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

IN THE MATTER OF THE PROTEST OF
VAL KILMER AND JOANNE WHALLEY NO. 02-30
PROTEST TO DEPARTMENT'S DETERMINATION
THAT IT LACKS AUTHORITY TO ACT UPON
TAXPAYERS' CLAIM FOR REFUND

DECISION AND ORDER

This matter came on for formal hearing on May 15, 2002. That hearing was continued and rescheduled for October 2, 2002 before Gerald B. Richardson, Hearing Officer. Val Kilmer and Joanne Whalley, hereinafter, "Taxpayers", were represented by Paul A Bleicher, Esq. and Dan Pick, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. Following the hearing, the parties submitted briefs, with the last being filed on November 12, 2002. The matter was considered submitted for determination at that time. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. For the 1995 tax year, the Taxpayers filed their original New Mexico personal income tax return as New Mexico residents for that year.

2. On December 21, 1999, the Taxpayers mailed to the Department, by certified mail, an Amended 1995 New Mexico Personal Income Tax return, Form 1995 PIT-1, showing that they were claiming a refund in the amount of $304,217.00.

3. The return was accompanied by a letter of the same date from Ms. Enza Pisa Cohn, the Tax Manager of Gelfand, Rennert & Feldman, LLC. The letter noted that the statute of limitations to file the amended return was due to expire on December 31, 1999 and it explained

that the reason for filing the amended return was that one of the Taxpayers, Ms. Whalley, was found to be a nonresident of New Mexico as of August 1, 1995. It went on to state that, "She was a resident in the state of California for that period and forward."

4. Ms. Cohn's letter did not inform the Department that the issue of Ms. Whalley's residency was a matter still in dispute between the Taxpayers and the State of California.

5. The Department received the amended return on December 29, 1999.

6. Gelfand, Rennert & Feldman is a business management firm which was a subsidiary of Price Waterhouse Coopers during the periods relevant to this protest. It manages its client's financial affairs, including paying bills, preparing financial statements and filing tax returns.

7. Ms. Cohn is a Certified Public Accountant.

8. The Taxpayers' amended return included a schedule which allocated the income of Mr. Kilmer and Ms. Whalley between New Mexico and California, with Mr. Kilmer being a New Mexico resident for the full year and Ms. Whalley being a New Mexico resident until July 31, 2002 and a California resident thereafter.

9. In 1998 the Taxpayers were notified by the California Franchise Tax Board that it was auditing them with respect to their 1995 tax return. The audit focused upon the separation petition filed by Ms. Whalley in 1995 and her residency status subsequent to the filing of the petition.

10. Gelfand, Rennert & Feldman and Ms. Cohn represented the Taxpayers with respect to the California Franchise Board Audit for the 1995 tax year. The Taxpayers took the position that Ms. Whalley was a New Mexico resident during 1995 because she and Mr. Kilmer were attempting to reconcile their marriage and that she did not decide to permanently reside in California until their divorce was final in 1996.

11. On July 26, 1999, the California Franchise Tax Board made its initial determination that Ms. Whalley had become a California resident in August, 1995.

12. Ms. Cohn responded to the July 26, 1999 initial determination, disputing its conclusion.

13. On December 21, 1999, Ms. Cohn was notified by a letter from the California Franchise Tax Board that it had reviewed her response and did not agree with her interpretation of the facts concerning Ms. Whalley's residency. The letter further provided that the Franchise Tax Board had concluded its audit and had determined that Ms. Whalley became a resident of California as of August 1, 1995. Ms. Cohn was further notified that an assessment would be issued in conformity with that determination.

14. The Taxpayers, through Ms. Cohn, appealed the determination of the California Franchise Tax Board through the administrative protest procedures of the Franchise Tax Board.

15. The Taxpayers' dispute with the California Franchise Tax Board was not resolved until August of 2001 when it was settled between the Taxpayers and the Franchise Tax Board.

16. After Ms. Cohn received the July 26, 1999 letter from the Franchise Tax Board, she began to explore the possibility of filing a protective refund claim with the Department to recover income taxes paid with respect to 1995 based upon Ms. Whalley's filing New Mexico personal income taxes as a New Mexico resident for the entire year.

17. Ms. Cohn did her own research in Commerce Clearinghouse publications in preparation of filing the protective refund claim, researching both the statute of limitations on refund claims as well as procedures for filing protective claims. Her investigation also included reading the New Mexico statutes concerning how New Mexico handles claims for refund. She

concluded that the statute of limitations for filing the Taxpayers' refund claim for the 1995 tax year was December 31, 1999.

18. Ms. Cohn was aware of the procedures for filing a protective refund claim with the California Franchise Tax Board, but she had no experience with filing protective refund claims with the Department. California has a special form that is filed with the refund claim to notify the tax authorities that it is a protective claim for refund.

19. The Department has no written policies or procedures with respect to protective refund claims nor does it have any forms for filing protective refund claims as opposed to any other refund claim.

20. Ms. Cohn also consulted with the tax experts at Price Waterhouse Coopers concerning the Taxpayers' refund claim. They confirmed that the statute of limitations was December 31, 1999 and that New Mexico had no particular procedures for filing protective refund claims as opposed to other refund claims.

21. Around November 29, 1999, Ms. Cohn called the Department about the potential refund claim. She was referred to Mr. Jerry Wells, who was head of the Department's Income Tax Section. She informed him about the refund claim, confirmed the date of the statute of limitations, discussed whether the Department looked to postmark date or date of receipt for determining timeliness of a claim and where the claim should be mailed.

22. Mr. Wells informed Ms. Cohn to mail the refund claim to the Department at PO Box 630, Santa Fe, NM.

23. Around December 20th, Ms. Cohn called Mr. Jerry Wells because she had not yet filed the amended return for the Taxpayers and she was concerned with the statute of limitations and things being lost in the holiday shuffle. She asked that she be able to send the amended

return directly to him. Mr. Wells provided her with a different address, PO Box 2788, Santa Fe, NM.

24. Ms. Cohn mailed the amended return to the Department on December 21, 1999 by mailing it to PO Box 2788, Santa Fe, NM, to the attention of Mr. Jerry Wells.

25. In early January, 2000, Mr. Wells called Ms. Cohn to discuss the Taxpayer's refund claim. He wanted to understand the allocation of income between California and New Mexico on the amended tax return. He requested the Taxpayers' 1995 California tax return. He explained that because it was a very large refund, it would take some time for action on it to occur.

26. On January 14, 2000, as a result of her conversation with Mr. Wells, Ms. Cohn faxed Mr. Wells a copy of the Taxpayers' original 1995 California income tax return.

27. Ms. Cohn found it puzzling that New Mexico was asking for the Taxpayers' 1995 California tax return. Ms. Cohn assumed, however, that New Mexico would perform a formal audit on the Taxpayers' amended 1995 tax return.

28. Ms. Cohn called Mr. Wells once or twice after January, 2000, and left a message to return her call. Mr. Wells did not receive or return her call(s).

29. Ms. Cohn made no written inquiries of the Department as to the status of the Taxpayer's refund claim during the period of January, 2000 through July, 2000.

30. Ms. Cohn did not call the Department again until July 27, 2000. She spoke to an employee named Roberta, who informed her that Mr. Wells had retired and that she would look into the status of the refund. Ms. Cohn was asked to fax everything that she had sent to Mr. Wells concerning the refund claim because the employee could find no record of the refund claim.

31. On July 31, 2000, Loretta Duran wrote a letter to Ms. Cohn informing her that her December 21, 1999 application for a refund had been denied pursuant to Section 7-1-26 NMSA 1978. Ms. Duran's letter further informed Ms. Cohn that the refund claim was denied because the claim was stale and could no longer be acted on by the Department. The letter further informed Ms. Cohn that she could direct a written request for a hearing on her claim within 30 days after the mailing of the denial and enclosed a copy of the Department's publication "Taxpayer Remedies".

32. On August 23, 2000, Ms. Cohn wrote a letter to the Department's Protest Office requesting a hearing pursuant to the Department's July 31st letter.

33. The Department issued a document entitled Acknowledgement as Timely Filed From the Protest Office, with respect to this matter. This document was an internal Department document and was not delivered to the Taxpayers.

34. The Taxpayers' amended tax return was treated by the Department as a prior year return. Prior year returns are tax returns for tax years which are three or more years out from the current tax year.

35. The Department does not enter prior year refund claims into its computer system. They are handled manually within the Income Tax Section and are not entered into the system until it has been reviewed and it has been determined that the refund will be granted.

36. In early 2000, the Department made a decision that it would not work prior year income tax returns until it could get caught up with processing the current year returns. This policy was in effect for approximately 3 months.

37. During the period that it was determined not to work prior year returns, the Department did not take action on approximately 800 returns.

38. The Department's Income Tax Section is very busy handling the volume of work.

39. Once 120 days have passed from the filing of a return requesting a refund, the Department's position is that it cannot act upon the refund claim.

40. Of the 800 prior year returns that were not worked by the Department in early 2000, approximately 20% of them became stale and were not acted upon by the Department because 120 days had passed since the filing of the return requesting a refund.

41. At the time the Taxpayers filed their amended return, the Department had a policy for handling protective claims for refund. Under this policy, taxpayers would be informed that the claim would be denied, that they must protest the denial, and the claim would be referred to the Department's Protest Office. The protest would be held in abeyance until the matter was resolved in the other taxing jurisdiction and then it could be acted on. This policy was designed to prevent refund claims from lapsing and being barred by the operation of the statute of limitations.

42. Mr. Wells had two or three telephone conversations with Ms. Cohn.

43. Mr. Wells was not aware that the Taxpayers' amended return was a protective claim for refund.

44. Mr. Wells' practice when discussing how to file protective claims with the Department was to have taxpayers note on the return that it was a protective claim and to send it to the Department's Revenue Processing Division.

45. It was not Mr. Wells' practice to have taxpayers send protective refund claims to the Department's Protest Office because the claim would have to be acted on by the Revenue Processing Division before there would be an action which could be protested by the taxpayer and handled by the Protest Office.

46. Post Office Box 630 is the Department's primary mailing address for general communications with the Department.

47. Post Office Box 2788 is the mailing address the Department uses for the filing of income tax returns.

48. Ms. Whalley became a California resident as of August 1, 1995.

DISCUSSION

THE NATURE OF THE PROTEST

The first matter to be determined is the nature of the protest at issue. The Taxpayers argue that the Department's July 31, 2000 letter constitutes a letter denying the Taxpayers' claim for refund, and that by filing a protest to that action on August 23, 2000, the Taxpayers have a valid and timely protest to the Department's denial of their claim for refund. The Department, on the other hand, argues that the Department lost its authority to deny the Taxpayers' refund claim after 120 days from the filing of the claim and that by failing to file a timely protest to the Department's inaction on the refund claim within 90 days thereafter, that there is no valid protest to a refund denial. Rather, because, pursuant to § 7-1-24(A) NMSA 1978, taxpayers may protest "the application to the taxpayer of any provision of the Tax Administration Act…", the instant protest should be considered to be a protest to the Department's application of the statutory time limitations contained within § 7-1-26(B) NMSA 1978. This issue is significant because the Department does not dispute that the Taxpayers would be entitled to a refund based upon the change of Ms. Whalley's residence, but it argues that it lacks the statutory authority to grant the refund at this time because the Taxpayers failed to file a timely protest to the Department's failure to act to grant or deny the refund.

The analysis of this issue is complicated by the fact that the statute governing refund claims, § 7-1-26 NMSA 1978, was amended during the time the Taxpayers' refund claim was pending, also raising the issue as to which version should be applied to analyze the timeliness issue. The Taxpayers' argument that they had a timely protest to the Department's denial of their refund claim rests on three contingencies, each of which must be met. First, we must apply the version of § 7-1-26(B) which became effective on July 1, 2000, after the Taxpayers filed their claim for refund, rather than the version in effect when their claim was filed. Second, the Taxpayers must be allowed to use the delivery date rather than the mailing date of their refund claim to calculate the time limitations for determining the timeliness of the protest. Third, we must conclude that the Department actually denied the refund claim.

The two versions of § 7-1-26(B) will first be examined. The version in effect in December, 1999, when the Taxpayers' claim for refund was filed provided as follows:

> The secretary or the secretary's delegate may allow the claim in whole or in part or may deny the claim. If the claim is denied in whole or part in writing, the claim may not be refiled. If the claim is not granted in full, the person, within ninety days after either the mailing or delivery of the denial of all or any part of the claim, may elect to pursue one, but not more than one, of the remedies in Paragraphs (1) and (2) of this subsection. [Paragraph 1 provides for the filing of an administrative protest with the Secretary, Paragraph 2 provides for the filing of a suit against the Department in district court.] *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 subsection.* (emphasis added.)

Section 7-1-26(B) NMSA 1978 (1998 Repl. Pamp.) The Department relies upon the emphasized language above to support its position that because the Department failed to act upon the

Taxpayers' refund claim within 120 days of its filing, that it lost the authority to take any action with respect to the granting or denial of the claim. That, combined with the Taxpayers' failure to file a protest within 90 days from the first 120 days, would bar this action as a protest to a denial of a refund claim.

The Taxpayers rely upon the amended version of § 7-1-26(B), effective July 1, 2000, for their argument that their protest is a timely protest to the Department's denial of their claim for refund. It provides that:

> The secretary of the secretary's delegate may allow the claim in whole or in part or may deny the claim.
>
> (1) If the claim is denied in whole or in part in writing, no claim may be refiled with respect to that which was denied but the person, within ninety days after either the mailing or delivery of the denial of all or any part of the claim may elect to pursue one, but not more than one, of the remedies in Subsection C of this section.
>
> (2) If the department has neither granted nor denied any portion of the claim for refund within one hundred twenty days of the date the claim was mailed or delivered to the department, 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 Subsection C of this section. After the expiration of the two hundred ten days from the date the claim was mailed or delivered to the department, the department may not approve or disapprove the claim unless the person has pursued one of the remedies under Subsection C of this section.

Section 7-1-26(B) NMSA 1978 (2000 Cum. Supp.) The Taxpayers' argument is a follows. The amended version of the statute does not bar the Department from taking action on the refund claim until 210 days have run from the mailing or delivery of the claim for refund, rather than the 120 days contained in the earlier version. It also counts the time from the "date the claim was mailed *or delivered* to the department." (emphasis added). If we use the date of delivery of the claim, which was received by the Department on December 29, 1999, as opposed to its

mailing date, December 21, 1999, then the 210 days did not run until August 5, 2000. This would place the Department's "denial" letter of July 31, 2000 within the 210 days it is allowed to act on a refund claim, and the Taxpayers' protest of August 23rd would be within the time for protesting that denial.

As noted earlier, the Taxpayers' argument rests on three contingencies. The first is that we use the version of § 7-1-26(B) which became effective on July 1, 2000, after the refund claim had been filed, rather than the version in effect at the time the claim was filed. This contingency is problematic because the general rule is that statutes which affect vested or substantive rights operate only prospectively. ***Swink v. Fingado,*** 115 N.M. 275,279, 850 P.2d 978, 982 (1993). But there are exceptions to this rule depending upon whether they diminish rights or increase liabilities already accrued, ***id.,*** at 290, 850 P.2d at 993, or whether the statutes relate to remedial procedure. ***Wilson v. N.M. Lumber & Timber Co.***, 42 NM 438, 441 81 P.2d 61, 63 (1938). For the purposes of addressing the Taxpayers' argument, it will be assumed, but not decided, that the latter version of § 7-1-26(B) can be applied under the facts and circumstances of this case.

The second contingency is that we can use the delivery date of the amended return as opposed to the mailing date to determine the timeliness of the Taxpayers' actions. This, I do not believe to be proper under the circumstances of this case, where the Taxpayers elected to mail their amended return to the Department. The statute's use of the date of "mailing or delivery" contemplates that the date of filing of the claim for refund[1] will depend upon the method of filing a taxpayer elects. Taxpayers may always personally deliver tax returns, amended tax returns, etc. to the Department. Section 7-1-9 NMSA 1978 also allows taxpayers to file returns (including amended returns amounting to claims for refund) by mail. When electing to file by

mail, the mailing date becomes the applicable filing date. Section 7-1-9(B) NMSA 1978. The Taxpayers' argument, however, would allow taxpayers to use the mailing date as the filing date, yet use the date the mailing is received as the delivery date, and to intermix the two however it suits them. The only fair and rational reading of the statute would require a consistent application of the time limits applicable to refund claims, regardless of which filing methodology a taxpayer elects to use. Thus, taxpayers who mail their returns would have the filing date calculated from the mailing date, and taxpayers who hand-deliver their returns would have the filing date calculated from the delivery date. Otherwise, taxpayers who elect to mail their returns could always have a longer statute of limitations than those who elect to hand-deliver their returns, since it is reasonable to assume that the mail delivery date will be after the mailing date itself. I find nothing in the language of any of the provisions of the Tax Administration Act to indicate that the legislature would favor taxpayers who mail their filings with the Department over those who choose to hand-deliver them. Thus, I believe that the Taxpayers are bound to use a consistent method of calculating the filing date of their claim for refund, based upon the methodology they elect to use for filing. This conclusion is supported by Department Regulation 3.1.8.17, promulgated under § 7-1-25 NMSA 1978. This section allows taxpayers to appeal from an adverse decision of the Department's hearing officer "within thirty days of the date of mailing or delivery of the written decision and order of the hearing officer…." The regulation provides:

> Use of the phrase "date of mailing or delivery" in Subsection A of Section 7-1-25 NMSA 1978 authorized the department to choose between mailing and hand-delivering the written decision and order of the hearing officer. "Date of mailing" means the time that the hearing officer's decision and order enclosed in a properly

[1] The filing date of a claim for refund is pertinent, not only for purposes of determining the timeliness of the claim and the timeliness of a protest to a denial of the claim, but also, the date from which the Department must begin to pay interest on claims for refund. See, § 7-1-68(D) NMSA 1978.

> addressed envelope or wrapper was postmarked by the United States postal service. "Delivery" means time of hand delivery of the written decision and order to the Taxpayer's business or residence.

3 NMAC 1.8.17.

The third contingency is whether the Department's July 31, 2000 letter can be characterized as a "denial" of the Taxpayers' refund claim, possibly giving rise to an administrative protest of the denial. Admittedly, the language of the Department's letter leaves much to be desired. The first sentence of the letter states, "Your application for tax refund date [sic] December 21, 1999 in the amount of $304,217.00, for tax year 1995 has been denied pursuant to Section 7-1-26 NMSA 1978." It goes on to advise that the Taxpayers may protest the action by requesting a hearing of their claim within 30 days after the mailing of the denial.[2] The second paragraph of the letter then explains that, "This denial is made because your claim is stale and can no longer be acted on by the department." At its worst, the Department's letter fails to distinguish between a claim which the Department has "denied in whole or in part in writing" and a claim which the Department "has neither granted nor denied".[3] This distinction, however, is clearly made in both versions of Section 7-1-26(B), and the Department, being a creature of statute, may not ignore the distinction. Thus, any Department action purportedly taken to deny a claim for refund, which is taken after the time the Department is authorized to act on a claim for refund would be *ultra vires* and beyond the Department's statutory authority. Given that the filing date of the Taxpayer's claim for refund was its mailing date, December 21, 1999, even under the version of § 7-1-26(B) which became effective on July 1, 2000, the 210 days in which the Department is authorized to act to approve or disapprove a refund claim would

[2] The advice of a thirty day time limit for filing a protest is wrong, regardless of which version of Section 7-1-26 is applied, since both provide for ninety days to protest.
[3] This language is the same in both the 1998 and 2000 versions of Section 7-1-26(B).

have expired on July 28, 2000. Thus, any action taken to deny the claim on July 31st would be *ultra vires.*

Based upon the above discussion, there is no jurisdiction to consider this matter as a protest to the Department's denial of the Taxpayers' refund claim. There is another basis for finding jurisdiction to decide this protest, however. Section 7-1-24(A) allows Taxpayers to dispute "the application to the taxpayer of any provision of the Tax Administration Act". This is done by filing a protest within thirty days of the date of the mailing to the taxpayer by the Department of a "peremptory notice or demand". Section 7-1-24(B). Section 7-1-26 is part of the Tax Administration Act. Thus, having protested the Department's determination letter of July 31, 2000 that the Taxpayers' refund claim is stale, and having done so within thirty days, this is a timely protest to the Department's application of § 7-1-26(B), determining that it is without authority to act on the Taxpayer's refund claim.

EQUITABLE ESTOPPEL

The Taxpayers have also challenged the Department's position that because of the lapse of the limitations provided in § 7-1-26(B), that it no longer has the authority to grant the Taxpayers' claim for refund on the grounds that under the facts and circumstances of this case, the Department should be equitably estopped from refusing to act on the refund. The Taxpayers argue that the Department's conduct, through its employees, such as Mr. Wells, misled the Taxpayers to believe that their claim would be processed by the Department and be protected from the application of any statute of limitations or any other statutory provision that would prevent the processing of their refund claim.

Equitable estoppel is only applied against the state when a statute so provides or when "right and justice demand it." ***United States v. Bureau of Revenue,*** 87 N.M. 164, 166, 531 P.2d

212, 214 (Ct. App. 1975). Even so, especially in the area of taxation, the doctrine of equitable estoppel is to be rarely applied against the state. ***Taxation and Revenue Dept. v. Bien Mur Indian Market***, 108 N.M. 228, 770 P.2d 873 (1989). 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, 637 (Ct. App.), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992). 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*. *See also*, ***Johnson & Johnson v. Taxation and Revenue Department***, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

The facts underlying the Taxpayers' claim of equitable estoppel are in dispute between the parties. Ms. Cohn, the Taxpayers' representative in filing the refund claim, asserted that in her November 1999 conversation with Mr. Wells, the supervisor of the Department's Income Tax Section, she discussed the Taxpayers anticipated refund claim, the statute of limitations for filing the claim and that it was a protective claim. She further claimed that Mr. Wells told her to mail it to the Department's Protest Office, at the PO Box 630 address. Ms. Cohn claims that in her second conversation with Mr. Wells, in December, 1999, just before filing the amended return, she again discussed the protective nature of the claim for refund. Ms. Cohn claims that in her conversation with Mr. Wells in January, that she again discussed the protective nature of the claim, that she was asked for the Taxpayer's California return, that she was told that it was a

large claim and that it would take some time to review and process, and that she was told not to worry, that the Department would let her know if it needed anything more to process the claim. It is the Taxpayers' contention that all of this led them to believe that they had done everything they needed to do to protect their refund claim.

Mr. Wells did not have as specific a memory of the conversations with Ms. Cohn as she claimed to have. He did remember discussing with her the statute of limitations on the claim, but he did not recall ever discussing the protective nature of the claim. He remembered that they discussed the issue of Ms. Whalley's state of residence, but he did not recall being informed that the matter of Ms. Whalley's residence was still a matter in dispute with the California Franchise Tax Board. He testified that the Department's policy for handling protective claims is to inform taxpayers that the claim would be denied, that they must protest the denial, and that the matter would then be referred to the Department's Protest Office, where it would be held in abeyance pending the outcome of the matter in dispute in the other taxing jurisdiction. He also stated that he would have advised a taxpayer filing a protective claim to write "protective claim" on the return. He further testified that he would not have informed a taxpayer to send the claim for refund to the Department's Protest Office because the claim would need to be acted upon by the Revenue Processing Division before it could be protested.

To resolve the conflicting testimony, I must judge it against the other known facts and circumstances. To me, the most compelling evidence that the Taxpayers did not communicate to the Department or its employees that their claim was a protective claim to be determined based upon the resolution of the matter in California can be found in their own transmittal letter to the Department with the claim. It makes no mention that the residency of Ms. Whalley was in dispute in California. Rather, it states that Ms. Whalley was "found" to be a nonresident of New

Mexico as of August 1, 1995 and that "she was a resident in the state of California for that period and forward." The chosen language would hardly put the Department on notice that the claim was a protective claim until the issue of Ms. Whalley's residence was finally determined. Indeed, it indicates that the Taxpayers' position was that Ms. Whalley "was a resident of California" during the disputed time frame.

I am also not dissuaded from my belief that the Department was not apprised of the protective nature of the Taxpayers' refund claim by Mr. Wells' less specific recollection of his conversations with Ms. Cohn. As the supervisor of the Department's very busy income tax section, Mr. Wells would have hundreds of conversations advising taxpayers and their representatives in a filing season. He can hardly be expected to remember the details of such conversations years later.[4] He could be expected to be familiar with the Department's practice and procedures with respect to the filing of protective claims and it is reasonable to assume that the advice he gave would be consistent with his understanding of Department practice.

Regardless of whose memory of the conversations was the best or most accurate, the one thing that is clear is that there was not a communication about the protective nature of the claim which was such that both parties understood that fact and could be expected to act upon it accordingly. Indeed, Mr. Wells did not treat the claim as a protective claim and just deny it for further action by the Protest Office. Rather, he attempted to work on the claim, and sought to gather additional information to verify the claim. The fact that he asked for the Taxpayers' original California return speaks volumes about his understanding of the Taxpayer's refund claim. Had he understood that the claim for refund was based upon an audit by California of the

[4] Even Ms. Cohn's recollection of the disputed conversations differed between her testimony given at deposition and her testimony given at the hearing. She was able to explain the discrepancy, but even so, it serves to indicate that our memories of distant events may not always be entirely accurate and are subject to a certain amount of reconstruction, based on documents found after the fact, assumptions we make, etc.

Taxpayers' California return, there would have been no reason to request the original return, which would have been filed prior to the audit. Even Ms. Cohn was puzzled by why Mr. Wells asked for this information, but she did not see fit to ask him why that information would be helpful to the Department or to explain why it would not be helpful. Thus, it is clear that the Taxpayers cannot meet their burden to establish the second element to be proven against the party to be estopped, that it had actual or constructive knowledge of the true facts regarding the protective nature of the Taxpayers' refund claim.

The second aspect of the Taxpayers' estoppel argument is even more deficient. Essentially, the Taxpayers claim that they were misled by the Department's employees into believing that they needed to take no more action with respect to their refund claim and that they need not concern themselves with any consequences, such as the statute of limitations on the Department's ability to act upon the claim. Ms. Cohn's testimony was to the effect that in her conversation with Mr. Wells in January, 2000, she was told that, with the exception of sending the California return, that there was nothing more that the Taxpayers would need to do and that because of the size of their claim, it would take some time to be processed. Even if this was a completely accurate reflection of their conversation, it must be taken in its context. The Department was in the process of examining her claim and had not yet determined its action on the claim. Thus, the conversation could have meant that Ms. Cohn did not need to do anything more at that time, but I doubt whether Mr. Wells was intending to indicate that there would never be anything else the Taxpayers may need to do with regard to their claim. Indeed, Ms. Cohn testified that she expected that the Department would perform some sort of audit of the claim for refund. Furthermore, Ms. Cohn did not testify that she and Mr. Wells had any kind of discussion about any sort of protest remedies the Taxpayers would have if the claim were not granted. In

essence, Ms. Cohn took her conversation with Mr. Wells that the Department would need time to review the claim and that no more action need be taken to mean that the Department was affirming that it would process *and grant* the claim. Given Ms. Cohn's own expectation that the Department would audit the refund claim, it is not reasonable to conclude that there was a meeting of the minds that the claim would be granted with no further action required by the Taxpayers.

Even if I were to believe that there had been a meeting of the minds between Ms. Cohn and Mr. Wells with regard to the Taxpayers' representation that they were informed that nothing more from them would be needed and that their claim would be processed, the Taxpayers are unable to meet their burden to establish their first element of equitable estoppel with respect to their own knowledge about what must be done when the Department fails to act on a refund claim and the time frame within which action must be taken. When estoppel is invoked to avoid application of a statute of limitations, the issue is whether the defendant has taken some action to prevent the plaintiff from bringing suit within the prescribed period.[5] ***Kern v. St. Joseph Hospital, Inc.,*** 102 N.M. 452, 455-456, 697 P.2d 135, 138-139 (1985). *See also*, ***Molinar v. City of Carlsbad***, 105 N.M. 628, 735 P.2d 1134 (1987). The party asserting estoppel has the burden of showing not only that he failed to discover the cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. ***Continental Potash, Inc. v. Freeport-McMoran, Inc***., 115 N.M. 690, 698, 858 P.2d 66, 74 (1993). 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. ***Bolton v. Board of County***

Commissioners of Valencia County, 119 N.M. 355, 890 P.2d 808 (Ct.App. 1994), *cert. denied* 119 N.M. 311, 889 P.2d 1233 (1995).

In this case, the Taxpayers have not established their own lack of knowledge about the statutory scheme under which New Mexico handles claims for refund or their own due diligence in ensuring that their claim did not become stale. 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." In ***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), the court of appeals upheld the district court's refusal to toll the statute of limitations on equitable grounds, finding that the plaintiffs had access to public records that would have provided them with complete information concerning the bond ordinance at issue.

New Mexico's tax laws are also a matter of public record available to all of the state's taxpayers. In this case, the Taxpayers' representative, Ms. Cohn, initially researched the Department's statutes concerning refund claims. Since § 7-1-26 is the statute which governs the handling of refund claims, presumably she would have read the provisions about preserving claims not acted upon by the Department, even if it was not particularly relevant at that time. Ms. Cohn also was a CPA who not only had her own knowledge and ability to research state tax laws to serve her, but she also had the resources of the Tax Section of her parent company, Price

[5] Or, in the circumstances in which the statute of limitations is at issue in this case, whether the Department took some action to prevent the Taxpayers from acting in a timely manner to protest the Department's failure to take action to grant or deny their refund claim.

Waterhouse Coopers. As the tax representative for the Taxpayers, it was incumbent upon her to be familiar with New Mexico's statutes and procedures governing refund claims. Thus, even if she had been misled by Department employees, which I do not believe to be the case, she still had the means available to her to obtain the knowledge which would have avoided the situation we are faced with today, which is the Department's lack of authority to now act upon her client's refund claim.

The party relying on estoppel has the burden of establishing all facts necessary to support the claim. ***In re Estates of Salas,*** 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct. App. 1987). The Taxpayers in this case have not met their burden of establishing each of the elements of equitable estoppel and are not entitled to claim its benefit.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely protest, pursuant to Section 7-1-24(A) NMSA 1978, to the Department's determination that it lacked the authority to act upon their claim for refund and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayers failed to file a timely protest to the Department's failure to act upon their claim for refund.

3. The Department lacks the authority to act upon the Taxpayers' claim for refund.

4. The Taxpayers have failed to establish that the Department should be equitably estopped from refusing to take action on their refund claim.

For the foregoing reasons, the Taxpayers' protest IS HEREBY DENIED.

DONE, this 20th day of December, 2002.