



1 reflect that penalty alone was at issue. The motion being granted, the caption above reflects the  
2 amendment.

3 In quick summary, this protest involves Taxpayer's claim that penalty should be abated for  
4 two late-filed gross receipts tax returns, as the Taxpayer followed instructions on the Department's  
5 website to pay the tax during the tax reporting periods at issue. The Department contended that the  
6 Taxpayer could not prove non-negligence under the facts at issue. Ultimately, after making findings  
7 of fact and discussing the issue in more detail throughout this decision, the Hearing Officer finds  
8 that Taxpayer's evidence is insufficient to establish nonnegligence in failing to file timely returns.  
9 The protest is denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

## 10 **FINDINGS OF FACT**

### 11 **Procedural Findings**

12 1. On July 18, 2019, under Letter Id. No. L2122804400, the Department issued a  
13 Notice of Assessment of Taxes and Demand for Payment to Taxpayer, assessing Taxpayer Gross  
14 Receipts Tax Penalty of \$6,701.10 for a total assessment of tax due of \$6,701.10 for quarterly tax  
15 reporting period ending December 31, 2017. [Administrative File].

16 2. On July 29, 2019, under Letter Id. No. L1068231856, the Department issued a  
17 Notice of Assessment of Taxes and Demand for Payment to Taxpayer, assessing Taxpayer Gross  
18 Receipts Tax Penalty of \$1,626.85 for a total assessment of tax due of \$1,626.85 for the quarterly  
19 tax reporting period ending March 31, 2018. [Administrative File].

20 3. Letter Id. No. L1068231856 does not reflect the true assessment of penalties for  
21 the period ending March 31, 2018. The true penalty assessed for that period is \$4,429.46. The  
22 assessment letter reflects only the unpaid balance of the assessment after the Department,

1 without providing Taxpayer notice or opportunity to object, deducted funds (\$2,802.61) from  
2 Taxpayer's "surplus payment" or "suspension account" credit balance (as shown on the TAP  
3 website) to reduce the penalty from \$4,429.46 before issuing the assessment letter, showing a  
4 balance of \$1,626.85. [Administrative File; Taxpayer's Exhibits #1-3, #1-4, #3-2, #3-3; Motion  
5 to Amend Caption colloquy, H.R.1 at 28:25-34:00; Testimony (Opening) of Dr. Wilson, H.R.1 at  
6 43:00-43:50; Department Attorney objection/Taxpayer response H.R.1 at 1:25:30-1:40:45; Re-  
7 direct examination of A. Tapia, H.R.2 at 54:00-54:40; Re-cross examination of A. Tapia, H.R.2  
8 at 54:40-1:00:10; Re-direct examination of A. Tapia, H.R.2 at 1:04:20-1:06:05; AHO  
9 Examination of A. Tapia, H.R.2 at 1:08:50-1:18:00; Department Exhibit C-3, C-4, C-5, B-3, B-4;  
10 Closing discussion of briefing, H.R.2 at 1:41:00-1:49:30].

11 4. On July 17, 2019, Taxpayer submitted a Protest letter, alleging that the  
12 Department was incorrect in its assessment of penalty, referencing Letter ID numbers  
13 L2122804400 (reporting period ending Dec. 31, 2017) and L1891128752 (no longer at issue),  
14 outlining the steps the Taxpayer took to ensure timely payment and the attempts at  
15 reconciliation, including departmental advice, and a request for informal resolution.  
16 [Administrative File].

17 5. On July 24, 2019, under Letter Id. No. L0572804272 the Department issued a  
18 letter informing the Taxpayer that the Department acknowledged receipt of Taxpayer's protest of  
19 Combined Reporting System (CRS) penalties for tax period ending December 31, 2017  
20 contained in Letter ID No. L2122804400. [Administrative File].

21 6. On July 26, 2019, Taxpayer submitted a second Protest letter, alleging that the  
22 Department was incorrect in its assessment of penalty, referencing Letter ID numbers  
23 L1068231856 (reporting period ending Mar. 31, 2018) and L2141973680 (no longer at issue),

1 outlining the steps the Taxpayer took to ensure timely payment and the attempts at  
2 reconciliation, and a request for informal resolution. The second protest letter was never  
3 acknowledged formally by an acknowledgment letter from the Department. [Administrative  
4 File].

5 7. On September 3, 2019, Taxpayer submitted a Tax Information Authorization  
6 form, allowing Kenneth P. Redwine, CPA access to Taxpayer records. [Administrative File].

7 8. On January 21, 2020, the Department submitted a Request for Hearing to the  
8 Administrative Hearings Office, requesting a hearing on the merits of Taxpayer's protest. The  
9 Request for Hearing stated that the total at issue was \$6,701.00. The request form indicated the  
10 only Letter Id. Number at issue was Letter Id. No. L2122804400 (reporting period ending Dec.  
11 31, 2017). [Administrative File].

12 9. On January 21, 2020, the Department submitted its Answer to Protest to the  
13 Administrative Hearings Office for Letter ID Numbers L1068231856 and L2141973680,  
14 claiming that the assessment of penalties was proper as Taxpayer paid gross receipts taxes  
15 without filing a return. The Answer to Protest did not contain in its caption any reference to  
16 Letter Id. No. L2122804400, for which the hearing request was made. [Administrative File].

17 10. On January 21, 2020, the Administrative Hearings Office mailed a Notice of  
18 Telephonic Scheduling Hearing to the parties, setting the matter for a telephonic scheduling  
19 hearing on February 14, 2020. [Administrative File].

20 11. At the telephonic scheduling hearing of February 14, 2020, the parties appeared.  
21 Mr. Kenneth Redwine, CPA, appeared on behalf of Taxpayer Slapfish Restaurant. Attorney  
22 Cordelia Friedman appeared on behalf of the Department. The parties did not object that  
23 conducting the scheduling hearing satisfied the 90-day hearing requirements of Section 7-1B-8

1 (F) (2019) while still allowing meaningful time for completion of the other statutory  
2 requirements under Section 7-1B-6 (D) (2015). *See also* Regulation 22.600.3.8 (E) NMAC. A  
3 lengthy discussion of the pleadings took place and the parties agreed to allow amendment of the  
4 Department's Answer and the case caption to reflect the Letter ID Numbers at protest. The  
5 Hearing Officer preserved an audio recording of the hearing. [Administrative File].

6 12. On February 14, 2020, the Administrative Hearings Office mailed a Scheduling  
7 Order and Notice of Hearing to the parties, setting various deadlines and setting the matter for an  
8 in-person merits hearing on May 19, 2020 to occur in Santa Fe, New Mexico. [Administrative  
9 File].

10 13. On March 11, 2020, Executive Order 2020-004 was issued by the State of New  
11 Mexico's Governor Michelle Lujan Grisham, declaring a public health emergency within the  
12 State of New Mexico due to the novel coronavirus disease (COVID-19). [Administrative File].

13 14. On March 12, 2020, the first Public Health Emergency Order was issued in  
14 response to the COVID-19 was issued by the New Mexico Department of Health, Kathyleen M.  
15 Kunkel, Cabinet Secretary. [Administrative File].

16 15. On March 13, 2020, Brian VanDenzen, Chief Hearing Officer of the  
17 Administrative Hearings Office, issued Standing Order No. 20-02, entitled "Emergency Order  
18 Requiring Remote Hearings Under Tax Administration Act and Property Tax Code During  
19 Public Health Emergency." The Standing Order required hearings to occur by video or audio  
20 conference, unless an in-person hearing was requested in a manner outlined in the order.  
21 [Administrative File].

22 16. On May 7, 2020, the Administrative Hearings Office mailed and emailed an  
23 Amended Notice of Administrative Hearing to Convert In-Person Hearing to Videoconference

1 Hearing keeping the merits hearing date of May 19, 2020 but indicating the medium of  
2 videoconference would be used. [Administrative File].

3 17. On May 8, 2020, Taxpayer, by Dr. Bridget Wilson requested a continuance of the  
4 videoconference hearing due to lack of familiarity with the Zoom videoconferencing application  
5 and expressing a preference for an in-person hearing. On May 8, 2020, the Department, by  
6 Attorney Cordelia Friedman, sent an email indicating the Department did not oppose the  
7 requested continuance if videoconference were the necessary medium, and asserting the  
8 Department's wish to retain an in-person hearing. [Administrative File].

9 18. On May 12, 2020, the Administrative Hearings Office issued its Order  
10 Concerning Taxpayer's Motion to Continue Videoconference Hearing, withholding ruling on the  
11 Motion until the parties had attempted to connect via videoconference or by telephone.  
12 [Administrative File].

13 19. On May 18, 2020, the Department, by Attorney Cordelia Friedman, filed  
14 Department's Request to Vacate and Reschedule Hearing, requesting that the May 19, 2020  
15 merits hearing be reset. On May 18, 2020, the Taxpayer, by Dr. Bridget Wilson, emailed  
16 indicating no objection to the Department's request. [Administrative File].

17 20. On May 18, 2020, the Administrative Hearings Office issued its Order Converting  
18 Videoconference Merits Hearing to Videoconference Scheduling Hearing, indicating that the  
19 continuance request would be granted, and providing notice to the parties that rather than vacate  
20 the hearing entirely, the hearing set for May 19, 2020 would be converted to a videoconference  
21 scheduling hearing to provide the parties an opportunity to provide input on a reset hearing date.  
22 [Administrative File].

1           21. Parties appeared at the May 19, 2020 scheduling hearing by videoconference and  
2 telephone. Dr. Bridget Wilson, managing member, and Kenneth Redwine, CPA, appeared on  
3 behalf of Taxpayer. Attorney Cordelia Friedman appeared on behalf of the Department. In  
4 addition to choosing a new hearing date, parties again discussed amending the case caption,  
5 narrowing the issues at protest, and reopening discovery. The Department attorney opposed  
6 reopening discovery, but it was apparent that the Department attorney had directed the Taxpayer  
7 to file an inspection of public records act (IPRA) request with the Department's custodian of  
8 records rather than following the process of discovery for obtaining information sought by the  
9 Taxpayer. Overruling the objection of Department's counsel, the Hearing Officer reopened  
10 discovery. The Hearing Officer preserved an audio recording of the hearing. [Administrative  
11 File].

12           22. On May 21, 2020, the Administrative Hearings Office issued a Notice of Third  
13 Telephonic Scheduling Hearing, addressing issues raised at the second scheduling conference,  
14 and setting the matter for a third telephonic scheduling hearing on June 19, 2020.  
15 [Administrative File].

16           23. On May 22, 2020, the Department filed its Motion to Amend Answer Solely to  
17 Correct Caption. The Department's Amended Answer to Protest (draft) was included as an  
18 attachment to the Motion. The Amended Answer contained an answer to the protest of Letter  
19 ID#s L2122804400, L1791128752, L1068231856, and L2141973680. [Administrative File].

20           24. Parties appeared at the June 19, 2020 scheduling hearing by telephone. Dr.  
21 Bridget Wilson, managing member, appeared on behalf of Taxpayer. Attorney Cordelia  
22 Friedman appeared on behalf of the Department. Taxpayer was still in the process of seeking  
23 information via the Inspection of Public Records Act (IPRA), NMSA 1978, Section 14-2-1

1 through 14-2-12 (2019) to support Taxpayer's position. The Hearing Officer preserved an audio  
2 recording of the hearing. [Administrative File].

3 25. On June 22, 2020, the Administrative Hearings Office issued its Amended  
4 Scheduling Order and Notice of Administrative Hearing, addressing issues raised at the  
5 scheduling conference, providing various deadlines to the parties, and providing notice of an in-  
6 person merits hearing scheduled for October 5, 2020, to occur in Santa Fe, New Mexico.  
7 [Administrative File].

8 26. On July 20, 2020, Taxpayer, by Dr. Bridget Wilson, filed Taxpayer's Motion to  
9 Compel Discovery (Response not Satisfactory). [Administrative File].

10 27. On July 20, 2020, the Department, by Attorney Cordelia Friedman, filed the  
11 Department's Response to Motion to Compel. [Administrative File].

12 28. On August 19, 2020, the Department, by Attorney Cordelia Friedman, filed its  
13 Certificate of Service indicating that the Department had provided responses to Taxpayer's  
14 discovery requests. [Administrative File].

15 29. On August 31, 2020, the Administrative Hearings Office issued its Order  
16 Concerning Taxpayer's Motion to Compel Discovery and Notice of Telephonic Status  
17 Conference, providing the parties with notice of a status conference to address pending discovery  
18 issues on September 9, 2020 by telephone. [Administrative File].

19 30. Parties appeared on September 9, 2020 at the telephonic status conference and  
20 motion hearing. Dr. Bridget Wilson, managing member, appeared on behalf of Taxpayer.  
21 Attorney Cordelia Friedman appeared on behalf of the Department. The Hearing Officer  
22 preserved an audio recording of the hearing. [Administrative File].



1           31.     On September 10, the Administrative Hearings Office issued its Order Denying  
2 Taxpayer’s Motion to Compel Discovery and Amended Notice of Videoconference Merits  
3 Hearing. [Administrative File].

4           32.     On September 14, 2020, the Taxpayer filed its Prehearing Statement and proposed  
5 Taxpayer Exhibits. Taxpayer identified the penalties under protest to total \$11,130.56 the sum of  
6 the penalties from reporting periods ending December 31, 2017 (\$6,701.10) and March 31, 2018  
7 (\$4,429.26). The proposed exhibits were sequestered in a sub-file before the hearing.  
8 [Administrative File].

9           33.     On September 15, 2020, the Department filed its Prehearing Statement and  
10 proposed Department Exhibits. The proposed exhibits were sequestered in a sub-file before the  
11 hearing. [Administrative File].

12           34.     On September 15, 2020, the Department filed a Motion to Correct Caption.  
13 [Administrative File].

14           35.     The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted  
15 the merits hearing on October 5, 2020 with the parties and witnesses present by videoconference.  
16 At the beginning of the hearing the Hearing Officer granted the Motion to Correct Caption. The  
17 Administrative Hearings Officer preserved an audio recording of the hearing in two parts  
18 (“Hearing Record” or “H.R.1” and “H.R.2”). [Administrative File].

19 **Substantive Findings**

20           36.     Taxpayer Slapfish Restaurant is a restaurant doing business in Albuquerque, New  
21 Mexico. Dr. Bridget Wilson is an owner and managing member. [Administrative File; Direct  
22 examination of Dr. Wilson, H.R.1 at 58:15-58:40].

1           37. Taxpayer, through managing member/owner Dr. Bridget Wilson, used the  
2 Taxpayer Access Point (TAP) website for combined reporting system reporting and payments.  
3 Without the assistance of an accountant, on two occasions, Dr. Wilson navigated to the  
4 Department's landing page, which provided options for businesses and tax professionals,  
5 individuals, and MVD services in bold. There were other options as well for e-file and electronic  
6 filing and payments and searching forms and publications in smaller typeface. [Administrative  
7 File; Direct Examination (opening) of Dr. Wilson, H.R.1 at 43:45-53:45; Direct examination of  
8 Dr. Wilson, H.R.1 at 58:00-1:02:30; Taxpayer exhibit #9-2].

9           38. Taxpayer utilized the "make a payment" option because her purpose was paying  
10 gross receipts taxes for the business. Dr. Wilson used the same "make a payment" option for  
11 both quarterly reporting periods at issue. On the landing page, there is no option presented on  
12 this page to submit a tax return. [Administrative File; Direct Examination of Dr. Wilson, H.R.1  
13 at 58:30-1:03:40; Taxpayer exhibit #9-2].

14           39. The "make a payment" option appears both on the TAP landing page, and within  
15 the options provided when a taxpayer has logged on to the business account. If a taxpayer has  
16 logged in to TAP with a username and password, there are options displayed that are particular  
17 to the taxpayer, including options that are not displayed on the TAP opening/landing page,  
18 including "file, change, or print return." [Administrative File; Direct examination of A. Tapia,  
19 H.R.2 at 4:45-11:40; Taxpayer Exhibit #9-2; Department Exhibit #C-4].

20           40. Generally, when a taxpayer uses the "make a payment" option, the TAP system  
21 generates a warning "Attention [in red type]: You are only making a payment. This does not  
22 constitute submitting a return. If a return is needed, please log in and submit the required return."  
23 The TAP website was revised in 2014 to provide taxpayers with the warning. Taxpayer testified

1 she did not see any disclaimer after submitting her payments on the TAP website.

2 [Administrative File; Direct examination (opening) of Dr. Wilson, H.R.1 at 37:15-39:55; 46:00-  
3 46:35; Taxpayer exhibit #9-3, #10-5 through 10-14; Direct examination of Dr. Wilson, H.R.1 at  
4 1:06:20-1:08:20; 1:15:00-1:17:45; Direct examination of A. Tapia, H.R.2 at 3:20-6:15].

5 41. Taxpayer, on January 2, 2018, timely paid the quarterly gross receipts tax  
6 payment for the period ending December 31, 2017. Taxpayer, on April 13, 2018, timely paid the  
7 quarterly gross receipts tax payment for the period ending March 31, 2018. The payments were  
8 diverted to and held in a “suspension account” as an overpayment credit by the Department, until  
9 CRS-1 returns reporting gross receipts taxes were submitted. [Administrative File; Direct  
10 Examination of Dr. Wilson, H.R.1 at 38:10-38:35, 58:30-1:02:30; Direct examination of K.  
11 Redwine, H.R.1 at 1:48:00-1:56:30; Re-cross examination of A. Tapia, H.R.2 at 58:45-59:35;  
12 Taxpayer exhibit #9-2; Department exhibits B-1, C-1].

13 42. The Department’s website provided a payment confirmation page, following the  
14 submission of tax payment that indicated that “[t]his is only the payment submission.” The  
15 confirmation page does not directly notify a taxpayer of a need to file a corresponding return, or  
16 that funds will be held in suspension. [Administrative File; Department Exhibit B; Taxpayer’s  
17 Exhibit #2-5; Direct examination of A. Tapia, H.R.2 at 25:10-25:35].

18 43. Because Taxpayer employed a payroll company, which submitted CRS-1 returns  
19 on behalf of Taxpayer reporting withholding taxes, CRS-1 returns were filed timely for the  
20 periods at issue. However, there was no indication visible to the Taxpayer on the Taxpayer’s  
21 TAP account that a CRS-1 returns to report gross receipts taxes were missing for the two periods  
22 at issue. The Department provided no notice of the missing gross receipts returns.

1 [Administrative File; Direct examination of K. Redwine, H.R.1 at 1:51-1:53:35; Cross  
2 examination of A. Tapia, H.R.2 at 44:30-48:45; Ex B-1].

3 44. In 2019, Taxpayer became aware of a credit balance (suspension account or  
4 surplus account) when she contacted the Department by phone about opening a new restaurant  
5 location. Taxpayer was unable to determine the reason for the credit balance from the person on  
6 the phone, who advised her to speak with someone at the local tax office. Taxpayer then inquired  
7 about the credit balance in person at the Albuquerque office. At the Department's office, she was  
8 directed to file a return using a nearby computer terminal. [Administrative File; Direct  
9 examination of Dr. Wilson, H.R.1 at 39:45-41:15; Direct examination of A. Tapia, H.R.2 at  
10 30:25-32:50].

11 45. On July 5, 2019, Taxpayer submitted the two missing Combined Reporting  
12 System (CRS-1) returns for gross receipts at that time. The submission of a return applied the  
13 credit balances from the suspension account to payment of gross receipts tax. The submission of  
14 a return also generated the assessment of penalty. [Administrative File; Direct examination of A.  
15 Tapia, H.R.2 at 30:25-34:45; Testimony of Dr. Wilson during re-cross examination of A. Tapia,  
16 H.R.2 at 1:21:30-1:23:40; Department Exhibits C-2, C-3].

17 46. When a taxpayer uses the TAP website to file a late GRT return there is no  
18 warning that by submitting the late return that penalties (and interest) will be automatically  
19 assessed. [Administrative File; Re-cross examination of A. Tapia, H.R.2 at 1:21:40-1:23:40].

20 47. The Department employee at the local tax office with whom Taxpayer spoke did  
21 not provide the option of requesting a managed audit or allow Dr. Wilson to speak with a  
22 supervisor. Despite Taxpayer's many requests for a managed audit after the issuance of the  
23 assessment, the Department did not provide Taxpayer with the opportunity for managed audit. It

1 is the perspective of the Department that once an assessment is issued, a managed audit is not an  
2 available option. [Administrative File (protest letters, prehearing statement); Direct examination  
3 of Dr. Wilson, H.R1 39:45-41:15; Direct examination of A. Tapia, H.R.2 at 29:00-29:55].

4 48. The protest auditor affirmed, after using the Department's computer system to  
5 trace the Taxpayer's login activity, that when Taxpayer made the two gross receipts tax  
6 payments in January and April of 2018, the Taxpayer actually did log in to the Taxpayer's own  
7 TAP account before using the "make a payment" option. [Administrative File; Cross  
8 examination of A. Tapia, H.R.2 at 36:30-37:30, 43:30-48:45; Department Exhibits B-1, B-3].

9 49. Taxpayer had logged into the Taxpayer's TAP account and filed returns along  
10 with payment in October of 2017, indicating that someone with access to Taxpayer's login  
11 information possessed the knowledge of how to file a gross receipts tax return and pay the tax.  
12 At that time, a different accountant/business manager was employed by Taxpayer, and the  
13 business had been open only a few days at the time. [Administrative File; Department Exhibit A;  
14 Direct examination of A. Tapia, H.R.2 at 23:00-29:00; Cross examination of A. Tapia H.R.2 at  
15 40:15-46:30; Department exhibit A-1; Rebuttal testimony of Dr. Wilson during cross-  
16 examination of A. Tapia, H.R.2 at 41:30-42:55, Taxpayer's Objection to Department Exhibit  
17 A/Rebuttal by Dr. Wilson H.R.2 1:02:20-1:04:20].

18 50. Kenneth Redwine is a Certified Public Accountant (CPA) registered in New  
19 Mexico. Taxpayer hired Mr. Redwine in July of 2019 to provide accounting, filing and advisory  
20 services concerning Taxpayer's business tax issues. In that capacity, he is familiar with  
21 Taxpayer's state tax history and status. Mr. Redwine did not advise Taxpayer prior to July of  
22 2019 and did not advise Taxpayer how to use the Department website or prepare the late returns.

1 [Administrative File; Direct examination of K. Redwine, H.R.1 at 1:45:00-1:48:00; AHO  
2 examination of K. Redwine, H.R.1 at 1:59:00-2:03:15].

3 51. Alma Tapia (formerly Lucero) is a protest auditor employed by the Department  
4 and has been employed in this capacity for more than one year. Mrs. Tapia is familiar with this  
5 protest. [Administrative File; Direct examination of A. Tapia, H.R.2 at 11:45-12:05; AHO  
6 examination of A. Tapia, H.R.2 at 1:07:50-1:08:25].

7 52. The Department did not allow Taxpayer to apply for a managed audit because an  
8 assessment had already been issued. There is no forewarning on the TAP website when  
9 submitting a late return electronically that an assessment will automatically issue.

10 [Administrative File; Direct examination of K. Redwine, H.R.1 at 1:48:00-1:51:10; Direct  
11 Examination of A. Tapia, H.R.2 at 29:30-30:00; Cross examination of A. Tapia (inclusive of  
12 rebuttal testimony by Dr. Wilson), H.R.2 at 49:00-51:25].

### 13 **DISCUSSION**

14 During the timeframes at issue, Taxpayer Slapfish Restaurant owner Dr. Bridget Wilson  
15 used the Taxpayer Access Point (TAP) website for paying gross receipts taxes. When doing so,  
16 Taxpayer made gross receipts tax payments but was not prompted to file and did not file CRS-1  
17 returns for gross receipts. Dr. Wilson believed that the website was misleading, claiming  
18 nonnegligence. Taxpayer logged on to the business's account using the login and password  
19 feature and used the "make a payment" option. Dr. Wilson did not rely on a department  
20 employee explaining the website to her, nor did she rely on advice of a CPA after disclosure of  
21 the pertinent information. The use of the payment only option informs taxpayers both on the  
22 website and in a subsequent confirmation email that the payment does not constitute filing a  
23 return. In the months following the submission of the payments, the Taxpayer was not informed

1 that the payments were held in suspension, was not informed that the returns were late, and had  
2 no way of knowing these two discrepancies were true from looking at the TAP website.

### 3 **Presumption of correctness**

4 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is  
5 presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See*  
6 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise  
7 specified, for the purposes of the Tax Administration Act, “tax” is defined to include interest and  
8 civil penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation § 3.1.1.16  
9 (12/29/2000). Under Regulation § 3.1.6.13 NMAC, the presumption of correctness under Section  
10 7-1-17 (C) extends to the Department’s assessment of penalty and interest. *See Chevron U.S.A.,*  
11 *Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d  
12 785 (agency regulations interpreting a statute are presumed proper and are to be given substantial  
13 weight). Accordingly, it is a taxpayer’s burden to present some countervailing evidence or legal  
14 argument to show that they are entitled to an abatement, in full or in part, of the assessment  
15 issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099,  
16 ¶8, 336 P.3d 436. When a taxpayer presents sufficient evidence to rebut the presumption, the  
17 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*  
18 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217, 62 P.3d 308.

### 19 **The amount of penalty assessed.**

20 At the outset, it is important to identify the amount of penalties under protest. One of the  
21 contentions Taxpayer made was that the Department collected a portion of the penalty without  
22 informing Taxpayer of the action. Taxpayer further contended that the collection reduced the  
23 amount of the written penalty assessment, but Taxpayer still challenged the entire amount. The

1 Department did not challenge the fact that there was a higher penalty and did not contest that a  
2 portion of the penalty had been taken out of the Taxpayer's surplus account. Nevertheless, the  
3 Department contended that the Taxpayer was protesting only the assessment identified in the  
4 assessment letter alone, not the total penalties applied, and by having a surplus account, that the  
5 Taxpayer tacitly agreed to the payment of penalties and would have had to apply for a refund.

6 The Department contended that the only amount at protest was the amount contained in the  
7 assessment letters. There are two penalty assessment letters at issue. For the quarterly tax period  
8 ending December 31, 2017, the amount at protest is the same amount identified by the Notice of  
9 Assessment of Taxes and Demand for Payment, Letter Id. No. L2122804400, which states the  
10 penalty of \$6,701.10. The assessment letter for that period correctly states the penalty assessed.  
11 There is no discrepancy between the true amount of penalties, and the penalties identified in the  
12 assessment letter.

13 However, for the quarterly tax period ending March 31, 2018, the amount at protest is not  
14 the same amount identified by the Notice of Assessment of Taxes and Demand for Payment,  
15 Letter Id. No. L1068231856. Assessment Letter Id. No. L1068231856 states the penalty as  
16 \$1,626.85 for the quarterly tax reporting period ending March 31, 2018. Letter Id. No.  
17 L1068231856 does not reflect the true assessment of penalties, as the Department, without  
18 providing Taxpayer notice or opportunity to object, deducted additional funds (\$2,802.61) from  
19 Taxpayer's surplus payment or "suspension account" credit balance to reduce the penalty from  
20 \$4,429.46 before issuing the assessment letter, showing a balance of \$1,626.85.

21 Because Taxpayer had not been informed of the reduction through application of the  
22 surplus account funds to the penalty, it took the Taxpayer's spelunking through the TAP website  
23 to determine that the assessment of penalties was much greater than the assessment letter



1 informed her. Taxpayer provided an assertion that the full penalty was at issue within the  
2 prehearing statement filed in accordance with the Hearing Officer’s scheduling order. At the  
3 hearing on the merits this was one of the first issues to be addressed, and the last issue addressed.

4 The Department asserted that the only matters before the Hearing Officer are the two  
5 assessment letters and the amounts contained therein. The Department asserted that if a refund  
6 had been requested, it certainly would have been denied, and the protest of the denial of refund  
7 would be the manner of asserting a protest of that action.

8 The Department is within its rights to assess and collect penalties from existing sources –  
9 in this case, the Taxpayer’s suspension account – in the same stroke as the collection of the  
10 underlying tax. *See* NMSA 1978, Section 7-1-30 (“Any amount of civil penalty and interest may  
11 be collected in the same manner as, and concurrently with, the amount of tax to which it relates,  
12 without assessment of separate proceedings of any kind.”); *see also* Regulation § 3.1.11.8 (B)  
13 NMAC (“Civil penalty shall be collected in the same manner as, and concurrently with, the  
14 amount of tax to which it relates”). Yet, the Department must be upfront with taxpayers when  
15 identifying the amount of taxes, penalties and interest when providing its notice of assessment.  
16 *See* NMSA 1978, Section 7-1-17 (A) (“If the secretary or the secretary’s delegate determines that  
17 a taxpayer is liable for taxes in excess of twenty-five dollars (\$25.00) that are due and that have  
18 not been previously assessed to the taxpayer, the secretary or the secretary’s delegate shall  
19 promptly assess the amount thereof to the taxpayer.”). Assessment letters issued by the  
20 Department often contain a column or line item for credits, which in this case was absent.

21 The Department’s position, dismissive of the Taxpayer’s contention and the Hearing  
22 Officer’s concerns, goes against the spirit and the letter of the New Mexico Taxpayer Bill of  
23 Rights. The spirit of the law is to “ensure that the rights of New Mexico taxpayers are adequately

1 safeguarded and protected during the assessment, collection and enforcement of any tax...”  
2 NMSA 1978, Section 7-1-4.1 (A). Hiding the ball by only providing notice of a portion of the  
3 true assessment of penalties does not provide New Mexico taxpayers the proper safeguards. And  
4 the letter of the law is to “the right to be provided with an explanation of the results of and the  
5 basis for audits, assessments or denials of refunds that identify any amount of tax, interest or  
6 penalty due.” NMSA 1978, Section 7-1-4.2 (F). Without providing proper notice to the Taxpayer  
7 that a substantial portion of the penalties were already paid and expecting Taxpayer to timely  
8 request a refund after discovering the application of payment on their own is unnecessarily  
9 cumbersome to a self-represented Taxpayer when a protest is already pending concerning the  
10 same tax period, the same tax program, and the same application of penalty.

11 Department’s Counsel argued that the proper method of protesting the penalty already  
12 paid out of the suspension account without the Taxpayer’s knowledge was for the Taxpayer to  
13 apply for a refund, which Counsel asserted would certainly be denied, and then the Taxpayer  
14 could protest the denial of refund. Taxpayer took none of the steps which the Department said  
15 she should have.

16 The Department refused to brief the issue twice dismissing the Hearing Officer’s request  
17 for additional briefing on the legal issue because Department’s Counsel asserted it was a factual  
18 issue. The Department’s Counsel’s refusal to brief the requested issue is contrary to NMSA  
19 1978, Section 7-1B-6 (D) (2) (2019), which establishes clear authority for the hearing officer to  
20 order written briefing on the case. *See also* Regulation 22.600.3.23 NMAC; *see also* 22.600.3.26  
21 NMAC. While the Department is certainly free in briefing to argue that the issue is beyond the  
22 scope of the protest or involves purely a question of fact, it is not an option for Department’s

1 counsel under the relevant statute and regulations to simply refuse the hearing officer’s order to  
2 brief an issue<sup>1</sup>.

3           Nevertheless, even as a factual issue, the Hearing Officer is able to make factual  
4 determinations if supported by substantial evidence. It is the role of the Hearing Officer, as the  
5 trier of fact, “to weigh the testimony, determine the credibility of the witnesses, reconcile  
6 inconsistencies, and determine where the truth lies.” *N.M. Taxation & Revenue Dep’t v. Casias*  
7 *Trucking*, 2014-NMCA-099, ¶ 23, 336 P.3d 436. Testimony from both the Department witness  
8 and the Taxpayer’s witnesses and documentary evidence from the Department own website  
9 supports the fact that the true assessment of penalties for the period ending March 31, 2018 was  
10 \$4,429.46. Since the Department refused to brief the question of whether the full penalty was at  
11 issue, or the protest could be amended to include the full amount of penalty, or to include the  
12 Taxpayer’s implicit request for refund, and the Department’s implicit denial of refund, which  
13 was implicitly contained in the Taxpayer’s protest of penalties imposed for the tax period ending  
14 March 31, 2018, the Hearing Officer deems that the Department abandoned the issues and the  
15 protest of the amount of penalty already paid is properly before the Hearing Officer. *See*  
16 *Helmerich & Payne International Drilling Co. v. New Mexico Taxation and Revenue Dep’t*,  
17 2019-NMCA-054, ¶24-31, 448 P.3d 1126 (by not answering a Taxpayer’s motion the  
18 Department in effect consented to the relief requested); *see also* NMSA 1978, Section 7-1B-8 (J)  
19 (2019) (“A taxpayer with two or more protests containing related issues may request that the  
20 protests be combined and heard jointly. The hearing officer shall grant the request to combine  
21 protests unless it would create an unreasonable burden on the administrative hearings office or

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<sup>1</sup> By refusing to file the required briefing, the hearing officer could find under Regulation 22.600.3.18 NMAC that the issue was adverse to the non-complying Department or take other even stronger actions. However, the hearing officer does not need to make that default finding on this issue.

1 the taxation and revenue department.”); *see also* Regulation § 3.1.7.12 (A) NMAC (“A  
2 prehearing statement filed in conformance with a scheduling order issued by the hearing officer  
3 will qualify as a supplemental statement of grounds for the protest.”); *see also* NMSA 1978,  
4 Section 7-1-24 (C) (“A taxpayer may amend a statement made by the taxpayer in accordance  
5 with Paragraphs (2) and (3) of Subsection B of this section at any time prior to ten days before  
6 the hearing conducted on the protest in accordance with the Administrative Hearings Office Act  
7 or, if a scheduling order has been issued, in accordance with the scheduling order.”); *see also*  
8 Regulation § 22.600.3.18 NMAC (8/25/2020); *see also* NMSA 1978, Section 7-1-29 (E) (“When  
9 a taxpayer makes a payment identified to a particular return or assessment, and the department  
10 determines that the payment exceeds the amount due pursuant to that return or assessment, the  
11 secretary may apply the excess to the taxpayer’s other liabilities pursuant to the tax acts to which  
12 the return or assessment applies, without requiring the taxpayer to file a claim for a refund”).

13 Therefore, the assessment of penalties for the period ending March 31, 2018 was  
14 \$4,429.46. This is the amount at protest for that period. The effect of this determination is that  
15 the Department must refund the balance already paid of \$2,802.61, or apply it as payment for a  
16 different tax period, if the Hearing Officer ultimately finds the Taxpayer’s protest to be granted.

17 **Managed Audit and Taxpayer’s attempts at Compromise.**

18 Within the protest letters, and throughout the administrative process the Taxpayer outlined  
19 the Taxpayer’s discovery of and subsequent efforts to resolve the abnormal “credit” to the account,  
20 in seeking advice from the Department staff. The first of the Department agents Taxpayer spoke  
21 with was able to see the credit, but could not explain it, so Taxpayer was directed to visit a local tax  
22 office. At the tax office, the person she spoke with was able to identify that returns were needed,  
23 declined the Taxpayer’s request to speak with a supervisor who could explain her options (i.e., the

1 option of applying for a managed audit), and directed Taxpayer to a computer terminal to submit the  
2 missing returns. Once the returns were filed, assessments were automatically generated. Initially,  
3 assessments of penalty and interest were automatically generated and shortly thereafter, Assessment  
4 Letters were issued, for penalty alone. The Taxpayer, realizing the consequence of late filing,  
5 continued to seek compromise. Yet, the Taxpayer was unable to budge the Department from the  
6 firmly held stance that once the assessment had been issued, compromise is no longer an option.

7         Once a tax assessment has been issued, compromise is not necessarily part of the  
8 Department's playbook. "If the secretary or the secretary's delegate determines that a taxpayer is  
9 liable for taxes in excess of twenty-five dollars (\$25.00) that are due and that have not been  
10 previously assessed to the taxpayer, the secretary or the secretary's delegate shall promptly assess  
11 the amount thereof to the taxpayer." NMSA 1978, Section 7-1-17 (A). While the secretary or the  
12 secretary's delegate *may* compromise the assessment of penalty, there are substantial limits to this  
13 authority, including that the Secretary must have a good-faith doubt about the liability. *See* NMSA  
14 1978, Section 7-1-20 (A); *see also* Regulation § 3.1.11.9 NMAC. The major limitation on the  
15 secretary's or the secretary's delegate is a determination that the assessment was made  
16 incorrectly, erroneously, or illegally. *See* NMSA 1978, Section 7-1-28 (A).

17         Likewise, the option for a managed audit is discretionary, with substantial limitations on that  
18 discretion. *See* FYI-404 "Managed Audits for Taxpayers." The statute provides that "the decision  
19 whether to enter into an agreement for a managed audit rests solely with the secretary or the  
20 secretary's delegate." NMSA 1978, Section 7-1-11.1 (E) (2003). Entering an agreement for  
21 managed audit requires a written application on a form prescribed by the Secretary on the part of the  
22 taxpayer. While Taxpayer indicated that it sought ways of compromise, including the possibility of  
23 withdrawing the protest, and then applying for managed audit, there is no evidence that the

1 Taxpayer submitted an application for managed audit, or that such an application, if any, was  
2 denied.

3 And under the New Mexico Taxpayer Bill of Rights, compromise and abatement of an  
4 assessment of tax requires that the assessment was incorrectly, erroneously, or illegally made. *See*  
5 Section 7-1-4.2 (I); *see also* FYI - 405 “Taxpayer Bill of Rights Your Rights as a Taxpayer.” This  
6 inability to simply forgive public debt stems from the “anti-forgiveness of debt” clause of the  
7 New Mexico Constitution. *See* N.M. Const. Art. IV, Section 32.

8 The Taxpayer’s repeated wishes to be placed in managed audit, or to otherwise  
9 compromise the penalties at issue are not for the Hearing Officer to decide. The Secretary or the  
10 secretary’s delegate (the Hearing Officer often assumes the role of “secretary’s delegate” when  
11 abating assessments) are able, under limited circumstances, to provide taxpayers the opportunity  
12 to seek and obtain compromise of an unassessed but likely liability or an assessed liability, if any  
13 such compromise is available at law. There is no precedent known to this Hearing Officer, and  
14 none cited by Taxpayer, that forcing a managed audit is within the tools available to the Hearing  
15 Officer. Here, there was no indication of an application for managed audit, and so the denial of  
16 the managed audit, if any, is not at issue. Therefore, the request for a managed audit as relief in  
17 this protest is reluctantly denied.

18 **Deadlines for reporting and paying gross receipts taxes.**

19 The assessments in this protest arise from an application of the Gross Receipts and  
20 Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-117, which imposes a tax for the  
21 privilege of engaging in business, on the receipts of any person engaged in business in New Mexico.  
22 *See* NMSA 1978, Section 7-9-4 (2010). There is a statutory presumption that all receipts of a

1 person engaged in business activities are taxable. *See* NMSA 1978, Section 7-9-5(A) (2019).

2 Taxpayer does not dispute the taxability of the receipts.

3         Statutory deadlines for reporting and paying gross receipts taxes are the same. Since  
4 Taxpayer was a quarterly filer at the time, the tax returns and tax payments were due on the twenty-  
5 fifth day of the month following the end of the quarterly reporting period. *See* NMSA 1978, Section  
6 7-9-11; *see also* Regulation § 3.2.2.14 (Reporting of Gross Receipts – Semi-annual reporting or  
7 quarterly reporting); *see also* Regulation § 3.2.2.15 NMAC (Return required to be filed); *see also*  
8 Regulation § 3.1.4.10 (A) NMAC (Due dates and timeliness) (“If the tax is not paid when it  
9 becomes due or if a report is not filed when due because of negligence of the taxpayer or taxpayer’s  
10 representative, the taxpayer will be able to become liable for penalty.”); *see also* Regulation § 3.1.4.8 (A)  
11 NMAC (Filing Returns – Forms) (“Information concerning the method of completing and filing a  
12 return, the filing date and the due date for paying taxes administered by the department may be  
13 found under the specific tax statutes, the secretary’s regulations thereunder, on the prescribed forms  
14 and on the instructions accompanying the forms.”).

15         The evidence presented showed that the Taxpayer timely paid gross receipt taxes using the  
16 Department’s TAP website. For the period ending December 31, 2017, the tax was paid January 2,  
17 2018. For the period ending March 31, 2018, the tax was paid April 13, 2018. Evidence presented  
18 also showed that the Taxpayer filed timely CRS-1 returns when the payroll company reported  
19 employee withholdings for the two quarterly periods at issue. However, the CRS-1 returns were not  
20 in evidence, yet parties did not challenge the fact that the original CRS-1 returns only reported  
21 employee withholdings, and they did not report gross receipts.

22         Although paid timely, no gross receipts taxes were reported on an original or an amended  
23 CRS-1 return for the two reporting periods until more than a year later, when Taxpayer inquired

1 about the “overpayment” showing on the TAP account in July of 2019. CRS-1 returns can be  
2 amended without penalty if voluntarily submitted within a year of the original filing, before any  
3 assessment has been issued. *See* Regulation § 3.1.11.11 (E) NMAC; *see also* FYI 105. Likewise, if  
4 a taxpayer suspects that the reporting was incorrect, and wishes to correct the reporting, the taxpayer  
5 may request a managed audit. Penalties and interest are waived when managed audits are  
6 conducted pursuant to a managed audit agreement. *See* NMSA 1978 Section 7-1-67 (A)(4); *see also*  
7 NMSA 1978, Section 7-1-69 (G)(2); *see also* FYI 104.

8 **Penalty for late filing returns.**

9 Taxpayer’s Gross Receipts Taxes were paid timely. The dispute arises because Taxpayer  
10 claims the payments were made by following the Department’s own website instructions. Taxpayer  
11 twice used the “make a payment” option on the Department’s Taxpayer Access Point (TAP)  
12 website and paid the gross receipts tax due timely without completing the complimentary returns.  
13 Over a year later, in 2019, when Taxpayer was opening a second business location, Taxpayer was  
14 alerted to a large credit on the tax account when speaking with a Department employee when asking  
15 unrelated questions concerning opening the new location. Taxpayer understood, from the  
16 conversation with the phone agent, that she should go into the local tax office to speak with  
17 someone about the credit. Taxpayer sought an explanation for the unexpected credit by going to the  
18 local tax office, but the Department’s agent there did not provide an answer and did not provide  
19 Taxpayer access to speak with a supervisor who might be able to answer the question. Taxpayer  
20 understood, following the conversation with the tax office agent, that Taxpayer needed to file  
21 returns, and there were computer terminals at the tax office to complete the returns immediately.  
22 The Taxpayer immediately filed returns for the periods at issue, and the returns were late. Before  
23 submitting the returns, the TAP website gave no warning that the submission would automatically



1 generate penalties, nor did it inform Taxpayer that the only way to avoid penalties would be to  
2 apply for a managed audit. Two assessments for outstanding penalties were generated  
3 automatically for the two tax reporting periods at issue, and the underlying tax and a portion of the  
4 newly generated penalties were also extracted from the large credit, without notifying the Taxpayer  
5 of this payment. The balance of the penalties were assessed under two letter ID numbers, one for  
6 each reporting period. Taxpayer seeks an abatement of late-filing penalties for nonnegligence,  
7 having relied on the Department's website in the original submission of tax payments, and having  
8 relied on Department personnel when submitting late returns, or alternatively, as a mistake of law  
9 made in good faith and on reasonable grounds.

10 Under NMSA 1978, Section 7-1-69 (A) (2007), when a taxpayer fails to pay taxes due or  
11 fails to file a return by the filing date, because of negligence or disregard of rules and  
12 regulations, but without intent to evade or defeat a tax, the Department must impose a civil  
13 negligence penalty on that taxpayer. “[I]n the case of failure due to negligence or disregard of  
14 department rules and regulations, but without the intent to evade or defeat a tax, to pay when due  
15 the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-  
16 13.1 NMSA 1978 when required to do so *or to file* by the date required a return regardless of  
17 whether a tax is due, there shall be added to the amount assessed a penalty” under Section 7-1-69  
18 (A) (italics added). The statute also provides a safety valve, stating “[n]o penalty shall be  
19 assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake  
20 of law made in good faith and on reasonable grounds.” Section 7-1-69 (B).

21 The use of the word “shall” makes the imposition of penalty mandatory in all instances  
22 where a taxpayer's actions or inactions meet the legal definition of “negligence.” *See Marbob*  
23 *Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d

1 135 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to  
2 the contrary).

3 Negligence can be found in several ways. Regulation § 3.1.11.10 NMAC (1/15/01) defines  
4 “negligence” as “failure to exercise that degree of ordinary business care and prudence which  
5 reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is  
6 required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”  
7 Late filing of gross receipts tax returns or late payment of taxes (inaction by taxpayers where action  
8 is required) is certainly negligence under the circumstances at issue applied to this definition. *See El*  
9 *Centro Villa Nursing Center v. Taxation & Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M.  
10 795, 779 P.2d 982 (Section 7-1-69 (A) is designed specifically to penalize unintentional failure to  
11 pay tax.).

12 Taxpayer claimed nonnegligence first, in the failure to file timely returns, and second, in the  
13 filing without understanding the consequence of the late filing would be the assessment of penalties.  
14 Regulation § 3.1.11.11 NMAC (1/15/01) defines “nonnegligence” by describing a list of eight  
15 situations which “may indicate” an absence of negligence, allowing the Department to issue or the  
16 Hearing Officer to order an abatement. At issue is one particular provision of the regulation which  
17 could apply: “taxpayer proves the taxpayer was affirmatively misled by a department employee.”  
18 Regulation § 3.1.11.11 (A). Because the regulation uses the phrase “may indicate” the permissive  
19 language permits some discretion with the hearing officer to determine that nonnegligence exists in  
20 situations which may not strictly fall within the eight enumerated examples. *See DeMichele v.*  
21 *Taxation & Revenue Department Motor Vehicle Div.*, 2015-NMCA-095, ¶ 11, 356 P.3d 523 (the  
22 word “may” used in a statute indicates discretion); *see also Albuquerque Bernalillo Co. Water*

1 *Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 51, 148 N.M. 21, 229 P.3d 494 (“canons of  
2 statutory construction guide our interpretation of administrative regulations”).

3 In regard to subsection (A), the evidence presented that Taxpayer accessed the Taxpayer  
4 Access Point (TAP) website using a computer. The information on the landing page is public.  
5 Taxpayer provided screen-shots of the webpages she accessed and reviewed how she accessed the  
6 “make a payment” option in order to submit the payments on her own. The “make a payment”  
7 option was in the center of the page. Taxpayer compared the situation to the situation described in  
8 *The protest of High Desert Bicycles Inc.*, Decision and Order #18-23 (N.M. Admin. Hearings  
9 Office, July 31, 2018, non-precedential) *affirmed* by N.M. Court of Appeals, No.A-1-CA-37580,  
10 2020 WL 2097507, 4/22/2020. In the *High Desert Bicycles Inc.* case, the Hearing Officer  
11 determined the taxpayer was not negligent after the taxpayer first sought advice from his  
12 accountant, who told him to call the Department help line. When that taxpayer called the help line,  
13 the department’s tax help line employee walked him through the process of making online  
14 payments, and the taxpayer understood he was to use the “make a payment” option. Here, the  
15 situation is somewhat different, but what remains the same is that the Taxpayer used the “make a  
16 payment” option, either by using the link placed prominently on the TAP opening page (like the  
17 *High Desert Bicycles Inc.* employee), or by logging into the business’s TAP account and choosing  
18 the “make a payment” option.

19 While the Taxpayer was credible, the evidence presented does not suggest that the Taxpayer  
20 sought advice from an accountant or Department employee when she entered the TAP website and  
21 used the “make a payment” option. The evidence presented does not suggest the Department’s  
22 website<sup>2</sup> provided Taxpayer incorrect information or that she was misled on the requirement to file

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<sup>2</sup> The parties did not argue the meaning of “employee of the department” or “department employee” as it pertains to the Department’s TAP website. *See* NMSA 1978, Section 7-1-3 (D) (2017); *see also* Reg. § 3.1.11.11 NMAC.

1 tax returns along with making the tax payments (i.e. informed that she did not need a return). In  
2 fact, the evidence showed that upon making the payment, a notice<sup>3</sup> appeared informing the  
3 Taxpayer that the payment alone does not satisfy the requirement of filing a tax return. Taxpayer  
4 either did not see the notice, ignored the notice, or misunderstanding it, did not follow up with  
5 questions to an accountant, collaborator, or the Department for more than a year. Taxpayer  
6 explained that the Department never notified her of the missing CRS-1 returns, since CRS-1 returns  
7 were filed timely by the payroll company reporting employee withholdings. Taxpayer explained  
8 that to the Taxpayer, there is no indication on the TAP site that anything was missing or late.  
9 Taxpayer explained that no notices were sent by the Department. Taxpayer explained that there was  
10 no notice on the TAP website that the payments were diverted to a suspension account. So to  
11 Taxpayer's eyes, there was no appearance that anything was amiss or that would lead a reasonable  
12 person to take corrective action.

13 The statute at issue imposes penalty for late payment of a tax *or* late submission of a  
14 required tax return. Section 7-1-69 (A). While it was clear that the payments were made timely, the  
15 returns were not made at the same time as the payments, or within the year-long grace period to  
16 amend returns to avoid penalties. *C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-  
17 NMCA-151, ¶ 8-9, 93 N.M. 697, 604 P.2d 835 (penalty upheld where there was no evidence that  
18 the taxpayer relied on “informed consultation and advice” in deciding not to pay tax); *see also El*  
19 *Centro Villa Nursing Center v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶ 14 (a taxpayer  
20 cannot abdicate the responsibility to learn of tax obligations merely by appointing an accountant as

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However, it was understood by all the parties that Taxpayer asserted that the information contained on the TAP website, not a particular person, was misleading. Because parties assumed the Department website to be the equivalent of a Department employee, the issue is not addressed here. Here the “may” in the regulation provides adequate discretion in the Hearing Officer to attribute the services provided by the TAP website as a substitute for a department employee.

<sup>3</sup> See FOF #40. The notice reads: “Attention: You are only making a payment. This does not constitute submitting a return. If a return is needed, please log in and submit the required return.”

1 its agent in tax matters). It was Taxpayer’s responsibility to become acquainted with the  
2 requirements of both tax payment and filing tax returns.

3 Concerning the Taxpayer’s second contention of nonnegligence, that she was misled by  
4 Department employees when seeking information concerning the large credit or overpayment on  
5 her TAP account, it deserves some scrutiny. Taxpayer contended that had she known about the  
6 managed audit program before filing the late returns, she would have gone in that route, rather than  
7 haphazardly file late returns. Taxpayer’s second contention stems not from the use of the  
8 Department’s website at the time the payments were made, but from interactions with Department  
9 employees leading to her filing of late returns.

10 The Taxpayer was not affirmatively misled by a Department employee. The person on the  
11 phone could not tell why there was a credit, and the Taxpayer understood the agent’s advice to be to  
12 go to the tax office. The agent at the tax office informed the Taxpayer of missing returns, which is  
13 accurate. While the agent did not inform the Taxpayer of the ability to apply for a managed audit to  
14 avoid penalties and interest, the agent had no statutory responsibility to provide the Taxpayer a  
15 menu of various options and advice concerning the potential benefits or pitfalls of the available  
16 courses of action. *See The protest of New Mexico Orthopedic Association*, Decision and Order #13-  
17 37 (N.M. Admin. Hearings Office, December 2, 2013, non-precedential).

18 It is the role of the Hearing Officer, as the trier of fact, “to weigh the testimony, determine  
19 the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies.” *N.M.*  
20 *Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23. While credible, Taxpayer’s  
21 testimony and documentary evidence does not overcome the presumption of correctness that  
22 attached to the assessment. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021,  
23 ¶13; *see also* Regulation § 3.1.6.12 (A) NMAC (1/15/2001). Taxpayer was not nonnegligent under

1 the requirements of Regulation § 3.1.11.11 NMAC. Taxpayer’s omission in filing the two CRS-1  
2 returns (or amended returns) reporting gross receipts taxes for more than a year after submitting  
3 payment for the same taxes was negligent. *See* Regulation § 3.1.11.10 (B) NMAC (negligence  
4 includes inaction by taxpayers when action is required).

5 **Conclusion.**

6 It is clear from Taxpayer’s testimony and documentary evidence that the Department’s TAP  
7 website at the time Taxpayer paid the gross receipts was confusing to Taxpayer. At that time,  
8 Taxpayer would have benefitted from clearer instructions and user prompts so that taxpayers are  
9 not left with the impression of completion of payment and return filing responsibilities, when in fact  
10 the Department software will generate penalties and interest for late-filed or late-amended returns.  
11 Taxpayer paid her gross receipts tax on time, but did not file CRS-1 returns reporting the gross  
12 receipts until nearly a year and a half after the reporting periods at issue. It is the Taxpayer’s duty to  
13 prove with substantial evidence that the assessment of penalty for late reporting was in error by  
14 proving nonnegligence in making the error that led to the late filing. “Substantial evidence is  
15 relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State*  
16 *v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted).  
17 Taxpayer provided evidence that when she entered the TAP website, she saw the “make a payment”  
18 option and used it. Evidence also showed that an alert and a confirmation page informed the  
19 Taxpayer that the payment did not constitute a tax return, and if a return was needed, that it should  
20 be submitted. The Department’s website and the Department employees Taxpayer later contacted  
21 did not affirmatively mislead the Taxpayer. The penalty assessment will be upheld.

22 **CONCLUSIONS OF LAW**

1           A.     The Taxpayer filed a timely written protest to the Notice of Assessment of Tax and  
2 Demand for Payment issued under Letter ID numbers L2122804400 and L1068231856, and  
3 jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-  
4 24 (D) (2017).

5           B.     A scheduling hearing was timely set and held within 90-days of protest under  
6 NMSA 1978, Section 7-1B-8 (2019). Parties did not object that the scheduling hearing satisfied  
7 the 90-day hearing requirement of Section 7-1B-8. *See also* Regulation 22.600.3.8 (E) NMAC  
8 (02/01/2018).

9           C.     Any assessment of tax made by the Department is presumed to be correct.  
10 Therefore, it is the taxpayer’s burden to come forward with evidence and legal argument to establish  
11 that the Department’s assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-  
12 17 (C) (2007).

13           D.     “Tax” is defined to include not only the tax program’s principal, but also interest and  
14 penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation 3.1.1.16 (12/29/2000).  
15 Assessments of penalties and interest therefore also receive the benefit of a presumption of  
16 correctness. *See* Regulation 3.1.6.13 NMAC (1/15/01).

17           E.     Taxpayer was not affirmatively misled by a Department employee when she used  
18 the “make a payment” option on the Department’s TAP website. *See* NMSA 1978, Section 7-1-  
19 69 (A) (2007); *see also* Regulation § 3.1.11.11 (A) NMAC (1/15/01); *cf. The protest of High Desert*  
20 *Bicycles Inc.*, Decision and Order #18-23 (N.M. Admin. Hearings Office, July 31, 2018, non-  
21 precedential) (finding of non-negligence when taxpayer was given advice from an accountant to call  
22 the department’s tax help line, then was walked through the process of making online payment,

1 understanding from department employee over the phone that he was to use the “make a payment”  
2 option) *affirmed* by N.M. Court of Appeals, No.A-1-CA-37580, 2020 WL 2097507, 4/22/2020.

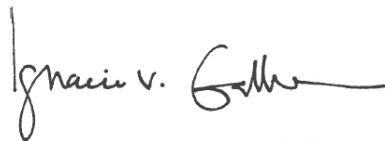
3 F. Taxpayer was not affirmatively misled by a Department employee when, as she  
4 sought information about a large credit to her account, an employee at the local tax office directed  
5 her to a computer terminal to file late returns. *See* NMSA 1978, Section 7-1-69 (A) (2007); *see also*  
6 Regulation § 3.1.11.11 (A) NMAC (1/15/01); *cf. The protest of High Desert Bicycles Inc.*, Decision  
7 and Order #18-23 (N.M. Admin. Hearings Office, July 31, 2018, non-precedential).

8 G. Taxpayer has not proven entitlement to the managed audit program, as the  
9 program is discretionary. *See* NMSA 1978, Section 7-1-11.1 (E) (2003); *see also* FYI-404  
10 “Managed Audits for Taxpayers.”

11 H. Taxpayer has not proven nonnegligence or a mistake of law made in good faith and  
12 on reasonable grounds. *See* NMSA 1978, Section 7-1-69 (A) and (B); *see also* Regulation §  
13 3.1.11.11 (A) NMAC (1/15/01).

14 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that the  
15 Department’s issuance of the Assessments was proper, and Taxpayer is responsible for payment of  
16 the outstanding penalty for a total of \$6,701.10 for quarterly tax reporting period ending  
17 December 31, 2017, and \$1,626.85 for the quarterly tax reporting period ending March 31, 2018.

18 DATED: June 28, 2021.



19  
20 Ignacio V. Gallegos  
21 Hearing Officer  
22 Administrative Hearings Office  
23 P.O. Box 6400  
24 Santa Fe, NM 87502



1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On June 28, 2021, a copy of the foregoing Decision and Order was submitted to the parties  
15 listed below in the following manner:

16 *First Class Mail and Email*

*Email*

17 INTENTIONALLY BLANK

18 \_\_\_\_\_  
19 John Griego  
20 Legal Assistant  
21 Administrative Hearings Office  
22 P.O. Box 6400  
23 Santa Fe, NM 87502