

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

**IN THE MATTER OF THE PROTEST OF
FLOYD E. CARROLL (d/b/a L&E WINDMILL &
WATERWORKS; CRS ID NO. 02-197414-00-4
TO ASSESSMENT OF GROSS RECEIPTS,
COMPENSATING AND WITHHOLDING TAXES
ISSUED UNDER LETTER ID L1380756480**

05-07

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on April 7, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Lewis J. Terr, Special Assistant Attorney General. Floyd E. Carroll ("Taxpayer") represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 15, 2004, the Department issued an assessment to the Taxpayer in the total amount of \$46,525.58, representing \$31,334.26 gross receipts tax, \$1,034.27 compensating tax, and \$515.00 withholding tax, plus interest and penalty.
2. On July 16, 2004, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the Department's assessment.
3. On February 21, 2005, Lewis J. Terr, 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 28, 2005, a Notice of Hearing was sent to the parties scheduling an administrative hearing for April 7, 2005. Enclosed with the hearing notice was an information sheet explaining the administrative hearing process.

5. On March 25, 2005, the Hearing Officer received a letter from the Taxpayer asking that his protest be dismissed, with prejudice, because Department employees had failed to file a surety bond with the secretary of state's office pursuant to the provisions of NMSA 1978, §§ 10-2-2 through 10-2-12. The Taxpayer also enclosed a Power of Attorney Contract appointing Antonio Gutierrez as his "choice of counsel" to assist him at the administrative hearing.

6. On March 28, 2005, the Hearing Officer sent a letter to the parties denying the Taxpayer's motion to dismiss and advising the Taxpayer that Mr. Gutierrez was not authorized to act as the Taxpayer's counsel because Mr. Gutierrez was not licensed to practice law in New Mexico. A copy of the Hearing Officer's March 28, 2005 letter ruling is attached to this decision as Exhibit A and incorporated herein by reference.

7. On April 5, 2005, the Hearing Officer received a letter from the Taxpayer disputing the Hearing Officer's ruling and accusing the Hearing Officer of treason.

8. The Taxpayer's charge of treason was based on the same arguments raised in his March 25, 2005 letter and on allegations in an attached memorandum of law concerning a "conspiracy" consisting of "an assemblage of persons—those exclusively but unlawfully given authorization to practice law in state courts of law for profit, by those posing as justices in the Supreme Court of New Mexico."

9. The Taxpayer further advised the Hearing Officer that: "You may ignore my letter, its contents, and the attached memorandum only at your own personal peril, I therefore urge you to survey your circumstance objectively and consider what value you place on your progress in life to date."

10. On April 7, 2005, the hearing on the Taxpayer's protest was convened in the Department's offices in Santa Fe, Santa Fe County, New Mexico.

11. Lewis J. Terr appeared on behalf of the Department. The Taxpayer appeared on his own behalf, accompanied by Antonio Gutierrez.

12. At the beginning of the hearing, the Hearing Officer stated that she had treated the Taxpayer's April 5, 2005 letter as a motion for reconsideration of her ruling, but was not persuaded by his legal arguments and was reconfirming her ruling on the surety bond issue. The Taxpayer was advised that he would have an opportunity to appeal this ruling to the New Mexico Court of Appeals once a final decision was entered.

13. The Hearing Officer told the Taxpayer that the hearing was intended to give him the opportunity to present whatever evidence or legal arguments he had to support the additional issues raised in his protest to the Department's assessment.

14. The Hearing Officer then attempted to put the Taxpayer under oath.

15. The Taxpayer refused to either swear or affirm that any testimony he gave would be the truth. Instead, he demanded to know whether the Hearing Office had filed a surety bond.

16. The Hearing Officer explained that she was not there to answer questions but to give the Taxpayer an opportunity to present evidence concerning his tax liability.

17. The Taxpayer repeatedly interrupted the Hearing Officer, continuing to demand that the Hearing Officer state whether she had filed a surety bond.

18. Based on the Taxpayer's uncooperative behavior, his refusal to accept the Hearing Officer's rulings, and his failure to present any relevant evidence or argument on the tax liability at issue in this protest, the Hearing Officer terminated the hearing.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessment of gross receipts, compensating, and withholding taxes issued under Letter ID L1380756480, and jurisdiction lies over the parties and the subject matter of this protest.

B. NMSA 1978, § 7-1-17(C) of the Tax Administration Act 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 to show that the assessment is incorrect.

C. The Taxpayer failed to provide any evidence or legal argument concerning his liability for the taxes assessed by the Department and has failed to meet his burden of proof.

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

DATED April 8, 2005.

EXHIBIT A

to April 8, 2005 Decision and Order Denying the
Protest of Floyd E. Carroll, CRS ID NO. 02-197414-00-4

HEARING BUREAU
1220 South St. Francis Drive
P. O. Box 630
Santa Fe, NM 87504
(505) 827-0735 Telephone
(505) 827-9732 Fax

March 28, 2005

*Via Certified Mail # 7003 0500 0002 3968 9633
with copy mailed by Regular First Class Mail*

Via Interoffice Mail

Floyd E. Carroll
RR3, 149 Wrangler Road
Roswell, NM 88201

Lewis J. Terr
Taxation and Revenue Department
P. O. Box 630
Santa Fe, NM 87504

Re: Protest of Floyd E. Carroll (d/b/a L&E Windmill & Waterworks)
CRS ID No. 02-197414-00-4; to Assessment of CRS Taxes
Issued June 15, 2004 Under Letter ID L1380756480

Dear Mr. Carroll and Mr. Terr:

I have reviewed Mr. Carroll's March 15, 2005 letter (which is postmarked March 21, 2005) asking that this matter be dismissed based on the failure of Department personnel to file a bond with the New Mexico Secretary of State. For the reasons set out below, I am denying Mr. Carroll's request.

Mr. Carroll states as an "undisputed fact" that various Department employees, including Secretary Jan Goodwin, "each individually failed or refused, intentionally or otherwise, to obtain and file the required bond(s) pursuant to 10-2-2 through 10-2-7." Even assuming that this is true, the sections cited by Mr. Carroll do not apply to Department employees.

NMSA 1978, §§ 10-2-1 to 10-2-12 set out qualifications and restrictions for bonds of any public officer of this state "executed by any individual, or firm as surety...." Sections 10-2-5, 10-2-6, and 10-2-7 require that all such bonds be recorded with and maintained by the office of the secretary of state. Mr. Carroll asserts that these provisions govern the process for surety bond coverage for employees of the Taxation and Revenue Department. Upon a careful review of all relevant state statutes, however, it becomes clear that the general requirements identified in §§ 10-2-

1 to 10-2-12 are not applicable to surety bond coverage provided by the State of New Mexico to its officers and employees.

NMSA 1978, § 9-11-6 prescribes the powers and duties of the secretary of the Taxation and Revenue Department, an executive branch cabinet department. Subsections (B)(11) and (12) of that section set out the bonding requirements for the secretary and other department employees: Subsection (B)(11) provides:

B. ...the secretary shall:

(11) give bond in the penal sum of twenty five thousand dollars (\$25,000.) and require directors to each give bond in the penal sum of ten thousand dollars (\$10,000.00) conditioned upon the faithful performance of duties, ***as provided in the Surety Bond Act*** [10-2-13 to 10-2-16 NMSA 1978]. The department shall pay the costs of these bonds; (emphasis added).

Subsection (B)(12) of § 9-11-6 requires employees who hold positions other than those of secretary or director to give bond only when deemed necessary by the secretary. Any bond issued pursuant to this subsection are also governed by the Surety Bond Act.

The Surety Bond Act, which is compiled at NMSA 1978, §§ 10-2-13 through 10-2-16, provides the exclusive form of coverage for all state employees. Section 10-2-15(A) of the Act provides:

A. The [general services] department shall provide surety bond coverage for all employees. Whenever an employee is required by another law to post bond or surety as a prerequisite to entering employment or assuming office, the requirement is met when coverage is provided for the office or position under the provisions of the Surety Bond Act [10-2-13 to 10-2-16 NMSA 1978]. ***Notwithstanding any other provisions of law, no state agency or employee shall purchase any employee surety bond other than pursuant to the provisions of the Surety Bond Act.*** (emphasis added)

This statute evidences a clear legislative intent to limit surety bond coverage for state officers and employees to the coverage provided in the Surety Bond Act. *See also*, New Mexico Attorney General Opinion 87-42. This coverage is not the same as the coverage identified in NMSA 1978 §§ 10-2-1 through 10-2-12, which is issued by an “individual or firm as surety.” The coverage required by the Surety Bond Act is a form of self-insurance issued by the General Services Department of the State of New Mexico. Nothing in the Surety Bond Act requires state agencies or their employees to comply with the recordation and filing requirements applicable to bonds issued by individuals or private firms.

For the foregoing reasons, I am ruling against Mr. Carroll’s argument that the failure of Department employees to comply with the provisions of §§ 10-2-1 through 10-2-12 deprives them of authority to perform their assigned duties, and I am denying his request that I dismiss the Department’s assessment against him.

On another matter, I note that Mr. Carroll's March 15, 2005 letter (postmarked March 21, 2005) includes a "Power of Attorney Contract" appointing Antonio Gutierrez as his "choice of counsel" to represent him at the administrative hearing scheduled for April 7, 2005. Pursuant to NMSA 1978, § 7-1-24, the only persons authorized to represent a taxpayer at an administrative tax hearing are a bona fide employee (*i.e.*, an employee subject to wage withholding as opposed to an independent contractor), an attorney, or a certified or registered public accountant. As used in § 7-1-24, the term "attorney" refers to an attorney licensed to practice law in New Mexico. This is based on New Mexico case law, which holds that representing a party at an administrative hearing constitutes the practice of law and may only be undertaken by a licensed attorney. *See, State ex rel. Norvell v. Credit Bureau*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973) ("representation of parties before judicial or administrative bodies" or "giving legal advice and counsel" would constitute the practice of law). *See also, Chisholm v. Rueckhaus*, 1997-NMCA-112, 124 N.M. 255, 948 P.2d 707 *cert. denied*, 949 P.2d 282 (1997).

In order to practice law in New Mexico, attorneys must be licensed by the New Mexico Supreme Court. Contrary to the assertions in Mr. Carroll's letter, the New Mexico Uniform Licensing Act does not apply to attorneys. *See, NMSA 1978, § 61-1-2* (listing licenses covered by that Act). Pursuant to NMSA 1978, § 36-2-1, the practice of law in New Mexico is regulated by the state supreme court. In order to be licensed to practice law in this state, an applicant must take and pass the written examination administered by the Board of Bar Examiners. *See, generally, Rules 15-101 through 15-304 NMRA (2005)*. In addition, Rule 24-101 NMRA (2005) states that "all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of New Mexico in accordance with the rules of this court." NMSA 1978, § 36-2-9.1 specifically designates the Board of Bar Examiners and the Board of Bar Commissioners of the New Mexico State Bar as "bodies of the judicial department." NMSA 1978, § 36-2-27 prohibits any person who is not licensed by the New Mexico Supreme Court "to advertise or display any matter or writing whereby the impression may be gained that he is an attorney or counselor at law or hold himself out as an attorney or counselor at law...."

Based on the above law, the Power of Attorney Contract Mr. Carroll executed does not confer a license to practice law on Antonio Gutierrez. Accordingly, Mr. Gutierrez will not be permitted to act as counsel or represent Mr. Carroll as an attorney at the April 7, 2005 hearing on his protest to the Department's assessment. Pursuant to NMSA 1978, § 7-1-24, Mr. Carroll may represent himself at the hearing or may engage the services of a certified or registered public accountant or an attorney who has been licensed to practice law by the New Mexico Supreme Court and is a member of the State Bar of New Mexico.

Sincerely,

s/

Margaret B. Alcock
Hearing Officer