

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

**IN THE MATTER OF THE PROTEST OF
STERLING M. KENNEDY
TO DEPARTMENT'S DENIAL OF REQUEST FOR
RELEASE OF TAX LIEN NO. 92421**

No. 05-17

DECISION AND ORDER

At the request of the parties, this matter was submitted to Hearing Officer Margaret B. Alcock on a stipulation of facts and written briefs. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Sterling M. Kennedy a/k/a Merle Sterling Kennedy ("Taxpayer") was represented by Patricia Tucker, attorney at law. The final brief of the parties was filed on August 19, 2005, at which time the matter was submitted for decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a New Mexico resident.
2. In October 1992 and November 1993, the Department issued the following personal income tax assessments against the Taxpayer, which were based on federal audit adjustments reported to the state:

Assessment Number	Date Issued	Report Period	Tax, Penalty & Interest Assessed
560544	10/23/93	1986	\$ 12,630.56
560512	10/23/93	1987	\$ 6,511.67
560513	10/23/93	1988	\$ 7,614.13
559678	10/09/93	1989	\$ 7,297.34
559679	10/09/93	1990	\$ 2,006.00
516472	11/13/92	1991	\$ 1,245.68

3. A payment of \$157.34 was received by the Department and applied against Assessment No. 560544; the Department abated an additional \$2.65 of that assessment.

4. A payment of \$180.13 was received by the Department and applied against Assessment No. 516472; the Department abated an additional \$2.25 of that assessment.

5. To present date, the remaining liabilities have not been paid, protested, abated or discharged in bankruptcy.

6. On July 23, 1997, the Department filed Notice of Claim of Tax Lien No. 92421 with the clerk of Bernalillo County, New Mexico, claiming a tax lien upon all property and rights to property of the Taxpayer in the amount of \$48,368.72, which was the balance outstanding on the above assessments as of the date the lien was filed.

7. By letter dated November 23, 2003, the Taxpayer, through his attorney, requested the Department to release Lien No. 92421. The request was based on NMSA 1978, 7-1-19, which states that no action or proceeding shall be brought to collect taxes due under an assessment after ten years from the date of such assessment.

8. On January 15, 2004, the Department denied the Taxpayer's request that Lien No. 92421 be released. The denial was based on NMSA 1978, § 7-1-39, which sets out the circumstances under which a tax lien will be released or extinguished. The Department's denial letter made reference to the provisions of Subsection (C) of § 7-1-39, which states that a lien shall be conclusively presumed to have been paid and shall be extinguished after a period of ten years has passed from the date of filing.

9. On February 4, 2004, the Taxpayer filed a written protest to the Department's denial of the Taxpayer's request that Lien No. 92421 be released.

DISCUSSION

The issue presented is whether the expiration of the ten-year limitations period set out in NMSA 1978, § 7-1-19, which bars the Department from bringing any action or proceeding to collect the income taxes assessed against the Taxpayer in November 1992 and October 1993, requires the Department to release the related tax lien filed in July 1997. The Taxpayer argues that because § 7-1-19 prevents the Department from initiating any action to foreclose the tax lien, the lien is now worthless and should be released. The Department agrees that § 7-1-19 prevents the Department from foreclosing on the lien, but argues that the statute simply bars the remedy and does not serve to extinguish the lien or require the Department to release the lien.

Pursuant to NMSA 1978, § 7-1-37, a lien on the Taxpayer's property arose at the time the Department issued its tax assessments in November 1992 and October 1993. In order for the lien to be effective against third parties, the Department was required to file a notice of lien as provided in NMSA 1978, § 7-1-38, which states:

A notice of the lien provided for in Section 7-1-37 NMSA 1978 may be recorded in any county in the state in the tax lien index established by Sections 48-1-1 through 48-1-7 NMSA 1978 and a copy thereof shall be sent to the taxpayer affected.... Recording of the notice of lien shall be effective as to all property and rights to property of the taxpayer.

On July 23, 1997, the Department filed Notice of Claim of Tax Lien No. 92421 with the clerk of Bernalillo County, New Mexico, claiming a tax lien upon all property and rights to property of the Taxpayer in the amount of \$48,368.72, which was the balance outstanding on the 1992 and 1993 assessments as of the date the lien was filed.

In *State v. Montoya*, 32 N.M. 314, 255 P. 634 (1927), the New Mexico Supreme Court held that the Legislature could not statutorily release a taxpayer from personal liability for

accrued taxes, but could enact a statute providing for the discharge of a tax lien. NMSA 1978, § 7-1-39 is the statute that sets out the circumstances under which a tax lien filed in accordance with § 7-1-38 will be released or extinguished. Subsection A provides for a full or partial release when “any substantial part” of the tax due from a taxpayer is paid. Subsection B provides for a full or partial release when the Department determines that the filing of a lien was premature or did not follow requirements of law, or when release would facilitate collection of the taxes due. Subsection C provides for extinguishment of a recorded lien after the passage of ten years from the date the lien was filed and states:

In all cases when a notice of lien for taxes, penalties and interest has been filed under Section 7-1-38 NMSA 1978 and a period of ten years has passed from the date the lien was filed, as shown on the notice of lien, the taxes, penalties and interest for which the lien is claimed shall be conclusively presumed to have been paid. The county clerk shall enter in his records a notice including the words “canceled by act of Legislature” and the lien is thereby extinguished. No action shall be brought to enforce any lien extinguished in accordance with this subsection.

In this case, none of the statutory prerequisites for releasing or extinguishing the tax lien filed against the Taxpayer have been met: the Department has not received a substantial payment of the tax due from the Taxpayer; there is no evidence that the lien was filed prematurely or did not follow the requirements of law; there is no evidence that releasing the lien would facilitate collection of the underlying tax; and 10 years have not yet passed since the date the lien was filed.

The Taxpayer argues that even though he has not met the requirements of § 7-1-39, he is still entitled to have the lien released because the statute of limitations set out in § 7-1-19 bars the state from initiating any action to collect the taxes on which the lien is based. Although there is no New Mexico case law addressing this issue, the Taxpayer’s argument is directly contrary to

the holdings of other state courts. *See, e.g., Amarillo Independent School District v. Brockmeyer*, 292 S.W.2d 886 (Tex. Civ. App. 1956) (statute of limitations merely barred the remedy; it could not legally form the basis of the property owner's suit to remove the cloud on his title by canceling the tax debt and lien); *Maricopa County v. Bloomer*, 78 P.2d 993 (Ariz. 1938) (fact that statute of limitations had run against affirmative action by county to recover taxes did not serve to remove tax lien); *Lemhi County ex rel. Gilbreath v. Boise Live Stock Loan Co.*, 278 P. 214 (Idaho 1929) (statute of limitations prevented enforcement of a tax lien, but did not extinguish the lien); *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 1879 Nev. LEXIS 31 (Nev. 1879) (a tax lien may continue after the remedy for its enforcement is lost). In *Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946), the New Mexico Supreme Court reached a similar result in the context of a mortgage lien, holding that the lien continued in effect even though the right to enforce the mortgage was barred.

All of the cases cited above are based on the principle that the application of a statute of limitations merely bars the remedy on a stale claim without determining the underlying validity of the claim or modifying it in any way. *Britton v. Britton*, 100 N.M. 424, 428, 671 P.2d 1135, 1139 (1983); *see also, Davis v. Savage, supra*. Here, § 7-1-19 limits the time within which the Department may bring an action or proceeding to collect assessed taxes, including an action to foreclose an existing tax lien. Case law is clear, however, that the running of the statute does not affect the continuing validity of the taxes themselves or the related tax lien.

Although the Taxpayer contends that a tax lien “serves no legitimate purpose” once the time to take collection action has passed (Reply Brief at 4), that is something for the Legislature to decide. It is not the role of the Taxpayer or the Department to second guess the Legislature’s

statutory prerequisites for releasing and extinguishing tax liens. As the law is currently written, the Taxpayer's only method of obtaining a release of Tax Lien No. 92421 is to meet one of the requirements set out in § 7-1-39 (A) or (B). Alternatively, he can wait until July 2007, when the lien will be extinguished under the provisions of Subsection C of § 7-1-39.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the Department's denial of his request for release of Tax Lien No. 92421, and jurisdiction lies over the parties and the subject matter of this protest.

B. The running of the ten-year limitations period in NMSA 1978, § 7-1-19 does not release or extinguish tax liens filed pursuant to NMSA 1978, § 7-1-38.

C. The Taxpayer has not established the existence of the statutory prerequisites for release of tax liens set out in NMSA 1978, § 7-1-39, and the Department has no obligation to release the tax lien filed against him.

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

DATED August 31, 2005.