

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
DONALD W. KRUMREY
TO DEPARTMENT'S FAILURE TO GRANT OR DENY A REFUND**

No. 17-22

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 28, 2017, before Hearing Officer Chris Romero in Santa Fe, New Mexico. The Taxation and Revenue Department (Department) was represented by Ms. Diana Martwick, Staff Attorney. Ms. Veronica Galewaler, Protest Auditor, also appeared and testified as a witness for the Department. Mr. Donald W. Krumrey (Taxpayer) appeared by telephone, with the prior approval of the Hearing Officer, and represented himself *pro se*. Department Exhibit A and Taxpayer Exhibits #1 and #2 were admitted into the record and are described in the Administrative Protest Hearing Exhibit Log. The Hearing Officer notified he would take administrative notice of the 2014 and 2015 New Mexico Personal Income Tax (PIT) Form Packets. Each party was provided with five business days to review the instructions and direct the hearing officer to any provisions they claimed were relevant in support of their respective provisions. The Department provided its response on March 29, 2017. The Taxpayer had until the close of business on April 4, 2017 but did not make any further submissions. The record closed upon the end of business on April 4, 2017. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 3, 2016, the Department assessed Taxpayer the sum of \$21.76 in penalty for underpayment of estimated taxes for tax year 2015 under Letter ID. No. L1785368112.

2. Taxpayer paid the assessed penalty, and thereafter on October 9, 2016, submitted an Application for Refund. [Testimony of Mr. Krumrey].

3. Having determined that the Department had failed to grant or deny his application for a refund after 120 days had elapsed, the Taxpayer filed a Formal Protest which was received in the Department's Protest Office on February 13, 2017.

4. On March 2, 2017, the Department acknowledged the Taxpayer's protest.

5. On March 13, 2017, the Department filed a Hearing Request asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

6. A Notice of Administrative Hearing was issued on March 13, 2017, which set the hearing for March 28, 2017. The hearing was set within 90 days of the Department receiving the Taxpayer's protest.

7. On March 15, 2017, the Taxpayer requested permission to appear by telephone. On March 17, 2017, the Department indicated that it did not object to Taxpayer's request.

8. On March 20, 2017, the Administrative Hearings Office entered an Order Permitting Telephonic Appearance.

9. Taxpayer moved to New Mexico from another state in 2014. Taxpayer has resided in New Mexico since January 1, 2014. [Testimony of Mr. Krumrey].

10. Taxpayer prepared and filed his own 2014 personal income tax returns in New Mexico. Taxpayer relied on the 2014 New Mexico Personal Income Tax (PIT) Form Packet and did not identify any provisions therein which he understood to require estimated tax payments for 2015. [Testimony of Mr. Krumrey].

11. Although the 2014 New Mexico Personal Income Tax (PIT) Form Packet does address estimated tax payment, Taxpayer did not understand those provisions to apply to him. [Testimony of Mr. Krumrey].

12. Taxpayer did not seek the advice of a tax professional regarding his personal income tax obligations in New Mexico. [Testimony of Mr. Krumrey].

13. Taxpayer was not aware that he may have incurred an obligation to pay estimated taxes to New Mexico in 2015. Taxpayer had never previously been obligated to pay estimated taxes. [Testimony of Mr. Krumrey].

14. Taxpayer's primary sources of income for the relevant period of time were social security, a pension from the City of Chicago, and a pension from the Bahai National Center in Illinois. Taxpayer only has federal tax withheld on income from his pension with the City of Chicago. [Testimony of Mr. Krumrey].

15. The Department did not notify the Taxpayer of the circumstances underlying the underpayment penalty until the assessment dated August 3, 2016. [Testimony of Mr. Krumrey].

16. Taxpayer Ex. #2 was prepared by Ms. Galewaler. It illustrates the method utilized to determine the amount of estimated tax penalty due in this matter. [Testimony of Ms. Galewaler].

17. Taxpayer does not dispute the method utilized to calculate the underpayment penalty or the result of the calculation as provided in Taxpayer Ex. #2. [Testimony of Mr. Krumrey].

18. The Department was not able to assess underpayment penalty for 2015 until the Taxpayer filed his 2015 return in 2016. [Testimony of Ms. Galewaler].

19. Because state income taxes are not withheld from Taxpayer's social security or pensions, Taxpayer was required to make estimated tax payments. [Testimony of Ms. Galewaler].

DISCUSSION

The issue to be decided is whether the penalty arising from the underpayment of estimated taxes due for tax year 2015 may be abated. In support of his position, Taxpayer contended that the penalty should be abated because he relied on the 2014 New Mexico Personal Income Tax (PIT) Form Packet which inadequately informed him that he would be required to pay estimated taxes in 2015.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, Section 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." *See* NMSA 1978, Section 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 the penalty was improperly imposed or that he is entitled to an abatement of penalty.

Estimated Tax and Penalty

Taxpayers are required to make "the required annual payment in installments through either withholding or estimated tax payments." *See* NMSA 1978, Section 7-2-12.2 (A) (2011). The required annual payment is either 90% of the current taxable year or 100% of the prior tax year, whichever is less. *See* NMSA 1978, Section 7-2-12.2 (B).

When a taxpayer underpays the required annual payment, the Department is required to assess a penalty following the formula specified in Section 7-1-67 (B) for the period of underpayment. *See* NMSA 1978, Section 7-2-12.2 (G). The Taxpayer did not challenge the methodology of assessment in this case. Rather, Taxpayer argued that the penalty should be abated because the 2014 New Mexico Personal Income Tax (PIT) Form Packet failed to adequately notify him of his obligation to make estimated tax payments in 2015.

Although not specifically cited by Taxpayer, NMSA 1978, Section 7-2-12.2 (H) (3) provides that “[n]o penalty shall be imposed under Subsection G of this section for any taxable year if: ... (3) “through either withholding or estimated tax payments, the taxpayer paid the required annual payment as defined in Subsection B of this section; or (4) the secretary determines that the underpayment was not due to fraud, negligence or disregard of rules and regulations.”

It was undisputed that the Taxpayer did not make the annual payment as defined in Subsection B. Neither his social security benefits nor his pensions were subject to state tax withholdings, and Taxpayer did not make estimated tax payments. Accordingly, the basis for the relief Taxpayer seeks rests on whether the underpayment was attributable to fraud, negligence or disregard of rules and regulations.

In Regulation 3.1.11.10 NMAC, the Department defined “negligence” as that term was used in NMSA 1978, Section 7-1-69 (2015) of the Tax Administration Act. There is no indication that the Legislature intended the term to be defined differently when it made reference to “negligence” in NMSA 1978, Section 7-2-12.2 of the Income Tax Act. Both sections address imposition of penalties resulting from taxpayer negligence.

Regulation 3.1.11.10 NMAC defines “negligence” as the: (A) “failure to exercise that

degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;” (B) “inaction by taxpayer where action is required”; or (C) “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.” In this case, Taxpayer denied that he was negligent. Rather, he asserted that the 2014 New Mexico Personal Income Tax (PIT) Form Packet inadequately informed him of his estimated tax obligations for the upcoming tax year. The entirety of Taxpayer’s claim is summarized in Taxpayer Ex. 1 which was an email Taxpayer sent to the Protest Auditor in this case, Ms. Galewaler. Taxpayer Ex. 1 states in relevant part:

My source document is the 2014 New Mexico PIT Form Packet. Page 11 presents the PIT-ES payment voucher. Page 16 describes the Penalty for Underpayment due to 2014 withholding and I have NO withholdings since I came from another state. Page 33 lists the line items about Estimated Taxes on the tax form. After reading these references to Estimated Taxes, I concluded that they did not apply to me and I did not read the instructions to PIT-ES.

I now realize and suggest that the WHO MUST PAY ESTIMATED TAXES? section in those instructions be placed in the WHO MUST FILE section of the general instructions in the packet. Then I would have known the correct procedure to follow.

(Emphasis in original)

The section to which the Taxpayer refers in Taxpayer Ex. 1 is found in the Instructions for 2014 PIT-ES, Estimated Tax Payment Voucher. It provides:

WHO MUST PAY ESTIMATED TAXES?

Every individual who must file a personal income tax return under the Income Tax Act also must pay estimated income tax. This occurs through withholding taxes or by making estimated tax payments using the Personal Income Estimated Tax Payment Voucher (PITES). You can also pay by check or credit card using the Department’s website.

The instructions go on to explain the method by which the estimated tax due should be calculated, the acceptable methods of making payments, the consequences of not making the obligatory payments, and other information pertinent to estimated taxes.

Although the Taxpayer asserted that the instructions were inadequate, the Taxpayer also conceded that he did not fully review all of the instructions. The result was that Taxpayer incurred underpayment penalty of \$21.76 stemming from inadvertence, erroneous belief or inattention, all of which constitute negligence.

When a taxpayer fails to make the required annual payment, NMSA 1978 Section 7-1-12.2 (G) requires that:

there *shall* be added to the tax a penalty determined by applying the rate specified in Subsection B of Section 7-1-67 NMSA 1978 to the amount of the underpayment for the period of the underpayment[.]

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer has failed to make the required annual payment due to negligence. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates that a provision is mandatory absent clear indication to the contrary).

However, Regulation 3.1.11.11 NMAC establishes eight indicators of non-negligence where penalty may be abated. Based on Taxpayer's argument, the only factor under Regulation 3.1.11.11 NMAC potentially applicable is subsection A, which reads:

the taxpayer proves the taxpayer was affirmatively mislead [sic] by a department employee[.]

The Hearing Officer was not persuaded that Taxpayer was affirmatively misled by any employee of the Department or by the 2014 instructions. Despite Taxpayer's honest intentions and good faith, Taxpayer has not overcome the presumption of correctness. Taxpayer had at his disposal all instructions applicable to his 2014 personal income taxes, including that information relevant to determining whether or not estimated taxes for the upcoming tax year would be due. Unfortunately, Taxpayer's review of the instructions was incomplete resulting in Taxpayer overlooking the requirement that he make estimated tax payments in 2015.

Notwithstanding Taxpayer's rationale for overlooking the instructions on estimated taxes, Taxpayer's oversight was the result of inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention which all constitute negligence in which penalty is mandated. *See* Regulation 3.1.11.10; *See also Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16 ("Every person is charged with the reasonable duty to ascertain the possible tax consequences of his action. This can be done by consultation with one's legal advisor. Depending on the facts, failure to do so may constitute negligence.").

Taxpayer failed to overcome the presumption of correctness, and the Department's assessment was proper.

CONCLUSIONS OF LAW

- A. The Taxpayer filed a timely refund application pursuant to NMSA 1978, Section 7-1-26.
- B. The Taxpayer filed a timely protest when the Department had not granted or denied Taxpayer's refund application pursuant to NMSA 1978, Section 7-1-26.
- C. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8.

D. The Taxpayer was required to make estimated tax payments in 2015 and the Department lawfully assessed a penalty for his failure to make such payments pursuant to NMSA 1978, Section 7-2-12.2.

E. Taxpayer's failure to make estimated tax payments for the year in issue was the result of negligence under NMSA 1978, Section 7-2-12.2 (H) (4).

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

DATED: May 12, 2017



Chris Romero
Hearing Officer
Administrative Hearings Office
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which

occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.