

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

**IN THE MATTER OF THE PROTEST OF
JOSEPH APODACA
ASSESSMENT NO. 481214**

No. 02-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 9, 2002, before Margaret B. Alcock, Hearing Officer. Joseph Apodaca ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In March 2000, the Taxpayer filled out a 1999 New Mexico personal income tax return ("PIT-1").
2. On Schedule PIT-ADJ to the PIT-1, the Taxpayer claimed a \$16,000 deduction available to persons who are over the age of 65 and whose adjusted gross income falls below a specified dollar amount.
3. Although a table showing the deduction allowed for each income level was set out in the Department's 1999 PIT instructions, the Taxpayer failed to realize that his adjusted gross income was too high to allow him to take the deduction.
4. The Taxpayer took his completed Forms PIT-1 and PIT-ADJ to the Department's Albuquerque office and asked one of the employees at the front desk to review his return to insure it was filled out correctly.

5. The employee who reviewed the forms did not check the adjusted gross income reported on the PIT-1 to verify that the Taxpayer was entitled to the deduction he had claimed on the PIT-ADJ. Instead, the employee told the Taxpayer that everything appeared to be correct, whereupon the Taxpayer filed his return with the Department.

6. The following year, the Department discovered the error in the Taxpayer's 1999 PIT return and disallowed the deduction he had mistakenly claimed on his PIT-ADJ.

7. On August 8, 2001, the Department issued Assessment No. 481214 to the Taxpayer for \$1,383.00 of additional 1999 personal income tax, plus penalty and interest.

8. On August 14, 2001, the Taxpayer filed a written protest to the assessment of penalty and interest.

9. As of the date of the April 9, 2002 hearing, the amount remaining in dispute was \$363.05 of interest and \$168.30 of penalty.

DISCUSSION

At issue is whether the Taxpayer is liable for the interest and penalty assessed on his underpayment of New Mexico income tax for calendar year 1999. The Taxpayer believes he should be excused from payment for the following reasons: (1) the Department employee who reviewed his return failed to catch the error he made on his 1999 PIT-ADJ; and (2) it took the Department sixteen months to discover the Taxpayer's error and issue an assessment.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 NMSA 1978 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the Department's assessment

of interest and penalty is presumed to be correct, and it is the Taxpayer's burden to present evidence showing he is entitled to an abatement.

Assessment of 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 ten percent, when a taxpayer fails "due to negligence or disregard of rules and regulations" to report or pay taxes in a timely manner. Taxpayer negligence for purposes of assessing penalty is defined in Regulation 3.1.11.10 NMAC as:

- A. failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- B. inaction by taxpayers where action is required;
- C. 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 situations where the taxpayer proves that he "was affirmatively misled by a department employee."

In this case, the Taxpayer was negligent in completing his 1999 personal income tax return. I take administrative notice that the Department's 1999 PIT Form Packet, which is a public record of the Department, explains the income limitations for claiming the over-65 deduction on Schedule PIT-ADJ. Page 16 of the packet sets out a deduction table that lists the amount of the deduction allowed for specific income levels. If the Taxpayer had read these instructions, he would have known he did not qualify for the \$16,000 deduction he claimed.

Even though the Taxpayer made the initial error on his 1999 PIT return, the Department employee who reviewed the return was equally negligent in failing to catch the error. As a result, the employee misled the Taxpayer into believing his return was correct. The Taxpayer had gone to the

Department before filing his return and asked the employee to review the return to insure it was completed correctly. Anyone familiar with the Department's PIT forms and the restrictions on the over-65 deduction should have caught the error on the Taxpayer's return: it was simply a matter of checking the amount of adjusted gross income reported on the PIT-1 to be sure it did not exceed the amount allowed to support the deduction claimed on the PIT-ADJ. Because the employee failed to do this and told the Taxpayer everything looked fine, he went ahead and filed his return with the Department. Based on these facts, the Taxpayer has established a basis for abating the penalty of \$168.30 assessed against him.

Assessment of Interest. Section 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, ***interest shall be paid*** to the state on that amount from the first day following the day on which the tax becomes due, without a regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Accordingly, the reason for a late payment of tax is irrelevant to the imposition of interest. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, Section 7-1-13(E) NMSA 1978.

The Taxpayer argues that he should be excused from payment of interest because the Department waited an unreasonable period of time to notify the Taxpayer of the error on his 1999 PIT return. In fact, there was no undue delay. Pursuant to Section 7-1-18(A) NMSA 1978, the Department

has three years from the end of the calendar year in which a tax is due to issue an assessment. Assessment No. 481214 was issued to the Taxpayer in August 2000—sixteen months after the due date of his 1999 PIT return—and was well within the limitations period provided by the legislature. The Taxpayer also must realize that while he is responsible for filing a single PIT return with the Department, the Department must review and process hundreds of thousands of PIT returns each year, in addition to corporate income tax returns and the monthly returns filed under the state's various business tax programs. Given these circumstances, the Department's August 2000 assessment was not unreasonably delayed.

In this case, the Taxpayer underreported income taxes due to the state. As a result, the Taxpayer—not the state—had use of those tax funds. While one could argue that the rate of interest is high in comparison with current market rates, that is a matter within the discretion of the legislature. The Department does not have authority to substitute its own judgment for that of the legislature in setting the rate of interest to be imposed. Section 7-1-67 NMSA 1978 requires interest to be paid at the rate of 15 percent per annum for any period of time during which the state is denied the use of the funds to which it is legally entitled. Accordingly, interest was properly assessed against the Taxpayer and there is no basis for abatement.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 481214 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was misled by the Department employee who reviewed his 1999 PIT return and is entitled to abatement of the penalty assessed against him.

3. The Department's August 2000 assessment was issued within the statutory time limit set by the New Mexico Legislature.

4. The Taxpayer is liable for payment of interest on his late payment of 1999 personal income taxes.

For the foregoing reasons, the Taxpayer's protest IS GRANTED IN PART AND DENIED IN PART. The Department is ordered to abate the \$168.30 of penalty assessed against the Taxpayer. The Taxpayer remains liable for payment of interest.

DATED April 11, 2002.