

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

**IN THE MATTER OF THE PROTEST OF
GENE F. AND GAIL G. MORTENSEN
TO REFUND DENIAL ISSUED UNDER
LETTER ID NO. L0870797312**

No. 05-03

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 2, 2005, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. Gene F. Mortensen appeared on behalf of himself and his wife. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayers are New Mexico residents.
2. The Taxpayers' 1998 New Mexico personal income tax return was due on or before April 15, 1999.
3. The Taxpayers did not file their 1998 return by the statutory due date.
4. The Taxpayers did, however, mail a check to the Department on April 15, 1999 in the amount of \$1,600 to cover their estimated 1998 New Mexico personal income tax liability.
5. The Department failed to credit the Taxpayers' \$1,600 check to their 1998 estimated personal income tax payments.

6. On April 12, 2002, the Taxpayers filed their 1998 state income tax return reporting a tax liability of \$1,263, a credit for prescription drugs of \$33, withholding tax of \$1, and estimated payments of \$1,600, resulting in a refund due of \$371.

7. The Department took no action on the Taxpayers' refund request.

8. The Taxpayers did not make any inquiry as to why their \$371 refund of 1998 income tax had not been granted until July 2003, when they learned that the \$1,600 estimated payment made in April 1999 had not been credited to their account.

9. The Department subsequently corrected its records by applying the \$1,600 payment to the Taxpayers' 1998 tax liability, resulting in an overpayment of \$371.

10. On August 13, 2003, the Department sent the Taxpayers a letter stating that their \$371 claim for refund of 1998 personal income taxes had been denied. That letter erroneously stated that the claim was denied because it had not been filed within the three-year period required by NMSA 1978, § 7-1-26.

11. On November 4, 2003, the Taxpayers filed a protest to the Department's letter denying their claim for refund.

DISCUSSION

The issue to be decided is whether the Taxpayers are entitled to the \$371 refund requested on their 1998 New Mexico personal income tax return, which was filed on April 12, 2002. The Department maintains that it is statutorily barred from granting the refund, citing to the provisions of NMSA 1978, § 7-1-26. At the time the Taxpayers filed their claim for refund in April 2002, that statute read, in pertinent part:

B. The secretary or the secretary's delegate may allow the claim in whole or in part or may deny the claim.

(1) If the claim is denied in whole or in part in writing, no claim may be refiled with respect to that which was denied but the person, within ninety days after either the mailing or delivery of the denial of all or any part of the claim, may elect to pursue one, but not more than one, of the remedies in Subsection C of this section.

(2) If the department has neither granted nor denied any portion of a claim for refund within one hundred twenty days of the date the claim was mailed or delivered to the department, the person may refile it within the time limits set forth in Subsection C of this section or may within ninety days elect to pursue one, but only one, of the remedies in Subsection C of this section. *After the expiration of the two hundred ten days from the date the claim was mailed or delivered to the department, the department may not approve or disapprove the claim unless the person has pursued one of the remedies under Subsection C of this section.* (Emphasis added)

C. A person may elect to pursue one, but only one, of the remedies in Paragraphs (1) and (2) of this subsection....

(1) the person may direct to the secretary a written protest against the denial of, or failure to either allow or deny the claim or portion thereof,...or

(2) the person may commence a civil action in the district court for Santa Fe county....

In this case, the Taxpayers filed their claim for refund on April 12, 2002. The Department did not take any action to approve or deny the claim during the following 120 days. In order to preserve their claim, the Taxpayers were required to file an administrative protest or a civil suit in district court within 90 days after the expiration of the initial 120-day period. The Taxpayers did neither. As a result, their refund claim was time barred on November 8, 2002, the 210th day from the date the claim was filed. At that point, the

Taxpayers' only remaining option was to refile the claim before December 31, 2002, the end of the three-year statute of limitations set out in NMSA 1978, § 7-1-26(D)(1) (2001). Again, the Taxpayers failed to take the action required and have now lost the opportunity to recover their \$371 overpayment.

At the administrative hearing, the Taxpayers argued that they should not be penalized for the Department's error in failing to properly credit their April 1999 estimated payment. While not to be condoned, this error was only one of the factors leading to the present situation. The direct cause of the Taxpayers' loss of their refund was their failure to take action to protect their claim within the 210 days set out in § 7-1-26. In *Kilmer v Goodwin, Secretary, New Mexico Taxation and Revenue Department*, 2004 NMCA 122, 99 P.3d 690, the New Mexico Court of Appeals found that the purpose of the time deadline in § 7-1-26 is to avoid stale claims, and that "[t]he time deadline places the burden of maintaining an active claim on the taxpayer and makes it the taxpayer's responsibility to confront the Department inaction." *Kilmer*, 2004 NMCA 122, ¶ 16.

In this case, the problem was compounded by the Taxpayers' failure to file their 1998 tax return on time. Had they done so, the Department's error in crediting their estimated payment would have been discovered soon enough to allow the Taxpayers to refile their claim before the expiration of the three-year statute of limitations. By the time the Taxpayers filed their return in April 2002—three years after the statutory due date—there were only a few months left on the limitations period. By the time the Taxpayers

called the Department in July 2003 to inquire as to why the refund had not been granted, it was too late to refile their claim and restart the 210-day period within which the Department could act.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely, written protest to the Department's August 13, 2003 letter denying their claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. Because the Taxpayers did not take any action to challenge the Department's failure to act on their claim for refund within the time period provided in NMSA 1978, § 7-1-26, the Taxpayers' claim is time barred and cannot be granted.

For the foregoing reasons, the Taxpayers' protest is DENIED.

DATED March 7, 2005.