

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

4 **THE MATTER OF THE PROTEST OF**  
5 **JOSEPH & JENNIFER CERVANTES**  
6 **TO THE ASSESSMENT OF TAX ISSUED UNDER**  
7 **LETTER ID NO. L2106017200**

8 v.

**AHO No. 22.04-021A, D&O No. 22-17**

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On July 14, 2022, Chief Hearing Officer Brian VanDenzen, Esq., of the Administrative  
12 Hearings Office conducted a merits administrative hearing in the matter of the tax protest of  
13 Joseph & Jennifer Cervantes (Taxpayers) pursuant to the Tax Administration Act and the  
14 Administrative Hearings Office Act. At the request of the parties, the merits hearing occurred via  
15 videoconference, as permitted under NMSA 1978, Section 7-1B-8 (H) (2019) and Regulation  
16 22.600.3.10 NMAC. At the hearing, Taxpayers appeared, represented by Ken Shaw, Certified  
17 Public Accountant. Staff Attorney Timothy Williams appeared, representing the opposing party  
18 in the protest, the Taxation and Revenue Department (Department). Department Protest Audit  
19 Manager Priscilla Castro appeared as a Department witness. Department Exhibits A and C  
20 through G were admitted into the record. Department Exhibit H was not admitted into the record,  
21 as discussed in more detail below.

22 In quick summary and substantively similar to another decision and order issued today, this  
23 protest involves Taxpayers' request for abatement of penalty and interest on their untimely paid  
24 2019 personal income taxes under the circumstances of the COVID-19 pandemic when Taxpayers  
25 mistakenly believed that the initial extended 2019 payment deadline of April 15, 2021 was further  
26 extended to May 17, 2021. Ultimately, after making findings of fact and discussing the issue in

1 more detail throughout this decision, the Hearing Officer partially finds for Taxpayers (and the  
2 taxpayers in the other decision issued today<sup>1</sup>) in that the civil negligence penalty should be abated  
3 pursuant to the good faith mistake of law statutory provision and accompanying Regulation  
4 3.1.11.11 NMAC under the circumstance of the extraordinary, once-in-a-century COVID-19  
5 pandemic. However, the assessed interest remains due and owing. IT IS DECIDED AND  
6 ORDERED AS FOLLOWS:

## 7 **FINDINGS OF FACT**

### 8 *Jurisdictional and Procedural Findings*

9 1. On May 5, 2021, under letter id. no. L2106017200, the Department issued a  
10 Notice of Assessment of Taxes and Demand for Payment to Taxpayers for \$63,391.42 in  
11 personal income tax, \$8,874.81 in civil negligence penalty, and \$1,498.14 in interest for a total  
12 assessment of \$73,764.37 for the personal income tax reporting period ending on December 31,  
13 2019. [Administrative Record, Hearing Request Packet, Assessment; Dept. Ex. D].

14 2. On July 28, 2021, Taxpayers filed a formal protest of the Department's  
15 assessment. In the formal protest, Taxpayers asked for abatement of the assessed penalty in the  
16 amount of \$8,874.81 based on the good faith, mistake of law statutory provision in light of  
17 confusion over extension of payment deadlines for personal income tax years 2019 and 2020.  
18 [Administrative Record, Hearing Request Packet].

19 3. On October 12, 2021, the Department acknowledged receipt of Taxpayers'  
20 protest. [Administrative Record, Hearing Request Packet, Acknowledgement Letter].

21 4. On April 22, 2022, the Department filed a request for hearing on the protest with  
22 the Administrative Hearings Office, along with its formal answer to Taxpayers' protest. In its

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<sup>1</sup> See *In the Matter of the Protest of Neal J. and Catherine A. Van Berg*, D&O No. 22-18 (Aug. 8, 2022).

1 answer, the Department asserted that penalty and interest were properly assessed in light of  
2 Taxpayers' untimely payment of 2019 personal income tax. Neither the hearing request nor the  
3 Department's answer provided an updated amount of penalty or interest. [Administrative Record,  
4 Hearing Request Packet, Request for Hearing].

5 5. Scheduling hearings in this matter occurred on May 13, 2022 and May 19, 2022.  
6 At neither hearing did the Department provide an updated penalty or interest amount other than  
7 what was contained in the original assessment. [Administrative Record].

8 6. The merits hearing occurred within 90-days of the hearing request.  
9 [Administrative Record].

10 *Taxpayers, their Accountant, and a history of their professional engagement.*

11 7. Taxpayers are a married couple who file and pay their personal income taxes  
12 jointly, using the services of their tax professional, Mr. Ken Shaw, CPA, and his accounting  
13 firm. [Testimony of Mr. Shaw, CPA; Testimony of Mr. Cervantes; Administrative Record].

14 8. Ms. Cervantes is an author and businessperson who earned taxable personal  
15 income from various sources in New Mexico during 2019. [Testimony of Mr. Shaw, CPA;  
16 Testimony of Mr. Cervantes; Administrative Record].

17 9. Mr. Cervantes is a practicing attorney in the field of civil litigation and a  
18 businessperson who earned taxable personal income from various sources in New Mexico during  
19 2019. [Testimony of Mr. Shaw, CPA; Testimony of Mr. Cervantes; Administrative Record].

20 10. Mr. Cervantes has been a member of the New Mexico Legislature for  
21 approximately 22 years, both previously in the State House of Representatives and in the State

1 Senate during the relevant period<sup>2</sup>. Mr. Cervantes has never served on any tax committee or the  
2 Senate Finance Committee during his time in the Legislature. [Cross-examination of Mr.  
3 Cervantes].

4 11. Mr. Ken Shaw, CPA, was and is Taxpayers' accountant. Mr. Shaw, CPA, and his  
5 firm have been engaged as Taxpayers' accountant since approximately 1997. [Cross-examination  
6 of Mr. Shaw, CPA; Testimony of Mr. Cervantes].

7 12. Mr. Shaw, CPA, and his firm keep track of relevant changes and developments to  
8 tax law. [Cross-examination of Mr. Shaw, CPA].

9 13. Mr. Shaw, CPA, provides advice to Taxpayers, copies of returns to file,  
10 instructions on when to file, and prepaid envelopes for submission of returns. [Cross-  
11 examination of Mr. Shaw, CPA].

12 14. Over the history of their professional engagement, Mr. Cervantes has always  
13 directed Mr. Shaw, CPA, to ensure that all taxes be filed and paid on time, to not engage in any  
14 questionable filing practices, and to set a good example as a public figure. [Direct of Mr.  
15 Cervantes; Cross-examination of Mr. Cervantes].

16 15. Taxpayers have a common practice of meeting with Mr. Shaw, CPA, in the later  
17 part of each calendar year to begin determining the process for preparing their personal income  
18 tax return and payment for that calendar year. At that point, they discuss their sources of income  
19 in the calendar year to reasonably estimate their total tax liability. With this information, Mr.  
20 Shaw, CPA, would begin preparing Taxpayers' return and Taxpayers would set aside sufficient  
21 money in their investment account to pay the estimated final tax obligations. Through this

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<sup>2</sup> The Department commented on Mr. Cervantes status as a state legislator in its opening statement and in cross-examination of Mr. Cervantes. Other than responding to the Department's argument and cross-examination, Taxpayers did not seek to invoke Mr. Cervantes status as a state legislature in order to influence the proceeding.

1 process, the money for payment of any outstanding tax from the previous year would be  
2 available for payment by any pertinent tax payment deadline. Mr. Shaw, CPA, would advise  
3 Taxpayers in the weeks before the payment deadline of the pending due date so that Taxpayers  
4 could write the check and bring it to Mr. Shaw's firm for payment of the outstanding liability.

5 [Testimony of Mr. Cervantes].

6 16. Under this practice, Taxpayers relied on Mr. Shaw, CPA, for over 20 years to  
7 keep track of required filing and payment dates and give Taxpayers the final direction to issue  
8 the required check. [Direct of Mr. Cervantes; Testimony of Mr. Shaw, CPA].

9 17. Taxpayers' past pattern and practice was to always request an extension on their  
10 personal income tax deadlines while they waited for the various business income schedules that  
11 they needed in order to accurately complete their required returns. [Testimony of Mr. Shaw,  
12 CPA; Testimony of Mr. Cervantes].

13 18. Taxpayers' past pattern and practice was always to pay their final outstanding tax  
14 obligations on the day they were due—which for them was always the extension deadline—not a  
15 day before or a day later. [Testimony of Mr. Cervantes; Testimony of Mr. Shaw, CPA].

16 19. Until the untimely payment of the 2019 personal income tax liability during the  
17 COVID-19 pandemic at issue in this protest, Taxpayers' system with their accountant was  
18 effective in ensuring that taxes were timely filed and paid. [Direct of Mr. Cervantes; Testimony  
19 of Mr. Shaw, CPA].

20 20. Taxpayers have never been assessed any late payment penalties for their federal  
21 personal income tax obligations in any year. [Cross-examination of Mr. Cervantes].

22 21. Until the year in dispute of this protest, Taxpayers have never had any late  
23 payment penalties assessed for their state tax obligations. [Cross-examination of Mr. Cervantes].

2           22.     Beginning in early March 2020, the worldwide COVID-19 pandemic impacted  
3 New Mexico acutely when the first public health orders were issued. The COVID-19 pandemic  
4 continued significantly through the relevant time frames at issue in this protest, which  
5 encompassed March 2020 through May 2021.

6           23.     The New Mexico Legislature convened a special session to address the impact of  
7 the COVID-19 pandemic in June 2020. During that first special session in 2020, the Legislature  
8 provided specific relief to taxpayers in certain tax programs from imposition of penalty and  
9 interest. The legislation effectively extended the 2019 personal income tax payment deadline to  
10 April 15, 2021 by shielding taxpayers from assessment of interest or penalty through that date.

11 *See* H.B. 6, §4, 55th Leg., 1st Special Sess. (N.M. 2020), *available* at  
12 <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf><sup>3</sup>.

13           24.     In his capacity as a State Senator, Mr. Cervantes voted in favor of H.B. 6., which  
14 passed the Senate unanimously on a vote of 42-0. Mr. Cervantes testified that he quickly  
15 reviewed that bill, reviewed the relevant analysis of the bill, and had a general understanding that  
16 the bill provided relief to New Mexico taxpayers during the pandemic. In light of its broad,  
17 bipartisan, and unanimous support, Mr. Cervantes testified that beyond an initial reading of the  
18 bill, he did not scrutinize the bill on a line-by-line basis and did not have a deep understanding  
19 of, or expertise in, the mechanical application of tax provisions addressed in the bill. [Cross-  
20 examination of Mr. Cervantes; Dept. Ex. C].

21           25.     On March 18, 2021, the Department issued a press release announcing that the  
22 deadline for filing and paying 2020 personal income tax had been extended to May 17, 2021.

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<sup>3</sup> Laws 2020, Chapter 4, Section 4 (1<sup>st</sup> S.S.).

1 This press release made no mention of personal income tax year 2019 or an extension of the  
2 payment deadline for tax year 2019. [Dept. Ex. G; Testimony of Mr. Shaw, CPA].

3 26. On March 31, 2021, the Department sent out a press release specifying that 2019  
4 outstanding personal income tax liability payment was due on April 15, 2021. [Dept. Ex. A;  
5 Direct Testimony of Ms. Castro].

6 *Timeline of Taxpayers 2019 Personal Income Tax Filings and Payments*

7 27. Pursuant to an extension, Taxpayers filed their state and federal personal income  
8 tax returns for tax year 2019 on or before the personal extension deadline of October 15, 2020.  
9 [Direct of Mr. Shaw, CPA].

10 28. In 2019, Taxpayers made an estimated federal payment on the original April 15,  
11 2020 due date, and then made an additional federal payment in October 2020 by the deadline  
12 related to the requested extension. [Redirect testimony of Mr. Shaw, CPA].

13 29. At the time of the filing of their return in October 2020, Mr. Shaw, CPA, advised  
14 Taxpayers of the changes to the payment deadline for state 2019 personal income tax obligations  
15 and Taxpayers deferred payment until that deadline, consistent with their past practice to pay on  
16 the due date. [Testimony of Mr. Shaw; Testimony of Mr. Cervantes].

17 30. For the 2019 personal income tax year, Taxpayers had the money set aside to pay  
18 their 2019 tax liability by the deadline. [Cross-examination of Mr. Cervantes].

19 31. Mr. Shaw, CPA, never saw the Department's March 31, 2021, press release  
20 reminder about the approaching 2019 personal income tax payment deadline. [Cross-  
21 examination of Mr. Shaw, CPA].

22 32. In March and April of 2021, approximately six months after filing their returns for  
23 2019, Taxpayers did not receive any specific instructions from Mr. Shaw, CPA, to prepare

1 payment for the approaching deadline for payment of the 2019 personal income tax as they had  
2 relied upon in their previous history and practice with their accountant. [Testimony of Mr.  
3 Cervantes].

4 33. At some point in March 2021, Mr. Cervantes became aware of general news  
5 accounts of a federal extension of personal income tax deadline until May 2021. Although he  
6 subsequently learned that the federal extension only applied to tax year 2020, he was not aware  
7 of that distinction in March 2021 and mistakenly concluded that the extension would also apply  
8 to tax year 2019. [Testimony of Mr. Cervantes].

9 34. Mr. Cervantes, who was used to a confluence of dates between the federal and  
10 state personal income tax deadlines, assumed that the changes he heard about in news accounts  
11 to federal deadlines would also apply to state deadlines, meaning that state returns and related tax  
12 payments also would be due in mid-May 2021. [Direct of Mr. Cervantes].

13 35. Mr. Cervantes did not recall ever seeing, reviewing, or reading the March 18,  
14 2021 or March 31, 2021 press releases from the Department or any news stories related to the  
15 contents of those press releases. Mr. Cervantes does not subscribe or receive press releases from  
16 the Department in any of his roles. Mr. Cervantes only recalled hearing general news about the  
17 federal extension to May 2021. [Testimony of Mr. Cervantes].

18 36. Mr. Shaw, CPA, did not recall himself or his firm ever telling Taxpayers that the  
19 2019 payment deadline had been extended beyond April 15, 2021 to May 17, 2021. [Cross-  
20 examination of Mr. Shaw, CPA].

21 37. Mr. Cervantes believed that the 2019 personal income tax payment deadline had  
22 been extended to May 17, 2021 for two reasons: first, because his accountant had not contacted  
23 him to prepare payment before April 15, 2021 (like the accountant had in the previous 20 or so  
24 years of their engagement); and second, because Mr. Cervantes was generally aware of news



1 accounts indicating that there was an extension to May 2021. [Cross-examination of Mr.  
2 Cervantes].

3 38. Taxpayers did not pay their outstanding 2019 personal income tax liability by  
4 April 15, 2021. [Testimony of Mr. Shaw, CPA; Testimony of Mr. Cervantes; Direct testimony of  
5 Ms. Castro].

6 39. On or about May 5, 2021, the Department issued its assessment to Taxpayers, as  
7 described in F.O.F. #1. [Dept. Ex. D].

8 40. Upon receipt of the notice of assessment of outstanding liability, Taxpayers  
9 immediately contacted Mr. Shaw, CPA to express their shock and anger at the delinquency. Mr.  
10 Cervantes believed Mr. Shaw, CPA, had not advised Taxpayers of the payment due date as he  
11 had, pursuant to their regular practice, for the last twenty years. [Testimony of Mr. Cervantes].

12 41. Although Mr. Cervantes holds Mr. Shaw, CPA, in high regard given their long-  
13 term practice, Mr. Cervantes believed that in this specific instance Mr. Shaw, CPA, did not  
14 adequately advise Taxpayers of the pertinent deadline under the confusing circumstances,  
15 shifting deadlines, and incongruence of federal and state deadlines during the pandemic.  
16 [Testimony of Mr. Cervantes].

17 42. Mr. Cervantes believed that Taxpayers relied to their detriment in this instance on  
18 their tax professional to inform them of the correct 2019 personal income tax payment deadline  
19 considering all the various extensions occurring during this period. Mr. Cervantes further  
20 believed that Taxpayers' untimely payment resulted from a mistake of law made in good faith  
21 and on reasonable grounds because of the confusing extensions and incongruence of federal and  
22 state deadlines during this period and the lack of communication from their accountant about the  
23 pending April 15, 2021 extended payment deadline. [Cross-examination of Mr. Cervantes].

1           43.     On the day of their receipt of the Notice of Assessment, Taxpayers wrote a check  
2 in the amount of \$63,357.00 for the 2019 personal income liability and directed Mr. Shaw, CPA,  
3 to submit it immediately. [Direct of Mr. Cervantes; Dept. Ex. F].

4           44.     Taxpayers' check was dated May 17, 2021 and the Department deposited the  
5 check on or about May 24, 2021. [Testimony of Ms. Castro; Dept. Ex. F].

6           45.     Neither party presented any evidence to establish the date of mailing of the notice  
7 of assessment or the date of mailing of the check paying the liability.

8           46.     Ms. Castro is a protest manager with the Department. She has been with the  
9 Department for 20 years. She oversees protest auditors and protests for the Department. In that  
10 capacity, Ms. Castro reviewed the details of Taxpayers' protest. [Direct testimony of Ms.  
11 Castro].

12           47.     On July 13, 2022, in preparation for the hearing and at the direction of the  
13 Department's counsel, Ms. Castro prepared an updated statement of Taxpayers account which  
14 was tendered as Dept. Ex. H1 and H2. The updated statement included additional amounts of  
15 penalty and interest that accrued in the 12 days between the date on the notice of assessment and  
16 the payment date. The information contained therein was available since at least the beginning of  
17 June 2021. Nevertheless, the statement of account was not provided to Taxpayers 10 days before  
18 the hearing, as required under the notice of hearing. Nor was it provided in the Department's  
19 hearing request, answer to the protest, exhibit list, or discussed or provided during any of the  
20 scheduling hearings<sup>4</sup>. [Testimony of Ms. Castro; Rebuttal of Mr. Cervantes; Administrative  
21 Record].

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<sup>4</sup> The Hearing Officer has no reason to doubt that Ms. Castro and Mr. Williams acted in good faith in this instance. Instead, this oversight likely resulted from other competing duties, deadlines, and obligations. Nevertheless, the document was not timely provided, which is a fact of consequence in the analysis.



1 ***Presumption of Correctness.***

2 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is  
3 presumed correct. Consequently, Taxpayers have the burden to overcome the assessment. *See*  
4 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the  
5 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*  
6 NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of  
7 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and  
8 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50,  
9 ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be  
10 given substantial weight). Accordingly, it is Taxpayers’ burden to present some countervailing  
11 evidence or legal argument to show that they are entitled to an abatement, in full or in part of the  
12 tax, penalty, and interest, of the assessment issued against them. *See N.M. Taxation & Revenue*  
13 *Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. When a taxpayer presents  
14 sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the  
15 assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-21, ¶13, 133  
16 N.M. 217.

17 ***New Mexico Personal Income Tax, the Pandemic, and the Extended Payment Deadline.***

18 The tax program at dispute in this protest is personal income tax, governed by the Income  
19 Tax Act under NMSA 1978, Section 7-2-1 through 39. Unless otherwise exempted by law, a tax is  
20 imposed “upon the net income of every” New Mexico resident. NMSA 1978, § 7-2-3 (1981).  
21 NMSA 1978, Section 7-2-12 (2016) requires any resident or person deriving income from New  
22 Mexico to file a state income tax return. Like many states, the calculation of New Mexico’s  
23 personal income tax liability begins with a taxpayer’s adjusted gross income as reported to the  
24 IRS. *See NMSA 1978, §7-2-2 (A) (2010); see also Holt v. N.M. Dep’t of Taxation & Revenue,*

1 2002- NMSC-34, ¶23, 133 N.M. 11 (“calculation of the taxpayers’ state income tax is based upon  
2 their adjusted gross income...on their federal return.”). Under Section 7-2-12, the required tax  
3 return and any amount of tax due under that return are due on or before the date in which the  
4 federal income tax return is due, which is typically April 15<sup>th</sup> of the next calendar year<sup>5</sup>. Thus,  
5 the personal income taxes for the reporting period ending on December 31, 2019, would have  
6 normally been due on or before April 15, 2020.

7 However, there was nothing normal about 2020. In early 2020, the COVID-19 pandemic  
8 spread across the planet, landing in New Mexico in early March 2020. On March 11, 2020, the  
9 pandemic was declared a public health emergency in New Mexico. *See Lujan Grisham v.*  
10 *Romero*, 2021-NMSC-009, ¶ 3, 483 P.3d 545, 549. On that same date, Governor Michelle Lujan  
11 Grisham invoked the All Hazard Emergency Response Act and directed all branches of state  
12 government to take immediate action to minimize the spread of COVID-19 and minimize the  
13 attendant physical and economic harms. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 7,  
14 487 P.3d 815, 820 (internal citations omitted). In a matter of weeks, this once-in-a-century  
15 pandemic impacted everyone across the globe, including in the United States and New Mexico,  
16 in ways unimaginable only months before. Courts across the country, including our own Court of  
17 Appeals, have recognized that the pandemic was beyond the ordinary circumstances anyone could  
18 foresee regardless of the level of their diligence, care, or preparation. *See State v. Alejandro M.*,  
19 2021-NMCA-013, ¶ 9-11, 485 P.3d 787, 790, *cert. denied* (S-1-SC-38654, Mar. 8, 2021).  
20 Systems, laws, rules, and regulations designed to work in a status quo, “normal” era quickly

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<sup>5</sup> In some years, depending on whether April 15<sup>th</sup> in that calendar year falls on a weekend or a federal holiday, the traditional April 15<sup>th</sup> deadline might extend out a few additional days. That is not an issue in this case and the broader point is that it is well understood and accepted in society that personal income tax returns, payments or requests for an extension to file are generally due on April 15<sup>th</sup> of the following year.

1 buckled under the weight of the pandemic, forcing individuals, taxpayers, businesses,  
2 institutions, governments, and society itself to adapt and improvise in short order.

3 Long understood and traditional rules of taxation—like the traditional April 15<sup>th</sup> personal  
4 income tax deadline—also yielded to the pressures of the pandemic. The New Mexico  
5 Legislature convened at a special session in June 2020 to address some of the consequences of  
6 the pandemic, including the need to provide relief for taxpayers in the context of the pandemic.  
7 In pertinent part, by temporarily restricting the imposition of penalty and interest on 2019  
8 income taxes, the Legislature effectively extended the payment deadline of 2019 personal  
9 income taxes a full year until April 15, 2021. *See* H.B. 6, §4 (A)(1), 55th Leg., 1st Special Sess.  
10 (N.M. 2020)<sup>6</sup>, available at <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf>.

11 As the Department repeatedly emphasized, Mr. Cervantes voted in favor of the unanimously  
12 passed, bipartisan legislation.

13 In this case, pursuant to a separate federal extension, Taxpayers timely filed their 2019  
14 personal income tax return by the October 15, 2020 deadline for returns under extension.  
15 However, Taxpayers did not pay their outstanding State 2019 personal income tax liabilities by  
16 the extended April 15, 2021 deadline. Instead, Taxpayers paid their 2019 personal income tax  
17 liability on May 17, 2021. Because of that late payment, the Department assessed Taxpayers  
18 penalty and interest, which Taxpayers challenge in this protest.

19 ***Interest Properly Assessed.***

20 Imposition of interest is mandatory in all circumstances where a taxpayer fails to pay an  
21 outstanding tax by the deadline. Under NMSA 1978, Section 7-1-67 (A) (2013), interest “shall be  
22 paid” on taxes that are not paid on or before the date on which the tax is due. The word “shall”

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<sup>6</sup> Laws 2020, Chapter 4, Section 4 (1<sup>st</sup> S.S.).

1 indicates that the assessment of interest is mandatory and not discretionary. *See Marbob Energy*  
2 *Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

3 Nothing in Section 7-1-67 (A), even giving that section a broad reading, would permit  
4 abatement of accrued interest under the circumstances of the pandemic. Unlike the civil penalty  
5 statute, Section 7-1-67 is not conditioned on a taxpayer's negligence. Nor does Section 7-1-67  
6 provide any potential relief tied to a good faith mistake of law made on reasonable grounds or other  
7 nonnegligence factors. This is because, distinct from penalty provisions, the assessment of interest  
8 is not designed to punish taxpayers but to compensate the State for the time value of the unpaid  
9 tax revenue. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dept.*, 2012-  
10 NMCA-010, ¶ 23, 268 P.3d 48, 55. Because the tax was not paid when it was due, interest was  
11 properly assessed and that portion of Taxpayers protest is denied. Assessing interest makes the  
12 State whole for the lapse of payment of the 2019 personal income tax by the April 15, 2021  
13 extended deadline because the State will receive both the underlying tax liability plus the time  
14 value of the lost revenue in the form of interest for the period of time after the April 15, 2021  
15 deadline.

### 16 ***Evidentiary Issue Regarding Updated Interest Liability***

17 Relevant to the collection of interest in this protest is an evidentiary matter that developed  
18 late in the proceeding. Near the close of presentation of its case, the Department attempted to  
19 introduce Exhibit H, a formal statement of account not previously disclosed or provided to  
20 Taxpayers. Normally, an updated liability as of the date of the hearing is customary testimony at  
21 a protest proceeding when the underlying tax liability has not been paid. However, in this  
22 instance Taxpayers immediately paid the underlying assessed tax and the Department presented a  
23 formal document under the Secretary's name – a statement of account – not mailed or otherwise  
24 disclosed to Taxpayers before the hearing. The information contained in this proposed exhibit

1 was known to the Department since at least June 2021. Yet, the Department did not provide the  
2 information upon filing the hearing request, filings its answer, at either scheduling hearing, on its  
3 exhibit list, or by the prehearing exhibit exchange deadline. Under the applicable notice of  
4 hearing, the Department was required to provide any proposed exhibits ten days before the  
5 hearing, which it failed to do in this instance. This document could also not reasonably be  
6 construed as a rebuttal exhibit to which the deadline might not apply.

7         Such updated liability may still be admitted into the record if there is no particular  
8 prejudice. But in this case, the untimely disclosure of the exhibit is potentially prejudicial.  
9 According to their credible testimony, Taxpayers paid the underlying liability immediately upon  
10 receipt of the assessment by a check dated May 17, 2021, twelve days after the date listed on the  
11 notice of assessment. However, if Taxpayers' payment was made within ten days of the notice of  
12 assessment, no further interest or penalty would accrue pursuant to Section 7-1-67 (A)(3) and  
13 Section 7-1-69 (E). So if Taxpayers could establish that the Department mailed the notice of  
14 assessment just two days later than the date listed on the face of notice, they could possibly  
15 establish that their payment was made within the ten days of the assessment for purposes of the  
16 protections of Section 7-1-67 (A)(3) and Section 7-1-69 (E). In other words, given the two days  
17 difference, the date of actual mailing of the notice of assessment is an important fact in this  
18 protest that Taxpayers were not able to address given the late disclosure of the exhibit. Although  
19 Taxpayers would have needed to overcome the presumption of correctness on the date of mailing  
20 of the notice of assessment, the untimeliness of disclosure of the statement of account precluded  
21 them an opportunity to explore that issue<sup>7</sup> and potentially challenge the updated interest and

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<sup>7</sup> The Hearing Officer does not mean to imply or suggest that the Department in fact delayed mailing of the notice of assessment in any manner, only that Taxpayers were at least entitled to explore that possibility—even if improbable—before the hearing date and at the hearing given the closeness of the 10-day payment period calculation.



1 penalty calculation under Section 7-1-67 (A)(3) and Section 7-1-69 (E). Because the statement of  
2 account was not timely provided in the Department’s answer or by the exhibit exchange  
3 deadline, it is not admissible as evidence in this proceeding and the hearing officer will not  
4 consider the updated interest. *See e.g.* NMSA 1978, Section 7-1B-8 (2019) (hearing officer may  
5 disallow untimely answer that prejudices a taxpayer).

6 ***Civil Penalty is Abated.***

7 By making payment after the extended statutory deadline, Taxpayers were potentially  
8 subject to a civil negligence penalty under NMSA 1978 Section 7-1-69 (2007). Although the State  
9 did receive the full outstanding tax liability from Taxpayers, and will receive compensation for the  
10 time-value of money associated with the delayed payment in the form of interest discussed above,  
11 the question remains whether the State also is entitled to the additional punitive civil negligence  
12 penalty under the circumstances of the pandemic. *See GEA*, 2012-NMCA-010, ¶ 23 (purpose of  
13 penalty is to encourage timely payment and punish untimely payment).

14 When a taxpayer fails to pay taxes due to the State because of negligence or disregard of  
15 rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69  
16 (2007) requires that

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

21 (emphasis added).

22 Again, under a plain language reading, the statute’s use of the word “shall” makes the imposition  
23 of penalty mandatory in all instances where a taxpayer’s actions or inactions meets the legal  
24 definition of “negligence” or otherwise disregards Department rules and regulations. *See Marbob*

1 *Energy Corp.*, ¶22. In that sense, the Department was compelled by statute to assess the penalty  
2 initially when it received Taxpayers' payment after the April 15, 2021 extended deadline.

3 Case law addressing the civil negligence penalty has relied on the Department's regulatory  
4 definition of negligence to define that term for purposes of Section 7-1-69. *See El Centro Villa*  
5 *Nursing Ctr. v. Taxation & Revenue Dept. of State of N.M.*, 1989-NMCA-070, ¶ 8, 108 N.M. 795,  
6 797, 779 P.2d 982, 984 (looking to regulatory definition of negligence to ascribe meaning to the  
7 statutory use of that term); *see also Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, ¶¶ 24-25, 114  
8 N.M. 784, 790-91, 845 P.2d 1238, 1244-45 (court looks to the controlling statutory, regulatory, or  
9 case law definition applicable to the time periods at issue). Regulation 3.1.11.10 NMAC defines  
10 negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and  
11 prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by  
12 taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness,  
13 erroneous belief or inattention." Taxpayers in this case specifically admitted they erroneously and  
14 mistakenly believed that the April 15, 2021 deadline had been extended further to May 17, 2021,  
15 which meets the definition of negligence under Regulation 3.1.11.10 (C) NMAC because of their  
16 "...erroneous belief..." Moreover, by not making timely payment by the April 15, 2021 extended  
17 deadline, Taxpayers met the regulatory definition of negligence under Regulation 3.1.11.10 (B)  
18 NMAC for their inaction (non-payment) when action (payment by the extended deadline) was  
19 otherwise required.

20 Nevertheless, despite their mistaken belief that led to inaction, Taxpayers argue for  
21 abatement of penalty under the mistake of law provision of Section 7-1-69 (B). Section 7-1-69 (B)  
22 provides a limited exception to civil negligence penalty: "[n]o penalty shall be assessed against a  
23 taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in  
24 good faith and on reasonable grounds." Related to the mistake of law provision, the Department

1 has provided guidance in Regulation 3.1.11.11 NMAC on the circumstances under which a taxpayer  
2 may be entitled to relief from penalty under Section 7-1-69. As Taxpayers argued in their opening  
3 remarks, the circumstances identified in 3.1.11.11 NMAC are not all encompassing. *See e.g.*  
4 *Hoffman v. New Mexico Taxation & Revenue Dep't*, No. A-1-CA-36399, 2019 WL 3765579, at  
5 ¶4 (N.M. Ct. App. July 18, 2019) (non-precedential<sup>8</sup>) (3.1.11.11 NMAC uses non-exclusive  
6 language that, in conjunction with the broad language of the statutory good faith, mistake of law,  
7 reasonable grounds provision, allows for penalty abatement in other circumstances not  
8 specifically listed). Because the regulation uses the phrase “may indicate,” the permissive  
9 language permits the Hearing Officer some discretion to determine that nonnegligence exists in  
10 situations which may not strictly fall within the eight enumerated examples. *See DeMichele v.*  
11 *Taxation & Revenue Department Motor Vehicle Div.*, 2015-NMCA-095, ¶ 11, 356 P.3d 523 (the  
12 word “may” used in a statute indicates discretion); *See also Albuquerque Bernalillo Co. Water*  
13 *Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 51, 148 N.M. 21, 229 P.3d 494 (“canons of  
14 statutory construction guide our interpretation of administrative regulations”).

15         The Department argues that since Taxpayers only cited the statutory good faith, mistake of  
16 law provision in their protest letter and failed to expressly cite Regulation 3.1.11.11 NMAC as a  
17 basis for potential relief, it would be inappropriate to consider any relief under that regulation.  
18 The Department’s argument is not persuasive because Taxpayers’ protest clearly identified that  
19 the legal and factual issue at protest was whether there were grounds to abate the statutory civil  
20 penalty. Taxpayers’ protest was sufficient for the purposes of Section NMSA 1978, Section 7-1-  
21 24 (B) (2019) because it identified the statutory provision in dispute, stated the grounds of the

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<sup>8</sup> While the Court of Appeals decision is non-precedential, it addressed the same statutory and regulatory language applicable here, making its legal observation insightful even if not technically controlling.

1 protest along with a summary of the evidence, and stated the affirmative relief sought of  
2 abatement of penalty.

3 Although the rules of civil procedure do not apply to this proceeding under NMSA 1978  
4 Section 7-1B-6 (D) (2) (2019), even if those more formal rules did arguably apply, Taxpayers'  
5 request for relief from civil penalty under Section 7-1-69 (B) was sufficient to give the  
6 Department and the tribunal a fair idea of Taxpayers' complaint and requested relief: abatement  
7 of penalty. *See Valles v. Silverman*, 2004-NMCA-019, ¶ 18, 135 N.M. 91, 97, 84 P.3d 1056,  
8 1062 (As to the adequacy of a complaint, the standard is one of notice. The complaint is  
9 sufficient when the allegations give the opposing party and the court a fair idea of the complaint  
10 and relief requested). In this protest, the Department was on notice that Taxpayers sought  
11 abatement of the assessed civil penalty in this protest under Section 7-1-69 (B)'s good faith,  
12 mistake of law provision.

13 Far from the surprise that the Department argued in closing, citing the specific statutory  
14 penalty abatement clause should have put the Department on clear notice that the proceeding  
15 would focus on whether there were grounds to abate that statutory civil penalty under Section 7-  
16 1-69 (B), including under the Department's own regulatory interpretation of the civil penalty  
17 statute, Regulation 3.1.11.11 NMAC. That regulation is presumed to be a proper interpretation of  
18 the civil penalty abatement statute, and as such is clearly relevant to determining whether there  
19 are grounds supporting abatement under the statute cited in Taxpayers' protest. *See* NMSA 1978  
20 § 9-11-6.2 (2015) (Department regulations are presumed proper implementation of the applicable  
21 law). *See also Chevron* 2006-NMCA-50, ¶16. Therefore, that regulation is implicated in this  
22 protest by Taxpayers' citation of Section 7-1-69 (B) and the Department cannot ignore its own  
23 regulatory guidance as to the meaning of that civil penalty statute by arguing that the protest did  
24 not specifically cite that regulation.

1 Regulation 3.1.11.11 (D) NMAC is particularly relevant to the facts of this protest. It states  
2 that penalty may be abated when

3 the taxpayer proves that the failure to pay tax or to file a return was  
4 caused by reasonable reliance on the advice of competent tax  
5 counsel or accountant as to the taxpayer's liability after full  
6 disclosure of all relevant facts; failure to make a timely filing of a  
7 tax return, however, is not excused by the taxpayer's reliance on an  
8 agent.

9 Even under this specific regulatory example of nonnegligence, the fact alone that a taxpayer  
10 hired a tax professional to handle their tax filings or obligations is insufficient grounds for relief.

11 *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070,

12 ¶14, 108 N.M. 795 (a taxpayer cannot “abdicate this responsibility [to learn of tax obligations]

13 merely by appointing an accountant as its agent in tax matters.”). Under New Mexico's self-

14 reporting tax system, “every person is charged with the reasonable duty to ascertain the possible

15 tax consequences” of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-

16 NMCA-127, ¶5, 90 N.M. 16. Generally, to implicate this regulatory relief provision, there must

17 be some element of meaningful consultation and discussion between a taxpayer and their tax

18 representative about their tax liabilities. *See e.g. C & D Trailer Sales v. Taxation and Revenue*

19 *Dep’t*, 1979-NMCA-151, ¶ 8-9, 93 N.M. 697, 604 P.2d 835 (penalty upheld where there was no

20 evidence that the taxpayer relied on “informed consultation and advice” in deciding not to pay

21 tax).

22 Within those limitations, Taxpayers still presented sufficient evidence to support

23 abatement of penalty under Regulation 3.1.11.11 (D) NMAC in conjunction with the good faith,

24 mistake of law provision of Section 7-1-69 (B) and the broader context of how the pandemic

25 altered deadlines and systems long taken for granted. Taxpayers and their accountant articulated

26 their long-standing pattern and practice of successfully preparing annual personal income tax

1 filings and payments in the previous 20-plus years of their professional engagement. Taxpayers  
2 would meet once or twice with their CPA near the end of the tax year to review their sources and  
3 amounts of income and estimate their potential final income tax liability. Based on those  
4 discussions, Taxpayers would set aside sufficient money in an investment account to pay that  
5 liability and Mr. Shaw, CPA would begin preparing the return and the request for an extension.  
6 As the deadline for payment approached, Mr. Shaw, CPA, had a pattern and practice of notifying  
7 Taxpayers of the pending deadline so that they could retrieve the funds from their investment  
8 account and bring a check to Mr. Shaw's firm for timely submission of that payment. This  
9 pattern and practice that Taxpayers and their accountant relied upon was prudent and successful  
10 for more than 20 years. This process involved the type of meaningful consultation, discussion of  
11 relevant facts, and planning generally needed to support a claim for abatement under 7-1-69 (B)  
12 and Regulation 3.1.11.11 (D) NMAC.

13         It was only within the context of the shifting deadlines of the pandemic that Taxpayers'  
14 system with their accountant broke down. Taxpayers timely filed their state and federal returns  
15 for tax year 2019 by October 2020. Although Mr. Cervantes may have been generally aware of  
16 the April 15, 2021 extended deadline at the time he voted on H.B. 6 some ten months before that  
17 deadline, as that deadline approached Mr. Cervantes credibly testified that Mr. Shaw, CPA, did  
18 not contact him in accord with their usual practice about the approaching payment deadline and  
19 the need to provide a check for payment.

20         The Department argued that there was conflicting testimony between Mr. Shaw and Mr.  
21 Cervantes on whether Mr. Shaw advised him of the April 15, 2021 deadline. However, the  
22 Hearing Officer did not find the testimony to necessarily be in direct, material conflict. Mr. Shaw  
23 initially advised Taxpayers of the April 15, 2021 extended deadline. However, the point in time  
24 Mr. Cervantes was testifying to was in March 2021, the critical period near the April 15, 2021

1 deadline, where the process in all previous years had been for Mr. Shaw or his firm to contact  
2 Taxpayers so that Taxpayers could cut a check from their account for the outstanding liability.  
3 On this point, the Hearing Officer found the testimony of Mr. Cervantes highly credible.

4 In conjunction with the absence of contact from his CPA as the April 15, 2021 deadline  
5 approached, Mr. Cervantes also noticed general news reports of a federal extension of tax  
6 deadlines to May 17, 2021, which Mr. Cervantes mistakenly concluded applied to the 2019  
7 personal income tax deadline and the corresponding state deadline, since those deadlines are  
8 usually congruent. Putting these two pieces together within the pandemic climate of constant  
9 changes and extensions, the Hearing Officer finds that Taxpayers' mistake of law was  
10 reasonable, made in good faith, and in reliance on their tax professional.

11 The statute and rules addressing personal income tax payment deadlines and civil  
12 negligence penalty were written for a normal time, not the extraordinary time presented by the  
13 COVID-19 pandemic. As Taxpayers persuasively argued, 2020 and 2021 were unlike any other  
14 years in that the federal and state deadlines were out of sync. Almost every taxpayer in the  
15 country understands and expects congruence between federal and state personal income tax  
16 deadlines, almost always occurring on or about April 15<sup>th</sup> of the following year (or in October  
17 under the extension deadline). Unlike all other years, that congruence of federal and state tax  
18 deadlines was lost in 2020 and 2021 through a well-intentioned but potentially confusing series  
19 of extensions designed to help taxpayers cope with the pandemic. As Taxpayers argued, it would  
20 be ironic to punish taxpayers based on unintended confusion related to the incongruence of the  
21 various state and federal tax deadlines when the purpose of the extensions was to assist taxpayers  
22 to manage during the pandemic.

23 Some of these extensions were mandated by statute, like H.B. 6. To that extent, the  
24 Department's initial argument that Taxpayers could not have made a reasonable mistake of law

1 in light of Mr. Cervantes’s previous vote on that legislation 10 months before does have some  
2 initial strength. But that initial strength weakens over time, because as Taxpayers argued, other  
3 reasonable and justifiable extensions occurred by executive directive without specific legislative  
4 action or intervention, not to mention the evolving nature and general confusion over shifting  
5 guidance and deadlines throughout the intervening 10 months of the pandemic. For example, the  
6 Department extended the 2020 personal income tax report and payment deadline through the  
7 March 30, 2021 press release, a year for which the Legislature had not expressly passed any new  
8 extension. That does not mean that the Department’s tax year 2020 extension was improper (it  
9 was within the Department’s existing statutory authority to do so and highly reasonable under the  
10 circumstances), but it does illustrate that extensions occurred regardless of new legislative action  
11 or intervention.

12           Beyond the specific question about whether the Department’s 2020 extension was related  
13 to new legislative action or whether its press releases clearly communicated that the extension  
14 only applied to tax year 2020 (which it certainly did), is the broader context of the pandemic in  
15 2020 and 2021. The time period involved a great deal of uncertainty, changes to the expected  
16 status quo, and a new fluidity, where traditional deadlines and standards in all areas of life—  
17 including taxation—changed frequently and sometimes with short notice. In the cacophony of  
18 generic news about changes to the status quo, even a sophisticated person could reasonably  
19 misconstrue an extension of personal income tax deadline for tax year 2020 to the outstanding  
20 2019 tax liability that normally would be due in calendar year 2020. Thus, even if Mr. Cervantes  
21 was aware of the deadline 10 months before when he voted on H.B. 6, intervening events could  
22 lead him to a good faith but a mistaken belief that the Department had extended the 2019  
23 payment deadline even beyond what the legislation specified. Moreover, whether he voted on  
24 H.B. 6 or whether the press releases made clear that the extension only applied to the 2020 tax



1 year, there remains the applicability of Regulation 3.1.11.11 (D) given that the evidence  
2 established a reasonable reliance on Taxpayers' accountant to provide final notice of the  
3 payment deadline, as had been the practice over the past 20 years.

4 The Department argued that Taxpayers failed to establish nonnegligence under their duty  
5 to ascertain tax consequences ascribed to them in *Tiffany Construction Co.*, 1976-NMCA-127, ¶5,  
6 failed to have a meaningful consultation with Mr. Shaw, CPA, about whether the extension applied  
7 under *C & D Trailer Sales*, 1979-NMCA-151, ¶ 8-9, and are unable to escape penalty merely by  
8 pointing out their reliance on their tax accountant under *El Centro Villa Nursing Center*, 1989-  
9 NMCA-070, ¶14. However, the Hearing Officer finds all three cases distinguishable from the  
10 unique confluence of events that occurred during the pandemic and the circumstances of this  
11 protest.

12 Taxpayers here are not seeking to abdicate their responsibility by their appointment of  
13 Mr. Shaw, CPA. Instead, as discussed throughout this decision, Taxpayers detailed a long history  
14 of meaningful engagement with Mr. Shaw, CPA, about their tax responsibilities in each year and  
15 developed a system that included final communication of the payment deadline. This system  
16 consistently worked for 20 some years. It is true that *El Centro Villa Nursing Center* did involve  
17 the failure of an accounting system that had previously worked, but that failure occurred during  
18 an ordinary period where the accountant and taxpayer did not detect or communicate about  
19 unexpected new income streams. *See id.* Unlike the *El Centro* system that failed in ordinary  
20 times, only within the context of the extraordinary pandemic and its shifting reporting and  
21 payment deadlines, did Taxpayers' system and communication with their accountant breakdown.  
22 That failure was hardly unique or particularly the result of their own negligence (at least as that

1 term is ordinarily understood<sup>9</sup>), as many long-term successful systems also buckled under the  
2 weight of the pandemic. If the good faith, mistake of law provision and the accompanying  
3 nonnegligence factors under 3.1.11.11 NMAC cannot apply in the extraordinary circumstances  
4 of a once-in-a-century pandemic and the facts of either of the protests decided today, it is unclear  
5 when they might ever apply and what purpose those provisions serve.

6 Before the two decisions issued today, the undersigned Hearing Officer has only  
7 considered abatement of penalty in one previous COVID-19 related case, *In the Matter of the*  
8 *Protest of XTO Energy Inc. To Assessment Issued Under Letter Id No. L1185855152 v. New*  
9 *Mexico Taxation and Revenue Department*, 2021 WL 6112848 (non-precedential) (hereinafter  
10 *XTO*). In that case, the undersigned Hearing Officer came very close to abating penalty under  
11 Regulation 3.1.11.11 (B) NMAC but declined to do so because affirmative evidence in that  
12 record indicated that the taxpayer had previously secured the services of another employee to  
13 prepare and file the tax return in a previous month when the employee responsible for the tax  
14 filing was ill with COVID-19. *See XTO*, p.11:16-13:5, p. 14:5-20, 2021 WL 6112848, at \*7-\*9.  
15 This case is clearly distinguishable in multiple ways. First, there is no such affirmative evidence  
16 in this protest. Second, this case involves untimely payment of the tax while the *XTO* case  
17 involved the untimely filing of a return. Under Regulation 3.1.11.11 (D) NMAC, appointment of  
18 a tax professional does not excuse the untimely filing of a return but does apply to an untimely  
19 payment of the tax at issue in this protest.

20 The undersigned Hearing Officer previously applied Regulation 3.1.11.11 (B) NMAC to  
21 abate penalty when there was a sudden onset of an emergency medical condition, even though  
22 the taxpayer in that case presented little evidence about whether it could have procured the

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<sup>9</sup> Black's Law Dictionary defines "ordinary negligence" as "lack of ordinary diligence; the failure to use ordinary care." Black's Law Dictionary 1198 (10th ed. 2009).

1 services of another to file and pay the tax. *See In the Matter of the Protest of New Mexico Food*  
2 *Distributors Inc. et al.*, Decision and Order No. 18-31, 2018 WL 5486263 (October 18, 2018;  
3 non-precedential). The Hearing Officer's decision to abate the penalty in *New Mexico Food*  
4 *Distributors* was based on the reasoning that some medical situations are so severe that there is  
5 little time, opportunity, or even a reasonable priority in the context of the medical situation for a  
6 taxpayer to arrange or seek the services of a third party to assist with filing of a return.

7         Within the context of a once-in-a-century pandemic that reshaped all aspects of society in  
8 short order, the Hearing Officer finds, similar to the decision in *New Mexico Food Distributors*,  
9 that the nonnegligence factors of Regulation 3.1.11.11 NMAC must be read and applied broadly  
10 in order to avoid unreasonable, unjust, or absurd results. *See e.g. City of Eunice v. State Taxation*  
11 *& Revenue Dep't*, 2014-NMCA-085, ¶8 (provisions not to be read to render their application absurd,  
12 unreasonable, or unjust); *see also AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶  
13 9, 284 P.3d 1118, 1120 (rules of statutory construction also apply to the administrative code). If the  
14 plain language interpretation of a statute or regulation would lead to an unreasonable or absurd  
15 result, it is necessary to look beyond the plain meaning of the statute or regulation to effectuate  
16 the legislative intent and purpose. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-  
17 NMSC-036, ¶11, 146 N.M. 473. Recent decisions of the Court of Appeals have reemphasized  
18 the importance of searching for and effectuating legislative intent. *See High Desert Recovery,*  
19 *LLC, v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-\_\_\_\_, ¶8, 2021 WL 5815749, (No.  
20 A-1-CA-37852, N.M. Ct. App., Dec. 6, 2021) (quoting *Sacred Garden, Inc. v. New Mexico*  
21 *Taxation & Revenue Dep't*, 2021-NMCA-038, ¶5, ¶15-16, 495 P.3d 576, *cert. quashed* (No. S-1-  
22 SC-38164, February 23, 2022)); *see also Golden Services Home Health & Hospice v. Taxation*  
23 *& Revenue Dep't*, No. A-1-CA-36987, 2020 WL 2045956 (Unpublished, non-precedential  
24 opinion, N.M. Ct. App. Apr. 20, 2020). Although those cases dealt with arguably ambiguous

1 statutory language, the logic of this recent line of cases would seem equally to extend to an  
2 instance where a narrow, plain reading of the statute and accompanying regulations would lead  
3 to an unreasonable result in the context of the pandemic, a result that does little to further  
4 legislative intent of the civil penalty provision.

5 In *GEA*, 2012-NMCA-010, ¶ 23, the Court of Appeals noted that the purpose of the civil  
6 negligence penalty provision is punitive in nature, designed to encourage timely payment of tax and  
7 punish untimely payment. *See also Hi-Country Buick GMC, Inc. v. Taxation & Revenue Dept. of*  
8 *State*, 2016-NMCA-027, ¶ 22, 367 P.3d 862, 868 (penalty is effectively punitive in nature and in  
9 some circumstances should not be imposed on those who bore no responsibility for the unpaid tax).  
10 Imposing the civil negligence penalty for the untimely payment of taxes in circumstances  
11 attributable to a once-in-a-lifetime global health pandemic—particularly when the state is otherwise  
12 made whole by payment of the underlying tax liability plus interest for the delayed payment—  
13 serves little effective deterrent value traditionally served by a punitive punishment. Taxpayers and  
14 their accountant had in place an effective system of tax reporting and payment that only broke down  
15 within the context of the confusing deadline extensions in the midst of the continuing, once-in-a-  
16 century global pandemic. Punishment in this extraordinary once-in-a-century pandemic  
17 circumstance does little to encourage timely payment or punish untimely payment in normal times  
18 and thus abatement of that penalty for pandemic-related circumstances does not contravene the  
19 legislative purpose of the civil negligence provision. *See GEA*, ¶ 23, citing *N. Slope Borough v.*  
20 *Sohio Petroleum Corp.*, 585 P.2d 534, 546 (Alaska 1978) (abating late payment penalty is logical  
21 and not contrary to the punitive component of the penalty provision when a taxpayer bears no  
22 responsibility for misconduct).

23 Today, in conjunction with another decision and order *In the Matter of the Protest of*  
24 *Neal J. and Catherine A. Van Berg*, D&O No. 22-18 (Aug. 8, 2022), the undersigned Hearing

1 Officer finds that the extraordinary circumstances of the COVID-19 pandemic generally require  
2 a broad reading and liberal application of the statutory and regulatory authority for abatement of  
3 penalty in COVID-19 related cases. Such broad construction gives the Department flexibility in  
4 addressing unintended consequences of the pandemic largely beyond the control of taxpayers  
5 and prevents unreasonable, absurd, and unjust results in the context of the pandemic. Moreover,  
6 such broad construction in the context of the pandemic is not contrary to the legislative purpose  
7 of the penalty provision of encouraging timely payment and punishing untimely payment in  
8 normal periods. There is little deterrent value in imposing penalty in circumstances occurring in  
9 a once-in-a-century/lifetime pandemic. The State, under the circumstances of the pandemic and  
10 this case, was made whole in that it received the outstanding, underlying tax liability and will  
11 under this decision also receive the lost time value of money for the delayed payment in the form  
12 of interest. Under these specific circumstances of this case in the context of the pandemic, there  
13 is no additional value, encouragement, or useful punishment in the State collecting a civil  
14 negligence penalty. As such, Taxpayers' protest as to the assessment of a civil negligence  
15 penalty is compelling under 3.1.11.11 (D) NMAC and Section 7-1-69 (B). That portion of the  
16 protest related to civil negligence penalty IS GRANTED.

17 However, there is no similar nonnegligence provision that allows for abatement of  
18 interest under Section 7-1-67. Therefore, the protest regarding the assessed interest IS DENIED.

### 19 CONCLUSIONS OF LAW

20 A. Taxpayers filed a timely, written protest to the Department's assessment, and  
21 jurisdiction lies over the parties and the subject matter of this protest.

22 B. The hearing was timely set and held within 90 days of the filing of the hearing  
23 request and accompanying Department answer under NMSA 1978, Section 7-1B-8 (2019).

1 C. Taxpayers' 2019 personal income tax return was timely filed, however payment of  
2 the 2019 personal income tax liability did not occur until after the extended April 15, 2021 deadline  
3 articulated in H.B. 6, §4, 55th Leg., 1st Special Sess. (N.M. 2020), *available at*  
4 <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf>.

5 D. Under the mandatory "shall" language contained in Section 71-1-69, the  
6 Department was required to assess Taxpayers a civil negligence penalty because of their  
7 erroneous belief and inaction in not timely making payment of the 2019 personal income tax due by  
8 the extended deadline, meeting the definition of civil negligence under Regulation 3.1.11.10  
9 NMAC. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146  
10 N.M. 24, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear  
11 indication to the contrary).

12 E. Nevertheless, within the context of the a once-in-a-century pandemic, Taxpayers are  
13 entitled to abatement of the civil negligence penalty under Regulation 3.1.11.11 (D) NMAC and  
14 Section 7-1-69 (B) because the evidence showed that Taxpayers made a mistake of law, in good  
15 faith, and based on reasonable grounds and because of their reasonable reliance on their CPA to  
16 continue their previously established, successful payment system, which did not occur in light of the  
17 extensions made during the pandemic.

18 F. There is no ability to abate interest under NMSA 1978, Section 7-1-67, as interest  
19 is designed to compensate for the time value of money from the original due date until the date  
20 of the untimely payment.

21 G. Taxpayer overcame the presumption of correctness as to the assessed civil  
22 negligence penalty but did not overcome the presumption of correctness as to interest under NMSA  
23 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3(X) (2013), and Regulation 3.1.6.13  
24 NMAC. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428; *see also N.M. Taxation*

1 & Revenue Dep't v. Casias Trucking, 2014-NMCA-099, ¶8; and MPC Ltd. v. N.M. Taxation &  
2 Revenue Dep't, 2003 NMCA 21, ¶13, 133 N.M. 217.

3 For the foregoing reasons, the Taxpayers protest **IS PARTIALLY GRANTED AND**  
4 **PARTIALLY DENIED**. The Department is ordered to abate the civil negligence penalty and  
5 Taxpayers are ordered to pay the assessed interest.

6 DATED: August 15, 2022.



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7  
8 Brian VanDzen  
9 Chief Hearing Officer  
10 Administrative Hearings Office  
11 P.O. Box 6400  
12 Santa Fe, NM 87502

13 **NOTICE OF RIGHT TO APPEAL**

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

1 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
2 statement from the appealing party. *See* Rule 12-209 NMRA.

3 **CERTIFICATE OF SERVICE**

4 On August 15, 2022, a copy of the foregoing Decision and Order was submitted to the  
5 parties listed below in the following manner:

6 *First Class Mail and Email*

*First Class Mail and Email*

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9 *INTENTIONALLY BLANK*