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

IN THE MATTER OF THE PROTEST OF
JAMES R. & DEBORAH Y. DOTSON **No. 04-09**

PENALTY AND INTEREST ASSESSED
UNDER LETTER ID L0028135424

DEPARTMENT'S INACTION ON 8/13/03 CLAIM
FOR REFUND OF 1999 PERSONAL INCOME TAX

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on July 27, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. James R. and Deborah Y. Dotson ("Taxpayers") were represented by Deborah Y. Dotson. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In February 2000, the Taxpayers filed federal and state personal income tax returns for the 1999 tax year.

2. Deborah Dotson prepared the Taxpayers' 1999 federal income tax return (Form 1040), which showed adjusted gross income of $87,819.00, deductions of $18,588.00, and taxable income of $57,231.00.

3. James Dotson prepared the Taxpayers' 1999 New Mexico income tax return (Form PIT-1), which showed adjusted gross income of $78,505.00, deductions of $18,588.00, and taxable income of $47,917.00.

4. In June 2003, the Taxpayers destroyed their records for the 1999 tax year based on the following passage in the Department's instructions to the 1999 Form PIT-1:

> KEEP COPIES OF YOUR TAX RECORDS AND RETURN. Please remember to keep a copy of your completed income tax return for at least 3 years after you file it. Also keep copies of any books, records, schedules, statements or other documents.
>
> You may be asked by the Department to provide copies of these records after you have filed your income tax return.

5. The Department subsequently obtained information from the Internal Revenue Service concerning the amount of federal adjusted gross income reported on the Taxpayers' 1999 Form 1040.

6. On July 10, 2003, the Department issued a "Tapematch--Advisement Letter" asking the Taxpayers to explain the $9,314.00 discrepancy between the adjusted gross income reported on their 1999 federal Form 1040 and their 1999 New Mexico Form PIT-1.

7. The Taxpayers responded that they had destroyed their records for 1999 and were unable to determine the reason for the discrepancy.

8. On August 5, 2003, the Department issued an assessment under Letter ID L0028135424 assessing the Taxpayers for $666.00 of personal income tax on the $9,314.00 discrepancy between their state and federal returns, plus $66.60 of penalty and $329.04 of interest.

9. On August 18, 2003, the Taxpayers paid the tax principal assessed. At the same time, they requested a refund of their tax payment and filed a written protest to the assessment of penalty and interest assessed under Letter ID L0028135424.

10. On February 5, 2004, the Taxpayers filed a written protest to the Department's failure to act on their claim for refund of the $666.00 of tax principal.

DISCUSSION

The issue to be decided is whether the Department's instructions to taxpayers to keep copies of their personal income tax returns "for at least 3 years after you file it" and to "[a]lso keep copies of any books, records, schedules, statements or other documents" invalidates an assessment of tax issued beyond the three-year period set out in the instructions but within the statutory time limit allowed by New Mexico's tax laws.

NMSA 1978, § 7-1-18(A) gives the Department "three years from the end of the calendar year in which payment of the tax was due" to assess unpaid personal income tax. Payment of the Taxpayers' 1999 personal income tax was due on or before April 15, 2000, which means that the Department had until December 31, 2003 to issue its assessment. The August 5, 2003 assessment was within this statutory time limit. The Taxpayers maintain, however, that the Department's instructions caused them to destroy their 1999 personal income tax records in June 2003 and that they now have no way to dispute the correctness of the Department's assessment. Accordingly, the Taxpayers argue that the Department should be estopped from assessing or collecting tax, penalty, and interest for the 1999 tax year.

As a general rule, courts are reluctant to apply the doctrine of estoppel against the state. *Rainaldi v. Public Employees Retirement Bd.*, 115 N.M. 650, 657, 857 P.2d 761, 768 (1993). This rule is given even greater weight in cases involving the assessment and collection of taxes. 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. NMSA 1978, § 7-1-60 provides for estoppel against the Department in two circumstances: where the taxpayer acted in accordance with a written ruling addressed to the taxpayer or where the taxpayer acted in accordance with a regulation in effect during the time the tax liability arose. To be effective, "any ruling or regulation issued by the secretary shall be reviewed by the attorney general or other legal counsel of the department prior to being filed as required by law, and the fact of the review shall be indicated on the ruling or regulation." NMSA 1978, § 9-11-6.2(C). There is no statutory requirement for legal review of Department instructions. Instructions do not undergo the same scrutiny as rulings and regulations, and they do not qualify for the protection of estoppel provided in § 7-1-60. Accordingly, the Taxpayers' reliance on the Department's instructions to the 1999 Form PIT-1 does not meet the requirements for statutory estoppel.

Estoppel Based on "Right and Justice." Equitable estoppel is applied against the state only in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State of New Mexico, Human Services Department*, 1998-NMSC-11, ¶ 17, 125 N.M. 140, 958 P.2d 98. For estoppel to apply, the party seeking it must show: (1) lack of knowledge of the true facts in question; (2) detrimental reliance on the other party's conduct; and (3) that its own reliance was reasonable. *Johnson & Johnson v. Taxation and Revenue Department*, 1997-NMCA-30, ¶ 28, 123 N.M. 190, 936 P.2d 872, *cert. denied*, 123 N.M. 168, 936 P.2d 337 (1997). *See also, Gonzales v. Public*

Employees Retirement Bd., 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied*, 114 N.M. 227, 836 P.2d 1248 (1992).

In this case, the Taxpayers argue that the Department should be estopped from enforcing its assessment because the 1999 PIT packet instructed the Taxpayers to keep their 1999 tax return "for at least 3 years after you file it" and to "[a]lso keep copies of any books, records, schedules, statements or other documents." Although the Taxpayers interpreted this to mean that the Department could not issue an assessment beyond three years after their return was filed, the instructions are not that explicit. The phrase "*at least* 3 years" (emphasis added) is ambiguous and indicates that there may be circumstances when returns should be kept for a longer period. The direction to keep copies of supporting documents does not include a time frame for retention. Nonetheless, Deborah Dotson testified that in making the decision to destroy their 1999 tax records, the Taxpayers did not consult the tax statutes or regulations, nor did they consult with a tax advisor or anyone from the Department.

The New Mexico Supreme Court has held that the "lack of knowledge" required for estoppel also includes the lack "of the means of knowledge of the truth as to the facts in question." *Memorial Medical Center v. Tatsch Construction, Inc.,* 2000-NMSC-30, ¶ 9, 129 N.M. 677, 12 P.3d 431; *See also, 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) (estoppel not applicable where plaintiffs had access to public records that would have provided them with complete information concerning the bond ordinance at issue). Here, the means of knowledge of the time period within which an assessment could be issued for the 1999 tax year was available in New Mexico's tax laws and regulations, which are a matter of

public record. NMSA 1978, § 7-1-18(A) gives the Department three years from the end of the calendar year in which a tax is due to issue an assessment. The statute itself provided the Taxpayers in this case with notice that they could be assessed for additional 1999 personal income tax up to December 31, 2003. *See*, *Vivigen, Inc. v. Minzner*, 117 N.M. 224, 228, 870 P.2d 1382, 1386 (Ct. App. 1994) (any necessary notice to the taxpayer concerning its tax liability was provided by New Mexico statutes).

The New Mexico Court of Appeals has stated that "estoppel cannot lie against the state where the act sought would be contrary to the requirements expressed by statute." *Hanson v. Turney*, 2004-NMCA-69, ¶ 19, Vol. 43, No. 27, State Bar Bulletin (July 8, 2004). In *Bien Mur, supra*, 108 N.M. at 231, 770 P.2d at 876, the New Mexico Supreme Court held that NMSA 1978, § 7-1-17(A) requires the Department to issue an assessment when a taxpayer owes more than ten dollars in unpaid taxes. In that case, the court rejected Bien Mur's argument that the Department should be estopped from applying the extended six-year assessment period provided in § 7-1-18(D) because the Department had a stated policy of not taxing the type of transactions in question and had given Bien Mur oral assurances that an assessment would not be issued. As the court explained:

> [T]he various provisions of Section 7-1-18 simply limit the number of years following the filing of a return during which the Department is authorized to exercise this mandate. If the Department may make the assessment under one of the provisions in Section 7-1-18, Section 7-1-17(A) mandates the Department shall do so when the amount owed is in excess of ten dollars. The use of the word "may" in Section 7-1-18(D), like the use of the words "may not" in Section 7-1-18(A), is conditioned by the mandatory word "shall" in Section 7-1-17(A). Accordingly, Section 7-1-18(D) does not afford the Department discretion to go back only three years rather than six when making an assessment, and principles of estoppel do not affect the Department's application of the longer assessment period.

Id., 108 N.M. at 231-232, 770 P.2d at 876-877.

The facts supporting estoppel in this case are much less compelling than the facts in *Bien Mur*. Deborah Dotson testified that she prepared the Taxpayers' 1999 federal income tax return while her husband prepared their 1999 New Mexico return. Although the PIT-1 instructions directed taxpayers to use the adjusted gross income shown on Line 33 of their federal return as the starting point for calculating New Mexico tax, Mr. Dotson failed to follow these instructions. Ms. Dotson does not know how her husband determined the adjusted gross income reported on the couple's 1999 PIT-1. At the administrative hearing, she speculated that he may have claimed business losses on the New Mexico return that were not claimed on the federal return. Ms. Dotson did not provide any information concerning the losses she thinks her husband may have claimed. She conceded, however, that the Taxpayers never took any steps to amend their Form 1040 to claim these business losses on their federal return. Because the definition of "adjusted gross income" is the same for both state and federal income tax purposes, such an amendment would be required before New Mexico could accept the adjustment for state tax purposes. *See*, NMSA 1978, § 7-2-2(A). Given the facts presented, it is far from certain that the Taxpayers could establish that the income reported on their 1999 PIT-1 was correct, even if they did have access to their 1999 tax records.

Based on the court's holding in *Bien Mur* and the other cases cited above, the Department is not estopped from assessing or collecting 1999 personal income tax from the Taxpayers. The instructions relied upon by the Taxpayers do not come within the purview of statutory estoppel provided by NMSA 1978, § 7-1-60, which is limited to situations where a taxpayer has relied on a regulation or written ruling. Nor is the Department's assessment barred by equitable estoppel.

The 1999 PIT-1 instructions do not make any specific representations concerning the time limit within which assessments may be made by the Department. The direction to taxpayers to keep their return for "at least 3 years after you file it" cannot override the clear language of New Mexico's tax statutes, which give the Department three years from the end of the calendar year in which a tax is due to issue an assessment. The August 5, 2003 assessment issued to the Taxpayers was well within this statutory time frame.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely, written protest to the assessment of penalty and interest issued under Letter ID L0028135424 and to the Department's failure to act on their claim for refund of 1999 personal income tax, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department's August 5, 2003 assessment was issued within the statutory time period allowed by NMSA 1978, § 7-1-18(A) and is a valid assessment.

3. The Department is not estopped from enforcing its assessment against the Taxpayers.

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

DATED August 3, 2004.