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

IN THE MATTER OF THE PROTEST OF
MAGGIE M. MARTINEZ **No. 04-10**

ASSESSMENT OF TAXES ISSUED
UNDER LETTER ID L1863806976

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 10, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Maggie M. Martinez ("Taxpayer") represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 2000, the Taxpayer asked her tax preparer, Martha Rodriguez, to prepare the Taxpayer's federal Form 1040 and New Mexico Form PIT-1 to report personal income taxes due for the 1999 tax year.

2. The Taxpayer was a first-year resident of New Mexico in 1999, having moved to New Mexico from the state of Texas in March 1999.

3. Ms. Rodriguez was also a first-year resident of New Mexico in 1999.

4. New Mexico's Form PIT-1 directs taxpayers to report their federal adjusted gross income, exactly as reported on their federal return, on Line 5 of the PIT-1. First-year residents are then directed to use Form PIT-B, Allocation and Apportionment Schedule, to allocate their income between New Mexico and non-New Mexico sources.

5. Ms. Rodriguez did not read the Department's instructions. Instead, she simply assumed that first-year residents should include only the income they earned in New Mexico as "federal adjusted gross income" on Line 5 of the PIT-1, and that is the way she prepared both the Taxpayer's New Mexico return and her own New Mexico return.

6. In 2003, the Department discovered the discrepancy between the federal adjusted gross income the Taxpayer and Ms. Rodriguez reported on their 1999 federal income tax returns and the federal adjusted gross income shown on their New Mexico income tax returns.

7. In June 2003, the Department sent separate notices to the Taxpayer and Ms. Rodriguez concerning the discrepancy between their federal and state income. Different tax examiners were assigned to the two cases.

8. When Ms. Rodriguez called the tax examiner assigned to her case, she was told that she needed to file a Form PIT-B to allocate and apportion her income between New Mexico source income and non-New Mexico source income.

9. Ms. Rodriguez subsequently prepared Forms PIT-B for both herself and the Taxpayer.

10. Ms. Rodriguez correctly reported total federal adjusted gross income in column 1 of the PIT-B and New Mexico income in column 2. However, she ignored the instructions on Line 13 to divide New Mexico income by federal income and apply the resulting percentage to the amount of tax due on total income. Instead, she calculated the tax based solely on the income earned in New Mexico.

11. The tax examiner assigned to Ms. Rodriguez's case accepted the PIT-B as filed and incorrectly told Ms. Rodriguez that no additional tax was due.

12. The tax examiner assigned to the Taxpayer's case did not accept the Taxpayer's PIT-B as filed. Instead, she corrected Ms. Rodriguez's calculations by determining the tax due on the total amount of the Taxpayer's federal adjusted gross income (less exemptions and deductions) and then multiplying this amount by the percentage of income the Taxpayer earned in New Mexico during tax year 1999.

13. In September 2003, the Taxpayer's examiner sent her a notice stating that as a first-year resident, "the PIT-B allocation would show 81.1% of your income was New Mexico income, with a tax due of $744, less the $562 reported on your original NM return."

14. The Taxpayer and Ms. Rodriguez did not understand why the tax examiner assigned to Ms. Rodriguez accepted her PIT-B while the tax examiner assigned to the Taxpayer determined that additional tax was due.

15. They decided that Ms. Rodriguez's tax examiner must be right and the Taxpayer's tax examiner must be wrong. They did not consult with a certified public accountant or other tax advisor in making this decision, nor did they go back and read the Department's instructions to Forms PIT-1 and PIT-B concerning the method that first-year residents must use to report their state income tax.

16. On October 10, 2003, the Department assessed the Taxpayer for $169.00 of tax principal, representing the underreporting created by the Taxpayer's erroneous method of computing her 1999 state income taxes, plus penalty and interest.

17. On November 5, 2003, the Taxpayer filed a written protest to the Department's assessment.

18. On November 12, 2003, the Department's protest office sent a letter to the Taxpayer acknowledging receipt of her protest. The letter advised the Taxpayer that interest on the amount of

tax principal in dispute would continue to accrue during the protest and advised the Taxpayer as follows: "You may make payment on a protested assessment to stop the accrual of interest and penalty. Upon resolution of the protest, you may claim a refund for any portion of the protested assessment resolved in your favor."

19. The Taxpayer decided not to make any payment of the tax principal assessed in order to stop the accrual of additional interest.

20. On March 26, 2004, the protest auditor assigned to the Taxpayer's protest sent the Taxpayer a letter explaining the method New Mexico used to calculate tax on the income of first-year residents and the reasons for the adjustments made to the Taxpayer's 1999 return.

21. Because the Taxpayer still believed that the tax examiner assigned to Ms. Rodriguez's case must be right, she refused to accept the explanation provided by the protest auditor.

22. Immediately prior to the August 10, 2004 hearing on the Taxpayer's protest, she and Ms. Rodriguez met privately with the Department's attorney and protest auditor. During that meeting, the protest auditor again explained the statutory method for calculating the New Mexico income tax liability of first-year residents and showed the Taxpayer exactly where the errors were made in the preparation of her 1999 Forms PIT-1 and PIT-B.

23. As a result of that meeting, the Taxpayer acknowledged her liability for the additional tax principal assessed and withdrew her protest to this amount of the assessment.

DISCUSSION

In her original protest, the Taxpayer questioned the method the Department used to recalculate her 1999 New Mexico income tax liability. At the August 10, 2004 hearing on her protest, the Taxpayer conceded that the Department's methodology was correct. The Taxpayer

continues to dispute the Department's assessment of penalty and interest, arguing that she was misled by the erroneous advice given by the tax examiner assigned to review Ms. Rodriguez's 1999 New Mexico tax return.

NMSA 1978, § 7-1-17(C) provides that any assessment of tax by the Department is presumed to be correct. NMSA 1978, § 7-1-3 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, 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 they are entitled to an abatement.

NMSA 1978, § 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

> A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, NMSA 1978, § 7-1-13(E).

The Taxpayer argues that the Department should not be allowed to collect the interest assessed because she was misled by the erroneous advice the Department's tax examiner gave to Ms.

Rodriguez concerning preparation of Form PIT-B. There are several problems with this argument. First, there is no dispute that the original underreporting of the Taxpayer's 1999 New Mexico income tax liability resulted from Ms. Rodriguez's own errors and her failure to carefully read the Department's instructions. Accordingly, the interest that accrued between April 2000 (the original due date of the tax) and June 2003 (the date the Taxpayer received the Department's audit letter) cannot be attributed to any advice given or action taken by the Department. Beginning in June 2003, the Taxpayer was on notice that there might be an error in her 1999 New Mexico tax return. While it is undisputed that the advice the Taxpayer received from her tax examiner conflicted with the advice received by Ms. Rodriguez, this did not excuse the Taxpayer from further inquiry. New Mexico has a self-reporting tax system, and it is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, NMSA 1978, § 7-1-13(B); *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

In this case, the Taxpayer made no attempt to determine which of the Department's tax examiners was correct. Had the Taxpayer done so, either by reviewing the Department's instructions or by consulting with a qualified tax advisor, she would have discovered the error in the return prepared by Ms. Rodriguez. Instead, the Taxpayer chose to engage in wishful thinking. She simply decided that the more favorable conclusion reached by Ms. Rodriguez's tax examiner was the correct one and rejected her examiner's determination that additional tax was due. The Taxpayer also chose to ignore the March 2004 letter from the Department's protest auditor explaining the statutory method used to calculate tax on the income of first-year residents. Finally, even after being advised that interest would continue to accrue during the pendency of the protest, the Taxpayer decided not to make a payment to stop the accrual of additional interest, preferring to wait for the outcome of the

hearing. Given these facts, there is no basis for finding that the Taxpayer should be excused from paying the full amount of interest due on her underpayment of 1999 income tax.

Assessment of Penalty. NMSA 1978, § 7-1-69 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent, "in the case of failure, due to negligence or disregard of rules and regulations" to pay taxes due to the state. Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including "reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts." Here, the Taxpayer relied on the advice of her tax preparer, who the Taxpayer had worked with for several years. This reliance justifies the abatement of penalty, a conclusion with which the Department's counsel agreed at the administrative hearing.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the personal income tax, penalty, and interest assessed under Letter ID 1863806976, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer underreported $169.00 of personal income tax due for the 1999 tax year, and interest was properly assessed against her pursuant to NMSA 1978, § 7-1-67.

3. The Taxpayer reasonably relied on her tax preparer, and the errors made in calculating the Taxpayer's 1999 income tax were not due to the Taxpayer's negligence.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the penalty assessed in the amount of $16.90. The Taxpayer remains liable for interest accrued during the period April 15, 2000, the original due date of the tax, until the date that payment is made.

DATED August 12, 2004.