

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

**IN THE MATTER OF THE PROTEST OF
MARCUS E. SCOTT
TO LEVY ISSUED UNDER LETTER
ID NO. L1048234448**

No. 14-6

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on February 3, 2014 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Marcus E. Scott (“Taxpayer”) appeared along with attorney Bridget Jacober. Staff Attorney Peter Breen appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Thomas Dillon appeared as a witness for the Department. All documents contained in the administrative protest file are part of the record in this matter. Neither party tendered any exhibits at the hearing. On February 7, 2014, at the direction of the hearing officer and over Taxpayer’s objection, Taxpayer submitted an application for a senior checking account at Los Alamos National Bank and bank account statements encompassing the months of September through December 2013. The Department was given until February 21, 2014 to file a response to the late filed exhibits. As of the date of this decision, no response has been filed. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 16, 2013, the Department issued Warrant of Levy #196018 against Taxpayer’s property rights and interest to the Los Alamos National Bank. The levy was for \$114,824.22 in Taxpayer’s unpaid tax liability. [**Letter id #L1048234448**].

2. On October 7, 2013, pursuant to Warrant of Levy # 196018, the Department secured \$1,464.71 from Los Alamos National Bank. [**Letter id #L0249395664**].
3. As part of the total \$1,464.71 in surrendered funds, \$638.19 came from the senior checking account of Mary A. Haley, Taxpayer's 82-year old mother. [**September 12, 2013 through October 11, 2013 bank statement of Los Alamos National Bank**].
4. On October 18, 2013, the Department sent Taxpayer a Notice of Levy, listing the property it had seized under Warrant of Levy #196018, and demanding payment of remaining outstanding liability. [**Letter id #L0249395664**].
5. On November 5, 2013, Taxpayer protested the warrant of levy.
6. On December 18, 2013, the Department requested a hearing on this matter.
7. On December 19, 2013, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on February 3, 2014.
8. On September 4, 2008, Mary Haley and Taxpayer opened a senior checking account at Los Alamos National Bank. The ownership type of the account was listed as "Multiple-party With Right of Survivorship." Both Mary Haley and Taxpayer were listed as account holders, and both signed the application for the account.
9. Mary Haley receives retirement income and social security checks, which are deposited into the senior checking account that she and Taxpayer own.
10. Taxpayer deposits money into the senior checking account to assist his mother with rent and other needs.
11. Taxpayer only listed himself on the senior checking account for emergency purposes given his mother's advanced age and medical conditions.
12. Taxpayer maintains access to the senior checking account for Internet banking.

13. Taxpayer does not write checks from the senior checking account, does not make any withdrawals from that account, and does not use the money in the account for any personal purpose.

14. Taxpayer also does his business banking at Los Alamos National Bank.

15. To address the loss of \$638.19 from the senior checking account, Taxpayer transferred in additional money from his separate account into the account he shares with Ms. Haley so that she could still pay her bills.

DISCUSSION

Although Taxpayer certainly presented sympathetic facts at hearing, this protest turns on the straightforward legal requirements of what property is subject to levy. The Department properly issued warrant of levy in this case. Pursuant to that levy, Los Alamos National Bank surrendered Taxpayer's funds to the Department. Some of the funds that the Los Alamos National Bank surrendered to the Department were drawn from Mary Haley's senior checking account. Ms. Haley is Taxpayer's 82-year old mother. Ms. Haley lives on her retirement income, her social security checks, and Taxpayer's occasional financial support, all of which is deposited into her Los Alamos National Bank senior checking account. Given that Taxpayer is only an account holder on Ms. Haley's senior checking account for emergency purposes, Taxpayer argued that the Department should return any of the funds seized from the senior checking account under the warrant of levy.

Under the Tax Administration Act ("TAA"), warrants of levy are governed by NMSA 1978, Section 7-1-31 to -36 (1993). Section 7-1-31 allows the Department to "collect tax from a *delinquent taxpayer* by levy upon *all property or rights to property* of such person." (emphasis added). Any property for which a delinquent taxpayer has rights to is subject to levy under the

plain language of Section 7-1-31. Section 7-1-34 requires that a person served with a levy surrender any obligated property or rights subject to the levy to the Department. Under Regulation 3.1.10.9 (B) NMAC (01/15/01), upon service of a warrant of levy, a financial institution served with a warrant of levy “must immediately surrender to the department any property or rights to property of the taxpayer which that institution possesses or holds as of the date of service of the warrant.” Section 7-1-36 articulates which property is exempt from a Departmental levy. However, none of the property exempted from levy under Section 7-1-36 is applicable to the facts of this protest.

In order to have a valid warrant of levy seizing a person’s property, the Department must make a threshold showing that its warrant of levy complied with the content requirements of Section 7-1-32. The Department need not establish the substantive validity of the outstanding liability, only the factual particulars of the tax liability as required under Section 7-1-32 (B). That total liability drawn from the previous notice of assessment or demand for payment is conclusive for purposes of the warrant of levy. In this case, the Department’s warrant of levy complied with the content requirements of Section 7-1-32 in this case. In particular, the warrant of levy listed Taxpayer’s name, and Taxpayer’s outstanding tax liability and original due dates in the form of a comprehensive spreadsheet. The warrant of levy was legally valid under Section 7-1-32.

The Department sought to collect delinquent Taxpayer’s outstanding tax liability through its September 16, 2013 warrant of levy, which it served upon Los Alamos National Bank along with a detailed schedule of Taxpayer’s outstanding tax liability. Upon receipt of the warrant of levy, the Los Alamos National Bank was compelled by Section 7-1-31, Section 7-1-34, and Regulation 3.1.10.9 (B) NMAC (01/15/01) to search for and surrender any of Taxpayer’s property held at that institution. Taxpayer testified that he was a co-applicant on the senior

checking account for emergency purposes. According to the senior checking account application, Taxpayer was an account holder and maintained joint ownership with the right of survivorship on that account. Taxpayer was also listed as an accountholder on the bank statements for the senior checking account. Because Taxpayer was an account holder, maintained joint ownership interest in the account, and had a property right to the account, Los Alamos National Bank had no choice but to surrender the funds in the senior checking account to the Department.

Taxpayer argued that it was improper and unfair of the Department to seize funds out of Ms. Haley's senior checking account, that Taxpayer merely served as a fiduciary for his mother, and that it was the contractual understanding of the parties that the money in Ms. Haley's senior checking account came from her retirement income and social security checks and was exclusively her money. However, there is nothing under the Section 7-1-36 that would exempt the property contained in the senior checking account, for which Taxpayer was a joint accountholder and for which he shared an ownership interest, from the Department's lawful levy. Taxpayer acknowledged that he maintained his business account at Los Alamos National Bank, making it logical for the Department to serve a levy on that bank. As required by operation of Regulation 3.1.10.9 NMAC, Los Alamos National Bank searched its own records, found that Taxpayer was an accountholder with shared ownership on the senior checking account, and surrendered that property to the Department. Los Alamos National Bank apparently was unaware of a contractual or fiduciary relationship between the parties when it surrendered the funds to the Department. And no contract or other form was tendered into the record in this matter to establish a contractual fiduciary relationship. The Department lawfully obtained the funds from Los Alamos National Bank pursuant to warrant of levy.

The Department asked that Taxpayer be ordered to provide detailed banking records as a late-filed exhibit in this matter so that it could consider whether any adjustments were necessary. Taxpayer objected to the Department's request for the presentation of the bank records. In support of this objection, counsel argued that Taxpayer's uncontroverted testimony, in the absence of any countervailing evidence from the Department, was sufficient for Taxpayer to rebut the presumption of correctness and shift the burden back to the Department to establish the legality of the levy from the senior checking account. Since the Department presented no evidence, Taxpayer argued that the protest should be granted and that Taxpayer should not have to produce any banking records. Taxpayer's objection and argument is unpersuasive for two reasons.

First, while Taxpayer argued that it had rebutted the presumption of correctness, the presumption of correctness only attaches to an assessment or demand for payment under NMSA 1978, Section 7-1-17 (C) (2007). Although not formally an assessment or demand for payment, the Department asserted that the presumption of correctness nevertheless carries over from the original assessment and applies to the warrant of levy. There have been previous decisions and orders finding that the presumption of correctness does attach to a warrant of levy. However, upon further consideration and review of the relevant statutory provisions, a warrant of levy is not an assessment of tax or a demand for payment for the purposes of NMSA 1978, Section 7-1-17 (C) (2007), but an attempt to collect on a delinquent taxpayer's previously established tax liability.

Assessments and demands for payment are distinct legal documents discussed under Section 7-1-17. In order to be effective, an assessment must be mailed or delivered to the taxpayer against whom the liability is asserted. *See* §7-1-17 (B). In contrast, under Section 7-1-

31, a warrant of levy may be served on someone other than a taxpayer against whom the liability is asserted. Moreover, both Section 7-1-31 addressing warrants of levy and NMSA 1978, Section 7-1-3 (G) (2013) defining the term “levy” for the purposes of the TAA, refer to the property of a “delinquent taxpayer.” By definition, under NMSA 1978, Section 7-1-16 (2013), a “delinquent taxpayer” is a person who has already received their assessment or demand for payment but failed to respond in a statutorily appropriate manner. Because that person failed to act appropriately within the statutory deadlines to the assessment or demand for payment, the total amount previously assessed or the total amount of the demand for payment becomes the delinquent taxpayer’s liability. *See* §7-1-16 (A) (1). By Section 7-1-31’s use of “delinquent taxpayer”, a definition predicated on a previously issued assessment or demand for payment, the warrant of levy is not itself an assessment or demand for payment covered by Section 7-1-17 (C)’s presumption of correctness but a collection mechanism after those precursor documents have already established the tax liability. The facts of this case illustrate this point: in its October 18, 2013 Notice of Levy sent to Taxpayer, the Department made a separate demand for payment to Taxpayer, a step unnecessary if the earlier warrant of levy served on Los Alamos National Bank rather than Taxpayer constituted a demand for payment.

The second reason why Taxpayer’s objection to the production of the bank records was unpersuasive is because even without those records, and without the Department presenting any evidence, Taxpayer’s testimony established he had a property interest in the senior checking account. While Taxpayer provided a well-intentioned explanation for why his name was on the senior checking account, Taxpayer clearly testified that he applied for the senior checking account along with Ms. Haley, that he had access to the account, and that his name remained on the senior checking account for emergency purposes. On that testimony alone, Los Alamos

National Bank had no choice under Section 7-1-31, Section 7-1-34, and Regulation 3.1.10.9 (B) NMAC (01/15/01) but to surrender those funds to the Department pursuant to the levy. However, out of an abundance of caution given the sympathetic financial arrangement that Taxpayer described, the undersigned hearing officer wanted to review the account application and the bank statements before making a final ruling in this matter on the day of the hearing.

As part of its proposal to accept the banking records as a late-filed exhibit, the Department expressed the possibility of returning funds to the senior checking account if the account paperwork and bank statements substantiated Taxpayer's testimony. The Department was directed to submit a written response to bank account records by February 21, 2014. As of the date of this decision, the Department has not done so. The hearing officer certainly understands and shares the Department's sympathy for Ms. Haley. However, the sympathy for Ms. Haley is mitigated by the fact that after the levy, Taxpayer deposited money from his separate banking account into the account he shared with Ms. Haley so that she could pay her bills. The practical effect of this transfer is that the levy came from Taxpayer's funds versus funds shared with his mother in the senior checking account. Moreover, despite any sympathy for Ms. Haley, under the language of the relevant statutes and regulation, Taxpayer's joint ownership of the senior checking account subjected that account to the Department's warrant of levy. Because Taxpayer had rights to the funds in that account, there was nothing legally improper about the warrant of levy in this matter and the TAA provides no basis at this time to return the funds to the senior checking account. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's warrant of levy. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer is a delinquent taxpayer with an outstanding tax liability.

C. Pursuant to its authority under Section 7-1-31, the Department served Los Alamos National Bank with a warrant of levy bearing the required contents under Section 7-1-32 for any of Taxpayer's property.

D. Since Taxpayer is a joint accountholder and shares an ownership interest in the senior checking account at Los Alamos National Bank, Taxpayer had rights to property in that account for the purposes of Section 7-1-31.

E. Because Taxpayer had a right to the property in senior checking account, the Los Alamos National Bank lawfully seized funds in that account and surrendered them to the Department, as required under Section 7-1-31, Section 7-1-34, and Regulation 3.1.10.9 (B) NMAC (01/15/01).

F. The funds in the senior checking account were not exempt from levy under Section 7-1-36.

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

DATED: February 24, 2014.

Brian VanDenzen, Esq.
Hearing Officer
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