

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

**IN THE MATTER OF THE PROTEST OF
NICHOLAS J. DROBOT
ASSESSMENT OF 1999 PERSONAL INCOME
TAX ISSUED UNDER LETTER ID L1238034432**

No. 04-11

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 12, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Nicholas J. Drobot ("Taxpayer") did not appear for the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 19, 2003, the Department assessed the Taxpayer for \$825.00 of personal income tax due for the 1999 tax year, plus \$443.44 of interest and \$82.50 of penalty.
2. On December 10, 2003, after obtaining an extension of time from the Department, the Taxpayer filed a written protest to the Department's assessment.
3. On February 2, 2004, Bruce Fort, the Department's attorney, filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On February 3, 2004, a Notice of Hearing was sent to the parties scheduling an administrative hearing for April 8, 2004.
5. Enclosed with the hearing notice was an information sheet explaining the administrative hearing process. The information sheet included the following passage:

The taxpayer may need to call witnesses to testify concerning...facts of the case. The taxpayer may also testify on his or her own behalf. The Department's attorney may call witnesses, including the taxpayer, to establish the Department's case. All witnesses are required to be present at the hearing, to testify under oath or affirmation, and to answer questions from both the taxpayer and the Department's attorney.

6. On February 10, 2004, the Taxpayer filed an unopposed request for continuance, explaining that he was employed as a tax preparer and that April 8, 2004 would be one of his busiest days.

7. On February 16, 2004, the Hearing Officer entered an Order granting the Taxpayer's motion and rescheduling the administrative hearing for April 27, 2004

8. On April 5, 2004, the Department's attorney filed a Motion to Compel Discovery, asking the Hearing Officer to require the Taxpayer to respond to the Department's First Set of Interrogatories and Request for Production, which were served on the Taxpayer on February 6, 2004.

9. On April 6, 2004, the Hearing Officer sent a letter to the parties vacating the April 27, 2004 hearing and ordering the Taxpayer to respond to the Department's discovery requests no later than May 7, 2004.

10. On April 20, 2004, the Taxpayer sent the Hearing Officer a letter stating that he had never received the Department's First Set of Interrogatories and Request for Production.

11. On April 21, 2004, the Hearing Officer sent a letter to the parties directing the Department's attorney to send the Taxpayer another copy of the Department's discovery requests and extending the time for the Taxpayer to respond to those requests until May 28, 2004

12. On April 27, 2004, the Taxpayer filed his responses to the Department's interrogatories. The Taxpayer declined to fully answer Interrogatories 1, 2, 6, and 12, objecting to those questions as irrelevant.

13. On May 14, 2004, the Department filed its response to the Taxpayer's objections.

14. On May 17, 2004, the Hearing Officer issued a letter ruling finding that the information sought by the Department was relevant to the Taxpayer's protest and ordering the Taxpayer to supplement his answers to the interrogatories by June 11, 2004.

15. The Hearing Officer informed the parties that after the supplemental answers were filed, she would reschedule the hearing on the protest, stating: "I anticipate setting a hearing sometime between July 19th and August 13th. If there are any dates during this period when either party (or required witnesses) will be unavailable, please let me know."

16. On June 8, 2004, the Taxpayer mailed supplemental answers to interrogatories in compliance with the Hearing Officer's order. With regard to the time frame for rescheduling the administrative hearing, the Taxpayer stated: "Based on ever changing schedules and availability, I suggest a hearing date as late as possible in August within your anticipated range."

17. On June 17, 2004, the Hearing Officer issued a Notice of Administrative Hearing rescheduling the hearing on the Taxpayer's protest for August 12, 2004.

18. The June 17, 2004 hearing notice was sent to the Taxpayer by certified mail, return receipt requested, and was signed for by the Taxpayer on June 18, 2004.

19. On August 5, 2004, the Hearing Officer received a letter from the Taxpayer stating that he would be "unable to attend the Administrative Hearing set for August 12, 2004"

because he had moved back to the State of New York. The envelope was postmarked in Windsor, New York, on July 31, 2004.

20. The Taxpayer's letter included various documents which the Taxpayer asked the Hearing Officer to consider in making a decision on the Taxpayer's protest.

21. On August 12, 2004 at 9:00 a.m., the Department's attorney entered his appearance at the scheduled hearing on the Taxpayer's protest. The Taxpayer did not appear for the hearing.

DISCUSSION

NMSA 1978, § 7-1-17 provides that any assessment of taxes made by the Department is presumed to be correct, and it is the Taxpayer's burden to come forward with evidence and legal argument to establish that he is entitled to an abatement.

In this case, the information sheet the Hearing Officer sent to the Taxpayer on February 3, 2004 notified him that all witnesses "are required to be present at the hearing, to testify under oath or affirmation, and to answer questions from both the taxpayer and the Department's attorney." Before rescheduling the hearing after discovery was completed, the Hearing Officer solicited the parties' input, stating: "I anticipate setting a hearing sometime between July 19th and August 13th. *If there are any dates during this period when either party (or required witnesses) will be unavailable, please let me know.*" (emphasis added.). On June 8, 2004, the Taxpayer responded: "I suggest a hearing date as late as possible in August within your anticipated range." Based on this response, the Hearing Officer rescheduled the hearing for August 12, 2004. The Taxpayer gave no indication that he was planning to leave the state, nor did he ever ask the Hearing Officer to move up the date of the hearing to accommodate his move

to New York. Instead, the Taxpayer sent a letter to the Hearing Officer after the fact, stating that he would be “unable to attend the Administrative Hearing set for August 12, 2004.”

Administrative tax hearings are quasi-judicial proceedings. Although such hearings are not required to observe the same evidentiary standards applied by a court, the proceedings must adhere to fundamental principles of justice and procedural due process, including an opportunity for the parties to present and cross-examine witnesses. *See, State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989). NMSA 1978, § 7-1-24 of the Tax Administration Act, provides that:

F. In hearings before the hearing officer, the technical rules of evidence shall not apply, but in ruling on the admissibility of evidence, the hearing officer may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt.

The Taxpayer’s July 31, 2004 letter asked the Hearing Officer to decide his case based on various statements and documents he had provided during the course of the protest. The Department has not stipulated to any of these statements, however, and continues to challenge the Taxpayer’s assertion that he was not a New Mexico resident during 1999. Because the Taxpayer’s statements were not given under oath, were not subject to cross-examination by the Department’s attorney, and were not stipulated to by the Department, they do not have sufficient indicia of reliability to be considered by the Hearing Officer. The same applies to the various documents provided by the Taxpayer, the authenticity of which cannot be verified. As a result, the Taxpayer has failed to meet his burden of proof under NMSA 1978, § 7-1-17.

NMSA 1978, § 7-1-16(C) specifies that a taxpayer who files a protest to a Department assessment “nevertheless becomes a delinquent taxpayer upon failure of the taxpayer to appear, in person or by authorized representative, at the hearing set” to consider his protest. This

establishes that a taxpayer who elects not to appear for the administrative hearing provided by the Department effectively abandons his protest and forfeits his right to contest his liability for the assessment.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the assessment of personal income tax issued under Letter ID L1238034432, and jurisdiction lies over the parties and the subject matter of this protest.

2. By failing to appear at the administrative hearing to present evidence and legal argument in support of his protest, the Taxpayer failed to meet his burden of proof in this matter and effectively abandoned his protest.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED August 17, 2004.