

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

4 **IN THE MATTER OF THE PROTEST OF**
5 **ON-SITE CASE MANAGEMENT**
6 **TO THE ASSESSMENT**
7 **ISSUED UNDER LETTER ID NO. L0378310320**

8 **v.**

AHO No. 21.05-026A, D&O No. 22-16

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On June 9, 2022, Hearing Officer Dee Dee Hoxie, Esq. conducted an in-person hearing
12 on the merits of the protest to the assessment. The Taxation and Revenue Department
13 (Department) was represented by Timothy Williams, Staff Attorney. Lizette Rivera, Auditor, also
14 appeared on behalf of the Department. Angela Gazzara, the owner and sole operator of On-Site
15 Case Management (Taxpayer), was present and represented herself¹. Ms. Gazzara and Ms.
16 Rivera testified. The Hearing Officer took notice of all documents in the administrative file.
17 The Department's exhibits A through E and G and H were admitted without objection. The
18 Department was given to the end of the hearing date to submit Exhibit H. Exhibit H was
19 submitted timely. The Taxpayer was given until June 10, 2022 to provide any written response
20 or objection to Exhibit H. Nothing was submitted by the Taxpayer by that deadline.

21 The main issue to be decided is whether the Taxpayer is liable under the assessment for
22 the gross receipts tax, the penalty, and the interest. The Hearing Officer considered all of the
23 evidence and arguments presented by both parties. The Taxpayer essentially withdrew her
24 dispute as to the underlying tax and argued that penalty and interest should be waived because

¹ Although the Taxpayer is the business entity, references throughout the decision will be to Ms. Gazzara as she is the sole owner and operator of the Taxpayer.

1 the Department waited so long to assess her and because she had issues with her accountant. As
2 the Department's assessment was issued within the time frame required by the statute and the
3 Taxpayer failed to prove that the penalty should be abated, the Hearing Officer finds in favor of
4 the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

5 **FINDINGS OF FACT**

6 1. On August 5, 2020, the Department issued an assessment to the Taxpayer for the
7 tax periods from January 1, 2013 through December 31, 2017. The assessment was for gross
8 receipts tax of \$7,636.18, penalty of \$1,527.24, and interest of \$1,501.20, for a total liability of
9 \$10,664.62. [Admin. file L0378310320; Testimony of Ms. Rivera; Testimony of Ms. Gazzara;
10 Exhibit E].

11 2. On November 5, 2020, the Taxpayer filed a timely written protest to the
12 assessment. [Admin. file protest].

13 3. On November 9, 2020, the Department acknowledged its receipt of the protest.
14 [Admin. file L0635748016].

15 4. On May 7, 2021, the Department filed a request for hearing with the
16 Administrative Hearings Office. [Admin. file request].

17 5. On June 4, 2021, a telephonic scheduling hearing was conducted. The parties
18 agreed that the scheduling hearing satisfied the statutory requirement that a hearing be held
19 within 90 days of the request. [Admin. file].

20 6. Several scheduling hearings were conducted, and the hearing on the merits was
21 commenced by videoconference on February 24, 2022; however, the Taxpayer's internet
22 connection was poor, so the hearing was reset for an in-person hearing ultimately conducted on
23 June 9, 2022. [Admin. file].

1 7. The Taxpayer primarily provides case management services for companies,
2 usually in reference to claims for workman’s compensation. The Taxpayer provides services to
3 companies in New Mexico, Colorado, Utah, Arizona, and Wyoming. The Taxpayer frequently
4 travels to various locations to perform those services. [Testimony of Ms. Gazzara].

5 8. The Taxpayer has been in business since 2011. [Testimony of Ms. Gazzara].

6 9. The Taxpayer had an accountant, who was a CPA, from 2011 until sometime in
7 2018. [Testimony of Ms. Gazzara].

8 10. The Taxpayer had an acrimonious relationship with her CPA, and she found his
9 explanations to be incomplete and confusing. [Testimony of Ms. Gazzara].

10 11. In 2015, the Department communicated with the Taxpayer’s CPA about an audit
11 of the Taxpayer. [Testimony of Ms. Gazzara; Testimony of Ms. Rivera; Exhibit B].

12 12. In 2015, the CPA advised the Taxpayer that she should be filing and paying gross
13 receipts tax as it did not appear that she was entitled to any exemptions or deductions. The CPA
14 also advised the Taxpayer that she could apply for a managed audit, which would avoid penalty
15 and interest, for the 2013, 2014, and 2015 tax periods. [Exhibit B].

16 13. Based on the tables of liability provided by the Department, it appears that the
17 Taxpayer should have been filing gross receipts tax returns and paying gross receipts tax every
18 six months. [Exhibit A; Exhibit G; Exhibit H].

19 14. The Taxpayer charged her customers “7% sales tax on each bill.” [Exhibit B].

20 15. Despite imposing this charge to her customers, the Taxpayer did not file gross
21 receipts tax returns or make payments during the tax periods from 2013 through 2017.

22 [Testimony of Ms. Rivera; Testimony of Ms. Gazzara].

1 (2019)². Gross receipts include the total amount received “from performing services in New
2 Mexico.” NMSA 1978, § 7-9-3.5 (A) (1) (2019). There is a statutory presumption that “all receipts
3 of a person engaging in business are subject to the gross receipts tax.” NMSA 1978, § 7-9-5 (A)
4 (2019). The Taxpayer provides case management services in New Mexico. Presumptively, the
5 Taxpayer’s receipts for providing those services are subject to the gross receipts tax. *See* NMSA
6 1978, § 7-9-4, §7-9-5.

7 The Taxpayer argued that some of her services were provided for out of state customers.
8 The burden is on the Taxpayer to prove that she is entitled to an exemption or deduction. *See*
9 *Public Services Co. v. N.M. Taxation and Revenue Dep’t.*, 2007-NMCA-050, ¶ 32, 141 N.M.
10 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “Where an exemption or deduction
11 from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the
12 right to the exemption or deduction must be clearly and unambiguously expressed in the statute,
13 and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation*
14 *and Revenue Dep’t.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v.*
15 *Taxation and Revenue Dep’t.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v.*
16 *Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. *See also Pittsburgh and Midway*
17 *Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

18 The Taxpayer provided some records to the Department for the final tax period from June
19 to December 2017 that were sufficient to show that some of her gross receipts came from out of
20 state customers. The Department abated part of the assessment for that tax period. The
21 Taxpayer admitted that she did not have adequate records to show any other gross receipts that
22 came from out of state customers.

² The most current version of statutes and regulations will be referenced unless there is a relevant substantive change between it and the version in effect at the time that the Taxpayer’s services were rendered.

1 **The assessment was properly issued within the statutory time limits.**

2 The Taxpayer argued that penalty and interest should be abated because the Department did
3 not make its assessment until 2020. The Taxpayer argued that she was disadvantaged by the late
4 assessment because penalty and interest accrued. In general, the Department may assess within
5 three years of the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18
6 (2013). However, when a taxpayer fails to complete and file any required return, the Department
7 has seven years to assess from the end of the calendar year in which the tax was due. *See id.* As the
8 Taxpayer failed to file returns, the Department had seven years to assess her. *See id.* Gross receipts
9 taxes are due on the twenty-fifth day of the month following the month when the transaction
10 occurred. *See* NMSA 1978, § 7-9-11 (1969). Per the Department’s calculations, the Taxpayer’s
11 payments and filings are due every six months. [Exhibit A; Exhibit G; Exhibit H]. The earliest
12 tax year assessed was 2013, and at least one payment was due in 2013. Seven years from the end of
13 the 2013 calendar year was December 31, 2020. The assessment was issued on August 5, 2020.
14 Therefore, the assessment was issued timely.

15 **Assessment of Penalty.**

16 Penalty “*shall* be added to the amount assessed” when a tax is not paid on time due to
17 negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word “shall” indicates that
18 the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
19 *Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are
20 presumed to be correct, and it is a taxpayer’s burden to show that the assessment was not correct.
21 *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070.
22 Negligence includes inadvertence. *See* 3.1.11.10 (C) (2001). If a taxpayer is not negligent,
23 penalties may be excused. *See* 3.1.11.11 NMAC (2001) (listing several factors, such as relying

1 on advice from an accountant, that indicate non-negligence). The Taxpayer had a CPA during
2 the tax periods in question. The Taxpayer described an acrimonious relationship with her CPA,
3 and she found his explanations and communications to be lacking, but she did not seek other
4 help. Moreover, it is apparent from their communications in Exhibit B that the Taxpayer's
5 failure to file returns and pay her gross receipts tax was not caused by the advice of her CPA.
6 [Exhibit B]. Therefore, penalty was properly assessed.

7 **Assessment of Interest.**

8 Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is
9 due. NMSA 1978, § 7-1-67 (A) (2013). Again, the word "shall" indicates that the assessment of
10 interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation*
11 *Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to
12 punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the
13 tax was not paid when it was due, interest was properly assessed.

14 **CONCLUSIONS OF LAW**

15 A. The Taxpayer filed a timely written protest to the assessment, and jurisdiction lies
16 over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8 (2019).

17 B. The first hearing was timely set and held within 90 days of the request for hearing.
18 *See id.*

19 C. The assessment was issued timely. *See* NMSA 1978, § 7-1-18.

20 D. The Taxpayer failed to overcome the presumption that the assessment was correct.
21 *See* NMSA 1978, § 7-1-17. *See also* 3.3.1.9 NMAC.

22 E. Assessments of penalty and interest were required and appropriate under the statutes.
23 *See* NMSA 1978, § 7-1-67 and § 7-1-69.

1 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
2 Taxpayer is liable for \$7,115.07 in gross receipts tax, \$1,423.01 in penalty, and \$1,654.53 in
3 interest for a total outstanding liability of \$10,192.61³.

4 DATED: July 14, 2022.

5 Dee Dee Hoxie

6 Dee Dee Hoxie
7 Hearing Officer
8 Administrative Hearings Office
9 P.O. Box 6400
10 Santa Fe, NM 87502

11 **NOTICE OF RIGHT TO APPEAL**

12 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
13 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
14 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
15 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
16 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
17 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
18 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
19 Hearings Office may begin preparing the record proper. The parties will each be provided with a
20 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
21 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
22 statement from the appealing party. *See* Rule 12-209 NMRA.

23 **CERTIFICATE OF SERVICE**

³ As of the date of the hearing. Interest continues to accrue until tax principal is paid.

1 On July 14, 2022, a copy of the foregoing Decision and Order was submitted to the parties
2 listed below in the following manner:

3 *First Class Mail and Email*

First Class Mail and Email

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5 *INTENTIONALLY BLANK*