

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

**IN THE MATTER OF THE PROTEST OF
A TEAM PRODUCTIONS
TO DENIAL OF PROTEST
ISSUED UNDER LETTER
ID NO. L0508248368**

No. 17-26

DECISION AND ORDER

A protest hearing occurred on the above captioned matter May 1, 2017 before David Buchanan, Esq., Hearing Officer, in Santa Fe. Attorney S. Thomas Overstreet appeared for the hearing representing A Team Productions (“Taxpayer”). Managing Member of A Team Productions John Overstreet appeared and testified as a witness for Taxpayer. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Andrea Umpleby and Staff Manager of the Department’s Mail Room Gene Fulgenzi appeared and testified as witnesses for the Department. Department Exhibits A-E were admitted into the record. Taxpayer Exhibits 1 and 2 were admitted into the record. Taxpayer Exhibits 3 – 11 were admitted into the record only as part of Taxpayer’s offer of proof that Taxpayer has a meritorious protest of the underlying assessment in this case. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 21, 2016, under letter id. no. L0508248368, the Department denied Taxpayer’s September 14, 2016 submission of a written protest of an assessment as untimely.

2. On November 10, 2016, Taxpayer submitted a formal protest of the Department's denial of protest.
3. On November 15, 2016, the Department acknowledged receipt of a valid protest to its denial of protest.
4. On December 29, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate agency from the Department.
5. On January 4, 2017, the Administrative Hearings Office issued a Notice of Administrative Hearing, setting this matter for a hearing on January 26, 2017.
6. On January 13, 2017, Taxpayer filed a Notice of Unavailability, Motion to Vacate, Request for Telephonic Setting and Waiver of Ninety (90) Day Time Limit.
7. On January 4, 2017, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing, vacating the hearing set for January 26, 2017 and setting this matter for a hearing on March 16, 2017.
8. On January 30, 2017, Taxpayer filed a Certificate of Service regarding discovery.
9. On February 24, 2017, Taxpayer filed a Motion to Vacate and Reschedule Hearing.
10. On March 1, 2017, the Department filed a Certificate of Service regarding discovery.
11. On March 3, 2017, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing, vacating the hearing set for March 16, 2017 and setting this matter for hearing on May 1, 2017.
12. On April 19, 2017, the Administrative Hearings Office issued a Notice of Reassignment of Hearing Officer for Administrative Hearing.

13. On May 1, 2017, a formal hearing regarding the protest was held. Taxpayer had waived the requirement that the hearing be held within 90-days of the Department's acknowledgment of receipt of a valid protest.

14. On June 15, 2016, through letter id. no. L0129164848, the Department assessed Taxpayer for outstanding gross receipts tax, penalty and interest totaling \$193,585.91 for the CRS reporting periods from January 1, 2010 through December 31, 2013.

15. Gene Fulgenzi is the Staff Manager of the Department's mailroom. Part of Mr. Fulgenzi's duties are to track every Notice of Assessment that is generated by the Department and to ensure that the Notice of Assessments are properly mailed through the United States Postal Service (USPS).

16. Every night the Department's GenTax computer system indicates when a Notice of Assessment is generated and placed into a folder for printing. The Notice of Assessment to Taxpayer was created in the GenTax computer system and placed in a folder with an identifying number of 326009344 at 2:14 a.m. on June 15, 2016. [Dept. Ex. D-6]. The only documents placed into that folder were Notice of Assessments to various taxpayers.

17. The Notice of Assessment to Taxpayer and the other Notice of Assessments contained in that folder were printed at 7:34 a.m. on June 15, 2016. [Dept. Ex. D-2 and 3].

18. The Notice of Assessment to Taxpayer and the other Notice of Assessments that had been printed were sent through a postal sorter optical reader and a USPS Postage Statement was automatically created. The 802 envelopes containing the various Notice of Assessments were postmarked at that time. Department employee Robert CdeBaca signed his initials on the USPS Postage Statement for Gene Fulgenzi. [Dept. Ex. D-4].

19. The 802 envelopes containing the Notice of Assessments were then delivered to the USPS at 1:55 p.m. on June 15, 2016. PS Form 3607R – Mailing Transaction Receipt was created to prove that the letters were delivered to USPS and mailed. [Dept. Ex. D-5].

20. An additional amount of postage was due when the 802 letters including the Notice of Assessment to Taxpayer were delivered to the USPS. Payment for the mailing of the documents was made on June 15, 2016 at 1:57 p.m. [Dept. Ex. D-6].

21. John Overstreet is the Managing Member of A Team Productions. Mr. Overstreet has been a CPA for a number of years and has received many Notice of Assessments from the Department on behalf of clients. He testified that he recalled seeing the Notice of Assessment to Taxpayer and was shocked that it went to Taxpayer. Mr. Overstreet testified that the postmark date on the envelope was June 17, 2016 and therefore the deadline for the protest was 90-days later on September 15, 2016.

22. Mr. Overstreet delivered the Notice of Assessment and the envelope to Donald W. Kluesner, the CPA for Taxpayer. Mr. Overstreet testified that Mr. Kluesner was unable to locate the envelope with the postmark to include with their protest.

23. The affidavit of Donald W. Kluesner was submitted with Taxpayer's protest. [Taxpayer Ex. 1-18]. Mr. Kluesner is a licensed CPA in New Mexico. He swore that on or about June 20, 2016, John Overstreet gave him the Notice of Assessment dated June 15, 2016 and that based on the postmark on the envelope the deadline to file a timely protest was September 15, 2016. Mr. Kluesner was unable to locate the envelope.

24. There have been other instances where the postmark on envelopes containing letters sent by the Department were two or three days after the date of the letter.

25. 90-days from the Department's June 15, 2016 mailing of the Notice of Assessment was September 13, 2016.

26. On September 14, 2016, Taxpayer prepared and hand-delivered a protest letter to challenge the Department's assessment. [Dept. Ex. C].

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.*”). Consequently, to be an effective assessment, the Department must establish that it either personally served (which it does not allege in this case) or mailed the assessments to Taxpayer. To determine when Taxpayer was required to file the protest under NMSA 1978, § 7-1-24 (C) (2015), it is first necessary to determine when the Department mailed the notice of assessment to Taxpayer.

Taxpayer asserted that the evidence of mailing by the Department was unreliable and lacked foundation. Taxpayer noted that the evidence was computer generated by employees other than Mr. Fulgenzi and that the only human involved with the mailing of the Notice of Assessment was Robert CdeBaca. Taxpayer noted that Mr. CdeBaca was not present to testify at the hearing. Taxpayer further noted that Dept. Ex. D-6 showed that additional postage was due

for 802 letters and that some letters would have been returned due to the incorrect postage. Taxpayer asserted that the testimony of Mr. Overstreet and the affidavit of by Donald W. Kluesner submitted with the protest [Taxpayer Ex. 1-18] established that the postmark on the envelope containing the Notice of Assessment was after the date on the letter itself and that the protest was timely filed on September 14, 2016. Taxpayer noted that other letters sent by the Department have had postmarks that were after the date of the letters.

Although Mr. Fulgenzi did not create the documents contained in Department Exhibit D, the documents are kept in the regular course of the Department's business to track the creation and mailing of Notice of Assessments and the printing, processing and mailing of the Notice of Assessment was done under his supervision. The Hearing Officer found that Mr. Fulgenzi was an appropriate witness to lay a proper foundation for the authentication of Department Exhibit D. The Hearing Officer further notes that the Rules of Evidence do not apply to hearings conducted pursuant to the Tax Administration Act. *See* NMSA 1978, § 7-1B-6 (D) (2015). Nonetheless, the Hearing Officer found the Department's evidence regarding the mailing of the Notice of Assessment on June 15, 2016 to be detailed, probative and reliable.

Department Exhibit D-6 does show that an additional amount of postage was due when the 802 letters including the Notice of Assessment in this matter were delivered to the USPS. However, there was no evidence to indicate that any of the 802 documents were returned and were not mailed at that time. Instead, the document indicates that the payment for the mailing of the documents was made on June 15, 2016 at 1:57 p.m. Thus, the Hearing Officer was persuaded that the Notice of Assessment to Taxpayer was properly mailed on June 15, 2016.

Although there have been other instances where the envelopes containing letters from the Department bore a different date than the letter itself, the evidence established that the mailing

process for those letters differed from the process for mailing the GenTax generated Notice of Assessments. The other letters referenced by Taxpayer were generated directly by Department employees who then had to provide the letters to the mailroom. The evidence presented by the Department established that the Notice of Assessment in this case was printed, postmarked and given to the USPS all on the same day.

The evidence provided by Taxpayer regarding the date of the postmark on the envelope containing the Notice of Assessment was less reliable than the evidence presented by the Department. Taxpayer depended on testimonial evidence and an affidavit to prove that the date was June 17, 2016 rather than June 15, 2016. Taxpayer did not provide the actual envelope to support the testimony. The Hearing Officer was persuaded by the preponderance of the evidence presented at the hearing that the Department mailed Taxpayer the Notice of Assessment on June 15, 2016 and that the envelope was postmarked June 15, 2016.

On June 15, 2016, 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 June 15, 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 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.

In order to challenge the Notice of Assessment, Taxpayer needed to file a timely written protest with the Department’s Secretary. *See NMSA 1978, § 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 September 13, 2016 to file a protest with the Department's secretary. Taxpayer's protest was filed September 14, 2016. Therefore the protest was not timely filed. 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. Taxpayer waived the requirement that the hearing be 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 September 13, 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 September 14, 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, Taxpayer's protest **IS DENIED**. The Department properly denied Taxpayer's protest of the underlying assessment as untimely.

DATED: May 31, 2017.

David Buchanan

David Buchanan
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), 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. *See Rule 12-601 NMRA*. If an appeal is not filed within 30 days, this Decision and Order will become final. 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 be preparing the record proper.