

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

**IN THE MATTER OF THE PROTEST OF
IRASEMA CERVANTES PETTIBONE
TO DEPARTMENT'S FAILURE TO GRANT OR DENY A REFUND**

No. 15-38

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 24, 2015 before Brian VanDenzen, Esq., Interim Chief Hearing Officer, in Santa Fe. At the hearing, Irasema Cervantes Pettibone ("Taxpayer") appeared *pro se* telephonically. Rosea Marshall was also present with Taxpayer. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibits #1.1 through 1.4 were admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 7, 2015, Taxpayer submitted a protest to the Department seeking approval of a claim for refund of 2008 personal income tax, a claim in which the Department never took any action to grant or deny.
2. On July 22, 2015, the Department's protest office acknowledged receipt of a valid protest.
3. On September 25, 2015, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

4. On September 28, 2015, the Administrative Hearings Office set this matter for a telephonic scheduling hearing on October 13, 2015.

5. A scheduling hearing in fact was held on October 13, 2015. Neither party objected that holding the scheduling hearing satisfied the 90-day hearing requirement of the statute.

6. On October 15, 2015, the Administrative Hearings Office issued Notice of Administrative Hearing, setting a merits hearing in this matter on November 24, 2015 at 10:00 a.m.

7. On November 6, 2015, Taxpayer filed a packet of exhibits for the scheduled hearing and a request to appear at the hearing telephonically in light of a medical condition, as supported by a statement of a physician.

8. On November 9, 2015, the Department submitted an email in opposition to Taxpayer's requested telephonic appearance.

9. On November 13, 2015, the Administrative Hearings Office issued an order allowing Taxpayer to appear telephonically in light of the documented medical condition and the generally straightforward factual timeline nature of a statute of limitations, refund protest case.

10. Taxpayer submitted her 2008 New Mexico personal income tax return to the Department on December 24, 2012, which included a claim for refund. [Taxpayer Ex. 1-2 and 1-3].

11. The Department took no action to grant or deny the claim for refund by April 22, 2013, within 120-days of December 24, 2012. [Taxpayer Ex. 1-3].

12. Taxpayer did not file a civil action or a protest against the Department's inaction on her claim for refund by July 21, 2013, or 90-days after the Department's failure to act and

210-days after Taxpayer's December 24, 2012 filing of her 2008 personal income tax return. [Taxpayer Ex. 1-3].

13. At some unspecified point in 2014, Taxpayer refiled her 2008 personal income tax return. [Taxpayer Protest Letter].

14. Taxpayer's 2014 refiling occurred after the lapse of the statute of limitations for a claim for refund of 2008 personal income tax.

15. When the Department still took no action on her claim for refund in the 2008 personal income tax return, Taxpayer filed her protest letter referenced in finding of fact #1.

16. Taxpayer submitted a statement of her doctor that she had a medical condition that "prevented her from managing her financial affairs and this condition has lasted for a continuous period of no less than 12 months." [Taxpayer Ex. 1-4].

17. The statement of Taxpayer's doctor does not specify when this condition was diagnosed and when the 12-month period of inability to manage financial affairs occurred.

DISCUSSION

At issue in this protest is whether Taxpayer's claim for refund was barred under the statute of limitations. Taxpayer argues that since she initially submitted her 2008 New Mexico personal income tax returns within the permissible three-year period, since the Department failed to inform her of her obligations to challenge the Department's inaction by the deadline, and since she subsequently suffered from a medical disability, Taxpayer's refund claim should be granted.

Because no assessment was issued in this case, other than Taxpayer's self-assessment of tax in her 2008 PIT-1 return, no presumption of correctness attaches in this protest. *See* NMSA 1978, § 7-1-17 (2007) and Regulation 3.1.6.10 NMAC. Nevertheless, for reasons that will be discussed in more detail throughout the decision, under the relevant statute and controlling case

law, Taxpayer had the obligation to both timely file her claim for refund and preserve their claim through resolution of the claim.

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. At issue in this protest is the payment of 2008 personal income tax. Under NMSA 1978, Section 7-2-12 (2003), 2008 personal income tax returns were due on April 15, 2009, making December 31, 2012 the end of the calendar year from which the taxes were due. Therefore, under Section 7-1-26 (D) (1), Taxpayer had until December 31, 2012 to make any claim for refund to the Department for 2008 personal income taxes.

In this case, Taxpayer did in fact file her 2008 New Mexico personal income taxes, which included the claim for refund, on December 24, 2012, before the expiration of the statute of limitations. However, for unexplained reasons, the Department took no action to either approve or deny Taxpayer's December 24, 2012 claim for refund within 120-days, which occurred on April 22, 2013.

Under Section 7-1-26 (B)(2), 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. *See Unisys Corp. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-059, 117 NM 609 (Section 7-1-26 gives taxpayers a method to challenges the Department's inaction on a claim for refund).

Reading Section 7-1-26 (B) (2) in conjunction with relevant case law establishes that a taxpayer's failure to preserve the claim for refund divests the Department of authority to act on

the stale claim. In *Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440, the New Mexico Court of Appeals addressed claims for refunds under 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. 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. The expiration of 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 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. 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 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.

Applying Section 7-1-26 (B) and the rationale of *Kilmer* to this protest, under the statutory 210-day deadline, when the Department failed to act on Taxpayer's December 24, 2012 claim for refund by April 22, 2013, Taxpayer needed to either file a written protest or commence a civil action by July 21, 2013. Taxpayer did not pursue either option by that July 21, 2013 deadline. By not filing either a protest or a civil action, Taxpayer abandoned her December 24, 2012 claim for refund and the Department was prohibited under Section 7-1-26 (B) (2) from either approving or disapproving that claim for refund. 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 2014 resubmission of her 2008 New Mexico personal income tax return which included a claim for refund was made after the December 31, 2012 expiration of the statute of limitations contained under Section 7-1-26 (D) (1). Under the plain language of Section 7-1-26 (D) (1), 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 Section 7-1-26 (D) (1). 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. *See also Unisys Corp.*, ¶3 (refund claims made after Section 7-1-26's statute of limitations are time-barred). Taxpayer did not establish any other provision of Section 7-1-26 that might allow the Department to consider her 2014 claim for refund after expiration of the standard statute of limitations.

Taxpayer nevertheless argued that her refund claim should be allowed in light of her disability and the Department's failure to take action on her initial timely claim or communicate with her about the deadlines she needed to follow to preserve her refund claim. Regarding the Department's lack of communication with Taxpayer, 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. It is somewhat unclear why it took Taxpayer until December 24, 2012 to file her 2008 personal income tax return (neither party addressed this issue at the hearing

and Taxpayer's doctor did not specify when Taxpayer's condition began to affect her). By waiting until that late date, Taxpayer ran the risk of running out of time on her refund claim. By not following up on the Department's inaction on her refund claim, as required under the statute, Taxpayer did not meet her obligation to ascertain the consequences of her actions under *Tiffany Construction Co.* Under the principal expressed in *Tiffany Construction Co.*, Taxpayer's lack of knowledge of this requirement does not relieve her of her obligation to preserve the claim. Nor is there any provision of the Tax Administration Act or case law allowing the granting of a stale claim for refund because of Taxpayer's medical condition. Despite sympathy for Taxpayer's situation, the statute and controlling case law discussed above dictates that the Department cannot grant Taxpayer's stale claim for refund or the 2014 post-statute of limitations, time-barred refund claim. For the foregoing reasons, Taxpayer's protest **IS DENIED**.

CONCLUSIONS OF LAW

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

B. Holding the October 13, 2015 Scheduling Hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer failed to either protest or file a civil action challenging the Department's inaction on her December 24, 2012 claim for refund within 210-days, rendering that claim stale. The Department lacks either express or inherent authority to grant Taxpayer's stale claim for refund. *See Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440.

D. Taxpayer's 2014 claim for refund of 2008 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).

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

DATED: December 16, 2015.

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