A) (2011). The required annual payment is either 90% of the current tax year or 100% of the prior tax year, whichever is less. *See* NMSA 1978, Sec. 7-2-12.2 (B). Relying on the prior tax year’s tax due, Taxpayers could have paid \$7,365.00 to avoid an underpayment penalty, or relying on 90 percent of the current tax year, Taxpayers could have paid approximately \$4,203.00 toward their total 2015 tax liability of \$4,669.00 in order to avoid the underpayment penalty. Taxpayers’ actual payment was \$2,304.00 which was far less than the required annual payment using either of the two permitted formulae.

Consequently, the Department was required to assess a penalty pursuant to NMSA 1978, Sec. 7-2-12.2 G which provides “in the case of an underpayment of the required annual payment by a taxpayer, there *shall* be added to the tax a penalty[.]” (Emphasis added).

The statute’s use of the word “shall” makes the imposition of penalty mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary).

Since the Taxpayers’ actual 2015 payment was more than \$1,000 less than the required annual payment, the Department correctly assessed a penalty. *See* NMSA 1978, Sec. 7-2-12.2 H (1). However, the circumstances in this protest warrant additional consideration to determine whether the Taxpayers are entitled to an abatement of the penalty.

At the hearing, the Ms. Chwirka explained that the circumstances presented in 2015 were

unique. Mr. Chwirka was diagnosed with cancer in March of 2015. He worked as long as his failing health permitted while also undergoing cancer treatment. In October of 2015, his health declined to the level that he could no longer work. Ms. Chwirka said Mr. Chwirka began to receive disability benefits for the remainder of 2015. He died in January of 2016.

Mr. Chwirka's health during the last three months of 2015 obviously continued to deteriorate. During this time, the Taxpayers did not recognize the fact that taxes were not being withheld from the disability income Mr. Chwirka was receiving nor did Taxpayers consider the potential consequences of the resulting underpayment. Rather, Ms. Chwirka testified that her efforts and attention were directed to caring for her ailing husband. As the Hearing Officer interpreted Ms. Chwirka's testimony, caring for her husband of 36 years in the final months of his life was all-encompassing and it would have been unreasonable to expect her to pause amid her family crisis to investigate the potential tax consequences of the disability income her husband had begun receiving only three months before the end of the year and his death. The Hearing Officer agreed.

Despite the mandatory imposition of penalty, the Legislature has recognized that there will be occasions when the imposition of a penalty may be waived. One such scenario in which the secretary is granted discretion to forego the imposition of an underpayment penalty is when "the secretary determines that the underpayment was not due to fraud, negligence or disregard of rules and regulations." *See* NMSA 1978, Sec. 7-2-12.2 (H) (4) (2015).

The Department does not allege that the Taxpayers acted with fraudulent intentions. Rather, the Department's claims that Taxpayers' failure to make the required annual payment resulted from negligence consisting of their lack of knowledge or erroneous belief, which is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v.*

*Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16 (“Every person is charged with the reasonable duty to ascertain the possible tax consequences of his action. This can be done by consultation with one's legal advisor. Depending on the facts, failure to do so may constitute negligence.”).

In Regulation 3.1.11.10 NMAC, the Department defined “negligence” as that term was used in NMSA 1978, Sec. 7-1-69 (2015) of the Tax Administration Act. There is no indication that the Legislature intended the term to be defined differently when it made reference to “negligence” in NMSA 1978, Sec. 7-2-12.2 of the Income Tax Act. Both sections address imposition of penalties resulting from taxpayer negligence.

Regulation 3.1.11.10 NMAC defines “negligence” as the: (A) “failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;” (B) “inaction by taxpayer where action is required”; or (C) “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.” In this case, Taxpayers were negligent under Regulation 3.1.11.10 (B) & (C) NMAC because they failed to take action to pay estimated taxes during the latter portion of 2015 resulting in an underpayment penalty.

However, Regulation 3.1.11.11 NMAC establishes eight indicators of non-negligence where penalty may be abated. Based on the argument of Ms. Chwirka and the evidence presented, the only factor under Regulation 3.1.11.11 NMAC potentially applicable is subsection B, which reads:

the taxpayer, disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of injury or illness.

During the final three months of 2015, Mr. Chwirka was indisputably disabled due to prolonged illness which eventually resulted in death. Ironically, it was the financial benefit received as a result of that disability which ultimately contributed to this protest.

Disability alone is not enough under Regulation 3.1.11.11 (B) NMAC. To abate penalty, a taxpayer must also demonstrate an inability to prepare a return and make payment or procure the services of another person to prepare the return. In this protest, it was clear and unquestionable that Ms. Chwirka was consumed with caring for her ailing husband. Taxes were not a priority in light of the surrounding circumstances. Rather, her efforts were concentrated on providing Mr. Chwirka with continuous care in what would be the final months of his life.

Recall that Mr. Chwirka's disability income started in October of 2015, the tax year concluded on December 31, 2015, and Mr. Chwirka died on January 28, 2016. Mr. Chwirka's condition was obviously in continuous decline during this period and the Hearing Officer inferred from the circumstances that opportunities to dedicate any time, thought, or effort to taxes were minimal to begin with, and became nonexistent as Mr. Chwirka's condition worsened, as he approached death.

Not until after Mr. Chwirka's death did Ms. Chwirka seek professional assistance with Taxpayers' returns because Ms. Chwirka recognized how the circumstances of tax year 2015 would pose some challenges from a tax perspective. However, it was too late to avoid the penalty despite the fact that Ms. Chwirka satisfied her 2015 liability before it was due on April 15, 2016.

Because Mr. Chwirka was undeniably disabled by illness, and the circumstances were such that it would be unreasonable to expect Taxpayers to retreat from this personal health crisis to prepare returns, pay estimated taxes, or even procure the services of another, it would be unconscionable to penalize Taxpayers under these circumstances, no matter how minute the penalty may seem. The underpayment penalty of \$35.39 should be abated pursuant to 3.1.11.11 (B) NMAC.

Therefore, Taxpayers' protest is GRANTED.



## CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of the Department's acknowledged receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayers were entitled to abatement of penalty under Regulation 3.1.11.11 (B) NMAC which allows for abatement of penalty because taxpayer, disabled because of injury or prolonged illness, demonstrated the inability to prepare a return and make payment and was unable to procure the services of another person to prepare a return because of injury or illness.

D. By establishing non-negligence under Regulation 3.1.11.11 (B) NMAC, Taxpayers overcame the presumption of correctness on the penalty assessed under NMSA 1978, Section 7-2-12.2 (2015).

For the foregoing reasons, the Taxpayers' protest **GRANTED**.

DATED: November 29, 2016.



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Chris Romero  
Hearing Officer  
Administrative Hearings Office  
P.O. Box 6400  
Santa Fe, NM 87502

## **NOTICE OF RIGHT TO APPEAL**

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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 Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may be preparing the record proper.