

1 2019 personal income tax), C (Notice of Assessment) and D (updated spreadsheet of liabilities)
2 were admitted into the record without objection.

3 In quick summary and substantively similar to another decision and order issued today¹, this
4 protest involves Taxpayers' request for abatement of penalty and interest on their untimely paid
5 2019 personal income taxes because payment was due at the worst part of the COVID-19 pandemic
6 and because of personal financial hardship related to the pandemic's impact on the economy.
7 Ultimately, after making findings of fact and discussing the issue in more detail throughout this
8 decision, the Hearing Officer partially finds for Taxpayers in that the imposition of civil negligence
9 penalty should be abated pursuant to NMSA 1978 Section 7-1-69 (B) (2007) and Regulation
10 3.1.11.11 (B) NMAC under the circumstance of the extraordinary, once-in-a-century COVID-19
11 pandemic. However, the protest to the remaining portions of the assessment—the interest and the
12 estimated tax underpayment penalty— must be denied and those totals remain due and owing. IT IS
13 DECIDED AND ORDERED AS FOLLOWS:

14 **FINDINGS OF FACT**

15 1. On May 5, 2021, under letter id. no. L0988256688, the Department issued a
16 Notice of Assessment of Taxes and Demand for Payment to Taxpayers for \$3,407.00 in personal
17 income tax, \$681.40 in civil negligence penalty, \$80.52 in interest, and \$2.05 in estimated tax
18 underpayment penalty for a total assessment of \$4,170.97 for the personal income tax reporting
19 period ending on December 31, 2019. [Administrative Record, Hearing Request Packet,
20 Assessment; Dept. Ex. C].

21 2. On July 14, 2021, Taxpayers filed a formal protest of the Department's
22 assessment. In the protest, Taxpayers asked for forgiveness of the assessed penalty and interest

¹ See *In the Matter of the Protest of Joseph & Jennifer Cervantes*, D&O No. 22-17 (Aug. 8, 2022).

1 because the amount due occurred during the worst part of the COVID-19 crisis and due to
2 personal financial hardship at a time when they were receiving financial assistance from the
3 state. [Administrative Record, Hearing Request Packet, Protest and Department Answer, p.1 ¶3].

4 3. On November 30, 2021, the Department acknowledged receipt of Taxpayers’
5 protest. [Administrative Record, Hearing Request Packet, Acknowledgement Letter].

6 4. On May 17, 2021, the Department filed a request for hearing on the protest with
7 the Administrative Hearings Office, along with its formal answer to Taxpayers protest.
8 [Administrative Record, Hearing Request Packet, Request for Hearing].

9 5. In its May 17, 2021, answer to the protest, the Department stated that Taxpayers
10 were seeking forgiveness of penalty and interest on two grounds: “Taxpayers allege [in their
11 protest] that amounts due occurred during the worst part of the COVID-19 pandemic *and* due to
12 personal financial hardship...” [Administrative Record, Department Answer, p.1 ¶3, *emphasis*
13 *added*].

14 6. Taxpayers are a married couple that filed their personal income tax returns as
15 “Married filing jointly” during the relevant times. [Dept. Ex. B-001; Taxpayer Ex. 1-5].

16 7. On April 9, 2020, Taxpayers timely filed their New Mexico 2019 personal income
17 tax return but did not make payment of the outstanding 2019 personal income tax liability at that
18 time. [Dept. Ex. B-001; testimony of Mr. Pacheco].

19 8. The Hearing Officer took administrative notice during the hearing, without
20 objection, that the worldwide COVID-19 pandemic impacted New Mexico acutely beginning in
21 early March 2020 when the first public health orders were issued. The COVID-19 pandemic
22 continued significantly through the relevant time frames at issue in this protest, through July
23 2021.

1 9. The New Mexico Legislature convened a special session to address the impact of
2 the COVID-19 pandemic in June 2020. During that first special session in 2020, the Legislature
3 provided specific relief to taxpayers in certain tax programs from imposition of penalty and
4 interest. The legislation effectively extended the 2019 personal income tax payment deadline to
5 April 15, 2021 by shielding taxpayers from assessment of interest or penalty through that date.
6 *See* H.B. 6, §4, 55th Leg., 1st Special Sess. (N.M. 2020), *available* at
7 <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf>².

8 10. Catherine Van Berg is an artist who sells her work in galleries. [Testimony of
9 Catherine Van Berg].

10 11. Because of the economic impact of the pandemic, Catherine Van Berg was unable
11 to sell her art for extended periods in 2020 and 2021. [Testimony of Catherine Van Berg].

12 12. Neil Van Berg sells stereos and also was impacted significantly by the pandemic,
13 as his business carefully complied with the various public health orders during 2020 and 2021.
14 [Testimony of Catherine Van Berg].

15 13. Because of their inability to generate income during the COVID-19 pandemic,
16 Catherine Van Berg received Medicaid from April 1, 2020, through the relevant period at issue
17 in the protest. [Testimony of Catherine Van Berg; Taxpayer Ex. #1-2].

18 14. Because of their inability to generate income during the COVID-19 pandemic,
19 Taxpayers received food assistance through August 31, 2021. [Testimony of Catherine Van
20 Berg; Taxpayer Ex.'s #1-3 and #1-4].

² Laws 2020, Chapter 4, Section 4 (1st S.S.).

1 15. During calendar year 2020, Taxpayers generated no income and in fact reported a
2 taxable loss for that subsequent 2020 tax year³. [Testimony of Catherine Van Berg; Taxpayer Ex.
3 #1-5].

4 16. Taxpayers stated that they were of an age of potential increased risk for severe
5 COVID-19. [Testimony of Neil Van Berg].

6 17. Catherine Van Berg became ill with COVID-19 around January and February
7 2021⁴. [Testimony of Catherine Van Berg].

8 18. Catherine Van Berg was briefly hospitalized with COVID-19 around day three of
9 her illness. [Testimony of Catherine Van Berg].

10 19. Catherine Van Berg was given monoclonal antibodies to treat her case of COVID-
11 19, which helped her recover. [Testimony of Catherine Van Berg].

12 20. Catherine Van Berg remained ill with COVID-19 for 4-6 weeks during the winter
13 of 2021 before she could resume more normal activity. [Testimony of Catherine Van Berg].

14 21. Neil Van Berg became ill with COVID-19 in the spring of 2021, shortly after
15 receiving his second booster shot on April 8, 2021, and visiting his elderly mother who was
16 hospitalized in Albuquerque. [Testimony of Neil Van Berg].

17 22. Neil Van Berg, as a type-1 diabetic, became significantly ill with COVID-19, was
18 hospitalized, received monoclonal antibodies, and remained significantly ill for three months.
19 [Testimony of Catherine & Neil Van Berg].

³ The tax period in dispute is 2019. Typically, personal income taxes are reported and paid on or about April 15th of the subsequent calendar year, which is presumably why Taxpayers pointed out their low income in the subsequent calendar year even though that is not the tax year in dispute.

⁴ Ms. Van Berg initially testified that she became ill in January 2020. However, that date was unlikely because in January 2020, there were very few known COVID-19 cases anywhere in the country and no known cases in New Mexico. Additionally, monoclonal antibodies were not widely known or available as a potential treatment in January 2020. However, subsequent follow-up questions and testimony made clear that she in fact became ill in early 2021 rather than 2020, which is far more consistent with the timeframe of when COVID-19 first impacted New Mexico as well as the widespread availability of the monoclonal antibodies for treating that condition.

1 23. Taxpayers were unable to pay their outstanding 2019 personal income tax liability
2 by April 15, 2021, because of how the COVID-19 pandemic impacted the country and how it
3 affected Taxpayers economically and individually. [Testimony of Catherine Van Berg].

4 24. In testimony and closing argument, and contrary to the other record evidence,
5 Neil Van Berg limited Taxpayers' request for relief to their lack of income related to the
6 pandemic's economic climate rather than extended COVID-19 illnesses each had suffered
7 beginning in January 2021 and extending through the April 15, 2021, extended payment
8 deadline. [Testimony of Neil Van Berg].

9 25. When Taxpayers received their federal COVID-19 relief funds in 2021, they used
10 that money to pay their outstanding New Mexico 2019 personal income tax liability. [Testimony
11 of Catherine Van Berg].

12 26. On July 13, 2021, Taxpayers paid \$3,407.00 in 2019 personal income tax. [Dept.
13 Ex. A-001; testimony of Taxpayers; testimony of Mr. Pacheco].

14 27. Mr. Pacheco is a protest auditor with the Department. In that capacity, Mr.
15 Pacheco reviews protest cases and decides how to proceed on the protest. Mr. Pacheco was
16 assigned this case and became familiar with Taxpayers' protest. [Testimony of Mr. Pacheco].

17 28. After reviewing Taxpayers payment history in GenTax⁵, Mr. Pacheco concluded
18 that Taxpayers' 2019 personal income tax liability payment was made after the April 15, 2021
19 extended deadline under H.B. 6 for avoidance of penalty and interest.

20 29. As of the date of hearing, Mr. Pacheco calculated the updated liabilities for
21 penalty (\$681.40) and interest (\$101.52), plus the \$2.05 underpayment penalty, for an updated,
22 alleged remaining liability of \$784.97. [Testimony of Mr. Pacheco; Dept. Ex. D-001].

⁵ GenTax is the Taxation and Revenue Department's computer tax data management and record system.

1 **DISCUSSION**

2 Taxpayers in this protest seek abatement of the assessed penalty and interest for their late
3 payment of 2019 New Mexico personal incomes taxes because payment was due at the worst
4 part of the COVID-19 pandemic and because of economic hardship attributable to the COVID-
5 19 pandemic. While Taxpayers focused their hearing presentation and argument on their inability
6 to pay the liability by the April 15, 2021, extended deadline, their protest letter referenced that in
7 addition to economic hardship, the payment deadline occurred at the worst part of the pandemic.
8 The Department acknowledged those two grounds for the protest in its answer. The evidence at
9 hearing indeed showed that the extended payment deadline occurred at the worst part of the
10 pandemic for Taxpayers: both the Van Bergs were directly impacted by acute COVID-19
11 illnesses at various extended periods from January 2021 through June 2021, the period
12 surrounding the April 15, 2021 extended payment deadline and their subsequent untimely
13 payment on July 13, 2021. Given the broader context of the pandemic and the illnesses that
14 impacted Taxpayers around the critical period around the extended payment deadline, the
15 Hearing Officer finds grounds to abate the assessed civil penalty in this case under Regulation
16 3.1.11.10 (B) NMAC. However, nothing allows abatement of interest and the underpayment
17 penalty, and those portions of the assessment remain due and owing.

18 ***Presumption of Correctness.***

19 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
20 presumed correct. Consequently, Taxpayers have the burden to overcome the assessment. *See*
21 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the
22 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*
23 NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of
24 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and

1 interest. See *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50,
2 ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be
3 given substantial weight). Accordingly, it is Taxpayers' burden to present some countervailing
4 evidence or legal argument to show that they are entitled to an abatement, in full or in part of the
5 tax, penalty, and interest, of the assessment issued against them. See *N.M. Taxation & Revenue*
6 *Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. When a taxpayer presents
7 sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the
8 assessment is correct. See *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133
9 N.M. 217.

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

11 The tax program at dispute in this protest is personal income tax, governed by the Income
12 Tax Act under NMSA 1978, Section 7-2-1 through 39. Unless otherwise exempted by law, a tax is
13 imposed "upon the net income of every" New Mexico resident. NMSA 1978, § 7-2-3 (1981).
14 NMSA 1978, Section 7-2-12 (2016) requires any resident or person deriving income from New
15 Mexico to file a state income tax return. Like many states, the calculation of New Mexico's
16 personal income tax liability begins with a taxpayer's adjusted gross income as reported to the
17 IRS. See NMSA 1978, § 7-2-2 (A) (2010); See also *Holt v. N.M. Dep't of Taxation & Revenue*,
18 2002- NMSC-34, ¶23, 133 N.M. 11 ("calculation of the taxpayers' state income tax is based upon
19 their adjusted gross income...on their federal return."). Under Section 7-2-12, the required tax
20 return and any amount of tax due under the return are due on or before the date which the federal
21 income tax return is due, which is typically April 15th of the next calendar year⁶. Thus, the

⁶ In some years, depending on whether April 15th in that calendar year falls on a weekend or a federal holiday, the traditional April 15th 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 and payments are generally due on April 15th of the following year.

1 personal income taxes for the reporting period ending on December 31, 2019, would have
2 normally been due on or before April 15, 2020.

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

19 Long understood and traditional rules of taxation—like the traditional April 15th personal
20 income tax deadline—also yielded to the pressures of the pandemic. The New Mexico
21 Legislature convened at a special session in June 2020 to address some of the consequences of
22 the pandemic, including the need to provide relief for taxpayers in the context of the pandemic.
23 In pertinent part, by temporarily restricting the imposition of penalty and interest on 2019
24 income taxes, the Legislature effectively extended the payment deadline of 2019 personal

1 income taxes a full year until April 15, 2021. *See* H.B. 6, §4 (A)(1), 55th Leg., 1st Special Sess.
2 (N.M. 2020)⁷, available at <https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf>.

3 In this case, Taxpayers timely filed their 2019 personal income tax return on April 9,
4 2020. However, Taxpayers did not pay their outstanding 2019 personal income tax liabilities by
5 the extended 2021 deadline and instead finally paid their 2019 personal income taxes some three
6 months later on July 13, 2021. Because of that late payment, the Department assessed Taxpayers
7 penalty, estimated payment underreporting penalty, and interest, all which Taxpayers challenge
8 in this protest.

9 ***Interest Properly Assessed.***

10 Imposition of interest is mandatory in all circumstances where a taxpayer fails to pay an
11 outstanding tax by the deadline. Under NMSA 1978, Section 7-1-67 (A) (2013), interest “shall be
12 paid” on taxes that are not paid on or before the date on which the tax is due. The word “shall”
13 indicates that the assessment of interest is mandatory and not discretionary. *See Marbob Energy*
14 *Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

15 Nothing in Section 7-1-67 (A), even giving that section a broad reading, would permit
16 abatement of accrued interest under the circumstances of the pandemic. Unlike the civil penalty
17 statute, Section 7-1-67 is not conditioned on a taxpayer’s negligence. Nor does Section 7-1-67
18 provide any potential relief tied to a good faith mistake of law made on reasonable grounds or other
19 nonnegligence factors. This is because, distinct from penalty provisions, the assessment of interest
20 is not designed to punish taxpayers but to compensate the State for the time value of the unpaid
21 tax revenue. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dept.*, 2012-
22 NMCA-010, ¶ 23, 268 P.3d 48, 55. Because the tax was not paid when it was due, interest was

⁷ Laws 2020, Chapter 4, Section 4 (1st S.S.).

1 properly assessed and that portion of Taxpayers protest is denied. Assessing interest makes the
2 State whole for the lapse of payment of the 2019 personal income tax by the April 15, 2021
3 extended deadline because the State will receive both the underlying tax liability plus the time
4 value of the lost revenue in the form of interest for the period of time after the April 15, 2021
5 deadline.

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 eventually received the full outstanding tax liability from Taxpayers, and will receive compensation
10 for the time-value of money associated with the delayed payment in the form of interest discussed in
11 the previous section, the question remains whether the State also is entitled to the additional punitive
12 civil negligence penalty under the circumstances of the pandemic that directly impacted these
13 Taxpayers. *See GEA*, 2012-NMCA-010, ¶ 23 (purpose of penalty is to encourage timely payment
14 and punish untimely payment).

15 When a taxpayer fails to pay taxes due to the State because of negligence or disregard of
16 rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69
17 (2007) requires that

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

22 (emphasis added).

23 Again, under a plain language reading, the statute’s use of the word “shall” makes the imposition
24 of penalty mandatory in all instances where a taxpayer’s actions or inactions meets the legal
25 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 As will be addressed in more detail, the Hearing Officer has some general concern about
4 whether Taxpayers failure to timely pay the outstanding liability amounted to negligence, as that
5 term is commonly understood⁸, in light of the circumstances of the pandemic that fundamentally
6 altered any concept of ordinary diligence and care. However, case law addressing the civil
7 negligence penalty has relied on the Department's broader regulatory definition of negligence to
8 define that term for purposes of Section 7-1-69. *See El Centro Villa Nursing Ctr. v. Taxation &*
9 *Revenue Dept. of State of N.M.*, 1989-NMCA-070, ¶ 8, 108 N.M. 795, 797, 779 P.2d 982, 984
10 (looking to regulatory definition of negligence to ascribe meaning to the statutory use of that term);
11 *see also Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, ¶¶ 24-25, 114 N.M. 784, 790-91, 845
12 P.2d 1238, 1244-45 (court looks to the controlling statutory, regulatory, or case law definition
13 applicable to the time periods at issue). Regulation 3.1.11.10 NMAC defines negligence in three
14 separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which
15 reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where
16 action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous
17 belief or inattention."

18 Given the circumstances of the pandemic that impacted every person, taxpayer, and every
19 business in this country regardless of their level of care, knowledge, or understanding of tax law, the
20 Hearing Officer expressly finds that Taxpayers did not meet the regulatory definition of negligence
21 under 3.1.11.10 (A) NMAC. No person or business, regardless of their degree of prudence,
22 planning, or caution, could have planned for, accounted for, or anticipated every consequence of a

⁸ 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 once-in-a-century pandemic. For these same reasons, it cannot be said that Taxpayers were
2 negligent under Regulation 3.1.11.10 (C) NMAC because their delay in paying the 2019 personal
3 income taxes by the extended April 15, 2021, deadline was not due to “inadvertence, indifference,
4 thoughtlessness, carelessness, erroneous belief or inattention” but to the unforeseen and
5 uncontrollable health and economic circumstances of the pandemic that directly impacted them.
6 Again, the common understanding of negligence, which most closely aligns with these two
7 regulatory provisions, simply does not apply to the facts of this protest in the context of the
8 pandemic. However, a broad catch-all provision contained in the regulatory definition—inaction
9 when action is required—does apply to the facts of this case: by not making timely payment by the
10 April 15, 2021 extended deadline, Taxpayers met the technical regulatory definition of negligence
11 under Regulation 3.1.11.10 (B) NMAC for their inaction (non-payment) when action (payment by
12 the extended deadline) was otherwise required.

13 Nevertheless, there still are potential grounds for abatement of a civil negligence penalty.
14 One ground for abatement is found in statute. Section 7-1-69 (B) provides a limited exception to
15 civil negligence penalty: “[n]o penalty shall be assessed against a taxpayer if the failure to pay an
16 amount of tax when due results from a mistake of law made in good faith and on reasonable
17 grounds.” Related to the mistake of law provision, the Department has provided guidance under
18 Regulation 3.1.11.11 NMAC on what circumstances where a taxpayer may be entitled to relief from
19 penalty under Section 7-1-69. Of particular relevance to the facts of this protest is Regulation
20 3.1.11.11 (B) NMAC, which states that penalty may be abated when

21 the taxpayer, disabled because of injury or prolonged illness,
22 demonstrates the inability to prepare a return and make payment
23 and was unable to procure the services of another person to prepare
24 a return because of the injury or illness.

1 The Department makes two arguments against application of this regulation. First, the
2 Department cites Neil Van Berg's statement at the hearing that, because Taxpayers were asking for
3 relief on economic grounds rather than because of their illnesses and the protest letter did not
4 specifically cite the regulation, no basis exists as part of this protest to consider Regulation
5 3.1.11.11 (B) NMAC, which focuses on illness rather than economic ability to pay. Related to
6 this argument, the Department argues that mere inability to pay is not grounds for the Secretary
7 to compromise a tax liability under another regulation, 3.1.6.14 NMAC.

8 As to the grounds of the protest and Mr. Van Berg's limiting comment at hearing,
9 Taxpayers in their protest sought general relief from civil penalty, which is reasonably specific
10 enough to put the Department on notice that the proceeding would focus on whether there was in
11 fact negligence under the civil penalty statute, whether there were grounds to abate penalty under
12 the statutory, good faith mistake of law provision of NMSA 1978, Section 7-1-69 (B), or whether
13 there were grounds for relief from penalty under any of the Department's own regulatory
14 implementation of the statute, the nonnegligence circumstances generally outlined under
15 Regulation 3.1.11.11 NMAC. *See e.g. Valles v. Silverman*, 2004-NMCA-019, ¶ 18, 135 N.M. 91,
16 97, 84 P.3d 1056, 1062 (As to the adequacy of a complaint, the standard under the more formal
17 but inapplicable rules of civil procedure is one of notice. Even under the more formal rules, the
18 complaint is sufficient when the allegations give the opposing party and the court a fair idea of
19 the complaint and relief requested). Indeed, in terms of notice of the scope of the protest, the
20 Department's answer to the protest acknowledged there were two grounds to the protest:
21 inability to pay and the fact that the tax was due at the worst part of the pandemic. The Hearing
22 Officer does not find, at least in the context of this pandemic, that asking for relief on economic
23 grounds is mutually exclusive from illness. In the context of the pandemic, where a diagnosis of
24 COVID-19 in accord with the various public health orders and CDC guidance required self-

1 isolation, the two concepts of financial and medical hardship were potentially intermixed:
2 someone who was ill with COVID-19 and thus required self-isolation may have lacked the
3 ability to work or generate income because of their illness.

4 That is the case here, where the actual evidence made clear that their illnesses prevented
5 Taxpayers from working and generating income during the critical months up to and after the
6 extended April 15, 2021 payment deadline. Catherine Van Berg fell ill with COVID-19 in January
7 2021, a mere four months before the extended filing deadline. She was so ill that she was
8 hospitalized and received monoclonal antibody treatment, a treatment which at the time was not
9 regularly available to everyone diagnosed with COVID-19 but instead was generally reserved for
10 people at risk of severe infection. Ms. Van Berg remained ill for six weeks, which pushed her illness
11 well into the middle of February, just two months before the extended April 15, 2021 payment
12 deadline. Because of her illness, Ms. Van Berg was unable to work and generate income during the
13 period of her illness, the critical months before the extended payment deadline.

14 Then, Neil Van Berg became ill with COVID-19 in early April 2021, the very month of the
15 extended payment deadline. Mr. Van Berg, who was more susceptible given an underlying medical
16 condition, struggled even more than Ms. Van Berg. His illness extended for three months, into June
17 2021, covering the period of time between when Taxpayers failed to make the April 15,
18 2021 payment and when they were finally able to pay their 2019 personal income tax obligation in
19 July 2021. Again, even if described as an inability to generate income because of the economic
20 conditions of the pandemic, Mr. Van Berg would have been unable to work and generate income for
21 these three months around the payment deadline because he was suffering from an acute infection
22 of COVID-19.

23 Given that Taxpayers specifically sought relief from penalty in their protest letter, that the
24 payment was due at the worst portion of the pandemic, and that the evidentiary record established

1 that around the time payment was due, Taxpayers were inflicted with significant cases of COVID-
2 19 that contributed to their inability to generate income, Mr. Van Berg's well-intentioned but
3 inartful argument that their request for relief was limited to only economic conditions rather than
4 illness is not grounds to ignore whether Regulation 3.1.11.11 (B) NMAC might provide Taxpayers
5 relief from civil penalty. The question is not whether a self-represented litigant can say the correct
6 magic words under the applicable statute or regulation, but whether the evidence at hearing showed
7 they were nonnegligent for purposes of abating civil negligence penalty—the very relief requested
8 in their formal protest.

9 Regulation 3.1.6.14 NMAC does limit the Secretary's ability to compromise a tax liability
10 merely because of a taxpayer's inability to pay the liability. Regulation 3.1.11.9 NMAC similarly
11 limits the Secretary's ability to compromise penalty because of a taxpayer's inability to pay. The
12 focus of Regulation 3.1.6.14 NMAC and Regulation 3.1.11.9 NMAC is when the Secretary can
13 consider entering into a voluntary settlement of a case because of a good faith doubt about the
14 liability through a closing agreement. In this case, no such closing settlement agreement was
15 reached before, during, or after the protest hearing. More importantly, whether the Secretary can
16 voluntarily enter into a closing agreement is a different issue than adjudicating a protest involving
17 whether there are grounds to abate civil negligence penalty. The Hearing Officer has been
18 statutorily tasked with adjudicating and ruling on the issue of whether Taxpayers were negligent for
19 purposes of civil penalty. Taxpayers may not be entitled to abatement solely because of inability to
20 pay, but nevertheless may still be found to be nonnegligent under Regulation 3.1.11.11 NMAC,
21 which lists examples of nonnegligent circumstances potentially supporting abatement of civil
22 penalty. The undersigned Hearing Officer does not find that the existence of Regulation 3.1.6.14
23 NMAC or Regulation 3.1.11.9 NMAC precludes consideration of the nonnegligence circumstances
24 identified by Regulation 3.1.11.11 (B) NMAC on the question of whether a taxpayer was civilly

1 negligent, especially in the circumstances of the pandemic where causes for inaction could
2 intermix (extended illness requires self-isolation, which leads to inability to work and generate
3 income by the date of the extended deadline).

4 The Department further speculated in closing argument that since the income was earned
5 in 2019 and Taxpayers knew the amount that would be due when they filed their taxes, they
6 should have set the money aside in preparation for the payment and kept the money available for
7 the tax payment. That speculation may be valid in normal circumstances, but certainly part of the
8 legislative purpose of extending the 2019 payment deadline was recognition that the pandemic
9 had so fundamentally altered the traditional health, work, and economic conditions for all of
10 society that many taxpayers who earned income in 2019 would not be able to pay their liability
11 by the traditional deadline April 15, 2020 deadline. As Taxpayers argued, because the time was
12 extended between filing and paying the taxes, the traditional time relationship between when the
13 income was earned and when payment was due was uniquely altered, making the Department's
14 argument and speculation less persuasive in the circumstances of the pandemic.

15 The Department also argues that the penalty under Regulation 3.1.11.11 (B) NMAC should
16 not be abated because Taxpayers in this case failed to expressly demonstrate that their illnesses
17 prevented them from physically making payment of the tax by the deadline or, prevented them from
18 procuring services of another to make payment. The Department asserts that the regulation only
19 applies when there is a physical inability to pay related to illness rather than a financial inability to
20 pay related to illness. While the Department's proposed strict application interpretation of this
21 regulation may be compelling during normal times, the pandemic was a time that was anything but
22 normal. The statute and rules addressing civil negligence penalty were written for a normal time, not
23 the extraordinary time presented by the COVID-19 pandemic. Applying the abatement provision
24 narrowly—as the Department argues for—in the context of the COVID-19 pandemic leads to an

1 unreasonable and absurd result of not being able to abate penalty in the extraordinary circumstance
2 in which people were seriously ill with COVID-19 and unable to generate income near the extended
3 tax deadline. *See e.g. City of Eunice v. State Taxation & Revenue Dep't*, 2014-NMCA-085, ¶8
4 (provisions not to be read to render their application absurd, unreasonable, or unjust); *see also*
5 *AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 9, 284 P.3d 1118, 1120 (rules of
6 statutory construction also apply to the administrative code).

7 If the plain language interpretation of a statute or regulation would lead to an
8 unreasonable or absurd result, it is necessary to look beyond the plain meaning of the statute or
9 regulation to effectuate the legislative intent and purpose. *See Bishop v. Evangelical Good*
10 *Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473. Recent decisions of the Court of
11 Appeals have reemphasized the importance of searching for and effectuating legislative intent.
12 *See High Desert Recovery, LLC, v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-____,
13 ¶8, 2021 WL 5815749, (No. A-1-CA-37852, N.M. Ct. App., Dec. 6, 2021) (quoting *Sacred*
14 *Garden, Inc. v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-038, ¶5, ¶15-16, 495 P.3d
15 576, *cert. quashed* (No. S-1-SC-38164, February 23, 2022)); *see also Golden Services Home*
16 *Health & Hospice v. Taxation & Revenue Dep't*, No. A-1-CA-36987, 2020 WL 2045956
17 (Unpublished, non-precedential opinion, N.M. Ct. App. Apr. 20, 2020). Although those cases
18 dealt with arguably ambiguous statutory language, the logic of that recent line of cases would
19 seem equally to extend to an instance where a narrow, plain reading of the statute and
20 accompanying regulations would lead to an unreasonable result during the pandemic. The
21 Department's narrow, technical interpretation of Regulation 3.1.11.11 (B) NMAC in the context of
22 the pandemic leads to an unreasonable result that does little to further the legislative purpose of the
23 penalty provision. The Department's rigid interpretation also exalts form over substance where the

1 circumstances at issue require flexibility and adaptability to address the unintended consequences of
2 a once-in-a-century pandemic.

3 In *GEA*, 2012-NMCA-010, ¶ 23, the Court of Appeals noted that the purpose of the civil
4 negligence penalty provision is punitive in nature, designed to encourage timely payment of tax and
5 punish untimely payment. *See also Hi-Country Buick GMC, Inc. v. Taxation & Revenue Dept. of*
6 *State*, 2016-NMCA-027, ¶ 22, 367 P.3d 862, 868 (penalty is effectively punitive in nature and in
7 some circumstances should not be imposed on those who bore no responsibility for the unpaid tax).
8 Imposing the civil negligence penalty for the untimely payment of taxes in circumstances
9 attributable to a once-in-a-lifetime global health pandemic—particularly when the state is otherwise
10 made whole by payment of the underlying tax liability plus interest for the delayed payment—
11 serves little effective deterrent value traditionally served by a punitive punishment. This is not a
12 circumstance where Taxpayers failed to pay because of lack of due care, carelessness, inadvertent
13 error, lack of attention, or common negligence. Instead, they missed timely payment because the
14 circumstances of the pandemic—which were beyond their control—left them ill and without the
15 ability to generate income during the critical period before, during, and after the extended payment
16 deadline. Punishment in this extraordinary once-in-a-century pandemic circumstance does little to
17 encourage timely payment or punish untimely payment in normal times and thus abatement of that
18 penalty for pandemic-related circumstances does not contravene the legislative purpose of the
19 civil negligence provision. *See GEA*, ¶ 23, citing *N. Slope Borough v. Sohio Petroleum Corp.*, 585
20 P.2d 534, 546 (Alaska 1978) (abating late payment penalty is logical and not contrary to the
21 punitive component of the penalty provision when a taxpayer bears no responsibility for
22 misconduct). Because the Department’s narrow, technical reading of the illness abatement provision
23 under this circumstance would do little to further the legislative purpose of the penalty provision,
24 the Hearing Officer declines such an application as unreasonable in the context of the COVID-19

1 pandemic, where Taxpayers were impacted by circumstances beyond their reasonable ability to
2 control or anticipate given the time period of their illness and the associated economic impact.

3 Before the two decisions issued today, the undersigned Hearing Officer has only
4 considered abatement of penalty in one previous COVID-19 related case, *In the Matter of the*
5 *Protest of XTO Energy Inc. To Assessment Issued Under Letter Id No. L1185855152 v. New*
6 *Mexico Taxation and Revenue Department*, 2021 WL 6112848 (non-precedential) (hereinafter
7 *XTO*). In that case, the undersigned Hearing Officer came very close to abating penalty under
8 Regulation 3.1.11.11 (B) NMAC but declined to do so because affirmative evidence in that
9 record indicated that the taxpayer had previously secured the services of another employee to
10 prepare and file the tax return in a previous month when the employee responsible for the tax
11 filing was ill with COVID-19. *See XTO*, p.11:16-13:5, p. 14:5-20, 2021 WL 6112848, at *7-*9.
12 This case is clearly distinguishable in that there is no such affirmative evidence and this case
13 involves untimely payment of the tax while the *XTO* case involved the untimely filing of a
14 return. Under Regulation 3.1.11.11 (B) NMAC, the requirement to show inability to procure the
15 services of another ties to return preparation (“...unable to procure the services of another person
16 *to prepare a return* because of injury or illness.”) rather than to the payment of the tax.

17 The current protest also is distinguishable from *In the Matter of the Protest of Santa Fe*
18 *Baking Company & Café Inc.* No. 15-36, 2015 WL 8802099 (Dec. 7, 2015)(non-precedential)
19 which the Department cited in its closing argument because this protest involves a once-in-a-
20 century pandemic largely outside the control of any taxpayer (let alone these Taxpayers who
21 were directly impacted by illness around the time of the extended payment deadline) whereas
22 that case involved circumstances within the control of that taxpayer and its agents.

23 The undersigned Hearing Officer previously applied Regulation 3.1.11.11 (B) NMAC to
24 abate penalty when there was a sudden onset of an emergency medical condition, even though

1 the taxpayer in that case presented little evidence about whether it could have procured the
2 services of another to file and pay the tax. *See In the Matter of the Protest of New Mexico Food*
3 *Distributors Inc. et al.*, Decision and Order No. 18-31, 2018 WL 5486263 (October 18, 2018;
4 non-precedential). The Hearing Officer's decision to abate the penalty in *New Mexico Food*
5 *Distributors* was based on the reasoning that some medical situations are so severe that there is
6 little time, opportunity, or even a reasonable priority in the context of the medical situation for a
7 taxpayer to arrange or seek the services of a third party to assist with filing of a return. Within
8 the context of a once-in-a-century pandemic that reshaped all aspects of society in short order,
9 the Hearing Officer tends to view COVID-19 related illnesses akin to sudden onset of an
10 emergency medical situation, where taxpayers may not have had a chance or opportunity to
11 arrange another to file their return, justifying a broad reading and application of the penalty
12 abatement provisions of Regulation 3.1.11.11 NMAC, including subsection (B), even without
13 evidence related to whether a taxpayer could have secured the services of another.

14 The Hearing Officer does find that Regulation 3.1.11.11 (B) NMAC is an appropriate
15 basis to abate penalty on this record under the circumstances of the pandemic. However, even if,
16 arguably, the technical, narrow specifics of 3.1.11.11 (B) NMAC are inapplicable to the facts of
17 this case, nonnegligence factors are not limited to the specific, narrow language and examples
18 contained in Regulation 3.1.11.11 NMAC. *See e.g. Hoffman v. New Mexico Taxation & Revenue*
19 *Dep't*, No. A-1-CA-36399, 2019 WL 3765579, at *4 (N.M. Ct. App. July 18, 2019) (non-
20 precedential⁹) (3.1.11.11 NMAC uses non-exclusive language that, in conjunction with the broad
21 language of the statutory good faith, mistake of law, reasonable grounds provision, allows for
22 penalty abatement in circumstances beyond the narrow language of that regulation). Because the

⁹ 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 regulation uses the phrase “may indicate” the permissive language permits some discretion with the
2 hearing officer to determine that nonnegligence exists in situations which may not strictly fall within
3 the eight enumerated examples. *See DeMichele v. Taxation & Revenue Department Motor Vehicle*
4 *Div.*, 2015-NMCA-095, ¶ 11, 356 P.3d 523 (the word “may” used in a statute indicates discretion);
5 *see also Albuquerque Bernalillo Co. Water Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 51,
6 148 N.M. 21, 229 P.3d 494 (“canons of statutory construction guide our interpretation of
7 administrative regulations”). Here, the record is ample to show Taxpayers’ nonnegligence under
8 Regulation 3.1.11.11 NMAC and the broad language of Section 7-1-69 (B).

9 Today, in conjunction with another decision and order *In the Matter of the Protest of*
10 *Joseph & Jennifer Cervantes*, D&O No. 22-17 (Aug. 8, 2022), the undersigned Hearing Officer
11 finds that the extraordinary circumstances of the COVID-19 pandemic generally require a broad
12 reading and liberal application of the statutory and regulatory authority for abatement of penalty
13 in COVID-19 related cases. Such broad construction gives the Department flexibility in
14 addressing unintended consequences of the pandemic largely beyond the control of taxpayers
15 and prevents unreasonable, absurd, and unjust results in the context of the pandemic. Moreover,
16 such broad construction in the context of the pandemic is not contrary to the legislative purpose
17 of the penalty provision of encouraging timely payment and punishing untimely payment in
18 normal periods. There is little deterrent value in imposing penalty in circumstances beyond
19 anyone’s control in a once-in-a-century pandemic. The State, under the circumstances of the
20 pandemic and this case, was made whole in that it received the outstanding, underlying tax
21 liability and will under this decision also receive the lost time value of money for the delayed
22 payment in the form of interest. Under these specific circumstances of the pandemic, there is no
23 additional value, encouragement, or useful punishment in the State collecting a civil negligence
24 penalty.

1 The Hearing Officer wishes to emphasize that this decision is limited to the time period
2 of the pandemic and that an inability to pay is generally not grounds for penalty abatement unless
3 it is caused by some other circumstances showing nonnegligence. In this case the inability to
4 timely pay that Taxpayers cite in their argument intermingles with the effects of their COVID-19
5 illness and the broader public health and economic circumstances of the pandemic,
6 demonstrating nonnegligence for purposes of penalty abatement. As such, Taxpayers' protest as
7 to the assessment of a civil negligence penalty is compelling under 3.1.11.11 NMAC,
8 specifically but not limited to subsection B, and Section 7-1-69 (B). That portion of the protest
9 related to civil negligence penalty IS GRANTED.

10 However, there is no similar nonnegligence provision that allows for abatement of
11 NMSA 1978, Section 7-2-12.2 (2011)'s estimated tax underpayment penalty. The failure to pay
12 the correct estimated tax would have occurred in 2019 or early 2020, before the pandemic
13 impacted Taxpayers, also mitigating against abatement of that amount. Nor are there any
14 grounds to abate the assessment of interest under Section 7-1-67. Therefore, the protest regarding
15 those two assessed amounts IS DENIED.

16 CONCLUSIONS OF LAW

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

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

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

1 D. Under the mandatory “shall” language contained in Section 71-1-69, the
2 Department was required to assess Taxpayers a civil negligence penalty because they failed to
3 pay the tax due under their 2019 personal income tax returns by the extended deadline, meeting the
4 definition of civil negligence under Regulation 3.1.11.10 (B) NMAC. *See Marbob Energy Corp. v.*
5 *N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word “shall” in
6 a statute indicates provision is mandatory absent clear indication to the contrary).

7 E. Nevertheless, within the context of the a once-in-a-century pandemic, Taxpayers are
8 entitled to abatement of the civil negligence penalty under Regulation 3.1.11.11 (B) NMAC because
9 the evidence showed that Taxpayers were both ill from COVID-19 during the critical months
10 immediately before, during, and after the extended payment deadline, preventing them from
11 generating the income needed to pay the liability by the extended deadline.

12 F. NMSA 1978, Section 7-2-12.2 (2011) requires imposition of estimated tax
13 underpayment penalty and there are no nonnegligence regulatory factors that would allow
14 abatement in this case.

15 G. Interest cannot be abated under NMSA 1978, Section 7-1-67, as interest is
16 designed to compensate for the time value of money from the original due date until the date of
17 the untimely payment.

18 H. Taxpayer overcame the presumption of correctness as to the assessed civil
19 negligence penalty but did not overcome the presumption of correctness as to interest and estimated
20 payment penalty under NMSA 1978, Section 7-1-17 (C) (2007), NMSA 1978, §7-1-3(X) (2013),
21 and Regulation 3.1.6.13 NMAC. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M.
22 428; *see also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336
23 P.3d 436; and *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

1 For the foregoing reasons, the Taxpayers protest **IS PARTIALLY GRANTED AND**
2 **PARTIALLY DENIED**. The Department is ordered to abate the civil negligence penalty of
3 \$681.40. Taxpayers are ordered to pay interest of \$101.52 and the assessed estimated penalty of
4 \$2.05.

5 DATED: August 15, 2022.



6
7 Brian VanDenzen
8 Chief Hearing Officer
9 Administrative Hearings Office
10 P.O. Box 6400
11 Santa Fe, NM 87502

12 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

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

4 *First Class Mail & E-Mail*

First Class and E-Mail

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6 *INTENTIONALLY BLANK*
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