

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

IN THE MATTER OF THE PROTEST OF
FRANKLIN E. AND SHIRLEY J. NILES,
PROTEST TO ASSESSMENT NO. 615724.

NO. 96-06

DECISION AND ORDER

This matter was scheduled for hearing before Julia Belles, Hearing Officer on January 22, 1996. Rather than conduct an evidentiary hearing, the matter was submitted for decision based upon stipulated facts, exhibits and written argument. Frank D. Katz, Special Assistant Attorney General, represented the Taxation and Revenue Department (Department) and Franklin E. and Shirley J. Niles (Taxpayer) represented themselves.

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

FINDINGS OF FACT

1. The Taxpayers earned income in New Mexico and were subject to the New Mexico personal income tax.
2. On April 1, 1995, the Taxpayers received their State of New Mexico 1994 income tax return from their accountant.
3. On April 2, 1995, the Taxpayers signed the return and wrote check number 0805 on Nations Bank in the amount of \$1315 to pay their New Mexico Personal Income Tax (PIT). The Taxpayers mailed the return on April 3, 1995.
4. On April 29, 1995, the Department notified the Taxpayers that it received the return without payment and that they owed \$1315 as tax due, along with \$26.30 as penalty and \$14.43 as interest.

5. The Taxpayers responded and on May 4, 1995 informed the Department that they sent check number 0805 with their return. The taxpayers requested penalty and interest be abated and that if the Department could not find that check they would send another.

6. On May 6, 1995, the Department issued Assessment No. 615724 assessing \$1315 in tax, \$16.43 in interest and \$26.30 in penalty.

7. The Taxpayers timely filed a written protest of the Department's imposition of interest and penalty on the assessment.

8. The Department acknowledged receipt of the protest on May 22, 1995 and advised the Taxpayer that interest on the tax would accrue until the tax was paid.

9. On October 2, 1995, the Department informed the Taxpayers that penalty would be abated penalty if Taxpayers stopped payment on check number 0805 and promptly remitted the tax owed. The Department also informed the Taxpayers that they would still owe \$16.43 in interest since the Tax Administration Act does not permit the abatement of interest.

10. On October 11, 1995, the Taxpayers submitted a check for the \$1315 tax due, a check for \$16.43 in interest, a copy of the stop payment order and a signed withdrawal or protest. The Taxpayers' letter stated they did not think they should have to pay the interest and that the Department should reimburse them for the stop payment fee of \$20.

11. The Taxpayers actually owed additional interest in the amount of \$82.15 to cover the period of May 15, 1995 through October 11, 1995 during which the tax remained unpaid. The Department determined that Taxpayers still wished to challenge the imposition of interest so the withdrawal of protest was not accepted.

DISCUSSION

The Taxpayers dispute the interest that was calculated on the assessment for the time period April 16, 1995 through October 11, 1995. Section 7-1-17(C) NMSA 1978 (1995 Repl.) provides that there is a presumption of correctness which attaches to any assessment of taxes by

the Department. "Tax" is defined to include the amount of interest related to any taxes. Section 7-1-3(U) NMSA 1978 (1995 Repl.). Therefore, the presumption of correctness attaches to the assessment of interest as well and the Taxpayer has the burden of proving that the assessment of interest is incorrect.

The Taxpayers attempted to correctly report and pay their taxes. This case arises from a lost check. The Taxpayers mailed the tax return and they believe that they included the check for taxes owed. The Department received the return but did not receive the check. The lost check has never been found and we shall probably never know what actually happened to it. The Department immediately notified the Taxpayers that it did not receive their check and informed them that interest was now owed on the taxes due. The correspondence between the Department and the Taxpayers over the lost check resulted in the Taxpayers filing written protest of the Department's action on May 8, 1995. On May 22, 1995 the Department acknowledged the protest and warned the Taxpayers that interest would accrue on the taxes owed until the taxes were paid. The Taxpayers paid the taxes assessed on Assessment No. 615724 and paid \$16.43 in interest on October 11, 1995. They also sent a copy of the stop payment order as requested by the Department so the Department could abate the penalty. The Taxpayers owed an additional \$82.15 in interest which accrued between May 15, 1995 and October 11, 1995. The Taxpayers asked that interest be abated because they were not delinquent since the tax return was postmarked by April 15, 1995.

A review of these fact does not indicate that the interest on Assessment No. 0615724 should be abated. The Taxpayers were required to pay taxes on their personal income tax under provision Section 7-1-13(A) NMSA 1978 (1995 Repl.). Section 7-1-12 NMSA 1978 (1995 Repl.) provides the date when the taxes are due. It states: "[t]he return required and the tax imposed on individuals under the Income Tax Act are due and *payment is required* on or before the fifteenth day of the fourth month following the end of the taxable year" (emphasis added).

The Department did not receive the payment for the taxes that were owed by April 15, 1995 and the Taxpayers did not pay their taxes until October 11, 1995. Between April 16, 1995 and October 11, 1995, the Taxpayers had the use of the money that they owed to the Department. Interest was properly assessed on the taxes that were owed since the Taxpayers did not pay their taxes by April 15, 1995 and had the advantage of having the use of the money until they paid their taxes.

The Taxpayers did not meet their burden to show that the Department's imposition of interest was incorrect. The Taxpayers' tax return, as well as tax payment, were due on April 15, 1995. The Department only received the tax return. The Taxpayers did not provide any evidence, such as a cancelled check, to demonstrate that the Department received the payment and that the taxes were timely paid. The taxes were not paid until October 11, 1995. As required by Section 7-1-67(A) NMSA 1978, interest accrued during the time the taxes remained unpaid. The Taxpayers were warned by the Department in its May 22, 1995 letter that interest would accrue until the taxes were paid. Under these circumstances, interest was properly assessed.

CONCLUSIONS OF LAW

1. The Taxpayer timely filed a written protest, pursuant to Section 7-1-24 NMSA 1978 (1995 Repl.), to the interest portion of Assessment No. 615724 and, therefore, jurisdiction lies over the parties and the subject matter of this protest.
2. The date on which Taxpayers' taxes were due was April 15, 1995.
3. The Department timely received the Taxpayers' tax return but did not receive the tax payment until October 11, 1995.
4. The penalty should be abated as the Department agreed to do so if the Taxpayers submitted a copy of the stop payment order. It was submitted on October 11, 1995.
4. The interest that accrued between April 16, 1995 until October 11, 1995 on the

taxes due was properly assessed.

For these reasons, the Taxpayers' protest is hereby denied.

Done this 15th day of February, 1996.