

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

IN THE MATTER OF THE PROTEST OF
DARRELL C. BOWERS,
PROTEST TO ASSESSMENT NO. 570664.

Decision No. 95-01

DECISION AND ORDER

This matter came on for hearing on December 16, 1994 before Gerald B. Richardson, Hearing Officer. Darrell C. Bowers, (hereinafter "Taxpayer") represented himself at the hearing. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel.

Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

1. The Taxpayer is employed as a drilling rig manager for offshore oil rigs. The Taxpayer's employer is headquartered in Houston, Texas. The Taxpayer's worksites are on offshore oil rigs around the world.

2. The Taxpayer's work schedule is to work 28 days on the drilling rig and then to have 28 days off. The 28 days off of the rig are used by the Taxpayer for travel to and from the work site from his home in Albuquerque, New Mexico, and to attend work related meetings and trainings scheduled by his employer. Because of the meetings and travel time, the Taxpayer spends less than 50% of his time in New Mexico.

3. For all relevant periods, the Taxpayer has maintained his permanent home in Albuquerque, New Mexico and is a resident of New Mexico.

4. The Taxpayer is single and is the only resident of his household.

5. The Taxpayer had consulted with individuals at H&R Block about his income tax liability to New Mexico. The Taxpayer had been informed that since his income was from employment out of state, that he was not subject to income tax in New Mexico. Based upon that

advice, the Taxpayer did not file and report income for income taxation purposes to the Department.

6. On April 25, 1994, the Department issued Assessment No. 570664 to the Taxpayer, assessing personal income tax in the amount of \$1,256.00, interest in the amount of \$596.70 and penalty in the amount of \$125.60 for tax year 1990. The Department's assessment was issued as a result of information shared between the Department and the Internal Revenue Service pursuant to an information sharing agreement between the two agencies.

7. On May 9, 1994, the Taxpayer filed a written protest to the Assessment, protesting 7/12 of the tax due, and the penalty and interest assessed. At some point prior to the hearing in this matter, the Taxpayer submitted payment for the tax portion of the assessment, which payment was accepted by the Department.

8. Prior to the hearing, the Department abated the penalty portion of the assessment based upon the Taxpayer's statements that he had relied upon the advice of a H&R Block employee and a Department employee that his wages were not subject to New Mexico income taxation.

DISCUSSION

The two issues presented for decision herein are whether a resident of New Mexico who earns income outside of New Mexico may pay tax only upon a proportionate share of that income, representing the portion of time spent in New Mexico, and if tax is due, whether interest is also due relating to the late payment of the tax due.

The Taxpayer maintains his residence in Albuquerque and for all relevant tax periods, has intended to make New Mexico his state of permanent residence. Thus, the Taxpayer meets the definition of a "resident" for purposes of Section 7-2-2(S) of the New Mexico Income Tax Act. While the Taxpayer does not object to paying income taxes in principle, he does object to paying what he believes to be an unfair amount of taxes. The basis of the Taxpayer's argument is that he

is only physically present in New Mexico less than half of the days of the year. As such, he is not present to utilize the many services provided by state government, such as police protection, roads, etc. for much of the year. The Taxpayer objects to paying income tax to New Mexico on 100% of his income when he is not present to benefit from the services paid for by such taxes. The Taxpayer's protest letter proposes that he only be subject to tax on 5/12 of his income, this representing what he believes to fairly approximate the proportion of time he is able to spend in New Mexico.

At the outset, it should be noted that the underlying premise of the Taxpayer's argument, that income should only be taxed in proportion to a Taxpayer's consumption of tax paid services, is one which has never found any support in the law of taxation. It has long been recognized that there is no *quid pro quo* between taxes paid and services consumed because there are many intangible benefits, often called the benefits of living in a civilized society, which are difficult to quantify, but for which every taxpayer benefits. *Wisconsin v. J.C. Penney*, 311 U.S. 435 (1940).

Thus, childless taxpayers are required to contribute to the expense of maintaining public institutions of learning even if they do not send children to public schools.

There is no statutory provision in the Income Tax Act which allows for the apportionment of income subject to taxation according to the amount of time spent in state by resident taxpayers.

The Legislature has seen fit to grant a credit for taxes paid to other states by resident individuals, Section 7-2-13 NMSA 1978, but since the Taxpayer's income was paid by a Texas employer and the state of Texas imposes no personal income tax, this credit is unavailing to this Taxpayer. Without the benefit of a statutory deduction, exemption or tax credit, there is simply no basis for reducing the Taxpayer's liability on a proportionate basis as he requests.

With respect to the imposition of interest, the Taxpayer argued that he should not be subject to interest since he believed that he was acting properly at the time he failed to report and pay income taxes. The underlying premise of this argument, that the imposition of interest is

intended to punish Taxpayer's who fail to report and pay taxes, is simply incorrect. There are provisions in the statutes for imposing penalties on taxpayers who fail to report and pay taxes. *See*, Section 7-1-69 NMSA 1978. In this case, penalty was abated because the Department agreed with the Taxpayer that under the circumstances of this case, where the Taxpayer was incorrectly advised by both H&R Block employees as well as Department employees as to his taxability, that there was no basis for imposing penalty in this matter. The imposition of interest, however, is a different matter. Section 7-1-67(A) NMSA 1978 (1990 Repl. Pamp.) provides:
If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid* to the state on such amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid. (emphasis added).

The imposition of interest merely represents the time-value to the state of not having the tax monies in its possession at the time they were due. While one may quibble with the legislatively determined rate of interest, that is a policy decision made by the legislature which the Department is bound to enforce. Additionally, the legislature has indicated its policy with regard to the imposition of interest by the wording it chose in enacting Section 7-1-67. It provides that interest *shall* be paid any time that a tax is not timely paid. It is a well settled canon of statutory construction that the use of the word "shall" in a statute indicates that the provisions of the statute are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. Thus, the legislature has directed the Department to impose interest whenever taxes are not timely paid, and has provided no exceptions to the mandates of the statute. Thus, interest must be paid any time a tax is untimely paid, regardless of the reasons a taxpayer may have for non-payment.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to Assessment No. 570664, pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of

this protest.

2. New Mexico imposes its income tax, pursuant to Section 7-2-3 NMSA 1978 upon the net income of every resident individual, without regard to the actual amount of time spent by the resident taxpayer within the state. There is no statutory authority within the Income Tax Act to apportion the taxability of the income of a resident individual based upon the proportion of the time the resident taxpayer spends within the state.

3. The tax credit for income taxes paid by resident taxpayers to other state taxing authorities has no applicability to the facts of this case because the Taxpayer paid no income taxes to other states.

4. Interest was properly imposed for the Taxpayer's failure to timely pay taxes.

For the foregoing reasons, the Taxpayer's protest is hereby denied.

Done, this 17th day of January, 1995.