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

IN THE MATTER OF THE PROTEST OF
NEW MEXICO TECH UNIVERSITY RESEARCH **No. 14-24**
TO DENIAL OF PROTEST ISSUED UNDER LETTER
ID NO. L1233765840

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 7, 2014 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. M. Blake Motl, CPA, and Mr. Clark Kegel, CPA, from Atkinson & Co., Ltd. appeared, representing New Mexico Tech University Research ("Taxpayer"). Staff attorney Peter Breen appeared, representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #1-10 and Department Exhibits A-D were admitted into the record, as more thoroughly described in the Administrative Exhibit Coversheet[1]. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On May 20, 2013, under letter identification number L1196974912, the Department assessed Taxpayer for $80,749.14 in corporate income tax, $3,229.96 in penalty, and $1,590.93 in interest for a total assessed liability of $85,570.03.

[1] Department Exhibits A & B, FYI- 402 rev. 9/10 and FYI-402 rev 7/2013 respectively, although present and admitted during the hearing, were not in the administrative file at the conclusion of the hearing. Copies of both public records (identical to those used during the hearing) were obtained after the hearing and placed in the administrative file as part of the record.

2. On November 19, 2013, Taxpayer through its representative Mr. Motl, CPA, protested the assessment issued under letter id. no. L1196974912.

3. On December 2, 2013, under letter id. no. L1233765840, the Department denied Taxpayer's protest of the assessment as untimely.

4. On January 10, 2014, through its representative Mr. Motl, CPA, Taxpayer protested the Department's denial of the protest under letter id. no. L1233765840.

5. On April 21, 2014, the Department requested a hearing in this matter with the Hearings Bureau.

6. On April 23, 2014, the Hearings Bureau issued Notice of Administrative Hearing, scheduling this matter for a protest hearing on May 7, 2014.

7. For context, the underlying assessment involves Taxpayer's Corporate Income Tax return for the tax year ending on June 30, 2012. In that return, Taxpayer attempted to deduct a net operating loss carryover dating from the corporate income tax year ending on June 30, 2008. The Department disallowed Taxpayer's net operating loss carryover in the 2012 return.

8. On May 7, 2013, the Department sent Taxpayer a "Return Adjustment Notice," warning Taxpayer that unless the liability cited was paid or resolved, the Department would be issuing a formal notice of assessment.

9. On May 20, 2013, the Department issued the assessment referenced in Finding of Fact #1 and enclosed a copy of FYI-402, rev. 9/2010, which provided Taxpayer with an explanation of Taxpayer's remedy to protest the assessment.

10. Taxpayer presented the Department's May 20, 2013 assessment to Taxpayer's representative, Mr. M. Blake Motl, CPA, on approximately May 28, 2013. [**Taxpayer Ex. #3**].

11. On or about June 6, 2013, Mr. Motl spoke with Leann Carrillo of the Department's Corporate Audit and Compliance Division about the Department's assessment. Mr. Motl's notes of his June 6, 2013, conversation with Ms. Carrillo reflect his belief that the assessment could be resolved without protesting: "can resolve – no protest required." [**Taxpayer Ex. #10**].

12. The Department did not provide Taxpayer with any written document or email purporting to extend the protest period or directing Taxpayer that there was no need to timely protest the assessment so long as Taxpayer's representative worked with the Corporate Audit and Compliance Division to resolve the assessment.

13. Taxpayer did not protest within 30-days of the assessment issued under letter id. no. L1196974912.

14. Taxpayer did not seek an extension of time in which to protest or a retroactive extension of time in which to a file protest within 90-days the assessment issued under letter id. no. L1196974912.

15. The Department did not grant Taxpayer an extension or a retroactive extension of time in which to a file a protest.

16. On June 26, 2013, 37-days after the Department's assessment, Mr. Motl, CPA, submitted a letter to the Department (with an enclosed copy of the assessment), explaining Taxpayer's understanding of the basis of the Department's assessment, Taxpayer's position on why its filed return was proper, and requesting "that the return be accepted as filed and any assessments relating to the year ending June 30, 2012, be abated." [**Taxpayer Ex. #1**].

17. On June 28, 2013, the Department sent Taxpayer a "Tax Collection Notice" for the assessed tax liability amount plus accrued interest. [**Taxpayer Ex. #5**].

18. Mr. Motl continued to have contact with Department representative throughout July and August of 2013 about resolving the assessment. [**Taxpayer Ex. #4**].

19. On August 1, 2013, the Department sent Taxpayer a "Notice of Intent to Lien" for the assessed tax liability amount plus accrued interest. [**Taxpayer Ex. #6**].

20. On or about August 27, 2013, Ms. Carrillo informed Mr. Motl that the Department would not allow Taxpayer's carry-over loss on its 2012 corporate income tax returns. [**Taxpayer Ex. #4**].

21. Believing that he had 90-days from when Ms. Carrillo told him about the decision to disallow the carry-over losses on or about August 27, 2013, Mr. Motl mailed Taxpayer's protest letter on November 19, 2013, 197-days after the May 20, 2013 assessment.

DISCUSSION

There are two main issues at protest. The first issue is whether Taxpayer timely filed a protest to the Department's assessment. The second issue is if Taxpayer's protest letter was untimely, whether Taxpayer was still entitled to relief under an estoppel theory based on Taxpayer's representative's assertions that Department employees informed Taxpayer's representative that a formal protest was not necessary so long as the parties worked at resolving the assessment.

The assessment was issued in this case on May 20, 2013, before the July 1, 2013 effective date of NMSA 1978, Section 7-1-24 (2013). The previous version of the protest statute, NMSA 1978, Section 7-1-24 (2003, amended 2013), in effect at the time the Department issued the assessment governs this matter. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dep't*, 2012-NMCA-010 (date of assessment determines whether a previous version or

amended version of penalty statute applies). Under Section 7-1-24, a taxpayer "shall" file a protest "within thirty days of the date of mailing to the taxpayer by the department of the notice of assessment." *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). Section 7-1-24 (B) allows a taxpayer to make a written request to extend the period to file a protest by 60-days. If a taxpayer demonstrates substantial merit to the protest grounds and an inability to timely file a protest or a written request for extension within thirty days, the secretary is also empowered under Section 7-1-24 (B) to grant a taxpayer a retroactive extension of no more than 60-days after the expiration of the initial thirty day period to file a protest. In other words, under Section 7-1-24 (B) including the possibility of an extension or retroactive extension, a taxpayer has at most 90-days from the date of the assessment to file a protest.

In *Associated Petroleum Transp. v. Shepard*, 1949-NMSC-002, ¶6 & ¶11, 53 N.M. 52, the New Mexico Supreme Court noted that a taxpayer's inability to timely follow the then-in-place designated protest procedure deprived the State Tax Commission of jurisdiction over the protest. More recently, the New Mexico Court of Appeals ordered the dismissal of a property tax taxpayer's complaints for refund when such complaints were not timely filed in compliance with the Legislature's statutorily imposed deadlines. *See Chan v. Montoya*, 2011-NMCA-72, 150 N.M. 44. Department Regulation 3.1.7.11 NMAC (01/15/01) finds that the 90-day period (which includes the 30-day period plus the additional 60-day period possible assuming an extension) articulated under NMSA 1978, § 7-1-24 (B) (2003) is jurisdictional. 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.

In *Lopez v. New Mexico Dep't of Taxation & Revenue*, 1997-NMCA-115, 124 N.M. 270, the Court of Appeals had opportunity to consider whether a taxpayer timely and properly filed a protest against the Department's notice of audit. At the administrative tax protest hearing, the tax hearing officer found that the *Lopez* taxpayer had failed to timely protest the Department's audit under Section 7-1-24. *See id*., ¶6. The *Lopez* taxpayer appealed that hearing officer's decision and order, arguing in part that he had "actually or constructively" protested the audit within the required time. *See id*., ¶7. The Court of Appeals in *Lopez* noted that Section 7-1-24 imposed a 30-day time restriction on a protest. *See id*., ¶6. In *Lopez,* the Court of Appeals looked closely at the only letter filed within the 30-days and found that it did not constitute a protest. *See id.*, ¶9. The Court of Appeals in *Lopez* affirmed that hearing officer's conclusion that the *Lopez* taxpayer did not timely protest the Department's audit. *See id*., ¶9.

Applying the statutes, regulations, and case law to the facts of this case, Taxpayer did not timely file a protest. Taxpayer did not file protest or a request for an extension of time in which to file a protest within 30-days of the May 20, 2013 assessment. In *Lopez*, the Court of Appeals carefully reviewed that taxpayer's sole letter submitted within the statute's 30-day window. However, unlike in *Lopez*, there is no evidence in this case that Taxpayer submitted any written communication to the Department within that 30-day window. As such, there is nothing in the record that even under a broad reading might constitute a protest within 30-days. *See cf. In the Matter of Collin Sanchez*, D&O 13-8 (non- precedential; under a broad reading, hearing officer found one letter submitted within the 30-day period constituted a protest).

Taxpayer did send the Department a letter on June 26, 2013, 37-days after the assessment. That letter included a copy of the Department's May 20, 2013 assessment and the final paragraph of that letter makes clear Taxpayer's intent to protest the assessment: "we request

that the return be accepted as filed and any assessments relating to the year ending June 30, 2012 be abated." Any reasonable reading of this document makes clear that it was a protest letter addressed to the Department. The problem is that this letter was filed seven-days after Section 7-1-24 (B)'s 30-days deadline and did not make any express or implied request for a retroactive extension of time to file a protest. Without a request for a retroactive extension under Section 7-1-24 (B), the Department never granted an extension or retroactive extension in this matter.

The protest letter Taxpayer sent to the Department's Protest Office on November 19, 2013 was submitted 197-days after the assessment. Again, that November 19, 2013, letter did not contain a request for retroactive extension. Even if the November 19, 2013 letter contained a request for a retroactive extension, the Department would have been without authority to grant Taxpayer an extension at that time. Taxpayer's November 19, 2013, protest letter was filed well beyond the maximum 90-days period including an extension for which to file a protest. On December 2, 2013, the Department's Protest Office denied Taxpayer's November 19, 2013 protest as untimely.

Taxpayer argues that its protest was either timely or should be deemed timely because Department employee Leann Carrillo assured Taxpayer verbally that no formal protest was necessary while the Department's Audit and Compliance Division worked with Taxpayer on resolving the assessment. Taxpayer believes that the statutorily limited window for a protest did not start until Ms. Carrillo informed Taxpayer's representative on August 27, 2013 that the Department was unable to accept Taxpayer's carry-over losses. Taxpayer's argues that its November 19, 2013 protest letter was filed timely, within 90-days of August 27, 2013. In the alternative, Taxpayer argues that it relied on Ms. Carrillo's statement that no formal protest was necessary in good faith like any reasonable person would in that situation, and to deny

Taxpayer's protest in this situation where Taxpayer, a component unit of a public university, received no tax benefit would be unjust.

Under the Tax Administration Act ("TAA"), a notice of assessment is a triggering action with specific legal implications and consequences. The date of mailing of an effective assessment legally triggers the 30-days protest period under Section 7-1-24. Another legal consequence is that unless a notice of assessment is timely protested, a taxpayer becomes a delinquent taxpayer under NMSA 1978, Section 7-1-16 (2007, amended 2013). Absent a timely protest, the TAA provides numerous enforcement and collection actions for the Department to satisfy the assessed tax liability, actions which the Department in fact pursued in this matter on June 28, 2013 and August 1, 2013. Taxpayer was represented by a CPA, a professional capable of researching and understanding these significant legal implications of the assessment under the TAA. While it is understandable that Taxpayer wanted to continue to work informally to resolve the assessment, given the clear legal implications of the assessment, Taxpayer needed to file its protest and then continue with informal efforts to resolve the assessment after the filing of a formal protest.

Moreover, the fact that Taxpayer received the June 28, 2013 tax collection notice and the August 1, 2013 notice of intent to lien put Taxpayer on notice that its understanding that it could wait to file a protest until after it had worked informally with the Department was not accurate. At those points, Taxpayer was still within the window to request a retroactive extension of time to file a protest. However, Taxpayer never did file any request for a retroactive extension in which to protest in this matter.

Without citing any supporting legal authority, Taxpayer argued that the period to protest did not commence until Ms. Carrillo informed Taxpayer's representatives that the amended

return would not be accepted on August 27, 2013. While Taxpayer's approach to work informally with the Department may have been appropriate in response to the Department's May 7, 2013 return adjustment notice, it is not consistent with the TAA's legal requirements associated with the notice of assessment issued in this matter. When a formal notice of assessment is effectively issued to a taxpayer, the TAA does not give a taxpayer the option of waiting to protest until the taxpayer determines that its informal efforts at resolving the protest with the Department are unsuccessful. Rather, the TAA requires a taxpayer to act in response to the assessment within the statutory limit. In this case, once the Department issued its assessment, Taxpayer was required to act within 30-days or request an extension or retroactive extension.

Turning to Taxpayer's fairness arguments, NMSA 7-1-60 (1993) establishes statutory estoppel in certain circumstances. In pertinent part, under Section 7-1-60 (emphasis added), the Department is estopped from acting when a taxpayer's actions were "in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and *in writing* by the secretary…" In this case, Taxpayer's actions were not done in reliance of a regulation or a ruling addressed to Taxpayer in writing. Consequently, Section 7-1-60 does not provide Taxpayer with any grounds for statutory estoppel.

Taxpayer's good faith and fairness argument also amount to a claim for equitable estoppel. Equitable estoppel does not appear to be a possible remedy in an administrative protest hearing before the Department. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 1994-NMSC-085, ¶18, 118 N.M. 273 (equitable remedies are not part of the "quasi-judicial" powers of administrative agencies). Even if it is available in this context, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving the

assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr., Inc.*, 1989-NMSC-015, ¶9, 108 N.M. 22. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Bien Mur Indian Market*, ¶9. Oral statements not reduced to writing are generally not grounds to grant equitable estoppel. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440. Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

In *Kilmer*, ¶25, the Court of Appeals considered that taxpayer's claims for equitable relief in the context of an untimely claim for refund. Under *Kilmer*, ¶26 (internal citations omitted), in order for a taxpayer to establish an equitable estoppel claim against the Department, a taxpayer must show that

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury.

The claimant must also show "affirmative misconduct on the part of the government." *id*., ¶27 (internal citations omitted).

In a relevant portion to the resolution of this protest, the *Kilmer* Court of Appeals considered the conduct of both parties as part of its estoppel analysis. *id*., ¶41. The *Kilmer* Court of Appeals found that the Department's own failings in that case were mitigated by the fact that the *Kilmer* taxpayer was represented by an accountant, a "professional [] capable of performing her own research… on New Mexico tax law." *id*., ¶41, 700, 450. The *Kilmer* Court of Appeals found that estoppel could not apply because of the accountant's "expertise, the resources available to [the accountant], and the language" of the relevant statute articulating a clear

timeline for action. *id*. Further, the Court of Appeals found it was "not reasonable" for the accountant "to assume that [the accountant] would not need to do anything further except wait for the claim to be denied." *id*.

The *Kilmer* rationale extends to the facts of this protest. Taxpayer received nothing in writing from the Department that the Department was extending the protest deadline pending Taxpayer's efforts to informally resolve the assessment with the Department or for any other reasons. Taxpayer's representative did not attempt to memorialize Ms. Carrillo's statements in the form of a confirmation letter. Oral statements not reduced to writing are generally not amendable to equitable estoppel. *See Kilmer*, ¶28. This is particularly true when Taxpayer was represented by a certified public accountant with the knowledge and means to research the legal requirements for perfecting Taxpayer's protest under Section 7-1-24.

Even if the Department suggested that Taxpayer need not file a formal protest while it tried to resolve the assessment informally with the Department, like in *Kilmer*, Taxpayer's representative could have verified quickly the clear statutory requirement for a timely protest. Moreover, the Department's collections actions on June 28, 2013 and August 1, 2013 should have alerted Taxpayer's representative that its understanding of either the legal requirements of a protest or its belief in the Department's verbal assurances that no formal protest was yet required were misguided. At the point of those collection notices, there was still sufficient time for Taxpayer to remedy the problem by filing a request for a retroactive extension. As such, Taxpayer was not ignorant of the true facts and could not reasonably rely on Ms. Carrillo's alleged statements. Under *Kilmer*, equitable estoppel does not apply to Taxpayer's failure to file a protest within 30-days or request an extension or a retroactive extension of time in which to file a protest. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of the untimely protest under letter id. no. L1233765840. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer's June 26, 2013 letter and November 19, 2013 protest letter to the assessment issued under letter id. no. L1196974912 were untimely under NMSA 1978, Section 7-1-24 (B) (2003, amended 2013).

C. Under the requirements of NMSA 1978, Section 7-1-24 (B) (2003, amended 2013), Taxpayer did not request an extension of time or retroactive extension of time to file a protest.

D. Taxpayer's failure to timely submit a protest letter, or a request for extension, within the 30-day jurisdictional limit articulated under NMSA 1978, Section 7-1-24 (B) (2003, amended 2013) deprived the Department of authority to consider Taxpayer's protest. *See Lopez v. New Mexico Dep't of Taxation & Revenue*, 1997-NMCA-115, 124 N.M. 270.

E. Taxpayer is not entitled to statutory estoppel under NMSA 1978, Section 7-1-60 (1993) because Taxpayer did not rely on a regulation or a ruling addressed in writing to Taxpayer.

F. Taxpayer is not entitled to equitable estoppel in this matter under *Kilmer v. Goodwin*, 2004-NMCA-122, 136 N.M. 440.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. The Department properly denied Taxpayer's protest of the underlying assessment as untimely.

DATED: June 11, 2014.

Brian VanDenzen, Esq.
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, §7-1-25 (1989), 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. *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. A party filing an appeal shall file a courtesy copy of the appeal with the Hearings Bureau contemporaneously with the filing of the Notice with the Court of Appeals so that the Hearings Bureau may prepare the record proper.