

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

**IN THE MATTER OF THE PROTEST OF
DR SISTAR YANCY
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1446023984**

D&O #18-40

Case no: 18.02-034A

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**IN THE MATTER OF THE PROTEST OF
ROBERT D. TOWNSEND
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0145953584**

v.

Case No: 18.01-009A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT.

DECISION AND ORDER

On September 6 and 7, 2018, Hearing Officer Ignacio V. Gallegos, Esq. conducted a merits hearing in the matter of the tax protest of Dr. Sistar Yancy and Robert D. Townsend pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Dr. Sistar Yancy and Robert D. Townsend (“Taxpayer” or “Taxpayers”) appeared representing themselves. Staff Attorney Jama Fisk appeared, representing the opposing party in the protest, the Taxation and Revenue Department (“Department”), along with Protest Auditor Veronica Galewaler.

Witnesses Leticia Zarate, Monica Gutierrez, Sandra Hidalgo, Bobby Griffiths, Dr. Yancy, Mr. Townsend, and Ms. Galewaler testified at the hearing. Taxpayer’s Exhibits 1, 2, 3, and 4 were admitted into the record without objection. The Department’s Exhibits A through P were admitted without objection. The Hearing Officer took administrative notice of all documents contained in the administrative file. All exhibits are more fully described in the Administrative Exhibit Log.

The main issue presented before this tribunal in this protest is whether directors of a New Mexico non-profit corporation are liable individually for unpaid withholding taxes of the corporation. After making findings of fact in this matter and discussing the arguments and the pertinent legal authority in more detail, this tribunal ultimately concludes/rules that the Taxpayers prevail in this protest because the individual Taxpayers named herein were not “employers” as contemplated by New Mexico law.

FINDINGS OF FACT

Robert D. Townsend (I)

1. On November 13, 2017, the Department assessed Taxpayer Robert D. Townsend the amounts of \$5,656.63 in withholding tax, \$1,134.67 in penalty, and \$827.85 in interest for a total assessment and amount due of \$7,619.15 for the reporting periods ending November 30, 2012 through December 31, 2013. [Letter ID #L0145953584]. The letter referenced the Taxpayer as “an ‘employer’ of the subject business[.]”
2. On December 12, 2017 the Department’s protest office received the Robert D. Townsend’s formal protest of the assessment. [Administrative file].
3. The Department acknowledged Robert D. Townsend’s Formal Protest on December 14, 2017. [Letter ID #L0777704240].
4. On January 8, 2018, the Department filed a Hearing Request with the Administrative Hearings Office. [Administrative file].
5. On January 9, 2018, the Administrative Hearings Office entered and served a Notice of Administrative Hearing to Robert D. Townsend, setting a hearing on the merits of Taxpayer’s protest for February 20, 2018, before administrative hearing officer David Buchanan. [Administrative file].

6. On February 13, 2018, the Department submitted a motion for continuance and to consolidate the three¹ cases under protest, regarding different taxpayers, with a single underlying organization. The motion also contained a waiver of the 90-day hearing requirement under NMSA 1978, Section 7-1B-8. [Administrative file].
7. On February 15, 2018, the Administrative Hearings Office issued a notice of reassignment of hearing officer, assigning the undersigned hearing officer to preside over the pending protest. [Administrative file].
8. On February 15, 2018, the Administrative Hearings Office issued an Order granting continuance and notice of administrative hearing, setting a merits hearing for April 13, 2018, and denying the motion to consolidate. [Administrative file].
9. On April 2, 2018, the Administrative Hearings Office issued an Order converting merits hearing to telephonic scheduling hearing, based on a request from the parties. [Administrative file].
10. On April 13, 2018, a telephonic scheduling conference occurred, and Robert D. Townsend and Department requested consolidation of the matters. [Administrative file].

Dr. Sistar Yancy (II)

11. On November 13, 2017, the Department assessed Taxpayer Dr. Sistar Yancy the amounts of \$5,656.63 in withholding tax, \$1,134.67 in penalty, and \$827.85 in interest for a total assessment and amount due of \$7,619.15 for the reporting periods ending November 30, 2012 through December 31, 2013. [Letter ID #L1446023984]. The letter referenced the Taxpayer as “an ‘employer’ of the subject business[.]”
12. On January 10, 2018 the Department’s protest office received Dr. Sistar Yancy’s formal protest of the assessment. [Administrative file].
13. The Department acknowledged Dr. Sistar Yancy’s Formal Protest on January 19, 2018. [Letter ID #L1573514032].

¹ The protest of the third case, issued under Letter ID# L1219695408, was withdrawn on February 23, 2018.

14. On February 12, 2018, the Department filed a Hearing Request with the Administrative Hearings Office. [Administrative file].
15. On February 13, 2018, the Administrative Hearings Office entered and served a Notice of Administrative Hearing to Dr. Sistar Yancy, setting a hearing on the merits of Taxpayer's protest for March 2, 2018, before the undersigned administrative hearing officer. [Administrative file].
16. On February 14, 2018, the Department submitted a motion to consolidate the three² cases under protest, regarding different taxpayers, with a single underlying organization. The motion also contained a waiver of the 90-day hearing requirement under NMSA 1978, Section 7-1B-8. [Administrative file].
17. On February 15, 2018, the Administrative Hearings Office issued an Order granting continuance and notice of administrative hearing, setting a merits hearing for April 13, 2018, and denying the motion to consolidate. [Administrative file].
18. On March 28, 2018, Taxpayer Yancy submitted a request for issuance of subpoenas to compel the presence of witnesses for the Taxpayers, and requesting additional time to prepare for the merits hearing. [Administrative file].
19. On April 2, 2018, the Administrative Hearings Office issued an Order converting merits hearing to telephonic scheduling hearing, based on the requests of the parties. [Administrative file].

Consolidated cases (III)

20. On April 13, 2018, a telephonic scheduling conferences occurred, and Taxpayers in both pending cases and Department requested consolidation of the matters. [Administrative file].
21. On April 17, 2018, the Administrative Hearings Office issued an Order consolidating cases of Dr. Sistar Yancy and Robert D. Townsend. [Administrative file].

² See Footnote 1.

22. On April 19, 2018, the Administrative Hearings Office issued a Scheduling Order and notice of administrative hearing, setting a hearing on the merits of Taxpayers' protest for June 18, 2018. [Administrative file].
23. On May 31, 2018, Taxpayers submitted a motion to continue the merits hearing. The Department concurred in the request. [Administrative file].
24. On June 7, 2018, the Administrative Hearings Office entered and served its Order granting continuance and Notice of Administrative Hearing. A hearing on the merits of Taxpayer's protest was scheduled to occur on September 6, 2018. [Administrative file].
25. Between July 19, 2018 and August 6, 2018 Subpoenas issued by the Administrative Hearings Office were served to witnesses. [Administrative file].
26. On September 6, 2018 and continuing through September 7, 2018, a hearing on the merits took place in Santa Fe, New Mexico, at the Administrative Hearings Office conference room in the Wendell Chino Building, 1220 S. St. Francis Drive.
27. The Eastern Plains Housing Development Corporation ["EPHDC"] is a non-profit corporation established under the laws of the State of New Mexico, particularly the Nonprofit Corporation Act, NMSA 1978, Section 53-8-1 *et seq.*, and under federal law, 26 USCS 501 (c)(3). [Department Exhibit D].
28. It was undisputed that during the period covered under the assessments, EPHDC failed to pay taxes withheld from its employees' gross pay to the Department as required under NMSA 1978, Section 7-3-1 *et seq.*
29. The Department issued multiple notices and assessments to EPHDC throughout 2013, 2014, 2015, and 2016 to the address on file with the Department, a post office box. The underlying tax is not in dispute. [Department Exhibit A, B, and C].

30. Dr. Sistar Yancy and Robert D. Townsend were on the board of directors of EPHDC during the timeframes covered by the Department's assessment. [Testimony of Dr. Sistar Yancy, Testimony of Robert D. Townsend, Department Exhibit D].
31. Dr. Sistar Yancy and Robert D. Townsend were listed as elected officers, President and Secretary/Treasurer, respectively, for the board of directors for EPHDC on publicly available corporate documents. Dr. Yancy, Mr. Townsend, and Ms. Zarate³ expressed surprise that they were listed as officers (president, secretary/treasurer and vice-president, respectively) of EPHDC. [Testimony of Ms. Zarate, Testimony of Mr. Townsend, Testimony of Dr. Yancy, Department Exhibit D].
32. The state record itself (D-27 through D-31) bears no indicia of when it was filed or by whom, and is therefore deemed to be unreliable. [Department Exhibit D].
33. Filing monthly CRS-1 tax returns were part of the responsibilities of the Executive Director of EPHDC, who at all times relevant to the protests was Monica Gutierrez. The monthly CRS returns were prepared by Ms. Gutierrez, returns were signed by Ms. Gutierrez, checks were written/printed by Ms. Gutierrez, and then the check was signed by an individual authorized to sign on the account the check was drawn on. Decisions on who to pay with the available funds were made by Ms. Gutierrez. [Testimony of Ms. Gutierrez].
34. Dr. Sistar Yancy and Robert D. Townsend had signing authority for two of three bank accounts held by EPHDC between 10-09-2012 and 02-04-2014. [Department exhibit J and K].
35. Dr. Sistar Yancy signed checks for taxes due on EPHDC's CRS-1 reports in 2012. Checks were supplied to Dr. Yancy with the necessary information filled in by Ms. Gutierrez. [Department Exhibit O].
36. Robert D. Townsend signed checks for EPHDC, depending on the needs of Ms. Guterrez, and she would usually provide backup, a bill or invoice or an accounting of hours worked, for the

³ The subject of the third withdrawn protest.

amounts paid. The only checks the directors signed were at the request of Ms. Gutierrez.

[Testimony of Mr. Townsend].

37. In addition to Ms. Gutierrez, who performed the bookkeeping duties, EPHDC also used the services of a CPA and had yearly audits. The firm “Accounting and Consulting” was responsible for the yearly audit and for filing yearly tax returns. [Testimony of Mr. Townsend, Testimony of Ms. Gutierrez].
38. The audit for fiscal year July 1, 2012 through June 30, 2013 was never completed and the findings were not presented to the board. [Testimony of Ms. Gutierrez].
39. Ms. Gutierrez was responsible for EPHDC’s daily business operations, which among other tasks, included hiring and firing staff, and fiscal management and reporting. [Testimony of Ms. Gutierrez].
40. Neither Ms. Gutierrez nor existing EPHDC board members provided Dr. Sistar Yancy nor Robert D. Townsend with materials or education concerning board or officer duties or expectations. [Testimony Mr. Townsend, Testimony of Dr. Yancy].
41. Ms. Gutierrez closed the doors to EPHDC on February 22, 2014. Following the closure, Ms. Gutierrez met with a person from Workforce Solutions, who filed a “final report” for her. She also believed an IRS Form 941 (for federal employee withholdings) was filed at the time. Ms. Gutierrez had exclusive access to the post office box. She knew of mail piling up at the post office, but did not collect it. [Testimony of Ms. Gutierrez].
42. As a result of the closure, the assets of EPHDC were dissolved among creditors and service providers. The assets of EPHDC at the time of the closure included motor vehicles and real estate. [Testimony of Ms. Gutierrez, Testimony of Ms. Hidalgo].
43. The reason the executive director gave to the Board of Directors for the financial problems that ultimately led to the closure was that a client, the J.L. Gray corporation, was not paying as agreed for service coordinator salaries, and for a portion of the executive director’s salary to supervise

the service coordinators. [Testimony of Mr. Townsend, Testimony of Dr. Yancy, Testimony of Ms. Gutierrez].

44. The J.L. Gray corporation, through Bobby Griffiths, co-owner, indicated that the U.S. Department of Housing and Urban Development (HUD), would not agree to rent increases for eligible properties, based on the management of EPHDC and its inability to comply with HUD policies. [Testimony of Mr. Griffiths].
45. Mr. Griffiths met with Ms. Gutierrez, and others, and in that meeting informed the participants from EPHDC about this, in order to manage expenses and correct the managerial faults in order to get rent increases approved by HUD. The Taxpayers named herein were not at the meeting. [Testimony of Mr.Griffiths].
46. Mr. Griffiths made other attempts to confer with Ms. Gutierrez to provide options to increase EPHDC's income or to reduce its expenses. The meetings produced no results. [Testimony of Mr. Griffiths].
47. Board members and the officers of EPHDC were unaware of the dispute between Mr. Griffiths and Ms. Gutierrez, and attributed the financial problems of the EPHDC to the failure of J.L. Gray to pay as agreed. [Testimony of Mr. Townsend].
48. Upon closure of EPHDC, Ms. Gutierrez handed the keys over to the Bank of Clovis, mortgagee of the building used to house EPHDC's offices. [Testimony of Ms. Gutierrez].
49. The board of directors had say-so when it came to the hiring of Ms. Gutierrez as the executive director, but neither Dr. Yancy nor Mr. Townsend were on the board of directors when Ms. Gutierrez was hired as executive director. [Testimony of Ms. Gutierrez].
50. Ms. Sandra Hidalgo was a founding member of the EPHDC, and was executive director of the organization until her retirement on June 30, 2010. [Testimony of Ms. Hidalgo].
51. In 2014, Ms. Hidaglo started getting phone calls from banks, in an effort to collect on delinquent mortgage payments, where her name was still on file despite her retirement. The New Mexico

Mortgage Finance Authority stepped in and, because she was familiar with EPHDC, appointed Ms. Hidalgo as a receiver and property manager for some properties. After some time, upon completion of the foreclosure process, a non-profit based in Las Cruces took over some of the properties. [Testimony of Ms. Hidalgo].

52. In dealing with the defunct corporation as receiver, Ms. Hidalgo had access to board meeting minutes as well as the incomplete audit. In her review of these documents, she determined that there appeared to have only been two or three meetings of the board of directors in the three years following her retirement, and the audit – although incomplete – revealed that payroll taxes had been left unpaid to the state and federal authorities for about a year before the corporation became insolvent. [Testimony of Ms. Hidalgo].

53. Ms. Hidalgo, when she was an executive director of the EPHDC, would try to have monthly board meetings, but at the very least would have quarterly meetings of the board. The articles of incorporation only require an annual meeting of the board, but Ms. Hidalgo believed that more meetings were needed due to the volume of work. [Testimony of Ms. Hidalgo].

DISCUSSION

Taxpayers did not protest the withholding tax principal, interest and penalties due under the assessments. Rather, Taxpayers' protest hinges on the contention that the Department illegally imposed a non-profit corporation's liability against volunteer directors as individuals who had no actual control over the finances of the organization, by virtue of being "employers."

Burden of proof.

The assessments issued in this case are presumed correct. NMSA 1978, Section 7-1-17 (C). Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. If Taxpayer can overcome the presumption of correctness in the assessment, the

burden shifts to the Department to prove the assessment was justified. *See New Mexico Taxation & Revenue Dep't. v. Whitener*, 1993-NMCA-161, 117 N.M. 130, 869 P.2d 829; *MPC Ltd. v. New Mexico Taxation & Revenue Dep't.*, 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308.

The origin of the assessments

In this case, the liability arose from the non-payment of employee wage withholdings by the employer, the Eastern Plains Housing Development Corporation, a not-for-profit organization dedicated to providing access to affordable housing. The organization had transitioned after the retirement of its Executive Director of fourteen years, Sandra Hidalgo. The transition included a new leader, Monica Gutierrez, the new Executive Director, who had been employed at the organization for several years, and who was best positioned in the organization to lead it through the transition. The board of directors for the organization was also in flux. As board members left, new members joined the board.

Ms. Gutierrez called and held only two or three board meetings following the departure of Ms. Hidalgo through the time the doors closed. During this time, income was not as Ms. Gutierrez had expected it to be and she conveyed her dismay at the non-payment of J.L. Gray to the board, as the reason for the financial woes. She indicated to the board that J. L. Gray was past due in making payments for service coordinator salaries and the portion of her own salary that was supervising the service coordinators. During this time, beginning on February 11, 2013, the Department began sending non-filer notices to the EPHDC – informing them that they were neglecting their required CRS report filing from November 2012.

Rather than cut the workforce or reduce other expenses, evidence suggests that Ms. Gutierrez opted to continue paying herself and the other employees in favor of paying audit expenses and withholding taxes for the organization. In February of 2014, Ms. Gutierrez closed the doors and gave the keys to the bank. By this time, the Department had sent three non-filer notices [Letter ID Nos. L2116840768, L0445616592, and L0066558416; Department exhibit A], and thirteen assessment notices

[Letter ID Nos. L0852575696, L1926317520, L0181487056, L1255228880, L0718357968, L1792099792, L0449922512, L1523664336, L0986793424, L2060535248, L0114378192, L1188120016, L0381393360; Department exhibit C] to the address controlled by the executive director, in the name of the organization. The organization still exists on paper, but is not in good standing with the Secretary of State's Office.

Sometime after the doors closed, the former executive director, Ms. Hidalgo was invited to be the receiver of the organization, by the New Mexico Mortgage Finance Authority (MFA). As receiver, Ms. Hidalgo helped mortgage foreclosures and property transfers run smoothly. In doing so, she was able to review minutes from the final board meetings, which she counted had been two or three meetings since she left in 2010.

The Department, after years of sending correspondence to EPHDC's post office box, discovered the directors and officers names and addresses from the corporate documents on file with the Secretary of State's office. As a result, the Department assessed Robert D. Townsend, Dr. Sistar Yancy, and Leticia Zarate as individuals acting as fiduciary, agent or employer for the entire amount due from EPHDC, jointly and severally, in 2017, under NMSA 1978, Section 7-3-11 (1990).

Ms. Zarate was able to show she was not a signer on any bank account held by EPHDC, and was excused from the assessment. The remaining tax protestants Dr. Sistar Yancy and Robert D. Townsend argue that the assessments were untimely, that they were led to believe they could not be held liable for acts of the corporation, and that they did not play a role in determining what would be paid, when they only signed checks presented to them by the executive director.

Statute of limitations

Taxpayers contend that the assessment should have been made earlier, challenging the statute of limitations, since the errors were made in 2012 and 2013, and the first they heard of it was in November of 2017. Again, the assessment bears the presumption of correctness. *See* NMSA 1978, Section 7-1-17.

The reporting periods at issue are November 2012 through December 2013. The Department initiated its assessments against Robert D. Townsend and Dr. Sistar Yancy on November 13, 2017. NMSA 1978 § 7-1-18 allows the Department authority to assess taxes up to three years “from the end of the calendar year in which payment of the tax was due” with several enumerated exceptions extending that three-year limit. The Department applies the non-filer exception under NMSA 1978 § 7-1-18 (C): “In case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required may be assessed at any time within seven years from the end of the calendar year in which the tax was due.”

EPHDC filed CRS-1 returns monthly. The evidence presented showed that the last CRS-1 return EPHDC submitted was for the reporting period ending October 31, 2012. For the tax period ending November 30, 2012, EPHDC should have filed a CRS-1 and paid any outstanding tax thereon by December 26, 2012. The assessment in 2017 was well within the seven-year limit from the end of 2012. The Department’s assessments for the tax periods from November 2012 through December 2013 and the assessments dated November 13, 2017 were within the extended limits of the statute for non-filers. Assessments were timely.

The Withholding Tax Act.

Payment of withholding taxes is governed by the Withholding Tax Act, NMSA 1978, Section 7-3-1, *et seq.* Employers who are required to deduct and withhold federal income tax from their employees’ wages are also required to deduct and withhold state income tax from those wages and to pay that amount to the state. *See* NMSA 1978, Section 7-3-3 (2010).

Under Section 7-3-5, “[e]very withholder shall be liable for amounts required to be deducted and withheld by the Withholding Tax Act regardless of whether the amounts were in fact deducted and withheld.” In this instance, EPHDC was the withholder entity. Under Section 7-3-2 (M), a withholder is

“a payor, an *employer* or any person required to deduct and withhold from winnings that are subject to withholding.” (emphasis added).

Section 7-3-3 is the specific statute relied upon by the Department to hold the individual Taxpayers liable for EPHDC’s unpaid withholding taxes. Section 7-3-3 reads as follows: “A. Every employer who deducts and withholds a portion of an employee’s wages for payment of income tax under the provisions of the Internal Revenue Code shall deduct and withhold an amount for each payroll period computed from a state withholding tax table furnished by the department[.]” The Withholding Tax Act defines an “employer” as “a person or an *officer, agent or employee of that person having control of the payment of wages*, doing business in or deriving income from sources within the state for whom an individual performs or performed any service as the employee of that person, except that if the person for whom the individual performs or performed the services does not have control over the payment of the wages for such services, “employer” means the person having control of the payment of wages” NMSA 1978, Section 7-3-2 (C) (emphasis added). As listed officers (president, vice-president, and secretary/treasurer) of the non-profit board, Taxpayers in this matter are potentially “employers” under the Withholding Tax Act if it can be established that Taxpayers were individuals with control of the payment of wages.

The resolution of these protests turns on the meaning and determination of the phrase “having control of the payment of wages.” A person “having control of the payment of wages” has been discussed at length in the federal court realm, and in other cases before this tribunal. Federal law also requires employers to withhold wages in order to prepay the government for income taxes due by the employee. *See* 26 U.S.C. Section 3403. An employer is defined in a similar manner to that in New Mexico. “[T]he term “employer” means the person for whom an individual performs or performed any service, ...except that ... if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages...” 26 U.S.C. Section

3401 (d). The United States Supreme Court considered “control of the payment of wages” in *Otte v. United States*, 419 U.S. 43 (1974), affirming a lower court judgment that a bankruptcy trustee was in control of the payment of wages, and therefore liable for federal wage withholdings, during the pendency of a bankruptcy proceeding. The Court reasoned, and other courts reiterated, that by enacting the law as such, the Congress intended to place responsibility at the point of control. See *Southwest Restaurant Systems Inc. v. I.R.S.*, 607 F.2d 1237 (9th Cir. 1979). In the *Southwest Restaurant* case, the Federal Circuit Court of Appeals took into consideration whether having shared control of an account reduced liability; it found that having three possible signers did not reduce the control of the signer, who was in charge of the bookkeeping, accounting and finances for the organization. The Circuit Court did nevertheless guide lower courts to consider, even if just a little, the impact of shared control over accounts, as well as the duties of those in the organization.

Previous cases before this tribunal (although non-precedential) have acknowledged some ambiguity of who can and cannot be held to be an employer. In *the Matter of the Protest of Bryan Templeton*, Decision and Order #10-03 (N.M.Tax.Rev.Dept., Hearings Bureau, March 18, 2010; non-precedential), the hearing officer held that under the facts of the case, the chief accounting officer for limited partnership which wholly owned subsidiary business was an “employer” under the statute, and liable for unpaid withholding tax. The evidence in that case included publicly available corporate documents that showed the taxpayer’s role as a director, evidence he signed employees’ paychecks, evidence he signed income tax returns, and evidence he held himself out to be the “Taxpayer or agent” of the organization. In *the Matter of the Protest of Eugene Baker*, Decision and Order # 01-30 (N.M. Tax. Rev. Dep’t., Hearings Bureau, November 1, 2001; non-precedential), is in line with the above reasoning (there is no question that a person is liable, in the instance when a person admits he was the corporate officer, was primarily responsible for business operations, and had authority to sign tax returns and make payments on behalf of the organization). By comparison, the decision *In the Matter of the Protest of Andrew Winton*, Decision and Order #15-32 (N.M. Administrative Hearings Office, September 29, 2015;

non-precedential) acknowledges that the factual posture of each case bears close consideration. In that case, the taxpayer, who appeared as a director in corporate documents for the limited liability corporation, but who had no check-writing authority and no role in the business was not found liable as an “employer.”

The evidence related to the control of payment of wages in this protest falls somewhere between those mentioned. The evidence that most supports the Department’s determination is that the Taxpayers both agreed that they signed checks on occasion in order to pay bills for EPHDC. Signature cards presented as evidence show this to be true. Dr. Yancy signed the final two checks to the New Mexico Taxation and Revenue Department for September and October 2012 withholding taxes due, and Mr. Townsend signed payroll checks on some occasions by his own admission.

The evidence that most supports the Taxpayer’s view of the case was that although they agreed to sign checks for the organization, they only signed those checks written and presented to them by Ms. Gutierrez, who acted on her own direction. Ms. Gutierrez, by her own sworn statement, was responsible for collecting EPHDC’s income, she decided which checks to write, when to write them, and which to present to the board members. Ms. Gutierrez did not present checks to board members that she did not intend to pay. Ms. Gutierrez signed the September and October 2012 withholding CRS-1 returns as “Executive Director.” Ms. Gutierrez would present checks to any available board member with signing authority, so by distributing the responsibility, no single board member was aware of what should be paid, nor whether one creditor was left unpaid in favor of some other obligation.

The person who had most control in the organization was Ms. Gutierrez, and it appeared that her use of the directors to sign checks was a mechanical duty, when the true decision-making power was in her own hands. “Authority to sign checks, without more, is a weak pillar on which to rest liability.” *Barrett v. United States*, 580 F2d 449, 453, 217 Ct. Cl. 617, 624-25 (1978); *Accord Pototsky v. United States*, 8 Cl. Ct. 308, 1985 U.S. Cl. Ct. LEXIS 970. The cases cited here, although they pertain to federal interpretation of what constitutes a “responsible person” under an IRS penalty provision, rather than what

constitutes a person in “control of the payment of wages,” are helpful insofar as they help the tribunal measure the appropriate weight to be given to the evidence presented, rather than a rationale for accountability. Here, the responsibility to make withholding payments was not in the hands of the named directors, but in Ms. Gutierrez’s hands. The ability to sign checks was a mechanical duty of board members, even those with honorary officer titles, not, as the Department suggested, substantial evidence of control of the payment of wages.

Rather than make necessary changes to maintain fiscal balance, and failing to act on repeated letters from the Department, Ms. Gutierrez shut the doors and handed over the keys to the bank.⁴ Ms. Gutierrez’s testimony that she never saw the Department’s many notices is not credible. A receiver was later appointed and the assets of the organization were distributed to creditors or foreclosed upon. The remainder of EPHDC’s assets were transferred to a successor entity. Dr. Yancy and Mr. Townsend have provided substantial evidence and have established that they should not be held liable as “employers” in control of payment of wages.

Liability of directors and officers of non-profit corporations.

Taxpayers have asserted that as directors, even officers, of a New Mexico corporation organized as a not-for-profit corporation, under the auspices of 26 U.S.C. 501(c)(3), any obligations of the corporation shall not be imposed on the individual directors or officers under the New Mexico Nonprofit Corporations Act. “The directors, officers, employees and members of the corporation shall not be personally liable for the corporation's obligations.” NMSA 1978, Section 53-8-25 (1975). I have not reached a decision on that issue because the underlying question of liability as “employers” concluded the matter in favor of the Taxpayers, so the issue is moot.

⁴ A note of caution: although the evidence presented at the hearing strongly suggested that Ms. Gutierrez was the person in control of wages, Ms. Gutierrez was not named as an assessed taxpayer, and was not afforded the necessary due process to defend herself.

Conclusion

If Taxpayer can overcome the presumption of correctness in the assessment, the burden shifts to the Department to prove the assessment was justified. *See New Mexico Taxation & Revenue Dep't. v. Whitener*, 1993-NMCA-161, 117 N.M. 130, 869 P.2d 829; *MPC Ltd. v. New Mexico Taxation & Revenue Dep't.*, 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308. The Department suggested no other means of holding these Taxpayers accountable for the unpaid withholding taxes.

The Taxpayers have overcome the presumption of correctness in the Department's determination that they were "employers." In so holding, there are several questions left unanswered. I have not addressed whether protection from corporate liability can be found in the New Mexico Nonprofit Corporations Act, the EPHDC Articles of Incorporation, or Corporate Bylaws. Nor have I addressed the issue of whether the Department was required to pierce the corporate veil in this Decision. Ultimately, the Taxpayers prevail in this protest because the Taxpayers named herein were not "employers" as contemplated by New Mexico law.

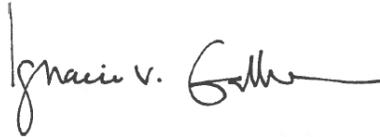
CONCLUSIONS OF LAW

- A. Taxpayers filed a timely written protest to the assessments issued under Letter ID# L1446023984 and L0145953584 and jurisdiction lies over the parties and the subject matter of this protest.
- B. The Taxpayers and Department waived the 90-day hearing requirement of NMSA 1978, Section 7-1B-8(A) (2015) when filing a Motion to Consolidate in February, 2018.
- C. Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it is entitled to an abatement.
- D. The Taxpayers overcame the presumption of correctness in the Department's initial assessment that they were "employers" as defined in NMSA 1978, Section 7-3-2 (C).
- E. Taxpayers were not in control of payment of wages, pursuant to NMSA 1978, Section 7-3-2 (C).

F. Taxpayers are entitled to abatement of assessments of tax, penalty and interest.

For the foregoing reasons, Taxpayers' protest is **GRANTED**.

Dated: November 29, 2018.



Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
Post Office 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

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 29th day of November, 2018 in the following manner:

First Class Mail

Interdepartmental State Mail

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
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