

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

IN THE MATTER OF THE PROTEST  
OF **BTA OIL PRODUCERS**, TAXPAYER  
NO. 620, PROTEST TO PARTIAL DENIAL  
OF CLAIM FOR REFUND.

NO. 96-05

**DECISION AND ORDER**

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on December 13, 1995. BTA Oil Producers (hereinafter "Taxpayer") was represented by Don R. Trott, CPA. The Taxation and Revenue Department (hereinafter "Department") was represented by Margaret B. Alcock, Special Assistant Attorney General. Based upon the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

**FINDINGS OF FACT**

1. BTA is registered with the Department for payment of oil and gas production taxes under Company No. 620.
2. In 1990, the Department conducted an audit of BTA's payment of oil and gas taxes for tax periods January 1, 1987 through December 31, 1989.
3. As a result of the Department's audit, on August 3, 1990, the Department sent a letter to BTA setting out the audit findings. The letter advised the Taxpayer of the Department's preliminary underpayment determination, and the basis for that determination, including detailed schedules showing the calculation of the underpayment. These schedules indicated that the Taxpayer owed additional oil and gas taxes in the amount of \$34,657.92 and state royalty payments in the amount of \$12,682.23.
4. The Department's audit findings transmittal letter gave the Taxpayer three options:  
(1) to explain and document its disagreement with the audit findings in writing within thirty days

of receipt of the audit findings, (2) to voluntarily file amended oil and gas tax reports and remit payment of the additional tax shown to be due, or (3) to take no action and receive an official assessment from the Department.

5. During the exit interview conducted at the end of the audit, Janet Sobien, one of the Department's auditors, told the Taxpayer that it could make a payment to stop the running of additional interest if it wished. Except as contained in the department's audit findings transmittal letter of August 3, 1990, there were no other statements or discussions regarding the timing or method of paying the additional tax shown in the Department's audit findings.

6. In October, 1990, the Taxpayer filed amended oil and gas returns for the audit period and remitted payment of additional tax in the amount of \$34,657.92 and additional state royalty in the amount of \$12,682.23.

7. In December 1990, the department issued Assessment No. 72182 in the amount of \$11,544.20, representing penalty and interest due on the taxes shown on the Taxpayer's amended returns calculated through the October, 1990 payment date when the Taxpayer remitted payment of the underlying tax. The Taxpayer paid this assessment in January, 1991.

8. By letter dated December 28, 1993, the Taxpayer submitted to the Department a claim for refund, requesting a refund of \$20,543.19 of the \$34,657.92 of tax paid as a result of the Department's audit findings letter and \$12,578.08 of the \$12,682.23 state royalty paid as a result of the Department's audit findings letter.

9. By letter dated April 26, 1994, the Department granted that portion of the refund claim relating to tax periods November and December, 1989. The return for the November 1989 tax period was originally due on January 25, 1990; the return for the December 1989 tax period was originally due on February 25, 1990. The Department granted the refunds for those periods because the refund claim was made within the limitation period for filing such claims set out at Section 7-1-26(B) NMSA 1978. Conversely, the Department denied the portion of the refund

claim relating to the earlier reporting periods because the returns for those periods were originally due prior to January 1, 1990 and the Department believed that the refund claims for those periods were beyond the statute of limitations set out at Section 7-1-26(B).

10. The Department letter of April 26, 1994 also granted the Taxpayer's claim for refund of all interest and penalty relating to the Taxpayer's \$20,543.19 refund claim. The Department considered this portion of the Taxpayer's claim for refund to have been made within the limitations period for filing such claims set out at Section 7-1-26(B) because the penalty and interest had been paid in January of 1991 as a result of Assessment No. 72182.

11. On June 22, 1994, the Taxpayer filed a written protest to the Department's partial denial of its claim for refund.

### **DISCUSSION**

The sole issue to be determined is whether the Department correctly denied part of the Taxpayer's claim for refund as being filed beyond the statute of limitations found at Section 7-1-26(B)(1)(a) NMSA 1978. The Department agrees that except for the statute of limitations issue, the Taxpayer would be entitled to the refund it claims.

Section 7-1-26(B)(1)(a) provides in pertinent part as follows:  
Except as otherwise provided in Subsection C and D of this section, no credit or refund of any amount may be allowed or made to any person unless as a result of a claim made by the 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 Department granted the portion of the refund claim, for the reporting periods of November and December of 1989, since the returns for those periods were not due until January and February of 1990 and thus the refund claims for those periods were made within three

years of the end of the calendar year in which the payment was originally due. The Department also granted refund of the interest and penalty claimed because that had been paid as a result of the assessment issued by the Department after the Taxpayer had paid the tax the Department had indicated was owing in its audit findings transmittal letter to the Taxpayer. The Department denied the remaining portion of the refund claim, however, because it believed that since an actual assessment of tax was never generated after it issued its audit findings because the Taxpayer paid the tax prior to an assessment being issued, that the refund claim did not qualify for consideration as an overpayment of tax resulting from an assessment by the Department.

Section 7-1-26(B)(1)(a) specifically references Section 7-1-17 NMSA 1978 concerning what is an assessment by the Department for purposes of determining the limitation period for claiming a refund of taxes. Section 7-1-17 provides as follows:

- A. If the secretary or the secretary's delegate determines that a taxpayer is liable for taxes in excess of ten dollars (\$10.00) that are due and that have not been previously assessed to the taxpayer, the secretary or the secretary's delegate shall promptly assess the amount thereof to the taxpayer.
- B. Assessments of tax are effective:
  - (1) when a return of a taxpayer is received by the department showing a liability for taxes;
  - (2) when a document denominated "notice of assessment of taxes," issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer; or
  - (3) when an effective jeopardy assessment is made as provided in the Tax administration Act.
- C. Any assessment of taxes or demand for payment made by the department is presumed to be correct.
- D. When taxes have been assessed to any taxpayer and remain unpaid, the secretary or

the secretary's delegate may demand payment at any time except as provided otherwise by Section 7-1-19 NMSA 1978.

The Department specifically relies upon subsection (B) as outlining three types of tax assessments. Subsection (B)(1) describes what the Department characterizes as a "self assessment," when a taxpayer files a return showing a liability. Subsection (B)(2) describes an assessment by the Department issued under normal circumstances. Subsection (B)(3) describes a jeopardy assessment issued by the Department when collection of the tax may be jeopardized by the delay involved in the normal assessment procedure. Although Subsection B, by its wording specifically addresses when a tax assessment is effective, nonetheless, it does describe three types of assessments. The distinction between whether an assessment was issued by the Department or is a self assessment is also of some consequence, since under Subsection C the presumption of correctness only applies to assessments made by the Department.

In this case, the Taxpayer only received the Department's audit findings transmittal letter and never received any document entitled "notice of assessment of taxes" as described in Section 7-1-17(B)(2). The plain meaning of the language of Section 7-1-26(B)(1)(a) appears to support the Department's interpretation that the overpayment of taxes for which the Taxpayer claims a refund did not result from "an assessment of taxes by the Department pursuant to Section 7-1-17 NMSA 1978."

The Taxpayer asserts, however, that this interpretation is inconsistent with the Department's own interpretation of what amounts to an "assessment by the department" in Section 7-1-68(C) NMSA 1978 as set forth in TA Regulation 68:1. Section 7-1-68 is the provision of the Tax Administration Act which governs how interest on a claim for refund of an overpayment of tax is to be calculated. Based upon TA Regulation 68:1, the Taxpayer argues that the Department is estopped from applying a different interpretation to the same term for purposes of determining the statute of limitations for claiming a refund of overpaid taxes than it applies when calculating

the interest to be paid on a claim for refund of a tax overpayment.

Section 7-1-68(C) NMSA 1978 (1993 Repl. Pamp.) provides as follows:

Unless otherwise provided by this section, interest on an overpayment *not arising from an assessment by the department* shall be paid from the date the claim for refund was made until a date preceding by not more than thirty days the date on which the amount thereof is credited or refunded to any person; interest on an overpayment *arising from an assessment by the department* shall be paid from the date overpayment was made until a date preceding by not more than thirty days the date on which the amount thereof is credited or refunded to any person. (emphasis added).

Thus, under this provision, the interest calculation on overpayments of tax depends upon whether the overpayment was a result of an assessment by the Department. If the overpayment arose from an assessment by the Department, interest runs from the date the overpayment was made. Otherwise, interest runs from the date the refund claim is made.

In December, 1984, the Department promulgated TA Regulation 68:1, interpreting Section 7-1-68 with respect to what amounted to an "assessment by the department" for purposes of determining the date for commencing the calculation of interest on overpayments of tax. This provision remains in effect to this day and provides as follows:

The determinative factor in deciding whether an "overpayment of taxes arose due to an assessment by the department"--requiring interest on a refund to be computed from the date of overpayment rather than the date of a claim for refund--*is whether the action establishing the amount of liability for taxes was initiated by the taxpayer or by the department.* Actions initiated by the taxpayer include, but are not limited to, the filing of a tax return reporting a tax liability for which no payment or partial payment is submitted, or for which payment is submitted by a check which is subsequently dishonored by the bank or the late filing of any tax return. *Actions initiated by the department include, but are not limited to, an audit of the taxpayers books and records or the issuance of a provisional assessment as a result of a taxpayer's failure to file any return or returns.* (emphasis added).

Under the provisions of TA Regulation 68:1, an overpayment of taxes is deemed to arise due to "an assessment by the department" where the action establishing the amount of liability

for taxes was initiated by an audit of the taxpayer's books and records. The regulation does not require the actual issuance of a "notice of assessment of taxes."

Any regulation issued by the secretary of the Department is presumed to be a proper implementation of the provisions of the revenue laws administered under the provisions of the Tax Administration Act. Section 7-1-5(G) NMSA 1978 (1993 Repl. Pamp.)<sup>1</sup> Additionally, substantial weight is to be accorded to the interpretation given a statute by the agency charged with administering the statute. *State ex rel Battershell v. City of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct App. 1989).

The Department has not challenged the validity or propriety of TA Regulation 68:1. Rather, the Department argues that this regulation is irrelevant because it applies to the interest calculation on overpayments of tax, not the statute of limitations for claiming refund of tax overpayments. Additionally, the Department attempts to distinguish the regulation based upon the fact that Section 7-1-68 contains no reference to Section 7-1-17, which Section 7-1-26(B)(1)(a) does.

With respect to the Department's claim of irrelevance, this argument would have us overlook the fact that there is no material difference in the term being interpreted and applied and that this term is being applied in the same context. Both Sections 7-1-26 and 7-1-68 deal with overpayments of tax either "arising from an assessment by the Department" (Section 7-1-68) or which "resulted from an assessment by the department" (Section 7-1-26). Also, Sections 7-1-26 and 7-1-68 operate hand in hand. Section 7-1-26 determines whether a claim for refund of overpaid taxes is properly made and Section 7-1-68 determines how interest on such a claim made under Section 7-1-26 is to be calculated. Both sections apply to claims for refund of overpaid taxes and both refer to an "assessment by the department." It makes absolutely no sense to interpret essentially the same language in the same context of a claim for refund of overpaid tax in

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<sup>1</sup> This provision was repealed by laws 1995, Ch. 32 § 7, and was recodified in substantially the same form at Section 9-11-6.2 (G) NMSA 1978 (1995 Supp.).

an inconsistent manner.

With respect to the Department's argument that Section 7-1-68 should be distinguished because it does not specifically reference Section 7-1-17 concerning assessments of tax, a review of the history of Section 7-1-68 reveals that since its enactment in Laws 1965, Ch. 248, §69 until it was substantially rewritten by Laws 1989, Ch. 325, §11, the provision did specifically reference Section 7-1-17 or its predecessor provision in the 1953 statutes, Section 72-13-32 NMSA 1953. Thus, at the time the Department promulgated TA Regulation 68:1, Section 7-1-68 specifically referenced Section 7-1-17 in conjunction with an "assessment arising from an assessment by the division<sup>2</sup>", and the regulation has been unchanged except for changing the reference from "division" to "department". Besides, Section 7-1-17 is the only provision of the Tax Administration Act which applies to describe what an assessment by the Department is. Clearly, the Department was aware of the provisions of Section 7-1-17 when it promulgated TA Regulation 68:1 and it cannot now distance itself from the interpretation it applied to determine what amounts to an "assessment by the department."

Section 7-1-60 NMSA 1978 (1993 Repl. Pamp.) provides for certain circumstances when estoppel will be applied against the Department with respect to its enforcement of the tax laws.

Specifically, it provides:

In any proceeding pursuant to the provisions of the Tax Administration Act, *the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary, unless the ruling had been rendered invalid or had been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose.* (emphasis added).

In this case, TA Regulation 68:1 was in effect at the time the Taxpayer's liability arose for

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<sup>2</sup> The reference to "division" was changed to "department" by Laws 1989, Ch. 325, §11.

which it made the overpayment of tax which it now asks to be refunded. As noted above, it makes no sense to interpret the phrase "assessment by the department" differently, depending upon whether the statute of limitations is being applied or only the interest to be paid on the same overpayment of tax for which refund is sought. The Department has interpreted that an overpayment of tax arising from an assessment by the Department to mean an overpayment of tax resulting from an audit by the Department in TA Regulation 68:1. It is estopped from interpreting the same situation differently when applying the provisions of Section 7-1-26(B)(1)(a) to determine the timeliness of the claim for refund for an overpayment of tax.

### **CONCLUSIONS OF LAW**

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

2. The Department has interpreted an overpayment of tax arising from an assessment by the Department to mean an overpayment of tax resulting from an audit by the Department in TA Regulation 68:1.

3. The Department is estopped from denying that the Taxpayer's payment of taxes as a result of the audit by the Department was not an overpayment resulting from an assessment by the Department for purposes of calculating the statute of limitations to be applied to the Taxpayer's claim for refund pursuant to Section 7-1-26(B)(1)(a) NMSA 1978.

4. The Taxpayer's claim for refund was therefore made within the limitation period of Section 7-1-26(B)(1)(a) NMSA 1978.

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

The Department is hereby ordered to grant the remaining portion of the claim for refund filed by the Taxpayer together with interest pursuant to Section 7-1-68 NMSA 1978.

Done, this 31st day of January, 1996.