

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

**IN THE MATTER OF THE PROTEST OF
COLLIN SANCHEZ
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO.'s L1950894656, L1816676928, L0330601024,
L1733694016, L0196383296, and L1899644480**

No. 13-8

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 29, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Collin Sanchez ("Taxpayer") appeared pro se. Staff attorney Cordelia Friedman appeared, representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #2-4 and Department Exhibits A, B, C, D, E, F, and H are admitted into the record, as more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 24, 2010, the Department mailed notices of assessment for personal income tax to Taxpayer as follows:
 - a. Under letter id. no. L1950894656, the Department assessed Taxpayer for \$3,562.00 in tax principal, \$712.40 in penalty, and \$2,469.33 in interest for the personal income period ending December 31, 2003.

b. Under letter id. no. L1816676928, the Department assessed Taxpayer for \$4,743.00 in tax principal, \$948.60 in penalty, and \$2,578.26 in interest for the personal income period ending December 31, 2004.

c. Under letter id. no. L0330601024, the Department assessed Taxpayer for \$3,352.00 in tax principal, \$670.40 in penalty, and \$1,317.75 in interest for the personal income period ending December 31, 2005.

d. Under letter id. no. L1733694016, the Department assessed Taxpayer for \$2,062.00 in tax principal, \$412.40 in penalty, and \$502.89 in interest for the personal income period ending December 31, 2006.

e. Under letter id. no. L0196383296, the Department assessed Taxpayer for \$3,031.00 in tax principal, \$606.20 in penalty, and \$357.14 in interest for the personal income period ending December 31, 2007.

2. The Department assessed Taxpayer for the above-described personal income tax during the relevant years because the Department's disallowed Taxpayer's claimed business losses. [Department Exhibit F].

3. On December 15, 2010, Taxpayer submitted a letter to the Department.

[Department Exhibit E]. In pertinent part, that letter read:

I am in receipt of your letter. As per our conversation, I am sending this letter as confirmation that the notice was sent in error. Thank you for explaining how you are going to remove the interest and penalties to settle the discrepancy by offsetting the previous years refunds that were owed to me. I want to clear this matter up in your computers as I live out of state. Please send me confirmation that zero taxes are owed.

4. Taxpayer's December 15, 2010 letter to the Department enclosed a copy of the Department's assessment of personal income tax for the period ending on December 31, 2003 under letter id. no. L19508946565. [Department Exhibit E].

5. While Taxpayer's December 15, 2010 letter is generally ambiguous, because the letter does state that the assessment was sent in "error" and that Taxpayer was waiting for confirmation that "zero taxes" were owed, that letter constituted a protest.

6. Taxpayer's December 15, 2010 letter was filed within thirty days of the Department's notices of assessment.

7. To the extent that Taxpayer's December 15, 2010 letter lacked specificity, Taxpayer's subsequent letters (addressed in more detail below) in this matter served as amendments to the December 15, 2010 protest.

8. On February 23, 2011, Taxpayer submitted a letter to the Department's Connie Dayton, protesting all of the Department's assessments for personal income tax from 2003-2007. In that letter, Taxpayer argued that he had been targeted for an audit, that he had been arbitrarily and unfairly assessed personal income tax, penalty, and interest, that he wanted an explanation for the assessments and for the Department's denial of tax refunds in the same years at issue, that he was seeking necessary corrections in order to make the assessments fair and impartial, and that he was asserting his rights under the Tax Administration Act to seek review. [Taxpayer Exhibit #3].

9. On March 4, 2011, under letter id. no. L189964480, the Department informed Taxpayer that his February 23, 2011 protest letter was untimely under NMSA 1978, Section 7-1-24 (2003).

10. On March 7, 2011, the Department's Barry Wilson sent Taxpayer a letter explaining the basis for the adjustments to Taxpayer's New Mexico taxable personal income in years 2003 through 2007 that resulted in the Department's assessments. Mr. Wilson's letter included a spreadsheet detailing the Department's adjustments. [Department Exhibit F].

11. On March 15, 2011, Taxpayer filed a protest of the Department's denial of protests articulated under letter id. no. L189964480. In this letter, Taxpayer stated he challenged the Department's determination that no timely protest letter had been received given Taxpayer's December 15, 2010 letter to the Department which Taxpayer contended constituted a protest.

12. On March 15, 2011, Taxpayer submitted a letter to the Department's Steven Ocszewski indicating he was making payments under protest to the assessments, expressing his frustrations with the Department's actions, and making disturbing comments/threats. [Taxpayer Exhibit #2].

13. On April 26, 2011, Taxpayer responded to the Department's Barry Wilson's March 7, 2011 letter. This letter provided a thorough and detailed basis for protest, again serving as an amendment to the protest. [Taxpayer Exhibit #4].

14. On January 3, 2012, the Department acknowledged receipt of Taxpayer's March 15, 2011 protest letter. [Department Exhibit H].

15. On January 25, 2012, the Department filed a request for hearing in this matter.

16. On February 2, 2012, the Hearing Bureau sent notice of administrative hearing, scheduling this matter for a hearing on October 18, 2012 at 10:30 AM.

17. On October 16, 2012, Taxpayer moved to continue the October 18, 2012 hearing because he lived out of state and was unable to make the scheduled hearing.

18. On October 17, 2012, the Hearing Bureau issued an order continuing the October 18, 2012 hearing until later on that same day, at 1:30 PM.

19. On October 18, 2012, Taxpayer appeared in person for a hearing, and the Department appeared through staff attorney Cordelia Friedman. At the hearing, Taxpayer asked

for a continuance so that he could consult with an attorney. That request for continuance was granted.

20. On October 19, 2012, the Hearing Bureau issued a Continuance Order and Amended Notice of Hearing, scheduling the continued hearing for January 29, 2013 at 1:30 PM. Of relevance to this case, that order in part read

Under NMSA 1978, Section 7-1-24(A) (2003), the protest hearing is limited only to the grounds stated in Taxpayer's protest letter, subject to Taxpayer's amendment up to 10-days before the scheduled hearing. In the March 15, 2011 protest letter, Taxpayer both claims that he timely protested the assessment issued in this matter, and that those assessments are "false and inaccurate." Consequently, the parties should be prepared to address both issues during the hearing.

21. On January 28, 2013, Taxpayer submitted a request to appear telephonically at the January 29, 2013 hearing.

22. On January 28, 2013, the Hearing Bureau issued an order denying the request for a telephonic appearance at the January 29, 2013 hearing.

23. At the hearing, Taxpayer was generally non-responsive or vague in responding to questions about the origins of the assessment, whether an audit had occurred, and the merits of the underlying assessment. Rather than providing much information in response to those questions, Taxpayer's answers generally returned to Taxpayer's contention that he was entitled to an explanation from the Department as to why he was being assessed. [Compact Disc, January 29, 2013, counter 00:40:00 through 00:41:45, 00:44:00-00:45:41, 00:46:30-00:48:02, 00:48:02-00:48:42, 00:55:45-00:57:00].

24. Taxpayer's testimony that no audit occurred in this matter was contradicted by his own correspondence with the Department, Taxpayer Exhibit #4, where Taxpayer referenced a forensic audit. [CD, 01-29-13,00:55:45-00:57:00].

25. Taxpayer had income from Enchanted Holdings, LLC during the relevant tax years. [CD, 01-29-13, 00:46:02-00:46:30, 00:57:00-00:57:30].

26. Enchanted Holdings, LLC was incorporated in New Mexico in 2002. Enchanted Holdings, LLC is in the business of real estate management. [CD, 01-29-13, 00:46:02-00:46:30, 00:57:00-00:57:30].

27. Taxpayer filed a Schedule C for his Enchanted Holdings, LLC, income with his Federal income tax returns during the relevant tax years. [CD, 01-29-13, 01:00:35-01:00:45].

28. Taxpayer claimed business losses for the costs of starting a business, including meals, transportation, gas, etc., on his personal income tax returns during the relevant period [CD, 01-29-13, 01:02:47-01:03:15, 01:07:25-01:08:10].

29. The Department asked Taxpayer for records to substantiate that the Enchanted Holdings, LLC, business existed, but Taxpayer felt he first was entitled to an explanation as to why he was being assessed before providing such information. [CD, 01-29-13, 00:46:30-00:48:02].

30. At hearing, Taxpayer presented no records of his personal income tax filings, his Federal Schedule C's, business incorporation, his claimed business losses, business receipts, business tax filings, or financial statements related to his business that would substantiate the claimed business losses on his personal income taxes during the relevant tax years.

31. Taxpayer was given an opportunity to ask the Department's Protest Auditor Milagros Bernardo any of his unanswered questions about this matter. Taxpayer acknowledged he had unanswered questions but choose not to ask any of those unanswered questions to Ms. Bernardo. [CD, 01-29-13, 01:21:15 through 01:22:21].

DISCUSSION

There are two main issues at protest. First, there is a genuine question whether Taxpayer timely filed a valid protest to the Department's assessments in this case. The second issue is whether Taxpayer overcame the presumption of correctness attached to the assessments. In short answer, while Taxpayer did file a timely protest that was twice amended, Taxpayer nevertheless did not overcome the presumption of correctness that attached to the Department's assessments.

I. Validity of Protest.

NMSA 1978, Section 7-1-24 (2003) governs the substance and timing for the filing of a protest. Under NMSA 1978, § 7-1-24(B) (2003), a taxpayer "shall" file a protest "within thirty days of the date of mailing to the taxpayer by the department of the notice of assessment." NMSA 1978, § 7-1-24(B) (2003) allows a taxpayer to make a written request to extend the period to file a protest by 60-days. If a taxpayer demonstrates substantial merit to the protest grounds and an inability to timely file a protest or a written request for extension within thirty days, the secretary is also empowered under NMSA 1978, § 7-1-24(B) (2003) to grant a taxpayer a retroactive extension of no more than 60-days after the expiration of the initial thirty day period to file a protest. In other words, including the possibility of an extension or retroactive extension, a taxpayer has at most 90-days under the statute to file a protest.

Department Regulation 3.1.7.11 NMAC (01/15/01) states that the 90-day period articulated under NMSA 1978, § 7-1-24(B) (2003) is jurisdictional. Department regulations interpreting a statute are presumed proper and are to be given substantial weight. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 139 N.M. 498, 503, 2006 NMCA 50, 16, 134 P.3d 785, 790 (N.M. Ct. App. 2006). Under Regulation 3.1.7.11 NMAC (01/15/01), the

secretary is without authority to consider any protest filed after the 90-day period (including possible extensions) has expired.

Turning to the substance of a protest, NMSA 1978, § 7-1-24(A) (2003) articulates what constitutes a protest. In pertinent part, NMSA 1978, § 7-1-24(A) (2003) reads

[a]ny taxpayer may dispute the assessment to the taxpayer of any amount of tax...by filing with the secretary a written protest against the assessment... Every protest shall identify the taxpayer and the tax involved and state the grounds for the taxpayer's protest and the affirmative relief requested. The statement of grounds for protest shall specify individual grounds upon which the protest is based and a summary statement of the evidence expected to be produced supporting each ground asserted, if any; *provided that the taxpayer may supplement the statement at any time prior to ten before any hearing conducted on the protest...* (italics for emphasis).

The way NMSA 1978, § 7-1-24(A) (2003) is structured, the legislature recognized the importance of a timely, detailed protest, but also allowed a taxpayer the ability to supplement the initial protest letter at any time up to ten-days before the hearing.

Two Department regulations address what is substantively required of a protest. To be an effective protest under Department Regulation 3.1.7.10 NMAC (01/15/01), the purported protest must be in writing, filed with the secretary, identify the taxpayer and taxes at issue, state the grounds of protest, and state the affirmative relief requested. Under Department Regulation 3.1.7.10 (C) NMAC (01/15/01), while a document not complying with the statute is not considered a protest, the Secretary may require more specificity from a taxpayer in those instances where a protest letter lacks sufficient grounds for protest. The second regulation addressing the substantive requirements of a protest is Department Regulation 3.1.7.12 NMAC (08/30/01). Department Regulation 3.1.7.12 (A) NMAC (08/30/01) requires a statement of the grounds of protest, an explanation of the law and facts supporting the protest, a legal basis to

challenge the assessment, and a summary of the evidence expected to be produced. Further, Regulation 3.1.7.12 (C) NMAC (08/30/01) provides an example of an appropriate protest.

In addition to the statute and the regulations, the Department relies on *Lopez v. New Mexico Dep't of Taxation & Revenue*, 124 N.M. 270, 1997-NMCA-115, 949 P.2d 284 (N.M. Ct. App. 1997) to argue that Taxpayer did not timely file an affective protest letter. In *Lopez v. New Mexico Dep't of Taxation & Revenue*, 124 N.M. 270, 1997-NMCA-115, 949 P.2d 284 (N.M. Ct. App. 1997), the Court of Appeals had an opportunity to consider whether a taxpayer timely filed a protest against the Department's notice of audit. At the administrative tax protest hearing, the tax hearing officer found that the *Lopez* taxpayer had failed to timely protest the Department's audit under NMSA 1978, § 7-1-24. *See id.* at 271, ¶6, 286. The *Lopez* taxpayer appealed that hearing officer's decision and order, arguing in part that he had "actually or constructively" protested the audit within the required time. *See id.* at 271, ¶7, 286. The Court of Appeals in *Lopez* noted that NMSA 1978, § 7-1-24 imposed a 30-day time restriction on a protest. *See id.* at 271, ¶6, 286. The taxpayer in *Lopez* only submitted one letter within that 30-day window under NMSA 1978, § 7-1-24. *See id.* at 272, ¶9, 286. The Court of Appeals found that that the letter the *Lopez* taxpayer submitted did not identify the tax protested, the grounds for protest, the relief requested, and "even more damaging" suggested acquiescence to the Department's proposed audit. *See id.* The Court of Appeals in *Lopez* affirmed that hearing officer's conclusion that the *Lopez* taxpayer did not timely protest the Department's audit. *See id.*

However, *Lopez* must be read within its specific context. In *Lopez*, the Court of Appeals was considering the evidence in a light most favorable to the agency's decision and using an arbitrary, capricious or an abuse of discretion appellate review standard. *See id.* at 271, ¶4, 285. Under this deferential review standard, the Court of Appeals in *Lopez* affirmed the hearing

officer's determination that the protest letter was untimely. However, that does not necessarily mean that the *Lopez* Court of Appeals was making a broad statement of law on the required substance of a protest letter under NMSA 1978, § 7-1-24.

Additionally, it must be noted that since the Court of Appeals decision in *Lopez*, the Legislature has promulgated a taxpayer Bill of Rights. *See* NMSA 1978, Section 7-1-4.1 *et. seq.* (2003). The taxpayer Bill of Rights gives taxpayers a right of review, formally or informally, of audit decisions. *See* NMSA 1978, Section 7-1-4.2(G) (2003). The taxpayer Bill of Rights entitles a taxpayer to nontechnical explanations of tax processes, rights, and remedies. *See* NMSA 1978, Section 7-1-4.2(E) (2003). The taxpayer Bill of Rights also affords taxpayers the right to prompt and courteous tax assistance. *See* NMSA 1978, Section 7-1-4.2(A) (2003).

Before depriving a taxpayer a merits protest hearing that a taxpayer is otherwise entitled to under the taxpayer Bill of Rights, any timely filed letter should be given its broadest possible reading. Supporting this notion of reading a protest letter broadly are the facts that NMSA 1978, §7-1-24 (2003) gives a taxpayer the ability to amend a protest and that Regulation 3.1.7.10(C) NMAC (01/15/01) gives the Department the ability to demand more details in a situation where it finds a taxpayer letter ambiguous.

Reading Taxpayer's December 15, 2010 letter broadly, it qualifies as a protest letter. Unlike the "more damaging" acquiescence expressed by the *Lopez* taxpayer's letter, *see id.* at 272, ¶9, 286, Taxpayer in this case expressed no sentiment that might be considered acceptance of the Department's action. In Taxpayer's December 15, 2010 letter, Taxpayer expressed that he believed the assessment was "sent in error." Taxpayer expressed that it was his understanding that previous year's refunds would offset and remove the discrepancies, penalty, and interest. Taxpayer asked for a remedy when he stated that he awaited confirmation that "zero taxes are

owed.” A reasonable, nontechnical reading of these statements shows that Taxpayer was not in agreement with the Department’s assessments and was in fact attempting to contest the assessments.

To the extent that Taxpayer’s December 15, 2010 letter was lacking in specific grounds and factual details, it must be noted that the Department took no action under Regulation 3.1.7.10(C) NMAC (01/15/01) to request more specificity from Taxpayer. This is not an instance where Taxpayer made no efforts to express timely his disagreement with the assessed tax. Given that assessments had been issued to Taxpayer, and Taxpayer’s December 15, 2010 letter was received within 30-days of those assessments, that letter from Taxpayer indicating that the assessments were sent in error and asking for confirmation that zero taxes were owed should have reasonably triggered a follow-up request from the Department for more detailed protest information, as permitted under Regulation 3.1.7.10(C) NMAC (01/15/01).

Further, while the December 15, 2010 letter may have technically been lacking in specific details, Taxpayer’s later letters on February 23, 2011, and April 26, 2011 supplemented the grounds of the protest, as permitted under NMSA 1978, §7-1-24 (2003). There is no doubt that those later February 23, 2011 and April 26, 2011 letters contained sufficient details and grounds for protest. Taxpayer’s December 15, 2010 letter constituted a timely protest. Taxpayer timely supplemented the grounds of protest on February 23, 2011 and April 26, 2011.

II. **Merits of Protest.**

In the October 19, 2012 Continuance Order and Amended Notice of Hearing, the undersigned hearing officer gave notice to all parties that the January 29, 2012 protest hearing would address both the question of the timeliness of Taxpayer’s protest and the merits of Taxpayer’s challenge of the assessments as “false and inaccurate.” There were three purposes for

this Order. First, the hearing officer desired to comply with NMSA 1978, § 7-1-24 (J) (2003) by making a complete record both on the procedural issue and the merits in this matter so that in event of appeal, all issues would be developed for review. Second, Taxpayer was traveling from out of state and it seemed unnecessarily burdensome to bifurcate the hearing between a procedural issue hearing and a possible later merits hearing. Finally, considering that the matter had already been continued once to afford Taxpayer the opportunity to arrange for representation, in order to avoid any further delay it was more efficient to conduct one hearing addressing both issues. *See* Regulation 3.1.8.9(B) NMAC (8/30/01) (directing a hearing officer to avoid delay in the proceedings and to regulate the course of the hearing). Despite both parties reluctance to address the merits issue during the hearing, both parties had clear notice well before the hearing date that the merits of the protest were at issue.

Under NMSA 1978, Section 7-1-17(C) (2007), the Department's assessments issued in this case are presumed correct. Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that Taxpayer is entitled to an abatement, in full or in part, of the assessments issued against him. *See TPL, Inc. v. Taxation and Revenue Dep't*, 2000-NMCA-083, ¶8, 129 N.M. 539, 542, 10 P.3d 863, 866, *cert. granted*, 129 N.M. 519, 10 P.3d 843, *rev'd on other grounds*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d, 474. Taxpayer has the burden to overcome the assessment of personal income tax. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessments are correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 219-220, 62 P.3d 308, 310-311; *Grogan v. New Mexico Taxation and Revenue Dep't*, 133 N.M. 354, 357-58, 62 P.3d 1236, 1239-40 (2002).

Taxpayer did not overcome that burden in this case. Under regulation 3.1.6.12(A) NMAC (01/15/01), “[u]nsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.” Therefore, Taxpayer’s unsubstantiated claims that the assessments were unfair, arbitrary, and erroneous are not enough without specific evidence to overcome the presumption of correctness.

The only documentary evidence Taxpayer presented related to the merits of the assessment was the April 26, 2011 letter he submitted in response to Barry Wilson’s explanation of the assessments, Taxpayer Exhibit #4. Taxpayer made no effort to substantiate the claims he made in that letter regarding Enchanted Holdings, LLC’s business losses supporting deductions on his New Mexico personal income tax obligations. Taxpayer did not present any personal income tax filings into the record (like W2’s or Schedule C’s, etc.), did not present any evidence to substantiate his claimed business loss deductions for each personal income tax year, any financial records related to Taxpayer’s business, or proof that Taxpayer’s business was still in operation during the years at issue.

Taxpayer was generally non-responsive or vague in response to questions related to the origins of the assessments, the merits of the assessments, and whether this case resulted from an audit. Taxpayer generally answered such questions by referring to his belief that he was entitled to answers from the Department for why he was being assessed. While it certainly understandable that Taxpayer might want answers from the Department, ultimately under the presumption of correctness, Taxpayer had an obligation at the hearing to overcome the assessments by showing he was entitled to the claimed business losses.

Taxpayer argued that he felt he did everything he could do to prepare his taxes correctly and that the Department has neglected to provide him with answers during this process. At the

hearing, Taxpayer was given a specific opportunity to ask the Department's witness, Protest Auditor Milagros Bernardo, any unanswered questions about this matter. Taxpayer acknowledged that he still had unanswered questions in this matter but inexplicably declined to ask them of Ms. Bernardo. Further, the Department's Mr. Wilson attempted to explain the basis of the underlying assessments to Taxpayer in Department Exhibit F. While Taxpayer disagreed with Mr. Wilson's explanation, as discussed above, Taxpayer did not provide the substantiating evidence at the hearing to support his contention that he was entitled to personal income tax deductions. Although Taxpayer argued he did the best he could with his laymen's knowledge of tax law, under New Mexico's self-reporting tax system, every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *See Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

Although Taxpayer's December 15, 2010 letter qualified as a protest letter, the absence of factual detail in that letter ultimately was consistent with the absence of information presented to the Department throughout this process and at the hearing to substantiate Taxpayer's protest of the assessments. Without more detailed evidence, Taxpayer did not present sufficient evidence to overcome the presumption of correctness that attached to the Department's assessments. Consequently, Taxpayer is liable for the assessed personal income tax, penalty, and interest.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the assessments of personal income taxes, penalty, and interest. Taxpayer timely amended that protest twice. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not present sufficient evidence to overcome the presumption of correctness under NMSA 1978, §7-1-17 (2007). *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. Taxpayer is liable for the payment of \$16,750.00 in personal income tax, \$3,350.00 in penalty, and any accrued interest until the tax principal is satisfied under NMSA 1978, Section 7-1-67 (2007).

DATED: April 9, 2013.

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