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

IN THE MATTER OF THE PROTEST OF
PECOS VALLEY DAIRY SUPPLY, INC.
ID. NO. 02-100121-00 9, PROTEST TO NO. 98-03
DETERMINATION OF UNTIMELY PROTEST

DECISION AND ORDER

This matter came on for formal hearing on December 22, 1997 before Gerald B. Richardson, Hearing Officer. Pecos Valley Dairy Supply, Inc., hereinafter, "Taxpayer", was represented by Phil Brewer, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. Based upon the evidence and the arguments submitted, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Commencing in 1992, the Taxpayer operated a business which sold, installed and serviced milking machines on dairy farms and sold various chemicals used in the dairy business, such as pit dip and soap.

2. The Taxpayer's business location and mailing address was 227 E. Darby Road, Dexter, New Mexico 88230.

3. At all times pertinent hereto, the Taxpayer's address of record with the Department, as reflected in the Taxpayer's original registration and any registration updates submitted to the Department by the Taxpayer was 227 E. Darby Road, Dexter, New Mexico 88230.

4. As of the end of August, 1995, the Taxpayer sold its assets, such as its inventory, tools, trucks and accounts receivable to Mr. Ken Romero. The corporation itself was not sold, although it is no longer conducting business in New Mexico. Mr. Romero operates a business called Pecos Valley Dairy Supply from the same business location, 227 E. Darby Road, Dexter, New Mexico, as had formerly been occupied by the Taxpayer.

5. On September 28, 1995 the Taxpayer submitted a form entitled "Registration Update" to the Department, requesting that the Department cancel the taxpayer identification number it had previously operated under, effective August 31, 1995. The reason stated for the cancellation was that the business had been sold to Kenny Romero, d/b/a Pecos Valley Dairy Supply at 227 E. Darby Road, Dexter, New Mexico.

6. The Registration Update form submitted to the Department by the Taxpayer also had a place on it for the Taxpayer to change its address in the records of the Department. That part of the form was left blank.

7. The Registration Update form was prepared by the Taxpayer's accountants, Ritter, Barr & Company, a certified public accounting firm, and was signed by Mr. Keith Brown, President of the Taxpayer.

8. In the Spring of 1996, the Department performed an audit on the Taxpayer for the periods of January 1993 through August, 1995. Mr. Brown authorized Ritter, Barr & Company

to be his authorized representatives to act on behalf of the Taxpayer with respect to the audit and this fact was conveyed to the Department.

9. On May 3, 1996, Mr. R. Cameron Hull, Assistant Bureau Chief of the Department's Roswell, New Mexico office, wrote to Ms. Joni Barr, of Ritter, Barr & Co. informing her that the audit of the Taxpayer was completed and enclosing copies of the workpapers showing the results of the audit. The letter informed the Taxpayer that the audit workpapers were not an assessment because the audit was subject to further review by the Department's Audit Services Offices prior to final assessment. Mr. Hull further informed Ms. Barr that a conference at the district office in Roswell could be held if requested within ten days. Finally, the letter enclosed copies of the Department's publications informing taxpayers of their administrative remedies to protests assessments of tax by the Department.

10. The first page of the Taxpayer's audit narrative reflects that both Ms. Barr and Mr. Brown were contact persons with respect to the audit. It also reflects the Taxpayer's mailing address to be 227 E Darby Road, Dexter, New Mexico.

11. On May 15, 1996 an informal district conference was held at the Department's Roswell office to discuss the Taxpayer's audit. The Taxpayer was represented by Mr. Walter Barr and Mr. David McKee of Ritter, Barr & Co. Attending the conference for the Department were Mr. R. Cameron Hull, Mr. David Hecht, the auditor who conducted the audit, and Mr. Raymond Anaya, the Audit Supervisor.

12. At the informal district conference the Taxpayer's representatives and the Department's representatives discussed issues and disputes concerning the Department's proposed audit liability. There was no discussion as to where any assessment resulting from the

audit should be mailed. Mr. McKee requested that the Department send its response to the matters raised by the Taxpayer at the informal district conference to both Ritter, Barr & Co. and the Taxpayer. There was also discussion about a Department ruling which was alleged to support the Taxpayer's arguments with respect to the audit. Because the Taxpayer's representatives did not have the ruling or its number with them, it was to be provided to the Department's representatives for their consideration within ten days.

13. On May 23, 1996 Mr. Hull and Mr. McKee had a telephone conversation as a follow up to the informal district conference. In that conversation, Mr. McKee provided Mr. Hull with the ruling number previously requested and he also provided Mr. Hull with Mr. Brown's address in Texas. The address provided by Mr. McKee was # 10 Beyers Center, Dublin, Texas 76446.

14. On May 29, 1996 Mr. Hull wrote to Mr. Brown at the Texas address provided, to inform him of the Department's response to the issues raised at the informal district conference. The letter rejected the arguments raised at the conference and advised the Taxpayer that the audit would now be sent for its final review and assessment and advised that the Taxpayer would have formal remedies once the assessment was made. Copies of this letter were provided to Mr. Barr and Mr. McKee of Ritter, Barr & Co.

15. After either an informal district conference is conducted or if none is requested, it is Department procedure that an audit is sent to the Department's Audit Services Office in Santa Fe for final review and assessment. The Audit Services Office encodes the information concerning the amount assessed, the tax programs assessed, and the Taxpayer identification number into the Department's computer for purposes of generating the Department's final

assessment. The District office generating the audit never sees the assessment when it is issued and does not have any control over when the assessment is actually generated or mailed to a taxpayer, nor does it have any control over where the assessment is mailed. All assessments resulting from audits are hand-stamped by the Audit Services Office, noting the day that the assessment was mailed to a taxpayer for purposes of calculating the timeliness of any administrative protest to the assessment.

16. All assessments are computer generated by the Department. The Department's computer is programmed to address all assessments to taxpayers at the taxpayer's address of record, as indicated in the Department's registration records for a taxpayer. Because of this programming, a taxpayer desiring that an assessment be mailed to an address other than its present address of record would need to file a change of registration, indicating a new address of record, so that the Department's registration records can be changed.

17. It is the Department's policy that there may be no changes made to a taxpayer's address of record as reflected in the Department's registration records absent a written document, signed by the taxpayer, requesting an address change on the registration records of the department.

18. On July 5, 1996 the Department issued Assessment No. 2046229 to the Taxpayer, assessing $60,495.56 in gross receipts tax, $899.64 in compensating tax, $6,139.55 in penalty and $20,697.36 in interest. The assessment was hand-stamped by the Audit Services Office, indicating that it was actually mailed to the Taxpayer on July 8, 1996. The assessment was mailed to the Department's address of record for the Taxpayer, 227 E Darby Rd., Dexter, NM 88230.

19. Sometimes the Taxpayer receives mail which has been forwarded to it by Mr. Romero, from the Taxpayer's former business location in New Mexico, but apparently, sometimes mail is not forwarded. Mr. Brown never received a forwarded copy of the Department's original assessment. He only became aware of the assessment sometime after August of 1996.

20. Sometime in September, 1996, Ritter, Barr & Co. became aware of a "Billing Notice" from the Department, billing the Taxpayer for the taxes, penalty and interest assessed by Assessment No. 2046229.

21. On September 27, 1996, Ritter, Barr & Co. wrote a letter to the Department purporting to protest "the adjustments in gross receipts tax liability set forth in your audit report letter dated May 3, 1996" on behalf of the Taxpayer.

22. Taxpayers may make a written request for an extension of time in which to file a protest to an assessment of tax for up to ninety days following the mailing of an assessment to a taxpayer and the Secretary of the Department is authorized to grant as much as sixty additional days in which to file a protest, when such a written request has been made.

23. Neither the Taxpayer, nor its representative, Ritter, Barr & Co., requested an extension of time to file a protest to Assessment No. 2046229.

24. On October 4, 1996, the Department responded to the September 27, 1996 letter from Ritter, Barr & Co. advising them that their September 27, 1996 letter cannot be considered a timely protest to Assessment No. 2046229.

25. On October 31, 1996, Ritter, Barr & Co. wrote the Department a letter protesting the Department's determination that its September 27, 1996 letter was not a timely protest.

DISCUSSION

The sole issue to be determined herein is whether a timely protest to the Department's assessment of tax was made under the facts and circumstances of this case. The determination of this issue will determine whether there is jurisdiction in this administrative forum to decide the matters in dispute between the parties with respect to the Department's assessment of tax.

Section 7-1-24 NMSA 1978 (1995 Repl. Pamp.) sets out the matters and the manner by which taxpayers may invoke the jurisdiction of the Department's administrative hearing process. Subsection A sets forth the matters which may be protested, and provides in pertinent part:

> 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.

Subsection B sets forth the time restrictions within which a protest may be filed and provides a mechanism by which a taxpayer can request an extension of time in which to file a protest. In pertinent part it provides as follows:

> Any protest by a taxpayer *shall be filed within thirty days of the date of the mailing to the taxpayer by the department of the notice of assessment* or mailing to, or service upon the taxpayer of other peremptory notice or demand, or the date of mailing or filing a return. Upon written request of the taxpayer made within the time permitted for filing a protest, the secretary may grant an extension of time, not to exceed sixty days, within which to file the protest. If a protest is not filed within the time required for filing a protest or, if an extension has not been granted within the extended time, the secretary may proceed to enforce collection of any tax if the

> taxpayer is delinquent within the meaning of Section 7-1-16 NMSA 1978. Upon written request of the taxpayer made after the time for filing a protest but not more than sixty days after the expiration of the time for filing a protest, the secretary may grant a retroactive extension of time, not to exceed sixty days, within which to file the protest provided that the taxpayer demonstrates to the secretary's satisfaction that the taxpayer was not able to file a protest or to request an extension within the time to file the protest and that the grounds for the protest have substantial merit. (emphasis added).

Thus, in order to be timely, a protest to an assessment of tax must be made within thirty days of its mailing or within the amount of time, not to exceed an additional sixty days, that the secretary has granted for filing a protest if an extension was requested and granted by the secretary of the Department.

The Taxpayer argues that its protest should be considered timely because the Department knew of Mr. Brown's new address in Texas prior to the date the assessment was issued and mailed, and the Department also knew how to contact the Taxpayer's representatives, Ritter, Barr & Co. and that the assessment should have been sent to either Mr. Brown's new address or to Ritter, Barr & Co. The Taxpayer also argued that the Department, at the informal district conference prior to issuing the assessment, had agreed to send the assessment to Mr. Brown at his Texas address and to Ritter, Barr & Co.

Although it is undisputed that the Department's representatives in its Roswell office were given Mr. Brown's new Texas address and were aware of Ritter, Barr & Co.'s involvement on behalf of the Taxpayer, I carefully reviewed the testimony of Mr. McKee who was at the informal conference on behalf of the Taxpayer, as well as the Department's employees who were also present. There was no conflict in their testimony with respect to the critical fact of whether

the Department had agreed to mail the assessment to Mr. Brown's new address and to Ritter, Barr & Co. Mr. McKee testified that at the informal conference he requested that the Department's "findings", or response to the arguments and information presented at the informal conference be mailed to Mr. Brown at his new address and to Ritter, Barr & Co. The evidence reflected that this was done by Mr. Hull by his letter of May 29, 1996. Under cross-examination, Mr. McKee also admitted that at that conference, there was no discussion of where the audit assessment would be sent. Thus, the Department did nothing to mislead or misrepresent where the assessment would be sent. Additionally, the Department's representatives in Roswell would have been careful not to misrepresent or mislead as to where the assessment would be sent. This is because they knew that once they send the audit to the Department's Audit Services Office in Santa Fe, they have no control over when, where or even if the assessment is issued, nor do they even receive a copy when it is issued. Thus, they would have no way to independently mail a copy to the Taxpayer's new address or to Ritter, Barr & Co. Additionally, the Department's representatives were well aware of the Department's policy and procedure that assessments are mailed to taxpayers at their address of record. They testified that had they been asked to mail the assessment to an address other than the Taxpayer's address of record, that they would have informed the Taxpayer that the Taxpayer would need to complete and file the form which formally requests that the Taxpayer's address of record be changed.

In making its arguments, the Taxpayer relies upon certain language in Section 7-1-9 NMSA 1978 (1995 Repl. Pamp.). Specifically, it relies upon the language in Subsection A, which provides in pertinent part:

> Any notice required or authorized by the Tax Administration Act 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.* (emphasis added).

Although the statute authorizes[1] the Department to mail notices, such as an assessment of tax, to taxpayers at either their address of record as shown upon their registration record, or to another address contained in the Department records, the statute, by its plain wording speaks only to the effectiveness of such a notice. It in no way requires the Department to mail notices to all addresses it may have and by its plain meaning, proves the effectiveness of the assessment at issue herein, which was mailed to the Taxpayer's address of record.

While it is most unfortunate that under the circumstances of this case, that the Taxpayer did not actually receive the notice of assessment of taxes, the Taxpayer is attempting to shift the blame for this occurrence onto the Department, when the responsibility for this occurrence actually falls upon the Taxpayer itself. Regulation TA 9:4, interpreting and implementing Section 7-1-9 provides as follows:

> All notices, returns or applications required to be made by the taxpayer must include the correct mailing address of the taxpayer *and the taxpayer must promptly advise the department in writing of any change in mailing address. If the department has prescribed a form or format for reporting a change of address, the form or format must be followed.* (emphasis added).

This regulation makes it clear that it is a taxpayer's responsibility to ensure that the Department has a correct and current address. This makes sense. It is the taxpayer who best knows their current and best address to assure that it receives important notifications from the Department

concerning its taxes. Also, as noted by the Department's witness, Rick Salazar, it is not uncommon for the Department's records to contain a number of different addresses for a Taxpayer. This is especially true for taxpayer who may have several business locations and for taxpayers whose tax departments might be located at a different location than their place of business in New Mexico. In such cases, while any of several addresses might ultimately reach the taxpayer, obviously there are addresses which are better in terms of assuring that the tax communication reaches the right parties within a taxpayer's organization in a timely manner.

It is also noteworthy that the Taxpayer did file a registration change request with the Department at the time it sold its business assets in New Mexico and ceased to do business here. While that form canceled the Taxpayer's registration number, the Taxpayer failed to fill out the portion of the form which would have changed its address on the Department's records. Having failed to keep the Department informed in the manner required of its best and most current address, the Taxpayer cannot now complain of the consequence of that failure, its failure to receive the Department's assessment in a timely manner.

The final argument made by the Taxpayer is that because its letter of September 27, 1996 came within the 90 days from the mailing of the assessment for filing a protest, providing that an extension of time has been requested, that the letter should be treated as a timely protest. There are at least two problems with this argument. In the first place, the letter does not protest the assessment of tax. Rather, it protests "adjustments in gross receipts tax liability set forth in your audit report letter dated May 3, 1996...." While the assessment was ultimately based upon the

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[1] Section 7-1-17(B)(2) specifically authorizes documents denominated as a "notice of assessment of taxes" to be mailed to taxpayers.

audit report adjustments, those adjustments are only proposed adjustments and do not affect a taxpayer's liability unless and until they are finalized in the form of a notice of assessment of tax. Even if this letter could be construed as a protest to the assessment however, it contains no language which could be construed as requesting an extension of time in which to file such a protest. The language of section 7-1-24 only authorizes the Department to grant an extension of time to file a protest "upon written request of the taxpayer...." Because no such request was made, the Department would not be authorized to treat the Taxpayer's letter as a timely protest.

As a final observation, although there has not been a timely protest to the Department's assessment of tax such as to invoke the jurisdiction of this administrative forum to determine the substance of the Taxpayer's objection to the Department's assessment of tax, the Taxpayer is not left without a remedy. Although it may present a hardship because of the amount of tax in dispute, the assessment may be paid and a refund claim submitted, asserting the Taxpayer's defenses to the assessment. If the Department denies any part of the claim for refund, the denial may be contested either administratively, pursuant to Section 7-1-24 or by filing suit in District Court, pursuant to Section 7-1-26.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest, pursuant to Section 7-1-24 NMSA 1978 to the Department's determination that its letter of September 27, 1996 did not constitute a timely protest to Assessment No. 2046229.

2. The Department's Assessment No. 2046229 was effective when mailed on July 8, 1996 to the Taxpayer at its address of record with the Department.

3. The Taxpayer failed to make a written request for an extension of time in which to protest Assessment No. 2046229.

4. The Taxpayer failed to file a timely protest, pursuant to Section 7-1-24 NMSA 1978 to Assessment No. 2046229.

5. This forum lacks jurisdiction to determine the issues which the Taxpayer has raised with respect to Assessment No. 2046229.

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

DONE, this 20th day of January, 1998.