

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

**IN THE MATTER OF THE PROTEST OF
RONALD A. & PAULA PETERSON
TO ASSESSMENTS ISSUED UNDER
LETTERS ID NOs. L1462116144 and L0007372592**

D&O # 19-02

v.

AHO Case Number 18.11-276A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On December 6, 2018, Chief Hearing Officer Brian VanDenzen, Esq., conducted a merits administrative hearing in the matter of the tax protest of Ronald & Paula Peterson (Taxpayers) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Ronald A. Peterson appeared representing Taxpayers. Staff Attorney Richard Pender appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Mary Griego appeared as a witness for the Department. Taxpayer Exhibit #1 (the protest letter) and Department Exhibits A (return adjustment notice), B (assessment), C (screen print from GenTax), D (spreadsheet of liability as of hearing date) and Supplement D (submitted with permission after the hearing to recalculate D) were admitted into the record.

In quick summary, this protest involves Taxpayers' 2016 and 2017 personal income returns and estimated tax payments. In 2016, Taxpayers requested that their overpayment of \$2,978.00 be applied against their 2017 estimated payments. In error, rather than apply those payments against Taxpayers' 2017 estimated payments, the Department mailed Taxpayers a refund check of \$2,978.00 of 2016 personal income tax overpayment. Without reviewing their 2016 personal

income tax returns or consulting anyone at the Department about why they received the check for \$2,978.00, Taxpayers cashed the check. In 2017, this resulted in an underpayment of required estimated payments, the return adjustment notice, and the notice of assessment. Taxpayers protested the imposition of penalty in this case, arguing that it was the Department's clerical error rather than Taxpayers' negligence that was responsible for the underpayment of 2017 personal income tax. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the hearing officer finds that despite the Department's initial and unfortunate clerical error, Taxpayers' protest must be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 17, 2018, under letter id. no. L0007372592, the Department issued a return adjustment notice to Taxpayers, indicating that Taxpayers still owed \$3,423.59 in 2017 personal income tax because the Department's records showed a lesser amount of estimated payments than Taxpayers reported. [Department Ex. A].

2. On August 28, 2018, under letter id. no. L142116144, the Department assessed Taxpayers for \$2,978.00 in tax, \$297.80 in civil negligence penalty, \$98.02 in underpayment penalty, \$51.81 in interest, for a total assessment of \$3,425.63 for the personal income tax year ending December 31, 2017. [Department Ex. B].

3. On September 29, 2018, Taxpayers protested the Department's return adjustment notice and the assessment, specifically challenging the assessment of civil negligence penalty, underpayment penalty, and interest. [Taxpayer Ex. #1].

4. Along with the September 29, 2018, protest letter, Taxpayers included a check for \$2,978.00 for their 2017 personal income taxes. [Administrative Record; Taxpayer Ex. #1; Direct Testimony of Ronald Peterson].

5. On October 16, 2018, the Department's protest office acknowledged receipt of a valid protest.

6. On November 1, 2018, the Department filed a request for hearing in this matter with the Administrative Hearings Office, an agency independent of the Taxation and Revenue Department.

7. On November 2, 2018, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on December 6, 2018.

8. The December 6, 2018, hearing occurred within 90-days of the Department's acknowledgment of receipt of a valid protest.

9. Taxpayers filed joint personal income tax returns in 2016 and 2017. [Testimony of Ronald Peterson].

10. Ronald Peterson personally prepared Taxpayers' 2016 and 2017 personal income tax returns, making him personally familiar and aware of the general details of the returns. [Testimony of Ronald Peterson].

11. For personal income tax 2016, Taxpayers claimed an overpayment of \$2,978.00 but requested that it be applied to their 2017 personal income tax estimated payments. [Testimony of Ronald Peterson].

12. On or about May 26, 2017, Taxpayers received a check from the Department for \$2,978.00. [Testimony of Ronald Peterson].

13. Taxpayers did not check their 2016 personal income tax return to confirm whether they were supposed to receive a check for \$2,978.00 from the Department. [Testimony of Ronald Peterson].

14. Taxpayers did not call, write, or otherwise inquire with the Department why it received the \$2,978.00 check. [Testimony of Ronald Peterson].

15. Taxpayers cashed the Department's check for \$2,978.00 on June 12, 2017. [Testimony of Ronald Peterson].

16. When preparing Taxpayers 2017 personal income tax return, Mr. Peterson did not verify whether their estimated payments in 2017 included the \$2,978.00. [Testimony of Ronald Peterson].

17. According to credible and knowledgeable Protest Auditor Mary Griego, it appeared that while a Department employee in the revenue processing division entered Taxpayers' 2016 hard copy personal income tax return into Gentax, that employee made a clerical data error in not marking that Taxpayers requested application of the overpayment to 2017 estimated payments.

18. After the hearing, and without objection of Taxpayer, Protest Auditor Mary Griego carefully reviewed the calculation of interest to ensure it was correct and in compliance with applicable law. [Department Ex. D and Supplemental to Ex. D].

19. The affidavit submitted by Protest Auditor Mary Griego explaining her method of recalculation and the final numbers of outstanding interest are credible and persuasive. [Department Ex. D and Supplemental to Ex. D].

20. As of the date of hearing, Taxpayer owed \$357.36 in civil negligence penalty, \$98.02 in underpayment penalty, and \$64.86 in interest for a total outstanding liability of \$522.69. [Department Ex. D and Supplemental to Ex. D].

DISCUSSION

With their protest letter, Taxpayers submitted payment for \$2,978.00, conceding the liability for the 2017 personal income tax principal. At hearing, Taxpayers conceded liability for interest in this protest. To the extent there was questioning and discussion about interest with Department Protest Auditor Mary Griego, it was related to ensuring that the calculation of interest was correct rather than disputing whether interest was in fact due. The testimony of Department Protest Auditor Griego, and in particular her submission of Supplemental Department Ex. D, was highly credible. The hearing officer adopts Department Protest Auditor Griego's method and calculation of interest as reflected on Supplemental Department Ex. D as the correct amount of outstanding interest. Only the assessed civil negligence penalty and underreporting penalty remains in dispute in this protest.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayers have the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. 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). Accordingly, it is Taxpayers' burden to present some countervailing

evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *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.”). Under Section 7-2-12, the required tax return and any amount of tax due under the return are due “on or before the fifteenth day of the fourth month following the end of the taxable year”, which is April 15th of the next calendar year.

Where a taxpayer does not have any personal income tax withheld, that taxpayer is required to make quarterly estimated payments of income tax under NMSA 1978, Section 7-2-12.2 (2011). Under Section 7-2-12.2 (D), those quarterly estimated payments are due on “April 15, June 15, and September 15 of the taxable year and January 15 of the following taxable year.” The required annual payment is either 90% of the current tax year or 100% of the prior tax year, whichever is less. *See* NMSA 1978, § 7-2-12.2 (B). If taxpayers fail to timely make estimated payments in amount sufficient to meet the requirements of Section 7-2-12.2 (B), then the

Department is required to assess an underreporting penalty under Section 7-2-12.2 (G). *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (the statutory use of the word “shall” makes the provision mandatory).

Additionally, 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, NMSA 1978 Section 7-1-69 (2007) requires that

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 twenty percent of the tax due but not paid.

(*italics added for emphasis*).

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.” *See Marbob Energy Corp*, ¶22 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary).

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (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 New Mexico, inadvertent error constitutes civil negligence subject to penalty. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795 (inadvertent error constitutes civil negligence). In this case, Mr. Peterson candidly acknowledged that when it received and cashed the refund check months after filing the 2016 personal income tax return, Taxpayers did not think much of it (which amounts to inadvertence or inattention) and

believed that if the Department sent them a check they were entitled to cash it (which amounts to erroneous belief).

Although sympathetic to Taxpayers' frustration in light of the Department's clerical error, applying these legal standards to the facts of this case, Taxpayers owe both underpayment penalty and civil negligence penalty. While the Department certainly made a regrettable error in this case, Taxpayers own subsequent errors could have been prevented with some basic diligence and review upon receipt of a fairly substantial check they were not expecting to receive. 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. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Given Taxpayers' duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of their actions/inactions, it was not reasonable for Taxpayers (who personally prepared their own return) to simply cash an unexpected refund check for \$2,978.00 without reviewing their return in more detail or consulting with the Department about the reason for the check. *See In the Matter of the Protest of Errol Chaisson*, Taxation and Revenue Department D&O No. 05-12 (June 16, 2005) (Non-precedential administrative decision where the hearing officer found it unreasonable for taxpayers to cash an unwanted refund check without reviewing their return or consulting with the Department or a tax professional). Further, when preparing the 2017 return, Taxpayers did not verify whether they had been credited with \$2,978.00 against their required estimated payments. Catching the error while preparing the 2017 personal income tax return would have allowed the Taxpayers to avoid much of the assessed outstanding penalty and interest in this case.

As a result of cashing the \$2,978.00 refund check, that amount was not available to apply to Taxpayers' 2017 personal income tax estimated payments and Taxpayers' 2017 estimated

payments fell below the mandatory minimum threshold established by 7-2-12.2 (B).

Consequently, Section 7-2-12.2 (G), requires imposition of underpayment penalty. And because of Taxpayers inadvertent error and erroneous belief in cashing the refund check, Taxpayers met the definition of civil negligence penalty under Section 7-1-69 subjecting them to penalty. Taxpayers were not able to establish any of the nonnegligence factors that would allow for abatement of either penalty.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not overcome the presumption of correctness on the assessed tax, penalty, and interest under NMSA 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3 (X) (2013), and Regulation 3.1.6.13 NMAC. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428; *See also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8; *see also MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217

D. 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. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Taxpayers did not meet this reasonable duty when they cashed the refund check without reviewing their 2016 personal income tax return or consulting with the Department.

E. Under Section 7-2-12.2 (G)'s mandatory "shall" language, Taxpayer is liable for underpayment penalty. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24.

F. Under Section 7-1-69's mandatory "shall" language, Taxpayer is liable for civil negligence penalty because of Taxpayers' inadvertent error and erroneous belief met the definition of civil negligence under Regulation 3.1.11.10 NMAC. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795.

For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that Taxpayer is liable for \$357.36 in civil negligence penalty, \$98.02 in underpayment penalty, and \$64.86 in interest for a total outstanding liability of \$522.69.

DATED: January 9, 2019.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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 timely 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 proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On January 9, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail and Email

Interoffice Mail and Email

INTENTIONALLY OMITTED

John Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502