STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
THE LOCAL VAPORY **No 17-27**
TO NOTICE OF LEVY
ISSUED UNDER LETTER
ID NO. L0058714416

DECISION AND ORDER

A formal hearing in the above-referenced protest was held May 11, 2017, before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. The Taxation and Revenue Department (Department) was represented by Mr. Marek Grabowski, Staff Attorney. Mr. Nicholas Pacheco, Auditor, appeared and testified on behalf of the Department. Mr. Joshua Dwyer, Esq. (counsel) represented The Local Vapory (Taxpayer). Mr. Chaz Betts, with the prior authorization of the Hearing Officer, appeared by telephone and testified on behalf of the Taxpayer. The Hearing Officer took notice of all documents in the administrative file. Department Exhibits A – G were admitted. The Taxpayer did not seek to introduce any exhibits. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Mr. Chaz Betts is the single member of The Local Vapory, LLC (Taxpayer) which engages in business in Las Cruces, New Mexico. Taxpayer sells vapor products, including supplies, and accessories. Mr. Betts has operated the business since July of 2016. [Testimony of Mr. Betts].
2. Taxpayer is located at 200 S. Solano Dr., Suite 5, Las Cruces, New Mexico 88001. This is also the Taxpayer's mailing address of record. [Testimony of Mr. Betts; Testimony of Mr. Pacheco; Dept. Ex. A, Lines 8 and 9; Dept. Ex. B].

3. Taxpayer has been registered to engage in business since July 8, 2016. [Dept. Ex. B].

4. In 2016, Mr. Betts was in communication with the Department regarding a review of potential liability against Taxpayer as an alleged successor in business. [Testimony of Mr. Betts].

5. Mr. Betts believed he provided all documents that the Department had requested as part of its review. [Testimony of Mr. Betts].

6. On or about September 22, 2016, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Taxpayer in the amount of $22,770.24 in taxes, $4,553.95 in penalty, and $1,134.81 in interest for a total amount due of $28,459.00. The assessment was issued to Taxpayer as a successor in business under Letter ID No. L0177069616. [Dept. Ex. C].

7. The Taxpayer did not protest the assessment issued under Letter ID No. L0177069616.

8. Mr. Betts denied ever receiving the Notice of Assessment of Taxes and Demand for Payment. [Testimony of Mr. Betts].

9. Although Taxpayer's employees may occasionally retrieve Taxpayer's mail, it is always delivered to Mr. Betts. To the best of his knowledge, Mr. Betts has never had mail lost or misplaced. [Testimony of Mr. Betts].

10. A notation in Taxpayer's electronic file dated September 22, 2016 indicated that the assessment was mailed to the Taxpayer on or about that date. [Testimony of Mr. Pacheco; Dept. Ex. D].

11. On or about January 5, 2017, the Department issued a Notice of Intent to Lien under Letter ID No. L1680298288. The total amount due was $28,717.79.

12. On or about January 18, 2017, the Department issued a Notice of Claim for Tax Lien under Letter ID No. L0845556016. It was mailed to Taxpayer's address of record and indicated as

due the amounts of $22,770.24 in tax, $4,553.95 in penalty, and $1,393.60 in interest for a total amount due of $28,717.79.

13. On February 7, 2017, the Department served a Warrant of Levy under Letter ID No. L0944073008 on Wells Fargo Bank N.A.

14. On or about February 9, 2017, Taxpayer executed a Formal Protest that referenced only the Notice of Intent to Lien. The Formal Protest, which appeared to reference the incorrect Letter ID Number, was likely intended to address Letter ID No. L1680298288. The Formal Protest was received in the Department's Protest Office on February 10, 2017.

15. On February 14, 2017, Wells Fargo Bank issued a cashier's check to the Department for $5,507.43. The payment was secured pursuant to Levy Number 261221. [Testimony of Mr. Pacheco; Dept. Ex. E; Dept. Ex. F].

16. On or about February 24, 2017, a Notice of Levy was mailed to the Taxpayer under Letter ID No. L0058714416 at its address of record. The Taxpayer was notified that payment in the amount of $5,507.43 had been secured from Wells Fargo Bank. The Department also made demand for the remaining balance due as of that that date in the amount of $23,295.21. [Testimony of Mr. Pacheco; Dept. Ex. E].

17. On or about March 2, 2017, the Department acknowledged the Taxpayer's Formal Protest of its Notice of Claim of Tax Lien filed under Letter ID No. L0845556016 and the Warrant of Levy under Letter ID No. L0944073008. The acknowledgment did not reference the Notice of Intent to Lien under Letter ID No. L1680298288.

18. The funds secured from Wells Fargo Bank were applied to Taxpayer's outstanding principal liability for the periods July 2014 through October 2014. [Testimony of Mr. Pacheco; Dept. Ex. G].

19. On April 12, 2017, the Department filed a Hearing Request that referenced only Letter ID No. L0944073008. The Hearing Request did not reference the Letter ID Numbers in the

Taxpayer's Formal Protest or the Letter ID Numbers referenced in the Department acknowledgment of March 2, 2017. The request was submitted with copies of the Notice of Levy issued under Letter ID No. L0058714416, Warrant of Levy issued under Letter ID No. L0944073008, Notice of Claim of Tax Lien issued under Letter ID No. L0845556016, and the Notice of Intent to Lien issued under Letter ID No. L1680298288.

20. On April 14, 2017, the Administrative Hearings Office entered a Notice of Administrative Hearing setting a hearing on the merits for May 11, 2017 at 1 p.m.

21. On April 17, 2017, the Administrative Hearings Office entered an Amended Notice of Administrative Hearing setting a hearing on the merits for May 11, 2017 at 3 p.m.

22. On May 10, 2017, Taxpayer filed Taxpayer's Motion to Participate Telephonically. The Department did not oppose the motion.

23. On May 11, 2017, the Administrative Hearings Office entered an Order Granting Taxpayer's Motion to Participate Telephonically.

24. The caption in this protest has at all times referenced only Letter ID No. L0058714416. Neither party raised any issues regarding the various Letter ID numbers at issue and this Decision and Order addresses all issues raised by the parties at the hearing.

25. The Department as a matter of standard practice applies payments on outstanding liabilities to principal first. [Testimony of Mr. Pacheco].

26. The Department's ordinary practice is to proceed with collection activities until the outstanding liability, including accrued penalty and interest are paid in full. [Testimony of Mr. Pacheco].

27. As of the date of the hearing, penalties and interest have not been abated in the present matter. Mr. Pacheco could not state as of the date of the hearing whether or not an abatement of penalty or interest was under consideration. [Testimony of Mr. Pacheco].

DISCUSSION

The issue Taxpayer presented in this protest is whether or not the Hearing Officer may enter an order prohibiting future conduct by the Department. In summary, the Taxpayer was assessed as a successor in business for the tax liability of its predecessor but claimed it had no knowledge of the assessment until it received the Notice of Intent to Lien, at which time it filed its Formal Protest.

The Taxpayer's strategy in this case, as explained by counsel, is to pay the assessment and then seek a refund because its opportunity to protest the underlying assessment expired. Consequently, it will present its defenses to the underlying assessment in a protest to a denial of refund which will stem from a refund application that it will submit at some time in the future.

At the hearing, Taxpayer requested only that the Hearing Officer enter an order prohibiting the Department from collecting penalty and interest on the assessment. Since it was assessed as a successor in business, the Taxpayer relied on *Hi-Country Buick GMC, Inc. v Taxation and Revenue Dept.*, 2016-NMCA-027 for the authority that the tax liability of a successor in business does not include penalties and interest that were incurred by its predecessor. Taxpayer also relied on *In the Matter of Autoglass Technologies, LLC* (No. 17-04), *In the Matter of Sol Bookkeeping Services, LLC* (16-13), and *In the Matter of Mountain Liquors, LLC* (16-15). Each of those decisions, consistent with the holding in *Hi-Country Buick GMC* concluded that the taxpayer, as a successor in business, was not liable for the penalty and interest incurred by its predecessor.

The problem in the current protest is one of ripeness. In this case, the Department assessed tax, penalty, and interest, but has yet to collect any penalty or interest in a manner that offends *Hi-Country Buick GMC*. In fact, the Taxpayer did not assert any actual wrongdoing by the Department. Rather, the Taxpayer seeks to avoid future wrongdoing.

Ripeness

As a jurisdictional matter, ripeness must be addressed prior to any consideration of the merits. *Manning v. Mining & Minerals Div*., 2006-NMSC-027, ¶54, 140 N.M. 528, 144 P.3d 87, (Minzner, J. dissenting) ("Lack of ripeness, like lack of standing, is a potential jurisdictional defect, which 'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court.'") (quoting *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008). *Manning,* 2006-NMSC-027 at ¶54. The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems. *N.M. Indus. Energy Consumers v. N.M. Publ. Serv. Comm'n.*, 1991-NMSC-018, ¶25, 111 N.M. 622, 808 P.2d 592. The courts avoid rendering advisory opinions. *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶18, 124 N.M. 640, 954 P.2d 72. "The ripeness doctrine exists 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *City of Sunland Park v. Macias,* 2003-NMCA-098, ¶23, 134 N.M. 216, 75 P. 3d 816 (quoting *US West Communications, Inc. v. N.M. State Corp. Comm'n,* 1998-NMSC-032, ¶ 8, 125 N.M. 798, 965 P.2d 917).

Ripeness involves a two pronged analysis. *American Federation of State, County & Municipal Employees, Council 18, AFL-CIO, Locals 1461, 2260 and 2499 v. Board of County Commissioners of Bernalillo County,* No. S-1-SC-35248, slip op. at 19 (N.M. Sup. Ct. May 23, 2016). Fitness and hardship are the two prongs of the analysis. *Id.* at 19. "Fitness is concerned with "whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id.* at 20 (quoting 15 Moore's Federal Practice §101.76[1][a] at 101-312.2).

In this case, Taxpayer has not met the fitness prong because, although the Department has not abated penalty and interest assessed to the Taxpayer as successor in business, whether or not

it will do so remains uncertain or contingent. Mr. Pacheco testified in reference to general collection practices in other cases, but the Hearing Officer is unwilling to construe his testimony as an assurance of how the Department will pursue collection against this Taxpayer in these specific circumstances. Under NMSA 1978, Section 7-1-28 (A), the Department retains the authority to abate any portion of an assessment when it determines that the assessment is incorrect. Since the underlying assessment is not in protest, the Department retains its authority to determine whether the assessment is incorrect and whether an abatement is appropriate.

The second prong in assessing ripeness is whether, and to what extent, the parties will endure hardship if a decision is withheld. *See N.M. Indus. Energy Consumers*, 1991-NMSC-018, ¶ 25. "The hallmark of cognizable hardship is usually direct and immediate harm." 15 Moore's Federal Practice § 101.76[2] at 101-331; *accord Morgan v. McCotter*, 365 F.3d 882, 891 (10th Cir. 2004) ("[T]he hardship inquiry may be answered by asking whether the challenged action creates a direct and immediate dilemma for the parties." (internal quotation marks and citation omitted)). "In assessing this possibility of hardship, we ask whether the challenged action creates a direct and immediate dilemma for the parties. The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 134 (2d Cir. 2008) (internal quotation marks and citations omitted).

The Taxpayer asserted that it intends to pay the assessment and apply for a refund. This strategy will eventually allow the Taxpayer to protest the liability that it did not previously protest when the Department issued its assessment. Taxpayer asserted that the hardship arises because the Taxpayer will be required to pay approximately $6,000 in interest and penalty before it is entitled to apply for a refund. The specific hardship will be a delay in its ability to apply for a refund as well as the hardship of paying $6,000 to the Department which Taxpayer could utilize for other purposes.

For the reasons previously stated, hardship under the circumstances is speculative. As of the present time, all funds secured pursuant to the Department's collection activities have been applied to the principal liability. If the Department were to determine that any part of the assessment were incorrect, it retains the authority to make an abatement. In the event the Department chooses not to abate any portion of the assessment, then the Taxpayer retains all rights under the Tax Administration Act to seek a refund, file a protest, and be heard on the merits of its case. In fact, the Taxpayer is in no different position than any other taxpayer who is paying a liability to the department which may be the subject of a future refund application. Consequently, the issue presented by Taxpayer is not ripe.

Application of *Hi-Country Buick GMC*

The Department asserted that it had not acted contrary to the law in its collection efforts. The Taxpayer did not dispute that assertion, but requested that the Hearing Officer enter a Decision and Order defining the limits of the Department's future collection activities with respect to Taxpayer. The Hearing Officer declines to assert any authority over the Department's *future* action absent specific legal authority to do so. The Administrative Hearings Office Act does not confer injunctive powers on the Hearing Officer.

With respect for the relief Taxpayer requested at this hearing, the Hearing Officer will acknowledge only what the parties already know. Everyone is presumed to know the law. *See State v. Tower*, 2002-NMCA-109, ¶ 9, 133 N.M. 32, 59 P.3d 1264 ("We have often stated that ignorance of the law is no excuse. Every person is presumed to know the law.").

Having addressed the only issue raised by Taxpayer, and finding no further dispute among the parties to this protest, the Hearing Officer finds that the protest should be DENIED.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Levy, and jurisdiction lies over the parties and the subject matter of this protest.

2. A hearing was held within 90 days of the Taxpayer's protest.

3. The issue underlying the specific relief Taxpayer requested is not ripe.

4. The Administrative Hearings Office Act does not grant the authority to enjoin future conduct of a party in a protest.

For the foregoing reasons, the Taxpayer's protest **is DENIED**.

DATED: June 12, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals,

which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.