

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

**IN THE MATTER OF THE PROTEST OF
HENRY AND KRISTYNA KALKA
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L1766321472**

No. 13-18

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 27, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. At the hearing, Jeffery M. Pennington, CPA, represented Henry and Krystyna Kalka (“Taxpayers”). Krystyna Kalka appeared as witness for Taxpayers. Chief Legal Counsel Nelson J. Gooden appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibits 1-1 through 1-12 were admitted into the record. Department Exhibits A-D were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. During 2007, Taxpayers made \$6,000.00 in estimated personal income tax payments to the State. [**Taxpayers Ex. 1.5; Department Ex. B.1**].
2. In Taxpayers’ 2007 New Mexico Personal Income Tax return, Taxpayers only listed \$3,000.00 in estimated tax payments for that year. Because of their omission of the \$3,000.00 estimated tax payment from their income tax liability calculation, Taxpayers overpaid their 2007 personal income taxes. [**Taxpayers Ex. 1.4-5; Department Ex. A-B.1**].

3. On September 14, 2011, the Department sent Taxpayers a letter informing them that their Personal Income Tax filing for the period ending December 31, 2007 “reflect[ed] an overpayment of \$2,801.96.” **[Taxpayers Ex. 1.4; Department Ex. A].**

4. The Department’s September 14, 2011 letter further advised Taxpayers that

If after reviewing your records you agree that you have overpaid, complete the enclosed Application for Tax Refund (RPD-41071) and mail it with this letter to the address listed below.

A refund check will be mailed to you.

...

Due to the statute of limitations, **your Application for Refund must be postmarked no later than December 31, 2011.**

[Taxpayers Ex. 1.4; Department Ex. A].

5. Under NMSA 1978, Section 7-1-26 (2007), Taxpayers had until December 31, 2011, to file a claim for refund on 2007 personal income taxes, which is three years from the end of the calendar year from the April 15, 2008 due date of the 2007 personal income taxes.

6. On December 21, 2011, Taxpayers mailed the Department an Application for Refund and an Amended 2007 PIT-X New Mexico Personal Income Tax return, as prepared by Taxpayers’ accountant Mr. Pennington, CPA. **[Taxpayers Ex. 1.5-8].**

7. As indicated by the date stamp on top of the Taxpayers’ Amended 2007 PIT-X New Mexico Personal Income Tax return, the Department received Taxpayers’ Amended Return on December 21, 2011. **[Taxpayers Ex. 1.6; 06-27-13 CD 31:26-48].**

8. Taxpayers assumed based upon the language of the Department’s September 14, 2011 letter, that upon timely submission of the Application for Refund and an Amended 2007 PIT-X New Mexico Personal Income Tax return, the Department would mail them a refund check without need for further contact with the Department. **[06-27-13 CD 21:03-34].**

9. After submission of Taxpayers' Application for Refund and Amended 2007 PIT-X, Henry Kalka sadly became terminally ill with cancer and passed away in June 2012. Krystyna Kalka understandably focused all her energies on caring for Mr. Kalka and mourning his loss rather than tracking Taxpayers' claim for refund. **[06-27-13 CD 10:08-22]**.

10. The Department took no action to either approve or deny Taxpayers' Application for Refund and Amended 2007 PIT-X New Mexico Personal Income Tax return by April 19, 2012, 120-days after Taxpayers' filing of that claim.

11. There is no clear evidence or clear explanation on the record for the Department's inaction on the claim within 120-days of Taxpayers' Application for Refund. **[06-27-13 CD 30:51-31:11]**.

12. The Department did not contact Taxpayers or Taxpayers' CPA Mr. Pennington at any point regarding alleged deficiencies with Taxpayers' claim for refund or amended return. **[Taxpayers Ex. 1.6; 06-27-13 CD 10:24-11:10, 22:29-41]**.

13. Taxpayers, either directly or through their representative Mr. Pennington, CPA, did not file a formal protest or commence a civil action in the district court challenging the Department's failure to approve or deny Taxpayers' Application for Refund by July 18, 2012, 210-days after their filing of that claim with the Department. **[06-27-13 CD 13:11-30]**.

14. On December 31, 2012, Taxpayers' representative Mr. Pennington, CPA, resubmitted Taxpayers' Application for Refund to the Department via facsimile. **[Department Ex. C]**.

15. On December 31, 2013, under letter identification number L1766321472, the Department denied Taxpayers' resubmitted December 31, 2012 application for refund because the statute of limitations had expired. **[Taxpayers Ex. 1.3; Department Ex. D]**.

16. On January 15, 2013, Taxpayers protested the Department's denial of the claim for refund. [**Taxpayers Ex. 1.1-2**].

17. On February 4, 2013, the Department acknowledged receipt of Taxpayers' protest.

18. On May 2, 2013, the Department requested a hearing with the Hearing Bureau on this protest.

19. On May 3, 2013, the Hearing Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on June 25, 2013.

20. On June 21, 2013, Taxpayers' representative Mr. Pennington, CPA, moved to continue the scheduled hearing until June 27, 2013. The Department did not oppose Taxpayers' motion.

21. On June 24, 2013, the Hearing Bureau issued Amended Notice of Hearing continuing the original hearing date and setting a new hearing for June 27, 2013.

DISCUSSION

The legal issue in this protest is whether the Department has the authority to grant a refund after Taxpayers did not file a protest or a civil action challenging the Department's inaction on their initial claim after the expiration of 210-days from the date of filing of the claim and the statute of limitations had expired by the time Taxpayers filed the second claim for refund. Taxpayers also raise fairness challenges to the Department's denial of the claim for refund.

In this matter, the Department directed Taxpayers to file a claim for refund on \$2,801.96 in overpaid 2007 personal income tax, and indicated in the same letter that upon timely filing of such a claim for refund, "[a] refund check will be mailed to you." With the assistance of their

accountant, Taxpayers timely filed a claim for refund and amended return of 2007 personal income taxes. Without explanation, the Department took no action within 120-days of Taxpayers' claim for refund. While the claim for refund was pending, Henry Kalka was diagnosed with terminal cancer. Mr. Kalka succumbed to his illness in June of 2012. Krystyna Kalka, who was caring for her husband and then mourning the loss of her husband, understandably did not focus on the submitted claim for refund during this period. A total of 210-days passed since the mailing of the claim for refund without Taxpayers either filing a protest or initiating a civil action in district court. When Taxpayers' representative resubmitted the claim for refund a year after the initial filing date, the Department denied the claim for refund because the statute of limitations had expired on the claim. Taxpayers timely protested the Department's denial of the claim for refund.

In pertinent part under NMSA 1978, Section 7-1-26 (D) (1) (2007), no refund can be granted unless as a result of a claim made within three-years of the end of the calendar year in which the tax was due. In this case, personal income taxes for the period ending December 31, 2007 are at issue. Under NMSA 1978, Section 7-2-12 (2003), 2007 personal income tax returns were due on April 15, 2008, making December 31, 2008 the end of the calendar year from which the returns were due. Therefore, under NMSA 1978, Section 7-1-26 (D) (1) (2007), Taxpayer had until December 31, 2011 to make any claim for refund to the Department for 2007 personal income taxes.

In response to the Department's letter of September 14, 2011, Taxpayers in fact made a timely claim for refund and amended return on December 21, 2011. The Department does not dispute that it timely received the claim for refund on that date. The Department further acknowledges that for unexplained reasons, it took no action to either approve or deny

Taxpayers' December 21, 2011 claim for refund within 120-days, which occurred on April 19, 2012¹.

Under NMSA 1978, Section 7-1-26 (B)(2) (2007), when the Department takes no action on a claim for refund within 120-days from that claim for refund, a taxpayer has 90-days to either file a protest or commence a civil action in the Santa Fe County District Court. In other words, in the face of Department inaction, a taxpayer has 210-days from the original filing date of the claim for refund to preserve their claim by either filing a protest or a civil action.

In this case, under the statutory 210-day deadline, when the Department failed to act on Taxpayers' December 21, 2011 claim for refund by April 19, 2012, Taxpayers needed to either file a written protest or commence a civil action by July 18, 2012. Taxpayers did not pursue either option by that July 18, 2012 deadline. By not filing either a protest or a civil action, Taxpayers abandoned the December 21, 2011 claim for refund and the Department was prohibited under NMSA 1978, Section 7-1-26 (B) (2) (2007) from either approving or disapproving the claim for refund.

Relevant case law affirms that when the Department takes no action on a claim for refund, that refund is time barred unless preserved through timely filing of either a protest or a civil action. In *Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690 (N.M. Ct. App. 2004), the New Mexico Court of Appeals addressed claims for refunds under NMSA 1978, Section 7-1-26. The facts in *Kilmer* established that the Department took no action on the *Kilmer* taxpayer's claim for refund within 120-days of the initial filing of that claim. *See id.* ¶9, 444,

¹ In the protest letter and in argument at hearing, Mr. Pennington, CPA, speculated that the absence of information on box 2 and box 15 of Taxpayers' Amended 2007 PIT-X New Mexico Personal Income Tax return might have explained why the Department failed to act on the claim for refund. However, the Department did not make that assertion at hearing, did not present any documents/exhibits containing that assertion, and the Department's attorney candidly acknowledged that it was unclear why the Department failed to either grant or deny the claim for refund. Even if the absence of information explains why the Department did not grant the claim for refund, there still is no good explanation why the Department did not submit a short denial letter citing that basis.

694. Like in the present protest, the *Kilmer* taxpayer failed to preserve her claim for refund within 90-days of the Department's inaction by either filing a protest or a civil suit. *See id.* ¶15, 445, 695. And like in the present protest, the statute of limitations prevented the *Kilmer* taxpayer from refiling a new claim for refund. *See id.* The New Mexico Court of Appeals noted in *Kilmer* that the Legislative purpose of the deadlines under NMSA 1978, Section 7-1-26 is "to avoid stale claims, which protects the Department's ability to stabilize and predict, with some degree of certainty, the funds it collects and manages." *id.* ¶16, 446, 696. The *Kilmer* court further found that the Legislature placed the responsibility on a taxpayer to maintain an active claim and to timely confront the Department's inactions on a claim. *See id.* The *Kilmer* court ultimately held that the Department lacked either express statutory authority under NMSA 1978, Section 7-1-26 or implied authority as an administrative agency to grant that taxpayer's stale claim for refund beyond the 210-days from the initial filing of that refund. *See id.* ¶19-24, 445-446, 695-696.

Here, while Taxpayers timely filed their initial claim for refund on December 21, 2011, Taxpayers or their accountant took no action to confront the Department's inaction on that claim within 210-days of filing that claim. Thus, like in *Kilmer*, Taxpayer's claim for refund became stale and the Department was statutorily barred from considering that claim for refund any further.

Taxpayer's December 31, 2012 resubmission of the claim for refund was exactly one-year after the expiration of the statute of limitations for a claim for refund of 2007 personal income taxes. The Department denied that resubmission of the claim for refund because it was beyond the statute of limitations. Under the plain language of NMSA 1978, Section 7-1-26 (D) (1) (2007), the Department had no statutory authority to grant a claim for refund made after three years from the end of the calendar year in which the tax was due. The reasoning the Court of

Appeals cited in *Kilmer*, as discussed above, equally applies to a claim for refund filed after the expiration of statute of limitation under NMSA 1978, Section 7-1-26 (D) (1) (2007). Pursuant to *Kilmer*, the Department further lacks any implied authority that might allow it to waive or otherwise find a manner to approve a claim for refund after the expiration of the statute of limitations. *See id.* ¶24, 446, 696.

Taxpayers argued they were entitled to their claim for refund because the Department had told Taxpayers in the September 14, 2011 letter that they were entitled to a refund check upon timely submission of the refund application and because Taxpayers should not be held liable for the Department's own failure to act on or communicate with Taxpayers about Taxpayers' claim for refund. To the extent the Mrs. Kalka mentioned that the refund amount in dispute is her money and she is not required to know the rules, it must be noted that under New Mexico's self-reporting tax system, every person is charged with the reasonable duty to ascertain the possible tax consequences of his or her actions. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16, 17 (Ct. App. 1976). The basis of the refund claim—Taxpayers' initial over-reporting and overpayment of 2007 personal income taxes—does not stem from a Department error but from Taxpayers' own miscalculations. Taxpayers are responsible for the initial overpayment of 2007 personal income taxes regardless of their absence of knowledge of tax rules. However, to the extent that Taxpayers argue they should not be held liable for Department errors in processing their claim for refund and failure to communicate with Taxpayers about that claim, Taxpayers' argument amounts to a claim for equitable relief.

In *Kilmer*, the Court of Appeals also considered that taxpayer's claims for equitable relief because of numerous alleged errors the Department made in that case. *See id.* ¶25, 446-447, 696-697. As part of its analysis of the issues, the *Kilmer* Court of Appeals provided a broad outline of

equitable estoppel in the tax context. Generally, courts are reluctant to apply the doctrine of equitable estoppel against the state. *See Kilmer*, ¶26, 447, 697 (internal citations omitted). This is particularly true of cases involving taxation. *id.* (internal citations omitted). The *Kilmer* Court of Appeals noted that estoppel can only apply when “there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it.” *id.* (internal citations omitted). Moreover, like here where the claim for refund does not comply with the requirements of NMSA 1978, Section 7-1-26 (2007), “equitable estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute.” *id.* (internal citations omitted).

Under *Kilmer*, ¶26, 447, 697 (internal citations omitted), in order for Taxpayer to establish an equitable estoppel claim against the Department, must show that

- (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.

The claimant must also show “affirmative misconduct on the part of the government.” *id.*, ¶27, 447, 697 (internal citations omitted).

Applying this standard to the facts of this case, two factors clearly support Taxpayers’ position for equitable relief: under the first factor, the Department knew the relevant facts on the claim for refund because the Department itself solicited Taxpayers’ claim for refund. Under the second factor, the Taxpayers had a right to believe that the Department meant what it said when the Department told Taxpayers that if they timely submitted a claim for refund, “a refund check will be mailed to you.”

However, the remaining three factors do not support Taxpayers’ claim for equitable relief. In considering the third and fourth equitable relief elements, the *Kilmer* Court of Appeals

considered the conduct of both parties. *id.*, ¶41, 699, 449. In particular, the *Kilmer* Court of Appeals found that the Department’s own failings in that case were mitigated by the fact that the *Kilmer* taxpayer was represented by an accountant, a “professional, capable of performing her own research... on New Mexico tax law.” *id.*, ¶41, 700, 450. The *Kilmer* Court of Appeals found that estoppel could not apply because of the accountant’s “expertise, the resources available to [the accountant], and the language in Section 7-1-26 addressing the action a taxpayer should take when Department inaction exceeds 120 days...” *id.* Further, the Court of Appeals found it was “not reasonable” for the accountant “to assume that [the accountant] would not need to do anything further except wait for the claim to be denied.” *id.*

Likewise, in the present protest, Mr. Pennington, CPA, represented Taxpayers and assisted in the preparation of the Taxpayers’ December 21, 2011 Amended Returns and Claim for Refund. Taxpayers’ inability to track the claim for refund after they submitted their amended returns and claim for refund is understandable given Mr. Kalka’s illness. However, during this period, Taxpayers’ accountant Mr. Pennington, CPA, was certainly capable of researching the refund requirements under NMSA 1978, Section 7-1-26 further, tracking the status of the refund claim with the Department, and timely confronting the Department’s inaction. The Department’s failure to act on Taxpayer’s claim for refund and communicate with Taxpayers is offset by the fact that Taxpayers had an accountant with the ability to research the law, understand the law surrounding a claim for refund, actively track the claim for refund during the relevant period, and timely challenge the Department’s failure to act either by filing a civil suit or a protest. Therefore, factors three and four of the estoppel analysis do not support Taxpayers’ claim for equitable relief and under the *Kilmer* rationale, equitable estoppel does not apply to this protest.

This is a difficult decision to render given the fact that the Department had no explanation for its inaction on the initial claim for refund it had solicited and because Mr. Kalka's terminal illness during the relevant period clearly affected Mrs. Kalka's ability to track the claim for refund. While the statute implicitly recognizes that the Department may choose to take no action on a claim for a refund, there is no apparent logical reason for the Department to fail to act or communicate with Taxpayers about their claim for refund in a circumstance where the Department initially solicited the claim for refund and suggested that a refund check would be forthcoming upon receipt of the solicited claim for refund. While there is no evidence under the final estoppel element that the Department engaged in any affirmative misconduct, Mrs. Kalka's frustration with the Department's inaction and lack of communication is understandable: the Department is a public servant and all citizens—including Ms. Kalka and Mr. Pennington, CPA—should reasonably expect better communication and prompt action from the Department in this circumstance where the Department itself initially solicited the claim for refund and suggested that a check would be issued upon receipt of the claim.

Nevertheless, despite sympathizing with Taxpayers' position, controlling precedent dictates the outcome of this protest. Under NMSA 1978, Section 7-1-26 (B) (2007) and *Kilmer*, Taxpayers' December 21, 2011 claim for refund became stale when Taxpayers did not file a protest or a civil action within 210-days, and the Department lacked authority to consider that claim thereafter. Further, the Department could not consider Taxpayers' December 31, 2012 claim for refund because it was beyond the statute of limitations under NMSA 1978, Section 7-1-26 (D) (1) (2007). Finally, although the Department's inactions in this matter fell below reasonable public expectations, under the *Kilmer* analysis, Taxpayers are not entitled to equitable estoppel relief. *See Kilmer*, ¶¶26, 447, 697 (internal citations omitted).

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the Department's denial of their claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayers did not timely file a protest or civil action to preserve their December 21, 2011 claim for refund of 2007 personal income tax under the time limitations set out in NMSA 1978, Section 7-1-26 (B)(2) (2007). Therefore, the Department lacked express or inherent authority to consider the December 21, 2011 claim further. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶¶19-24, 136 N.M. 440, 445-6, 99 P.3d 690, 695-6 (N.M. Ct. App. 2004).

C. Taxpayers December 31, 2012 claim for refund of 2007 personal income tax was beyond the three-year statute of limitations deadline for the filing of a claim for refund under NMSA 1978, Section 7-1-26 (D) (1) (2007).

D. Taxpayers are not entitled to equitable estoppel relief under the five-factor test articulated in *Kilmer*, ¶¶26, 447, 697, because the Department did not engage in affirmative misconduct and because Taxpayers' accountant was capable of researching the refund law, understanding the refund law, tracking the claim for refund, and preserving that claim regardless of the Department's errors and inactions. *See Kilmer*, ¶¶41, 700, 450.

For the foregoing reasons, the Taxpayers' protest **IS DENIED**.

DATED: July 25, 2013.

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