

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

**IN THE MATTER OF THE PROTEST OF
MARIAH RANCH
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1681751504**

No. 15-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 4, 2015, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Cordelia Friedman, attorney for the Department. Mary Griego, protest auditor, appeared as a witness for the Department. Mariah Ranch (“Taxpayer”) was represented by Timothy R. Van Valen, Esq. from the Brownstein Hyatt Farber Schreck, LLP firm. Also appearing on Taxpayer’s behalf was William Schudlich, Chief Financial Officer of Mariah Media, Inc. and Mariah Media, LLC, and Dennis R. Burt, CPA and Carol M. Wilkens, CPA, from Burt & Company CPAs, LLC. No exhibits were introduced into the record. Both parties were encouraged to review each other’s exhibits and, if possible, stipulate to the authenticity of the documents.

In addition to the pleadings and filings referred to in the Findings, the record contains the following: New Mexico Taxation and Revenue Department’s Request to Use Scheduled Merits Hearing Time to Conduct a Scheduling Conference filed on August 29, 2014; Amended Notice of Administrative Hearing Setting Telephonic Scheduling Conference issued on September 4, 2014; Scheduling Order and Notice of Administrative Hearing issued on September 11, 2014; New Mexico Taxation and Revenue Department’s First Witness and Exhibit List filed on November 17,

2014; Mariah Media Inc.-Lawrence Burke Preliminary Witness and Exhibit List filed on November 17, 2014; Certificate of Service filed on November 26, 2014; Notice of Reassignment issued on December 17, 2014; Certificate of Service filed on December 18, 2014; Mariah Media Inc. (Ranch)-Lawrence Burke's Responses and Objections to the Department's First Requests for Admission, Interrogatories, and Requests for Production of Documents filed on December 24, 2014; Certificate of Service filed on December 24, 2014 and Certificate of Service filed on January 21, 2015.

Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 3, 2014, the Department issued an assessment in gross receipts tax to Taxpayer in the amount of \$24,818.11 in principal, \$4,963.62 in penalty, and \$3,705.96 in interest for the tax period of June 1, 2009 through December 31, 2009. Letter Id. No. L1681751504.
2. Taxpayer filed a protest to the assessment on June 25, 2014.
3. The Department acknowledged the protest on July 8, 2014. Letter Id. No. L1798321104.
4. On August 25, 2014, the Department requested a hearing in this matter.
5. On August 28, 2014, the Hearings Bureau mailed a Notice of Administrative Hearing setting the hearing for September 11, 2014. The hearing was continued to February 4, 2015.
6. Mariah Ranch is a sole proprietorship owned by Lawrence Burke. [02-04-15 CD 10:50-11:10].
7. In this matter, Taxpayer is Mariah Ranch.

8. Mariah Ranch is registered as a business in New Mexico.
9. Mariah Media, Inc. is a separate corporate entity and is not Taxpayer in this matter.
10. Mariah Media, LLC is a separate corporate entity and is not Taxpayer in this matter.
11. Mariah Media, Inc. made payments to Lawrence Burke from January 1, 2009 through June 2009. [02-04-15 CD 12:20-12:31].
12. Lawrence Burke received \$10,000.00 in director's fees and these fees were remuneration for services performed in New Mexico. [02-04-15 CD 09:52-9:57; 24:40-24:47].¹
13. The disputed amount of wages earned or gross receipts received (\$525,046.00) was received by Lawrence Burke from January 1, 2009 through June 30, 2009. [02-04-15 CD 33:23-35:04].

DISCUSSION

At the commencement of the hearing, the hearing officer raised the issue that Taxpayer in this matter is Mariah Ranch. Taxpayer responded by stating that the Department did not assess Lawrence Burke because the Department did not create a CRS number for Lawrence Burke. [02-04-15 13:52-14:10]. The hearing officer noted that Mariah Ranch is the only taxpayer who is named on the Notice of Assessment and "whom the liability for tax is asserted." See NMSA 1978, Section 7-1-17(B)(2)(2007). A taxpayer is defined by the Tax Administration Act as any individual or entity "...liable for payment of any tax ... to whom an assessment has been made."

¹ The Responses to the Department's First Requests for Admission, Interrogatories, and Requests for Production of Documents filed by Taxpayer indicate that the director's fee, while gross receipts, were received in January 2009, which is outside of the assessed tax period. [12-24-14 RES 4-5].

NMSA 1978, Section 7-1-3(Y)(2013). The protestant is the person or entity named on the Notice of Assessment. *Severns v. N.M. Taxation & Revenue Dep't.*, No. 31,817, mem. op at 28 (N.M. Ct. App. April 1, 2013) (non-precedential). In addition, the court held in *Breen v. State of N.M. Taxation & Revenue Dep't, 2012-NMCA-101*, ¶ 31, 287 P.3d 379, "...that only those persons who engage in business can be held liable for the gross receipts tax. As explained by the Supreme Court, 'the [gross receipts] tax is levied against *the business of an owner or operator*['] *Comer v. State Tax Comm'n of N.M.*, 41 N.M. 403, 406, 60 P.2d 936, 938 (1937)." Regardless, any wages or receipts earned or received were received by Lawrence Burke. For purposes of this Decision and Order, the only Taxpayer in this matter is Mariah Ranch.

Mr. Van Valen raised the issue that the disputed amount of wages or gross receipts (\$525,046.00) was earned outside of the assessed tax period. The Department's attorney, Ms. Friedman, conceded that Mr. Van Valen was correct insofar as the disputed amount of gross receipts was received by Lawrence Burke outside of the assessed time period. [02-04-15 CD 33:2-35:04].² She also agreed with the hearing officer that the hearing officer has no jurisdiction because the Notice of Assessment did not incorporate the correct tax period and therefore the Notice of Assessment failed to state the nature of the amount of tax at issued pursuant to NMSA 1978, Section 7-1-17(B)(2) (2007). See also, Section 7-1-24 (2013) and Section 7-1-24.1(A)(1) (2013) which provide that a hearing officer shall be designated to hold a hearing of a protest of an assessment. Therefore, a hearing on the merits cannot proceed because the disputed wages or gross receipts were earned or received outside of the assessed tax period.

² The Responses to the Department's First Requests for Admission, Interrogatories, and Requests for Production of Documents filed by Taxpayer provide that the wages or gross receipts were earned or received between January 1, 2009 and June 30, 2009. [12-24-14 RES 4-5].

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the Notice of Assessment Letter Id. No. L1681751504 for gross receipts tax principal, penalty and interest for the tax period June 1, 2009 through December 31, 2009.

B. Jurisdiction rests over the subject matter of this protest only as it relates to the director's fees or \$10,000.00, if those fees were earned from June 1, 2009 through December 31, 2009.

C. The Department presented insufficient evidence that Lawrence Burke was doing business as Mariah Ranch and that the director's fees were attributable to Mariah Ranch.

D. Jurisdiction does not rest over the subject matter of the disputed wages or gross receipts of Lawrence Burke in the amount of \$525,046.00.

E. The hearing was timely set as required by NMSA 1978, Section 7-1-24.1(A) (2013).

F. Pursuant to NMSA 1978, Section 7-1-17(C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to an abatement.

G. Any wages or receipts earned or received in the amount of \$525,046.00 by Lawrence Burke were earned or received prior to the tax period at issue or before June 1, 2009 and therefore any principal tax, penalty and interest assessed is abated.

H. Taxpayer does not owe gross receipts tax on the \$10,000.00 in director's fees because Mariah Ranch did not earn or receive the director's fees, and therefore any principal tax, penalty and interest assessed is abated.

I. Lawrence Burke owes gross receipts tax on the \$10,000.00 in director's fees; however, the Department failed to assess him.

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

DATED: March 5, 2015

Monica Ontiveros

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