

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

IN THE MATTER OF THE PROTEST
OF JOSEPH R. RUIZ
DENIAL OF CLAIM FOR REFUND

No. 98-43

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 10, 1998, before Margaret B. Alcock, Hearing Officer. Joseph R. Ruiz represented himself. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During the period 1987-1994, Mr. Ruiz made certain errors in calculating his federal and state personal income tax ("PIT") liability and fell behind in his payment of state income taxes.
2. Mr. Ruiz's 1990 New Mexico PIT return was due April 15, 1991. Mr. Ruiz filed the return on November 19, 1991, showing tax due in the amount of \$1,367.00. (Exhibit A)
3. Mr. Ruiz was unable to pay the full amount of tax due at the time he filed his 1990 return, but enclosed a partial payment in the amount of \$500.00. (Exhibit B)
4. On December 16, 1991, the Internal Revenue Service ("IRS") issued a correction notice adjusting Mr. Ruiz's 1990 federal income tax return and reducing the amount of tax due to the federal government. (Exhibit 7)
5. On December 24, 1991, the Department issued Assessment No. 466205 assessing Mr. Ruiz for the balance of income tax reported on his 1990 New Mexico PIT return in the total

amount of \$1,151.23, representing tax principal of \$867.00, interest of \$147.53 and penalty of \$136.70. (Exhibit 10)

6. On January 6, 1992, Mr. Ruiz sent a letter notifying the Department of the adjustment made to his 1990 federal income tax return by the IRS. (Exhibit 9)

7. On January 9, 1992, the Department placed a "hold" flag on Mr. Ruiz's 1990 PIT return, which suppressed the mailing of monthly computer-generated billing notices pertaining to that return. The hold flag remained in place until January 1996.

8. On February 28, 1992, Mr. Ruiz filed an amended 1990 New Mexico PIT return reflecting the IRS reduction in his federal adjusted gross income. This adjustment reduced Mr. Ruiz's 1990 state income tax liability from \$1,367.00 to \$1,249.00. (Exhibit 12)

9. On April 16, 1992, the Department notified Mr. Ruiz that his amended 1990 PIT return had been processed. The notice showed an adjusted balance due of \$1,008.16, representing \$749.00 of tax principal, \$134.26 of interest and \$124.90 of penalty. (Exhibit 14)

10. On May 4, 1992, the Department mailed Mr. Ruiz an Enforcement Notice of Delinquent Tax Liability for tax years 1987 and 1990 in the combined amount of \$1,071.91. On the same day, Mr. Ruiz mailed the Department a check for \$63.29 in payment of his 1987 tax liability. This payment left an outstanding balance of \$.46 on his 1987 liability.

11. On May 11, 1992, Mr. Ruiz sent a letter to Mary Rogers, the Department employee listed as the contact person in the Department's May 4, 1992 Enforcement Notice. Mr. Ruiz enclosed a check for \$250.00 as partial payment of the \$1,071.91 in delinquent taxes due for 1987 and 1990 and also enclosed the bottom portion of the notice to insure proper application of his payment. Mr. Ruiz's letter noted that prior to receiving the notice, he had made a payment in the amount of \$63.29 and stated: "I intend to pay the remainder within 60 days." (Exhibit 18)

12. The Department applied \$.46 of Mr. Ruiz's \$250.00 check to pay off the balance remaining on his 1987 tax liability. Instead of applying the balance of \$249.54 to Mr. Ruiz's 1990 delinquent tax liability, the Department applied the payment to personal income taxes Mr. Ruiz owed for tax year 1991.

13. On June 18, 1992, the Department sent Mr. Ruiz a notice that his 1991 income tax return had been processed. The notice showed payments of \$250.00 cash received with the return and a credit of \$249.54, leaving a balance due for 1991 of \$27.94. (Exhibit 19)

14. When Mr. Ruiz received the June 18, 1992 notice, he did not understand why the Department had credited him with a payment of \$249.54 on his 1991 taxes. It did not occur to Mr. Ruiz that this was a misapplication of the \$250.00 he mailed on May 11, 1992 in partial payment of his 1987 and 1990 tax liabilities.

15. On June 29, 1992, Mr. Ruiz called the Department on two different occasions to clarify the source of the \$249.54 credit. Mr. Ruiz recalls being told by a Department employee that someone probably recomputed Mr. Ruiz's 1991 taxes and that this could be the source of the credit. Mr. Ruiz was told he would be billed if he owed more money on his 1991 taxes.

16. Mr. Ruiz did not ask for any further explanation or confirmation of the \$249.54 credit against his 1991 income taxes.

17. Mr. Ruiz did not make any additional payments on his 1990 income taxes.

18. As a result of the hold flag placed on Mr. Ruiz's account at the time he notified the Department of the federal adjustment to his 1990 income tax return, Mr. Ruiz did not receive monthly billing notices of the outstanding amount due on his 1990 taxes.

19. Mr. Ruiz continued to receive notices from the Department concerning his tax liabilities for other years. Mr. Ruiz consistently made payments on the notices he received.

20. In December 1995, Mr. Ruiz's wife called the Department concerning a payment on their 1994 tax liability. The Department employee who checked the Ruiz's account noticed there was an outstanding liability for 1990 income taxes and told Mrs. Ruiz there was a balance due of \$1,008.00.

21. Following Mrs. Ruiz's December 1995 telephone call to the Department, the hold flag was removed from the Ruiz's 1990 return.

22. At the end of January 1996, a billing notice was issued for 1990 taxes showing a balance forward of \$1,008.16, plus additional penalty of \$58.70 and additional interest of \$449.42. The notice also showed a credit of \$15.25, which had been applied from an overpayment of the Ruiz's 1994 tax liability. (Exhibit 26)

23. On February 19, 1996, Mr. Ruiz paid the outstanding tax principal on the 1990 liability, leaving penalty and interest due in the amount of \$767.28. (Exhibit 27)

24. On June 13, 1996, the Department abated \$58.70 of penalty because the penalty had already reached the statutory maximum of 10 percent prior to the accrual of this additional amount as shown on the 1996 billing notice. (Exhibit 32)

25. On August 22, 1996, Mr. and Mrs. Ruiz entered into an installment payment agreement to pay off the \$708.58 balance on their 1990 tax liability. The last payment was made on December 2, 1996. (Exhibit 29)

26. On December 31, 1996, Mr. Ruiz filed a claim for refund of \$449.42, which represents the amount of interest that accrued on his 1990 liability between April 16, 1992, the date the Department sent Mr. Ruiz notice of the balance due on his 1990 amended PIT return (Exhibit

14), and February 15, 1996, the date to which interest had accrued when the Department recommenced sending billing notices on the Ruiz's 1990 tax liability (Exhibit 28).¹

27. On April 28, 1997, the Department denied Mr. Ruiz's claim for refund.

28. On May 2, 1997, Mr. Ruiz filed a written protest of the Department's denial.

29. At the formal hearing held on Mr. Ruiz's protest, the Department introduced calculations showing that \$84.78 of additional interest accrued on Mr. Ruiz's 1990 tax liability as a result of the Department's application of his May 11, 1992 payment to 1991 taxes instead of to 1990 taxes. (Exhibits E and F)

DISCUSSION

Mr. Ruiz's protest raises two issues: (1) whether Mr. Ruiz is entitled to a refund of the interest that accrued on his unpaid 1990 personal income taxes during the period when the Department failed to send Mr. Ruiz monthly billing notices reminding him of his outstanding tax liability; and (2) whether Mr. Ruiz is entitled to a refund of the interest that accrued on the \$249.54 payment that should have been applied to Mr. Ruiz's 1990 taxes but was mistakenly applied to his 1991 taxes.

ISSUE 1: BILLING NOTICES.

Mr. Ruiz maintains that he never refused to pay taxes due to the state and consistently made payments on all liabilities for which he received notices from the Department. It is Mr. Ruiz's position that his 1990 tax liability would have been paid within 60 days of his May 11, 1992 letter and partial payment if the Department had sent him a follow-up notice. He argues that he should not

¹ Mr. Ruiz's method of calculating the amount of his refund claim, as explained at the hearing, included penalty as well as interest. Because the penalty had reached the statutory maximum of 10 percent by April 1992, Mr. Ruiz's final figure of \$449.42 represents only the interest accrued between April 1992 and February 1996.

be liable for interest that accrued during the period the Department failed to remind him of his outstanding liability.

Assessment of Interest. Section 7-1-67 NMSA governs the imposition of interest on late payments of tax and provides, in pertinent part:

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).

The reason for a late payment of tax does not affect the imposition of interest. Unlike the assessment of penalty, the assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). Even taxpayers who contact the Department before a tax is due and obtain a formal extension of time to pay the tax are liable for interest from the original due date of the tax to the date payment is made. Section 7-1-13(E) NMSA 1978. The legislature has directed the Department to assess interest whenever taxes are not timely paid and has provided no exceptions to the mandate of the statute.

Estoppel. Mr. Ruiz maintains that he is not liable for interest accrued during the period the Department failed to send him regular billing notices. In effect, Mr. Ruiz is raising the argument of estoppel, *i.e.*, that the Department's failure to send out billing notices estops the Department from assessing the interest required by Section 7-1-67 NMSA 1978.

(a) **Estoppel Based on Statute.** Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: where the taxpayer acted according to a regulation or where the taxpayer acted according to a revenue ruling addressed to the taxpayer. No regulation or

ruling requires the Department to send out monthly billing notices or relieves a taxpayer of his liability for interest when the Department fails to send such notices. Accordingly, there is no statutory basis for estoppel under Section 7-1-60.

(b) **Estoppel Based “Right and Justice”**. Case law provides for estoppel against the state where right and justice demand its application. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied*, 114 N.M. 227, 836 P.2d 1248 (1992). The following elements must be shown as to the party to be estopped: (1) conduct that amounts to a false representation or concealment of material facts, (2) actual or constructive knowledge of the true facts, and (3) an intention or expectation that the other party will act on the representations. The party claiming estoppel must show: (1) lack of knowledge of the true facts, (2) detrimental reliance on the adverse party's representations or concealment of facts, and (3) that such reliance was reasonable. *Id. See also, Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

The facts of this case do not establish a basis for applying equitable estoppel against the Department. There is no evidence the Department misrepresented or concealed the fact that Mr. Ruiz had an outstanding tax liability for 1990. The Department's failure to regularly remind the taxpayer of this liability does not qualify as either misrepresentation or concealment. Although the reason for placing a hold flag on Mr. Ruiz's account is not entirely clear, the sequence of events suggests that it was done to suppress billings while the Department followed up on Mr. Ruiz's January 6, 1992 letter concerning the adjustment to his 1990 federal income tax return. The Department's failure to remove the flag after Mr. Ruiz's amended state return was processed in April

1992 was an oversight. There is nothing to indicate the Department either intended or expected that the absence of monthly billing notices would lead Mr. Ruiz to lose track of his 1990 tax liability, thereby generating additional interest for the state.

Turning to the taxpayer, there is no question that Mr. Ruiz knew he owed personal income taxes for 1990. The initial liability was established by Mr. Ruiz's own tax return and was later adjusted based on his amended return. On May 4, 1992, the Department sent Mr. Ruiz a notice of delinquent tax liability for 1990 taxes. On May 11, 1992, Mr. Ruiz responded to the notice by sending a partial payment and stating that he intended to pay the balance within 60 days. This payment was never made. At the hearing on his protest, Mr. Ruiz was unable to explain his failure to make the promised payment, except to say that he may have been confused by the subsequent notice pertaining to his 1991 tax liability. He also testified that he probably would have noticed the absence of billing notices for 1990 if he had not been receiving so many notices concerning his delinquent tax liabilities for other years. Mr. Ruiz acknowledged that he never asked the Department for a listing of current liabilities or requested information concerning the outstanding balance of taxes due for 1990.

New Mexico has a self-reporting tax system and it is the obligation of taxpayers, who have the most accurate and direct knowledge of their activities, to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, Section 7-1-13, NMSA 1978. While the Department makes every effort to advise taxpayers of the status of their accounts, the ultimate responsibility for payment of tax remains with the taxpayer. Mr. Ruiz's confusing multiplicity of tax liabilities was a situation of his own making. It was Mr. Ruiz's responsibility to keep track of those liabilities and insure that proper payment was made. To the extent Mr. Ruiz relied on the Department to provide him with bookkeeping services, his reliance was not reasonable. Nor does it justify a finding of

equitable estoppel to relieve Mr. Ruiz of his liability for interest due under Section 7-1-67 NMSA 1978.

ISSUE 2: MISAPPLICATION OF PAYMENT.

On May 11, 1992, Mr. Ruiz sent the Department a \$250.00 partial payment on his 1987 and 1990 tax liabilities. The check was sent with a cover letter to Mary Rogers, the Department employee listed as the contact person in the Department's May 4, 1992 enforcement notice. Mr. Ruiz also enclosed the bottom portion of the notice to insure proper credit. The Department's subsequent application of \$249.54 of the payment to Mr. Ruiz's 1991 tax liability was an error. The payment should have been applied to 1990 taxes.

At the August 10, 1998 hearing, the Department argued that the misapplication of Mr. Ruiz's payment is irrelevant because moving the payment from 1991 to 1990 will simply create an underpayment of 1991 taxes. This may be true, but Mr. Ruiz's liability for 1991 taxes is not at issue in this protest. The only issue before the hearing officer is whether Mr. Ruiz is entitled to a refund of the \$84.78 of interest that accrued on the \$249.54 payment that should have been applied to his 1990 taxes but was mistakenly applied to his 1991 taxes. Mr. Ruiz is entitled to this refund. Pursuant to Section 7-1-29(C) NMSA 1978, the Secretary of the Department has discretion to pay the refund in cash or apply the refund against any other tax for which Mr. Ruiz is liable.

CONCLUSIONS OF LAW

1. Joseph R. Ruiz filed a timely, written protest to the Department's denial of his December 31, 1996 claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. Mr. Ruiz is entitled to a refund of \$84.78 of interest he paid as a result of the Department's misapplication of the \$249.54 payment made by Mr. Ruiz on May 11, 1992.

3. Pursuant to Section 7-1-67 NMSA 1978, interest was properly assessed and paid on the balance remaining on his 1990 income taxes, and no refund is due.

4. The Department's failure to send billing notices to remind Mr. Ruiz of his 1990 tax liability does not estop the Department from assessing and collecting interest due on unpaid taxes as required by Section 7-1-67 NMSA 1978.

IT IS THEREFORE ORDERED that Mr. Ruiz's protest to the Department's denial of his claim for refund is granted in the amount of \$84.78, representing interest accrued on the misapplication of his \$249.54 payment. On all other issues, Mr. Ruiz's protest is denied.

DONE, this 14th day of August 1998.