

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

**IN THE MATTER OF THE PROTEST OF
ESTATE OF INEZ S. VAN TUBERGEN
ASSESSMENT NO. 21390**

No. 02-15

DECISION AND ORDER

A formal hearing on the above-referenced protest was held June 12, 2002, before Margaret B. Alcock, Hearing Officer. The Estate of Inez S. Van Tubergen ("Taxpayer") was represented by Katherine Y. Benny-Dell, the estate's personal representative. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Inez S. Van Tubergen died September 15, 1999. At the time of her death, Mrs. Van Tubergen was a resident of Albuquerque, New Mexico.
2. Katherine Y. Benny-Dell, who lives in Maryland, was appointed as the personal representative of her mother's estate.
3. The due date for reporting and paying estate tax due to the federal government and the State of New Mexico was June 15, 2000.
4. After Mrs. Van Tubergen's death, it was discovered that the attorney who handled the estate of Mrs. Van Tubergen's deceased husband had failed to establish a "by-pass" trust set up in the husband's will.
5. A by-pass trust is an estate planning tool commonly used to minimize the amount of estate tax paid on the combined assets of married couples. Had the trust been established, no tax

would have been due on Mrs. Van Tubergen's estate. Without the trust, the estate owed estate tax to both the federal government and the State of New Mexico.

6. Ms. Benny-Dell hired an attorney in an Albuquerque law firm to explore the possibility of reopening the estate of Mrs. Van Tubergen's husband to establish the by-pass trust retroactive to the date of his death, thereby avoiding the payment of estate tax on Mrs. Van Tubergen's estate.

7. Ms. Benny-Dell never heard back from the Albuquerque attorney. After numerous telephone calls, she learned that he was no longer with the law firm and had left no forwarding address. Ms. Benny-Dell spoke to the firm's senior partner, but he was not familiar with Ms. Benny-Dell's case, nor was he familiar with estate law. The senior partner was subsequently hospitalized for a period of several months and did not return Ms. Benny-Dell's telephone calls.

8. In March 2000, Ms. Benny-Dell's Maryland accountant made several telephone calls to the New Mexico Taxation and Revenue Department and finally reached an employee named Katy, who works in the Department's estate tax unit.

9. On March 24, 2000, the accountant explained the estate's trust problem to Katy and told her that he did not know whether the estate would have a liability or whether the estate was required to file an estate tax return. Katy told the accountant that if the matter were not resolved by the due date of the estate tax return, he should request an extension of time to file the return.

10. At some point following this conversation, the estate obtained a six-month filing extension from the IRS, which was also effective to extend the time to file the New Mexico estate tax return.

11. On April 2, 2000, the accountant left a telephone message for Katy asking for a copy of the instructions for filing a New Mexico estate tax return. On April 13, 2000, the accountant

received a copy of New Mexico's Estate Tax Report, Form 41058. The estate tax return is printed on the front of the form and the instructions for filling out the return are printed on the back of the form.

12. The first sentence of the instructions states: "A tax in an amount equal to the federal credit is imposed on the transfer of the net estate of every resident."

13. The instructions on Form 41058 also state that interest at the rate of 1.25% per month will be due on any payment of estate tax made after the original due date and that "an extension of time, federal or state, does not waive the accumulation of interest."

14. On June 8 and 9, 2000, the accountant called the Department to ask some additional questions, but was unable to reach anyone who could help him.

15. On June 14, 2000, the day before the estate tax return was due, the accountant called Ms. Benny-Dell to determine whether the Albuquerque attorney had made any progress on establishing the by-pass trust. When Ms. Benny-Dell told the accountant that no progress had been made, he advised her to go ahead and pay the amount of federal estate tax that would be due if no trust could be established.

16. On June 14, 2000, the accountant also spoke with Katy in the Department's estate tax unit. The accountant later told Ms. Benny-Dell that he "talked with Katy about filing and about the screw-up the lawyers made with the now-deceased husband's estate accounting and how we were lost as to our requirements to even file a return." Katy responded by advising the accountant to retain a New Mexico attorney to help him figure out the estate's tax liability.

17. On June 15, 2000, Ms. Benny-Dell filed the estate's federal estate tax return, with full payment. Ms. Benny-Dell did not file a New Mexico estate tax return or make any estimated payment of New Mexico estate tax.

18. At some point after her mother's death, Ms. Benny-Dell bought a book on the administration of decedents' estates. The book erroneously stated that New Mexico does not have an estate tax. Ms. Benny-Dell was confused by the book and thought it might not be necessary to file an estate tax return with New Mexico.

19. Ms. Benny-Dell subsequently consulted her personal attorney in Maryland about retaining a New Mexico attorney to help resolve the issue of the by-pass trust. The Maryland attorney said he did not know any attorneys in New Mexico and told Ms. Benny-Dell to just do the best she could.

20. Ms. Benny-Dell finally gave up on the plan to establish the by-pass trust.

21. On December 15, 2000, the last day of the extended filing period, the estate filed a New Mexico Estate Tax Report, Form 41058, with a payment of \$22,284.23.

22. On January 17, 2001, the Department issued Assessment No. 21390 to the estate in the amount of \$1,656.55, representing interest due on the late payment of the estate tax originally due on June 15, 2000. Because the estate had obtained a valid extension of time to file the return, no penalty was assessed.

23. Ms. Benny-Dell's accountant told her that someone at the Department told him that she could request a waiver of the interest by writing a letter to the Department and that such requests were reviewed on a case-by-case basis.

24. On January 28, 2001, Ms. Benny-Dell filed a written protest to the Department's assessment of interest.

DISCUSSION

The issue to be decided is whether the Estate of Inez S. Van Tubergen is liable for the interest assessed on its late payment of estate tax due to the State of New Mexico. Ms. Benny-Dell

argues that the estate should be excused from payment of interest because there were extenuating circumstances for the late payment and because her accountant was not given adequate advice by the New Mexico Taxation and Revenue Department.

Section 7-1-17 NMSA 1978 provides that any assessment of tax by the Department is presumed to be correct. Section 7-1-3 NMSA 1978 defines tax to include not only the amount of tax principal imposed but also “the amount of any interest or civil penalty relating thereto.”

Accordingly, the Department’s assessment of interest is presumed to be correct, and it is the taxpayer’s burden to present evidence to show that it is entitled to an abatement. *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989).

Section 7-1-67 NMSA 1978 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid to the state* on that 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 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, 560 P.2d 167 (1977). 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. The legislature has further specified that an extension of time to file or pay taxes does not excuse the taxpayer from the payment of interest. *See also*, Section 7-1-13(E) NMSA 1978, which gives the Secretary of the Department authority to extend filing and payment due dates, but states that “no extension shall prevent the accrual of interest as otherwise provided by law.”

When the Department determines that a taxpayer has been negligent or fraudulent in failing to pay taxes due to New Mexico, Section 7-1-69 NMSA 1978 directs the imposition of a 10%

negligence penalty or a 50% fraud penalty. In contrast, the imposition of interest pursuant to Section 7-1-67 NMSA 1978 is not a penalty designed to punish taxpayers, but is a means of compensating the state for the time value of unpaid revenues. In this case, the Van Tubergen estate failed to pay its estate taxes in a timely manner. Because Ms. Benny-Dell had valid reasons for this failure, no penalty was assessed under Section 7-1-69 NMSA 1978. The fact remains, however, that the state was denied the use of funds to which it was legally entitled during the six-month period between June 15, 2000 and December 15, 2000. In effect, the state made an involuntary loan of funds to the taxpayer—a loan on which interest was statutorily imposed at the rate of 1.25% per month.

Ms. Benny-Dell argues that the estate should be excused from the payment of interest because the Department failed to properly advise her accountant concerning the requirements for filing a New Mexico estate tax return. The evidence does not support this contention. According to Ms. Benny-Dell, her accountant first talked to Katy, an employee in the Department's estate tax unit, on March 24, 2000. During this conversation, the accountant explained the estate's problem with the by-pass trust and told Katy that he did not know whether the estate would have a tax liability or needed to file an estate tax return. Katy told the accountant that if the matter were not resolved by the due date of the estate tax return, he should request an extension of time to file the return. This was the correct advice to give the taxpayer. By following Katy's advice and obtaining a six-month extension from the IRS, the estate avoided payment of the \$2,228.42 late-filing penalty that would have been assessed against the estate if it had filed its return without a filing extension.

The accountant's next contact with the Department was on April 2, 2000, when he left a telephone message for Katy asking for a copy of the instructions for filing a New Mexico estate tax return. Eleven days later, on April 13, 2000, the accountant received a copy of New Mexico's Estate Tax Report, Form 41058. This form is a public record of the Department, and I take administrative

notice that the form consists of two sides: the estate tax return itself is printed on the front of the form and the instructions for completing the return are printed on the back of the form. The first sentence of the instructions states: “A tax in an amount equal to the federal credit is imposed on the transfer of the net estate of every resident.” The instructions also warn taxpayers that interest at the rate of 1.25% per month will be due on any payment of estate tax made after the original due date and that “an extension of time, federal or state, does not waive the accumulation of interest.”

On June 8 and 9, 2000, the accountant called the Department to ask some additional questions, but was unable to reach anyone who could help him. Ms. Benny-Dell maintains that because no one was available to answer the accountant’s questions on June 8th and 9th, the estate was unable to file a timely estate tax return. When she was asked to explain what information the accountant needed that was not contained in the Department’s instructions, Ms. Benny-Dell was unable to answer the question. She said that she never called or spoke to anyone in the Department herself and was relying solely on notes “e-mailed” to her by her accountant. Ms. Benny-Dell acknowledged that she does not understand estate tax matters and does not know why the accountant was unable to complete the New Mexico estate tax form he received from the Department in mid-April 2000.

On June 14, 2000, the day before the estate tax return was due, the accountant talked with Katy in the Department’s estate tax unit. The accountant subsequently told Ms. Benny-Dell that he “talked with Katy about filing and about the screw-up the lawyers made with the now-deceased husband’s estate accounting and how we were lost as to our requirements to even file a return.” Katy responded by advising the accountant to retain a New Mexico attorney to help him figure out the estate’s tax liability. This was a reasonable response. It was clearly unreasonable for Ms. Benny-

Dell and her accountant to expect an employee of the Department to resolve complex legal issues of trust and probate law and advise the estate as to whether it was required to file an estate tax return.

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 those liabilities to the state. *See*, Section 7-1-13(B) NMSA 1978; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). If a taxpayer does not have adequate knowledge or information to complete his tax returns, he has an obligation to consult with a qualified accountant or attorney. Ms. Benny-Dell's testimony that she could not obtain the services of a New Mexico attorney because her Maryland attorney did not know anyone in New Mexico is unconvincing. There are many sources to obtain information concerning New Mexico attorneys. As just one example, the State Bar of New Mexico maintains a list of attorneys who have qualified as specialists in specified areas of practice, including estate planning, probate and trusts. This information can be obtained by calling the State Bar on the telephone or by accessing the State Bar's web site on the internet.

Finally, Ms. Benny-Dell maintains that the Department misled her into believing she could obtain a waiver of the interest assessed against the estate. Again, the evidence does not support this contention. Ms. Benny-Dell's accountant told her that someone at the Department told him that the estate could write a letter requesting a waiver of the interest and that such requests were reviewed "on a case-by-case basis." Ms. Benny-Dell testified that she and her accountant "assumed" the interest would be waived because there were extenuating circumstances to explain the estate's late payment of estate tax. A taxpayer's assumption does not equate to a promise by the Department. Given the clear language in the Department's instructions that interest is due on payments of estate tax made after the original due date and that an extension of time to file does not waive the accumulation

of interest, it is difficult to understand why Ms. Benny-Dell believed that interest would be waived in this case.

After reviewing the evidence presented, there is no basis to find that the Department was responsible for the estate's late payment of estate tax or that the Department promised Ms. Benny-Dell a waiver of the interest assessed as a result of the late payment. Section 7-1-67 NMSA 1978 requires interest to be paid whenever the state is denied the use of tax revenue to which it is legally entitled. Accordingly, interest was properly assessed against the estate for the six-month period from June 15, 2000, the date the estate tax was originally due, until December 15, 2000, the date payment was made.

CONCLUSIONS OF LAW

1. The Estate of Inez S. Van Tubergen filed a timely, written protest to Assessment No. 21390, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Van Tubergen Estate was late in paying estate taxes due to the state, and interest was properly assessed pursuant to Section 7-1-67 NMSA 1978.
3. The Department was not responsible for the Estate's failure to pay estate taxes on time and is not estopped from assessing or collecting interest due on the late payment.

For the foregoing reasons, the taxpayer's protest IS DENIED.

DATED June 17, 2002.