

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

**IN THE MATTER OF THE PROTEST OF  
MICHAEL E. LUNNON  
TO ASSESSMENT  
ISSUED UNDER LETTER  
ID NO. L2144229680**

**No. 17-40**

**DECISION AND ORDER**

A hearing occurred in the above-captioned protest on August 15, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Michael E. Lunnnon (“Taxpayer”) appeared in person and represented himself *pro se*. Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Veronica Galewaler appeared as a witness for the Department. Department Exhibit A and Taxpayer Exhibits 1 – 3 were admitted into the evidentiary record without objection. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. On August 28, 2017, Taxpayer requested that the Hearing Officer withhold a decision in this matter and hold the protest in abeyance. For the reasons stated below, that request is denied. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On March 6, 2017, under Letter ID No. L2144229680, the Department assessed \$44,553.00 in personal income tax, \$8,910.60 in penalty, and \$6,212.09 in interest, for a total assessment of \$59,675.69 for the Personal Income Tax periods from January 1, 2011 through December 31, 2012 (hereinafter “Assessment”).
2. On May 26, 2017, the Department’s Protest Office received Taxpayer’s formal protest of the Department’s Assessment under Letter ID No. L2144229680.

3. On June 12, 2017, the Department acknowledged receipt of Taxpayer's protest of its Assessment.

4. On July 19, 2017, the Department submitted a Hearing Request that requested a hearing on the merits of Taxpayer's protest.

5. On July 20, 2017, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on August 15, 2017.

6. A hearing on the merits occurred on August 15, 2017. The hearing occurred within 90 days of Taxpayer's protest.

7. Prior to receiving the Department's Assessment, Taxpayer received a Notice of Limited Scope Audit Commencement – Personal Income Tax (hereinafter "Notice"). The Notice was dated December 17, 2016 and explained that an IRS Audit identified income that may not have been reported to the State of New Mexico. [Testimony of Mr. Lunnon; Testimony of Ms. Galewaler; Taxpayer Ex. 1].

8. On February 13, 2017, Taxpayer responded to the Notice indicating that he did not understand the basis for the claim and denied having income in those amounts specified by the Notice. [Testimony of Mr. Lunnon; Taxpayer Ex. 2].

9. Taxpayer thereafter expressed surprise to receive the Department's Assessment. Taxpayer continued to deny that there was any basis for the Notice or the resulting Assessment. [Testimony of Mr. Lunnon].

10. To the extent Taxpayer conducted any research or investigation to develop a better understanding of the basis for the Assessment, Taxpayer was unwilling or unable to elaborate regarding his findings or conclusions.

11. Taxpayer refused to testify regarding his occupation or his sources of income, claiming those subjects were irrelevant to his protest. [Testimony of Mr. Lunnon].

12. Taxpayer eventually reluctantly disclosed on cross examination that he managed a business at the address of record, 2418 E. Historic Highway 66, Gallup, NM 87301-4767. [Testimony of Mr. Lunnon].

13. Taxpayer denied receiving a salary from the business. [Testimony of Mr. Lunnon].

14. Upon request for elaboration regarding his responsibilities as a manager for the business, he said his responsibility was to “order things,” some of which may be intended for resale, and provided no additional explanation. [Testimony of Mr. Lunnon].

15. Taxpayer refused to elaborate regarding the type of business he allegedly managed, but admitted on cross examination that it involved packing and shipping services. [Testimony of Mr. Lunnon].

16. Taxpayer, although the manager, denied having knowledge of whether the business maintained any employees, how the store operated in his absence, or information regarding income generated by the business. [Testimony of Mr. Lunnon].

17. Taxpayer claimed that he supported himself from bartering and performing odd jobs. [Testimony of Mr. Lunnon].

18. Taxpayer admitted having a long history of disputes with the IRS. [Testimony of Mr. Lunnon].

19. Although Taxpayer vehemently denied that the information provided by the IRS was correct, Taxpayer admitted he did not have any evidence to dispute the information. [Testimony of Mr. Lunnon].

20. Taxpayer could not recollect whether or not he filed New Mexico Personal Income Tax returns for the years in protest, nor could he recall if he filed tax returns for even the most recent years, including 2016. [Testimony of Mr. Lunnon].

21. Taxpayer had not filed personal income tax returns for the years subject of the protest. [Testimony of Ms. Galewaler].

22. Although Taxpayer claimed he could not comprehend the basis for the Assessment, Taxpayer Ex. 3.1 – 3.8 represented Ms. Galewaler’s efforts to explain the foundation for the Assessment. The IRS Account Transcript resulting in the Assessment was provided in Taxpayer Ex. 3.3 – 3.8. Taxpayer did not respond to Ms. Galewaler. [Testimony of Ms. Galewaler; Taxpayer Ex. 3.1 – 3.8].

23. The Assessment subject of the protest relied on information provided by the IRS [Taxpayer Ex. 3-3 – 3.8]. To the extent any information provided by the IRS is erroneous, Taxpayer is responsible for addressing such errors. [Testimony of Ms. Galewaler].

24. The IRS Account Transcript indicated that Taxpayer had an Adjusted Gross Income in 2011 in the amount of \$467,663.00, and in 2012 in the amount of \$472,253.00. [Taxpayer Ex. 3.3 – 3.8].

25. The Adjusted Federal Taxable Income was therefore \$458,163.00 in 2011 and \$462,503.00 in 2012. [Taxpayer Ex. 1; Taxpayer Ex. 3.3 – 3.8].

26. The Department utilized the information derived from the IRS to generate a New Mexico personal income tax return to identify the amounts of taxes, interest, and penalty due to New Mexico. [Testimony of Ms. Galewaler].

27. Before issuing the Assessment, Taxpayer was provided with an opportunity to address questions or concerns regarding the Notice, and respond with any information that might be useful to reducing the identified amounts of tax, penalty, or interest due. [Testimony of Ms. Galewaler; Taxpayer Ex. 1].

28. Taxpayer's response to the Notice was that he did not understand the basis for the claim and that the Department was relying on "bad information." Taxpayer provided no further documentation or explanation. [Testimony of Mr. Lunnon; Taxpayer Ex. 2].

29. When Taxpayer did not provide any suitable response to explain the mismatch or otherwise justifying a reduction of his estimated liability, the Department issued its Assessment. [Testimony of Ms. Galewaler].

30. The Department relied heavily on information provided by the IRS and Taxpayer. Where a dispute arises regarding the accuracy of information contained in a federal return or in the records of the IRS, Taxpayer must address that issue of dispute with the IRS. [Testimony of Ms. Galewaler].

31. As of the date of the hearing, Taxpayer owed \$44,553.00 in personal income tax, \$8,910.60 in penalty, and \$7,022.59 in interest for a total amount due of \$60,486.19. [Testimony of Ms. Galewaler; Dept. Ex. A].

32. On August 28, 2017, Taxpayer submitted a document entitled Supplemental Hearing Information (hereinafter "Supplement") in which Taxpayer requested that the Hearing Officer place the matter in abeyance pending conclusion of litigation involving Taxpayer and the IRS.

33. On August 31, 2017, the Department filed a document entitled New Mexico Taxation and Revenue Department's Motion in Limine to Exclude Taxpayer's Supplemental Hearing Information (hereinafter "Department's Motion In Limine").

34. On September 7, 2017, Taxpayer filed a second copy of his entitled Supplemental Hearing Information and a document entitled Michael E. Lunnon's Motion to Strike the New Mexico Taxation and Revenue Department's Motion in Limine to Exclude Hearing Information (hereinafter "Taxpayer's Motion to Strike").

## DISCUSSION

The only issue presented in this protest is whether the Department was entitled to rely on the information it received from the IRS in assessing Taxpayer for New Mexico Personal Income Tax, penalty, and interest for tax years 2011 and 2012. Taxpayer argued that the Department should not be permitted to rely on the IRS without conducting some independent investigation to corroborate the reliability of the information it provided. Taxpayer claimed ignorance with respect to all facts that may have led to the Assessment in this protest.

### **Presumption of Correctness and Burden of Proof**

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment of tax issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that he is entitled to an abatement, in full or in part, of the assessment issued against him. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC.

Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Sec. 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.

### **Personal Income Tax**

Payment of New Mexico personal income tax is governed by NMSA 1978, Sections 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, Sec. 7-2-3 (1981). NMSA 1978, Sec. 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, Sec. 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, the Department identified a mismatch between the adjusted gross income as calculated by the IRS and its own records. The Department therefore issued a Notice of Limited Scope Audit Commencement and provided Taxpayer with an opportunity to explain the inconsistency. Taxpayer’s response was that the information provided by the IRS was incorrect. Although disputing the accuracy of the information provided by the IRS, Taxpayer did not offer any evidence to contradict it. The Department subsequently issued its Assessment and Taxpayer filed his protest in which he once again stated that the information provided by the IRS was erroneous.

At the hearing, Taxpayer continued to argue that the information provided by the IRS was incorrect, and proclaimed that there was not any foundation to substantiate it. Although Taxpayer did not waiver from his position, he also failed to introduce any credible evidence to substantiate his claims and rebut the presumption that the Department’s Assessment was correct.

As provided by *Holt*, the calculation of New Mexico's personal income tax liability begins with a taxpayer's adjusted gross income as reported to the IRS. In this case, there was no evidence that the Taxpayer reported any income to the IRS. In contrast, the income attributed to Taxpayer was identified during an IRS audit. Nevertheless, "a state has the power to gauge its income tax by reference to the income on which the taxpayer is required to pay to the United States." See *Champion Int'l Corp. v. Bureau of Revenue*, 88 N.M. 411, 416, 540 P.2d 1300, 1305 (Ct.App.1975). In this case, the IRS Account Transcript identified a total of \$920,666.00 in income taxable to the United States for 2011 and 2012. The Department was entitled to rely on that information in issuing its Assessment. *Id.*

Therefore, Taxpayer was obligated to present evidence upon which it might be established that the IRS Account Transcript was incorrect. Rather, Taxpayer incredibly claimed to be ignorant and proved to be extremely elusive, even with the most ordinary topics of direct examination. Taxpayer either declined or evaded examination in areas such as personal income, his occupation, his business activities or employment responsibilities, his sources of income, and his tax preparation and filing history, just to name a few. He claimed these topics of inquiry were irrelevant and seemingly took offense when either the Hearing Officer or counsel for the Department asked questions touching upon these issues. Taxpayer actually said he was surprised by examination into such areas, despite the fact that the Assessment arose from personal income tax, which is directly related to Taxpayer's personal income. Nevertheless, the Hearing Officer found that examination intended to solicit evidence regarding Taxpayer's personal income was relevant to a proceeding in which Taxpayer contested the Assessment of personal income tax.

Taxpayer's strategy in this protest was obvious. His efforts were intended to shift the burdens of persuasion and production to the Department to show the correctness of its Assessment, but the law on this subject is firm. It is Taxpayer's burden to present some countervailing



evidence or legal argument to show that he is entitled to an abatement, in full or in part, of the assessment issued against him. *See Casias Trucking, supra*. “Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.” *See MPC Ltd.* 2003-NMCA-21, ¶13.

Taxpayer’s statements in opposition to the Assessment in this case are the types of statements that our courts have found to be unpersuasive, unavailing, and ultimately insufficient. Taxpayer’s statements were clearly unsubstantiated by any evidence in the record and were insufficient to overcome the presumption of correctness in this case. Consequently, Taxpayer has failed to rebut the presumption of correctness that attached to the Department’s Assessment.

### **Penalty and Interest**

Although Taxpayer did not address the imposition of penalty or interest, they nevertheless merit a brief discussion.

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, Sec. 7-1-67 (2007) (*italics for emphasis*). Under the statute, regardless of the reason for non-payment of the tax, 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, 32 (use of the word “shall” in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full.

In this case, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the tax was due but not paid until the tax principal liability is satisfied.

With regard for penalty, Department Ex. A indicates that the Department assessed penalty consistent with the penalty that is imposed for negligence, rather than the penalty that is imposed for a willful intent to evade or defeat a tax under Sec. 7-1-69 (D). 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 (A) (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).

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 meet the legal definition of "negligence."

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 this case, Taxpayer was negligent under Regulation 3.1.11.10 (B) NMAC, at a minimum, because of his inaction in failing to report and pay personal income taxes when due.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." In this case, Taxpayer failed to introduce any evidence to suggest or establish that his negligence resulted from a mistake of law made in good faith on reasonable grounds.

Further, in relevant part to this protest, Regulation 3.1.11.11 NMAC also allows for abatement of penalty under various scenarios. However, none of those circumstances apply under the evidence introduced in this protest.

For these reasons, Taxpayer's protest should be denied.

### **Taxpayer's Supplemental Hearing Information**

Nearly two weeks after the close of evidence, Taxpayer submitted his Supplement in which he requested that the Hearing Officer suspend or delay this decision, or otherwise hold the protest in abeyance pending resolution of a federal lawsuit in which Taxpayer claimed the central issue to be the amount of any federal taxes due and owing. The Department filed the Department's Motion In Limine and requested that the Supplement be excluded from the Hearing Officer's consideration of evidence in this case. Taxpayer responded by filing Taxpayer's Motion to Strike.

Although the *pro se* Taxpayer stated his intention to "supplement" his testimony in the Supplemental Hearing Information, the Hearing Officer interprets the Supplement as a request to hold the matter in abeyance rather than an effort to introduce evidence on any fact that is of consequence to Taxpayer's protest. In other words, Taxpayer's request does not seek to establish any facts that are directed to rebutting the presumption of correctness of the Department's Assessment. Rather, the Supplement states reasons why Taxpayer believes the matter should be held in abeyance pending the conclusion of his litigation against the IRS.

Considering that specific request, the Hearing Officer finds the motion should be denied. The request was presented nearly two weeks following the conclusion of the hearing on the merits of Taxpayer's protest. Although Taxpayer explained that he overlooked providing the information contained in the Supplemental Hearing Information or making the request earlier, the Hearing Officer, was not persuaded that the request was presented in good faith. Rather, the

Hearing Officer finds that the request was made at such a late date in order to effect delay of a potentially unfavorable decision.

The Hearing Officer also finds that the denial of Taxpayer's request would not result in any prejudice to Taxpayer. In the event Taxpayer obtains a favorable result from his litigation against the IRS, then Taxpayer is not without relief in this matter. *See* NMSA 1978, Sec. 7-1-26.

Accordingly, the Hearing Officer finds Taxpayer's request to hold the protest in abeyance, Department's Motion In Limine, and Taxpayer's Motion to Strike shall all be denied.

### CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's Notice of Assessment and Demand for Payment issued under Letter ID No. L2144229680, 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 the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not overcome the presumption of correctness that attached to the Assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

D. Taxpayer failed to prove that he was not negligent; therefore, penalty was properly assessed under NMSA 1978, Sec. 7-1-69.

E. The tax was not paid when it was due, so interest was properly assessed under NMSA 1978, Sec. 7-1-67.

For the foregoing reasons, Taxpayer's protest **IS DENIED**. As of the date of the hearing, Taxpayer owed \$44,553.00 in personal income tax, \$8,910.60 in penalty, and \$7,022.59 in interest for a total amount due of \$60,486.19.

DATED: September 20, 2017



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Chris Romero  
Hearing Officer  
Administrative Hearings Office  
Post Office 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 September \_\_\_\_, 2017, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner:

*First Class Mail*

*Interoffice Mail*