

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
STRATEGIC CONSULTING ASSOCIATES
TO THE DENIAL OF REFUND ISSUED
UNDER LETTER ID NO. L0984153040**

No. 15-22

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 18, 2015 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Gene Polito, President of Strategic Consulting Associates (“Taxpayer”) appeared *pro se*. Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Mary Griego appeared as a witness for the Department. Taxpayer Exhibits #1-8 and #11-15 were admitted into the record. Department Exhibit J was 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. On October 28, 2014, Taxpayer filed a claim for refund with the Department for \$5,693.42 in gross receipts tax for the CRS reporting periods from January 1, 2006 through March 1, 2008.
2. On November 10, 2014, through letter id. no. L0984153040, the Department denied Taxpayer’s claim for refund, citing that the statute of limitations had expired.
3. On November 20, 2014, Taxpayer protested the Department’s denial of claim for refund.

4. On March 31, 2015, the Department's protest office received the protest.
5. On April 2, 2015, the Department's protest office acknowledged receipt of the protest.
6. On May 20, 2015, the Hearings Bureau¹ first learned of this protest when the Department filed its request for hearing.
7. On May 21, 2015, the Hearings Bureau set this matter for a scheduling hearing on June 5, 2015.
8. On June 5, 2015, a scheduling hearing occurred in this matter where a merits hearing date was selected.
9. On June 5, 2015, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on June 18, 2015.
10. Mr. Polito began Taxpayer as a sole proprietorship sometime in late 2005 or early 2006.
11. Taxpayer performed consulting services mainly outside of New Mexico, with some of the services occurring within New Mexico.
12. As part of setting up his business, in late 2005 and/or early 2006, Mr. Polito consulted with Department employees over the phone about Taxpayer's gross receipts tax obligations. Department employees apparently informed Mr. Polito orally that gross receipts tax was required on all of Taxpayer's receipts, whether from in-state or out-of-state clients².
[Taxpayer Ex. #1].

¹ On July 1, 2015, pursuant to enacted Senate Bill 356, the Hearings Bureau became the Administrative Hearings Office ("AHO"). Since most of the events, except issuance of this decision, occurred before that date, the Hearings Bureau will be referenced in the findings of fact even though the decision is issued under AHO's caption.

² It is unclear whether the Department employees told Taxpayer that receipts from out-of-state clients were subject to gross receipts tax or that the performance of a service out-of-state was subject to gross receipts tax, which will be addressed further in the discussion section.

13. Mr. Polito did not receive any written advice from Department employees and did not know the names of the Department employees he had consulted with about Taxpayer's gross receipts tax obligations.

14. In 2005 or 2006, Mr. Polito did not consult with any other tax professionals about Taxpayer's potential gross receipts tax liabilities.

15. During the relevant periods, from the combined reporting periods ending on January 31, 2006 through March 31, 2008, Taxpayer paid gross receipts tax totaling \$5,693.42 for receipts he earned from out-of-state consultation services. [Taxpayers Ex. #5]

16. In 2008, the downturn in the economy caused Taxpayer's business to stagnate and Mr. Polito sought employment rather than continue to operate Taxpayer's business.

17. Mr. Polito worked as an employee from January 2009 through approximately April 2013. During that time, Taxpayer stopped business operations.

18. In April 2013, Mr. Polito left his previous employment to revive defunct Taxpayer as a corporation.

19. Taxpayer received a new CRS number when it incorporated in 2013.

20. As part of reviving Taxpayer's business in 2013, Mr. Polito consulted with a tax preparer, whom informed Mr. Polito that any receipts derived from the performance of an out-of-state service was not subject to gross receipts tax, including the previous receipts in 2006 through 2008.

21. In January of 2014, Taxpayer filed a claim for refund for an unspecified CRS reporting period that ended at some point during 2013. The Department granted Taxpayer's claim of refund of 2013 gross receipts tax.

22. After filing this first claim for refund, on October 28, 2014 Taxpayer filed the claim for refund at issue in this protest and discussed in finding of fact #1.

23. The Department provided a complete list of when each of Taxpayer's claims for refund for each reporting period must have been filed to satisfy the statute of limitations. For the last reporting for which Taxpayer claimed a refund, for the reporting period ending on March 31, 2008, any request for refund would have been due no later than December 31, 2011. [Department Ex. J].

24. The statute of limitations for each of Taxpayer's refund claims had lapsed for each period by the time Taxpayer filed the claim for refund. [Department Ex. J].

DISCUSSION

There are two legal issues in this protest. The first issue is whether the Department has the authority to grant Taxpayer's claim for refund on reporting periods where the statute of limitations had lapsed by the time of Taxpayer's claim. The second issue is whether Taxpayer is nevertheless entitled to relief despite the statute of limitations issue because of the oral statements of Department employees made when setting up the sole proprietorship in late 2005 or early 2006 that gross receipts tax was required for receipts from out-of-state clients.

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. The statute does not require a finding that Taxpayer was aware of the statute of limitations deadlines. At issue in this protest is the payment of gross receipts tax. Gross receipts tax are due on the 25th of the following month after the taxable receipts were received. *See* NMSA 1978, Section 7-9-1. Looking to the last period at issue, the reporting period ending on March 31, 2008, gross receipts tax were due on April 25, 2008. Therefore, under NMSA

1978, Section 7-1-26 (D) (1) (2007), Taxpayer had three years from the end of 2008 to file a claim for refund for the March 31, 2008 gross receipts tax, which was December 31, 2011.

After this December 31, 2011, any claim for refund for the March 31, 2008 period (and those periods before March 31, 2008), were time barred by 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. In *Kilmer v. Goodwin*, 2004-NMCA-122, ¶16, 136 N.M. 440, the Court of Appeals noted 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.” The Department properly denied the refund claim because it lacked authority to grant Taxpayer’s claim for refund filed after the expiration of the statute of limitations. *See Kilmer*, ¶24.

Taxpayer also argued that despite the statute of limitations issue, the refund must be granted because Mr. Polito relied on the advice of Department employees in late 2005 and/or early 2006 to pay gross receipts taxes on receipts received from out-of-state clients. These conversations apparently occurred during a series of telephone calls in late 2005 and/or early 2006 when Taxpayer was starting its business. During testimony, Mr. Polito could not specifically recall telling the Department employees that the services would be performed out-of-state. Mr. Polito also testified that some of the services were performed in New Mexico as well as traveling out-of-state.

Regarding the statements themselves, it is unclear whether the Department employees advised that gross receipts tax was owed on receipts from out-of-state clients, as suggested in Mr. Polito’s description of the advice in Taxpayer Ex. 1, or from the performance of a service

outside of New Mexico. This is an important distinction under NMSA 1978, Section 7-9-3.5 (A) (1) (2007) in determining Taxpayer's potential gross receipts tax liability (gross receipts includes "selling a service outside of New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico."). If the Department employees believed that Taxpayer was performing the service in New Mexico, even if the receipts were received from out-of-state clients, or if they believed that the product of the out-of-state service would be initially used in New Mexico, their advice was not necessarily in error in light of Section 7-9-3.5 (A) (1). Without knowing exactly what Mr. Polito informed the Department employees about the nature of Taxpayer's business transactions and what exact advice the Department employees provided Taxpayer in 2006, it cannot be conclusively stated that the Department employees provided incorrect information.

Nevertheless, assuming for the sake of discussion that the Department employee's advice was inaccurate, Taxpayer never received any written direction from the Department or the employees he spoke with that gross receipts was due from the performance of an out-of-state service. Given that the nature of the advice is unclear, as discussed in the preceding paragraph, such a written statement would have been particularly helpful in this matter. Moreover, Mr. Polito did not consult any tax professional at the time, which would have been prudent given 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).

Taxpayer's argument amounts to a claim for equitable estoppel. Equitable estoppel does not appear to be a possible remedy in an administrative protest hearing before the Department. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 1994-NMSC-085, ¶18,

118 N.M. 273 (equitable remedies are not part of the “quasi-judicial” powers of administrative agencies). Even if it is available in this context, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving the assessment and collection of taxes. *See Taxation & Revenue Dep’t v. Bien Mur Indian Mkt. Ctr., Inc.*, 1989-NMSC-015, ¶9, 108 N.M. 22. In such cases, estoppel applies only pursuant to statute or when “right and justice demand it.” *Bien Mur Indian Market*, ¶9. Oral statements not reduced to writing, like the ones that Mr. Polito cites in his argument, are generally not grounds to grant equitable estoppel. *See Kilmer*, ¶28. 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*, 1993-NMSC-028, ¶18-19, 115 N.M. 650. Here, granting a refund after expiration of the statute of limitations would be contrary to NMSA 1978, Section 7-1-26. Therefore, there is no basis for granting Taxpayer’s equitable relief argument.

CONCLUSIONS OF LAW

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

B. Taxpayer’s October 28, 2014 claim for refund of 2006, 2007, and 2008 gross receipts 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. Taxpayer is not entitled to equitable estoppel relief for reliance on the somewhat ambiguous oral statements of Department employees, *see Kilmer*, ¶28, and because granting such relief would be contrary to requirements expressed by statute. *See Rainaldi*, ¶18-19.

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

DATED: July 13, 2015.

Brian VanDenzen
Interim Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have 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 will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may be preparing the record proper.