

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

**IN THE MATTER OF THE PROTEST OF
TRACY SANCHEZ,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0974228944; L2047970768; and L0101813712**

No. 14-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 23, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Ms. Tracy Sanchez (Taxpayer) appeared for the hearing and represented herself. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer and Ms. Bernardo testified at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 16, 2014, the Department assessed the Taxpayer for personal income tax (PIT), penalty, and interest for the tax period ending on December 31, 2010. The assessment was for \$1,632.00 tax, \$326.40 penalty, and \$141.11 interest.
2. On January 16, 2014, the Department assessed the Taxpayer for PIT, penalty, and interest for the tax period ending on December 31, 2011. The assessment was for \$2,562.00 tax, \$512.40 penalty, and \$133.14 interest.
3. On January 16, 2014, the Department assessed the Taxpayer for PIT, penalty, and interest for the tax period ending on December 31, 2012. The assessment was for \$1,303.00 tax, \$234.54 penalty, and \$28.92 interest.

4. On February 12, 2014, Taxpayer filed a formal protest letter.
5. On March 25, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
6. The Taxpayer was working as a commissioned officer with the United States Public Health Service (PHS).
7. The PHS is a branch of the United States military.
8. The PHS is an unarmed branch.
9. The Taxpayer believed that her income from PHS as an active duty military officer was exempt from New Mexico tax.
10. The Taxpayer's belief was based on her earnings statements from PHS, which all indicated that her earnings were exempt from New Mexico tax. The Taxpayer also relied upon a software tax program that indicated that active military members were exempt from New Mexico tax.
11. The PIT return instructions for the 2010 tax year included a definition of "armed forces". The PIT return instructions for the 2011 and 2012 tax years also included a definition of "armed forces". However, the 2011 and 2012 PIT instructions also specified that PHS is excluded from the exemption.
12. The Taxpayer now realizes that her earnings are taxable in New Mexico as PHS is not an armed branch of the military, but requests that penalty and interest be abated.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for penalty and interest for the 2010, 2011, and 2012 tax years.

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 Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. 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 she is entitled to an abatement of penalty and interest.

Armed forces exemption.

A tax is levied on the personal income of every resident. *See* NMSA 1978, § 7-2-3 (1981). Salary paid by the United States “for active duty service in the armed forces of the United States is exempt from state income taxation.” NMSA 1978, § 7-2-5.11 (2007). The Taxpayer concedes that she is not a member of the armed forces and that she is subject to PIT. However, the Taxpayer argues that she was relying on the software tax program as well as her employer when she claimed the exemption. The Taxpayer argues that the penalty and interest should be abated.

Assessment of Penalty.

Assessment of penalty is also presumed to be correct. *See* 3.1.11.8 NMAC (2001). Failing to pay a tax when it was due because of negligence or disregard for department rules and regulations is subject to penalty. *See* NMSA 1978, § 7-1-69 (A) (2007). A taxpayer’s lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). *See also* 3.1.11.10 NMAC (2001).

The Taxpayer mistakenly believed that she was entitled to an exemption from PIT based upon her service in the PHS. *See* NMSA 1978, § 7-2-5.11 (2007) (providing an exemption for members of the armed forces). “Armed forces” is not defined by the statute. *See id.* *See also* NMSA 1978, § 7-1-3 (2013) and § 7-2-2 (2010). However, a definition for “armed forces” occurs in a regulation under the Income Tax Act. *See* 3.3.1.9 NMAC (2010). The definition relates to residency and includes all members of the army, navy, marines, air force, coast guard, “and all officers of the public health service *detailed by proper authority* for duty either *with* the army or the navy”. 3.3.1.9 (D) (5) NMAC (2010) (emphasis added). As the regulation specifically addresses residency, it is not clear that the regulation would apply. Moreover, the Taxpayer’s services with PHS were not detailed for duty with the army or the navy. Federal law also defines “armed forces” as “the Army, Navy, Air Force, Marine Corps, and Coast Guard” and defines “uniformed services” as “the armed forces, [and] the commissioned corps of public health service”. 5 U.S.C. § 2101 (1979). *See also* 10 U.S.C. § 101 (2013).

The Department argues that the statute is clear that only members of the “armed forces” may claim the exemption. The Department also argues that the Taxpayer was not relying on the advice of counsel or an accountant. The Department also argues that the instructions that were included with the PIT return forms for 2010, 2011, and 2012 tax years made it perfectly clear that a member of the PHS was not able to claim the exemption.

The exhibits submitted showed that the 2011 and 2012 PIT instructions specifically excluded the PHS from the definition of “armed forces”. However, the 2010 PIT instructions do not contain the same explicit exclusion. The Taxpayer did not see the PIT instructions for any tax year as she was using a tax software program. The Taxpayer believed military service to be exempt, and so claimed the exemption. *See* 5 U.S.C. § 8331 (2012) (defining military service to

include service in the armed forces as well as in the PHS). A taxpayer may be entitled to abatement of penalty when the taxpayer relied on advice of counsel or an accountant, or in various other circumstances. *See* 3.1.11.11 NMAC (2001). The Taxpayer was not willfully attempting to defraud the Department or to evade taxation. The Taxpayer made an understandable mistake based on her reliance on a tax software program and on her employer's assurances. However, neither of those situations falls within the definition of nonnegligence. *See id.* Nor can the Taxpayer's situation be said to be a mistake of law. *See* NMSA 1978, § 7-1-69 (B) (2007). A mistake of law is a mistake about the legal effect of a fact. *See State v. Hubble*, 2009-NMSC-014, ¶ 22, 146 N.M. 70. The Taxpayer's mistake was a factual mistake, that her services for PHS were services for the "armed forces". Consequently, the assessment of penalty was appropriate.

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 word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 1977-NMSC-010, ¶ 4, 90 N.M. 103. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the PIT was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Notice of Assessment of 2010, 2011, and 2012 personal income taxes issued under respective Letter ID numbers L0974228944, L2047970768, and L0101813712, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer conceded that she was properly assessed for personal income taxes and that she was not entitled to the exemption for the armed forces.

3. The Taxpayer was properly assessed for penalty and interest.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: June 11, 2014.

Dee Dee Hoxie

DEE DEE HOXIE
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