STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
MICHAEL D. & SUE CALLAWAY
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1175577008

v. Case Number 21.04-020A, D&O #22-04

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT FOR TAXPAYER

On September 9, 2021, Hearing Officer Chris Romero, Esq., conducted a hearing on the competing motions for summary judgment in the protest of Michael D. and Sue Callaway pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Ms. Sue Callaway, Esq., an attorney licensed to practice law in New Mexico, appeared representing herself and her spouse (collectively referred to herein as "Taxpayer"). Mr. Kenneth Fladager, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department") accompanied by Ms. Alma Tapia, protest auditor, and Mr. Richard Galewaler, auditor. Ms. Callaway testified on behalf of Taxpayer. Ms. Tapia and Mr. Galewaler testified for the Department.

The hearing occurred by videoconference pursuant to NMSA 1978, Section 7-1B-8 (H) under the circumstances of the public health emergency presented by COVID-19, as discussed in greater detail in Standing Order 21-02, which is made part of the record of the proceeding.

Department Exhibit A and Taxpayer Exhibits 1 – 34 were admitted as evidentiary exhibits and Administrative Notice was taken of the Administrative File.

Taxpayer presents several issues for consideration. The primary issue is whether the Hearing Officer can abate accrued interest where an undisputed error by the Department in addressing

correspondence allegedly deprived Taxpayer of the benefits of a managed audit, or otherwise precluded and prejudiced Taxpayer's ability to meaningfully engage with the Department during the pre-assessment, audit process, and contributed to the additional accrual of interest.

The remaining issues balance on the question of the Administrative Hearings Office's authority under the Tax Administration Act and the Administrative Hearings Office Act to award other relief, including relief under the doctrine of equitable estoppel to preclude imposition of interest, or even to order destruction of erroneous records generated by the Department. Despite the Hearing Officer's empathy for Taxpayer under the circumstances of this protest, the Tax Administration Act does not permit a full abatement of interest nor the other forms of relief sought by Taxpayer. Taxpayer is, however, entitled to a partial abatement of interest under NMSA 1978, Section 7-1-11.2 and Section 7-1-67 (A) (7) as discussed herein. For the reasons that follow, Taxpayer's protest should be granted in part and denied in part. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On February 4, 2021, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L1175577008 ("Assessment"). The amount due under the Assessment was $4,287.08 comprised of $3,331.00 in personal income tax, $666.20 in penalty, and $289.88 in interest for the periods from January 1, 2017 to December 31, 2018. [Administrative File (Letter ID No. L1175577008); Taxpayer MSJ #4]

2. On February 12, 2021, Taxpayer, by and through Ms. Callaway, executed

a Formal Protest of the Assessment. The protest requested relief from assessed penalty and interest. Taxpayer did not protest the imposition of the principal amount of tax assessed. [Administrative File (Formal Protest); Taxpayer MSJ #6]

3. On March 18, 2021, under Letter ID No. L1787883952, the Department notified Taxpayer that it was unable to abate penalty or interest under the facts of the protest as they were then established or understood. [Administrative File (Letter ID No. L1787883952); Taxpayer MSJ #8]

4. On April 12, 2021, the Department issued a Notice of Abatement of Tax Assessment under Letter ID No. L1632528816 which fully abated penalty in the amount of $666.20. [Administrative File (Letter ID. No. L1632528816); Taxpayer MSJ #18]

5. On April 14, 2021, the Department acknowledged the receipt of Taxpayer's protest under Letter ID No. L1987275184. [Administrative File (Letter ID No. L1987275184); Taxpayer MSJ #25]

6. On April 14, 2021, the Department issued a Statement of Account under Letter ID No. L1487235504 notifying Taxpayer that the only amount due under the Assessment was for interest in the amount of $291.53. [Administrative File (Letter ID No. L1487235504); Taxpayer MSJ #26]

7. As of April 14, 2021, the only outstanding and unresolved dispute arising from the Assessment concerned the imposition of interest in the amount of $291.53. [Administrative File (Letter ID Nos. L1175577008, L1632528816, L1487235504, and Formal Protest); Taxpayer MSJ #26]

8. On April 23, 2021, the Department filed a Request for Hearing requesting a hearing on the merits of Taxpayer's protest. A copy of the Hearing Request was copied to

Taxpayer and included New Mexico Taxation and Revenue Department's Answer to Protest. [Administrative File]

9. On April 23, 2021, the Administrative Hearings Office entered a Notice of Videoconference Administrative Hearing that set a hearing on the merits of the protest to occur on June 30, 2021. [Administrative File]

10. On June 28, 2021, the Hearing Officer, through his assistant, inquired whether the parties were available for a telephonic hearing. The inquiry was made because the Administrative Hearings Office was notified that there was some misunderstanding or confusion from Taxpayer regarding pre-hearing procedures which suggested that Taxpayer would not be ready to proceed to the hearing as scheduled. A hearing was held on June 28, 2021 upon concurrence of the parties. [Administrative File]

11. Neither party objected that conducting the hearing on June 28, 2021 satisfied the 90-day hearing requirements of Section 7-1B-8 while still allowing meaningful opportunity to engage in other prehearing activities provided by NMSA 1978, Section 7-1B-6 (e.g. motions, discovery). [Record of Hearing 6/28/2021]

12. On June 29, 2021, the Administrative Hearings Office entered an Order Continuing Hearing and Notice of Motion Hearing upon the parties' suggestion that the issues in dispute presented questions of law and that no material facts were likely to be disputed. A hearing was set for September 8, 2021. [Administrative File]

13. On August 2, 2021, Taxpayer filed Taxpayers Michael D. & Sue Callaway's Motion for Summary Judgment and Memorandum of Law in Support Thereof. [Administrative File]

14. On August 17, 2021, the Department filed New Mexico Taxation and

Revenue Department's Response to Taxpayer's Motion for Summary Judgment and Cross Motion and Memorandum in Support of Cross Motion for Summary Judgment. [Administrative File]

15. On August 26, 2021, Taxpayer filed Taxpayers Michael D. & Sue Callaway's Reply to New Mexico Taxation and Revenue Department's Response to Taxpayers' Motion for Summary Judgment and Taxpayers' Response to New Mexico Taxation and Revenue Department's Cross Motion for Summary Judgment. [Administrative File]

Undisputed Material Facts[1]

16. The Department conducted an audit after detecting a Schedule C mismatch in Taxpayer's 2017 and 2018 tax returns. [Taxpayer MSJ #1 (4 pages)]

17. The results of the audit generated a Notice of Intent to Assess - Personal Income Tax dated November 19, 2020. The deadline to respond was January 18, 2021, and Taxpayer missed the deadline due to not receiving the notice. [Taxpayer MSJ #1; #13]

18. Taxpayer did not receive the notice because it was incorrectly addressed. [Taxpayer MSJ #1; #13]

19. The Notice of Intent to Assess - Personal Income Tax was incorrectly mailed to 8529 San Diego Court NE, Albuquerque, NM 87122 which was neither a correct address nor Taxpayer's address of record with the Department. [Taxpayer MSJ #2 (2 pages); #13]

20. Taxpayer's correct previous address was 8524 San Diego Court NE, Albuquerque, NM 87122. [Taxpayer MSJ#22; #23]

21. The parties concur that the discrepancy derived from a text recognition scan of

[1] The following facts derive from the respective motions. Some facts provided have been reproduced exactly as derived from the pleadings while others may have been edited for sake of simplicity, clarification, or to omit facts the Hearing Officer did not perceive as material to the issues under consideration, including duplicative procedural history.

Taxpayer's handwritten tax returns which erroneously identified a handwritten "4" as a "9." [Taxpayer MSJ #22; Cross Examination of Ms. Tapia; Cross Examination of Mr. Galewaler]

22. Nonetheless, Taxpayer's address of record as of the date the Notice of Intent to Assess was mailed on or about November 19, 2020 was 309 Jake Drive, Jarrell, TX 76537. The Department had knowledge of Taxpayer's address because it was utilized in Taxpayer's 2019 tax return, to which the Department also mailed a tax refund check on or about July 2, 2020. [Taxpayer MSJ #2 (2 pages); #13]

23. In addition to filing the 2019 tax return containing Taxpayer's correct address, Taxpayer also filed a change of address with the United States Postal Service ("USPS") and requested forwarding service to 309 Jake Drive, Jarrell, TX 76537. [Taxpayer MSJ #3]

24. Because Taxpayer did not have notice of the Department's pre-assessment contacts, the opportunity to resolve questions or concerns prior to the assessment lapsed resulting in the issuance of the Assessment on February 4, 2021.

25. Despite the Department's reliance on an incorrect address in prior written communications, the Assessment was mailed to Taxpayer's correct address at 309 Jake Dr., Jarrell, TX 76537-1772 which brought the issue to Taxpayer's attention for the first time. [Administrative File (Letter ID No. L1175577008); Taxpayer MSJ #4; Testimony of Ms. Callaway]

26. In response to further inquiries from Taxpayer, the Department informed Taxpayer that any relief from the Assessment would need to be obtained through filing a protest of the Assessment. [Taxpayer MSJ #1]

27. Taxpayer does not contest the assessment of tax, conceding prior to the hearing that the assessment derived from an error that Taxpayer subsequently rectified. [Taxpayer MSJ #5]

28. Penalty in the amount of $666.20 was abated on or about April 12, 2021 as a result of the Department recognizing its erroneous reliance on an incorrect address. [Taxpayer MSJ #18; Cross Examination of Ms. Tapia]

29. Due to lack of resources, the Department is not able to verify the accuracy of scanned compilations of handwritten Personal Income Tax returns. [Direct Examination of Mr. Galewaler]

30. Taxpayers may submit an amended return to correct identified errors generated by the Department's automated scanning system. [Direct Examination of Mr. Galewaler]

31. Mr. Galewaler offered Taxpayer an opportunity to complete a post-Assessment managed audit for PIT years 2017 and 2018 and suggested that the managed audit agreement also include 2019. Taxpayer declined preferring to address any 2019 issues, if any, separate and apart from any issues known to exist in 2017 and 2018. [Cross Examination of Mr. Galewaler]

32. Taxpayers are not entitled to a managed audit when the relevant assessment is subject to an active protest. [Cross Examination of Mr. Galewaler]

33. There is no technical difference between a Notice of Intent to Assess and a Notice of Commencement of Audit and despite the different names, they essentially serve the same purpose. [Examination by Hearing Officer of Mr. Galewaler]

34. Taxpayer observed other differences between the scanned versions and the handwritten versions of the relevant tax returns. For example, the scanned versions excluded initials, contained an erroneous date of birth, and seemingly omitted dependent information.

[Taxpayer MSJ #15; #21]

DISCUSSION

Because the issues presented center on questions of law, and there are no disputed material facts, both parties moved for summary judgment. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664. If the movant for summary judgment makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331.

The material facts presented by this protest are not in dispute. Although Taxpayer presents several issues for consideration, entitlement to any relief stems from the fact that the Department relied on an incorrect address in its efforts to engage in pre-Assessment communications with Taxpayer, particularly a Notice of Intent to Assess which is analogous to a Notice of Audit. When those attempts at communication failed by no fault of Taxpayer, the Department proceeded with the Assessment of taxes. Not until the Assessment was received, at the correct address, did Taxpayer realize there had been issues with its 2017 and 2018 tax returns and that any possibility to resolve those issues prior to the Assessment had been undermined by the Department's unsuccessful attempts to communicate with Taxpayer.

By that time, however, any opportunity to enter into a managed audit had dissolved, also evaporating Taxpayer's opportunity to resolve any potential liability without imposition of interest and penalty under NMSA 1978, Section 7-1-11.1.

Taxpayer ultimately did not dispute the imposition of the tax and the Department fully abated the imposition of penalty. Accordingly, the only remaining issue with respect for Taxpayer's

tax liability concentrates on the imposition of interest. Taxpayer also requests other forms of relief separate and apart from a determination of its liability for interest, such as ordering the destruction of erroneous records created by the Department.

Presumption of Correctness

Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Assessment of tax issued in this case is presumed correct and unless otherwise specified, for the purposes of the Tax Administration Act, "tax" includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Therefore, under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) also extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

As a result, the presumption of correctness in favor of the Department requires that Taxpayer carry the burden of presenting countervailing evidence or legal argument to establish entitlement to abatement of the Assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. "Unsubstantiated statements that [an] assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-NMCA-021, ¶13.

Although pre-Assessment communications were addressed to an incorrect address, the Hearing Officer notes that the Assessment was correctly addressed and received by Taxpayer.

This observation is relevant because the presumption of correctness attaches to the Assessment despite previous addressing errors in written communications. *See* NMSA 1978, Section 7-1-17 (B) & (C) (2007) and Regulation 3.1.6.11 NMAC (1/15/01). *See also Torridge Corp. v. Commissioner of Revenue*, 84 N.M. 610, 612 (N.M. Ct. App. 1972) ("*after*…notice of assessment of taxes is delivered to a taxpayer, taxpayer must carry burden of proof in order to negate the presumption of correctness.")

Effect of Erroneous Mailing Address

The undisputed facts establish that the Department relied on an incorrect address when attempting to engage in pre-Assessment communications, particularly the Notice of Intent to Assess. The Department was solely accountable for the incorrect address.

In the normal course of business, the Department scans hand-written tax returns in order to compile the contents of the return in a digital and readily accessible format. The scan does not simply generate an image of the document but recognizes handwritten text and assembles it in a digital format that the Department can then access for a variety of purposes, such as to review or verify computations.

The technology upon which the Department relies, like any technology, apparently has its limitations. The relevant limitation in this protest concerns the scanner's inability to distinguish Taxpayer's handwritten "4" from a "9." Although Taxpayer identified other errors in the scan, this inability to distinguish between these digits ultimately formed the basis for this protest because that caused all pre-Assessment communications to be misdirected.

Recognizing the error of its technology, the Department fully abated penalty, but not interest. Accordingly, the amount in dispute in this protest as of the time the Department

requested a hearing was approximately $300. Taxpayer did not dispute the imposition of tax which was paid in full.

Thus, the first question presented for consideration is whether under the circumstances presented by the undisputed facts, the Hearing Officer can relieve Taxpayer of liability, in full or in part, for accrued interest.

Interest

Despite Taxpayer's reasonable frustrations with the Department's reliance on an erroneous mailing address, that reliance did not cause Taxpayer to incur the interest on any tax due. In contrast, interest is imposed when a taxpayer fails to make timely payment of taxes due to the state. "[I]nterest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Section 7-1-67 (2007) (italics for emphasis).

The Department retains no discretion in the imposition of interest regardless of the reason for non-payment of the tax, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary).

The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. Again, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the tax was due, but not paid, until the tax principal liability is satisfied.

In this case, the event triggering the accrual of interest had already occurred as of the date of the misdirected communications. Conversely stated, interest was already due and continuing to accrue

despite the Department's subsequent reliance on an erroneous address. Therefore, misaddressed communications did not instigate the accrual of interest on Taxpayer's liability.

However, the Department's reliance on an erroneous address did contribute to the Taxpayer's inability to resolve its liability with a managed audit under NMSA 1978, Section 7-1-11.1, which if accepted, could have relieved Taxpayer of interest.[2] Yet, this perceived harm may also be somewhat speculative as there is no absolute right to a managed audit. Section 7-1-11.1 (E) states, "The decision whether to enter into an agreement for a managed audit rests solely with the secretary or the secretary's delegate." This is significant because a taxpayer has no right to a managed audit in that the authority to confer its benefits rest solely with the Department.

On the other hand, the undisputed facts suggest that if the Department was offering the opportunity to enter into a managed audit, that there was also a likelihood that it would grant the application. Despite the suggestion that the Department would likely view Taxpayer's application favorably, that outcome is not certain, nor does that suggestion now permit the Administrative Hearings Office to rectify the harm caused by any misaddressed communications by ordering a managed audit after the fact. The Hearing Officer is not aware of any legal authority, nor has Taxpayer directed the tribunal to any authority, which would permit the Administrative Hearings Office to order a managed audit under the circumstances at issue in this protest. That authority lies within the discretion of the Department.

Yet, given the harm identified, the next question centers on what other remedy might rectify the Department's error. As previously stated, the imposition of interest is mandatory. Neither the Department nor the Administrative Hearings Office have the authority to fully abate interest, even under the circumstances presented in this protest.

[2] A managed audit under Section 7-1-11.1 may also relieve a taxpayer of liability for penalty. In this protest, the Department exercised its authority to fully abate penalty without need for a managed audit.

However, NMSA 1978, Section 7-1-67 does contemplate a limited form of relief "if the taxpayer was not provided with proper notices as required in Section 7-1-11.2 NMSA 1978," in which case, "interest shall be paid from the first day following the day on which the tax becomes due until the tax is paid, *excluding the period between one hundred eighty days prior to the date of assessment and the date of assessment.*" *See* NMSA 1978, Section 7-1-67 (A) (7). Meanwhile, Section 7-1-11.2 requires notice to taxpayer of the intent to audit or the Department's desire to review records. It would seem at first blush to the Hearing Officer that this provision contemplates the sort of circumstances at issue in this protest in which pre-Assessment communications purporting to alert Taxpayer of an issue were misaddressed and never received according to the Taxpayer's credible testimony.

The Department does not necessarily dispute the potential application of Section 7-1-67 (A) (7). Instead, it asserts that despite addressing errors with its pre-Assessment communications, all mailings were reasonably calculated to provide notice. It argues "*actual notice* of an administrative action *is not required* as long as the administrative agency took reasonable measures to effect notice." (Emphasis in Original) It also relies on long standing and well-established authority of our federal and state courts that "[a]ctual notice is not required, so long as the notice given is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *See Maso v. State, Taxation & Revenue Dept., Motor Vehicle Div.*, 2004-NMSC-028, ¶10, 136 N.M. 161, 164, 96 P.3d 286, 289 (*citing Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950)); *see also City of Albuquerque v. Juarez,* 1979-NMCA-084, ¶ 10, 93 N.M. 188, 190, 598 P.2d 650, 652, *overruled on other grounds by State v. Herrera*, 1991-NMCA-005, ¶ 10, 111 N.M. 560, 807 P.2d 744.

The Department goes on to explain that its reliance on the erroneous address, deriving from a scanner's inability to distinguish a "4" from a "9," was reasonable and consistent with NMSA 1978, Section 7-1-9 (A) which states, "[a]ny notice … to be given by mail is effective if mailed … to the taxpayer or person at the last address shown on his registration certificate *or other record of the department*." (Emphasis Added) The Department, despite now knowing that its scan was imperfect, asserts that reliance on the address generated by the scanner was nevertheless reasonable because, notwithstanding the error, the contents of the erroneous scan constituted "a record of the department." Taxpayer, in contrast, points out that our Supreme Court has previously observed that a notice to an incorrect address through no fault of the person entitled to notice, was not proper. *See Buescher v. Jaquez*, 1983-NMSC-107, ¶ 12, 101 N.M. 2, 5, 677 P.2d 615, 618.

The Hearing Officer agrees with Taxpayer and is not persuaded that the Legislature intended for the provision, "a record of the Department," to include erroneous records generated by the Department through no fault of a taxpayer. In fact, applying the statute with such loose regard effectively renders the provision meaningless contrary to the rule that no statute should be construed in a manner that renders any other part surplusage or superfluous. *See Katz v. New Mexico Dept. of Human Services, Income Support Div.*, 1981-NMSC-012, ¶18, 95 N.M. 530, 534, 624 P.2d 39, 43.

"Statutes are to be read in a way that facilitates their operation and the achievement of their goals." *See Rutherford v. Chaves County*, 2003-NMSC-010, ¶ 24, 133 N.M. 756, 762, 69 P.3d 1199, 1205. Statutes should not be literally applied "when [to do so] would lead to counterproductive, inconsistent, and absurd results[.]" *See Eldridge v. Circle K Corp.*, 1997-NMCA-022, ¶ 29, 123 N.M. 145, 151–52, 934 P.2d 1074, 1080–81. Under the circumstances of this protest, the Department's interpretation of "a record of the department" also produces absurd

results in that it diminishes any incentive for the Department to maximize the accuracy of its record-keeping capabilities, and permits unreasonable latitude for the Department to determine what will, or will not, constitute a record which, in this case, would include an erroneous record generated by the Department, not a taxpayer.

For this reason, the Hearing Officer is persuaded that Section 7-1-11.2 is relevant and applicable in this protest, and the applicable portion of Section 7-1-67 entitles Taxpayer to a reduction in interest for failing to comply with the former. That statute entitles taxpayers to notice of a commencement of an audit[3], identifying the tax program at issue, as well as the relevant reporting periods. The Department's reliance on its scanner which failed to distinguish between "4" and "9" deprived Taxpayer of such notice, not to mention the fact that other, more current records of the Department contained Taxpayer's current address in Texas.

The Hearing Officer concurs with the observation made by the Department in *Dusenbery v. United States*, 534 U.S. 161, 170, 122 S. Ct. 694, 701, 151 L. Ed. 2d 597 (2002), that the "Due Process Clause does not require such heroic efforts by the Government; it requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action[.]" However, the Hearing Officer does not believe that effective pre-Assessment communications required heroic efforts. The Department only needed to rely on the address that Taxpayer provided which is well within what might be deemed reasonable.

Of course, the Hearing Officer recognizes the enormous task with which the Department is confronted. It receives, processes, and generates numerous records every day. It may be impossible to cross-check even a fraction of hand-written returns against the scan of those returns to identify errors. Really, the fact that this sort of issue does not arise more frequently despite the enormity of its

[3] Mr. Galewaler explained that there is no technical difference between a notice of intent to audit and a Notice of Intent to Assess.

mission demonstrates the success of its efforts to maximize the accuracy of its procedures despite the occasional irregularity, such as that seen in this case. However, when such error occurs, such as that in this case, a taxpayer should be entitled to the relief afforded by the Legislature, just as the Department should be amenable to recognizing and correcting its errors.

For these reasons, the Hearing Officer concurs with Taxpayer that the relief provided by NMSA 1978, Section 7-1-11.2 (2003) and NMSA 1978, Section 7-1-67 (A) (7) (2013) is appropriate under the circumstances of this protest and has established entitlement to a partial abatement of interest.

Equitable and Other Relief Requested

In addition to seeking relief under Section 7-1-67 (A) (7), Taxpayer also seeks equitable relief. Taxpayer first relies on NMSA 1978, Section 7-1-60 which provides:

> In any proceeding pursuant to the provisions of the Tax Administration Act, the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary, unless the ruling had been rendered invalid or had been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose.

The Hearing Officer is not persuaded that this statute is applicable in the circumstances at hand since a more specific statute, Section 7-1-67 (A) (7), contemplates and addresses the specific issues arising in this protest. *See Lubbock Steel & Supply, Inc., Div. of Lubbock Am. Iron & Metal, Inc. v. Gomez*, 1987-NMSC-025, ¶ 14, 105 N.M. 516, 518, 734 P.2d 756, 758 ("As a general rule of statutory construction[,] … general language in a statute is limited by specific language.")

Moreover, this statute only affords relief when "it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation

effective during the time the asserted liability for tax arose" and the Department is now taking a position contrary to that regulation. In this case, the Hearing Officer does not necessarily perceive a scenario where Taxpayer's "action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose" and the Department is now taking a position contrary to that regulation. The asserted liability arose years prior to the circumstances giving rise to this protest and the Department's position is not necessarily contrary to its position at that time, but addressed to the consequences of its error at the time it addressed its pre-Assessment communications in 2020.

Even if this statute did apply, there is no indication that its application would entitle Taxpayer to relief beyond that to which Taxpayer is entitled under Section 7-1-67 (A) (7) because, despite subsequent errors in addressing correspondence to Taxpayer, interest was lawfully incurred and assessed for an unpaid tax obligation and negating a lawful assessment of interest, in its entirety, under these circumstances would produce absurd results conflicting with other provisions of the Tax Administration Act which address imposition of interest for unpaid tax obligations.

To the extent Taxpayer seeks relief under the doctrine of equitable estoppel, as opposed to statutory estoppel, the Supreme Court has recognized that although administrative bodies, such as the Administrative Hearings Office, may exercise "quasi-judicial powers," application of equitable doctrines might extend beyond the reach of the administrative body's limited powers. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, 118 N.M. 273, 279, 881 P.2d 18 ("authority to grant an equitable remedy depends on whether such authority may be fairly encompassed within the realm of 'quasi-judicial powers.' We do not believe that it can."). In the absence of clear authority, the Hearing Officer declines to test the limits of the

court's comments in *AA Oilfield Service* by affording relief in reliance on powers which are not explicit in any authority cited by the parties or otherwise known to the Hearing Officer.

In addition to relief from assessed interest, Taxpayer requests an order of the Administrative Hearings Office directing the Department to remove and destroy the erroneous scan or data from its records. Taxpayer intends for this request, if granted, to remedy other errors she perceived with the Department's scan of Taxpayer's handwritten return. However, Ms. Calloway, acknowledged that she was not aware of the statutory authority that would permit such order. The Hearing Officer is also unaware of such authority.

Generally speaking, "[a]gencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *See State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 8, 346 P.3d 1191, 1194 (*quoting Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006–NMSC–042, ¶ 20, 140 N.M. 440, 143 P.3d 478). A review of the Administrative Hearings Office Act and the applicable portions of the Tax Administration Act fail to reveal any express authority to enter an order directing those erroneous records be purged or destroyed. In the absence of citation to legal authority, the Hearing Officer respectfully declines to engage in an analysis of whether such authority is necessarily implied.

One would hope that on the infrequent occasion where errors are identified by a taxpayer or by the Department, that the error could be efficiently corrected, either manually, by rescanning the original document, or some other method that will assure that the information provided on a written return will be accurately transferred to a taxpayer's account. Instead, Mr. Galewaler explained that a taxpayer in this situation could correct a misread electronic version of a handwritten return by filing an amended return. This approach, although perhaps representing only one of several options, seems unreasonable because it would require a taxpayer to amend a return, not because the original return

required amending, but because a Department scanner misinterpreted information. In other words, after a taxpayer has incurred the burden of preparing an amended return, the amended return might be identical to the original return in every way with exception for the date of its submission and selection of the checkbox identifying it as an amendment, which at least to the Hearing Officer, defies common sense.

Nevertheless, the request for an order directing the removal or destruction of the erroneous scan is denied.

For the reasons stated, Taxpayer's protest is DENIED IN PART and GRANTED IN PART. Taxpayer is entitled to reduction in interest consistent with the computation provided in Section 7-1-67 (A) (7) (2013). Any further request for relief is DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. The Department made a timely request for hearing and the Administrative Hearings Office conducted a hearing within 90 days of Taxpayer's protest under NMSA 1978, Section 7-1B-8 (2019).

C. Taxpayer carries the burden to present countervailing evidence or legal argument to show entitlement to an abatement of an assessment. *See Casias Trucking*, 2014-NMCA-099, ¶8.

D. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*, 2003-NMCA-021, ¶13.

E. Taxpayer overcame the presumption of correctness with respect to the computation

of interest. *See* Section 7-1-17(C).

F. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment, which shall continue to accrue until the tax principal is satisfied, except that Section 7-1-67 (A) (7) (2007) provides for partial relief from interest when a taxpayer was not provided with proper notice as required by Section 7-1-11.2 in which case "interest shall be paid from the first day following the day on which the tax becomes due until the tax is paid, excluding the period between one hundred eighty days prior to the date of the assessment and the date of the assessment."

For the reasons stated, Taxpayer's protest is DENIED IN PART and GRANTED IN PART. Taxpayer is entitled to reduction and refund in interest consistent with the computation provided in Section 7-1-67 (A) (7) (2013).

DATED: February 17, 2021

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

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

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

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the parties listed below this 17h day of February, 2022 in the following manner:

E-Mail *E-Mail*

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