

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
ROSWELL HOSPITAL CORPORATION
TO THE DENIAL OF PROTEST ISSUED UNDER
LETTER ID NO. L0291658032**

No. 17-45

DECISION AND ORDER

A hearing on the merits occurred on the above-captioned protest on October 19, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Ms. Suzanne Wood Bruckner and Mr. Andrew J. Simons (Sutin, Thayer & Browne, P.C.) appeared in person, representing Roswell Hospital Corporation (“Taxpayer”). Mr. Josh Killian (Ryan, L.L.C.) and Mr. Craig Pickard, Vice President for Corporate Taxation for Community Health Services, appeared as witnesses and testified for Taxpayer. Mr. Gerard Quinlan (Ryan L.L.C.), also appeared and was present for the duration of the hearing, but was not called upon to testify.

Staff Attorney, Mr. David Mittle, represented the Taxation and Revenue Department of the State of New Mexico (“Department”). Auditor, Ms. Irene Jaramillo, and Ms. Robin Cruz, Assistant Bureau Chief for the Revenue Processing Division, appeared as witnesses and testified for the Department. Protest Auditor, Tom Dillon, also appeared and was present for the duration of the hearing, but was not called upon to testify.

Taxpayer Exhibits Nos. 1 – 8 and 10 and Department Exhibits B, C, and F were admitted into the record, and are described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is owned and operated by Community Health Systems (“CHS”). [Testimony of Mr. Pickard].

2. On June 28, 2016, Taxpayer, by and through CHS Vice-President for Corporate Taxation, Mr. Craig Pickard, executed two Tax Information Authorization forms which authorized Mr. Josh Cohen and Mr. Josh Killian of Ryan, L.L.C. to represent Taxpayer in matters regarding CRS taxes for tax year 2015. [Taxpayer Ex. 2; Testimony of Mr. Pickard; Testimony of Mr. Killian].

3. Mr. Pickard’s intention was to authorize Mr. Cohen and Mr. Killian of Ryan, L.L.C. to act on Taxpayer’s behalf on all matters pertinent to its 2015 New Mexico CRS filings and payments, including a 2015 refund application which it intended to subsequently submit to the Department for consideration. [Testimony of Mr. Pickard].

4. Mr. Pickard’s expectations were that Taxpayer’s representatives would coordinate all aspects of the refund application, and act as Taxpayer’s points of contact for the claim, including all communications with the Department relevant to the claim. [Testimony of Mr. Pickard].

5. Mr. Pickard’s expectations were consistent with his prior experience with the Department, in which he had also delegated authority to Ryan, L.L.C. by Tax Information Authorization forms. [Testimony of Mr. Pickard].

6. Mr. Pickard has been with CHS for 19 years. [Testimony of Mr. Pickard].

7. The Tax Information Authorization forms provided the following address for Taxpayer’s authorized representatives: Three Galleria Tower, 13155 Noel Road, Suite 100, Dallas, Texas 75240. [Taxpayer Ex. 2].

8. On July 26, 2016, Taxpayer, by and through Ryan, L.L.C., submitted an application for refund of gross receipts taxes for the periods from January 1, 2015 through December 31, 2015. The application was submitted under a cover letter displaying the Ryan, L.L.C. insignia and its address, which was the same as that contained in the Tax Information Authorization forms, likewise included in the submission. [Taxpayer Ex. 1; Taxpayer Ex. 2; Testimony of Mr. Killian].

9. The body of the cover letter which accompanied the application for refund, as well as the application itself, stated that Ryan, L.L.C. was representing Taxpayer in reference to the application and expressed that further inquiries should be directed to Mr. Killian. [Taxpayer Ex. 1].

10. The Department will copy correspondence to an authorized representative of a taxpayer if the representative makes such request. [Testimony of Ms. Jaramillo].

11. Taxpayer's application for refund, dated and submitted on July 26, 2016, was the only application it filed relevant to CRS taxes in tax year 2015. [Testimony of Mr. Killian].

12. In or about September or October of 2016, after several weeks had elapsed from the time it submitted its application for refund, Taxpayer's representative initiated contact with the Department. Taxpayer's plan was to permit the Department several weeks to review the application before it initiated follow-up inquiries. [Testimony of Mr. Killian].

13. Ms. Robin Cruz is the Assistant Bureau Chief of the Revenue Processing Division and supervised Mr. Daniel Varela during all relevant times. [Testimony of Ms. Cruz].

14. Mr. Varela, CRS Tax Examiner for the Department, was Taxpayer's point of contact in reference to its 2015 refund application. [Testimony of Mr. Killian; Testimony of Ms. Cruz].

15. Despite the fact that Mr. Varela was the Department's point of contact with Taxpayer, the refund application was actually under review by Ms. Jaramillo, Tax Accounts Auditor. [Testimony of Ms. Cruz].

16. Mr. Varela and Mr. Killian communicated regarding the 2015 application for refund. One such communication occurred by email dated October 14, 2016 in which Mr. Varela requested additional records "regarding the refund claim for Roswell Hospital, TY 2015[.]" [Taxpayer Ex. 4; Testimony of Mr. Killian].

17. Mr. Varela is no longer employed by the Department. [Testimony of Ms. Jaramillo; Testimony of Ms. Cruz; Testimony of Mr. Killian].

18. On December 14, 2016, the Department, by and through Ms. Jaramillo made another written request for additional information in reference to Taxpayer's application. The request, stated in part: "Your tax year 2015 New Mexico Combined Reporting System refund has been received. However, the refund you claim *has not* been processed at this time. Additional information is required[.]" (Emphasis contained in original). [Taxpayer Ex. 5; Testimony of Mr. Killian].

19. The December 14, 2016 correspondence went on to identify the information which the Department required in order "to permit the Department to verify the correct refund amount[.]" and specifically requested "[d]etail information for the requested refund under 7-9-93 NMSA 1978 to include: billing date, detail customer names, and billing amounts." The correspondence concluded with a statement that indicated "[t]his request for additional information or forms may result in a considerable delay in the issuance of any refund as processing will not commence until you submit the requested information." [Taxpayer Ex. 5; Testimony of Mr. Pickard; Testimony of Mr. Killian].

20. Taxpayer interpreted the December 14, 2016 correspondence as indicating that the application to which it referred was pending, and had neither been granted nor denied as of the date it was generated. [Taxpayer Ex. 5; Testimony of Mr. Pickard; Testimony of Mr. Killian].

21. On February 21, 2017, the 210th day from the submission of Taxpayer's application for refund, Taxpayer filed a formal protest because the Department had not granted or denied its application as of that date. [Taxpayer Ex. 6; Testimony of Mr. Killian].

22. On March 15, 2017, the Department responded, under Letter ID No. L0291658032, to Taxpayer's formal protest and indicated that Taxpayer's protest was not timely because it had not been submitted within 90 days of a refund denial letter dated September 19, 2016. [Taxpayer Ex. 7].

23. The letter to which the denial referenced, was generated and printed by the Department's computer system (GenTax), on September 19, 2016, under Letter ID No. L0106339888 (hereinafter "Notice of Denial"). [Taxpayer Ex. 3; Testimony of Ms. Jaramillo; Testimony of Ms. Cruz].

24. The Notice of Denial purported to deny Taxpayer's refund application and invited Taxpayer to contact Mr. Varela with any questions. [Taxpayer Ex. 3].

25. Taxpayer denied receiving the Notice of Denial and disputed that its underlying protest was untimely. Taxpayer filed a Formal Protest of the denial of protest on March 23, 2017. [Taxpayer Ex. 8].

26. On April 10, 2017, the Department acknowledged Taxpayer's protest of the denial of its underlying protest. The correspondence indicated that Taxpayer should "be advised that this protest will only address the denial of your protest." The correspondence went on to indicate that "[t]he refund denial will not be addressed at this time. If the hearing officer rules

that the denial was not in accordance with the provisions of the Tax Administration Act, your protest of the refund denial will be acknowledged at that time.” [See Administrative File, Letter ID. No. L1188136240, April 10, 2017].

27. On April 12, 2017, the Department filed a Hearing Request for the Administrative Hearings Office to set a hearing to address scheduling on Taxpayer’s protest. The Hearing Request indicated that the issue under protest was the “Protest of Protest Denial”.

28. On April 14, 2017, the Administrative Hearings Office filed a Notice of Administrative Hearing which set a hearing on the merits of Taxpayer’s protest for May 12, 2017.

29. On April 24, 2017, Taxpayer’s counsel of record filed an Entry of Appearance.

30. On April 24, 2017, Taxpayer filed Taxpayer’s Motion to Continue Hearing scheduled for May 12, 2017.

31. On May 1, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Order which set a telephonic scheduling conference for May 15, 2017.

32. On May 17, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Hearing on the Merits. In addition to establishing various deadlines, a hearing on the merits of Taxpayer’s protest was set for August 17, 2017.

33. On June 2, 2017, Taxpayer filed a Certificate of Service indicating that it served Taxpayer’s First Sets of Requests for Admission, Interrogatories and Requests for Production.

34. On June 16, 2017, the Department filed Department’s Preliminary Witness List which also contained its preliminary exhibit list.

35. On June 16, 2017, Taxpayer filed a Certificate of Service indicating that it served Taxpayer’s Preliminary Witness List.

36. On June 16, 2017, Taxpayer filed a Certificate of Service indicating that it served Taxpayer's Preliminary Exhibit List.

37. On June 28, 2017, the Department filed a Certificate of Service indicating that it served "Property Tax Division's [sic] Response to Taxpayer's First Sets of Requests for Admissions, Interrogatories [and] Requests for Production."

38. On August 2, 2017, Taxpayer filed Taxpayer's Motion to Vacate and Reset Merits Hearing, and to Extend Certain Prehearing Deadlines.

39. On August 9, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing on the Merits which in addition to establishing various deadlines, noticed a hearing on the merits of Taxpayer's protest for October 19, 2017.

40. On September 29, 2017, the Administrative Hearings Office entered a Notice of Reassignment of Hearing Officer for Administrative Hearing that assigned the above-captioned protest to the undersigned Hearing Officer.

41. On October 4, 2017, the parties filed a Joint Prehearing Statement.

42. On October 4, 2017, Taxpayer filed the Affidavit of Holly Elizabeth Schmidt.

43. Although the Notice of Denial was allegedly generated through GenTax by Mr. Varela, he was not called upon to testify regarding any circumstances relevant to the protest, including the events concerning the preparation or mailing of the Notice of Denial.

44. Ms. Jaramillo was responsible for reviewing Taxpayer's application. If Mr. Varela generated the Notice of Denial, it would have been only after Ms. Jaramillo determined that the application should be denied. [Testimony of Ms. Cruz].

45. If the Notice of Denial was mailed, then it would have been mailed to Taxpayer's mailing address as provided in its Business Tax Registration Update, dated June 10, 2013. The

mailing address provided therein was 4000 Meridian Blvd., Franklin, Tennessee 37067. [Taxpayer Ex. 3; Department Ex. C].

46. The Department stipulated to the fact that it did not mail the Notice of Denial to either of Taxpayer's authorized representatives at Ryan, L.L.C. at the address provided in the Tax Information Authorization forms.

47. Mr. Pickard is familiar with the mail distribution procedures utilized by CHS at 4000 Meridian Blvd., Franklin, Tennessee 37067. [Testimony of Mr. Pickard].

48. Neither Mr. Pickard nor anyone within his knowledge received the Notice of Denial at 4000 Meridian Blvd., Franklin, Tennessee 37067. [Testimony of Mr. Pickard].

49. Neither Ms. Jaramillo nor Ms. Cruz had personal knowledge of whether the Notice of Denial was ever mailed. [Testimony of Ms. Jaramillo; Testimony of Ms. Cruz].

50. There was no other reliable evidence provided to establish that the Department ever mailed the Notice of Denial to Taxpayer at 4000 Meridian Blvd., Franklin, Tennessee 37067, the address appearing on the face of the Notice of Denial. [Taxpayer Ex. 3; Department Ex. C].

DISCUSSION

The lone issue in protest is whether Taxpayer filed a timely protest of the Department's failure to grant or deny its underlying refund application. In contrast, the Department asserted during the course of the hearing that both the timeliness of the underlying protest and the actual merits of that protest needed to be addressed concurrently in the same hearing. For that reason, the Hearing Officer will briefly address the scope of the hearing that was held in this protest.

Scope of Hearing on the Merits

This dispute arose as counsel for the Department cross-examined Mr. Killian, at which time a specific inquiry was directed to the existence or contents of any internal memos regarding the likelihood of success in obtaining a refund in reliance on the deduction stated at NMSA 1978, Sec. 7-9-93.

Counsel for Taxpayer objected based on relevance. Counsel for the Department argued that his inquiry was relevant because the purpose of the hearing was to address the merits of the underlying refund application *in addition to* the timeliness of Taxpayer's protest. The inquiry into any internal memos addressing the application of Sec. 7-9-93 was directed at the underlying refund application. The objection was sustained. However, the Hearing Officer noted that the issue regarding the scope of the hearing would be addressed in more detail at a more appropriate time, rather than during the testimony of a witness.

At the conclusion of the witness' examination, which coincided with the conclusion of Taxpayer's presentation of evidence, the Hearing Officer requested that the Department address its understanding of the scope and purpose of the hearing. The Department requested that the Hearing Officer require Taxpayer to rest prior to addressing the Hearing Officer's inquiry. The Hearing Officer denied the Department's request.

The Department argued that the purpose of the hearing has always been to address both the timeliness of Taxpayer's underlying protest *and* the merits of that protest, which concern application of the deduction under NMSA 1978, Sec. 7-9-93. The Department suggested that this should have been evident to the Hearing Officer and Taxpayer, but the record clearly provides otherwise.

On April 10, 2017, the Department acknowledged Taxpayer's protest of the denial of its underlying protest. The correspondence indicated that Taxpayer should "be advised that *this*

protest will only address the denial of your protest.” (Emphasis added). The correspondence went on to indicate that “[t]he refund denial will not be addressed at this time. *If the hearing officer rules that the denial was not in accordance with the provisions of the Tax Administration Act, your protest of the refund denial will be acknowledged at that time.*” (Emphasis Added). [See Administrative File, Letter ID. No. L1188136240, April 10, 2017].

Two days later, on April 12, 2017, the Department submitted a Hearing Request in which it stated that the nature of the protest was “Protest of Protest Denial[.]” Then, on May 15, 2017, during a telephonic scheduling hearing, the parties addressed the scope of the hearing, at which time it was once again stated, in no-uncertain terms, as confirmed by the record of that hearing, that the scope of the hearing on the merits was limited to the timeliness of the protest. Finally, in the Joint Prehearing Statement, filed on October 4, 2017, the Department identified one solitary issue which it viewed as unresolved: “Taxpayer’s protest is barred by the statute of limitations. Taxpayer claims they did not receive notice; however, notice was sent to the address maintained in Gentax” [See Joint Prehearing Statement (filed 10/4/2017)].

The Department cites *In the Matter of the Protest of A Team Productions*, Decision and Order No. 17-26, Administrative Hearings Office, for the proposition that the scope of the hearing in this matter necessarily includes the merits of the underlying protest. The Department misreads *A Team Productions*, which promotes no such requirement. In any regard, a thorough review of the record in this matter clearly illustrates that the purpose and scope of this hearing has always been limited to the question of whether Taxpayer’s protest was untimely, which would then determine whether Taxpayer would be entitled to address the merits of its underlying protest in a separate hearing.

At no time in the record of this proceeding has Taxpayer received notice to the contrary, and for that reason, it would offend the most fundamental element of due process for the scope of the hearing to be expanded as the Department suggested. *See Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, ¶ 20, 319 P.3d 639 (due process requires reasonable notice and opportunity to be heard and present any claim or defense); *See also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 94 L.Ed 865 (1950) (requiring that an adjudication for deprivation of property “be preceded by notice and opportunity for hearing appropriate to the nature of the case”).

Timeliness of Taxpayer’s Underlying Protest

A taxpayer may dispute the Department’s denial of, or its failure to act on a claim for refund as provided by NMSA 1978, Sections 7-1-24 (A) (3) (b) and 7-1-26 (B) (2015).¹ However, the right to a protest is not unrestricted. Section 7-1-24 (C) requires that “[a] protest by a taxpayer shall be filed within ninety days of the date of mailing to or service upon the taxpayer by the department of the . . . denial of a claim pursuant to Section 7-1-26 NMSA 1978 or the last date upon which the department was required to take action on the claim but failed to take action.” Use of the word “shall” makes it an absolute requirement that a taxpayer file a protest within 90-days. *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).

The process for claiming refunds is provided at NMSA 1978, Sec. 7-1-26 (2015). In addition to establishing the general provisions governing the process by which taxpayers may

¹ House Bill 408 of the 53rd Legislature of the State of New Mexico enacted various amendments to the Tax Administration Act, including NMSA 1978, Sec. 7-1-24 and Sec. 7-1-26. The amendments took effect June 16, 2017, subsequent to all relevant events at issue in the current protest. The parties do not assert that any amendments enacted by House Bill 408 should be applied retroactively to events relevant to the current protest.

claim refunds, the statute also establishes the deadlines for protesting the Department's action or inaction. In a nutshell, the deadlines adhere to the 90-day limit established in Section 7-1-24.

Section 7-1-26 (B) establishes the following deadlines:

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 D 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)

One of the remedies referenced in Sec. 7-1-26 (B) (1) and (2), and the remedy selected in this instance, was the remedy to file a protest. *See* NMSA 1978, Sec. 7-1-26 (C) (1). The deadline for filing the protest is determined by whichever of the foregoing provisions governs. Since the issue in this protest is whether or not the protest was timely filed, it is essential to determine which deadline applies, a question that is answered by determining which course of action the Department took with respect to Taxpayer's application. Taxpayer has the burden of proof as provided in Regulation 3.1.8.10 NMAC.

The Department contends that it mailed the Notice of Denial to Taxpayer at the designated mailing address provided in its Business Registration Update, dated June 18, 2013.

[Dept. Ex. C]. Consequently, the Department claims that the deadline for Taxpayer to protest that denial was ninety days following the mailing of the denial: December 19, 2016. This argument relies on the application of Sec. 7-1-26 (B) (1) and presumes that the denial letter was also mailed on September 19, 2016. The Department does not assert that the denial letter was personally served.

In contrast, Taxpayer asserted that the Department never took action on the refund application. Therefore, the deadline was determined by Section 7-1-26 (B) (2) which provides 210 days, consisting of an initial period of 120 days plus 90 days, in which to file a protest. Since Taxpayer filed its application for refund on July 26, 2016, it asserted that the deadline to file its protest was 210 days from that date: February 21, 2017. In this matter, Taxpayer's protest was filed on February 21, 2017. This argument relies on a determination that the Notice of Denial was never mailed as provided in Section 7-1-26 (B) (1).

If the Hearing Officer were to be persuaded that the Notice of Denial was mailed, then the parties offer conflicting interpretations of NMSA 1978, Section 7-1-9 (A), which establishes where the Notice of Denial should have been mailed in order to be effective. Section 7-1-9 (A) provides:

A. Any notice required or authorized by the Tax Administration Act to be given by mail is *effective if mailed or served by the secretary or the secretary's delegate to the taxpayer or person at the last address shown on his registration certificate or other record of the department*. Any notice, return, application or payment required or authorized to be delivered to the secretary or the department by mail shall be addressed to the secretary of taxation and revenue, taxation and revenue department, Santa Fe, New Mexico or in any other manner which the secretary by regulation or instruction may direct.

(Emphasis Added)

In summary, the Department asserted that the Notice of Denial was effective because it was purportedly mailed to the address provided in Taxpayer's Business Registration Update and in GenTax. Taxpayer asserted that the Department erred by not addressing the Notice of Denial to its authorized representatives, whose address represented the last address shown in another record of the Department, specifically referring to the Tax Information Authorization forms and the application to which they were attached.

However, the Hearing Officer finds that consideration of the competing interpretations of Section 7-1-9 is secondary to the threshold question of whether or not there is reliable evidence to first establish mailing under Sec. 7-1-26 (B) (1). Only if there was evidence to establish mailing does it then become necessary to determine whether the envelope containing the Notice of Denial was properly addressed, and therefore effective under Section 7-1-9.

The evidence firmly established that the Department, regardless of the Notice of Denial, never took action to grant or deny Taxpayer's refund application before February 21, 2017. Under Sec. 7-1-26 (B) (2), that date represented the final day in which Taxpayer was permitted to file its protest to the Department's failure to act on its application, and the Department's reliance on the Notice of Denial, is misplaced for the reasons explained in more detail below. The Hearing Officer will first address the threshold question of mailing.

Taxpayer presented credible testimony from Mr. Pickard that the Notice of Denial was never received. Although that is not necessarily the relevant inquiry, it does lead reasonable minds to consider what evidence exists to establish that the Notice of Denial was mailed, because only upon *mailing* is the Department's Notice of Denial effective pursuant to Sec. 7-1-9 (A). The Department does not allege personal service in this matter.

Evidence that the Notice of Denial was mailed was inadequate and insufficient, at best. Ms. Jaramillo and Ms. Cruz testified regarding the general process of generating and mailing correspondence. However, they also candidly and credibly admitted that they lacked personal knowledge regarding the mailing of the Notice of Denial in this particular case.

Beyond the general information provided by Ms. Jaramillo and Ms. Cruz, the Department offered no records or documents establishing that it adhered to any mailing procedures, practices, routines, or policies in this specific case. It offered no testimony from any witness having personal knowledge of mailing, or other types of reliable and relevant evidence to establish that the Department mailed the Notice of Denial, such as a copy of the postmarked envelope or a mailing log.

The Hearing Officer finds the testimony of Ms. Cruz, in addition to evidence of other communications between Taxpayer and the Department to weigh heavily in Taxpayer's favor in finding that the Department either: 1) did not actually intend to deny Taxpayer's refund application at the time it generated the Notice of Denial, meaning that the Notice of Denial may have been generated in error; or 2) that the Department reconsidered the action stated in the Notice of Denial prior to mailing. Both scenarios would explain the lack of evidence to establish mailing in this case, and would be consistent with the balance of the evidence in this protest. Ms. Cruz, whose candor was notable, testified as follows beginning at 1:53:03:

Mr. Mittle: So who makes the decision that a refund's been denied?

Ms. Cruz: It, in this instance, the, the refund was actually under review by ACD Auditor, Irene Jaramillo. She worked in conjunction with Daniel, who is in our, in Revenue Processing Division under CRS, and he handled the correspondence. So in discussion with him, with Irene, when she made her determination, she provides that determination

to Daniel who would generate the refund denial.

Accordingly, this testimony established that the Notice of Denial would not have been generated by Mr. Varela until, or unless, Ms. Jaramillo *first* authorized him to do so, *and only after she determined that the refund should be denied*. Mr. Varela was not called to testify.

Ms. Jaramillo did testify. However, neither the Department nor Taxpayer asked any questions that provided her with an opportunity to explain whether she actually denied the application or authorized Mr. Varela to generate the Notice of Denial.

However, the record speaks for itself. Nearly three months after the Notice of Denial was generated, Ms. Jaramillo made a written request for additional information in reference to Taxpayer's application. The request clearly stated "Your tax year 2015 New Mexico Reporting System refund has been received. However, the refund you claim *has not* been processed at this time. Additional information is required[.]" (Emphasis contained in original). [Taxpayer Ex. 5].

Her correspondence went on to identify the information which the Department required in order "to permit the Department to verify the correct refund amount[.]" and specifically requested "[d]etail information for the requested refund under 7-9-93 NMSA 1978 to include: billing date, detail customer names, and billing amounts." The correspondence concluded with a statement that indicated "[t]his request for additional information or forms may result in a considerable delay in the issuance of any refund as processing will not commence until you submit the requested information." The correspondence provided a deadline of January 16, 2017 in which to provide her with information responsive to the request. [Taxpayer Ex. 5].

It is unreasonable to believe that Ms. Jaramillo would continue making follow-up inquiries for additional information nearly three months after she denied the application, and in doing so, make clear statements indicating that "the refund you claim *has not* been processed at

this time[,]” or that “processing [would] not commence until you submit the requested information.” [Taxpayer Ex. 5].

Rather, the evidence suggests the probability that the Notice of Denial was generated within one of the two possible scenarios explained above. If there were other facts known to Ms. Jaramillo that might controvert or clarify the foregoing, she was not asked to address them at the hearing.

The Department expressed the possibility that the December 14, 2016 follow-up correspondence may have been in reference to another, unrelated application. However, there was no evidence to establish that more than one application for refund was pending for tax year 2015 which addressed the application of Sec. 7-9-93. Mr. Killian credibly testified that Taxpayer submitted only one refund application for tax year 2015. Moreover, had the correspondence of December 14, 2016 been in reference to another, unrelated application, then Ms. Jaramillo would have been in the best position to provide that explanation. She was never asked to do so.

Based on the evidence presented, the Hearing Officer was persuaded that the Department did not grant or deny Taxpayer’s application for refund within 210 days of the application being submitted for consideration.

Under these circumstances, and because Taxpayer established application of NMSA 1978, Sec. 7-1-26 (B) (2), Taxpayer was entitled to file its protest within 210 days from the date it submitted its refund application. Since Taxpayer filed its protest within the allotted time, Taxpayer’s protest should be GRANTED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of its underlying protest of the Department's failure to grant or deny its application for refund. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer had 210 days from the date its application for refund was submitted to file a protest based on the Department's failure to grant or deny its application under NMSA 1978, Sec. 7-1-26 (B) (2).

C. Taxpayer's underlying protest was timely within NMSA 1978, Sec. 7-1-26 (B) (2) (2015).

D. NMSA 1978, Sec. 7-1-26 (B) (1) was not applicable to Taxpayer's underlying protest.

For the foregoing reasons, Taxpayer's protest **IS GRANTED**. The Department shall acknowledge the receipt of Taxpayer's underlying protest [Taxpayer Ex. 6] and request a hearing with the Administrative Hearings Office to address the merits of that protest.

DATED: October 24, 2017



Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On October 30, 2017, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner: