

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

**IN THE MATTER OF THE PROTEST OF
ROBERT WILES,
D/B/A METAFORMS
TO WARRANT OF LEVY ISSUED UNDER
ID NO. L1707083216**

No. 15-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held February 20, 2014, before Dee Dee Hoxie, Hearing Officer. The Hearing Officer rendered the decision on this case on March 11, 2014. The decision was submitted to the Hearings Bureau's main office in Santa Fe, New Mexico on that date for distribution and publication. For unknown reasons, the decision was never sent to the parties. A review of case files revealed the error on February 6, 2015. Therefore, the decision is being resubmitted with this explanation for its late distribution included.

At the hearing, the Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Robert Wiles (Taxpayer) appeared for the hearing and represented himself. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business as Metaforms, and was assessed for gross receipts taxes on November 3, 2009. Two assessments were done on that date; the first was for the tax period ending in 2005 and the second for the tax period ending in 2006.
2. The Taxpayer never protested the assessments and did not pay the assessments in full.
3. The Taxpayer was a delinquent taxpayer.

4. On March 21, 2013, the Department sent the Taxpayer a Final Notice Before Seizure which referenced Lien #1285076 for the amount of \$1,218.02.
5. The Taxpayer contacted the Department in April or May 2013 about letters he had received on the lien. The Taxpayer was told that a lien had been placed on his house for the taxes owed from 2005 and 2006. The Taxpayer was told that the lien meant that the money would be subtracted from the sale of his house, in the event that he sold his house. The Taxpayer did not realize that he needed to take steps to pay off the taxes owed.
6. The Taxpayer was again assessed for gross receipts tax on April 25, 2013 for the tax period ending 2008 for a total amount of \$9,805.06.
7. The Taxpayer did not formally protest this assessment and did not pay anything on the assessment.
8. The Taxpayer received another Final Notice Before Seizure in June 2013. The Taxpayer contacted the Department was told that he must pay 20% of what was owed or funds would be taken from his bank account.
9. On or about June 13, 2013, the Taxpayer met with an employee of the Department and was told that \$245.00 was 20% of what he owed on the 2005 and 2006 assessments and that he would need to set up a payment plan for the balance. The Taxpayer asked about the assessment for the 2008 tax period, and the employee told the Taxpayer to bring in his records on that for review.
10. On or about June 28, 2013, the Taxpayer met with the same employee of the Department and provided records on the 2008 tax period. The employee advised that the records would have to be reviewed. The Taxpayer asked again about the payment plan, and the employee advised that it could be set up the next time they met and that he would call the Taxpayer when it was ready.

11. The Taxpayer took no further action to set up a payment plan or to pay off his tax liabilities.
12. On October 29, 2013, the Department issued a warrant of levy to the bank where the Taxpayer had accounts. Funds in the amount of \$2,161.37 were seized from the Taxpayer's accounts.
13. The Taxpayer learned in November 2013 that his funds had been seized.
14. As a result of the seizure of his funds, the Taxpayer suffered numerous bank fees, including overdraft fees and interest on the overdrafts.
15. The Taxpayer contacted the employees at the Department with whom he had spoken in June 2013. The employees admitted that they had not taken any further action on the records he brought in on his 2008 tax period.
16. The Department reviewed the records and determined that the Taxpayer's gross receipts for the 2008 tax period were earned out of state. On November 25, 2013, the Department abated the assessment for the 2008 tax period and refunded \$1,174.27 to the Taxpayer. The remainder of the amount seized was kept to satisfy fully the assessments for 2005 and 2006.
17. On November 25, 2013, the Taxpayer filed a formal protest to the warrant of levy. In his protest, the Taxpayer advised that part of the funds seized from an account actually belonged to another person even though the Taxpayer was named on the account.
18. The Department investigated the ownership of the funds in the account, and determined that they did belong to another person. The Department refunded \$532.08 to the other person. This refund caused the amount seized from the Taxpayer to be inadequate to satisfy the 2005 and 2006 assessments. The Taxpayer's outstanding balance as of the date of the hearing was \$533.22.

19. The Taxpayer feels that the Department improperly seized his funds and should reimburse him for bank fees and should compensate him for the time he has spent dealing with this matter.
20. The Department's position is that the Taxpayer was, and remains, delinquent, and that the Department may levy against a delinquent taxpayer.

DISCUSSION

The issue to be decided is whether the warrant for levy was done in accordance with law.

Levies.

The Department may collect taxes owed by a delinquent taxpayer by levy on all property of the taxpayer. *See* NMSA 1978, § 7-1-31 (1993). A taxpayer is delinquent if any assessment made against the taxpayer is not paid in full within 90 days of the assessment. *See* NMSA 1978, § 7-1-16. The Taxpayer knew he had been assessed for the 2005, 2006, and 2008 tax periods when he began communicating with the Department in June 2013. The Taxpayer knew the assessments had not been paid in full at that time. Therefore, it was undisputed that the Taxpayer was a delinquent taxpayer at the time of the levy in October 2013. Levies are required to meet certain criteria in order to be valid. *See* NMSA 1978, § 7-1-32 (1993). The warrant of levy in this case, including its attached schedule, appears to satisfy these criteria. *See id.* Consequently, the warrant of levy was properly executed on the Taxpayer's accounts.

Payment plans.

The Taxpayer argues that he commenced the process for obtaining a payment plan when he communicated with the Department in June 2013. The Taxpayer argues that the warrant of levy was improper on that basis. Installment agreements must be made in writing and must require monthly installment payments. *See* NMSA 1978, § 7-1-21 (A). When the Department enters into an installment agreement with a taxpayer, "no further attempts to enforce payment of the tax by levy or

injunction shall be made". NMSA 1978, § 7-1-21 (E) (2003). However, the Department may still take action and proceed to enforce collection in unusual circumstances or when conditions of the installment agreement are not met. *See id.*

The Taxpayer never entered into a written installment agreement with the Department. Although the Taxpayer expressed his desire to obtain a payment plan when he met with Department employees in June 2013, a written installment agreement was never executed and the Taxpayer was not making monthly installment payments. Therefore, the Department was free to enforce collection by levy.

The Taxpayer argues that it was not his fault that the agreement was never done. The Taxpayer argues that the Department's employees were negligent in their duties and had promised to get back in touch with him about setting up a payment plan. The Department argues that the Taxpayer was negligent in following up with the employees and that the Taxpayer should have been taking action to pay his taxes. A taxpayer's failure to take action is not excused by the taxpayer's reliance on oral statements of an employee of the Department. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 45, 136 N.M. 440. It is a taxpayer's responsibility to pay taxes owed, and the Department may take any legal action to enforce collection. *See* NMSA 1978, § 7-1-58. As the Taxpayer never entered into a written installment agreement, there was no legal prohibition to keep the Department from executing a levy.

Bank fees.

The Taxpayer argues that the Department should be held responsible for his bank fees and should reimburse him for his time dealing with this matter. The Department argues that there is no basis for granting the Taxpayer's request in this instance. Some costs and fees may be awarded to a taxpayer, but only when the taxpayer is the prevailing party. *See* NMSA 1978, § 7-1-29.1. A taxpayer will be the prevailing party if they substantially prevail with respect to the amount in

controversy or with respect to the issues involved. *See id.* The warrant of levy in this case is found to be valid and properly executed. Therefore, the Taxpayer is not the prevailing party and cannot be awarded costs or fees.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the Warrant of Levy issued under Letter ID number L1707083216, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer was a delinquent taxpayer as of October 29, 2013, and the Department was able to enforce collection by levy. *See* NMSA 1978, § 7-1-31.

3. The Warrant of Levy satisfied the statutory requirements and was properly served to the Taxpayer's financial institution. *See* NMSA 1978, § 7-1-32.

4. The Taxpayer's attempts to obtain a payment plan were not sufficient to block enforcement by levy. *See* NMSA 1978, § 7-1-21.

5. The Taxpayer is not entitled to reimbursement for bank fees or for his time. *See* NMSA 1978, § 7-1-29.1.

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

DATED: March 11, 2014.

Dee Dee Hoxie

DEE DEE HOXIE
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