

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

**IN THE MATTER OF THE PROTEST OF
HEALTHSOUTH REHABILITATION,
TO THE DENIAL OF REFUND UNDER
ID NO. L0402881600**

No. 11-19

DECISION AND ORDER

A formal hearing on the above-referenced protest was held August 4, 2011, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Counsel. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Ms. Julie Gonzales, an employee of the Department, also appeared as a witness on behalf of the Department. Mr. Ronnie Gregory, CPA with Deloitte Tax LLP, appeared for the hearing and represented Healthsouth Rehabilitation (Taxpayer). Mr. Chris Muth, an attorney with Deloitte Tax LLP, also appeared as a witness on behalf of the Taxpayer. The Hearing Officer took notice of all documents in the administrative file. Most of the facts were also stipulated to at the hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 8, 2009, the Taxpayer filed a claim for refund (claim) for the gross receipts tax periods from January 2006 through December 2008.
2. On May 19, 2010, the Department sent the Taxpayer a letter (210-day letter) indicating that the Department could not take any action on the claim because more than 210 days had passed since the claim was filed. The letter also advised that the claim could be refiled provided that the statute of limitations had not expired.

3. Mr. Muth spoke to Ms. Gonzales about the 210-day letter, refiling the claim, and the statute of limitations. Mr. Muth was told that the statute of limitations would not apply because the claim had originally been filed within the time and was presently being processed.
4. The Taxpayer refiled the claim on May 19, 2010.
5. On July 20, 2010, the Department issued a letter partially denying the claim for refund due to the statute of limitations.
6. The part of the claim that was denied was for the tax periods of January 2006 through November 2006. The remaining part of the claim, for the tax periods December 2006 through December 2008, was granted.
7. The Taxpayer filed a formal protest by letter dated October 7, 2010.
8. The Department acknowledged the protest by letter dated February 1, 2011.
9. The Department filed a request for hearing on May 9, 2011.
10. The Hearings Bureau sent the parties notice of hearing on May 13, 2011.

DISCUSSION

The issue to be decided is whether the Department properly denied the claim for refund for the January 2006 through the November 2006 gross receipts tax periods based on the statute of limitations.

Statute of Limitations for Filing a Claim.

All claims for refund must be filed within three years of the end of the calendar year in which the payment was originally due. *See* NMSA 1978, § 7-1-26 (D). The Taxpayer's gross receipts tax payments were due monthly in 2006, so the January 2006 through November 2006 tax periods would have had payments due February 2006 through December 2006, respectively. Therefore, the final date on which to file a claim for the January 2006 through November 2006 tax periods would have been December 31, 2009. The Taxpayer filed a timely claim for refund

on October 8, 2009. However, the claim was neither granted nor denied within 120 days of being filed, and the Taxpayer failed to perfect its right to appeal the inaction by the Department within 210 days of the filing of the claim. The Taxpayer refiled the claim on May 19, 2010. At the time of refiling, the claim had become stale as it was after the December 31, 2009 deadline, and the Department could not act on the claim.

Remedies for Inaction by the Department.

When a claim for refund is neither granted nor denied within 120 days of the date the claim was filed, taxpayers have the option of refiling the claim or of pursuing a legal or administrative remedy within 90 days of the 120th day, that is within 210 days of the date of the claim. *See* NMSA 1978, § 7-1-26 (B). Taxpayers may only refile the claim if there is still time to do so under the statute of limitations. *See* NMSA 1978, § 7-1-26 (B) and (D). Taxpayers must file an administrative protest or a lawsuit in district court within 210 days of the date that the claim was filed. *See* NMSA 1978, § 7-1-26 (B) and (C).

The Taxpayer argues that it was relying on statements made by Ms. Gonzales when the 210-day letter was sent and that the statute of limitations should not apply. The Taxpayer also argues that the claim was originally filed within the time limits. To the extent that the Taxpayer's argument might encompass equitable estoppel, it is overruled as equitable estoppel is an exclusively judicial remedy. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 118 N.M. 273, 881 P.2d 18 (1994) (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary).

Ms. Gonzales denied telling the Taxpayer that the claim would not be barred by the statute of limitations. Ms. Gonzales explained that she did not say that because she did not have the authority to say that. Mr. Muth indicated that Ms. Gonzales told him that the statute of

limitations would not apply since the claim was previously made and was under process, and that her supervisor had assured her of that fact. I found Mr. Muth's testimony to be more credible than Ms. Gonzales's testimony. However, the statute absolutely bars the Department from acting on a claim for refund that is more than 210 days old even when the claim was originally filed within the statute of limitations. *See Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690. It is incumbent on a taxpayer to file the protest or action in court within the 210-day period. *See id.* at ¶1. A taxpayer's failure to file a protest or an action within the 210-day period is not excused by the taxpayer's reliance on oral statements of an employee of the Department. *See id.* at ¶45.

The claim for refund was filed on October 8, 2009. The Department neither granted nor denied the refund by February 5, 2010, which was 120 days from the date of the claim. The Taxpayer neither filed a protest nor an action in district court by May 6, 2010, which was 210 days from the date of the claim. Therefore, the Taxpayer failed to perfect its right to appeal the inaction of the Department on the original claim. Consequently, the Department is statutorily prohibited from acting on the claim. *See* NMSA 1978, § 7-1-26 (B). *See also Kilmer*, 2004-NMCA-122. The Taxpayer filed a timely protest to the denial of its refiling of the claim. However, the claim for the January 2006 through November 2006 tax period was statutorily barred from being filed after December 31, 2009. *See* NMSA 1978, § 7-1-26 (D). Therefore, the Department's denial of the claim for refund for the January 2006 through the November 2006 tax periods was appropriate.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely written protest to the partial denial of its claim for refund that was issued under Letter ID No. L0402881600, and jurisdiction lies over the parties and the subject matter of this protest.

2. The claim for gross receipts tax periods from January 2006 through November 2006 was barred by the statute of limitations. Therefore, the partial denial of the claim, with respect to those tax periods, was appropriate.

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

DATED: September 6, 2011.