BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT

IN THE MATTER OF **SMITH OIL COMPANY, INC.**
I.D. No. # 01-798853-00 1, Claim for Refund NO. 97-01

DECISION AND ORDER

This matter came on for hearing on December 6, 1996 before Ellen Pinnes, Hearing Officer. Smith Oil Co. ("the Taxpayer") was represented by its attorneys, Robert Brack and James Hart. The Taxation and Revenue Department ("the Department") was represented by Frank Katz, Special Assistant Attorney General. The case was submitted on stipulated facts and the hearing was limited to legal argument.

Based upon the factual stipulations and exhibits submitted by the parties and the arguments presented, IT IS HEREBY DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer, a corporation, is in the business of selling fuel, including diesel fuel, in Clovis, New Mexico.

2. The Petroleum Products Loading Fee Act, §7-13A-1 *et seq*. NMSA 1978 ("the Act"), effective July 1, 1990, imposes a fee ("the loading fee") on loading of gasoline or special fuels in New Mexico.

3. Following enactment of the Petroleum Products Loading Fee Act, the Department sent a form letter to the Taxpayer and other affected parties, advising them of the Act's terms. (Exhibit H to the parties' Stipulations of Fact, hereinafter referred to as "Stipulations".) That letter quoted the statutory provisions that gasoline and "special fuels" are petroleum products subject to the fee, that "special fuels" includes diesel fuel, kerosene and other liquid fuels used in generating power to propel motor vehicles, and that petroleum products are considered to be received when first unloaded in New Mexico. The letter further advised the Taxpayer that all petroleum products received are

subject to the loading fee and that the Department would send the Taxpayer appropriate forms to use in remitting the tax.

4. For each month for the period of July, 1990 through November, 1995, the Taxpayer filed with the Department a "Petroleum Products Loading Fee Report", reporting quantities of fuel and calculating fees due to the Department.

5. The Taxpayer reported and paid the loading fee on the total quantity of fuel received each month, including gallons of diesel fuel that were sold for use in equipment other than motor vehicles.

6. Diesel fuel used in equipment other than motor vehicles is excluded from the definition of "special fuel" subject to the loading fee under the Act. No loading fee was due on these gallons.

7. The loading fee reports were submitted by the Taxpayer on forms prepared by the Department for that purpose.

8. The report form used by the Taxpayer from July, 1990 through November, 1995 ("the original form") was drafted by the Department and promulgated in June, 1990. (Copies of the original form, as submitted to the Department by the Taxpayer, are attached as Exhibit A to the Stipulations.)

9. The Department revised the report form in November, 1995 ("the revised form"). (A copy of the revised form is attached as Exhibit B to the Stipulations.)

10. The original form directed the Taxpayer to report quantities of gasoline and special fuels received. The form did not include a line for deduction of fuels not used in motor vehicles, either in the body of the form or in the instructions. Neither the form nor the accompanying instructions specifically informed the Taxpayer that certain quantities of fuel should be excluded from the total reported as received by the Taxpayer, because they were not used in motor vehicles (as defined by the Act) and therefore were not subject to the loading fee. Neither the form nor the instructions directed the Taxpayer to include these quantities of fuel in amounts reported to the Department or to pay the loading fee on them.

11. The revised form includes a worksheet as part of the instructions on the back of the form. The instructions and worksheet direct the Taxpayer to subtract, from total gallons of special

fuel received, the number of gallons not used in motor vehicles.

12. On March 3, 1996 and March 14, 1996, the Taxpayer filed claims for refund with the Department, seeking refunds of taxes erroneously paid for the period from July, 1990 through November, 1995. (Stipulations, Exhibit C) The Taxpayer in March, 1996 also filed amended reports for the months of July, 1990 through December, 1992. (Stipulations, Exhibit D)

13. The Department approved the refunds for 1993 through 1995, and refunded the full amounts sought by the Taxpayer for those years.

14. By letters dated March 21, 1996 (Stipulations, Exhibit E), the Department denied the claims for refund for 1990, 1991 and 1992, on the grounds that they were barred as untimely by §7-1-26(B) NMSA 1978 because they were filed more than three years after the end of the calendar year in which the payments were originally due.

15. By letters dated March 26, 1996 from its secretary-treasurer, Valeria Smith, the Taxpayer filed a timely protest of the denials.

16. The amounts erroneously paid by the Taxpayer, of which refunds are sought, are $2,567.88 for 1990, $4,102.01 for 1991, and $4,020.69 for 1992.

17. The Taxpayer did not at any time request from the Department a formal ruling or other clarification of the status of diesel fuel sold by the Taxpayer for use in equipment other than motor vehicles.

18. The Department did not at any time advise the Taxpayer that the loading fee was due on gallons of fuel sold by the Taxpayer for use in equipment other than motor vehicles.

19. The Department did not, prior to issuance of the revised form, advise the Taxpayer that no loading fee was due on gallons of fuel sold by the Taxpayer for use in equipment other than motor vehicles.

DISCUSSION

The Petroleum Products Loading Fee Act

The Petroleum Products Loading Fee Act, enacted in 1990, imposes a fee on the "loading [of] gasoline or special fuel from a rack at a refinery or pipeline terminal in this state into a cargo

tank". §7-13A-3(A) NMSA 1978. The Act defines "special fuel" to mean "diesel-engine fuel, kerosene and all other liquid fuels <u>used for the generation of power to propel a motor vehicle</u>", with certain listed exceptions. §7-13A-2(K), emphasis added. A "motor vehicle" is defined as a "self-propelled vehicle or device that is used or may be used on the public highways ... for the purpose of transporting persons or property". §7-13A-2(F).

The term "loading" is not defined in the Act. The statute instead includes a definition of "received", which is defined as occurring when the petroleum product is loaded in New Mexico into transportation equipment or placed into a container from which sales or deliveries are made. §7-13A-2(I).[1]

Diesel fuel that is used in equipment other than motor vehicles does not fall within the Act's definition of "special fuel". Since the loading fee applies only to gasoline and special fuel, diesel fuel sold for use in equipment other than motor vehicles is not subject to the fee.

An element of confusion arises because the fee applies, by the Act's terms, to fuel loaded by the distributor, not to the fuel sold by it. §§7-13A-3A, 7-13A-6. The ultimate use of the fuel -- whether in motor vehicles or other equipment -- cannot be determined until the fuel is sold. At the time the distributor receives diesel fuel, it is all diesel fuel. However, it may not all be special fuel considered a petroleum product under the Act, because any of it that is sold for use other than in motor vehicles will not be considered special fuel.[2] This is obviously a confusing statutory scheme.

Smith Oil Company paid the loading fee on all quantities of fuel received, including those amounts sold for use in equipment other than motor vehicles. The refunds it sought in 1996, some of which are at issue here, are of fees paid on the latter amounts. The Department agreed that those fees were improperly paid, and refunded the overpaid sums for periods that fell within the applicable

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[1] The term "received" is not used elsewhere in the statute.

[2] The Act requires monthly reporting and remittance of the loading fee. §7-13A-6. If the fuel is sold by the distributor within the month in which it is received, it is possible to determine what portion is special fuel and how much is not. If the fuel is not sold within the month of receipt, the distributor would have no way of knowing the exact quantity that was or was not special fuel subject to the loading fee. It does not appear that Smith Oil was affected by this quandary, since it did not exclude <u>any</u> amounts of fuel from its reports.

three-year statutory limitations period in §7-1-26(B) NMSA 1978. The Department denied the Taxpayer's claims for refund for earlier years.

The Taxpayer argues that the Department should be estopped to raise the statute of limitations as a bar to the claimed refunds. The state may be estopped when provided for by statute or when right and justice demand it. Taxation & Revenue Department v. Bien Mur Indian Market Center, 108 N.M. 228, 770 P.2d 873 (1989). However, estoppel against the state is applied only rarely. Rainaldi v. Public Employees Retirement Board, 115 N.M. 650, 857 P.2d 761 (1993); Bien Mur.

Estoppel under §7-1-60

The Tax Administration Act, §7-1-60 NMSA 1978, expressly provides for estoppel against the Department if the adverse party shows that its action or inaction was in accordance with either a regulation of the Department or a written ruling addressed to the party. The Taxpayer does not contend that any such ruling exists, but asserts that it acted in accordance with Department regulations.

There is no departmental regulation explicitly addressing the issue of whether taxpayers are or are not required to report and pay the loading fee on gallons of diesel fuel sold for use in equipment other than motor vehicles. Instead, the Taxpayer relies on Regulation TA 13:2, which states in part:

> Information concerning the method of completing and filing a return ... may be found under the specific tax statutes, the secretary's regulations thereunder, on the prescribed forms and on the instructions accompanying the forms. Returns are considered complete and timely filed when the requirements of those documents ... are complied with by taxpayers. [Emphasis added.]

TA 13:2 implements the provisions of §7-1-13 of the Tax Administration Act, which provides in pertinent part:

> Every taxpayer shall, on or before the date on which payment of any tax is due, complete and file a tax return in a form prescribed and according to the regulations issued by the secretary.

§7-1-13(B) NMSA 1978.

Neither §7-1-13 nor TA 13:2 goes to the method of computing particular taxes. They are general provisions regarding the submission of returns for taxes administered by the Department.

The Taxpayer argues that it was required by TA 13:2 to submit forms in accordance with the Department's instructions, that it did so, and that compliance with this regulation estops the Department to deny the claimed refunds of overpaid taxes. However, the Taxpayer has not shown that its reporting to the Department was in accordance with applicable instructions. The instructions on the original form required the Taxpayer to report total gallons of special fuel and gasoline received during the reporting month. The Petroleum Products Loading Fee Act defines "special fuel" to include only fuel used to propel motor vehicles. §7-13A-2(K). "Motor vehicle" is defined to include only those vehicles capable of being used on public highways to transport persons or property. §7-13A-2(F). The reporting form's instructions did not direct Smith Oil to report gallons sold for use in equipment other than motor vehicles or to pay the fee on those gallons.

Moreover, TA 13:2 requires that returns be filed in accordance with statute as well as instructions on report forms. Smith Oil has not shown that its filings were in accord with the Petroleum Products Loading Fee Act; it expressly argues to the contrary in seeking a refund of amounts overpaid.

The Taxpayer has not shown that it completed its tax returns in accordance with statute or the Department's instructions regarding the forms. It therefore cannot rely on compliance with Regulation TA 13:2 as a basis for estoppel under §7-1-60.[3]

Estoppel based on the demands of right and justice

Although the Taxpayer has not established grounds for estoppel under §7-1-60, the Department may still be estopped to deny the claimed refunds of overpaid taxes if right and justice demand such action. Bien Mur, *supra*.

[3] Because the Taxpayer has not demonstrated that it acted in accordance with the Act or the instructions on the reporting form, the issue of whether compliance with the general terms of TA 13:2 would be sufficient to support an estoppel under §7-1-60 need not be decided here.

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 (Ct.App. 1992), cert. den. 8/14/92. 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*.

The Taxpayer has not established that the Department misrepresented material facts. The Department did not advise the Taxpayer that diesel fuel sold for use in equipment other than motor vehicles (as defined by the Act) was subject to the loading fee. The Department's actions, in the letter distributed to the Taxpayer and other fuel dealers and in the original report form and instructions, consisted of quoting the statutory provisions relating to imposition of the loading fee.

Nor is there any showing that the Department concealed material facts. The language of the statute was readily available to the Taxpayer; in fact, the Department sent a letter to the Taxpayer and others in the same line of business, quoting the statutory provisions. The Department did not explicitly advise the Taxpayer that the loading fee was inapplicable to gallons of diesel fuel that did not fall within the statutory definition of "special fuel". However, this did not constitute concealment. To establish a claim to estoppel by virtue of the Department's failure to expressly advise the Taxpayer on this point, Smith Oil must show that the Department had a duty to so advise it and that the agency refrained from doing so with knowledge that Smith Oil was acting in reliance on that silence. Continental Potash v. Freeport-McMoran, 115 N.M. 690, 858 P.2d 66 (1993), cert. den. 114 S.Ct. 1064. No such showing was made.[4]

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[4] The Act is confusingly drafted, and it would have been helpful to taxpayers such as Smith Oil if the Department had acted earlier to call their attention to the non-taxability of diesel fuel used in equipment other than motor vehicles. However, not doing so is not adequate grounds for estoppel.

Moreover, Smith Oil has not established its own lack of knowledge or that its alleged reliance on the Department was reasonable. The Taxpayer had a duty to familiarize itself with the legal requirements applicable to its operations. See Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 64 (1984). The Taxpayer was informed of the language of the statute, and could interpret the Act's terms and draw its own conclusions about the statutory provisions. It is true that the statute is confusingly written. However, if the Taxpayer was uncertain as to whether fuel sold for use other than in motor vehicles was subject to the loading fee, it could have contacted the Department to request clarification. This was not done. Estoppel is an equitable remedy and, as such, applies only when a party has exercised reasonable diligence to protect its own interests. Garcia on behalf of Garcia v. LaFarge, 119 N.M. 532, 536, 893 P.2d 428 (1995). The Taxpayer here failed to do so.

The Taxpayer, as the party alleging an estoppel, has the burden to prove all facts necessary to support it. Continental Potash, *supra*. Smith Oil has not proved the facts necessary to establish an estoppel here.

Estoppel to assert statute of limitations

Even assuming that the Department misled Smith Oil as to the applicability of the loading fee, that would be insufficient to support the Taxpayer's estoppel claim here. The Taxpayer is not attempting to estop the Department to deny that the fees were erroneously paid, as the Department does not contest that point. The estoppel the Taxpayer attempts to assert is to bar the Department from relying on the limitations period for making a claim for refund.

Estoppel to raise the statute of limitations as a defense will be applied against a defendant who has prevented a plaintiff from bringing suit within the prescribed period. Kern v. St. Joseph Hospital, Inc., 102 N.M. 452, 697 P.2d 135, 138-39 (1985). Thus, a defendant who has assured the plaintiff that a claim can be settled without litigation, or who has concealed facts from the plaintiff to prevent the latter from being aware of the existence of a claim, will be barred to assert the statute of limitations. See Molinar v. City of Carlsbad, 105 N.M. 628, 735 P.2d 1134 (1987); Kern, *supra*. In such circumstances, the statute is tolled until the right of action is discovered, or until it could have

been discovered through the exercise of due diligence on the part of the plaintiff. Bolton v. Board of County Commissioners of Valencia County, 119 N.M. 355, 890 P.2d 808 (Ct.App. 1994), cert. den. 119 N.M. 311, 889 P.2d 1233 (1995).

Here, there was no conduct by the Department to interfere with the Taxpayer claiming refunds for 1990-92 within the three-year period set out in §7-1-26(B). The Taxpayer was free to review the statute at any time following its enactment, and could have determined that the loading fee appeared to be inapplicable and that it had made overpayments. The Department neither prevented the Taxpayer from discovering the error nor discouraged it from filing timely claims to recover overpaid sums.

What the Taxpayer is complaining of, in essence, is that the Department did not take action sooner to alert the Taxpayer to its error in paying the loading fee. Failure to act earlier to protect the Taxpayer from its own mistakes is not sufficient to estop the Department to assert the statute of limitations applicable to the Taxpayer's claims.

CONCLUSIONS OF LAW

1. By its March 21, 1996 letters, the Taxpayer filed a timely protest of the Department's denial of its claims for refund for 1990 through 1992. Jurisdiction thus lies over the parties and the subject matter of the protest.

2. The Taxpayer overpaid loading fees under the Petroleum Products Loading Fee Act in the amounts of $2,567.88 for 1990, $4,102.01 for 1991, and $4,020.69 for 1992.

3. The Taxpayer's claims for refund for 1990 through 1992 were not submitted to the Department until March of 1996, more than three years following the end of the calendar year in which the payment was originally due, and thus were barred by the statute of limitations in §7-1-26(B) of the Tax Administration Act.

4. The Department is not estopped to assert the statute of limitations as a bar to the Taxpayer's claims.

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

DONE this 6th day of January, 1997.