

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

**IN THE MATTER OF THE PROTEST OF
ANDRUS A. LESANSEE
TO DENIAL OF NATIVE AMERICAN VETERAN'S
INCOME TAX SETTLEMENT FUND**

No. 14-3

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 6, 2014 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Andrus A. Lesansee ("Taxpayer") appeared pro se. Staff Attorney Peter Breen appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits 1-4 and Department Exhibits A-B were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 18, 2011, Taxpayer applied for Native American Veteran's Income Tax ("NAVIT") settlement funds for tax years 1981, 1982, 1983, 1984, and 1985.
2. On June 21, 2013, the Department partially granted Taxpayer NAVIT settlement funds for 1985. The Department denied Taxpayer NAVIT settlement funds for 1981, 1982, 1983, and 1984 because there was no record of state personal income tax withholdings in those years.
3. On July 11, 2013, Taxpayer protested the Department's denial of claim for NAVIT settlement funds.

4. Taxpayer is an enrolled member of a Federally-recognized Indian Tribe, the Zuni Pueblo.
5. Before 1981, Taxpayer lived and resided on Zuni Pueblo.
6. In 1981, Taxpayer entered the United States Navy. Taxpayer was stationed in Pearl Harbor, Hawaii during his active duty service. Taxpayer remained in the Navy until 1985.
7. Taxpayer remained domiciled on Zuni Pueblo during his military service.
8. In 1985, after finishing his service with the Navy, Taxpayer returned to living and residing within Zuni Pueblo.
9. Taxpayer provided the Department with a Leave and Earnings Statement for 1985, showing that Taxpayer had \$81.47 in New Mexico personal income taxes withheld in that year from his Navy salary. [**Department Ex. B**].
10. Based on the 1985 Leave and Earnings Statement, the Department granted Taxpayer NAVIT settlement funds for \$81.47 plus accrued interest.
11. Taxpayer did not provide the Department any evidence that he had New Mexico personal income taxes withheld from his Navy salary in 1981, 1982, 1983, or 1984.
12. Taxpayer requested his withholding records from the Department of the Navy, but has not received any additional documentation to show whether he had New Mexico personal income taxes withheld in 1981, 1982, 1983, and 1984.
13. On or after November 18, 2011, the Department requested Taxpayer's state tax withholding information while in the Navy from the United States Department of Defense, Defense Manpower Data Center.
14. On December 12, 2011, the Defense Manpower Data Center informed the Department that it had no record of state tax withholdings for Taxpayer. [**Department Ex. A**].

15. On August 27, 2013, the Department requested a hearing in this matter.
16. On August 28, 2013, the Hearings Bureau mailed Notice of Administrative Hearing, scheduling this matter for a hearing on September 12, 2013.
17. On September 11, 2013, Taxpayer moved to continue the scheduled hearing so that he had more time to obtain supporting W-2's showing his state income tax withholdings during the relevant period.
18. On September 12, 2013, a telephonic status conference occurred rather than a formal protest hearing. Taxpayer's request for a continuance was granted in order to allow Taxpayer more time to gather supporting evidence. Taxpayer was advised that if he was still having trouble obtaining the supporting evidence before the time of the next hearing, he must file a continuance request at least fourteen-days before the hearing. **[09-12-13 CD 05:07-06:00]**.
19. On September 12, 2013, the Hearings Bureau issued a Continuance Order and Amended Notice of Administrative Hearing, setting a new hearing date for January 6, 2014.
20. On January 6, 2014, during the protest hearing, Taxpayer asked to continue the matter again so that he could obtain necessary records. The Department opposed Taxpayer's request. Given the tax calendar and the short-notice of the request for continuance at the time of hearing, that request for continuance was denied on the record. **[01-06-14 CD 09:55-12:45]**.
21. In lieu of a continuance, the Department proposed to allow Taxpayer to present additional military records to the Department and into the administrative record as late-filed exhibits in this matter. Taxpayer was given until February 5, 2014 to submit additional military records to the Department and into the record. **[01-06-14 CD 11:03-28; 12:43-54; 43:28-46:42]**.

22. As of February 10, 2014, Taxpayer has not provided any additional documents for the administrative record and the Department has not advised that it has received any additional records from Taxpayer warranting further NAVIT settlement funds.

DISCUSSION

Taxpayer sought NAVIT settlement fund money for the time of his military service in 1981 through 1985. The Department partially approved Taxpayer's claim for 1985 because Taxpayer provided proof that he had state income tax withholdings from his military pay checks during that time. However, the Department denied the remaining claims in tax years 1981 through 1984 because it had no records of state income tax withholdings in those years. Taxpayer protested the Department's denial of the remaining years. The only issue at protest is whether Taxpayer was eligible for NAVIT settlement funds in 1981 through 1984.

Burden of Proof

Since no assessment was issued in this matter, the presumption of correctness that attaches to an assessment under NMSA 1978, Section 7-1-17(C) (2007) does not apply. However, under persuasive case law, Taxpayer nevertheless maintains the burden of proof to establish he was entitled to NAVIT settlement funds. The New Mexico Court of Appeals has found that "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447. Seeking NAVIT settlement funds is similar to seeking an exemption from taxation in that Taxpayer is requesting a refund of withheld personal income taxes that otherwise

might have been exempt from state taxation. Therefore, under the rationale articulated by *Wing Pawn Shop*, Taxpayer has the obligation to establish that he is entitled to NAVIT settlement funds.

NAVIT

NMSA 1978, Section 7-2H-3 (2008) established the NAVIT settlement fund. Under Section 7-2H-3, the Department is to pay settlement funds to “Native American veterans who were domiciled within the boundaries of their tribal lands...during the period of their active military duty and had state personal income taxes withheld from their military income.” In other words, to be eligible for NAVIT settlement funds under Section 7-2H-3, the Native American Veteran must have been domiciled on his or her tribal lands during their active duty and must have had state personal income tax withheld from their military pay. Under Section 7-2H-3, the Department is to refund the withheld taxes and applicable interest to *eligible* Native American veterans who have not previously been refunded and who are no longer able to timely claim a refund. The deadline for submitting a NAVIT settlement fund claim under Section 7-2H-3 was December 31, 2012.

Regulation 3.3.2.11 NMAC (12/15/11) addresses the eligibility and proof requirements for NAVIT settlement fund payments. In pertinent part to this protest, Regulation 3.3.2.11 (B) (4) NMAC requires a claimant to substantiate their claim for settlement funds by “providing copies of Form(s) W-2 covering active duty military pay” for the years at issue. If the claimant does not have the appropriate W-2’s, then under Regulation 3.3.2.11 (B) (4) NMAC, the claimant can request that the Department seek the information from the Department of Defense.

In this case, there is no dispute that Taxpayer is a Native American veteran who was domiciled on his tribal land during his active duty military service from 1981 to 1985. With his November 11, 2011 application for NAVIT settlement funds, Taxpayer did not present any W-

2's for the period in question, as required under Regulation 3.3.2.11 (B) (4) NMAC. However, for 1985 Taxpayer presented his "Leave and Earnings Statement" showing that he had \$81.47 in New Mexico state income taxes withheld that year. Based on that 1985 "Leave and Earnings Statement," the Department approved NAVIT settlement funds for that 1985 state tax withholding plus appropriate interest.

Taxpayer did not submit any proof—either W-2's or Leave and Earning Statements—showing he had withholdings in 1981 through 1984 and the Department was unable to find any evidence of withholdings in those years. As required by Regulation 3.3.2.11 (B) (4) NMAC, the Department researched Taxpayer's records with the United States Department of Defense, Defense Manpower Data Center. From July 28, 1981 through July 27, 1985, the Defense Manpower Data Center showed that Taxpayer had no New Mexico personal income tax withholdings. Without proof of withholdings in 1981 through 1984 either directly from Taxpayer or through Department's own research of the Department of Defense records, the Department properly determined that Taxpayer was not eligible for NAVIT settlement funds in those years.

Taxpayer has been seeking his W-2 records from the Navy Processing Center since receiving the Department's Acknowledgement of Protest Letter on July 24, 2013. When he was unable to obtain those records by the time of the scheduled September 12, 2013 hearing date, Taxpayer moved to continue the protest hearing. The Hearings Bureau granted Taxpayer a continuance of approximately three months in order to give Taxpayer more time to seek his records from the Navy Processing Center. At the beginning of the protest hearing, Taxpayer again moved to continue the hearing in order to have more time to seek his W-2 records from the Navy Processing Center. Although Taxpayer's request for a second continuance was denied, the undersigned Hearing Officer did agree with the Department's proposal in this matter to reserve

ruling for an additional 30-days in the event Taxpayer obtained those records and submitted them to the Department or the Hearings Bureau as late-filed exhibits. As of the date of this decision, neither Taxpayer nor the Department has advised the undersigned Hearing Officer that Taxpayer obtained or provided any withholding records for 1981 through 1984.

Taxpayer has not been able to obtain or produce the W-2 withholding records in the two-years since his NAVIT settlement fund application or in the six-months since his protest. In the absence of those additional records, the Department is left only with the Defense Manpower Data Center information reporting that Taxpayer had no state tax withholdings. Without records of state tax withholdings in 1981 through 1984, Taxpayer was unable to establish he was eligible for NAVIT settlement funds (and if eligible, in what amount) for those periods under the language of Section 7-2H-3 and the substantiation requirements of Regulation 3.3.2.11 (B) (4) NMAC. Therefore, the Department properly denied Taxpayer's NAVIT settlement fund application for 1981 through 1984 and Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's partial denial of NAVIT settlement funds. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not present sufficient records to show he had state tax withholdings in 1981 through 1984, as required to be eligible for NAVIT settlement funds under Section 7-2H-3 and Regulation 3.3.2.11 (B) (4) NMAC. *See Wing Pawn Shop*, ¶16 (a taxpayer must clearly establish the right to a deduction or an exemption from taxation, which is analogous to the claim for settlement funds).

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

DATED: February 11, 2014.

Brian VanDenzen, Esq.
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630