STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
GENERAL DESIGN AND CONSTRUCT **No. 16-32**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0208589360

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on April 25, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Rick Garduno appeared for General Design & Construct ("Taxpayer"). Staff Attorney Peter Breen appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Nicholas Pacheco appeared as a witness for the Department. Taxpayer Exhibit #1 and Department Exhibit A were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 14, 2016, under letter id. no. L0208589360, the Department assessed Taxpayer for $10,435.65 in gross receipts tax, $2,087.13 in penalty, and $1,589.57 in interest for the CRS reporting periods between January 1, 2009 and December 31, 2012.

2. On February 12, 2016, Taxpayer protested the Department's assessment. Although Taxpayer made arguments related to acceptance of NTTCs in its protest letter, at the protest hearing Taxpayer abandoned those arguments in favor of an argument related to bankruptcy, an issue not raised or identified in the protest letter.

3. On February 19, 2016, the Department's protest office acknowledged receipt of a valid protest.

4. On March 30, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

5. On April 4, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on April 25, 2016, within 90-days of the Department's acknowledgment of receipt of a valid protest.

6. Taxpayer was a sole proprietor operated by Rick Garduno.

7. There is no evidence that Taxpayer timely filed CRS-1 returns for any of the relevant periods.

8. At some unspecified point in 2013, Rick Garduno and his wife Debbie filed a petition for bankruptcy.

9. On January 24, 2014, the United States Bankruptcy Court issued an order discharging debt under section 727 of title 11 of the United States Code. The back of the order clearly stated that the order generally did not discharge most tax debt. [Taxpayer Ex. #1].

10. Through its Schedule C mismatch program with the IRS, the Department detected that Taxpayer had unreported more gross receipts business income on its Federal Schedule C not reported as New Mexico gross receipts on a CRS-1 return.

11. As a result of the Schedule C mismatch, the Department issued its January 14, 2016 described in finding of fact #1.

12. Before the scheduled hearing, the Department made an abatement of the assessed tax based on Taxpayer's presentation of a NTTC.

13. As of the date of hearing, and reflecting the Department's prehearing abatement, Taxpayer still owed $7,175.04 in tax, $1,435.01 in penalty, and $997.43 in interest for a total outstanding balance of $9,607.48. [Dept. Ex. A].

DISCUSSION

Although Taxpayer's protest letter related to claims for deductions requiring presentation of NTTCs, at hearing Taxpayer's sole evidence and argument related to his 2014 bankruptcy discharge order. In light of the bankruptcy discharge, Taxpayer argued that he was not liable for the assessed tax. The Department responded that under a case from the 10th Circuit, *Mallo v. IRS (In re Mallo),* 774 F.3d 1313 (10th Cir. 2014), Taxpayer was still liable for the assessed tax debt.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that he is entitled to an abatement, in full or in part, of the assessment issued against him. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd.*, 2003 NMCA 21, ¶13.

Neither party presented much evidence into the record in this protest, which makes some of the factual conclusions and legal analysis in this case challenging. Ultimately, however, the absence of the presentation of evidence in this case goes against the party with the burden in the proceeding, which is Taxpayer. At hearing, Taxpayer did not present any evidence or argument that the assessment was incorrect or about the NTTC issues identified in the protest letter. Without presenting any argument or evidence to support the issues identified in the protest letter, Taxpayer abandoned the NTTC argument and failed to overcome the presumption of correctness that attached to the assessment. Because of the abandonment of this issue and the presumption of correctness of the assessment, the merits of the underlying assessment need not be addressed further in this decision.

Taxpayer never raised the bankruptcy issue in its protest letter, making that issue arguably not germane at the protest hearing even under the Administrative Hearings Office's traditional approach of reading a protest letter broadly. *See* Regulation 3.1.7.12 (A) (protest limited to grounds stated in protest letter absent an amended protest). Nevertheless, the Department was prepared to address the legal merits of the bankruptcy issue, and in turn, the issue will be addressed here.

Under 11 U.S.C. § 727(b), generally all debts that arose before the bankruptcy discharge order are discharged, with the exception of those provided under 11 U.S.C. § 523. Section 11 U.S.C. § 523 lists specific exceptions to the discharge of debt in bankruptcy. Pertinent to this case is the exception to discharge of a tax obligation under 11 U.S.C. § 523(a)(1). Under 11 U.S.C. § 523(a)(1)(A), regardless of whether a return was filed, a tax of the type specified under 11 U.S.C. § 507(a)(8) is not dischargeable. 11 U.S.C. § 507(a)(8)(a) reads "a tax on or measured by income or gross receipts for a taxable year…". The provision continues to list specific time conditions, including the date the tax return was due compared to date of petition for bankruptcy and the

assessment date compared to the bankruptcy filing. Taxpayer, again who carries the burden in this proceeding under the Tax Administration Act, made no effort to address the timeframes articulated under 11 U.S.C. § 507(a)(8)(a) and consequently the record is devoid of sufficient information to make a clear determination about those timelines. Since the assessment of tax in this case was related to the collection of gross receipts tax in years ending before the unspecified date of the filing of the petition sometime in 2013, and since Taxpayer did not present evidence related to the timeframes under 11 U.S.C. § 507(a)(8)(a) despite carrying the burden to do so in this proceeding, there is no basis to conclude that the gross receipts tax debt was dischargeable given 11 U.S.C. § 523(a)(1)(A) and its cross-reference to 11 U.S.C. § 507(a)(8)(a).

Additionally, not dischargeable under 11 U.S.C. § 523(a)(1)(B) is a tax debt when no return was filed or was filed late. The age of the assessed periods, which include periods dating back seven-years to 2009, suggests that Taxpayer was a non-filer of gross receipts tax returns under the statute of limitations period pursuant to NMSA 1978, Section 7-1-18 (C) (2013) (the Department has seven-years to assess a non-filer rather than the usual three-year statute of limitation to issue an assessment). In any event, Taxpayer who carries the burden did not establish that he timely filed CRS-1 returns during the relevant periods. As such, as *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014) clearly established, under 11 U.S.C. § 523(a)(1)(B), as non-filer Taxpayer's tax liability was not discharged by the bankruptcy discharge order. In summary, Taxpayer did not overcome the presumption of correctness of the assessment and did not present sufficient factual and/or legal information to establish that the tax debt was discharged by the bankruptcy order.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not overcome the presumption of correctness on the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

D. Pursuant to 11 U.S.C. § 523(a)(1)(A) and its cross-reference to 11 U.S.C. § 507(a)(8)(a), a tax debt related to gross receipts tax is generally not dischargeable in a bankruptcy proceeding and Taxpayer did not establish that this tax debt fell outside the timeframes addressed in 11 U.S.C. § 507(a)(8)(a).

E. Since Taxpayer did not establish it timely filed the tax returns in question before the bankruptcy discharge, the tax debt is not dischargeable under 11 U.S.C.S 523. *See Mallo v. IRS (In re Mallo)*, 774 F.3d 1313 (10th Cir. 2014).

For the foregoing reasons, the Taxpayers' protest **IS DENIED** As of the date of hearing, Taxpayer owed $7,175.04 in tax, $1,435.01 in penalty, and $997.43 in interest for a total outstanding balance of $9,607.48. Interest continues to accrue under Section 7-1-67 until tax principal is satisfied.

DATED: June 29, 2016.

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may being preparing the record proper.