

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

IN THE MATTER OF THE PROTEST OF
TIM AND DIANE GONZALES
PROTEST TO ASSESSMENT NO. 683334

No. 97-21

DECISION AND ORDER

This matter came on for formal hearing on May 12, 1997, before Ellen Pinnes, Hearing Officer. Tim and Diane Gonzales ("the Taxpayers"), appeared on their own behalf. The Taxation and Revenue Department ("the Department") was represented by Bruce J. Fort, Special Assistant Attorney General.

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

FINDINGS OF FACT

1. The Taxpayers submitted a timely return for New Mexico personal income tax for 1992. That return was prepared for them by Rosebella Lineberry, a paid tax preparer.
2. In preparing the Taxpayers' state and federal income tax returns for 1992, Ms. Lineberry inadvertently failed to report \$18,491.65 of income received by the Taxpayers as wages paid to Mr. Gonzales. Accordingly, no tax was paid on this income. Instead of paying a balance due for 1992 tax, as they would have been required to do if the omitted income had been included in the return, the Taxpayers received a refund of \$592 from the Department. Although they were surprised to receive such a large refund, the Taxpayers did not question it at the time.
3. In 1994, the federal Internal Revenue Service (IRS) discovered the error in reporting

the Taxpayers' income on their federal tax return. The IRS assessed the additional federal tax due, plus penalty and interest. The Taxpayers concurred in the assessment and paid the amounts determined to be owed.

4. Neither the IRS nor Ms. Lineberry advised the Taxpayers that they should also amend their New Mexico tax return to report the omitted income and pay taxes thereon. The Taxpayers did not take any action to correct the error in their state return.

5. In 1996, the Department discovered the discrepancy between the income reported to the IRS and the amount shown on the Taxpayers' state tax return for 1992 through a computer check, known as a "tape match", comparing information reported to state and federal tax authorities.

6. On October 17, 1996, the Department issued Assessment No. 683334 for \$1,083.21 in personal income taxes for 1992, plus penalty and interest.

7. The Taxpayers filed a timely protest of the assessment by their form protest dated November 7, 1996.

8. The Department has abated penalties assessed against the Taxpayers.

9. The Taxpayers do not contest their liability for the tax. Their challenge is only as to interest imposed.

DISCUSSION

The Taxpayers protest the imposition of interest on two grounds. One is that the failure to make timely payment of the tax owed was due to the error of their paid tax preparer, for which they should not be penalized. The Taxpayers also argue that the Department should have notified them of their duty to amend their state tax return and pay the additional state tax in 1994, when the error was discovered by the IRS, rather than waiting until nearly two years later to contact them regarding the error.

Liability for interest on tax deficiencies

Section 7-1-67 NMSA 1978 provides for the imposition of interest on tax deficiencies:

- 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 ... until it is paid
- B. Interest due to the state under Subsection A ... *shall be at the rate of fifteen percent a year* (Emphasis added.)

It is a well settled rule of statutory construction that the word "shall" is mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The New Mexico Legislature has expressly reiterated this general rule in §12-2-2(I) NMSA 1978 (in construing statutory provisions, the words "shall" and "must" are to be construed as mandatory unless this would be inconsistent with manifest legislative intent or repugnant to the context of the statute).

Section 7-1-67 requires that interest, at the rate of fifteen percent per year, be imposed on the amount of any unpaid tax. No exceptions to this rule are provided for. Interest is intended to compensate the state for the time-value of money which was not paid when it was due. It may be unpleasant to pay interest on monies owed, particularly where the taxpayer is for some time unaware of the existence of the debt, as was the case here. However, interest is not a penalty for late payment. It is, rather, a means of making a creditor whole through reimbursement for not

having had the use of the money during the time it remained unpaid.

The Taxpayers here relied on their paid tax preparer to properly determine and report their state and federal tax liability. That person erred in erroneously reporting the Taxpayers' income. This error was compounded by her later failure to advise the Taxpayers, when the error was discovered, that their state return should be amended as well as the federal one. The Department has abated the penalties originally assessed against the Taxpayers. However, the interest assessed is mandated by statute and cannot be abated.

Department's failure to give earlier notice of error

The Taxpayers also challenge the assessment of interest on the grounds that the Department should have informed them earlier that they owed additional state income tax. They reason that, since New Mexico income tax returns "piggyback" on federal tax information, and the Department has access to information from the IRS, the Department had a duty to notify them promptly when the IRS discovered the error on the Taxpayers' 1992 income tax return.

The Taxpayers misapprehend the nature of the relationship between the state and federal tax systems and tax agencies. New Mexico's personal income tax returns "piggyback" on federal returns in the sense that information from the federal return is transferred to the state return to begin the process of determining the amount of state tax due. Also, the Department performs periodic "tape matches" in which information reported to the IRS is compared with information reported to the state.

Contrary to the Taxpayers' apparent belief, information regarding New Mexico taxpayers is not transmitted to the Department when it is received by the IRS. Rather, the Department becomes aware of such information only through mechanisms such as these periodic tape matches. There is no showing either that the Department was aware of the error in the Taxpayers' 1992 state tax return before the time of the 1996 tape match, or that it should have been. Nor was there any duty on the Department's part to identify such an error or advise the Taxpayers of its existence.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely protest of Assessment No. 683334. Jurisdiction thus lies over the parties and the subject matter of the protest.
2. The Taxpayers do not contest the assessment insofar as it is for income tax owed. The validity of those taxes therefore is not before the hearing officer for decision.
3. The Department has abated penalties assessed against the Taxpayers. The validity of the penalties therefore is not before the hearing officer for decision.
4. The Taxpayers underpaid personal income tax for 1992 and interest was properly imposed on the deficiency at the statutory rate of fifteen percent per year.

For the foregoing reasons, the Taxpayers protest of interest assessed on the tax deficiency IS HEREBY DENIED.

DONE, this 9th day of June, 1997.