

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

4 **IN THE MATTER OF THE PROTEST OF**
5 **KIMMET D. HOLLAND**
6 **TO DENIAL OF REFUNDS ISSUED UNDER**
7 **LETTERS ID NOs. L0371665584 and L1024963248**

8 **v.**

Case Number 20.08-109R

Decision and Order No. 21-22

9
10 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

11 **DECISION AND ORDER**

12 On February 2, 2021, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits
13 administrative hearing in the matter of the tax protest of Kimmet D. Holland (“Taxpayer”)
14 pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the
15 hearing, Mr. Kimmet D. Holland appeared representing himself, accompanied by his spouse
16 Kathy Wright. Mr. Holland was the Taxpayer’s sole witness. Staff Attorney Kenneth Fladager
17 appeared, representing the opposing party in the protest, the Taxation and Revenue Department
18 (“Department”). Department protest auditor Alma Tapia appeared as a witness for the
19 Department. Taxpayer offered formal exhibits 1, 2, 3, and 4 which were admitted into the record
20 without objection from the Department. The Department offered no exhibits. The administrative
21 file is considered part of the record.

22 In quick summary, this protest involves a Taxpayer’s assertion that the Department
23 improperly denied a refund claim, for taxes withheld from retirement income by the Public
24 Employee’s Retirement Administration (PERA) after Taxpayer had moved to another state, which
25 also taxed his retirement income. Ultimately, after making findings of fact and discussing the issue
26 in more detail throughout this decision, the hearing officer finds that the Taxpayer’s protest must be

1 denied. The denial of refund was proper because Taxpayer's refund claim was statutorily time-
2 barred. IT IS DECIDED AND ORDERED AS FOLLOWS:

3 **FINDINGS OF FACT**

4 **Procedural Findings**

5 1. On December 12, 2019, under Letter Id. No. L1024963248, the Department,
6 Revenue Processing Division, issued a denial of refund letter to Taxpayer, indicating that
7 Taxpayer's refund request for the 2014 tax period was denied, in the amount of \$1,902.00.
8 [Administrative File].

9 2. On January 29, 2020, under Letter Id. No. L0371665584, the Department,
10 Revenue Processing Division, issued a denial of refund letter to Taxpayer, indicating that
11 Taxpayer's refund request for the 2013 tax period was denied, in the amount of \$1,907.00.
12 [Administrative File].

13 3. On February 4, 2020, Taxpayer submitted a protest letter, and Form ACD-31064
14 Formal Protest, challenging the denials of his claimed refunds alleging that the Taxpayer had
15 informed PERA of his change of address to the state of Colorado following his retirement from
16 public service in 2012. The protest was stamped as received by the Department Protest Office on
17 February 10, 2020. [Administrative File].

18 4. On February 13, 2020, a Department protest auditor sent a letter informing
19 Taxpayer that Ms. Sherin Gonzales-Miller had been assigned to the protest. A second identical
20 letter was sent February 20, 2020. [Administrative File].

21 5. On February 28, 2020, under Letter Id. No. L0037984944 the Department issued
22 a letter acknowledging receipt of Taxpayer's protest. [Administrative File].

1 6. On August 24, 2020, the Department, through Attorney Kenneth Fladager,
2 submitted a Request for Hearing to the Administrative Hearings Office, requesting a scheduling
3 hearing on Taxpayer's protest. [Administrative File].

4 7. On August 24, 2020, the Department, through Attorney Kenneth Fladager, timely
5 submitted the Department's Answer to Protest to the Administrative Hearings Office.
6 [Administrative File].

7 8. On August 24, 2020, the Administrative Hearings Office sent a Notice of
8 Telephonic Scheduling Hearing to the parties, informing them of the scheduling hearing to take
9 place on September 22, 2020 by telephone. [Administrative File].

10 9. Hearing Officer Ignacio V. Gallegos conducted the scheduling hearing on
11 September 22, 2020 with the parties present. Mr. Holland represented himself. Attorney Peter
12 Breen stood in for Attorney Kenneth Fladager, representing the Department. The parties did not
13 object that the scheduling hearing satisfied the 90-day hearing requirement of Section 7-1B-8 (F)
14 2019. The Hearing Officer preserved an audio recording of the hearing. [Administrative File].

15 10. On September 22, 2020, the Administrative Hearings Office sent a Notice of
16 Second Telephonic Scheduling Hearing to the parties, informing them of the second scheduling
17 hearing to take place on October 23, 2020 by telephone. [Administrative File].

18 11. Hearing Officer Ignacio V. Gallegos conducted the second telephonic scheduling
19 hearing on October 23, 2020 with the parties present. Mr. Holland represented himself. Attorney
20 Kenneth Fladager represented the Department. The Hearing Officer preserved an audio recording
21 of the hearing. [Administrative File].

1 12. On October 23, 2020, the Administrative Hearings Office sent a Notice of Third
2 Telephonic Scheduling Hearing to the parties, informing them of the third scheduling hearing to
3 take place on December 10, 2020 by telephone. [Administrative File].

4 13. Hearing Officer Ignacio V. Gallegos conducted the third telephonic scheduling
5 hearing on December 10, 2020 with the parties present. Mr. Holland represented himself.
6 Attorney Kenneth Fladager represented the Department. The Hearing Officer preserved an audio
7 recording of the hearing. [Administrative File].

8 14. On December 10, 2020, the Administrative Hearings Office sent a Scheduling
9 Order and Notice of Administrative Hearing to the parties, informing them of various deadlines
10 and providing notice that a hearing on the merits of the case would be held on February 2, 2021
11 using the Zoom videoconference application, using an unique URL provided. The hearing was
12 scheduled pursuant to NMSA 1978 Section 7-1B-8 (2019) and Regulation § 22.600.3.10 NMAC.
13 [Administrative File].

14 15. On January 4, 2021, the Department filed its Motion for Summary Judgment.
15 [Administrative File].

16 16. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
17 the merits hearing on February 2, 2021 with the parties and witnesses present by
18 videoconference. Mr. Holland represented himself. Attorney Kenneth Fladager represented the
19 Department. The Department informed the Hearing Officer of the pending Motion, and opted to
20 proceed with the hearing, incorporating the Motion as argument in support of the Department's
21 position, as there were no facts in evidence in support of a summary judgment motion. The
22 Hearing Officer preserved an audio recording of the hearing ("Hearing Record" or "H.R.").
23 [Administrative File].

1 **Substantive Findings**

2 17. Taxpayer Kimmet D. Holland is an individual residing in Colorado. Mr.
3 Holland's testimony was highly credible. [Administrative File; Direct examination of K.
4 Holland, H.R. 20:50-23:00; Taxpayer Exhibit #1].

5 18. Mr. Holland is a retired New Mexico public employee who worked as a fire-
6 fighter and emergency medical services provider (paramedic), while residing in New Mexico,
7 from 1987 until 2012. [Administrative File; Direct examination of K. Holland, H.R. 14:50-
8 15:10].

9 19. At the time he retired in April of 2012, Mr. Holland filled out the paperwork
10 provided by PERA. At that time, Taxpayer did not plan to move. [Administrative File; Cross
11 examination of K. Holland, H.R. 31:55-32:40; AHO examination of K. Holland, H.R. 33:00-
12 35:30; Re-Cross examination of K. Holland, H.R. 37:15-37:35].

13 20. Mr. Holland decided to permanently move to Colorado around August of 2012,
14 when he was offered a job in Silverton, Colorado. Since 2013, Mr. Holland has been a full-time
15 resident of Colorado. The last year Mr. Holland filed personal income tax returns in New Mexico
16 was 2012. He filed Colorado personal income tax returns beginning in 2013. [Administrative
17 File; Direct examination of K. Holland, H.R. 15:00-15:15, 20:50-30:20; AHO examination of K.
18 Holland, H.R. 33:00-35:30; Taxpayer exhibit #1.1, #1.2, #1.3].

19 21. Mr. Holland receives retirement income originating in New Mexico as a retired
20 member of the Public Employee's Retirement Association (PERA) of New Mexico and has
21 received this income since 2012. [Administrative File; Direct examination of K. Holland, H.R.
22 15:05-15:45, 16:00-16:15; Taxpayer's Exhibit #2].

1 22. Mr. Holland's 2012 PIT-1, filed in New Mexico, reported income from both New
2 Mexico and Colorado. [Administrative File; Rebuttal testimony of K. Holland, H.R. 45:55-
3 46:35].

4 23. Mr. Holland informed PERA of his change of address by phone after June of
5 2012, and before the end of 2012. PERA did not notify Taxpayer of the need to fill out any tax
6 document to reflect the change of residence. He also submitted a change of address form through
7 the U.S. Postal Service [Administrative File; Direct examination of K. Holland, H.R. 15:20-
8 16:00, 29:00-30:20; AHO examination of K. Holland, H.R. 33:00-36:50; Taxpayer Exhibit #1.3].

9 24. Personal Income Tax returns for the tax year ending December 31, 2013 were due
10 April 15, 2014. The refund request for the 2013 tax year was filed January 14, 2020.
11 [Administrative File; Motion for Summary Judgment, Statement of facts ¶ 2; Direct examination
12 of Alma Tapia, H.R. 39:30-40:00].

13 25. Personal Income Tax returns for the tax year ending December 31, 2014 were due
14 April 15, 2015. The refund request for the 2014 tax year was filed October 22, 2019.
15 [Administrative File; Motion for Summary Judgment, Statement of facts ¶ 2; Direct examination
16 of Alma Tapia, H.R. 39:30-40:00].

17 26. Mr. Holland used the services of a professional tax preparer for filing his tax
18 returns during the years at issue. The tax preparer believed the retirement withholdings were
19 being paid to the State of Colorado. [Administrative File; Direct examination (opening) of K.
20 Holland, H.R. 16:00-16:35; Rebuttal of K. Holland, H.R. 45:55-46:30].

21 27. Mr. Holland discovered, after receiving a letter from the Colorado Department of
22 Revenue, that his retirement income withholdings were not being sent to the State of Colorado.
23 After notification from PERA that his withholdings were paid to New Mexico instead of being

1 paid to Colorado, in an attempt to claim a refund for taxes paid to New Mexico, he took swift
2 action. He began filing in 2019 for refunds of withholding taxes paid for the years following
3 2012. Each of the refund requests filed within the three-year statutory period were granted.
4 [Administrative File; Direct examination of K. Holland, H.R. 15:30-17:05, 23:15-24:15, 24:50-
5 25:40; Taxpayer Exhibit #2, Ex. #3; Re-Direct examination of A. Tapia, H.R. 44:10-44:50].

6 28. Alma Tapia is the Department's tax auditor assigned to the protest. She has
7 reviewed the documentation associated with the protest. Her review verified that the Taxpayer's
8 requests for refund at issue were late. For the Taxpayer's requests that were timely (not at issue
9 here), the refunds were granted. [Administrative File; Direct examination of A. Tapia, H.R.
10 38:30-40:00; Re-direct examination of A. Tapia, H.R. 44:00-44:45].

11 29. The Department accepts income tax withholding payments from many income
12 sources but does not flag the taxpayers' withholdings as non-filers unless the Department
13 receives information that there is income (whether through a return or through a "project"). If no
14 New Mexico return is filed, the process takes time, and in the experience of the protest auditor
15 can be from two to five years. Mr. Holland's six years of withholdings payments without
16 accompanying New Mexico PIT returns were never flagged. [AHO examination of A. Tapia,
17 H.R. 42:00-43:30; Re-Cross-examination of A. Tapia, H.R. 45:00-45:55; Rebuttal of K. Holland,
18 H.R. 45:55-46:30; 47:10-47:45].

19 DISCUSSION

20 Taxpayer's protest involves denials of Taxpayer's 2013 and 2014 personal income tax
21 refund requests. Taxpayer requested refunds of withholding tax paid to the Department for years
22 2013 through 2019 after discovering that PERA had been withholding income and remitting the
23 withholding payments to the State of New Mexico Taxation and Revenue Department, despite

1 Taxpayer's change of residence to the State of Colorado. Taxpayer's 2015, 2016, 2017, 2018, and
2 2019 refund requests all fell within the three-year statute of limitations and the Department granted
3 them. The 2013 and 2014 refund requests were denied as untimely by the Department. Taxpayer
4 contends that federal law preventing states from taxing the income of residents of other states
5 preempts the state's statutory limit for filing refund requests.

6 New Mexico's personal income tax is governed by the Income Tax Act, NMSA 1978,
7 Sections 7-2-1 through 7-2-39. Facts are largely undisputed. It is the application of these facts,
8 interpretation of the refund statute, and federal law that are addressed herein.

9 **Presumption of correctness and burden of proof.**

10 The presumption of correctness under NMSA 1978, Section 7-1-17 (C) (2007) does not
11 strictly attach in this matter because the protest does not stem from the issuance of an assessment
12 under Section 7-1-17. Taxpayer nevertheless has the burden to establish that he was entitled to
13 the claims for refund pursuant to Regulation §3.1.8.10 (A) NMAC (08/30/2001) and must
14 establish entitlement to the claimed refund. The Department's denial of Taxpayers' claim for
15 refund is viewed under the lens of a presumption of correctness. *See Corr. Corp. of Am. of Tenn.*
16 *v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779.

17 **State statute governing requests for refund.**

18 New Mexico's Tax Administration Act specifically allows taxpayers to request refunds
19 when the taxpayer believes an amount has been withheld in excess of the amount due. *See NMSA*
20 *1978, Section 7-1-26 (A) (2019)*. The breadth of the permission the legislature granted to taxpayers
21 to request a refund extends to retirees who believe exempt retirement benefits were improperly
22 withheld to pay state income tax. *See Neff v. State Through Taxation and Revenue Dep't*, 1993-
23 *NMCA-116, ¶20, 116 N.M. 240, 861 P.2d 281* ("If taxes are paid that are not due, the taxpayer has

1 overpaid.”); *see also* *Alarid v. Secretary of New Mexico Dep’t. of Taxation and Revenue*, 1994-
2 NMCA-075, ¶ 25, 118 N.M. 23, 878 P.2d 341 (“The power to tax, however, is only coextensive
3 with a sovereign’s boundaries.”).

4 Mr. Holland is a retired member of the New Mexico Public Employees Retirement
5 Association (PERA), having worked in fire and emergency services during his 25-year career. *See*
6 *generally*, Public Employees Retirement Act, NMSA 1978, Section 10-11-1 through 10-11-142. In
7 2012, he informed PERA by telephone of his new address in Colorado. In 2012, he was a part-year
8 resident in New Mexico, thus required to file a New Mexico Personal Income Tax return. *See*
9 NMSA 1978, Section 7-2-2; *see also* Regulation §3.3.1.9 (B)(1)(a) NMAC.

10 Late in 2012, Mr. Holland accepted a new job in Colorado and decided to permanently
11 remain in Colorado to be closer to family. In 2012, he filed both a part-year resident PIT return for
12 New Mexico and Colorado’s equivalent. Beginning in 2013 Mr. Holland was not required to file
13 personal income tax returns in New Mexico, as he had established domicile in Colorado. Also,
14 beginning in 2013, Mr. Holland exclusively filed Colorado state income tax returns, prepared by a
15 professional tax return preparer. The Department did not contest that Mr. Holland was a Colorado
16 domiciliary beginning in 2013 and thereafter. *See* Regulation §3.3.1.9 (B)(1)(b) NMAC. He filed
17 IRS returns every year as well.

18 In 2019, the State of Colorado provided notice to Mr. Holland that his claimed total
19 withholdings were being denied, and the State of Colorado assessed tax, penalties, and interest. As a
20 result, Taxpayer sought out information and discovered that PERA was still sending withholding tax
21 payments to the State of New Mexico Taxation and Revenue Department. Thereafter, in 2019, Mr.
22 Holland requested refunds from the Department for all pertinent years the withholding tax payments
23 had been made in error by PERA on his behalf, including a refund for tax year 2014. In 2020, Mr.

1 Holland requested a refund of the withholding tax payments made by PERA on his behalf for tax
2 year 2013.

3 The pertinent section of the statute requires that requests for refunds are made “within three
4 years after the end of the calendar year in which the payment was originally due.” Section 7-1-26
5 (F)(1)(a). Personal income taxes for the year ending December 31, 2013 were due to be paid in full
6 by April 15, 2014. Therefore, the deadline to request a refund of 2013 personal income taxes under
7 Section 7-1-26 was three years from December 31, 2014 which was December 31, 2017. The
8 request for refund filed January 14, 2020 for tax year 2013 was filed in the sixth year following
9 the calendar year in which payment was originally due, therefore it was late. The claim for
10 refund was denied for this reason and was statutorily proper.

11 Personal income taxes for the year ending December 31, 2014 were due to be paid in full
12 by April 15, 2015. Therefore, the deadline to request a refund of 2014 personal income taxes under
13 Section 7-1-26 was three years from December 31, 2015 which was December 31, 2018. The
14 request for refund filed October 22, 2019 was filed in the fourth year following the calendar year
15 in which payment was originally due, therefore it was also late.

16 The fact that the refund requests for 2013 and 2014 were filed late is not in dispute. The
17 claim for refund was denied for this reason and was statutorily proper.

18 **Federal law.**

19 Under Federal law, there is clear law preventing states from imposing an income tax on the
20 retirement income of an individual resident or domiciliary of another state. *See* 4 U.S.C.S. §114 (a).
21 Mr. Holland was domiciled in the State of Colorado during the years at issue, 2013 and 2014. Yet
22 consistent with Taxpayer’s previous direction regarding withholding of tax, PERA continued to
23 send those withholding payments to the State of New Mexico Taxation and Revenue Department.

1 The Department contends that by accepting the withholding payments from the Taxpayer's
2 retirement income from PERA, the Department did not "impose an income tax" on retirement
3 income of a taxpayer who lives outside the State of New Mexico, it simply did not change what it
4 had already been doing, which was taxing the retirement income of a New Mexico resident.
5 Likewise, the tax system created by the legislature which created the three-year limit on claims for
6 refund was not a prohibited imposition of an income tax. The Department contends that as a self-
7 reporting state, it is the Taxpayer's obligation to inform the Department of any changes to
8 withholdings. Hence, while the denial of refund was not due to a factual deficiency, the Department
9 denied the claim for timeliness alone. *See* Section 7-1-26.

10 The Department's contention is that the Taxpayer bears the responsibility to inform the
11 Department (not just PERA) that his state of residence has changed. Ordinarily this is done by
12 submitting an updated W-4, or W-4P (for pension or annuity payments) or similar document. PERA
13 had a legal obligation to withhold and remit personal income taxes as directed by Taxpayer in the
14 original paperwork Taxpayer filed upon his retirement. *See Landess v. Gardner Turf Grass, Inc.*,
15 2008-NMCA-159, ¶ 8 (addressing mandatory requirements that employer withhold income at the
16 source); *see also* NMSA 1978, § 7-3-3 (1996) (requiring a payor to withhold income tax if required
17 to do so by I.R.C. or if requested by individual to do so). Taxpayer apparently directed PERA to
18 withhold in New Mexico at the time of his retirement when he remained a domiciled New Mexico
19 resident, triggering PERA's legal obligation to withhold income taxes in New Mexico under
20 Section 7-3-3 (C). Taxpayer had the power at any point to update the withholdings from his income
21 by filing a new W-4 form with PERA. There is no evidence that Taxpayer filed an updated W-4
22 with either PERA or the Department upon his change of residency. Some evidence presented
23 (Exhibit #1.3) showed that Taxpayer had submitted an official change of address to the United

1 States Postal Service as early as November of 2012. *See* Regulation § 3.1.4.9 NMAC. The change
2 of address fulfills the Taxpayer’s responsibility to notify the Department of his address change, but
3 it has no effect on his income tax withholdings and is not equivalent to completing an updated W-4
4 for purposes of income tax withholdings.

5 Unfortunately, Taxpayer informed PERA by telephone, and did not submit an updated tax
6 document either to PERA or to the Department. Unfortunately for Taxpayer again, PERA is not one
7 of the state agencies with which the Department may share information, pursuant to NMSA 1978,
8 Section 7-1-8.8. Furthermore, the Department does not flag withholding payments made on behalf
9 of taxpayers unless income is reported and did not ask for substantiation of the withholding
10 payments from either PERA or the Taxpayer. Likewise, the Department did not take note that
11 Taxpayer began reporting Colorado income from employment in 2012. The system of taxation in
12 New Mexico relies on self-reporting. Without a paper trail showing the Taxpayer took the proper
13 steps to change his withholdings, the Department by taking no action cannot be held to a higher
14 standard than the Taxpayer, on whom the responsibility rests to ensure proper income withholdings.
15 Under New Mexico's self-reporting tax system, “every person is charged with the reasonable
16 duty to ascertain the possible tax consequences” of his or her actions. *Tiffany Construction Co. v.*
17 *Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16.

18 Does the statute of limitations on refund claims impermissibly “impose” an income tax on
19 an out-of-state residents’ retirement income? Statutory analysis shows that it does not. In
20 construing the word “impose” and its derivatives, the interpretation begins with the plain meaning
21 of the language employed, must be consistent with legislative intent, and an interpretation must
22 not render a statute’s application absurd, unreasonable or unjust. *See In re Portal*, 2002-NMSC-
23 011, ¶ 5, 132 N.M. 171, 45 P.3d 891. “As a starting point for interpreting undefined terms

1 contained in a statute, our courts often use dictionary definitions to ascertain the ordinary
2 meaning of words that form the basis of statutory construction inquiries.” *State v. Lindsey*, 2017-
3 NMCA-048, ¶ 14, 396 P.3d 199 (internal quotation marks and citations omitted). The online
4 Merriam-Webster Dictionary defines the verb “impose” as “to establish or apply by authority; to
5 establish or bring about as if by force.”¹ This definition of “impose” requires some action of the
6 Department in bringing about, establishing, or enforcing the debt. While the Department did not
7 actively impose or issue an assessment of tax for this out-of-state Taxpayer, it simply allowed its
8 coffers to fill without notifying anyone of the surplus withholding. And after three years
9 following the year a tax would have been due, the Department denied the application for refund.
10 In this instance, the state law in question grants a three-year period within which an aggrieved
11 taxpayer can claim a refund and restricts refund claims to only those filed within the three-year
12 period – it does not “impose” an income tax. And in the context of the specific prohibition against
13 taxing retirement income, this limit on refund claims applies to individuals with all types of income,
14 not strictly retirees with retirement income. While the evidence was clear that the late refund request
15 prohibition certainly had an effect on the Taxpayer’s retiree pension income (it was due to him by
16 PERA and paid to the source state rather than the state of his domicile), the effect is across the board
17 on not only retirement income but all types of income.

18 The legislative intent of Congress was clearly “to prohibit State taxation of certain
19 retirement income of a nonresident of the taxing State.” H.R. Rep. 104-389 (1995). Parties agreed
20 that the funds were not withheld properly at the time they were paid. Yet, statutory time limits for
21 requesting refunds apply across the spectrum, regardless of evidence of compelling inequities
22 presented. *See Martinez v. Public Employees Retirement Association of New Mexico*, 2012-NMCA-

¹ Online definition is available at: <https://www.merriam-webster.com/dictionary/impose> (last visited 9/02/2021).

1 096, 286 P.3d 613 (widow of PERA member denied all surviving spouse benefits because the one-
2 year statute of limitations had passed by the time widow completed application). One of the state's
3 goals of the three-year limitation on refund claims contained in Section 7-1-26 has been
4 acknowledged by the courts to be "to avoid stale claims, which protects the Department's ability to
5 stabilize and predict, with some degree of certainty, the funds it collects and manages." *Kilmer v.*
6 *Goodwin*, 2004-NMCA-122, ¶16, 163 N.M. 440, 99 P.3d 690. There is no statute requiring the
7 Department to notify taxpayers of withholdings in excess of unreported income. The statute
8 providing a mechanism for requesting refunds and foreclosing those not made in accordance with its
9 constraints does not improperly impose an income tax on retirement income of an out-of-state
10 domiciliary, although its effect was so in this case.

11 **Dormant Commerce Clause.**

12 Taxpayer argued that the case of *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S.
13 543, 135 S.Ct. 1787 (2015) controlled the outcome of this case, as he was assessed a tax by the State
14 of Colorado, and the taxes withheld and paid to New Mexico made it that he was being double
15 taxed. While the specter of tax discrimination against out-of-state residents and double taxation are
16 valid concerns, the facts here do not justify finding this to have occurred as a result of New
17 Mexico's taxation scheme.

18 The Commerce Clause of the United States Constitution is separated between the positive
19 grant of the power of Congress to regulate interstate commerce, and its implicit negative command,
20 known as the Dormant Commerce Clause, prohibiting States from taxation schemes which place
21 higher tax burdens on out-of-state taxpayers. *See* U.S.C.A. Const. Art. 1 Section 8, cl. 3 ("The
22 Congress shall have Power... To regulate Commerce with foreign Nations, and among the several
23 States, and with the Indian Tribes"); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514

1 U.S. 175, 179-180, 115 S.Ct. 1331 (1995). The dormant commerce clause disallows any State's tax
2 scheme "which discriminates against interstate commerce either by providing a direct commercial
3 advantage to local business, or by subjecting interstate commerce to the burden of multiple
4 taxation." *Wynne*, at 549-550 (internal quotation marks and citations omitted). The *Wynne* case
5 addressed a tax scheme that discriminated against out-of-state taxpayers with income from activity
6 within the state.

7 On its face, the simple fact that Mr. Holland's retirement income was in effect taxed both in
8 Colorado and in New Mexico does raise the possibility of multiple taxation of the retirement
9 income. However, the multiple taxation came about not by the design of New Mexico's tax
10 scheme, but by Taxpayer's error in (1) not filling out an updated withholding form, and (2) not
11 inspecting the documents provided by PERA when completing tax returns, as discussed below.

12 **Overcoming the statutory timeframes.**

13 Taxpayer argued that as soon as he discovered the error he took immediate action, and this
14 is an element of any claim to work around (or toll) a statute of limitations. He had used a
15 professional tax preparer when he filed in 2013 and thereafter. Taxpayer argued that since he paid
16 taxes on the income to the State of New Mexico, and Colorado was demanding that he pay tax to
17 the State of Colorado for the same income, which he would be paying, he was being double taxed.
18 To uphold the Department's denial of the refund requests, he argued, which were made within a
19 year of discovering the withholding error by a third party, would be unfair to him as a taxpayer.

20 To address the first issue: not all statutes of limitation are the same. A statute of limitations,
21 in tort law, for example, provides a window of time for a plaintiff to bring suit against a defendant.
22 In tort law, courts apply the doctrine of discovery, where a statute of limitations can begin at the
23 time the harm is discovered (when the plaintiff knew or should have known the relevant facts). *See*

1 *generally Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶¶ 7-8, 306 P.3d 524. The statute at
2 issue in this protest, Section 7-1-26, is also a statute of limitations. But unlike a tolling statute of
3 limitation, Section 7-1-26 contains a mandatory triggering date regardless of a taxpayer’s
4 knowledge of a potential refund claim. *See Kilmer*, ¶16 (because purpose of refund statute of
5 limitation is to avoid stale claims, which protects state’s ability to project revenue, burden is on
6 taxpayer to timely pursue refund). The argument that the date of discovering the fact that the
7 withholdings had been getting paid to New Mexico started the timeframes for a request for refund is
8 simply not tenable under the law, as the statute sets a mandatory triggering date.

9 Factually, for the years at issue, both the Form W-2 and the Form 1099 (it was not clear
10 from the record which of the two forms the Taxpayer would have received for his PERA retirement
11 income) have boxes (W-2, boxes 15, 16, 17, 18, 19, and 20; 1099-Misc, boxes 16, 17, and 18) that
12 indicate the state to which state income taxes have been withheld.² Taxpayer or his tax preparer,
13 upon inspection of the documents, should have known the State of New Mexico was receiving
14 Taxpayer’s withholding payments. The claim of late discovery is negated by the negligence of
15 Taxpayer to submit an updated W-4, inspect the W-2 or Form 1099 he received from PERA, and to
16 timely submit a refund request. *See* Regulation § 3.1.11.10 NMAC (1/15/01) (Negligence is “failure
17 to exercise that degree of ordinary business care and prudence which reasonable taxpayers would
18 exercise under like circumstances.”). The forms the Taxpayer actually received were not offered
19 into evidence.

20 The second argument, concerning fairness, is cognizable since New Mexico allows
21 aggrieved parties the opportunity to seek “equitable recoupment” by statute:

² Available online through the IRS website: <https://www.irs.gov/pub/irs-prior/iw2w3--2013.pdf> (last visited 8/23/21); <https://www.irs.gov/pub/irs-prior/iw2w3--2014.pdf> (last visited 8/23/21); <https://www.irs.gov/pub/irs-prior/f1099msc--2013.pdf> (last visited 8/23/21); and <https://www.irs.gov/pub/irs-prior/f1099msc--2014.pdf> (last visited 8/23/21).

1 In response to a *timely* refund claim pursuant to Section 7-1-26 NMSA 1978 and
2 notwithstanding any other provision of the Tax Administration Act, the secretary or
3 the secretary's delegate may refund or credit a portion of an assessment of tax paid,
4 including applicable penalties and interest representing the amount of tax previously
5 paid by another person on behalf of the taxpayer on the same transaction, provided
6 that the requirements of equitable recoupment are met. For purposes of this
7 subsection, the refund claim may be filed by the taxpayer to whom the assessment
8 was issued or by another person who claims to have previously paid the tax on
9 behalf of the taxpayer. NMSA 1978, Section 7-1-29 (H) (2017) (emphasis added).

10 Here, the refund claim was not "timely," as noted above, so the equitable recoupment option is
11 not available under the statute. The analysis must stop there since the application of the statute
12 first requires timeliness.

13 **Conclusion.**

14 PERA withheld taxes on the retirement income, despite the knowledge that Taxpayer was a
15 Colorado resident, and paid the withholdings to New Mexico. The PERA withholding payments in
16 2013 and 2014 were made in error. No failsafe caught the error until the State of Colorado
17 informed the Taxpayer that his withholding amounts were incorrect on the Taxpayer's Colorado
18 personal income tax returns. The Taxpayer's requests for refund for 2013 and 2014 were filed four
19 and six years after the year in which the tax would have been due. Because the Taxpayer in this case
20 requested a refund outside the three-year statutory limit permitting claims, the late claims are time-
21 barred. Taxpayer had multiple remedies available to him to address the alleged improper taxation
22 of his retirement income. First, Taxpayer could have filed an updated W-4 wage withholding form
23 but failed to do so. And secondly, Taxpayer could have timely sought a refund upon review of his
24 annual W-2 statements showing that the withholding was going to New Mexico rather than
25 Colorado, but through negligence failed to do so. In any case, Taxpayer's own failures to act are not
26 grounds to find that New Mexico's tax regime somehow runs afoul of federal restrictions on the
27 taxation of retirement income.

1 **CONCLUSIONS OF LAW**

2 A. Taxpayer filed a timely, written protest of the Department’s Denial of claim for
3 refund letters L0371665584 and L1024963248 and jurisdiction lies over the parties and the subject
4 matter of this protest. *See* NMSA 1978, Section 7-1-24 (A) & (B) (2019); *see also* NMSA 1978,
5 Section 7-1-26 (A) (2019).

6 B. The hearing was timely set and held within 90-days of the Department’s request for
7 hearing pursuant to NMSA 1978, Section 7-1B-8 (2019).

8 C. Taxpayer bears the burden of establishing entitlement to the claimed refund at
9 issue. The Taxpayer has not satisfactorily met the burden of establishing the entitlement to the
10 claimed refund at issue. The Department’s refund denial is viewed under a lens of a presumption of
11 correctness, therefore it is the Taxpayers burden to establish that they were entitled to their claim for
12 credit. *See* Regulation §3.1.8.10 NMAC (08/30/2001); *see also* *Corr. Corp. of Am. of Tenn. v. State*,
13 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779. *See* NMSA 1978, Section 7-1-17 (C) (2007).

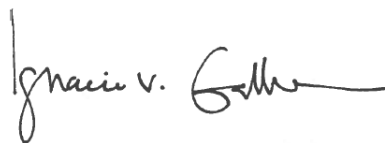
14 D. Taxpayer’s requests for refund for tax years 2013 and 2014 were untimely pursuant
15 to NMSA 1978, Section 7-1-26.

16 E. Federal law prohibiting states from imposing an income tax on the retirement
17 income of out-of-state residents does not apply to a statutory limit where valid claims for refund
18 filed timely are granted or, alternatively, barred after the passing of the statutory time limit. *See* 4
19 U.S.C. 114; *Kilmer v. Goodwin*, 2004-NMCA-122, ¶16, 163 N.M. 440, 99 P.3d 690.

20 For the foregoing reasons, the Taxpayer’s protest is **DENIED. IT IS ORDERED** that the
21 Department’s denial of refund for tax years 2013 and 2014 was correct.

22 DATED: September 3, 2021.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19



Ignacio V. Gallegos
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.

1 **CERTIFICATE OF SERVICE**

2 On September 3, 2021, a copy of the foregoing Decision and Order was submitted to the
3 parties listed below in the following manner:

4 *First Class Mail and E-Mail*

E-Mail

5 INTENTIONALLY BLANK

6
7 _____
8 John Griego
9 Legal Assistant
10 Administrative Hearings Office
11 P.O. Box 6400
Santa Fe, NM 87502