

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

**IN THE MATTER OF THE PROTEST OF
KD PLUMBING WORKS, INC.
I.D. No. 02-173929-00-3
TO DENIAL OF CLAIM FOR REFUND**

No. 00-08

DECISION AND ORDER

A formal hearing on the above-referenced protest was held February 22, 2000, before Margaret B. Alcock, Hearing Officer. KD Plumbing Works, Inc. ("Taxpayer") was represented by Clifford C. Gramer, Esq.. The Taxation and Revenue Department ("Department") was represented by Monica M. Ontiveros, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a licensed plumbing business established in 1992.
2. Taxpayer provides plumbing services to general contractors on a subcontract basis.
3. Taxpayer's CRS-1 returns for reporting periods June 1993 through December 1996 were prepared and filed by its accountant, Robert Kingsbury.
4. Taxpayer paid the Department the gross receipts taxes reported on the CRS-1 returns prepared and filed by its accountant.
5. In 1996, Kenny Diaz, Taxpayer's president, was advised by another plumber that because Taxpayer was doing subcontract work, it might be overpaying gross receipts taxes.
6. Mr. Diaz relayed this information to Robert Kingsbury and asked him to determine whether Taxpayer was paying too much gross receipts taxes.

7. Mr. Kingsbury subsequently discovered that if Taxpayer obtained nontaxable transaction certificates (“NTTCs”) from the general contractors for whom it performed services, Taxpayer would be entitled to deduct its receipts from those services.

8. Mr. Kingsbury told Mr. Diaz that Taxpayer could claim a refund of gross receipts taxes previously paid. Mr. Kingsbury indicated there was a time limit within which to file the claim, but did not tell Mr. Diaz when that deadline expired.

9. By July 1996, Taxpayer had obtained NTTCs from all the general contractors for whom it performed services.

10. At that time, Mr. Diaz directed Mr. Kingsbury to file amended CRS-1 returns for Taxpayer and apply for a refund of gross receipts taxes paid since 1993.

11. Mr. Kingsbury prepared amended CRS-1 returns for 1995 and 1996, but did not file a refund claim for these periods with the Department. Mr. Kingsbury did not prepare amended returns or file a refund claim for 1993 or 1994.

12. In January 1998, Taxpayer terminated Mr. Kingsbury’s services and hired Fila Y. Diaz to take charge of Taxpayer’s books and accounts.

13. After obtaining Taxpayer’s files from Mr. Kingsbury, Mrs. Diaz discovered that no claim for refund had been filed to recover the gross receipts taxes paid by Taxpayer during the years 1993 through 1996.

14. In August 1998, Taxpayer filed a claim for refund of gross receipts taxes paid during the period 1995-1996 and received a refund in the amount of \$14,604.50.

15. Sometime between November 20, 1998 and December 2, 1998, Taxpayer filed a claim for refund of \$20,802.04 of gross receipts taxes paid during the period 1993-1994. None of these taxes had been paid as the result of an assessment by the Department.

16. On December 11, 1999, the Department denied the refund because it was not filed within the three-year limitations period set out in Section 7-1-26 NMSA 1978.

17. On March 2, 1999, Taxpayer filed a written protest of the denial of its claim for refund of gross receipts taxes paid during the period 1993-1994.

DISCUSSION

The issue to be determined is whether the Department properly denied Taxpayer's claim for refund of \$20,802.04 of gross receipts taxes paid for tax periods January 1993 through November 1994. The Department denied the refund because the statute of limitations for claiming the refund had passed. The statutory provision at issue is Section 7-1-26 (C)(1)(a) NMSA 1978, which provides, in pertinent part¹:

[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;

No assessment was issued against Taxpayer. Accordingly, Taxpayer's claim for refund of gross receipts tax was required to be filed within three years of the end of the calendar year in which payment of the tax was originally due.

Pursuant to Section 7-9-12 NMSA 1978, gross receipts taxes "are to be paid on or before the twenty-fifth day of the month following the month in which the taxable event occurs." Gross receipts taxes for tax period January 1993 were due on or before February 25, 1993; the time within which a taxpayer could claim a refund of these taxes expired December 31, 1996. Gross receipts

taxes for tax period November 1994 were due on or before December 25, 1994; the time within which a taxpayer could claim a refund of these taxes expired December 31, 1997. Taxpayer's claim for refund of gross receipts taxes paid for reporting periods January 1993 through November 1994 was filed with the Department sometime between November 20, 1998 and December 2, 1998. The claim was not filed within the limitations period required by Section 7-1-26(C) and was properly denied by the Department.

Taxpayer argues that Section 7-1-13(E) NMSA 1978 gives the Department discretion to grant Taxpayer a 12-month extension of time to file its refund claim. That section provides:

E. The secretary or the secretary's delegate may, for good cause, extend in favor of a taxpayer or a class of taxpayers, for no more than a total of twelve months, the date on which payment of any tax is required or on which any return required by provision of the Tax Administration Act shall be filed, but no extension shall prevent the accrual of interest as otherwise provided by law....

Taxpayer relies on the following example found in Department Regulation 3 NMAC 1.4.12.1.5:

Example 3: If the taxpayer's accountant has suddenly died or has become disabled and unable to perform services for the taxpayer and the taxpayer can show that the taxpayer is unable either to complete the return or to procure the services of a person to complete the return before the due date, an extension will be given favorable consideration.

There are several problems with Taxpayer's argument. First, Section 7-1-13(E) gives the secretary authority to grant an extension of time to file returns or pay taxes. The statute does not give the secretary authority to grant an extension of time within which to file a refund claim. A refund claim must be filed within the time limit provided in Section 7-1-26(C)(1)(a), *i.e.*, within three years of the end of the calendar year in which the payment was originally due.

¹ This is the version of Section 7-1-26(C) in effect in November 1998, the date the Taxpayer's claim for refund was filed.

Second, no request for extension was ever filed with the Department. The gross receipts taxes at issue were due in 1993 and 1994 and payments were made in a timely manner. Taxpayer cannot retroactively request an extension of time to pay taxes that have already been paid. Even if Taxpayer had obtained an extension of time to pay his 1993 and 1994 gross receipts taxes, this would not have changed the original, statutory due date or changed the date on which the statute of limitations to claim a refund of those taxes expired.

Third, the facts presented do not provide a basis for granting Taxpayer an extension of time to either file or pay. The regulation cited by Taxpayer addresses a situation where an accountant suddenly dies or becomes disabled and is unable to carry out his accounting duties. The regulation does not cover a situation where an accountant is able to act but simply fails to carry out his client's instructions. Taxpayer's reliance on its accountant does not excuse Taxpayer from its obligation to comply with New Mexico's tax laws. As stated by the New Mexico Court of Appeals in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

The failure of Taxpayer's accountant to file timely refund claims is a matter between Taxpayer and Mr. Kingsbury. The facts of this case do not provide grounds for the Department to extend or waive the statute of limitations for filing refund claims set by the New Mexico legislature.

CONCLUSIONS OF LAW

1. KD Plumbing Works, Inc. filed a timely, written protest to the Department's denial of Taxpayer's claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer's claim for refund of \$20,802.04 of gross receipts taxes paid during the period 1993-1994 was not filed within the statutory time limit set out in Section 7-1-26(C).

3. There is no basis for the Department to extend or waive the statute of limitations set out in Section 7-1-26 NMSA 1978.

4. Taxpayer's refund claim was properly denied by the Department.

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

DATED March 3, 2000.