BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT

IN THE MATTER OF THE PROTEST OF
TEDKEN OIL CO. I.D. No. 01-864754-00-5 No. 98-20
PROTEST TO DENIAL OF CLAIM FOR REFUND

DECISION AND ORDER

This matter came on for hearing on April 8, 1998, before Margaret B. Alcock, hearing officer. Tedken Oil Co. ("the Taxpayer") was represented by William T. Paulson, its president, and his wife, T. J. Paulson, who prepared and filed the claims for refund at issue in this protest. The Taxation and Revenue Department ("the Department") was represented by Bridget Jacober, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

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

2. The Petroleum Products Loading Fee Act, Section 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. For each month of the period July 1990 through February 1996, the Taxpayer filed with the Department a "Petroleum Products Loading Fee Report", reporting quantities of fuel and calculating fees due to the Department.

4. 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.

5. 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.

6. The report forms used by the Taxpayer (referred to as the "original form") were provided to the Taxpayer by the Department. Department Exhibits 1-3.

7. The original form directed the Taxpayer to report the total gallons of gasoline and special fuel received. Neither the form nor the accompanying instructions defined the term “special fuel” or specifically informed the Taxpayer that fuel not used in motor vehicles did not come within the definition of special fuel (as defined by the Act) and therefore was not subject to the loading fee. Conversely, neither the form nor the instructions directed the Taxpayer to include these quantities of fuel in the amounts reported to the Department or to pay the loading fee on them.

8. In September 1992, T. J. Paulson took over the job of reporting taxes for the Taxpayer.

9. Because Mr. and Mrs. Paulson were concerned about the company’s expenses, Mrs. Paulson worked with an accountant to conduct a careful review of the company’s tax reporting.

10. Mrs. Paulson discovered that the former bookkeeper had made substantial overpayments of the gross receipts tax and filed claims for refund of these overpaid taxes. The Department approved and paid the claims made within the limitations period set out in Section 7-1-26 NMSA 1978.

11. Mrs. Paulson also reviewed the Taxpayer’s payment of the loading fee and had numerous conversations with employees of the Department concerning the proper method of reporting the fee. In working through the forms with various Department employees, Mrs. Paulson was told to report total gallons received from the supplier.

12. Although Mr. Paulson questioned why the company was paying the loading fee on fuel that was sold for off-highway use, Mrs. Paulson never specifically asked the Department's employees whether this fuel was subject to the loading fee, nor did anyone at the Department volunteer the information that diesel fuel used in equipment other than motor vehicles is excluded from the definition of "special fuel" and that no loading fee was due on these gallons.

13. The Taxpayer did not at any time request a formal ruling or other written clarification from the Department as to whether diesel fuel sold by the Taxpayer for use in equipment other than motor vehicles was subject to the loading fee.

14. In November 1995, the Department revised the report form used to report the loading fee ("revised form"), although the Taxpayer did not receive a copy of the form until April 1996. Department Exhibit 4.

15. The revised form included a worksheet as part of the instructions on the back of the form. The instructions and worksheet directed the Taxpayer to subtract, from total gallons received, the number of gallons not used in motor vehicles.

16. After learning that the company had overpaid the loading fee, Mrs. Paulson called the Department and was told to file claims for refund back to July 1990.

17. On April 25, 1996, the Taxpayer filed claims for refund of the overpaid loading fee for the period July 1990 through February 1996.

18. The Department approved the refunds for the period December 1992 through February 1996 and refunded $14,626.69 to the Taxpayer.

19. By letters dated April 26, 1996, the Department denied the claims for refund for the period July 1990 through November 1992 in the amount of $21,632.45 on the grounds that these claims were barred by the limitations period set out in Section 7-1-26 NMSA 1978 because they

were filed more than three years after the end of the calendar year in which the payments were originally due.

20. By letter dated April 30, 1996, the Taxpayer protested the refund denials.

DISCUSSION

The Taxpayer maintains that the Department's failure to specifically advise taxpayers that the petroleum products loading fee does not apply to diesel fuel sold for use in vehicles other than motor vehicles should estop the Department from raising the statute of limitations as a bar to the Taxpayer's claims for refund of the fees paid on such fuel.

As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989).

Estoppel Based on Statute. Section 7-1-60 NMSA 1978 provides for estoppel against the Department in two circumstances: where the taxpayer acted according to a regulation or where the taxpayer acted according to a revenue ruling addressed to the taxpayer. Rulings are issued under the authority of Section 9-11-6.2(B)(2) NMSA 1978, which states:

> rulings shall be written statements of the secretary, of limited application to a small number of persons, interpreting the statutes to which they relate, ordinarily issued in response to a request for clarification of the consequences of a specified set of circumstances.

To be effective, all regulations and rulings must be reviewed by the attorney general or other legal counsel of the department. Section 9-11-6.2(C). All regulations and rulings must be filed as public records and are open to inspection by taxpayers. *See* Section 9-11-6.2(A).

In this case, the Department does not have a 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. There is, however, a ruling on this issue. In October 1992, the Department issued Ruling 640-92-1 in response to a question as to whether diesel fuel sold for various off-highway uses (*e.g.* a railroad locomotive) was subject to the petroleum products loading fee.[1] The ruling concluded that it was not, stating:

> the petroleum products loading fee applies only to the loading of gasoline or special fuel that is to be used in a motor vehicle. Gasoline or special fuel destined for uses other than in motor vehicles is not subject to the fee.

Although Ruling 640-92-1 was not addressed to the Taxpayer in this case, it was issued at the same time that the Paulsons were conducting their review of the company's payment of the loading fee. Had the Taxpayer applied to the Department for a ruling to clarify Mr. Paulson's questions concerning the sale of fuel for off-highway use, the Taxpayer would have been alerted to its overpayment of the loading fee in time to file a claim for refund within the limitations period set out in Section 7-1-26 NMSA 1978.

Clearly, estoppel cannot be applied against the Department under Section 7-1-60. There was no regulation addressing the application of the loading fee to diesel fuel sold for use in equipment other than motor vehicles, nor was there a ruling addressed to this Taxpayer on the issue. The only ruling that did address the application of the loading fee correctly concluded that diesel fuel not used in motor vehicles was not subject to the loading fee.

Estoppel Based "Right and Justice". Case law provides for estoppel against the State where right and justice demand its application. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420,

[1] I take notice of Ruling 640-92-1 as a nonconfidential business record of the Department and a public record open

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).

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. *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).

The facts of this case do not establish a basis for applying equitable estoppel against the Department. First, there is no evidence that the Department misrepresented or concealed the fact

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to inspection by taxpayers and other members of the public.

that the loading fee is not due on fuel sold for off-highway use. The Taxpayer argues that the Department's instructions misled the Taxpayer into paying the loading fee on such fuel. A review of the instructions indicates otherwise. 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. Section 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. Section 7-13A-2(F). Neither the petroleum products loading fee report form nor the accompanying instructions directed the Taxpayer to report gallons sold for use in equipment other than motor vehicles or to pay the fee on those gallons.

Second, there is no evidence that the Department knew the Taxpayer was paying the loading fee on fuel not used in motor vehicles or that the Department advised the Taxpayer to continue this practice. Mrs. Paulson maintains that the Department's employees misled her into paying the loading fee on exempt fuel by advising her to report the fee on the total gallons received from the Taxpayer's supplier. When Mrs. Paulson was asked whether she explained to the Department that some of the fuel was sold for use in equipment other than motor vehicles, Mrs. Paulson admitted that she did not. Nor did she ever specifically inquire as to whether fuel not used in motor vehicles was subject to the loading fee. Mrs. Paulson said she did not think it was necessary to provide this information since it was common knowledge among people in the industry that some fuel would be sold for off-highway use.

What is common knowledge in a particular industry is not necessarily common knowledge to employees of the tax department. Mrs. Paulson never informed the Department that she was paying the loading fee on fuel sold for off-highway use in equipment other than motor vehicles or asked

whether the fee was due on such fuel. Given these facts, there is no basis for finding that the Department knowingly misled the Taxpayer into continuing to pay the loading fee on exempt fuel.

Turning to the other side of the coin, the Taxpayer has not established its own lack of knowledge or shown that it exercised due diligence to insure proper reporting of the loading fee. 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 a matter of public record available to all of the state's taxpayers. In this case, the Taxpayer was free to review the pertinent tax statutes at any time following their enactment and could have determined that it had erroneously paid the loading fee on fuel sold for use in equipment other than motor vehicles. The Taxpayer also had access to the statutes setting out the time limit for filing claims for refund. The Department neither prevented the Taxpayer from discovering its reporting error nor discouraged it from filing timely claims to recover overpaid sums.[2]

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[2] In 1996 Mrs. Paulson was incorrectly advised that she could file refund claims for periods as far back as 1990. While the erroneous advice was unfortunate, and led Mrs. Paulson to expend unnecessary time and effort researching the earlier periods, the Taxpayer cannot claim that this advice prevented the Taxpayer from discovering its reporting error back in 1992 or 1993, when there still would have been time to recover all of the overpayments made between July 1990 and November 1992.

Finally, the Taxpayer has not established that its failure to file timely refund claims was attributable to reasonable reliance on the advice of the Department's employees. Mr. Paulson testified that he did not understand why the company was required to pay the loading fee on fuel sold for off-highway use. Mrs. Paulson testified that she had questions concerning how to report the loading fee. Mrs. Paulson said that the Department employees with whom she spoke also seemed confused as to the proper method of completing the report forms and would sometimes call her back to change the advice they had previously given her. Based on these facts, it was not reasonable for the Taxpayer to rely on the oral advice of these Department employees to determine its tax liability. This is especially true in light of the fact that the Taxpayer had engaged an accountant to work with Mrs. Paulson in reviewing the Taxpayer's tax reporting. It appears that the Taxpayer's overpayment of the loading fee was attributable to their accountant's failure to properly advise them as much as to the Department's failure to inform them that the definition of special fuel does not include fuel sold for use in equipment other than motor vehicles.

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 Taxpayer in this case has not met its burden of establishing that the Department engaged in fraudulent conduct that prevented the Taxpayer from discovering its error in reporting the loading fee or prevented the Taxpayer from filing timely claims for refund to recover its overpayments.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of the Taxpayer's claims for refund for the period July 1990 through November 1992 and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer's claims for refund for the period July 1990 through November 1992 were not submitted to the Department until more than three years following the end of the calendar year in which the payment was originally due and are therefore barred by the limitations period set out in Section 7-1-26 NMSA 1978.

3. The Department is not equitably 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 17th day of April 1998.