

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

**IN THE MATTER OF THE PROTEST OF
BREWER OIL COMPANY
TO DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L1253162048.**

No. 11-26

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 5, 2011, before Sally Galanter, Hearing Officer. Mr. Jay Lamberth, Vice President and Chief Financial Officer appeared on behalf of Brewer Oil Company ("Taxpayer"). The Taxation and Revenue Department ("Department") was represented by Nelson J. Goodin, Chief Legal Counsel. All documents in the administrative file are admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Department notified Taxpayer in February 2009 of its September 2006 fuel excise tax overpayment. The original amount of overpayment was \$71,230.12. After offsets were applied, the balance of the overpayment was \$50,165.04.
2. Taxpayer did not understand the basis for the overpayment as its employee who had prepared its fuel tax reports for the prior ten years had died in 2008.
3. A Department employee suggested to Taxpayer to apply for the refund and offered to prepare a spreadsheet explaining the overpayment. Taxpayer never received the spreadsheet.

4. In September 2009, a fuel tax audit commenced for the subsequent tax period from January 2007, through December 2009. The audit was finalized June 2010.

5. In 2009, Taxpayer was involved in the audit, updating its computer system and transferring its record keeping operations to its main office and dealing with the death of its employee.

6. Taxpayer completed the application for refund for the September 2006 overpayment on July 22, 2010.

7. By letter dated August 13, 2010, the Department denied Taxpayer's refund request because the refund was not filed within the limitations set out in NMSA 1978, §7-1-26 (2007).

8. On September 20, 2010, Taxpayer filed a written protest to the Department's denial of their refund claim.

9. On May 4, 2011, the Department acknowledged receipt of the protest, explained its reasoning for the denial and provided taxpayer notification of its legal options.

10. On May 20, 2011, the Department requested a setting for hearing.

11. On June 16, 2011, the Hearing Bureau sent a Notice of Administrative Hearing, scheduling the hearing for October 5, 2011, at 9:00 a.m.

DISCUSSION

The sole issue to be decided is whether Taxpayer is entitled to a refund of the overpayment of fuel excise tax for tax period September 2006. Taxpayer claimed that it was waiting for the Department employee's offered spreadsheet explaining the overpayment and that its delay in filing the claim was at least partially due to not receiving the documentation.

Taxpayer requested that the refund be credited toward what was owed from an audit assessment for years 2007 through 2009. Taxpayer argued that it was entitled to a tolling of time to file a claim for refund during the audit period. The Department's position is that the refund claim is untimely because it was not submitted within three years of the end of the calendar year in which the payment was originally due.

Statute of Limitations on Claims for Refund. Section 7-1-27 (A) allows an individual who is owed a refund to claim the refund "by directing to the secretary, within the time limited by the provisions of Subsections D, E and F of this section, a written claim for refund." The applicable subsection D limits the possibility of obtaining a refund, stating that "no credit or refund of any amount may be allowed or made to any person unless as the result of a claim made by that person as provided in this section: (1) within three years of the end of the calendar year in which: (a) the payment was originally due..."

The refund was for an overpayment for tax period September 2006. The end of the calendar year in which payment was originally due was December 31, 2006. In counting the three years, December 31, 2009 would have been the last date for which a claim for refund could have been made within the statutory three-year requirement. The claim for refund was dated and sent to the Department on July 22, 2010.

The question as to whether the application for the refund submitted by Taxpayer is time barred based on the time restraints in the statute was answered in the Court of Appeals decision, *In the matter of the protest of Val Kilmer and Joanne Whalley v. Jan Goodwin, Secretary, New Mexico Taxation and Revenue*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690. While this case dealt with a request for a refund claim based on the Department's inaction in approving or

denying the claim, the court determined that the legislature has placed the “burden of maintaining an active claim on the taxpayer.” The court explained that the legislature has allocated that responsibility to taxpayers as “it is the taxpayer who can more easily keep track of the status of a refund claim.” *See id.* at ¶16. In *Kilmer*, the court determined that legislative intent in creating the statute is paramount and that “when the language is free from ambiguity, we will not resort to any other means of interpretation.” *See id.* at ¶18. The court then determined that the time deadlines as set out in the statute have a “clear and definite outer limit” and that Taxpayer’s argument would undermine the legislature’s definite time limit. *See id.* at ¶20. The policy reasons for having a statute of limitations for claims for refund are clear. It would be fiscally irresponsible for the State if it allowed claims for refund to be filed at any time. Therefore as the time limitation for requesting a refund and submitting the application for a refund is clear and definite and as the claim was made after this deadline, the claim for refund is time barred by the statute.

Taxpayer’s claim that the refund request was delayed based on a Department employee’s promise to supply documentation that was never forthcoming does not negate Taxpayer’s responsibility to timely file a request for the refund within the three-year time period. Taxpayer was understandably dealing with another audit and many internal issues. It was nevertheless unreasonable, in light of the statutory scheme, for Taxpayer to assume that nothing needed to be done to claim the refund until the state supplied the agreed upon spreadsheet. *See id.* at ¶41. As the refund claim was filed after the time allowed by statute, the Department was barred from allowing the refund and applying it toward the subsequent assessment.

Further, NMSA 1978, §7-1-26 is very clear as to the responsibilities of a taxpayer in

seeking a refund and the inability of the department to allow this refund after the statute of limitations has expired. The statute does not allow for any tolling of the time period within which a taxpayer is required to file a timely refund request for any reason. Therefore as Taxpayer's claim for refund was filed beyond the December 31, 2009 statute of limitations time period, the Department had no statutory authority to grant the claim for refund pursuant to Section 7-1-26 (D) (1) (2003) and properly denied the claim for refund.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of its claim for refund of September 2006 fuel excise tax, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer's claim for refund is time barred pursuant to NMSA 1978, §7-1-26.

C. Section 7-1-26 does not provide for a tolling of the time running for the filing of a claim for refund.

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

DATED October 18, 2011.

SALLY GALANTER
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