

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

IN THE MATTER OF THE PROTEST OF  
**RAFAEL M. ROMERO,**  
PROTEST TO ASSESSMENT NOS. 98071, 98072  
AND TAX LIEN NO. 38411

**NO. 99-24**

**DECISION AND ORDER**

This matter came on for formal hearing on July 13, 1999 before Gerald B. Richardson, Hearing Officer. Rafael M. Romero, hereinafter, "Taxpayer", was notified of the hearing and elected not to attend. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. For the 1994 tax year, the Taxpayer, together with his spouse, Doris M. Romero, filed a New Mexico personal income tax return with the Department as married persons filing jointly. That return reflected federal adjusted gross income in the amount of \$79,855. Attached to that return were W-2 forms for Mr. Romero showing that he received \$50,917.45 in wages from his employer, U.S. West Communications, Inc. during that year and that Mrs. Romero had received \$28,792 in wages from her employer, Santa Fe Computer Supplies Inc. For 1994, the Taxpayer and his wife reported and paid \$3,450 in New Mexico personal income taxes to the Department.

2. For the 1995 tax year, The Taxpayer, together with his spouse, Doris M. Romero, filed a New Mexico personal income tax return with the Department as married persons filing

jointly. That return reflected federal adjusted gross income in the amount of \$95,105. Attached to that return were W-2 forms reflecting that Mr. Romero had received wages in the amount of \$57,673.72 from U.S. West Communications, Inc. and that Mrs. Romero had received wages in the amount of \$37,271 from Santa Fe Computer Supplies, Inc. For 1995, the Taxpayer and his wife reported and paid \$4,164 in New Mexico personal income taxes to the Department.

3. For the 1996 tax year, the Taxpayer filed a 1996 personal income tax return with the Department as a married individual filing separately. That return reflected that the Taxpayer reported zero federal adjusted gross income and claimed a refund in the amount of \$2,145, which was the amount of New Mexico income tax withheld from his wages received from his employer, U.S. West Communications, Inc. during calendar year 1996. The Department did not grant the Taxpayer a refund of the income tax withheld from his wages.

4. U.S. West Communications, Inc. issued a W-2 form to the Taxpayer for tax year 1996 which reflected that it paid him \$62,105.89 in wages, tips or other compensation.

5. For the 1996 tax year, the Taxpayer's spouse, Doris V. McBride Romero, filed a 1996 New Mexico personal income tax return with the Department as a married individual filing separately. In that return she reported \$29,011 as her federal adjusted gross income and she reported and paid \$1,088 in New Mexico personal income tax.

6. On August 21, 1996, the Taxpayer filed a federal form W-4 and delivered it to his employer, U.S. West Communications, which claimed exemption from federal income withholding tax for 1996.

7. On August 29, 1997, the Taxpayer filed a federal form W-4 and delivered it to his employer, U.S. West Communications which claimed exemption from federal income withholding tax for 1997.

8. U.S. West Communications, Inc. issued a W-2 form to the Taxpayer for the 1997 tax year indicating that it had paid him \$59,157.06 in wages, tips or other compensation. 9.

The Taxpayer filed no New Mexico personal income tax return with the Department for tax year 1997.

10. For the 1997 tax year, the Taxpayer's spouse, Doris V. McBride Romero filed a New Mexico personal income tax return as a married person filing separately. In that return she reported federal adjusted gross income in the amount of \$34,232 and reported and paid \$1,443 in New Mexico personal income tax.

11. On December 4, 1998, the Department issued Assessment No. 98071 to the Taxpayer, assessing \$3,566 in personal income tax, \$1,783 in penalty and \$846.93 in interest for the 1996 tax year. This assessment was a provisional or estimated assessment due to the fact that at the time it was issued, the Department did not have information in its possession to determine the amount of taxable income the Taxpayer had for 1996.

12. On December 4, 1998, the Department issued Assessment No. 98072 to the Taxpayer, assessing \$6,521 in personal income tax, \$3,260.50 in penalty and \$570.59 in interest for the 1997 tax year. This assessment was a provisional or estimated assessment due to the fact that at the time it was issued, the Department did not have information in its possession to determine the amount of income the Taxpayer had in 1997.

13. On December 11, 1998, the Department filed Notice of Claim of Tax Lien No. 38411 in the records of Santa Fe County, New Mexico in the amount of \$16,548.02 to secure Assessment Nos. 98071 and 98072.

14. On December 17, 1998 the Taxpayer wrote the Secretary of the Department to protest the assessments for 1996 and 1997 taxes, penalty and interest and the Department's lien

securing those assessments.

15. On February 8, 1999, the Department acknowledged the Taxpayer's protest.

16. On May 19, 1999, the Department's counsel filed a Request for Hearing in this matter.

17. On June 5, 1999, the Taxpayer wrote the Department's counsel in response to the Request for Hearing informing the Department that he did not wish to participate in such an action, challenging the Department's jurisdiction to hear such an action and informing her that he would not attend any such hearing.

18. On June 3, 1999, a letter notifying the Taxpayer that a formal hearing would be held concerning his protest on July 13, 1999 was mailed to the Taxpayer by this Hearing Officer.

19. On June 8, 1999, the Taxpayer signed the return receipt for the letter notifying him of the formal hearing of his protest.

20. On July 1, 1999, the Department's counsel wrote the Taxpayer in response to his letter of June 5, 1999 to inform him that the Department considered this matter to be a valid protest under Section 7-1-24(A), but that if he did not wish to pursue his remedies under that provision, that he must withdraw his protest, or the hearing would proceed. The letter enclosed a form for withdrawing the protest.

21. The Taxpayer never filed a protest withdrawal in this matter.

22. As a result of obtaining copies of the W-2 forms issued to the Taxpayer by U.S. West Communications, Inc. for tax years 1996 and 1997, the Department has agreed to modify and reduce the assessments at issue herein to reflect the Taxpayer's actual income from wages during those years. Accordingly, Assessment No. 98071 for the 1996 tax year should be in the amount of \$1,524.46 in personal income tax, \$762.23 in penalty and \$514.51 in interest. The

amount of this assessment reflects the fact that the Department did not grant the Taxpayer's request for a refund of the \$2,144.54 in taxes withheld by his employer. Additionally, Assessment No. 98072 for the 1997 tax year should be in the amount of \$3,397 in personal income tax, \$1,430.97 in penalty and \$536.62 in interest.

### **DISCUSSION**

Section 7-1-17(C) NMSA 1978 provides that "Any assessment of taxes or demand for payment made by the department is presumed to be correct." "Tax" is defined at Section 7-1-3(U) NMSA 1978 to include the amount of any interest or civil penalty relating to taxes assessed pursuant to the provisions of the Tax Administration Act unless the context of the statutory provision requires otherwise. Thus, the presumption of correctness also attaches to the interest and penalty portions of assessments unless there is something in the context of the statute at issue to indicate otherwise. Because of the presumption of correctness, the burden of proof is upon any taxpayer protesting an assessment to present evidence contesting the factual correctness of the assessment or legal arguments challenging the legal basis of the assessment which clearly overcome the presumption of correctness. *Archuleta v. O'Cheskey*, 84 N.M. 428, 504 P.2d 638 (Ct. App. 1972). Having failed to appear to present evidence or argument in support of his protest, the Taxpayer has not met his burden of proof in this case and the presumption of correctness that attaches to the Department's assessments establishes the Taxpayer's liability for personal income tax and interest.<sup>1</sup>

With respect to the penalty assessed in this case, the Department assessed the 50% of tax penalty provided at Section 7-1-69(C) NMSA 1978, which imposes penalty for failure to pay tax

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<sup>1</sup> As noted in Finding No. 22, the Department has agreed, based upon obtaining copies of the Taxpayer's W-2 forms for 1996 and 1997, to reduce the amount of the assessments, which had been issued as estimated or

when such failure is due to willful intent to evade or defeat the payment of any tax. Section 7-1-78 of the Tax Administration Act provides as follows:

In any proceeding involving the issue of whether any person has been guilty of fraud or corruption, the burden of proof in respect of such issue shall be upon the director or the state.

Although Section 7-1-69(C) does not specifically use the words “fraud” or “corruption”, the context of the provision, which imposes a steep penalty for failure to pay tax with willful intent to evade or defeat the payment of such tax, can fairly be characterized as a fraud penalty. Section 7-1-78 does not specify the standard or degree of proof required for the state to meet its burden of proof. The common law rule in New Mexico, however, is that proof of fraud in a civil action must be established by clear and convincing evidence. *First National Bank in Albuquerque v. Abraham*, 97 N.M. 288, 291, 693 P.2d 575 (1982).

In this case, there is ample evidence to sustain a conclusion that the Taxpayer failed to pay income taxes in 1996 and 1997 with the willful intent to evade the payment of tax, especially in light of the fact that the Taxpayer failed to attend the hearing to present any evidence to rebut the evidence presented by the Department.

First, we have evidence that the Taxpayer understood that he was subject to New Mexico personal income tax on his wages from U.S. West Communications based upon the returns he filed jointly with his wife for tax years 1994 and 1995 in which he reported and paid tax on that income. We also have the evidence that he filed a 1996 New Mexico income tax return separately from his wife in which he reported that he had no income subject to tax and asked for a refund of the \$2,145 which had been withheld from his wages for New Mexico income tax purposes. The Department denied his request for a refund, putting him on notice that the

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provisional assessments. Therefore, the presumption of correctness has been overcome to the extent the original

Department disagreed with his claim that he had no income subject to tax. We have even more compelling evidence to indicate that Mr. Romero knew or should have known that his income from wages was subject to tax because his wife, who also had income from wages, apparently refused to participate in his effort to avoid paying tax on his wage income. Instead of continuing to file jointly as a married couple as was done in previous years, she chose to file separately from her husband for both tax years at issue and she reported and paid New Mexico personal income tax on her income from wages. Finally, we have the fact that for 1997, after being denied a refund of the New Mexico taxes withheld from his wages in 1996, the Taxpayer simply failed to file any return whatsoever with the Department.

Although none of these facts constitute direct evidence of willful intention to evade the payment of tax, it is well established that an intention to evade the payment of tax may be inferred from circumstantial evidence and direct proof is not necessary. *See, State v. Long*, 121 N.M. 333, 335, 911 P.2d 227, 229 (Ct. App., 1995), *Melinder v. U.S.*, 281 F. Supp. 451 (1968).

As discussed above, the evidence in this case is sufficient to establish an intention to evade the payment of New Mexico personal income tax, especially in light of the fact that the Taxpayer failed to present any evidence or argument to refute such an inference.

The final issue to be discussed is the Taxpayer's protest to the Department's lien. There is no statutory presumption of correctness which attaches to the lien itself. The lien, however, secures the two assessments at issue herein, which have been upheld insofar as the reduced amount the Department now claims to be owing. There being no other evidence or arguments presented by the Taxpayer to challenge the validity of the lien and the underlying assessments,

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assessment amount exceeds the amounts reflected in Finding No. 22.

the lien is upheld as valid except to the extent it exceeds the amounts the Department now contends are owing with respect to those assessments.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a valid, timely, written protest, pursuant to Section 7-1-24(A) NMSA 1978 to Assessment Nos. 98071 and 98072 and Lien No. 38411. The Taxpayer's protest was not withdrawn after being given an opportunity to do so. Jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer failed to present evidence or arguments to overcome the presumption of correctness which attaches to the amount of tax and interest assessed. Thus, Assessment Nos. 98071 and 98072 are upheld, insofar as the amounts have been reduced as reflected in Finding No. 22, together with interest as it accrues until the assessments are paid.

3. The Department has the burden of proving by clear and convincing evidence that penalty was properly imposed upon the Taxpayer pursuant to Section 7-1-69(C) NMSA 1978.

4. The Department met its burden of proving that penalty was properly assessed pursuant to Section 7-1-69(C) NMSA 1978 insofar as the amounts reflected in Finding No. 22.

5. Lien No. 38411 is upheld insofar as it secures the amounts of Assessment Nos. 98071 and 98072 which have been upheld by this decision, together with interest accruing until the assessments are paid.

For the foregoing reasons the Taxpayer's protest is **GRANTED IN PART AND DENIED IN PART**. The Department **IS HEREBY ORDERED** to abate those portions of Assessment Nos. 98071 and 98072 which exceed the amounts reflected in Finding No. 22, together with interest which accrues until paid. The Department **IS FURTHER ORDERED** to file a partial release of lien to reflect the portions of Assessment Nos. 98071 and 98072 which have been abated.



DONE, this 19<sup>th</sup> day of July, 1999.