

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

IN THE MATTER OF THE PROTEST OF
JOHN F. GILLIAM JR. AND MARTHA L. GILLIAM
PROTEST TO WARRANT OF LEVY

No. 98-35

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on May 20, 1998. Mr. and Mrs. Gilliam, hereinafter, "Taxpayer", were represented by Mr. John F. Gilliam. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 21, 1998 the Department served two warrants of levy, numbers 8818 and 8819, upon Sunwest Bank in Albuquerque New Mexico.
2. Warrant of Levy no.8818 lists John F. Gilliam and Martha L. Gilliam doing business as USA Printing as the Taxpayer owing the Department unpaid taxes. The Warrant of Levy was for the total amount of \$47,924.49 and contains an attached schedule of assessments which list the assessment number, the dates of the assessment, the period for which the tax is due and the total amount of tax, penalty and interest assessed. The assessments were for gross receipts tax, penalty and interest assessed against the Taxpayer's business, USA Printing.
3. Warrant of Levy no. 8819 lists John F. Gilliam and Martha L. Gilliam as the Taxpayer owing the Department taxes. It lists two assessments, nos. 718277 and 718278 for personal

income taxes for tax years 1994 and 1995, and claims a total amount due of \$15,105.72 in tax, penalty and interest.

4. Both Warrants of Levy, (hereinafter, levy or levies) order the person upon whom the levy is served to reveal the property in their possession belonging to the listed taxpayer and to surrender the property in their possession to the Department.

5. Pursuant to the levies served upon it, on August 21, 1997 Sunwest Bank paid to the Department \$13,966.74 which it had held in accounts owned by the Taxpayer.

6. On August 22, 1997, John J. Chavez, III, the Secretary of the Department, wrote the Taxpayer a letter advising them that on August 21, 1997 the Department had secured \$13,966.74 from Sunwest Bank in Albuquerque pursuant to service of levy no. 8819.

7. Both Assessment nos. 718277 and 718278 show an assessment date of July 23, 1997 on the Department's information system. Copies of the assessments which were mailed to the Taxpayer, however, reflect a hand-stamp which states that the assessments were not actually mailed to the Taxpayer until August 15, 1997.

8. Section 7-1-31 NMSA 1978 of the Tax Administration Act authorizes the Secretary of the Department to collect tax from a delinquent taxpayer by levy upon all property of delinquent taxpayers.

9. Section 7-1-16 NMSA 1978 of the Tax Administration Act defines a delinquent taxpayer to be a taxpayer to whom taxes have been assessed who does not, within thirty days after the date of assessment make payment or protest the assessment as provided by Section 7-1-24 NMSA 1978.

10. Section 7-1-24(B) NMSA 1978 allows a taxpayer to whom an assessment has been issued thirty days from the date of mailing of the assessment to file a protest to the assessment.

11. On September 11, 1997, the Taxpayer filed a timely, written protest, pursuant to Section 7-1-24 NMSA 1978 to Assessment nos. 718277 and 718278.

12. The Taxpayer was not a delinquent taxpayer with respect to Assessment nos. 718277 and 718278.

13. Upon learning of the Department's levy upon his bank account, Mr. Gilliam called Secretary Chavez to object to the seizure of his bank account for assessments which he had only just received. On August 28, 1997, Anita Williams of the Department's Office of Inspector General and Secretary Chavez spoke with Mr. Gilliam. They admitted that the Department was not authorized to levy upon his bank account for the personal income tax assessments which were not delinquent, but informed Mr. Gilliam that the monies seized would be applied to other assessments which were delinquent and which were referenced in the Department's levy number 8818. They further informed Mr. Gilliam that they would send him new paperwork to reflect how the proceeds of the levy would be applied.

14. On August 28, 1997, the Department mailed Mr. Gilliam a letter advising him that the proceeds of levy no. 8818 were applied as follows;

Assessment no. 1742648	\$3,647.00
Assessment no. 1742649	\$3,575.49
Assessment no. 1742650	\$3,324.82
Assessment no. 1742651	\$3,175.43
Assessment no. 2118321	\$ 11.53.

The letter further reflected a credit to the Taxpayer in the amount of \$232.47, reflecting excess monies seized pursuant to the levy which were not applied to any assessments.

15. The schedule of assessments attached to levy no. 8818 reflects an assessment date of January 6, 1994 for Assessment nos. 1742648, 1742649, 1742650 and 1742651. It reflects an assessment date of March 7, 1997 for Assessment no. 2118321.

16. The assessments to which the proceeds of levy no. 8818 were applied were not protested by the Taxpayer.

17. On September 11, 1997 the Taxpayer filed a timely, written protest to the Department's seizure of money from his bank account at Sunwest Bank pursuant to the Department's levies.

DISCUSSION

The sole issue to be determined herein is whether the Department properly levied upon the Taxpayer's bank account with Sunwest Bank. The Taxpayer argues that since he was informed by the Department Secretary that the account proceeds were levied upon pursuant to levy 8819 and since the assessments secured by levy 8819 were not delinquent, that the levy was unauthorized and illegal and that the proceeds of the levy should be returned to him with interest.

The Department acknowledges that Section 7-1-31 NMSA 1978 only authorizes levies for delinquent taxes and that the Taxpayer was not delinquent with respect to the taxes assessed by the personal income tax assessments referenced in levy no. 8819. It thus acknowledges that levy no. 8819 was invalid. It argues, however, that levy no. 8818 was a valid levy since the levy references assessments of tax which were delinquent. It further argues that because the proceeds of the levy were only applied to delinquent assessments of tax, the Department could validly levy upon the Taxpayer's bank account pursuant to levy no. 8818.

The Department is correct. Although Secretary Chavez erroneously informed the Taxpayer that the Department had seized the Taxpayer's bank account proceeds pursuant to an invalid levy, the Department served two levies upon Sunwest Bank at the same time, and the Taxpayer has not established any infirmities or improprieties with respect to levy no. 8818. The Secretary has the duty to administer and enforce the laws with which the Department is charged.

Section 9-11-6(A) NMSA 1978. Thus, the Secretary is charged with the collection of delinquent tax assessments. Assessments of tax are also presumptively correct. Section 7-1-17(C) NMSA 1978. Thus, the assessments referenced in levy no. 8818 were presumptively correct. Section 7-1-17(D) NMSA 1978 authorizes the Secretary to demand payment of any taxes which have been assessed, except for assessments which are more than ten years old, the collection of which is barred by Section 7-1-19 NMSA 1978. Reading these statutes together, the Secretary is under the duty to enforce the collection of delinquent taxes. The tax assessments to which the levy proceeds were applied were delinquent assessments which had not been protested by the Taxpayer.¹ Thus, regardless of the fact that levy no. 8819 was invalid, levy no. 8818 was valid, the Secretary had the obligation to enforce the assessments referenced in that levy, and the Department acted properly when they applied the proceeds of levy no. 8818 to the delinquent assessments referenced in the levy.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's seizure of his property pursuant to its Warrants of Levy and jurisdiction lies over both the parties and the subject matter of this protest.

¹ There remains a credit in the amount of \$232.47 reflecting amounts the Department collected pursuant to levy no. 8818 which have not been applied to any of the other assessments referenced in the levy. The Taxpayer's protest did not reference this credit or ask for its return, but focused solely upon the fact that the assessments referenced by levy 8819 were not delinquent. Thus, whether the Taxpayer is entitled to a return of the amount of the credit was not an issue herein. Should the Taxpayer wish to obtain a refund of this credit, a claim for refund may be filed with the Department pursuant to Section 7-1-26 NMSA 1978.

2. The Department's Warrant of Levy no. 8818 is invalid because it was employed to collect assessments of tax which were not subject to collection because the Taxpayer was not a delinquent taxpayer with respect to the assessments referenced in the levy.

3. The assessments referenced by levy no. 8818 are presumptively correct pursuant to Section 7-1-17 NMSA 1978.

4. The Taxpayer was a delinquent taxpayer, pursuant to Section 7-1-16 NMSA 1978 with respect to the assessments to which the proceeds of levy no. 8818 were applied.

5. The Taxpayer failed to meet its burden of proving that levy no. 8818 was invalid or improper in any manner.

6. Because Sunwest Bank was served with levy no. 8818 as well as levy 8819, any amounts received by the Department from Sunwest Bank were properly collected pursuant to levy 8818.

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

DONE, this 18th day of June, 1998.