

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

**IN THE MATTER OF THE PROTEST OF  
ABELARDO ORTIZ,  
TO THE DENIAL OF REFUND ISSUED UNDER  
ID NO. L1245073984**

**No. 12-11**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held February 16, 2012, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Nelson Goodin, Chief Legal Counsel. Mr. Tom Dillon, Auditor, also appeared on behalf of the Department. Mr. Abelardo Ortiz (Taxpayer) appeared for the hearing with his attorney, Ms. Katharine Fishman. The Hearing Officer took notice of all documents in the administrative file. Taxpayer's exhibits #1 through #8 were admitted. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer was engaged in a picking and harvesting business in New Mexico 2008.
2. The Taxpayer paid gross receipts tax to the Department for 2008.
3. The Taxpayer learned that his gross receipts were subject to a deduction under Section 7-9-59.
4. The Taxpayer filed a timely claim for refund on March 17, 2010.
5. The Department sent the Taxpayer a letter on April 14, 2010. The letter requested statements from each farm with details of the duties performed, and requested invoices.
6. The Taxpayer responded to the letter the next day and explained to the Department employee that he did not have any invoices. In May 2010, the Taxpayer acquired

statements and 10-99 forms from the farms where he had worked, and sent them in to the Department.

7. On July 7, 2010, the Department sent the Taxpayer another letter asking for invoices.
8. The Taxpayer then went in person the Department's office in Las Cruces and again explained that he did not have invoices. The Taxpayer also took copies of the farms' statements and 10-99 forms. The personnel at the Las Cruces office tried to reach the auditor assigned, but were not able to speak to him. The personnel at the Las Cruces office took the documents from the Taxpayer and indicated that they would send the documents to the auditor in Santa Fe to ensure that he received them.
9. The Taxpayer finally spoke to the assigned auditor on the phone. The auditor had the Taxpayer speak to another employee, who spoke Spanish, because the auditor said he was having a hard time understanding the Taxpayer. The Taxpayer again explained that he did not have invoices and that it was not common practice for invoices to be done in his line of business.
10. On January 10, 2011, the Department sent the Taxpayer a letter explaining that the Department could not take any action on the claim for refund because of the time that had elapsed.
11. The Taxpayer signed the bottom of the January 10, 2011 letter to indicate that he was re-filing his claim for refund.
12. The Taxpayer felt that he would be unable to achieve satisfaction of his claim on his own. The Taxpayer hired an attorney and timely refiled his claim for refund.
13. On March 2, 2011, the Department issued another letter to the Taxpayer which indicated that the claim for refund had been received and again requested invoices.

14. On March 29, 2011, the Department issued the denial of claim of refund to the Taxpayer.  
The Department indicated that the denial was issued because of the statute 7-9-59.
15. On April 19, 2011, the Taxpayer filed a formal protest letter. The Taxpayer also requested that he be awarded costs and fees.
16. After the protest was filed, Mr. Dillon was assigned to the Taxpayer's case. In May 2011, Mr. Dillon requested amended returns for the tax periods in question.
17. The amended returns were provided, and the Department granted the refund prior to the hearing. The appropriate amount of the refund was found to be slightly in excess of the amount originally claimed by the Taxpayer.
18. The Taxpayer substantially prevailed with respect to the amount and to the issues.
19. The Department failed to establish that its position was based upon a reasonable application of the law to the facts of this case.
20. The Taxpayer is the prevailing party.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is entitled to an award of reasonable administrative costs as the prevailing party.

#### **Awarding of costs and fees.**

When a taxpayer is the prevailing party in an administrative proceeding, "the taxpayer *shall* be awarded a judgment or a settlement for reasonable administrative costs incurred in connection with an administrative proceeding". NMSA 1978, §7-1-29.1 (A) (emphasis added). Reasonable administrative costs include attorney's fees. *See* NMSA 1978, §7-1-29.1 (B) (3).

#### **Prevailing party.**

To be a prevailing party, a taxpayer must substantially prevail with respect to the amount in controversy or with respect to the issues involved. *See* NMSA 1978, §7-1-29.1 (C) (1). It was undisputed that the Taxpayer was the prevailing party as to the amount and as to the issues since the Department conceded the matter and issued the refund prior to the hearing. However, a taxpayer who is a prevailing party shall not be treated as such if the Department can establish that its position “in the proceeding was based upon a reasonable application of the law to the facts of the case.” NMSA 1978, §7-1-29.1 (C) (2).

The Department argues that its position in this matter was a reasonable application of the law because the refund could not be granted until the amended returns had been filed, pursuant to Regulation 3.1.9.8. *See* 3.1.9.8 (E) NMAC. Mr. Dillon explained that the Department’s computer system could not process a refund claim until amended returns are entered into the system. Mr. Dillon also explained that the regulation was enacted to facilitate the system process and that it is common knowledge among accounting professionals that amended returns be filed on claims for refund.

The Taxpayer argues that the Department did not follow its applicable published guidelines in this matter and that its position was, therefore, unreasonable. *See* NMSA 1978, §7-1-29.1 (C) (2). The Taxpayer argues that when a claim does not satisfy the regulation, the Department must either return an invalid claim or advise the taxpayer of what information is missing and that the claim is invalid without the missing information. *See* 3.1.9.8 (F) NMAC. The Taxpayer argues that the Department opted to advise the Taxpayer of missing information, but failed to properly advise the Taxpayer of what information was missing. The Taxpayer also argues that the Department violated the Taxpayer’s right to prompt and courteous assistance and

the right to be provided with an explanation of the basis for denial of refund. *See* NMSA 1978, §7-1-4.2.

The Department did contact the Taxpayer and advised that his claim was missing information, farm statements and invoices. Prior to the protest being filed, the Department never advised the Taxpayer that his claim was missing amended returns. Mr. Dillon explained that some other unspecified information was received after the protest, but that the crux for granting the return was the filing of the amended returns. The Taxpayer also argued that filing amended returns should not be required because the claim for refund form promulgated by the Department does not advise of such a requirement and the statute does not require it.

A claim for refund must be in writing and must include specific information. *See* NMSA 1978, §7-1-26 (A). Filing a return may also serve as a claim for refund. *See* NMSA 1978, §7-1-26 (J). The statute does not require that both be filed. *See* NMSA 1978, §7-1-26. The regulation essentially reiterates the information required by the statute in a written return. *See id.* *See also* 3.1.9.8 (E) (1-5) NMAC. However, the regulation imposes the additional requirement of the filing of an amended return. *See* 3.1.9.8 (E) (6) NMAC. When a statute and a regulation address the same issue, they are in conflict if following one would reach a different result than following the other. *See State v. Bowden*, 2010-NMCA-070, ¶10, 148 N.M. 850, 242 P.3d 417. In this case, the statute allows a refund to be claimed when it is made in writing and includes specific information. *See* NMSA 1978, §7-1-26 (A). However, the regulation only allows a refund to be claimed when it is made in writing and includes the same specific information required by the statute, and when an amended return is filed. *See* 3.1.9.8 NMAC. Therefore, the statute and regulation are in conflict as they impose different requirements on the same issue. *See Bowden*,

2010-NMCA-070, ¶ 10. When a statute and a regulation are inconsistent, the statute prevails. *See id.* at ¶ 12.

Based upon the totality of the circumstances, the Department failed to establish that its position was based upon a reasonable application of the law to the facts of this case. The Department imposed a condition on the claim for refund that was not required by statute, and the Department failed to properly advise the Taxpayer of what information was missing from the claim for refund pursuant to its regulation. *See* NMSA 1978, §7-1-26 and 3.1.9.8 NMAC. The Department also failed to properly explain the reason the claim for refund was denied. *See* NMSA 1978, §7-1-4.2. The Department's letter stated that the claim was denied under Section 7-9-59, but the Department's actual reason for denying the claim was under Regulation 3.1.9.8. Therefore, the Taxpayer is the prevailing party and should be treated as such. *See* NMSA 1978, §7-1-29.1. Consequently, administrative costs shall be awarded. *See id.*

**Reasonableness of attorney's fees.**

The Department argues that Taxpayer #1 does not establish that the attorney's fees are reasonable because the invoices do not show how much time was spent on the case and do not indicate what the attorney's hourly rate was. Taxpayer #1 and the Taxpayer's testimony reflect that the Taxpayer incurred attorney's costs for five months, from March 2011 through July 2011. The Taxpayer did not know his attorney's hourly rate or how many minutes or hours were spent working on his case. However, the Taxpayer did testify that he had spoken to his attorney for many hours regarding the case and that he felt that the attorney's fees were reasonable for his case. The Taxpayer indicated that he was very happy with his attorney because he was finally granted his refund after he secured her services.

Taxpayer #1 details several different actions taken by the attorney over the course of the case, but does not specify the time spent or the hourly rate. The total bill for the work done over the course of five months was \$3,250.15, which the Taxpayer has already paid. An award of administrative costs will be limited to 20% of the amount of settlement or \$50,000, whichever is less. *See* NMSA 1978, §7-1-29.1. The Taxpayer's total bill is less than 20% of the amount of the settlement, which was \$31,264.88. Mr. Dillon explained that this amount was ultimately found to be the correct refund amount, and that the amount refunded was slightly more than the amount originally claimed. The refund was granted in June, but the Taxpayer did not receive anything until July. Given the facts of this case, including the details provided in Taxpayer #1 and provided by the Taxpayer, I do not find the attorney's fees claimed to be inherently unreasonable or egregious. The award of administrative costs shall be the amount of attorney's fees detailed in Taxpayer #1.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely written protest to the Denial of Refund issued under respective Letter ID number L1245073984, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was the prevailing party, and the Department failed to establish that its position was a reasonable application of the law to these facts.
3. The Taxpayer shall be awarded administrative costs.
4. The attorney's fees submitted in Taxpayer #1 are not inherently unreasonable. The amount of the award shall be the \$3,250.15 that the Taxpayer paid to his attorney.

For the foregoing reasons, the Taxpayer's protest is **GRANTED** and the Department is hereby ordered to remit administrative costs to the Taxpayer.

DATED: March 21, 2012.

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DEE DEE HOXIE  
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