

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

**IN THE MATTER OF THE PROTEST OF
SAMUEL O. PONCE
TO DEPARTMENT'S REFUSAL TO RELEASE
LIENS #104015 AND #199062**

No. 11-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 21, 2009 and reconvened on April 20, 2010, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, attorney for the Department. Mr. Andrick Tsabetsaye, Shannon Baxter and Kimberly Lowe appeared and testified as witnesses for the Department. Mr. Samuel O. Ponce ("Taxpayer") appeared at the appointed time and was represented by counsel, Thomas Smidt, II. Mr. Denis Burt, CPA, appeared and testified on behalf of Taxpayer. The Department presented no exhibits and Taxpayer presented Exhibits 1 and 2 which were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Both parties agreed and stipulated that one personal income tax assessment (assessment) was issued by the Department for tax year 1996. (No assessment was introduced into the record.) The assessment was issued on December 10, 1997 as stated on Department Lien #104015.
2. Sometime in 1998, the Department filed and recorded its first Notice of Claim of Lien (Lien #1) in Bernalillo County on Taxpayer's property based on the assessment issued by the Department. Department Lien #191034.
3. On February 7, 2003, the Department filed and recorded a Second Notice of Claim

of Lien (Lien #2) in Bernalillo County on Taxpayer's property based on the assessment issued by the Department. The amount of principal stated on the tax lien was \$25,438.00. Department Lien #104015.

4. On February 20, 2006, the Department filed and recorded a Notice of Claim of Lien (Lien #3) in Bernalillo County on Taxpayer's property based on the assessment issued by the Department. The amount of principal stated on the tax lien was \$25,104.21. Department Lien #199062.

5. The discrepancy between the two amounts in principal in Liens #2 and #3 may be attributed to Taxpayer paying a small amount of principal.

6. On January 22, 2009, the Department denied Mr. Smidt's request that the Department's Lien Nos. #2 and 3 be released pursuant to NMSA 1978, Section 7-1-19, which states that no action or proceeding shall be brought to collect taxes due under an assessment after ten years from the date of such assessment. The Department's letter also referred to NMSA 1978, Section 7-1-39 which sets out the circumstances under which a tax lien will be released or extinguished, but generally requires the tax liability to be paid or that a period of ten years has passed from the date of filing of the lien.

7. On February 5, 2009, Taxpayer filed a protest to the refusal to release the liens (Liens # 2 and #3).

8. On April 16, 2009, the Department acknowledged the protest.

9. The Department requested a hearing in this matter on August 12, 2009.

10. On September 1, 2009, the Hearings Bureau mailed a Notice of Administrative

Hearing in this matter setting the hearing for November 17, 2009.

11. On November 16, 2009, the parties filed a Stipulated Motion for Continuance.

12. An Order was issued granting the Motion for Continuance and this matter was reset for December 21, 2009.

13. A hearing was convened on December 21, 2009, and the parties were permitted time in which to discuss settlement.

14. On March 9, 2010, Taxpayer's counsel requested that the matter be reset for closing argument.

15. On March 26, 2010, the Hearings Bureau mailed a Notice of Administrative Hearing in this matter setting the hearing for April 20, 2010.

16. On or after December 10, 2007, the Department was precluded from taking any action or proceeding to collect on the assessment issued on December 10, 1997, pursuant to NMSA 1978, Section 7-1-19 (1986).

17. On December 10, 2007, the Department was precluded from enforcing and collecting Liens #1, #2 and #3.

18. Sometime in 2008, Lien #1 was conclusively presumed to have been paid as to the taxes, penalties and interest pursuant to NMSA 1978, Section 7-1-39(C) (1997). The County Clerk extinguished Lien #1.

19. The Department took no enforcement action on the collection of any of the liens that it filed.

20. Kimberly Lowe, an employee of the Department, testified that as of 2007 the

Department's procedure was to only file one lien per assessment.

21. Shannon Baxter, an employee of the Department, testified that the current policy of the Department is that multiple liens may be filed to let the public know of increased amounts in interest, even though it was unnecessary to do so since the first lien covered any accrued amounts of interest.

22. Ms. Baxter testified that if an account had been deactivated because of the 10 year prohibition on collecting after the date of the assessment, that while the Department did not call taxpayers to collect the liability, the Department actively negotiated with taxpayers and third parties on the amount of money the Department would accept prior to releasing a lien.

23. Ms. Baxter testified that the Department was entitled to file as many as six liens or more based on one assessment if additional interest had accrued, even though it was not legally necessary to file six or more liens on the same assessment.

24. On February 7, 2013, Lien #2 will be conclusively presumed to have been paid as to the taxes, penalties and interest pursuant to NMSA 1978, Section 7-1-39(C) (1997).

25. On February 20, 2016, Lien #3 will be conclusively presumed to have been paid as to the taxes, penalties and interest pursuant to NMSA 1978, Section 7-1-39(C) (1997).

26. Mr. Dennis Burt, CPA, testified that the assessment was based on capital gains accrued on the sale of Taxpayer's business. The buyer of Taxpayer's business defaulted on paying on the installment contract for the business.

27. Mr. Burt testified Taxpayer had both federal and state liabilities. Taxpayer worked out a closing agreement with the Internal Revenue Service, and he attempted to work out a

payment agreement with the Department but the Department was unwilling to accept the amount of payments Taxpayer offered to make.

28. Mr. Burt testified that in his 34 years of experience with representing clients, that he never had a situation where the Department filed multiple liens on one assessment.

29. Mr. Burt testified that Taxpayer eventually filed for Bankruptcy.

DISCUSSION

The issue to be determined is whether the Department is authorized to record multiple overlapping liens based on one assessment. Taxpayer and the Department argued that the issue is whether the expiration of the ten-year limitations period set out in Section 7-1-19 which bars the Department from bringing any action or proceeding to collect the income taxes assessed against Taxpayer, requires the Department to release the related tax liens that were filed in 2003 and 2006. Taxpayer argued that Liens #2 and #3 should be released because the time in which to collect or take any action to enforce collection on the assessment has expired. Taxpayer further argued that by recording multiple overlapping liens on the same assessment, the Department was impermissibly extending the statutory period in Section 7-1-39(C) in which to collect on the taxes, penalties and interest due from the assessment. Taxpayer's proposed remedy was that Liens #2 and #3 should be released.

The Department argued that it had the authority to file multiple overlapping liens based on the same assessment and that it cannot release a lien unless the taxes, penalties and interest have been paid. (It should be noted that there was no evidence presented that the Department took any action to enforce any of the tax liens on property. It simply filed the liens.) Both parties referred

to the *Decision and Order No. 05-17, Sterling M. Kennedy* for guidance in making the determination that a lien cannot be released until certain conditions have been met.

Section 7-1-19 states that “(n)o **action** or proceedings shall be brought to collect taxes administered under the provisions of the Tax Administration Act [this Article] and due under an assessment or notice of assessment of taxes after ten years from the date of such assessment or notice.” (Emphasis added). NMSA 1978, Section 7-1-19 (1986). Regulation 3.1.17 NMAC (1996) provides that the term “action” includes the filing of a lien.

The lien on Taxpayer’s property arose at the time the Department issued its assessment in December 1997. Section 7-1-37(A) provides that:

(i)f any person liable for any tax neglects or refuses to pay the tax after assessment and demand for payment as provided in Section 7-1-7 NMSA 1978 or if any person liable for tax pursuant to Section 7-1-63 NMSA 1978 neglects or refuses to pay after demand has been made, unless and only so long as such a person is entitled to the protection afforded by a valid order of a United States court entered pursuant to Section 362 or 1301 of Title 11 of the United States Code, as amended or renumbered, **the amount of the tax shall be a lien** in favor of the state upon all property and rights to property of the person.

(Emphasis added). NMSA 1978, Section 7-1-37 (A) (1993). In order for the lien to be effective against third parties, the Department is required to file and record a notice of lien with the county clerk as provided in Section 7-1-37(C), which states:

(a)s against any mortgagee, pledge, purchaser, judgment creditor, personal claimant claiming a lien under Section 48-2-1 through 48-11-9 NMSA 1978, lienor for value or other encumbrance for value, the lien imposed by Subsection A of this section shall not be considered to have arisen or have any effect whatever until notice of the lien has been filed as provided in Section 7-1-38 NMSA 1978.

NMSA 1978, Section 7-1-37 (C) (1993). Therefore, the importance of the filing of a lien is to

perfect the Department's rights as to other credits and to seek priority status as to any other liens filed by third parties. Further, Section 7-1-38 provides that a lien may be recorded in any county and the recording of the notice of lien is effective as to all property and rights to property of the taxpayer.

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.... Recording of the notice of lien shall be effective as to all property and rights to property of the taxpayer.

NMSA 1978, Section 7-1-38 (1996).

The statutes provide that a lien is extinguished after a period of ten years from the date the lien was filed as shown on the notice of lien. NMSA 1978, Section 7-1-39 (C) (1997). Once the ten year period has expired, the county clerk is required to enter in her or his records a notice including the words "canceled by act of legislature," extinguishing the lien. The Department is forbidden from taking any collection action after the extinguishment of the lien. NMSA 1978, Section 7-1-39 (C) (1997). The Legislature deliberately created some time between when the assessment becomes uncollectible and when the lien is extinguished by the county clerk. In other words, the Department is prohibited from releasing the lien if the conditions have not been met, even if the 10 year assessment period has expired, making the lien in essence unenforceable. The tax liability is never discharged, however, pursuant to N.M. Const. art. IV, Section 32.

Generally, liens to secure taxes did not exist at common law and must be provided for in statute. *Patten v. Corbin*, 42 N.M. 561, 562, 82 P.2d 789, 790 (1938). An assessment is an unrecorded tax lien based on the amount of the tax liability. NMSA 1978, Section 7-1-37 (A)

(1993). If a lien is filed based on an assessment, the Department has the authority to enforce and collect on the lien. NMSA 1978, Section 7-1-40 (1979) (foreclosing by seizing and selling property). The filing of the lien protects the Department's ability to collect and enforce the lien. NMSA 1978, Section 7-1-40 (1979). A tax lien can be enforced by sale of property or personal collection action. Tax liens are imposed by statute to help ensure payment of the taxes. *City of Sunland Park v. Santa Teresa Services Company*, 2003-NMCA-106, ¶57, 134 N.M. 243, 75 P.3d 843, *cert. denied*, 2003 NMCERT- 203, 74 P.3d, 1071 (No., 28,166, August 18, 2003). Therefore the statutes must provide the mechanism for creating and enforcing the liens.

As for releasing a tax lien, in *State v. Montoya*, 32 N.M. 314, 318, 255 P. 634, 637 (1927), the New Mexico Supreme Court held that the Legislature could not statutorily release a taxpayer from personal liability for accrued taxes, but could enact a statute providing for the discharge of a tax lien. Section 7-1-39 was enacted by the Legislature to provide for statutory circumstances in which a tax lien may be released or extinguished. Subsection A provides for a full or partial release when "any substantial part" of the tax due from a taxpayer is paid. Subsection B provides for a full or partial release when the Department determines that the filing of a lien was premature or did not follow requirements of law, or when release would facilitate collection of the taxes due. Subsection C provides for extinguishment of a recorded lien after the passage of ten years from the date the lien was filed. Therefore, a lien may be released if the lien was filed contrary to law.

In this case, the law or regulation 3.1.17 NMAC (1996) specifically precludes the Department from filing liens to collect on a stale assessment. The evidence is that the Department filed multiple liens in this case, to allow it to continue to collect on the 1997 assessment. Both

Ms. Lowe and Ms. Baxter testified credibly. Ms. Kimberly Lowe, a Revenue Agent Supervisor, testified that she filed the 2006 tax lien (Lien #3) on the same assessment to update penalty and interest. Upon further examination, Ms. Lowe testified that it was not necessary to file a second lien based on the same assessment to update the penalty and interest since the original lien would include all interest amounts past the filing of the lien. She also testified that in the past the policy of the Department was to file multiple overlapping tax liens on an assessment or on multiple assessments. Now the Department only files liens on separate periods and the Department no longer files overlapping multiple liens based on an assessment. The change in policy occurred sometime in 2007. Ms. Lowe testified that it was not the Department's policy to file multiple liens on the same assessment to extend the 10 year collection period. Ms. Lowe was asked whether, today, she would file multiple liens on Taxpayer's assessment. Ms. Lowe responded "no."

Ms. Baxter oversees the "hard-core" collections and the taxpayer assistance office. She has been with the Department a total of 19 years. She testified that it was her job and responsibility to collect the tax debt. Ms. Baxter testified that the Department has filed multiple liens on the same assessment and that the Department was still filing multiple liens on the same assessment to update the interest, even though it was not necessary to file a second lien on the same assessment to update the interest. She said that the Department's procedure is that the Department has a right to file a second lien based on the same assessment, if there is a large accrual of penalty and interest or if new property is acquired. Upon further examination, Ms. Baxter testified that the Department's filing of a second lien on the same assessment does not give the Department a superior priority date, and that it was unnecessary to file a second tax lien based

on additional accrued interest amounts because the original lien would cover after acquired property. Ms. Baxter testified that if the Department needs to, it is allowed to file as many as six or more liens based on the same assessment so long as the Department is filing the liens within the 10 year period of assessment.

When asked what occurs if an assessment can no longer be collected upon because of the 10 year statute, Ms. Baxter testified that taxpayers or third parties contact the Department and she reactivates the account. She then discusses with the taxpayer or third parties a payment arrangement, but she doesn't ask for payment of the debt. Ms. Baxter testified that she cannot ask for payment because that would violate the law. Regulation 3.1.1.17 permits the Department to process any payment made by the taxpayer. Ms. Baxter testified that the filing of the multiple liens on one assessment allows the revenue agents additional time after the expiration of the 10 years on the assessment to collect the tax liability.

From the testimony presented, it is clear that the sole purpose of filing a second or third lien on Taxpayer's stale assessment was a collection "action" barred by Section 7-1-19 and its regulation. In this case, since there was no legal reason to file multiple liens on the same assessment, Lien #2 and Lien #3 were filed contrary to law. Any doubtful meaning or intent of tax statute must be resolved against the state and in favor of taxpayer. *Field Enters. Educ. Corp. v. Commissioner of Revenue*, 82 N.M. 24, 28, 474 P.2d 510, 513 (Ct. App. 1970). Without specific statutory authority to file multiple liens on the same assessment for a stated legal purpose other than to collect on the underlying stale assessment, beyond the 10 year limit, the Hearing Officer finds that the Department in this case acted outside of its statutory authority. The Hearing Officer

does not believe it is her role to read into a statute words not provided for by the Legislature.

Both parties referred to the *Decision and Order No. 05-17, Sterling M. Kennedy (Kennedy Decision)* as being applicable to this case. However the *Kennedy Decision* is very different from this case. The Hearing Officer decided that none of the statutory prerequisites for releasing or extinguishing the tax lien filed against the Taxpayer had been met. She noted that the Department did not receive a substantial payment of the tax due from the Taxpayer; there was no evidence that the lien was filed prematurely or did not follow the requirements of law; there was no evidence that releasing the lien would facilitate collection of the underlying tax; and 10 years had not yet passed since the date the lien was filed. In addition in the *Kennedy Decision*, there was one lien filed based on multiple assessments. The Hearing Officer in the *Kennedy Decision* did not take any position as to whether it was contrary to law to file multiple overlapping liens based on one assessment. Therefore, the *Kennedy Decision* does not alter this Hearing Officer's conclusion that the Department acted outside of its statutory authority by filing multiple liens.

CONCLUSIONS OF LAW

- A. Samuel O. Ponce filed a timely written protest to the Department's refusal to release Department Lien #104015 and Department Lien #199062.
- B. In this case, there was no statutory authority for the Department to file multiple overlapping tax liens based on one assessment.
- C. The Hearing Officer has no jurisdiction over the Notice of Claim of Lien (Lien #1) because the lien has been conclusively presumed to have been paid as to the taxes, penalties and interest pursuant to NMSA 1978, Section 7-1-39(C) (1997). Department Lien #191034.

D. The Department did not have statutory authority to file a second lien, or its Notice of Claim of Lien #104015, filed on February 7, 2003, for the sole purpose of collecting on the 1997 assessment.

E. The Department did not have statutory authority to file a third lien, or its Notice of Claim of Lien, #199062, filed on February 20, 2006 for the sole purpose of collecting on the 1997 assessment.

F. The Department shall release Notice of Claim of Lien, #104015, filed on February 7, 2003 and Notice of Claim of Lien, #199062, filed on February 20, 2006.

For the foregoing reasons, Samuel O. Ponce's protest is GRANTED.

DATED: September 22, 2011.