

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

**IN THE MATTER OF THE PROTEST OF
MOSAIC POTASH CARLSBAD, INC.
TO THE FAILURE TO GRANT OR TO DENY REFUND
PROTEST ACKNOWLEDGED BY LETTER ID NO. L0037138992**

No. 17-15

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on December 15, 2016 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Wryan Capps, CPA, of Axiom CPAs and Business Advisors, LLC, appeared representing Mosaic Potash Carlsbad, Inc. (“Taxpayer”). Accountant Everett Trujillo of Axiom also appeared as a Taxpayer witness in this matter. Staff Attorney Cordelia Friedman appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Danny Pogan appeared as a witness for the Department. Taxpayers Exhibits #1-#5, #8, and #9 were admitted into the record. Department Exhibits A-C, H, I, and J 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 24, 2015, Taxpayer submitted a claim for refund of \$1,719,342.03 in compensating tax for the CRS reporting periods from January 1, 2012 through December 31, 2014. [Taxpayer Ex. #1.1].
2. The Department did not grant or deny Taxpayer’s claim for refund by November 21, 2015, within 120-days of the claim.

3. On February 4, 2016, within 210-days of the submission of its claim to the Department, Taxpayer timely protested the Department's inaction on the claim for refund.
4. On February 9, 2016, the Department's protest office acknowledged receipt of a valid protest.
5. On March 17, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office, a separate and distinct agency.
6. On March 17, 2016, the Administrative Hearings Office set this matter for a telephonic scheduling hearing on April 15, 2016.
7. On April 19, 2016, a scheduling hearing in fact was held in this matter and neither party objected that holding that scheduling hearing satisfied the 90-day hearing requirement of the statute. The parties requested additional time to work on the claim for refund rather than scheduling the matter for a merits hearing.
8. On April 19, 2016, the Administrative Hearings Office set this matter for a second telephonic scheduling hearing on October 7, 2016.
9. On October 7, 2016, a Scheduling Hearing occurred, and dates and times for a scheduling order were agreed to by the parties and hearing officer.
10. On October 13, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting a merits hearing in this matter on December 15, 2016 at 1:00 p.m.
11. Department FYI-105, and the Department's Application for Refund Instructions direct taxpayers requesting a claim for refund to attach supporting documentation with their claim. [Dept. Ex.'s A & B].

12. As part of the original July 24, 2015 claim for refund of \$1,719,342.03 in compensating tax, Taxpayer filled out an Application for Refund on the Department's form listing pro forma information about the claim. In pertinent part, Taxpayer's claim included the following information:

- a. As the basis of refund, Taxpayer simply stated that "Mosaic Potash Carlsbad Inc seeks a refund of over reported compensating taxes pursuant to NMSA § 7-9-7 for the period of Jan 1, 2012 through December 31, 2014." [Taxpayer Ex. #1.1].
- b. Taxpayer provided a single page spreadsheet, listing the original compensating tax reported by reporting period, the refund amount by reporting period, and the amended compensating tax amount by reporting period. [Taxpayer Ex. #1.4].
- c. Taxpayer provided amended CRS-1 returns, listing the new amount of reported compensating tax, along with the corresponding TAP return confirmation sheet, showing that the electronic returns had been electronically filed. [Taxpayer Ex. #1.5 through #1.76].

13. Taxpayer's July 24, 2015 claim for refund did not include a specific statement or explanation why it had originally made \$1,719,342.03 in compensating tax payments during the relevant period, what information had led it to conclude that payment was in error, or a meaningful explanation why it was now entitled to a refund of \$1,719,342.03.

14. On July 24, 2015, Taxpayer did not provide any contracts, invoices, bills of sale, bills of lading, purchase orders, delivery receipt/confirmation, or other information from which the Department could reasonably examine Taxpayer's pro forma claim for refund of \$1,719,342.03 in compensating tax.

15. On August 21, 2015, through letter id. no. L1525993520, the Department acknowledged receiving Taxpayer's claim for refund and indicated it would review the claim once it received a vendor summary and invoices for the relevant period. The Department warned Taxpayer that the claim could be denied if the information was not provided within 60-days. [Taxpayer Ex. #2.1].

16. On October 8, 2015, through letter id. no. L1435297840, the Department acknowledged receiving Taxpayer's claim for refund and indicated it would review the claim once it received a vendor summary and invoices for the relevant period. [Dept. Ex. C].

17. On October 9, 2016, on behalf of Taxpayer, Everett Trujillo of Axiom emailed the Department a detailed spreadsheet by year, showing the compensating tax related to each vendor. Mr. Trujillo only provided the spreadsheet and did not provide the requested invoices. [Taxpayer Ex. #3.1; 4.1-4.2]

18. On October 16, 2016, the Department replied to Mr. Trujillo's email by requesting additional information about the invoices from Taxpayer. [Taxpayer Ex. #3.6]

19. On December 1, 2016, in response to the Department's October 16, 2016 inquiry for more information, Mr. Trujillo emailed Taxpayer client invoices from Taxpayer to the Department. [Taxpayer Ex. #3.6-11; Dept. Ex. H].

20. On January 12, 2016, the Department mailed Taxpayer a letter listing additional information it required before it could review the claim for refund, which was similar to the first acknowledgement letter the Department sent in August of 2015. [Taxpayer Ex. #5.1].

21. On January 15, 2016, the Department's Robin Cruz emailed Mr. Trujillo that she received the materials from Taxpayer and would review further with the auditor. [Taxpayer Ex. #3.12].

22. On March 30, 2016, the Department's Robert Cruz emailed Mr. Trujillo an initial refund computation and a request for more information, specifically invoices from each vendor not registered. [Taxpayer Ex. #3.13].

23. On April 22, 2016, Mr. Trujillo emailed the Department on behalf of Taxpayer and asked that the Department not process Taxpayer's refund claim until Taxpayer had an opportunity to submit additional documentation in support of the claim. [Dept. Ex. J].

24. On May 6, 2016, Mr. Trujillo emailed the Department that Taxpayer would be providing additional information soon. [Taxpayer Ex. #3.14].

25. On May 9, 2016, Mr. Trujillo emailed Taxpayer's invoices to the Department. Taxpayer continued to provide additional information over the next ten days as the Department requested more information for review. [Taxpayer Ex. 3.15-25; Dept. Ex. I].

26. On or about May 17, 2016, the Department indicated in an email to Mr. Trujillo that it would approve the refund. [Taxpayer Ex. 3.26].

27. On May 19, 2016, under letter id. no. L0402155056, the Department issued Taxpayer a partial approval of the claim for refund in the amount of \$1,170,856.89. [Taxpayer Ex. #9.1].

28. In light of the partial approval of the claim for refund, the parties argued that the only remaining issue at protest was Taxpayer's belief it was entitled to interest on the claim for refund from the July 24, 2015 filing date.

DISCUSSION

The issue in this case is whether, and from what date, Taxpayer is entitled to interest on its claim for refund. Taxpayer argues that since it provided all the information required under the

Application for Refund instructions on July 24, 2015, it was entitled to interest from that date until the Department approved the claim on May 19, 2016. Conversely, the Department argues that July 24, 2015 claim for refund was invalid because it lacked essential information and only became a valid claim when Taxpayer provided all the necessary information on May 9, 2016. Consequently, the Department avers that no interest was due on Taxpayer's claim for refund because the refund was granted within 60-days of the valid claim.

Presumption of Correctness.

Since no assessment was issued in this case, no presumption of correctness attaches under NMSA 1978, Section 7-1-17 (C) (2007). Nevertheless, Taxpayer still has the burden to establish its entitlement to the claim for refund and accompanying interest. *See* Regulation 3.8.10 (A) NMAC; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through “lens of presumption of correctness” and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Thus, Taxpayer carries the burden in this matter.

Claims for Refund and Payment of Interest on Claims for Refund.

Under NMSA 1978, Section 7-1-68 (2013), “[a]s provided in this section, interest shall be allowed and paid on the amount of tax overpaid by a person that is subsequently refunded or credited to that person.” The statutory use of the word “shall” makes it a mandatory provision. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the contrary). Generally, interest on refunds is paid from the date the claim for refund was filed until “a date preceding by not more than thirty days the date of the credit or refund to any person.” § 7-1-

68 (C). However, in pertinent part, no interest shall be allowed or paid on the credit or refund if the credit or refund is made within sixty days of the date of the claim for refund. *See* § 7-1-68 (D)(2)(b).

At the heart of the protest is whether Taxpayer's July 24, 2015 claim for refund constituted a valid and sufficient claim to trigger interest under that section. Although NMSA 1978, Section 7-1-68 (2013) makes no express reference to the validity of a claim for refund as part of the interest determination on a refund, Section 7-1-68 must be read in conjunction with claim for refund provision under the Tax Administration Act, NMSA 1978, Section 7-1-26 (2015). *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14 (statutes should be read in harmony with statutes dealing with the same subject matter); *See also Hayes v. Hagemeyer*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law.").

Section 7-1-26 of the Tax Administration Act addresses what constitutes a claim for refund. Under that section, a person who believes they paid tax in excess, may file a written claim for refund with the Department by the applicable time deadline. Under Section 7-1-26 (A), a written claim for refund must include:

- (1) the taxpayer's name, address and identification number;
- (2) the type of tax for which a refund is being claimed, the credit or rebate denied or the property levied upon;
- (3) the sum of money or other property being claimed;
- (4) with respect to refund, the period for which overpayment was made; and
- (5) a brief statement of the facts and the law on which the claim is based, which may be referred to as the "basis for the refund".

Until these statutory claim for refund requirements are satisfied, there is logically no valid claim for refund that could trigger the interest calculation provisions of Section 7-1-68.

Consistent with the statutory requirements for a valid claim for refund, Department Regulation 3.1.9.8 (D) NMAC establishes that "a claim for refund is valid if it states the nature of the complaint and affirmative relief requested and if it contains information sufficient to allow

processing of the claim.” Department regulations interpreting a statute are presumed proper and are to be given substantial weight. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503. Regulation 3.1.9.8 (E) NMAC lists the information sufficient to process a claim:

- (1) taxpayer's name, address and identification number;
- (2) the type or types of tax for which the refund is being claimed;
- (3) the sum of money being claimed;
- (4) the period for which the overpayment was made;
- (5) the basis for the refund; and
- (6) a copy of the appropriate, fully completed amended return for each period for which a refund is claimed.

Regulation 3.1.9.8 (F) NMAC (emphasis added) goes on to state that

[a] claim that does not include the information required by Subsections D and E of 3.1.9.8 NMAC is *invalid*. The department may return any invalid claim to the taxpayer. Alternatively the department may advise the taxpayer of the missing information and that the claim is invalid without submission of the missing information. If the taxpayer re-submits the claim with the required information or, when the return is not returned, submits all required information, *the claim becomes valid only at the time the claim is re-submitted or the required information is supplied*.

There are potentially competing interests at play in interpreting the statutory and regulatory provisions. On the one hand, because Regulation 3.1.9.8 (F) NMAC gives the Department the ability to find a claim invalid without sufficient additional information, there is the possibility that the Department could unnecessarily seek additional information on an otherwise valid claim in order to minimize the time period where interest might be required under Section 7-1-68. On the other hand, to say that the Department must immediately deny any claim when the claim lacks basic details about the facts and/or and law supporting the claim would discourage the Department from seeking more information from a taxpayer about the claim. In order to balance these concerns and be consistent with the controlling statutory provisions, Regulation 3.1.9.8 (E) NMAC’s “invalid claim” language must be read narrowly to apply only when the initial refund claim was severely

lacking in the statutorily required basis of the claim and that the Department operated diligently and in good faith to seek additional information from taxpayer. The application of Regulation 3.1.9.8 (E) NMAC to any situation where a taxpayer's claim met the basic statutory requirements of Section 7-1-26 (A) of a claim but the Department did not act diligently in reviewing the claim and/or otherwise simply requested a never-ending stream of additional information to justify its initial delay would be inconsistent with the mandatory interest provisions of Section 7-1-68.

Under the facts of this protest and the relevant law, despite Taxpayer's assertions at hearing that it provided the requested information and the Department decided to conduct an audit of the claim, an objective review of the claim for refund shows that it was perfunctory and lacking in the detail necessary to meaningfully review a claim of that magnitude. Attached to the Application for Refund was a spreadsheet breaking down the individual reporting periods and the amended returns for each reporting period. The basis for the claim for refund listed on the Application for Refund amounted to one conclusory sentence: "[Taxpayer] seeks a refund of over reported compensating taxes pursuant to NMSA § 7-9-7 for the period of Jan 1, 2012 through December 31, 2014." This simply does not provide any actionable facts or law for which the Department could use to judge the validity of the claim for refund of \$1,719,342.03. Nor did Taxpayer provide any supporting evidence for the claim, such as identifying the specific receipts where it had originally paid compensating tax, the customer name for those receipts, the invoices associated with those receipts, or any other information that would establish the factual basis for the claim. While Taxpayer did provide the Department with the "what" (the amount of the claim for refund, broken down by reporting period), it made no effort to provide the Department with "why" it was entitled to the claimed refund. The "why" information is the basis of the claim required under Section 7-1-26

(A)(5) requires and the statement of the nature of the complaint and the affirmative relief requested required under Regulation 3.1.9.8 (D).

Without an articulated legal and factual basis for the claim for refund of \$1,719,342.03, the Department lacked information to consider the merits of the claim upon the July 24, 2015 receipt of the application for refund. On August 21, 2015, the Department informed Taxpayer that while it had received the claim, in order to review it, it needed to receive additional information within 60-days of the claim. In fact, the record shows that the Department diligently sought out information from Taxpayer about the claim. On October 8, 2015, the Department again mailed Taxpayer a list of information it needed to review the claim for refund. The Department also emailed back and forth with Taxpayer's representative Everett Trujillo repeatedly, asking for specific information, including relevant invoices and detailed spreadsheets breaking down the claim by customer and invoice. In the absence of an explanation of the basis of the claim including facts and the law supporting the claim, the invoices were particularly important to determining the validity of the claim for refund of compensating tax because they would show the client name (which could establish whether client had nexus with New Mexico), location of client, shipping destination, whether a tangible or a service was sold, and whether a nontaxable transaction certificate would be issued. While Mr. Trujillo did provide more information on October 9, 2015, than on the original claim, it did not include all the requested information and the Department continued to have to request specific factual information about the nature of the claim. This process continued through December 2015, January 2016, February 2016, and March 2016.

While there may be an argument that the claim became valid at some point in December, January, February, or March, on April 22, 2016, Taxpayer's representative emailed the Department and asked the Department to hold off on reviewing Taxpayer's claim for refund until Taxpayer had

an opportunity to submit additional documentation. This email suggests that even Taxpayer was aware it had not provided sufficient support for its claim into April of 2016. On May 9, 2016, Taxpayer submitted that additional information, after which the Department promptly processed the claim within ten days. Taxpayer's July 24, 2015, Application for Refund did not provide a legal and/or factual basis of support, as further evidenced by the Department's repeated diligent efforts to obtain pertinent information and Taxpayer's own request on April 22, 2016 to delay review of the claim until it could gather the supporting information.

In light of these facts and the applicable statutory and regulatory requirements for the filing of a valid claim for refund, Taxpayer's July 24, 2015 claim was incomplete under Section 7-1-26 (A) because it did not provide a brief summary of the facts and law supporting the claim and was invalid under Regulation 3.1.9.8 (D, E, & F) NMAC. As permitted under Regulation 3.1.9.8 (F) NMAC, the Department informed Taxpayer that it would review the claim for refund once it received additional information. Pursuant to Regulation 3.1.9.8 (F) NMAC, the claim did not become valid until Taxpayer provided that additional information on May 9, 2016. On May 19, 2016, within sixty days of the valid claim, the Department approved Taxpayer's claim for refund. Thus, under Section 7-1-68 (D)(2)(b), no interest was due on the claim for refund made within 60-days of the valid claim. Consequently, Taxpayer's protest is denied.

CONCLUSIONS OF LAW

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

B. Holding the April 15, 2016 Scheduling Hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer's July 24, 2015 claim for refund was invalid because it did not contain a brief description of the facts and laws supporting the claim required under NMSA 1978, Section 7-1-26 (A) (2015), and did not contain sufficient information to make a valid claim under Regulation 3.1.9.8 NMAC.

D. Taxpayer's claim for refund became valid on May 9, 2016, when it provided the requested additional information.

E. Because the Department approved Taxpayer's May 9, 2016 valid claim for refund on May 20, 2016, within sixty days, no interest shall be paid under NMSA 1978, Section 7-1-69 (D)(2)(b) (2013).

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

DATED: March 29, 2017.

Brian VanDenzen
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 (2015), 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.