

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

**IN THE MATTER OF THE PROTEST OF
RONALD O. JAYNES
TO DENIAL OF PROTEST
ISSUED UNDER LETTER
ID NO. L1537539632**

No. 17-08

DECISION AND ORDER

A hearing occurred in the above-captioned protest on January 11, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Randal O. Jaynes (“Taxpayer”) appeared in person and with his authorized representative, Crystal R. Mayville, C.P.A. Diana Jaynes, Taxpayer’s spouse, also appeared as a witness for the Taxpayer. Staff Attorney David Mittle appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Tom Dillon appeared as a witness for the Department. Department Exhibits A – C and Taxpayer Exhibits 1 – 7 were admitted into the evidentiary record without objection. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 24, 2016, under Letter ID No. L1537539632, the Department denied Taxpayer’s submission of a protest letter postmarked September 14, 2016 as untimely.
2. On November 3, 2016, the Department received Taxpayer’s formal protest of the Department’s denial of protest.
3. On November 9, 2016, the Department acknowledged receipt of a valid protest to its denial of protest.

4. On November 9, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate agency from the Department.

5. On November 10, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, setting this matter for a merits hearing on January 6, 2017.

6. On January 6, 2017, Taxpayer's request for a continuance was granted and a Continuance Order and Amended Notice of Administrative Hearing was entered which set a hearing on the merits for January 11, 2017 at 3 p.m.

7. The January 11, 2017 hearing occurred within 90-days of the Department's acknowledgement of receipt of a valid protest.

8. Ronald Jaynes and Diana Jaynes are married.

9. Taxpayer provides construction services to the film industry in New Mexico.

[Taxpayer Ex. No. 3].

10. Taxpayer received a Notice of Limited Scope Audit Commencement dated January 1, 2016 (hereinafter "Notice") **[Taxpayer Ex. No. 4.3]** and a Reminder Notice of Limited Scope Audit dated February 10, 2016 **[Taxpayer Ex. 4.1]** (hereinafter "Reminder").

11. Taxpayer made undocumented attempts to contact the Department employee identified in the Notice **[Taxpayer Ex. No. 4.3]** and the Reminder **[Taxpayer Ex. 4.1]**. Contact efforts were made by telephone and email. **[Testimony of Ms. Jaynes].**

12. Taxpayer initiated efforts to better understand his tax obligations by talking to various individuals, including at least one individual at the Department who generally discussed the subject of gross receipts taxes. **[Testimony of Ms. Jaynes].**

13. Taxpayer's efforts to address the subject of the Notice and the Reminder also included communications with the Office of the Governor and the State Auditor of the State of New Mexico. **[Testimony of Ms. Jaynes; Testimony of Ms. Mayville].**

14. The Taxpayer had a conversation with Tim Keller, State Auditor, regarding Taxpayer's tax liability in November of 2015. It was the Taxpayer's conclusion following that meeting that Taxpayer should not pay any tax owed. The date of the conversation with Mr. Keller predated the Notice, Reminder, and Assessment issued in this case. **[Testimony of Mr. Jaynes; Taxpayer Ex. 3].**

15. Taxpayer's efforts to discuss, address, or resolve the matter subject of the Notice and the Reminder were unsuccessful. **[Testimony of Ms. Jaynes].**

16. On April 11, 2016, through Letter ID No. L1195096624, the Department assessed Taxpayer for outstanding gross receipts tax, penalty and interest totaling \$12,383.81 for the CRS reporting periods from January 1, 2009 through December 31, 2012 (hereinafter "Assessment"). **[Dept. Ex. A].**

17. The Department printed the underlying Assessment on April 9, 2016 as part of a batch of documents. **[Dept. Ex. B; Testimony of Mr. Dillon].**

18. The Department mailed the batch of printed documents containing the underlying Assessment via first class U.S. mail on April 11, 2016. **[Dept. Ex. B; Testimony of Mr. Dillon].**

19. The Assessment was mailed to Taxpayer at the same address appearing on the face of the Assessment. **[Testimony of Mr. Dillon].**

20. Ninety (90) days from April 11, 2016, the date upon which the Department mailed the Assessment was Sunday, July 10, 2016. The deadline was extended to the next business day, Monday, July 11, 2016.

21. Taxpayer admitted that the address provided on the Assessment is Taxpayer's correct address **[Dept. Ex. A; Testimony of Ms. Jaynes]** and matched the address provided on the Notice and the Reminder.

22. In reference to the Taxpayer options as provided in the Assessment, Taxpayer admitted that Taxpayer did not pay the amount indicated to be due in the Assessment. Taxpayer admitted that a protest was not filed within 90 days of the Notice of Assessment of Taxes and Demand for Payment. Taxpayer admitted that Taxpayer did not provide documentation to show that the assessment was in error. **[Testimony of Ms. Jaynes]**.

23. Taxpayer continued to make follow up inquiries as provided in the provision contained in the Statement of Account dated June 28, 2016 which provided “If you have questions or disagree with the balance due: Call (505) 841-6352 in Albuquerque or toll free 1-866-285-2996 to speak with a department representative who can explain the balance or assist with your account.” **[Testimony of Ms. Jaynes]**.

24. As of June 28, 2016, the date of the Statement of Account, the protest period had not yet expired. **[Taxpayer No. 5]**

25. The mailing address contained on the Statement of Account is the same as the address provide on the Assessment.

26. The Taxpayer decided that a protest was necessary after receiving the correspondence of June 28, 2016. **[Taxpayer No. 5; Testimony of Ms. Mayville]**.

27. Taxpayer retained Ms. Mayville’s assistance at an undetermined date between June 28, 2016 and July 21, 2016. Although Ms. Mayville was aware of the Assessment dated April 11, 2016, there was also a belief by her and the Taxpayer that the Taxpayer was still within the protest period. Ms. Mayville estimated that the Taxpayer contacted her about one week after the protest period expired. **[Testimony of Ms. Mayville]**.

28. On July 21, 2016, Ms. Mayville submitted, correspondence to the Audit and Compliance Division of the Department which she initially characterized during direct examination as an “official protest.” On cross-examination, Ms. Mayville admitted that the

correspondence was intended to respond to the Department's Statement of Account dated June 28, 2016 and represented as an ongoing effort to "work it out before going to protest."

[Taxpayer Ex. No. 6; Testimony of Ms. Mayville].

29. The correspondence of July 21, 2016 was submitted to the Department's Audit and Compliance Division, but not to the Department's Protest Office. **[Taxpayer Ex. No. 6; Testimony of Ms. Mayville].**

30. As of January 6, 2017, Taxpayer owned \$9,040.69 in gross receipts tax, \$1,810.12 in civil penalty, and \$1,786.25 in interest for a total outstanding liability of \$12,637.06. **[Dept. Ex. C; Testimony of Mr. Dillon].**

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.

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 Assessment in this case was dated and mailed on April 11, 2016. Consequently, the evidence established that it became effective on April 11, 2016 under Section 7-1-17 (B) (2) (Notice of Assessment effective when it "is mailed or delivered in person."). The evidence also established that the Assessment was mailed to the Taxpayer at the appropriate address.

Once the Department properly mailed the assessment on April 11, 2016, 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 to show that Taxpayer 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 Assessment, Taxpayer needed to file a written protest with the Department. *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 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 July 11, 2016 to file a formal written protest. However, the evidence established that the Taxpayer's attention was consumed by efforts to discuss the issue with various people ranging from Department employees, to the State Auditor, to the Governor of the State of New Mexico. **[Testimony of Mr. Jaynes; Testimony of Ms. Jaynes; Testimony of Ms. Mayville]**. Despite those efforts, the

Taxpayer never submitted anything in writing to the Department prior to July 11, 2016 that could be construed as a formal protest.

The first communication from the Taxpayer that could arguably be construed as a protest was correspondence from Ms. Mayville to the Audit and Compliance Division dated July 21, 2016. However, upon cross examination, Ms. Mayville acknowledged that the letter, which she previously characterized as an “official protest” actually represented an ongoing effort to resolve the issue without the need to file a formal protest. [**Testimony of Ms. Mayville**]. Furthermore, despite Ms. Mayville’s initial characterization of her letter of July 21, 2016, there is not any evidence to establish it was submitted to the Department’s Protest Office.

Regardless of how the letter was characterized, its intended purpose, or where it was sent within the Department, the uncontested fact is that it was not submitted to the Department before the protest period expired. The letter was dated July 21, 2016 and the protest period expired on July 11, 2016. Therefore, even if the correspondence of July 21, 2016 represented a formal written protest of the underlying Assessment, and even if it was submitted to the Department’s Protest Office, it was still untimely by at least ten days.

The Hearing Officer notes that the Department’s letter denying the timeliness of the protest [**Letter ID. No. L1537539632**] references a “letter postmarked September 14, 2016 in which you state a desire to protest the issuance of the assessments identified above.” It is unclear from the record which specific letter is being referenced. Ms. Mayville testified that she sent numerous items of correspondence. However, the evidence established that Ms. Mayville’s earliest correspondence to the Department was dated July 21, 2016 [**Testimony of Ms. Mayville**] and the Taxpayer did not submit a formal protest before July 11, 2016 [**Testimony of Ms. Jaynes**]. Any protest submitted after July 11, 2016, including any protest postmarked September 14, 2016, would still be untimely.

Taxpayer argued that he acted in good faith and attempted to address the subject matter of the Notice, Reminder, and Assessment with the urgency it deserved. Taxpayer attempted to discuss the matter with Department employees, the State Auditor, and even the Governor. Except for hearsay testimony about what the State Auditor may have said five months prior to the underlying Assessment being issued, there was no evidence presented to establish what specific information the Taxpayer may have relied upon, if anything, with concern for filing of a protest. Rather, all testimony suggested that discussions were directed toward the merits of the underlying assessment, not toward the procedural aspects of how or when to file a formal protest of that Assessment. The result was that Taxpayer regrettably sat on his right of protest until it expired.

Because a written formal protest was not submitted until after the 90-day period for protest under Section 7-1-24 (C) had lapsed on July 11, 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.

Based on the foregoing, the Taxpayer's protest of the denial of his protest should be denied.

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 failure to timely submit a protest letter by July 11, 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 July 21, 2016 submission or any other subsequent submissions intended to protest the Assessment dated and mailed April 11, 2016. *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: February 10, 2017



Chris Romero
Hearing Officer
Administrative Hearings Office
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.