

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

**IN THE MATTER OF THE PROTEST OF
HAROLD'S GRADING AND TRUCKING, CO.,
TO THE DENIAL OF PROTEST ISSUED UNDER
LETTER ID NO. L1708255184**

No. 15-20

DECISION AND ORDER

A formal hearing on the above-referenced protest was held May 29, 2015, before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Brad Odell, Chief Legal Counsel. Ms. Andrea Umpleby, Auditor, Mr. Tom Dillon, Auditor, and Mr. Rene Gonzalez also appeared on behalf of the Department. Ms. Antoniette Dominguez, Officer Manager, and Ms. Sharon Domingez, Owner, appeared on behalf of Harold's Grading and Trucking, Co. (Taxpayer). Ms. Antoinette Dominguez represented the Taxpayer. All references to Ms. Dominguez in the body of this decision refer to Ms. Antoinette Dominguez. 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. On October 30, 2014, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest.
2. The Taxpayer received that notice of assessment on October 31, 2014.
3. On January 30, 2015, per the postmark, the Taxpayer filed a formal protest letter.
4. On February 9, 2015, the Department denied the Taxpayer's protest as it was not filed timely.

5. Ninety days from the assessment on October 30, 2014 was January 28, 2015. Ninety days from the service on October 31, 2014 was January 29, 2015.
6. On March 6, 2015, the Taxpayer filed a protest to the denial of the protest to the assessment.
7. On March 25, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
8. On March 27, 2015, the Hearings Bureau issued a notice of hearing. The hearing date was set within ninety days of the protest.
9. Ms. Dominguez corresponded with the Department on behalf of the Taxpayer regarding the assessment. Ms. Dominguez believed that they had until January 31, 2015 to file a protest to the assessment.
10. Ms. Dominguez asked Mr. Gonzalez in an email if they had until January 31, 2015 to file a protest.
11. Mr. Gonzalez responded by saying yes and that the protest had to be filed within 90 days of the assessment.
12. Ms. Dominguez replied and asked for clarification on the date of the assessment.
13. Mr. Gonzalez replied that the date of the assessment was October 30, 2014, and that the protest had to be filed within 90 days of that date.
14. The Department provided a signed certified return receipt from the mailing of the assessment that showed that the assessment was delivered to the Taxpayer on October 31, 2014.
15. Ms. Dominguez did not understand how to calculate the 90 days and believed that they had until January 31, 2015.

16. Ms. Dominguez felt that by replying yes to her question regarding January 31, 2015, the Department had misled her as to the deadline and should be estopped from asserting the 90-day deadline.

DISCUSSION

The issue to be decided is whether the Taxpayer's protest was properly denied as it was filed more than 90 days after the assessment.

Deadline to file a protest.

“Any protest by a taxpayer *shall* be filed within ninety days of the date of the mailing to or service upon the taxpayer by the department of the notice of assessment”. NMSA 1978, § 7-2-24 (C) (emphasis added). The word “shall” indicates that the provision is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Any protest that is not filed within the time will not be accepted and divests the Department of authority to consider the protest. *See* 3.1.7.10 and 3.1.7.11 NMAC. When a taxpayer fails to file a protest within that deadline, consideration of the protest is properly denied. *See Lopez v. N.M. Dep’t. of Taxation and Revenue*, 1997-NMCA-115, ¶ 6-10, 124 N.M. 270. *See also Associated Petroleum Transp. v. Shephard*, 1949-NMSC-002, ¶ 6-11, 53 N.M. 52 (holding that a protest filed two days after the statutory deadline for filing was not timely and that there was no jurisdiction to hear the protest). *See also Chan v. Montoya*, 2011-NMCA-072, ¶ 7, 150 N.M. 44 (holding that a complaint that was not filed within the statutory deadline for filing was not timely and should be denied).

The Taxpayer failed to file the protest within 90 days of the service of the assessment. The Taxpayer's protest was filed one day late. Therefore, the protest was properly denied.

Estoppel.

For statutory estoppel to apply, a taxpayer must establish that their actions were done “in accordance with any ruling addressed to the party personally and in writing by the secretary”. NMSA 1978, §7-1-60 (1993). Rulings must be written statements of the secretary that interpret the statutes to which they relate. *See* NMSA 1978, § 9-11-6.2 (B) (1995). In order to be effective, rulings must be reviewed by the attorney general or the Department’s legal counsel and the fact of the review must be indicated on the ruling. *See* NMSA 1978, § 9-11-6.2 (C) (1995). Mr. Gonzalez’s emails to the Taxpayer do not constitute a ruling and statutory estoppel does not apply.

To the extent that the Taxpayer’s arguments might encompass equitable estoppel, they are overruled as hearing officers cannot grant equitable estoppel. *See AA Oilfield Service v. New Mexico State Corp. Comm’n*, 118 N.M. 273, 881 P.2d 18 (1994) (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). Moreover, Mr. Gonzalez’s initial reply to the Taxpayer’s question might be somewhat ambiguous since he prefaced his reply with “yes”, but his email sent a few minutes later clarified the requirement that the protest must be filed within 90 days of the October 30, 2014 assessment.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the denial of protest issued under Letter ID number L1708255184, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer filed its protest to the assessment more than 90 days after the notice of assessment was served. Therefore, the Taxpayer failed to file a timely protest to the assessment. *See* NMSA 1978, § 7-1-24.

C. The protest was properly denied. *See id.* *See* 3.1.7.10 and 3.1.7.11 NMAC. *See Lopez v. N.M. Dep’t. of Taxation and Revenue*, 1997-NMCA-115.

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

DATED: June 29, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
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