

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

IN THE MATTER OF THE PROTEST  
OF ANTHONY TAFOYA  
TO DEMAND FOR PAYMENT OF

No. 99-19

ASSESSMENT Nos. 1348190, dated 11/30/90  
1351755, dated 12/08/90  
1360529, dated 11/11/91  
1360530, dated 11/11/91  
1360531, dated 11/11/91  
1916365, dated 04/02/95  
1916366, dated 04/02/95  
1916367, dated 04/02/95  
1916368, dated 04/02/95  
1916369, dated 04/02/95

**DECISION AND ORDER**

On April 14, 1999, the above-referenced protest was submitted to Margaret B. Alcock, hearing officer, for decision on a written stipulation and briefs. Anthony Tafoya was represented by Tracy J. Ahr and Claudia Gayheart Crawford of Keleher & McLeod, P.A.. The Taxation and Revenue Department ("Department") was represented by Donald F. Harris, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During the period at issue, American Ready-Mix, Inc. (the "Corporation"), ID No. 01-177568-00-8, was a corporation licensed to do business in New Mexico.
2. In 1989, Anthony Tafoya, Ralph Villegas and Jerry Alsup were the directors and shareholders of the Corporation.
3. Ralph Villegas was president, Anthony Tafoya was vice president, and Jerry Alsup was general operations manager of the Corporation.
4. In July 1989, the Corporation declared Chapter 11 bankruptcy.

5. On or about July 31, 1989, the directors and shareholders held an emergency meeting and appointed Anthony Tafoya as president and chief executive officer of the Corporation and removed Ralph Villegas as president and director.

6. The Corporation did not pay New Mexico withholding taxes from July 1989 until October 1990.

7. Anthony Tafoya was the primary officer of the Corporation responsible for hiring personnel during the period July 1989 through September 1990.

8. Anthony Tafoya was in a position to sign the withholding tax returns, he knew the returns had to be filed, and he knew the Corporation was liable for these taxes.

9. On or about October 24, 1990, the Corporation converted from a Chapter 11 to a Chapter 7 bankruptcy.

10. From approximately October 24, 1990 onward, the Chapter 7 trustee managed the Corporation.

11. Anthony Tafoya entered personal bankruptcy on July 13, 1992, which was discharged on August 13, 1994.

12. Between November 1990 and April 1995, the Department issued ten assessments totaling \$43,595.25 to the Corporation for withholding taxes, penalty and interest due for report periods July through October 1989 and May through October 1990.

13. Since at least 1995, the Department has followed the practice of demanding payment and pursuing collection action against corporate officers for withholding taxes assessed to the corporation but not separately assessed to the corporate officers.

14. On August 7, 1995, the Department sent Tafoya a letter notifying him that as an "employer" under Section 7-3-2(C) NMSA 1978, he was liable for the Corporation's unpaid withholding taxes in the amount \$43,595.25.

15. The Department's August 7, 1995 letter stated: "Unless we receive payment or we are not contacted by you within ten (10) days, regarding any disagreement with this assessment, we will proceed to enforce collection by levy."

16. The Department subsequently filed a lien against Tafoya's property.

17. On August 28, 1995, Tafoya filed a protest to the Department's August 7, 1995 demand for payment of withholding taxes.

18. On June 10, 1998, the Department acknowledged Tafoya's protest.

### **DISCUSSION**

The issue to be decided is whether the Department may demand payment and pursue collection action against a corporate officer for withholding taxes assessed to the corporation but not separately assessed to the corporate officer. Tafoya argues that Section 7-1-17(A) NMSA 1978 requires the Department to issue a formal assessment to each taxpayer the Department determines to be liable for payment of tax. The Department relies on Subsection (D) of Section 7-1-17 NMSA 1978 to support its practice of pursuing collection action against corporate officers the Department determines to be liable for payment of withholding taxes, so long as an assessment for those taxes has been issued to "any taxpayer" and remains unpaid.

In October 1996, the Department adopted Regulation 3 NMAC 1.6.16, which states that the Department is not required to issue separate assessments against "secondarily liable" taxpayers, defined as taxpayers who would not normally be expected to file a return reporting the liability or would not be expected to have a tax identification number with respect to the liability. Because the Department's demand for payment to Tafoya was made in August 1995, the parties agree that the regulation is not applicable to this protest. *See also, Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993) (a regulation promulgated by an administrative agency shall be construed to have retroactive effect only if it is clearly and manifestly intended). Accordingly, the only matter before the

hearing officer is whether the Department's administrative practice of demanding payment of withholding taxes from corporate officers to whom no assessment has been issued complies with applicable tax statutes.

## **I. WITHHOLDING TAX ACT.**

Payment of withholding taxes is governed by the Withholding Tax Act, Sections 7-3-1, *et seq.*, NMSA 1978. For periods prior to July 1, 1990, Section 7-3-5 imposed liability for withholding taxes on "every employer." The term "employer" was defined in Section 7-3-2(B) as follows:

B. "employer" means a person doing business in or deriving income from sources within the state who has control of the payment of wages to an individual for services performed for him by that individual or a person who is the officer, agent or employee of the person having control of the payment of wages.

In 1990, the legislature amended Section 7-3-5 by substituting "withholder" for "employer." The term "withholder" was defined in amended Section 7-3-2(J) to mean "a payor or an employer." The definition of "employer" in Section 7-3-2(C) was changed to read:

C. "employer" means a person, or an officer, agent or employee of that person having control of the payment of wages, doing business in or deriving income from sources within the state for whom an individual performs or performed any service as the employee of that person except that if the person for whom the individual performs or performed the services does not have control over the payment of the wages for such services, "employer" means the person having control of the payment of wages.

Under both versions of the Withholding Tax Act applicable to tax periods July 1989 through October 1990, a corporate officer who had control of the payment of wages was liable for payment of the corporation's withholding tax. In this case, the parties stipulated that Anthony Tafoya was the primary corporate officer responsible for hiring personnel, knew the Corporation was liable for withholding tax, knew withholding tax returns had to be filed with the state, and was in a position to sign these returns on behalf of the Corporation. Based on these facts, there is no question that Anthony Tafoya was liable for the withholding taxes American Ready-Mix failed to pay to the state

of New Mexico. The only issue is whether the Department's efforts to collect the tax from Tafoya comply with the statutory requirements set out in the Tax Administration Act.

## II. TAX ADMINISTRATION ACT.

*Section 7-1-17: Requirements for Issuing Assessments.* In arguing their opposing positions, both parties focus on the proper interpretation of Section 7-1-17 NMSA 1978,<sup>1</sup> which provides:

### **7-1-17. Assessment of tax; presumption of correctness.**

A. If the secretary or the secretary's delegate determines that a taxpayer is liable for taxes in excess of ten dollars (\$10.00) that are due and that have not been previously assessed to the taxpayer, the secretary or the secretary's delegate shall promptly assess the amount thereof to the taxpayer.

B. Assessments of tax are effective:

(1) when a return of a taxpayer is received by the department showing a liability for taxes;

(2) 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; or

(3) when an effective jeopardy assessment is made as provided in the Tax Administration Act.

C. Any assessment of taxes or demand for payment made by the department is presumed to be correct.

D. When taxes have been assessed to any taxpayer and remain unpaid the secretary or the secretary's delegate may demand payment at any time except as provided otherwise by Section 7-1-19 NMSA 1978.

The Department maintains that Subsection D allows the Department to demand payment from any person liable for payment of withholding tax, so long as the amount of tax due has been assessed to

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<sup>1</sup> Unless otherwise noted, the statutory provisions of the Tax Administration Act in effect during the period at issue are compiled in the 1995 Replacement Pamphlet.

"any taxpayer" and remains unpaid. Department Brief at 3. As Tafoya points out, this argument ignores the express direction in Subsection A that once the Department determines a person is liable for taxes not "previously assessed *to the taxpayer*", the secretary "shall promptly assess the amount thereof *to the taxpayer*." (emphasis added). Based on the legislature's use of the word "shall", the Department is required to issue an assessment to each person liable for payment of tax. *See, State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977) (the word "shall" is mandatory not discretionary). Nothing in Section 7-1-17 indicates that an assessment issued to one taxpayer is effective as to all other persons who may be liable for the same tax. To the contrary, Subsection B provides that an assessment is not effective until a taxpayer files a return showing a liability for taxes or a document denominated "notice of assessment of taxes" is mailed or delivered "*to the taxpayer against whom the liability for tax is asserted....*" (emphasis added). In this case, no assessment of withholding taxes was mailed or delivered to Anthony Tafoya.

***Section 7-1-16: Definition of a Delinquent Taxpayer.*** The Department's interpretation of Section 7-1-17(D) to allow collection of withholding taxes from a corporate officer to whom no assessment has been issued is directly contrary to other sections of the Tax Administration Act limiting collection activities to "delinquent" taxpayers. *See, e.g.*, Section 7-1-31 (levying on taxpayer property); Section 7-1-53 (enjoining a taxpayer from engaging in business); Section 7-1-82 (refusing a tax clearance for the transfer or renewal of a liquor license). Section 7-1-16 defines a delinquent taxpayer as:

Any taxpayer to whom taxes have been assessed as provided in Section 7-1-17 NMSA 1978 or upon whom demand for payment has been made as provided in Section 7-1-63 NMSA 1978 who does not within thirty days after the date of assessment or demand for payment make payment, protest the assessment or demand for payment as provided by Section 7-1-24 NMSA 1978 or furnish security for payment as provided by Section 7-1-54 NMSA 1978 becomes a delinquent taxpayer....

The importance of issuing an assessment before initiating collection action is illustrated by the court of appeals' decision in *Bank of Commerce v. State of New Mexico Department of Taxation and Revenue*, 125 N.M. 183, 958 P.2d 753 (Ct. App.), *cert. denied*, 125 N.M. 145, 958 P.2d 103 (1998). In that case, the Department conditioned issuance of a tax clearance for transfer of a liquor license on the payment of back taxes. The court subsequently ordered the Department to refund the taxes collected because the transferor of the license did not meet the definition of a "delinquent taxpayer."

As the court noted:

Under Section 7-1-16 *a delinquent taxpayer is not simply anyone who owes taxes*. For a taxpayer to be a "delinquent taxpayer," the Department must have assessed taxes against the taxpayer or demanded payment from the taxpayer, and the taxpayer must have gone thirty days without paying the taxes, furnishing security for payment, or protesting the assessment or demand. (emphasis added).

125 N.M. at 186, 958 P.2d at 756. The court further noted that the only circumstance in which the Department could demand payment without first issuing an assessment was in connection with the transfer of a business under Section 7-1-63 NMSA 1978.<sup>2</sup> The provisions of Section 7-1-63 have no application to the facts of this case.

In construing a statute, courts look first to the plain language of the statute as the primary indicator of legislative intent and construe the words of the statute according to their ordinary meaning, absent evidence of legislative intent to the contrary. *Wilson v. Denver*, 125 N.M. 308, 314, 961 P.2d 153, 159 (1998); *Whitely v. New Mexico State Personnel Bd.*, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993). According to the plain language of Section 7-1-17(A), the Department is required to issue an assessment to any person who is liable for taxes in excess of \$10.00. The assessment is effective when it is mailed or delivered "*to the taxpayer against whom the liability for*

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<sup>2</sup> Prior to July 1, 1997, Section 7-1-63 read: "If, after any business is sold, any tax for which the former owner is liable remains due, the director or his delegate shall make demand upon the purchaser for payment over of that amount and the purchaser shall comply with the demand". Effective July 1, 1997, the legislature amended Section 7-1-63 to require the Department to formally assess the purchaser of a business for the former owner's outstanding tax liabilities.

*tax is asserted.*" If the taxpayer fails to protest the assessment, pay the assessment or furnish security for payment within 30 days, he becomes a "delinquent taxpayer" under Section 7-1-16. Only then is the Department authorized to take collection action by such means as levying on the taxpayer's property. *See*, Section 7-1-31(A): ("The secretary or secretary's delegate may proceed to collect tax from a delinquent taxpayer by levy upon all property or right to property of such person....").

In this case, the Department assessed withholding taxes to American Ready-Mix, Inc., a corporation. There is nothing in the Tax Administration Act that would make this assessment effective against Anthony Tafoya, a corporate officer of American Ready-Mix, in his individual capacity. Nor is there any provision of the Tax Administration Act authorizing the Department's August 7, 1995 letter to Tafoya demanding payment of the taxes assessed to American Ready-Mix and stating: "Unless we receive payment or we are not contacted by you within ten (10) days, regarding any disagreement with this assessment, we will proceed to enforce collection by levy." As the court found in *Bank of Commerce, Id.*: "a delinquent taxpayer is not simply anyone who owes taxes." A delinquent taxpayer is someone "to whom" taxes have been assessed. This does not include a corporate officer who may be liable for payment of withholding taxes, but to whom no assessment has been issued.

***Section 7-1-24: Right to Hearing.*** Section 7-1-24 of the Tax Administration Act provides that 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...." Protests must be filed within thirty days of mailing or service of the assessment or other peremptory notice or demand. If requested timely, the taxpayer may receive an extension of up to an additional sixty days. If no protest is filed within the time required, "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.*" (emphasis added).



Between November 1990 and April 1995, the Department issued ten assessments for withholding taxes to American Ready-Mix, Inc. During this period, the corporation was under the management of the bankruptcy trustee. Anthony Tafoya did not receive notice of the assessments until the Department's demand letter was issued on August 7, 1995. Although Tafoya filed a timely protest to the demand for payment, he was foreclosed from protesting the underlying assessments: first, because he was not the taxpayer to whom the assessments were issued, and second, because more than 90 days had passed since the assessments were mailed to American Ready-Mix. Given the strict time limits in Section 7-1-24, the only issue Tafoya could protest was the Department's contention that he was liable for payment of withholding taxes assessed to American Ready-Mix because he qualified as an "employer" under the Withholding Tax Act. Tafoya could not raise other defenses that might have been available to dispute the correctness of the assessments themselves.

The Department's decision to by-pass the assessment requirement in Section 7-1-17(A) and proceed directly to collection action against Tafoya also served to by-pass the procedural safeguards provided in Section 7-1-24. The Department had Tafoya's address, as evidenced by the August 7, 1995 demand for payment, and could have assessed Tafoya as well as American Ready-Mix. This would have given each taxpayer actual notice of the liability and an opportunity to protest. In the absence of any evidence that the legislature intended to treat corporate officers differently than other taxpayers, there is no legal basis for the Department's administrative practice of assessing some, but not all, taxpayers liable for payment of withholding tax to the state.<sup>3</sup>

### **III. Deference to Agency Interpretation.**

The Department argues that its use of demand letters to collect withholding tax from corporate officers represents a "long-standing" administrative interpretation of Section 7-1-17(D)

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<sup>3</sup> Tafoya also argued that the Department's failure to give him a timely notice of assessment violated his constitutional right to due process. It is not necessary to reach the constitutional issues raised by the taxpayer since

that should be accorded deference by the hearing officer. There is no evidence that the Department's practice is particularly long-standing. While it is clear the use of demand letters to collect withholding tax goes back to at least 1995, the record is silent as to when or why this practice was instituted. It was not until October 1996 that the Department's interpretation of Section 7-1-17 was reduced to writing in Regulation 3 NMAC 1.6.16.

More problematic is the fact that the Department's interpretation cannot be reconciled with the language of the statutes. An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority, *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934,935 (1984), and a reviewing authority may not give legal sanction to an agency's incorrect construction of unambiguous statutory language. *Miller v. Bureau of Revenue*, 93 N.M. 252, 254, 599 P.2d 1049, 1051 (Ct. App.) *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979). Statutes are to be interpreted in accordance with legislative intent and in a manner that will not render the statute's application absurd, unreasonable or unjust. *City of Las Cruces v. Garcia*, 102 N.M. 25, 26-27, 690 P.2d 1019, 1020-21 (1984). Statutes must be read in their entirety and each part must be construed in connection with every other part to produce a harmonious whole. *State ex rel. Kline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).

When read in its entirety, the Tax Administration Act sets out a fair and uniform method to: (1) determine a person's liability for payment of tax to the state; (2) give that person notice of the liability and an opportunity to challenge any assessment issued by the Department; and (3) enable the Department to collect payment of established liabilities through the use of liens, levies and other collection alternatives. The Department's practice of proceeding directly from the initial determination of a corporate officer's withholding tax liability to a demand for payment and threats

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the Department's attempts to collect withholding taxes from Tafoya are clearly contrary to the statutory requirements of the Tax Administration Act.

of levy is contrary to the plain language of the statutes and violates the procedural safeguards the legislature has provided to all taxpayers.

#### **IV. BURDEN OF PROOF.**

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes or demand for payment made by the Department is presumed to be correct, and it is the taxpayer's burden to overcome this presumption. *See also, Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). One way in which the presumption may be overcome is "by showing that the Bureau of Revenue failed to follow the statutory provisions contained in the Tax Administration Act." *Regents of New Mexico College of Agriculture and Mechanic Arts v. Academy of Aviation, Inc.*, 83 N.M. 86, 488 P.2d 343, 346 (1971). The Department's collection actions against Tafoya were not in compliance with the statutory provisions of the Tax Administration Act, and Tafoya has overcome the presumption of correctness that attaches to the Department's demand for payment.

#### **CONCLUSIONS OF LAW**

1. Anthony Tafoya filed a timely, written protest to the Department's August 7, 1995 demand for payment, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Department's collection actions against Tafoya for withholding taxes assessed to American Ready Mix, Inc., but not separately assessed to Tafoya, were contrary to the provisions of the Tax Administration Act and exceeded the Department's authority to interpret the statutes with which it is charged with administering.
3. Because the Department failed to assess Tafoya for withholding taxes as required by Section 7-1-17(A) NMSA 1978, Tafoya was not a "delinquent taxpayer" under Section 7-1-16 NMSA 1978, and the Department was not entitled to demand payment or levy against Tafoya's property to enforce payment of those taxes.

For the foregoing reasons, the Taxpayer's protest IS GRANTED.

DATED April 30, 1998.