BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
ERNEST I. ARAGON

PROTEST TO OFFSET OF 2002 INCOME TAX REFUND AGAINST 1995 LIABILITY **No. 03-24**

PROTEST OF PENALTY AND INTEREST ASSESSED UNDER LETTER ID L0292458496

DECISION AND ORDER

A formal hearing on the above-referenced protest was held December 2, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Ernest I. Aragon represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1996, Ernest and Nora Aragon filed a New Mexico personal income tax return (Form PIT-1) for the 1995 tax year.

2. The Aragons' PIT-1 showed a tax liability of $2,112, a prepayment of $1,321, and tax due of $791. A check for $791 was enclosed with the return.

3. Upon receipt of the Aragons' return, the Department checked its records, but was unable to locate the $1,321 prepayment on its computer system.

4. On June 7, 1996, an assessment in the amount of $1,321, plus interest and penalty, was generated by the Department's "Legacy" computer system in Santa Fe. The number assigned to the assessment was 662226.

5. Although the address shown on Assessment No. 662226 was the Aragons' correct address in Albuquerque, the Aragons never received the assessment.

6. Between June 1996 and December 1997, periodic billing notices were sent to at least some taxpayers with outstanding tax assessments. The Department did not keep copies of the billing notices, and there is no record to indicate exactly when or to whom these notices were sent.

7. In 1997, the Department switched its personal income tax program from the Legacy computer system to the "TRIMS" computer system.

8. In 2002, the Department switched its personal income tax program from the TRIMS computer system to the new "GenTax" computer system.

9. During the period 1998 through 2002, the Department did not take any action to collect the $1,321 of tax assessed against the Aragons under Assessment No. 662226.

10. In February 2003, Assessment No. 662226 was assigned to the Department's collection unit in Albuquerque.

11. On March 20, 2003, the Department notified the Aragons that the Department had intercepted their $519 personal income tax refund for tax year 2002 and applied this amount to the $1,321 of tax shown on Assessment No. 662226.

12. On April 7, 2003, Mr. Aragon filed a written protest to the Department's offset of his 2002 personal income tax refund.

13. On July 14, 2003, the Department issued an assessment against the Aragons under Letter ID No. L0292458496 for $261.00 of personal income tax due for the 1999 tax year, plus penalty and interest.

14. On July 23, 2003, Mr. Aragon filed a written protest to the assessment of penalty and interest on the tax due for 1999.

15. On September 11, 2003, a formal administrative hearing was scheduled for December 2, 2003 to consider the merits of Mr. Aragon's protest to the Department's offset of his 2002 refund and his protest to the assessment of penalty and interest issued under Letter ID No. L0292458496.

16. At the December 2, 2003 hearing, Mr. Aragon withdrew his protest to the assessment of penalty and interest issued under Letter ID No. L0292458496.

DISCUSSION

The issue raised in this protest is whether the Department's application of the Aragons' 2002 personal income tax refund to the $1,321 of tax assessed under Assessment No. 662226 was authorized by law. NMSA 1978, § 7-1-29(C) provides that "any amount of tax due to be refunded may be offset against any amount of tax for the payment of which the person due to receive the refund is liable." Given the authority granted to the Department by this statute, the question to be addressed is whether the Aragons are "liable" for the assessment of 1995 personal income tax generated by the Department's Legacy computer system in June 1996. If the assessment is a valid assessment, the offset was proper; if the assessment is not valid, the offset was improper and the Aragons are entitled to the return of their 2002 refund, with interest.

NMSA 1978, § 7-1-17(B)(2) states that assessments of tax are effective:

> (2) when a document denominated "notice of assessment of taxes", issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer….

In this case, the evidence establishes that Assessment No. 662226, addressed to the Aragons at their Albuquerque address, was generated by the Department's Legacy computer system on or about June 7, 1996 (Department Exhibits 2000 E and 2000 G). Mr. Aragon has consistently maintained that he never received the Department's assessment. Mrs. Aragon also testified that the assessment was never received.

Although NMSA 1978, § 7-1-17 does not require proof of receipt by the taxpayer, it does require proof of mailing. Department Regulation 3.1.6.12 NMAC confirms that the presumption of correctness that applies to Department assessments attaches only after the assessment "has been mailed or personally delivered to a taxpayer…." There is a presumption that a properly addressed letter that is mailed will be received by the addressee. *Garmond v. Kinney*, 91 N.M. 646, 647, 579 P.2d 178, 179 (1978). The addressee may rebut this presumption by introducing evidence that the letter was not received. *State Farm Fire and Casualty Co. v. Price*, 101 N.M. 438, 443, 684 P.2d 524, 529 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 44 (1984), *overruled on other grounds*, *Ellingwood v. N.N. Investors Life Ins. Co*., 111 N.M. 301, 805 P.2d 70 (1991). When a mailing is challenged, the "party relying on service by mail has the burden of proving the mailing." *Myers v. Kapnison*, 93 N.M. 215, 217, 598 P.2d 1175, 1177 (Ct. App. 1979).

In *Myers*, the court found that the existence of a transmittal memorandum and an attorney's certificate of mailing was not sufficient to establish that the legal document at issue was mailed. As stated by the court:

> Unchallenged, the attorney's certificate was sufficient proof of mailing. *Timmons v. United States*, 194 F.2d 357 (4th Cir. 1952). Here, the fact of mailing was challenged. Four affidavits were submitted on behalf of plaintiff….

> These affidavits raised a factual question as to whether the answer was mailed on November 3, 1978.
>
> The transmittal memorandum says nothing about mailing. The attorney's certificate concludes that the answer was mailed, but states nothing in support of that conclusion. There is no reference to postage or to placing in a mail box of any kind. *See Davis v. Pennsylvania R.R.*, 7 F.R.D. 622 (N.D. Ohio E.D. 1947). Compare the certificate in *Timmons v. United States, supra*. *See* N.M. Crim. App. 301(b) which states: "'Mailing' shall include deposit in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney."

93 N.M. at 216-217, 598 P.2d 1175, 1176-1177. *See also, Estate of Griego ex rel. Griego v. Reliance Standard Life Insurance Co*., 2000-NMCA-022, ¶¶ 40-42, 128 N.M. 676, 685, 997 P.2d 150, 159 (testimony of non-receipt was sufficient to create a factual question as to whether insurance company properly mailed a premium notice).

In this case, Mr. Aragon challenged the mailing of Assessment No. 662226. In support of its position that the Aragons received the assessment, the Department introduced a June 20, 1996 letter from Mr. Aragon concerning a refund application he filed for the 1990-1993 tax years. In his letter, Mr. Aragon maintains that the "collection of taxes entails more than simply computing taxes, interest and penalties, and making the assessments: you must also establish communication and coherent rapport with the taxpayer to resolve an issue." The letter also states that "[s]imply making an assessment while ignoring the taxpayer amounts to repressive government…." The Department maintains that Mr. Aragon's references to "the assessments" and "an assessment" serve as proof that he received Assessment No. 662226. There is nothing in these references, however, to indicate that Mr. Aragon received the particular assessment at issue in this case. His letter sets out his general dissatisfaction with the Department's actions and procedures and states that his complaints

involve his 1990-1993 returns. There is no reference in the letter to Assessment No. 662226 or to personal income taxes due for the 1995 tax year.

The Department also points out that Mr. Aragon's June 1996 letter enclosed a copy of Department publication FYI-402 on taxpayer remedies. Because it is the Department's practice to include FYI-402 with all assessments, the Department argues that the copy of FYI-402 enclosed with Mr. Aragon's letter must have been the copy sent to him with Assessment No. 662226. There is no basis for this conclusion. Publication FYI-402 is readily available to taxpayers, and Mr. Aragon could have obtained a copy in any number of ways. The evidence shows that Mr. Aragon had an ongoing dispute with the Department long before Assessment No. 662226 was generated, and it is reasonable to assume that the copy of FYI-402 included with Mr. Aragon's letter was provided to him in connection with that earlier dispute. Mr. Aragon's June 1996 letter actually lends support to his assertion that he never received Assessment No. 662226. Given his history of vigorously protesting any Department action (or inaction) taken in connection with his personal income taxes, it would have been completely out of character for Mr. Aragon to ignore receipt of an assessment of tax for the 1995 tax year.

I find that the Aragons were credible witnesses and accept their testimony that they never received the Department's assessment of 1995 tax. This places the burden on the Department to come forward with evidence to establish that the assessment was properly mailed. *Myers, supra*. No evidence was introduced on this issue. Shannon Baxter, the acting bureau chief of the Department's collection unit in Albuquerque, testified that assessments issued by the Legacy system were generated and mailed by the Department's Revenue Processing Division in Santa Fe. Ms. Baxter conceded that her knowledge of the Legacy system was limited and that she had never

worked in the Revenue Processing Division. Ms. Baxter did not provide any testimony to explain the process by which a 1996 assessment generated by the Legacy system would have been transported to the Department's mail room, how postage would have been affixed, or how the assessment would have been deposited with the United States Postal Service. Her assumption that once Assessment No. 662226 was generated it would have been properly mailed to the taxpayers does not constitute evidence of mailing.[1]

Ms. Baxter also testified that periodic billing notices were generated by the Legacy system up through December 1997, when the Department switched its personal income tax program to the TRIMS computer system. Ms. Baxter said that billings were sent out either monthly or quarterly at the direction of management. The Department did not keep copies of billing notices, however, and there is no record to indicate exactly when or to whom notices were sent between June 1996 (the date appearing on Assessment No. 662226) and December 1997. Although Ms. Baxter testified that billing notices were generated and mailed from Santa Fe during this period, she did not provide any information to explain the mailing process. Such evidence would have minimal value in any event, since billing notices do not constitute assessments. In order to establish the Aragons' liability for 1995 personal income tax, and thereby justify the offset of their 2002 refund, the Department was required to show that an

[1] Prior to the December 2, 2003 hearing, Mr. Aragon notified the Department that he wanted to call the "person responsible for programming the computer handling the taxpayer's assessment in 1996" and the "person responsible for administering…Assessment Number 662226." The Department responded that it did not know the identities of these persons. There is no indication that the Department made any effort to locate other Department employees who might have first-hand knowledge of the Legacy computer system and the procedures for mailing assessments generated by the system.

assessment of taxes was mailed to the taxpayers on or before December 31, 1999, the end of the three-year limitations period set out in NMSA 1978, § 7-1-18. The Department failed to present sufficient evidence to meet its burden of proof on this issue.

CONCLUSIONS OF LAW

1. Ernest I. Aragon filed a timely, written protest to the Department's offset of his 2002 personal income tax refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department failed to meet its burden of proving that Assessment No. 662226 was mailed to Mr. Aragon on or before December 31, 1999.

3. Without proof of mailing, Assessment No. 662226 does not constitute a valid assessment under NMSA 1978, § 7-1-17, and the Department may not apply tax refunds due to Mr. Aragon against the liability shown on that assessment.

For the foregoing reasons, Mr. Aragon's protest IS GRANTED. The Department is ordered to refund the $519 of personal income tax due to the Aragons for tax year 2002, with interest as provided in NMSA 1978, § 7-1-68.

DATED December 29, 2003.