IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

INNOVATIVE COMMUNICATIONS CORP. f/k/a ATLANTIC TELE-NETWORK CO. and VIRGIN ISLANDS TELEPHONE CORP., Plaintiffs,	)	**CIV. NO. 490/1999**
vs.	)	**ACTION FOR DECLARATORY RELIEF; INJUNCTIVE RELIEF AND FOR RECOVERY OF OVERPAID FRANCHISE TAXES**
GOVERNMENT OF THE VIRGIN ISLANDS and **HON. GERARD L. JAMES, III,** in his Official Capacity as Lieutenant Governor of the Virgin Islands of the United States and **HON. BERNICE TURNBULL,** in her Official Capacity as Commissioner, Department of Finance of the Government of the Virgin Islands, Defendants.	)	**NOT FOR PUBLICATION**

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CABRET, P.J.

MEMORANDUM OPINION
(January 29, 2001)

THIS MATTER is before the Court on the Government's ("Government" or "Defendant") Motion for Reconsideration of the Court's order granting partial summary judgment in favor of the Plaintiffs. For the reasons which follow, the motion will be denied.

FACTS AND PROCEDURAL POSTURE

The plaintiffs are required to pay annual franchise taxes, which they assert should be assessed at the statutory rate of $1.50 per thousand dollars of capital stock from its businesses in the Virgin Islands. The defendants notified Plaintiffs by letter in January 1998 that the Government would conduct a comprehensive review of their tax reports for the period 1988 - 1997. After completing this review, the Defendants contend they found that Plaintiffs had neglected to include all required capital in calculating franchise taxes, resulting in an underpaid amount. Plaintiffs were then assessed outstanding taxes, penalties and interest totaling $74,912.55 for that period, which they paid under threat of involuntary dissolution or further penalties. However, the plaintiffs now complain the Government has included "capital" in its computation of the taxes, which they claim goes beyond the statutory definition of "capital stock" and is, therefore, an improper factual basis for the tax assessment. They now seek to recoup those payments.

Plaintiffs filed a motion for summary judgment and raised several arguments. The argument pertinent to the current motion is that the statute of limitations has expired on a portion of the Government's claim. The Government argued that the general statute of limitations did not apply because of its sovereign immunity.

By order dated December 27, 2000, this Court held that Title 5, Section 31 (3)(B) of the Virgin Islands Code, which imposes a six-year statute of limitations on actions to recover liabilities created by statute, applied to bar a portion of the Government's claim, because the Government had expressly waived sovereign immunity by specifically applying the statue of limitations to the Virgin Islands Franchise Tax statute. Additionally, the order denied the Government's request for oral argument and a Rule 56 (f) motion to continue discovery, reasoning that its ruling would be unaffected by any further discovery or arguments. The Court further denied the plaintiffs' request for summary judgment on the remaining claims, because the Government had successfully raised genuine issues of material fact. Therefore, the court also denied the Government's Rule 56(f) motion for more discovery as moot with regard to those claims.

DISCUSSION

The Government now files this motion for reconsideration, arguing that: 1) the statute of limitations was subject to equitable tolling and, therefore, could not be decided as a matter of law; 2) an opportunity to conduct discovery would have allowed the Government to uncover a factual basis warranting application of equitable tolling principles, and; 3) granting summary judgment without oral argument was a violation of due process. The Court will discuss these arguments in turn.

Equitable tolling

A statute of limitations that waives sovereign immunity is jurisdictional. *See e.g. United States v. Dalm*, 494 U.S. 596, 606-608, 110 S. Ct. 1361, 1367-68, 108 L. Ed. 2d 548 (1990). Such statutes are also deemed jurisdictional if the time limits the right to action – rather than merely the remedy – so as to deprive the Court of jurisdiction for noncompliance. *See Ramadan v. Chase Manhattan Corp.*, 156 F. 3d 499, 504 (3d Cir. 1998).

Because the statute of limitations at issue here is jurisdictional, the Government's estoppel argument (had it been properly raised) could not save the claim. This is because jurisdictional statutes of limitations are mandatory, and may not be avoided by equitable tolling principles; rather, such tolling is applied only to periods of limitations. *See Dalm*, 494 U.S. at 606-608; *Ramadan*, 156 F. 3d at 500; *Shendock v. Director, Office of Workers' Compensation Programs*, 893 F. 2d 1458, 1466 1466-67 (3rd Cir. 1990) (jurisdictional statute can never be tolled, regardless of the equities), *cert. den.* 498 U.S. 826, 111 S. Ct. 81 (1990); *La Vallee Northside Civic Ass'n v. Coastal Zone Mgt Comm'n*, 866 F. 2d 616, 625 (3rd Cir. 1989) (mandatory and jurisdictional statutes of limitations cannot be tolled); *Nesovic v. United States*, 71 F. 3d 776, 777 (9th Cir. 1995) (Once the government waives sovereign immunity and subjects itself to a statute of limitations, those terms "define and circumscribe our jurisdiction" and, therefore, deprive the court of jurisdiction to entertain actions outside the limitation period). Moreover, the Court is without authority to alter jurisdictional statutes and must adhere to legislative mandates. *See Shendock*, 893 F. 2d at 1466 (courts must observe jurisdictional limitations even if doing so has a "harsh result") (citations omitted).

In the case at bar, the applicable franchise tax statute, Title 13, Section 533 (c) (2)(d), specifies that a corporation cannot be involuntarily dissolved for the nonpayment of franchise taxes "which the Government is barred from recovering by the statute of limitations set out in Title 5, Section 31" of the V.I. Code. This reference to the general statute of limitations is an express waiver of sovereign immunity. The limitations in Section 31 is mandatory, providing that "civil actions shall only be commenced within the periods prescribed below" unless specified otherwise by statute. Thus, the right to judicial review of claims is conditioned on compliance with this statute. Failure to comply, therefore, deprives the court of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1), 12 (h)(3). This limitation is further underscored in the express language of Title 13, Section 533 that the Government is specifically "*barred from recovering*" claims beyond the statutory period. By specifically applying Title 5, Section 31 to the Franchise Tax statute, the Legislature clearly intended to protect individuals from litigation to recover such taxes beyond the statutory period. This is in keeping with the general purpose of statutes of limitations to protect persons from having to defend against stale claims. Therefore, having determined that the limitations provision was jurisdictional, the Court could not, as a matter of law, entertain the action on those claims.

Denial of Oral Argument and Rule 56 (f) Motion

The Government further argues that denying its motion for oral arguments was a denial of due process. In support of its argument, the Government asserts that: the Court should not deny a hearing after giving the parties an opportunity to request argument by a certain date; and that it relied on the opportunity for oral argument to fully present its arguments on the statute of limitations issue.

Territorial Court Rule 36 makes the grant of oral argument discretionary and not mandatory. The Court may, therefore, opt to have a hearing or decide the motion solely "based upon the submission(s)." Terr. Ct. R. 36. Moreover, in considering a summary judgment motion, the court decides whether, considering all facts in the light most favorable to the non-movant, there exists no genuine issue of material fact in dispute, thus entitling the movant to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct 2548, 91 L. Ed. 2d 265 (1986).

In opposing the summary judgment motion, the Government relied solely on a sovereign immunity argument to avoid the statute of limitations. Having found an express waiver of sovereign immunity, and because of the mandatory nature of the limitations statute, the Court found there was no genuine issue of material fact in dispute. Thus, the court held as a matter of law that the defendant was precluded from collecting any overdue or underpaid taxes beyond the limitations period. The court, therefore, had no jurisdiction to hear this claim.

Having decided that issue as a matter of law and denying summary judgment on the remaining claims, oral argument would have been pointless. It is no due process violation to deny a hearing on an issue the Court finds may clearly be decided as a matter of law, without further supplementation. Thus, the Court did not abuse its discretion in denying a hearing after finding that a portion of the claim was time-barred.

For similar reasons, continued discovery pursuant to Federal Rule of Civil Procedure 56(f) would have been meaningless, where the limitations is an absolute bar to any action and deprives the Court of jurisdiction. Moreover, although Rule 56 (f) motions, indeed, should be liberally granted, there was no basis for doing so here, where the Court dismissed only those claims that were barred as a matter of law by the statute of limitations and ruled in favor of the non-movant on all other claims.

Reconsideration Motion May Not Raise New Arguments

Finally, even if equitable tolling were available to avoid the statute of limitations in this case, the Government raises this argument for the first time in its motion for reconsideration. A motion for reconsideration is not the proper forum for raising new legal arguments or theories which could have been addressed initially, and the court need not address such arguments. *See Kiewit Eastern Co., Inc. v. L & R Const. Co., Inc.*, 44 F. 3d 1194, 1203-04 (3rd Cir. 1995); *United States v. Diaz*, 36 V.I. 363, 365-69 (D.V.I. 1998); *Holland v. Big River Minerals Corp.*, 181 F. 3d 597, 605-06 (4th Cir. 1999), *cert. den.* – U.S. -- , 120 S. Ct. 936, 145 L.Ed. 2d 814 (2000); *Uphoff v. Elegant Bath, Ltd.* 176 F. 3d 399 (7th Cir. 1999); *389 Orange St. Partners v. Ciarcia,* 179 F. 3d 656, 665 (9th Cir. 1999).

Moreover, a claim for equitable tolling or estoppel must be properly pled, including facts tending to show some affirmative conduct of the plaintiff, done deliberately to prevent the Government from timely asserting its rights. *See Bachner v. Commissioner*, 81 F. 3d 1274, 1281-2 (3rd Cir. 1996) (negligence or mistake insufficient). Specifically, the pleadings must establish the following: that the opposing party knew of the facts; the party claiming estoppel (i.e. the Government) was ignorant of those facts; the opposing party actively misled the Government so as to prevent it from asserting its rights; and the party claiming estoppel used reasonable diligence in investigating and bringing the claim. *See United States v. Midgley,* 142 F. 3d 174 (3rd Cir. 1998) (criminal case); *Miller v. Corrections*, 145 F. 3d 616, 618 (3rd Cir. 1998) (no tolling, however, if statute is jurisdictional).

In this instance, the Government has failed to plead even the minimum standard -- an assertion of some deliberate conduct. The Government noted that in 1998, upon a review of Plaintiff's taxes several years after they became due and were paid (or underpaid), it found discrepancies which it attempted to reconcile by requesting the review of additional documentation. There were no assertions that the Plaintiff, prior to expiration of the statute of limitations, deliberately acted in some way to induce the defendant not to ascertain earlier whether the taxes had, indeed, been underpaid.

Equitable tolling principles do not operate to protect parties who have slept on their rights; rather, there must be some affirmative conduct by the other party that induced inaction. Even if the plaintiff failed to provide all documentation in tax reports, that did not preclude the Government from initiating an appropriate review -- within the statutory period -- to reconcile any discrepancies. However, this point is not controlling because of the jurisdictional issue earlier noted.

CONCLUSION

Because the Government expressly waived its sovereign immunity by subjecting itself to the applicable statute of limitations, that statute operates as a jurisdictional bar which is not subject to equitable tolling principles. Therefore, the applicable statute precludes judicial review of that portion of the Government's claim that was time-barred. Accordingly, the plaintiff was entitled to partial summary judgment as a matter of law, notwithstanding any facts that could be gleaned from oral arguments or further discovery. The Government's motion for reconsideration will, therefore, be denied.

MARIA M. CABRET
Presiding Judge