


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico

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2 Opinion Number: _____

3 Filing Date: **MARCH 3, 2020**



Mark Reynolds

4 **No. A-1-CA-37052**

5 **IN THE MATTER OF THE PROTEST**
6 **OF MARC A. GELINAS TO**
7 **ASSESSMENT ISSUED UNDER**
8 **NO. L1020757296,**

9 Protestant-Appellee,

10 **v.**

11 **NEW MEXICO TAXATION**
12 **AND REVENUE DEPARTMENT,**

13 Respondent-Appellant.

14 **APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE**
15 **Christopher Romero, Hearing Officer**

16 Marc A. Gelinas
17 La Pointe, WI

18 Pro Se Appellee

19 Hector H. Balderas, Attorney General
20 David Mittle, Special Assistant Attorney General
21 Santa Fe, NM

22 for Appellant

1 **OPINION**

2 **B. ZAMORA, Judge.**

3 {1} Appellee Marc A. Gelinas (Taxpayer) protested an assessment of tax by the
4 New Mexico Taxation and Revenue Department (the Department) on gross receipts
5 for commissions earned on the sale of implantable prosthetic devices. Following a
6 hearing and supplemental briefing by the parties, the hearing officer found in favor
7 of Taxpayer and abated the assessment in full. The Department appealed. Because
8 we conclude the filing of the Department’s notice of appeal was not timely, we
9 dismiss the Department’s appeal with prejudice.

10 **DISCUSSION**

11 {2} On January 9, 2018, the hearing officer filed his decision and order in favor
12 of Taxpayer, finding that, under NMSA 1978, Section 7-9-66 (1999), and
13 3.2.1.18GG(6) NMAC,¹ Taxpayer’s commissions were not subject to the gross
14 receipts tax, and ordering the assessment be abated in full. On January 17, 2018, the
15 Department filed a motion for reconsideration, arguing that Section 7-9-66 could not
16 form the basis of Taxpayer’s relief because it was not timely raised, and that the
17 hearing officer had misinterpreted Section 7-9-66 and NMSA 1978, Section 7-9-93

¹In his order and decision, the hearing officer cited Regulation 3.2.1.18HH. This appears to have been in error. Subsection GG pertains to commission of independent contracts, while Subsection HH pertains to receipts from winning contests.

1 (2016). The hearing officer denied the Department’s motion for reconsideration on
2 January 24, 2018. The Department filed its notice of appeal on February 16, 2018,
3 twenty-three days after denial of its motion for reconsideration and thirty-eight days
4 after the filing of the hearing officer’s decision and order.² On March 1, 2018,
5 Taxpayer filed a motion in opposition to notice of appeal arguing that the
6 Department’s appeal is untimely. We agree with Taxpayer.

7 {3} Our resolution of this issue presents an issue of statutory interpretation, and
8 our review is therefore de novo. *See In re Grace H.*, 2014-NMSC-034, ¶ 65, 335
9 P.3d 746 (stating that “[o]ur interpretation of a statute is a question of law that an
10 appellate court reviews de novo”). NMSA 1978, Section 7-1-25(A) (2015), of the
11 Tax Administration Act provides that a party dissatisfied with a decision and order
12 of the hearing officer “may appeal to the [C]ourt of [A]ppeals for further relief” and
13 that “[a]ll such appeals to the [C]ourt of [A]ppeals shall be taken within thirty days
14 of the date of mailing or delivery of the written decision and order of the hearing
15 officer.” Section 7-1-25(A). Subsection B of Section 7-1-25 states that “[t]he
16 procedure for perfecting an appeal under this section to the [C]ourt of [A]ppeals
17 shall be as provided by the Rules of Appellate Procedure.” Rule 12-601 NMRA of
18 the Rules of Appellate Procedure governs the perfection of direct appeals to this

²There is some confusion in the pleadings about the date the notice of appeal was filed, but the notice was in fact filed on February 16, 2018.

1 Court from decisions and orders issued by administrative agencies. *See* Rule 12-601.
2 Rule 12-601(B) states that “[d]irect appeals from orders, decisions, or actions of
3 boards, commissions, administrative agencies, or officials shall be taken by filing a
4 notice of appeal with the appellate court clerk . . . within thirty (30) days from the
5 date of the order, decision, or action appealed from.”

6 {4} The Department does not dispute that it filed its notice of appeal more than
7 thirty days after the hearing officer filed his decision and order. However,
8 notwithstanding the plain language of the provisions governing this appeal, the
9 Department contends its appeal is timely because the filing of a motion for
10 reconsideration tolls the period for filing a notice of appeal and, even if it does not,
11 the Department’s appeal includes a challenge to the hearing officer’s denial of its
12 motion for reconsideration, and the time for appealing that order did not expire until
13 February 24, 2018. The Department contends there is an absence of guidance in Rule
14 12-601 and Section 7-1-25, because neither includes language addressing the effect
15 of a party’s filing of a motion for reconsideration on the timeliness of an appeal, and
16 asks us to import statutory language from “other procedural rules” to provide such
17 guidance. We decline to do so.

18 {5} “When a statute contains language which is clear and unambiguous, we must
19 give effect to that language and refrain from further statutory interpretation.”
20 *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 18, 117 N.M. 346, 871 P.2d

1 1352 (internal quotation marks and citation omitted). Here, neither Section 7-1-25
2 nor Rule 12-601, nor the interplay between the two, contains any ambiguity with
3 respect to the time for filing an appeal of a decision and order issued by a hearing
4 officer considering a tax protest. *See* § 7-1-25(A); Rule 12-601(B). However, even
5 if we were to look beyond the clear and unambiguous language of both the statute
6 and rule that govern this appeal, we remain unpersuaded by the Department’s
7 arguments directing us to other rules (which govern appeals to district courts). The
8 first such statute, NMSA 1978, Section 39-3-1.1(A) (1999), is expressly limited to
9 “judicial review of agency final decisions that are *placed under the authority of this*
10 *section by specific statutory reference.*” (Emphasis added.) That condition is not
11 satisfied here. The second, Rule 1-074 NMRA, says nothing about the effect of a
12 motion for reconsideration on the time to file a notice of appeal. *See* Rule 1-074
13 (setting the date for filing a notice of appeal to the district court at thirty days). And
14 the third, Rule 12-505(C) NMRA, makes it plain that when our Supreme Court
15 wishes to make finality dependent upon whether a motion for reconsideration is
16 filed, it is capable of doing so by including appropriate language. *See* Rule 12-505(C)
17 (stating that “[f]inal action by the district court shall be the filing of a final order or
18 judgment in the district court unless timely motion for rehearing is filed, in which
19 event, final action shall be the disposition of the last motion for rehearing that was
20 timely filed); *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030,

1 ¶ 25, 148 N.M. 426, 237 P.3d 728 (“[I]f a statute on a particular subject omits a
2 particular provision, inclusion of that provision in another related statute indicates
3 an intent that the provision is not applicable to the statute from which it was
4 omitted.” (alteration, internal quotation marks, and citation omitted)). The “other
5 procedural rules” the Department relies upon are therefore unavailing.

6 {6} Finally, we are not persuaded that the Department is entitled to appeal the
7 hearing officer’s denial of its motion for reconsideration separately from its appeal
8 of the decision and order, such that its notice of appeal was rendered timely in this
9 case. As we have explained, the rule governing a direct appeal of a hearing officer’s
10 decision establishes the filing timeline based on the issuance of the decision and
11 order. *See* § 7-1-25(A). The Department has pointed to no statute, case, or rule
12 authorizing an appeal from the denial of a motion for reconsideration issued in a
13 matter arising under the Tax Administration Act and we therefore presume none
14 exists. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482
15 (“Where a party cites no authority to support an argument, we may assume no such
16 authority exists.”). Moreover, to conclude otherwise would effectively insert the
17 tolling language urged by the Department into Rule 12-601 and Section 7-1-25 that
18 we have rejected.

19 {7} This Court must dismiss a case when it does not have jurisdiction, *see*
20 *Thornton v. Gamble*, 1984-NMCA-093, ¶ 15, 101 N.M. 764, 688 P.2d 1268, and the

1 timeliness of an appeal is a mandatory precondition to the exercise of our
2 jurisdiction. *See Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 12, 112 N.M. 226,
3 814 P.2d 94 (stating that satisfaction of time and place requirements for filing a
4 notice of appeal are mandatory preconditions to the exercise of appellate
5 jurisdiction). We will not waive this precondition in the absence of unusual
6 circumstances. *See Santa Fe Pac. Tr., Inc. v. City of Albuquerque*, 2012-NMSC-028,
7 ¶ 31, 285 P.3d 595 (“An untimely appeal will not be excused when the appellant is
8 responsible for not filing a notice of appeal on time and there are no unusual
9 circumstances warranting excusal.”). We perceive no such circumstances here. The
10 Department has offered no reason why it was unable to comply with the thirty-day
11 rule for filing a notice of appeal in this matter. The hearing officer disposed of the
12 Department’s motion for reconsideration five days before the notice deadline and,
13 in its order denying the motion, clearly instructed that “[m]otions for reconsideration
14 may not be used to circumvent the appeals process and do not extend the time for
15 taking an appeal.” The Department had ample time to file a timely notice of appeal
16 following the denial of its motion, yet failed to do so. We therefore conclude the
17 Department’s appeal is untimely.

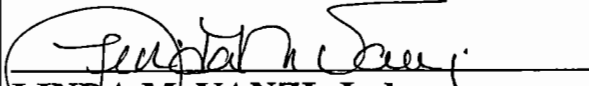
18 **CONCLUSION**

19 {8} Based on the foregoing, we dismiss the Department’s appeal with prejudice.

1 {9} IT IS SO ORDERED.


BRIANA H. ZAMORA, Judge

4 WE CONCUR:


LINDA M. VANZI, Judge


JACQUELINE R. MEDINA, Judge