

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

**IN THE MATTER OF THE PROTEST OF  
AT ELAN CHIROPRACTIC  
ID NO. 01-165286-00-1  
DENIAL OF CLAIM FOR REFUND**

**No. 02-05**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held February 18, 2002, before Margaret B. Alcock, Hearing Officer. At Elan Chiropractic was represented by Robbie Kip Kipping (“Taxpayer”), its owner. 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. In 1981, the Taxpayer began practice as a chiropractor under the name “At Elan Chiropractic.”
2. In 1992, the Taxpayer was diagnosed with severe arthritis that interfered with his ability to continue with his profession as a chiropractor. In addition, the Taxpayer suffers from post-traumatic stress disorder as a result of his service in Vietnam.
3. The Taxpayer’s wife suffered a nervous breakdown, which was aggravated by her father’s death from cancer.
4. As a result of these problems, the Taxpayer found it difficult to keep up with his practice and fell behind in his tax payments.
5. The Taxpayer filed for Chapter 13 bankruptcy and entered into an installment agreement with the Department to repay his back taxes.

6. In August 1995, the Taxpayer closed his business, but kept his business accounts and tax identification number active because he was still receiving payments on work done in the past.

The Taxpayer continued to report and pay gross receipts tax on these payments.

7. In late 1997, the Taxpayer realized he had overpaid his gross receipts taxes for the period March 1997 through October 1997 in the amount of approximately \$3,000.

8. The Taxpayer called the Department and confirmed the existence of an overpayment. The employee with whom the Taxpayer spoke told the Taxpayer he could apply for a refund, but did not tell him there was a three-year limitations period within which the claim had to be filed.

9. The Taxpayer decided to wait until he wrapped up his business before filing a claim for refund.

10. In December 2000, the Taxpayer closed his business accounts and retired his chiropractor's license. That same month, the Taxpayer's wife of 32 years told him she wanted a divorce.

11. In January 2001, the Taxpayer's father died.

12. In March 2001, the Taxpayer's best friend died in a diving accident.

13. Because of these misfortunes, the Taxpayer did not get around to filing a claim for refund of his 1997 gross receipts taxes until September 15, 2001.

14. On October 11, 2001, the Taxpayer's claim for refund was denied because it was filed beyond the limitations period set out in Section 7-1-26 NMSA 1978.

15. On October 18, 2001, the Taxpayer filed a written protest to the denial of his claim for refund.

## DISCUSSION

The issue to be determined is whether the Department properly denied the Taxpayer's claim for refund of gross receipts taxes paid for reporting periods March 1997 through October 1997. The Department's 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, the time within which the Taxpayer could claim a refund of gross receipts taxes paid during the period March through October 1997 expired on December 31, 2000. The Taxpayer's September 15, 2001 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 that the Department misled the Taxpayer by not informing him of the three-year limitations period. 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).

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. Here, the Taxpayer's payment of gross receipts taxes was not in accordance with a regulation or revenue ruling, and there is no statutory basis to estop the Department from applying the limitations period set out in Section 7-1-26 NMSA 1978.

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. Although the Taxpayer testified that he had no knowledge of the three-year limitations period, this lack of knowledge cannot be attributed to any act of concealment by the Department. 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 and on the internet. The fact that the Department employee with whom the Taxpayer spoke in 1997 did not specifically advise the Taxpayer that he had to file his claim for refund by December 31, 2000 does not meet the requirements for equitable estoppel.

The Taxpayer's failure to file a timely claim for refund was primarily attributable to a series of personal misfortunes that distracted him from his business affairs. The Taxpayer asks the Department to take this into consideration when ruling on his claim for refund. The Taxpayer also asks the Department to recognize his continuing volunteer work as a lieutenant colonel in the New Mexico State Defense Force. There is no question that the Taxpayer has suffered many setbacks, including his illness, his divorce, and the deaths of his father-in-law, his father and his close friend. It is also without question that the Taxpayer has demonstrated great patriotism, both by serving in Vietnam and by volunteering his time in the state defense force. Unfortunately, these factors are not something the Department can consider in determining whether to grant the Taxpayer's claim for refund. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, the supreme court made the following observations concerning the power of administrative agencies:

Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.

The job of the Department's hearing officer is to determine whether the Department has properly applied the law as written. Neither the Department nor its hearing officer has authority to question the wisdom of the laws passed by the legislature or modify the application of those laws based on the financial or personal situations of individual taxpayers. The law enacted by the legislature prohibits the Department from granting refunds filed beyond the three-year limitations period set out in Section 7-1-26 NMSA 1978, and the Department must follow the directive of the statute.

### **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 gross receipts taxes paid for reporting periods March 1997 through October 1997 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.

4. The hearing officer does not have authority to override the provisions of New Mexico's tax laws and waive the limitations period set out in Section 7-1-26 NMSA 1978.

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

DATED February 19th, 2002.