

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

IN THE MATTER OF THE PROTESTS OF
NESTOR & EMMELINE-DOROTHY PADILLA
ASSESSMENT NOs. 98066, 98067 and 98608
TAX LIEN NO. 93523

No. 99-23

DECISION AND ORDER

A formal hearing on the above-referenced protest was scheduled for June 24, 1999, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department was represented by Monica M. Ontiveros, Special Assistant Attorney General. Nestor and Emmeline-Dorothy Padilla failed to appear at the hearing. Based upon the evidence in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 4, 1998, the Department issued the following personal income tax assessments to Nestor Padilla:

<i>Assessment</i>	<i>Tax Year</i>	<i>Tax</i>	<i>Penalty</i>	<i>Interest</i>	<i>Total</i>
No. 98066	1995	\$120.00	\$60.00	\$46.50	\$226.50
No. 98067	1996	\$125.00	\$62.50	\$29.69	\$217.19
No. 98608	1997	\$173.00	\$86.50	\$15.14	\$274.64

2. On December 10, 1998, the Department mailed the Padillas a Notice of Claim of Tax Lien No. 93523, claiming a lien upon the property of Nestor and Emmeline D. Padilla for payment of Assessments 98066, 98067 and 98608.

3. On December 14, 1998, Nestor Padilla sent the Secretary of the Department a letter that disputed the validity of the Department's assessments and included a "Request For Rights At Law and Hearing/Administrative Appeal to the Director."

4. On December 15, 1998, Mr. Padilla sent the Department a document entitled "Claim for Release of Erroneous Notice of Lien/Levy" disputing the validity of the tax lien and demanding "an Adjudicatory Appeal Office Hearing."

5. On May 20, 1999, counsel for the Department filed a Request for Hearing on Mr. Padilla's protests to Assessments 98066, 98067, 98608 and Tax Lien No. 93523.

6. On May 25, 1999, the Hearing Officer sent Mr. and Mrs. Padilla a letter by certified mail, return receipt requested, notifying them that a hearing on their protests was scheduled for June 24, 1999.

7. On June 8, 1999, Mr. and Mrs. Padilla returned the notice of hearing marked "Refused for Fraud" and sent the Hearing Officer an affidavit stating, among other things: "AFFIANTS DO-NOT ACCEPT THE INVITATION OF THE ENTERING INTO A FOREIGN: STATE-FICTION-JURISDICTION UNDER A FOREIGN-YELLOW-FRINGED FLAG, SUCH AS THE 'STATE OF NEW MEXICO', WHERE ONE IS GUILTY UNTIL PROVEN INNOCENT."

8. On June 24, 1999, the date of the hearing, Department counsel submitted a letter notifying the Hearing Officer that the Department was withdrawing its assessment of the fifty-percent civil fraud penalty shown on Assessments 98066, 98067 and 98608. The Department's decision to abate the fraud penalty was based on its discovery of several documents the Padillas submitted prior to the date of the assessments notifying the Department of their intent not to pay income tax and their belief that the tax was unconstitutional.

9. The Padillas did not appear at the June 24, 1999 hearing scheduled on their protests.

DISCUSSION

There is a statutory presumption that the Department's assessment of tax is correct. Section 7-1-17(C) NMSA 1978; *Mears v. Bureau of Revenue*, 87 N.M. 240, 241, 531 P.2d 1213, 1214 (Ct. App.

1975). To be successful, anyone challenging an assessment must clearly overcome this presumption. *Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (Ct. App. 1972). Having failed to appear and present evidence in support of their protests, the Padillas have not met their burden of proof in this case and have not overcome the presumption of correctness that attaches to the Department's assessments of personal income tax and accrued interest.

As the party protesting the Department's tax lien, it is also the Padillas' burden to present evidence that the Department's action in filing the lien was incorrect. By failing to appear and present evidence in support of their protest, the Padillas have failed to demonstrate that the lien was improper under the law.

Although the Padillas' failure to appear at the hearing is sufficient to support entry of a decision in favor of the Department, I will briefly address the arguments raised in Mr. Padilla's protest letter in order to provide some guidance to the Padillas and give them notice of the Department's position concerning their belief that they are not liable for payment of personal income tax.

Obligations of the Federal Government are Exempt from State Taxation. Mr. Padilla maintains that because his wages are paid in federal reserve notes, which are federal obligations, his wages are not subject to tax by New Mexico. In support of his argument, Mr. Padilla cites to 12 U.S.C. § 411, which states that federal reserve notes "shall be obligations of the United States" and 31 U.S.C. § 3124(a), which states that "[s]tocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State...." Mr. Padilla overlooks 31 U.S.C § 5154, which gives states express permission to tax federal reserve notes:

§ 5154. State Taxation

A State or a territory or possession of the United States may tax United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) as money on hand or on

deposit in the same way and at the same rate that the State, territory, or possession taxes other forms of money.

In *Smith v. Davis*, 323 U.S. 111, 114, 65 S.Ct. 157, 159 n.4 (1944), the United States Supreme Court noted that while state taxation of legal tender notes was once prohibited, this was changed by Congress's 1894 enactment of what is now 31 U.S.C § 5154. *See also, Hibernia Savings & Loan Society v. San Francisco*, 200 U.S. 310, 26 S.Ct. 265, 267 (1906). The fact that Mr. Padilla's wages are paid in the form of federal reserve notes does not prevent New Mexico from imposing a personal income tax on those wages.

Tax Protester Arguments. Mr. Padilla raises several other arguments in support of his position that he is not subject to personal income tax, including the following: (1) the Constitution prohibits Congress from imposing a direct, nonapportioned tax on individuals; (2) the Sixteenth Amendment was never properly ratified; (3) the Padillas are sovereign citizens not subject to the jurisdiction of the United States or the State of New Mexico; (4) the term "income" includes gain or profit from capital, but does not include compensation for labor; (5) the income tax applies only to people exercising corporate or governmental privileges; (6) payment of income tax is voluntary; (7) it is a violation of the Padillas' Fourth and Fifth Amendment rights to require them to file income tax returns; (8) the Internal Revenue Code is not positive law; (9) the tax laws do not define who is liable for tax and are unconstitutionally vague and indefinite. All of these arguments—which are attributable to what is generally known as the tax protester or tax resister movement—have been soundly rejected by both federal and state courts. I direct Mr. Padilla's attention to the following cases:

In re Becraft, 885 F.2d 547, 548 (9th Cir. 1989): "For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's

authorization of a non-apportioned direct income tax on United States citizens residing in the United States and thus the validity of the federal income tax laws as applied to such citizens."

Betz v. United States, 40 Fed.Cl. 286, 295 (1998): "Despite plaintiff's and numerous other tax protesters' contention that the Sixteenth Amendment was never ratified, courts have long recognized the Sixteenth Amendment's ratification and validity."

United States v. Sloan, 939 F.2d 499, 500-501 (7th Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992): "Also basic to Mr. Sloan's 'freedom from income tax theory' is his contention that he is not a citizen of the United States, but rather, that he is a freeborn, natural individual, a citizen of the State of Indiana, and a 'master'—not 'servant'—of his government. As a result, he claims that he is not subject to the jurisdiction of the laws of the United States. This strange argument has been previously rejected as well.... Mr. Sloan's proposition that he is not subject to the jurisdiction of the laws of the United States is simply wrong."

Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984): "Plaintiffs argue first that they are exempt from federal taxation because they are 'natural individuals' who have not 'requested, obtained or exercised any privilege from an agency of government.' This is not a basis for an exemption from federal income tax."

United States v. Lawson, 670 F.2d 923, 925 (10th Cir. 1982): "Notwithstanding Lawson's belief that his wages are not gains or profits but merely what he has received in an equal exchange for his services, the Internal Revenue Code clearly includes compensation of this nature within reportable gross income."

Olson v. United States, 760 F.2d 1003, 1005 (9th Cir. 1985): "This court has repeatedly rejected the argument that wages are not income as frivolous [citations omitted] and has also rejected the idea that a person is liable for tax only if he benefits from a governmental privilege."

United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993), *cert. denied*, 510 U.S. 1193 (1994): "Appellants' claim that payment of federal income tax is voluntary clearly lacks substance."

United States v. Schiff, 876 F.2d 272, 275 (2d Cir. 1989): "payment of income taxes is not optional...the average citizen knows that payment of income taxes is legally required."

United States v. Stillhammer, 706 F.2d 1072, 1076 (10th Cir. 1983): "The Fifth Amendment does not serve as a defense for failing to make any tax return, and a return containing no information but a general objection based on the Fifth Amendment does not constitute a return as required by the Code."

Ryan v. Bilby, 764 F.2d 1325, 1328 (9th Cir. 1985): "Congress's failure to enact a title into positive law has only evidentiary significance and does not render the underlying enactment invalid or unenforceable.... Like it or not, the Internal Revenue Code is the law, and the defendants did not violate Ryan's rights by enforcing it."

Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990): "the following arguments alluded to by the Lonsdales are completely lacking in legal merit and patently frivolous: (1) individuals ("free born, white, preamble, sovereign, natural, individual common law 'de jure' citizens of a state, etc.") are not "persons" subject to taxation under the Internal Revenue code; (2) the authority of the United States is confined to the District of Columbia; (3) the income tax is a direct tax which is invalid absent apportionment, ... (4) the Sixteenth Amendment to the Constitution is either invalid or applies only to corporations; (5) wages are not income; (6) the income tax is voluntary; (7) no statutory authority exists for imposing an income tax on individuals; (8) the term "income" as used in the tax statutes is unconstitutionally vague and indefinite; (9) individuals are not required to file tax returns fully reporting their income;...."

The above cases represent only a small sampling of the hundreds of federal and state court decisions rejecting the arguments raised by the tax protester movement. In this case, the Department withdrew its assessment of the fifty percent civil fraud penalty because the Padillas notified the Department of their intent to cease filing income tax returns and because there was no evidence they did not have a genuine belief in the positions they espoused. The Padillas are now on notice, however, that there is no legal merit to the arguments on which they have relied in failing to report and pay personal income tax to the state of New Mexico. The Padillas cannot continue to assert they do not come within the definition of "taxpayers" or are not subject to payment of New Mexico personal income tax without risking imposition of fraud penalties. As the court stated in *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68, 69 (7th Cir. 1986):

Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead—so tax protesters think—to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, *but it may penalize people who act on them.* (emphasis added).

CONCLUSIONS OF LAW

1. Nestor and Emmeline-Dorothy Padilla filed timely, written protests to Assessment Nos. 98066, 98067, 98608 and Tax Lien No. 93523, and jurisdiction lies over the parties and the subject matter of this protest.
2. Having failed to appear and present evidence at the hearing set to consider their protests, the Padillas have failed to meet their burden of showing that the Department's assessments were incorrect or that the Department's tax lien did not comply with legal requirements.

For the foregoing reasons, the Padillas' protest IS DENIED.

Dated June 29, 1999.