

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

IN THE MATTER OF THE PROTEST OF
PIONEER SAVINGS BANK & SUBSIDIARIES,
ID. NO. 01-503105-00 5, PROTEST TO
DENIAL OF CLAIM FOR REFUND

NO. 99-18

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer, based upon a Stipulation of Facts and briefs of the parties. Pioneer Savings Bank & Subsidiaries, hereinafter, “Taxpayer”, was represented by Terrence M. Melia, CPA, of Arthur Andersen LLP. The Taxation and Revenue Department, hereinafter, “Department”, was represented by Javier López, Esq. Based upon the Stipulation of Facts and the arguments of the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 15, 1995, the Taxpayer filed its original 1994 New Mexico Corporate Income and Franchise Tax return (Form CIT-1) with the Department. The return indicated a total tax due of \$30,866, with a net overpayment of \$78,800. The Taxpayer requested that \$8,800 of the overpayment be applied towards the Taxpayer’s 1995 income tax liability and requested that the \$70,000 balance of its overpayment be refunded to it.

2. In April of 1996, the Taxpayer filed an amended 1994 New Mexico Corporate Income and Franchise Tax return (Form CIT-1) with the Department. The return indicated an overpayment of tax in the amount of \$23,042, in addition to the original overpayment of

\$78,800. The Taxpayer's amended return requested that the \$23,042 overpayment be refunded to the Taxpayer.

3. The Taxpayer's 1994 amended return listed the full amount of the 1994 overpayment (\$78,800) from the original return on line 17 of the amended CIT-1 return. This line is for amended returns only and requests that a filer enter on that line the "amount of all 1994 overpayments received or applied to 1995". It does not provide a way to disclose that a refund requested in the original return has not yet been received.

4. The total amount of refunds claimed by the taxpayer as a result of its filing of an original and an amended CIT-1 return was \$93,042.

5. The refund of \$23,042 requested in the Taxpayer's amended return was issued to the Taxpayer on July 24, 1996. As of that date, the Taxpayer had not received the refund of \$70,000 requested in its original 1994 CIT-1 return.

6. When, in December, 1996, the Taxpayer still had not received a refund of the \$70,000 originally requested, the Taxpayer requested that its representative, Arthur Andersen LLP, contact the Department about its refund claim. The Arthur Andersen representative spoke with Mr. Mike Baca, an employee of the Department, to determine the proper course of action. Mr. Baca requested a letter detailing the 1994 returns filed by the Taxpayer. On December 18, 1996, Arthur Andersen LLP sent the requested letter to Mr. Baca of the Department. The letter attached copies of the Taxpayer's original and amended 1994 CIT-1 returns and explained that the refund of \$23,042 had been received but that the \$70,000 refund claimed had not been received. The letter also demanded payment of interest on the \$70,000 refund claim which the Taxpayer had not been refunded. The Taxpayer received no response to its December 18, 1996 letter to Mr. Baca.

7. In May, 1997, Arthur Andersen LLP contacted Lillian Trujillo and Teddy Chapman, employees of the Department, concerning the status of its \$70,000 refund claim. Ms. Trujillo indicated that the Department had no record of the December 18, 1996 letter. Ms. Chapman explained that due to the constraints of the State's system, the Taxpayer should file another amended return, indicating the overpayment and refund due of \$70,000.

8. In May of 1997, the Taxpayer filed another amended CIT-1 for the 1994 tax year requesting a refund of \$70,000. The Taxpayer attached a statement to the amended return which attached the two previous CIT-1 returns of the Taxpayer for the 1994 tax year and its December 18, 1996 letter. The Taxpayer's attachment explained the chain of events in this matter with regard to the Taxpayer's returns and claims for refund. An additional statement was also attached to the second amended return demanding the payment of interest on the \$70,000 refund from the date of filing of the original return.

9. On July 2, 1997, the Department refunded the Taxpayer \$70,000, but did not make payment of any interest on that refund.

10. On November 5, 1997 the Taxpayer filed an Application for Tax Refund (Form RP-16) with the Department requesting payment of interest in the amount of \$18,375, as interest on its \$70,000 claim for refund pursuant to Section 7-1-67(B) NMSA 1978 from the date of filing of its original 1994 CIT-1 return until the amount was refunded on July 2, 1997.

11. The Department took no action on the November 5, 1997 Application for Tax Refund.

12. On March 12, 1998, Stacy Devenport of Arthur Andersen LLP contacted Mary Grace López of the Department to inquire about its November 5, 1997 claim for refund. Ms.

López informed Ms. Devenport that the Department did not have the refund claim in its possession.

13. As a result of the conversation between Ms. Devenport and Ms. López, on March 18, 1998, the Taxpayer mailed a letter to the Department attaching a copy of its November 5, 1997 Application for Tax refund along with a postal return receipt showing that the Department had received the original Form RP-16 on November 5, 1997. The Department took no action on the Taxpayer's request for payment of interest after receiving the Taxpayer's letter and attachments of March 18, 1998.

14. On July 21, 1998, the Taxpayer filed a protest to the Department's denial through inaction of its March 18, 1998 claim for refund.

DISCUSSION

I. Jurisdiction

The primary issue presented by this protest is whether the Taxpayer is entitled to payment of interest on its original claim for refund. Before reaching that issue, however, a threshold issue is presented as to whether the Taxpayer's July 21, 1998 protest letter to the Department constituted a timely protest. The Department argues that it was not, and that consequently, there is no jurisdiction to determine the issue of whether the Taxpayer is entitled to payment of interest.

The determination of whether jurisdiction lies to determine the Taxpayer's claim for payment of interest turns upon the application of Section 7-1-26 NMSA 1978 (1998 Repl. Pamp.). Subsection A of that provision provides for the right of Taxpayers to file a claim for

refund. Subsection B is the section which is relevant to the discussion herein. It provides in pertinent part:

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 in part in writing, the claim may not be refiled. If the claim is not granted in full, the person, within ninety days after the mailing or delivery of the denial of all or 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. *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)

The remedies provided in paragraphs one and two referenced above are to file a protest with the Secretary to receive an administrative hearing or to commence a civil action in the district court. Thus, with respect to a claim for refund which has not been acted upon by the Department to either grant or deny it in whole or in part, within one hundred and twenty days of the date it was filed, a taxpayer may refile the claim so long as it is refiled within the time limitations of Subsection C of Section 7-1-26 or within ninety days after the expiration of one hundred and twenty days, it may file an administrative protest with the Department or commence an action in district court against the Department.

The Department argues that the Taxpayer's July 21, 1998 protest is untimely using the November 5, 1997 filing date of the Taxpayer's Application for Tax Refund, Form RP-16, as the starting point for calculating the time limitations of Section 7-1-26(B). The first one hundred and twenty days of Department inaction would take us to approximately March 5, 1998. Adding

ninety days to that would take us to approximately July 5th, with a protest filed on July 21st being clearly beyond the time limits of the statute.

Although the Taxpayer did not respond to the Department's jurisdictional argument, the events occurring in March, 1998 between the Department and the Taxpayer's representative also bear on this issue. On March 12, 1998, Stacy Devenport of Arthur Andersen LLP contacted a Department employee, Mary Grace López, to inquire about the status of the claim for refund filed in November. Ms. López informed the Taxpayer's representative that the Department did not have the Taxpayer's November 5, 1997 claim for refund in its possession. As a result of that conversation, on March 18, 1999, the Taxpayer's representative sent a letter to the Department referencing the conversation with Ms. López, attaching a copy of its November, 1997 claim for refund and a copy of the certified mail return receipt showing that the Department had received the claim for refund on November 5, 1997. The letter thanks Ms. López for her assistance with the matter.

If the Taxpayer's letter of March 18, 1998 is regarded as a refiling of the Taxpayer's refund claim, there is a timely protest. This is because March 18th falls after the expiration of one hundred and twenty days from the filing of its November 5, 1997 refund claim upon which no action was taken by the Department. At that point the Taxpayer had the option of refiling its claim or of filing a protest to the Department's inaction. While I agree with the Department that the March 18th letter cannot be viewed as a protest, since it fails to meet the criteria for a protest under Section 7-1-24 NMSA 1978, I do not agree that it does not constitute a refiling of the claim. The Department argues that the Taxpayer's March 18th letter does not constitute a refiling of the claim because it should be read as a reminder to the Department that the original claim had, in fact, been received and it attached a copy of the original form RP-16 rather than a

newly dated form. While I agree that the March 18th letter does not state that the Taxpayer is refiling its claim and does not attach a new form RP-16, I can find nothing in the Department's regulations or procedures which would require such a narrow interpretation of what constitutes the filing of a valid claim for refund. The Department's regulations do not distinguish between a claim for refund and a refiled claim for refund. They do address, however, what is required to state a valid claim for refund. Regulation 3 NMAC 1.9.8.4 provides that:

A claim for refund is valid if it states the nature of the complaint and affirmative relief requested and if it contains information sufficient to allow the processing of the claim.

Regulation 3 NMAC 1.9.8.5 provides:

Information sufficient to allow processing of a claim includes: 1) taxpayer's name, address and identification number; 2) the type or types of tax for which the refund is being claimed; 3) the sum of money being claimed; 4) the period for which the overpayment was made; 5) the basis for the refund; and 6) a copy of the appropriate, fully completed amended return for each period for which a refund is claimed. Any claim for refund which is invalid because it is lacking in one or more of these requirements will be returned to the taxpayer for additional information and will not be considered filed until the date on which all requirements have been met.

I have no doubt that the requirements of these two regulations were met in this case by the Taxpayer's March 18th letter and enclosures. The context of the letter together with the attachments makes clear the nature of the Taxpayer's claim and that the affirmative relief requested is a refund of the full amount of interest claimed. There can also be no doubt that the claim contained sufficient information to allow processing of the claim. Besides, if it didn't, the Department was under an affirmative duty under its own regulations to return the claim to the Taxpayer for additional information if it did not consider the claim to contain sufficient information. Because the Taxpayer's March 18th submittal to the Department met the

requirements of a valid claim for refund, it constitutes the refiling of the Taxpayer's November, 1997 claim. The one hundred and twenty days for the Department to act upon that claim expired on July 16, 1998. The Taxpayer filed its protest on July 21, 1998, well within the ninety day deadline to do so. Therefore, jurisdiction lies to reach the merits of the Taxpayer's protest.

II. Is the Taxpayer entitled to interest on its claim for refund?

The Taxpayer's original claim for refund was filed in September, 1995, when it filed its original return claiming a refund of \$70,000.¹ In April, 1996, the Taxpayer filed an amended return asking for a refund of an additional \$23,042. Although the Taxpayer had not received the \$70,000 it originally claimed, the Taxpayer, believing its original claim to still be pending within the Department, reflected its \$70,000 claim as "received or applied to 1995" on line 17 of its amended return. The Department refunded the \$23,042 in July of 1996. The Taxpayer waited until December, 1996 to inquire of the Department what had happened to its original \$70,000 refund claim filed more than a year before. The Department employee the Taxpayer's representative spoke to requested a letter detailing the circumstances of the original claim and the Taxpayer sent that letter on December 18, 1996. The Department never responded to that letter. In May, 1997, the Taxpayer again inquired as to the status of its refund claim and was informed at that time to file another amended return indicating the overpayment and refund due in the amount of \$70,000. The Taxpayer then filed an amended return, dated May 13, 1997, requesting the \$70,000 refund, explaining its previous filings and requested the payment of interest from the filing of its original return in September, 1995. The Department granted the refund in the amount of \$70,000 on July 2, 1997, but did not grant the Taxpayer's claim for

¹ Section 7-1-26(G) NMSA 1978 (1995 Repl. Pamph) provides that the filing of a fully completed corporate income tax return that shows a balance due the taxpayer constitutes the filing of a claim for refund.

interest from the date of filing of the original return.² The Taxpayer took no action to protest the fact that the Department did not grant it interest within 90 days of the date the Department partially granted its claim for refund. It applied for a refund of the interest it had previously requested, however, when it filed an Application for Tax Refund, Form RP-16 on November 5, 1997. The Department took no action on that claim. The claim was refiled on March 18, 1998.³ The Department also took no action on that claim resulting in the instant protest.

The Taxpayer claims that it is entitled to statutory interest on its \$70,000 claim for refund from the date of its original filing in September, 1995 until it was paid in July, 1997, relying upon the language of Section 7-1-68 NMSA 1978,⁴ which governs the payment of interest on overpayments of tax. It provides in pertinent part:

- A. As provided in this section, interest shall be allowed and paid on the amount of tax overpaid by a person which is subsequently refunded or credited to that person.
- B. Interest payable on overpayments of tax shall be paid at the rate of fifteen percent a year, computed at the rate of one and one-fourth percent per month or fraction thereof.
- C. Unless otherwise provided by this section, interest on an overpayment not arising from an assessment by the department shall be paid from the date the claim for refund was made until a date preceding by not more than thirty days the date on which the amount thereof is credited or refunded to any person;...
- D. No interest shall be allowed or paid with respect to an amount credited or refunded if:

(2) the credit or refund is made within seventy-five days of the date of the claim for refund of income tax ...for the tax year immediately preceding the tax year in which the claim is made;

(3) the credit or refund is made within one hundred twenty days of the date of the claim for refund of income tax ... for any tax

² Because the refund was granted within 120 days of the filing of the Taxpayer's second amended 1994 return, no interest on the refund claim would be payable under Section 7-1-68(D) NMSA 1978 (1996 Supp.) with respect to the Taxpayer's May, 1997 claim for refund.

³ See discussion in part I, *supra*.

⁴ The 1995 Replacement Pamphlet version will be quoted as this was the version applicable at the time the Taxpayer's original refund claim was filed.

year more than one year prior to the year in which the claim is made;

The Taxpayer relies upon the language of Subsection A, which, in essence, states that interest shall be allowed and paid on the amount of tax overpaid by a person that is subsequently refunded to that person. The Taxpayer also relies upon Regulation 3 NMAC 1.9.14.1, promulgated under Section 7-1-68, which provides in pertinent part:

When an overpayment results from a self-assessment based on a return filed by the taxpayer, interest on a refund of that overpayment of taxes shall be computed from the date of filing of the claim for refund when the refund is not paid within the appropriate 60, 75 or 120 days limit specified in Subsection D of Section 7-1-68 and when the overpayment results from a self-assessment of taxes based on a return filed by the taxpayer.

The problem with the Taxpayer's argument is that it overlooks the statutory restrictions on the Department's authority to grant refunds of tax. Section 7-1-68, which provides for the payment of interest on overpayments must be read in *pari materia* with the requirements of Section 7-1-26 for claiming refunds of tax overpayments, since they relate to the same subject matter, overpayments of tax. Thus, implicit in the provisions of Section 7-1-68 concerning payment of interest on a tax overpayment is the requirement that a claim for refund was made for the overpayment and that a valid, extant claim for refund of the overpayment still remains which can be granted. If a claim for refund is denied by the Department, either explicitly, in whole or in part in writing, or by inaction by the Department within 120 days of the filing of the claim for refund, then Section 7-1-26 provides the remedies to contest that denial and to keep that claim for refund alive. As discussed in part I, *supra.*, those remedies depend upon whether the Department acts to grant or deny the claim in whole or in part, or whether the Department simply takes no action upon the claim. When a claim is denied in whole or in part in writing, it may not

be refiled, but a taxpayer may contest the Department's action by filing an administrative protest or suit in district court. When a claim is simply not acted upon within 120 days by the Department, the taxpayer has the option of refileing its claim, or of filing an administrative protest or suit in district court. Section 7-1-26 (B).

There can be no doubt that if the remedies of Section 7-1-26 are not pursued, then the claim for refund is extinguished. This is made clear by the decision in *Unisys Corporation v. New Mexico Taxation and Revenue Department*, 117 N.M. 609, 874 P.2d 1273 (Ct. App. 1994). In that case, a taxpayer submitted a claim for refund of taxes which the Department determined did not contain enough information for the Department to grant or deny. One hundred and twenty-three days after the claim was filed, the Department asked the taxpayer for the additional information and advised the taxpayer to file a written protest to the Department's inaction on the refund claim within the time limits for filing a protest. Although the taxpayer provided the Department the additional information it requested, it failed to file any action to contest the Department's inaction on its refund claim within the statutory time frame. The Department never took any action to grant the refund claim. The taxpayer, after the time for contesting the Department's inaction by filing a protest or a civil suit in district court had elapsed, wrote the Department demanding that it take action on its refund claim. The Department refused to act on the claim, contending that the claim was extinguished when no action was taken by the taxpayer to contest the Department's failure to act on its claim within the limitations of Section 7-1-26. The taxpayer filed an administrative protest pursuant to Section 7-1-24 NMSA 1978 to the Department's refusal to act on its refund claim. Thus, the issue before the Court of Appeals, was whether the Department is required to act on a refund claim or whether it has the discretion to take no action to grant, deny or partially grant or deny a refund

claim.⁵ The court ruled that in Section 7-1-26, the legislature recognized there would be cases of inaction by the Department and expressly provided for them, by providing taxpayers the remedies of filing a protest, filing suit in district court, or refiling the claim. Of particular interest to the issue in this case is the court's discussion of the interplay between Section 7-1-68 governing the payment of interest on overpayments and Section 7-1-26. The court stated:

There is an additional reason why we reject Taxpayer's contention that the statutory scheme, if read the way we read it, gives the Secretary unlawful, unbridled discretion to arbitrarily and capriciously refuse to act on a claim. The Secretary's brief points out that the portion of the statutes permitting him to refuse to act are part of a statutory scheme that governs the payment of interest on claims for refunds. Interest is to be paid "from the date the claim for refund was made" unless the refund is made within 120 days of the claim. NMSA 1978, § 7-1-68(C) & (D) (Repl. Pamp. 1990). Our construction of the statutes allows both parties a measure of control over the delay in a case and the consequent payment of or obligation to pay interest.

The way the statutory scheme works is as follows. *If a taxpayer wants to recover interest from the date of the original claim and the Secretary neither grants nor denies the claim, the taxpayer must proceed in accordance with Section 7-1-26(A)(1) or (2) and either timely protest or file the civil action.* However, there may exist cases in which the taxpayer may not wish to litigate immediately. For example, the taxpayer may not have provided the Secretary with sufficient information on which to either grant or deny the claim and may not wish to hurriedly gather the information as would be required by a timely protest or lawsuit. *In such a case, the taxpayer may wish to forego the interest.* Thus, when the Secretary takes no action on such a claim, the taxpayer may refile the claim. (citation omitted.) (emphasis added.)

This discussion of the interplay between Sections 7-1-68 and 7-1-26 could not be more clear. In order to claim interest under Section 7-1-68 from the date of filing of a claim on which the Department has failed to take action, a taxpayer must contest the Department's failure to

⁵ Eventually, the taxpayer refiled the refund claim, but the statute of limitations found in Section 7-1-26(C) barred the taxpayer's claim for one year of taxes. The Department granted the refund for the periods not barred by the statute of limitations.

grant or deny the claim by filing a protest or civil suit within the time limits of Section 7-1-26. If a taxpayer chooses to refile a claim, as happened in this case, the taxpayer foregoes interest on its original claim and the payment of interest under Section 7-1-68 is determined from the date of the refiled claim. In this case, because the Taxpayer took no action to preserve its original claim for refund by filing a protest or civil suit within the time limitations of Section 7-1-26, the Department properly denied the Taxpayer's claim for refund of interest on its original claim for refund.

CONCLUSIONS OF LAW

1. The Taxpayer's March 18, 1998 letter and enclosures referencing its November 5, 1997 application for tax refund constituted a refile of its November 5, 1997 claim for refund.
2. The Taxpayer filed a timely, written protest to the Department's failure to act to grant or deny its March 18, 1998 claim for refund and jurisdiction lies over both the parties and the subject matter of this protest.
3. Because the Taxpayer took no action to file a protest or civil suit to contest the Department's failure to act to grant or deny its original claim for refund of corporation income tax filed on September 15, 1995, that claim for refund was extinguished and the Taxpayer was not entitled to interest pursuant to the provisions of Section 7-1-68 NMSA 1978 on that claim.

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

DONE, this 6th day of April, 1999.