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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  
DANIEL S. DAWES  
LIGHTHOUSE ENTERTAINMENT  
TO THE ASSESSMENT  
ISSUED UNDER LETTER ID NO. L1187026608**

9  
**v.**

**AHO No. 21.07-043A, D&O No. 21-23**

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**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

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**DECISION AND ORDER**

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On October 21, 2021, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference hearing on the merits of the protest to the assessment. The Taxation and Revenue Department (Department) was represented by Kenneth Fladager, Staff Attorney, who appeared by videoconference. Elvis Dingha, Auditor, also appeared by videoconference on behalf of the Department. Daniel Dawes (Taxpayer) appeared by videoconference and represented himself. The Taxpayer and Mr. Dingha testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer filed Exhibit #1, proof of payment, prior to the hearing.

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The main issue to be decided is whether the Taxpayer owes the penalty and interest that were assessed. 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:

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**FINDINGS OF FACT**

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1. On June 9, 2020, the Department assessed the Taxpayer for gross receipts tax for the tax periods from January 1, 2012 through December 31, 2016. The assessment was for tax of

1 \$3,766.14, penalty of \$753.22, and interest of \$820.95. [Admin. file L1187026608; Testimony  
2 of Taxpayer; Testimony of Mr. Dingha].

3 2. On September 8, 2020, the Taxpayer filed a timely<sup>1</sup> written protest to the denial  
4 of refund. [Admin. file protest].

5 3. On January 27, 2021, the Department acknowledged its receipt of the protest.  
6 [Admin. file].

7 4. On July 21, 2021, the Department filed a request for hearing with the  
8 Administrative Hearings Office. [Admin. file request].

9 5. On August 6, 2021, a telephonic scheduling hearing was conducted, which was  
10 within 90 days of the request as required by statute. The Taxpayer failed to appear. [Admin.  
11 file].

12 6. On September 3, 2021, a videoconference hearing on the merits was conducted.  
13 The Taxpayer again failed to appear. [Admin. file].

14 7. On September 3, 2021, the Taxpayer filed a motion to be heard and explained that  
15 he tried to appear for the hearing at the wrong time. The Department did not file a response, and  
16 the hearing on the merits was reset. [Admin. file].

17 8. At some point, the Taxpayer became aware that he owed gross receipts taxes.  
18 [Testimony of Taxpayer].

19 9. The Taxpayer applied for a managed audit as he hoped to avoid penalty and  
20 interest on the overdue taxes that he owed. [Testimony of Taxpayer].

21 10. The managed audit was rejected in March 2020 because the Taxpayer had not  
22 provided sufficient information and had missed deadlines. [Testimony of Taxpayer].

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<sup>1</sup> The 90<sup>th</sup> day from the assessment was September 7, 2020. Since September 7, 2020 was a legal holiday, the deadline extended to the following business day, which was September 8, 2020. See 22.600.1.12 NMAC (2018).

1 11. The Taxpayer continued to try to communicate with the Department and was still  
2 hopeful that a managed audit could be done. [Testimony of Taxpayer].

3 12. After the assessment, the Taxpayer paid the tax principal that was assessed.  
4 [Testimony of Taxpayer; Testimony of Mr. Dingha; Exhibit #1].

5 13. The Taxpayer is requesting leniency on the penalty and interest based on his lack  
6 of understanding of the managed audit process and the lack of helpful communication with the  
7 Department, which he feels was caused in part by the pandemic. [Testimony of Taxpayer].

## 8 DISCUSSION

### 9 **Burden of proof.**

10 The assessment issued in this case is presumed correct. *See* NMSA 1978, § 7-1-17 (C)  
11 (2007). Unless otherwise specified, for the purposes of the Tax Administration Act, “tax” is  
12 defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (Z) (2019). The presumption  
13 of correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and  
14 interest. *See* 3.1.6.13 NMAC (2001). Consequently, the Taxpayer has the burden to overcome  
15 the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. *See also N.M.*  
16 *Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8.

### 17 **Managed audits.**

18 The Department has discretion to make agreements for managed audits. *See* NMSA, § 7-1-  
19 11.1 (2003). All managed audit agreements must satisfy the statutory requirements, which include  
20 deadlines for submission that the Department sets. *See id.* The Taxpayer admitted that he did not  
21 provide all of the information that the Department requested by the deadlines that were set.  
22 [Testimony of Taxpayer]. The Taxpayer was confused about the process and tried to communicate  
23 with the Department to better his understanding. [Testimony of Taxpayer]. His attempts to

1 communicate were largely unsuccessful, often resulting in missed calls on both sides and a  
2 repetition of previous requests and explanations. [Testimony of Taxpayer].

3 The Taxpayer's frustration with the managed audit process was clear. However, there was  
4 no evidence that the Taxpayer failed to meet the managed audit deadlines due to any pandemic-  
5 related reasons. Moreover, the Department has the sole discretion to enter into a managed audit  
6 agreement. *See* NMSA 1978, § 7-1-11.1. There was no evidence that the Department and the  
7 Taxpayer came to any agreement. *See id.* Without an agreement stating otherwise, the Department  
8 was free to assess the Taxpayer. *See id.* *See also* NMSA 1978, § 7-1-17.

### 9 **Assessment of Penalty.**

10 The Taxpayer conceded that he owed the tax and paid it after the assessment was made.  
11 [Testimony of Taxpayer]. The Taxpayer asks for leniency on penalty. When a tax is not paid by  
12 the due date or a return is not filed by its due date, "there *shall* be added to the amount assessed a  
13 penalty". NMSA 1978, § 7-1-69 (A) (2007) (emphasis added). In addition to the standard  
14 penalty, underpayments of income tax are also assessed an underpayment penalty. *See* NMSA  
15 1978, § 7-2-12.2 (2011). The word "shall" indicates that the assessment of penalties is  
16 mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*,  
17 2009-NMSC-013, ¶ 22, 146 N.M. 24. If a taxpayer is not negligent, penalties may be excused.  
18 *See* 3.1.11.11 NMAC (2001) (listing several factors, such as consulting an accountant, that  
19 indicate non-negligence). The Taxpayer did not provide evidence that he was not negligent  
20 under the factors in the regulation or that his failure to pay his taxes when they were due was  
21 based on a mistake of law made in good faith on reasonable grounds; rather, the Taxpayer  
22 admitted that he was negligent. [Testimony of Taxpayer]. *See* NMSA 1978, § 7-1-69 (B). *See*  
23 *also* 3.1.11.11 NMAC. Therefore, the penalty was properly assessed.

1 **Assessment of interest.**

2 The Taxpayer also asks for leniency on interest. Interest “shall be paid” on taxes that  
3 were not paid on or before the date on which they were due. NMSA 1978, § 7-1-67 (A) (2013).  
4 Again, the word “shall” indicates that the assessment of interest is mandatory. *See Marbob*  
5 *Energy Corp.*, 2009-NMSC-013. Therefore, interest was properly assessed.

6 **CONCLUSIONS OF LAW**

7 A. The Taxpayer filed a timely, written protest of the Department’s assessment and  
8 jurisdiction lies over the parties and the subject matter of this protest.

9 B. The first hearing was timely set and held within 90 days of the request for hearing.  
10 *See* NMSA 1978, Section 7-1B-8 (2019).

11 C. The Taxpayer failed to overcome the presumption of correctness, and the penalty  
12 and interest were properly assessed. *See* NMSA 1978, § 7-1-17. *See also* 3.1.6.13 NMAC.

13 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that  
14 Taxpayer is liable for \$753.22 in penalty and \$820.95 in interest.

15 *Dee Dee Hoxie*

16 \_\_\_\_\_  
17 Dee Dee Hoxie  
18 Hearing Officer  
19 Administrative Hearings Office  
20 P.O. Box 6400  
Santa Fe, NM 87502

21 **NOTICE OF RIGHT TO APPEAL**

22 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
23 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
24 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this

1 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
2 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
3 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
4 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
5 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
6 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
7 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
8 statement from the appealing party. *See* Rule 12-209 NMRA.

9 **CERTIFICATE OF SERVICE**

10 On November 10, 2021, a copy of the foregoing Decision and Order was submitted to the  
11 parties listed below in the following manner:

12 INTENTIONALLY OMITTED ON PUBLIC COPY