

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

**IN THE MATTER OF THE PROTEST OF
VINCENT & TESSLIN VIGIL
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L2009825664, L0880793216 and L0228333184**

13-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 9, 2013, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Nelson Goodin, Esq., attorney for the Department. Ms. Milagros Bernardo, protest auditor, appeared as a witness for the Department. Vincent and Tesslin Vigil (“Taxpayers”) appeared at the appointed time. This matter was originally set for hearing on February 28, 2013. The Hearings Bureau reset this matter because it had a conflict on its calendar. A second hearing was set for May 9, 2013. The Department introduced into the record without objection Exhibit #A – 2001 State Return (3 pages).

Based on the aforementioned pleadings, the testimony and evidence introduced at the hearing, and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 10, 2007, the Department assessed Taxpayers in personal income tax in the amount of zero principal, \$43.70 in penalty and \$197.62 in interest for tax year 2003. [Letter Id No. 0228333184].
2. On July 24, 2007, Taxpayers protested the assessment for tax year 2003.

3. On August 17, 2007, the Department assessed Taxpayers in personal income tax in the amount of zero principal, \$57.60 in penalty and \$346.92 in interest for tax year 2002.

[Letter Id No. 0880793216].

4. On August 8, 2007, Taxpayers protested the assessment for tax year 2002.

5. On December 5, 2007, the Department assessed Taxpayers in personal income tax in the amount of zero in principal, \$31.30 in penalty and \$235.36 in interest for tax year 2001.

[Letter Id No. 2009825664].

6. On December 18, 2007, Taxpayers protested the assessment for tax year 2001.

7. On May 23, 2012, the Department acknowledged Taxpayers' protests. [Letter Id Nos. L1521367360, L1265723712, and L0997288256].

8. On January 15, 2013, the Department requested a hearing in this matter.

9. On January 16, 2013, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for February 28, 2013.

10. On February 12, 2013, the Hearings Bureau reset the hearing and mailed a new Notice of Administrative Hearing setting the hearing for May 9, 2013.

11. Taxpayers failed to file a state tax return for tax years 2001, 2002 and 2003. At the hearing there was some discussion of other tax years. These tax years are not in protest and not before this hearing officer.

12. The reason Taxpayers did not file state tax returns for 2001, 2002 and 2003 was because they believed that they had no tax liability.

13. Taxpayers were mistaken about the legal requirement that they file state income tax returns.

14. Taxpayers filed a state tax return for 2001 on or about March 30, 2007. [Ex. A]. Taxpayers filed a state tax return for 2002 and 2003 on or about April 23, 2007. [Administrative File].
15. Taxpayers paid the principal amount of tax owed for tax years 2001, 2002 and 2003 on or about April 23, 2007. [Administrative File].
16. Taxpayers did not dispute that they owed personal income tax for tax years 2001, 2002 and 2003.
17. Taxpayers did not pay the corresponding amounts of penalty and interest for tax years 2001, 2002 and 2003.
18. Taxpayers received two notices from the Department that they were non-filers and subject to an audit.
19. Taxpayers hired a tax preparer, Tom Costigan, sometime in 2007 to assist them with filing the returns for 2001, 2002 and 2003. Mr. Costigan did not assist Taxpayers with applying for a managed audit.
20. Taxpayers did not request nor did they apply for a managed audit from the Department for tax years 2001, 2002 and 2003.
21. Neither the Secretary nor the delegate of the Secretary of Taxation and Revenue Department signed a managed audit agreement with Taxpayers.
22. Prior to filing their protest, no one from the Department informed Taxpayers that they could apply for a managed audit for tax years 2001, 2002 and 2003.
23. At the hearing, the Department stated that the rate for the civil penalty is 10%, which was applied to the Taxpayers' principal amounts for tax years 2001, 2002 and 2003.

DISCUSSION

The only issues in dispute are whether Taxpayers owe penalty and interest for tax years 2001, 2002 and 2003.

Burden of Proof and Standard of Review.

Section 7-1-17(C) provides that any assessment of taxes made by the Department is presumed to be correct. NMSA 1978, Section 7-1-17(C) (2007). *TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.2d 3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. Accordingly, it is Taxpayers' burden to present evidence and legal argument to show that they are entitled to an abatement, in full or in part, of the assessments issued against them. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *MPC Ltd. v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

Civil Penalty.

There is no dispute that Taxpayers failed to file their personal income tax returns for tax years 2001, 2002 and 2003. In fact, Section 7-2-12(A) requires every resident of this state deriving income from employment to file a return if they are required to file a federal return. NMSA 1978, Section 7-2-12(A) (2003). Taxpayers stated that they failed to file their returns because in the past they had received a refund. They argued that because they normally are entitled to a refund, they did not file their income tax returns. Section 7-2-12(A) makes it very

clear that if a taxpayer is a resident of this state and if he or she is required to file a federal return, then he/she *must* file a state return. There is no exception to this rule. Taxpayers failed to file state returns for tax years 2001, 2002 and 2003 even though they were legally required to do so.

Civil penalty is imposed when a taxpayer is “negligent” or disregards the Department’s rules and regulations in not filing a return or paying tax when it is due. Section 7-1-69(A) states that:

(e)xcpt as provided in Subsection C of this section, in the case of failure due to **negligence** or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:

(1) 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;

(Emphasis added). NMSA 1978, Section 7-1-69 (A) (1) (2003). The Department’s regulation provides that “negligence” includes “failure to exercise ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.” Regulation 3.1.11.10 NMAC (2001).

Taxpayers argued that they are not liable for penalty because sometime in 2007 an undisclosed employee of the Department failed to inform them of their right to a managed audit. Taxpayers stated that their tax preparer, Mr. Costigan, did not assist them with applying for a managed audit. Taxpayers did not apply for a managed audit; nor did the Secretary or her delegate enter into an agreement for a managed audit with Taxpayers. If a taxpayer enters into a managed audit agreement with the Department, penalty and interest are not due. NMSA 1978,

Sections 7-1-69(G) (2) (2007) and 7-1-67(A) (4) (2007). There are very precise prerequisites that must exist prior to the Department agreeing to enter into a managed audit with a taxpayer. NMSA Section 7-1-11.1 (2001); Department Publication FYI-404, *Managed Audits for Taxpayers*. For example, taxpayers who receive more than two non-filer notices are not eligible for a managed audit. Department Publication FYI-404, *Managed Audits for Taxpayers*, page 3. In Taxpayers' letter dated July 23, 2007, Taxpayers stated that they were audited for tax year 2004 and that they had received at least two letters from the Department. [Administrative File, Protest Letter with attached Taxpayer letter dated July 23, 2007.] Because Taxpayers received at least two non-filer notices from the Department, they probably were not eligible for a managed audit even if they had applied to participate in the Department's managed audit program. (Taxpayers failed to file returns for tax years 2001-2006 and had received correspondence from the Department at their old address.)

Taxpayers' reasons for failing to report fall within the definition of "negligence." Mr. Vigil testified that he was mistaken as to the requirement that he file his state return each year. No testimony or evidence was offered indicating that any legally recognizable indications of non-negligence were present. Regulation 3.1.11.11 NMAC (2001). Taxpayers owe the full amount of penalty applied at a rate of 10%.

Interest.

Taxpayers argued that they did not owe interest for the reasons stated above. Section 7-1-67(A) (2007) states that 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) (2007). The word "shall" is interpreted to mean that the Department does not have discretion and must assess interest if principal tax is due and owing. *Marbob Energy Corporation v. NM Oil Conservation Commission*, 2009-NMSC-013,

¶22, 146 N.M. 24, 32, 206 P.3d 135, 143 (2009). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the principal amount of tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

A. Taxpayers filed timely written protests to Notice of Assessment Letter Id Nos. 0228333184, 0880793216 and 2009825664 for personal income tax in the amount of zero principal, \$43.70 in penalty and \$197.62 in interest for tax year 2003; personal income tax in the amount of zero principal, \$57.60 in penalty and \$346.92 in interest for tax year 2002; and personal income tax in the amount of zero in principal, \$31.30 in penalty and \$235.36 in interest for tax year 2001.

B. Taxpayers failed to file and report income tax for tax years 2001, 2002 and 2003.

C. Taxpayers did not rebut the presumption of correctness as it applies to both penalty and interest.

D. Taxpayers were negligent in not filing and paying income tax for tax years 2001, 2002 and 2003; accordingly they owe penalty.

E. Interest is due and owing on the principal amount of tax due until the date the principal was paid.

F. The total amount due is \$43.70 in penalty and \$197.62 in interest for tax year 2003; \$57.60 in penalty and \$346.92 in interest for tax year 2002; and \$31.30 in penalty and \$235.36 in interest for tax year 2001. The total amount of tax due is \$912.50.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

DATED: May 13, 2013

Monica Ontiveros
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 (1989), the Taxpayers 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 NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final. A party filing an appeal shall file a courtesy copy of the appeal with the Hearings Bureau contemporaneously with the filing of the Notice with the Court of Appeals so that the Hearings Bureau may prepare the record proper.

CERTIFICATE OF SERVICE

On May 14, 2013, a copy of the foregoing Decision and Order was mailed by regular mail to Vincent and Tesslin Vigil located at 2413 Cardenas Drive, NE, Albuquerque, NM 87110, and delivered through interoffice mail to Nelson Goodin, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.