

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
KENNETH W. WHITE
TO REFUND DENIAL
ISSUED UNDER LETTER
ID NO. L0728093232**

No. 17-48

v.

TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned protest on November 16, 2017 before Ignacio V. Gallegos, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Kenneth W. White (“Taxpayer”), deceased, was represented by his daughter, Judith M. Page, as Personal Representative of the Estate and successor in interest. Staff Attorney Cordelia Friedman appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Thomas Dillon appeared as a witness for the Department. The contents of the Administrative File were admitted into the record at hearing by stipulation. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 27, 2016, the Department sent Taxpayer a letter denying the Taxpayer’s claim for refund. [Letter ID # L0728093232].
2. The denial letter was directed to the address of Ms. Page, the Taxpayer’s Estate’s Personal Representative and successor in interest, but addressed to Taxpayer. Ms. Page testified

that she did not receive the letter of denial until she inquired again in February of 2017.

[Testimony of J. Page]

3. Ms. Page protested the initial denial of refund on March 16, 2017. [First protest letter]

4. On March 24, 2017 the Department denied Taxpayer's protest of the initial denial of refund letter. [Letter ID # L0259425584].

5. The Department denied Taxpayer's protest because the protest letter was received by the Department beyond the 90-day window for receipt of a protest of Departmental action taken January 27, 2016.

6. Ms. Page protested the second denial (of protest) on June 13, 2017, stating by sworn declaration that she did not receive the January 27, 2016 denial letter until February 28, 2017, at which point the protest of March 16, 2017 would have been within the 90-day window.

[Second protest letter; Declaration of J. Page]

7. On July 12, 2017, the Department issued a letter acknowledging receipt of a timely protest to the denial of protest letter issued under Letter ID L0259425584 [Letter ID #L1686326576].

8. On August 14, 2017, the Department submitted a request for hearing to the Administrative Hearings Office and the hearing was scheduled within 90-days of receipt of the second protest.

9. Ms. Page requested necessary continuances, waived the 90-day requirement of NMSA 1978, Section 7-1B-8, and requested that she be permitted to appear by telephone. Because the material facts were not in dispute and only the application of the law was in dispute,

Ms. Page was allowed to appear by telephone. A hearing on the merits took place November 16, 2017.

10. On or about October 15, 2007, Taxpayer, through a CPA and his Personal Representative, filed a timely (after extension) PIT-1 tax return for tax year ending December 31, 2006, asserting a claim for refund for the overpayment of taxes paid in the amount of \$1,000.00.

11. The claim for refund appeared to be a valid claim. [Testimony of T. Dillon]

12. Testimony revealed there was no apparent reason for the Department's inaction, but the Department did not take action to either refund the claimed amount, or issue a denial on the claim within 120 days of the filing of the claim. [Testimony of T. Dillon; Testimony of J. Page]

13. Taxpayer did not either protest or file a civil action within 210 days of the protested inaction.

14. Documents submitted by Ms. Page revealed that Taxpayer died on October 13, 2006, leaving a will appointing his daughter Ms. Judith M. Page as a personal representative.

15. Many years passed and Ms. Page began to inquire about the lack of refund in January of 2016. [Testimony of J. Page]

16. Complicating the matter of closing the Taxpayer's Estate, Ms. Page lives outside New Mexico and her siblings who were assisting her were also living outside of New Mexico. Taxpayer had several business entities that required winding down. [Testimony of J. Page]

17. After speaking with an unknown Department employee who encouraged her to re-apply for the refund, Ms. Page re-submitted an "application for refund" on January 20, 2016. [Testimony of J. Page; no document contained in the file]

DISCUSSION

This protest involves three questions, first, whether the Taxpayer was entitled to a refund, second, what responsibility rests with the Taxpayer's Personal Representative and the Department when a valid claim for refund is received, and finally, whether the Taxpayer's Personal Representative may revive a valid claim for refund after the expiration of the three-year statute of limitation on a claim for refund has expired.

Taxpayer has the burden of establishing it was entitled to the claimed refund at issue. *See* Regulation 3.1.8.10 (A) NMAC. Taxpayer's claim for refund is premised on an overpayment of tax. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Consequently, Taxpayer must show that it is entitled to its claim for refund.

Was taxpayer entitled to the refund of overpaid 2006 taxes?

Mr. Kenneth W. White, Sr., died October 13, 2006. During the 2006 tax year Taxpayer paid "Other payments" of one thousand dollars (\$1,000.00). [2006 PIT-1, Image 1 of 18]. The Taxpayer's PIT-1 2006 tax return was completed by Ms. Page with the assistance of a Certified Public Accountant (CPA) and was delivered to the Department timely in 2007, stamped received

on October 15, 2007. This constituted a timely request for refund. *See* Regulation 3.1.9.8 (A) (“The filing of a fully completed income...tax return ... showing an overpayment of tax, a credit or rebate claimed will constitute the filing of a claim for refund and no separate claim for refund is required.”). Through testimony, Ms. Page and Mr. Dillon agreed that there was no reason the claim for refund of the 2006 tax overpayment should have been denied at the time it was filed. The claim for refund claimed within the PIT-1 tax return was a legitimate claim.

What responsibilities do the parties bear to act on the valid refund claim?

The second question of what responsibilities the parties bear once the valid claim for refund is delivered to the Department then rests on statutory interpretation. New Mexico law does not require the Department to act on claims of refunds. NMSA 1978 Section 7-1-26 (B) states: “[t]he secretary or the secretary's delegate may allow the claim in whole or in part or may deny the claim.” The statute uses the word “may” rather than the word “shall.” New Mexico courts have interpreted this to mean that “the word “may” in the sentence allowing the secretary to grant or deny a claim should be construed as permissive.” *Unisys Corp. v. New Mexico Taxation & Revenue Dep't*, 117 N.M. 609, 874 P.2d 1273; *Thriftway Marketing Corp. v. State*, 114 N.M. 578, 844 P.2d. 828 (Ct. App. 1992). Although Subsection B of the statute only allows two options (to allow or to deny), the *Unisys* court determined that “Section 7-1-26(A) gives the Secretary the choice of whether or not to act upon a refund claim.” *Unisys Corp. v. New Mexico Taxation & Revenue Dep't*, 117 N.M. 609, 874 P.2d 1273. The statute then anticipates three possibilities: that the Department deny the claimed amount, that the Department refund the claimed amount, or that the Department take no action on the claim. *See* NMSA 1978, Section 7-1-26 (B)(2). The evidence showed that the Department did not deny the original claim for

refund, and did not pay out the claimed refund amount, therefore this case is one in which the Department did not take any action on the original claim for refund submitted with the Taxpayer's 2006 PIT-1 personal income tax return.

In the event of Departmental inaction, the responsibility then shifts to the Taxpayer to force the Department to take action where none was taken. "If the department has neither granted nor denied any portion of a claim for refund within one hundred twenty days of the date the claim was mailed or delivered to the department, the person may refile it within the time limits set forth in Subsection D of this section or may within ninety days elect to pursue one, but only one, of the remedies in Subsection C of this section. After the expiration of the two hundred ten days from the date the claim was mailed or delivered to the department, the department may not approve or disapprove the claim unless the person has pursued one of the remedies under Subsection C of this section." NMSA 1978, Section 7-1-26 (B)(2).

When the tax return was filed, delivered October 15, 2007, the Taxpayer's successor in interest had until May 12, 2008 to take action to force the Department to pay out or reject the original claim for refund filed with the tax return. That did not occur within the statutory time-frame. "[T]he legislature intended a clear and definite outer limit, of 210 days, on the Department's authority to act on a claim for refund." *Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690. The original claim was lost after May 12, 2008.

Subsection D then allows taxpayers to take corrective action for an additional three years from "the end of the calendar year in which (a) the payment was originally due..." NMSA 1978, Section 7-1-26 (D)(1)(a). The Taxpayer's successor in interest then could have reasserted or revived the claim for refund within Section 7-1-26 (D)(1)(a)'s time limitation. Typically, personal income tax payments are due by April 15 of the year following the reporting period.

See NMSA 1978, Section 7-2-12 and 24 U.S.C. Section 6072 (a). This tax payment for 2006 would have been due in 2007, and the end of that year was December 31, 2007. Under Section 7-1-26 (D), the third year from the year the tax was originally due expired December 31, 2010. The Taxpayer's successor did not reassert the claim for refund within that time. The original claim and subsequent ability to reassert the claim was lost after that time. *Unisys Corp. v. New Mexico Taxation & Revenue Dep't*, 117 N.M. 609, 874 P.2d 1273 (Court of Appeals held that a claim for refund was time barred when taxpayer did not confront the department inaction by timely filing either a protest or a civil action).

The hearing officer is not unsympathetic to the estate's claim, particularly in light of the Department's unexplained failure to act on a claim it acknowledges was proper. Estates can be complicated to wind down, and it appears to be so in this case. Nevertheless, the legislature has established a statute of limitation on refund claims so that the state will not be held liable for late-asserted claims so the ledger books may be closed after a finite amount of time. The limits set out in NMSA 1978, Section 7-1-26 were intended "to avoid stale claims, which protects the Department's ability to stabilize and predict, with some degree of certainty, the funds it collects and manages." *Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690.

Was taxpayer's reassertion of the claim in 2016 sufficient to revive the claim for refund under the doctrine of estoppel?

The Taxpayer's successor in interest, Ms. Page, inquired about the missing refund in 2016, and filed an "Application for refund" on January 20, 2016, after the idea was suggested to her by a Department employee over the phone. The application for refund was not filed within the three-year statute of repose, which had expired at the end of 2010.

New Mexico statutes provide no permissive method of revivor of claims, even valid claims, that may allow for a re-opening of a claim nine years after filing. “A claimant may... refile a claim within the statutory period [three years] if the department has not denied the claim in whole or in part and has taken no action on that claim within 120 days from the filing of the claim.” Regulation 3.1.9.9 (C) NMAC.

However, under particular circumstances, the law allows revivor of stale claims under the doctrines of statutory estoppel or equitable estoppel. Statutory estoppel is determined by applying NMSA 1978, Section 7-1-60 to the facts of the case. The statute reads:

In any proceeding pursuant to the provisions of the Tax Administration Act, the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary, unless the ruling had been rendered invalid or had been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose. NMSA 1978, § 7-1-60 (1993).

The facts of this case do not show the Taxpayer’s reliance on a Department regulation effective at the time the tax arose, nor on a ruling addressed to the party personally and in writing. Statutory estoppel does not prevent the Department from denying this claim.

The doctrine of equitable estoppel has an even more limited application. As a general rule, estoppel is rarely applied against the state, and is applied only when “right and justice demand it.” *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989). When estoppel is raised to avoid application of a statute of limitations, the issue is whether the party to be estopped has taken some action to prevent the other party from bringing suit within the prescribed period. *Kern v. St. Joseph Hospital, Inc.*, 1985-NMSC-031, ¶10, 102 N.M. 452, 697 P.2d 135. The *Kern* court acknowledged that

“Silence may sometimes constitute fraudulent concealment” *Id.* at ¶11. The evidence of this case indicates that the Department’s inaction is equivalent to silence. In *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 698, 858 P.2d 66, 74 (1993), the New Mexico Supreme Court emphasized that the party asserting equitable estoppel to toll a statute of limitations must show not only a lack of knowledge of the truth as to the facts in question, but also “the lack of means by which knowledge might be obtained.” Here, the Taxpayer’s 2006 tax return was filed by Ms. Page with assistance of a CPA who prepared the return. The CPA could have advised Ms. Page on a course of action if the refund was not immediately paid out. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 41. The Taxpayer’s successor had adequate means of obtaining the knowledge necessary to force the Department to act on the request for refund, or to re-assert the claim within the applicable statute of limitations for claims for refund of three years. The Department’s inaction did not prevent the Taxpayer’s successor from acting.

Additionally, a taxpayer is not entitled to rely on the oral advice of a Department employee as a substitute for conducting its own analysis of New Mexico’s tax statutes and regulations. *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 42, 136 N.M. 440, 99 P.3d 690. The evidence showed that Ms. Page submitted an application for refund in 2016, after speaking with a Department employee over the phone. However, there was no indication in the evidence that Ms. Page was led to believe the application would be granted. Equitable estoppel is not warranted in this circumstance and cannot overcome the application of the three-year statute of limitation on a claim for refund in this case. Despite sympathizing with Taxpayer’s successor’s position, controlling precedent dictates the outcome of this protest.

For the stated reasons, the Taxpayer’s protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's March 13, 2017 denial of the claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was timely set and held within 90-days of the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer established that it was entitled to the claimed refund submitted through the 2006 PIT-1 tax return.

D. The Department took no action on the claim for refund within 120 days.

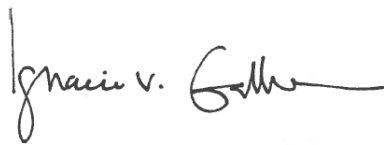
E. Taxpayer did not timely protest the Department's inaction within 210 days of the original claim for refund. Section 7-1-26 (B)(2).

F. Taxpayer did not timely re-submit a request for payment of the refund within three years of the end of the calendar year the payment would have been due. Section 7-1-26 (D)(1).

G. Taxpayer's late actions to reassert the claim were untimely and were barred by the statute of limitations for refunds under Section 7-1-26.

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

Dated: December 11, 2017.



Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision **by filing a notice of appeal with the New Mexico Court of Appeals** within 30 days of the date shown above. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On December 11, 2017, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner: