

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

IN THE MATTER OF THE PROTEST
OF *EMIEL AND SARA BOSMAN*,
PROTEST TO
ASSESSMENT NO. 595796.

No. 95-04

DECISION AND ORDER

This matter came on for hearing on July 19, 1995 before Gerald B. Richardson, Hearing Officer. Mr. Emiel Bosman (hereinafter "Taxpayer") represented himself at the hearing. The Taxation and Revenue Department (hereinafter "Department") was represented by Bridget A. Jacober, Special Assistant Attorney General.

Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED as follows:

1. On February 9, 1991, the Taxpayer filed a PIT-1A short form personal income tax return for 1990 claiming a refund in the amount of \$399.42. Based upon this return, the Department refunded \$399.42 to the Taxpayer.

2. The starting point on the PIT-1A form for calculating a taxpayer's New Mexico personal income tax liability is line 7, which instructs a taxpayer to state his adjusted gross income as reported to the federal government.

3. Line 8 of the PIT-1A form instructs taxpayers to state their federal taxable income as reported to the federal government.

4. In filling out lines 7 and 8 of his 1990 PIT-1A form, the Taxpayer made handwritten notations disclosing his federal adjusted gross income and federal taxable income as reported to the federal government and then subtracted \$2,405.69 and filled in the blanks on lines 7 and 8 with the reduced amount reflecting the deduction of \$2,405.69. The Taxpayer's handwritten notations indicated that the \$2,405.69 was non-New Mexico income.

5. In filing his 1990 New Mexico personal income tax return, the Taxpayer also attached a copy of his federal return which reflected the Taxpayer's adjusted gross income and federal taxable income as reported to the federal government which corresponded to the amounts noted in the Taxpayer's handwritten notations on the Taxpayer's New Mexico return.

6. In 1990 the Taxpayer worked as a photographer for Shugart Studios based in Levelland, Texas. The Taxpayer's work was to take photographs of school children. The majority of the Taxpayer's work assignments were in New Mexico but the Taxpayer also worked in Arizona and New Mexico. The \$2,405.69 deducted by the Taxpayer as non-New Mexico income reflects wages earned by the Taxpayer while working on assignments outside of New Mexico during 1990.

7. As a resident, domiciled in New Mexico, the wages earned by the Taxpayer are subject to income taxation by New Mexico regardless of the fact that the work representing those wages occurred outside of New Mexico. If a taxpayer also pays income tax to another state on those same wages, a credit against the taxpayer's New Mexico income tax liability in the amount of taxes paid to the other state is available. The Taxpayer now understands this and agrees that the \$2,405.69 was not deductible for purposes of calculating the income tax owing to New Mexico for 1990. At the time the Taxpayer's return was filed, however, the Taxpayer did not believe that his wages earned as a New Mexico resident for work performed outside of New Mexico were taxable in New Mexico.

8. The Department has an information sharing agreement with the Internal Revenue Service (IRS) whereby the IRS provides the Department information concerning the filing information reported to the IRS by New Mexico residents. The Department then compares the information it receives from the IRS with the information as reported to New Mexico concerning taxpayer's adjusted gross income and federal taxable income. This is called a "tape match program."

9. In 1994, as a result of the tape match program, the Department noted the discrepancy between the Taxpayer's adjusted gross income and federal taxable income as reported to the Department and as reported to the IRS. Consequently, on August 22, 1994, the Department issued Assessment No. 595796 to the Taxpayer, assessing \$59.12 in personal income tax, \$5.91 in penalty and \$30.29 in interest for the 1990 tax year.

10. On September 9, 1994, the Taxpayer filed a timely, written protest to Assessment No. 595796 with the Department.

11. The Department has abated the penalty portion of the assessment and the Taxpayer has paid the tax portion of the assessment.

12. The Taxpayer is now retired, living on a fixed income, and it is more difficult now for him to pay the liability for 1990 than it would have been if the Department had noted the Taxpayer's filing error at the time the 1990 return was filed and had reduced the amount of the Taxpayer's refund claim for 1990. If the error had been caught by the Department at the time of the Taxpayer's 1990 tax filing, it would also have avoided the accumulation of interest upon the unpaid taxes for the 1990 tax year.

DISCUSSION

The Taxpayer does not dispute his liability for the underlying tax assessed and the Department has abated the penalty assessed. Thus, the only issue to be determined is whether the Taxpayer is liable for interest on the underpaid taxes for 1990. The Taxpayer does not dispute that he received the full refund he claimed in filing his 1990 return and that this resulted in the underpayment of taxes until after he paid the assessed tax. The Taxpayer disputes the interest assessed however because he feels that because his return disclosed his erroneous filing position, that the Department should have noticed his mistake, recalculated the tax and correspondingly reduced his refund claimed. Essentially, the Taxpayer's argument is that although he made a mistake in how he filed his tax return, the Department also made a mistake in not catching this mistake when he filed his return, since the difference in calculation was noted on the face of the return. The Taxpayer argues that the Department's mistake should offset his own mistake and that interest should be abated.

It should be noted at the outset that the Taxpayer has operated at all times in good faith. His mistake in the manner in which he filed was based upon a mistaken understanding of how the tax laws applied to wages of a resident earned from out-of-state locations and his tax return made full disclosure of the adjustments to income he was claiming. Nonetheless, the Taxpayer is operating under some misconceptions about the operation of the tax laws and where the responsibility lies for properly reporting taxes.

First, the Taxpayer misunderstands the nature of the assessment of interest. Underlying the Taxpayer's protest to interest is his preception that he is somehow being penalized for not properly reporting his taxes. The assessment of interest is not a penalty, but is intended to compensate the state for the value of revenues which should have been in the hands of the state but were not because taxes were improperly reported. While one may quibble with the rate of interest imposed, that is set by the legislature in Section 7-1-67 NMSA 1978 and the Department

has no authority to charge a rate other than the rate established by statute. The legislature has provided a penalty for failure to properly report taxes based upon taxpayer negligence or fraud. Those penalties are set out at Section 7-1-69 NMSA 1978. The Department has already agreed to abate the penalty assessed because it has determined that in the circumstances of this case, there was no evidence of fraud and insufficient evidence of negligence to require the imposition of penalty. The imposition of interest is not based upon any intention of a taxpayer in filing a return, but is simply based upon the determination that an underpayment of tax occurred for any reason. This is born out by the language of Section 7-1-67(A) which provides in pertinent part: 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).

In this case, the Taxpayer has acknowledged that the tax was not properly reported, resulting in an incorrectly large refund to the Taxpayer, which caused there to be an underpayment of tax. Thus, interest is due for the period of time after the due date that the Department did not have payment of the tax.

The Taxpayer is also operating under a misconception of where the responsibility lies for properly determining a taxpayer's tax liability. We have a self reporting tax system. Section 7-1-13 NMSA 1978 places the responsibility upon taxpayers to report their taxes properly, and in a timely manner. Under such a system it is the taxpayer's responsibility to accurately determine and report its tax liability. Although the Taxpayer did not intentionally misreport his tax liability, nonetheless, it was his error in reporting his income which caused the underreporting of tax. The fact that the Department erred in failing to notice the underreporting and did not catch this error for several years does not shift the responsibility for accurately determining the Taxpayer's liability to the Department. There is simply no exception to the imposition of interest pursuant to Section 7-1-67 when an underpayment of tax occurs due to taxpayer error and the Department

fails to notice the underpayment of tax even though the taxpayer's return provided information that, if analyzed, would provide the Department with the information necessary to determine that an underpayment existed. The fact of the matter is that in this case, the Department accepted the Taxpayer's own determination of his tax liability and granted the Taxpayer's refund based upon the Taxpayer's own calculations. The fact that these calculations were in error and that the Department could have determined that based upon information disclosed in the return does not shift the responsibility for accurately determining tax liability to the Department. The Taxpayer bears that responsibility and must bear the consequences for inaccurately determining his own tax liability.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 595796 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over the parties and the subject matter of this protest.
2. An underpayment of tax resulted from the inaccurate reporting of tax liability by the Taxpayer.
3. Because there was an underpayment of tax as reported by the Taxpayer, interest was properly imposed on the underpayment pursuant to Section 7-1-67 NMSA 1978.
4. The Department's failure to notice, at the time of the filing of the Taxpayer's return, that the Taxpayer had not properly calculated his tax liability does not mitigate the imposition of interest on tax underpayments pursuant to Section 7-67 NMSA 1978.

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

DONE, this 15TH day of August, 1995.