

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

IN THE MATTER OF THE PROTEST OF  
*WILBE ANTONE*  
PROTEST TO ASSESSMENT NOS. 613871,  
613872, 613873, 614053, 614107, 614112

**No. 97-22**

**DECISION AND ORDER**

This matter came on for hearing on May 12, 1997, before Ellen Pinnes, Hearing Officer. Wilbe Antone ("the Taxpayer") appeared on his own behalf. The Taxation and Revenue Department ("the Department") was represented by Bruce J. Fort, Special Assistant Attorney General.

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

**FINDINGS OF FACT**

1. The assessments at issue in this matter are for personal income taxes plus penalty and interest. Assessment Nos. 613871, 613872, and 613873 are for tax years 1987 through 1989 and were issued by the Department on March 26, 1995. Assessment No. 614053, for 1991, was issued on April 3, 1995. Assessment Nos. 614107 and 614112 are for 1992 and 1993 and were issued on April 6, 1995.

2. By his letter dated April 10, 1995, the Taxpayer filed a timely protest to the foregoing assessments.

3. The Taxpayer is a member of the Oneida Tribe. His wife is a member of the Navajo

Nation. The Taxpayer and his wife reside on the Navajo Reservation and did so during the time relevant to the assessments at issue.

4. The Taxpayer's income was received from work on the Navajo Reservation.
5. New Mexico income tax was not withheld from the Taxpayer's pay.
6. As an Indian working on an Indian reservation, the Taxpayer believed that he was not subject to New Mexico income tax.
7. Upon receiving the assessments, the Taxpayer acquiesced in the assessment of income tax, but challenged imposition of penalty and interest.
8. The Taxpayer has made payments to the Department to satisfy the liability for income tax included in the assessments. The tax due under several of those assessments has been paid in full. The Taxpayer has partially paid the tax due under the remaining assessments.
9. The Department has agreed to abate the penalties assessed against the Taxpayer.

### DISCUSSION

The Taxpayer does not contest the assessment of income tax for the years at issue, and the Department has abated the penalties included in the original assessments. Thus, the only issue remaining for decision is the propriety of interest imposed on the tax deficiencies. The Taxpayer challenges assessment of interest on the grounds that it is unfair to charge interest when he acted in good faith and believed that he was not liable for tax.

The New Mexico Tax Administration Act 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.)

§7-1-67 NMSA 1978.

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 15% per year, be imposed on the amount of any unpaid taxes. No exceptions to this rule are provided for.

The Taxpayer here apparently sees interest as a punishment and believes that it should not be imposed when he acted innocently and in good faith. However, interest is not a penalty for late payment. 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. But interest is not intended as a punishment. 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. While the interest rate imposed here may seem high, that rate has been set by the Legislature in the statute, and both the Department and the hearing officer lack the authority to reduce it.

There is no contention here that the Taxpayer acted otherwise than in complete good faith, or that he was in any way trying to evade his tax obligation. The Department apparently agrees that the Taxpayer's conduct was in no way culpable, as it has abated the penalties originally assessed. However, the interest assessed is mandated by statute and cannot be abated.

#### CONCLUSIONS OF LAW

1. By his letter of April 10, 1995, The Taxpayer filed a timely protest of Assessment Nos. 613871, 613872, 613873, 614053, 614107 and 614112. Jurisdiction thus lies over the parties and the subject matter of this protest.

2. The Taxpayer does not contest the assessment insofar as it is for personal income taxes owed. The validity of those taxes therefore is not before the hearing officer for decision.

3. The Department has abated penalties assessed against the Taxpayer. The validity of the penalties therefore is not before the hearing officer for decision.

4. The Taxpayer failed to pay New Mexico personal income tax owed for the years at issue and interest was properly imposed on the deficiency at the statutory rate of fifteen percent per year.

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

DONE, this 9th day of June, 1997.