

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

IN THE MATTER OF THE PROTEST  
OF JIM D. DODSON  
ASSESSMENT NO. 704860

98-34

**DECISION AND ORDER**

This matter came on for formal hearing on June 12, 1998, before Margaret B. Alcock, Hearing Officer. Jim Dodson appeared on his own behalf. 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. Jim Dodson filed timely federal and New Mexico personal income tax ("PIT") returns for calendar year 1993.
2. Mr. Dodson was a first-year resident of New Mexico in 1993 and was not familiar with New Mexico's personal income tax laws.
3. The Department's 1993 Form PIT-1 and related instructions directed taxpayers to report their federal adjusted gross income on Line 7 of the New Mexico return.
4. Mr. Dodson did not believe he should have to include the portion of his federal adjusted gross income that he earned in California on his New Mexico return. Mr. Dodson failed to notice the Department's instructions directing first-year residents to report all federal adjusted gross income and then use Form PIT-B to allocate and apportion that income between in-state and out-of-state sources.

5. Mr. Dodson called the Department to ask whether his California income was subject to tax in New Mexico and was told that only his New Mexico income was subject to tax. Mr. Dodson did not specifically ask how his income should be reported on Form PIT-1, nor did the employee volunteer any information concerning the method first-year residents should use to allocate and apportion income between New Mexico and out-of-state sources.

6. Based on his belief that only New Mexico income should be reported on his New Mexico income tax return, Mr. Dodson ignored the Department's instructions to report all federal adjusted gross income on Line 7 of Form PIT-1 and use Form PIT-B to allocate and apportion that income. Instead, Mr. Dodson excluded his California income from the amount reported on Line 7 of the New Mexico return.

7. As a result of this reporting error, Mr. Dodson underreported his 1993 New Mexico income tax by \$165.45.

8. In 1997, the Department discovered the discrepancy between the income Mr. Dodson reported to the IRS and the income shown on his New Mexico PIT-1 return through a computer tape-match program that compares information reported to state and federal tax authorities.

9. In May 1997, the Department sent an inquiry letter to Mr. Dodson, who responded promptly and explained that the difference between the federal and state income reported was due to his reporting only New Mexico income on Line 7 of his 1993 state return.

10. On May 30, 1997, the Department issued Assessment No. 704860 to Mr. Dodson in the amount of \$165.45 tax principal, representing the underreporting created by Mr. Dodson's erroneous method of computing his 1993 state income taxes, plus \$16.54 penalty and \$78.58 interest.

11. On June 3, 1997, Mr. Dodson filed a protest of the Department's assessment of penalty and interest.

### DISCUSSION

At issue is whether Mr. Dodson is liable for the Department's assessment of penalty and interest on his underpayment of state income tax for calendar year 1993. Mr. Dodson objects to the assessment because the Department did not notify him of the error in his state return until May 1997, thirty-eight months after the return was filed.

**Assessment of Interest.** Section 7-1-67 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 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). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Accordingly, the reason for a late payment of tax is irrelevant to the imposition of interest.

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.

**Assessment of Penalty.** Section 7-1-69 NMSA 1978 (1995 Repl.Pamp.) governs the imposition of penalty during the period at issue in this protest. Subsection A imposes a penalty of two percent per month, up to a maximum of ten percent:

in the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid...

The statute imposes penalty based on negligence (as opposed to fraud) for failure to timely pay tax.

There is no contention on the part of the Department that Mr. Dodson's underpayment of his 1993 state income tax was the result of fraud or bad faith. What remains to be determined is whether Mr. Dodson was negligent in failing to properly report those taxes.

Taxpayer "negligence" for purposes of assessing penalty is defined in Regulation 3 NMAC

1.11.10 as:

- 1) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;
- 2) inaction by taxpayers where action is required;
- 3) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, Mr. Dodson's underpayment of his 1993 state income tax was due to his erroneous belief that only New Mexico income should be reported on his New Mexico return and his failure to notice the requirement that first-year residents must file a Form PIT-B to allocate and apportion out-of-state income. At the hearing, Mr. Dodson raised three arguments to support his contention that he should not be held liable for his misunderstanding of New Mexico law.

First, Mr. Dodson argued that the Department's instructions to the 1993 New Mexico PIT-1 return were confusing. He did not explain which portions of the instructions caused his confusion. Nor did he explain why he did not see the paragraph on the first page of the instructions that begins with the words "First Year Resident" in bold print. That paragraph states:

**First Year Resident:** A first year resident is an individual who has moved to New Mexico during the tax year and who was a nonresident for at least one full tax year prior to moving to New Mexico. *A first year resident of New Mexico*

*must file using the forms PIT-1 and PIT-B to allocate and apportion income from both within and without New Mexico. (emphasis added).*

Page 3 of the instructions lists the forms required to be attached to the long form of the PIT-1. Included in the list is the PIT-B:

**PIT-B, ALLOCATION AND APPORTIONMENT SCHEDULE**—Use if you are a full-year resident taxpayer who has income or losses from business or property located outside New Mexico *or if you are a first-year resident of New Mexico. (emphasis added).*

The evidence does not support Mr. Dodson's position that the Department's instructions were confusing. Nothing in the instructions could be read to advise first-year residents to report only New Mexico income on the PIT-1. Both the instructions and the form itself direct first-year residents to report the federal adjusted gross income shown on federal Form 1040 and then use Form PIT-B to allocate and apportion out-of-state income.

Mr. Dodson's second argument was that the Department employee with whom he spoke in 1994 should have given him better directions concerning the method of reporting his out-of-state income. This argument is problematic for two reasons. First, Mr. Dodson does not have a clear memory of the details of the conversation. While this is understandable given the amount of time that has passed, it is difficult to evaluate the advice given to Mr. Dodson when there is no way to know exactly what questions were asked. Nor is it possible to test the employee's memory of the conversation since Mr. Dodson did not ask for the employee's name. The second problem with Mr. Dodson's argument is that even assuming the employee failed to inform him of the reporting method to be used by first-year residents, the Department had already provided this information in the instructions to Forms PIT-1 and PIT-B.

Finally, Mr. Dodson argued that the Department was negligent in failing to notice the error in his 1993 income tax return at the time the return was filed. This argument misapprehends the nature of

New Mexico's self-reporting tax system. 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. There are insufficient government resources available for the Department to continually audit every taxpayer to determine whether he or she has fully complied with state tax laws.<sup>1</sup> Every person is therefore charged with the reasonable duty to ascertain the possible tax consequences of his action. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). In this case, it was Mr. Dodson's responsibility to obtain the information he needed to properly report and pay his New Mexico income taxes. He cannot avoid the consequences of his reporting error by attempting to shift this responsibility to the Department.

#### **CONCLUSIONS OF LAW**

1. Mr. Dodson filed a timely, written protest to Assessment No. 704860 pursuant to Section 7-1-24 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.
2. Pursuant to Section 7-1-67(A) NMSA 1978, interest was properly assessed against Mr. Dodson on the late payment of a portion of his 1993 state income taxes.
3. Pursuant to Section 7-1-69(A) NMSA 1978, Mr. Dodson was negligent in underreporting his 1993 personal income taxes and penalty was properly imposed.

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

DONE, this 15<sup>th</sup> day of June 1998.

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<sup>1</sup> Although the Department performs periodic "tape matches" that compare information reported to the IRS with information reported to New Mexico, there is some delay before the federal tape match information is made available to the Department. Under the Tax Administration Act, the Department has three years from the end of the calendar year in which a tax is due to issue an assessment. Section 7-1-18(A) NMSA 1978. The May 30, 1997 assessment issued to Mr. Dodson was well within the statutory limitations period provided by the New Mexico Legislature.