

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

ENRIQUE ARROYO

v.

D&O # 24-09, AHO Case Number 24.02-008A

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On April 23, 2024, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the merits in the matter of the tax protest of Enrique Arroyo (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Enrique Arroyo appeared, accompanied by his authorized representative Gloria Mejia, a licensed Certified Public Accountant (CPA). Staff Attorney Timothy Williams appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Nicholas Pacheco appeared as a witness for the Department.

Based on the evidence in the record, after making findings of fact, the hearing officer finds that Taxpayer has failed to overcome the presumption of correctness that attached to the Department's assessment, failed to show the Department acted improperly with the use of a Notice of Levy, and failed to show the Department's third abatement was improper. Taxpayer did not make a request for refund. The Taxpayer's protest is therefore DENIED.

IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural findings

1 1. On July 25, 2019, the Department issued a Notice of Intent to Assess – Gross
2 Receipts to Taxpayer for the gross receipts tax reporting periods beginning January 1, 2013, and
3 ending December 31, 2016, based on a federal Schedule C mismatch. [Department Ex. D; Case
4 ID # 790197; Administrative file].

5 2. On October 9, 2019, the Department issued a Notice of Assessment of Taxes and
6 Demand for Payment for the gross receipts tax reporting periods beginning January 1, 2013, and
7 ending December 31, 2016. The assessment was for audit gross receipts tax of \$173,486.12,
8 penalty of \$34,697.24, and interest of \$32,249.63, for a total assessment due of \$240,432.99.
9 [Department Exhibit #C; Letter ID# L1059627696; Administrative file].

10 3. On December 26, 2019, the Department issued a Statement of Account to
11 Taxpayer showing the amount of tax due to be \$242,666.92. [Department Exhibit #E; Letter ID
12 #L0450890416; Administrative file].

13 4. The time to submit a protest of the assessment expired ninety days from the
14 issuance of the Notice of Assessment, on January 7, 2020. [Department Exhibit #C,
15 Administrative file].

16 5. On June 16, 2023, the Department issued a Notice of Abatement of Tax
17 Assessment, showing an abatement of taxes for periods January 1, 2015 through December 31,
18 2016, in the amount of \$128,804.70. [Department Exhibit A-1; Letter ID # L1161493616;
19 Administrative file].

20 6. On August 29, 2023, the Department issued a second Notice of Abatement of Tax
21 Assessment, showing an abatement of taxes for periods January 1, 2013 through December 31,
22 2014, in the amount of \$119,855.39. [Department Exhibit A-2; Letter ID # L1935626864;
23 Administrative file].

1 7. On August 30, 2023, the Department issued a Notice of Levy, showing that on
2 March 8, 2023, the Department obtained \$3,852.50 from a Wells Fargo Bank account in
3 Taxpayer's name, pursuant to service of Levy Number 23925. [Department Exhibit #B; Letter
4 ID # L1527304816; Taxpayer Exhibit #2; Administrative file].

5 8. On October 23, 2023, the Department issued a third Notice of Abatement of Tax
6 Assessment, showing an abatement of taxes for periods January 13, 2013 through December 31,
7 2013, showing an abatement of \$905.62, with a negative balance of \$1,248.30. [Taxpayer
8 Exhibit #3; Letter ID # L1177623152; Administrative file].

9 9. On November 15, 2023, Taxpayer submitted protest form to the Department's
10 protest office alleging that all receipts were from Texas, and that the Department had not fully
11 refunded the amount levied from Taxpayer's bank account on March 8, 2023. [Department
12 Exhibit #F; Taxpayer Exhibit #1, #31; Administrative file].

13 10. On February 27, 2024, the Taxpayer submitted a Request for Hearing to the
14 Administrative Hearings Office, signed by Gloria Mejia, CPA. The Taxpayer's request alleged
15 that the amount of the protest was \$2,604.20. The Taxpayer's request identified Letter ID #
16 L1527304816 (Notice of Levy) and Letter ID # L1177623152 (third Notice of Abatement). On
17 February 27, 2024, Taxpayer also submitted a 26-page protest packet. [Administrative File].

18 11. On March 5, 2024, the Administrative Hearings Office issued a Notice of
19 Videoconference Administrative Hearing, setting various deadlines and providing notice of a
20 merits hearing to take place April 23, 2024. [Administrative file].

21 12. On April 1, 2024, the Department filed an Answer to Protest asserting that the
22 Taxpayer as a New Mexico resident must report and pay gross receipts taxes on business income
23 reported on federal Schedule C forms. [Administrative file].

1 13. On April 15, 2024, the Department filed an Amended Answer to Protest asserting
2 that the original assessment had not been protested, there was a levy, and there were abatements,
3 and the Taxpayer had not filed an application for refund of the amount levied but not abated and
4 not refunded. [Administrative file].

5 14. The undersigned Hearing Officer conducted a merits hearing on April 23, 2024,
6 using the Zoom videoconferencing application. Taxpayer and Taxpayer's authorized
7 representative Gloria Mejia, CPA, appeared at the merits hearing. The Department was
8 represented by Staff Attorney Timothy Williams, accompanied by protest auditor Nicholas
9 Pacheco. The Hearing Officer preserved an audio recording of the hearing. [Administrative file;
10 Hearing Record].

11 **Substantive findings**

12 15. Enrique Arroyo is a resident of New Mexico. During times pertinent to this
13 protest, the Taxpayer was a resident of Anthony, New Mexico. [Administrative file; Examination
14 of E. Arroyo].

15 16. Mr. Arroyo, at the times pertinent to this protest, owned and operated, and
16 continues to own a framing construction company. Taxpayer claimed that the company is
17 registered and pays business taxes in Texas, but all documentation from the timeframes at issue
18 taken into the record shows a New Mexico address for "Enrique Arroyo Framing LLC".
19 [Administrative file; Examination of E. Arroyo; Taxpayer Exhibits 11, 12, 13, 14, 15, 16, 17, 18,
20 19, 20, 21, 22, 23, 24, 25, 26].

21 17. The framing company does business primarily with the Taxpayer's brother's
22 company, Classic American Homes. Subcontracting work with Classic American Homes took

1 place in El Paso, Texas. For this work Taxpayer accepted form 1099s. The Department abated
2 the tax, penalty and interest assessed for this work performed in Texas. [Administrative file;
3 Examination of E. Arroyo; Taxpayer Exhibits 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22;
4 Examination of N. Pacheco; Department Exhibits A-1, A-2, A-3].

5 18. Taxpayer's framing company had a contract with the El Paso Convention and
6 Performing Arts Center in 2013. For this work Taxpayer accepted form 1099s. The Department
7 abated the tax, penalty and interest assessed for this work performed in Texas. [Administrative
8 file; Examination of E. Arroyo; Taxpayer Exhibits 23, 24, 25, 26; Examination of N. Pacheco;
9 Department Exhibits A-1, A-2, A-3].

10 19. Gloria Mejia is a certified public accountant registered in the State of Texas. She
11 is employed by Classic American Homes. Ms. Mejia challenged the Department's retention of
12 \$2,604.20. She created Exhibit 27 for the tax year 2013. She was unable to provide Taxpayer
13 support to explain a deduction applicable to the balance of \$27,827.50. Ms. Mejia anticipated
14 paying the statewide base rate of 5% for gross receipts on this amount. Ms. Mejia did not
15 understand the calculations applied by the Department. [Administrative file; Examination of G.
16 Mejia; Taxpayer Exhibit #27, 28, 29, 30].

17 20. Nicholas Pacheco is a protest auditor for the New Mexico Taxation and Revenue
18 Department. [Administrative file; Examination of N. Pacheco].

19 21. The assessment arose from a Schedule C mismatch audit. The Taxpayer did not
20 file New Mexico gross receipts tax returns (Form CRS-1) or pay gross receipts tax during the
21 timeframes at issue. [Administrative file; Examination of E. Arroyo; Examination of N.
22 Pacheco].

1 Taxpayer Enrique Arroyo is a New Mexico resident, whose business income was
2 reported on form 1099s during tax years 2013 through 2016. During the same years, Taxpayer
3 did not file New Mexico gross receipts tax returns or pay New Mexico gross receipts tax.
4 Taxpayer filed Schedule Cs on federal returns reporting business income in 2013. Based on the
5 mismatch, an assessment was issued for all tax years at issue. The Taxpayer did not challenge the
6 assessment within ninety days from the issuance of the assessment. Taxpayer became a
7 delinquent taxpayer. As a result of the delinquency status, the Department issued a Notice of
8 Levy and took possession of Taxpayer funds pursuant to a levy of Taxpayer's bank account.
9 Before and after \$3,852.50 was removed from Taxpayer's bank account pursuant to levy,
10 Taxpayer communicated with the Department and provided evidence that justified the
11 Department's issuance of three substantial abatements for the balance of the assessment. The
12 Department thereafter issued a refund to Taxpayer in the amount of \$1,248.30, refunding some
13 of the money obtained by levy. There remained an unrefunded amount of \$2,604.20 retained by
14 the Department. The formal protest form identified the Notice of Levy and the third Notice of
15 Abatement. Taxpayer questioned the Department's justification for retention of the sum of
16 \$2,604.20, following the exercise of the levy and the payment of a partial refund of the amount
17 levied. In essence, the Taxpayer perceived that the Department was required to substantiate its
18 taking, rather than the Taxpayer's burden to show entitlement to a deduction. While there are
19 methods of challenging a levy, the challenge to a levy is not a means of undercutting the original
20 assessment. The Department's exercise of the levy and abatement is affirmed.

21 **Presumption of correctness**

22 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
23 presumed correct. The Taxpayer was able to protest the assessment within 90 days from the

1 issuance of the assessment, but did not ever challenge the assessment, and became a delinquent
2 taxpayer. *See* NMSA 1978, Section 7-1-23 and Section 7-1-16 (A). The Department issued a
3 Notice of Levy and collected monies from Taxpayer's bank account to offset the outstanding
4 assessment. *See* NMSA 1978, Section 7-1-30 and Section 7-1-31; *see also* Regulation 3.1.10.9
5 NMAC. The Taxpayer did not request a refund of the amount collected pursuant to NMSA 1978,
6 Section 7-1-26 (A).

7 Taxpayer has the ability to challenge the exercise of a levy, however, a taxpayer's
8 challenge to a levy is not a recognized method of undercutting the underlying assessment at this
9 late stage. *See* NMSA 1978, Section 7-1-31, Section 7-1-24, and Section 7-1-26.

10 **Department's Abatements.**

11 The assessment in this protest arose from an application of the Gross Receipts and
12 Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-117, which imposes a tax for the
13 privilege of engaging in business, on the receipts of any person engaged in business in New Mexico.
14 *See* NMSA 1978, Section 7-9-4 (2010). The Department issued its assessment following a
15 comparison between the Taxpayer's income reported on his federal Schedule Cs for tax years 2013,
16 2014, 2015, and 2016 and the Taxpayer's gross receipts tax CRS-1 returns for the same time frame.
17 The comparison revealed Taxpayer had not filed CRS-1 returns to report gross receipts, nor did
18 Taxpayer pay gross receipts taxes for the years at issue. Focusing on tax year 2013, the Taxpayer
19 had three Schedule Cs, reporting income from what appeared to be three sources. While the
20 Taxpayer did not present the Schedule Cs or the 1099s, the Taxpayer presented a short summary of
21 amounts received and amounts substantiated as work performed out-of-state. Taxpayer argued that
22 because they had provided substantiation for 95% of the work, the remainder should be forgiven,
23 challenging the abatement of the part assessed but not protested or substantiated.

1 Because the Taxpayer did not protest the original assessment, the Taxpayer became a
2 delinquent taxpayer pursuant to NMSA 1978, Section 7-1-16. When the Department seized money
3 from the Taxpayer's bank account pursuant to levy, it acted lawfully pursuant to NMSA 1978,
4 Section 7-1-30 and Section 7-1-31. *See also* Regulation 3.1.10.9 NMAC.

5 When Taxpayer informally challenged the Department's assessment, albeit late, the
6 Taxpayer provided evidence that the vast majority of his work was outside of New Mexico.
7 Taxpayer's information provided the Department with the ability to issue abatements. *See* NMSA
8 1978, Section 7-9-4; *see also* NMSA 1978, Section 7-9-3.5 (A); *see also* Regulation 3.2.4.8
9 NMAC; *see also* NMSA 1978, Section 7-1-20; *see also* Regulation 3.1.6.14 NMAC. Taxpayer
10 provided evidence sufficient for the Department to issue a first abatement on June 16, 2023, in the
11 amount of \$128,804.70. The Taxpayer provided evidence sufficient for the Department to issue a
12 second abatement on August 29, 2023, in the amount of \$119,855.39. It was thereafter that the
13 Department exercised the levy on August 30, 2023, for a portion of the assessment balance, in the
14 amount of \$3,835.50. Thereafter, Taxpayer again provided evidence sufficient for the Department to
15 issue a third abatement on October 23, 2023, in the amount of \$905.62. Because the abatement
16 showed that the amount recovered from Taxpayer was in excess of the amount owed, the
17 Department issued a refund for \$1,248.30 to Taxpayer.

18 The balance retained by the Department for taxes owed under the assessment and collected
19 pursuant to levy was \$2,604.20. The Department explained that this retained amount was the gross
20 receipts tax for a total of \$27,827.50 of income that had not been attributed to out-of-state business.
21 After backing out the tax at the rate(s) applicable to Taxpayer's residential location in Anthony,
22 NM, the total taxable gross receipts were \$26,159.81, and tax was \$1,667.69. Penalties reached a
23 statutory maximum of 20% of the tax, at \$333.54, and the remainder of \$602.97 was outstanding

1 interest at the variable rates for the time prior to collection. The retention of \$1,667.69 of tax,
2 \$333.54 in penalties, and \$602.97, for a total of \$2,604.20 was not shown to be improper.

3 **Conclusion**

4 The Taxpayer failed to present any evidence that might support the improper exercise of a
5 levy to collect overdue delinquent taxes. The Department's exercise of levy was properly within ten
6 years of the initial assessment. The abatement and refund was also properly exercised within the
7 authority of the Department. The Taxpayer's protest is denied.

8 **CONCLUSIONS OF LAW**

9 A. The Taxpayer filed a timely written protest to the Notice of Levy issued under Letter
10 ID number L1527304816 and Notice of Abatement issued under Letter ID number L1177623152,
11 and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section
12 7-1-26 (A) (2021); *see also* NMSA 1978, Section 7-9-1, *et seq.* ("Gross Receipts and Compensating
13 Tax Act").

14 B. The hearing was timely set and held within one hundred twenty (120) days of the
15 Taxpayer's request for hearing. NMSA 1978, Section 7-1B-8 (F) (2019). Parties did not object that
16 the scheduling hearing satisfied the 120-day hearing requirement of Section 7-1B-8 (F). *See also*
17 Regulation § 22.600.3.8 (J) NMAC (8/25/20).

18 C. The Department timely submitted its Answer to the protest within thirty (30) days
19 of the Taxpayer's request for hearing. NMSA 1978, Section 7-1B-8 (D) (2019). The Department's
20 Amended Answer was timely filed within ten (10) days of the scheduled hearing. NMSA 1978,
21 Section 7-1B-8 (D) (2019); *see also* Regulation § 22.600.3.8 (J) NMAC (8/25/20).

22 D. Any assessment of tax made by the Department is presumed to be correct.
23 Therefore, it is the taxpayer's burden to come forward with evidence and legal argument to establish

1 that the Department's assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-
2 17 (C) (2007).

3 E. "Tax" is defined to include not only the tax program's principal, but also interest and
4 penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019). Assessments of penalties and interest therefore
5 also receive the benefit of a presumption of correctness. *See* Regulation § 3.1.6.13 NMAC
6 (1/15/01).

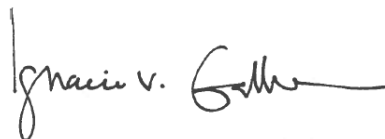
7 F. The Taxpayer became a delinquent taxpayer after the expiration of ninety days
8 during which Taxpayer could protest the Assessment. *See* NMSA 1978, Section 7-1-23 and
9 Section 7-1-16 (A).

10 G. The Department is entitled to collect from delinquent taxpayers by use of a levy.
11 NMSA 1978, Section 7-1-17 (D) (2007); *see also* NMSA 1978, Section 7-1-30 and Section 7-1-
12 31; *see also* Regulation 3.1.10.9 NMAC; *see also* Regulation 3.1.7.10 (B) NMAC.

13 H. The Department properly exercised its authority to issue abatements to reflect a
14 good faith doubt as to taxpayer's liability for work performed outside of New Mexico. *See*
15 NMSA 1978, Section 7-1-20; Regulation 3.1.6.14 NMAC.

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

17 DATED: June 12, 2024



18
19 Ignacio V. Gallegos
20 Hearing Officer
21 Administrative Hearings Office
22 Post Office Box 6400
23 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On June 12, 2024, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16 *First Class Mail and E-Mail*

First Class Mail E-Mail

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