

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

**IN THE MATTER OF THE PROTEST OF
SATYA DEB MISRA
ID NO. 01-195060-00-9
DENIAL OF CLAIM FOR REFUND**

No. 01-05

DECISION AND ORDER

A formal hearing on the above-referenced protest was held April 18, 2001, before Margaret B. Alcock, Hearing Officer. Satya Deb Misra ("Taxpayer") represented himself. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. From November 1983 through May 1985, the Taxpayer was one of four partners in the Redwood Lodge Partnership, which owned and operated a motel in Farmington, New Mexico.
2. Upon formation, the partnership registered with the Department for payment of gross receipts, compensating and withholding taxes under the Department's combined reporting system ("CRS taxes").
3. The registration form listed the names and addresses of two of the partners, including that of the Taxpayer, but the addresses of the partners, and of the motel itself, were incorrect.
4. On May 31, 1985, the Taxpayer gave the other three partners written notice that he was dissolving the partnership, stating: "As of this date, my sharing of any profit or losses, as well as, any responsibility, whatsoever, relating to Redwood Lodge Motel and Restaurant ends."
5. The Taxpayer did not send a copy of the notice concerning his dissolution of the partnership to the Department.

6. Although the other partners continued to operate the motel in Farmington, neither they nor the Taxpayer changed the partnership's registration with the Department to show that the Taxpayer was no longer a partner in the business.

7. On June 15, 1992, the Taxpayer received a letter from the Department notifying him that his 1991 New Mexico income tax refund in the amount of \$373.03 had been applied to outstanding CRS assessments against Redwood Lodge.

8. The June 15, 1992 letter did not provide the Taxpayer with information on how he could protest the Department's application of his refund, and the Taxpayer did not know he had to submit something to the Department in writing.

9. The Taxpayer called the telephone number shown on the 1992 letter and spoke with someone in Albuquerque. The Taxpayer explained that he had withdrawn from the Redwood Lodge Partnership in May 1985 and was not responsible for the partnership's CRS taxes.

10. Based on this conversation, the Taxpayer believed everything would be straightened out, but he never received his 1991 income tax refund from the Department.

11. In 1994, the Taxpayer filed his 1993 New Mexico personal income tax return without payment of the taxes shown to be due. He withheld payment because he believed his 1991 refund had been unlawfully applied to the CRS taxes of Redwood Lodge.

12. After receiving an assessment from the Department, the Taxpayer paid his 1993 income taxes, along with penalty and interest in the amount of \$55.50.

13. On April 8, 1996, the Taxpayer filed a claim for refund of \$1,258.32, which covered a number of payments the Taxpayer had made on the CRS liabilities of Redwood Lodge. Included in the refund claim was the \$373.03 applied from the Taxpayer's 1991 personal income tax refund and

the \$55.50 of penalty and interest the Taxpayer was assessed and paid for the late payment of his 1993 personal income taxes.

14. The Taxpayer's claim for refund was denied, and the Taxpayer filed a protest, which was acknowledged by the Department on September 9, 1996.

15. The Department subsequently granted \$829.79 of the Taxpayer's refund claim, leaving \$428.53 in dispute: the \$373.03 applied from the Taxpayer's 1991 tax refund and the \$55.50 of penalty and interest on the late payment of his 1993 personal income taxes.

DISCUSSION

The issue to be addressed is whether the Taxpayer is entitled to refunds of \$373.03, representing the 1991 personal income tax refund the Department applied against the CRS liabilities of Redwood Lodge, and \$55.50, representing the penalty and interest the Taxpayer was assessed on his late payment of 1993 personal income taxes.

Refund of 1991 Personal Income Taxes. In 1992, the Taxpayer filed his 1991 New Mexico personal income tax return claiming a refund of \$373.03. The Department granted his refund, but then applied the refund to outstanding assessments against Redwood Lodge Partnership. The Taxpayer maintains the Department erred in offsetting his refund against the partnership's liabilities because he had withdrawn from the partnership in May 1985. The Department argues that the liability to which the refund was applied arose during May 1985, prior to the Taxpayer's withdrawal.

For purposes of this protest, there is no need to determine whether the liability at issue arose before or after the Taxpayer withdrew from the partnership. Even assuming the Department's offset was erroneous, the Taxpayer's April 8, 1996 claim for refund was not filed until after expiration of

the limitations period set out in Section 7-1-26 NMSA 1978. In April 1996, that statute provided as follows:

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

In this case, the 1992 application of the Taxpayer's 1991 income tax refund served as an involuntary payment of various CRS assessments issued by the Department against Redwood Lodge. Pursuant to Section 7-1-26, the Taxpayer had until December 31, 1995—three years from the end of the calendar year in which the payment was made—to file a claim for refund. Because the Taxpayer's April 8, 1996 refund claim was not filed within the limitations period in Section 7-1-26 NMSA 1978, it was properly denied by the Department.¹

Penalty and Interest on Late Payment. The Taxpayer requested a refund of the penalty and interest assessed on his late payment of 1993 personal income taxes. The Taxpayer filed a timely 1993 return, but did not include payment because he believed the Department had wrongfully applied his tax refunds from previous years. The Taxpayer subsequently paid the tax, plus accrued penalty and interest in the amount of \$55.50. The Taxpayer is now seeking a refund of the penalty and interest, asserting that he was entitled to withhold payment of his 1993 income taxes as a method of recouping the Department's wrongful offset of his refunds from prior years.

¹ The Taxpayer's April 8, 1996 letter states that he also requested refunds on October 17, 1994 and November 4, 1994, which would have been within the three-year statutory period. There is no evidence, however, that the Taxpayer filed a timely protest to the Department's failure to act on those claims as required by Section 7-1-26 NMSA 1978. In the absence of a protest, the Taxpayer's only option was to refile the claim within the three-year period provided in Section 7-1-26. The claim filed in April 1996 did not meet this requirement.

Although the Taxpayer's frustration is understandable given his many attempts to resolve the matter of the offsets with the Department, taxpayers may not employ "self-help" to recover what they believe to be an overpayment of tax for earlier periods. The Taxpayer had two options for recovering his personal income tax refunds: (1) pursuant to Section 7-1-24 NMSA 1978, the Taxpayer could have filed a written protest within thirty days of receiving notice that his refund was being applied to Redwood Lodge's CRS assessments; or (2) pursuant to Section 7-1-26 NMSA 1978, the Taxpayer could have filed a claim for refund within three years of the end of the calendar year in which his refund was applied to those assessments. If the Department denied or failed to take action on the refund request, the Taxpayer had ninety days to file a written protest.

With regard to the first option, the Taxpayer testified that the June 15, 1992 letter notifying him of the offset of his 1991 income tax refund did not include information on how to protest the Department's action. As a result, the Taxpayer made his objections to the Department's action by telephone, rather than by filing a written protest. Although it would have been helpful for the Department to advise the Taxpayer of his statutory remedies, it was not legally required to do so. Section 7-1-17(B)(2) NMSA 1978 provides that a notice of assessment of taxes issued by the Department is not effective unless it includes information "briefly informing the taxpayer of the remedies available to the taxpayer." A similar requirement applies to jeopardy assessments under Section 7-1-59 NMSA 1978. The Tax Administration Act does not require information concerning taxpayer remedies to be included with any other notices issued by the Department, including notices of refund offsets under Section 7-1-29(C) NMSA 1978. Nonetheless, I take administrative notice that the Department's 1991 personal income tax instructions set out the remedies available to taxpayers in some detail. The instructions, which are a public record of the Department, informed taxpayers that they could dispute a tax assessment, a payment of tax, or the application of any

provision of the Tax Administration Act by filing a written protest or, where appropriate, by filing a claim for refund. The instructions also advised taxpayers to request a hearing on any refund that was not granted within 120 days.

In this case, the Taxpayer did not exercise either of the statutory remedies available to him. Instead, he attempted to recoup what he believed to be an erroneous offset by withholding payment of his 1993 income taxes. Such action is not authorized by New Mexico's tax laws. A taxpayer must continue to file and pay all taxes currently due to the state, regardless of any dispute he may have concerning taxes for earlier tax periods. For this reason, penalty and interest was properly assessed against the Taxpayer for late payment of his 1993 taxes and no refund is due.

Summary. This case results from a series of miscommunications between the Taxpayer and the Department, including the following:

At the time the Redwood Lodge Partnership was registered with the Department, incorrect information was entered into the Department's records concerning the addresses of the Farmington motel and the individual partners. At the hearing, the Taxpayer acknowledged that it was possible one of his partners provided the Department with the incorrect addresses. As a result of the error, the Taxpayer did not receive notice of the various assessments against the partnership for which he was later held liable.

When the Taxpayer dissolved the partnership in May 1985, he did not notify the Department. Although taxpayers have an obligation to insure that their tax registration is correct, neither the Taxpayer nor any of the other partners took the steps necessary to remove the Taxpayer's name from the partnership's registration. Because of this oversight, the Taxpayer continued to be shown on the Department's records as an active partner responsible for the partnership's unpaid taxes.

The Taxpayer exchanged numerous telephone calls and correspondence with various Department employees. Based on these exchanges, the Taxpayer believed everything would be straightened out and his money would be returned. None of the Department employees with whom he spoke advised the Taxpayer that he had to file a written protest to the Department's actions or file a formal claim for refund of taxes already paid. Nor, it appears, did the Taxpayer read the taxpayer remedies contained in the Department's personal income tax instructions or realize—until it was too late—that he had to take specific action to preserve his right to dispute the offset of his tax refunds.

Due to this combination of circumstances, it has taken several years to resolve the issue of the Taxpayer's liability for taxes assessed against Redwood Lodge. Fortunately, the Taxpayer has now received \$829.79 of the \$1,258.32 refund he requested. Unfortunately, the limitations period in Section 7-1-26 NMSA 1978 bars consideration of his claim for refund of the \$373.03 the Department withheld and offset in June 1992. Nor is the Taxpayer entitled to recover the \$55.50 in interest and penalty assessed on his late payment of 1993 personal income taxes.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of his claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer's claim for refund of \$373.03, representing the 1991 personal income tax refund applied against liabilities of Redwood Lodge in June 1992, is barred by the limitations period set out in Section 7-1-26 NMSA 1978.
3. The Taxpayer is liable for the \$55.50 of penalty and interest assessed for late payment of his 1993 personal income taxes and the Taxpayer is not entitled to a refund of this amount.

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

DATED April 25, 2001.

