

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
MERIDIAN OIL, INC.

No. 94-01

DECISION AND ORDER

This matter comes on for decision before Gerald B. Richardson, Hearing Officer, based upon briefs submitted by the parties. Meridian Oil, Inc. (hereinafter "Meridian") was represented by Michael B. Campbell, Esq. and Mark F. Sheridan, Esq. of Campbell, Carr, Berge & Sheridan, P.A. The Taxation and Revenue Department (hereinafter "Department") was represented by Margaret B. Alcock, Special Assistant Attorney General.

Based upon the arguments and the undisputed facts presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Commencing in April of 1992, the Department and the State Land Office, conducted a concurrent audit of Meridian to determine whether Meridian had properly paid New Mexico oil and gas taxes and state royalties.
2. The Department's audit manager signed a "Confidentiality Agreement" for Meridian which acknowledges that pursuant to Section 7-1-8 NMSA 1978 it is unlawful to reveal information about Meridian acquired as a result of the audit "except as permitted in 7-1-8." The Confidentiality Agreement further provided that documents would be kept confidential pursuant to Section 19-1-2.1 NMSA 1978.
3. During the course of the concurrent audit, Meridian provided the auditors access to documents and information which it considered to be proprietary or confidential information.
4. On September 30, 1993, the Department issued the Meridian Audit Report.
5. The Meridian audit report concluded that Meridian was responsible for the payment

of additional oil and gas taxes. A closing agreement was entered into between the Department and Meridian as a result of the audit report or the assessment issued as a result of the audit report in October, 1993. The closing agreement settled and resolved any and all issues between the Department and Meridian resulting from the Meridian audit report.

6. On January 6, 1994, the Department received a written request for a copy of the Meridian audit report from Cinco General Partnership, hereinafter, "Cinco," which represented that it is a working interest owner in certain natural gas producing properties in the San Juan Basin, New Mexico.

7. On January 14, 1994, the Department, by letter to Meridian's counsel, notified it of Cinco's request for the Meridian audit report. The letter further informed Meridian of the Department's position that Cinco, as a working interest owner, would be entitled to the audit report and that it had informed Cinco's representatives that the Department would make a copy of the audit report available to Cinco on February 1, 1994. The Department's letter stated that notice was being given to Meridian in order to give it the opportunity to seek judicial construction of the statutes involved.

8. On February 1, 1994, Meridian filed suit against the Department and the Attorney General seeking a declaratory judgment and a temporary restraining order and preliminary and permanent injunction prohibiting the Department from honoring Cinco's request.

9. On February 1, 1994, the Santa Fe County District Court entered a temporary restraining order prohibiting the Department from disclosing the audit report.

10. On February 6, 1994, Cinco filed an unopposed motion to intervene in the declaratory judgment action.

11. On February 8, 1994, Meridian filed a protest with the Department, alleging that the Department's decision to release the audit report was an application to Meridian of Section 7-1-8 of the Tax Administration Act, "TAA", Sections 7-1-1 *et seq.* NMSA 1978 and that the action pending

in district court should be decided in the context of an administrative hearing.

12. On February 9, 1994, the Department, by letter, informed Meridian that it rejected Meridian's February 8, 1994 correspondence with the Department as a valid protest under Section 7-1-24 NMSA 1978 (1993 Repl. Pamp.) on the grounds that there is no provision in the Tax Administration Act to protest anticipated actions of the Department and that it did not believe that disclosure of information under the Inspection of Public Records Act is an application to Meridian of a provision of the Tax Administration Act which can be protested pursuant to Section 7-1-24.

13. On February 14, 1994, acting on a verified petition filed by Cinco, the district court issued an alternative writ of mandamus ordering the Department to allow Cinco to inspect the Meridian audit report or to appear at a hearing on February 18, 1994 to show cause why the report should not be released.

14. Subsequently, the district court quashed the writ of mandamus, determining that it does not have subject matter jurisdiction to proceed with Cinco's claims under the Inspection of Public Records Act because that Act is superseded by the Tax Administration Act, specifically Section 7-1-22 NMSA 1978. The court directed the Department to either hear Meridian's protest or make a determination that it cannot hear the protest. Finally, the court granted a preliminary injunction restraining the Department from disclosing the Meridian audit report pending resolution of this controversy.

15. On March 10, 1994, Meridian filed the instant protest with the Department, protesting the Department's determination which rejected as a valid protest Meridian's protest filed on February 8, 1994.

DISCUSSION

This case presents a question of first impression concerning the interaction between the Tax Administration Act (hereinafter TAA)¹ and the Inspection of Public Records Act (hereinafter

¹ Chapter 7, Article 1 NMSA 1978, being Sections 7-1-1 through 7-1-82 NMSA 1978.

IPRA)². The context for this dispute is that Cinco³ made a request of the Department under the IPRA for the Meridian audit report. The Department made a determination that the information requested by Meridian was not confidential under the confidentiality provision of the TAA, Section 7-1-8. Section 7-1-8 is implicated because Section 14-2-1(F) of the IPRA sets forth an exception "as otherwise provided by law" to the public's right to inspect any public records of the state. The Department informed Meridian of Cinco's request and of its intent to honor the request "in order to give Meridian an opportunity to seek judicial construction of the pertinent statutes". (Department's Exhibit 3). Meridian filed a complaint for declaratory judgment in the district court for Santa Fe County and sought to enjoin the disclosure, but it also filed a protest, pursuant to Section 7-1-24 NMSA 1978 (1993 Repl. Pamp.) to the Department's decision to honor Cinco's request. The Department rejected Meridian's protest as not being authorized under Section 7-1-24 (Meridian's Exhibit D). It is that determination which Meridian has protested by a subsequent protest and which is at issue herein.⁴ Thus, the sole issue to be determined is whether Meridian's letter of February 8, 1994 constituted a valid protest under Section 7-1-24.

In pertinent part, Section 7-1-24(A) provides:

Any taxpayer may dispute the assessment to the taxpayer of any amount of tax, *the application to the taxpayer of any provision of the Tax Administration Act* or the denial of or failure to either allow or deny a claim for refund made in accordance with Section 7-1-26 NMSA 1978 by filing with the secretary a written protest against the assessment or against the application to the taxpayer of the provision or against the denial of or the failure to allow or deny the amount claimed to have been erroneously paid as tax. . . . (emphasis added).

² Chapter 14, Article 2 NMSA 1978, being Sections 14-2-1, 14-2-4 through 14-2-12 NMSA 1978 (1994 Cum. Supp.).

³ There appears to be a dispute between the Department and Meridian about whether Cinco is an interest holder in certain oil and gas properties who would be entitled to see audit workpapers under Section 7-1-8(U)(3) NMSA 1978 or a competitor of Meridian's. It is immaterial to the resolution of the instant matter to determine this issue.

⁴ Since the Department has not contested the Hearing Officer's jurisdiction to proceed in deciding the instant matter, the Department apparently agrees that in rejecting Meridian's protest of February 8, 1994 as a valid protest under Section 7-1-24, that it has "applied" a provision of the TAA which Meridian may contest by filing a second protest pursuant to the same provision.

In denying the validity of Meridian's protest, the Department informed Meridian that:

"[T]here is no provision in the Tax Administration Act for protesting anticipated actions of the Department. In addition, the Department does not agree that a disclosure of information required by the Inspection of Public Records Act is an application to Meridian of a provision of the Tax Administration Act."

(Meridian Exhibit I). The Department's position is further clarified by the letter from Department's counsel to Meridian's counsel after the Department's counsel had reviewed Meridian's protest. In essence, the Department takes the position that there has been no application of the Tax Administration Act to Meridian because the Department has determined that the provisions of Section 7-1-8 of the TAA do *not* apply to prohibit the disclosure of the Meridian audit report. (Meridian Exhibit J).

Section 7-1-8 is written as a general prohibition against the Department revealing any information about taxpayers with numerous (over 20) exceptions to the general prohibition. In the context of this case, the Department determined that Section 7-1-8(U)(3) operates as an exception to taxpayer confidentiality which permits the disclosure of the Meridian audit report to Cinco.

(Meridian Exhibit F). Section 7-1-8 (1993 Repl. Pamp.) provides in pertinent part as follows:

It is unlawful for any employee of the Department or any former employee of the department to reveal to any individual other than another employee of the department any information contained in the return of any taxpayer made pursuant to any law subject to administration and enforcement under the provisions of the Tax Administration Act or any other information about any taxpayer acquired as a result of his employment by the department, except:

* * * * *

U. information with respect to the taxes or tax acts administered pursuant to Subsection B of Section 7-1-2 NMSA, except that:

* * * * *

(3) audit workpapers and the proprietary information contained in such workpapers shall not be released except to a person having a legal interest in the property that is subject to the audit,

Apparently, the Department's analysis of Section 7-1-8 went something like this⁵:

1. the Meridian audit report contains information about a taxpayer acquired as a result of employment by the Department by the Department's auditors, which would be confidential under the general confidentiality provision;

2. the exception to confidentiality found in Subsection U, which refers to the oil and gas tax programs under which Meridian was audited, would operate to except information acquired by the Department pursuant to the oil and gas tax programs specified from the general confidentiality provision;

3. the exception for audit workpapers under subpart (3) operates to except oil and gas tax program audit workpapers from the exception to confidentiality provided by Subsection U of 7-1-8, making them confidential; and

4. the exception to subpart (3) which allows oil and gas audit workpapers to persons having a legal interest in the property audited operates to remove any confidentiality.

It is obvious from this exercise, that the Department engaged in a fairly rigorous exercise of statutory construction to determine whether the Meridian audit report could be disclosed to Cinco under Section 7-1-8. The issue presented is whether the Department's determination that Section 7-1-8 does not operate to provide confidentiality to the information sought by Cinco is an *application* of Section 7-1-8 of the TAA to Meridian which could be protested under Section 7-1-24(A).

When interpreting a statute the primary concern is to determine the legislature's intent, which is determined primarily from the language of the statute and those words chosen will be given their ordinary and usual meaning unless a different intent is clearly indicated. *Hammonds v.*

⁵ As noted in footnote 3, the correctness of the Department's interpretation of Section 7-1-8 is not at issue herein. It is only discussed to provide a context for the determination of the issue herein, whether a provision of the TAA has been applied to Meridian.

Freymler Trucking, Inc., 115 N.M. 364, 851 P.2d 486 (Ct.App. 1993). Webster's Third New International Dictionary defines application as the act of applying, as in "the bringing to bear (as of one general statement upon another) by means of elucidation." Regardless of the outcome of the Department's determination as to whether the audit report was confidential, I have little doubt that in arriving at its ultimate determination, the Department, was required to "bring to bear" the provisions of Section 7-1-8 to the circumstances surrounding the Meridian audit and the information Meridian provided the Department in that audit. The Department's determination that the audit report was not confidential required a four step analysis where the language of three different provisions of Section 7-1-8 was brought to bear upon the facts presented to arrive at the determination. Thus, under the plain and ordinary meaning of "application", there was an application of the provisions of Section 7-1-8 to Meridian when the Department applied its interpretation of that statute to the information it acquired from Meridian and which Meridian claims to be confidential.

This interpretation is further supported by the law's abhorrence of a right without a remedy. The confidentiality provision clearly sets up a general right to confidentiality which covers information the Department obtains from taxpayers. There is a dispute which remains unresolved at this time, between Meridian and the Department as to whether Cinco is an interest owner in the property which was subject to the Department's audit, which would entitle it to the information sought under 7-1-8(U)(3). There is no provision of the IPRA which would grant Meridian or any person wishing to assert that some other provision of law prevents the release of public records standing to challenge a public agency's determination that the information was subject to release under that act. While the IPRA specifically provides that administrative remedies need not be exhausted prior to proceeding to district court to enforce a IPRA request, that provision, Section 14-2-12(C) must be read in conjunction with Section 14-2-12(A), which grants the right to enforce an IPRA request only to the requestor or the attorney general or the district attorney. That

provision has no bearing on the issue of whether there may be an administrative remedy provided for a party claiming privilege or confidentiality for the information requested. The IPRA simply fails to address or provide for a determination of the rights of such a party. Yet, in the context of the dispute between Meridian and the Department, there can be no doubt that when considering the TAA's general assertion of confidentiality over taxpayer information, a substantive right is at issue. Given that situation, it makes some sense that the legislature would have contemplated an opportunity to adjudicate that right in an administrative forum within the agency charged with the interpretation and administration of the laws implicated. Section 7-1-22 lends some support to that interpretation, since it would deny jurisdiction to any district court to entertain any proceeding by a taxpayer in which he calls into question "the application to him or any provision of the Tax Administration Act" where he failed to exhaust his administrative remedies unless the action was an authorized refund action under Section 7-1-26. Of course, the Department would argue that since the same language about "application" of a provision of the TAA is used in Section 7-1-22, and since it did not apply 7-1-8 to Meridian, that this proves nothing. Regardless of whether one agrees that there was an application of Section 7-1-8 in this instance, Section 7-1-22 can be read as a statement of legislative preference to have issues concerning the interpretation of the Tax Administration Act addressed by the Department administratively, since Section 7-1-26 only applies in the context of a dispute about allegedly overpaid taxes, a much smaller subset of tax litigation than cases where unpaid taxes or the application of provisions of the TAA are involved.

The Department argues that this case is not about the application of the TAA to Meridian because any application of the TAA applied to Meridian during the audit and Meridian should have disputed the confidentiality of the disputed information during the context of that audit and not elsewhere. Additionally, it argues that since all issues about disputed taxes are now resolved between Meridian and the Department, that there is no jurisdiction in the administrative forum over this dispute. Although it is clear that Meridian could have disputed the issue of confidentiality at

the time of the audit by requiring the Department to issue a subpoena for the information and resisting the subpoena, I find nothing in the TAA which provides that this is an exclusive remedy. This view takes too narrow a view of taxpayer confidentiality under Section 7-1-8. Confidentiality is an ongoing concept. Section 7-1-8 contains no limitation period or sunset clause which would allow confidential information to be released at some future date. If information is confidential, it remains so even though the Department may have resolved any taxes implicated by the information a taxpayer provided to the Department. Furthermore, Section 7-1-23 which does provide for exclusive remedies for taxpayers to dispute taxes does not apply to this dispute, which involves the interpretation of the confidentiality provisions. Given the ongoing nature of taxpayer confidentiality, there is nothing in the applicable statutes which prohibits administrative jurisdiction over this dispute.

CONCLUSIONS OF LAW

1. Meridian filed a timely, written protest, pursuant to Section 7-1-24 NMSA 1978, to the Department's application of Section 7-1-24 to determine that Meridian's letter of February 8, 1994 letter of protest was not a valid protest. Accordingly, jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's determination that the Meridian audit report was not confidential pursuant to Section 7-1-8 NMSA 1978, was an application of Section 7-1-8, a provision of the Tax Administration Act, to Meridian.

3. Section 7-1-24(A) grants Meridian the right to administratively protest the Department's determination that Meridian's audit report was not confidential pursuant to Section 7-1-8 NMSA 1978.

For the foregoing reasons, Meridian's protest is hereby granted. The Department is hereby ordered to accept as a valid protest Meridian's protest of February 8, 1994.

Done, this 31st day of October, 1994.