

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

IN THE MATTER OF THE PROTEST OF
JERRY ANAYA, SR.
PROTEST TO ASSESSMENT NO. 687052

NO. 97-35

DECISION AND ORDER

This matter came on for formal hearing on September 17, 1997 before Gerald B. Richardson, Hearing Officer. Mr. Jerry Anaya, Sr., hereinafter, "Taxpayer", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer had his 1992 state and federal income tax returns prepared by H & R Block.
2. Sometime after filing his federal return, the Taxpayer was assessed approximately \$100 of additional federal tax for tax year 1992. The Taxpayer simply paid the additional tax without investigating the basis for the additional assessment.
3. Pursuant to its information sharing agreement with the Internal Revenue Service ("IRS"), the Department receives information from the IRS providing information as to the

income tax reporting information the IRS has on New Mexico residents. The Department then compares that information with the information it has in its records concerning taxpayer reporting and determines if there are any discrepancies. This comparison is called a tape match.

4. As a result of information received from the IRS, on November 6, 1996 the Department issued the Taxpayer Assessment No. 687052, assessing \$155.90 in additional personal income tax, \$15.59 in penalty and \$83.79 in interest for the 1992 tax year.

5. On December 5, 1996, the Taxpayer filed a timely, written protest to the interest portion of Assessment No. 687052.

6. After receiving the Department's assessment, the Taxpayer investigated the source of the discrepancy between the income reported to the Department by the IRS and that which he reported. The Taxpayer discovered that the discrepancy was due to the failure to report an additional \$2,688 of income which was received during tax year 1992 from the Taxpayer's employment by Lovato's Lounge. The Taxpayer was unable to determine whether his failure to report this income was due to his misplacement of his W-2 form from Lovato's Lounge or whether H & R Block overlooked the W-2 form.

7. The Taxpayer had received an refund from the Department of \$161.75 for tax year 1992 based upon the information contained in the Taxpayer's 1992 personal income tax return.

DISCUSSION

The sole issue to be determined herein is whether the Taxpayer is liable for the interest assessed due to his underreporting of income for tax year 1992. The Taxpayer objects to the assessment of interest because of the more than three years that passed between the filing of his return and the assessment of tax, which allowed interest to accrue during that time.

Section 7-1-67(A) NMSA 1978 addresses the imposition of interest on tax deficiencies and provides as follows:

- 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)

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to Section 7-1-67, the statute requires that interest be paid to the state on any unpaid taxes and no exceptions to the imposition of interest are countenanced by the statute. Thus, it doesn't matter why taxes were unpaid. Interest is imposed for the period of time that they are unpaid.

The Taxpayer's argument essentially conceives of interest as a penalty imposed to punish a taxpayer for the late payment of taxes. This argument misapprehends the nature of the assessment of interest. Interest is imposed to compensate the state for the lost value of having tax revenues at

the time they are required to be paid. Those tax revenues could have been invested by the state and interest earned upon those revenues, until the state needed to use the money to meet its obligations. While one may disagree with the rate of interest set by the legislature, as being excessive in comparison with market rates of interest, that is a matter within the sound discretion of the legislature, and the Department is without authority to substitute its own judgment for that of the legislature in setting the rate of interest to be imposed.

The Taxpayer's argument also misapprehends where the burden of correctly reporting and paying taxes lies. Although it is unfortunate that there was such a long lapse of time between the filing of the Taxpayer's 1992 income tax return and when the Department issued its assessment, nonetheless, the primary responsibility for reporting and paying taxes correctly lies with the Taxpayer. The Taxpayer is the one who has the information, such as W-2 forms and other books and records to allow him to properly report and pay taxes in a timely manner. While there is no question that the Taxpayer's underreporting of tax in this instance was inadvertent and unintentional, it still remains that the Taxpayer was in the best position to know if his tax return was complete and accurate at the time it was filed. Even if the mistake was not realized immediately, the Taxpayer found out that there was some problem when he was assessed additional tax by the IRS. Since both the Department and the IRS use the same starting point in determining taxable income, that is, federal adjusted gross income, any adjustments to income by the IRS should have tipped off the Taxpayer that there may also need to be an adjustment to his state tax return. In fact, whenever there is an adjustment of a federal tax liability, § 7-1-13(C) NMSA 1978 requires that taxpayers file an amended state return and pay any additional taxes due

within ninety days of the federal adjustment. Thus, in this case the Taxpayer was on notice well before the Department even received the federal tape match information that additional state tax may be due.

There is a lapse of over a year from the due date for federal and state returns before the Department even receives the information from the IRS with which to compare the amounts reported to the two taxing agencies. Then the Department must cross check over 30,000 returns and investigate the basis for the discrepancies and determine whether the discrepancy signifies an underreporting of tax. Thus, there will always be well over a year and often several years before the Department will assess tax on any differential. Because the § 7-1-67 mandates that interest be imposed on any unpaid taxes from the date they are due until the date they are paid, there will often be a significant accrual of interest. While this is unfortunate, as noted above, the Taxpayer is in the best position to determine if his taxes are being accurately reported and is in the best position to assure that there is no basis for assessing interest on the underpayment of tax.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 687052 and jurisdiction lies over both the parties and the subject matter of this protest.
2. Interest was properly assessed due to the Taxpayer's underpayment of tax for tax year 1992.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 26th day of September, 1997.