

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

**IN THE MATTER OF THE PROTEST OF
JUAN B. ORTEGA
TO DENIAL OF REFUND OF PENALTY AND
INTEREST PAID ON ASSESSMENT ISSUED
UNDER LETTER ID L1354715136**

No. 06-01

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 10, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Juan B. Ortega represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In April 2003, Juan B. Ortega filed a timely 2002 New Mexico personal income tax return with the Department.
2. On his return, Mr. Ortega claimed the exemption provided in NMSA 1978, § 7-2-5.2 for certain income of persons sixty-five years of age and older.
3. Mr. Ortega was not entitled to this exemption because his federal adjusted gross income exceeded the income limit set out in § 7-2-5.2.
4. The Department discovered and corrected Mr. Ortega's error, resulting in additional income tax due for the 2002 tax year in the amount of \$142.00.

5. On August 20, 2003, the Department issued an assessment to Mr. Ortega under Letter ID L1354715136 in the total amount of \$163.59, representing the additional \$142.00 of tax due, plus penalty of \$14.20 and interest of \$7.39.

6. Mr. Ortega paid the assessment and then filed a claim for refund of the \$21.59 of penalty and interest assessed on his late payment of the additional tax resulting from the error on his 2002 return.

7. On November 25, 2003, the Department denied Mr. Ortega's claim for refund.

8. On December 16, 2003, Mr. Ortega filed a written protest to the denial of his claim for refund.

DISCUSSION

The issue to be decided is whether Juan B. Ortega is liable for the \$21.59 of penalty and interest assessed on his underpayment of personal income tax for the 2002 tax year.

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). 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, Mr. Ortega underreported his 2002 taxable income. If he had completed his return correctly, the State of New Mexico would have

received an additional \$142.00 tax payment in April 2003. As a result of his error, Mr. Ortega—rather than the state—had the use of this money for the period between April 2003, the original due date of the tax, and August 2003, the date when the additional tax was paid. For this reason, interest was properly imposed.

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. 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, Mr. Ortega failed to carefully read the instructions concerning the exemption for persons age 65 and older, resulting in a tax underpayment of \$142.00. Mr. Ortega’s error meets the definition of negligence set out in Department regulations and in New Mexico case law. *See, El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.). For this reason, penalty was properly imposed.

Application of the Managed Audit Program. At the January 10, 2006 hearing on his protest, Mr. Ortega argued that he should not have to pay penalty and interest on his late payment of 2002 income tax because penalty and interest was being waived for other taxpayers. In support of his argument, Mr. Ortega produced a September 2003 newspaper clipping discussing the expansion of the state’s managed audit program.

The managed audit program is authorized by NMSA 1978, § 7-1-11.1, which was enacted in 2001. Laws 2001, ch. 16, § 1. Under this program, a taxpayer may file an application with the Department to enter into a written agreement under which the taxpayer will conduct a self-audit to determine the taxpayer's compliance with the state's tax laws. The taxpayer must present the results of its audit to the Department within the time limits set out in the written agreement. Upon receipt of the taxpayer's managed audit, the Department issues an assessment to the taxpayer for any unpaid taxes found to be due. Pursuant to NMSA 1978, §§ 7-1-67(A)(1)(4) and 7-1-69(G)(2), no interest or penalty is imposed on taxes found to be due as the result of a managed audit.

The managed audit program was initially limited to taxes due under the Gross Receipts and Compensating Tax Act. In 2003, the legislature expanded the program to include all taxes administered under the Tax Administration Act. It was this amendment that prompted the newspaper article seen by Mr. Ortega. The article did not explain the managed audit program, but simply stated that the legislature had expanded the waiver of penalty and interest for certain taxpayers. This led Mr. Ortega to believe that he should not have to pay penalty and interest on his late payment of 2002 personal income tax. Unfortunately, Mr. Ortega does not qualify for the waiver of penalty and interest under the managed audit program because the Department's assessment was not based on a managed audit conducted pursuant to a written agreement with the taxpayer, but was based on an examination of Mr. Ortega's 2002 tax return that was initiated and conducted by the Department.

Mr. Ortega argued that waiving penalty and interest for some taxpayers, but not for others, is unfair. He also asserted, without substantiation, that the Department would have abated penalty

and interest if it had been imposed on a state legislator or other well-connected taxpayer. Mr. Ortega's beliefs concerning the unfairness and corruption in state government are not something that the Department or its hearing officer has jurisdiction to consider. Mr. Ortega must address these concerns to his state representative or to the appropriate law enforcement agency. The only matter at issue in this administrative protest is whether the Department's denial of Mr. Ortega's refund claim is supported by New Mexico law. Based on the statutes and regulations cited above, the Department's denial was correct.

CONCLUSIONS OF LAW

A. Juan B. Ortega filed a timely, written protest to the Department's denial of his claim for refund of \$21.59 of penalty and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, § 7-1-67, Mr. Ortega was liable for the interest he paid on his underpayment of 2002 personal income tax, and no refund is due.

C. Pursuant to NMSA 1978, § 7-1-69, Mr. Ortega was liable for the penalty he paid on his underpayment of 2002 personal income tax, and no refund is due.

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

DATED January 12, 2006.