STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF **No. 18 - 32**
KEVIN D. FENNER
TO NOTICE OF LEVY
ISSUED UNDER LETTER
ID NO. L1154736944

AND

IN THE MATTER OF THE PROTEST OF
KEVIN D. FENNER
TO NOTICE OF LIEN
ISSUED UNDER LETTERS
ID NOs. L0851133232 and L0018236208

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing occurred in the above-captioned protest on September 26, 2018[1] before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Kevin D. Fenner ("Taxpayer") appeared by telephone. Staff Attorney, Ms. Cordelia Friedman, Esq., appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor, Ms. Milagros Bernardo, appeared as a witness for the Department.

Although Taxpayer was initially scheduled to appear by videoconference, the parties did not object to Taxpayer appearing by telephone after Taxpayer encountered technical difficulties. Taxpayer indicated that he did not encounter any problems when he tested his connection, software, and hardware in preparation for the hearing, but at the time of the hearing, the

[1] The Hearing Officer realized at the conclusion of the hearing that he had inadvertently referred to the date as September 28, 2018. Neither party apparently noticed the error, or if they did, they did not bring it to the Hearing Officer's attention. Nonetheless, the actual date of the hearing was Wednesday, September 26, 2018.

Taxpayer was neither visible nor audible to those present in Santa Fe, even though the videoconference system indicated Taxpayer was indeed present as a participant.

All documents contained in the administrative file are incorporated into the record in this matter, and the Hearing Officer took administrative notice, upon Taxpayer's request, of the Decision and Order entered in the matter of the protest of Kevin Fenner to assessments issued under Letter ID Nos. L0330070480, L1614874064, L0421194192, L1672247760, L1263204816, L1583610320, and L1321327232, entered on December 15, 2014 (hereinafter "D&O 14-39"). The Hearing Officer also took notice of the outcome of the subsequent appeal. *See* Court of Appeal No. 34,365 (A-1-CA-34365).

Taxpayer Exhibits 1 – 23 were admitted over the Department's objections. Department Exhibits A – I were admitted over Taxpayer's objections. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 4, 2016, the Department issued a Notice of Claim of Tax Lien under Letter ID No. L0110850608. The lien was for personal income taxes for all filing periods ending between December 31, 2003 and December 31, 2010, excluding the year ending December 31, 2004. The lien claimed was for $75,544.88 in tax, $35,863.93 in penalty, and $27,261.08 in interest for a total lien in the amount of $138,669.89. [*See* Department Exhibit B; Taxpayer Exhibit 11].

2. The liability for the period ending December 31, 2003 was assessed February 15, 2007. All other years subject of the Notice of Claim of Tax Lien under Letter ID No. L0110850608 were assessed on November 14, 2013. [*See* Department Exhibit B; Taxpayer Exhibit 11].

3. Taxpayer's underlying tax liability for years 2003, 2005, 2006, 2007, 2008, 2009, and 2010 was protested, and subsequently determined in the Department's favor in D&O 14-39.[2]

4. The New Mexico Court of Appeals summarily affirmed D&O 14-39 on or about August 28, 2015. *See* Court of Appeal No. 34,365 (A-1-CA-34365).

5. On May 25, 2017, the Department issued a Notice of Claim of Tax Lien under Letter ID No. L0323855664. The lien was for personal income taxes for the filing period ending December 31, 2011 and was for $12,421.00 in tax, $2,484.20 in penalty, and $2,021.15 in interest for a total lien in the amount of $16,926.35. [*See* Department Exhibit A].

6. The liability for the period ending December 31, 2011 was assessed on April 5, 2016. [*See* Department Exhibits C, D, E, F, and G].

7. The Notices of Claim of Tax Lien issued under Letter ID Nos. L0110850608 and L0323855664 were filed in Bernalillo County, State of New Mexico upon the belief that Taxpayer owned property situated in that county. [Testimony of Ms. Bernardo].

8. Taxpayer asserted that he never received a notice of assessment for tax year 2011 nor any accompanying notice of his right to protest such assessment. [Testimony of Mr. Fenner].

9. On June 9, 2017, the Department issued a Warrant of Levy to E-Trade Clearing LLC, under Letter ID No. L1682912560. The Warrant of Levy referenced all periods ending December 31, 2005 through December 31, 2011 and indicated a total amount due of $146,334.79. The assessment dates for periods 2005, 2006, 2007, 2008, 2009, and 2010 were November 14, 2013. The assessment date for 2011 was April 5, 2016. Tax years preceding 2005 were not included in the Warrant of Levy. [*See* Department Exhibit C].

10. On June 9, 2017, the Department issued a Warrant of Levy to North Western

[2] *See* http://realfile.tax.newmexico.gov/14-39_kevin_fenner.pdf

Mutual Life Insurance under Letter ID No. L0738432304. The Warrant of Levy referenced all periods ending December 31, 2005 through December 31, 2011 and indicated a total amount due of $146,334.79. The assessment dates for periods 2005, 2006, 2007, 2008, 2009, and 2010 were November 14, 2013. The assessment date for 2011 was April 5, 2016. Tax years preceding 2005 were not included in the Warrant of Levy. [*See* Department Exhibit D].

11. On June 9, 2017, the Department issued a Warrant of Levy to National Financial Serv, LLC under Letter ID No. L1275303216. The Warrant of Levy referenced all periods ending December 31, 2005 through December 31, 2011 and indicated a total amount due of $146,334.79. The assessment dates for periods 2005, 2006, 2007, 2008, 2009, and 2010 were November 14, 2013. The assessment date for 2011 was April 5, 2016. Tax years preceding 2005 were not included in the Warrant of Levy. [*See* Department Exhibit E].

12. On June 9, 2017, the Department issued a Warrant of Levy to Fidelity Brokerage Services, LLC (hereinafter "Fidelity") under Letter ID No. L0201561392. The Warrant of Levy referenced all periods ending December 31, 2005 through December 31, 2011 and indicated a total amount due of $146,334.79. The assessment dates for periods 2005, 2006, 2007, 2008, 2009, and 2010 were November 14, 2013. The assessment date for 2011 was April 5, 2016. Tax years preceding 2005 were not included in the Warrant of Levy. [*See* Department Exhibit G].

13. On July 18, 2017, the Department issued a Warrant of Levy to Central Pacific Bank, under Letter ID No. L0434949424. The Warrant of Levy referenced all periods ending December 31, 2005 through December 31, 2011 and indicated a total amount due of $146,683.87. The assessment dates for periods 2005, 2006, 2007, 2008, 2009, and 2010 were November 14, 2013. The assessment date for 2011 was April 5, 2016. Tax years preceding 2005 were not included in the Warrant of Levy. [*See* Department Exhibit F].

14. The difference in the amount due as indicated on Department Exhibits C, D, E and G and the amount due as indicated on Department Exhibit F is attributable to the accrual of interest. Compare corresponding schedules in referenced exhibits. [*See* Department Exhibits C, D, E, F, and G].

15. On October 10, 2017, the Department provided two notices that it filed liens on certain motor vehicles registered in Taxpayer's name. The notices specified that the liens were to secure payment for taxes owed and were issued under Letter ID Nos. L0851133232 and L0018236208. The liens claimed amounts due for tax periods 2005, 2006, 2007, 2008, 2009, 2010 and 2011. Tax years preceding 2005 were not included in the liens. [*See* Administrative File].

16. The notices issued under Letter ID Nos. L0851133232 and L0018236208 indicate a balance due in the amount of $147,238.79 for personal income taxes for income tax periods 2005 through 2011. [*See* Administrative File].

17. The notices issued under Letter ID Nos. L0851133232 and L0018236208, and particularly their referenced attachments, indicate that as of October 10, 2017, the Department had two addresses of record for Taxpayer. The first was P.O. Box 729, Honokaa, HI 96727-0729 (hereinafter "Mailing Address[3]"). The second address was 67-1085 N. Alulike Rd., Kamuela, HI 96743-5602 (hereinafter "Street Address"). [*See* Administrative File].

18. On June 20, 2017, Fidelity notified the Department that it was unable to process a distribution from Taxpayer's account for the reasons stated therein, in response to the Department's Warrant of Levy. [*See* Department Exhibit H].

[3] The Hearing Officer takes administrative notice that "P.O. Box" refers to "Post Office Box." Accordingly, the address will be referred to as Taxpayer's "Mailing Address" having also taken administrative notice that the primary, if not solitary purpose of a post office box, is to receive U.S. mail.

19. On or about October 16, 2017, Fidelity remitted the sum of $1,110.07 to the Department. The levied funds were paid to the Department by Check No. 927193694, dated October 16, 2017, and credited to Taxpayer's tax account on or about October 23, 2018. [*See* Administrative File; Department Exhibit I].

20. On October 24, 2017, Taxpayer executed a series of "Formal Protests" arising from the notice of levy:

a. Taxpayer executed a Formal Protest in which he claimed that the Department acted contrary to NMSA 1978, Sections 7-1-9, 7-1-32, 7-1-24, 7-1-18, and 7-1-4.2 by allegedly failing to enforce the collection of tax due by separate tax years rather than the aggregate of all years subject of its collection activities. The protest was accompanied by a Final Notice Before Seizure issued by the Department on May 25, 2017 under Letter ID No. L1781060912. [*See* Taxpayer Exhibit 13].

b. Taxpayer executed a Formal Protest in which he claimed that "Social Security [is] not subject to levy or legal process" and alleged that $1,110.07 seized from Fidelity represented proceeds from social security. The Formal Protest was received by the Department's Protest Office on October 26, 2017. The protest was accompanied by a copy of 42 U.S.C. Section 407. [*See* Administrative File; *See* Taxpayer Exhibit 14].

c. Taxpayer executed a Formal Protest in which he claimed that the Department acted contrary to NMSA 1978, Section 7-1-36 by allegedly seizing $1,000 from Fidelity that purportedly should have been exempt from levy. The protest was accompanied by a copy of a Transaction Confirmation from Fidelity dated October 16, 2017. [*See* Administrative File; *See* Taxpayer Exhibit 15].

d. Taxpayer executed a Formal Protest in which he claimed that the Department

acted contrary to NMSA 1978, Section 7-1-9 by allegedly failing to mail relevant notices to his purported address of record. The protest made reference to the levy of $1,110.07 from Fidelity and attached an Affidavit of Service for Docketing Statement that was pertinent to the appeal of D&O 14-39. [*See* Taxpayer Exhibit 16].

21. On November 1, 2017, the Department issued a Notice of Levy in reference to $1,110.07 obtained from Fidelity, pursuant to Levy Number 206080, issued under Letter ID No. L1154736944. The Notice of Levy was mailed to Taxpayer's Street Address. [*See* Administrative File].

22. Subsequent correspondence to Taxpayer as contained in the record would similarly be addressed to Taxpayer's Street Address beginning on November 1, 2017.

23. On November 14, 2017, the Department acknowledged Taxpayer's protests on the Warrant of Levy 206080 which resulted in the seizure of $1,110.07 from Fidelity, and the Motor Vehicle Liens. The acknowledgment was issued under Letter ID No. L0819499824. [*See* Administrative File].

24. On November 15, 2017, the Department requested a hearing on the merits of Taxpayer's protests, as acknowledged in Letter ID No. L0819499824. [*See* Administrative File].

25. On November 16, 2017, the Administrative Hearings Office sent Notice of Administrative Hearing to Taxpayer which set a hearing on the merits of the protest for January 17, 2018. [*See* Administrative File].

26. On January 9, 2018, Taxpayer requested a continuance of the hearing set for January 17, 2018 in which he expressly waived the 90-day hearing requirement under NMSA 1978, Section 7-1B-8A and specifically requested that the hearing be reset after August of 2018 due to health-related matters. [*See* Administrative File, Correspondence filed 1/9/2018, Paras. 4

and 5].

27. On January 17, 2018, the Administrative Hearings Office entered an Order Granting Taxpayer's Request for Continuance, Scheduling Order and Notice of Administrative Hearing. Among other deadlines, it set a hearing on the merits of Taxpayer's protest for September 26, 2018 and authorized Taxpayer to appear by videoconference. [*See* Administrative File].

28. On January 17, 2018, the Administrative Hearings Office entered an Order Addressing Requests to Chief Hearing Officer and Motions Practice. The order denied various requests that were made by Taxpayer with the exception of the request that he be permitted to appear via video conference. Otherwise, the Hearing Officer found that any request for additional relief contained in the email was lacking "sufficient information necessary to permit an intelligible response from the opposing party, or to invoke an informed ruling by the Hearing Officer." The order did not preclude Taxpayer from renewing any of his requests in the form of a written motion setting forth the specific relief requested and the relevant facts and law in support of each request. [*See* Administrative File; Taxpayer Exhibit 21 (email to which order responded)].

29. On September 17, 2018, the Department filed Department['s] Pre-Hearing Statement. [*See* Administrative File].

30. On September 25, 2018, the Administrative Hearings Office filed Videoconference Instructions. [*See* Administrative File].

31. On September 26, 2018, Taxpayer provided copies of his exhibits to the Administrative Hearings Office and counsel for the Department. [*See* Administrative File].

32. On September 26, 2018, after conclusion of the hearing, Taxpayer sent an email

to the Administrative Hearings Office, copied to counsel for the Department, in which Taxpayer made unsolicited statements regarding issues in protest. [*See* Administrative File]. Similar emails would also be received on October 11, 2018 and October 17, 2018.

33. Department Exhibits A, B, C, D, E, F, and G reference and rely on Taxpayer's Mailing Address. However, Taxpayer started using his Street Address on March 17, 2015. [*See* Taxpayer Exhibit 16].

34. Although Taxpayer used the Street Address in his email signatures and various certificates of service during his appeal of D&O 14-39, Taxpayer never provided written notice of his intention to discontinue the use of his Mailing Address, in favor of his Street Address, as required by Regulation 3.1.4.9 which provides that taxpayer must adhere to the prescribed form for reporting a change of address. [*See* Taxpayer Exhibits 1, 2, 3, 4, 5, 6, 9, 22, 23; *See* RPD-41260, Rev. 06/2010].

35. Taxpayer did not dispute that the Mailing Address was a correct and proper address for mailing prior to March 17, 2015. [*See* Taxpayer Exhibit 16; Testimony of Mr. Fenner].

36. With concern for any relevant mailing, the Department had no record to indicate that any mail to Taxpayer's Mailing Address after March 17, 2015 had been unsuccessful, or had been returned as undeliverable. [Testimony of Ms. Bernardo].

37. Without specific notice in the manner prescribed by law, it was reasonable for the Department to continue relying on Taxpayer's Mailing Address, even if it was arguably also aware of Taxpayer's alternate Street Address.

DISCUSSION

Taxpayer presented various issues for consideration. The issues Taxpayer raised in

defense to the Department's collection activities included: 1) whether the Department was entitled to assess tax or pursue collection of a tax liability against a non-resident; 2) whether at any relevant time, the Department acted contrary to the Tax Administration Act or the Taxpayer Bill of Rights; 3) whether at any relevant time, any Department employee acted in bad faith in reference to the issues subject of the protest; 4) the consequence of an assessment and other notices purportedly mailed to an incorrect address; 5) whether the Department is time barred from collecting an established tax liability; and 6), whether Taxpayer should be entitled to call the Department's attorney of record as a witness.

Although not necessarily presented as a defense to the Department's action, Taxpayer also insisted that each of his Formal Protests, introduced as Taxpayer Exhibits 13, 14, 15, and 16, be heard as separate protests, in separate hearings. The Hearing Officer will address each issue in turn, beginning with the request that Taxpayer's "protests" be heard separately.

"De-Consolidation" of Taxpayer's "Protests."

As a preliminary issue, Taxpayer wanted to "de-consolidate" his "protests," represented in the record by Taxpayer Exhibits 13, 14, 15, and 16. Having carefully considered Taxpayer's argument, and having reviewed the referenced exhibits, it was apparent that what Taxpayer characterized as separate protests actually represented separate *claims or defenses* to the Department's action, not separate "protests." They all arose from the same, identical facts.

For example, the Hearing Officer observed that each protest referred to the Department's authority to collect an outstanding tax liability, with Taxpayer Exhibits 14, 15, and 16 referring specifically to funds seized from Fidelity, and Taxpayer Exhibit 13 referring to collection activities generally.

According to NMSA 1978, Section 7-1-24, it is from the Department's action that a

taxpayer's right to protest originates. Taxpayer's protests, Taxpayer Exhibits 13, 14, 15, and 16, embody separate claims or defenses to that single action, not separate "protests." For that reason, Taxpayer is not entitled to separate hearings on each of his various claims or defenses, even if he did present them as separate, "Formal Protests."

Permitting Taxpayer to present each claim or defense as a separate protest, in separate hearings in the manner suggested, would produce absurd results. Each claim or defense, although based on the same underlying facts, would be litigated separately, decided separately, and appealed separately. The Hearing Officer declines the opportunity to endorse a litigation strategy that promotes inefficiency and waste of resources for the parties, the Administrative Hearings Office, and the appellate courts which may eventually be tasked with reviewing the findings and conclusions deriving from Taxpayer's multiple "protests."

Therefore, Taxpayer's request to "de-consolidate" his "protests" was denied. Nevertheless, Taxpayer was provided a full and fair opportunity to present all evidence relevant to each and every one of his claims and defenses, as presented in Taxpayer Exhibits 13, 14, 15, and 16.

Moreover, Taxpayer will further recall that the Order Addressing Requests to Chief Hearing Officer and Motions Practice, filed on January 17, 2018, specifically alerted him that all requests made in his email of January 12, 2018 (Taxpayer Exhibit 21) had been denied, except for the request to appear remotely. That denial included Taxpayer's request to "de-consolidate" his "protests." The Hearing Officer had determined that Taxpayer's email (Taxpayer Exhibit 21) did not provide sufficient information necessary to permit an intelligible response from the Department, or to invoke an informed ruling by the Hearing Officer.

However, the Hearing Officer also stated that "nothing in this order shall discourage

Taxpayer from renewing his requests in one or more proper motions." The order went on to instruct Taxpayer that a motion should (1) be in writing, (2) state the relevant facts and law, and (3) set forth the specific relief Taxpayer requested. Despite clear direction, Taxpayer did not renew any of his requests before the deadline to file motions, or before commencement of the hearing.

Nevertheless, Taxpayer's request, as renewed during the hearing was duly considered, and subsequently denied for these reasons. Taxpayer was thereafter encouraged, if not urged, to present all evidence he considered relevant with respect to any of the issues raised in Taxpayer Exhibits 13, 14, 15, and 16. At the close of the hearing, Taxpayer was provided an additional opportunity to address the question of what evidence, if any, may have been omitted, but which he believed was necessary to complete the evidentiary record. Taxpayer was unable to identify anything in particular.

Since conclusion of the hearing, Taxpayer has sent two emails to the Administrative Hearings Office repeating his demand that his "protests" be de-consolidated, but in the absence of any compelling reasons or legal authority not already previously considered, the Hearing Officer's ruling will stand.

Administrative Notice of D&O 14-39.

The Hearing Officer took administrative notice of D&O 14-39, including the outcome of Taxpayer's appeal. However, Taxpayer also requested that the Hearing Officer take administrative notice of all records relating thereto, including the evidentiary record, administrative record, and presumably Taxpayer's entire record with the Department. For the reasons that follow, the Hearing Officer respectfully declines to do so.

It was apparent that Taxpayer wanted the Hearing Officer to perform a record review of

D&O 14-39 which might expose some error that could inure to his benefit in the present protest. The Hearing Officer, however, is mindful that Taxpayer exercised his right to appeal that matter, and our Court of Appeals, having considered Taxpayer's contentions, *summarily affirmed* D&O 14-39.

The Hearing Officer will not therefore cloak himself with some fictitious authority to oversee the Court of Appeals by engaging in a subsequent review of the record in search of errors which the Court of Appeals did not recognize upon consideration of Taxpayer's arguments.

Moreover, Taxpayer's posture in this protest, and particularly with respect to this request, resembles an improper collateral attack on D&O 14-39. "A collateral attack is [either] an attempt to impeach the judgment by matters [outside of] the record, in an action other than that in which it was rendered [or] an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *See Phx. Funding, LLC v. Aurora Loan Servs., LLC,* 2017-NMSC-010, ¶32, 390 P.3d 174. In this case, a substantial portion of Taxpayer's liability was established in D&O 14-39. Any effort to defeat it in the present matter is improper, and not authorized by law.

As stated previously, the Hearing Officer takes administrative notice of D&O 14-39, but will not re-weigh evidence or reconsider the application of law relevant to that decision. D&O 14-39 stands and the present protest shall not be the mechanism through which it is disturbed.

Request to Call Counsel to Testify.

Taxpayer demanded that he be permitted to compel the Department's attorney to testify as a witness. Taxpayer's request appeared to be encouraged more by hostility than the desire to solicit relevant evidence through a necessary witness. Taxpayer accused Ms. Friedman of

personally assessing Taxpayer, engaging in ex parte communications with the hearing officer in D&O 14-39, impersonating Taxpayer to obtain personal information, and other allegedly deceitful acts. Taxpayer's request was denied.

Several examples of Taxpayer's resentment appear in his own exhibits. For example, although Taxpayer claimed that Taxpayer Exhibit 5 was intended to demonstrate Taxpayer's use of his Street Address, in lieu of his previously-used Mailing Address, it contained a selected portion of a larger document, identified by its footer as "Docketing Statement Case Number 34365 – Kevin Fenner vs. NMTRD[.]" The exhibit consisted of page numbers 22 through 34, plus a certificate of service. The exhibit excluded all pages preceding page 22.

Of those pages proffered, perhaps only Taxpayer's signature page and his certificate of service were relevant for illustrating Taxpayer's use of his Street Address. Nevertheless, Taxpayer included no less than a dozen pages of additional argument which were not relevant with respect to that discreet issue. It is within those pages that he described Ms. Friedman as "the person who manufactured the case against [Taxpayer] and whom committed criminal impersonation of the [Taxpayer] based on evidence submitted to the [prior] Hearing Officer." *See* Taxpayer Exhibit 5, Page 24, Para. 11. This is not the only statement along these lines.

Similar remarks are scattered throughout other exhibits as well, ranging from alleged violations of professional rules, allegations of improper ex parte communications with the previous hearing officer[4], violations of the Taxpayer Bill of Rights, and threats to file complaints with various federal and state law enforcement entities. *See also* Taxpayer Exhibit 21, Page 1,

[4] Among Taxpayer's assortment of grievances stemming from the matter subject of D&O 14-39, he alleged improper ex parte communications between Department's counsel or witnesses, and the hearing officer who presided over the matter subject of D&O 14-39. These allegations were similarly brought to the attention of the Court of Appeals as part of its appellate review of D&O 14-39, and were similarly dismissed. *See e.g.* Taxpayer Exhibit 4, Page 9.

Para. 4; Taxpayer Exhibit 4, Page 21, Paras I, II, IV, V; Exhibit C (to Taxpayer Exhibit 4), Page 3. Taxpayer's resentment was also apparent on the record of the hearing, in which on one occasion, the Hearing Officer intervened with an observation that Taxpayer was addressing Ms. Friedman in a manner he perceived to be disrespectful.

Under NMRA 2017, Rule 16-307 (A), "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a *necessary* witness." (Emphasis Added). "This rule recognizes the correlative interest of an adverse party in adducing essential proofs that are not available except through testimony of the client's attorney." *See Chappell v. Cosgrove*, 1996-NMSC-020, ¶12, 121 N.M. 636, 916 P.2d 836. If Ms. Friedman acquired any personal knowledge of relevant facts through her representation, she was not a *necessary* witness because adducing central proofs were available through other sources, particularly Ms. Bernardo. Not only was Ms. Bernardo the central witness for the Department in the current hearing, but she served in a similar capacity during the previous hearing as well. *See* D&O 14-39.

In fact, Taxpayer called Ms. Bernardo as a witness, and she credibly answered his questions, including those addressed to his allegations against counsel. If that were not sufficient, Taxpayer had a second opportunity, this time to cross-examine Ms. Bernardo, after she was called for a second time to testify for the Department. Moreover, Taxpayer was not required to rely on Ms. Bernardo alone. He was aware of his right to conduct discovery and subpoena additional witnesses.

Taxpayer claimed that he made a similar request in the previous hearing subject of D&O 14-39, and asserted error because that request had been denied, supposedly without explanation. The Hearing Officer observed from Taxpayer's exhibits, particularly Taxpayer Exhibit 4, Page 10, that similar allegations were also brought to the attention of the Court of Appeals. Again,

having notice of all issues raised by Taxpayer in reference to D&O 14-39, the New Mexico Court of Appeals summarily affirmed the decision, and in doing so, *rejected* any notion that Taxpayer was entitled to call Ms. Friedman as a witness, or that he was prejudiced by not being permitted to do so. *See* Court of Appeal No., No. 34,365 (A-1-CA-34365). The same remains true at the present time.

Warrants of Levy.

Under the Tax Administration Act, warrants of levy are governed by NMSA 1978, Section 7-1-31 to -36. Section 7-1-31 authorizes the Department to "collect tax from a *delinquent taxpayer* by levy upon *all property or rights to property* of such person." (Emphasis Added). Any property to which a delinquent taxpayer has rights is subject to levy under the plain language of Section 7-1-31.

Section 7-1-34 requires that one served with a levy surrender any obligated property or rights subject to the levy to the Department. Under Regulation 3.1.10.9 (B) NMAC (01/15/01), a financial institution served with a warrant of levy "must immediately surrender to the department any property or rights to property of the taxpayer which that institution possesses or holds as of the date of service of the warrant." Section 7-1-36 pronounces which property is exempt from levy.

In order to have a valid warrant of levy seizing a person's property, the Department must make a threshold showing that its warrant of levy complied with the content requirements of Section 7-1-32. The Department need not establish the substantive validity of the outstanding liability, only the factual particulars of the tax liability as required under Section 7-1-32 (B). That total liability, drawn from previous notices of assessment or demands for payment, is conclusive for purposes of the warrant of levy. In this case, the Department's warrants of levy, particularly

regarding that provided to Fidelity (Department Exhibit G), complied with the content requirements of Section 7-1-32. Taxpayer's name is listed along with his outstanding liability, and original due dates in the form of comprehensive spreadsheets. The warrants of levy, including Department Exhibit G, were legally valid under Section 7-1-32.

The remainder of this discussion will focus exclusively on the warrant of levy to Fidelity. Although there may have been initial hesitation by Fidelity regarding its obligations to act, it is undisputed that it did eventually remit $1,110.27 to the Department pursuant to the Warrant of Levy. How it resolved its underlying concerns, as initially expressed in its correspondence of June 20, 2017 (Department Exhibit H), remains unknown. Though Taxpayer may take issue with Fidelity's understanding of its obligations under the law, and its eventual determination to remit funds to the Department, Fidelity is not a party to the protest nor was it called upon to present evidence. This is significant because nothing on the record of this protest permits any inference that Fidelity remitted funds in error or contrary to law, or that the Department was in error for accepting it.

Taxpayer presents a variety of reasons why the Department's action was nevertheless allegedly erroneous, why the underlying liability is purportedly incorrect, and why the Department lacked the authority to collect on Taxpayer's liability.

The effect of an assessment and other notices purportedly mailed to an incorrect address.

Taxpayer claimed that notices mailed after March 17, 2015 were ineffective if they were addressed to his Mailing Address, rather than his Street Address. *See* Taxpayer Exhibit 16. Those notices would include the assessment relevant for the 2011 period and other notices arising from the facts subject of D&O 14-39.

The Department does not dispute the fact that it relied on Taxpayer's Mailing Address

until somewhat recently. Indeed, each of its proffered exhibits relied on Taxpayer's Mailing Address, not his Street Address. Taxpayer provides numerous examples of how he provided, what might be perceived as *constructive notice*, of his Street Address. However, a review of Taxpayer's exhibits and testimony reveal that Taxpayer never changed his address in conformity with the requirements of Regulation 3.1.4.9 NMAC, which provide "[i]f the department has prescribed a form or format for reporting a change of address, the form or format *must be followed*[.]" (Emphasis Added). Taxpayer conceded that he never followed the prescribed procedure for reporting a change of address[5].

Nevertheless, Taxpayer relies on NMSA 1978, Section 7-1-9 and claims that any mailing after March 17, 2015 is effective only if mailed to his Street Address because that is the address presumably contained in a "record of the Department." The statute provides in relevant part:

> A. Any notice required or authorized by the Tax Administration Act [7-1-1 NMSA 1978] to be given by mail is effective if mailed or served by the secretary or the secretary's delegate to the taxpayer or person at the last address shown on his registration certificate or other record of the department. Any notice, return, application or payment required or authorized to be delivered to the secretary or the department by mail shall be addressed to the secretary of taxation and revenue, taxation and revenue department, Santa Fe, New Mexico or in any other manner which the secretary by regulation or instruction may direct.

A thorough review of the Administrative File, particularly with concern for Letter ID Nos. L0851133232 and L0018236208, and more specifically, the attachments incorporated therein by reference, indicate that both Taxpayer's Mailing Address and Street Address were contained in the Department's records, at least as of October 10, 2017. Nonetheless, absent

[5] In perhaps the most direct statement in reference to a change of address, Taxpayer in Taxpayer Exhibit 2, Page 3, on December 28, 2015, stated "The address on the letters is the incorrect address and I have notified NMTRD of my current address." However, there was no indication regarding what addresses had been used on the letters to which Taxpayer was referring and the Hearing Officer is prohibited from speculation. D&O 14-39 made reference to no less than 8 addresses with which Taxpayer was associated, not including the Mailing Address or Street Address.

notice in the prescribed form or format, it was reasonable for the Department to rely on Taxpayer's Mailing Address for communications.

Post office boxes are used exclusively for receiving U.S. mail. If the Department maintained two addresses in its record, one of which was a post office box, then it was reasonable for it to rely on that address for communicating by mail. Taxpayer's passive reliance on his email signature or certificates of service, relating to his appeal of D&O 14-39, to inform the Department that his Street Address should be used in lieu of his Mailing Address is not reasonable.

Use of the prescribed form or format is critical for an agency responsible for administering numerous tax programs affecting millions of taxpayers, since the form alerts the Department that its attention is required, unlike passive methods of notice concealed in lengthy legal documents or emails to individuals whose job responsibilities may be concentrated on other areas and tasks.

At this point, it is worthwhile to recall that Taxpayer does not dispute that the 2011 assessment and other relevant notices were mailed. The Hearing Officer will recognize the presumption of administrative regularity of notice to which the Department is entitled. *See Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶29, 111 N.M. 735 (there is a presumption of administrative regularity with notice).

Taxpayer's contentions focus on the Department's reliance on the Mailing Address, rather than the Street Address, and asserts that the use of the allegedly incorrect Mailing Address deprived him of notice and an opportunity to protest the 2011 assessment, and presumably any other protestable action addressed in the various notices.

With respect to the Department's reliance on Taxpayer's Mailing Address, Ms.

Bernardo's testimony was most persuasive. She credibly testified that based on her review of the Taxpayer's records, that the Department received no indication from the U.S. Postal Service that any correspondence addressed to Taxpayer's Mailing Address had been returned as undeliverable. This is significant because if Taxpayer's Mailing Address was invalid, then one could expect some article of mail to eventually be returned as undeliverable. Yet, Ms. Bernardo credibly testified that Taxpayer's record lacked any evidence that ever happened.

It would be reasonable to expect a postal worker delivering mail within the post office maintaining Taxpayer's box to have some knowledge regarding the status of the box, whether the lease was expired, or whether the box was no longer in use for any other reason, and then be in the best position to return the mail to its sender or perhaps deliver it to a forwarding address. This is unlike an example where an item of mail might be delivered to a rural mail box atop a post at the end of a two-track road, where the mail carrier's only responsibility is to simply deposit the mail in the box without further knowledge regarding the actual use of the box, or who even retrieves mail from the box.

In contrast, anyone stepping inside a typical post office facility will observe that post office boxes are secured with locks, permitting only that person having a key or combination to gain access to the contents of the box. If that doesn't happen, and mail in the box accumulates and goes unclaimed for months, or perhaps years under the circumstances of this protest, the post office remains in the best position to gather the contents of the box and return it to the sender, or deliver it to a forwarding address.

These inferences suggest that if mail was delivered as addressed, and *never* returned as undeliverable after months or years, that the Department effectuated notice despite claims to the contrary. The Department's reliance on Taxpayer's Mailing Address was reasonable, consistent

with NMSA 1978, Section 7-1-9, and consistent with due process. *See Dusenbery v. United States*, 534 U.S. 161 (2002) (holding that reasonableness requires that the State attempt to provide actual notice, but due process does not require actual notice); *Cordova v. Taxation & Revenue, Prop. Tax Div.*, 2005-NMCA-009, ¶36, 136 N.M. 713, 104 P.3d 1104 ("due process is satisfied by either actual notice or notice reasonably calculated, under all the circumstances, to apprise the affected party"); *Maso v. State Taxation & Revenue Dep't, Motor Vehicle Div.*, 2004-NMCA-025, 135 N.M. 152, 157, 85 P.3d 276 (explaining that due process does not necessarily require actual notice).

Whether the Department is time barred from collecting an assessed tax liability.

NMSA 1978, Section 7-1-19 provides that "[n]o action or proceeding shall be brought to collect taxes administered under the provisions of the Tax Administration Act and due under an assessment or notice of the assessment of taxes after the later of either *ten years from the date of such assessment or notice* or, with respect to undischarged amounts in a bankruptcy proceeding, one year after the later of the issuance of the final order or the date of the last scheduled payment."

The Department interprets the term "action or proceeding" to mean any effort initiated by the Department under the Tax Administration Act including the "filing of a lien, seizure of property through service of a warrant of levy, demand for security to cover the liability, sale of security which has previously been posted, demand for payment, civil action in district court, injunction to enjoin the taxpayer from engaging in business or foreclosure of a lien." *See* Regulation 3.1.1.17 NMAC.

The evidence in the present matter establishes that the "action or proceeding," in each instance was within ten years from the date of such assessment or notice. *See* Department

Exhibits C, D, E and G (Warrant of Levy was dated June 9, 2017, but earliest date of assessment was November 14, 2013, a duration of 3 years, 6 months, and 26 days excluding the end date); Department Exhibit F (Warrant of Levy was dated July 18, 2017, but earliest date of assessment was November 14, 2013, a duration of 3 years, 8 months, and 4 days excluding the end date); Department Exhibit A (Notice of Claim of Tax Lien dated May 25, 2017 for Personal Income Tax filing period ending December 31, 2011, assessed on April 5, 2016, a duration of 1 year, 1 month, and 20 days excluding the end date); Department Exhibit B (Notice of Claim of Tax Lien dated February 4, 2016, but earliest period of assessment was February 15, 2007, a duration of 8 years, 11 months, and 20 days excluding the end date).

In each instance referenced, including the Warrant of Levy relevant to Fidelity, the Department's collection efforts came within ten years as required by Section 7-1-19. To the extent Taxpayer interprets the statute as relating to the period subject of the assessment, rather than the date of the assessment, his method of computing time is incorrect.

Exemptions.

Taxpayer argued that money or property of a delinquent taxpayer, up to a total value of $1,000 *per account*, is exempt from levy. *See* Taxpayer Exhibit 15. Taxpayer therefore requests that $1,000 of the $1,110.07 levied from Fidelity, be refunded. Taxpayer misstates, or perhaps misunderstands the exemption.

Money or property of a delinquent taxpayer, up to a total value of $1,000 of Taxpayer's total assets is exempt from levy. NMSA 1978, Section 7-1-36A states "[t]here shall be exempt from levy the money or property of a delinquent taxpayer in a total amount or value not in excess of one thousand dollars ($1,000)." The exemption specifically refers to an amount of $1,000 from the total amount of Taxpayer's money or property. Taxpayer provided no citations to any

authority that might potentially assist his interpretation of the statute, that the exemption should apply on a per-asset basis.

Instead, the plain meaning of the statute exempts $1,000 of Taxpayer's total assets. The statute makes sense as written, and the Hearing Officer will not read any language into the exemption which the Legislature itself, has not seen fit to insert. *See DeMichele v. State Taxation & Revenue Dep't Motor Vehicle Div.*, 2015-NMCA-095, ¶14, 356 P.3d 523 ("pursuant to the plain meaning rule, we will not read into a statutory provision 'language which is not there, especially when it makes sense as it is written.'") *citing Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶15, 147 N.M. 512, 226 P.3d 611.

Taxpayer also relies on 42 U.S.C. Section 407 (a) for the position that the funds levied from Fidelity should be exempt because they represented proceeds from social security benefits. *See* Taxpayer Exhibit 14. That section provides that "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys paid* or payable or rights existing under this subchapter *shall be subject to execution, levy, attachment, garnishment, or other legal process*, or to the operation of any bankruptcy or insolvency law."

The Department did not dispute Taxpayer's interpretation of 42 U.S.C. Section 407 (a), but correctly pointed out that there was no reliable evidence to establish that the funds were subject to its prohibition. Moreover, the Department persuasively argued that even if there were evidence to establish the source of the funds, which there was not, there was no evidence to establish that those funds had not been comingled with funds derived from other sources as well. Department Exhibit H, the correspondence in which Fidelity originally responded to the Warrant of Levy made no reference to social security income or that being the reason for its concerns as

expressed in the letter.

Accordingly, there was insufficient evidence to establish that the application of 42 U.S.C. Section 407 (a), or that funds levied from Fidelity exceeded what was permitted under Section 7-1-19.

Whether amounts due for multiple tax periods may be consolidated in a single levy or lien.

Taxpayer asserts that "levies and liens need to be specific to the assessments by tax year" rather than be "aggregated in a single amount." Taxpayer cites Section 7-1-9, Section 7-1-32, Section 7-1-24, Section 7-1-18, and Section 7-1-4.2. *See* Taxpayer Exhibit 13.

However, none of those sections, on their own or in conjunction with one another impose such a requirement. The general rule is that the levy or lien state the entire amount due as well as the date upon which that amount became due. *See* NMSA 1978, Sections 7-1-32 B; 7-1-38. To the extent Taxpayer demands an itemization by relevant tax year, he may refer to the schedules attached to the Department's exhibits, as well as one of his own. *See* Department Exhibits A, B-2, C-2, D-2, E-2, F-2, and G-2; Taxpayer Exhibit 11.

Whether the Department was entitled to collect an outstanding tax liability from a non-resident.

As stated previously, Taxpayer's argument resembles an improper collateral attack on D&O 14-39 to which the Hearing Officer declines the invitation to re-weigh evidence or rummage for errors in the application of the relevant law. The findings and conclusions in D&O 14-39 are final, and speak for themselves. Taxpayer will not be permitted to re-litigate the issues presented in that protest, nor be permitted to avoid the determination that he was liable for taxes, interest, and penalty for the years at issue therein. Taxpayer was afforded an appeal of that protest, and the Court of Appeals, having duly considered Taxpayer's arguments, affirmed the decision. The findings and conclusions in D&O 14-39 will not be disturbed.

To the extent Taxpayer argues that the Department's authority to engage in collections is restricted to in-state activities, Taxpayer's arguments are vague and unsupported by citation to legal authority.

Although it may be true that the Department's ability to engage in various collection activities in other jurisdictions may have its limitations, Taxpayer did not attempt to address those limitations with citations to any legal authority or establish how the Department may have exceeded its authority under the facts of this protest. The majority of Taxpayer's evidence on this issue consists of his own emails to the Department and nothing which, when held up to any applicable law, demonstrates any contradiction.

With specific concern for the Warrant of Levy issued to Fidelity, a reasonable inference may be drawn that Fidelity made a determination that it could comply with the Warrant of Levy. The Hearing Officer will not speculate regarding Fidelity's reasoning, but its conclusion was obvious. Fidelity paid the Department the sum of $1,110.27. Had Fidelity disputed its obligation to comply with the Warrant of Levy, or questioned the Department's authority, then it would have presumably addressed that matter with the Department. It did not do so, and Taxpayer did not introduce any reliable evidence upon which to infer, much less establish, any error by Fidelity in remitting funds pursuant to the Warrant of Levy, or any impropriety by the Department for accepting it.

Whether the Department acted contrary to the Tax Administration Act or the Taxpayer Bill of Rights.

Upon cautious review of the evidence presented, the Hearing Officer was not persuaded that any action of the Department was contrary to the Tax Administration Act or the Taxpayer Bill of Rights. Accusations against the Department's counsel, its witnesses, or even the hearing officer who presided in the underlying protest were unpersuasive, lacking trustworthiness, and

wholly unreliable. Some allegations even bordered on absurd. *See* NMSA 1978, Section 7-1-4.2.

Nothing in the Tax Administration Act or the Taxpayer Bill of Rights, NMSA 1978, Section 7-1-4.2, requires that the Department concede to a taxpayer's position when a disagreement ensues. A taxpayer is entitled to file a protest and have an opportunity to be heard. That is what the Taxpayer was afforded in the present case as well as in the circumstances subject of D&O 14-39.

Whether any employee of the Department acted in bad faith in reference to the issues subject of his protest.

Incorporating the observations made in the previous sections, there was simply no credible evidence that any person affiliated with the Department acted in bad faith in reference to any issue relevant to Taxpayer's protest, including the Department's counsel, witnesses, or the hearing officer presiding over the hearing subject of D&O 14-39[6]. With respect to the subject of D&O 14-39, Taxpayer presented his grievances, in full, without abridgment to the Court of Appeals, which summarily affirmed the decision.

Motor Vehicle Liens.

Although the Department acknowledged that Taxpayer's protest included the automobile liens subject of Letter ID Nos. L0851133232 and L0018236208, Taxpayer never specifically addressed those specific matters. Nevertheless, the Hearing Officer observed that the motor vehicle liens did not appear defective on their face under NMSA 1978, Section 7-1-37 to -38, and the same conclusions made with respect to the Department's authority to enforce a liability apply to the liens.

[6] At the time the parties litigated the issues subject of D&O 14-39, the agency now known as the Administrative Hearings Office was a bureau within the Taxation and Revenue Department. The Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 to – 9 removed the bureau from the Department establishing the Administrative Hearings Office as an independent agency, effective July 1, 2015.

Having carefully weighed and considered the evidence and arguments presented, the Hearing Officer finds that Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's warrant of levy and notices of plate liens. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer is a delinquent taxpayer with an outstanding tax liability for personal income tax, penalty, and interest as determined in D&O 14-39, and the subsequent assessment for personal income tax period 2011. *See* NMSA 1978, Section 7-1-16.

C. Taxpayer was not denied due process by the Department mailing any relevant notice to his Mailing Address in lieu of his Street Address because reliance on the Mailing Address was reasonably calculated under the circumstances to afford notice. *See Dusenbery v. United States,* 534 U.S. 161 (2002) (holding that reasonableness requires that the State attempt to provide actual notice, but due process does not require actual notice); *Cordova v. Taxation & Revenue, Prop. Tax Div.*, 2005-NMCA-009, ¶36, 136 N.M. 713, 104 P.3d 1104.

D. Pursuant to its authority under Section 7-1-31, the Department served Fidelity with a warrant of levy bearing the required contents under Section 7-1-32 for any of Taxpayer's property.

E. Fidelity seized funds in that account and surrendered them to the Department, as required under Section 7-1-31, Section 7-1-34, and Regulation 3.1.10.9 (B) NMAC (01/15/01).

F. The Fidelity funds were not exempt from levy under Section 7-1-36 or 42 U.S.C. Section 407 (a).

G. Notices of liens complied with the requirements established by NMSA 1978, Section 7-1-38.

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

DATED: October 22, 2018

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.

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