

1 **STATE OF NEW MEXICO**  
2 **ADMINISTRATIVE HEARINGS OFFICE**  
3 **TAX ADMINISTRATION ACT**

4 **IN THE MATTER OF THE PROTEST OF**  
5 **XTO ENERGY INC.**  
6 **TO ASSESSMENT ISSUED UNDER**  
7 **LETTER ID NO. L1185855152**

8 **v.**

**AHO No. 21.02-005A, D&O No. 21-25**

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On May 5, 2021, Chief Hearing Officer Brian VanDenzen, Esq., of the Administrative  
12 Hearings Office conducted a merits administrative hearing in the matter of the tax protest of  
13 XTO Energy Inc. (Taxpayer) pursuant to the Tax Administration Act and the Administrative  
14 Hearings Office Act. With agreement of the parties and in accord with the standing order  
15 addressing hearings during the pandemic, the hearing occurred via videoconference. At the  
16 hearing, Taxpayer employees Lisa Call and Eldon Andrus appeared on behalf of Taxpayer. Ms.  
17 Call and Mr. Andrus also testified as Taxpayer witnesses. Staff Attorney David Mittle appeared,  
18 representing the opposing party in the protest, the Taxation and Revenue Department  
19 (Department). Department Protest Auditor Nicholas Pacheco appeared as a Department witness.  
20 Neither party presented any exhibits into the record other than what was contained in the  
21 administrative record in this matter.

22 In quick summary, this protest involves Taxpayer's request for abatement of \$62,917.63 in  
23 assessed penalty because of one-day delay in filing its Oil and Gas Severance Tax Return. Taxpayer  
24 timely paid the applicable tax by the deadline. However, Taxpayer claims nonnegligence for the  
25 one-day delay in filing the return because Taxpayer's employee responsible for filing the New  
26 Mexico return was beset with a series of COVID-19 family medical emergencies and tragedies

1 around the time of the return deadline. Ultimately, after making findings of fact and discussing the  
2 issue in more detail throughout this decision, the hearing officer finds that because Taxpayer had the  
3 ability to assign another employee to prepare, file and pay the tax when due—just as it had done in  
4 April of 2020—penalty cannot be abated under the applicable statutory and regulatory language  
5 despite the highly sympathetic circumstances afflicting Taxpayer’s employee during the  
6 extraordinary, once-in-a-century COVID-19 pandemic. IT IS DECIDED AND ORDERED AS  
7 FOLLOWS:

### 8 **FINDINGS OF FACT**

9 1. On July 16, 2020, under letter id. no. L1185855152, the Department issued a  
10 Notice of Assessment of Taxes and Demand for Payment to Taxpayer for \$62,917.63 in oil and  
11 gas severance tax for the reporting period ending on April 30, 2020. [Administrative Record,  
12 Hearing Request Packet, Assessment].

13 2. On October 12, 2020, Taxpayer filed a formal protest of the Department’s  
14 assessment, challenging the imposition of penalty in light of COVID-19 related complications to  
15 the employee responsible for filing the return, pandemic related tax relief provided by the New  
16 Mexico Legislature during the first 2020 special session, and certain statutory provisions  
17 allowing for abatement of penalty [Administrative Record, Hearing Request Packet, Protest and  
18 Request for Hearing].

19 3. On November 25, 2020, the Department acknowledged receipt of Taxpayer’s  
20 protest. [Administrative Record, Hearing Request Packet, Acknowledgement Letter].

21 4. On February 5, 2021, Taxpayer filed a request for hearing on the protest with the  
22 Administrative Hearings Office. [Administrative Record, Hearing Request Packet, Request for  
23 Hearing].

1           5.       On February 8, 2021, the Administrative Hearings Office issued a Notice of  
2 Videoconference Administrative Hearing, setting the merits hearing on May 5, 2021.

3           6.       On February 9, 2021, the Department timely filed its answer to Taxpayer's  
4 protest. [Administrative Record].

5           7.       At the hearing, both Taxpayer witnesses Lisa Call and Eldon Andrus adopted  
6 their respective opening statements as their sworn, under oath testimony without objection from  
7 the Department.

8           8.       At the hearing, Department Protest Auditor Nicholas Pacheco testified under oath.

9           9.       Taxpayer is in the business of oil and gas production. [Cross-examination of Ms.  
10 Call].

11          10.      Taxpayer operates in New Mexico and 15-other states, as well as in Argentina.  
12 [Cross-examination of Ms. Call].

13          11.      Taxpayer remits between \$500-\$900 million in severance tax in the states it  
14 operates. [Cross-examination of Ms. Call].

15          12.      Taxpayer remits severance tax payments in all 16 states where it engages in oil  
16 and gas production. Most of these 16 states require monthly severance tax payments, with a few  
17 states requiring annual returns. [Cross-examination of Ms. Call].

18          13.      Taxpayer has an in-house department, State Tax and Royalty Reporting, dedicated  
19 to severance tax payments in return. [Testimony of Ms. Call].

20          14.      Mr. Andrus is Taxpayer's Severance Tax Manager in the Tax Department.  
21 [Testimony of Mr. Andrus].

22          15.      Taxpayer's Comptroller's Organization has the responsibility to file severance tax  
23 returns. [Testimony of Mr. Andrus].

1           16.     Taxpayer had a specific employee within the Comptroller’s Organization assigned  
2 to file its New Mexico oil and gas severance tax. This employee will hereafter be referred to  
3 Employee X<sup>1</sup>. [Testimony of Ms. Call].

4           17.     In March of 2020, the coronavirus COVID-19 worldwide pandemic caused  
5 Taxpayer to direct its employees in the State Tax and Royalty Reporting Department to telework  
6 from their homes. [Testimony of Ms. Call].

7           18.     In March of 2020, Employee X’s significant other fell ill with COVID-19.  
8 [Testimony of Ms. Call].

9           19.     Employee X became ill with COVID-19 in late March of 2020. Employee X’s  
10 illness extended into April of 2020. [Testimony of Ms. Call].

11          20.     Employee X was on leave because of COVID-19 in April of 2020 for three days.  
12 [Testimony of Ms. Call].

13          21.     In April of 2020, when Employee X was ill with COVID-19 and out of the office,  
14 another Taxpayer employee handled New Mexico’s severance tax returns for the January 2020  
15 reporting period. That other Taxpayer employee timely filed the severance tax payment and  
16 returns due in April. [Testimony of Ms. Call].

17          22.     In mid-May, Employee X’s mother-in-law passed away from COVID-19.  
18 [Testimony of Ms. Call].

19          23.     Employee X’s father became ill with COVID-19 in June of 2020, with a diagnosis  
20 on June 17, 2020. [Testimony of Ms. Call].

21          24.     On Friday, June 19, 2020, Employee X’s father was hospitalized in Phoenix, AZ.  
22 [Testimony of Ms. Call].

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<sup>1</sup> The name of the employee will not be identified in this public decision because the decision will discuss sensitive medical information related to that employee and that employee’s family.

1           25.     On Sunday, June 21, 2020, Employee X’s father was transferred into the ICU and  
2 placed on a ventilator. [Testimony of Ms. Call].

3           26.     Employee X went to Phoenix at some unspecified time around this period to be  
4 with his father. [Testimony of Ms. Call].

5           27.     Taxpayer’s oil and gas severance tax liability and tax return for the April 2020  
6 reporting period was due on Thursday, June 25, 2020. [Testimony of Ms. Call].

7           28.     Taxpayer timely paid the outstanding severance tax for the April 2020 reporting  
8 period on Thursday, June 25, 2020. [Testimony of Ms. Call].

9           29.     Taxpayer’s severance tax return for the April 2020 reporting period was untimely  
10 filed on Friday, June 26, 2020, one day after the statutory deadline. [Testimony of Ms. Call;  
11 Testimony of Mr. Pacheco].

12           30.     Mr. Pacheco is a protest auditor with the Department. In that capacity, Mr.  
13 Pacheco reviews protest cases and decides how to proceed on the protest. [Testimony of Mr.  
14 Pacheco].

15           31.     Mr. Pacheco was assigned this case. [Testimony of Mr. Pacheco].

16           32.     In this case, Mr. Pacheco reviewed the Taxpayer’s GenTax<sup>2</sup> filing history.  
17 [Testimony of Mr. Pacheco].

18           33.     Mr. Pacheco believed that Taxpayer had the ability to timely file the return in this  
19 matter based on his review in this matter and his understanding of the testimony. Consequently,  
20 Mr. Pacheco opined that assessment of penalty was correct in this matter. [Testimony of Mr.  
21 Pacheco].

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<sup>2</sup> GenTax is the Taxation and Revenue Department’s computer tax data management and record system.



1 and the deeply sympathetic personal circumstances of Employee X with the strict statutory and  
2 regulatory penalty provisions that the hearing officer is bound to follow<sup>3</sup>.

3 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is  
4 presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See*  
5 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the  
6 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*  
7 NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of  
8 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and  
9 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50,  
10 ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be  
11 given substantial weight). Accordingly, it is Taxpayer’s burden to present some countervailing  
12 evidence or legal argument to show that it is entitled to an abatement, in full or in part of the tax,  
13 penalty, and interest, of the assessment issued against it. *See N.M. Taxation & Revenue Dep’t v.*  
14 *Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut  
15 the presumption, the burden shifts to the Department to show that the assessment is correct. *See*  
16 *MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-21, ¶13, 133 N.M. 217.

17 At issue in this protest are Taxpayer’s oil and gas severance tax returns, which are governed  
18 by NMSA 1978, Section 7-29-1 through 23, known as the Oil and Gas Severance Tax Act. Under  
19 the Oil and Gas Severance Tax Act, a taxpayer required to pay the applicable tax “shall” remit  
20 payment of the tax accompanied by a tax return “on or before the twenty-fifth day of the second  
21 month after the calendar month for which the return is required.” NMSA 1978 § 7-29-7. The

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<sup>3</sup> Unlike a court, an administrative hearing officer lacks traditional powers of equitable relief that seem might be justified in this matter given that Taxpayer established there was little real harm to the state by the overnight delay in filing the return.

1 statutory use of the word “shall” makes the filing of a return and payment by the deadline  
2 mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22,  
3 146 N.M. 24, 32.

4 In this case, the April 2020 reporting period is at issue. Under Section 7-9-27, the return and  
5 payment of the outstanding oil and gas severance tax for the April 2020 reporting period was due on  
6 or before June 25, 2020. In this case, Taxpayer timely paid the outstanding oil and gas severance  
7 tax by the June 25, 2020, deadline. However, Taxpayer did not submit the required tax return until  
8 the next morning, June 26, 2020, at approximately 6:30 am, after the deadline under Section 7-9-27  
9 had passed.

10 By filing the return after the statutory deadline, Taxpayer was potentially subject to civil  
11 negligence penalty under NMSA 1978 Section 7-1-69 (2007). When a taxpayer fails to pay taxes  
12 due to the State because of negligence or disregard of rules and regulations, but without intent to  
13 evade or defeat a tax, Section 7-1-69 requires that

14 there *shall* be added to the amount assessed a penalty in an amount equal  
15 to the greater of: (1) two percent per month or any fraction of a month  
16 from the date the tax was due multiplied by the amount of tax due but not  
17 paid, not to exceed twenty percent of the tax due but not paid.

18 (*italics* added for emphasis).

19 The statute’s use of the word “shall” makes the imposition of penalty mandatory in all instances  
20 where a taxpayer’s actions or inactions meets the legal definition of “negligence.” *See Marbob*  
21 *Energy Corp.*, ¶22.

22 Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) “failure to  
23 exercise that degree of ordinary business care and prudence which reasonable taxpayers would  
24 exercise under like circumstances;” (B) “inaction by taxpayer where action is required”; or (C)  
25 “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”



1           Given the circumstances of the pandemic that impacted everyone and every business in this  
2 country regardless of their level of care, the hearing officer expressly finds that Taxpayer did not  
3 meet the definition of negligence under 3.1.11.10 (A) NMAC. No person or business, regardless of  
4 their degree of prudence, planning, or caution, could have planned for, accounted for, or anticipated  
5 every consequence of a once-in-a-century pandemic. This is particularly true in the first few months  
6 of the pandemic (the period at issue in this protest), when businesses large and small were quickly  
7 adapting to remote work on an emergency basis to comply both with government public health  
8 orders and to protect their employees from the then-emerging but not fully understood virus. Those  
9 who ran businesses or public agencies have first-hand knowledge and experience of the difficulty in  
10 those early months of adopting and implementing new systems and processes virtually overnight, of  
11 making decisions with imperfect and sometimes in retrospect incorrect information about the  
12 nature, impact, and duration of the pandemic, and supporting employees living through the anxiety  
13 of the moment, not to mention supporting those employees directly impacted by the disease of  
14 COVID-19. Courts across the country, including our own Court of Appeals, have recognized that  
15 the pandemic was beyond the ordinary circumstances anyone could foresee regardless of the level  
16 of their diligence. *See e.g. State v. Alejandro M.*, 2021-NMCA-013, ¶9-11, (cert. denied). For these  
17 same reasons, it cannot be said that Taxpayer was negligent under Regulation 3.1.11.10 (C) NMAC  
18 because the delay in reporting the paid oil and gas severance taxes was not due to “inadvertence,  
19 indifference, thoughtlessness, carelessness, erroneous belief or inattention” but to the unforeseen  
20 and uncontrollable circumstances of the pandemic.

21           The only possible grounds that Taxpayer might arguably meet the regulatory definition of  
22 negligence is under Regulation 3.1.11.10 (B) NMAC for inaction when action was required.  
23 Taxpayer was clearly required to both pay its oil and gas severance taxes and file its return on or

1 before June 25, 2020. While it did timely make payment, Taxpayer’s failure to file the  
2 accompanying tax return until the following morning amounted to inaction when the statute  
3 required action, meeting the regulatory definition of civil negligence under Regulation 3.1.11.10 (B)  
4 NMAC.

5           Nevertheless, Regulation 3.1.11.11 (B) NMAC still might allow for abatement of penalty  
6 in this case. Under 3.1.11.11 (B) NMAC, penalty may be abated when

7                     the taxpayer, disabled because of injury or prolonged illness,  
8                     demonstrates the inability to prepare a return and make payment  
9                     and was unable to procure the services of another person to prepare  
10                    a return because of the injury or illness.

11 The Department argues that 3.1.11.11 (B) NMAC cannot apply to a corporation. However,  
12 various statutory definitions make clear that under the Tax Administration Act, the term  
13 “taxpayer” includes corporations. Under NMSA 1978, Section 7-1-3 (BB), “‘taxpayer’ means a  
14 person liable for payment of any tax.” Further, under Section 7-1-3 (Q) (emphasis added), the  
15 term “‘person’ means “any individual, estate, trust, receiver, cooperative association, club,  
16 *corporation*, company, firm, partnership, limited liability company, limited liability  
17 partnership...” Combining these two definitions in pertinent part, a reference to the taxpayer  
18 under 3.1.11.11 (B) NMAC means any individual or corporation liable for payment of any tax.  
19 Thus, under the plain statutory definitions, Regulation 3.1.11.11 (B) NMAC could theoretically  
20 apply to a corporation if the other provisions of that regulation are met.

21           Returning to the substance of Regulation 3.1.11.11 (B) NMAC, it requires three things:  
22 first, that a taxpayer was disabled because of an injury or prolonged illness. Second, the taxpayer  
23 must demonstrate that the injury or prolonged illness led to an inability to prepare a return and  
24 make payment. Finally, Regulation 3.1.11.11 (B) NMAC requires that the taxpayer demonstrates

1 that because of the injury or illness that they were unable to procure the service of another to  
2 prepare the return.

3 In this case, Taxpayer clearly established that Employee X, who was responsible for  
4 filing and payment of Taxpayer's oil and gas severance tax return, was suffering under the  
5 prolonged effect and impact of COVID-19 and that the impact of that illness prevented  
6 Employee X from timely filing the return. Beginning with March of 2020, Employee X and his  
7 wife suffered under that disease. In the middle of May, Employee X's mother-in-law passed  
8 away from the disease. Then in June, after having already suffered through the disease himself  
9 and losing his mother-in-law to the disease, Employee X's father became ill with COVID-19. In  
10 short order, right around the time Taxpayer's oil and gas severance tax payment and return was  
11 due, Employee X's father was admitted into the hospital, transferred into an intensive care unit  
12 on June 21, 2021, and placed on a ventilator. Employee X traveled to be with his father around  
13 this time. Against this backdrop, while being understandably distracted by the COVID-19 saga  
14 afflicting his family, Employee X paid the outstanding tax liability on the day it was due but  
15 overlooked submitting the corresponding return until early the next morning, one day late.

16 Despite the deeply sympathetic circumstances surrounding Employee X, it is the third  
17 requirement of Regulation 3.1.11.11 (B) NMAC where Taxpayer is unable to demonstrate  
18 entitlement to abatement of penalty. The Department avers that Taxpayer is still not entitled to  
19 relief under Regulation 3.1.11.11 (B) NMAC because as a corporation, it had the ability to  
20 procure the services of another staff member to file the return. In support of this argument, the  
21 Department points specifically to the fact that this is the exact procedure Taxpayer employed for  
22 the January reporting period return due in April, when it assigned another employee to pay and

1 file the New Mexico oil and gas severance tax returns while Employee X was ill with COVID-  
2 19.

3 The Department's argument is persuasive under the specific facts of this case. The facts  
4 of this case clearly demonstrate that Taxpayer had the ability to reassign the responsibility of  
5 filing and paying the oil and gas severance taxes because that is exactly what it did in April of  
6 2020. This office has rejected abatement of penalty under Regulation 3.1.11.11 (B) NMAC when  
7 a taxpayer had sufficient time or ability to arrange for another person to file and pay taxes on  
8 their behalf. *See In the Matter of the Protest of M&M Stores, Inc.* Decision and Order No. 16-  
9 25, 2016 WL 3262419 (June 7, 2016; non-precedential); *See also In the Matter of the Protest of*  
10 *Jimmy Stuart*, Decision and Order No. 16-22, 2016 WL 3131475 (May 31, 2016; non-  
11 precedential). *See also In the Matter of the Protest of Gail Stefl*, Decision and Order No. 15-15,  
12 2015 WL 2452557 (May 5, 2015; non-precedential). *See also In the Matter of the Protest of*  
13 *Spirit Halloween*, Decision and Order No. 17-18, 2017 WL 1433376 (April 10, 2017; non-  
14 precedential). The logic of those decisions interpreting Regulation 3.1.11.11 (B) NMAC apply  
15 here, where Taxpayer demonstrated ability to have another file the returns just two months  
16 before but failed to do so in June of 2020.

17 This decision and order should be read narrowly to the facts at issue, where Taxpayer  
18 previously had opportunity to have another employee file and pay the return just two months  
19 before the untimely return at issue here. That is because in other circumstances this office has  
20 applied Regulation 3.1.11.11 (B) NMAC to abate penalty when there was a sudden onset of an  
21 emergency medical condition that left a taxpayer without reasonable time to procure the services  
22 of another to file and pay the tax. *See In the Matter of the Protest of New Mexico Food*  
23 *Distributors Inc. et al.*, Decision and Order No. 18-31, 2018 WL 5486263, (October 18, 2018;

1 non-precedential). The hearing officer tends to view COVID-19 related illnesses much more akin  
2 to sudden onset of an emergency medical situation, leaving open the possibility of abatement  
3 under Regulation 3.1.11.11 (B) NMAC in other COVID-19 illness cases where there is no  
4 affirmative evidence that a taxpayer had previously procured the services of another for filing or  
5 payment of a return.

6 Three other areas for potential relief, raised by the parties at the hearing or during the  
7 hearing process, require brief analysis. First, the Department mentioned that the Legislature  
8 provided specific relief for certain tax programs from penalty and interest during the first special  
9 session it held in 2020. *See* H. B. 6, §4, 55th Leg., 1st Special Sess. (N.M. 2020), *available at*  
10 <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf><sup>4</sup>. Taxpayer also cited this  
11 legislative action in its protest letter. In response to the pandemic, under H.B. 6, *id.*, the  
12 Legislature did waive penalty and interest under the Income Tax Act, the Corporate Income and  
13 Franchise Tax Act, the Withholding Tax Act, the Gross Receipts Tax Act, under certain  
14 managed audit agreements, and for certain property taxes for limited periods. However, the Oil  
15 and Gas Severance Tax Act was not specified as subject to the penalty and interest relief under  
16 H.B. 6, *id.* Therefore, that special legislation does not provide any grounds for relief in this case.

17 Secondly, Taxpayer asked in closing arguments for consideration of its previous filing  
18 history in making a ruling in this case. Taxpayer also asserted its corporate commitment to being  
19 a timely and committed taxpayer in this state, as well as some additional steps it had developed  
20 to prevent this situation from occurring again. While Taxpayer's past history and future  
21 commitment is commendable, no provisions of New Mexico law allow the hearing officer to  
22 weigh previous tax compliance in favor of abatement of tax penalty.

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<sup>4</sup> Laws 2020, Chapter 4, Section 4 (1<sup>st</sup> S.S.).

1 Finally, Taxpayer argued that it might qualify for a five-day grace period under Section  
2 7-1-69 (F). However, this provision applies to issues related to submission of electronic payment.  
3 Taxpayer did timely pay the oil and gas severance tax in this protest. Because Taxpayer's  
4 untimely submission of the return at issue in this protest, Section 7-1-69 (F) provides no relief.

5 Ultimately, despite an openness to abating penalty under Regulation 3.1.11.11 (B)  
6 NMAC for COVID-19 related illnesses, the hearing officer cannot ignore the fact in this case  
7 that Taxpayer had previously assigned another employee to prepare, file, and pay the oil and gas  
8 severance taxes in April of 2020. Given this recent experience, there is no reason why the same  
9 procedure could not have been employed in June of 2020, when Employee X's father developed  
10 COVID-19, was hospitalized, and ventilated. Given the rapidly escalating COVID-19 illness  
11 impacting the father between June 19, 2020, and the June 25, 2020, tax deadline, a reasonable  
12 taxpayer in the same circumstances as Taxpayer could reasonably anticipate that Employee X's  
13 focus would understandably be divided around the filing and paying of the tax return. Although  
14 the hearing officer does not fault Employee X with negligence given the sudden onset of illness  
15 to his father, Taxpayer itself was negligent in not using the same April 2020 procedure of  
16 assigning another employee to prepare, file, and pay the June 25, 2020, severance tax. Because  
17 Taxpayer previously demonstrated its ability to have another employee handle the New Mexico  
18 severance tax payment and return, and because it did not do so again in June of 2020, Regulation  
19 3.1.11.11 (B) NMAC does not allow for abatement of penalty under the specific facts of this  
20 case.

## 21 CONCLUSIONS OF LAW

22 A. Taxpayer filed a timely, written protest to the Department's assessment, and  
23 jurisdiction lies over the parties and the subject matter of this protest.

1 B. The hearing was timely set and held within 90-days of the acknowledged receipt of  
2 valid protests under NMSA 1978, Section 7-1B-8 (2019).

3 C. Taxpayer's oil and gas severance tax return for the April 2020 reporting period was  
4 filed one-day after the June 25, 2020, statutory deadline contained under NMSA 1978, Section 7-9-  
5 27.

6 D. Taxpayer did not overcome the presumption of correctness on the assessed tax,  
7 penalty, and interest under NMSA 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3 (X)  
8 (2013), and Regulation 3.1.6.13 NMAC. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84  
9 N.M. 428; *See also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8;  
10 *see also MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

11 E. Under Section 7-1-69's mandatory "shall" language, Taxpayer is liable for civil  
12 negligence penalty because of Taxpayers' inaction in not timely filing the return, meeting the  
13 definition of civil negligence under Regulation 3.1.11.10 (B) NMAC. *See Marbob Energy Corp. v.*  
14 *N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in  
15 a statute indicates provision is mandatory absent clear indication to the contrary).

16 F. Taxpayer is not entitled to abatement of civil negligence penalty under Regulation  
17 3.1.11.11 (B) NMAC because Taxpayer had demonstrated the ability to procure the services of  
18 another to file and pay the oil and gas compensating tax just two months before but failed to do so in  
19 this instance.

20 G. H. B. 6, §4, 55th Leg., 1st Special Sess. (N.M. 2020), *available at*  
21 <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf>, does not apply to the Oil  
22 and Gas Severance Tax Act.

1 H. NMSA 1978, Section 7-1-69 (F) provide a grace period related to electronic  
2 payment issues, not the untimely filing of a return at issue in this protest.

3 For the foregoing reasons, the Taxpayers protest **IS DENIED**. Taxpayer is ordered to pay  
4 the assessed penalty totaling \$62,917.63.

5 DATED: December 17, 2021.



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6 Brian VanDenzon  
7 Chief Hearing Officer  
8 Administrative Hearings Office  
9 P.O. Box 6400  
10 Santa Fe, NM 87502  
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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 **INTENTIONALLY BLANK**