

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
KELLY A. DAY  
TO ASSESSMENTS AND REFUND DENIAL ISSUED UNDER LETTERS  
ID NOS. L0399732272, L1473474096, L1788202544 and L1180229936**

**No. 17-30**

**DECISION AND ORDER**

A protest hearing occurred in the above captioned matter on April 25, 2017 before David Buchanan, Esq., Hearing Officer Supervisor, in Santa Fe, New Mexico. Kelly A. Day (“Taxpayer”) appeared for the hearing. Taxpayer was represented by attorney Michael Schwarz, Esq. Taxpayer testified on her own behalf at the hearing. Staff Attorney Elena Morgan, Esq. appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Mary Griego appeared and testified as a witness for the Department. Taxpayer Exhibits 1 through 13 and Department Exhibits A through C and G pages 1-3 were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. Taxpayer started work at Edible Communities, Inc. in February 2009.
2. Edible Communities, Inc. hired Taxpayer as an independent contractor and issued her 1099's for Tax Years 2009 through 2014. Tax Years 2009, 2010 and 2011 are the only tax years still at issue in this protest.
3. Taxpayer had no role in determining her employment status with Edible Communities, Inc.
4. In reliance upon the issued 1099s, Taxpayer timely filed her original tax

returns for Tax Years 2009, 2010 and 2011 indicating she was an independent contractor for Edible Communities, Inc.

5. On November 15, 2014, Edible Communities, Inc. terminated Taxpayer.

6. On April 6, 2015, Taxpayer filed an Internal Revenue Service (IRS) form SS-8, contesting her classification as an independent contractor, contending that she was an employee.

7. On March 14, 2016, the IRS issued its determination, ruling that Taxpayer was an employee of Edible Communities, Inc. and not an independent contractor.

8. Based on the IRS determination of March 14, 2016, there was a change in the basis for the computation of federal tax for Tax Years 2009, 2010 and 2011. Exhibits A, B and C.

9. Based on the IRS determination of March 14, 2016, Taxpayer filed Amended Personal Income Tax (PIT) Returns for Tax Years 2009, 2010 and 2011.

Exhibit 4.

(a) Taxpayer signed her Amended PIT Return for Tax Year 2010 on April 7, 2017 and for Tax Years 2009 and 2011 on April 9, 2016.

10. The Amended PIT Returns for Tax Years 2009, 2010 and 2011 resulted in additional liability for New Mexico tax. Exhibits 5, 6 and 7.

11. Taxpayer had previously received a refund in the amount \$102.00 based on the original Tax Year 2009 PIT Return. Exhibit A.

12. The Tax Year 2009 Amended PIT Return filed by Taxpayer indicated that there was \$33 in tax due. Line 30 on the return states "Leave blank if you want penalty computed for you." Line 31 on the return states "Leave blank if you want interest computed

for you.” Taxpayer left lines 30 and 31 blank. Exhibit 4.

13. On August 31, 2016, the Department issued a Return Adjustment Notice for Tax Year 2009 indicating the Proposed Assessment of \$33.00 in tax, \$6.60 in penalty, \$27.50 in interest and -\$102.00 in credits. Exhibit A.

14. On September 7, 2016, the Department issued a Notice of Assessment and Demand for Payment for Tax Year 2009 in the amount of \$102.00 tax and \$20.68 interest for repayment of the previously issued refund. Exhibit A.

15. Taxpayer previously donated a \$2.00 refund based on the original Tax Year 2010 PIT Return, Exhibit B.

16. The Tax Year 2010 Amended PIT Return filed by Taxpayer indicated that there was \$450 in tax due. Line 32 on the return states “Leave blank if you want penalty computed for you.” Line 33 on the return states “Leave blank if you want interest computed for you.” Taxpayer left lines 32 and 33 blank. Exhibit 4.

17. On August 31, 2016, the Department issued a Return Adjustment Notice for Tax Year 2010 indicating the Proposed Assessment of \$450.00 in tax, \$90.00 in penalty and \$75.99 in interest. Exhibit A.

18. The Department did not issue a Notice of Assessment for Tax Year 2010 for repayment of the previously issued \$2 refund that had been donated by Taxpayer.

19. Taxpayer previously received a tax refund in the amount \$58.00 based on the original Tax Year 2011 PIT Return, Exhibit C.

20. The Tax Year 2011 Amended PIT Return filed by Taxpayer indicated that there was \$675 in tax due along with an underpayment of estimated tax penalty of \$15 (as indicated on Line 30). Line 32 on the return states “Leave blank if you want penalty

computed for you.” Line 33 on the return states “Leave blank if you want interest computed for you.” Taxpayer left lines 32 and 33 blank. Exhibit 4.

21. On August 31, 2016, the Department issued a Return Adjustment Notice for Tax Year 2011 indicating the Proposed Assessment of \$737.00 in tax, \$157.23 in penalty, \$106.68 in interest and -\$58.00 in credits. Exhibit C.

22. On September 7, 2016, the Department issued a Notice of Assessment and Demand for Payment for Tax Year 2011 in the amount of \$58.00 tax and \$7.65 interest for repayment of the previously issued refund. Exhibit C.

23. On September 22, 2016, Taxpayer filed a Formal Protest pertaining to the assessments for Tax Years 2009 through 2011.

24. Taxpayer paid all taxes due and owing for Tax Years 2009 through 2011.

25. The Department waived all penalties for Tax Years 2009 through 2011.

26. On November 1, 2016, the Department filed a request for consolidated hearing in this matter with the Administrative Hearings Office.

27. On November 3, 2016, the Administrative Hearings Office issued a Notice of Hearing setting this matter for a merits hearing on November 21, 2016.

28. On November 8, 2016, Taxpayer submitted a Notice of Unavailability, requested a continuance and asked that the matter be set for a scheduling conference.

29. On November 15, 2016, the Administrative Hearings Office vacated the merits hearing and set the matter for a telephonic scheduling hearing on November 29, 2016.

30. On November 29, 2016, a telephonic scheduling hearing was held. Both parties agreed that the hearing met the requirement that the hearing be held within 90 days of the protest.

31. On November 30, 2016, the Administrative Hearings Office issued an Order of

Abeyance so that related matters could be addressed and possibly consolidated with the protest.

32. On December 15, 2016, Taxpayer, submitted a Formal Protest seeking a refund for taxes paid for Tax Years 2009, 2010 and 2011.

33. On December 30, 2016, the Department filed a consolidated hearing request involving Letter ID Nos L0399732272, L1473474096, L1788202544 and L1180229936.

34. On December 30, 2016, Taxpayer filed a Motion for Summary Judgment.

35. On January 10, 2017, the Department objected to the summary judgment.

36. On January 11, 2017, the Administrative Hearings Office issued notice that a telephonic status conference would be held on January 26, 2017.

37. On January 19, 2017, Taxpayer replied and responded to the Department's objection to Summary Judgment.

38. On January 26, 2017, a telephonic status conference was conducted.

39. On January 26, 2017, Taxpayer submitted supplemental authority in support of the Motion for Summary Judgment.

40. On January 26, 2017, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing setting the protest for a hearing on the merits on April 25, 2017. In that order, the Hearing Officer reserved any determination on the issue of summary judgment.

41. On March 29, 2017, Taxpayer submitted a memorandum of law arguing that the assessment of interest in this matter violates the U.S. and New Mexico Constitutions.

42. On April 5, 2017, a Joint Prehearing Statement was filed.

43. On April 5, 2017, Taxpayer submitted a memorandum of law arguing that Taxpayer should be awarded attorney's fees.

44. On April 10, 2017, Taxpayer submitted a Proposed Request for Findings of Fact and Conclusions of Law.

45. On April 25, 2017, a hearing on the merits was conducted.

46. On May 18, 2017, the Department submitted a Table showing interest liability. Submission of the Table by the Department was not discussed at the hearing.

47. On May 19, 2017, Taxpayer objected to the Table because it was not submitted at the hearing and any consideration would violate Taxpayer's due process rights.

48. On May 19, 2017, the Department submitted Proposed Findings of Fact and Conclusions of Law as discussed at the hearing.

49. On May 19, 2017, Taxpayer submitted Proposed Request for Findings of Fact and Conclusions of Law as discussed at the hearing.

50. Taxpayer was without fault in causing her the erroneous classification of her employment status with Edible Communities, Inc. as an independent contractor.

51. Taxpayer did not engage in fraud, deceit or misrepresentation or exhibit any intent to evade taxes when she filed her original PIT Returns.

52. Taxpayer did not fail to complete or file any PIT Returns.

53. Taxpayer has not been audited for any of the tax years in question by the IRS.

54. Taxpayer has not signed any document agreeing to waive the statute of limitations for any assessment.

## **DISCUSSION**

### Disposition of the Table Submitted by Department on May 18, 2017.

The Department submitted a table for the Hearing Officer's consideration on May 18, 2017. Taxpayer objected to consideration of the table because it was not submitted at the hearing and

any consideration would violate Taxpayer's due process rights. No request or provision for submission of the Table was made at the time of the hearing. Taxpayer did not have the ability to cross-examine witnesses as to the content of the Table since it was submitted after the hearing. The Hearing Officer hereby sustains Taxpayer's objection and excludes the table submitted by the Department on May 18, 2017 from consideration in this matter.

Constitutionality of the Imposition of Interest on Taxpayer.

Taxpayer argues that the assessment of interest against her is tantamount to imposing an excessive fine in violation of the Eighth Amendment of the United States Constitution and the Excess Fines Clause of Article II, Section 13 of the New Mexico Constitution. Taxpayer argues that she was completely without fault in this matter and reasonably relied on her employer's determination that she as an independent contractor when she filed her original Tax Year 2009, 2010 and 2011 PIT Returns.

The Excess Fines Clause provides that "(e) excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted." The Amendment functions as a limitation of the Government's power to punish through the extraction of payments. Taxpayer's argument that the imposition of interest is improper because the taxpayer was an "innocent victim" is not persuasive. The legislature has authorized the imposition of a penalty with discretion to recognize that taxpayers' situations may arise that may be beyond their control. The Department recognized that Taxpayer's filing of a late return was not due to negligence on the part of the Taxpayer pursuant to 1978 NMSA, §7-1-69 and NMAC §3.1.11.10. That recognition resulted in the abatement of Taxpayer's liability for any penalty for Tax Years 2009, 2010 and 2011.

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. The legislature, by authorizing the imposition of interest, allows the state to recover its damages due to late payment of tax. The Department calculated interest on the late tax payments and on the amounts previously refunded to Taxpayer based on the original PIT Returns. The interest was the value of money over time and was not punitive. It was imposed to compensate the Department for the lack of use of the money that was properly due the Department. The interest imposed on the Taxpayer was not a penalty for purposes of the Excess Fines Clause. The interest imposed was directly proportional to the balance of the tax which was due and the refunds which the Taxpayer was required to repay.

Statute of Limitations.

Taxpayer argued that she is entitled to a refund of the tax paid and that she is not liable for any interest because the statute of limitations bars the assessment of that tax and interest by the Department. NMSA 1978, § 7-1-18 (A) states: “Except as otherwise provided in this section, no assessment of tax may be made by the department after three years from the end of the calendar year in which payment of the tax was due, and no proceeding in court for the collection of such tax without prior assessment thereof shall be begun after the expiration of such period.” NMAC § 3.1.1.16 (2010) defines tax to include the amount of any related interest or civil penalty.

Taxpayer cited Appeal of Weaver, 4 B.T.A. 15 (1926) and Sargent v. C.I.R., 22 B.T.A. 1270 (1931) in support of the proposition that amended tax returns relate back to the original

returns and do not furnish a starting point for the running of the statute of limitations. However, the cases cited by Taxpayer are distinguishable from the facts at hand. Both cases dealt with assessment by the Federal taxing authority, rather than the Department. *See Holt v. N.M. Dep't of Taxation & Revenue*, 2002- NMSC-34, ¶6, 133 N.M. 11 (state has the authority to assess and collect tax independent of IRS). In addition, both cases found that the amended returns relate back to the original return, but stressed the fact that the amended returns in those cases contained no facts concerning gross income or allowable deductions that were not contained in the original returns. In the present protest, there were changes to both the gross income and deductions claimed in each of the amended returns.

NMSA 1978, § 7-1-13 (C) requires that an amended return be filed within 180 days of final determination of any adjustment to the basis for computation for any federal tax as a result of the making of any change for which federal approval is required by the Internal Revenue Code. The IRS issued a determination changing Taxpayer's status from an independent contractor to an employee on March 14, 2016. Since Taxpayer was originally issued 1099 forms as an independent contractor, the IRS determination was necessary for that change under the Internal Revenue Code. This IRS determination process is equivalent to the IRS approval language contemplated under NMSA 1978, § 7-1-13 (C). The IRS determination resulted in a change in the basis for computation of federal tax. Taxpayer indicated increased amounts of Federal Adjusted Gross Income and the Federal standard or itemized deduction on each of the Amended PIT Returns for Tax Years 2009, 2010 and 2011. Thus, Taxpayer was required to file amended returns in accordance with § 7-1-13 (C).

NMSA 1978, § 7-1-18 (E) states: "If any adjustment in the basis for computation of any federal tax is made as a result of an audit by the internal revenue service or the filing of an

amended federal return changing a prior election or making any other change for which federal approval is required by the Internal Revenue Code that results in liability for any tax, the amount thereof may be assessed at any time, but not after three years from the end of the calendar year in which filing of an amended return is required by Subsection C of Section 7-1-13 NMSA 1978.”

The IRS issued its determination on March 14, 2016. Taxpayer was required to file an amended return within 180 days. Therefore, the Department may assess Taxpayer for any tax liabilities based on the Amended PIT Returns through the end of 2019. The Department is not barred by NMSA 1978, § 7-1-18 (A) from assessing any taxes or interest against Taxpayer based on the Amended PIT Returns.

Amount of Interest Due.

For Tax Year 2009, Taxpayer was refunded \$102 based on the original PIT Return. The Department determined that interest of \$20.68 on the \$102 refund had accrued from the time Taxpayer received the refund through September 7, 2016, when the Notice of Assessment of Taxes and Demand for Payment was issued by the Department. The Department also calculated the interest as requested in the Amended PIT Return and determined that an interest amount of \$27.50 was due from Taxpayer on the taxes that had not been timely paid at the time that the original PIT Return was required to be filed. Thus, the Department determined that Taxpayer owed interest for Tax Year 2009 in the total amount of \$48.18.

For Tax Year 2010, Taxpayer donated her refund of \$2 based on the original PIT Return. The Department did not attempt to obtain any return of that refund or to collect any interest based on that refund. The Department calculated the interest as requested in the Amended PIT Return and determined that interest in the amount of \$75.99 was due from Taxpayer on the taxes that had not been timely paid at the time that the original PIT Return was required to be filed.

Thus, the Department determined that Taxpayer owed interest for Tax Year 2010 in the amount of \$75.99.

For Tax Year 2011, Taxpayer was refunded \$58 based on the original PIT Return. The Department determined that interest of \$7.65 on the \$58 refund had accrued from the time Taxpayer received the refund through September 7, 2016, when the Notice of Assessment of Taxes and Demand for Payment was issued by the Department. The Department also calculated the interest as requested in the Amended PIT Return and determined that interest in the amount of \$106.68 was due from Taxpayer on the taxes that had not been timely paid at the time that the original PIT Return was required to be filed. Thus, the Department determined that Taxpayer owed interest for Tax Year 2011 in the total amount of \$114.33.

#### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely, written protest and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely held within 90-days of protest under NMSA 1978, Section 7-1B-8(A) (2015).

C. An IRS determination was required by the Internal Revenue Code in order to change Taxpayer's status from an independent contractor to an employee for Tax Years 2009, 2010 and 2011. That determination was equivalent to an approval as contemplated under NMSA 1978, § 7-1-13 (C).

D. As a result of the IRS determination, there was an adjustment to the basis for computation of Taxpayer's federal taxes for Tax Years 2009, 2010 and 2011.

E. Taxpayer was required to file amended PIT returns for Tax Years 2009, 2010 and 2011 within 180 days of the IRS determination on March 14, 2016 that Taxpayer was an

employee rather than an independent contractor. NMSA 1978, § 7-1-13 (C).

F. The Department may assess the taxes for which Taxpayer is liable based on the Amended PIT Returns through the end of 2019. NMSA 1978, § 7-1-18 (E).

G. Taxpayer is not entitled to a refund of any taxes paid based on the Amended PIT Returns.

H. Taxpayer left the lines blank on each of the Amended PIT Returns indicating that the Department should calculate any penalty and interest for Taxpayer. Thus, the Department was required to calculate any penalty and interest that Taxpayer owed and notify Taxpayer of those amounts.

I. The imposition of interest by the Department does not violate either the United States Constitution or the New Mexico Constitution.

J. Taxpayer was liable for interest when she filed her Amended PIT Returns because she did not pay the tax when it was originally due. NMAC § 3.1.4.10 (2010).

K. Taxpayer's late filing of Amended PIT Returns for Tax Years was not due to Taxpayer's negligence so she was not liable for penalty. NMAC § 3.1.4.10 (2010).

L. The Department may assess Taxpayer for tax liabilities based on the Amended PIT Returns for three years from the end of the calendar year in which filing of the amended return was required. NMSA 1978, § 7-1-13 (C) and § 7-1-18 (E).

M. The Department properly determined that the total amount of interest due from Taxpayer for Tax Year 2009 was \$48.18. NMSA 1978, § 7-1-3 (Y) and § 7-1-67.

N. The Department properly determined that the total amount of interest due from Taxpayer for Tax Year 2010 was \$75.99. NMSA 1978, § 7-1-3 (Y) and § 7-1-67.

O. The Department properly determined that the total amount of interest due

from Taxpayer for Tax Year 2011 was \$114.33. NMSA 1978, § 7-1-3 (Y) and § 7-1-67.

P. Taxpayer is not entitled to any award of costs or fees because she is not the prevailing party in this administrative proceeding. NMSA 1978, § 7-1-29.1.

For the foregoing reasons, Taxpayers' Motion for Summary Judgement and Taxpayer's protest are **DENIED. IT IS ORDERED** that the Taxpayer is liable for the outstanding amount of \$238.50 in interest for Tax Years 2009, 2010 and 2011.

DATED: June 28, 2017.

*David Buchanan*

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Administrative Hearings Office  
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## **NOTICE OF RIGHT TO APPEAL**

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may be preparing the record proper.