

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

**IN THE MATTER OF THE PROTEST OF
ROBERT G. HOOPER
TO DENIAL OF PROTEST ISSUED UNDER LETTER
ID NO. L0663820336**

No. 16-20

DECISION AND ORDER

A protest hearing occurred on the above captioned matter February 3, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Michael Andrews, CPA, appeared, representing Robert G. Hooper (“Taxpayer”). Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibit #1 was admitted into the record. Department Exhibits A-D were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 26, 2015, under letter id. no. L0663820336, the Department denied Taxpayer’s October 16, 2015 submission of a protest related to three assessments dated February 9, 2015.
2. On November 10, 2015, Taxpayer submitted a formal protest of the Department’s denial of protest.
3. On November 16, 2015, the Department acknowledged receipt of a valid protest to its denial of protest.
4. On December 21, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate agency from the Department.

5. On December 29, 2015, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on February 3, 2016.

6. The February 3, 2016 hearing occurred within 90-days of Taxpayer's protest and the Department's acknowledgement of receipt of a valid protest in this matter.

7. On February 9, 2015, through letter id. no.'s L1414664144, L0877793232, and L1951535056, the Department assessed Taxpayer for tax liabilities for the CRS reporting periods ending on December 31, 2009, December 31, 2010, and December 31, 2011 respectively. [Dept. Ex. B].

8. Monday, May 11, 2015 was 90-days after the Department's assessments.

9. Taxpayer did not file a protest on or before May 11, 2015.

10. At some point in the spring of 2015, Taxpayer engaged the services of Michael Andrews, CPA.

11. Mr. Andrews, CPA, could not recall whether he was engaged before or after May 11, 2015.

12. Upon engagement, Mr. Andrews, CPA, made contact with Department Auditor Laura Gage about the assessments.

13. Mr. Andrews, CPA, submitted additional documentation to Ms. Gage related to the assessments.

14. On September 22, 2015, Department Auditor Laura Gage sent Taxpayer's representative Mr. Andrews, CPA, a letter indicating that Taxpayer's file had been reviewed in conjunction with the additional documents submitted by Taxpayer. Based on that review of the submitted documentation, Ms. Gage indicated that the Department could only make one adjustment to the assessment for the 2011 reporting year. [Dept. Ex. #1].

15. The Department in fact abated a portion of the original assessment for the 2011 reporting year.

16. Taxpayer contended in his protest letter and at hearing that the Department's September 22, 2015 letter is controlling for the purposes of starting the 90-day protest period.

17. As of the date of the hearing, Taxpayer still owed \$16,816.93 in gross receipts tax, \$3,363.38 in penalty, and \$2,383.46 in interest under the three February 9, 2015 original assessments. [Dept. Ex. D].

DISCUSSION

This case involves the issue of whether Taxpayer timely protested the underlying assessments, or alternatively whether the Department's September 22, 2015 letter triggered the 90-days protest period to challenge the underlying assessment issued on February 9, 2015.

In this case, Taxpayer does not dispute that the Notices of Assessments were timely mailed and that Taxpayer did not file a protest within 90-days of the February 9, 2015 assessments. Although the Department did not provide evidence of mailing of the original assessments in this matter, as discussed in *In the Matter of the Protest of Club 33, Inc.*, Decision and Order No. 12-13 (non-precedential) and *In the Matter of the Protest of Reggie Olguin*, Decision and Order No. 16-19 (non-precedential), such information is generally only pertinent in cases involving an alleged tardiness of a day or two rather than the eight months between the assessments and the protest at issue in this case. Since Taxpayer presented no argument or countervailing evidence related to the assessments, the presumption of administrative regularity of notice applies to the Department mailing of those assessments. *See Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶29, 111 N.M. 735 (there is a presumption of administrative regularity with notice).

Upon mailing of the February 9, 2015 assessments, under Section 7-1-17 (C) the Department is entitled to the presumption of correctness of those assessments. Consequently, Taxpayer carries the burden to overcome the assessments. *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 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.

Taxpayer had 90-days to protest the Department's assessments by filing a written protest with the 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..." 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 and that the Department lacks authority to consider an untimely protest. 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 that the statutory deadline for filing a protest is jurisdictional. 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 Monday, May 11, 2015, to file a protest with the Department's secretary to challenge the underlying assessments. *See* NMSA 1978, § 7-1-77 (when a due date falls on a weekend or holiday, then the next business day is considered timely). Taxpayer did not submit a protest letter by that date. In fact, it is not even clear that Taxpayer retained Mr. Andrews, CPA, on his behalf by that time. Because Taxpayer did not timely protest the assessments within 90-days under Section 7-1-24 (C), the Department lacks authority to consider a challenge to merits of those assessments under Regulation 3.1.7.11 NMAC. *See Associated Petroleum Transp.*, 1949-NMSC-002, ¶6; *See also Lopez*, 1997-NMCA-115, ¶6.

Taxpayer nevertheless asserted that the Department's subsequent letter of September 22, 2015 was an action under the Tax Administration Act ("TAA") that allowed Taxpayer to protest the merits of the balance due on the underlying assessments. This argument is not persuasive.

It is true that Section 7-1-24 (A) (2) allows a taxpayer to protest the application of any provision of the Tax Administration Act except the issuance of a subpoena or summons. However, reading this provision both within the remaining structure of Section 7-1-24 and in conjunction with other broader provisions of the TAA, that provision does not grant taxpayers a second opportunity to protest the merits of an assessment after the 90-day period for such a protest has already lapsed. That is because Section 7-1-24 (A) (1) specifically addresses a taxpayer's ability to protest an assessment separately from more general challenges to the TAA under Section 7-1-24 (A) (2). It is a principal of statutory construction that a more specific provision applies over a more general provision in the same subject matter. *See Hi-Country Buick GMC, Inc. v. Taxation & Revenue Dep't of N.M.*, 2016-NMCA-027, ¶21. Thus, with respect to challenging an assessment, which is specifically listed under Section 7-1-24 (A) (1), taxpayers only have 90-days to challenge that assessment, and failure to do so deprives the Department jurisdiction to consider the assessment further. The more general provision to protest the application of any provision of the TAA does not reopen the 90-day period to challenge the merits of the underlying assessment after that 90-day period related to the assessment has already lapsed.

To find that the general protest provision under Section 7-1-24 (A) (2) would allow a taxpayer to challenge the merits of the underlying assessment after the 90-day protest period had lapsed upon receipt of any subsequent mailing by the Department could potentially result in discord between other related provisions of the TAA, a disfavored approach to statutory construction. *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). Under the TAA, a notice of assessment is a triggering action with specific legal implications and consequences. As discussed above, the date of mailing of an effective assessment legally triggers the 90-days protest period under Section 7-1-24. Another legal consequence is that unless a notice of assessment is timely protested within 90-days, a taxpayer becomes a delinquent taxpayer under NMSA 1978, Section 7-1-16 (2013). Absent a timely protest, the TAA provides numerous enforcement and collection actions against a delinquent taxpayer for the Department to satisfy the assessed tax liability, including the ability to seize property through a levy under NMSA 1978, Section 7-1-31 (2015) and execute a lien against a delinquent taxpayer under NMSA 1978, Section 7-1-37 through 7-1-40.

To allow a protest of an assessment after 90-days, when the Department is already pursuing the collections actions established elsewhere by the Legislature under the TAA, would be to create confusion and uncertainty in the state's ability and authority to accurately project and collect revenue after the defined 90-day assessment protest period had expired. While not entirely on point because it deals with the deadlines to protest inaction under a refund claim pursuant to NMSA 1978, Section 7-1-26, rather than the time to protest an assessment, the New Mexico Court of Appeals in *Kilmer v. Goodwin*, 2004-NMCA-122, ¶16, 136 N.M. 440, expressed a rationale that also carries some persuasive weight in this matter: that the purpose of the strict nature of the statutory timeliness deadlines on a refund claim was to "avoid stale claims, which protect the Department's ability to stabilize and predict, with some degree of certainty, the funds it collects or manages." Given the other collection provisions under the TAA tied to the expiration of the 90-day assessment protest period, it seems that the Legislature may have had a similar purpose in mind when it established that deadline.

Taxpayer's theory that the September 22, 2015 letter constitutes the last action under the TAA related to the assessments pursuant to Section 7-1-24 (A) (2) also would not have the practical effect of reopening the underlying assessments that Taxpayer hopes for in this protest. The September 22, 2015 letter informed Taxpayer that the Department had reviewed the information submitted, and based on that information made a partial abatement of the assessed taxes for the CRS reporting period ending in 2011. NMSA 1978, Section 7-1-28 (2013) gives the Department authority to abate an assessment in response to a written protest filed under Section 7-1-24 when it determines that any part of the assessment was incorrectly, erroneously, or illegally made. Here, Department Auditor Laura Gage apparently determined that some portion of the assessment related to the 2011 CRS period was incorrectly and/or erroneously made. Consequently, Ms. Gage applied the provisions of Section 7-1-28 to abate that portion of the assessed tax. The application of the TAA at issue in the September 22, 2015 letter for the purposes of protest under Section 7-1-24 (A) (2) is the Department's use of Section 7-1-28 to grant an abatement in favor of Taxpayer. In other words, the action that Taxpayer would challenge would be the Department's abatement in favor of Taxpayer, meaning that Taxpayer would not be aggrieved by the abatement.

Taxpayer may be dissatisfied with the amount of abatement, but considering that Taxpayer missed the 90-day period in which to file a protest against the underlying assessments, the fact that the Department nevertheless gave Taxpayer a partial abatement under Section 7-1-28 (A) does not confer Taxpayer a new opportunity to challenge the remaining assessed amounts after the 90-day period to protest the underlying assessment has lapsed. In summary, Taxpayer did not timely protest the underlying Notices of Assessment. Therefore, the Department properly denied the October 16, 2015 protest letter as untimely pursuant to Section 7-1-24 (C)'s

mandatory 90-day requirement, Regulation 3.1.7.11 NMAC, *Associated Petroleum Transp* and *Lopez*.

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 October 16, 2015 protest letter was filed with the Department well after the 90-day period under Section 7-1-24 to protest the assessments had lapsed. The Department is without authority to consider an untimely protest. *See* Regulation 3.1.7.11 NMAC; *See also 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.

D. The Department's partial abatement of tax pursuant to NMSA 1978, Section 7-1-28 (2013) on September 22, 2015 does not restart or otherwise reopen the 90-day protest period to challenge the underlying assessments.

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

DATED: May 25, 2016.

Brian VanDenzen
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