

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

**IN THE MATTER OF THE PROTEST OF  
CHRISTOPHER ROCHE & NGUYEN H. PARK  
TO ASSESSMENT  
ISSUED UNDER LETTER  
ID NO. L0267198768**

**No. 17-20**

**DECISION AND ORDER**

A formal administrative hearing on the above referenced protest was held on March 22, 2017 before Hearing Officer David Buchanan. The Taxation and Revenue Department (Department) was represented by Peter Breen, Staff Attorney. Veronica Galewater, Auditor, appeared as a witness on behalf of the Department. Christopher Roche and Nguyen H. Park (Taxpayers) appeared for the hearing and represented themselves. Taxpayers both testified at the hearing on their own behalf. 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. Taxpayers were residents of New Mexico in 2015.
2. The deadline for 2015 New Mexico Personal Income Tax (PIT) returns was April 18, 2016 absent the request for an extension of time to file.
3. Taxpayers mailed their 2015 PIT return along with a personal check for taxes owed to the Department by regular United States Postal Service mail on April 16<sup>th</sup> or April 17<sup>th</sup>, 2016.
4. Taxpayers mailed the 2015 PIT return and the payment check pursuant to the PIT instructions.

5. Taxpayers mailed their 2015 Federal income tax return and a personal check for taxes owed to the Internal Revenue Service (IRS) at the same time they mailed their New Mexico return.
6. Taxpayers mailed their 2015 tax returns instead of filing electronically because they victims of a recent data breach and concerned about potential identity theft.
7. Taxpayers' check to the IRS cleared in a timely manner.
8. Taxpayers' check to the Department never cleared so they contacted the Department by telephone. They received an automated response indicating that the processing of returns was backed up for up to six weeks.
9. Veronica Galewater acknowledged that the Department had widespread problems processing refunds for the 2015 tax year, but she was unaware of any other issues that the Department experienced.
10. Taxpayers attempted to contact the Department several other times by telephone, but each call received an automated response.
11. Taxpayers were able to get in touch with a Department employee by telephone during the first or second week of October 2016. Taxpayers were advised that the Department had never received their 2015 PIT return or their payment.
12. Taxpayers did not speak with Veronica Galewater at that time, but did speak with her after the protest was filed.
13. After learning of the issue, Taxpayers re-mailed their 2015 PIT return and payment in the form of a check to the Department in October 2016. That payment was received by the Department.

14. On November 21, 2016, the Department assessed Taxpayers for penalty and interest owed in relation to their 2015 PIT in letter ID number L0267198768. The assessment was for \$404.32 penalty and \$54.05 interest for a total of \$458.37.
15. On December 23, 2016, Taxpayers filed a formal protest of the assessment.
16. On January 13, 2017, the Department issued a letter acknowledging the protest.
17. On January 24, 2017, the Department requested a hearing before the Administrative Hearings Office to consider Taxpayers' protest.
18. On January 25, 2017, the Administrative Hearings Office issued notice of the hearing.

### **DISCUSSION**

The issue to be decided is whether Taxpayers are liable for penalty and interest for the 2015 tax year due to a failure to timely file their return.

#### **Burden of Proof.**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. The presumption of correctness also applies to any interest or penalty that are imposed in the assessment. *See* 3.1.6.13 NMAC (2001) Therefore, the assessment issued to Taxpayers is presumed to be correct, and it is Taxpayers' burden to present evidence and legal argument to show that they are entitled to an abatement of penalty and interest. *See* 3.1.6.12 NMAC (2001). When a taxpayer presents evidence sufficient to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308 (filed October 2, 2002).

#### **Filing of the Return.**

Taxpayers presented evidence, through their testimony, that they filed their 2015 PIT return on April 16<sup>th</sup> or April 17<sup>th</sup>, 2016 by placing the return and a check for payment in the

United States Postal Service mail addressed to the Department as required by the 2015 PIT Instructions. Returns may be filed by mail. *See* NMSA 1978, § 7-1-13 (B) (2013). All authorized mailings are timely if they are mailed on or before the date on which they are due. *See* NMSA 1978, § 7-1-9 (1997). However, “[i]f a mailing is not received by the department, the contents of the mailing are not timely.” *See* 3.1.4.10 (C) (2) NMAC (2010).

Taxpayers provided evidence that they mailed their PIT return and payment check on April 16<sup>th</sup> or 17<sup>th</sup>, 2016. I found Taxpayers to be entirely credible on that issue. However, the evidence presented at the hearing established that the Department did not receive the PIT return or the payment. Based upon the totality of the evidence, Taxpayers did not timely file their 2015 PIT return or payment.

#### **Assessment of Penalty.**

Penalty “*shall* be added to the amount assessed” when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word “shall” indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. It is a taxpayer’s responsibility to make payments. *See* NMSA 1978, § 7-1-13 (2013). Negligence includes the failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is required; or inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention. *See* 3.1.11.10 NMAC (2001). Several factors may be considered in determining that a taxpayer was not negligent, such as relying on the advice of an accountant or a prolonged illness. *See* 3.1.11.11 NMAC. Penalty may be assessed even when the failure to pay is based on an inadvertent error or unintentional failure to pay the tax when it was due. *See id.* *See also Grogan v. N.M. Taxation and Revenue*

*Dep't*, 2003-NMCA-033, ¶ 32-35, 133 N.M. 354. *See also Arco Materials, Inc. v. Taxation and Revenue Dep't*, 1994-NMCA-062, ¶ 14, 118 N.M. 12 *rev'd on other grounds by Blaze Constr. Co v. Taxation and Revenue Dep't*, 1995-NMSC-110, 118 N.M. 647.

Taxpayers in this case exercised the degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances by mailing their 2015 PIT return and payment through the United States postal service prior to the due date. Taxpayers did not fail to act when action was required. Taxpayers did not act with indifference, thoughtlessness, carelessness, inattentively or under an erroneous belief. Nor did Taxpayers commit any inadvertent error.

At the hearing, the Department noted a recent decision from the Administrative Hearings Office regarding the consolidated protests of the City of Albuquerque and Mid-Region Counsel of Governments issued March 16, 2017 (No. 17-13). In that case, there was an inadvertent error when the City of Albuquerque's computer system failed to properly transmit an electronic funds transfer request to the City of Albuquerque's bank so that taxes could be paid to the Department. The City of Albuquerque was found negligent in that decision due to the inadvertent error caused by their own computer system.

The Hearing Officer finds that fact pattern distinguishable from the facts in this protest. There the City of Albuquerque was responsible for the inadvertent error because the error was due to a malfunction in their own computer system. In this case, Taxpayers were not negligent in any way. The failure to deliver Taxpayers' 2015 PIT return and payment check in this case was due to a third party's error, the United States Postal Service, and not due to Taxpayers' actions. Taxpayers fully exercised reasonable and ordinary care when sent their 2015 PIT return and payment through the regular United States Postal Service mail. Taxpayers were not negligent.

Taxpayers have overcome the presumption of the correctness of the penalty assessment. The penalty shall be abated.

**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). Again, 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. Taxpayers filed a timely written protest to the Notice of Assessment of 2015 personal income taxes issued under respective Letter ID number L0267198768, and jurisdiction lies over the parties and the subject matter of this protest.
2. Taxpayers mailed their 2015 PIT return and payment on April 16<sup>th</sup> or 17<sup>th</sup>, 2016, however, the Department did not receive the return or payment. The PIT was not timely paid.
3. Taxpayers did not act negligently in this matter and any error was on the part of the United States Postal Service. Taxpayers overcame the presumption of correctness of the assessment of penalty. Taxpayer is entitled to an abatement of the assessment of penalty.
4. The PIT was not timely paid. Taxpayers did not overcome the presumption of correctness of the assessment of interest.

For the foregoing reasons, Taxpayers’ protest with regard to the penalty assessment **IS GRANTED** and Taxpayers’ protest with regard to the interest assessment **IS DENIED**. The

penalty assessed by the Department shall be abated. Taxpayers are ordered to pay the interest assessed by the Department.

Dated: April 14, 2017

*David Buchanan*

David Buchanan  
Hearing Officer  
Administrative Hearings Office  
Post Office 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. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.