

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

**IN THE MATTER OF THE PROTEST OF
REGGIE OLGUIN
TO DENIAL OF PROTEST ISSUED UNDER LETTER
ID NO. L1832727088**

No. 16-19

DECISION AND ORDER

A protest hearing occurred on the above captioned matter May 10, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Reggie Olguin (“Taxpayer”) appeared *pro se*. Staff Attorney Marek Grabowski appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Veronica Galewaler appeared as a witness for the Department. Department Exhibits A-F were admitted into the record. The undersigned hearing officer, without objection of the parties during the hearing, takes administrative notice of Department FYI-402, a copy of which is being included in the record. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. On February 3, 2016, under letter id. no. L1832727088, the Department denied Taxpayer’s January 28, 2016 submission of the protest letter originally dated on January 11, 2016 as untimely.
2. On March 4, 2016, Taxpayer submitted a formal protest of the Department’s denial of protest via facsimile.
3. On March 10, 2016, the Department acknowledged receipt of a valid protest to its denial of protest.

4. On March 30, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate agency from the Department.

5. On March 31, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on May 10, 2016.

6. The May 10, 2016 hearing occurred within 90-days of the Department's acknowledgement of receipt of a valid protest.

7. On October 26, 2015, through letter id. no. L0496396336, the Department assessed Taxpayer for outstanding gross receipts tax, penalty and interest totaling \$11,828.35 for the CRS reporting periods from January 1, 2008 through January 31, 2011.

8. The Department created and dated the underlying assessment on October 26, 2015. [Dept. Ex A].

9. The Department printed the underlying assessment on October 27, 2016 as part of a batch of documents. [Dept. Ex. A].

10. The Department mailed the batch of printed documents containing the underlying assessment via first class USPS mail on October 27, 2016. [Dept. Ex. D].

11. 90-days from the Department's October 27, 2016 mailing of the Notice of Assessment was January 25, 2016.

12. Included with the Department's Notice of Assessment was an FYI-402, titled "Taxpayer Remedies" that explained Taxpayer's ability to protest the assessment. That document lists the Department's address for the filing of protests by mail as P.O. Box 1671, Santa Fe, NM 87504-1671 or a physical address for private courier delivery as 1100 St. Francis Drive, Suite 1100, Santa Fe, NM 87507. [Administrative Notice, FYI-402, admitted without objection; Dept. Ex. A].

13. On January 11, 2016, Taxpayer prepared a protest letter to challenge the Department's assessment. However, when addressing the envelope, Taxpayer inadvertently transposed the P.O. Box information with the street address provided on FYI-402, resulting in Taxpayer sending the protest to the incorrect address of P.O. Box 1100, Santa Fe, NM 87505. [Dept. Ex. F].

14. P.O. Box 1100, Santa Fe, NM 87505 is not a correct address for the Department and the Department has no record of receiving Taxpayer's January 11, 2016 mailing.

15. Although Taxpayer speculated that any mailing to a Santa Fe address (even in incorrect address) with "Taxation and Revenue Department" noted as the recipient should get to the Department, there is no evidence to support that assertion and no evidence that any person or any bureau of the agency received the protest letter by the 90-day deadline.

16. Taxpayer never received a copy of his January 11, 2016 mailing back from the postal service

17. On January 26, 2016, Taxpayer called the Department's protest office to inquire about the status of his protest.

18. After exchanging voicemails, on January 27, 2016, Taxpayer spoke with Protest Auditor Andrea Umpleby about the status of his protest. Ms. Umpleby told Taxpayer that the Department had not received any protest in his case and directed Taxpayer to submit anything he had related to the protest via email to the Department for review. [Contact Log of Andrea Umpleby and Taxpayer testimony at hearing].

19. On January 28, 2016, Taxpayer emailed a copy of his January 11, 2016 protest letter to Ms. Umpleby, which was the first time the Department received any letter from Taxpayer after its Notice of Assessment.

DISCUSSION

This case involves the straightforward issue of whether Taxpayer timely protested the underlying assessment and whether the Department has jurisdiction to entertain a protest not timely received due to Taxpayer's inadvertent error.

While the Department receives a statutory presumption of correctness to its assessments under NMSA 1978, § 7-1-17 (2007), conceptually such a presumption of correctness can only attach upon a mailed or personally delivered legally effective Notice of Assessment. *See* NMSA 1978, § 7-1-17 (B) & (C) (2007) and Regulation 3.1.6.11(A) NMAC. *See also* *Torridge Corp. v. Commissioner of Revenue*, 172-NMCA-171, ¶13, 84 N.M. 610 (“after...notice of assessment of taxes is delivered to a taxpayer, taxpayer must carry burden of proof in order to negate the presumption of correctness.”). The Department's Notice of Assessment in this case was dated on October 26, 2015. The Department introduced evidence related to the mailing of that Notice of Assessment¹, which established by the preponderance that the Department mailed Taxpayer the document entitled “Notice of Assessment” on October 27, 2015 despite the October 26, 2015 date on the face of the letter. On October 27, 2015, when the Department mailed the Notice of Assessment, it became effective under Section 7-1-17 (B) (2) (Notice of Assessment effective when it “is mailed or delivered in person.”).

Once the Department properly mailed the assessment on October 27, 2015, under Section 7-1-17 (C) that assessment is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See* *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument

¹ *See In the Matter of the Protest of Club 33, Inc.*, Decision and Order No. 12-13 (non-precedential), another similar case dealing with an allegation that a taxpayer missed the deadline to protest by a matter of days. In that case, unlike here, the Department did not establish a date of mailing of its assessment. In cases where a party is alleging a dispositional jurisdictional default involving a matter of a day or two, it is important for that party to establish the triggering action for the jurisdictional period, like the Department did in this case.

to show that it is entitled to an abatement, in full or in part, of the assessments issued against him. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8.

“Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.” *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC.

In order to challenge the Notice of Assessment, Taxpayer needed to file a written protest with the Department’s secretary. *See* NMSA 1978, Section 7-1-24 (2015). In pertinent part under Section 7-1-24 (C) (emphasis added), such protest “*shall be filed within ninety days* of the date of the mailing to or service upon the taxpayer by the department...” Regarding interpreting the “or” provision of this section, this section must be read in conjunction with Section 7-1-17 (B) (2), which defines the assessment as effective upon mailing or delivery in person. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14 and *Hayes v. Hagemeyer*, 1963-NMSC-095, ¶9, 75 N.M. 70 (Statutes are to be read in harmony with other provisions of the law dealing with the same subject matter). In conjunction with the two options the Department has to issue an effective assessment under Section 7-1-17 (B), Section 7-1-24 (C) requires a taxpayer to file their protest within 90-days of the Department’s mailing if that is the method of service the Department used or within 90-days of the Department’s personal delivery if the Department used that method. In either case, Section 7-1-24 (C)’s use of the word “shall” makes it an absolute requirement that a taxpayer file a protest within 90-days. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary). Accordingly, Department Regulation 3.1.7.11 NMAC finds that the 90-day protest period is jurisdictional. Department regulations interpreting a statute are presumed proper and are to be given substantial weight. *See*

Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue, 2006-NMCA-50, ¶16, 139 N.M. 498.

Case law further affirms this approach. In *Associated Petroleum Transp. v. Shepard*, 1949-NMSC-002, ¶6 & ¶11, 53 N.M. 52, the New Mexico Supreme Court noted that a taxpayer's inability to timely follow the then-in-place designated protest procedure deprived the State Tax Commission of jurisdiction over the protest. More recently, the New Mexico Court of Appeals ordered the dismissal of a property tax taxpayer's complaints for refund when such complaints were not timely filed in compliance with the Legislature's statutorily imposed deadlines. *See Chan v. Montoya*, 2011-NMCA-72, 150 N.M. 44. In *Lopez v. New Mexico Dep't of Taxation & Revenue*, 1997-NMCA-115, 124 N.M. 270, the Court of Appeals had opportunity to consider whether a taxpayer timely and properly filed a protest against the Department's notice of audit. At the administrative tax protest hearing, the tax hearing officer found that the *Lopez* taxpayer had failed to timely protest the Department's audit under Section 7-1-24 (which then required a protest within 30-days rather than 90-days under the current statute). *See id.*, ¶6. The Court of Appeals in *Lopez* noted that Section 7-1-24 imposed a 30-day time restriction on a protest. *See id.*, ¶6. The Court of Appeals in *Lopez* affirmed that hearing officer's conclusion that the *Lopez* taxpayer did not timely protest the Department's audit. *See id.*, ¶9.

In this case, applying this 90-day period to protest, Taxpayer had until January 25, 2016 to file a protest with the Department's secretary. Taxpayer attempted to file a protest within that timeframe, but because of inadvertent error in addressing the envelope incorrectly, the Department never received Taxpayer's protest. The question is whether this failed mailing amounts to a timely protest?

Generally, under the Tax Administration Act, any required filing is timely if mailed on or before the deadline. *See* NMSA 1978, Section 7-1-9 (B) (1997). Section 7-1-9 (B) grants the

Department the specific authority to promulgate regulations regarding what constitutes timely filing and adequacy of postmarks. In accord with that provision, Regulation 3.1.4.10 (C) NMAC addresses the determination of timeliness. Again, the regulations are presumed proper and are to be given substantial weight. *See Chevron U.S.A., Inc.*, 2006-NMCA-50, ¶16. Relevant to this case is Regulation 3.1.4.10 (C) (2) NMAC, which states that

[i]f a mailing is not received by the department, the contents of the mailing are not timely. If an envelope is improperly addressed and is returned to the sender by the post office, there has been no timely mailing within the meaning of the statute. The postmark date on the improperly addressed envelope will not be deemed the date of receipt by the department.

Here, although certainly inadvertent, Taxpayer acknowledges that the envelope containing his January 11, 2016 Protest was not properly addressed to the Department. The Department provided Taxpayer with the FYI-402 explaining the protest process. In that form, the Department clearly provided a mailing address and a physical address for submission of protest letters. Despite being provided with the clear address information by the Department, Taxpayer mistakenly transposed the number of the physical address with the P.O. Box number on the envelope. The Department has no record that it ever received Taxpayer's mailing. Taxpayer's speculative questioning about what the post office might have done with the incorrectly addressed envelope is insufficient to establish that the Department in fact received the letter or to overcome the presumption of correctness. Since the mailed protest was not properly addressed and never received by the Department, the mailing of that protest letter could not be deemed timely under Regulation 3.1.4.10 (c) (2) NMAC, Section 7-1-9 (B), or Section 7-1-24.

The only other potential protest submitted in this case is the copy of the January 11th letter that Taxpayer submitted to the Department on January 28, 2016. However, this document was not submitted until after the 90-day period for protest under Section 7-1-24 (C) had lapsed on January 25, 2016. After January 25, 2016, the Department lacked jurisdiction to entertain the

protest. *See* Regulation 3.1.7.11 NMAC. In light of Section 7-1-24 (C)'s mandatory 90-day requirement, Regulation 3.1.7.11 NMAC, *Associated Petroleum Transp and Lopez*, Taxpayer's protest filed with the Department after the 90-day deadline cannot be accepted as a valid protest in this case.

CONCLUSIONS OF LAW

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

B. The hearing was timely set and held within 90-days of the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer's January 11, 2016 letter containing his protest was improperly addressed and not received by the Department, meaning that the mailing of that protest letter could not be deemed timely under Regulation 3.1.4.10 (c) (2) NMAC, NMSA 1978, Section 7-1-9 (B) (1997), or NMSA 1978, Section 7-1-24 (2015).

D. Taxpayer's failure to timely submit a protest letter by January 25, 2016, within the 90-day jurisdictional limit articulated under NMSA 1978, Section 7-1-24 (C) (2015), deprived the Department of authority to consider Taxpayer's January 28, 2016 submission of the protest letter. *See Associated Petroleum Transp. v. Shepard*, 1949-NMSC-002, ¶6 & ¶11, 53 N.M. 52; *See also Chan v. Montoya*, 2011-NMCA-72, 150 N.M. 44; *See also Lopez v. New Mexico Dep't of Taxation & Revenue*, 1997-NMCA-115, 124 N.M. 270.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. The Department properly denied Taxpayer's protest of the underlying assessment as untimely.

DATED: May 20, 2016.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
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