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

IN THE MATTER OF THE PROTEST OF RICARDO S. GIRON; TO ASSESSMENTS OF PERSONAL INCOME TAX ISSUED UNDER LETTER ID NOS. L0619011072 & L0471030784

No. 05-24

DECISION AND ORDER

A formal hearing on the above-referenced protest was scheduled for December 1, 2005, before Albert J. Lama, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Richard S. Giron failed to appear for the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In April 2004, the Department notified Richard S. Giron that pursuant to section 6103(d) of the Internal Revenue Code, the Department had received copies of two Revenue Agent Reports ("RAR") from the Internal Revenue Service. These reports found that Mr. Giron underreported his 2000 taxable income by $221,603 and his 2001 taxable income by $124,105. *See*, April 26, 2004 RAR Personal Income Tax Advisement Letters attached as pages 5 and 6 of Exhibit D to Mr. Giron's August 24, 2005 letter to Lewis Terr.

2. The Department's advisement letters also notified Mr. Giron that a similar discrepancy was found in his reporting of New Mexico personal income tax since Mr. Giron had reported zero taxable income for both 2000 and 2001.

3. On August 12, 2004, the Department issued the following assessments of personal income tax against Ricardo S. Giron:

Assessment	Tax Year	Tax Principal	Interest
L0619011072	2000	$ 16,898.95	$ 8,390.50
L0471030784	2001	$ 8,904.00	$ 3,092.09

4. On August 24, 2004, Mr. Giron filed a protest to the assessments, stating that he was "disputing the factual correctness of all current assessments" and "therefore, the burden of proof is properly shifted to the department." Mr. Giron further asserted that the Department's assessments violated the statutory requirements of NMSA 1978, § 7-1-18 (setting out the limitations period for assessments) and NMSA 1978, § 7-2-12 (setting out the requirement for filing personal income tax returns).

5. An administrative hearing on Mr. Giron's protest was scheduled for August 17, 2005. At Mr. Giron's request, the hearing was continued twice, first to November 3, 2005 and then to December 1, 2005.

6. On October 21, 2005, Mr. Giron submitted additional arguments in support of his protest.

7. On December 1, 2005 at 9:00 a.m., the Department's attorney appeared for the hearing with his witness. Mr. Giron failed to appear for the hearing.

DISCUSSION

NMSA 1978, § 7-1-17(C) states that any assessment of taxes made by the Department is presumed to be correct, and the burden is on the taxpayer to overcome this presumption. *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. Contrary to the position taken by Mr. Giron in his August 24, 2004 protest letter, a taxpayer cannot shift the burden of proof to the Department merely by asserting that he is disputing the factual

correctness of an assessment. As stated by the New Mexico Court of Appeals in *Grogan v. New Mexico Taxation & Revenue Department*, 2003 NMCA 33, ¶ 12, (N.M. Ct. App., 2002):

> The Department's assessment is presumed to be correct. NMSA 1978, § 7-1-17(C) (1992); *Carlsberg*, 116 N.M. 247 at 249, 861 P.2d at 290. "The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." 3.1.6.12(A) NMAC 2001.

In this case, the RARs the Department received from the IRS establish that Mr. Giron had $221,603 of taxable income for the 2000 tax year and $124,105 of taxable income for the 2001 tax year. Prior to the December 1, 2005 hearing, Mr. Giron raised various legal arguments in support of his protest, but did not provide any financial records or other evidence to refute the accuracy of the IRS's information concerning his 2000 and 2001 income. As set out below, Mr. Giron's legal arguments are without merit. Having failed to present evidence to rebut the factual basis for the Department's assessments of personal income tax, Mr. Giron has not met his burden of overcoming the presumption of correctness that attaches to those assessments.

Statute of Limitations. In his August 24, 2004 protest, Mr. Giron maintains that the Department's assessment of tax for the 2000 tax year violated the statutory requirements of NMSA 1978, § 7-1-18, which sets out the time limitations for issuing assessments. Mr. Giron is mistaken. Subsection A of § 7-1-18 gives the Department three years from the end of the calendar year in which a tax is due to issue an assessment. Personal income taxes for the 2000 tax year were due on or before April 15, 2001. The August 2004 assessment issued to Mr. Giron was well within the time limits provided in § 7-1-18(A).

Disclosure Agreements. In his October 18, 2005 supplemental protest, Mr. Giron asserts that the agreements for disclosure of tax information entered into between the Department and the

IRS pursuant to the provisions of 26 U.S.C. § 6103(d) are invalid because the agreements do not comply with the requirements set out in 26 CFR § 301.6363-1. The problem with Mr. Giron's argument is that the cited regulation addresses the requirements for state agreements entered into pursuant to 26 U.S.C. §§ 6361-6365.[1] That regulation has no application to the requirements for disclosure of tax information under § 6103 of the Internal Revenue Code.

With regard to disclosure agreements, federal courts have consistently held that the standard-form coordination and implementation agreements the IRS has entered into with each of the 50 states meet the disclosure requirements of § 6103(d). *Smith v. United States*, 964 F.2d 630 (7th Cir. 1992), *cert. denied*, 506 U.S. 1067 (1993); *Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *Long v. United States*, 972 F.2d 1174 (10th Cir. 1992); *Stone v. Commissioner*, T.C. Memo 1998-314 (U.S. Tax Court Memos 1998). New Mexico entered into its Agreement on Coordination of Tax Administration with the Internal Revenue Service in 1988. In 1989 and again in 1999, the Department entered into an Implementation Agreement setting out the type of information to be exchanged between the IRS and Department, including examination reports with respect to individual income tax adjustments. Both of these agreements, copies of which were provided to Mr. Giron and are attached as exhibits to his supplemental protest, meet the statutory requirements of 26 U.S.C. § 6103(d).

Even if the IRS's disclosure of Mr. Giron's tax information did not meet statutory requirements, this is not the appropriate forum in which to raise that issue. Instead, Mr. Giron's

[1] Sections 6361-6365 of the Internal Revenue Code were enacted as part of the Federal-State Tax Collection Act of 1972. These sections provided that a state with a "qualified state individual income tax," *i.e.*, a tax closely conforming to the model of the federal income tax, could enter into an agreement to have the state's individual income taxes collected and administered by the federal government. As noted in W. Hellerstein, *Symposium on State and Local Taxation*, 39 Vand. L. Rev. 1033, 1055 n. 31 (May 1986), none of the states chose to enter into such an agreement. Sections 6361-6365 were repealed in November 1990. Public Law 101-508, Title XI, § 11801(a)(45), 104 Stat. 1388-522.

remedy is found in 26 U.S.C. § 7431, which creates a federal cause of action for the improper disclosure of an individual's return information. Suppression of such information is not one of the remedies provided in § 7431. *See*, *Nowicki v. Commissioner*, 262 F.3d 1162, 1163 (11th Cir. 2001) (imposition of the exclusionary rule is not warranted for a disclosure of return information which violates § 6103). *See also, United States v. Orlando*, 281 F.3d 586, 595-596 (6th Cir. 2002). There is no legal authority to support the argument that improper disclosure under § 6103 warrants abatement of an otherwise valid state tax assessment.

Title 27 Argument. Mr. Giron contends that the authority for enforcement of federal taxes has been transferred from the Internal Revenue Service to the Bureau of Alcohol, Tobacco and Firearms ("BATF") and that the only taxes remaining in effect are those excise taxes set out in Title 27 of the Code of Federal Regulations. In support of his argument, Mr. Giron relies on the following passage in 26 CFR 601.101 (Exhibit D to his supplemental protest):

> The regulations relating to the taxes administered by the Service are contained in Title 26 of the Code of Federal Regulations. The regulations administered by the Bureau of Alcohol, Tobacco and Firearms are contained in Title 27 of the Code of Federal Regulations.

and on Treasury Order 120-01 (Exhibit E to his supplemental protest), which concerns the establishment of the BATF and states, in part:

> 2. The Director [of BATF] shall perform the functions, exercise the powers, and carry out the duties of the Secretary in the administration and enforcement of the following provisions of law:
>
> a. Chapters 51, 52, and 53 of the Internal Revenue Code of 1954 and sections 7652 and 7653 of such Code insofar as they relate to the commodities subject to tax under such chapters;
>
> b. Chapters 61 to 80, inclusive of the Internal Revenue Code of 1954, insofar as they relate to activities administered and enforced with respect to chapters 51, 52, and 53;….

Mr. Giron misconstrues section 2b of Treasury Order 120-01 to mean that all provisions of chapter 61 of the Internal Revenue Code (which includes § 6103 relating to disclosures of tax information) are now under the authority of the BATF. Mr. Giron overlooks the second half of Section 2b, which provides that the transfer of enforcement authority to the BATF is limited to those provisions of chapter 61 that "relate to activities administered and enforced with respect to chapters 51, 52, and 53," *i.e*., to those provisions relating to alcohol, tobacco, firearms and explosives. There is no merit to Mr. Giron's argument that the procedural provisions of the Internal Revenue Code concerning the disclosure of tax information and the filing of tax returns now apply only to taxes enforced by the BATF. In *Herbst Asset Management Trust v. Commissioner*, T.C. Memo 2002-73 and *Richards Asset Management Trust v. Commissioner*, T.C. Memo 2002-74, the United States Tax Court dismissed similar arguments as "frivolous and/or groundless."

Other Arguments. The remaining arguments raised in Mr. Giron's supplemental protest are based on portions of federal statutes, regulations, and administrative materials taken completely out-of-context and applied without regard to the overall statutory scheme of which they are a part. Because these arguments are virtually unintelligible, a reasoned response is not possible. *See*, *Clayton v. Trotter*, 110 N.M. 369, 373, 796 P.2d 262, 266 (Ct. App. 1990) (the court is unable to respond to unintelligible arguments). In *Crain v. Commissioner*, 737 F.2d 1417, 1418 (5th Cir. 1984), the Fifth Circuit Court of Appeals found that Crain's appeal challenging the validity of the federal income tax was "a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish." The court further found that "[t]he government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of 'adjudicating' this meritless appeal." *Id*. Mr. Giron's protest of his liability for New Mexico income tax is

similarly devoid of merit and fails to provide any legal or factual basis to justify an abatement of the Department's assessments of tax on his 2000 and 2001 income.

CONCLUSIONS OF LAW

A. Pursuant to NMSA 1978, § 7-1-17(C), the Department's assessment is presumed to be correct, and it is Mr. Giron's burden to come forward with evidence and legal argument to establish that he is entitled to abatement.

B. Mr. Giron failed to meet his burden of proving that the Department's assessments of personal income tax for the 2000 and 2001 tax years are incorrect.

C. Pursuant to NMSA 1978 § 7-1-16(C), Mr. Giron became a delinquent taxpayer upon his failure to appear at the hearing set to consider his protest.

For the foregoing reasons, the taxpayer's protest is DENIED.

DATED December 6, 2005.