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HOUSE BILL 64

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Luciano "Lucky" Varela

FOR THE REVENUE STABILIZATION AND TAX POLICY COMMITTEE

AN ACT

RELATING TO TAXATION; ENACTING THE NEW MEXICO TAXPAYER BILL OF RIGHTS; PROVIDING THAT TAXPAYERS MAY BE AWARDED COSTS AND FEES IN CERTAIN INSTANCES; PROHIBITING PENALTY ASSESSMENTS IN CERTAIN CASES; AMENDING AND ENACTING CERTAIN SECTIONS OF THE TAX ADMINISTRATION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Tax Administration Act is enacted to read:

"[NEW MATERIAL] NEW MEXICO TAXPAYER BILL OF RIGHTS CREATED- -PURPOSE. --The "New Mexico Taxpayer Bill of Rights" is created. It is the purpose of the New Mexico Taxpayer Bill of Rights to:

A. guarantee that the rights, privacy and property of New Mexico taxpayers are adequately safeguarded and

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1 protected during the tax assessment, collection and enforcement
2 procedures for the tax acts administered by the department
3 pursuant to the Tax Administration Act;

4 B. assure that the taxpayer is treated with dignity
5 and respect; and

6 C. compile in one act, brief but comprehensive
7 statements that explain in simple, nontechnical terms, the
8 rights of taxpayers. "

9 Section 2. A new section of the Tax Administration Act is
10 enacted to read:

11 "[NEW MATERIAL] NEW MEXICO TAXPAYER BILL OF RIGHTS. --The
12 rights afforded New Mexico taxpayers to assure that their
13 privacy and property are safeguarded and protected during tax
14 assessment, collection and enforcement are available insofar as
15 they are implemented in the Tax Administration Act and the tax
16 acts administered by the department pursuant to the provisions
17 of that act and the rules adopted and promulgated pursuant to
18 those acts by the secretary. The rights guaranteed New Mexico
19 taxpayers pursuant to those laws and rules are as follows:

20 A. the right to available information and prompt,
21 courteous and accurate response to questions and requests for
22 tax assistance;

23 B. the right to be represented or advised by
24 counsel or other qualified representatives at any time in
25 administrative interactions with the department in accordance

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1 with the provisions of Section 7-1-24 NMSA 1978;

2 C. the right to have audits, inspections of records
3 and meetings conducted at a reasonable time and place in
4 accordance with the provisions of Section 7-1-11 NMSA 1978;

5 D. the right to have the department begin and
6 complete its audits in a timely and expeditious manner after
7 notification of intent to audit;

8 E. the right to obtain simple, nontechnical
9 information that explains the procedures, remedies and rights
10 available during audit, protest, appeals and collection
11 proceedings pursuant to the Tax Administration Act, including
12 the rights pursuant to the New Mexico Taxpayer Bill of Rights;

13 F. the right to be provided with an explanation for
14 denials of refunds as well as the basis of audits, assessments
15 or denials of refunds that identify any amount of tax, interest
16 or penalty due;

17 G. the right to seek review, through formal or
18 informal proceedings, of any findings or adverse decisions
19 relating to determinations during audit or protest procedures;

20 H. the right to have the taxpayer's tax information
21 kept confidential unless otherwise specified by law, in
22 accordance with Section 7-1-8 NMSA 1978;

23 I. the right to abatement of an assessment of taxes
24 determined to have been incorrectly, erroneously or illegally
25 made, as provided in Section 7-1-28 NMSA 1978 and the right to

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1 seek a compromise of an asserted tax liability by obtaining a
2 written determination of liability or nonliability when the
3 secretary in good faith is in doubt of the liability as
4 provided in Section 7-1-20 NMSA 1978;

5 J. upon receipt of a tax assessment, the right to
6 be informed clearly that if the assessment is not paid,
7 secured, protested or otherwise provided for within thirty days
8 pursuant to the provisions of Section 7-1-16 NMSA 1978, the
9 taxpayer will be a delinquent taxpayer and, upon notice of
10 delinquency, the right to timely notice of any collection
11 actions that will require sale or seizure of the taxpayer's
12 property;

13 K. after a jeopardy assessment, the right to at
14 least five days to review the jeopardy assessment before paying
15 the tax or furnishing satisfactory security for the tax in
16 accordance with Section 7-1-59 NMSA 1978;

17 L. the right to procedures for retirement of tax
18 obligations by installment payment agreements, in accordance
19 with Section 7-1-21 NMSA 1978, which recognize both the
20 taxpayer's financial condition and the best interests of the
21 state; provided that the taxpayer gives accurate, current
22 information and meets all other tax obligations on schedule;
23 and

24 M the right to procedures that assure that the
25 individual employees of the department are not paid, evaluated

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1 or promoted on the basis of the amount of assessments or
2 collections from taxpayers. "

3 Section 3. A new section of the Tax Administration Act is
4 enacted to read:

5 "[NEW MATERIAL] NEW MEXICO TAXPAYER BILL OF RIGHTS--NOTICE
6 TO THE PUBLIC.--The department shall develop a brochure that
7 states the New Mexico Taxpayer Bill of Rights in simple,
8 nontechnical terms and shall disseminate the brochure to
9 taxpayers, at a minimum, with the annual income and semiannual
10 combined reporting system tax forms. "

11 Section 4. A new section of the Tax Administration Act,
12 Section 7-1-29.1 NMSA 1978, is enacted to read:

13 "7-1-29.1. [NEW MATERIAL] AWARDING OF COSTS AND FEES.--

14 A. In any administrative or court proceeding that
15 is brought by or against the taxpayer on or after July 1, 2001
16 in connection with the determination, collection or refund of
17 any tax, interest or penalty for a tax governed by the
18 provisions of the Tax Administration Act, the taxpayer shall be
19 awarded a judgment or a settlement for reasonable
20 administrative costs incurred in connection with an
21 administrative proceeding with the department or reasonable
22 litigation costs incurred in connection with a court
23 proceeding, if the taxpayer is the prevailing party.

24 B. As used in this section:

25 (1) "administrative proceeding" means any

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1 procedure or other action before the department;

2 (2) "court proceeding" means any civil action
3 brought in state district court;

4 (3) "reasonable administrative costs" means:

5 (a) any administrative fees or similar
6 charges imposed by the department; and

7 (b) actual charges for: 1) filing fees,
8 court reporter fees, service of process fees and similar
9 expenses; 2) the services of expert witnesses; 3) any study,
10 analysis, report, test or project reasonably necessary for the
11 preparation of the party's case; and 4) fees and costs paid or
12 incurred for the services in connection with the proceeding of
13 attorneys or of certified public accountants who are authorized
14 to practice before the department; and

15 (4) "reasonable litigation costs" means:

16 (a) reasonable court costs; and

17 (b) actual charges for: 1) filing fees,
18 court reporter fees, service of process fees and similar
19 expenses; 2) the services of expert witnesses; 3) any study,
20 analysis, report, test or project reasonably necessary for the
21 preparation of the party's case; and 4) fees and costs paid or
22 incurred for the services of attorneys in connection with the
23 proceeding.

24 C. For purposes of this section:

25 (1) the taxpayer is the prevailing party if

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1 the taxpayer has:

2 (a) substantially prevailed with respect
3 to the amount controversy; or

4 (b) substantially prevailed with respect
5 to most of the issues involved in the case or the most
6 significant issue or set of issues involved in the case;

7 (2) the taxpayer shall not be treated as the
8 prevailing party if the department establishes that the
9 position of the department in the proceeding was based upon a
10 reasonable application of the law to the facts of the case.
11 For purposes of this paragraph, the position of the department
12 shall be presumed not to be based upon a reasonable application
13 of the law to the facts of the case if:

14 (a) the department did not follow its
15 applicable published guidance in the proceeding; or

16 (b) the assessment giving rise to the
17 proceeding is not supported by substantial evidence determined
18 at the time of the issuance of the assessment;

19 (3) as used in Subparagraph (a) of Paragraph
20 (2) of this subsection, "applicable published guidance" means:

21 (a) department regulations, revenue
22 rulings, revenue procedures, information releases,
23 instructions, notices, technical advice memoranda and
24 announcements; and

25 (b) private letter rulings and letters

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1 issued by the department to the taxpayer; and

2 (4) the determination of whether the taxpayer
3 is the prevailing party and the amount of reasonable litigation
4 costs or reasonable administrative costs shall be made by
5 agreement of the parties or:

6 (a) in the case where the final
7 determination with respect to the tax, interest or penalty is
8 made in an administrative proceeding, by the department hearing
9 officer; or

10 (b) in the case where the final
11 determination is made by the court, the court.

12 D. An order granting or denying in whole or in part
13 an award for reasonable litigation costs pursuant to Subsection
14 A of this section in a court proceeding may be incorporated as
15 a part of the decision or judgment in the court proceeding and
16 shall be subject to appeal in the same manner as the decision
17 or judgment. A decision or order granting or denying in whole
18 or in part an award for reasonable administrative costs
19 pursuant to Subsection A of this section by the department
20 hearing officer shall be reviewable in the same manner as a
21 decision of the department hearing officer. "

22 Section 5. Section 7-1-69 NMSA 1978 (being Laws 1965,
23 Chapter 248, Section 70, as amended) is amended to read:

24 "7-1-69. CIVIL PENALTY FOR FAILURE TO PAY TAX OR FILE A
25 RETURN. --

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1 A. Except as provided in Subsection ~~[B]~~ C of this
2 section, in the case of failure due to negligence or willful
3 disregard of department rules and regulations, but without
4 intent to evade or defeat a tax, to pay when due the amount of
5 tax required to be paid, to pay in accordance with the
6 provisions of Section 7-1-13.1 NMSA 1978 when required to do so
7 or to file by the date required a return regardless of whether
8 a tax is due, there shall be added to the amount ~~[as]~~ assessed
9 a penalty in an amount equal to the greater of:

10 (1) two percent per month or any fraction of a
11 month from the date the tax was due multiplied by the amount of
12 tax due but not paid, not to exceed ten percent of the tax due
13 but not paid;

14 (2) two percent per month or any fraction of a
15 month from the date the return was required to be filed
16 multiplied by the tax liability established in the late return,
17 not to exceed ten percent of the tax liability established in
18 the late return; or

19 (3) a ~~minimum~~ of five dollars (\$5.00), but the
20 five-dollar (\$5.00) ~~minimum~~ penalty shall not apply to taxes
21 levied under the Income Tax Act or taxes administered by the
22 department pursuant to Subsection B of Section 7-1-2 NMSA 1978.

23 B. A penalty shall not be assessed against a
24 taxpayer if the failure to pay an amount of tax when due
25 results from a mistake of law or fact made in good faith and on

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1 reasonable grounds.

2 ~~[B.]~~ C. If a different penalty is specified in a
3 compact or other interstate agreement to which New Mexico is a
4 party, the penalty provided in the compact or other interstate
5 agreement shall be applied to amounts due under the compact or
6 other interstate agreement at the rate and in the manner
7 prescribed by the compact or other interstate agreement.

8 ~~[C.]~~ D. In the case of failure, with willful intent
9 to evade or defeat a tax, to pay when due the amount of tax
10 required to be paid, there shall be added to the amount fifty
11 percent of the tax or a minimum of twenty-five dollars
12 (\$25.00), whichever is greater, as penalty.

13 ~~[D.]~~ E. If demand is made for payment of a tax,
14 including penalty imposed pursuant to this section, and if the
15 tax is paid within ten days after the date of such demand, no
16 penalty shall be imposed for the period after the date of the
17 demand with respect to the amount paid.

18 ~~[E.]~~ F. If a taxpayer makes electronic payment of a
19 tax but the payment does not include all of the information
20 required by the department pursuant to the provisions of
21 Section 7-1-13.1 NMSA 1978 and if the department does not
22 receive the required information within five business days from
23 the later of the date a request by the department for that
24 information is received by the taxpayer or the due date, the
25 taxpayer shall be subject to a penalty of two percent per month

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1 or any fraction of a month from the fifth day following the
2 date the request is received. If a penalty is imposed under
3 Subsection A of this section with respect to the same
4 transaction for the same period, no penalty shall be imposed
5 under this subsection.

6 ~~[F.]~~ G. No penalty shall be imposed on:

7 (1) tax due in excess of tax paid in
8 accordance with an approved estimated basis pursuant to Section
9 7-1-10 NMSA 1978;

10 (2) tax due as the result of a managed audit;
11 or

12 (3) tax that is deemed paid by crediting
13 overpayments found in an audit or managed audit of multiple
14 periods pursuant to Section 7-1-29 NMSA 1978. "

15 Section 6. EFFECTIVE DATE. --The effective date of the
16 provisions of this act is July 1, 2003.