

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

**IN THE MATTER OF THE PROTEST OF  
BURLINGTON NORTHERN SANTA FE CORP.,  
TO ASSESSMENT ISSUED UNDER  
ID NO. L1172702080**

**No. 12-01**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held November 10, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Amy Chavez-Romero, Staff Attorney. Mr. Andrick Tsabetsaye, Auditor, also appeared on behalf of the Department. Mr. Douglas Hinds, Esq. and Ms. Suzanne Waldrep appeared as employee representatives for the hearing on behalf of Burlington Northern Santa Fe Corp. (Taxpayer). The Hearing Officer took notice of all documents in the administrative file. The parties agreed to waive the 30-day limit on the decision. The parties stipulated to the facts and each filed a Motion for Summary Judgment prior to the hearing. The parties advised that taking evidence at the hearing would not be required due to the stipulations. The parties supplemented their motions with oral argument at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer was subjected to federal audit for the tax years of 1995 through 1999.
2. On November 3, 2008, the Taxpayer filed amended New Mexico corporate income tax returns for tax years 1995 through 1999 to reflect the final IRS adjustments on income for those tax years.

3. The amended return for 1995 showed an additional tax liability of \$6,484. The amended return for 1996 showed additional tax liability of \$539,115. The amended return for 1997 showed an overpayment of \$134,268. The amended return for 1998 showed an overpayment of \$75,754. The amended return for 1999 showed an overpayment of \$269,253.
4. When the Taxpayer filed its amended returns, the Taxpayer paid \$347,202, which was the tax and interest that it had determined was still owed.
5. The Taxpayer calculated the interest from the due dates of the taxes for the 1995 and 1996 years until the overpayments in 1997, 1998, and 1999 and until the final payment of tax in November 2008.
6. On April 1, 2009, the Department assessed Taxpayer for an additional \$628,926.63 in interest for the 1996 tax year.
7. The Department calculated the interest from the due dates of the taxes for the 1995 and 1996 years until the amended return was filed in November 2008.
8. On April 8, 2009, Taxpayer filed a timely protest to the assessment.
9. On June 21, 2011, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
10. On July 6, 2011, the Hearings Bureau mailed Notice of Hearing to the parties, showing that the hearing was set for November 10, 2011.
11. On October 17, 2011, the Department filed a Motion for Summary Judgment.
12. On October, 27, 2011, the Taxpayer filed a Motion for Summary Judgment.
13. On November 4, 2011, the Department filed its Response to the Taxpayer's motion.

14. On November 8, 2011, the Department advised the Hearing Officer that there was not any dispute as to issues of fact and that the parties had agreed to stipulate to the facts and to supplement their filed motions with oral argument at the hearing.

### **DISCUSSION**

The issue to be decided is whether the interest accrued from the due date of the tax until the overpayments in 1997, 1998, 1999, and the final payment in 2008, or whether the interest accrued from the due date of the tax until the amended return was filed without regard to previous overpayments.

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

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that it is entitled to an abatement of interest. There was no dispute on the material facts, and the arguments were made on cross motions for summary judgment solely on the legal issues.

#### **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). The parties agreed that interest was owed on the 1995 and 1996 tax years, but disagreed as to the time period to which interest should accrue.

#### **Interest Period.**

The Taxpayer argued that Section 7-1-29 (E) applied and that the tax was deemed paid when the overpayments occurred in 1997, 1998, and 1999. The Taxpayer applied interest on the tax outstanding from the due date until the overpayments in 1997, 1998, and 1999 were made. The Taxpayer also applied interest on the amount of tax still outstanding until the final payment was made in 2008. The Department argued that Section 7-1-29 (E) does not apply. The Department applied interest on the entire amount of the outstanding tax from the due date until the 2008 amended return was filed. The Department explained that it credited the tax due against the liabilities under Section 7-1-29 (C) at the time that the amended return was filed.

The Department argued that the *Amoco* case controlled. *See Amoco Production Co. v. N.M. Taxation and Revenue Dep't.*, 118 N.M. 72, 878 P.2d 1021 (Ct. App. 1994) (holding that there was not a statutory basis for applying overpayments of tax from one reporting period to underpayments from another prior reporting period). The Department also cited to prior tax hearing decisions that relied on *Amoco*. The Taxpayer pointed out that Section 7-1-29 has been amended since the *Amoco* case was decided. *See* NMSA 1978, § 7-1-29 (2006). The tax hearing decisions that the Department cited all involved facts that occurred prior to the amendment of the statute. The Taxpayer argued that the new subsection (E) in Section 7-1-29 was specifically legislated to remedy the situation that occurred in *Amoco*.

There does not seem to be any caselaw on the applicability of Section 7-1-29 (E). Statutes are to be interpreted in accordance with legislative intent and in a manner that does not lead to an absurd, unreasonable, or unjust result. *See Amoco*, 118 N.M. at 74. *See also Hess Corp. v. N.M. Taxation and Revenue Dep't.*, 2011-NMCA-043, 149 N.M. 527, 252 P3d. 751. The first step in statutory interpretation is to look at the plain language of the statute and to refrain from further interpretation if the plain language is not ambiguous. *See Marbob Energy*

*Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, 146 N.M. 24, 206 P.3d 135). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Section 7-1-29 (E) allows the Department to apply a payment identified to a particular return that exceeds the amount due to the taxpayer's other liabilities, even if the taxpayer does not apply for refund. *See* NMSA 1978, § 7-1-29 (E) (2006). "The liability to which an overpayment is applied pursuant to this section *shall be deemed paid* in the period in which the overpayment was made". *Id.* (emphasis added). The word "shall" indicates that the provision is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The plain language of Section 7-1-29 (E) supports the Taxpayer's interpretation of the statute.

The Department argued that subsection (E) did not apply because there was not a payment identified with a particular return because the returns were amended in 2008 and the payments were made in 1997, 1998, and 1999. The Department also argued that the amended returns filed for 1997, 1998, and 1999 were not returns. The Department argued that they were claims for refund that should be distinguished from returns. The Department's interpretations are untenable in light of the statutory definition of return. The Taxpayer correctly pointed out that returns are defined as "any tax or information return, declaration of estimated tax or claim for refund, including any amendments or supplements to the return". NMSA 1978, § 7-1-3 (R) (2009). Moreover, the statute does not require that the payment be made at the time that the return is filed. *See* NMSA 1978, § 7-1-29 (E) (2006). It is inappropriate to read language into a statute that is not there. *See Amoco*, 118 N.M. at 75. The Taxpayer made payments in 1997, 1998, and 1999 that were identified to particular returns. When the amended returns were filed,

it was determined that the payments made in 1997, 1998, and 1999 exceeded the amount due pursuant to those returns.

The Department also argued that there were not overpayments made in 1997, 1998, and 1999 because the payments made in 1997, 1998, and 1999 were not known to be overpayments at that time. The Department argued that to be an overpayment the payment must be made in excess of the tax due as noted in the original return filed. Again, the Department's interpretation is untenable in light of the statutory definition of a return. *See* NMSA 1978, § 7-1-3 (R) (2009). There is no distinction between an originally filed return and an amended return. *See id.* Moreover, an overpayment is defined as "an amount paid...in excess of tax due from the person to the state *at the time of the payment*". NMSA 1978, § 7-1-3 (K) (2009) (emphasis added). The statute is clear and unambiguous. *See id.* It does not require that the payment made be identified as an overpayment at the time it is made, nor does it require that the payment be made in excess of the tax believed to be due at the time of the payment; it is simply an amount paid in excess of that which was actually due. *See id.* *See also Amoco*, 118 N.M. at 75 (prohibiting reading language into a statute that is not there).

As a matter of law, Section 7-1-29 (E) applies to the Taxpayer. Due to statutory changes, *Amoco* does not apply. *See Amoco*, 118 N.M. at 76 (indicating that a legislative remedy would be necessary). The payments made in 1997, 1998, and 1999 were in excess of the tax due at the time those payments were made, and the payments were identified to particular returns. Those overpayments were applied to the Taxpayer's other liabilities for the 1995 and 1996 tax years. Consequently, the liabilities for the 1995 and 1996 tax years were "deemed paid" in 1997, 1998, 1999 to the extent of the overpayments for those years. *See* NMSA 1978, § 7-1-29 (E) (2006). *See Dresser Industries, Inc. v. U.S.*, 73 F.Supp.2d 682 (D.N.D. Tex) (1999) (holding that tax is

deemed paid if an overpayment of one year is credited against a deficiency of another year and that the deemed payment is treated the same as if it were a cash payment). The remaining outstanding tax was paid in 2008 when the amended returns were filed. The Taxpayer properly calculated the interest to the dates in 1997, 1998, 1999, and 2008 when the taxes were deemed paid and were fully paid. *See Fluor Corp. v. U.S.*, 126 F.3d 1397 (Ct. App. Fed. Cir.) (1997) (holding that interest runs from the due date of the tax until the time that the tax is deemed paid).

### CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of interest for the 1996 tax year under respective Letter ID number L1172702080, and jurisdiction lies over the parties and the subject matter of this protest.
2. Due to statutory changes, *Amoco* does not apply to the Taxpayer.
3. Section 7-1-29 (E) applies to the Taxpayer, and the 1995 and 1996 liabilities were deemed paid in 1997, 1998, and 1999 to the extent of the overpayments made in those years.
4. The Taxpayer paid the remaining tax balance in 2008 when it filed its amended returns and properly remitted the interest owed from the 1995 and 1996 due dates of the tax until the deemed payments of 1997, 1998, and 1999, and until the final payment of the tax in 2008.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED**. The Department is ordered to abate the assessment against the Taxpayer.

DATED: December 28, 2011.

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DEE DEE HOXIE  
Hearing Officer  
Taxation & Revenue Department  
Post Office Box 630  
Santa Fe, NM 87504-0630

### **NOTICE OF RIGHT TO APPEAL**

Pursuant to NMSA 1978, §7-1-25, 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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final.

### **CERTIFICATE OF SERVICE**

On \_\_\_\_\_, 20\_\_, a copy of the foregoing Decision and Order was mailed to Douglas Hinds, AVP and General Tax Counsel, BNSF Railway Company, PO Box 961101, Fort Worth, TX 76161-0101, and delivered through interoffice mail to Amy Chavez-Romero, Staff Attorney, Taxation and Revenue Department, Santa Fe, New Mexico.

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