

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

GLADYS COBOS and L. ROBERTO SANCHEZ,

Plaintiffs,

vs.

No. CIV-_____

DEMESIA PADILLA, in her official
Capacity as the Secretary of Taxation and
Revenue and the NEW MEXICO TAXATION
AND REVENUE DEPARTMENT,

Defendants.

COMPLAINT

Plaintiffs, Gladys Cobos and L. Roberto Sanchez, by and through their attorneys, file this complaint against Defendants Demesia Padilla, in her official capacity as the Secretary of Taxation and Revenue, and the New Mexico Taxation and Revenue Department (herein, “the Department”). Plaintiffs allege as follows:

INTRODUCTION

Plaintiffs are longtime residents of New Mexico. For years they have worked hard to support themselves and their families, and they have complied diligently with state and federal laws by reporting and paying taxes on their income. In the past, Plaintiffs annually filed their state income tax returns using their federal Individual Tax Identification Numbers (“ITINs”) because they did not qualify for Social Security Numbers. As a result of having overpaid their state taxes, Plaintiffs received tax refunds without incident. In 2012, however, Defendants instituted a policy and practice of denying and withholding tax refunds targeted at New Mexico residents who are foreign nationals and who file tax returns using their ITINs (“ITIN Policy”). The ITIN policy,

which contravenes state statutes and the rights of Plaintiffs to equal protection and due process of law under the New Mexico Constitution, has resulted in the Department deliberately keeping hundreds of dollars owed to Plaintiffs, and millions of dollars owed to thousands of other New Mexico taxpayers.

The ITIN policy is a clear misinterpretation of the Tax Administration Act, which contains no authorization for the Department to withhold, or otherwise fail to process, valid refunds based on tax returns filed by ITIN-users. NMSA 1978, §§ 7-1-1 to 7-1-82. Plaintiffs contend that the Department may not read new and different conditions into statutes that are not found in the text and reinvent the law on their own—that is the Legislature’s job. Nor may the Department single out a vulnerable group based on their alienage. As a result of the ITIN policy, the Department has for at least the past three years, and continuing through the present, unlawfully and unfairly failed to process and/or denied Plaintiffs’ claims for refunds, failed to credit appropriately Plaintiffs for taxes paid to the State through their withholding, and assessed additional income taxes on Plaintiffs that they did not owe. Plaintiffs pray this Court for an order declaring the actions of the Department unlawful and unconstitutional, enjoining the unlawful and unconstitutional actions of the Department, directing the Department to grant Plaintiffs refunds in the amount of their claims, and enjoining the Department from pursuing claims against Plaintiffs for erroneous additional taxes owed.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this cause of action pursuant to NMSA 1978, § 7-1-26; NMSA 1978, § 38-3-1.1; NMSA 1978, § 44-6-4.

2. Venue for this action lies in the First Judicial Court of Santa Fe County pursuant to NMSA 1978, § 38-3-1(A) and NMSA 1978, § 7-1-26 (c)(2).
3. Plaintiffs have exhausted available administrative remedies under NMSA 1978, § 7-1-22. Plaintiffs timely filed their claims for refund and credit for the relevant tax years. The Department reviewed and then denied Plaintiffs' claims by letter dated November 14, 2014. *See* Plfs.' Exs. 1 & 2.
4. Plaintiffs' claims are timely under NMSA 1978, § 7-1-26(B).

PARTIES

5. Plaintiff Gladys Cobos is an individual taxpayer who resides and works in Santa Fe County, New Mexico.
6. Plaintiff Mr. Sanchez is an individual taxpayer who resides and works in Santa Fe County, New Mexico.
7. All plaintiffs are foreign nationals.
8. Defendant Demesia Padilla, in her official capacity, is the Secretary of Taxation and Revenue and oversees the New Mexico Taxation and Revenue Department.
9. Defendant New Mexico Taxation and Revenue Department is charged by law with administering all State tax acts.

FACTUAL ALLEGATIONS

10. Similar to the Internal Revenue Service ("IRS"), New Mexico requires all eligible New Mexico residents to file a personal income tax return, regardless of their work status or immigration status.

11. By law, all taxpayers must furnish a taxpayer identification number on all returns, statements, and other tax-related documents. 3.1.1.15(D) NMAC. For most individuals, this number is a Social Security Number (“SSN”). However, some foreign nationals are not eligible for an SSN, and instead use their ITIN, a nine-digit tax-processing number created and assigned by the IRS to individuals who are obligated to file a federal tax return, but ineligible for an SSN.
12. Accordingly, ITINs allow more taxpayers to follow state tax laws, the state government to collect more tax revenue, and employers to meet withholding requirements. The Department instructs anyone who is ineligible for an SSN to enter an ITIN everywhere the SSN is required. 3.1.1.15(D) NMAC.
13. When an employer withholds state income taxes from an employee’s wages, the employee receives a credit for the withholding against any income tax due to the State. Before the implementation of the ITIN policy, the Department simply processed the returns, credited the withholding for tax returns submitted under an ITIN, and, when necessary, issued a refund.
14. In 2012, however, the Department began implementing the ITIN policy, which automatically suspends returns filed with ITINs.
15. Taxpayers who use ITINs to file their tax returns, like Plaintiffs, receive a letter from the Department saying there are “discrepancies” between the “personal identifying information submitted on the return” and that “supporting documents” must be provided within 30 days of the letter. For example, the Department has demanded that some Plaintiffs provide paystubs,

earning statements, and/or a letter from the employer to verify wages were earned and the amount of state tax withheld with the SSN indicated on it.

16. This practice of requesting “supporting documents” is arbitrary and unfounded, because the Department already has the W-2s from both the employers and employees, which establish the earnings, taxes paid, and SSNs of the ITIN-users.
17. In many cases, however, including Plaintiffs’ cases, returns remain suspended and the Department assesses additional taxes regardless whether ITIN-users provide supporting documents.
18. The Department automatically disallows the withholding and processes the return which results in either no refund; the issuance of a reduced refund; and/or the issuance of an assessment for additional taxes not actually due by the taxpayer under state law (essentially, a double-tax).
19. The Department reported in 2014 that it had sent over 14,500 “discrepancy” letters to taxpayers filing individual state income tax returns using ITINs since 2012, resulting in over \$4 million in tax monies withheld.
20. Because a taxpayer’s use of the ITIN to file a tax return is not indicative of fraud, and instead is required by state and federal law, the Department has no statutory authority to automatically suspend tax returns filed by foreign nationals solely because they filed with ITINs, or to require additional documents in order to process properly filed tax returns where the taxpayer has already established employment and identity. The Department also has no

authority to assess additional taxes and threaten sanctions, such as interest and penalties, on foreign national ITIN-users.

21. Plaintiffs are longtime New Mexico residents who have dutifully followed state law and filed their state income taxes every year for over a decade. Plaintiffs used their assigned ITIN numbers to file their tax returns pursuant to state law.

22. To their knowledge, Plaintiffs have never been accused of tax fraud or been under investigation for tax fraud by the Department.

23. Before 2012, Plaintiffs always received their lawfully owed state tax refunds without incident.

24. However, since the implementation of the ITIN policy, the Department has unlawfully denied Plaintiffs and other foreign nationals like them tax refunds amounting to thousands of dollars and assessed additional state taxes that they did not owe under law.

25. Ms. Cobos has filed her state and federal income taxes using her ITIN since 2007, until 2014 when she filed her federal and state taxes with her newly issued SSN.

26. Specifically, Ms. Cobos timely filed her 2012 New Mexico Personal Income Tax (“NM PIT”) return and requested that the Department pay her \$845.00 for the refund. Instead of processing the return and issuing the refund, the Department notified Ms. Cobos by letter that her return had been adjusted under the ITIN policy and that she owed the State \$334.21 in taxes, penalty, and interest. In a letter issued to Ms. Cobos on January 10, 2014, the

Department stated that the reason for the adjustment was that the amount of withholding was “not supported by statements included with the return.” However, all of the information in the return was consistent and sufficient to support Ms. Cobos’ identity, employment, income earned, and taxes paid. Ms. Cobos never received her refund for overpaying state taxes in 2012.

27. The following year, Ms. Cobos timely filed her 2013 NM PIT using her lawful, newly-issued SSN. However, the Department refused to issue the \$351.00 refund it owed her, and instead, on March 20, 2014, demanded that she provide substantial, additional documentation for the 2013 tax year. The documentation demanded of her, such as W-2s (already submitted by both Ms. Cobos and her employer), was duplicative of what she had already submitted. Ms. Cobos refused to send the additional documentation because she felt the policy unfairly discriminated against her and that sending such would be futile. Ms. Cobos never received her refund for overpaying state taxes in 2013.

28. Ms. Cobos timely filed her claims for refund for the 2012 and 2013 tax years and was denied on November 14, 2014. (Plfs.’ Ex. 1).

29. Mr. Sanchez has filed his state income taxes since 2004 using his ITIN. Mr. Sanchez’s ITIN is the same number listed on his W-2 form for his employer of over ten years.

30. Until 2012, Mr. Sanchez received his personal New Mexico income tax refund without incident. Mr. Sanchez timely filed his 2012 PIT, and requested that the Department pay him \$219.00 for the refund. Instead of

processing the return and issuing the refund, the Department instead sent Mr. Sanchez a “discrepancy letter.” Mr. Sanchez engaged the services of a pro bono attorney and only then, was able to obtain his refund.

31. Mr. Sanchez timely filed his 2013 PIT and was due a refund in the amount of \$329.00.

32. Instead of receiving his refund, however, Mr. Sanchez received a “Return Adjustment Notice” from the Department on March 18, 2014, stating that his return had been readjusted and he was being levied a tax, penalty and interest of \$291.00. The notice stated that Mr. Sanchez’s SSN on his W-2 did not match the ITIN on the return, even though the same number was provided in both documents. Mr. Sanchez continues to receive letters from the Department stating, falsely, that he owes taxes plus penalties and interest. To date, Mr. Sanchez has not received his refund for overpaying taxes in 2013.

33. Mr. Sanchez timely filed his claims for refund for the 2013 tax year and was denied on November 14, 2014. *See Ex. 2.*

34. Consistent with other policies Defendants have attempted to implement in recent years, Defendants’ ITIN policy is a thinly veiled pretext to target and harass foreign nationals. Under federal regulations, the IRS only issues ITINs to “alien individual[s],” which, for purposes of the regulations, IRS defines as “an individual who is not a citizen or a national of the United States.” 26 CFR § 301.6109-1(d)(3)(i). Therefore, as applied and on its face, the Department’s policy singles out and classifies individuals by alienage (including Plaintiffs) and treats them differently than other similarly situated taxpayers. There is no

rational basis, much less a compelling interest that is supported by narrowly tailored means, for targeting Plaintiffs and other foreign national ITIN users.

35. Collectively, the Department has withheld approximately \$1,525.00 in excess of what Plaintiffs are liable for state income taxes.

36. Plaintiffs fully complied with Sections 7-1-13(B) and (C), N.M.S.A.1978 of the Tax Administration Act, which govern the process for submitting a tax return and claim for refund. Plaintiffs are entitled to their refunds without being subjected to the punitive, arbitrary, and unnecessary policies and practices of Defendants.

37. No provision in the Tax Administration Act or any other state law permits the Department to: refuse to process tax returns, or withhold income tax refunds, by requiring additional documentation from the taxpayer on the basis that the taxpayer is a foreign national who filed with an ITIN; withhold refunds after the taxpayer has provided the requested additional documentation; or assess additional income taxes that are not otherwise owed under the law.

38. The Legislature did not create, ratify, or otherwise authorize Defendants to create and implement, the ITIN policy. In fact, the ITIN policy distorts and perverts the Legislature's intent in enacting the current version of the Tax Administration Act, including 3.1.1.15(D) N.M. CODE R. (1998), and other related provisions, as well as the constitutional provisions identified below.

FIRST CAUSE OF ACTION

DEBT DUE UNDER THE TAX ADMINISTRATION ACT

39. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.
40. Defendants' denials of Plaintiffs' claims for refunds are clear legal error. At the time Plaintiffs submitted their claims for refunds, Defendants had no authority under the Tax Administration Act ("the TAA") to automatically suspend Plaintiffs' tax returns, process their returns without crediting their withholding, demand additional documentation of their employment and/or identity when those matters were already established by Plaintiff's income tax returns, or assess income taxes that Plaintiffs did not actually owe.
41. Under the TAA, Plaintiffs are due the refunds of taxes they each overpaid as identified above and do not owe the State any additional taxes, penalties, or interest.
42. The TAA contains no special requirements, prohibitions or limitations for foreign national ITIN-users, and does not require them to produce additional documentation that other taxpayers are not required to show under similar circumstances.
43. As a direct consequence of the Defendants' misinterpretation and misapplication of the TAA, Defendants owe Ms. Cobos \$1,196.00 plus interest.
44. As a direct consequence of the Defendants' misinterpretation of the Tax Administration Act, Defendants owe Mr. Sanchez \$329.00 plus interest.

SECOND CAUSE OF ACTION

**VIOLATION OF SEPARATION OF POWERS UNDER
ARTICLE III, SECTION 1 OF THE NEW MEXICO CONSTITUTION**

45. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.
46. Defendants have exceeded their statutory authority and unlawfully intruded upon the province of the Legislature by (1) automatically suspending the tax returns of Plaintiff foreign national ITIN-users on the basis of the taxpayers using their ITINs to file the returns; (2) automatically disallowing tax withholdings when processing the returns of foreign national ITIN-users; (2) requiring additional documentation than is necessary to establish the identity of foreign national ITIN-users and the amount withheld from their earnings; and (4) assessing additional income taxes on Plaintiffs over and above what they owe under New Mexico law.
47. Through the TAA, the New Mexico Legislature has adopted a series of laws that applies equally and fairly to all individual New Mexico taxpayers filing state income tax returns. Defendants' ITIN policy subverts and contravenes those laws.
48. Defendants have violated the separation of powers by creating and implementing, without legislative authority or individualized suspicion of fraud, a program that singles out foreign national ITIN-users, including Plaintiffs, and commanding them to submit to additional administrative hurdles before obtaining their tax refunds, if at all.

THIRD CAUSE OF ACTION

DENIAL OF EQUAL PROTECTION UNDER ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION

49. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.
50. Defendants' ITIN policy violates the rights of Plaintiffs under the Equal Protection Clause of the New Mexico Constitution, which states that "[n]o person shall be . . . denied equal protection of the laws." N.M. Const. art. II, § 18.
51. Under federal regulations, the federal government only issues ITINs to "alien individuals." Foreign national ITIN users, including Plaintiffs, are not U.S. citizens and therefore cannot vote in federal or state elections, and they cannot run for state office, leaving them with a substantial degree of political powerlessness. Individuals who are not U.S. citizens are often perceived as "undocumented" and are the targets of both governmental and public discrimination in New Mexico, further establishing the need for their protection from the majoritarian political process.
52. Foreign national ITIN-users are similarly situated to other taxpayers who file returns, but as applied and on its face, Defendants' policy treats foreign national ITIN-users differently than other taxpayers. No other group of taxpayers, other than foreign national ITIN-users, automatically receives a demand for additional documentation verifying identity and employment under the ITIN policy.

53. The use of an ITIN in and of itself is not indicative of fraud, and instead is in fact *required* by both the federal and New Mexico state governments. Arbitrarily and irrationally withholding tax refunds and/or “double taxing” foreign national ITIN-users does not serve the interest of investigating fraud and violates the rights of Plaintiffs to equal protection under the law.

FOURTH CAUSE OF ACTION

DENIAL OF PROCEDURAL DUE PROCESS UNDER ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION

54. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.

55. The New Mexico Constitution protects against deprivations of “life, liberty, or property, without due process of law.” N.M. Const. art. II § 18.

56. The withholding of a tax refund under the foreign national ITIN policy constitutes a taking of Plaintiffs’ property right without procedural due process.

57. Plaintiffs’ interest in a refund of the taxes paid in excess of their liability is a state-created property right. Plaintiffs have a legitimate claim of entitlement to their tax refund because the TAA entitles Plaintiffs to the amount withheld in excess of the state income tax due, subject to their submission of certain statutorily required documentation. Plaintiffs complied with the statutes and are entitled to their returns.

58. Both the procedures set in place by Defendants to request additional documentation of ITIN users and the administrative process are self-defeating and continue to operate in a manner that deprives Plaintiffs of their property

right without due process of law. The foreign national ITIN policy, Defendants' implementation of the policy, and the self-defeating administrative process are not adequate to safeguard Plaintiffs' property rights.

ATTORNEYS' FEES AND COSTS

59. Plaintiffs request an award of reasonable attorney's fees and costs as authorized under law and equity.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and collectively, respectfully request judgment in their favor and that the Court:

- A. Declare that by requiring additional documentation of employment and identity from ITIN-users on the basis of filing their returns using ITINs, and refusing to recognize credits for withholding on that basis, Defendants have misinterpreted and misapplied the Tax Administration Act as intended by the New Mexico Legislature;
- B. Declare that as a result of Defendants' misinterpretation and misapplication of the Tax Administration Act, Defendants owe Ms. Cobos \$1,196.00 plus interest;
- C. Declare that as a result of their misinterpretation of the Tax Administration Act, Defendants owe Mr. Sanchez \$ 329.00 plus interest;
- D. Declare that Defendants have violated the separation of powers because the ITIN policy exceeds and contravenes Defendants' authority under state tax laws;

- E. Declare that nothing in the Tax Administration Act or any other state tax act demonstrates that the Legislature intended to require ITIN-users to provide additional documentation of their employment and identity, on the basis that state taxpayers used their ITIN to file state income tax returns;
- F. Declare that the Legislature did not impose any special restrictions or conditions on taxpayers who are foreign nationals who file income tax returns using ITINs and are owed income tax refunds;
- G. Declare that Defendants' have denied equal protection to Plaintiffs by unreasonably and unfairly targeting them on the basis of alienage and as members of a marginalized group;
- H. Declare that Plaintiffs have a property interest in their refund of overpayment of state income taxes under the laws of New Mexico;
- I. Declare that Defendants have denied Plaintiffs due process by arbitrarily denying them their property interest in the amount of state income taxes withheld from their paychecks in excess of the amount of state income taxes they actually owe under New Mexico law and failing to implement sufficient safeguards to protect Plaintiffs' due process rights;
- J. Enjoin Defendants from implementing the ITIN policy against Plaintiffs and targeting ITIN-users without individualized indicators or fraud, specifically: refusing to process returns; demanding additional documentation of employment or identity already established in a submitted tax return; automatically disallowing the credit for withholding for ITIN-users; and assessing additional taxes not owed by ITIN-users;

K. Grant Plaintiffs reasonable and necessary attorneys' fees and costs as provided by law and equity; and

L. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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