

1 from a late filed return and payment can be abated due to the unique circumstances
2 presented by the public health emergency posed by COVID-19. Taxpayer, at the hearing,
3 conceded that the imposition of interest was reasonable and proper despite the fact that it
4 also previously protested the imposition of interest.

5 As explained further in the following discussion, the Hearing Officer ultimately
6 determined that Taxpayer failed to establish by a preponderance of evidence that the
7 circumstances presented by the public health emergency entitled Taxpayer to relief from the
8 imposition of penalty for a late-filed CRS-1 return and the corresponding tax payment. IT IS
9 DECIDED AND ORDERED AS FOLLOWS:

10 **FINDINGS OF FACT**

11 1. Taxpayer is a hotel situated in Santa Fe, New Mexico. [Administrative
12 File; Administrative Notice (see [https://www.rosewoodhotels.com/en/inn-of-the-anasazi-](https://www.rosewoodhotels.com/en/inn-of-the-anasazi-santa-fe/overview)
13 [santa-fe/overview](https://www.rosewoodhotels.com/en/inn-of-the-anasazi-santa-fe/overview) (as of August 13, 2021)]

14 2. On July 20, 2020, Taxpayer filed a CRS-1 return and made a
15 corresponding payment for tax due for the period ending March 31, 2020. The deadline to
16 file the relevant CRS-1 return was April 27, 2020. [Direct Examination of Ms. Tapia;
17 Direct Examination of Mr. Beher; Dept. Ex. D; Dept. Ex. E; Administrative File]

18 3. Taxpayer's CRS-1 return and associated payment of July 20, 2020, was
19 approximately 84 days past due based on the dates provided. [Administrative Notice;
20 Dept. Ex. D; Dept. Ex. E]

21 4. Despite the Taxpayer's late filing, House Bill 6¹ afforded relief from

¹ The statute identified by the Department as "House Bill 6" is more precisely cited as Chapter 4, Section 4, Laws 2020 (1st S.S.). It was a temporary provision enacted during the first special session of 2020 and signed by the governor on June 29, 2020, at which time it became immediately effective pursuant to its emergency clause. As of that date, Taxpayer's CRS-1 return for the reporting period ending March 31, 2020 was already 63 days past due.

1 penalty so long as full payment was made on or before April 25, 2021, provided all returns were
2 timely filed. [Direct Examination of Ms. Tapia; Dept. Ex. A-002]

3 5. Because the CRS-1 return relevant to this protest was not timely filed,
4 House Bill 6 afforded no relief to Taxpayer. [Direct Examination of Ms. Tapia; Dept. Ex. A-002]

5 6. Taxpayer's CRS-1 return and associated payment was admittedly late because of
6 Taxpayer's temporary closure stemming from the public health emergency presented by
7 COVID-19. [Direct Examination of Mr. Beher]

8 7. The closure caused employees to be furloughed and therefore, Taxpayer did not
9 have any staff available to file its CRS-1 return and make the associated payment prior to, or on
10 the date it was due. [Direct Examination of Mr. Beher]

11 8. On October 2, 2020, the Department issued a Combined Reporting System
12 Account Balance Notice indicating a total amount due of \$1,862.77 comprised of \$1,675.59 in
13 penalty and \$276.33 in interest. [Direct Examination of Mr. Beher; Administrative File]

14 9. On October 18, 2020, Taxpayer executed a Formal Protest explaining, "During
15 COVID-19 we closed hotel [and] furloughed staff. As soon as we got staff back we paid full tax
16 (GRT) due. We request penalty and interest be waived." [Administrative File]

17 10. On November 25, 2020, the Department acknowledged receipt of Taxpayer's
18 protest under Letter ID No. L1441169072. [Administrative File]

19 11. On May 18, 2021, the Department filed a Request for Hearing with the
20 Administrative Hearings Office in which it requested that a hearing on the merits of Taxpayer's
21 protest be scheduled. [Administrative File]

22 12. The Request for Hearing included New Mexico Taxation and Revenue
23 Department's Answer to Protest. [Administrative File]

1 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050,
2 ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and
3 are to be given substantial weight).

4 As a result, the presumption of correctness in favor of the Department requires that
5 Taxpayer carry the burden of presenting countervailing evidence or legal argument to show that
6 it is entitled to abatement of penalty under the circumstances of this protest. *See N.M. Taxation*
7 *& Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. "Unsubstantiated
8 statements that [an] assessment is incorrect cannot overcome the presumption of correctness."
9 *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62
10 P.3d 308; *See also* Regulation 3.1.6.12 NMAC.

11 **Penalty**

12 The facts underlying this protest are undisputed and straightforward. In response to, and in
13 an effort to decelerate the spread of COVID-19 in March of 2000, the State of New Mexico began
14 implementing a series of safety precautions, including imposing restrictions on hotel occupancies.
15 Consequently, according to Mr. Beher, Taxpayer suspended operations and furloughed staff. For
16 that reason, as Mr. Beher explained, Taxpayer did not file a CRS-1 return or make a corresponding
17 CRS-1 payment for the period ending March of 2020, until July 20, 2020. By that time, the relevant
18 CRS-1 return and payment were 84 days past due. Taxpayer asserted the unique circumstances of
19 the public health emergency justified the abatement of penalty imposed for its late filing and
20 payment.

21 The Hearing Officer sincerely empathizes with Taxpayer in that no facet of life was
22 untouched by the pandemic that ultimately upended the operations of countless businesses,
23 government operations, and individual lives worldwide and in New Mexico. The challenges and

1 obstacles presented were unheard of in modern times and everyone affected did, and continues to
2 do, the best they can in their personal and professional lives.

3 Despite the Hearing Officer's empathetic sentiments, if Taxpayer is entitled to an abatement
4 of penalty under the facts of this protest, then it must derive from one of the following sources: (1)
5 relief afforded by House Bill 6; (2) relief afforded by NMSA 1978, Section 7-1-69; or (3) relief
6 afforded by Regulation 3.1.11.11 NMAC.

7 First, House Bill 6 provides no relief under the circumstances of this protest. Although
8 House Bill 6 temporarily waived interest and penalties on late payments, that relief was only
9 afforded to taxpayers that filed timely returns. In other words, payments made late, but received
10 prior to April 25, 2021, would be accepted without consequence so long as the corresponding return
11 was filed on time. In this protest, Taxpayer would have had to file its return on or before April 27,
12 2020, but admittedly did not do so until July 20, 2020. For that reason, Taxpayer is excluded from
13 the relief afforded by House Bill 6, even though its payment was made on July 20, 2020. *See* Dept.
14 Ex. A; NMSA 1978, Section 7-1-69; 2020 New Mexico Laws 1st Sp. Sess. Ch. 4 (H.B. 6).

15 Second, NMSA 1978, Section 7-1-69 similarly provides no relief. It states that when a
16 taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and
17 regulations, but without intent to evade or defeat a tax:

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

23 [Emphasis Added]

24 The word "shall" makes the imposition of penalty mandatory in all instances where a
25 taxpayer's actions or inactions meet the legal definition of "negligence." *See Marbob Energy*

1 *Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word
2 “shall” in a statute indicates that a provision is mandatory absent clear indication to the contrary).

3 Regulation 3.1.11.10 NMAC employs three definitions of negligence: (A) “failure to
4 exercise that degree of ordinary business care and prudence which reasonable taxpayers would
5 exercise under like circumstances;” (B) “inaction by taxpayer where action is required”; or (C)
6 “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”

7 Taxpayer argues that the late-filed return was excusable under the circumstances of the public
8 health emergency, particularly since it closed and furloughed staff in response to public health
9 requirements imposed by the State. As a result of its closing and subsequent furloughs, Taxpayer
10 claims it could not file its CRS-1 returns on schedule. The Hearing Officer, despite being
11 sensitive to Taxpayer’s predicament, is unpersuaded even when viewing the evidence in the light
12 most favorable to Taxpayer that the circumstances presented are not negligent. All three
13 definitions of negligence could potentially apply, but the Hearing Officer finds the first two most
14 applicable in that Taxpayer failed to exercise that degree of ordinary business care and prudence
15 which reasonable taxpayers would exercise under like circumstances, as well as negligence for
16 inaction where action was required.

17 However, in instances where a taxpayer might fall under the definition of civil negligence
18 subject to penalty, Section 7-1-69 (B) provides an exception in that “[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.” In this case, even when viewing the
21 evidence in the light most favorable to Taxpayer, there is no basis on which to find that
22 Taxpayer’s failure to file a return before April 27, 2020, resulted from a mistake of law made in
23 good faith and on reasonable grounds. Instead, Taxpayer attributed the failure to file a timely

1 return to its closure, staff furloughs, and a resulting lack of personnel available to file the return.
2 Once again, the Hearing Officer is sympathetic to Taxpayer’s predicament, but is unable to
3 afford relief under Section 7-1-69 (B).

4 The third and final option for attaining the relief Taxpayer seeks stems from the factors
5 the Department will consider in determining whether a taxpayer was not negligent. Regulation
6 3.1.11.11 NMAC identifies several scenarios in which the Department will find that a taxpayer
7 was not negligent. It provides that, “[t]he following situations may indicate that a taxpayer has
8 not been negligent or in disregard of rules and regulations and the secretary will consider these
9 circumstances in deciding whether to assess civil penalty as provided by Section 7-1-69 NMSA
10 1978, or whether to abate assessed civil penalty as provided by Section 7-1-28 NMSA 1978[.]”

11 The regulation progresses to list several scenarios indicating non-negligence, none of
12 which Taxpayer has specifically asserted should apply. Nevertheless, the Hearing Officer
13 evaluated whether any might potentially apply under the circumstances of the protest, and
14 whether they might encompass the concept of *force majeure* to which Taxpayer suggested
15 should be considered. The Hearing Officer identified two indicators of non-negligence which
16 could be broadly read to make a colorable argument.

17 The first indicator of non-negligence that could potentially apply under the
18 circumstances, if read extremely broadly, excuses the imposition of penalty when “the taxpayer,
19 disabled because of injury or prolonged illness, demonstrates the inability to prepare a return and
20 make payment and was unable to procure the services of another person to prepare a return
21 because of the injury or illness.” See Regulation 3.1.11.11 (B). Although one could potentially
22 analogize the circumstances of Taxpayer’s protest to being disabled due to injury or illness, this
23 exception would not apply because there was not any evidence to establish that Taxpayer was

1 “unable to procure the services of another person to prepare a return because of the injury or
2 illness.”

3 The second potential indicator of non-negligence, once again read very broadly, allows
4 for the excusal of penalty when “the taxpayer shows that physical damage to the taxpayer’s
5 records or place of business caused a delay in filing a return or making payment of tax[.]” This
6 exception does not apply either. Although the circumstances arising from the public health
7 emergency undoubtedly harmed Taxpayer’s business, as it did countless other businesses, it was
8 not the sort of harm that caused “physical damage to the taxpayer’s records or place of business”
9 such as what might be observed in a fire or a flood.²

10 On this note, the Hearing Officer will remark that if *force majeure* were applicable, it
11 would likely come within these indicators of non-negligence, but since there was no physical
12 damage to Taxpayer’s records or place of business, or because there was no evidence that
13 Taxpayer was unable to procure the services of another person to prepare a return because of the
14 injury or illness, the concept of *force majeure* provides no relief under these circumstances.

15 Moreover, the Hearing Officer also notes that a claim of *force majeure* is equivalent to an
16 affirmative defense in a contract dispute. *See Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023,
17 ¶ 34, 134 N.M. 308, 319, 76 P.3d 626, 637. In essence, it may operate to excuse a party’s
18 inability to perform obligations incurred by contract. The situation at hand is dissimilar.
19 Taxpayer did not fail to satisfy its obligations under any contract. The obligation under which
20 this protest arose was imposed by law and the Hearing Officer was unable to identify, nor did
21 Taxpayer cite, any authority for the proposition that *force majeure* could afford relief from the
22 penalty imposed by a tax law analogous to circumstances existing in the present case.

² Incidentally, the harm experienced by Taxpayer was the sort of harm that House Bill 6 was intended to partially alleviate.

1 Taxpayer failed to establish that it was entitled to relief from penalty imposed for a late-
2 filed CRS-1 return and corresponding payment. It admittedly filed its return late causing
3 Taxpayer to incur mandatory penalty and interest. Despite empathetic sentiments the Hearing
4 Officer has previously acknowledged herein, penalty and interest were properly imposed. For the
5 reasons stated, Taxpayer's protest is DENIED.

6 **CONCLUSIONS OF LAW**

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

9 B. The hearing occurred within 90 days of the Department's request for hearing under
10 NMSA 1978, Section 7-1B-8 (2015) (amended 2019).

11 C. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence
12 penalty and there is no basis under the facts of the protest to permit an abatement.

13 For the foregoing reasons, Taxpayer's protest should be DENIED.

14 DATED: December 20, 2021



16 Chris Romero
17 Hearing Officer
18 Administrative Hearings Office
19 P.O. Box 6400
20 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
25 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates

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

8 **CERTIFICATE OF SERVICE**

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