

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

**IN THE MATTER OF THE PROTEST OF
NEW MEXICO DEPO
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1017684784**

D&O No. 18-37

Case Number 18.02-037A

and

**IN THE MATTER OF THE PROTEST OF
ANA KOEBLITZ
HAUTE MOUNTAIN GIRL
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0179872560**

Case Number 18.02-038A

DECISION AND ORDER

A hearing in the above-referenced protest was held September 27, 2018, before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. The Taxation and Revenue Department (Department) was represented by Ms. Regina Ryanczak, Esq. who was accompanied by Mr. Juan Trujillo and Ms. Laura Gage who testified on behalf of the Department. Mr. Anthony Jeffries, Esq. appeared on behalf of New Mexico Depo¹ and Haute Mountain Girl, and was accompanied by his assistant, Mr. Ryan Bromberg. Mr. Robert Koebnitz and Ms. Ana Koebnitz both appeared and testified by telephone for New Mexico Depo.

The primary issue in this protest was whether Ms. Koebnitz, as New Mexico Depo's sole proprietor, should be personally liable for gross receipts tax liabilities incurred during the time it operated as a sole proprietorship, and subsequent to its organization as a limited liability company because it did not update its business tax registration with the Department. Taxpayer Exhibits 1 – 7, 9 – 18, and Department Exhibits A – E were admitted, and the Hearing Officer

¹ Unless otherwise indicated, a reference to "New Mexico Depo" shall be intended as a reference to the sole proprietorship of which Ms. Koebnitz is sole proprietor.

took notice of all documents in the administrative file. Based on the evidence and arguments presented, the Hearing Officer finds that the protest should be DENIED.

IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On October 12, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L0179872560 to Ana Koeblitz, Haute Mountain Girl, in the amount of \$21,728.64 in gross receipts tax, \$4,345.73 in gross receipts tax penalty, and \$2,935.58 in gross receipts tax interest for a total assessment of \$29,009.95. The assessment was for the periods from January 1, 2010 through December 31, 2013. [*See* Administrative File; Taxpayer Exhibit 2-2].

2. On October 12, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L1017684784 to New Mexico Depo, in the amount of \$12,251.02 in gross receipts tax, \$2,450.20 in gross receipts tax penalty, and \$1,999.02 in gross receipts tax interest for a total assessment of \$16,700.24. The assessment was for the periods from January 1, 2012 through December 31, 2012. [*See* Administrative File; Taxpayer Exhibit 1-2].

3. On January 9, 2018, Haute Mountain Girl filed a protest of the assessment issued under Letter ID No. L0179872560, and New Mexico Depo filed a protest of the assessment issued under Letter ID No. L1017684784. [*See* Administrative File; *See* Taxpayer Exhibits 1 and 2].

4. On January 18, 2018, the Department acknowledged the protest of Haute Mountain Girl under Letter ID No. L0902624048, and New Mexico Depo under Letter ID No. L2113628976. [*See Administrative File*].
5. On February 16, 2018, the Department submitted two Hearing Requests which separately requested scheduling hearings in reference to the protests of Haute Mountain Girl and New Mexico Depo. [*See Administrative File*].
6. On February 19, 2018, the Administrative Hearings Office entered separate Notices of Telephonic Scheduling Hearing in reference to the protests of Haute Mountain Girl and New Mexico Depo. Scheduling hearings were set for March 16, 2018. [*See Administrative File*].
7. On March 16, 2018, a telephonic scheduling occurred in which the parties agreed that the protests should be consolidated due to the commonality of issues and parties. [*See Record of Hearing, 3/16/18*].
8. On March 19, 2018, the Administrative Hearings Office entered a Consolidation Order and Notice of Status Hearing which in addition to setting a status hearing also consolidated the previously separate protests of Haute Mountain Girl and New Mexico Depo. [*See Administrative File*].
9. On April 27, 2018, counsel of record for Haute Mountain Girl and New Mexico Depo provided notice of his unavailability. [*See Administrative File*].
10. On April 27, 2018, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing which set a hearing on the merits of the consolidated protests for September 27, 2018. [*See Administrative File*].

11. On July 20, 2018, counsel of record for Haute Mountain Girl and New Mexico Depo provided notice of his unavailability. [*See Administrative File*].
12. On August 14, 2018, Haute Mountain Girl and New Mexico Depo filed Protestant's Motion for Summary Judgment and Memorandum in Support of Protestants' Motion for Summary Judgment. [*See Administrative File*].
13. On August 28, 2018, the Department filed a Stipulated Motion for Extension of Time to respond to Protestant's Motion for Summary Judgment. [*See Administrative File*].
14. On August 29, 2018, the Department filed Department's Response to Protestant's Motion for Summary Judgment. [*See Administrative File*].
15. On September 11, 2018, Haute Mountain Girl and New Mexico Depo filed their Request for Hearing and Decision Regarding Motion for Summary Judgment in Advance of Merits Hearing, and Motion for Continuance to Allow Preparation for Merits Hearing. [*See Administrative File*].
16. On September 17, 2018, Haute Mountain Girl and New Mexico Depo filed Taxpayer Prehearing Statement. [*See Administrative File*].
17. On September 17, 2018, the Department filed Department's Prehearing Statement. [*See Administrative File*].
18. On September 17, 2018, Haute Mountain Girl and New Mexico Depo filed Taxpayer Renewal of Request for Hearing and Decision Regarding Motion for Summary Judgment in Advance of Merits Hearing, and Request for Leave to Appear by Telephone. [*See Administrative File*].

19. On September 18, 2018, the Administrative Hearings Office entered an Order Denying Summary Judgment, Denying Motions for Continuance, and Addressing Remainder of Outstanding Motions and Notices. The order provided the following:

a. The Administrative Hearings Office accepted for filing, as of September 11, 2018, the reply of Haute Mountain Girl and New Mexico Depo to Department's Response to Protestant's Motion for Summary Judgment.

b. Protestant's Motion for Summary Judgment was denied.

c. The request of Haute Mountain Girl and New Mexico Depo to continue the hearing on the merits of the protest was denied.

d. The request to extend the period of time in which to file prehearing statements was granted.

e. The request of Haute Mountain Girl and New Mexico Depo for confirmation that the scope of the hearing set for September 27, 2018 would be limited to argument on Protestant's Motion for Summary Judgment was denied.

f. To the extent any requested relief was not directly addressed, it was denied.

[See Administrative File].

20. On September 18, 2018, Haute Mountain Girl and New Mexico Depo filed a Motion for Abatement or for Continuance. [See Administrative File].

21. In view of the previous rulings contained in the Order Denying Summary Judgment, Denying Motions for Continuance, and Addressing Remainder of Outstanding

Motions and Notices, the Hearing Officer found it unnecessary to specifically address the Motion for Abatement or for Continuance which was subsequently filed the same day.

22. On September 24, 2018, Haute Mountain Girl and New Mexico Depo filed a Motion for Leave to Testify by Telephone. The Department took no position on the relief requested. [*See Administrative File*].

23. On September 25, 2018, the Administrative Hearings Office entered an Order Permitting Telephonic Appearance and Testimony. [*See Administrative File*].

Facts Relating to the Merits

24. Mr. Robert Koebnitz and Ms. Ana Maria Gallegos de Koebnitz are married.

25. During all years relevant to the consolidated protests, Ms. Koebnitz was engaged in the business of providing court reporting services. [Testimony of Ms. Koebnitz].

26. Ms. Koebnitz was initially licensed in New Mexico in 1989, but moved out of state shortly thereafter. She returned to Santa Fe, New Mexico in 2009 and resumed providing court reporting services. [Testimony of Ms. Koebnitz].

27. Although she initially provided services as a freelancer, after a few months, she established her own service which she called New Mexico Depo. [Testimony of Ms. Koebnitz].

28. Ms. Koebnitz had no specific recollection of registering her court reporting business with the Department or obtaining a CRS number. [Testimony of Ms. Koebnitz].

29. Regardless of Ms. Koebnitz' inability to recall, New Mexico Depo was registered with the Department as a sole proprietorship on or about January 23, 2009 at which time it was assigned CRS No. 03-152861-00-9. [Testimony of Mr. Trujillo; *See Department Exhibit A-1*].

30. Mr. Koeblitz is an attorney specializing in litigation. He has practiced in California and New Mexico since 1992. However, he does not practice in tax or tax litigation. [Testimony of Mr. Koeblitz].

31. On January 17, 2012, approximately three years after commencing business as New Mexico Depo, Ms. Koeblitz with the assistance of her spouse, organized a limited liability company called New Mexico Depo, LLC. [Testimony of Mr. Koeblitz; *See* Taxpayer Exhibit 3].

32. Mr. Koeblitz assisted Ms. Koeblitz in organizing the limited liability company after determining that a limited liability company would provide advantages over a sole proprietorship. [Testimony of Mr. Koeblitz].

33. Ms. Koeblitz admitted that she had minimal knowledge regarding those aspects of the business which were not directly related to court reporting services. For example, her involvement and knowledge of taxation and other business matters was minimal. She concentrated on court reporting and relied on Mr. Koeblitz for everything else. [Testimony of Ms. Koeblitz].

34. For the stated reason, Mr. Koeblitz assumed responsibility for legal matters concerning the business and Ms. Koeblitz would usually sign documents as he requested with a minimal amount of inquiry. [Testimony of Ms. Koeblitz].

35. Mr. Koeblitz made unwritten inquiries to the Department in reference to whether a change in the legal entity through which a business operates also required a change to the business' state tax registration. Mr. Koeblitz' understanding was that the Department did not require any update to the business' tax registration. [Testimony of Mr. Koeblitz].

36. Mr. Koebnitz first inquiry was at the Department's Albuquerque field office. The second inquiry was made during a Department-sponsored seminar. [Testimony of Mr. Koebnitz].

37. Mr. Koebnitz also relied on his understanding of a portion of FYI-105, addressing common questions and answers, in which the following question and answer is provided:

If I currently have an identification number from the Taxation and Revenue Department as a registered proprietorship (i.e. sole owner) and later decide to incorporate, may I continue to use this number?

No. You must cancel the identification number issued to you as a proprietorship and apply for a new identification number as a corporation. The incorporation of a business qualifies as a change in form of ownership. Upon applying for your identification number, you should indicate your date of incorporation as the "start business date" on the Application for Business Tax Identification Number (Form ACD-31015) for the new number.

[Testimony of Mr. Koebnitz; *See* Taxpayer Exhibit 17-2; FYI-105, Rev. 11/2011 (Emphasis Added)]

38. Mr. Koebnitz interpreted the discussion contained in FYI-105 as providing an exception for limited liability companies because the discussion specifically referenced corporations only, and was silent in reference to limited liability companies. [Testimony of Mr. Koebnitz].

39. Mr. Koebnitz also made inquiries of the Internal Revenue Service regarding the change in business entity from sole proprietor to limited liability company. [Testimony of Mr. Koebnitz].

40. On or about February 13, 2012, the Internal Revenue Service assigned New Mexico Depo, LLC a Federal Employer Identification Number XX-XXXX672. [Taxpayer Exhibit 5-3].

41. On or about June 8, 2012, the Internal Revenue Service acknowledged that the LLC was classified as a single member disregarded entity and was not required to file Form 1065 (U.S. Return of Partnership Income). [See Taxpayer Exhibit 5-2].

42. From January 17, 2012, Ms. Koebnitz continued to engage in the business of providing court reporting services, and held her business out publicly as New Mexico Depo, LLC. [Testimony of Mr. Koebnitz].

43. However, there would be no change to the business tax registration associated with CRS No. 03-152861-00-9 to reflect a transformation in business entity until May 9, 2014. [Testimony of Mr. Trujillo; Testimony of Ms. Gage; See Department Exhibit A-7].

44. At some point prior to May 9, 2014, the Department was alerted to a potential Schedule C mismatch. Ms. Laura Gage was assigned to review the issue. [Testimony of Ms. Gage].

45. During her examination, Ms. Gage discovered that New Mexico Depo had a Federal Employer Identification Number. Because Ms. Gage perceived that as unusual, especially in situations where an individual was engaging in business as a sole proprietor, she conducted additional research. [Testimony of Ms. Gage].

46. Through a review of such records on file with the New Mexico secretary of state, Ms. Gage discovered the existence of New Mexico Depo, LLC. [Testimony of Ms. Gage].

47. Ms. Gage conferred with her supervisor who subsequently authorized her to update the Department's record for CRS No. 03-152861-00-9 to reflect that New Mexico Depo was engaging in business as a limited liability company as of May 9, 2014. [Testimony of Ms. Gage; See Department Exhibit A-7].

48. Accordingly, on May 9, 2014, Ms. Gage updated the “Client Type” field in the Department’s computerized record associated with CRS No. 03-152861-00-9 to reflect “Ltd. Liability Company”. [Testimony of Ms. Gage; *See Taxpayer Exhibit A-7*].

49. The change in the Department’s records associated with CRS No. 03-152861-00-9 did not result from the submission of a Business Tax Registration Update. [Testimony of Mr. Trujillo; Testimony of Ms. Gage].

50. On or about April 8, 2016, Mr. Koeblitz submitted a Business Tax Registration Update for CRS No. 03-152861-00-9 indicating that New Mexico Depo had closed and therefore ceased engaging in business effective February 29, 2016. [*See Taxpayer Exhibit 6-1*].

51. The Department rejected the Business Tax Registration Update because it determined that Mr. Koeblitz did not have proper authority to make changes to the referenced account. [*See Taxpayer Exhibit 6-2*].

52. Mr. Koeblitz re-submitted the Business Tax Registration Update for CRS No. 03-152861-00-9 with a Tax Information Authorization on or about May 3, 2016. [Testimony of Mr. Koeblitz; *See Taxpayer Exhibit 6-3*].

53. On or about June 18, 2018, Mr. Koeblitz registered New Mexico Depo, LLC (although the registration confirmation omitted “LLC” from the business’ name) with the Department. The Department assigned NM Depo LLC CRS No. 03-408019-00-8. [Testimony of Mr. Koeblitz; *See Taxpayer Exhibit 4*].

54. Ms. Koeblitz had no specific recollection of preparing, signing, or submitting any forms for the purpose of updating her business registration prior to 2018. [Testimony of Ms. Koeblitz].

55. A sample of records demonstrates that New Mexico Depo held itself out as a limited liability company after January 17, 2012. Examples include:
- a. New Mexico Depo utilized the LLC designation on various Form W-9s on February 13, 2012, June 25, 2013, and November 20, 2014. [*See* Taxpayer Exhibit 9].
 - b. New Mexico Depo issued various Form 1099-MISCs utilizing the LLC designation in 2014. [*See* Taxpayer Exhibit 10-1 to 10-2].
 - c. New Mexico Depo issued non-taxable transaction certificates utilizing the LLC designation. [*See* Taxpayer Exhibit 10-3].
 - d. Ms. Koeblitz reported profits and losses from the New Mexico Depo on Schedule C in which she utilized the LLC designation. [*See* Taxpayer Exhibit 11].
 - e. New Mexico Depo submitted a Substitute W-9 to the New Mexico department of finance and administration which utilized the LLC designation. [*See* Taxpayer Exhibit 12].
 - f. New Mexico Depo received payments tendered to New Mexico Depo LLC. [*See* Taxpayer Exhibit 13].
 - g. New Mexico Depo made payment to its employees and contractors on an account utilizing the LLC designation. [*See* Taxpayer Exhibits 14 and 15].
 - h. Correspondence addressed to Ms. Koeblitz from the New Mexico department of workforce solutions indicated that it was in reference to “N[M] Depo, LLC”. [*See* Taxpayer Exhibit 14-3 to 14-4].
 - i. New Mexico Depo’s statements for services provided utilized the LLC designation. [*See* Taxpayer Exhibit 16].

j. Ms. Koeblitz executed a Limited Liability Company Statement for Bank of the West in which she provided information in reference to the limited liability company, including its legal name, street address, Federal Employer Identification Number, and the names of members and managers. She was identified as the single member. [See Taxpayer Exhibit 18].

56. Mr. Juan Trujillo was the protest auditor assigned to the consolidated protests. [Testimony of Mr. Trujillo].

57. Mr. Trujillo determined that Haute Mountain Girl never generated income from engaging in business in New Mexico and that income originally attributed to Haute Mountain Girl was generated by New Mexico Depo. [Testimony of Mr. Trujillo].

58. Mr. Trujillo determined that tax assessed against Haute Mountain Girl should be abated, but that the amount of tax abated should be re-assessed to New Mexico Depo. [Testimony of Mr. Trujillo].

59. There is no indication from the record in this matter to establish that any liability originally assessed to Haute Mountain Girl, and subsequently abated, was thereafter re-assessed to New Mexico Depo. [Testimony of Mr. Trujillo].

DISCUSSION

The primary issue in this protest is whether New Mexico Depo's sole proprietor, Ms. Koeblitz, is personally liable for gross receipts tax liabilities incurred during the time she operated as a sole proprietorship, and after organizing a limited liability company because she failed to update her business tax registration with the Department. New Mexico Depo did not present evidence to dispute the correctness of the amounts assessed, but only disputed whether the sole proprietor was ultimately liable for the assessment.

This observation is significant because under NMSA 1978, Section 7-1-17 (C) (2007), an assessment of tax is presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013).

Furthermore, Regulation 3.1.6.13 NMAC provides that the presumption of correctness afforded by Section 7-1-17 (C) should extend to the Department’s assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Therefore, taxpayers have the burden of overcoming assessments. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431.

Since Ms. Koeblitz and New Mexico Depo did not expressly contest the correctness of the assessed amounts of tax, penalty, or interest for the periods between January 1, 2012 and December 31, 2012, the central issue shifts to the consequence of the undisputed facts: Ms. Koeblitz organized New Mexico Depo, LLC on January 17, 2012 but did not register it to conduct business with the Department until June 13, 2018, after this protest was already pending, after it had ceased operating in 2016, and after the Department determined the liability.

Preliminary Issue Regarding
Haute Mountain Girl

Although not directly raised by the parties, the Hearing Officer perceived an issue regarding the assessment and subsequent abatement of tax to Haute Mountain Girl. This preliminary issue may affect the amount claimed to be owed by New Mexico Depo.

The Department conceded that Haute Mountain Girl did not generate any receipts from engaging in business, and for that reason, it fully abated the assessment under Letter ID No.

L0179872560. However, the Department also concluded that the receipts initially attributed to Haute Mountain Girl were actually generated by New Mexico Depo and for that reason, the amounts abated as to Haute Mountain Girl should be re-assessed to New Mexico Depo.

Yet, the record fails to establish that the Department re-assessed any taxes to New Mexico Depo, which were previously assessed to Haute Mountain Girl, and subsequently abated. This observation is significant because the Department may only pursue an alleged tax liability through its authority to assess under NMSA 1978, Section 7-1-17. That section provides three methods for assessing taxes allegedly due, for which only the second applies under the facts of this protest. That method provides that an assessment of tax 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[.]” *See* NMSA 1978, Section 7-1-17 B (2).

In this protest, Mr. Trujillo and counsel for the Department made verbal reference to a re-assessment of taxes, and even referenced the same in a footnote to the Department’s Prehearing Statement. However, that is insufficient under the law because neither a verbal statement nor a footnote in a pleading constitutes a formal “notice of assessment of taxes” under Section 7-1-17. Otherwise, there is nothing on the record in this protest to establish that any amounts originally assessed to Haute Mountain Girl, and subsequently abated, were thereafter re-assessed to New Mexico Depo as required by Section 7-1-17.

Since the mere intention to re-assess a previously-abated tax is not a “notice of assessment of taxes”, and because unassessed tax liabilities are not protestable, previously-abated taxes claimed to be due, but not actually assessed, are not properly before this tribunal.

Although the Department does not suggest this approach, the Hearing Officer is not at liberty to merely add to one assessment an amount of tax that the Department abated from another. The authority to assess taxes lies solely with the Department.

Therefore, by virtue of the fact that the Department abated all amounts allegedly due under the notice of assessment to Haute Mountain Girl, the only assessment now at issue is that addressed to New Mexico Depo under Letter ID No. L1017684784.

Personal Liability for Taxes Owed by New Mexico Depo

Ms. Koeblitz asserted that New Mexico Depo, the sole proprietorship, should not be liable for any tax liability incurred subsequent to the organization of New Mexico Depo, LLC on January 17, 2012. Instead, Ms. Koeblitz argued that liability rests squarely on the limited liability company in which she was the single member.

Although there may be various benefits to operating a business through a limited liability company, one of the most desirable benefits may derive from NMSA 1978, Sec. 53-19-13. It provides that “[e]xcept as otherwise provided in the Limited Liability Company Act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company.” It goes on to provide that “[n]o member or manager of a limited liability company ... shall be obligated personally for any debt, obligation or liability of the limited liability company solely by reason of being a member or manager of the limited liability company[.]”

In contrast, a sole proprietor is exclusively liable for the debts of the business because there is no legal distinction between the sole proprietorship and its owner. “The universal rule is that the sole proprietor is personally responsible for the activities of the business.” *See Georgantas v. Country Mut. Ins. Co.*, 570 N.E.2d 870, 873 (Ill.App. 1991); *See also Sec’y v. Carter*, 2012 N.M. App. Unpub. LEXIS 95, 2012 WL 868895 (N.M. Ct. App. February 16, 2012) (non-precedential).

The consequence in this matter is that if the limited liability company is liable for the tax liability, then the liability rests exclusively with the company, and not its single member, Ms. Koebnitz. In contrast, if the sole proprietorship is liable, then Ms. Koebnitz is personally responsible for the activities of the business.

In this case, Ms. Koebnitz with her husband’s assistance, organized New Mexico Depo, LLC in 2012. From the date of organization onward, she intended for it to supplant her sole proprietorship in both ownership and operation of New Mexico Depo. However, not until 2018, while this protest was already pending, did she or her spouse register the limited liability company with the Department. This was well after the principal liability at issue in this protest had been incurred and assessed.

Taxpayer’s counsel argued that this was inconsequential because from the inception of the limited liability company until it ceased its operations, it was that entity engaging in business in New Mexico, not the sole proprietorship, and its registration should be given retroactive effect. For the reasons that follow, the Hearing Officer is not persuaded.

The Department’s mission requires that it be able to follow and distinguish numerous taxpayers in order to fairly, properly, and accurately administer the tax laws of this state. *See*

NMSA 1978, Section 9-11-6; Section 7-1-4.2. In order to facilitate its mission, the Legislature enacted NMSA 1978, Section 7-1-12 A which provides “[t]he secretary by regulation shall establish a system for the *registration and identification of taxpayers* and *shall* require taxpayers to comply therewith.” (Emphases Added).

In compliance with Section 7-1-12 A, the Department established Regulation 3.1.1.15 (A) (1) NMAC requiring the secretary of the Department to develop and maintain systems “for the *registration and identification of taxpayers* who are subject to taxes and tax acts listed in Section 7-1-2 NMSA 1978 and taxpayers *shall* comply therewith.” (Emphases added). The use of the word “shall” as provided in the statute and regulation indicates that the provision is mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary).

In this protest, New Mexico Depo, the limited liability company failed to comply with that procedure which left New Mexico Depo, the sole proprietorship, obligated for reporting and paying taxes. Although one might be inclined to characterize the failure to register as placing form over substance, the result is more significant. Registration is the Department’s primary method for *identifying* taxpayers, and therefore assuring their compliance with the tax laws of New Mexico. Had the Legislature not imposed a mandatory duty to self-register, then the incredible, and perhaps impossible, task of seeking out and identifying every taxpayer engaging in business in New Mexico would have descended on the Department, allowing some taxpayers to elude their tax obligations by remaining slightly out of its sight. This is clearly what the Legislature intended to avoid.

In this protest, New Mexico Depo claimed that the limited liability company was obligated for the assessed taxes even though neither Mr. Koeblitz nor Ms. Koeblitz notified the Department, though the mandatory procedure, that the identity of the taxpayer in this protest had changed. This is significant because although both entities were engaged in the same business, had nearly identical names, and were owned and operated by Ms. Koeblitz, they were distinct and separate entities from one another. *See* NMSA 1978, Section 53-19-10 A (“A limited liability company formed pursuant to the Limited Liability Company Act is a separate legal entity.”). Yet, they were so similar in other ways, that it would be unreasonable to presume that the Department would be on notice of the change without some affirmative steps by the taxpayer. From its standpoint, the sole proprietorship was the taxpayer during the periods of time relevant to the assessment.

In contrast, New Mexico Depo’s position places the Department in the untenable position of not being able to rely on the accuracy of its registration and identification system for managing hundreds of thousands, or perhaps millions of taxpayer accounts. The effect would encourage some taxpayers to exploit that vulnerability through something akin to business-structure shapeshifting, in which a taxpayer might attempt to circumvent personal obligation for a mounting tax liability by discreetly shifting from one form of entity to another, and then deflect an assessed liability to an insolvent entity that the Department never even knew existed.

The Hearing Officer does not intend to imply or suggest that this was the intention of Mr. or Ms. Koeblitz, but this illustration exemplifies the absurdity that results from their construction of the law, which the Legislature did not intend in any of the enactments thus far referenced. *See Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401, 962

P.2d 1236 (it is a canon of statutory construction to the plain wording of a statute except if there is ambiguity, error, absurdity, or a conflict among statutory provisions).

The scenario presented in this protest is analogous to *The Matter of the Protest of Louie Casias*, Decision and Order No. 17-25 (non-precedential). Although counsel for New Mexico Depo asserted that the analysis in *Casias* was incorrect, at least with respect for how it would apply in this protest, the New Mexico Court of Appeals summarily affirmed that Decision and Order on October 29, 2018. *See Casias v. N.M. Taxation and Revenue Dep't*, No. A-1-CA-36489.

In the Notice of Proposed Summary Disposition entered on September 13, 2018, and subsequently affirmed on October 29, 2018, Chief Judge Vanzi recognized that NMSA 1978, Section 53-19-13 (1993) stated “[e]xcept as otherwise provided in the Limited Liability Company Act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company.” Chief Judge Vanzi went on to further note, as the hearing officer similarly did in that protest, that the section concludes with the following language: “Nothing in this section shall be construed to immunize any person from liability for the consequences of his own acts or omissions for which he otherwise may be liable.”

Consequently, Chief Judge Vanzi wrote: “It appears that, in this case, Casias incurred the tax liability of Casias Trucking as a sole proprietorship. Therefore, we are not convinced that Casias has demonstrated that the hearing officer erred below.” *See Casias v. N.M. Taxation and Revenue Dep't*, No. A-1-CA-36489 (Notice of Proposed Summary Disposition entered September 13, 2018 and affirmed October 29, 2018). The same logic applies in the present matter as well.

New Mexico Depo has failed to establish that the tax obligation at issue in this protest was that of New Mexico Depo, LLC. Rather, New Mexico Depo, the sole proprietorship, incurred the obligation to report and pay taxes in New Mexico when it registered on or about January 23, 2009, and there was never any update to the Taxpayer's registration that would have essentially substituted the limited liability company for the sole proprietorship during any period of time relevant to the assessment.

As similarly discussed in *Casias*, the Hearing Officer finds the concept of novation to be informative and instructive. The New Mexico Supreme Court in *Beebe v. Fouse*, 27 N.M. 194, 196 (1921) explained that “[a] novation ... as understood in modern law, is a mutual agreement, between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another, or a like agreement for the discharge of a debtor to his creditor by the substitution of a new creditor.”

Ms. Koeblitz, by registering to engage in business as a sole proprietor agreed that she would be personally liable for the tax obligations of her sole proprietorship. In turn, the Department issued a unique CRS number through which returns and payments would be submitted. New Mexico Depo, LLC was not a party to that arrangement because it did not yet exist, similar to the facts in *Casias*.

New Mexico Depo essentially asserts that a novation occurred because New Mexico Depo, LLC substituted for New Mexico Depo, the sole proprietorship. However, novation requires the *mutual agreement*, between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another. *Mutual agreement* may be accomplished with mere compliance with the Department's

mandatory registration and identification procedure, but that did not occur in this protest, at least during the relevant period of time.

New Mexico Depo proffered evidence which if afforded any weight, might tend to mitigate its failure to update its registration for the sole proprietorship or initially register the limited liability company. However, the Hearing Officer found that evidence to be unreliable.

The Hearing Officer afforded minimal weight to Mr. Koebnitz' testimony that Department employees advised him that he was required to do nothing with regard for registering the limited liability company with the Department, or taking other steps in reference to closing out the sole proprietorship. Mr. Koebnitz presented as a sophisticated individual; a litigation attorney with more than 25 years of experience. However, he was unable to recall the names of any individuals with whom he allegedly spoke, and documented nothing in writing in reference to his interactions with those employees.

Although it was evident that Mr. Koebnitz communicated with the Internal Revenue Service in reference to various questions and concerns relating to the limited liability company, the IRS does not administer New Mexico tax law. Moreover, communications with the IRS demonstrated that Mr. Koebnitz' inquiries were directed primarily toward income tax under federal law, which is dissimilar from the New Mexico gross receipts tax. This caused the Hearing Officer to have some reservation regarding whether inquiries to the Department were actually in reference to income tax, instead of gross receipts tax, because income tax seemed to be a major area of concern during the first half of 2012.

Mr. Koebnitz also asserted reliance on a portion of *FYI-105 (Gross Receipts & Compensating Taxes: An Overview)*, Rev. 7/2014, for the proposition that New Mexico Depo,

the sole proprietorship, was not required to update its business tax registration, and the limited liability company was not required to submit a new registration, citing to a question and answer appearing on page 48². *See* Taxpayer Exhibit 17-2.

Although New Mexico Depo tendered the 2014 version of the publication, Mr. Koebnitz testified that he relied on the version that would have been in effect during the early portion of 2012, and testified that the 2014 version was substantially similar to the version he recalled from 2012. The Hearing Officer therefore took administrative notice of *FYI-105, Rev. 7/20/2011*, effective July 1, 2011 to June 30, 2012.

The particular question and answer Mr. Koebnitz referenced was contained in the section entitled Responses to Common Questions and Concerns of CRS Taxpayers. *See id.*, Page 43 – 46. On Page 45, it states as follows:

If I currently have an identification number from the Taxation and Revenue Department as a registered proprietorship (i.e. sole owner) and later decide to incorporate, may I continue to use this number?

No. You must cancel the identification number issued to you as a proprietorship and apply for a new identification number as a corporation. The incorporation of a business qualifies as a change in form of ownership. Upon applying for your identification number, you should indicate your date of incorporation as the "start business date" on the Application for Business Tax Identification Number (ACD-31015) for the new number.

Mr. Koebnitz asserted that because the above-quoted answer specifically discussed corporations only, it was reasonable for him to infer that limited liability companies, and perhaps every other type of business entity not specifically discussed, were not be required to register and

² New Mexico Depo proffered pages 45 and 48 of the referenced 2014 version of *FYI-105*. However, the Hearing Officer took administrative notice of the 2011-2012 version in its entirety.

obtain a new CRS number. However, Mr. Koeblitz' interpretation was misplaced and unreasonable. The above-quoted answer was drafted for the purpose answering a common question specific to corporations. Its silence regarding limited liability companies is attributable only to the fact that the question did not refer to limited liability companies.

New Mexico Depo also argued that the limited liability company's registration on June 13, 2018 should be retroactive to its inception. However, it offers no legal authority for that proposition. Although Ms. Gage discussed scenarios where the Department might identify the existence of a non-filing taxpayer, and thereafter establish a CRS account and number retroactive to the period when a non-filing taxpayer incurred liability, that scenario is not applicable in this protest. The sole proprietorship was registered and therefore subsequently assessed. Registering the limited liability company in June of 2018, well after the liability was incurred, and after the hearing in this matter was already scheduled for a hearing, was clearly an afterthought.

It is also undisputed that Ms. Gage modified New Mexico Depo's registration on or about May 9, 2014 to indicate that it was a "Ltd. Liability Company". In review, New Mexico Depo, the sole proprietorship, registered with the Department on or about January 23, 2009. The Department assigned a CRS number and New Mexico Depo proceeded to engage in business until it ceased operations in 2016, and closed its account. In the interim, Ms. Gage determined while investigating an alleged Schedule C mismatch, that a limited liability company, New Mexico Depo, LLC, had been organized, and updated its records to recognize that New Mexico Depo, the sole proprietorship assigned CRS No. 03-152861-00-9, was now operating as a limited liability company.

Although the update could perhaps affect tax liabilities incurred after May 9, 2014, neither the New Mexico Depo assessment nor the fully abated Haute Mountain Girl assessment concern that period of time. Therefore, the Hearing Officer will not opine on the potential significance of the 2014 update to the facts of this protest.

Based on the foregoing, New Mexico Depo, the sole proprietorship, should be liable for the amounts due under the assessment.

Penalty.

As stated previously, New Mexico Depo did not present evidence to dispute the amounts contained in the assessment. Its primary argument was directed to which person, or entity, should bear ultimate responsibility for the liability, Ms. Koebnitz, as the sole proprietor, or the limited liability company. However, Ms. Koebnitz also claimed that she significantly relied on the advice of her spouse, a litigation attorney with more than 25 years of experience in the practice of law.

For this reason, it might appear that Ms. Koebnitz is seeking abatement of penalty even though she does not appear to dispute that the underlying tax was not paid. The Hearing Officer will nevertheless briefly address the issue of whether Ms. Koebnitz' reliance on her husband might provide some ground for the abatement of penalty.

When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(Emphasis Added)

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence" even if a taxpayers actions or inactions were unintentional.

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, New Mexico Depo was negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC because it failed to take appropriate steps to close the sole proprietor's CRS account and register the limited liability company as a new business, not to mention the *failure to pay the underlying amount of tax due*.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, as New Mexico Depo does in the present matter, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Regulation 3.1.11.11 (D) NMAC which implements Section 7-1-69 (B) goes on to permit an abatement of penalty when "the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent[.]"

However, Mr. Koeblitz candidly admitted that he did not practice tax law, and never claimed that he had any specialized knowledge or expertise in state taxation. For this reason,

there was no evidence that Mr. Koebnitz was competent *tax* counsel as that term is utilized in Regulation 3.1.11.11 (D) NMAC. This observation in no way reflects on Mr. Koebnitz' experience as an attorney, but taxation was simply not within his field of expertise.

Moreover, there was no evidence to suggest that Ms. Koebnitz reasonably relied on her spouse's advice after full disclosure of all relevant facts. Ms. Koebnitz candidly admitted that her focus was on the work of court reporting, and that she had no understanding and minimal involvement with other aspects of operating her business.

Although the Hearing Officer finds no fault with Ms. Koebnitz relying on her spouse for assistance in operating her business, her hands-off approach stands in opposition to the duties of those engaging in business in New Mexico. In a self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Generally, a taxpayer cannot "abdicate this responsibility merely by appointing an accountant as its agent in tax matters." *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795. Civil negligence penalty is appropriate in these circumstances and Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty in this case.

CONCLUSIONS OF LAW

1. New Mexico Depo filed a timely written protest to the assessment issued under Letter ID No. L1017684784, and jurisdiction lies over the parties and the subject matter of this protest.
2. A hearing was timely held in accordance with NMSA 1978, Sec. 7-1B-8 (A).

3. New Mexico Depo, the sole proprietorship, is obligated for the liability subject of the assessment issued under Letter ID No. L1017684784 since that was the identity of the taxpayer engaging in business in New Mexico. *See* NMSA 1978, Section 7-1-12 A; *Georgantas v. Country Mut. Ins. Co.*, 570 N.E.2d 870, 873 (Ill.App. 1991); *Sec'y v. Carter*, 2012 N.M. App. Unpub. LEXIS 95, 2012 WL 868895 (N.M. Ct. App. February 16, 2012) (non-precedential); *See Casias v. N.M. Taxation and Revenue Dep't*, No. A-1-CA-36489 (Notice of Proposed Summary Disposition entered September 13, 2018 and affirmed October 29, 2018) (non-precedential).

4. New Mexico Depo is not entitled to abatement of penalty under NMSA 1978 Section 7-1-69 (2007).

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

DATED: November 20, 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.

CERTIFICATE OF SERVICE

On November 20, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail

Interagency Mail

INTENTIONALLY BLANK

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