

1 STATE OF NEW MEXICO  
2 ADMINISTRATIVE HEARINGS OFFICE  
3 TAX ADMINISTRATION ACT

4 IN THE MATTER OF THE PROTEST OF  
5 EDUARDO AGUIRRE  
6 TO THE ASSESSMENT ISSUED UNDER  
7 LETTER ID NO. L1436242096

8 v. AHO No. 19.04-077A, D&O No. 19-22

9 NEW MEXICO TAXATION AND REVENUE DEPARTMENT

10 DECISION AND ORDER

11 On July 18, 2019, Hearing Officer Dee Dee Hoxie, Esq. conducted a hearing on the  
12 merits of the protest to the assessment. The Taxation and Revenue Department (Department) was  
13 represented by Peter Breen, Staff Attorney. Angelica Rodriguez, Auditor, and Alma Lucero,  
14 Revenue Agent, also appeared on behalf of the Department. Eduardo Aguirre (Taxpayer) was  
15 present and represented himself. Luis Aguirre, the Taxpayer's brother, also appeared for the  
16 hearing. Mr. Aguirre, the Taxpayer, and Ms. Rodriguez testified. The Hearing Officer took  
17 notice of all documents in the administrative file. The Taxpayer's exhibits #1 (business  
18 licenses), #2 (tax in Texas), and #3 (letter, return, and 1099s) were admitted. The Department's  
19 exhibit A (assessment information) was admitted. A more detailed description of exhibits  
20 submitted at the hearing is included on the Administrative Exhibit Coversheet.

21 The main issue to be decided is whether the Taxpayer is liable for New Mexico's gross  
22 receipts taxes for his sale of wooden pallets to customers who are doing business in New  
23 Mexico. The Department conceded at the hearing that the Taxpayer was not doing business in  
24 New Mexico. In light of the concession and considering all of the evidence and arguments  
25 presented, the Hearing Officer finds in favor of the Taxpayer. IT IS DECIDED AND  
26 ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1  
2           1.       On December 13, 2018, the Department assessed the Taxpayer for gross receipts  
3 taxes. The assessment was for \$31,148.91 in tax, \$6,229.79 in penalty, and \$4,984.91 in interest,  
4 for a total liability of \$42,363.61. [L1436242096]

5           2.       On January 28, 2019, the Taxpayer filed a formal protest of the assessment.  
6 [Administrative file]

7           3.       On February 20, 2019, the Department acknowledged its receipt of the  
8 Taxpayer’s protest. [Administrative file]

9           4.       On April 30, 2019, the Department filed a Request for Hearing asking that the  
10 Taxpayer’s protest be scheduled for a formal administrative hearing. [Administrative file]

11          5.       The Taxpayer requested a continuance of the initial setting and waived the 90-day  
12 requirement of the statute. [Administrative file]

13          6.       On June 24, 2019, the Taxpayer filed his supplemental grounds for the protest and  
14 moved to withdraw his previous waiver of the 90-day requirement. [Administrative file]

15          7.       The supplemental grounds had two nontaxable transaction certificates (NTTCs)  
16 attached to it. [Administrative file]

17          8.       The Taxpayer lives and works in Texas. [Administrative file, Testimony of Mr.  
18 Aguirre, Testimony of Taxpayer, Testimony of Ms. Rodriguez]

19          9.       The Taxpayer manufactures wooden pallets and sells them to businesses that use  
20 the pallets as part of their packaging when those businesses ship their products to their  
21 customers. [Testimony of Mr. Aguirre, Testimony of Taxpayer, Testimony of Ms. Rodriguez]

22          10.      Packaging materials are considered to be items that are resold when they are used  
23 in this manner. [Testimony of Ms. Rodriguez]

1 11. The Taxpayer's business is located a few miles from the border with New  
2 Mexico. [Testimony of Mr. Aguirre, Testimony of Taxpayer]

3 12. Recently, a couple of New Mexico businesses have become customers of the  
4 Taxpayer. [Administrative file, Testimony of Mr. Aguirre]

5 13. The Taxpayer's customers come to his location to make purchases of his wooden  
6 pallets. The Taxpayer has a couple of trucks, but they are not for delivery; they are used to haul  
7 the wood and materials that the Taxpayer uses in his manufacturing of the pallets. [Testimony of  
8 Mr. Aguirre, Testimony of Taxpayer]

9 14. The Taxpayer did not have records to show where delivery of the pallets occurred,  
10 ostensibly because his customers come to his location to purchase and procure the pallets.  
11 [Testimony of Mr. Aguirre, Testimony of Ms. Rodriguez]

12 15. The Department concedes that the testimony presented at the hearing in  
13 conjunction with the NTTCs produced are sufficient to show that the Taxpayer is conducting his  
14 business in Texas and is not subject to the New Mexico gross receipts taxes. [Department's  
15 closing argument]

## 16 DISCUSSION

### 17 **Burden of Proof.**

18 Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17.  
19 Tax includes, by definition, the amount of tax principal imposed and, unless the context  
20 otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, §  
21 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-  
22 070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,

1 and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled  
2 to an abatement.

3 **Gross Receipts Tax.**

4 Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See*  
5 NMSA 1978, § 7-9-4. After testimony and evidence was presented, the Department conceded  
6 that it appears that the Taxpayer is engaged in business in Texas. The Taxpayer makes sales to  
7 his customers at his location in Texas, and the customers get the pallets there. The Department  
8 also conceded that even if the Taxpayer were doing business in New Mexico, the NTTCs  
9 provided show that his sales would be deductible as sales for resell. *See* NMSA 1978, § 7-9-43  
10 and § 7-9-47.

11 **90-day requirement.**

12 The Taxpayer argued that the Department failed to comply with the statute because it  
13 referred the protest for hearing more than 45 days after the protest was filed. The Taxpayer  
14 argued that the referral also occurred more than 90 days after the protest was filed and that  
15 requiring the Taxpayer to waive the 90-day requirement in its request for continuance of the  
16 initial setting was unfair since the 90-day deadline had already passed.

17 It is not clear whether the statutory requirement is intended to be jurisdictional as the  
18 statute does not provide any remedy or relief for a failure to comply. *See* NMSA 1978, § 7-1B-8  
19 (2015)<sup>1</sup>. A hearing is required 90 days from the date of the "receipt of a protest filed pursuant to  
20 Section 1-7-24 NMSA 1978." *Id.* Protests are filed with the Department, and the Department  
21 files a request for hearing with the Administrative Hearings Office. *See id.* *See also* NMSA  
22 1978, § 7-1-24. Although the Taxpayer mailed his protest on January 18, 2019, the Department

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<sup>1</sup> The statute in effect at the time this protest was filed. The statute has since been amended.

1 received it and filed it on January 28, 2019. *See* 22.600.1.12 (H) NMAC (noting that date of  
2 receipt is the date of filing). *See also* 3.1.4.10 NMAC (using the postmark to determine  
3 timeliness of submission). The Department acknowledged its receipt of the Taxpayer’s protest  
4 on February 20, 2019. [Administrative file]. The Department did not offer any explanation for  
5 the delay in the acknowledgement. However, the regulations allow for the deadlines to  
6 commence upon the Department’s acknowledgement of the protest. *See* 22.600.3.8 NMAC.  
7 Even using the acknowledgement date of February 20, 2019, the Department was in violation of  
8 the statute by failing to refer the protest for hearing within 45 days. *See id.* *See also* NMSA  
9 1978, § 7-1B-8. The Department did not offer any explanation for its tardiness. The  
10 Administrative Hearings Office was still able to set the initial hearing on May 17, 2019, which  
11 was within 90 days of the Department’s acknowledgment of the protest. *See* 22.600.3.8 NMAC.  
12 Therefore, the Taxpayer’s waiver of the 90-day requirement was appropriate when he requested  
13 a continuance of the initial setting.

14 Another taxpayer previously argued that the Department denied it the statutory right to a  
15 prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue*  
16 *Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13.  
17 The court found that the general rule is that the tardiness of public officer’s is not a defense to an  
18 action by the state. *See id.* The court noted that the statute did not provide a consequence for  
19 failure to comply with the requirements of a prompt hearing. *See id.* Therefore, “[t]he general  
20 rule is applicable in these cases unless [the statute] makes it inapplicable.” *Id.* The statute here  
21 does not provide a consequence for failure to comply with its requirements. *See* NMSA 1978, §  
22 7-1B-8. Therefore, there is no defense based on the Department’s failure to comply with the

1 statute. *See Ranchers-Tufco*, 1983-NMCA-126. Given that the Taxpayer has prevailed on the  
2 merits of the protest, this timeliness issue is moot and need not be decided.

### 3 CONCLUSIONS OF LAW

4 A. The Taxpayer filed a timely, written protest of the Department's assessment and  
5 jurisdiction lies over the parties and the subject matter of this protest.

6 B. As the Department conceded at the hearing, the Taxpayer is doing business in Texas,  
7 is not presently doing business in New Mexico, and is not presently subject to the New Mexico  
8 gross receipts taxes. *See* NMSA 1978, § 7-9-4.

9 For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that  
10 the assessment is hereby abated in full.

11 DATED: August 30, 2019.

12 *Dee Dee Hoxie*

13 \_\_\_\_\_  
14 Dee Dee Hoxie  
15 Hearing Officer  
16 Administrative Hearings Office  
17 P.O. Box 6400  
Santa Fe, NM 87502

### 18 NOTICE OF RIGHT TO APPEAL

19 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
20 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
21 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
22 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
23 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
24 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative

1 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
2 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
3 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
4 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
5 statement from the appealing party. *See* Rule 12-209 NMRA.

6 **CERTIFICATE OF SERVICE**

7 On September 3, 2019, a copy of the foregoing Decision and Order was submitted to the  
8 parties listed below in the following manner:

9 *First Class Mail*

INTENTIONALLY BLANK

*Interdepartmental Mail*

10  
11 \_\_\_\_\_  
12 John Griego  
13 Legal Assistant  
14 Administrative Hearings Office  
15 P.O. Box 6400  
Santa Fe, NM 87502