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

IN THE MATTER OF THE PROTEST OF
SUNBELT TASTEE FREEZE, INC.,
ID. NO. 02-074006-00 9, AND
FREDRICK D. COLLINS AND L.WAYNE COLLINS **NO. 99-15**
AS CORPORATE OFFICERS OF
SUNBELT TASTEE FREEZE, INC.,
PROTEST TO WARRANT OF LEVY NO. 8755

DECISION AND ORDER

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on February 15, 1999. Sunbelt Tastee Freeze, Inc., hereinafter, "Taxpayer", was represented by its corporate officers, Fredrick D. ("Rick") Collins, President and L. Wayne Collins, Vice-President. Messrs. Collins also represented themselves in their personal capacity at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Esq. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a Subchapter S corporation operating in Roswell, New Mexico.

2. Rick and Wayne Collins are shareholders and corporate officers of the Taxpayer, being President and Vice-President, respectively.

3. On March 24, 1995, the Taxpayer entered into Installment Agreement No. 10254, hereinafter, "the first installment agreement", with the Department. Under the terms of that agreement, the Taxpayer admitted conclusive liability for $215,289.52 in tax, penalty and interest

broken down as follows: $125,006.69 in tax principal, $52,964.81 in interest accrued to the date of the agreement, $15,000.71 in penalty and estimated amortized interest accruing during the 36 month term of the agreement in the amount of $22,317.31. The Taxpayer made a $35,000 down payment when the agreement was signed, agreed to make regular monthly payments for the next 34 months totaling $141,000 and to make a final balloon payment of $39,289.52 no later than March 24, 1998 under the terms of the agreement.

4. Normally, at the time an installment agreement is entered into, the Department requires security, in the form of a surety bond, to be given to secure the performance of the installment agreement, or it requires that liens be filed against a taxpayer's property to secure the performance of the security agreement.

5. In this case, because the Taxpayer wished to avoid having liens filed against its property, the Taxpayer appealed directly to the Secretary of the Department, John Chavez, for an exception to the Department's policy of requiring a surety bond or that liens be filed. Secretary Chavez approved entering into the first installment agreement without a surety bond or liens to secure the Department's interest on the condition that Messrs. Collins each sign personal guarantees to guarantee the payments required by the first installment agreement.

6. On March 24, 1995, both Rick and Wayne Collins signed documents entitled "personal assumption of tax liability" whereby they personally assumed and guaranteed all payments required by the first installment agreement. Additionally the personal guarantees provided that in the event of any default of the terms and conditions of the first installment agreement that the guarantors personally assumed any and all outstanding corporate liability covered by the first installment agreement.

7. The Taxpayer had sought to have an installment agreement whose term was longer than three years because of its concern that it would not be able to keep up the size of payments called for, but the Department would not allow a longer term.

8. The Taxpayer had sought to have its payments under the first installment agreement applied first to any outstanding tax principal before payments would be applied to interest or penalty. This would have lessened the accrual of interest on the tax assessments covered by the first installment agreement. The Department, however, would not agree to this and the first installment agreement repayment amount includes estimated interest accruing during the payout of the first installment agreement.

9. The Department's policy, which was applied to the payments received from the Taxpayer in this case, is to apply payments for delinquent taxes to the oldest assessment first, retiring liabilities in the order of their age. This means that for each tax assessment, the payments are applied first to tax, then to penalty and interest, retiring the liability for the oldest assessment first, with any excess then applied to the next oldest assessment in order of tax principal, penalty and interest.

10. Between the execution date of the first installment agreement and October, 1997, the Taxpayer paid $138,000 in payments under the first installment agreement. The Taxpayer, however, had fallen behind on some of its payments. The Department and the Taxpayer agreed that the first installment agreement would be defaulted and a new agreement would be entered into.

11. On January 16, 1998, the Taxpayer and the Department entered into another installment agreement ("the second installment agreement"). That agreement covered some of the same tax assessments as the first installment agreement, although, apparently, some of the

assessments covered by the first installment agreement had been paid off. The second installment agreement also covered some additional assessments not covered by the first installment agreement.

12. Under the terms of the second installment agreement, the Taxpayer admitted to conclusive liability for $40,103.19 in tax principal, $23,074.89 in interest accrued to the date of the agreement, $4,101.15 in penalty and $9,323.78 in estimated amortized interest for the term of the agreement. The payment amounts under the second agreement were smaller than under the first installment agreement because the Taxpayer had already paid off a substantial part of the liability covered by the first installment agreement and the second agreement called for a new 26 month period over which the Taxpayer's liability could be paid.

13. The Department did not have Messrs. Collins execute new personal assumptions and guarantees with respect to the execution of the second installment agreement.

14. By May of 1998, the Taxpayer had defaulted on payments called for under the second installment agreement. The Department proceeded to file liens against the Taxpayer.

15. The Taxpayer sought relief from the top management of the Department. As a result of these negotiations, by letter dated June 9, 1998, the Department's Deputy Secretary, Gail Reese, agreed to remove the Department's liens to allow the Taxpayer to restructure its debt on the condition that the Taxpayer make a lump sum payment of at least $30,000 by July 20, 1998. Ms. Reese also refused to agree to allow the Taxpayer's payments to be applied first to tax principal of all outstanding assessments, instead applying the payments to the oldest assessments first, in order of tax principal, penalty and interest.

16. The Taxpayer did not make the required payment on or before July 20, 1998 and the Department proceeded to file liens against the Taxpayer.

17. On August 10, 1998, the Department wrote Rick Collins, notifying him that payments required by the second installment agreement had not been paid and demanding payment in the amount of $102,784.55 pursuant to Mr. Collins' March 24, 1995 personal assumption of tax liability. The letter notified Mr. Collins that if he did not respond to the Department's demand within ten days from the date of the letter it would take collection actions against him.

18. On August 21, 1998, the Department wrote Wayne Collins, notifying him that payments required by the second installment agreement had not been paid and demanding payment in the amount of $102,784.55 pursuant to Mr. Collins' March 24, 1995 personal assumption of tax liability. The letter notified Mr. Collins that if he did not respond to the Department's demand within ten days from the date of the letter it would take collection actions against him.

19. By August 21, 1998, the Taxpayer paid the Department $3,641.89 in unpaid income withholding taxes on the wages paid its employees. Messrs. Collins paid that because they believed that they were individually liable for payment of those taxes as corporate officers. They did not believe that they were personally liable for any other amounts of the Taxpayer's liability because they had not executed personal guarantees of the liability secured by the second installment agreement.

20. On September 17, 1998, the Department filed Notice of Claim of Lien No. 55203 against Wayne Collins as corporate officer of the Taxpayer and Notice of Claim of Lien No.55201 against Rick Collins as corporate officer of the Taxpayer. The liens were filed in Chavez County, New Mexico. The liens secured a number of assessments against the Taxpayer, including assessment nos. 1820448, 1820449, 1820450, 1821453 and 1821454 which had been

part of the liability covered by the first installment agreement. At the time the lien was filed the outstanding liability on those assessments covered by the first installment agreement which remained unpaid was $66,363.85

21. On October 14, 1998, Rick Collins was personally informed by the Department that the only way to stop the Department from proceeding to collect the Taxpayer's liabilities was by payment of the liability in full.

22. On October 20, 1998, the Department served Warrant of Levy No. 8755 on a number of banks and credit unions in the Roswell area. The levy was in the amount of $100,389.04 and sought to collect from the financial institutions any funds the institutions held which belonged to the Taxpayer, Rick Collins or Wayne Collins.

23. Pursuant to the Department's levy, the Department collected $1,790.32 from the personal accounts of Rick and Wayne Collins as corporate officers of the Taxpayer and $11,547.64 from the corporate accounts of the Taxpayer.

24. On October 20, 1998, the Taxpayer filed a protest to the Department's levy on its bank accounts.

25. On November 19, 1998, Rick and Wayne Collins each filed protests to the Department's levies upon their personal accounts.

DISCUSSION

The primary issue to be determined herein is whether the Department had the authority to levy upon the personal bank accounts of the Taxpayer's corporate officers, Wayne and Rick Collins, for the Taxpayer's corporate liabilities. Messrs. Collins argue that their personal guarantees only secured their obligations under the first installment agreement, which the Department voided when it was defaulted and the second installment agreement was entered into.

Because the first agreement was no longer valid, they assert that their personal guarantees were no longer effective.

In support of this argument, they rely upon language in the first paragraph of the personal guarantee instruments. Specifically, they rely upon the following language:

> I, [Frederick or Wayne Collins], as a corporate officer and shareholder of Sunbelt Tastee Freeze, Inc., a New Mexico corporation, do personally assume and guarantee *all payments required by the attached Installment Agreement* entered into between Sunbelt Tastee Freeze Inc. and the Taxation and Revenue Department for the payment of certain tax liabilities incurred by Sunbelt Tastee Freeze, Inc. I hereby certify that if Sunbelt Tastee Freeze, Inc. fails to meet *any required payment under said Agreement* that I, [Frederick or Wayne Collins], will pay personally or will cause payment of such amount within ten (10) days of notification to me by the Taxation and Revenue Department. (emphasis added.)

I agree that this language, on its face, only guarantees and assumes responsibility for the payments required under the first installment agreement, which was superseded by the second installment agreement. This argument, however, does not take into account the language of the second paragraph of the personal assumption and guarantee. It provides as follows:

> In the event of any default to the terms and conditions contained in [the] Installment Agreement by Sunbelt Tastee Freeze, Inc., I, [Fredrick or Wayne Collins], an individual residing in New Mexico *do personally assume any and all outstanding corporate liability covered by such Agreement.* (emphasis added.)

This language goes beyond the language of the first paragraph, which only guarantees the payments required by the first installment agreement. It assumes and guarantees any and all outstanding liability covered by the installment agreement in the event of default. The first installment agreement references twenty-one separate tax assessments. The language of the second paragraph of the personal assumption assumes liability for any and all of those

assessments. Thus, the Department did not need to obtain another signed personal guarantee and assumption to secure its interests when the first installment agreement was defaulted and superseded by the second agreement, insofar as the Department only enforces the personal guarantee with respect to liabilities covered by the first installment agreement.[1]

Next, Messrs. Collins argue that the levies against their personal bank accounts were improper because they were for the same amount as the levy against the Taxpayer, which included amounts which were assessed subsequently to the execution of the first installment agreement, and those subsequently assessed amounts would not be covered by the personal guarantees. It is true, that the levies against Rick and Wayne Collins referenced assessments not referenced in the first installment agreement.[2] Thus, to the extent that the levies were for amounts not referenced in the first installment agreement, they would be improper as against Messrs. Collins. That does not, however, render the levy invalid. The Department only collected $1,790.32 from the personal accounts of Wayne and Rick Collins.[3] This is far less than the amount they were liable for under the assessments covered and secured by the personal assumptions of liability, which was slightly more than $66,000. Because the amount collected under the personal levies did not exceed the amounts secured by the personal assumptions, the levies against the personal accounts of Rick and Wayne Collins were not invalid.

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[1] It might, however, be more prudent policy for the Department to do so. Not only would it serve, again, as notice to corporate officers, such as Messrs. Collins, but it avoids potential problems which could have arisen in this case, as will be more fully explained below.

[2] Although the copies of the levies in the record do not contain the schedule of assessments covered, the Department's liens against Messrs. Collins, which were filed approximately one month before the levies were served do schedule the assessments covered and the outstanding assessments referenced which were referenced also in the first installment agreement totaled approximately $66,000. Since the levies were in the amount of $100,389.04, it is fair to infer that the levies also covered amounts not included in the personal assumptions executed by Messrs. Collins.

[3] The record does not provide the detail as to which amounts collected from personal accounts are attributable to Rick Collins and which are attributable to Wayne Collins.

The Taxpayer also has raised objections about the Department's handling of the installment agreements and the payments made under the installment agreements. It should be noted that these issues are addressed herein only in an effort to address the concerns raised by the Taxpayer and Messrs. Collins and not because they raise any legally valid objections. These objections raise no legal issues because the terms of the installment agreements were agreed to by the Taxpayer and its corporate officers when they were executed and cannot now be disputed.

First, the Taxpayer objects to the fact that the Department would not grant a repayment period longer than three years, and the Taxpayer apparently informed the Department all along that it would have great difficulty making the payments called for under the terms of the agreement. The Secretary of the Department is given the authority to enter into installment agreements for the payment of delinquent taxes by the provisions of § 7-1-21 NMSA 1978. Subsection A of that statute, however, specifically limits the Secretary's authority to enter into installment agreements to those which are "not for a period longer than thirty-six months." Thus, the Department had no authority to accommodate the Taxpayer's desire for a longer payment period.

Messrs. Collins also argue that since they made payments in the amount of $138,000 under the terms of the first installment agreement prior to its default, and since the tax principal of the amount covered by the first installment agreement was only $125,006.69, that had the Department applied their payments to tax principal first, as they had requested, that their liability would have been largely satisfied and there should not have been an outstanding liability as large as the one for which they remained personally liable. While we do not have calculations to show what the actual amount of liability would have been had the payments been applied as the

Taxpayers requested,[4] this argument is without merit because the Taxpayer knew at the time it executed the first installment agreement that the Department would not agree to apply the payments in the manner requested by the Taxpayer. In fact, under the terms of the installment agreement, the Taxpayer admits conclusive liability for the gross total of taxes in the recapitulation of taxes due portion of the agreement, and that gross total includes estimated amortized interest during the terms of the agreement calculated in accordance with the Department's policy and methodology. Additionally, the Taxpayer has no right which can be identified in the tax code or elsewhere which would allow the payments to be applied as it requested. The statutes are silent in this respect. Because the statutes are silent as to how payments must be applied, the Secretary of the Department has the discretion to make that determination. While the Department had the discretion to apply the payments as the Taxpayer requested, it chose not to do so. There may be sound reasons for the Department's policy. One which comes to mind is that by applying payments to the oldest outstanding assessments, the Department may prevent the ten year statute of limitations on the collection of assessments found at § 7-1-19 NMSA 1978 from operating to bar the collection of old tax liabilities. In any event, the Department acted within its authority in applying its policy to the Taxpayer and the Taxpayer's admission of liability for the interest accrued under the Department's calculations serves as an absolute bar to the Taxpayer's challenge as to the amount of liability secured by the first installment agreement.

[4] The Taxpayer attempted to establish this in Taxpayer's Exhibit A, which shows their calculations of what would be owing if all payments were first applied to tax principal. The exhibit is not an accurate reflection, however, because the Taxpayer used a 12% rate of interest per annum as opposed to the statutory rate of 15%. See, § 7-1-67 NMSA 1978. Even going by the Taxpayer's figures, however, the amount owing under the first installment agreement would have exceeded $60,000 when all payments made under that agreement are taken into account. That amount far exceeds any amount collected under the Department's levies.

The final issue to be determined is the propriety of the Department's levy against the Taxpayer's corporate bank account. This protest was filed apparently out of the Taxpayer's desire to get the Department to release the amounts it collected from the Taxpayer's account which the Taxpayer wished to use to cover its employee payroll. The Taxpayer did not present any evidence or arguments at the hearing as to why the Department's levy against its corporate banking accounts was improper. Thus, the Taxpayer failed to carry its burden of proving the levy to be improper or illegal.

CONCLUSIONS OF LAW

1. The Taxpayer and Rick and Wayne Collins filed timely, written protests to the Department's levies and jursidiction lies over both the parties and the subject matter of those protests.

2. The personal assumptions of liability executed by Rick and Wayne Collins secured the outstanding liabilities of the Taxpayer under the assessments referenced in the first installment agreement.

3. Because the amounts collected from Rick and Wayne Collins' personal accounts did not exceed the amount of the liability secured by their personal assumptions of liability, the Department's levies upon the personal bank accounts of Rick and Wayne Collins were proper.

4. Because Rick and Wayne Collins' personal assumption of tax liability covered the accrual of interest in accordance with the Department's policy of applying tax payments to the oldest outstanding assessments, they may not challenge the Department's calculation of the liability under their preferred method.

5. The Taxpayer failed to establish that the Department's levy against corporate assets was improper or illegal.

For the foregoing reasons, the protests of the Taxpayer and Rick and Wayne Collins ARE HEREBY DENIED.

DONE, this 5th day of March, 1999.