STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
CIBL INC. & SUBSIDIARIES
TO DENIAL OF REFUND
ISSUED UNDER LETTER
ID NO. L0035805488

v. **D&O No. 18-05**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on November 7, 2017, before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Staff Attorney, Mr. David Mittle, Esq., appeared representing the Taxation and Revenue Department ("Department"). Attorney, Mr. Robert Fiser, appeared representing CIBL, Inc. & Subsidiaries ("Taxpayer"). The matter came before the Hearing Officer on the Department's Motion for Summary Judgment (hereinafter "Motion") filed on October 4, 2017 and the Taxpayer's Response to Department's Motion for Summary Judgment (hereinafter "Response") filed on November 2, 2017.

The Department's Motion presented a statement of facts that the Taxpayer did not dispute. Based on the undisputed facts, review of exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On March 7, 2017, the Department notified Taxpayer that it reviewed its claim for Corporate Income Tax Refund for the period ending December 31, 2012 in the amount of

$113,381.00, and that the claim was denied as untimely. The refund denial was issued under Letter ID No. L0035805488. [*See* Administrative File].

2. The deadline to make a claim for refund in this matter was December 31, 2016. [*See* Motion, Pg. 3; Response, Pg. 4].

3. On April 28, 2017, the Taxpayer submitted a Formal Protest of the denial of its claim for Corporate Income Tax Refund. The Formal Protest was received in the Department's Protest Office on May 1, 2017. [*See* Administrative File].

4. On May 11, 2017, the Department acknowledged Taxpayer's Formal Protest under Letter ID No. L0191554864. [*See* Administrative File].

5. On June 26, 2017, the Department filed a Hearing Request. The Department requested a scheduling hearing. [*See* Administrative File].

6. On June 27, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a scheduling hearing in reference to Taxpayer's protest for July 12, 2017. [*See* Administrative File].

7. On July 11, 2017, Taxpayer, by and through its Interim Chief Executive Officer and Chief Financial Officer, Mr. Robert E. Dolan, filed a summary of events in reference to the issues in protest. [*See* Administrative File].

8. A telephonic scheduling conference occurred on July 12, 2017. The hearing was within 90 days of the Taxpayer's protest. [*See* Administrative File].

9. On July 14, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing that set a hearing on the merits of Taxpayer's protest for November 7, 2017. [*See* Administrative File].

10. On October 4, 2017, the Department filed Department's Motion for Summary Judgment. [*See* Administrative File; Motion].

11. On October 10, 2017, Taxpayer's attorney of record filed an Entry of Appearance. [*See* Administrative File].

12. On October 19, 2017, the parties filed a Joint Motion to Vacate Hearing and Convert to a Scheduling Hearing. [*See* Administrative File].

13. On October 23, 2017, the Administrative Hearings Office entered an Order Converting Hearing on the Merits to Hearing on Department's Motion for Summary Judgment. [*See* Administrative File].

14. On November 2, 2017, Taxpayer filed Taxpayer's Response to Department's Motion for Summary Judgment. [*See* Administrative File; Response].

Stipulated and Undisputed Material Facts

15. CIBL, Inc. owns two wholly-owned subsidiaries, Wescal Cellular, Inc. and Wescal Cellular II, Inc. ("Subsidiaries"). [*See* Motion, Pg. 1, ¶1; Response, Pg. 2, ¶4.a].

16. The Subsidiaries in turn each owned an interest in a different partnership ("Partnerships"). [*See* Motion, Pg. 1, ¶2; Response. Pg. 2, ¶4.b].

17. The Partnerships were operated by Verizon Wireless and provided cellular telephone services in New Mexico. [*See* Motion, Pg. 1, ¶3; Response, Pg. 2, ¶4.c].

18. For the years ending December 31, 2011 and 2012, Verizon Wireless was responsible for tax matters of the Subsidiaries. [*See* Motion, Pg. 2, ¶5; Response, Pg. 2, ¶4.e].

19. On or about September 5, 2012, Taxpayer filed its 2011 CIT-1 for the year ending December 31, 2011. Taxpayer requested $126,437 in overpayment be applied to its 2012 liability. [*See* Motion, Pg. 2, ¶6; Response, Attachment A-2/9, Line 27a, to Unidentified Exhibit].

20. In December of 2012, the Subsidiaries sold their interests in the Partnerships to Verizon Wireless. [*See* Motion, Pg. 2, ¶7; Response, Pg. 2, ¶4.f].

21. On or about September 11, 2013, Taxpayer filed its original 2012 CIT-1 for the year ending December 31, 2012. Taxpayer's return showed an overpayment and requested a refund of $53,086. [*See* Motion, Pg. 2, ¶5; Pg. 2, ¶8; Response, Pg. 2, ¶4.d; P g. 2, ¶4.g; Attachment B-1/9 to 2/9, Line 29 of Unidentified Exhibit].

22. The refund amount claimed on Line 29 of the original 2012 CIT-1 was in error. [*See* Attachment B-2/9, Line 29 of Unidentified Exhibit to Response] The correct amount should have been $55,943.00. [*See* Motion, Pg. 2, ¶8; Response, Pg. 3, ¶4.m; Pg. 2, ¶4.g].

23. Taxpayer's original 2012 CIT-1 for the year ending December 31, 2012 did not claim Verizon Partnership withholdings of $57,438.00, which it was otherwise entitled to claim. [*See* Motion, Pg. 2, ¶8; Response, Pg. 2, ¶4.h; Attachments B-2/9, Line 21, and D-4/6 to Unidentified Exhibit].

24. On October 29, 2013, the Taxpayer received a Proposed Assessment. [*See* Motion, Pg. 2, ¶9; Response, Pg. 2, ¶4.i].

25. On November 19, 2013, the Taxpayer made a refund request to the Department for $110,524.00, which represented $53,086.00, the amount of refund asserted in Taxpayer's original 2012 CIT-1, plus an additional $57,438.00 for Partnership withholdings. [*See* Motion, Pg. 2, ¶10; Response, Pg. 2, ¶4.j; Attachment C-1/1 and B-1/9 to 2/9 to Unidentified Exhibit].

26. At some point in 2014, Verizon Wireless updated and corrected its tax withholdings with the Department. [*See* Motion, Pg. 2, ¶11; Response, Pg. 3, ¶4.k].

27. On September 16, 2016, the Department mailed the Taxpayer a Statement of Account. [*See* Motion, Pg. 2, ¶12; Response, Pg. 3, ¶4.l; Attachment D-3/6 to Unidentified Exhibit to Response].

28. On December 8, 2016, Taxpayer, by and through Mr. Dolan, submitted correspondence requesting a refund in the amount of $113,390.00. Although the parties stipulated that the amount requested was $113,381.00, the correspondence clearly indicated that a slightly different amount was requested. [*See* Motion, Pg. 2, ¶13; Response, Pg. 3, ¶4.m; Attachment D-1/6 to D-6/6 to Unidentified Exhibit to Response].

29. On February 10, 2017, the Department requested an amended 2012 CIT-1. Taxpayer filed an amended 2012 CIT-1 on or about February 20, 2017 (referring to date accompanying Taxpayer's agent's signature) requesting a refund of $113,381.00. [*See* Motion, Pg. 2, ¶14; Response, Pg. 3, ¶4.n; Pg. 3, ¶4.o].

30. On March 7, 2017, the Department notified Taxpayer that it reviewed its claim for Corporate Income Tax Refund for the period ending December 31, 2012 in the amount of $113,381.00, and that the claim was denied as untimely. The refund denial was issued under Letter ID No. L0035805488. [*See* Motion, Pg. 2, ¶15; Response, Pg. 3, ¶4.q].

31. Taxpayer did not file and amended 2012 CIT-1 prior to December 31, 2016.

DISCUSSION

The primary issue in this matter is whether Taxpayer's claim for refund was untimely and barred by the statute of limitations. The parties recognize that under NMSA 1978, Section 7-1-26 (D) (1) (2015), no refund can be granted unless claimed within three-years of the end of the calendar year in which the tax was due.

The parties do not dispute that the deadline to submit a claim for refund under the facts of this

protest was December 31, 2016. *See* Motion, Pg. 3; Response, Pg. 4. The critical question is whether two items of correspondence submitted to the Department prior to December 31, 2016 satisfied the legal elements essential for establishing a claim for refund under Section 7-1-26 (2015) and Regulation 3.1.9.8 NMAC. This is a question of law presented for summary judgment.

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.,* 2010-NMSC-035, ¶7, 148 N.M. 713. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez,* 1986-NMSC-066, ¶10-11, 104 N.M. 664. The parties agree that this matter is suitable for summary judgment. *See* Response, Pg. 1, ¶3.

The examination of what constitutes a claim for refund is initially determined by construing Section 7-1-26 (2015). Questions of statutory construction begin with the plain-meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12. In *Wood,* the Court of Appeals stated "that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* A statutory construction analysis begins by examining the words chosen by the legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

The parties agree that the Tax Administration Act establishes the requirements for asserting a claim for refund under NMSA 1978, Section 7-1-26 (A) (2015):

> A. A person who believes that an amount of tax has been paid … in excess of that for which the person was liable… may claim a refund by directing to the secretary, within the time limited by the provisions of Subsections D and E of this section, a written claim for refund. Except as provided in Subsection I of this section, a refund claim shall *include*:
>
> (1) the taxpayer's name, address and identification number;
>
> (2) the type of tax for which a refund is being claimed, the credit or rebate denied or the property levied upon;
>
> (3) the sum of money or other property being claimed;
>
> (4) with respect to refund, the period for which overpayment was made; and
>
> (5) a brief statement of the facts and the law on which the claim is based, which may be referred to as the "basis for the refund".
>
> (Emphasis Added)

It is evident that the statute does not specifically require the submission of an amended tax return as part of a claim for refund. In fact, the Department conceded that such requirement is expressed only in its regulation. *See* Regulation 3.1.9.8 NMAC. Similarly, there is also no indication from the statute that its list is intended to be exhaustive or definite, or that the Department is prohibited from establishing additional requirements. The Hearing Officer noted the Legislature's use of "include" which Black's Law Dictionary, 531 (9th ed. 2009), defines as "[t]o contain as a part of something." It continues to explain that "[t]he participle *including* typically indicates a partial list" and that "some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing." (Emphasis in Original).

Consistent with that definition, New Mexico courts and numerous other jurisdictions have also recognized that:

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' is usually a term of enlargement, and not of limitation. It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated."

See Mechant Bank & Trust Co. v. Meyer (In re Estate of Corwin), 1987-NMCA-100, ¶3, 106 N.M. 316, 317, 742 P.2d 528, 529, *quoting 2A N. Singer, Sutherland Statutory Construction Section* 47.07 (Sands 4th ed. 1984); *citing Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941); *Smyers v. Workers' Comp. Appeals Bd.*, 157 Cal.App.3d 36, 203 Cal.Rptr. 521 (1984); *Schwab v. Ariyoshi*, 58 Hawaii 25, 564 P.2d 135 (1977); *Janssen v. Janssen*, 331 N.W.2d 752 (Minn.1983).

Consequently, the Legislature's use of "include" in Section 7-1-26 (2015) conveyed the meaning that other items were includable, although not specifically enumerated. Therefore, contrary to Taxpayer's position, the statute does not preclude the imposition of additional requirements.

The next question addresses what authority, if any, the Department may have to promulgate such additional requirements. As the Department accurately perceived, "[i]t is, of course, a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom." *See Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, ¶6, 83 N.M. 757, 758, 497 P.2d 968, 969.

The Department is empowered under NMSA 1978, Sec. 9-11-6.2 (A) to issue regulations to administer the tax laws of this state. Its authority, however, is not without limitation. The Department may only promulgate regulations that interpret and exemplify the statutes to which they relate. *See* NMSA 1978, Section 9-11-6.2 (B) (1).

Finding that the plain language of Section 7-1-26 (2015) does not preclude the implementation of additional requirements on submitting claims for refund, and that the Department is authorized to promulgate regulations to administer the law of this state, the question at this juncture is whether Regulation 3.1.9.8 NMAC interprets or exemplifies the law.

Regulation 3.1.9.8 NMAC provides that "[a] claim for refund is valid if it states the nature of the complaint and affirmative relief requested and if it contains *information sufficient to allow the processing of the claim*." (Emphasis Added). The regulation goes on to define the phrase "information sufficient to allow processing of the claim."

> **3.1.9.8 CLAIM FOR REFUND - GENERAL:**
>
> …
>
> E. Information sufficient to allow processing of a claim includes:
>
> (1) taxpayer's name, address and identification number;
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> (2) the type or types of tax for which the refund is being claimed;
>
> (3) the sum of money being claimed;
>
> (4) the period for which the overpayment was made;
>
> (5) the basis for the refund; and
>
> (6) a copy of the appropriate, fully completed amended return for each period for which a refund is claimed.

The Department's regulation further provides that a claim for refund omitting any of the information required by Subsections D and E of 3.1.9.8 NMAC is invalid. *See* Regulation 3.1.9.8 (F) NMAC. The principal difference between Section 7-1-26 (A) (2015) and the regulation is that the latter explicitly requires "a copy of the appropriate, fully completed amended return for each period for which a refund is claimed."

In deciding whether a regulation interprets or exemplifies a statute, a regulation may not abridge or otherwise limit the scope of the related statutory enactment. *See Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139, ¶¶ 10-12, 84 N.M. 303, 305-306. In *Rainbo Baking Co.*, the court held that the Commissioner of Revenue may not promulgate a regulation that would nullify a deduction authorized by the Legislature. In *Rainbo*, the Commissioner promulgated a regulation that required a nontaxable transaction certificate to be in the possession of the buyer at the time of an audit, which contradicted the statute that only required the buyer to have in its possession a nontaxable transaction certificate. Consequently, the Court ruled that a regulation may not add a requirement that the Legislature has not also authorized or imposed that limits or abridges a statute.

Similarly, in *Gonzales v. Educ. Retirement Bd.*, 1990-NMSC-024, 109 N.M. 592, 788 P.2d 348, the Court held that the Educational Retirement Board could not enact a regulation that was "unreasonable or irrelevant." In *Gonzales*, the Board, by regulation, required a member who was requesting an award of disability benefits to hold no property interest in a bus contract. The Court said that there was nothing within the statutory grant of authority to award disability benefits that authorized the Board to refuse to accept an application for disability if the applicant continued to have a property interest in a bus contract. The Court held that the Board did not have the "statutory power to create unreasonable or irrelevant requirements within the application process before it considers the application." *See Gonzales,* 109 N.M. at 594, 788 P.2d at 350. Thus, the Board's regulation was held to create an unreasonable or irrelevant requirement.

Turning to the undisputed facts in this protest, the parties agreed that on two occasions prior to December 31, 2016, Taxpayer submitted correspondence to the Department that requested a refund of corporate income taxes allegedly overpaid. Neither item of correspondence included an appropriate, fully completed amended return for the period for which a refund was claimed as

required by Regulation 3.1.9.8 (E) (6) NMAC.

The first item of correspondence was dated November 19, 2013. *See* Attachment C to Unidentified Exhibit to Response. The correspondence references the Taxpayer's name, Federal Employer Identification Number ("FEIN"), and provides information (with the assistance of its enclosures) for the Department to identify the Taxpayer and the essence of the claim. Taxpayer's correspondence sought a refund of $110,524.00.

The next item of correspondence was dated December 8, 2016. The correspondence provided the name of the Taxpayer, its address, FEIN, addressed the type of tax for which a refund was being sought, the period for which the overpayment was allegedly made, and the reasons for the refund. The correspondence sought a refund for $113,390.00, which differed from the amount previously claimed on November 19, 2013 ($110,254.00) and from the amount claimed in the original 2012 CIT-1 ($53,086.00). It also differed, although not by much, from the amount that would eventually be claimed on the amended 2012 CIT-1 ($113,381.00).

Less than three weeks later, on December 31, 2016, the statute of limitations expired. On or about February 10, 2017, the Department requested that the Taxpayer file an amended 2012 CIT-1. Taxpayer complied on or about February 20, 2017 (referencing the date on which the signature of Taxpayer's officer appears). On March 7, 2017, the Department denied the Taxpayer's request for a refund because a claim had not been made on or before December 31, 2016.

Although Taxpayer argued that it should be entitled to rely on its correspondence from November of 2013 and December of 2016, a closer review of that correspondence illustrates the reasonableness of the Department's regulation. Both items of correspondence requested refunds in amounts that differed from one another, from the final amount requested in Taxpayer's amended 2012 CIT-1, and from the amount requested in the original 2012 CIT-1. The varying amounts

resulted, at least in part, from clerical errors.

The regulation at issue herein is reasonable and relevant because it is designed, in part, to minimize the potential for errors by requiring taxpayers to prepare an amended return, which in turn requires taxpayers to acknowledge the following, appearing above the line reserved for every taxpayer's signature on the 2012 CIT-1:

> I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer or an employee of the taxpayer) is based on all information of which preparer has any knowledge.

Similar to a witness taking an oath to testify truthfully in a trial, the statement provided on the form is intended to awaken a person's conscience and impress upon his or her mind the duty to be truthful. *See e.g.* UJI 13-211, NMRA 2016 (Committee commentary). Moreover, it encourages a taxpayer to examine the return and any supporting documents for errors or omissions. The result should be the submission of a return, or amended return, that the Department can reasonably rely upon for truthfulness and accuracy.

The regulation is also reasonable and relevant given the volume of documents the Department is tasked with processing because the requirement to submit an amended return promotes efficiency and standardization. Otherwise, the Department would be required to manually verify even the most basic computations and assemble the results in a format enabling the Department to take further action. However, placing such responsibility on the Department contradicts the Legislature's intentions, which has made the taxpayer, not the Department, responsible for pursuing its refund. *See Kilmer v. Goodwin,* 2004-NMCA-122, ¶16, 136 N.M. 440, 99 P.3d 690.

Since the relevant events giving rise to the current protest, the Legislature has codified the Department's requirement that an amended tax return accompany a refund claim. *See* NMSA 1978,

Sec. 7-1-26 (A) (6) (2017). Taxpayer asserted that the amendment demonstrated the Legislature's intention that amended returns not be required under previous versions of the statute. The Hearing Officer is unpersuaded. As previously explained, the use of the term "include" signifies a partial, non-exhaustive list consistent with the inference that may be drawn from the Legislature's inaction in response to the Department's administrative interpretation, that the implementation of the statute was consistent with its intent. *See Ensenada Land & Water Ass'n v. Reynolds (In re Sleeper)*, 1988-NMCA-030, ¶15, 107 N.M. 494, 760 P.2d 787.

Had the Legislature been offended by the Department's regulation, its purpose would have been to enact legislation that would have expressly contradicted and overruled the regulation. Rather, the Legislature did the opposite. It enacted legislation that codified the regulation.

The Hearing Officer was therefore persuaded that Regulation 3.1.9.8 NMAC is a proper implementation of the law which required that Taxpayer submit an amended 2012 CIT-1 as part of its claim for refund. The regulation is within the requirements of what the statute permitted, and does not impose unreasonable or irrelevant requirements on taxpayers.

The facts in this case present an ancillary issue that concerns the responsibilities of the respective parties to act on a claim for refund. Taxpayer submitted its initial request for refund on or about November 19, 2013. According to the undisputed facts, the next documented communication in reference to Taxpayer's request for refund occurred more than three years later. Except for Verizon updating and correcting information with the Department at some unidentified point in 2014 (Motion, Pg. 2, ¶11; Response, Pg. 3, ¶4.k), and the Department's Statement of Account dated September 16, 2016 (Motion, Pg. 2, ¶12; Response, Pg. 3, ¶4.l), the record is void of any evidence to suggest additional efforts by the Taxpayer to pursue its claim for refund.

There is similarly no evidence to suggest any action by the Department during the same

period. However, New Mexico law does not require the Department to act on claims for refund, specifically stating that "[t]he secretary or the secretary's delegate *may* allow the claim in whole or in part or *may* deny the claim." (Emphasis Added). The Legislature's use of the word "may" in lieu of "shall" is decisive because New Mexico courts have explained that "the word 'may' in the sentence allowing the secretary to grant or deny a claim should be construed as permissive." *See Unisys Corp. v. N.M. Taxation & Revenue Dep't.,* 1994-NMCA-059, 117 N.M. 609, 874 P.2d 1273. Although Subsection B of the statute may seem to permit only two options, whether to allow or deny a claim for refund, *Unisys* concluded that "Section 7-1-26 (A) contains express language indicating a legislative intent that the Secretary not be required to act on all claims and providing a specific remedy for taxpayers whose claims the Secretary does not act upon." *Id*., ¶11.

Hence, the Legislature anticipated three possibilities in response to a claim for refund: 1) that the Department would deny the refund; 2) that the Department would grant the refund; or (3) that the Department would take no action at all. *See* NMSA 1978, Section 7-1-26 (B) (2).

In the event the Department were to take no action, which best describes what occurred after the Taxpayer's correspondence of November 19, 2013 until February 10, 2017, the responsibility to pursue Taxpayer's refund fell on the Taxpayer, whose options are provided by NMSA 1978, Section 7-1-26 (B) (2) (2015):

> 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.

When it became apparent that the Department had not acted on Taxpayer's correspondence from 2013, the Taxpayer responded with a second request for refund more than three years following its initial communication. By that time, mere weeks remained under the statute of limitations. Regrettably, for the reasons already discussed, Taxpayer's correspondence failed to satisfy the requirements for establishing a valid claim for refund, and the timing of the request left no room for error. The correspondence, in similar fashion to the correspondence from 2013, omitted the required amended 2012 CIT-1.

At a minimum, a perfunctory review of the Department's Application for Refund forms, utilized between 2013 and 2016 should have alerted the Taxpayer to its omission. *See* RPD-41071 (Rev. 3/24/2015); RPD-41071 (Rev. 8/2/2012). Both versions of the Application for Refund form applicable during the period relevant to this protest instruct readers as follows:

> Amended Returns: If your refund is the result of overstating the tax, fees or surcharges due on a previously filed return, you must attach a fully completed amended report for each period affected.

Taxpayer did not file an amended 2012 CIT-1 until after the statute of limitations passed, and only after it was requested by the Department. Although the outward appearance of the Department's request in February of 2017 could be interpreted as suggesting that the Department did not view Taxpayer's refund request as barred, as of that date, such inference would be unreasonable. Our courts have determined that agencies should not be discouraged from communicating with taxpayers, and have declined to interpret statutes in a manner that might encourage agencies to behave in such manner. *See Kilmer*, 2004-NMCA-122, ¶21 ("We decline to encourage a state agency to behave in this fashion. It makes far more sense for the Department to be able to respond, as it did, informing Taxpayers that it could not act on the claim.").

Rather, if any inference is be drawn from the Department's request in 2017, it would only

be that the Department required the refund request to conform with its regulations before it would make any further determinations.

However, once the deadline passed for making a claim for refund, the Department was prohibited from taking further action, even in situations where it may be sensitive to a taxpayer's position. *Kilmer* explained:

> The purpose of the time deadline in Section 7-1-26 is 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. The time deadline places the burden of maintaining an active claim on the taxpayer and makes it the taxpayer's responsibility to confront the Department inaction. The legislature has apparently allocated that responsibility to the taxpayer because it is the taxpayer who can more easily keep track of the status of a refund claim.
>
> *See Kilmer*, 2004-NMCA-122, ¶16.

Regrettably, Taxpayer's diligence over a number of years was not sufficient to preserve its claim for refund. Its efforts between November 19, 2013 and December 8, 2016 were negligible at best, and the law placed no additional obligation on the Department to pursue or preserve Taxpayer's claim.

Since Taxpayer failed to request a refund in conformity with the statute, as implemented by the regulation, before the expiration of its rights under the statute of limitations, its claim for refund is barred. The Department's Motion should be GRANTED and the Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

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

B. A hearing was held within 90 days of Taxpayer's protest. *See* NMSA 1978, Section 7-1B-6 (D).

C. There is no genuine dispute as to any material fact and summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

D. NMSA 1978, Section 7-1-26 (2015) does not preclude the implementation of additional requirements on the submission of claims for refund.

E. Regulation 3.1.9.8 NMAC is a proper implementation of the law. *See* NMSA 1978, Sec. 9-11-6.2.

F. Taxpayer did not make a valid claim for refund within the period prescribed by the statute of limitations. *See* NMSA 1978, Section 7-1-26 (2015); Regulation 3.1.9.8 NMAC.

G. Taxpayer's claim for refund is barred. *See* NMSA 1978, Section 7-1-26 (2015); Regulation 3.1.9.8 NMAC.

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

DATED: February ___, 2018

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. 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 timely 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 proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On February ___, 2018, a copy of the foregoing Decision and Order Granting Summary Judgment was mailed to the parties listed below in the following manner: