

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
ESTATE OF RICHARD SHOUDT AND
DIANE K. SHOUDT
TO THE NOTICE OF CLAIM OF TAX LIEN
ISSUED UNDER LETTER ID NO. L0468477232**

D&O No. 18-39

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On October 10, 2018, Hearing Officer Dee Dee Hoxie, Esq. conducted a telephonic hearing on the Taxpayers' motion for summary judgment. The Administrative Hearings Office provided a toll-free phone number to the parties with instructions on how to appear for the hearing by telephone. Mr. David Mittle, Staff Attorney for the Taxation and Revenue Department (Department), appeared by telephone. Mr. Ben Roybal, attorney for Diane K. Shoudt and the Estate of Richard Shoudt (Taxpayers), appeared by telephone for the hearing.

The dispositive issue to be decided is whether the lien against the Taxpayers followed the requirements of the law. The Taxpayers contend that the lien did not follow the requirements of law because "no assessment and demand for payment has been issued by the Department to Richard Shoudt, the Estate or to Protestant". *See* the Taxpayer's motion for summary judgment. The Department contends that the lien is valid because Richard Shoudt was operating a sole proprietorship and "the lien or assessment was entered against the names associated with the CRS number." *See* the Department's response.

Whether a lien followed the requirements of the law is a very narrow issue. *See* NMSA 1978, § 7-1-37 thru 7-1-39. The parties made several arguments about the type of business and the Taxpayers' liability. These issues are moot since they do not address the statutory validity of the lien. The parties also made several arguments and objections regarding the other side's failure to follow the rules of civil procedure. Rules of civil procedure do not apply to the hearing. *See* NMSA 1978, § 7-1B-6 (2015). The Hearing Officer considered all of the evidence and arguments presented by both parties. The Hearing Officer finds in favor of the Taxpayers. The decision and order is as follows:

FINDINGS OF FACT

1. On May 15, 2017, the Department filed a Notice of Claim of Tax Lien against the Taxpayers for a total of \$29,776.04 for taxes owed under the combined reporting system (CRS).
2. On August 1, 2017, the Taxpayers filed a formal protest letter.
3. On October 4, 2017, the Administrative Hearings Office first learned of the Taxpayers' protest when the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing. On October 5, 2017, the Administrative Hearings Office issued a notice of hearing.
4. The Taxpayers requested a scheduling conference, and a telephonic scheduling hearing was conducted on October 30, 2017. The hearing was held within 90 days of the protest.
5. The parties filed various motions and responses throughout the course of the protest, and hearings were conducted on some of the motions.
6. On July 5, 2018, the Taxpayers filed their motion for summary judgment with exhibits attached.

7. On July 13, 2018, the Department filed its response to the motion with exhibits attached.
8. On July 23, 2018, the parties filed the joint prehearing statement.
9. On July 23, 2018, an order vacating the hearing on the merits and notice of reassignment was issued.
10. On September 4, 2018, the Department filed a request for a hearing on the merits.
11. On September 5, 2018, the notice of telephonic hearing on the motion for summary judgment was issued.
12. On October 10, 2018, the telephonic hearing on the motion was conducted. The Hearing Officer explained that a final decision and order would be issued if there were no disputes as to the material facts. The parties did not object.
13. In July of 2012, the Department issued 42 assessments to “Special Events Marketing Tal” (the business) for gross receipts taxes, penalties and interest. *See* the Taxpayer’s motion for summary judgment Exhibit D.
14. “Special Events Marketing Tal” was registered with the Department as a taxpayer doing business in New Mexico.
15. No other taxpayer was identified on the assessments.
16. Richard Shoudt was the owner of the business.
17. Richard Shoudt was the spouse of Diane Shoudt.
18. Richard Shoudt is now deceased.
19. On October 20, 2016, the Department issued a Notice of Intent to Lien to the Taxpayers and others. The Taxpayers were identified by name and partial social security

numbers. The others were identified by name and CRS numbers, one of which included the business. *See* the Department's response Exhibit D.

20. The lien filed in May of 2017 against the Taxpayers was based on the tax liability from the assessments issued in July of 2012 to the business.

DISCUSSION

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17 (2007). An assessment becomes a lien when the person liable for the tax neglects or refuses to pay after the assessment is made. *See* NMSA 1978, § 7-1-37 (1993). Therefore, it is the Taxpayers' burden to present evidence and legal argument to show that the lien should be released.

Motions for summary judgment are appropriate when there is no genuine issue of material fact and the judgment is a matter of law. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 12. *See also Roth v. Thompson*, 1992-NMSC-011, 113 N.M. 331. *See also Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 1967-NMSC-086, 77 N.M. 730. If the material facts are not in dispute and only their legal effect remains to be determined, summary judgment is appropriate. *See Roth*, 1992-NMSC-011 at ¶ 17.

Liens.

In order to have a valid lien, the lien filed must comply with the requirements of the statutes. *See* NMSA 1978, §§ 7-1-37 thru 7-1-39. The substantive validity of the underlying tax liability need not be shown. *See id.* The previous notices of assessment and demands for payment would be conclusive for purposes of filing a lien. *See id.* A lien should be released when it does "not follow requirements of law". *See* NMSA 1978, § 7-1-39 (B) (2013).

To follow the requirements of the law, a notice of lien must be provided for by statute, must identify the taxpayer who is liable for the taxes, must identify the dates that the tax became due, and must state that New Mexico claims a lien for the amount due. *See* NMSA 1978, § 7-1-38 (1996). The main issue of this protest is whether the lien was provided for by statute.

A lien is provided for by statute when “any person liable for any tax neglects or refuses to pay the tax *after assessment and demand for payment as provided in Section 7-1-17 NMSA 1978*”. NMSA 1978, § 7-1-37 (A) (emphasis added). The Department contends that “[n]otice of assessment of taxes were sent to Taxpayer” because the Notice of Intent to Lien serves that function. *See* the Department’s response and its Exhibit D.

An assessment is effective “when a document denominated ‘notice of assessment of taxes’, issued in the name of the secretary, is mailed or delivered in person *to the taxpayer* against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed *by the taxpayer* to the state, demanding *of the taxpayer* the immediate payment of the taxes and briefly informing *the taxpayer of the remedies available to the taxpayer*”. NMSA 1978, § 7-1-17 (B) (2) (emphases added). The Notice of Intent to Lien is not denominated anywhere as a “notice of assessment of taxes” and does not state a “demand” for payment. *See* the Department’s response Exhibit D. Therefore, the Notice of Intent to Lien does not satisfy the statutory requirements for an assessment. *See id.* *See also* NMSA 1978, § 7-1-17 (B) (2).

The Department contends that “[t]he assessment and subsequent lien were predicated on the CRS number associated the Taxpayer [sic]” and was sufficient notice to the Taxpayers of their personal liability for the taxes of the business, even though their names did not appear on the assessments. *See* the Department’s response. “Special Events Marketing Tal” was clearly a

taxpayer who was registered with the Department and had been issued a CRS number. *See* NMSA 1978, § 7-1-12. *See also* 3.1.1.15 NMAC (2000). Again, the Taxpayers' liability is not the issue. The only issue is whether the lien is valid under the statute. *See* NMSA 1978, § 7-1-39.

The applicable definition of taxpayer in this protest is “a person to whom an assessment has been made”. NMSA 1978, § 7-1-3 (AA) (2017). A person is “any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, limited liability partnership, joint venture, syndicate, other association or gas, water or electric utility”. NMSA 1978, § 7-1-3 (P). Even though the business is identified by the Department as a “proprietor”, it is also identified in the same document as a “firm”. *See* the Department's response Exhibit A. A CRS number is not a person or a taxpayer under the statutes. *See* NMSA 1978, § 7-1-3 and § 7-1-17. Therefore, the CRS number on the assessments is not “a person to whom an assessment has been made”. *See* NMSA 1978, § 7-1-17. The Department issued a notice of assessment and demand for payment to “Special Events Marketing Tal”. As a firm, “Special Events Marketing Tal” is the “person to whom an assessment has been made”. *See* NMSA 1978, § 7-1-3. The Department did not issue a notice of assessment and demand for payment to Richard Shoudt, to his estate, or to Diane Shoudt.

Richard Shoudt was the owner of “Special Events Marketing Tal”. The Department contends that “Special Events Marketing Tal” was the sole proprietorship of Richard Shoudt. The Department cited to the proposed summary disposition in *Casias v. N.M. Taxation and Revenue Dep't* for the proposition that an individual owner of a sole proprietorship is liable for its gross receipts taxes and that a lien is an appropriate collection action against the individual owner. *See Casias v. N.M. Taxation and Revenue Dep't*, No. A-1-CA-36489, mem. op. (N.M.

Ct. App. October 29, 2018) (non-precedential) (affirming the decision). In that case, the issue was whether the taxpayer was “personally responsible for the tax liability of his business, and to what extent the [t]axpayer may protest the assessment that was the subject of a previous protest and withdrawal.” *See In the Matter of the Protest of Louie Casias*, Decision and Order #17-25 (N.M. Admin. Hearings Office, May 30, 2017) (non-precedential). Liability is not the issue of this protest; rather, it is whether the lien followed the requirements of law. *See* NMSA 1978, §§ 7-1-37 thru 7-1-39. Moreover, the Department offered no justification for deeming notice to Diane Shoudt based on the assessments made to her husband’s business. *See Breen v. State Taxation and Revenue Dep’t*, 2012-NMCA-101, ¶ 31 (holding that a husband was not the taxpayer with respect to his wife’s business’s gross receipts taxes).

In another case, an assessment was made for personal income taxes against a husband. *See Severns v. N.M. Taxation and Revenue Dep’t*, No. 31,817, mem. op. (N.M. Ct. App. April 1, 2013) (non-precedential). The assessment did not identify the wife as a taxpayer, even though the couple filed joint returns. *See id.* The court agreed with the husband’s argument that his wife was not a party “because the Department’s assessments were directed solely to him and he was the sole protestant.” *Id.* at ¶ 28.

In another protest with a similar issue, the Hearing Officer found that the Department could not pursue collection action, in that case a levy, against an individual taxpayer who had not been assessed. *See In the Matter of the Protest of Anthony Tafoya*, Decision and Order #99-19 (N.M. Taxation and Revenue Dep’t Hearing Office¹, April 30, 1999) (non-precedential). In that case, as in this one, the underlying business had been assessed, but the individual taxpayer had

¹ The Administrative Hearings Office became an agency independent of the Taxation and Revenue Department in 2015. *See* NMSA 1978, § 7-1B-1, et. seq.
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not. *See id.* The Hearing Officer concluded that “[n]othing in Section 7-1-17 indicates that an assessment issued to one taxpayer is effective as to all other persons who may be liable for the same tax.” *See id.* The same holds true now. *See* NMSA 1978, § 7-1-17.

An assessment is an important and necessary step before the Department may pursue collection. *See Bank of Commerce v. Dep’t of Taxation and Revenue*, 1998-NMCA-063, 125 N.M. 183, *cert. denied* 125 N.M. 145. The Court noted that the only circumstance that allowed the Department to demand payment without first issuing an assessment involved the transfer of a business². *See id.* at ¶ 5. In that case, the Court found that not everyone who owes tax is a delinquent taxpayer. *See id.* at ¶ 2. The Court found that a person can only be a delinquent taxpayer under the statute after the person had been assessed. *See id.* at ¶ 9. An assessment provides a procedural safeguard to taxpayers. *See* NMSA 1978, § 7-1-24 (giving taxpayers the right to protest an assessment made against them, but requiring protests to be made within 90 days of the assessment). In this case, the Department issued the assessments to the business in 2012. The Department then pursued collection against the Taxpayers by lien in 2017, several years later. The Taxpayers are well outside of the 90-day limit to protest the assessments and would not have been able to protest assessments that were not made to them. *See* NMSA 1978, § 7-1-24. Again, the issues that may be protested with respect to a lien are very narrow. *See* NMSA 1978, § 7-1-37 thru 7-1-39. It does not afford the parties an opportunity to challenge, to amend, to validate, or to otherwise litigate the original assessment. *See id.* The Department’s decision to proceed to collection without first making an assessment serves to circumvent the Taxpayers’ rights to procedural safeguards. *See* NMSA 1978, § 7-1-24. *See also In the Matter*

² The statute regarding successors in business was amended after the circumstances that led to that case and now requires an assessment to be issued. *See* NMSA 1978, § 7-1-63 (1997).

of the Protest of Anthony Tafoya, Decision and Order #99-19. *See also Bank of Commerce*, 1998-NMCA-063 (holding that the Department’s refusal to issue clearance of a liquor license transfer because of unpaid taxes was improper because the original licensee had not been assessed and was, therefore, not a delinquent taxpayer).

An assessment is a necessary prerequisite to filing a lien. *See* NMSA 1978, §§ 7-1-37 and 7-1-38. The only “taxpayer” identified on the assessments was “Special Events Marketing Tal”. The Taxpayers were never assessed. Therefore, the lien did not follow the requirements of law. *See* NMSA 1978, § 7-1-39.

CONCLUSIONS OF LAW

A. The Taxpayers filed a timely written protest to the notice of claim of tax lien issued under Letter ID number L0468477232, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Department issued notices of assessment to the business, but did not issue a notice of assessment to the Taxpayers. *See* NMSA 1978, § 7-1-17. *See also Severns*, No. 31,817, mem. op. *See also Breen*, 2012-NMCA-101. *See also Bank of Commerce*, 1998-NMCA-063.

C. The lien did not follow the requirements of law since the Department did not first issue a notice of assessment to the Taxpayers. *See* NMSA 1978, §§ 7-1-17, 7-1-37, and 7-1-38. *See also Severns*, No. 31, 817 mem. op. *See also Breen*, 2012-NMCA-101. *See also Bank of Commerce*, 1998-NMCA-063.

D. The Taxpayers are entitled to summary judgment as a matter of law. *See* NMSA 1978, §7-1-38. *See also Elane Photography, LLC*, 2013-NMSC-040. *See also Roth*, 1992-NMSC-011. *See also Ute Park Summer Homes Ass’n*, 1967-NMSC-086.

For the foregoing reasons, the Taxpayer's protest is **GRANTED**, and the Department is
HEREBY ORDERED TO FILE A RELEASE OF THE LIEN.

DATED: November 21, 2018.

Dee Dee Hoxie

Dee Dee Hoxie, Esq.
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this 21st day of November, 2018 in the following manner:

First Class Mail

Interoffice Mail

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502
PH: (505)827-0466
FX: (505)827-9732