

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

IN THE MATTER OF THE PROTEST OF
ROBERT AND MARILYN DAVIDSON,
PROTEST TO ASSESSMENT NO. 559742.

No. 96-18

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on June 18, 1996. Robert and Marilyn Davidson (hereinafter "Taxpayers") represented themselves at the hearing. The Taxation and Revenue Department (hereinafter "Department") was represented by Gail MacQuesten, Special Assistant Attorney General.

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

FINDINGS OF FACT

1. The Taxpayers moved to New Mexico in the Spring of 1990. For thirty years prior to moving to New Mexico, the Taxpayers lived in the state of Texas, which has no income tax.
2. Mr. Davidson is a retired professor of philosophy, ethics and logic. In the Fall of 1990, Mr. Davidson began teaching at the Santa Fe Community College on a part-time basis.
3. No New Mexico income tax was withheld from the compensation Mr. Davidson was paid by the Santa Fe Community College and because Mr. Davidson was not accustomed to paying state income taxes, it did not occur to him that he was subject to state income tax upon his compensation for teaching in New Mexico. Accordingly, no 1990 New Mexico personal income tax return was filed by the Taxpayers.
4. In the Spring of 1993, the Taxpayers were contacted by the Department, which inquired of the Taxpayers why no 1989 personal income tax return had been filed by them. That matter was cleared up with the Department when the Taxpayers provided evidence that they did

not reside in New Mexico during 1989. In the course of clearing up 1989, however, the Taxpayers learned that they were subject to income taxation by the Department upon their income earned in New Mexico.

5. The Taxpayers requested personal income tax returns for the years 1990, 1991 and 1992 from the Department and subsequently filed returns with the Department and paid any taxes due.

6. On October 15, 1993, the Department issued Assessment No. 559742 to the Taxpayers assessing \$216.39 in interest and \$61.10 in penalty with respect to the late payment of the Taxpayer's 1990 personal income taxes.

7. On November 11, 1993, the Taxpayers filed a written protest of Assessment No. 559742 with the Department.

8. The Department has abated the penalty portion of Assessment No. 559742.

DISCUSSION

The sole issue to be determined herein is whether the Department's assessment of interest should be abated based upon the Taxpayer's lack of knowledge that they were subject to income taxation by the State of New Mexico and with consideration given to the fact that when they learned they were subject to tax, they took measures to properly report their taxes.

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

A. 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)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167

(1977). Applying this rule to Section 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus it doesn't matter why taxes were unpaid. Interest is imposed for the period of time that they are unpaid.

The underlying premise of the Taxpayers' argument is that they feel that the imposition of interest is a punishment or penalty for their failure to timely pay tax. While I have no doubt of the good faith with which the Taxpayers acted and that they did not intend to avoid paying their proper share of taxes, the Taxpayers' argument misapprehends the nature of interest. While it may be painful to pay interest, especially at the rate that the statutes require, interest is not a penalty. It is intended to compensate the state for the time-value of those tax monies which it did not receive when they were due. While one may quibble with the interest rate imposed by the state, that is a matter of policy, established by the legislature, which the Department has no power to change.

The Taxpayers' argument also misapprehends the nature of our tax reporting system. We have a self-reporting tax system in this country which imposes the responsibility upon taxpayers to properly report and pay their taxes. While taxing authorities have the power to assess taxes when they have not properly been reported, this does not shift the primary responsibility from the individuals subject to taxation. Every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions and to report and pay taxes accordingly. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct.App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

Finally, I would note that there are provisions in the law intended to penalize taxpayers for failing to properly report and pay taxes. Section 7-1-69 NMSA 1978 contains provisions for penalties for both negligent failure to pay tax and for failure to pay tax which is done willfully, and with the intent to defraud the state. Although the Taxpayers herein were initially assessed a

penalty for negligent failure to pay, the Department has abated that portion of the assessment. Thus, in this case, the Taxpayers have only been assessed with interest to compensate the state for not getting the tax revenues due to it when those revenues were due from the Taxpayers. Since the Taxpayers' relative fault or lack of fault in failing to pay their tax in a timely manner is irrelevant to the imposition of interest, the Taxpayers' protest must be denied.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely, written protest to Assessment No. 559742 pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Interest was properly imposed upon the Taxpayers for failing to timely pay taxes which were owed by them.

3. The imposition of interest is for the purposes of compensating the government for the value of the use of money which was due to it but not paid in a timely manner, and is not for the purposes of penalizing those who fail to make timely payment.

For the foregoing reasons, the Taxpayers protest IS HEREBY DENIED.

DONE, this 12th day of July, 1996.