

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

IN THE MATTER OF THE PROTEST OF  
JOE ANAYA, d/b/a ANAYA'S CARPET SERVICE  
ID No. 02-243668-00 5  
PROTEST TO REFUND DENIAL

No. 98-56

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on November 16, 1998, before Margaret B. Alcock, Hearing Officer. Joe Anaya appeared on his own behalf. The Taxation and Revenue Department ("the Department") was represented by Frank D. Katz, Chief Counsel. Based on the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. During the period January 1994 through May 1997, Joe Anaya was engaged in performing services as a subcontractor for two carpet stores.
2. In July 1994, Mr. Anaya paid gross receipts tax of \$833.68 for the six-month period January-June 1994.
3. Mr. Anaya did not pay gross receipts tax during subsequent tax periods, and in May 1997, the Department assessed Mr. Anaya \$2,348.00 for unpaid gross receipts tax, penalty and interest.
4. Mr. Anaya paid the assessment and then consulted a tax service known as Tax Express.
5. Mr. Anaya obtained a Type 5 (Service For Resale) nontaxable transaction certificate from the carpet stores for which he had performed services . The Type 5 certificates allowed Mr. Anaya to deduct his receipts from performing services for the two stores.

6. Mr. Anaya understood that Tax Express would file a refund claim on his behalf to recover the \$2,348.00 Mr. Anaya paid on the Department's assessment, as well as the \$833.68 Mr. Anaya paid for the period January-June 1994.

7. The Department did not receive a refund claim on behalf of Mr. Anaya, nor did Tax Express provide Mr. Anaya with a copy of any refund claim.

8. After determining that the Department had not received a refund claim from Tax Express, Mr. Anaya filed his own refund claim on September 4, 1997.

9. Although the application form filed by Mr. Anaya was limited to a request for refund of the \$2,348.00 paid on the May 1997 assessment, Mr. Anaya included amended returns for the period January-June 1994, indicating that he was entitled to an additional refund of \$833.68.

10. The Department employee who took Mr. Anaya's refund claim told him she thought the amended returns would serve as a claim for refund of the \$833.68, even though this amount was not requested on his application form.

11. On March 25, 1998, the Department mailed Mr. Anaya a refund check in the amount of \$2,348.00. Mr. Anaya did not receive a refund of the additional \$833.68.

12. On April 16, 1998, Mr. Anaya filed a new Application for Tax Refund requesting refund of the \$833.68 of gross receipts tax he had paid for the period January-June 1994.

13. On May 1, 1998, the Department denied Mr. Anaya's refund because the refund claim was not filed within the limitations period set out in NMSA 1978, Section 7-1-26 (1997 Cum.Supp.).

14. On May 12, 1998, Mr. Anaya filed a protest of the Department's denial of his claim for refund of \$833.68.

## **DISCUSSION**

Mr. Anaya does not dispute that his April 16, 1998 claim for refund of \$833.68 of gross receipts tax paid for the period January-June 1994 was not filed within the three-year limitations period set out in NMSA 1978, Section 7-1-26(C) (1997 Cum.Supp.). Mr. Anaya maintains that he is still entitled to the refund because he filed a timely claim for this amount on September 4, 1997.<sup>1</sup> It is the Department's position that Mr. Anaya is not entitled to the refund claimed in September 1997 because he failed to follow the statutory procedures for protesting the Department's failure to act on the refund within 120 days of the date the claim was filed.

NMSA 1978, Section 7-1-26 (1997 Cum.Supp.) provides, in pertinent part:

A. Any person who believes that an amount of tax has been paid by or withheld from that person in excess of that for which the person was liable...may claim a refund by directing to the secretary, within the time limited by the provisions of Subsections C, D and E of this section, a written claim for refund....

B. The secretary or the secretary's delegate may allow the claim in whole or in part or may deny the claim.... If the department has neither granted nor denied any portion of a claim for refund within one hundred twenty days of the date the claim was mailed or delivered to the department, the department may not approve or deny the claim but the person may refile it within the time limits set forth in Subsection C of this section or may within ninety days elect to pursue one, but only one of the remedies in Paragraphs (1) and (2) of this section.... The remedies are as follows:

(1) the person may direct to the secretary a written protest against the denial of, or failure to either allow or deny, the claim ...; or

(2) the person may commence a civil action in the district court....

In *Unisys Corp. v. New Mexico Taxation and Revenue Department*, 117 N.M. 609, 874 P.2d 1273 (Ct. App. 1994), the New Mexico Court of Appeals held that while the Department retained discretion to grant or deny a claim for refund after the passage of 120 days, it could not be compelled to

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<sup>1</sup> Although it could be argued that Mr. Anaya's 1997 application was limited to a claim for refund of \$2,348.00 and did not include the additional \$833.68, the Department has taken the position that Mr. Anaya's inclusion of amended

do so. In 1997, the legislature amended Section 7-1-26 to expressly prohibit the Department from taking action on a refund claim after 120 days from the date the claim is filed.<sup>2</sup> This change made it clear that any taxpayer whose refund claim is not acted upon in a timely manner must take affirmative action to protect his refund by: (1) refileing the claim within the three-year limitations period set out in Subsection C of Section 7-1-26; (2) filing an administrative protest to the Department's inaction; or (3) filing a civil suit in district court.

In this case, Mr. Anaya filed his refund claim on September 4, 1997. On January 3, 1998, the 121<sup>st</sup> day after delivery of the claim, the Department lost discretion to either grant or deny Mr. Anaya's refund.<sup>3</sup> The time within which a claim for refund of the \$833.68 of gross receipts tax paid in 1994 could be filed expired at the end of December 1997, which is three years from the end of the year in which the tax was due. With regard to this portion of the claim, the only recourse open to Mr. Anaya was to file a protest of the Department's failure to act on his claim or file a civil action in district court. Instead, Mr. Anaya refiled his claim for refund after the statute of limitations for doing so had expired. Having failed to exercise either of the remedies open to him, and because his second claim for refund is barred by the statute of limitations, Mr. Anaya is not entitled to a refund of the \$833.68.

### **CONCLUSIONS OF LAW**

1. Mr. Anaya 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.

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returns for the January-June 1994 reporting period was sufficient to constitute a valid claim for refund of the \$833.68.

<sup>2</sup> Laws 1997, ch. 67, sec. 11, made the amendment applicable to claims for refund filed on or after July 1, 1997.

<sup>3</sup> In fact, the Department did refund \$2,348.00 of Mr. Anaya's claim after expiration of 120 days. This refund was erroneous and not authorized by the 1997 amendment to Section 7-1-26. It should be noted, nonetheless, that Mr.

2. Mr. Anaya is not entitled to the \$833.68 refund claimed on April 16, 1998 because the claim was not filed within the limitations period set out in NMSA 1978, Section 7-1-26(C) (1997 Cum.Supp.).

3. Mr. Anaya is not entitled to the \$833.68 refund claimed on September 4, 1997 because he did not exercise either of the remedies available to him when the Department failed to act on the refund within 120 days.

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

DONE, this 4<sup>th</sup> day of December 1998.

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Anaya could have refiled this portion of his claim as late as December 2000, which is three years from the end of the year in which the assessment was issued and paid.