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

**IN THE MATTER OF THE PROTEST OF**
**NAVAJO REFINING COMPANY** **No. 12-18**
**TO DEPARTMENT'S DENIAL OF REFUND**
**SPECIAL FUEL TAX & PETROLEUM PRODUCTS LOADING FEE**

## DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 29, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Attorney Joel M. Carson II appeared in person, representing Navajo Refining Company ("Taxpayer"). During the protest hearing, Taxpayer called Emilda Santiesteban and Kelly Mathews as witnesses in this matter. Staff attorney Amy Chavez-Romero represented the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Sylvia Sena and Ms. Theresa Smith of the Revenue Processing Division appeared as witnesses for the Department. Taxpayer Exhibits #1-11, 14, 15, and 26 are admitted into the record. Department Exhibits A-F were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. As ordered at the conclusion of the protest hearing, both parties submitted proposed findings of fact, conclusions of law, and written argument into the record on June 18, 2012. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. Taxpayer claimed a refund of New Mexico Special Fuel Suppliers Tax and Petroleum Products Loading Fee for tax periods January 2007 through March 2007. Special Fuels refers to diesel fuel.

2. During that time, Taxpayer operated a refinery in Artesia, New Mexico, where it refined diesel fuel.

3. Taxpayer also owned and stored diesel fuel at the Bloomfield, New Mexico pipeline terminal.

4. Taxpayer was a registered Special Fuels Supplier and Rack Operator in New Mexico.

5. Because it could not refine enough diesel fuel to satisfy its contractual obligations to provide diesel fuel to its New Mexico customers, Taxpayer needed to purchase 1,240,334 gallons of diesel fuel from Musket Corporation ("Musket") during the relevant time. [Taxpayer Exhibit 8.1]

6. Before selling the diesel fuel to Taxpayer, Musket imported the diesel fuel from Texas into New Mexico.

7. As the entity that owned the special fuel upon importation into New Mexico, it is uncontested that Musket was legally required to pay New Mexico Special Fuel Suppliers Tax and Petroleum Products Loading Fee on all 1,240,334 gallons of diesel fuel it sold to Taxpayer.

8. Although not clearly established on the record presumably because of confidentiality requirements, there is no dispute that Musket in fact paid the New Mexico Special Fuel Suppliers Tax and Petroleum Products Loading Fees on the imported fuel to New Mexico.

9. There is no evidence on the record that Musket ever made a timely claim for refund for New Mexico Special Fuel Suppliers Tax and Petroleum Products Loading Fees, or that Musket would have any legal basis supporting any theoretical claim for refund.

10. In invoicing the total 1,240,334 gallons of diesel fuel sold to Taxpayer, Musket charged Taxpayer $260,472.24 in Special Fuel Suppliers Tax and $23,256.46 in Petroleum Products Loading Fees, for a total invoiced tax of $283,728.70. [Taxpayer Exhibit #8.1 ]

11. Musket delivered all 1,240,334 gallons of diesel fuel to Taxpayer from its railcars located in Albuquerque. [Taxpayer #1].

12. Taxpayer transported via truck the Musket purchased diesel fuel from Albuquerque to its holdings at the Bloomfield Terminal. [Taxpayer #1].

13. Taxpayer's holdings at the Bloomfield Terminal already consisted of diesel fuel delivered via pipeline, which had not yet been subject to Special Fuels Tax or Petroleum Loading Fees. [Taxpayer Exhibit 8.2].

14. At the Bloomfield Terminal, Taxpayer comingled the diesel fuel it purchased from Musket with other Taxpayer diesel fuel delivered from Taxpayer's Artesia Refinery via pipeline. [Taxpayer Exhibit #1 & 8.2].

15. During the relevant period, Taxpayer sold a total 4,320,163 gallons of the commingled diesel fuel to registered and unregistered suppliers from its Bloomfield Terminal holdings. [Taxpayer Exhibit 8.10].

16. Of this 4,320,163 gallon sales total, Taxpayer did not differentiate between selling gallons of the Musket fuel or the fuel received via pipeline at the Bloomfield Terminal to specific sales. For instance, while Taxpayer could account for the receipt and distribution of all fuel at the Bloomfield Terminal, Taxpayer did not show that of its sales during the relevant period, it invoiced the first 1,240,334 gallons of diesel fuel as the Musket fuel, and the remaining 3,079,829 gallons as fuel from the pipeline, or in the alternative that it sold all the Musket fuel to registered suppliers rather than unregistered suppliers. [Taxpayer Exhibit #8.10].

17. Taxpayer reported 4,190,724 gallons of diesel fuel sold to registered New Mexico suppliers on its Schedule 6 informational returns in January, February, and March of 2007. [Taxpayer Exhibit 2, 3, 4, & 8.10].

18. In accord with the statutes, Taxpayer remitted no Special Fuel Taxes or Petroleum Loading Fees on the 4,190,724 gallons of diesel fuel sold to registered New Mexico suppliers during the relevant period.

19. Taxpayer sold 129,439 gallons of the commingled diesel fuel to unregistered suppliers during the relevant time. [Taxpayer Exhibit #8.10].

20. Taxpayer remitted Special Fuel Taxes and Petroleum Loading Fees for the sale of 129,439 gallons of the commingled diesel fuel to unregistered suppliers during the relevant time. Although not clearly established by either party on the record, using the statutory rates applied to the number of gallons sold, Taxpayer paid $2,426.98 in Petroleum Loading Fees ($150 dollars per 8000-gallon load) and $27,182.19 Special Fuel Taxes ($0.21 per gallon) on its sale of diesel to unlicensed resellers from January through March of 2007. This is the only evidence on the record of Taxpayer paying Special Fuel Taxes and Petroleum Loading Fees to the State of New Mexico.

21. Beginning in January 2007, Taxpayer began a dialogue with the Department about how it might be able to take credit for the amount it paid to Musket. Taxpayer, through Emilda Santiesteban, engaged in numerous phone calls and emails in an effort to get credit for the money Taxpayer paid to Musket. [Taxpayer Exhibit 10].

22. In February 2009, the Department selected Taxpayer for an audit of Gasoline, Special Fuel Taxes, and Petroleum Loading Fees for a period beginning January 1, 2006 through October 31, 2008. This audit did not include fuels sold from Taxpayer's Bloomfield Terminal

holdings. This audit ultimately resulted in a determination of no additional Taxpayer liability. [Taxpayer Exhibit 7].

23. During the audit, Taxpayer asked the Department to consider the issue of how it could receive a credit for the Musket fuel tax it had paid directly to Musket. Because the audit did not involve sales from the Bloomfield terminal, the Department told Taxpayer that it could not consider the refund issue from the sale of Musket fuel from the Bloomfield terminal as part of the audit and that Taxpayer should instead file a separate claim for refund. [Testimony of Emilda Santiesteban]

24. On August 3, 2009, Taxpayer filed an application for refund with the Department, requesting a total refund of $283,728.53 for Special Fuel Taxes and Petroleum Loading Fees, the same amount Taxpayer paid to Musket upon purchasing the fuel, during the January through March 2007 reporting periods. [Taxpayer #5].

25. On September 14, 2009, the Department's Leslie Montgomery, whom had been communicating with Taxpayer for sometime about the Musket fuel issue and had participated in the audit, emailed Taxpayer about the claim for refund. The email explained why the issue could not be addressed during the audit, Ms. Montgomery's summary of what she believed Taxpayer's reason for refund was, an indication that the claim for refund had to go up "channels" for signature, and that "a refund is simply due because the tax was twice paid."[Taxpayer Exhibits 10.9-10.10].

26. On September 22, 2009, the Department's Leslie Montgomery emailed Taxpayer's Emilda Santiesteban indicating that she was having trouble getting the request for refund approved. [Taxpayer Exhibit 10.9].

27. On November 18, 2009, the Department denied Taxpayer's request for refund through letter identification number L2048907136, citing a lack of statutory authority to grant the claim for refund. [Taxpayer Exhibit #6].

28. On February 15, 2010, Taxpayer submitted a detailed letter protesting the Department's denial of the claim for refund. [Taxpayer Exhibit #8].

29. On February 19, 2010, the Department acknowledged receipt of Taxpayer's protest.

30. On April 15, 2010, the Department through attorney Patrick E. Preston sent a letter stating the Department's position that there was no statutory basis supporting Taxpayer's claim for refund. [Taxpayer Exhibit #9].

31. On August 23, 2010, the Department submitted a request for hearing to the Hearing's Bureau in this protest.

32. On September 17, 2010, the Department's Hearing Bureau sent notice of administrative hearing, scheduling this matter for June 21, 2011.

33. On June 20, 2011, Taxpayer and the Department moved for a continuance of the June 21, 2011 hearing.

34. On June 20, 2011, the Hearing Bureau ordered the June 21, 2011 hearing continued and resetting the matter for hearing on December 8, 2011.

35. On November 18, 2011, Taxpayer moved to continue the December 8, 2011 hearing.

36. On December 2, 2011, the Hearing Bureau issued a second order of continuance, resetting the protest on May 15, 2012.

37. On May 8, 2012, the parties jointly moved to continue the May 15, 2012 scheduled protest hearing. The request for continuance was initially denied. Taxpayer moved to reconsider. A telephonic status conference occurred on May 11, 2012. On May 11, 2012, the Hearing Bureau issued an order granting the reconsideration and continuance, rescheduling the hearing on May 29, 2012.

## DISCUSSION

This protest presents three issues. The first issue is whether Taxpayer is entitled to a refund from the State of New Mexico of the money it paid directly to Musket for imported special fuels. The second issue is whether Taxpayer is entitled to a refund of $29,609.17 in special fuel taxes and petroleum loading fees on the 129,439 gallons of commingled fuel it sold from the Bloomfield Terminal to unregistered suppliers, the only instance where Taxpayer demonstrated it remitted Special Fuel Taxes and Petroleum Loading Fees to New Mexico. The final issue is whether Taxpayer is entitled to relief on estoppel grounds, on substantial compliance grounds, or equitable recoupment grounds.

**ISSUE 1: Taxpayer's claim for refund for Musket's payment of tax is not appropriate**.

Taxpayer is seeking a $283,728.53 refund of Petroleum Product Loading Fees, pursuant to NMSA 1978, Section 7-13A et seq., and Special Fuel Suppliers Tax, pursuant to NMSA 1978, Section 7-16A et seq., that Musket paid to the State upon importation of 1,240,334 gallons of diesel fuel into the State. There is no genuine dispute that Musket was in fact required to pay both the Special Fuel Suppliers Tax and Petroleum Product Loading Fees to the State upon importation of the fuel under the plain language of both statutes. *See* NMSA 1978, § 7-13A-3 (B) (1996) and NMSA 1978, § 7-16A-2.1 (C) (1997). Although not clearly established on the record, there is no dispute that Musket paid the taxes to the State upon importation. There is no evidence

on the record that Musket ever made a timely claim for refund for this money, or that Musket would have any legal basis supporting any theoretical claim for refund because Musket was legally required to remit the tax upon importation. The record clearly established that Taxpayer never paid any Petroleum Loading Fees or Special Fuel Suppliers Tax directly to the State on the diesel fuel it purchased from Musket.

NMSA 1978, Section 7-1-26 (2007) addresses claims for refund. Under NMSA 1978, § 7-1-26(A) (2007), "[a]ny person who believes that an amount of tax has been paid by or withheld *from that person* in excess of that which the person was liable… may claim a refund…" (italics added for emphasis). Taxpayer argues that the Legislature rewrote this section in the 1993 to replace the word "taxpayer" with the word "person" because it intended for anyone to be able to claim a refund even if that person was not a taxpayer for the purposes of the Tax Administration Act ("TAA"). However, regardless of the use of "person" instead of "taxpayer, the legislative choice of words in the statute still limits claims for refund to a person whom is seeking a refund on taxes paid or withheld "*from that person*." In other words, while any person may now be able to a claim a refund, that person may only do so for amounts that person remitted to the State.

This plain language reading of NMSA 1978, § 7-1-26(A) (2007) is also consistent with case law in the refund area. As the United States Supreme Court has stated, "(a)s a rule, a nontaxpayer may not sue for a refund of taxes paid by another." *Mont. v. Crow Tribe of Indians*, 523 U.S. 696, 713, 118 S. Ct. 1650, 1659 (U.S. 1998), citing *Furman Univ. v. Livingston*, 136 S.E.2d 254, 256, 244 S.C. 200, 204 (1964); *Krauss Co. v. Develle*, 236 La. 1072, 1077, 110 So. 2d 104, 106 (1959); *Kesbec, Inc. v. McGoldrick*, 278 N.Y. 293, 297, 16 N.E.2d 288, 290 (1938); cf. *United States v. California*, 507 U.S. 746, 752, 123 L. Ed. 2d 528, 113 S. Ct. 1784 (1993).

Similarly, by case law in New Mexico, only someone who has paid a tax or fee to the State may claim a refund. Although involving a different statutory claim for refund scheme then contained in the TAA, the New Mexico Supreme Court's decision in *Anadarko Petroleum Corp. v. Baca*, 117 N.M. 167, 870 P.2d 129 (N.M. 1994) is particularly insightful to the resolution of this protest. In *Anadarko*, the plaintiff oil and mining company acknowledged never paying any money directly to the State Commissioner for Public Lands yet sought a claim of refund for the portion money it remitted into a federal settlement escrow fund that it "attributed to the Commissioner's benefit…" *See id*. at 169, 131. While the New Mexico Supreme Court relied heavily on the language of the particular statute at issue for claims for refund with the Commissioner for Public Lands, it also turned to Black's Law Dictionary to resolve the issue in *Anadarko*, 169-170, 131-132:

> In addition (to the statute), the plain meaning of "refunds" from a governmental entity is that "money received by the government or its officers which, for any cause, are to be refunded or restored to the parties paying them." Black's Law Dictionary, 1282 (6th ed. 1990). Here, as the Commissioner did not receive the money which Anadarko alleges is paid to the federal court escrow fund, he cannot properly refund the same to Anadarko.

In other words, in *Anadarko* the New Mexico Supreme Court found that the government entity could not refund a person or party other than the party whom had paid the government the claimed money.

Further, since the taxpayer in *Anadarko* argued that the government had inured benefit at the taxpayer's economic detriment, the court's *Anadarko* holding extends to Taxpayer's argument in this case that the State was the beneficiary of Taxpayer's inability to recapture the economic burden of the tax. Related to this question of economic burdens and inured benefits that Taxpayer raises in this protest, the New Mexico Supreme Court ended the *Anadarko*

decision by endorsing the district court's conclusion that although the plaintiff may have had a "legitimate claim against the State," a claim for refund was not the legally supported mechanism for such a claim. *id*. at 171, 133, 12. Consistent with *Anadarko* rationale, even if there is some merit to Taxpayer's claim that it could not recuperate the economic burden in this case, that fact does not give rise to a claim for refund if the statute does not permit such a claim in this circumstance (there may be a private cause of action between the parties).

While the parties in this protest have a much larger legal dispute about whether the Petroleum Products Loading Fee and the Special Fuel Suppliers Tax may be imposed more than once or is limited to one first receipt, that dispute need not be resolved because factually Taxpayer never paid the State of New Mexico any tax on the 1,240,334 gallons of diesel fuel Musket imported into the State. Under NMSA 1978, § 7-1-26(A) (2007), *Crow Tribe of Indians*, and *Anadarko*, since Taxpayer did not pay any tax to the State, the Department has no authority to issue Taxpayer a refund regardless of Taxpayer's allegations that the State inured benefit from Taxpayer's inability to recover its economic burden. The Department properly denied Taxpayer's claim for refund in this circumstance.

**ISSUE 2: Taxpayer did not prove that the fuel it sold to unregistered suppliers was the same tax-paid fuel it purchased from Musket**.

Of the 4,320,163 in gallons of fuel Taxpayer sold during the relevant period, Taxpayer sold 4,190,724 gallons of diesel to registered suppliers and 129,439 gallons of diesel fuel to unregistered suppliers. Taxpayer was not required and did not remit any Petroleum Loading Fees or Special Fuel Suppliers Tax on its sale of 4,190,724 gallons of diesel to registered suppliers. Since Taxpayer did not remit any taxes on these 4,190,724 gallons of diesel sold to registered

suppliers, in accord with the above discussion, there is no basis to consider those gallons any further.

Taxpayer did remit Petroleum Loading Fees ($2,426.98) and Special Fuel Suppliers Tax ($27,182.19) to the State on 129,439 gallons of diesel it sold to unregistered suppliers. To the extent that Taxpayer in fact remitted a total of $29,609.17 in taxes to the State, that amount of its total claimed $283,728.53 refund is a potentially actionable claim under NMSA 1978, § 7-1-26 (A) (2007). However, Taxpayer failed to show that it was factually entitled to a $29,609.17 refund on the 129,439 gallons of diesel it sold to unregistered suppliers.

Taxpayer's overall argument for refund is that both Petroleum Loading Fees or Special Fuel Suppliers Tax are only imposed once upon first receipt, and therefore once Musket paid the tax on the imported fuel, Taxpayer was not required to remit any additional tax on that Musket fuel to the state. However, in order to grant Taxpayer a $29,609.17 refund on the 129,439 gallons of diesel it sold to unregistered suppliers, which was the only instance when Taxpayer remitted tax to New Mexico, one must make a factual assumption that all of the tax-paid Musket fuel was sold to the unregistered suppliers. Under Taxpayer's argument, since Musket had already paid the tax on the imported fuel, if Taxpayer sold that imported, tax-paid fuel to unregistered suppliers, Taxpayer should not have been required to remit the $29,609.17 in taxes and should be entitled to a refund because those taxes had already been paid once upon first receipt. The assumption built into Taxpayer's argument is not supported by this record.

Taxpayer was clearly able to account for all fuel entering its Bloomfield terminal holdings, including the 1,240,334 gallons of imported Musket diesel fuel for which Musket had already paid the Petroleum Loading Fees or Special Fuel Suppliers Tax. Taxpayer could also account for all fuel sales from its Bloomfield terminal holdings during the relevant period. But

Taxpayer could not provide information about which portion of the 4,320,163 gallons of commingled fuel, which included both tax-paid 1,240,334 gallons Musket fuel and 3,079,829 gallons of pipeline fuel still subject to special fuel taxes, was sold to any particular registered or unregistered supplier. This information about the particular type of fuel sold to a particular supplier is important because of the disparate tax treatment between sales to registered suppliers (no tax required from Taxpayer) and unregistered suppliers (tax required from Taxpayer).

However, the evidence did not establish that Taxpayer sold the tax-paid Musket diesel fuel to unregistered suppliers because Taxpayer did not establish the manner of sale and accounting to any particular client. For instance, Taxpayer could have sold the entire Musket tax-paid imported diesel to registered suppliers, in which case Taxpayer would have never remitted any tax on those sales, or all to unregistered suppliers which would have required Taxpayer to remit the special fuel taxes. As another example, out of the 4,320,163 in gallons of fuel Taxpayer sold during the relevant period, Taxpayer may have decided to sell the first 1,240,334 gallons sold from the portion of the commingled Musket diesel fuel. However, as Taxpayer's witness Ms. Mathews' acknowledged, Taxpayer did not employ any accounting system like first in, first out or last in, last out to account for the specific type of fuel sold from the commingled fuel at the Bloomfield terminal. Taxpayer's witness Ms. Mathews' acknowledged that the assumption built into Taxpayer's argument—that it sold only the tax-paid Musket fuel to unregistered suppliers and therefore the special fuel taxes were remitted twice on the same gallons of fuel—could also go the other direction, that Taxpayer sold the tax-paid fuel entirely to registered suppliers where Taxpayer paid no additional special fuel taxes.

Because Taxpayer cannot substantiate the factual assumption built into its argument that it was entitled to a refund on the 129,439 gallons of diesel fuel it sold to unregistered suppliers,

Taxpayer's argument for a refund related to those gallons is not factually persuasive regardless of the legal merits of the argument.

**Issue 3: Estoppel and Equitable Recoupment**

Taxpayer further argues that it is entitled to a refund under a theory of estoppel or equitable recoupment because it was the Department that initially directed Taxpayer to file a claim for refund, and Department employee Leslie Montgomery seemed to suggest in some emails that a refund would be forthcoming in light of the circumstances.

Under NMSA 1978, Section 7-1-60 (1993), the State is estopped and precluded from acting only when a complaining taxpayer can show that the complaining taxpayer's

> action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary, unless the ruling had been rendered invalid or had been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose.

In this matter, none of Ms. Montgomery's email—even those suggesting support for Taxpayer's claim for refund position—rise to the level requiring statutory estoppel under NMSA 1978, Section 7-1-60 (1993).

Regarding any claim for equitable estoppel, the hearing officer lacks authority to grant such relief. The adjudicative functions of an administrative agency like the Department are considered by New Mexico courts to be "quasi-judicial" powers. With limited exceptions, according to the New Mexico Supreme Court the quasi-judicial powers of an administrative agency do not include the authority to grant equitable relief to a party before the agency, although a court may later do so after the administrative action is completed. *See AA Oilfield*

*Service v. New Mexico State Corporation Commission*, 118 N.M. 273, 279, 881 P.2d 18, 24 (1994).

Even if equitable estoppel may be addressed in this protest hearing, principals of equitable estoppel do not apply to the facts in this case. As a general rule, courts are reluctant to apply the doctrine of equitable estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *See Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Bien Mur Indian Market*, at 231, 876. Moreover, like here where the claim for refund does not comply with the requirements of NMSA 1978, §7-1-26 (2007), equitable estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board*, 115 N.M. 650, 658-59, 857 P.2d 761, 769-70 (1993).

In order for Taxpayer to establish an equitable estoppel claim against the Department, Taxpayer must show "affirmative misconduct on the part of the government" and four other factors:

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury. *Kilmer v. Goodwin*, 136 N.M. 440, 447, 2004 NMCA 122, ¶27, 99 P.3d 690, 697 (N.M. Ct. App. 2004).

Taxpayer cannot establish that the Department engaged in affirmative misconduct or that Taxpayer reasonably relied on government's conduct to Taxpayer's injury. Taxpayer seems to argue that the Department engaged in affirmative misconduct in that rather than considering the Musket fuel issue as part of an ongoing audit, the Department directed Taxpayer to file a

separate claim for refund, which it ultimately denied. However, directing a party to the statutory refund process is hardly an indication of affirmative misconduct. The Department may have directed Taxpayer to apply for a refund because that is the most proper statutory mechanism for considering the refund or credit of the large sum of money at issued in this protest or because sales from the Bloomfield Terminal were beyond the scope of the audit.

Taxpayer also fails to establish it reasonably relied on the Department's conduct. Ms. Montgomery's emails, even those suggesting tacit support of Taxpayer's claim for refund, all made clear that she had to pass the claim for refund up in her chain of command. Because Ms. Montgomery made clear that others had to act on the claim before it could be granted, it was not reasonable of Taxpayer to rely on Ms. Montgomery's emails for the proposition that the claim for refund would be granted. Additionally, under NMSA 1978, Section 7-1-29 (2006), the Department may only grant a claim for refund over $10,000 upon approval of the New Mexico Attorney General. Consequently, as a matter of statute, Taxpayer could not reasonably rely on any of the emails of Ms. Montgomery where she indicated support of Taxpayer's claim for refund because Ms. Montgomery and the Department could not act under the statute until the Attorney General had approved the claim for refund.

Regarding Taxpayer's substantial compliance argument, Taxpayer fails to cite any authority standing for the proposition that the substantial compliance doctrine is applicable under the TAA. The evidence simply does not support that Taxpayer's claim for refund substantially complied with the requirements of NMSA 1978, § 7-1-26 (A) (2007) for the reasons articulated above.

Finally, Taxpayer's equitable recoupment argument is not persuasive. According to the New Mexico Court of Appeals, there are three conditions that must be met in order to establish a

satisfactory claim for equitable recoupment: "1) a single taxable event, 2) taxes assessed on that event on inconsistent theories, and 3) a strict identity of interest." *See Teco Invs. v. Taxation & Revenue Dep't*, 125 N.M. 103, 106, 1998 NMCA 55, ¶8, 957 P.2d 532, 535 (N.M. Ct. App. 1998). Under this standard, Taxpayer cannot establish the second element, taxes assessed on that event on an inconsistent theory. The Department did not assess, and the Taxpayer did not pay any taxes to the State upon Musket's importation of the diesel fuel into New Mexico. Moreover, to the extent that Taxpayer argues that its later taxable sales to unregistered suppliers resulted in a tax paid on the imported Musket fuel on an inconsistent theory, those sales no longer constitute a single taxable event or a strict identity of interest under the first and third elements of the equitable recoupment analysis because each sale involved a new transaction of commingled fuel with a new party—the unregistered supplier—to the sale.

In sum, because the statute does not allow Taxpayer to claim a refund for money it did not pay to the State. In addition Taxpayer could not distinguish between the particular type of fuel it sold to unregistered suppliers for the small portion of taxable sales it actually had during the relevant period, and because theories of statutory estoppel, equitable estoppel, substantial compliance, and equitable recoupment do not provide a basis for a refund, the Department properly denied Taxpayer's claim for refund. The protest is denied.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest. Jurisdiction lies over the parties and the subject matter of this protest.

B. Because Taxpayer did not pay any taxes to the State of New Mexico on Musket's importation of diesel fuel into New Mexico, Taxpayer is not a person who may claim a refund under the plain language of NMSA 1978, § 7-1-26(A) (2007).

C. For the small percentage of fuel Taxpayer sold to unregistered suppliers that resulted in payment of tax to the State, Taxpayer was unable to document that it sold those unregistered suppliers the tax-paid Musket diesel fuel.

D. Taxpayer could not establish a claim for statutory estoppel under NMSA 1978, Section 7-1-60 (1993).

E. Taxpayer's claim for equitable estoppel also fails because it did not establish governmental misconduct or that it could reasonably rely on the email of Ms. Montgomery indicating that she was paying on the claim for refund to her superiors for approval.

F. Taxpayer cited no case law supporting its claim for substantial compliance with the refund statute.

G. Taxpayer did not establish its claim for equitable recoupment of the imposed taxes.

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

DATED: August 31, 2012.

Brian VanDenzen, Esq.
Tax Hearing Officer