

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
ANDREW WINTON,
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0651859008**

No. 15-32

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 31, 2015, before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Andrew Winton (Taxpayer) appeared for the hearing by telephone, and his attorney, Mr. Robert Skipworth, appeared in person. 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 January 28, 2010, the Department assessed the Taxpayer for withholding tax, penalty, and interest for the tax periods from November 2008 through March 2009. The assessment was for \$3,372.70 tax, \$910.49 penalty, and \$170.84 interest.
2. On February 2, 2010, the Taxpayer filed a formal protest letter.
3. On March 31, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On March 31, 2015, the Hearings Office issued a notice of hearing.
5. On April 7, 2015, a motion for scheduling hearing was filed. The request was granted and a scheduling hearing was conducted on May 15, 2015.

6. The scheduling order and notice was issued on May 18, 2015 and an amended notice was issued on June 9, 2015.
7. The Taxpayer filed a motion to appear by telephone due to health concerns. The motion was granted.
8. A second amended notice was issued on July 6, 2015
9. The Taxpayer filed a brief on August 19, 2015.
10. On February 26, 2007, the Taxpayer filed to register a limited liability company (LLC) in the state of Texas. The LLC was organized to engage in the restaurant business.
11. The Taxpayer filed as the registered agent and manager of the LLC.
12. The Taxpayer filed the LLC on behalf of his son-in-law. The son-in-law was not able to register an LLC in Texas at that time as he was not a U.S. citizen.
13. The son-in-law was the one who actually owned and operated the restaurant under the LLC. The son-in-law opened and operated his restaurant in New Mexico.
14. The LLC registered with PRC as a foreign LLC in New Mexico on June 26, 2007. This registration listed the Taxpayer as the agent of the LLC. It also listed the Taxpayer, his son-in-law, and the son-in-law's business partner as officers of the LLC.
15. The LLC registered with the Department for gross receipts taxes on July 27, 2007. The application for business tax identification number included a list that identified the Taxpayer as one of the managers of the LLC. The son-in-law and his business partner were also listed as managers, as well as presidents, CEOs, and owners. Two other businesses were also listed as owners. The son-in-law's business partner signed the application.

16. From November 2008 through March 2009, the LLC filed its withholding tax, but failed to pay the amounts due.
17. The LLC's original registration in Texas was amended on April 1, 2009. That amendment removed the Taxpayer from the registration and indicated that the son-in-law was the agent and manager of the LLC.
18. The Taxpayer was aware that his son-in-law was running the restaurant in New Mexico and ate there on a few occasions.
19. The Taxpayer was unaware of any business or tax registrations that were done in New Mexico and had not consented to the use of his information on any such registrations.
20. The Taxpayer did not work in the restaurant or LLC, was not paid by them, did not deal with any of their finances, was not authorized on any of their accounts, did not know who their suppliers were, did not have any control over or knowledge about their employees or wages, and did not participate in any aspects of their business.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for withholding tax, penalty, and interest for the tax periods from November 2008 through March 2009.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,

and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement.

Withholding tax.

Employers who are required to deduct and withhold federal income tax from their employees' wages are also required to deduct and withhold state income tax from those wages and to pay that amount to the state. *See* NMSA 1978, § 7-3-3 (1996). Those deductions are considered to be a collected tax, the employee has no cause of action against an employer for taking those deductions, and the state credits the employee against his/her tax liability for those deductions. *See* NMSA 1978, § 7-3-4 and § 7-3-9.

“Every withholder shall be liable for amounts required to be deducted and withheld”. NMSA 1978, § 7-3-5 (2010). A withholder is “a payor, an employer or any person required to deduct and withhold”. NMSA 1978, § 7-3-2 (M) (2010). The assessment identified the Taxpayer as an employer. The Taxpayer argued that he was not liable for the withholding tax. The Taxpayer argued that as a manager of an LLC, he was protected from the debts of the LLC, including any tax debts. The Taxpayer also argued that he was not an employer for purposes of withholding tax.

Generally the members and managers of an LLC are protected from debts of the LLC. *See* NMSA 1978, § 53-19-13 (1993). *See also Fin & Feather Club v. Leander*, 415 S.W. 3d 548, 556 (holding that members of an LLC are protected from the debt of the LLC absent a showing of fraud that would justify piercing the corporate veil). There are situations when tax liabilities are considered to be debts. *See Lopez v. Lopez*, No. 31,217 mem. op. (N.M. Ct. App. May 29, 2013) (non-precedential). *See also Nelson v. Nelson*, 1971-NMSC-027, § 3, 82 N.M. 324. However, there are also situations when tax liability and debt are given diametrically opposed

legal constructions. *See Schneller v. Schneller*, 1994-NMCA-014, ¶ 8, 117 N.M. 197. There does not appear to be a case directly on point for the Taxpayer's situation.

Ultimately, though, the issue is moot. New Mexico tax law clearly contemplates holding an individual liable for withholding tax. The definition of person includes an LLC. *See* NMSA 1978, § 7-3-2 (H). However, the definition of an employer includes "a person or an officer, agent or employee of that person". NMSA 1978, § 7-3-2 (C). Consequently, the individual employee, officer, or agent can be held liable as an employer and withholder. *See* NMSA 1978, § 7-3-2 and § 7-3-5. The key inquiry appears to be whether the individual had "control of the payment of wages". NMSA 1978, § 7-3-2 (C).

"Control of the payment of wages" is not defined. *See id.* The primary goal in interpreting a statute is to give it the effect that the Legislature intended. *See State v. Davis*, 2003-NMSC-022, 134 N.M. 172. Statutory construction begins by looking at the plain meaning of the language. *See id.* *See also Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 12, 149 N.M. 455. *See also State v. Maestas*, 2007-NMSC-001, 149 P.3d 933. *See also Johnson v. NM Oil Conservation Com'n*, 1999-NMSC-021, 127 NM 120. In the federal context of withholding, "control" has been found to be in the hands of the person actually making the payment or having control of the bank account from which payments were made. *See U.S. v. Total Employment Co., Inc.*, 305 B.R. 333, 339 (M.D. Fla. 2004). *See also Otte v. U.S.*, 419 U.S. 43, 50 (1974).

I found the Taxpayer's testimony to be credible. The Taxpayer had no dealings with the LLC other than as a customer of the restaurant. He was not authorized on any accounts and did not control any of the LLC's assets. He was officially removed from the LLC's paperwork on April 1, 2009. He never paid any wages or any other expenses of the LLC. There was no evidence presented that contradicted his testimony. *See MPC Ltd. v. N.M. Taxation and Revenue*

Dep't., 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308 (filed October 2, 2002) (holding that the burden shifts to the Department when a taxpayer presents sufficient evidence to rebut the presumption). In this case, the Taxpayer was not the individual who had control over the payment of wages. Therefore, he is not personally liable for the withholding tax, penalty, or interest owed by the LLC.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of withholding taxes issued under Letter ID number L0651859008, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was not an employer for purposes of withholding tax as he did not control the payment of wages. *See* NMSA 1978, § 7-3-5 and § 7-3-2.

C. Consequently, the Taxpayer is not liable for the tax, penalty or interest of the LLC, and the assessment is **HEREBY ABATED**.

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

DATED: September 29, 2015.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
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