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

IN THE MATTER OF THE PROTEST OF
CLUB 33, INC. **No. 12-13**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L2111745600

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 10, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Attorney Paul A. Bleicher appeared in person, representing Club 33, Inc. ("Taxpayer"). During the protest hearing, Taxpayer called attorney Dan Pick as witness in this matter. Chief Legal Counsel Nelson J. Goodin represented the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Andrea Umpelby appeared as a witness for the Department. Taxpayer Exhibits #1-5 and Department Exhibits A.1, A.2, A.3, and C are admitted into the record, as more thoroughly described in the Administrative Exhibit Coversheet. The record was left open until May 25, 2012 for the parties to submit proposed findings of fact, conclusions of law, and written argument. On that date, Taxpayer submitted a supplemental hearing brief, proposed findings of fact and conclusions of law, which is part of the record of this proceeding. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. At some unspecified point before August 2010, the Department selected Taxpayer for an audit.

2. On August 30, 2010, Mr. Fredrick S. Kraus, President of Taxpayer, submitted a Tax Information Authorization to the Department, designating attorney Dan Pick ("Attorney Pick"), 8500 Menual Blvd. NE, Ste B450, Albuquerque, NM 87112 as Taxpayer's representative for CRS taxes in any year.

3. On August 31, 2010, the Department generated three notices of assessment, as detailed below. The three notices of assessment were addressed directly to Taxpayer at 902 Juan Tabo Blvd. NE, Albuquerque, NM 87112-5817 rather than to Attorney Pick's address as indicated in Taxpayer's Tax Information Authorization.

a. L0414974528 for CRS reporting periods January 31, 2004 through January 31, 2010. The total obligation under this assessment for both gross receipts and withholding tax plus applicable penalty and interest was $620,759.06. [Department A.1]

b. L1284325952 for Tobacco Products Tax reporting periods November 30, 2005 through January 31, 2010. The total obligation under this assessment for tobacco products tax plus applicable penalty and interest was $14,570.77. [Department A.2]

c. L1986085440 for Worker's Compensation Fee reporting periods March 31, 2004 through December 31, 2009. The total obligation under this assessment for worker's compensation fee plus applicable penalty and interest was $3,013.78. [Department A.3]

4. Although the three notices of assessment listed an "Assessment Date" of August 31, 2010, there is no evidence to establish when the Department mailed the notices of assessment.

5. There is no evidence that the Department personally served the notices of assessment on the listed August 31, 2010 "Assessment Date."

6. At some point in October 2010, the Department issued Taxpayer a notice of lien.

7. After Taxpayer received the notice of lien, Taxpayer brought the notice of lien to Attorney Pick in early November.

8. During this meeting in early November with Taxpayer about the notice of lien, Attorney Pick first learned of the notices of assessment in this matter.

9. Attorney Pick contacted Department employee, Brenda Lujan, via telephone on November 16, 2010 to express his displeasure that the Department did not send him the notices of assessment and to ask for extension of time to file a protest to the notices of assessment.

10. At that time, Brenda Lujan worked as a Revenue Agent in the Department's Albuquerque Office. Brenda Lujan was not a member of the Department's Protest Bureau, and there is no evidence that Brenda Lujan was authorized to grant protest extensions.

11. Brenda Lujan told Attorney Pick that she wanted to consult with a supervisor about Taxpayer's requested extension.

12. Later that day, or the next day, Brenda Lujan contacted Attorney Pick over the phone to inform him that Taxpayer had until the end of November to submit a protest. Attorney Pick asked that Brenda Lujan reduce that information to writing.

13. On November 18, 2010, Brenda Lujan submitted an email to Attorney Pick, stating that "(a)fter a discussion with my supervisor you have until the(sic) end of November 2010" to file Taxpayer's protest to the notices of assessments. Brenda Lujan's email also quoted NMSA 1978, Section 7-1-24(B), which addresses protests, in its entirety and referenced FYI 400 for assistance in filing the protest. [Taxpayer Exhibit #1]

14. Attorney Pick is a tax attorney with 22-years of practice experience. During that time, Attorney Pick has filed between 10-20 tax protests under the provisions of the Tax Administration Act. Attorney Pick has previously filed for and been granted extensions of time to file a protest. Attorney Pick previously filed those requests with the Department's Protest Bureau.

15. Taxpayer, through Attorney Pick, mailed its protest letter to the Department on November 30, 2010. The protest letter included a specific reference to Brenda Lujan's email.The Tax Information Authorization, Brenda Lujan's email, a Tobacco Products Tax Return, and a cleared check image were attached to Taxpayer's protest letter as exhibits. [Taxpayer Exhibit #2]

16. November 30, 2010 was 91-days after the August 31, 2010 "Assessment Date" listed on the three notices of assessment issued in this matter.

17. Other than a status-check call from the Department, Attorney Pick testified that the Department made no effort to collect on the three assessments after he submitted Taxpayer's protest letter.

18. Nearly a year later, on October 7, 2011, the Department sent a letter to Taxpayer to acknowledge receipt of Taxpayer's November 30, 2010 protest letter. The Department informed Taxpayer that it deemed the protest untimely and invalid under the statute because it was not submitted by November 29, 2010 (90-days after the August 31, 2010 "Assessment Date").

19. According to Attorney Pick's testimony, after this October 7, 2011 letter from the Department, the Department renewed its collection efforts on the three notices of assessment by filing a notice of levy.

20. On October 31, 2011, Taxpayer filed a protest ("second protest") to the Department's denial of the first protest as untimely.

21. On November 9, 2011, the Department acknowledged timely receipt of Taxpayer's second protest. The Department informed Taxpayer that the second protest would be limited strictly to the question of whether the first protest was timely, and not the merits of the three notices of assessment. The Department informed Taxpayer that only upon a finding by the hearing officer that the first protest was timely would the Department consider the first protest.

22. On January 9, 2012, the Department filed a request for hearing in this matter.

23. On January 24, 2012, the Department's Hearing Bureau sent notice of administrative hearing, scheduling this matter for May 10, 2012.

DISCUSSION

The issue at protest is whether Taxpayer timely filed its first protest with the Department. Both Taxpayer and the Department makes extensive argument as to the meaning of NMSA 1978, Section 7-1-24(B) (2003) and whether under that provision the failure to protest an assessment within 90-days divests the Department of jurisdiction to consider the protest. However, the resolution of this protest turns on a much narrower factual and legal basis than the parties competing interpretations of NMSA 1978, § 7-1-24(B) (2003). Factually, the Department never established the date of mailing of the three notices of assessment and without such proof, there is no basis to find Taxpayer's protest untimely under NMSA 1978, § 7-1-24(B) (2003). Legally, the notices of assessment were arguably ineffective without proof of mailing and because they were not addressed to Taxpayer's last known address of record on file with the Department[1].

[1] Taxpayer's questions of Attorney Pick, and Attorney Pick's responses at 18:03-18:27, 19:50-20:05, fairly raised the issue of effective mailing of assessments.

Factually, the Department never established the requisite date of mailing necessary to calculate the beginning of the 90-day time-frame for Taxpayer to file its protest. The question of timeliness of Taxpayer's protest under NMSA 1978, § 7-1-24(B) (2003) turns on whether the protest was submitted within the requisite (30-days or up to 90-days upon appropriately granted extension) "days of the *date of mailing* to the taxpayer by the department of the notice of assessment." (italics added for emphasis). Similar to the importance of the Department's mailing under NMSA 1978, § 7-1-24(B) (2003), under NMSA 1978, Section 7-1-17 (B) (2) (2007), an assessment of tax is only effective when an appropriately titled document issued under the secretary's name "is *mailed* or delivered in person to the taxpayer…" (italics added for emphasis). Consequently, to be an effective assessment, the Department must establish that it either personally served (which it does not allege in this case) or mailed the assessments to Taxpayer. To determine when Taxpayer was required to file the protest under NMSA 1978, § 7-1-24(B) (2003), it is first necessary to determine when the Department mailed effective notices of assessment to Taxpayer.

While typically the Department receives a statutory presumption of correctness to its assessments under NMSA 1978, § 7-1-17 (2007), conceptually such a presumption of correctness can only attach upon a mailed or personally delivered legally effective Notice of Assessment. *See* NMSA 1978, § 7-1-17 (B) & (C) (2007) and Regulation 3.1.6.11(A) NMAC (1/15/01). *See also Torridge Corp. v. Commissioner of Revenue*, 84 N.M. 610, 612 (N.M. Ct. App. 1972) ("*after*…notice of assessment of taxes is delivered to a taxpayer, taxpayer must carry burden of proof in order to negate the presumption of correctness."). Even if the presumption of correctness arguably still applies in this circumstance, as will be discussed in greater detail below, Taxpayer overcomes that presumption by showing that the Department did not comply

with mailing of notice requirements of NMSA 1978, Section 7-1-9 (A) (1997) under the TAA. *See Regents of New Mexico College v. Academy of Aviation*, 83 N.M. 86, 88-89, 488 P.2d 343, 345-346 (N.M. 1971) (a taxpayer can overcome the presumption by showing the Department failed to follow statutory provisions contained in the TAA). Moreover, like here where the Department relies on service by mail to establish the notices of assessment, a "party relying on service by mail has the burden of proving the mailing." *Myers v. Kapnison*, 93 N.M. 215, 216 (N.M. Ct. App. 1979). Until the Department can prove mailing the notices of assessment, no presumption of correctness attaches to those assessments and no triggering date under that NMSA 1978, § 7-1-24(B) (2003) timeliness of protest requirements can be determined.

In this protest, the Department presented no witness testimony or other evidence establishing when it mailed the notices of assessment. The closest evidence related to mailing is the fact that the notices of assessment each list an "Assessment Date" of August 31, 2010. However, that "Assessment Date" does not necessarily establish the date the Department mailed the assessments in this case. The Department presented no witness testimony or other evidence that equated the "Assessment Date" with the actual date of mailing. The Department presented no evidence related to proof of actual mailing of the three assessments such as a copy of the postmarked envelope or a mailing log. In the absence of actual proof of mailing, the Department did not attempt to present any testimony or evidence regarding the Department's assessment mailing procedures, practices, routines, or policies that might have established that these three assessments were mailed in conformance therewith.

That is not to say that this type of detailed evidence of mailing is always required. However, considering that in this protest the Department avers that Taxpayer's protest letter was one-day late, detailed evidence and proof of actual date of mailing is critical to the question of

timeliness and/or jurisdiction in this specific case. Under the specifics of this case, there is not enough evidence of the actual, triggering date of mailing to find Taxpayer's November 30, 2010 protest untimely under the 90-day limit articulated by NMSA 1978, § 7-1-24(B) (2003).

The other reason why Taxpayer's protest is persuasive in this matter turns on a narrow legal analysis of whether the notices of assessment were effective under the TAA on August 31, 2010. It is worth repeating that under NMSA 1978, § 7-1-17, the notices of assessment are only effective upon either mailing or personal delivery. Since, as discussed above, the Department did not establish either mailing or personal service on August 31, 2010, there is no basis on this record to find that the assessments were legally effective on that date.

Moreover, the notices of assessment are also arguably ineffective under the TAA because they were not addressed or mailed to Taxpayer at Attorney Pick's address. NMSA 1978, Section 7-1-9 (A) (1997) discusses what constitutes effective mailing under the under the TAA: "a notice required or authorized…is effective if mailed or served by the secretary or the secretary's delegate to the taxpayer or person *at the last address* shown on his registration certificate or *other record of the department*." (italics added for emphasis). The evidence in this protest established that on August 30, 2010, Taxpayer filed a "Tax Information Authorization" to the Department, designating Attorney Pick, 8500 Menual Blvd. NE, Ste. B450, Albuquerque, NM 87112 as Taxpayer's representative for CRS taxes in any year. On that date, Taxpayer's last address shown for the purposes of NMSA 1978, § 7-1-9 (A) (1997) became Attorney Pick's address in Albuquerque.

The day after Taxpayer changed its last known address by filing the "Tax Information Authorization," the Department generated notices of assessment listing Taxpayer's previous address of record rather Attorney Pick's address. Since the Department generated the notices of

assessment using Taxpayer's previous address rather than Taxpayer's correct, last known address at Attorney Pick's office, the notices of assessment in this matter were arguably ineffective under the mailing of notice requirements of NMSA 1978, § 7-1-9 (A) (1997).

To the extent that the Department argues or suggests that Taxpayer never requested a written retroactive extension in this matter, whether requested or not, the evidence is clear that the Department in fact granted a retroactive extension on November 18, 2010 based on the written email of Brenda Lujan. Taxpayer could reasonably rely on her representation to determine that the Department had granted a retroactive extension. The Department itself appeared to act in reliance upon the extension and Taxpayer's subsequent November 30, 2010 protest letter by stopping all enforcement action against Taxpayer for nearly a year after receipt of Taxpayer's protest.

The Department's assertion that any extension was ineffective in this case because Brenda Lujan lacked authority to grant an extension is not persuasive under the facts of this case. While internally Department employees may be quite familiar with the specific duties and responsibilities of each of the Department's respective divisions, a member of the public may not be aware of the Department's myriad divisions let alone the specific decision making authority of each respective division within the Department. NMSA 1978, §7-1-24(B) (2003) does not explicitly state that an extension may only be granted by the Department's Protest Bureau; rather it references the secretary directly, which by definition under NMSA 1978, Section 7-1-3(T) (2009) would include the secretary, deputy secretary, or division directors delegated by the secretary. Even if Attorney Pick knew based on his experience that extensions usually came from the Protest Bureau, the fact that Ms. Lujan told Attorney Pick that she consulted with a supervisor before informing Taxpayer of the extension certainly could leave Attorney Pick with

the reasonable inference that Ms. Lujan may have consulted with an individual designated by the secretary under NMSA 1978, § 7-1-3(T) (2009) with authority to grant extensions on the secretary's behalf.

In summary, because the Department did not demonstrate a date of mailing that serves as a trigger to Taxpayer's timeliness of protest requirement under NMSA 1978, § 7-1-24(B) (2003), and because the notices of assessment were ineffective without proof of mailing on August 31, 2010 and without mailing to Taxpayer's last known address at Attorney Pick's office, Taxpayer's second protest is granted. The Department shall accept Taxpayer's November 30, 2010 first protest to the underlying assessments as timely filed within the requisite 90-day extension period. As discussed at the conclusion of the hearing, and as the parties agreed, the parties will submit a new request for hearing when the protest involving the three underlying Notices of Assessment is ripe for hearing.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written second protest to the denial of the initial first protest letter. Jurisdiction lies over the parties and the subject matter of this protest.

B. No presumption of correctness attached in this case because the Department did not show that it had mailed or personally served effective notices of assessment on August 31, 2010.

C. There is no basis to conclude that Taxpayer's protest was untimely without proof of mailing. Consequently, Taxpayer's protest was timely filed under NMSA 1978, §7-1-24(B) (2003).

For the foregoing reasons, the Taxpayer's protest **IS GRANTED.** The Department should accept Taxpayer's initial November 30, 2010 protest as timely, proceed to address the three notices of assessment on the merits, and submit a request for hearing when that protest is ripe for a formal hearing.

DATED: June 11, 2012.

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