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

IN THE MATTER OF THE PROTESTS OF
AMOCO OIL COMPANY AND AFFILIATED SUBSIDIARIES, **NO. 97-18**
ID NO. 01-604972-00 1,
Claim for Refund

DECISION AND ORDER

This matter was scheduled for hearing on April 8, 1997. In lieu of an evidentiary hearing, the matter was submitted for decision based upon stipulated facts and written argument. Amoco Oil Company and Affiliated Subsidiaries (hereinafter referred to as "the Taxpayer", "Amoco", or "the company") was represented by James L. Siddall, the company's manager of state income and franchise tax planning. The Taxation and Revenue Department ("the Department") was represented by Bruce J. Fort, Special Assistant Attorney General.

Based upon the evidence and the arguments presented, IT IS HEREBY DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a Maryland corporation with its principal place of business in Illinois. For all years relevant to this matter, the company filed income tax returns with the state of New Mexico on a domestic combined basis as Amoco Oil Company and Combined Affiliates.

2. On September 15, 1993, the Taxpayer completed a federal application, Internal Revenue Service (IRS) Form 1139, for a refund of federal corporate income taxes paid for 1989, based on the carryback to that year of a capital loss incurred in 1992.

3. The capital loss incurred by the Taxpayer in 1992 was not the result of a federal audit, the changing of a federal election, or any other change in federal tax reporting for which federal approval was required.

4. The Taxpayer filed its original 1992 New Mexico corporate income tax return with the Department on October 15, 1993.

5. On December 20, 1993, the Taxpayer filed an amended 1989 state corporate income tax return with the Department, seeking a refund of previously-paid taxes. The amended return related to the reclassification of foreign dividend income subsequent to the United States Supreme Court's decision in Kraft General Foods v. Iowa, 505 U.S. 71 (1992), and not to carryback of the 1992 capital loss.

6. The Taxpayer's refund claim filed on December 20, 1993 was resolved in October, 1994 pursuant to a closing agreement between the Taxpayer and the Department which allowed the Taxpayer a credit for taxes previously paid for the 1989-1991 tax years.

7. Pursuant to the closing agreement, the Taxpayer was permitted to apply these credits to its New Mexico corporate income tax liabilities for the 1994 tax year. The Taxpayer's return for the 1994 tax year, originally due March 15, 1995, was filed on or about October 15, 1995, pursuant to permitted extensions of time.

8. On January 17, 1995, the Taxpayer filed an amended 1989 New Mexico corporate income tax return, reflecting deduction of a 1992 capital loss of $40,735,848 from capital gains reported on the Taxpayer's original 1989 return. Under Internal Revenue Code §§1211 and 1212, the Taxpayer could not use the capital loss to reduce its 1992 income for state or federal tax purposes, but was permitted to carry the loss back to 1989 to reduce income for that year.

9. The net effect of the carryback of the 1992 capital loss to the 1989 tax year was to reduce the amount of federal taxable income reported in that year and thereby reduce the state income taxes owed for the 1989 tax year by $64,588.

10. The Taxpayer's amended return for the 1989 tax year, reflecting a reduction in taxable income, constituted a claim for refund by the Taxpayer.

11. On July 12, 1995, the Department denied the refund claim.

12. The Taxpayer filed a timely protest of the denial on August 10, 1995.

13. On June 24, 1992, the Taxpayer filed an amended return for the 1990 tax year,

showing a capital loss, and filed amended returns for the 1987, 1988 and 1989 tax years, offsetting capital gains reported for those years with the 1990 capital loss, which could not be used to offset income reported on the 1990 federal and state tax returns. The Department allowed the Taxpayer's refund claims for the 1987-1989 tax years.

DISCUSSION

The federal Internal Revenue Code (IRC) permits corporate taxpayers to offset capital losses against capital gains in computing income tax. IRC §1211(a). The loss may be carried back to the three taxable years prior to the loss year or forward to the succeeding five taxable years. IRC §1212(a)(i). The Taxpayer's claim in this matter arises from its attempt to carry back a capital loss sustained in 1992 to the 1989 tax year, for purposes of determining its state tax liability.

The New Mexico Tax Administration Act provides that a claim for refund must be made within three years of the end of the calendar year in which the tax was originally due. §7-1-26(B)(1)(a) NMSA 1978.[1] The tax at issue here is for the 1989 tax year. That tax was due in 1990. See §7-2A-9 NMSA 1978. Thus, by the terms of §7-1-26(B), any claim for refund was due no later than December 31, 1993. The Taxpayer's claim here was made by means of an amended tax return filed with the Department in January of 1995, more than a year after December 31, 1993.

Tax year at issue

The Taxpayer argues that the tax year at issue is not 1989, but 1992, the year in which the Taxpayer incurred the capital loss that it carried back to 1989 in the amended return filed in

[1] The Tax Administration Act, §7-1-26(D) NMSA 1978, provides that where an overpayment of tax results from an audit by the IRS or from the filing of an amended federal return changing a prior election or making any other change for which federal approval is required by the IRC, a claim for refund may be made to the Department within one year after the date of the audit or payment of the federal refund. The parties agree that the circumstances specified in §7-1-26(D) do not exist here, so that the possibly extended deadline for submission of a refund claim provided by that subsection is not at issue in this case.

January 1995. Because the return for 1992 was not due until 1993, the Taxpayer argues that it had until December of 1996 to carry back that loss through amendment of its 1989 return. The Taxpayer cites no authority for this position. This is not surprising, as it is unlikely that the Taxpayer could locate authority supporting the proposition that a return for the 1989 tax year is in fact a return for the 1992 tax year. Amoco seeks to amend its liability for 1989 taxes, and the applicable time limitation is that for the 1989 tax year.

Timeliness of the claim for refund

The Taxpayer was unable to apply the capital loss to reduce its tax for 1992. It therefore hoped to carry back the loss to 1989, when it had reported a gain against which the loss could be applied to reduce the total tax due. It had the right to do so, but was required to file the amended return within the time period provided in the Tax Administration Act. This it failed to do.

The Taxpayer has not shown that it was prevented from filing a timely amendment to its New Mexico return for 1989. Amoco was aware of the existence of the 1992 capital loss by September 15, 1993, the date on which it sought a refund of federal income taxes for 1989 based on carryback of the 1992 capital loss. Thus, this case does not present a situation where application of the statute of limitations would be unfair because the party could not have known of the existence of a claim prior to the expiration of the statute. Amoco apparently knew of its claim but failed to take timely action.

Amoco also argues that the statute of limitations for the 1989 tax year was extended to October 1995, by virtue of an amended return for 1989 that was filed by the Taxpayer in December 1993. The closing agreement between Amoco and the Department was executed in October 1994.[2] It appears that the agreement recognized an overpayment by Amoco for 1989 and allowed the Taxpayer to apply the overpaid amount to its New Mexico tax liability for 1994. Since that return was filed in October 1995, the Taxpayer argues that the filing deadline for the

[2] That agreement is not included in the record in this matter. However, the Department does not contest Amoco's characterization of the agreement's terms, and that description therefore is assumed to be correct for the purposes of this decision.

1989 return was extended to 1995, and its January 1995 amended return was therefore timely.

The amended return submitted by Amoco in December 1993 sought a refund of taxes previously paid for the 1989 tax year, based on the reclassification of foreign dividend income following a decision on that issue by the United States Supreme Court. Although Amoco characterizes the December 1993 amended return as having been filed to preserve the company's rights to redetermination of its 1989 state tax liability, the company does not contend that the amended return made any reference to carryback of the 1992 capital loss to the 1989 tax year or to any grounds for amendment of the original return other than the issue relating to classification of foreign dividend income.

Again, Amoco cites no authority for the proposition that its filing of an amended return seeking a refund on specific grounds could operate as a general reservation of the right to redetermine its tax liability on grounds other than those raised in the amendment. The Tax Administration Act requires that a claim for refund "state the nature of the [taxpayer's] complaint and contain information sufficient to allow processing of the claim, except as provided in Subsection G of this section." §7-1-26(A) NMSA 1978. Subsection G states that "[t]he filing of a fully completed ... corporate income tax return ... constitutes the filing of a claim for refund for the difference in tax due shown on the original and amended return." Amoco's December 1993 amended return did not recompute tax based on the capital loss carryback and thus did not constitute a claim for refund of that amount under §7-1-26(G). Whether a claim for refund should be granted cannot be determined unless the nature of the claim is set forth. Amendment of the 1989 return on one ground did not operate to reopen that return to revision on other, unstated grounds.

Amoco also argues that the Department should allow its claim for refund, notwithstanding the provisions of §7-1-26(B), because its carryback of the 1992 capital loss to 1989 was proper under the IRC. The Taxpayer's position is that New Mexico has adopted the federal Code except where the state legislature has specifically enacted variances from the Code's

provisions. Section 7-1-26 is such a specific variance. The Taxpayer's state claim is governed by state law, and is untimely under the provisions of state statute.

Estoppel

The Taxpayer also argues that the Department has in the past allowed it to apply capital loss carrybacks to a year as to which the statute of limitations had run. In 1992, Amoco was allowed to apply a 1990 capital loss to 1987, 1988 and 1989, although adjustment of the 1987 liability was technically barred because more than three years had passed from the time the return for that year was due. Although Amoco does not clearly argue estoppel in this regard, it appears to contend that, because the Department in the past allowed a time-barred carryback, the Department should be estopped to reject that course of action here.

The Tax Administration Act, §7-1-60 NMSA 1978, provides that the Department may be estopped to withhold relief from a party if the party's action or inaction was in accordance with any regulation or any written ruling addressed personally to the party. Amoco does not argue that it relied on any such regulation or ruling. The Department therefore is not estopped by the terms of §7-1-60.

Although statutory estoppel does not apply here, the Department still may be estopped to deny the relief sought by the Taxpayer if right and justice demand such action. 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.

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, as the party alleging an estoppel, has the burden to prove all facts necessary to support it. Continental Potash v. Freeport-McMoran, 115 N.M. 690, 858 P.2d 66 (1993), cert. den. 114 S.Ct. 1064.

Here, the Taxpayer has failed to demonstrate an essential element of estoppel: that it relied on the Department's actions when it delayed making the claim for refund at issue in this matter. The Taxpayer was aware by September 1993 of the 1992 capital loss and its ability to carry that loss back to 1989 to reduce its New Mexico tax liability for that year. There is no showing that Amoco chose to defer submitting its amended return reflecting carryback of the 1992 capital loss on the basis of the Department's earlier action permitting it to amend its 1987 return beyond the time permitted by statute.

The estoppel sought by the Taxpayer here is as to the statute of limitations and not as to the substance of the claim. The Department does not deny that Amoco could properly amend its 1989 New Mexico tax return to carry back the 1992 capital loss; it simply argues that the company did not do so within the time provided by law.

In order to estop a party to raise the statute of limitations as a defense, it must be shown that the plaintiff was prevented 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 a refund for 1989 within the three-year period set out in §7-1-26(B). A previous error by the Department in allowing Amoco to recover on an untimely claim is insufficient to estop the Department from asserting the statute of limitations here.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest of the Department's denial of its claim for refund of corporate income taxes for 1989. Jurisdiction thus lies over the parties and the subject matter of the protest.

2. The Taxpayer's claim for refund of taxes for 1989 was not submitted to the Department until January of 1995, more than three years following the end of the calendar year in which the tax return and payment for the 1989 tax year were originally due, and thus was barred by the statute of limitations set out in §7-1-26(B) of the Tax Administration Act.

3. 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 8th day of May, 1997.