

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

IN THE MATTER OF THE PROTEST
OF *DONALD DUSZYNSKI*
PROTEST TO ASSESSMENT NO. 560523.

No. 96-03

DECISION AND ORDER

This matter was heard on December 18, 1995 by Julia Belles, Hearing Officer. Mr. Duszynski (Taxpayer) was represented by Vidal Oaxaca, Esq. and the Taxation and Revenue Department (Department) was represented by Bruce J. Fort, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED as follows:

FINDINGS OF FACT

1. The Taxpayer is a resident of New Mexico who pays personal income tax.
2. In 1984, the Taxpayer decided to invest in a tax shelter.
3. By 1988, the Taxpayer realized the investment did not provide shelter from tax liability and sought advice on how to deal with this problem.
4. On June 15, 1988, the Taxpayer amended his 1984 federal income tax return to adjust his income to reflect the money that was invested in the tax shelter.
5. The Taxpayer paid the Internal Revenue Service (IRS) the anticipated tax liability which he estimated when he amended his 1984 federal income tax return.
6. The IRS did not resolve the issue of the Taxpayer's tax liability until the early 1993 and sent the Taxpayer notice of his additional tax liability on June 14, 1993.
7. Pursuant to the information sharing agreement between the Department and the IRS, the Department received information that the Taxpayer's federal taxable income upon which New Mexico bases its income tax calculations was adjusted and, on 10/30/93, the Department sent the Taxpayer Notice of Assessment No. 560523 assessing \$1,373.00 in tax, \$1767.73 in

interest and \$137.30 penalty.

8. On November 17, 1993, Taxpayer timely filed a written protest to Assessment No. 560523.

9. On February 9, 1994, the Department abated the penalty on Assessment No. 560523.

DISCUSSION

The Taxpayer disputes the interest that was calculated on his late payment of taxes for the time period April 16, 1985 to June 1993. The Taxpayer argued that the statutes in effect in 1993, when the federal adjustment was made, should apply. The Department argued the statutes in effect in 1984, when the tax was due, were applicable, but agreed to use the 1993 statutes since there were no material differences.

Section 7-1-67(A) NMSA 1978 establishes the way in which interest will be assessed. "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). Thus, the imposition and calculation of interest is governed by the due date for the tax at issue. The Taxpayer was liable for taxes as he earned income in New Mexico, which made him subject to the Income Tax Act, Section 7-1-2 NMSA 1978. The Taxpayer was required to pay taxes on his personal income tax under the provision of Section 7-1-13(A). Section 7-1-13(A) NMSA 1978 mandates: "[T]axpayers are liable for tax at the time of and after the transaction or incident giving rise to tax, until payment is made. Taxes are due on and after the date on which their payment is required, until payment is made." To determine the due date, we refer to the pertinent provision of the Income Tax Act, Section 7-1-12 NMSA 1978, which provides: "[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."

The Taxpayer argues that Section 7-2-12 NMSA 1978 is modified by Section 7-1-13(C) NMSA 1978 which addresses the filing of an amended return and payment of any additional tax because of an adjustment made at the federal level. The Taxpayer argues that, pursuant to Section 7-1-13(C) NMSA 1978, the filing of an amended federal tax return changed the due date of his tax liability so that the accrual date for the interest should start from July of 1993 when the IRS adjusted his federal income tax liability. Section 7-1-13(C) NMSA 1978 states: "[i]f any adjustment is made in the basis for computation of any federal tax, the taxpayer affected shall, within thirty days, file an amended return with the department. *Payment of any additional tax due shall accompany the return.*" (emphasis added) The Taxpayer argued that under this provision he was not liable for additional taxes until his federal tax liability was adjusted. He then had thirty days to file his amended return. He claims that interest would start to accrue thirty days after filing the amended return.

The Taxpayer misunderstands the operation of these two statutes and confuses the due date for income taxes with the requirement for payment of taxes due because of the filing of an amended return. Section 7-1-13(C) NMSA 1978, which Taxpayer relies upon, establishes a time limit within which to file an amended return and requires that the payment be filed with the return. It does not change or modify the due date for payment of taxes on income earned in 1984, which was April 15, 1985. As the tax was due on April 15, 1985, interest accrued on the deficiency starting April 16, 1985. Section 7-1-67(A) NMSA 1978.

The Taxpayer argued that Section 7-1-13(C) NMSA 1978 refers to "tax" and does not include interest as part of what is due thirty days after a federal adjustment. The Taxpayer used Section 7-1-67(A) to buttress his argument. That is, interest only starts to accrue after the tax is due so tax cannot include interest. The Taxpayer pointed out that if this interpretation is given weight, then Section 7-1-13(C) NMSA 1978 becomes ambiguous and the ambiguity should be

resolved in his favor. This argument ignores the clear and unambiguous definition of "tax" set out at Section 7-1-3(U) which provides:

'tax' means the total amount of each tax imposed and required to be paid, withheld and paid or collected and paid under provision of any law made subject to administration and enforcement according to the provisions of the Tax Administration Act and, unless the context otherwise requires, *includes the amount of any interest or civil penalty relating thereto...*(emphasis added)

As interest is included in the definition of 'tax' and there is nothing in the context of Section 7-1-13(C) NMSA 1978 addressing interest whatsoever, the payment of both interest and taxes is due thirty days after the federal adjustment. With this argument the Taxpayer is trying to create an ambiguity where none exists. As explained earlier, under Section 7-2-13 NMSA 1978, the Taxpayer was liable for its 1984 income taxes on April 15, 1985. Any tax unpaid at that time would cause the addition of interest under Section 7-1-67(A) NMSA 1978 until all tax was paid. Thus, at the time the Taxpayer filed his amended return, additional interest was already owed on the additional tax due and Section 7-1-13(C) NMSA 1978 requires that this be paid, in addition to the tax, at the time the amended return is filed.

The Taxpayer relied on statutes dealing with tax refunds, Sections 7-1-68 and 7-1-26(D) NMSA 1978, to illustrate that the legislature contemplated and enacted laws to have specific time periods for dealing with interest that accrues on refunds and argued that the concepts embodied in those provisions of laws should be applied to this case. The Taxpayer used the statutory scheme for refunds as an example to demonstrate that the legislature can and does change the time periods by which interest is calculated. While it is true that the Legislature has provided for a different methodology and time periods for the calculation of interest on overpayments of tax, there is no overpayment of tax at issue in this case and those statutes are not pertinent to decide the date when the interest accrues on an underpayment of tax, a matter specifically addressed by Section 7-1-67(A) NMSA 1978.

The Taxpayer admitted that the reason he filed his amended return with the IRS was to avoid the assessment of penalty and the accrual of interest for his 1984 tax liability. New Mexico calculates income tax based on the federal taxable income. The Taxpayer could have filed an amended return with the Department at the same time he filed an amended return with the IRS and avoided the accrual of further interest. Instead, he chose to wait until his federal liability was finalized. The consequence of this action within New Mexico's statutory scheme is that interest accrued on this liability until it was paid.

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. 560523 and, therefore, jurisdiction lies over the parties and the subject matter of this protest.
2. The date on which Taxpayer's tax was due was April 15, 1985.
3. The IRS's delay in adjusting the Taxpayer's federal income tax liability does not operate to change the due date of the Taxpayer's liability to the Department or the calculation of interest on whatever portion of the Taxpayer's liability to the Department which remained unpaid.
4. "Tax" is defined by Section 7-1-3(U) NMSA 1978 and includes interest in the definition, consequently, the presumption of correctness attaches to the assessment of interest.
5. The statutory scheme involving refunds is not relevant to the issue of interest that accrues on a tax deficiency.

For these reasons, the Taxpayer's protest is hereby denied.

Done this 17th day of January, 1996.