

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

**IN THE MATTER OF THE PROTEST OF
MARILYN STOCK
TO DENIAL OF CLAIM FOR REFUND OF
PENALTY AND INTEREST PAID ON 1999
PERSONAL INCOME TAX ASSESSMENT**

No. 05-04

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 9, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Marilyn Stock ("Taxpayer") represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a resident of Albuquerque, New Mexico.
2. In April 2000, the Taxpayer's accountant prepared the Taxpayer's 1999 New Mexico Personal Income Tax return ("PIT-1"), which the Taxpayer signed and filed with the Department.
3. On Line 5 of her 1999 Form PIT-1, the Taxpayer reported federal adjusted gross income of \$47,571.
4. On Line 6 of Form PIT-ADJ, *Schedule of Additions and Deductions*, the Taxpayer claimed a \$2,000 deduction for persons age 65 and older. This deduction was then carried over to Line 9 of the Taxpayer's PIT-1, resulting in a \$2,000 decrease in her New Mexico taxable income.

5. Pursuant to NMSA 1978, § 7-2-5.2(C) and the Department's 1999 PIT instruction packet, the deduction of \$2,000 claimed by the Taxpayer in this case was only available to single taxpayers whose federal adjusted gross income was between \$25,500 and \$27,000. Single taxpayers whose federal adjusted gross income exceeded \$28,500 were not entitled to claim any deduction.

6. In determining the over-65 deduction claimed on the Taxpayer's 1999 PIT return, the Taxpayer's accountant used the table in Subsection B of § 7-2-5.2, which applies to married individuals filing jointly, rather than the table in Subsection C, which sets out the deduction available to single individuals.

7. The Taxpayer did not catch the error because she did not go over her return with her accountant or read the statute or the Department's instructions pertaining to the over-65 deduction. Instead, the Taxpayer simply assumed that her accountant had prepared the return correctly.

8. Because the Taxpayer's 1999 federal adjusted gross income exceeded the income limit for single taxpayers claiming the over-65 deduction, the Department disallowed the \$2,000 deduction on Line 6 of the Taxpayer's Form PIT-ADJ.

9. On July 6, 2001, the Department issued Assessment No. 4696425 to the Taxpayer assessing her for \$144.50 of additional 1999 personal income tax due as a result of the disallowed deduction, plus interest and penalty.

10. The Taxpayer does not have any record or recollection of receiving the assessment.

11. In February 2003, the Taxpayer received a Statement of Account from the Department showing the amount of the outstanding assessment.

12. After receiving the Statement of Account and becoming aware of the assessment issued against her, the Taxpayer contacted the Department to determine the basis for the liability.

13. The day after receiving the Statement of Account, the Taxpayer paid the assessment in full, including \$144.50 of tax principal, \$54.00 of interest, and \$14.45 of penalty.

14. On March 13, 2003, the Taxpayer filed an Application for Tax Refund requesting a refund of the \$68.45 of interest and penalty paid on the assessment.

15. On March 27, 2003, the Department denied the Taxpayer's refund claim.

16. On April 29, 2003, the Taxpayer filed a written protest to the denial of her refund claim.

DISCUSSION

The issue to be decided is whether the Taxpayer was liable for payment of the \$68.45 of interest and penalty that accrued on her underpayment of 1999 personal income tax between April 2000, the original due date of the tax, and February 2003, when the additional tax was paid. The Taxpayer maintains that interest and penalty should not be imposed because she did not receive the Department's original assessment and did not learn of her liability for additional tax until February 2003. In effect, the Taxpayer argues that interest and penalty should not begin to accrue until the date she received actual notice of her error in calculating the amount of 1999 personal income taxes due to the state.

Assessment of Interest. 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 provisions of the statute are mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). *See also*, NMSA 1978, § 12-2A-4(A) of the Uniform Statute and Rule Construction Act (the words "shall" and "must" express a duty, obligation, requirement or condition precedent). With limited exceptions that do not apply here, the New Mexico Legislature has directed the Department to assess interest whenever taxes are not timely paid. 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 assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. In this case, the Taxpayer underreported her 1999 taxable income. If the Taxpayer's accountant had followed the Department's instructions and completed the Taxpayer's return correctly, the State of New Mexico would have received an additional \$144.50 tax payment in April 2000. As a result of the error, the Taxpayer—rather than the state—had the use of this money for the period between April 2000, the original due date of the tax, and February 2003, the date when the additional tax was paid.

New Mexico has a self-reporting tax system. There are insufficient government resources available for the Department to continually audit every taxpayer to determine whether

he or she has fully complied with the state's tax laws. For this reason, the law places the duty on taxpayers to accurately determine and pay their taxes by the statutory due date. NMSA 1978, § 7-1-13; *See also, 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). When a taxpayer fails to make timely payment of taxes due to the state, NMSA 1978, § 7-1-67(A) imposes interest "*from the first day following the day on which the tax becomes due...until it is paid.*" The language of the statute makes it clear that interest on an underpayment of tax begins to run from the original due date of the tax—not the date the Department notifies the taxpayer of the underpayment.

Assessment of Penalty. NMSA 1978, § 7-1-69(A) provides that when a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and regulations, a penalty "shall be added" to the amount of the underpayment, calculated as follows:

two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid.

As with interest, the amount of penalty is calculated "*from the date the tax was due,*" not the date that the taxpayer is notified of the underpayment.

The term "negligence" as used in § 7-1-69(A) is defined in Regulation 3.1.11.10 NMAC to include "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, the Taxpayer acknowledges that her accountant made a mistake in claiming a \$2,000 deduction on the Taxpayer's 1999 PIT return, resulting in an underpayment of \$144.50. This error was based on the accountant's use of the wrong table when determining the deduction. Looking at the applicable statute and instructions, it is apparent that the Taxpayer's

accountant inadvertently used the table pertaining to the deduction for married individuals filing jointly, rather than the table pertaining to single individuals. The Taxpayer did not catch this error because she did not go over her return with her accountant or read the statute or the Department's instructions explaining the over-65 deduction. Instead, the Taxpayer simply assumed that her accountant had prepared the return correctly. This meets the definition of negligence set out in Department regulations and in New Mexico case law. *See, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989) (a taxpayer cannot abdicate responsibility for payment of taxes "merely by appointing an accountant as its agent in tax matters").

Summary: The Department is charged with enforcing the state's tax laws, and NMSA 1978, § 7-1-10 requires the Department to assess any taxpayer who is liable for tax in excess of \$10.00. While individual taxpayers are required to file one PIT return each year, the Department is charged with the administration of more than 40 different tax programs and receives thousands of tax filings each month. For this reason, NMSA 1978, § 7-1-18(A) gives the Department three years from the end of the calendar year in which a tax is originally due to determine whether the tax has been paid and issue an assessment. In this case, the Department had until December 31, 2003 to notify the Taxpayer of her liability for 1999 income tax, plus any related penalty and interest. While it is certainly regrettable that the Taxpayer did not receive the Department's original assessment issued in July 2001, the Taxpayer did receive actual notice of her liability within the time frame provided by the Legislature. There is nothing in New Mexico tax law that authorizes an abatement of interest or penalty when a

taxpayer receives notice of her failure to properly report and pay tax near the end—rather than the beginning—of the three-year limitations period set out in § 7-1-18.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the denial of her claim for refund of interest and penalty paid in connection with her underpayment of 1999 personal income tax, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-1-67(A), the Taxpayer was liable for payment of the interest that accrued from the first day following the day on which her 1999 personal income tax became due in April 2000 until the date the underreported tax was paid in February 2003.

C. Pursuant to NMSA 1978, § 7-1-69(A), the Taxpayer was negligent in under-reporting her 1999 personal income tax, and penalty was properly assessed from the date the tax was due in April 2000 until the penalty reached its maximum of 10 percent in September 2000.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED March 14, 2005.