

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

**IN THE MATTER OF THE PROTEST OF
HOWARD L. BANCROFT, III
ASSESSMENT NOS. 612890, 612891, 612892**

No. 01-29

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 26, 2001, before Margaret B. Alcock, Hearing Officer. Howard L. Bancroft, III ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the 1990s, the Taxpayer was involved in litigation arising out of his divorce.
2. One of the issues in litigation concerned the Taxpayer's status as a single or married taxpayer and his right to claim his children as dependents for federal income tax purposes.
3. On the advice of his attorney, the Taxpayer decided not to file federal or state income tax returns for 1992, 1993 and 1994 until these issues were resolved.
4. The Taxpayer applied to the Internal Revenue Service ("IRS") for an extension of time to file his federal income tax returns.
5. The Taxpayer did not request an extension of time from the Department, nor did he make estimated payments to cover any tax liability that might be due.

6. The IRS ultimately determined that the Taxpayer was required to file his 1992, 1993 and 1994 income tax returns as a single person and was not entitled to claim his children as dependents. Based on these findings, the IRS assessed the Taxpayer for additional tax due.

7. The Taxpayer subsequently entered into a settlement agreement with the IRS that took into account his ability to pay the assessment and other equitable considerations.

8. In 2000, the Department received information from the IRS concerning the adjustments made to the Taxpayer's federal income tax returns. The Department checked its records and discovered that the Taxpayer had failed to file New Mexico income tax returns for the years at issue and had also failed to request an extension of time to file or make estimated payments of tax due for those years.

9. On June 29, 2000, the Department issued the following assessments to the Taxpayer, reflecting personal income tax, penalty and interest for tax years 1992, 1993 and 1994:

Assessment No.	Tax Year	Total Amount Due
612890	1992	\$ 756.87
612891	1993	\$1,216.38
612892	1994	\$1,560.96

10. On July 24, 2000, the Taxpayer filed a written protest to the assessment.

11. The Taxpayer subsequently provided the Department with copies of his W-2 forms for 1992, 1993 and 1994 showing that New Mexico income tax had been withheld from the Taxpayer's wages.

12. After crediting the Taxpayer with the taxes withheld by his employer, the total amount remaining in dispute (with interest accrued through November 15, 2001) is as follows:

Assessment No.	Tax Year	Total Amount Due
612890	1992	\$ 0
612891	1993	\$146.98
612892	1994	\$724.82

Due to these adjustments, the Taxpayer’s liability for Assessment No. 612890 is no longer at issue and will not be addressed in this decision.

DISCUSSION

The Taxpayer raises the following issues in support of his protest: (1) the Department should be required to settle with the Taxpayer on the same terms he settled with the IRS; and (2) the Taxpayer should be excused from payment of penalty because his decision not to file New Mexico personal income tax returns was based on the advice of his attorney.

Settlement. The Taxpayer maintains that the Department is required to settle with him on the same terms he settled his federal tax liability with the IRS. 26 U.S.C. § 7122 governs compromises of federal tax liabilities and gives the IRS the authority to consider a taxpayer’s ability to pay in determining whether settlement is appropriate. New Mexico law does not give the Department the same latitude to compromise state taxes. Section 7-1-20 NMSA 1978 limits the Department’s settlement authority to situations where the secretary has a “good faith” doubt as to a taxpayer’s liability for the tax assessed. Regulation 3.1.6.14 NMAC specifically states that the Secretary “may not compromise a taxpayer’s liability because of the taxpayer’s inability to pay.” Nor may the Secretary enter into a settlement “solely because of the threat of litigation or as an expedient means of disposing of a controversy”.

The Taxpayer argues that federal tax law should override state tax law. The Taxpayer has not provided any legal authority to support his position and, in fact, none exists. To the contrary, New Mexico courts have consistently rejected taxpayers’ attempts to apply federal law to state tax

disputes. In *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989), the New Mexico Court of Appeals refused to apply the standard of negligence used to impose penalty under the Internal Revenue Code, finding that the provisions of the federal statute were inconsistent with the provisions of Section 7-1-69 NMSA 1978. *See also, State v. Long*, 121 NM 333, 911 P.2d 227 (Ct. App.), *cert. denied*, 121 N.M. 119, 908 P.2d 1387 (1995) (in tax cases, New Mexico courts follow federal law only to the extent they find that law persuasive); *In re Rates & Charges of Mountain States Telephone & Telegraph Co.*, 104 N.M. 36, 43, 715 P.2d 1332, 1339 (1986) (New Mexico's Corporate Income Tax Act does not incorporate or adopt the Internal Revenue Code and Treasury Regulations); *Sutin, Thayer & Browne v. Revenue Division of the Taxation and Revenue Department*, 104 N.M. 633, 635, 725 P.2d 833, 835, (Ct. App. 1984), *cert. denied*, 102 N.M. 293, 694 P.2d 1358 (1985) (the Department was correct in denying a request for refund based on a federal income tax credit not recognized under state law).

Under New Mexico law, the only basis for entering into a settlement agreement is the existence of a good faith doubt as to the Taxpayer's liability for the tax in dispute. There is no evidence to support such a good faith doubt in this case.

Penalty. Section 7-1-69 NMSA 1978 governs the imposition of penalty. Subsection A imposes a penalty of two percent per month, up to a maximum of 10 percent:

in the case of failure due to negligence or disregard of rules and regulations, but without intent to evade or defeat any tax, to pay when due any amount of tax required to be paid ... or to file by the date required a return...

Taxpayer "negligence" is defined in Regulation 3.1.11.10 NMAC as:

1. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
2. inaction by taxpayers where action is required;

3. inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including proof that “the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer’s liability after full disclosure of all relevant facts”.

In this case, the Taxpayer testified that he believed the extension of time he received from the IRS would also extend the time for him to file his state income tax returns. New Mexico will honor extensions of time to file federal income tax returns “provided that a copy of the approved federal extension of time is attached to the taxpayer’s New Mexico income tax return...” Section 7-1-13 NMSA 1978. The Taxpayer did not meet this requirement because he never filed New Mexico income tax returns for 1993 and 1994 and never provided the Department with a copy of an approved federal extension of time to file. The Department only discovered that the Taxpayer was delinquent in payment of his state income tax after receiving information from the IRS, at which point the Taxpayer’s tax returns and tax payments were five to six years overdue.

The Taxpayer argues that he comes within the nonnegligence provisions of Regulation 3.1.11.11 NMAC because his failure to file state income tax returns was based on his attorney’s advice not to file until the tax issues in his pending litigation were resolved. The regulation is limited, however, to situations where the failure to file or pay “was caused by reasonable reliance on the advice of competent tax counsel or accountant *as to the taxpayer’s liability...*” (emphasis added). In this case, there is no evidence the Taxpayer’s attorney gave him advice concerning his liability for federal or state income tax. In addition, once the IRS made a final determination of the Taxpayer’s federal income tax liability for 1993 and 1994 and issued an assessment against him, there was no reason for the Taxpayer

to further delay the filing of his state income tax returns. The Taxpayer's continued failure, over a period of five or six years, to file state income tax returns or make estimated payments to cover the tax ultimately determined to be due was negligent.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment Nos. 612891 and 612892, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department is not required to enter into a settlement agreement for payment of the Taxpayer's 1993 and 1994 New Mexico personal income tax on the same terms the Taxpayer settled his federal income tax liability for those years.

3. The Taxpayer was negligent in failing to file income tax returns or pay income tax due for 1993 and 1994, and penalty was properly assessed under Section 7-1-69 NMSA 1978.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED October 30, 2001.