

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

**IN THE MATTER OF THE PROTEST OF
PENNY MITCHELL TO ASSESSMENT
ISSUED TO ROB AND PENNY MITCHELL
UNDER LETTER ID 2088973824**

No. 06-20

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 29, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Special Assistant Attorney General. Penny Mitchell, the taxpayer who filed the protest, represented herself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 2002, Rob and Penny Mitchell filed joint federal and state personal income tax returns for the 2001 tax year.
2. In 2003, the Internal Revenue Service (“IRS”) notified the Mitchells that they had underreported their 2001 income and assessed them for additional federal income tax.
3. The Mitchells did not consult with a tax professional or call the Department to determine whether they were liable for additional state tax as a result of the IRS adjustment, and did not file an amended New Mexico income tax return for 2001.
4. In August 2005, after receiving information from the IRS concerning the adjustment to the Mitchells’ federal return, the Department assessed the Mitchells for \$672.00 of additional 2001 state income tax, plus interest of \$336.41.

5. Penny Mitchell received the Department's assessment and filed a written protest to the assessment of interest, which was acknowledged by the Department on August 30, 2005.

6. The Mitchells had separated prior to the date of the Department's assessment and subsequently divorced.

7. Ms. Mitchell began to make payments of \$50 per month against the tax principal due, with Mr. Mitchell contributing \$25 toward this monthly payment.

8. At some point, Ms. Mitchell called the Department to ask for the current balance on the assessment and was told that the Department planned to apply her former husband's tax refund against the liability, which would have satisfied the amount of outstanding tax principal.

9. Ms. Mitchell later discovered that the refund had not been applied, but had been paid to Mr. Mitchell.

DISCUSSION

The issue to be decided is whether Penny Mitchell is liable for the interest assessed on the \$672.00 of additional 2001 personal income tax due as a result of errors on the joint income tax return she filed with her former husband. Ms. Mitchell does not dispute her legal liability for the assessment, but asks for a waiver of interest because it will create a financial hardship for her and because the Department gave her erroneous information concerning application of her former husband's tax refund to the couple's liability.

New Mexico has a self-reporting tax system, and it is the obligation of taxpayers 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). When adjustments are made to a taxpayer's federal tax return, NMSA 1978, § 7-1-13(C) imposes an affirmative duty on the taxpayer to file an amended New Mexico return within ninety days from the date of the adjustment. The Mitchells failed to comply with this statutory requirement. The Department did not discover the Mitchells' error until 2005, when it received information under its information sharing agreement with the IRS. Pursuant to NMSA 1978, § 7-1-18(A), the Department had until December 31, 2005 to issue an assessment for income taxes due on April 15, 2002. The August 2005 assessment issued to the Mitchells was within this statutory time limit.

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. *Redman v. Board of Regents*, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct.App. 1984); *see also*, NMSA 1978, § 12-2A-4(A). Unlike penalty, interest is not based on a finding that the taxpayer acted negligently or fraudulently, but is simply designed to compensate the state for the time value of unpaid revenues. Ms. Mitchell believes that interest should be waived for the period after she was advised that Mr. Mitchell's tax refund would be

applied to the balance of the assessment. Mr. Mitchell subsequently received his refund, however, and he, rather than the state, has had the use of those funds. The fact that the couple is now divorced and Ms. Mitchell did not share in the benefit of her former husband's refund does not affect her continuing liability for interest on tax still due to the state as a result of errors on the Mitchells' joint 2001 income tax return.

Ms. Mitchell also asks the Department to take into consideration the fact that she is a single mother and a student and that payment of the interest will impose a financial hardship. Unfortunately, this is not something the Department can consider. Department Regulation 3.1.6.14 NMAC specifically states that the Secretary "may not compromise a taxpayer's liability because of the taxpayer's inability to pay." In addition, the New Mexico Supreme Court has held that "the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform," and that an administrative agency's discretion does not justify "altering, modifying or extending the reach of a law created by the Legislature." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶¶ 022, 961 P.2d 768, 774-775. 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 and has not granted the Department or its Hearing Officer the authority to abate or adjust tax assessments based on the financial or personal situations of individual taxpayers.

CONCLUSIONS OF LAW

A. Penny Mitchell filed a timely, written protest to the assessment issued under Letter ID 2088973824, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Mitchells underreported \$672.00 of their joint 2001 New Mexico income tax liability, and they are jointly and severally liable for the interest that accrues on this amount from April 15, 2002, the original due date of the tax, until final payment is made.

C. The Department does not have the authority to waive or reduce the amount of interest due based on Ms. Mitchell's personal or financial circumstances.

For the foregoing reasons, Penny Mitchell's protest IS DENIED.

DATED December 4, 2006.