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

IN THE MATTER OF THE PROTEST OF **No. 11-02**
PERKINELMER, INC. AND SUBSIDIARIES, FEIN 04-205204
REFUND DENIAL DATED MAY 9, 2008
CORPORATE INCOME TAX, FYE: JANUARY 1, 2000
LETTER ID: L1807898752

DECISION AND ORDER

This matter comes before Gerald B. Richardson, Hearing Officer, upon cross motions for summary judgment and supporting memoranda of law. PerkinElmer, Inc., and Subsidiaries, hereinafter, "Taxpayer", was represented by William P. Gagnon. The Taxation and Revenue Department, hereinafter, "Department", was represented by Amy Chavez-Romero, Esq. Based upon the evidence and arguments submitted, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. The Taxpayer is the parent corporation for three subsidiary corporations: PerkinElmer, Inc. (f/k/a EG&G, Inc.), hereinafter, "PerkinElmer"; EG&G Management Systems, Inc., hereinafter, "EG&G" and Astrophysics Research Corporation, hereinafter, "Astrophysics". PerkinElmer, EG&G and Astrophysics each filed New Mexico corporate income tax returns as separate corporate entities for the 1999 tax year on or about September 15, 2000.

2. The extended due date shown on page 1 of the 1999 PerkinElmer New Mexico return is October 16, 2000.

3. The extended due date shown on page 1 of the 1999 Astrophysics New Mexico return is September 15, 2000.

4. No extended due date is shown on the1999 EG&G New Mexico return.

5. PerkinElmer, EG&G and Astrophysics each filed separate corporate income tax returns for all tax years subsequent to the 1999 tax year.

6. The Internal Revenue Service ("IRS") audited the Taxpayer, a federal consolidated filer, for multiple tax years, including the 1999 tax year.

7. The IRS audit was finalized on February 26, 2008.

8. In late 2007, before the IRS audit was finalized, the Taxpayer filed an amended New Mexico corporate income tax return for the 1999 tax year. The amended return did not indicate that the Taxpayer's amended return was being filed as a combination of unitary domestic corporations. However, the amended return did contain a statement with an explanation of changes. This statement explained that the amended return was filed to report federal changes pursuant to an IRS audit. It further explained under the caption "Combined Filing", that for the 1999 tax year, PerkinElmer, EG&G and Astrophysics had each filed New Mexico corporate income returns as separate corporations and that the parent corporation, the Taxpayer herein, had participated in the filing of a US consolidated return for that same tax year with numerous affiliates and subsidiaries, but that at the time the returns were prepared, no analysis had been done to determine whether a unitary business existed, but that upon a subsequent review of its New Mexico tax filings, it had been determined that the business transacted by the Taxpayer during the tax year represented a unitary business and that the Taxpayer is the designated filer for the combined unitary group.

9. The combined unitary group included Perkin Elmer, EG&G and Astrophysics, all of which had filed original 1999 New Mexico corporate income tax returns as separate corporate entities.

10. The amended 1999 return claimed a refund of $740,529.

11. By letter dated May 9, 2008, the Department denied the refund claim in part because the return did not contain a check mark to indicate the filing method.

12. By letter dated June 11, 2008, PerkinElmer Inc. and Subsidiaries filed a timely protest to the Department's denial of its refund claim.

13. The Department acknowledged the protest by letter dated June 18, 2008.

14. Subsequently, the Taxpayer provided the Department additional information to review concerning its protest, including information concerning the IRS audit and its resolution.

15. On August 5, 2009, counsel for the Department issued letter to the representative for the Taxpayer explaining its position that Regulation 3.4.10.8(E) NMAC prohibits the retroactive election of a different filing method for reporting income tax and that the deadline for making such an election would have been September 15, 2000, the last day on which the Taxpayer's 1999 corporate income tax return could be timely filed.

DISCUSSION

The legal issue to be determined herein is whether the Taxpayer is entitled to a refund of corporation income tax based upon the filing of an amended corporate income tax return many years later, which retroactively changed the method under which its subsidiaries had reported New Mexico corporation income tax. Normally, the statute of limitation for filing a claim for refund requires that the claim is made within three years of the end of the calendar year in which the payment was originally due. *See,* § 7-1-26(D)(1) NMSA 1978. However, there is an exception, "[I]f, as a result of an audit by the internal revenue service...any adjustment of federal tax is made with the result that there would have been an overpayment of tax if the adjustment to federal tax had been applied to the taxable period to which it relates...." In such case, a taxpayer may make a claim for refund "within one year of the date of the internal revenue audit adjustment...." Thus, although the claim for refund at issue was made seven years after the original return was due, it was made within the statute of limitations because of the IRS audit.

The New Mexico Corporate Income and Franchise Tax Return provides for three different reporting methodologies by which corporations may determine their New Mexico taxable income for purposes of reporting corporate income tax. *See,* Exhibits A and B. These methodologies are: separate corporate entity; hereinafter, "separate reporting"; combination of unitary domestic corporations, hereinafter, "combined reporting"; and federal consolidated group, hereinafter, "consolidated reporting".

The Corporate Income and Franchise Tax Act, Chapter 7, Article 2A NMSA 1978 does not have a provision defining separate reporting, but it is addressed in Regulation 3.4.10.7(A) NMAC, which provides as follows:

> A. Under the "separate accounting method" of reporting formerly provided for in Paragraph (4) of Subsection A of Section 7-2A-8 NMSA 1978 for taxable years beginning prior to January 1, 1996, a taxpayer accounts for that portion of business activity conducted within this state as if the business activities were conducted by a distinct and separate entity which operated solely within this state. A pro forma federal form 1120 reflecting such activity shall be prepared and included with the New Mexico report form. Only income generated and expenses incurred from business activities conducted within this state are to be included when calculating New Mexico tax liability.

Consolidated reporting is addressed in § 7-2A-8.4 NMSA 1978, which provides in part:

> A. Any corporation that is subject to taxation under the Corporate Income and Franchise Tax Act and that reports to the internal revenue service for federal income tax purposes its net income consolidated with the net income of one or more other corporations may elect to report to New Mexico on the same basis.

Section 7-2A-8.3 addresses combined reporting and provides in part:

> A. A unitary corporation that is subject to taxation under the Corporate Income and Franchise Tax Act and that has not previously filed a combined return pursuant to this section or a consolidated return pursuant to Section 7-2A-8.4 NMSA 1978 may elect to file a combined return with other unitary corporations as though the entire combined net income were that of one corporation. The return filed under this method of reporting shall include the net income of all the unitary corporations. Transactions among the unitary corporations may be eliminated by applying the appropriate rules for reporting income for a consolidated federal income tax return. Any corporation that has filed an income tax return with New Mexico pursuant to Section 7-2A-8.4 NMSA 1978 shall not file pursuant to this section unless the secretary gives prior permission to file on a combined return basis.

Both statutes also contain provisions which limit a taxpayer's ability elect a different reporting methodology once they have elected to file a return using either the combined or consolidated methodology. Specifically, § 7-2A-8.4(B) provides as follows:

> Once a corporation has been included in a consolidated return to New Mexico, the corporation shall not elect to file a New Mexico return under any other method without prior permission of the secretary, unless the

change in reporting method is required or allowed under the Internal Revenue Code. Furthermore, such a corporation shall not elect nor shall the secretary grant it permission to separately account for income in New Mexico pursuant to Paragraph (4) of Subsection A of Section 7-2-8 NMSA 1978.

Similarly, § 7-2A-8.3(B) and (C) NMSA 1978 provide:

> B. Once corporations have reported net income through a combined return for any taxable year, they shall file combined returns for subsequent taxable years, so long as they remain unitary corporations, unless the corporations elect to file pursuant to Section 7-2-8.4 NMSA 1978 or unless the secretary grants prior permission for one or more of the corporations to file individually.
> C. For taxable years beginning on or after January 1, 1993, no unitary corporation once included in a combined return may elect, or be granted permission by the secretary, for any subsequent taxable year to separately account pursuant to Paragraph (4) of Subsection A of Section 7-2A-8 NMSA 1978.

With this background, we may now examine the issue at hand, whether the Taxpayer may retroactively amend its 1999 Corporate Income Tax return to change its reporting methodology from the separate entity reporting methodology elected by its subsidiaries when they filed their original corporate income tax returns to a combined return filed by the parent corporation on behalf of a unitary group of corporations including the subsidiaries involved in the original filing. The Department denied the claim for refund based upon its regulation concerning reporting methodologies, Regulation 3.4.10.8 NMAC. The parts of that regulation which are pertinent to the issue presented herein are as follows:

> B. For taxable years beginning on or after January 1, 1996, a taxpayer ma elect to file the taxpayer's initial New Mexico corporate income tax return using any one of three reporting methods:
> (1) 1st -- separate corporate entity;
> (2) 2nd -- combination of unitary corporations;
> (3) 3rd -- federal consolidated group.
> C. In succeeding taxable years, a taxpayer may elect to file on a different reporting method without written permission from the department as long as the reporting method chosen is ranked higher on this numbered list than the previous reporting method.
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> E. No retroactive election of a different method for reporting New Mexico state income tax will be permitted. An election to report under a

higher-ranked method or a request for permission to file under a lower-ranked method must be made no later than the last day on which the corporate income tax return may be timely filed for the taxpayer's taxable year to which the change in method applies.

F. This section (3.4.10.8 NMAC) applies to taxable years beginning on or after January 1, 1996.

The Department specifically relied on Subsection E, which prohibits the retroactive election of a different reporting methodology. From the context of that Subsection, it is clear that an election of a reporting method is made at the time a return is originally filed, or at the very latest, it must be made "no later than the last day on which the corporate income tax return may be timely filed for the taxable year to which the change in method applies." With respect to each of the subsidiaries involved in this matter, that would have been in September or October of 2000.[1]

PerkinElmer and Subsidiaries argues that the Department's regulation is *ultra vires* and therefore void because it goes beyond interpreting the statute and limits the operation of the statute. It argues that the regulation is inconsistent with the language of § 7-2A-8.3(A) which states that a "unitary corporation...that has not previously filed a combined return...**may elect to file a combined return** with other unitary corporations...." (emphasis added) by limiting the amount of time a taxpayer has to elect its filing methodology. In making this argument, this taxpayer must overcome the presumption that agency regulations that interpret statutes and which are promulgated under statutory authority are presumed to be a proper implementation of the statute. *Chevron U.S.A., Inc. v. State of New Mexico ex rel. Taxation and Revenue Department,* 139 N.M. 498, ¶16, 134 P.3d 785, 790 (N.M. App. 2006). Additionally, an interpretation of a statute by the agency charged with its administration is to be given substantial weight. *Id.* Finally, a regulation issued by the Department is presumed to be a proper implementation of the laws charged to the Department. Section 9-11-6.2 (G) NMSA 1978.

The Taxpayer has not overcome this presumption. In fact, given a reading of the entirety of §§7-2A-8.3 and 7-2A-8.4, both of which have similar language stating that

[1] With respect to EG&G, although no extended due date was shown on its original return, it will be assumed that it was September 15, 2000, since that is the date the officer signed the original return.

taxpayers "may elect" to report on either a combined or consolidated basis, it is clear that the election is made at the time a taxpayer files its return for any given taxable year and that there are restrictions on whether and how taxpayers may make such elections in subsequent years. As noted previously, both statutes have restrictions which limit a taxpayer from changing its election of reporting methodology for subsequent years. Specifically, with respect to combined reporting, at issue herein, Subsection B of § 7-2A-8.3 limits a taxpayer who has elected to report on a combined basis from changing its reporting methodology for subsequent years unless it elects to file on a consolidated basis or it obtains prior permission from the Secretary for one or more of the corporations in the combined group to file individually. Thus, the reasons for the prohibition against retroactive changes in reporting methodology, found in Regulation 34.10.8E NMAC are demonstrated by the facts of the instant matter. The subsidiary corporations elected to file as separate entities not only in their 1999 original returns, but also in all subsequent years. If the Taxpayer were to be allowed to amend the subsidiaries returns and to file as a combined unitary corporation for tax year 1999, the provisions of § 7-2A-8.3 (B) would be violated as no prior permission from the Secretary would have been obtained to allow it's subsidiaries to file as separate corporate entities for tax year 2000 and subsequent years.[2] Thus, the provisions of Regulation 3.4.10.8(E) NMAC, which prohibit retroactive elections to change reporting methods and which require that any requests to change reporting methodologies be made no later than the date for timely filing a return are a reasonable interpretation and implementation of § 7-2A-8.3 NMSA 1978.

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[2] The Taxpayer has stated that if its protest is granted and it is allowed this claim for refund, that it will file amended tax returns, as a combined unitary corporation for subsequent years. This could be done, however, only if the Secretary gave permission, prior to filing amended returns, to do so, and given the position the Department has taken in this protest, it would be fair to assume that such permission would not be granted. Additionally, even if the Secretary were to grant such permission, if subsequent year returns resulted in a claim for refund, such as is made in the instant matter, such claims for refund could not be granted without violating the statute of limitations for making such refund claims for many of the years subsequent to 1999 by the provisions of § 7-1-26(D)(1) NMSA 1978. Thus, Regulation 3.4.10.8(E) also interprets § 7-2A-8.3 in a manner which is consistent with the statute of limitations for filing amended returns making claims for refund.

Next, the Taxpayer argues that New Mexico has adopted the Internal Revenue Code of 1986 as amended and as such, is required to adhere to it and the regulations promulgated thereunder unless New Mexico has explicitly decoupled from the provisions of the code. Specifically, the Taxpayer argues that the Department is thus required to follow the "good faith" exception of Treasury Regulation §301.9100-3 to allow a retroactive change in reporting methods despite the requirements of Regulation 3.4.10.8(E) NMAC. The Treasury Regulation allows the IRS to grant administrative relief to taxpayers when certain beneficial elections are erroneously not exercised within the prescribed time limits through no fault of their own. The Taxpayer cites to a decision of the Missouri Supreme Court which allowed a corporation and its subsidiaries to retroactively file a consolidated Missouri corporate income tax return even though the group had not made a timely election to file a consolidated return by applying the good faith exception cited above. *See, Kidde America, Inc. v. Director of Revenue,* 198 S.W.3d 153 (2006). This decision is distinguishable from the instant matter, however. The reason the Missouri Supreme Court gave for its decision was a Missouri statute requiring that the rules and regulations prescribed by the director of revenue "follow as nearly as practicable the rules and regulations of the secretary of the Treasury of the United States or his delegates regarding income taxation." *Id.* Thus, the court determined that application of this statute required application of the federal "good faith" exception. *Id.* New Mexico has no such statute. Although New Mexico's Corporate Income and Franchise Tax Act does contain references to the Internal Revenue Code and follows the code as a starting point to determine the taxable income to which the corporation income tax applies, *see,* § 7-2A-2 (C), (G), (H) and (I) NMSA 1978, it contains no such broad inclusion of the IRS regulations as contained in the Missouri statute. Indeed, our courts have eschewed such an interpretation. As stated in *Mountain States Telephone and Telegraph Co. v. New Mexico State Corporation Commission,* 104 NM. 36, 715 P.2d 1332:

> New Mexico's Corporate Income Tax Act...does not incorporate or adopt the Internal Revenue Code and Treasury Regulations word for word. New Mexico taxpayers are not instructed to prepare their state returns by following the provisions of the Internal Revenue Code, inserting the words "New Mexico" or "state" at appropriate points, but simply are required to use the single figure calculated to be their federal taxable income as the

> starting point for calculating state income tax. NMSA 1978, Sec. 7-2A-2 and -3 (Repl. Pamp. 1983).

Id. 104 N.M. at 43, 715 P.2d at 1339. Even were the "good faith" exception somehow applicable, the facts of this case would not warrant its application. As stated in the explanation accompanying the amended return submitted in this case, at the time of the filing of the original returns, no analysis was done to determine whether a unitary business existed. Thus it appears that the failure to elect a more beneficial filing methodology was based on the failure of the taxpayer or its agent to make the analysis it should have made at the time the original return was due. The inapplicability of the federal good faith exception to the facts of this case is further demonstrated by the fact there is no such thing as combined filing by unitary corporations under the Internal Revenue Code. For federal tax purposes, a corporation which does not file on a separate entity basis may file a consolidated return if it is a member of an affiliated group of corporations. 26 U.S.C. § 1502. Neither the Internal Revenue Code or the Treasury Regulations provide for filing a combined return, such as the amended return at issue in this case.

Finally, the Taxpayer argues that in another administrative decision of the Department, *In the Matter of the Protest of DePuy, Inc. and Subsidiaries, Decision and Order No. 05-10,* the hearing officer granted retroactive relief allowing a taxpayer to change its method of filing and the same result should be applied now. This is not a fair characterization of that decision, however, and the facts presented herein are quite distinguishable. In her decision, the hearing officer actually agreed that Regulation 3.4.10.8(E) NMAC prohibited the retroactive change in reporting methods, but found that since the Department had granted the taxpayer's request to retroactively change its reporting method based on a different and more liberal interpretation of § 7-2A-8.3[3] and accepted amended returns for several other tax years, it could not pick and choose which statutory interpretation to follow in a given situation. Nonetheless, the hearing officer found that the amended return requesting a tax refund was barred by the statute of limitations on claims for refund and denied the taxpayer's protest.

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[3] This more liberal interpretation has no application to this case because of the different facts presented herein.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of its claim for refund of 1999 corporate income taxes, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is prohibited by 3.4.10.8(E) from retroactively changing its reporting methodology from separate corporate entity to combined reporting.

3. Regulation 3.4.10.8 properly interprets and implements § 7-2A-8.3 NMSA 1978 and is valid.

4. The federal "good faith" exception as found in Treasury Regulation §301.9100-3 does not apply and the Department need not follow it with respect to this protest.

5. The Department's prior administrative decision, *In the Matter of the Protest of DePuy, Inc. and Subsidiaries, Decision and Order 05-10*, does not apply to or govern the determination of this matter.

6. The Department properly denied the claim for refund filed by the Taxpayer when it filed an amended corporate income tax return for tax year 1999.

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

DONE, this ____ day of January, 2011.