

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

**IN THE MATTER OF THE PROTEST OF
HUMBERTO & PETRA MORALES, d/b/a BOBCAT
SUPERMARKET, ID NO. 03-053698-00-7, TO
ASSESSMENT ISSUED UNDER LETTER ID L1980041472
AND NOTICE OF CLAIM OF TAX LIEN NO. 195104**

No. 07-09

**DECISION AND ORDER
ON TIMELINESS OF TAXPAYERS' PROTEST**

An administrative hearing on the above-referenced protest was held on May 30, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Humberto and Petra Morales d/b/a Bobcat Supermarket ("Taxpayers") were represented by their attorney, Albert J. Costales. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 3, 2006, the Department's "GenTax" computer system generated a Notice of Assessment of Taxes and Demand for Payment to "Bobcat Supermarket, P. O. Box 3915, Roswell, NM 88202," as successor in business to OK Grocery, Inc., in the amount of \$282,332.06, plus \$29,465.58 penalty and \$81,802.03 interest.
2. The Taxpayers do not recall whether or when they received the assessment.
3. On May 10, 2006, the Department issued Notice of Claim of Tax Lien No. 195104 against "Humberto & Petra Morales, Bobcat Supermarket, P. O. Box 3915, Roswell, NM 88202-3915," claiming a lien in the amount of \$398,345.66, representing the \$282,332.06 of tax principal previously assessed, plus accrued interest and penalty.
4. The Notice of Claim of Tax Lien was filed on the records of Chavez County, New Mexico, on May 15, 2006.

5. The Taxpayers acknowledge receiving the Department's Notice of Claim of Tax Lien, which referenced the Department's earlier assessment against them.

6. On July 17, 2006, the Department mailed a Final Notice Before Seizure to "Bobcat Supermarket, P. O. Box 3915, Roswell, NM 88202-3915."

7. On August 7, 2006, the Taxpayers' attorney faxed and mailed a letter to the Department's Protest Office protesting the "taxes assessed against my client Humberto and Petra Morales," and requesting a retroactive extension of time to protest the tax lien issued on May 10, 2006.

8. On September 26, 2006, the Department acknowledged the Taxpayers' protest to the Notice of Claim of Tax Lien No. 195104, but denied the Taxpayers' protest of the underlying tax assessment as untimely.

DISCUSSION

The issue to be addressed in this decision is whether the Taxpayers may challenge the validity of the Department's May 10, 2006 Notice of Claim of Tax Lien by presenting evidence that they are not a successor in business to OK Grocery, Inc., the taxpayer who incurred the gross receipts tax liability on which the lien is based. The Department maintains that the Taxpayers may not challenge the underlying tax liability because they failed to timely protest the April 3, 2006 assessment issued against them. For this reason, the Department limited its acknowledgment of the Taxpayers' protest to the May 10, 2006 Notice of Claim of Tax Lien and rejected the Taxpayers' protest of the underlying assessment. In response, the Taxpayers argue that the Department failed to establish the date on which the successor-in-business assessment was mailed and, therefore, their August 7, 2006 protest should be accepted as a timely protest of both the assessment and the claim of tax lien.

Burden of Proof. NMSA 1978, § 7-1-17(C) provides that any assessment of tax by the Department is presumed to be correct. The presumption of correctness does not arise, however, until after the assessment “has been mailed or personally delivered to a taxpayer....” See, Department Regulation 3.1.6.12 NMAC. When the matter at issue concerns the date of mailing of an assessment, the applicable rule is that the “party relying on service by mail has the burden of proving the mailing.” *Myers v. Kapnison*, 93 N.M. 215, 216, 598 P.2d 1175, 1176 (Ct. App. 1979); *Schneider National, Inc. v. State, Taxation and Revenue Department*, 2006-NMCA-128, ¶ 14, 140 N.M. 561, 144 P.3d 120. In order to establish that the Taxpayers’ protest of the Department’s assessment was untimely, thereby foreclosing the Taxpayers from presenting evidence concerning the underlying tax liability, the Department first must establish that the assessment was mailed more than 90 days prior to the date of the Taxpayers’ protest.¹

Evidence of Mailing Date. At the May 30, 2007 administrative hearing, the Department called the protest auditor to testify concerning the assessment issued to the Taxpayers as successor in business to OK Grocery, Inc. The auditor has worked in the Department’s Protest Office for about one year; prior to that, she spent six years as a collector in the Audit and Compliance Division. She first identified Department Exhibit A, which is a copy of the assessment generated by the Department’s “GenTax” computer system and is a business record of the Department. She then testified to her understanding that the Department’s Revenue Processing Division generates assessments sufficiently in advance to insure that they are mailed out to taxpayers by the date printed on the assessment. In this case, the date on the assessment is April 3, 2006. On cross-examination, the auditor acknowledged that

¹ NMSA 1978, § 7-1-24(B) gives taxpayers “thirty days of the date of the mailing to the taxpayer” of the notice of assessment to file a protest, but allows the Department to grant an extension of up to sixty additional days upon written request of the taxpayer. In this case, the Department granted the Taxpayers’ written request for a retroactive extension of time to file their protest.

she has never worked in the Revenue Processing Division, which includes the Department's mail room operations, and has no personal knowledge concerning the assessment issued to the Taxpayers.

The Taxpayers both testified that they do not remember whether they received the Department's April 3, 2006 assessment. Ms. Morales does remember receiving the Notice of Claim of Tax Lien issued on May 10, 2007, which referenced the earlier assessment. She testified that she may have received the assessment, but cannot find a copy of it in her records. (Ms. Morales was also unable to produce a copy of an authorization form she provided to the Department, indicating that her records may not be complete.)

Based on the foregoing testimony, Exhibit A was admitted as evidence that the Department's assessment was mailed to the Taxpayers on April 3, 2006 and that the Taxpayers' protest of their liability as successor in business to OK Grocery, Inc. was untimely. After further research and consideration, however, I find that this ruling was in error.² Although not cited by either of the parties, the recent case of *Schneider National, Inc. v. State, Taxation and Revenue Department*, 2006-NMCA-128, 140 N.M. 561, 144 P.3d 120, contains a detailed analysis of the evidence required to establish the mailing date of notices that trigger the running of statutory deadlines under the Tax Administration Act. Given the discussion in *Schneider*, it is my conclusion that the evidence presented by the Department is not sufficient to prove that the assessment dated April 3, 2006 was actually mailed to the Taxpayers on that date and that the Taxpayer's August 7, 2006 protest was untimely.

In *Schneider*, the Department moved to dismiss a taxpayer's refund suit in district court, arguing that the complaint was filed seven days beyond the statutory deadline. In response, the

² Oral rulings are merely evidence of the court's intentions, which can change at any time before the entry of a final judgment. *Bouldin v. Bruce M. Bernard, Inc.*, 78 N.M. 188, 189, 429 P.2d 647, 648 (1967); *In re Estate of Harrington*, 2000-NMCA-058, ¶ 8, 129 N.M. 266, 5 P.3d 1070.

taxpayer challenged the sufficiency of the two affidavits filed in support of the Department's motion, asserting that the affidavits failed to establish when the notices used to calculate the 90-day limitations period were mailed. The first affidavit was signed by the manager of the Department's Commercial Vehicles Bureau and stated:

Although I do not remember specifically mailing the Schneider partial denial letters, it is my business practice to mail the letters the same business day by depositing them in our office mailbox. That box is collected several times a day for mailing by our mail room.

Id. at ¶ 3. The second affidavit was signed by the chief of the Department's Postal Processing Center and stated that, based on established business practices, his employees would have made two or more trips to the outgoing mailbox of the Commercial Vehicles Bureau on the pertinent dates to pick up mail and that ordinary mail picked up on those days would have been mailed the same day.

On appeal, the Court of Appeals upheld the district court's summary judgment in favor of the Department, finding that the affidavits presented sufficient circumstantial evidence of the Department's routine mailing practices to support a prima facie case that the Department acted in accordance with those practices on the two dates at issue. The court distinguished a New Jersey case cited by the taxpayer where the evidence of mailing was limited to testimony that two company employees prepared letters which were left on their desks for pickup, noting: "In this case, Fletcher's [the postal processing chief] affidavit provides the evidence of mailing practice that was missing in *Cook*."

Based on the discussion of routine business practices in *Schneider*, the evidence in this case falls short. The only testimony concerning the date of mailing of the Department's assessment was that of the protest auditor. Although she testified that all assessments are generated sufficiently in advance to insure mailing on the date printed on the assessment, she did not explain how she came by this knowledge. As an employee of the Protest Office and a former employee of the Audit and

Compliance Division, there is no indication that she has personal knowledge of the mailing practices of the Department's Revenue Processing Division. The auditor did not explain how or when an assessment generated by the GenTax system is transported to the Department's mail room or how it is deposited with the United States Postal Service. In the absence of such testimony, the Department has not met its burden of proving when the successor-in-business assessment generated against the Taxpayers was mailed or that the August 7, 2006 protest of that assessment was untimely.

IT IS THEREFORE ORDERED that the Department accept the Taxpayers' August 7, 2006 letter as a timely protest of the assessment issued under Letter ID L1980041472, as well as to the Notice of Claim of Tax Lien No. 195104 issued on May 10, 2007.

IT IS FURTHER ORDERED that an administrative hearing on the merits of the Taxpayers' protest will be held on September 12, 2007 in accordance with the enclosed Scheduling Order.

DATED June 7, 2007.