

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

**IN THE MATTER OF THE PROTEST OF
TIMOTHY & TERESA MARTIN
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L2112729920**

No. 13-38

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on November 6, 2013, before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Timothy Martin appeared *pro se*, representing Timothy and Teresa Martin (“Taxpayers”). Staff Attorney Aaron A. Rodriguez appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Andrick Tsabetsaye appeared as a witness for the Department. Taxpayer Exhibit #1-4 and Department Exhibits A- B were admitted into the record, as described in the Administrative Exhibit Log. At the request of the Hearing Officer, on November 22, 2013, the Department submitted final briefing on the question of whether the Servicemembers Civil Relief Act, 50 U.S.C. §526, applied in this matter. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayers live in El Paso, Texas. Teresa Martin works for the Santa Theresa School District in New Mexico, where she earns income in New Mexico.
2. Taxpayers did not originally file personal income tax returns in New Mexico for the relevant personal income tax years: 2007, 2008, 2009, 2010.

3. Through information it received from the New Mexico Department of Workforce Solutions, the Department discovered that Teresa Martin had New Mexico income in each relevant year.

4. On August 10, 2011, the Department sent Taxpayers Notices of Limited Scope Audit for personal income tax years 2007 and 2008. [**Taxpayer Ex. #'s 1-2**].

5. In response to those Notices of Limited Scope Audit, at an unspecified date in October 2011, Taxpayers e-filed their 2007 and 2008 New Mexico personal income returns. Taxpayers did not make a claim for Special Needs Adopted Child Tax Credit at that time.

6. In January 2012, Timothy Martin was deployed with the New Mexico National Guard to Egypt for 12-months.

7. While Mr. Martin was deployed, Taxpayers received the Department's Notice of Limited Scope Audit for personal income tax year 2009.

8. Because Mr. Martin was deployed, the Department granted Taxpayers an extension on the Limited Scope Audit for personal income tax year 2009 until Mr. Martin returned from Egypt.

9. Mr. Martin completed his deployment in December of 2012 and returned home by January of 2013.

10. Upon returning from his deployment, Mr. Martin began to prepare Taxpayers' 2009 New Mexico personal income tax return. In preparing that return, Mr. Martin first became aware of the Special Needs Adopted Child Tax Credit.

11. In February or March of 2013, Mr. Martin prepared and submitted Taxpayers' 2009 and 2010 New Mexico personal income tax returns, claiming the Special Needs Adopted Child Tax Credit for all eight of Taxpayers' children.

12. Mr. Martin also called the Department to inquire about amending Taxpayers' 2007 and 2008 New Mexico personal income tax returns in light of his discovery of the Special Needs Adopted Child Tax Credit. Mr. Martin was told that his 2007 and 2008 New Mexico personal income tax returns had not ever been processed by the Department.

13. In February or March of 2013, Mr. Martin resubmitted Taxpayers 2007 and 2008 New Mexico personal income tax returns, claiming the Special Needs Adopted Child Tax Credit on all eight of Taxpayers' children in each year.

14. Taxpayers did not make a claim for the Special Needs Adopted Child Tax Credit within three years from the end of the calendar year in which the claim first could have been made for the 2007 personal income taxes (December 31, 2011).

15. On May 20, 2013, the Department only granted Taxpayers a partial refund for four of the Taxpayers' children for personal income tax years 2009 and 2010. The Department did not grant Taxpayers' claim for the Special Needs Adopted Child Tax Credit in personal income tax years 2007 and 2008. [**Letter id. no. L2112729920**].

16. In partially granting Taxpayers' credit in 2009 and 2010, the Department applied Taxpayers' allocation of income to New Mexico percentage, as required under NMSA 1978, Section 7-2-11 (C) (2001), in personal income tax years 2009 (.661) and 2010 (.323) to determine what percentage of the \$1000.00 per child Special Needs Adopted Child Tax Credit Taxpayers' were entitled to claim. [**Letter id. no. L2112729920**].

17. On August 20, 2013, Taxpayers protested the Department's allocation of the Special Needs Adopted Child Credit in tax years 2009 and 2010, the denial of the Credit for four of Taxpayers' children in 2009 and 2010, and the denial of Taxpayers' claim for the Credit in personal income tax years 2007 and 2008.

18. On August 27, 2013, the Department acknowledged receipt of Taxpayers' protest.
19. On September 27, 2013, the Department requested a hearing in this matter.
20. On September 30, 2013, the Hearing Bureau issued Notice of Administrative Hearing, scheduling this matter for November 6, 2013.
21. After reviewing Taxpayers paperwork on all eight of Taxpayers' adopted children, the Department conceded at hearing that Taxpayers were entitled to the Special Needs Adopted Child Tax Credit for all eight children rather than the four initially allowed.
22. After the hearing, in response to a request for briefing on the applicability of the Servicemembers Civil Relief Act, 50 U.S.C. §526, the Department granted Taxpayers' claim for the Special Needs Adopted Child Tax Credit in personal income tax year 2008.

DISCUSSION

Taxpayers are residents of Texas whom initially did not file New Mexico personal income tax returns in 2007, 2008, 2009, and 2010. The Department detected that Ms. Martin had income earned in New Mexico as an employee of public schools in Santa Teresa, New Mexico. The Department sent Taxpayers a notice of limited scope audit for 2007, 2008, and 2009. In 2013, Taxpayers prepared and filed their New Mexico personal income tax returns for each year, claiming a Special Needs Adopted Child Tax Credit for all eight of their adopted children. The Department partially granted Taxpayers' Special Needs Adopted Child Tax Credit for four children in tax years 2009 and 2010, prorated consistent with Taxpayers allocation of income percentage in those years. Taxpayers protested this partial denial of claim for credit. After the Department made two adjustments to the partial claim for credit, only two protested issues remain relevant: whether the Department properly prorated the credit by using the apportionment of New Mexico income percentage reported by Taxpayers in each relevant year; and whether

Taxpayers claim for Special Needs Adopted Child Tax Credit for personal income tax year 2007 was barred under the relevant statute of limitations.

Presumption of Correctness.

The presumption of correctness under NMSA 1978, Section 7-1-17 (C) (2007) does not attach in this matter because the Department did not issue an assessment under Section 7-1-17. However, Taxpayers nevertheless have the burden to establish that they were entitled to their claim for credit. “Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 740 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447, 451. While this protest deals with the claim for a tax credit rather than a deduction or exemption, a claim for a credit is analogous enough to a deduction or exemption that the rationale articulated in *Wing Pawn Shop* extends to a claim for credit. Consequently, under *Wing Pawn Shop*, Taxpayers must establish that they were entitled to the Special Needs Adopted Child Tax Credit.

Apportionment.

The Special Needs Adopted Child Tax Credit is found under NMSA 1978, Section 7-2-18.16 (2007). Section 7-2-18.16 allows for a \$1,000.00 refundable credit in each tax year for each eligible child. However, under Regulation 3.3.4.10 (D) NMAC (12/14/00), the Credit under Section 7-2-18.16 is to be apportioned consistent with NMSA 1978, Section 7-2-11 (C). *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M.

498 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

Taxpayers argued that apportionment is not required because Regulation 3.3.4.10 (D) NMAC (12/14/00) continues on to say that “no separate process is necessary to apportion the exemption provided by Section 7-2-5.4 NMSA 1978.” However, when read within the overall context of Regulation 3.3.4.10 (D) NMAC (12/14/00) and Section 7-2-11, this provision simply means that there is no distinct apportionment process needed beyond the apportionment process already codified under Section 7-2-11. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401 (statutes are to be interpreted in a manner to give the entire statute effect and not render portions of the statute superfluous). Moreover, it should be noted that Section 7-2-5.4 referenced in the latter portion of Regulation 3.3.4.10 (D) has been repealed, rendering that portion of the regulation superfluous.

Turning to Section 7-2-11 (C), that statute reads in pertinent part that “[a] taxpayer may claim a credit in an amount equal to the amount of tax determined to be due...multiplied by the non-New Mexico percentage.” In other words, a taxpayer may only receive a credit in the same proportion as their apportionment of New Mexico income versus non-New Mexico income percentage. The Department used Taxpayers’ income percentage to calculate the proportions of the Special Needs Adopted Child Tax Credit Taxpayers were entitled to in 2009 and 2010. Under the plain language of Section 7-2-11 (C), the Department’s apportionment method was correct. That same apportionment method extends to Taxpayers’ claim for credit in tax year 2008.

Statute of Limitations on 2007 Claim for Credit.

Taxpayers also argued that they were entitled to a refund for the Special Needs Adopted Child Credit in personal income tax year 2007 on multiple grounds.

Taxpayers' claim for credit of 2007 tax was untimely under two statutory provisions. First, NMSA 1978, Section 7-2-12.1 (1990) sets a limit on the length of time a claim for a credit or rebate can be made under New Mexico's Income Tax Act. In pertinent part, under Section 7-2-12.1,

a credit... that is claimed shall be disallowed if the claim for the credit... was first made after the end of the third calendar year following the calendar year in which the return upon which the credit or tax rebate was first claimable was initially due.

In this case, a claim for credit on 2007 personal income taxes was first claimable on Taxpayers' April 15, 2008 personal income tax return. *See* NMSA 1978, § 7-2-12 (2003). The end of the third calendar year following the end of 2008 was December 31, 2011. Under Section 7-2-12.1, the Department must disallow any 2007 income tax credit claimed after December 31, 2011. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Similarly, under the second statutory provision, NMSA 1978, Section 7-1-26 (D) (1) (2007, before 2013 amendment), no credit or 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. Again, under Section 7-2-12, 2007 personal income tax returns were due on April 15, 2008, making December 31, 2011 the three year deadline under Section 7-1-26 (D) (1) for a claim for credit or refund. 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 (B). Although the *Kilmer* court was addressing a different subparagraph of Section 7-1-26, 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.” *Kilmer*, ¶16. That same rationale is equally compelling to the three-year statute of limitation deadline under Section 7-1-26 (D) (1).

In this case, Taxpayers did not make their claim for the Special Needs Adopted Child Tax Credit until February or March 2013, over a year after the expiration of the statute limitations on a claim for refund under Section 7-2-12.1 and Section 7-1-26 (D) (1). Moreover, the December 31, 2011 statute of limitation deadlines under both Section 7-2-12.1 or Section 7-1-26 (D) (1) had already expired before Mr. Martin was deployed in 2012. Taxpayers’ claim for credit on the 2007 personal income tax was untimely and time-barred by the statute.

Taxpayers argued that even if their claim for credit was beyond the statute of limitations, they still believed they were entitled to their claim under Section 7-1-26 (F) because the claim resulted from an audit. However, Section 7-1-26 (F) only allows for the credit of an overpayment in one period of the audit to offset the underpayment of tax in another audit period in audits involving multiple reporting periods. In this case, there is no evidence that Taxpayers had a tax liability in any other audit period that could be offset by the claimed 2007 credit.

Taxpayers also cited Section 7-1-26 (J)¹ as a basis for the claimed credit. Section 7-1-26 (J) simply indicates that the filing of return showing a balance due to a taxpayer or the filing of an amended return showing a balance due to a taxpayer constitutes the filing of a claim for refund. This is a provision that defines what constitutes a claim for refund, not whether a claim is timely filed. There is no doubt that Taxpayers made a claim for credit under this section, but that does not establish whether those claims were timely.

Taxpayers also cited Regulation 3.1.9.12 (B) NMAC as a basis to support the 2007 claim for

¹ Taxpayers actually referred to Section 7-1-26 (I) (2013), which reflected an amended and renumbered statute effective in July 2013. However, under the statute controlling for a 2007 claim for refund, Section 7-1-26 (J) contained the same substance as current subsection I.

credit. Regulation 3.1.9.12 (B) NMAC reads

When the department has assessed tax for periods specified in Subsections 7-1-18 B, C or D NMSA 1978 and the assessment applies to a period ending at least three years prior to the beginning of the year in which the assessment is made, the taxpayer may submit a claim for refund with respect to those periods for which an assessment is made. Any such claim for refund must be submitted within one year of the date of the assessment.

Taxpayers' argument requires that the word "assessment" in this Regulation be read to include the Department's Notice of Audit. However, an audit and an assessment are two distinct legal concepts with separate meanings: assessments are governed by NMSA 1978, Section 7-1-17 (2007), while audits are governed by NMSA 1978, Section 7-1-11-11.2. Because after receiving the Notice of Audit, Taxpayers filed their 2007 tax returns reporting no tax liability, the Department never issued an assessment to Taxpayers under subsection (B), (C) or (D) of NMSA 1978, Section 7-1-18 (1994). Consequently, under the plain language of the statute, in the absence of an assessment, Regulation 3.1.9.12 (B) NMAC does not apply to Taxpayers' 2007 personal income tax claim for credit.

In summary, under the relevant statute of limitations, the Department lacks authority to grant Taxpayers' untimely claim for credit on the 2007 personal income tax. Because no other statutory or regulatory exception applies, the Department properly denied Taxpayers' claim for credit on their 2007 personal income tax. Aside from the adjustments that the Department agreed to make before and after the hearing, Taxpayers' protest is denied.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest to the Department's partial denial of claims for credit on 2007, 2008, 2009, and 2010 personal income taxes. Jurisdiction lies over the parties and the subject matter of this protest.

B. The Department properly allocated all of Taxpayers' claims for credit using Taxpayers' allocation of income percentage determined under NMSA 1978, Section 7-2-11 (2001).

C. Taxpayers' 2013 claim for credit on 2007 personal income tax was beyond the statute of limitations under NMSA 1978, Section 7-2-12.1 (1990) and NMSA 1978, Section 7-1-26 (D) (1) (2007, before 2013 amendment).

For the foregoing reasons, with the exception of the Department's adjustments, Taxpayers' protest **IS DENIED**.

DATED: December 9, 2013.

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