

1 1. On June 5, 2020, under letter id. no. L0452499120, the Department issued a
2 partial denial of refund to the Taxpayer. The Taxpayer's refund claim was denied for \$51,750.11
3 for the tax periods from January 1, 2016 through November 30, 2016. The Taxpayer's refund
4 claim was granted for \$53,784.84 for the tax periods from December 31, 2016 through
5 November 30, 2018¹. [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. [Admin. 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 Administrative Hearings Office. [Admin. file request].

12 5. On February 12, 2021, a telephonic scheduling hearing was conducted, which was
13 within 90 days 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 31, 2016 through December 31, 2018 in the amount of \$105,534.95. [Admin. file
16 L0452499120].

17 7. The Department requested additional documentation from the Taxpayer to
18 support its claim 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. Bullard; 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.

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
14 for refund.

15 The Taxpayer argues that another exception applies and that the claim for refund should
16 be granted as overpayments found as a result of an audit under both Section 7-1-26 (H) and
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

1 overpayments. NMSA 1978, 7-1-29 (D) (2017) (also allowing for a refund if the overpayments
2 exceed the underpayments). The Taxpayer argues that its claim for refund of the 2016 tax
3 periods was transmuted into an audit when the Department requested documentation to
4 substantiate the claim for refund. The Taxpayer argues that the Department’s employees are
5 “auditors” and that any action taken by an “auditor” to examine a taxpayer’s records should be
6 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.*

18 The Taxpayer argues that the Department would have assessed it if underpayments made
19 in the 2016 tax periods were discovered as a result of the information that it provided.

20 [Testimony of Mr. Dingha]. The Taxpayer argues that this hypothetical, potential assessment
21 alone is sufficient to transform the Department’s request for substantiation into an audit. The
22 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].

16 The Taxpayer failed to prove that any exception applied to its claim for refund.
17 Therefore, the general three-year limitation applied to the Taxpayer's claim for refund. *See id.*
18 The Taxpayer's payments were due in 2016, and the final date on which the Taxpayer could
19 make a claim for refund was December 31, 2019⁷. The Taxpayer admits that its claim for refund
20 with respect to the 2016 tax periods occurred after the general three-year limitation had expired.
21 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 *Dee Dee Hoxie*

22 _____
23 Dee Dee Hoxie
Hearing Officer

1 Administrative Hearings Office
2 P.O. Box 6400
3 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 INTENTIONALLY BLANK
20

21 _____
22 John Griego
23 Legal Assistant
24 Administrative Hearings Office
25 P.O. Box 6400
Santa Fe, NM 87502