

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

**IN THE MATTER OF THE PROTEST OF
UNIQUE DENTAL LABORATORY, LLC
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1459749184**

No. 13-1

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on December 18, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Ms. Loretta Molina appeared pro se on behalf of Unique Dental Laboratories (“Taxpayer”). Staff attorney Laura E. Sanchez represented the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Thomas Dillon appeared as a witness for the Department. Department Exhibits A-G were admitted into the record. The hearing officer reserved ruling on Taxpayer’s tendered exhibits 1-3 depending on relevancy. 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. Ms. Loretta Molina started a small dental laboratory business called Unique Dental Laboratories.
2. Initially, Taxpayer only had one employee. Taxpayer grew to two and then three employees.
3. Taxpayer provides quality dental laboratory services to local dentists in transactions supported by executed Non Taxable Transaction Certificates (“NTTCs”). Taxpayer

did not impose gross receipts taxes on any invoices for those dental services during the relevant period.

4. From December 2003 through January 2007, Taxpayer alleged that it calculated, reported, and paid its gross receipts liability including otherwise deductible transactions for the sale of a service for resale.

5. In March 2007, Taxpayer hired an accountant, Jerry Kegerreis, to handle its tax obligations.

6. Taxpayer's accountant made Taxpayer aware of Taxpayer's apparent failure to claim meritorious deductions resulting in the overpayment of gross receipts tax in the previous CRS filings.

7. On February 22, 2008, Taxpayer submitted a claim for refund to the Department for \$31,525.38 in paid gross receipts taxes from December 2003 through January 2007¹.

8. On March 19, 2008, the Department sent Taxpayer a letter acknowledging receipt of Taxpayer's claim for refund and requesting copies of invoices matching Taxpayer's NTTCs.

9. Taxpayer called Ms. Eloya Archuleta of the Department after receipt of this letter to confirm what information Taxpayer needed to provide in order to substantiate the February 22, 2008 claim for refund. Taxpayer was informed that it needed to provide all invoices relating to the NTTCs to the Department.

10. Taxpayer was overwhelmed with the prospects of obtaining all the invoices to support Taxpayer's claim for refund and did not submit those invoices in response to the Department's March 19, 2008 letter.

¹ Neither party could actually produce a copy of the February 22, 2008 claim for refund, so the basis for the claim, the exact amount of the claim, and tax period of the claim cannot conclusively be found as findings of fact; this information comes from Taxpayer's representations in the protest letter and testimony.

11. Other than requesting additional information from Taxpayer, the Department took no action to either approve or deny Taxpayer's February 22, 2008 claim for refund within 120-days (June 21, 2008).

12. Taxpayer did not file a formal protest of the Department's inaction on the original claim for refund or commence a civil action in the district court on the original claim for refund within 210-days (September 19, 2008) of its filing of the claim for refund with the Department.

13. Taxpayer filed no other claim for refund before December 31, 2010, three-years since the end of the calendar year in which Taxpayer's January 2007 CRS taxes were due.

14. Taxpayer suffered financial difficulties because of the deep economic recession beginning in 2008. As a result, Taxpayer had to reduce its staff from three employees to two employees.

15. On May 12, 2012, Taxpayer filed another claim for refund with the Department for \$31,525.38 in gross receipts taxes for periods ending December 2003 through January 2007. The claim for refund was again premised on deductible transactions supported by NTTCS.

16. On May 21, 2012, via letter identification number L1459749184, the Department denied Taxpayer's May 12, 2012 claim for refund on the basis that Taxpayer's claim for refund was outside of the three year statute of limitations under NMSA 1978, Section 7-1-26 (2007).

17. On June 14, 2012, Taxpayer protested the Department's denial of the May 12, 2012 claim for refund, asking that the "statute of limitations be waived or another option be identified for approving my claim."

18. Taxpayer submitted copies of its protest to the Department's Secretary and to the Governor.

19. On July 13, 2012, the Department acknowledged receipt of Taxpayer's protest and informed Taxpayer that the Department's Thomas J. Dillon, CPA, had been assigned Taxpayer's protest.

20. On July 18, 2012, Mr. Dillon sent Taxpayer a letter reiterating the lapse of the statutes of limitations basis for the Department's denial of the claim for refund.

21. On September 7, 2012, the Department requested a hearing in this matter.

22. On September 11, 2012, the Hearing Bureau sent Notice of Administrative Hearing, scheduling this matter for December 18, 2012.

23. Taxpayer submitted three exhibits containing its invoices and NTTCs to the Hearing Bureau before the hearing. At the hearing, the undersigned hearing officer reserved ruling on the admission of those exhibits and directed Taxpayer to maintain possession of those exhibits until ordered to produce them to the Hearing Bureau.

DISCUSSION

The legal question at protest in this matter is straightforward in light of the controlling statute and case-law: whether the Department has any authority to grant a claim for refund after the Taxpayer failed to timely confront the Department's inaction on an initial claim for refund and after the statute of limitations for a new claim had passed? In short answer, regardless of the merits of Taxpayer's claim for refund, the Department may not grant Taxpayer's claim for refund because the claim is time-barred by operation of law.

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, Taxpayer claimed a refund for CRS gross receipts tax reporting period ending January 31, 2007. Under NMSA 1978, Section 7-9-11, those gross

receipts taxes were due on February 25, 2007. The end of the calendar year from that gross receipts tax deadline was December 31, 2007. Under NMSA 1978, Section 7-1-26 (D) (1) (2007), Taxpayer had until December 31, 2010 to make any claim for refund to the Department.

Taxpayer did make a timely claim of refund on February 22, 2008. On March 19, 2008, the Department requested additional Taxpayer information to substantiate Taxpayer's claim for refund. At that time, Taxpayer did not submit the requested information for the Department. Probably because the Department never received the additional requested information from Taxpayer, the Department neither granted nor denied Taxpayer's February 22, 2008 claim for refund within 120-days, which occurred on June 21, 2008.

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, a taxpayer has 210-days from the date of filing a claim for refund to either protest the Department's inaction or commence a civil action. In this case, when the Department failed to act on Taxpayer's February 22, 2008 claim for refund by June 21, 2008, Taxpayer needed to either file a written protest or commence a civil action by September 19, 2008. Taxpayer did not assert either option by that September 19, 2008 deadline. By not filing either a protest or civil action, Taxpayer abandoned the February 22, 2008 claim for refund and the Department was prohibited by the statute from either approving or disapproving the claim for refund under NMSA 1978, Section 7-1-26 (b)(2) (2007).

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*, 136 N.M. 440, 2004-NMCA-122, 99 P.3d 690 (N.M. Ct.

App. 2004), the New Mexico Court of Appeals dealt with a similar set of facts and circumstances as this present protest. In *Kilmer*, the taxpayer had filed a New Mexico personal income tax return for tax year 1995. *See id.* at 443. In 1998, the State of California began auditing the *Kilmer* taxpayer because California believed that the taxpayer had been a resident of California in 1995 rather than New Mexico. *See id.* In response to this California audit, in 1999 the *Kilmer* taxpayer filed a protective claim for refund with the Department for the 1995 personal income taxes paid to New Mexico. *See id.* The facts in *Kilmer* establish that the Department took no action on the *Kilmer* taxpayer's protective claim for refund within 120-days of the initial filing of that claim. *See id.* at 444. 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.* at 445. 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 found in *Kilmer* that the Legislative purpose with the deadlines set out in NMSA 1978, § 7-1-26 (D) (1) (2007) 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.* at 445. 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 explicit statutory authority under NMSA 1978, § 7-1-26 (D) (1) 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.* 444-446.

Like in *Kilmer*, because Taxpayer in this matter failed to either protest or initiate a civil action for its claim for refund within 210-days of filing that claim, Taxpayer's claim for refund

became stale and the Department was statutorily barred from considering that February 22, 2008 claim for refund any further.

Taxpayer did not file another claim for refund before the expiration of the statute of limitations on December 31, 2010. Taxpayer's May 5, 2012 claim for refund was more than 16-months after the expiration of the statute of limitations. The Department denied that May 5, 2012 claim for refund because it was past the statute of limitations. That denial triggered this protest. Taxpayer asks that the "statute of limitations be waived or another option be identified for approving (the) claim."

However, 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, as Taxpayer requests, to waive or otherwise find a manner to approve a claim for refund after the expiration of the statute of limitations. *See id.* 446. Although Taxpayer points to economic hardship as a basis for granting the untimely claim for refund, the Legislature has not provided any authority that allows the Department to consider economic hardship as a basis to grant a claim for refund beyond the statute of limitations. *See* NMSA 1978, § 7-1-26 (2007) generally.

Regarding the merits of the underlying claim for refund, it must be noted that Taxpayer was completely credible in her testimony that she made an honest mistake in paying too much gross receipts tax to the State. However, 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. *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). While Taxpayer made an honest mistake, it was nevertheless a mistake. Taxpayer could have avoided that mistake initially by further research or by consultation with a tax professional at the time of the CRS filings. Even after the mistake was made, Taxpayer still had the power to timely correct that mistake by submitting the requested invoices to the Department to support the February 22, 2008 claim for refund when requested in March of 2008 or by timely filing a protest or civil action by September 19, 2008.

The Department has no legal basis to grant Taxpayer's claim for refund after the expiration of the statute of limitations regardless of the merits of the underlying claim. To that end, the undersigned Hearing Officer does not admit Taxpayer's proposed exhibits, as the exhibits relate to the merits of the claim for refund. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

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

B. Taxpayer failed to timely preserve its February 22, 2008 claim for refund of 2007 gross receipts tax under the time limitations set out in NMSA 1978, Section 7-1-26 (B)(2) (2007).

C. Taxpayer's May 5, 2012 claim for refund 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. The Department lacks the statutory or implicit authority to grant Taxpayer's claim for refund pursuant to the rationale and holding of *Kilmer v. Goodwin*, 136 N.M. 440, 2004-NMCA-122, 99 P.3d 690 (N.M. Ct. App. 2004).

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

DATED: January 22, 2013.

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