1 2 3	STATE OF NEW MEXICO ADMINISTRATIVE HEARINGS OFFICE TAX ADMINISTRATION ACT
4 5 6 7	IN THE MATTER OF THE PROTEST OF DESIRE.SANTE, LLC TO THE DENIAL OF REFUND ISSUED UNDER LETTER ID NO. L0452499120
8	v. AHO No. 21.01-003R, D&O No. 21-06
9	NEW MEXICO TAXATION AND REVENUE DEPARTMENT
10	DECISION AND ORDER
11	On March 26, 2021, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference
12	hearing on the merits of the protest to the denial of refund. The Taxation and Revenue
13	Department (Department) was represented by Peter Breen, Staff Attorney, who appeared by
14	telephone. Elvis Dingha, Auditor, also appeared by videoconference on behalf of the
15	Department. Desire.Sante, LLC (Taxpayer) was represented by its CPA, Norman Fristoe, who
16	appeared by videoconference with his consultant, Rebecca Bullard, for the hearing. Ms. Bullard,
17	Mr. Fristoe, and Mr. Dingha testified. The Hearing Officer took notice of all documents in the
18	administrative file. No exhibits were submitted.
19	The main issue to be decided is whether the Taxpayer is entitled to a refund for tax
20	periods from January 1, 2016 through November 30, 2016. The Hearing Officer considered all
21	of the evidence and arguments presented by both parties. Because the Taxpayer's claim for
22	refund was filed beyond the three-year statute of limitations, the Hearing Officer finds in favor of
23	the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

24

FINDINGS OF FACT

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1	1.	On June 5, 2020, under letter id. no. L0452499120, the Department issued a
2	partial denia	l of refund to the Taxpayer. The Taxpayer's refund claim was denied for \$51,750.11
3	for the tax pe	eriods from January 1, 2016 through November 30, 2016. The Taxpayer's refund
4	claim was gr	anted for \$53,784.84 for the tax periods from December 31, 2016 through
5	November 3	0, 2018 ¹ . [Admin. file L0452499120; Testimony of Mr. Dingha].
6	2.	On June 30, 2020, the Taxpayer filed a timely written protest to the denial of
7	refund. [Ad	min. file protest].
8	3.	On July 29, 2020, the Department acknowledged its receipt of the protest.
9	[Admin. file	L1886385840].
10	4.	On January 19, 2021, the Department filed a request for hearing with the
11	Administrati	ve Hearings Office. [Admin. file request].
12	5.	On February 12, 2021, a telephonic scheduling hearing was conducted, which was
13	within 90 day	ys of the request as required by statute. [Admin. file].
14	6.	On February 21, 2020, the Taxpayer filed a claim for refund for the tax periods
15	from January	7 31, 2016 through December 31, 2018 in the amount of \$105,534.95. [Admin. file
16	L045249912	0].
17	7.	The Department requested additional documentation from the Taxpayer to
18	support its cl	aim for refund. [Testimony of Ms. Bullard; Testimony of Mr. Fristoe; Testimony of
19	Mr. Dingha;	Admin. file protest].
20	8.	The Taxpayer provided additional documentation to the Department. [Testimony
21	of Ms. Bulla	rd; Testimony of Mr. Fristoe; Testimony of Mr. Dingha; Admin. file protest].

¹ The period ending December 31, 2018 was also denied because an amended return was not filed. The parties did not present any evidence or argument regarding that month. That issue is deemed abandoned.

9. The Department reviewed the documentation and determined that the tax periods
 from 2016 were beyond the statute of limitations and should be denied, and it granted the refund
 for the other tax periods². [Testimony of Ms. Bullard; Testimony of Mr. Dingha; Admin. file
 L0452499120].

5 10. The three-year period for filing a refund for payments due and made in 2016
6 ended on December 31, 2019. [Testimony of Mr. Dingha]. *See also* NMSA 1978, § 7-1-26
7 (2019).

8 11. The Taxpayer's claim for refund was filed February 21, 2020, which was after the
9 three-year statute of limitations expired. [Admin. file L0452499120; Testimony of Mr. Dingha;
10 Testimony of Ms. Bullard].

11

DISCUSSION

12 **<u>Three-year statute of limitations.</u>**

13 A person may claim a refund within the time limits. See NMSA 1978, § 7-1-26 (A). 14 "Except as otherwise provided in Subsection G of this section, a credit or refund of any amount 15 may be allowed or made to a person: (1) only within three years after the end of the calendar year" of certain events³. NMSA 1978, § 7-1-26 (F) (emphasis added). One deadline is three 16 17 years⁴ from when "the final determination of value occurs with respect to any overpayment that 18 resulted from a disapproval by any agency of the United States or the state of New Mexico or 19 any court of increase in value of a product subject to taxation under" various sections related to 20 oil and gas. NMSA 1978, § 7-1-26 (F) (1) (b). The Taxpayer does not allege and has not proven

² Except for December 31, 2018.

³ Subsection G deals with claims for refund of the gasoline tax and does not apply to the Taxpayer's claim. *See* NMSA 1978, § 7-1-26 (G).

⁴ Here and throughout the rest of the decision, deadlines are the number of years from the end of the calendar year.

1 that this provision applies to its claim for refund. Another deadline is three years from when 2 "property was levied". NMSA 1978, § 7-1-26 (F) (1) (c). The Taxpayer does not allege and has 3 not proven that this provision applies to its claim for refund. Another deadline is three years 4 from when "an overpayment of New Mexico tax resulted from" an audit adjustment or 5 amendment to one's federal return. NMSA 1978, § 7-1-26 (F) (1) (d). The Taxpayer does not 6 allege and has not proven that this provision applies to its claim for refund. The general deadline 7 is three years from when "the payment was originally due or the overpayment resulted from an 8 assessment". NMSA 1978, § 7-1-26 (F) (1) (a). Exceptions to the general three-year limitation 9 are related to cases involving the denial of certain credits, to cases where the taxpayer has signed 10 a waiver of the statute of limitations on assessments, to cases where the tax was not paid within 11 three years of its due date or of the assessment date, and to cases where the taxpayer has been 12 assessed more than three years after the tax was due. See NMSA 1978, § 7-1-26 (F) (2) thru (5). 13 The Taxpayer does not allege and has not proven that any of these exceptions apply to its claim for refund. 14

15 The Taxpayer argues that another exception applies and that the claim for refund should be granted as overpayments found as a result of an audit under both Section 7-1-26 (H) and 16 17 Section 7-1-29. Claims for refund may be credited against underpayments found if 18 overpayments are found "as a result of an audit by the department or a managed audit covering 19 multiple periods". NMSA 1978, § 7-1-26 (H). Both the underpayments and the overpayments 20 must be included in the tax periods covered by the audit. See id. "In an audit by the department 21 or a managed audit covering multiple reporting periods in which both underpayments and 22 overpayments of a tax have been made in different reporting periods," those overpayments will 23 be credited against the underpayments if the taxpayer files a claim for refund of the

Desire.Sante, LLC Case No. 21.01-003R page 4 of 8 overpayments. NMSA 1978, 7-1-29 (D) (2017) (also allowing for a refund if the overpayments
exceed the underpayments). The Taxpayer argues that its claim for refund of the 2016 tax
periods was transmuted into an audit when the Department requested documentation to
substantiate the claim for refund. The Taxpayer argues that the Department's employees are
"auditors" and that any action taken by an "auditor" to examine a taxpayer's records should be
considered an "audit".

7 A managed audit is initiated by a taxpayer. See NMSA 1978, § 7-1-.11.1 (2003). It must 8 be a written agreement between the taxpayer and the Department, and it must meet several 9 statutory requirements. See id. The Taxpayer does not allege and has not proven that a managed 10 audit occurred. An office or field audit is an examination of a taxpayer's records that is initiated 11 by the Department. See NMSA 1978, § 7-1-.11.2 (2007) (requiring the Department to issue a 12 formal written notice of commencement of audit)⁵. At a minimum, the notice must identify the 13 tax programs and periods under audit and indicate the date on which the audit is commenced. 14 See id. There is no evidence that the Department issued a formal written notice of audit 15 commencement to the Taxpayer. The job titles of the Department's employees are not 16 dispositive to prove that their actions initiated an "audit" when the statutory requirements for 17 commencing an audit were not satisfied. See id.

The Taxpayer argues that the Department would have assessed it if underpayments made
in the 2016 tax periods were discovered as a result of the information that it provided.
[Testimony of Mr. Dingha]. The Taxpayer argues that this hypothetical, potential assessment
alone is sufficient to transform the Department's request for substantiation into an audit. The
Taxpayer argues that is unfair to allow the Department to make a possible assessment unless it is

⁵ Notice of audit commencement can occur prior to or at the same time that the Department requests a taxpayer's records. *See* NMSA 1978, § 7-1-11.2.

1 engaged in an audit, especially when the Department can go back more than three years. If the 2 Department determines that a taxpayer is liable for taxes in excess of \$25.00, the Department 3 must assess. See NMSA 1978, § 7-1-17 (2007). There is no requirement that the determination 4 be made as a result of an audit. See id. Like a taxpayer's claim for refund, the Department has a 5 general three-year limitation on making an assessment. See NMSA 1978, § 7-1-18 (2013)⁶. 6 Moreover, the Taxpayer invited scrutiny of its records when it filed a claim for refund. See 7 NMSA 1978, § 7-1-26 (B) and (C) (allowing the Department to request additional 8 documentation to prove a claim for refund).

9 The Department examines claims for refund as they are submitted. [Testimony of Mr. 10 Dingha]. The Department requested documentation on the 2016 tax period because it was 11 included in the Taxpayer's claim for refund. [Testimony of Mr. Dingha]. The Department's 12 request was reasonable, was tailored to the Taxpayer's claim, and did not purport to commence 13 an audit. After it received the documentation from the Taxpayer, the Department reviewed the 14 claim in its entirety and determined that the 2016 tax periods were beyond the statute of 15 limitations. [Testimony of Mr. Dingha].

The Taxpayer failed to prove that any exception applied to its claim for refund.
Therefore, the general three-year limitation applied to the Taxpayer's claim for refund. *See id.*The Taxpayer's payments were due in 2016, and the final date on which the Taxpayer could
make a claim for refund was December 31, 2019⁷. The Taxpayer admits that its claim for refund
with respect to the 2016 tax periods occurred after the general three-year limitation had expired.
The statute of limitations prevents stale claims and effectively places the onus on the taxpayer to

⁶ Like claims for refund, there are exceptions to the general three-year limitation, such as fraud or substantial underreporting. *See* NMSA 1978, § 7-1-18.

⁷ That is three years from the end of the calendar year 2016, when the payments were due.

1	pursue their claim in a timely manner because the taxpayer is the one who can more easily keep
2	track of their claims for refund. See Kilmer v. Goodwin, 2004-NMCA-122, ¶ 16, 136 N.M. 440.
3	If the claim is not filed within the three-year statute of limitations, the claim is barred by the
4	statute. See NMSA 1978, § 7-1-26. See also Kilmer, 2004-NMCA-122. See also Sisters of
5	Charity v. County of Bernalillo, 1979-NMSC-044, ¶ 24-28, 93 N.M. 42 (holding that an
6	untimely filed claim for refund was barred by the statute of limitations).
7	CONCLUSIONS OF LAW
8	A. The Taxpayer filed a timely, written protest of the Department's denial of refund and
9	jurisdiction lies over the parties and the subject matter of this protest.
10	B. The first hearing was set and held within 90 days of the request for hearing. See
11	NMSA 1978, Section 7-1B-8 (2019).
12	C. The Taxpayer filed its claim for refund of the 2016 tax periods beyond the three-year
13	statute of limitations. See NMSA 1978, § 7-1-26.
14	D. The Department did not commence an audit of the Taxpayer by requesting
15	substantiation of its refund claim. See id. See also NMSA 1978, § 7-1-11.2.
16	E. No exception to the general three-year limitation applied; therefore, the Taxpayer's
17	claim for refund was properly denied. See NMSA 1978, § 7-1-26. See also Kilmer, 2004-NMCA-
18	122. See also Sisters of Charity, 1979-NMSC-044.
19	For the foregoing reasons, the Taxpayer's protest IS DENIED.
20	DATED: April 7, 2021.
21 22 23	Dee Dee Hoxie Hearing Officer
	Desire.Sante, LLC Case No. 21.01-003R page 7 of 8

1 2 3	Administrative Hearings Office P.O. Box 6400 Santa Fe, NM 87502
4	NOTICE OF RIGHT TO APPEAL
5	Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision
6	by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown
7	above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order
8	will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting
9	an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a
10	courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of
11	Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The
12	parties will each be provided with a copy of the record proper at the time of the filing of the record proper
13	with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of
14	the docketing statement from the appealing party. See Rule 12-209 NMRA.
15	CERTIFICATE OF SERVICE
16	On April 7, 2021, a copy of the foregoing Decision and Order was submitted to the parties listed
17	below in the following manner:
18	Email Email
19 20	INTENTIONALLY BLANK
20 21 22 23 24 25	John Griego Legal Assistant
23 24	Administrative Hearings Office P.O. Box 6400
25	Santa Fe, NM 87502