

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

**IN THE MATTER OF THE PROTEST OF  
FRED W. SCHONFELD  
TO REFUND DENIAL ISSUED UNDER  
LETTER ID NO. L0801591296**

**No. 05-02**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on January 11, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. Fred W. Schonfeld ("Taxpayer") was represented by James A. Dinkel, CPA. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is a New Mexico resident.
2. In April 1997, the Taxpayer applied for an extension of time to file his 1996 personal income tax returns. At that time, the Taxpayer sent the Department a check in the amount of \$2,700 to cover his estimated New Mexico income tax liability.
3. The Taxpayer noted "1996 Tax" on his check, but did not include his social security number. As a result, the Department did not credit the check to the Taxpayer's 1996 estimated payments.
4. On October 15, 1997, the Taxpayer filed his 1996 state income tax return reporting a tax liability of \$7,642, prepayments of \$7,900 (which included the \$2,700 payment made in April 1997), and a refund due of \$258.

5. Because the Taxpayer's \$2,700 check had not been credited to his account, the Department did not grant the Taxpayer's refund request. Instead, the Department issued an assessment to the Taxpayer on December 17, 1997, assessing him for \$2,442 of additional tax, plus penalty and interest.

6. The Taxpayer does not recall receiving the December 17, 1997 assessment.

7. During the following six years, the Taxpayer did not make any inquiry as to why his \$258 refund of 1996 income tax had not been granted, nor did he take any action to protest the Department's failure to act on his refund claim.

8. In July 2003, the Department sent the Taxpayer a "Statement of Account for Personal Income Tax" showing the outstanding balance on the December 17, 1997 assessment issued against the Taxpayer.

9. The Taxpayer took the Statement of Account to his accountant, who called the Department and discovered that the Taxpayer's April 1997 estimated payment had not been credited to his account and that this had created the assessed deficiency.

10. The Department subsequently corrected its records by applying the \$2,700 payment to the Taxpayer's 1996 tax liability, resulting in an overpayment of \$258.

11. On August 14, 2003, the Department sent the Taxpayer a letter stating that his \$258 claim for refund for the 1996 tax year had been denied. That letter erroneously stated that the claim was denied because it had not been filed within the three-year period required by NMSA 1978, § 7-1-26.

12. On August 26, 2003, the Taxpayer filed a protest to the Department's letter denying his claim for refund.

## DISCUSSION

The issue to be decided is whether the Taxpayer is entitled to the \$258 refund requested on his 1996 New Mexico income tax return. The Department maintains that it is statutorily barred from granting the refund, citing to the provisions of NMSA 1978, § 7-1-26(B). At the time the Taxpayer filed his claim for refund in October 1997, that statute read as follows:

B. 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 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; Paragraph 2 provides for the filing of a suit 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.)

In this case, the Taxpayer filed his claim for refund on October 15, 1997. The Department did not take any action to approve or deny the claim during the following 120 days. In order to preserve his claim, the Taxpayer was required to file an administrative protest or a suit in district court within 90 days after the expiration of the initial 120-day period. The Taxpayer did neither. As a result, his refund claim was time barred on May 13, 1998, the 210<sup>th</sup> day after the day it was filed. At that point, the Taxpayer's only remaining option was to refile the claim within the three-year period allowed in NMSA 1978, § 7-1-26(C). Again, the Taxpayer failed to take the action required and has now lost the opportunity to recover his \$258 overpayment.

At the administrative hearing, the Taxpayer's certified public accountant admitted that he has never read the statutory provisions relating to taxpayer refunds. He nonetheless argues that the Taxpayer should not be penalized for the Department's error in failing to properly credit his April 1997 estimated payment. The Taxpayer's accountant believes the Department should grant the Taxpayer's refund, even though the Taxpayer failed to protect his claim by filing an administrative protest or a suit in district court.

The New Mexico Court of Appeals recently considered—and rejected—a similar argument raised by the taxpayers in *Kilmer v Goodwin, Secretary, New Mexico Taxation and Revenue Department*, 2004 NMCA 122, 99 P.3d 690. In that case, the court found that the purpose of the time deadline in § 7-1-26 is to avoid stale claims, and that “[t]he time deadline places the burden of maintaining an active claim on the taxpayer and makes it the taxpayer's responsibility to confront the Department inaction.” *Kilmer*, 2004 NMCA 122, ¶ 16. The court further found that the Department's erroneous denial of a refund claim after the 210-day period has elapsed cannot serve to revive the claim, stating:

If we were to accept Taxpayers' argument, we would be undermining the legislature's definite time limit. A construction of Section 7-1-26 that allows a taxpayer ninety days to protest or file a civil action when the Department issues a written denial after the 210-day period has run would read the 210-day period out of the statute and potentially extend the time limit well beyond 210 days. We will not do so without a clear indication from the legislature.

*Id.*, 2004 NMCA 122, ¶ 20.

The plain language of § 7-1-26, and the interpretation of that statute by the New Mexico Court of Appeals, support the Department's position that once the initial 120-day period for acting on the Taxpayer's claim had expired, the Taxpayer was required to take action to protect his claim by filing an administrative protest or an action in district court. Because the Taxpayer

did neither, and because the time for refiling the claim has passed, the Taxpayer is foreclosed from recovering his \$258 overpayment of 1996 personal income tax.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely, written protest to the Department's August 14, 2003 letter denying his claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. Because the Taxpayer did not take any action to challenge the Department's failure to act on his claim for refund within the time period provided in NMSA 1978, § 7-1-26, the Taxpayer's claim is time barred and cannot be granted.

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

DATED January 12, 2005.