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

IN THE MATTER OF THE PROTESTS OF

JO ANN STOCKTON TO ASSESSMENT OF PERSONAL INCOME TAX ISSUED UNDER LETTER ID NO. L0391334912 **No. 05-18**

JO ANN AND BROOKY STOCKTON TO NOTICE OF CLAIM OF LIEN DATED JANUARY 20, 2005

DECISION AND ORDER

An administrative hearing on the above-referenced protest was held on July 29, 2005 before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("the Department") was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Jo Ann and Brooky Stockton ("the Stocktons") represented themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1988, the Department entered into an Agreement on Coordination of Tax Administration with the Internal Revenue Service.

2. Section 3.2 of the agreement, which was signed by the Department's cabinet secretary and the IRS commissioner, states: "This agreement constitutes the requisite authorization pursuant to section 6103(d)(1) of the Code for IRS to disclose to, and permit inspection by, an Agency Representative of Federal returns and Federal return information…."

3. Section 1.2 of the agreement provides for the parties to enter into an implementing agreement "prescribing the nature, quantity and mechanics for the continuous exchange of tax information, including criteria and tolerance for selection of tax returns and return information…."

4. In 2003, the IRS provided the Department with tax information concerning Jo Ann Stockton via federal form 4549, titled "Income Tax Examination Changes," which is generally referred to as a Revenue Agent Report ("RAR").

5. The RAR did not have an original signature, but showed the typewritten name "A. Likens" and the typewritten date "07/17/2002."

6. The RAR showed that Jo Ann Stockton reported zero taxable income for the 1999 tax year and that the IRS adjusted her income by an additional $17,153.00, representing wages she received from NCES of New Mexico, Inc.

7. The RAR gave Ms. Stockton credit for the standard federal deduction and exemption, and determined that her corrected taxable income for 1999 was $10,803.00, resulting in federal income tax due of $1,624.00, less prepayment credits of $576.00 for tax withheld by NCES.

8. The RAR included the following statement: "The Internal Revenue Service has agreements with State tax agencies under which information about Federal tax, including increases or decreases, is exchanged with the States. If this change affects the amount of your State income tax, you should file the State form."

9. Ms. Stockton did not file a 1999 New Mexico personal income tax return reporting the taxable income shown on the RAR.

10. On May 26, 2004, the Department issued an assessment under Letter ID No. L0391334912 assessing Ms. Stockton for $330.00 of 1999 personal income tax, plus $33.00 of penalty and $202.95 of interest accrued to the date of assessment.

11. On June 16, 2004, Ms. Stockton filed a written protest to the assessment.

12. On January 20, 2005, the Department issued Notice of Claim of Tax Lien No. 161920 against Jo Ann Stockton and Brooky R. Stockton.

13. The Department mailed the Notice of Claim of Tax Lien to the Stocktons on February 10, 2005, but sent it to an incorrect address. The United States Postal Service redirected the envelope to the Stocktons' correct address and the notice of lien was received by the Stocktons on March 9, 2005.

14. On March 16, 2005, the Stocktons filed a written protest to the Department's Claim of Tax Lien No. 161920.

15. An administrative hearing on the Stocktons' consolidated protests was held on July 29, 2005.

16. At the close of the hearing, the Stocktons asked for additional time to respond to the Department's legal arguments, and the Hearing Officer gave the Stocktons until September 1, 2005 to submit supplemental arguments.

17. On August 30, 2005, the Hearing Officer received a document from the Stocktons entitled "Factual Deficiencies Undermining the Assessment of Tax Against Jo Ann

and Brooky Stockton for the Tax Period Ending 1999," which the Hearing Officer accepted as the Stocktons' supplemental brief.

ISSUES TO BE DECIDED

There are five issues to be addressed in this protest. *See*, Statement of Claim at pages 3-4 of the Stocktons' Certified Petition to Abate Claim of Lien and Constructive Notice ("Certified Petition"), and the Hearing Officer's Order Granting Continuance:

1. Whether the information-sharing agreement entered into between the New Mexico Taxation and Revenue Department and the Internal Revenue Service meets the requirements of 26 U.S.C. § 6103(d) and authorizes the Department to obtain tax information concerning individual residents of New Mexico without having to submit a separate, written request for each resident.

2. Whether the Taxation and Revenue Department was entitled to rely on the information contained in the Internal Revenue Service's July 17, 2002 Revenue Agent Report ("RAR") on Jo Ann Stockton, or whether the RAR is invalid under the provisions of 26 U.S.C. § 6065, which states that "any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

3. Whether the 1999 income that Jo Ann Stockton identifies as being received "from working in an occupation of common right" and the July 17, 2002 RAR identifies as "wages—NCES of New Mexico Inc." is subject to tax under the provisions of the Internal Revenue Code (26 U.S.C. § 1 et seq.) and is, therefore, also subject to tax under New Mexico's Income Tax Act (NMSA 1978, § 7-2-1 et seq.).

4. Whether the January 2005 Notice of Claim of Lien the Taxation and Revenue Department filed against Brooky and Jo Ann Stockton is a valid lien under the provisions of the Tax Administration Act (NMSA 1978, § 7-1-1 et seq.) or other New Mexico law.

5. Whether employees of the Taxation and Revenue Department are "public officers" required to file a surety bond with the New Mexico Secretary of State before they may legally carry out their duties as state employees.

BURDEN OF PROOF

NMSA 1978, § 7-1-17(C) states that any assessment of taxes or demand for payment made by the Department is presumed to be correct, and the burden is on the Stocktons to overcome this presumption. *See*, *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. In addition, the interpretation of a statute by the agency charged with its administration is to be given substantial weight. *Regents of University of New Mexico v. Hughes*, 114 N.M. 304, 312, 838 P.2d 458 (1992). *See also*, NMSA 1978, § 9-11-6.2(G). As the party challenging the Department's Notice of Claim of Tax Lien, it is the Stocktons' burden to show that the Department's interpretation of the Tax Administration Act's statutory lien provisions is incorrect.

DISCUSSION

Issue 1: IRS Disclosure of Information to State Tax Authorities. 26 U.S.C. § 6103(d)(1) authorizes the IRS to disclose returns and return information to any state agency charged with responsibility for the administration of state tax laws,

> only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n) [relating to persons performing certain services, such as processing, storage, transmission, programming, etc., for purposes of tax administration]….

The IRS's disclosure of information concerning Ms. Stockton was made under the terms of a 1988 agreement between the IRS and the Department. A copy of the "Agreement on

Coordination of Tax Administration Between Internal Revenue Service and the State of New Mexico" was provided to the Stocktons and introduced at the administrative hearing. The Stocktons argue that the agreement's general authorization for the exchange of information does not meet the requirements of 26 U.S.C. § 6103 and that the Department was required to submit a specific request for Ms. Stockton's tax information before the RAR could be released. This same argument has previously been considered—and rejected—by the federal courts.

In *Smith v. United States*, 964 F.2d 630, 633-634 (7th Cir. 1992), *cert. denied*, 506 U.S. 1067 (1993), the Seventh Circuit Court of Appeals addressed the issue as follows:

> In order for the Agreement on Coordination to fulfill the written request requirement of section 6103(d), it must (1) "request" tax information, (2) be signed by the head of the state tax agency and (3) designate the individuals "who are to inspect or to receive the returns or return information" on behalf of the agency. 26 U.S.C. § 6103(d). The Agreement on Coordination meets these criteria. Section 3.2 of the Agreement provides:
>
> > This agreement constitutes the requisite authorization pursuant to section 6103(d) of the Code for I.R.S. to disclose to, and permit inspection by, an Agency representative of Federal return information relating to taxes imposed by chapters 1 [Income Taxes] . . . of the Code.
>
> Section 5.1 states that the IDR and the IRS will furnish each other with information on audit adjustment, and section 5.2 provides that the IDR and the IRS "will exchange lists of taxpayers and other information relevant to the identification of persons who have failed to file tax returns." The Agreement on Coordination thus constitutes a blanket request for certain categories of information, including information relating to tax delinquencies and failures to file returns. These categories clearly include the information disclosed in this case.

See also, *Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *Long v. United States*, 972 F.2d 1174 (10th Cir. 1992); *Stone v. Commissioner*, T.C. Memo 1998-314 (U.S. Tax Court

Memos 1998); *McQueen v. United States*, 5 F.Supp.2d 473 (D. Tex. 1998). The text of Section 3.2 of New Mexico's agreement with the IRS is virtually identical to the text quoted in *Smith*. Section 1.2 of the New Mexico agreement provides for the parties to enter into an implementing agreement "prescribing the nature, quantity and mechanics for the continuous exchange of tax information, including criteria and tolerance for selection of tax returns and return information…." This language clearly authorizes the "continuous" exchange of broad categories of tax information and does not contemplate the submission of a separate written request for the return information of each individual taxpayer.

Even if the IRS did not follow proper procedures in releasing information to the Department, the Stocktons' remedy is found in 26 U.S.C. § 7431, which creates a cause of action against the United States for the improper disclosure of an individual's return information. Despite the Stocktons' reference to the "fruit of the poisonous tree" (Certified Petition at page 7), there is no legal authority to support their argument that improper disclosure warrants abatement of an otherwise valid assessment. In *Nowicki v. Commissioner*, 262 F.3d 1162, 1163 (11th Cir. 2001), the Eleventh Circuit Court of Appeals held that exclusion of evidence is *not* an appropriate remedy for a violation of § 6103:

> [I]mposition of the exclusionary rule is not warranted for a disclosure of return information which violates § 6103. Congress has specifically provided civil (I.R.C. § 7431) as well as criminal penalties (I.R.C. § 7213) for violations of § 6103. There is no statutory provision requiring exclusion of evidence obtained in violation of § 6103 and we will not invent one.

See also, United States v. Orlando, 281 F.3d 586, 595-596 (6th Cir. 2002).

Finally, the Stocktons challenge the Department's interpretation of § 6103(d) as a violation of their privacy rights. This argument, too, has been rejected by the federal courts. As stated in *Taylor v. United States*, 106 F.3d 833, 836 (8th Cir. 1997):

> Taylor argues that, if we allow the agreements at issue to operate as standing requests for disclosure of taxpayer information, we will "totally eviscerate[] Section 6103 as a statutory implementation of a right of privacy." Appellant's Brief at 12. We disagree. The confidentiality of taxpayer information is by no means absolute. The bulk of § 6103 constitutes exceptions to the general rule of non-disclosure. *See Church of Scientology v. IRS*, 484 U.S. 9, 15, 98 L. Ed. 2d 228, 108 S. Ct. 271 (1987) ("Subsections (c) through (o) of § 6103 set forth various exceptions to the general rule that returns and return information are confidential and not to be disclosed. These subsections provide that in some circumstances, and with special safeguards, returns and return information can be made available to...state tax officials...."). Notwithstanding the need to prevent abusive disclosure of federal taxpayer information by the IRS and others, Congress clearly recognized the need for disclosure of such information in certain carefully delineated circumstances. Disclosure of individual taxpayer information by the IRS to a state taxing authority via a standing written agreement that is carefully crafted to satisfy concerns for confidentiality implements rather than "eviscerates" the will of Congress.

Based on federal courts' interpretation of § 6103(d), the information contained in the RAR on Ms. Stockton was properly disclosed to the Department.

Issue 2: Validity of Unsigned RAR. The Stocktons argue that the RAR the Department received from the IRS was invalid because it was not signed under penalty of perjury as required by 26 U.S.C. § 6065, which states as follows:

> § 6065**.** Verification of returns.
>
> Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

In *Morelli v. Alexander*, 920 F. Supp. 556, 558 (S.D.N.Y. 1996), the court disposed of this argument as follows:

> Morelli argues that the Agents violated their duty under 26 U.S.C. § 6065 by failing to sign the notices that they sent to Morelli…. Morelli has incorrectly interpreted this provision. Section 6065 was enacted to permit the taxpayer to submit a verified return rather than a notarized return, *see, e.g., Cohen v. United States*, 201 F.2d 386, 393 (9th Cir.) (construing § 6065's predecessor provision), *cert. denied*, 345 U.S. 951, 97 L. Ed. 1374, 73 S. Ct. 864 (1953), and does not apply to notices issued by IRS agents.

See also, *Nordbrock v. United States*, 173 F.Supp.2d 959, 972-973 (D. Ariz. 2001) (§ 6065 does not require that a lien or other notice issued by the IRS be verified by a written declaration that it is made under penalty of perjury); *Thompson v. IRS*, 23 F.Supp.2d 923, 925 (D. Ind. 1998) (the verification provision of § 6065 does not apply to notices issued by IRS agents); *Cermak v. United States*, 1997 U.S. App. Lexis 13706 (7th Cir. 1997) (the phrase "required to be made" limits the applicability of § 6065 to documents that must be filed with the IRS, and not documents issued by the IRS); *McCandless v. United States*, 2002 U.S Dist. Lexis 21464 (N.D. Cal. 2002) (the verification requirement in 26 U.S.C. § 6065 applies to taxpayers, not the IRS); *Kaetz v. IRS*, 2002 U.S. Dist. Lexis 14471 (D. Pa. 2002) (§ 6065 does not apply to notices issued by the IRS). There is no legal authority to support the Stocktons' position that the July 17, 2002 RAR was invalid because it was not signed under penalty of perjury.

Issue 3: Taxation of Ms. Stockton's Compensation from NCES of New Mexico, Inc. The RAR provided to the Department shows that Ms. Stockton earned $17,153.00 in wages from NCES of New Mexico, Inc. during 1999. Ms. Stockton has not denied that she

worked for NCES and received payment for her services. Instead, Ms. Stockton maintains that she was "working in an occupation of common right" and that the compensation she received is not taxable income under the Internal Revenue Code. She also argues that the income tax applies only to foreign income or to the income of corporations and government employees. These arguments have been soundly rejected by both state and federal courts. In *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34 ¶ 14, 133 N.M. 11, 59 P.3d 491, the New Mexico Supreme Court noted that the United States Supreme Court, "as well as every circuit of the United States Court of Appeals, has recognized that employment wages are taxable income." The *Holt* decision confirmed that compensation received by a New Mexico resident working for a private employer comes within the definition of income in the Internal Revenue Code and New Mexico's tax statutes:

> Through its plain language, Section 61(a) includes "compensation for services" in its definition of gross income. Our conclusion that compensation for services equals wages earned from employment is confirmed by state statute. Section 7-2-2(C) states that "'compensation' means wages, salaries, commissions and any other form of remuneration paid to employees for personal services." The plain language of Section 7-2-2(C) and Section 7-2-3 specifically indicates that employment wages and salaries are taxable income….

2002 NMSC 34, ¶ 12. Although the court found the Holts' arguments to be "manifestly without merit," it issued a published decision "because the appeal appears to present an issue of first impression and arguments that are likely to arise again, causing unnecessary expenditure of public resources." *Id.* at ¶ 3. Unfortunately, the Stocktons' research in support of their protest failed to uncover the *Holt* decision—or the hundreds of other

decisions holding that compensation paid to United States citizens by private employers is subject to tax.

In *Christensen v. United States*, 733 F.Supp. 844, 850 (D.N.J., 1990), *aff'd w/o opinion*, 925 F.2d 416 (3d Cir. 1991) the federal court held that payment for working in an "occupation of common right" is subject to federal income tax, as did the court in *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990). In *Lonsdale*, the Tenth Circuit Court of Appeals summarily disposed of the taxpayers' numerous arguments concerning their liability for federal income tax, including several of the arguments raised by the Stocktons:

> "[T]he following arguments alluded to by the Lonsdales are completely lacking in legal merit and patently frivolous: (1) individuals ("free born, white, preamble, sovereign, natural, individual common law 'de jure' citizens of a state, etc.") are not "persons" subject to taxation under the Internal Revenue code; (2) the authority of the United States is confined to the District of Columbia; (3) the income tax is a direct tax which is invalid absent apportionment…; (4) the Sixteenth Amendment to the Constitution is either invalid or applies only to corporations; (5) wages are not income; (6) the income tax is voluntary; (7) no statutory authority exists for imposing an income tax on individuals; (8) the term "income" as used in the tax statutes is unconstitutionally vague and indefinite; (9) individuals are not required to file tax returns fully reporting their income; and (10) the Anti-Injunction Act is invalid."

919 F.2d at 1448. The courts have also rejected the Stocktons' argument that the federal income tax (and, therefore, the New Mexico income tax) is limited to income from a source listed in the regulations to 26 CFR § 861, titled "Source Rules and Other General Rules Relating to Foreign Income." In July of this year, the Third Circuit Court of Appeals upheld an injunction against Thurston Bell, described by the court as a "professional tax protester," who maintained a web site to sell bogus tax strategies. The court noted that:

> Substantively, Bell's main rationale for avoiding the income tax is known as the "U.S. Sources argument" or the "Section 861 argument." [footnote omitted]. This method has been universally discredited. *See, e.g., Great-West Life Assurance Co. v. United States*, 230 Ct. Cl. 477, 678 F.2d 180, 183 (Ct. Cl. 1982); *Loofbourrow v. Comm'r*, 208 F. Supp. 2d 698, 709-10 (S.D. Tex. 2002); *Williams v. Comm'r*, 114 T.C. 136, 138-39 (2000)….

United States v. Bell, 414 F.3d 474 (3d Cir. 2005). *See also, Christopher v. C.I.R.*, T.C. Memo 2002-18 (U.S. Tax Ct. 2002) (the source rules of sections 861-865 do not exclude from U.S. taxation income earned by U.S. citizens from sources within the United States).

Based on settled law, there is no question that Jo Ann Stockton is liable for federal—and New Mexico—income tax on the compensation she received from NCES of New Mexico, Inc. during 1999.

Issue 4: Validity of Notice of Claim of Tax Lien. The Stocktons maintain that the Department's Notice of Claim of Tax Lien No. 161920 is invalid because it is "not in a form cognizable in any court of competent jurisdiction in this Nation," citing to NMSA 1978, § 48-1A-5 (Certified Petition at page 5, #14). Section 48-1A-5 is part of the Lien Protection Efficiency Act enacted by the Legislature in 1999 and states:

> Nonconsensual common law liens against real property shall not be recognized or be enforceable. Nonconsensual common law liens claimed against personal property shall not be recognized or be enforceable if, at the time the lien is claimed, the claimant fails to retain actual lawfully acquired possession or exclusive control of the property.

The lien filed by the Department is not a common law lien. It is a statutory lien authorized by NMSA 1978, §§ 7-1-37 and 7-1-38. Section 7-1-37 states that a lien arises at the time an assessment of tax and demand for payment is made pursuant to NMSA 1978, § 7-1-17. Section 7-1-38 states that:

> A notice of the lien provided for in Section 7-1-37 NMSA 1978 may be recorded in any county in the state in the tax lien index established by Sections 48-1-1 through 48-1-7 NMSA 1978 and a copy thereof shall be sent to the taxpayer affected. Any county clerk to whom the notices are presented shall record them as requested without charge. The notice of lien shall identify the taxpayer whose liability for taxes is sought to be enforced and the date or approximate date on which the tax became due and shall state that New Mexico claims a lien for the entire amount of tax asserted to be due, including applicable interest and penalties. Recording of the notice of lien shall be effective as to all property and rights to property of the taxpayer.

The Department's Tax Lien No. 161920 against Jo Ann Stockton meets the requirements of §§ 7-1-37 and 7-1-38. The lien against Brooky Stockton does not meet statutory requirements because the Department has never issued an assessment against Mr. Stockton. The Department has acknowledged this error, however, and stated at the administrative hearing that it was in the process of releasing the lien against Brooky Stockton.

The Stocktons' argument that filing a lien before granting them a hearing violates their due process rights is also without merit. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990), the United States Supreme Court confirmed the long-standing rule that states may take collection action on asserted tax liabilities prior to hearing:

> [I]t is well established that a State need not provide predeprivation process for the exaction of taxes. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies such as distress sales in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

See also, Bob Jones University v. Simon, 416 U.S. 725, 746 n. 20 (1974) (noting that for at least 60 years, the Court has dismissed claims that post-tax assessment or post-collection

appeals violate due process). Pursuant to the authority granted to the Department in the Tax Administration Act, the lien filed against Jo Ann Stockton is valid.

Requirements of NMSA 1978, §§ 10-2-1 through 10-2-12 Regarding Oath of Office and Surety Bond. The Stocktons maintain that the Department had no authority to issue an assessment or lien against them because none of the Department employees involved in this matter, including the Hearing Officer, have taken an oath of office or filed a surety bond with the New Mexico Secretary of State. In support of their argument, the Stocktons cite to Article XXII, § 19 of the New Mexico Constitution, which states:

> Within thirty days after the issuance by the President of the United States of his proclamation announcing the result of said election so ascertained, all officers elected at such election, except members of the Legislature, shall take the oath of office and give bond as required by this Constitution or by the laws of the territory of New Mexico in case of like officers in the territory, county or district, and shall thereupon enter upon the duties of their respective offices; but the Legislature may by law require such officers to give other or additional bonds as a condition of their continuance in office.

The Stocktons also rely on NMSA 1978, §§ 10-2-5 through 10-2-9, which read as follows:

> 10-2-5. The bonds given by all persons elected or appointed to office in this state shall be recorded.
>
> 10-2-6. The bonds of all state and district officers shall be recorded in a record book to be provided for that purpose, and known as the record of official bonds, in the office of the secretary of state.
>
> 10-2-7. The bonds of all state officials, and of the members of all state boards and institutions, after having been recorded as required by law, shall be filed and kept in the office of the secretary of state; and all state bonds now filed elsewhere shall be transferred to the office of the secretary.

> 10-2-8. The bonds of all county officers and constables shall be recorded in the office of the county clerk in a book designated as the record of official bonds. After having been recorded, the bonds shall be filed and kept in the office of the county clerk.
>
> 10-2-9. Each and every person who may hereafter be elected or appointed to office in this state, required by law to give bond, shall file the same for record before entering upon the discharge of the duties of the office.

The Stocktons' interpretation of the constitutional and statutory provisions quoted above overlooks two important points. (1) the provisions of Article XXII, § 19 and §§ 10-2-5 through 10-2-9 apply to public officers "elected or appointed to office," and do not apply to state employees hired under the provisions of the Personnel Act (NMSA 1978, §§ 10-9-1, et seq.); and (2) surety bond coverage for all state officers and employees is governed by the Surety Bond Act (NMSA 1978, §§ 10-2-13 through 10-2-16), which supercedes the provisions of NMSA 1978, §§ 10-2-5 through 10-2-9.

(1) Distinction Between a Public Officer and an Employee. The New Mexico courts have made a clear distinction between public officers and state employees. In *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P.2d 1197 (1936), the New Mexico Supreme Court held that a special tax attorney employed by the New Mexico state tax commission did not qualify as a "public officer." As the court explained:

> All authorities agree that some portion of sovereignty must be vested in the occupant of a position, to constitute it a public office. By the terms of the New Mexico statute, "the power, jurisdiction and authority to collect all delinquent taxes" is vested in the state tax commission, and for that purpose it was "granted all powers and duties" theretofore granted to the district attorneys of the state and to all special tax collectors or attorneys under existing laws…. It is true the state tax commission is authorized to employ an officer to be known as "Special Tax Attorney" with duties specified in the act, whose compensation, within a limit, is to be fixed by the state tax commission, but the

> purpose of his employment is not to exercise any of the functions of sovereignty, all of which is by unambiguous language delegated to the state tax commission.

40 N.M. at 292-293, 58 P.2d at 1200. The same result was reached in *Lacy v. Silva*, 84 N.M. 43, 45, 499 P.2d 361, 363 (Ct. App.), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972), where the New Mexico Court of Appeals held that a district director employed by the state tax commission was an employee and not a public officer:

> [T]he district director is not free from control by the Commissioner, is not autonomous and is not independent. Sovereign power has not been vested with the district director either by the Legislature or by the Commissioner pursuant to legislative authority. Absent a vesting of sovereign power in Silva as district director, he was not an "officer" within the meaning of § 21-5-1(G), *supra*. Silva was an employee. Section 72-13-15(D), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971).

See also, *State ex rel. Stratton v. Roswell Independent Schools*, 111 N.M. 495, 505, 806 P.2d 1085, 1095 (Ct. App. 1991) (New Mexico has differentiated an "employee" from a "public officer" based on the exercise of sovereign power).

In this case, the Department personnel involved in issuing the assessment and lien against the Stocktons, as well as those involved in the conduct of the administrative hearing on the Stocktons' protest, are employees hired under New Mexico's Personnel Act. They are neither elected nor appointed to their positions and are not subject to the constitutional and statutory requirements applicable to public officers.

(2) Surety Bond Act. NMSA 1978, § 9-11-6 prescribes the powers and duties of the cabinet secretary of the Taxation and Revenue Department. Subsections (B)(11) and (12) of § 9-11-6 provide that 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*. The department shall pay the costs of these bonds; and
>
> (12) require performance bonds of such department employees and officers as the secretary deems necessary, *as provided in the Surety Bond Act*. The department shall pay the cost of these bonds. (Emphasis added).

There is no evidence that the secretary has required performance bonds of the employees involved in the assessment and lien issued against the Stocktons. Had she done so, however, those bonds would be subject to the terms of the Surety Bond Act (NMSA 1978, §§ 10-2-13 through 10-2-16), which provides the exclusive form of coverage for all state officers and employees, including the secretary. *See,* NMSA 1978, § 10-2-14(C). By its terms, the Surety Bond Act supercedes the provisions of NMSA 1978, §§ 10-2-5 through 10-2-9 requiring state officers to record and file a bond with the secretary of state's office. Section 10-2-15(A) of the Surety Bond Act provides as follows:

> 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. *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 language evidences a clear legislative intent to limit surety bond coverage for state officers and employees to coverage provided by the General Services Department of the State of New Mexico. Nothing in the Surety Bond Act requires—or allows—the Department's

cabinet secretary or employees to obtain individual surety bonds or to file such bonds with the secretary of state.

CONCLUSIONS OF LAW

A. The Taxpayers filed a timely, written protest to the assessment of personal income tax issued to Jo Ann Stockton under Letter ID No. L0391334912 and to the Notice of Claim of Tax Lien No. 161920, and jurisdiction lies over the parties and the subject matter of this protest.

B. The 1988 Agreement on Coordination of Tax Administration entered into between the Internal Revenue Service and the State of New Mexico meets the requirement for a written request for taxpayer information in 26 U.S.C. § 6103(d), and the Revenue Agent Report on Jo Ann Stockton was properly disclosed to the Department by the Internal Revenue Service.

C. The verification requirements in 26 U.S.C. § 6065 do not apply to notices issued by the Internal Revenue Service, and the Department was entitled to rely on the Revenue Agent Report on Jo Ann Stockton even though the report was not signed under penalty of perjury.

D. Jo Ann Stockton is liable for New Mexico income tax on the compensation she received from NCES of New Mexico, Inc. during 1999.

E. The Department's Notice of Claim of Tax Lien No. 161920 filed against Jo Ann Stockton meets the statutory requirements of the Tax Administration Act and is a valid lien; the Department has agreed to release the lien filed against Brooky Stockton, and Mr. Stockton's protest of the lien is now moot.

F. Department employees are not public officers and are not required to take an oath of office.

G. Pursuant to the terms of the Surety Bond Act (NMSA 1978, §§ 10-2-13 through 10-2-16), the Department's cabinet secretary and employees are not required to obtain individual surety bonds or file such bonds with the New Mexico Secretary of State.

For the foregoing reasons, the Stocktons' protests ARE DENIED.

DATED September 2, 2005.