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

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**IN THE MATTER OF THE PROTEST OF
ORVILLE & SHARON WHYTE
TO THE ASSESSMENT
ISSUED UNDER LETTER ID NO. L0098181808**

v.

AHO No. 20.03-036A, D&O No. 21-19

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On July 29, 2021, Hearing Officer Dee Dee Hoxie, Esq. conducted an in-person hearing on the merits of the protest to the assessment. The Taxation and Revenue Department (Department) was represented by Kenneth Fladager, Staff Attorney. Mary Griego, Auditor, also appeared on behalf of the Department. Orville Whyte (Taxpayer) appeared for the hearing and represented himself. The Taxpayer and Ms. Griego testified. The Hearing Officer took notice of all documents in the administrative file. The Department's exhibits "A" (check), "B" (envelope), and "C" (update) were admitted¹.

The main issue to be decided is whether the Taxpayer is liable for penalty and interest. The Hearing Officer considered all of the evidence and arguments presented by both parties. Because the Taxpayer failed to overcome the presumption of correctness, the Hearing Officer finds in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 4, 2019, the Department issued an assessment to the Taxpayer for penalty and interest for the tax period ending December 31, 2018. The assessment was for

¹ Citations to exhibits will be "Ex." followed by their respective letter.

1 penalty of \$45.40 and interest of \$1.11, for a total liability of \$46.51. [Admin. file
2 L0098181808; Testimony of Taxpayer; Testimony of Ms. Griego].

3 2. On November 7, 2019, the Taxpayer filed a timely written protest to the
4 assessment. [Admin. file protest].

5 3. On December 23, 2019, the Department acknowledged its receipt of the protest.
6 [Admin. file].

7 4. On March 9, 2020, the Department filed a request for hearing with the
8 Administrative Hearings Office. [Admin. file request].

9 5. A videoconference hearing was set for April 23, 2020, due to the recently
10 declared public health state of emergency². The hearing was set within 90 days of the request as
11 required by statute. [Admin. file].

12 6. The parties advised that they were unprepared to appear by videoconference, and
13 the Taxpayer requested that the hearing be delayed until the public health crisis ended. [Admin.
14 file].

15 7. An order canceling the hearing and holding the protest in abeyance during the
16 public health crisis was issued. The order held that the parties had effectively waived the 90-day
17 requirement of the statute, but they had an opportunity to object to that determination. [Admin.
18 file].

19 8. No objection was filed, and the parties are deemed to have waived the 90-day
20 requirement. [Admin. file].

21 9. The Taxpayer filed his personal income tax return and made payment for the 2018
22 tax year by mail. [Testimony of Taxpayer; Testimony of Ms. Griego; Ex. A; Ex. B].

² The state of emergency remains ongoing at the time of this decision, though some restrictions have been eased.

1 **Assessment of penalty.**

2 The Taxpayer argues that he was only three days late and should have been given a
3 greater grace period. When a tax is not paid by the due date or a return is not filed by its due
4 date, “there *shall* be added to the amount assessed a penalty”, and the penalty is calculated by
5 multiplying the tax due by “two percent per month or *any fraction of a month*” from the due
6 dates. NMSA 1978, § 7-1-69 (A) (2007) (emphasis added). The word “shall” indicates that the
7 assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
8 *Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The statute requires that penalty
9 be paid at a rate of two percent of the tax due when a payment or return is late, even if it is only
10 late by a fraction of a month. *See* NMSA 1978, § 7-1-69. The statute does not provide a grace
11 period. *See id.*

12 The Taxpayer argued that he was not accustomed to filing state taxes because he was
13 previously an active military member and not required to pay state income taxes. If a taxpayer is
14 not negligent, penalty may be excused. *See* 3.1.11.11 NMAC (2001) (listing several factors,
15 such as consulting an accountant, that indicate non-negligence). Negligence includes
16 “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”
17 3.1.11.10 NMCA (2001). A taxpayer’s lack of knowledge or erroneous belief that the taxpayer
18 did not owe the tax is considered to be negligence for purposes of assessment of penalty. *See id.*
19 *See also Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16.

20 The Taxpayer failed to prove that he was not negligent. The Taxpayer filed his return
21 and his tax payment three days late. [Ex. A; Ex. B]. *See also* NMSA 1978, §7-2-12. The
22 amount of tax due was \$2,270.00. [Ex. A]. Two percent of \$2,270.00 is \$45.40. The amount of
23 penalty assessed was \$45.40. [L0098181808]. Therefore, the penalty was properly assessed.

1 **Assessment of interest.**

2 The Taxpayer did not object to the interest and felt that \$1.11 was an appropriate “late
3 fee” for three days tardiness. Interest “shall be paid” on taxes that were not paid on or before the
4 date on which they were due. NMSA 1978, § 7-1-67 (A) (2013). Again, the word “shall”
5 indicates that the assessment of interest is mandatory. *See Marbob Energy Corp., 2009-NMSC-*
6 *013.*

7 The assessment of interest is not a “late fee”, but it is intended to compensate the state for
8 the time value of unpaid revenue. Interest in this case is significantly less than the penalty
9 because interest is accrued at the rate of 15 percent per year, which is applied at a daily rate of
10 significantly less than one percent. *See NMSA 1978, § 7-1-67. See also 3.1.10.18 NMAC*
11 *(2001).* Three days tardiness did not cause a significant amount of interest to accrue. Because
12 the tax was not paid when it was due, interest was properly assessed.

13 **CONCLUSIONS OF LAW**

14 A. The Taxpayer filed a timely written protest to the Notice of Assessment of penalty
15 and interest issued under Letter ID Number L0098181808, and jurisdiction lies over the parties and
16 the subject matter of this protest.

17 B. The first hearing was set to be held within 90 days of the request for hearing, and the
18 parties waived the 90-day requirement based on the public health state of emergency. *See NMSA*
19 *1978, § 7-1B-8 (2019).*

20 C. The Taxpayer filed and paid his personal income taxes three days late. *See NMSA*
21 *1978, § 7-2-12.*

22 D. Penalty is assessed at two percent of the tax due and unpaid for any fraction of the
23 month past the due date. *See NMSA 1978, § 7-1-69.*

1 E. Interest is assessed daily at a fraction of a percent of the tax due and unpaid. *See*
2 NMSA 1978, § 7-1-67. *See also* 3.1.10.18 NMAC.

3 F. The Taxpayer failed to overcome the presumption that the assessment was correct.
4 *See* NMSA 1978, § 7-1-17. *See also* 3.1.11.11 NMAC.

5 G. Assessment of penalty and interest were required and appropriate under the
6 statutes based on the Taxpayer's late filing of his personal income tax return and payment. *See*
7 NMSA 1978, § 7-1-67 and § 7-1-69.

8 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
9 Taxpayer is liable for \$46.51 in penalty and interest.

10 DATED: August 11, 2021.

11 *Dee Dee Hoxie*

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

17 **NOTICE OF RIGHT TO APPEAL**

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

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

5 **CERTIFICATE OF SERVICE**

6 On August 11, 2021, a copy of the foregoing Decision and Order was submitted to the
7 parties listed below in the following manner:

8 *Email*

Interdepartmental Mail

9 INTENTIONALLY BLANK

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