

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

**IN THE MATTER OF THE PROTEST OF
SHAUN E. HOLGUIN
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1841111856**

v.

D&O No. 18-14

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

AMENDED DECISION AND ORDER

A decision and order in this matter was issued April 30, 2018. Shortly after the issuance of that decision and order, on May 9, 2018, Shaun E. Holguin (“Taxpayer”) left an unsolicited voice message with the undersigned hearing officer complaining that he did not understand the purpose of the decision and order, as he had provided the requisite documents to the State of New Mexico Taxation and Revenue Department (“Department”)¹ during the post-hearing submission period while this matter was still under advisement, and that as a result, the Department had fully abated the assessed tax (a fact that this amended decision and order makes clear was never communicated to the Administrative Hearings Office). That voicemail was made part of the record and promptly disclosed to the Department on May 10, 2018. *See* 22.600.2.16 (D) NMAC (unsolicited ex parte communication shall be promptly disclosed, and does not constitute a prohibited ex parte communication).

By May 10, 2018 order, the Department was given seven-days to respond to Mr. Holguin’s allegations and to indicate whether the final decision and order issued in this matter on April 30,

¹ The Administrative Hearings Office is a separate, independent agency from the Taxation and Revenue Department under the Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 through 9 (2015).

2018 should be withdrawn or amended. As of the date of this amended decision and order, the Department has failed to respond to the two specific issues identified in that order.

As such, the undersigned hearing officer pursuant to Regulation 22.600.3.17 (A) NMAC infers that the allegations Mr. Holguin in the voicemail were correct. The previous decision and order issued in this matter on April 30, 2018 is withdrawn in favor of this amended decision and order. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 29, 2017, under letter id. no. L1841111856, the Department assessed Taxpayer for \$1,164.00 in personal income tax, \$232.80 in penalty, and \$246.66 in interest for the personal income tax year ending December 31, 2010.
2. On October 11, 2017, Taxpayer protested the Department's assessment.
3. On November 7, 2017, the Department's protest office acknowledged receipt of a valid protest.
4. On November 29, 2017, the Department filed a request for hearing in this matter with the Administrative Hearings Office, an agency independent of the Taxation and Revenue Department.
5. On November 30, 2017, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on January 8, 2018.
6. The January 8, 2018 hearing occurred within 90-days of the Department's acknowledgment of receipt of a valid protest.
7. Taxpayer worked for the Veterans Affairs Hospital in Albuquerque beginning in 2008 and through the relevant 2010 personal income tax year.

8. Through its tape mismatch program with the IRS, the Department detected that Taxpayer did not file New Mexico personal income tax returns for 2010.

9. In light of the mismatch, the Department initiated a limited scope audit of Taxpayer regarding personal income tax year 2010.

10. Taxpayer believed that he did file his New Mexico 2010 personal income tax return, however he did have records dating back to 2010 and could not provide proof of filing his returns at the time of the hearing.

11. The evidentiary merits hearing in this matter occurred on January 8, 2018.

12. At the suggestion of the Department's attorney of record, Peter Breen, during the evidentiary merits hearing, at the end of the merits hearing the matter was taken under advisement and the record was left open for 60-days after the hearing for Taxpayer to produce the records in question, which the Department indicated could resolve this matter. [01-08-18 CD 31:25-32:23].

13. In discussing taking the matter under advisement for submission of additional records at the close of the hearing, the Department's counsel Mr. Breen stated on the record that "...if they have those kinds of records, we could make the adjustment, no offense, faster than you'd be able to [rule] and we [the Department] would let you know if we did make that adjustment." [01-08-18 CD 35:05-35:31].

14. Taxpayer did in fact produce the records in question within days of the conclusion of the hearing to the Department. [Unrefuted Voice Message of Taxpayer].

15. During the post-hearing submission period, the Department issued a notice of abatement of the assessed tax, penalty and interest against Taxpayer. [Unrefuted Voice Message of Taxpayer].

16. Despite Mr. Breen's assertion on the record that it would inform the Administrative Hearing Office of any adjustments it made, the Department failed to provide any notice of such abatement, or other similar notification of the adjustments, to the Administrative Hearings Office that Taxpayer had submitted the documents discussed at hearing that resulted in an abatement despite the fact that the matter remained under advisement before the Administrative Hearings Office.

17. On April 30, 2018, as a result of the Department's failure to communicate that it issued a notice of abatement during the post-hearing submission period when the matter remained under advisement with the Administrative Hearings Office, the Administrative Hearings Office issued a final, public decision and order unknowingly but incorrectly finding Taxpayer liable for taxes that the Department determined he did not owe.

18. The decision and order finding Taxpayer liable for an assessed tax was published to the Department's website and remains available to this very day. *See* http://www.tax.newmexico.gov/uploads/files/18-14_Shaun%20E%20Holguin.pdf (accessed on May 29, 2018).

19. On May 9, 2018, Taxpayer called the undersigned hearing officer and left an unsolicited voice-message indicating he was confused about the decision and order because he had submitted the required documents to the Department shortly after the hearing and that the Department issued a formal notice of abatement of the assessed tax to him resolving the matter. That voice-message was saved into the record of this proceeding.

20. On May 10, 2018, the undersigned hearing officer issued an order directing the Department to specifically respond within seven days to Taxpayer's allegations, either

confirming, denying, or clarifying their accuracy and addressing whether the final decision and order issued in this matter should be withdrawn in favor of an amended decision and order.

21. The Department did not file a response addressing those two questions within seven days.

22. On May 14, 2018, the Department filed a withdrawal of protest form in this matter. However, since a final decision and order in this matter had already been issued resolving the underlying protest, there was no protest that could be withdrawn and the withdrawal was untimely. Nor does the untimely filing of a withdrawal of protest address the issue that because of the Department's failure to communicate, an incorrect final decision and order in this matter was issued that remains publicly available on the Department's website.

DISCUSSION

The previous decision and order in this matter is withdrawn in favor of this amended decision and order. Taxpayer was not liable for any assessed tax in this matter, based on the Department's uncommunicated post-hearing notice of abatement of tax while this matter remained under advisement. Because the Department failed to communicate that Taxpayer had in fact paid the taxes in dispute, despite Mr. Breen's clear statement on the record that the Department would inform the Administrative Hearing Office if it made any adjustments, the final public decision and order unknowingly but incorrectly indicated that Taxpayer failed to meet his tax liabilities. The Department is admonished in the future to promptly communicate any abatement it makes in a case heard and under advisement before the Administrative Hearings Office. The Department **IS ORDERED** to remove the original decision and order from its website in favor of this amended decision and order. Taxpayer's protest **IS GRANTED**.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessment, 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 protest under NMSA 1978, Section 7-1B-8.3 (B) (2015).

C. A final, public decision and order was issued in this matter on April 30, 2018 pursuant to NMSA 1978, Section 7-1-8, addressing the underlying protest.

D. Taxpayer left an unsolicited voice-message raising his concerns about the accuracy of the decision and order issued in this case. That voice message was promptly disclosed to the opposing party, as required under 22.600.2.16 (D) NMAC (unsolicited ex parte communication shall be promptly disclosed, and does not constitute a prohibited ex parte communication).

E. The Department did not respond to the May 10, 2018 order requiring it to address whether Taxpayer's allegations were correct and whether the previous decision and order should be withdrawn in light of those allegations. As such, pursuant to Regulation 22.600.3.17 (A) NMAC, in the absence of Department response, it is inferred that the allegations Mr. Holguin in the voicemail were correct and that the Department accedes that the decision and order needs to be withdrawn.

F. The Department's submission of withdrawal of protest filed on May 14, 2018 was untimely because the protest had already been ruled upon with a final, public decision and order on April 30, 2018.

G. Based on the Department's uncommunicated notice of abatement of tax, Taxpayer is not liable for the assessed tax and the previous decision and order issued pursuant to NMSA 1978, Section 7-1-8 is withdrawn in favor of this decision and order.

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

DATED: May 30, 2018.



Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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.

CERTIFICATE OF SERVICE

On May 30, 2018, a copy of the foregoing Amended Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail

Interoffice Mail