

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

IN THE MATTER OF THE PROTEST OF
BIENVENIDOS RESORT INCORPORATION
ID NO. 02-325365-00-7
DENIAL OF CLAIM FOR REFUND

No. 00-21

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 17, 2000, before Margaret B. Alcock, Hearing Officer. Bienvenidos Resort Incorporation ("Taxpayer") was represented by its president, Bonifacio I. Vasquez. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in the business of renting apartments.
2. The Taxpayer started business with two apartment units in 1991. At that time, the Taxpayer's president, Bonifacio I. Vasquez, went to the Department to ask what he needed to do to comply with New Mexico's tax laws.
3. Mr. Vasquez was told to register for payment of gross receipts tax and was given a CRS Filer's Kit containing forms and instructions, including a list of deductions taxpayers are entitled to take against their gross receipts.
4. Mr. Vasquez used the Filer's Kit to determine how to calculate his monthly gross receipts tax, but did not read the explanation of deductions available to taxpayers.
5. In 1992 or 1993, the Taxpayer acquired a third apartment unit. At that time, Mr. Vasquez returned to the Department to ask whether having a third apartment unit required any

changes to the way he was filing gross receipts tax. Mr. Vasquez was told that the addition of a third apartment did not affect his method of reporting the tax.

6. On a couple of occasions, Mr. Vasquez missed a reporting period and received notices from the Department informing him that he needed to file returns for those periods.

7. In 1997 or 1998, Mr. Vasquez's tax preparer asked Mr. Vasquez why he was paying gross receipts tax on the income from his rental units and told him these receipts were deductible.

8. Mr. Vasquez returned to the Department to ask about the deduction. After reviewing the statutes and Department regulations, a Department employee told Mr. Vasquez he could deduct receipts from renting apartments and that a taxpayer with three or fewer rental units was exempt from all reporting.

9. Mr. Vasquez asked whether he was entitled to a refund of the tax previously paid and was told he could claim a refund for tax paid during the last three years.

10. On January 20, 2000, the Taxpayer filed a claim for refund for all gross receipts tax it had paid for reporting periods August 1992 through October 1999.

11. On February 18, 2000, the Department partially granted the Taxpayer's claim for refund in the amount of \$1,566.04, representing tax paid for reporting periods December 1996 through October 1999.

12. At the same time, the Department partially denied the Taxpayer's claim for refund in the amount of \$2,605.87, representing tax paid for reporting periods August 1992 through November 1996. The Department's refund denial letter explained that this portion of the refund claim was denied because it was not filed within three years of the end of the calendar year in which the tax was due.

13. On February 28, 2000, the Taxpayer filed a written protest to the denial of its claim for refund.

DISCUSSION

The issue to be determined is whether the Department properly denied the Taxpayer's claim for refund of gross receipts tax paid for reporting periods August 1992 through November 1996. The Department acknowledges the Taxpayer did not owe gross receipts tax on its rental receipts. *See*, Section 7-9-53 NMSA 1978 and Regulation 3 NMAC 2.28.10. The Department's only reason for denying the Taxpayer's refund claim was the expiration of the limitations period set out in Section 7-1-26 (C)(1)(a) NMSA 1978, which provides, in pertinent part:

[N]o 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 payment was made or the overpayment resulted from an assessment by the department pursuant to Section 7-1-17 NMSA 1978, whichever is later;

In this case, gross receipts tax for reporting period August 1992 was due on or before September 25, 1992; the time within which the Taxpayer could claim a refund of this tax expired December 31, 1995. Gross receipts tax for reporting period November 1996 was due on or before December 25, 1996; the time within which the Taxpayer could claim a refund of this tax expired December 31, 1999. The Taxpayer's January 20, 2000 refund claim was not filed within the limitations period required by Section 7-1-26 NMSA 1978 and was properly denied by the Department.

In its protest, the Taxpayer raises an estoppel argument, asserting the Department misled the Taxpayer into paying tax it did not owe. As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving

the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or 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).

Estoppel Based on Statute. Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: when the taxpayer acted according to a regulation or when the taxpayer acted according to a revenue ruling specifically addressed to the taxpayer. In this case, the Taxpayer’s payment of gross receipts tax was not in accordance with any Department regulation or ruling. To the contrary, if Mr. Vasquez had read the Department’s regulations, he would have realized that no taxes were due on the Taxpayer’s rental receipts. Given these facts, there is no statutory basis to estop the Department from applying the limitations period set out in Section 7-1-26 NMSA 1978 to the Taxpayer’s claim for refund.

Estoppel Based “Right and Justice”. Case law provides for estoppel against the state where right and justice demand its application. When estoppel is invoked 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.*, 102 N.M. 452, 455-456, 697 P.2d 135, 138-139 (1985). 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.” *See also, Bolton v. Board of County Commissioners of Valencia County*, 119 N.M. 355, 369, 890 P.2d 808, 822 (Ct.App. 1994), *cert. denied* 119 N.M. 311, 889 P.2d 1233 (1995)

(estoppel not warranted where plaintiffs had access to public records that would have provided them with complete information concerning the bond ordinance at issue).

The facts of this case do not establish a basis for applying equitable estoppel against the Department.¹ New Mexico's tax laws are a matter of public record available to all of the state's taxpayers. Copies of the tax statutes and accompanying regulations can be obtained from the Department and are also available in public libraries. If Mr. Vasquez had reviewed the provisions of the Gross Receipts and Compensating Tax Act—or asked his accountant to do so—he would have realized that no tax was due on the Taxpayer's rental receipts. He also could have made this determination by simply reading the CRS Filer's Kit provided to him at the time he registered with the Department. At the hearing, Mr. Vasquez testified that he referred to the Filer's Kit to calculate the amount of tax, but did not read the explanation of the various deductions available to gross receipts taxpayers.

The party relying on estoppel has the burden of establishing all facts necessary to support the claim. *In re Estates of Salas*, 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct. App. 1987). The Taxpayer in this case has not met its burden of showing that the Department engaged in fraudulent conduct that prevented the Taxpayer from discovering its error in reporting gross receipts tax or prevented the Taxpayer from filing a timely claim for refund to recover its overpayments of tax.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of its claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

¹ It should be noted that the hearing officer's powers do not include authority to grant an equitable remedy not authorized by statute. *See, AA Oilfield Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 881 P.2d 18 (1994). Even if the hearing officer determined that equitable estoppel was appropriate in a particular case, the taxpayer would have to appeal to the New Mexico Court of Appeals to obtain such relief.

2. The Taxpayer's claim for refund of gross receipts tax paid for reporting periods August 1992 through November 1996 is barred by the limitations period set out in Section 7-1-26 NMSA 1978.

3. The Department is not estopped from denying the Taxpayer's claim for refund.

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

DATED July 19, 2000.