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

IN THE MATTER OF THE PROTEST OF **No. 10-06**
PETER SINCLAIRE and ELIZABETH DURSTON
TO DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L0154758528.

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 23, 2010, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Ida Lujan, Special Assistant Attorney General. Mr. Peter Sinclaire and Ms. Elizabeth Durston ("Taxpayers") appeared representing themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 15, 2008, the Department sent Taxpayers a letter notifying them that they had made an overpayment in the amount of $60.00 on the 2004 personal income tax return. (Department Exhibit A)

2. The Department's protocol is to mail along with the notice of overpayment instructions the blank application for refund form. (Department Exhibit A)

3. Taxpayers completed the application for refund on February 5, 2009 and delivered it to the Department on the same date. (Department Exhibit B)

4. By letter dated February 13, 2009, the Department notified Taxpayers that the refund request was denied based on the claim being filed late as it was not filed within three

years of the end of the calendar year in which payment was due. The Department enclosed information for Taxpayers to protest the denial of refund. (Department Exhibit C)

5. On February 26, 2009 Taxpayers filed a written protest to the Department's denial of their refund claim. (Department Exhibit D).

6. On March 11, 2009 the Department acknowledged receipt of the protest.

7. The Department requested a hearing on November 5, 2009.

DISCUSSION

The issues to be decided are whether Taxpayers are entitled to a refund of the overpayment made on their 2004 personal income tax return and whether estoppel should be applied against the Department. Taxpayers claim that while they received the Department's letter dated September 15, 2008, they never received the instructions to the application for refund. They also argued that the information from an employee of the Department gave them the impression that they would be able to have the refund applied to their 2008 taxes and that it was not necessary to complete the refund application. Taxpayers claim that no one told them that there was a deadline for the refund claim or that an application for refund must be completed.

Refund. NMSA 1978, §7-1-27 (A) (2007) allows an individual who is owed a refund to claim the refund "by directing to the secretary, within the time limited by the provisions of Subsections D, E and F of this section, a written claim for refund." The applicable subsection D limits the possibility of obtaining a refund, stating that "no credit or refund of any amount may be allowed or made to any person unless as the result of a claim made by that person as provided in this section: (1) within three years of the end of the calendar year in which: (a) the payment was originally due…"

The refund was for an overpayment of taxes for the tax year 2004. The tax return was due April 15, 2005. In counting the three years, December 31, 2008 would have been the last date for which a claim for refund could be made and be within the statutory requirement of within "three years of the calendar year in which payment was originally due. The claim for refund was delivered to the Department on February 5, 2009.

The question as to whether the application for the refund being submitted by Taxpayers is time barred based on the time restraints in the statute was recently answered in the Court of Appeals decision, *In the matter of the protest of Val Kilmer and Joanne Whalley v. Jan Goodwin, Secretary, New Mexico Taxation and Revenue*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690. While this case dealt with a request for a refund claim based on the Department's inaction in approving or denying the claim, the court determined that the legislature has placed the "burden of maintaining an active claim on the taxpayer." The court explained that the legislature has allocated the responsibility to taxpayers as "it is the taxpayer who can more easily keep track of the status of a refund claim." ¶16. In *Kilmer*, the court determined that legislative intent in creating the statute is paramount and that "when the language is free from ambiguity, we will not resort to any other means of interpretation." ¶18. The court then determined that the time deadlines as set out in the statute have a "clear and definite outer limit" (¶19) and that Taxpayer's argument would undermine the legislature's definite time limit. ¶20. The policy reasons for having a statute of limitations for claims for refund are clear. It would be fiscally irresponsible for the State if it allowed claims for refund to be filed at any time. Therefore as the time limitation for requesting a refund and submitting the application for refund is clear and definite and as the claim was made after this deadline, the claim for refund is time barred by the statute.

Equitable Estoppel. Taxpayers claim that the refund should be allowed based on information they obtained from a Department employee arguing that the Department had an obligation to notify them as to the deadline for applying for the refund. They claim that the Internal Revenue Service has a protocol for returning refunds to taxpayers when there is an overpayment and that the cover letter notifying Taxpayers of a potential refund should notify Taxpayers of the time deadline for applying for the refund. It should be noted that the Internal Revenue Service has a statute of limitations for claims for refunds. See IRC Title 26, subtitle F, Chapter 66, paragraph 6511 and IRC publication 556.

Previously our courts have determined that estoppel will not be applied against a state governmental entity "unless there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't,* 1998-NMSC-11, P17, 125 N.M. 140, 958 P.2d 98. Additionally, "Estoppel cannot lie against the state when the act sought would be contrary to the requirements express by statute." *Rainaldi v. Pub Employees Ret. Bd.,* 115 NM 650, 658-59, 857 P.2d 761, 769-70 (1993). In determining whether estoppel is appropriate, the conduct of both parties must be considered *Gonzales v. Public Employees Retirement Board,* 114 NM 420, 427, 839 P.2d 630, 637, *cert. denied,* 114 Nm 227, 836 P.2d 1248 (1992).

In *Kilmer,* ¶27, the court sets out that an individual seeking to establish estoppel against the government must prove:

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury…the party seeking to establish estoppel must

> show that reliance was reasonable). In addition to these four factors the plaintiff must demonstrate 'affirmative misconduct on the part of the government.'"

In examining the conduct of both parties, the courts have been willing to grant estoppel when a party has relied on written representations but unwilling to grant estoppel when a party has relied solely on oral representations. *See Bien Mur Indian Ctr.,* 108 NM 228, 231, 770 P.2d 873, 876 (refusing to apply estoppel when only oral representations were made and relied on). Here, Taxpayers claim that they relied on the oral representations of an employee of the Department's Santa Fe office. The oral statements of a Department employee do not give rise to estoppel. The Department's written communications with Taxpayers (Department A) notified them as to the refund for 2004 taxes and notified them of forms to complete either for obtaining the refund or applying the refund to a subsequent tax liability. In *Bien Mur,* 108 N.M. at 231, 770 P.2d at 876, the court held that the taxpayer "did not act reasonably in relying on the oral representation of the Department."

Further, in considering the conduct of both parties to determine whether or not estoppel should apply against the government, Taxpayers acknowledge having received Department Exhibit A although denying receipt of the attached application instructions and application for refund. The letter itself, which is acknowledged as received, provides sufficient information to place Taxpayers on notice to complete the application for refund and provide sufficient information such that the Department has information as to its proper allocation. The letter states, "If after reviewing your records you agree that you have overpaid, complete the enclosed Application for Tax Refund (RPD-41071) and mail it with this letter to the address listed below. A refund check will be mailed to you." It subsequently states, "If you would like to have the

overpayment applied to another tax liability or tax program, please fill out the attached Application for Tax Refund. Be sure to include the tax program you would like the overpayment applied to, the reporting period and the amount you want applied." Therefore even if the instructions and application form were not enclosed, the letter put Taxpayers on notice as to the method to apply for the refund or have the refund applied to another tax liability. New Mexico law has determined that when an individual receives documentation that he/she does not understand that "a reasonable person who did not understand those papers would seek to have them translated or explained." *See Maso v. State Taxation and Revenue Dept., Motor Vehicle Division,* 136 Nm 161, 96 P.3d 286 (2004) ¶13. Further, in *Bogan v. Sandoval County Planning & Zoning Comm'n,* 119 NM 334, 890 P.2d 395 (Ct. App. 1994), our Court of Appeals held, "where circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed." *Id* at 341, 890 P.2d at 402.

Taxpayers were informed of the procedure of filing a claim for refund and the procedure to apply the refund to another tax liability. They were required to act as reasonably prudent person should have and made inquires based on the letter they received. Taxpayers are charged with knowledge of the facts reasonable inquiry would have revealed. It was unreasonable for Taxpayers to assume they did not have to do anything but wait for the state to do something. *Kilmer* ¶41. *See also Patten v. Santa Fe Nat'l Life Ins. Co.,* 47 N.M. 202, 208, 138 P.2d 1019,1023 (1943) (stating that when a party seeking to establish estoppel has the ability to obtain relevant information and shows indifference to the information at hand, the party may be precluded form relying on the doctrine of estoppel).

Taxpayers have not met their burden of proving that estoppel is appropriate in this matter. The facts presented do not support a finding of estoppel as the action sought by taxpayers is time barred by the statute and is contrary to the requirements expressed by the statute. There was no affirmative misconduct by the Department. The Taxpayers were on notice that there was a process for either receiving the tax refund or for having that refund applied to a subsequent tax liability by the letter sent by the Department on September 15, 2008. Having that information Taxpayers had a duty to know, to research and conform to the requirements of the statute.

CONCLUSIONS OF LAW

A. The Taxpayers filed a timely, written protest to the Department's denial of their claim for refund of 2004 personal income taxes, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayers claim for refund is time barred pursuant to NMSA 1978, §7-1-26.

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

DATED April 21, 2010.