

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

**IN THE MATTER OF THE PROTEST OF
TAWANDA LATHAM
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L0002120144**

No. 14-14

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 6, 2014, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Elena Morgan, attorney for the Department. Ms. Mary Griego appeared and testified as a witness for the Department. Ms. Tawanda Latham (“Taxpayer”) appeared and testified. The Department introduced into the record Exhibit D. Taxpayer presented Exhibits 1 and 2. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer filed an application or claim for refund for tax years 2004 through 2009 on June 21, 2013. Exhibit 1.
2. Taxpayer requested a refund of \$17,301.97 in gross receipts taxes in the application or claim for refund. Exhibit 1.
3. The Department denied the refund request on October 3, 2013 because the June 2013 application or claim for refund was filed beyond the three year statute of limitations. Letter ID No. L0002120144.
4. Taxpayer protested the denial of the refund on October 9, 2013.
5. The Department requested a hearing in this matter on November 6, 2013.
6. On November 14, 2013, the Hearings Bureau mailed a Notice of Administrative

Hearing in this matter setting the hearing for January 6, 2014.

7. During the tax period, Taxpayer provided community based services as a licensed occupational therapist to individuals with disabilities who were enrolled in the developmental disability waiver program with the State of New Mexico. Taxpayer contracted directly with the Department of Health, State of New Mexico but received payment for services from both federal and state sources.

8. Taxpayer is an independent contractor and began her business in 2004, but she starting contracting with the Department of Health, State of New Mexico in 2005. (This testimony is unclear since Taxpayer's application for refund included the 2004 tax year.)

9. Taxpayer was told by a Department employee in 2004 or 2005 that she was required to file returns and pay taxes on the gross receipts she received from performing services for the Department of Health.

10. Taxpayer sporadically filed paid gross receipts taxes for tax periods 2004 through 2008. Exhibit D. The total amount of payments for these tax periods is \$17,201.97. Exhibit D. Taxpayer did not dispute that the payments add to \$17,201.97 instead of 17,301.97.

11. Taxpayer was issued a limited scope audit by the Department for tax year 2008. Taxpayer made two payments towards the liability of tax for tax year 2008. One payment was made for \$5,742.17 on July 15, 2010 and the other payment was for \$778.78 made on September 30, 2010.

12. Taxpayer requested a refund of any gross receipts taxes paid for tax years 2010 through 2013. The Department granted Taxpayer's request for a refund for these tax periods.

13. In September 2012, Taxpayer was notified that she was not in compliance with her reporting requirements.

14. On October 25, 2012, Taxpayer went to the Department's office in Albuquerque to discuss the matter and she was provided a list of non-filed reporting periods from Mabel. (CD 05:21-05:38). Taxpayer was in the process of working out a payment plan when Taxpayer was directed to speak with Michelle Gonzales from the Department. (CD 05:50-5:58).

15. Taxpayer stated in her protest letter that she was audited in November 2012 and that she spoke with Michelle Gonzales on December 7, 2012. Protest Letter dated October 9, 2013.

16. At some point, Taxpayer was told by Michelle Gonzales from the Department that she probably was exempt from paying gross receipts taxes. (CD 06:50-06:55).

17. Taxpayer applied and received a refund from the Department for tax years 2010 through 2012.

18. Taxpayer testified that "nobody ever let her know" that she was entitled to a refund. (CD 32:47-34:03).

19. Taxpayer does not have any nontaxable transaction certificates (NTTCs) for any transactions.

DISCUSSION

The issue to be determined is whether Taxpayer is entitled to a refund amount of \$17,301.97 which she requested on June 21, 2013. There are no factual issues in dispute. Taxpayer argued that she was unable to file a timely refund claim because she did not know that

she was entitled to the refund because she had initially been told by a Department employee that she should be filing and reporting gross receipts taxes.

Claim for Refund.

Generally speaking, a claim for refund must be filed within three years from the end of the calendar year in which the payment was originally due or the overpayment was made. NMSA 1978, §7-1-26 (D) (2007). The statute is fairly clear and states that: "...no credit or refund of any amount may be allowed or made to any person ... (1) within three years of the end of the calendar year in which: (a) the payment was originally due or the overpayment resulted from an assessment...". The payment for each monthly reporting period was due on or before the 25th of the month following the month in which the taxable event occurred. NMSA 1978, §7-9-11 (1969). In addition, a claim for refund may be filed one year after the tax was paid if the tax was not paid by the original due date. NMSA 1978, §7-1-26(D)(4)(2013).

The claim for refund statute absolutely bars the Department from acting on a claim for refund that is not filed within the time period set out in the statute. *See Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, 99 P.3d 690. It is incumbent on a taxpayer to file the protest or action in court within the statutory period. *See id.* at ¶21. The court in *Kilmer* stated that "The purpose of the time deadline in 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." *See id.* at ¶16.

In this case, the claim for refund of \$17,301.97, which was filed on June 21, 2013, was filed untimely for all of the tax periods from 2004 through 2009. Taxpayer was required to file

her claim for refund no later than the end of the calendar year following three years after each monthly return was due. The protest auditor, Mary Griego, nicely set out the three year statute of limitations for each reporting period on a spreadsheet and the spreadsheet clearly indicates that the application for refund was filed untimely. Exhibit D. Therefore, the claim for refund was filed untimely by Taxpayer.

The other issue Taxpayer raised at the hearing was whether the statute of limitations applied to her payments made in 2010 for tax year 2008. For tax year 2008, Taxpayer was issued a limited scope audit indicating she had a tax liability. Taxpayer made two payments towards the liability of tax for tax year 2008: One payment was made for \$5,742.17 on July 15, 2010 and the other payment of \$778.78 was made on September 30, 2010. While the three year statute of limitation does not apply, the one statute of limitation found in Section 7-1-26(D)(4) prohibits the Department from granting a refund if the application or claim for refund is filed more than one year after the tax was paid. In this case, the claim for refund was filed more than one year from the date the payments were made. Therefore the refund of the payments made in 2010 is time barred.

Taxpayer argued that the reason she did not file her claim for refund timely was that initially she had been told that she was required to pay gross receipts taxes for performing services under the developmental disability waiver program administered through the Department of Health. In reviewing the Gross Receipts Tax Act for both exemptions and deductions, the information provided to Taxpayer when she started her business and the information provided by Mabel from the Department of Taxation and Revenue appears to be in compliance with the Gross

Receipts Tax Act, §§7-9-1 through 7-9-114. Taxpayer provided a service directly to the State of New Mexico, Department of Health to Medicaid recipients, and she received payments through the Medicaid Management Information System through the Human Services Department, State of New Mexico. Taxpayer was a provider of Medicaid services under Title XIX of the Social Security Act, 42 U.S.C §§ 1302, 1396, 1397(2009).

In reviewing Taxpayer's assertion that the information initially provided to her was incorrect, a review of deductions which may apply to Taxpayer is warranted. Taxpayer did not receive payments from the United States government for services provided to **Medicare** beneficiaries and therefore she was not eligible for the deduction under §7-9-77.1 (2007). Taxpayer was did not receive payment from a managed health care provider or health care insurer and therefore was not eligible for the deduction under NMSA 1978, §7-9-93 (2007). In fact regulation 3.2.241.12(C) NMAC (5/31/06) states that "receipts from providing services to **medicaid** patients" are not deductible under §7-9-93. (Emphasis added). Therefore, the information provided by the Department employee in 2004 or 2005 and by Mabel from the Albuquerque office of the Department appears to be correct: Taxpayer's services to Medicaid recipients were gross receipts and she was required to file returns and pay tax on those receipts. The Hearing Officer is unaware of any exemption that may apply to Taxpayer.

Equitable Estoppel.

Taxpayer did not use the phrase "equitable estoppel" when she argued that she was entitled to a refund, but a quick review of the elements of equitable estoppel will be discussed. The argument proposed by Taxpayer is that the statements made by Department employees in 2004 or

2005 and again by Mabel relating to her whether she was required to file gross receipts somehow now require the Department to refund her \$17,301.97.

Generally, the courts are reluctant to apply equitable estoppel against a government to agency. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-12, §24, 132 N.M. 207, 46 P.3d 668.

Before the courts will apply estoppel, the state's conduct must be "shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs.*

Dep't, 1998-NMSC-11, §17, 125 N.M. 140, 958 P.2d 98. Moreover, the courts are reluctant to

apply equitable estoppel against a government agency if there are no written assurances made and only oral representations exist. *Bien Mur Indian Mkt. Ctr.*, 1988-NMCA-104, 108 N.M.355, 772

P.2d 885. The elements Taxpayer would need to prove that estoppel applies against the

Department are: "(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." *Gallegos* 2002-NMSC-12, §24 n.5. In addition to these four elements,

there must be "affirmative misconduct on the part of the government." *Gallegos* 2002-NMSC-12, §24 n.5.

In applying these principals to Taxpayer's argument, the statements made by Mabel and the Department employee who met with Taxpayer when she started her business, do not relate to when or if Taxpayer should file a claim for refund. The statements relate to whether Taxpayer should be filing and paying gross receipts taxes and they have nothing to do with whether Taxpayer should file a refund claim. These employees believed, as this Hearing Officer believes,

Taxpayer was required to pay gross receipts taxes on the services she performs as described herein. For estoppel to apply, there needs to be affirmative misconduct on the part of the government employees. Since there is no affirmative misconduct and since there are no statements that relate to Taxpayer's claim for refund, equitable estoppel does not apply in this case.

In preparing this Decision and Order, the Hearing Officer requested a copy of Taxpayer's contract (public record) with the Department of Health from the Department of Health to better understand the contractual agreement between Taxpayer and the Department of Health. The Hearing Officer reviewed the contract (public document) and she is taking notice of the contract pursuant to regulation 3.1.8.10(C) NMAC (2001). The terms of the agreement do not relate in any way to whether the claim for refund was filed timely, nor are the terms of the contract "material" to the facts. The contract and its terms are not relevant to the statute of limitation issue, which is the sole issue of this case. The contract is made part of this record.

The contract provided by the Department of Health is a standard contract entered into with all "providers" for "medicaid reimbursed services" to developmental disabled recipients. See TERM OF PROVIDER AGREEMENT, page 1 of the contract and Title of contract. Most importantly, under Article 35 of the contract titled GROSS RECEIPTS AND INCOME TAXES, Taxpayer was required to provide "proof" that she was registered with the New Mexico Taxation and Revenue Department for the payment of gross receipts tax and that "any payment of gross receipt tax shall be the obligation of the provider as appropriate." This evidence is additional evidence that Taxpayer was required to file and pay gross receipts taxes and that Taxpayer was

properly informed of her tax obligations.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest on October 3, 2013 to the denial of the claim for refund for \$17,301.97 and jurisdiction lies over the parties and the subject matter of this protest.

B. The application or claim for refund for tax years 2004-2009 was filed on June 21, 2013 and it was filed untimely pursuant to NMSA 1978, §7-1-26 (D) (2007).

C. The application or claim for refund of the payments made in 2010 for the 2008 tax liability was filed untimely pursuant to NMSA 1978, §7-1-26(D)(4)(2013).

D. Equitable estoppel does not apply in this matter because there was no affirmative misconduct by the Department.

E. Taxpayer was required to file and pay gross receipts taxes for all tax years she provided services to the Medicaid recipients under the contract with the Department of Health.

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

DATED: April 17, 2014.

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), Taxpayer has the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See*, Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order shall become final. A copy of the Notice of Appeal should be mailed to John Griego, Taxation & Revenue Hearings Bureau at P.O. Box 630 Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.