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

IN THE MATTER OF THE PROTEST OF
RAVEN WOLF COMMUNICATIONS No. 01-25
ID NO. 02-240078-00-8
DENIAL OF CLAIM FOR REFUND

DECISION AND ORDER

A formal hearing on the above-referenced protest was held October 11, 2001, before Margaret B. Alcock, Hearing Officer. Raven Wolf Communications was represented by its owner, Tanya Zelenkov ("Taxpayer"). The Taxation and Revenue Department ("Department") was represented by Donald F. Harris, 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 a consulting astrologer who provides her services to both business and individual clients by telephone.

2. All of the Taxpayer's clients are located outside New Mexico.

3. When the Taxpayer started business in 1994, she registered with the Department for payment of gross receipts tax. At that time, she asked the employee at the information counter of the Department's Albuquerque office whether she had to pay gross receipts tax on receipts from providing services to out-of-state clients. The employee told the Taxpayer she had to pay gross receipts tax on receipts from both in-state and out-of-state clients because her services were being performed in New Mexico.

4. From March 1994 through January 1998, the Taxpayer filed CRS-1 reports and paid gross receipts tax on her receipts from providing consulting services to out-of-state clients.

5. Sometime in 1996 or 1997, the Taxpayer had a casual conversation with someone who happened to be an accountant. The Taxpayer complained that she did not think it was fair for the state to tax her on services provided to out-of-state clients. The accountant told her she might not have to pay gross receipts tax on these services.

6. Following this conversation, the Taxpayer contacted six accountants whose names she obtained from the Yellow Pages and asked each for an informal opinion on whether her receipts were subject to gross receipts tax. Fifty percent of the accountants she spoke with said her receipts were taxable and fifty percent said her receipts were not taxable.

7. In February 1998, the Taxpayer stopped paying gross receipts tax on her receipts.

8. In June 2000, the Taxpayer contacted the Department's Santa Fe office to obtain a definitive answer as to whether she should be paying gross receipts tax on her receipts from providing consulting services to out-of-state clients. The Department told her to submit something in writing so it could be reviewed by the Department's legal counsel.

9. The Taxpayer subsequently submitted documentation explaining her situation. Based on this submission, the Department determined that the Taxpayer did not owe gross receipts tax on her receipts and granted her a $10,000 refund of taxes paid for reporting periods December 1996 forward.

10. On November 11, 2000, the Taxpayer submitted a claim for refund of taxes paid for reporting periods March 1994 through November 1996.

11. On December 14, 2000, the Department denied the claim for refund because it was filed beyond the three-year limitations period set out in Section 7-1-26 NMSA 1978.

12. On March 7, 2000, the Taxpayer filed a written protest to the denial of her 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 March 1994 through November 1996. The Department acknowledges that no tax was due for this period because the Taxpayer was entitled to deduct her receipts from providing consulting services delivered to and initially used by clients outside New Mexico. *See*, Section 7-9-57 NMSA 1978. 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 (D)(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 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 March 1994 was due on or before April 25, 1994; the time within which the Taxpayer could claim a refund of this tax expired December 31, 1997. 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 November 11, 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.

The Taxpayer raises an estoppel argument, asserting the Department misled the Taxpayer into paying tax she 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 written 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 addressed to the Taxpayer. To the contrary, if the Taxpayer had read the Department's regulations under Section 7-9-57 NMSA 1978, she could have determined that no taxes were due on receipts from services delivered and used outside New Mexico. 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 on "Right and Justice". Case law provides for estoppel against the state where right and justice demand its application. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992). The following elements must be shown as to the party to be estopped: (1) conduct that amounts to a false representation or concealment of material facts, (2) actual or constructive knowledge of the true facts, and (3) an intention or expectation that the other party will act on the representations. As to the party claiming estoppel, the following must be shown: (1) lack of knowledge of the true facts, (2) detrimental reliance on the adverse party's representations or concealment of facts, and (3)that such reliance was reasonable. *Id. See also*, *Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

When estoppel is invoked to avoid application of a statute of limitations, the issue is whether the defendant has taken some action to prevent the plaintiff 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." The party asserting estoppel has the burden of showing that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery of the cause of action at issue. *Id. See also, Bolton v. Board of County Commissioners of Valencia County*, 119 N.M. 355, 890 P.2d 808 (Ct.App. 1994), *cert. denied* 119 N.M. 311, 889 P.2d 1233 (1995).

The evidence presented in this case does not establish a basis for applying equitable estoppel against the Department.[1] First, there was no concealment or misrepresentation of material facts by the Department. All of the facts concerning the transactions at issue were provided by the Taxpayer and were within the Taxpayer's knowledge. Although the Department employee was mistaken in her interpretation of the tax law applicable to those facts, there is no evidence the employee acted fraudulently or intended to induce the Taxpayer to pay tax the employee knew was not due. Turning to the other side of the equation, the Taxpayer had access to the information needed to make her own determination concerning the taxability of her receipts. New Mexico's tax laws and regulations are a matter of public record available to all of the state's taxpayers. The law itself provides notice to taxpayers as to which transactions are subject to tax and which are not. In this case, the Taxpayer

[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

obtained informal opinions from six certified public accountants. Although the advice she received was conflicting, it was sufficient to cause the Taxpayer to stop paying gross receipts tax on her business receipts in February 1998 and to seek a written ruling from the Department in June 2000. Had the Taxpayer sought professional advice or a written ruling earlier, she would have had the information necessary to file her claim for refund within the limitations period set out in Section 7-1-26 NMSA 1978.

New Mexico has a self-reporting tax system and taxpayers have a statutory obligation to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, Section 7-1-13 NMSA 1978. While the Department makes every effort to give correct advice to taxpayers who contact the Department, the ultimate responsibility for payment (or nonpayment) of tax remains with the taxpayer. A taxpayer is not entitled to rely on the oral advice of an unidentified Department employee as a substitute for making his or her own independent review of the statutes and regulations or consulting with a qualified tax professional. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (in light of New Mexico's statute providing for estoppel, taxpayer's reliance on the oral representations of a Department employee was not reasonable).

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of the Taxpayer's claim for refund of gross receipts tax paid for tax periods March 1994 through November 1996, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer's claim for refund is barred by the limitations period set out in Section 7-1-26 NMSA 1978.

P.2d 18 (1994). Even if the hearing officer determined that equitable estoppel was appropriate in a particular case,

3. The Department is not estopped from asserting the statute of limitations as a bar to the Taxpayer's claims.

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

Dated October 22, 2001.

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the taxpayer would have to appeal to the New Mexico Court of Appeals to obtain such relief.