

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

**IN THE MATTER OF THE PROTEST OF
ST. MARY LAND & EXPLORATION COMPANY
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L1641538624**

No. 12-14

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 12, 2012, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Nelson J. Goodin, attorney for the Department of Taxation and Revenue. Mr. Andrick Tsabetsaye, protest supervisor, appeared and testified as witnesses for the Department. Mr. Michael F. Roach, Assistant Vice President, CPA, Director of Taxation for SM Energy Company appeared on behalf of SM Energy, formerly known as St. Mary Land & Exploration Company (“Taxpayer”), and testified on Taxpayer’s behalf. On December 12, 2011, the Hearings Bureau received a packet of Exhibits from Taxpayer. The Department introduced Exhibits #A, B, C, D, E and F into the record. Taxpayer introduced Exhibits #1, 2, 3, 4, 5 and 6 into the record. The Department objected to the relevance of the Exhibits #2, #3, #4, and #6. The objections were overruled. Exhibits #4 and #6 do not relate to the tax year at issue but were admitted nonetheless. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 15, 2006, Taxpayer filed a Corporate Income Tax Return (“Return”) for tax year 2005. Exhibit #A. The Return was timely filed.
2. On June 24, 2009, Taxpayer filed an Amended Corporate Income Tax Return to reflect changes in the apportionment percentages and to include New Mexico income tax withheld from oil and gas proceeds. (“Amended Return”). Exhibit #B.

3. The amount of refund requested on the Amended Return was \$39,307.00. Exhibit #B.
4. The Department partially granted the refund request on August 26, 2009 in the amount of \$28,811.00. Exhibit #C.
5. The difference between the amount requested to be refunded by Taxpayer and the amount refunded by the Department is \$10,496.00.
6. On June 3, 2010, the Department notified Taxpayer that it was denying its request for a refund in the amount of \$10,496.00 for three reasons, one of which was that “Section 7-1-26 NMSA 1978 provides that if a claim for refund is denied; a claimant may not refile that claim. If a taxpayer wishes to challenge the denial, they may within 90 days, file a protest with the department or file a lawsuit in Santa Fe District Court within 90 days of the date of mailing of the refund denial, the refund denial is final.” Exhibit #E.
7. On September 3, 2010, Taxpayer filed a protest to the partial denial of the refund.
8. On December 23, 2010, the Department acknowledged the protest to the partial denial of the refund.
9. The Department requested a hearing in this matter on July 8, 2011.
10. On August 2, 2011, the Hearings Bureau mailed a Notice of Administrative Hearing in this matter setting the hearing for January 12, 2012.
11. If Taxpayer had filed a timely protest in this matter to the partial denial of the refund, the Department would have granted the additional claim for refund of \$10,496.00.
12. On June 24, 2009 when Taxpayer filed its Amended Return, Taxpayer provided the Department with 1099R forms along with a spreadsheet of the federal adjustments to the Department. Exhibit #B, page 2.
13. On July 9, 2009, the Department requested that Taxpayer provide a spreadsheet of the federal adjustments by Letter ID No. L 1833376640 attached to protest letter. Taxpayer was provided 30 days to provide the information which had already been provided.

14. When the Department issued the partial refund on August 26, 2009, it stated that the reason for the adjustment was that the “W-K form and/or 1099R not provided. Reported payment is incorrect.” Exhibit #C.

15. The reason for denying the partial refund given by the Department was inaccurate.

16. Taxpayer received the partial refund amount of \$28,811.00 on August 31, 2009. Exhibit #C. The partial denial of the refund was deposited by Taxpayer on September 1, 2009.

17. Or about October 2, 2009, Ms. Sue Smith, a Department employee, informed Taxpayer that the reason the refund was partially denied was because Taxpayer had failed to provide merger documents to the Department. Exhibit Taxpayer #5.

18. On or about October 2, 2009, Taxpayer, through its employee, Joe Scarfarotti, faxed a letter to the Department indicating that St. Mary Operating Company had merged with St. Mary Land & Exploration Company. Attached to Protest Letter, Attachment E.

19. On or about December 4, 2009, Ms. Smith left a voice message for one of Taxpayer’s representatives, Joe Scarfarotti, that to receive the denied refund amount, Taxpayer would have to “re-amend” its return and resubmit the return and all of the attachments. Exhibits #4 and #5.

20. After receiving the partial denial of refund on August 26, 2009, Taxpayer had further conversations with the Department. Based on those conversations, Taxpayer filed a Second Amended Return on April 28, 2010. Exhibit #D.

21. The Second Amended Return requested a refund of \$10,496.00, which was the difference between the amount requested on the Amended Return and the partial refund granted by the Department. Exhibits #C and #D.

22. The Second Amended Return requested a refund amount that had already been denied by the Department.

23. On June 3, 2010, the Department denied the requested refund amount because of the statute of limitations. Exhibit #E.

DISCUSSION

At issue in this matter is whether the Department properly denied the claim for refund filed by Taxpayer for the 2005 tax year for corporate income taxes based on Taxpayer's Second Amended Return. *NO PROTEST FILED WITHIN 90 DAYS.*

Generally speaking, a claim for refund must be filed within three years of the end of the calendar year in which the payment was originally due. NMSA 1978, § 7-1-26 (D) (2007). For the tax year 2005, the latest the request for a claim for refund could be filed was December 31, 2009 pursuant to NMSA 1978, Section 7-2A-9(A)(1989) and Section 7-1-26(D)(1)(a) (2007). In this case, the only timely request for a claim for refund is the Amended Return filed on June 24, 2009.¹ Once this claim for refund was filed, Taxpayer's remedies became limited.

On June 24, 2009, Taxpayer filed an Amended Return to reflect changes in the apportionment percentages and to include New Mexico income tax withheld from oil and gas proceeds. Exhibit #B. There is no dispute between the parties that the information provided in the Amended Return was accurate. Taxpayer was requesting a refund of \$39,307.00. Exhibit #B. On August 26, 2009, the Department refunded a partial amount, \$28,811.00, of the requested amount in the Amended Return filed on June 24, 2009. Exhibit #C. The difference between the amount requested to be refunded by Taxpayer and the amount refunded by the Department was \$10,496.00.

At that point of receiving the partial denial of refund instead of providing the Department with additional information that it was requesting, Taxpayer should have protested the partial denial of the refund within 90 days from receiving the partial denial of the refund. The statute provides that "(i)f the claim is denied in whole or in part in writing, no claim may be refiled with respect to that which was

¹ There is a statute of limitations that provides a one year period for requesting a claim for refund if the Internal Revenue audits the taxpayer and makes adjustments. NMSA 1978, Section 7-1-26(F) (2007). The date on the Internal Revenue audit work papers indicates that the federal adjustments were completed on January 20, 2009. It appears Taxpayer filed a Second Amended Return on April 28, 2010. Exhibit #D. The Amended Return filed on April 28, 2010 is still untimely under this provision.

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.” NMSA 1978, §7-1-26(B) (1) (2007). Pursuant to Section 7-1-26(B)(1), Taxpayer was required to protest the partial denial within 90 days.

In this case, the partial denial of the refund was mailed to Taxpayer on August 26, 2009 and received by Taxpayer on August 31, 2009. Exhibit #C. The refund amount was deposited by Taxpayer on September 1, 2009. The time period of 90 days began at the latest on September 1, 2009. Therefore the 90th day expired on or about November 29, 2009. Taxpayer’s protest was filed on September 3, 2010. The protest of the partial denial of the refund was untimely.

Taxpayer argues that the information provided and requested by the Department was confusing and misleading which caused Taxpayer to miss the earlier protest period. The confusion for Taxpayer began when the Department requested, on July 9, 2009, a spreadsheet of the federal adjustments by Letter ID No. L 1833376640. Taxpayer was provided 30 days to provide the information which had already been provided. When the Department issued the partial refund on August 26, 2009, it stated that the reason for the adjustment was that the “W-K form and/or 1099R not provided. Reported payment is incorrect.” Exhibit #C. However, the W-K form and/or 1099R had already been provided to the Department at the hearing. The Department did not provide an explanation as to why the Department partially denied the refund and why it kept requesting information already provided.

Then or about October 2, 2009, Ms. Smith informed Taxpayer that the reason the refund was partially denied was because Taxpayer had failed to provide merger documents to the Department. Exhibit Taxpayer #5. This reason provided by the Department was a different reason than that provided in the explanation of the partial denial. Exhibit #C. Taxpayer promptly provided the merger documents that Ms. Smith requested. On or about October 2, 2009, Taxpayer, through its employee, Joe Scarfarotti, faxed a letter to the Department indicating that St. Mary Operating Company had merged with St. Mary Land & Exploration Company. Attached to Protest Letter, Attachment E. Mr. Roach testified that

Taxpayer kept providing the Department with the requested documents in hopes of receiving the remainder of his refund.

At least one more telephone conversation occurred, in which, Ms. Smith left a voice message for one of Taxpayer's representatives, and said that to receive the denied refund amount, Taxpayer would have to "re-amend" its return and resubmit the return and all of the attachments and that the return should "reflect the additional \$6,508.00." Exhibits #4 and #5. This occurred on December 4, 2009. Taxpayer submitted a Second Amended Return for tax year 2005 requesting the refund of \$10,496.00 on April 28, 2010. It is clear from the evidence and testimony that Taxpayer was attempting to comply with Ms. Smith's directive. However, her directive was incorrect. The Hearing Officer acknowledges that Ms. Smith provided incorrect information to Taxpayer. Taxpayer should have been told to protest the partial denial of the refund because the deadline was on or about November 29, 2009. Taxpayer should not have filed a Second Amended Return in hopes of receiving the remainder of its refund or \$10,496.00, since the statute provides that "(i)f 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 file a protest of the partial denial. NMSA 1978, §7-1-26(B) (1) (2007). (Emphasis added).

To the extent that the Taxpayer's argument might encompass equitable estoppel, a hearing officer does not have authority to grant equitable estoppel. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 118 N.M. 273, 881 P.2d 18 (1994) (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). However, 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 90 day period. *See id.* at ¶1. A taxpayer's failure to file a protest or an action within the 90-day period is not excused by the taxpayer's reliance on oral statements of an employee of the Department. *See id.* at ¶45.

Therefore, the Department's denial of the claim for refund based on Taxpayer's Second Amended Return filed on April 28, 2010 for \$10,496.00 was properly denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest on September 3, 2010 to the denial of the claim for refund the Department issued on June 3, 2010.

B. On August 26, 2009, Taxpayer filed an Amended Return requesting a refund. The refund was partially granted and partially denied. Pursuant to NMSA 1978, Section 7-1-26(B) (1) (2007), Taxpayer failed to protest the partial denial of the refund.

C. Taxpayer filed a Second Amended Return on April 28, 2010. This Second Amended Return was properly denied because the Department did not have authority to grant the partial denial.

D. On June 3, 2010, the Department properly denied the claim for refund filed on April 28, 2010.

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

DATED: June 28, 2012.

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, §7-1-25, the Taxpayers 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* NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

CERTIFICATE OF SERVICE

On July 2, 2012, a copy of the foregoing Decision and Order was mailed via certified mail #7011 0470 0001 1511 6160 to Michael F. Roach, Director of Taxation at SM Energy, 1775 Sherman St. Suite 1200, Denver, Colorado 80203 and delivered through interoffice mail to Staff Attorney Julia Belles, Esq. Taxation and Revenue Department, Santa Fe, New Mexico.

John Griego