

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

**IN THE MATTER OF THE PROTEST OF
MELINDA L. SCHRAMM
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1127935440**

No. 14-29

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 17, 2014, before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Ms. Melinda Schramm Broussard (“Taxpayer”) appeared *pro se*. Staff Attorney Peter Breen appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits 1-2 and Department Exhibit A were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 27, 2014, the Department assessed Taxpayer for \$2,743.65 in personal income tax, \$425.00 in penalty, and \$191.25 in interest for a then total assessment of \$2,743.65 for the income tax reporting period ending on December 31, 2010. [Letter id. no. L1127935440].
2. On March 25, 2014, Taxpayer protested the Department’s assessment.
3. On May 9, 2014, the Department requested a hearing in this matter with the Hearings Bureau.

4. On May 20, 2014, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on June 17, 2014.

5. During the relevant time, Taxpayer worked as a case manager for a case management agency that contracted with the State of New Mexico to provide services to developmentally delayed and disabled individuals.

6. Taxpayer was a non-filer of 2010 federal and state personal income tax returns.

7. Sometime in January of 2014, upon receipt of information from the IRS, the Department detected that Taxpayer had unreported New Mexico income in personal income tax year 2010, as shown by a Form 1099-MISC issued to Taxpayer by her New Mexico employer.

8. Sometime in January of 2014, the Department sent Taxpayer notice of that unreported income.

9. In response to the Department's notice, Taxpayer engaged the services of Guidance Tax Services in Los Angeles, CA, to assist her with preparing and filing her 2010 federal and state tax returns.

10. On February 27, 2014, the Department issued its assessment to Taxpayer, as described in Finding of Fact #1.

11. On May 5, 2014, Guidance Tax Services faxed Taxpayer's 2010 personal income tax return to the IRS office in Fresno, CA. [Taxpayer Ex. #1].

12. The IRS informed Taxpayer via letter that they could not accept the faxed 2010 personal income tax return because they needed an original copy with Taxpayer's signature.

13. The Department requested that Taxpayer provide an IRS transcript showing that her 2010 income tax return had been filed.

14. Taxpayer requested the IRS transcript from Guidance Tax Services to show proof that her 2010 federal income tax return had been filed. Guidance Tax Services faxed Taxpayer a transcript during the hearing, which is admitted into the record as Taxpayer Ex. #2.

15. The IRS Wage and Income Transcript dated February 6, 2014, showed only her Form 1099-MISC income. The IRS Wage and Income Transcript did not indicate that Taxpayer had filed her 2010 IRS income tax return. [Taxpayer Ex. #2].

16. Protest Auditor Milagros Bernardo checked Taxpayer's records with the Department on the date of hearing and did not see any indication that Taxpayer had filed her 2010 New Mexico personal income tax return.

17. Other than relying on Guidance Tax Services, Taxpayer never independently verified that either her 2010 federal or state personal income tax returns were formally filed with the IRS and New Mexico respectively.

18. At the hearing, Taxpayer was unable to prove that her 2010 tax returns had ever been filed with the IRS or with the Department.

19. As of the date of hearing, Taxpayer owed \$2,127.00 in personal income tax, \$425.40 in penalty, and \$211.53 in interest for a total liability of \$2,763.93.

DISCUSSION

Taxpayer did not file either federal or state 2010 personal income tax returns. The Department learned from the IRS that Taxpayer had received income in New Mexico in 2010, as shown by a Form 1099-MISC issued to Taxpayer by her New Mexico employer. The Department assessed Taxpayer for 2010 personal income tax based on the income reported on the Form 1099-MISC. Taxpayer protested, arguing that once she filed her 2010 returns, she would not owe the assessed tax amount.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment of tax issued in this case is presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Taxpayer has the burden to overcome the assessment. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431. However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-21, ¶13, 133 N.M. 217.

Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1 to 36. Unless otherwise exempted by law, a tax is imposed “upon the net income of every” New Mexico resident. NMSA 1978, § 7-2-3 (1981). NMSA 1978, Section 7-2-12 (2003) requires any resident or any person deriving income from New Mexico to file a state income tax return. Like many states, the calculation of New Mexico’s personal income tax liability begins with a taxpayer’s adjusted gross income as reported to the IRS. *See* NMSA 1978, § 7-2-2 (A) (2010); *See also Holt v. N.M. Dep’t of Taxation & Revenue*, 2002- NMSC-34, ¶23, 133 N.M. 11 (“calculation of the taxpayers’ state income tax is based upon their adjusted gross income...on their federal return.”).

In this case, Taxpayer derived income from New Mexico, as indicated by the Form 1099-MISC that Taxpayer’s employer prepared. As such, Taxpayer was required to file a New Mexico personal income tax return under Section 7-2-12. Because Taxpayer was a non-filer of both federal

and state income tax returns in 2010, the Department relied on the Form 1099-MISC income information reported by Taxpayer's New Mexico employer to determine the assessed tax liability.

Taxpayer has not presented sufficient evidence that she filed her 2010 federal income tax returns showing a different federal adjusted gross income other than the income information the Department received on the Form 1099-MISC. Taxpayer's representative Guidance Tax Services did fax a 2010 federal income tax return to the IRS office in Fresno, California on May 5, 2014. However, the IRS only accepts the filing of tax returns via mail or e-file, not via facsimile. *See* IRS Form 1040 Instructions, (2010). Indeed, as Taxpayer testified, she received a letter from the IRS in May informing her that she needed to submit an original signed copy of her 2010 federal income tax return to the IRS rather than the faxed copy. Consequently, Guidance Tax Services' faxing of Taxpayer's tax return to the IRS does not establish that Taxpayer formally filed her 2010 federal income tax returns.

Moreover, Taxpayer has not been able to produce a IRS transcript showing that she officially filed her 2010 federal income tax returns. The only IRS transcript that Taxpayer was able to produce merely confirms the amount of income reported on Form 1099-MISC. That transcript does not indicate that Taxpayer filed her 2010 federal income tax returns. Taxpayer further did not demonstrate that she filed a New Mexico personal income tax return for tax year 2010. The Department's Protest Auditor Milagros Bernardo checked the Department's computer system the morning of the hearing and found no indication that Taxpayer's 2010 state personal income tax return had been filed with the Department.

While Taxpayer may have been relying on Guidance Tax Services to file her returns, ultimately Taxpayer has the responsibility for filing her 2010 personal income tax returns. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16 (under New

Mexico's self-reporting tax system, “every person is charged with the reasonable duty to ascertain the possible tax consequences” of his or her actions). In addition to failing to file the tax returns when due on April 15, 2011, Taxpayer had notice from the Department since January of 2014 of the unreported income. Yet, some six months after the Department first notice in this matter, Taxpayer still was unable to show at the hearing that she had filed her required federal and state personal income tax returns. Without some federal filing showing a federal adjusted gross income and a corresponding state income tax return that might warrant a recalculation of Taxpayer’s New Mexico personal income tax liability, the Department has no evidence or grounds to abate the assessment.

When a taxpayer fails to make timely payment of taxes due to the state, “interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid.” NMSA 1978, § 7-1-67 (2007) (*italics for emphasis*). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word “shall” makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24.

Further, the Department has no basis to abate civil negligence penalty under NMSA 1978, Section 7-1-69 (2007) in this case. When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word “shall”, Section 7-1-69 requires that civil penalty be added to the assessment. As discussed above, the statute’s use of the word “shall” makes the imposition of penalty mandatory in all instances where a taxpayer’s actions or inactions meets the legal definition of “negligence.” Despite being required to file a return by Section 7-2-12, Taxpayer was a non-filer of New

Mexico personal income tax in 2010, subjecting her to penalty under Section 7-1-69. *See* Regulation 3.1.11.10 (B) NMAC (defining negligence to include inaction when action is required).

Taxpayer's protest is denied and Taxpayer owes the assessed amount. However, upon proof of her federal adjusted gross income, Taxpayer may still be able to claim a refund against her paid New Mexico personal income tax liability until at a minimum the end of this calendar year. *See generally* NMSA 1978, Section 7-1-26 (2013).

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set and held in compliance with NMSA 1978, Section 7-1-24.1 (A) (2013).

B. Since Taxpayer derived income in New Mexico in 2010, Taxpayer was required to file a New Mexico personal income tax return under Section 7-2-12 but failed to do so by the time of the hearing.

C. The Department's assessment relied on the only income information it ever received in this matter: the Form 1099-MISC income that Taxpayer's New Mexico employer reported to the IRS. Section 7-2-2 (A) and *Holt*, ¶23, establish that federal adjusted gross income is the starting point for calculating New Mexico personal income tax liability. However, because Taxpayer did not provide evidence of a federal return establishing a federal adjusted gross income that might justify a recalculation of her state income tax liability, the Department has no basis to abate the assessment.

D. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

E. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (B) NMAC.

For the foregoing reasons, Taxpayer' protest **IS DENIED**. As of the date of hearing, Taxpayer owed \$2,127.00 in personal income tax, \$425.40 in penalty, and \$211.53 in interest for a total liability of \$2,763.93. Interest continues to accrue until the tax principal is satisfied.

DATED: July 16, 2014.

Brian VanDenzen, Esq.,
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), 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. Either party filing an appeal shall file a courtesy copy of the appeal with the Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.