

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

4 **IN THE MATTER OF THE PROTEST OF**
5 **GUY & JUNE HENCE**
6 **TO THE ASSESSMENT**
7 **ISSUED UNDER LETTER ID NO. L1606171056**

8 **v.** **AHO No. 21.11-064A, D&O No. 22-19**

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On July 21, 2022, Hearing Officer Dee Dee Hoxie, Esq. conducted an in-person hearing
12 on the merits of the protest to the assessment. Cordelia Friedman, Staff Attorney, appeared for
13 the Taxation and Revenue Department (Department). Andres Sanchez, Auditor, and Tiffany
14 Smyth, Deputy Director of Audit and Compliance, also appeared. Guy and June Henc
15 (Taxpayers) appeared for the hearing, and Mr. Henc represented them. Mr. Henc, Ms. Smyth,
16 and Mr. Sanchez testified. The Hearing Officer took notice of all documents in the
17 administrative file.

18 The Taxpayers’ exhibits #1 (abatement), #2 (current assessment), #3 (correspondence),
19 #4 (advocate), #5 (FYI-404), #6 (IRS article), and #7 (returned letter) were admitted. The
20 Department’s exhibits A (March assessment), B (engagement letter), C (managed audit), D
21 (returns), E (abatement), F (current assessment), G (notice), and H (emails) were admitted. A
22 more detailed description of exhibits submitted at the hearing is included on the Administrative
23 Exhibit Coversheet. As the parties had some issues exchanging their exhibits prior to the
24 hearing, the Administrative Hearings Office emailed copies of the exhibits that were submitted at
25 the hearing, which were the exhibits scanned into the official electronic file, to the parties on July
26 25, 2022. The parties had seven days from that date to file objections, and seven days from the

1 objection deadline to file responses. The parties understood that the hearing would not be
2 considered complete until the final deadline for responses, which was on August 8, 2022. The
3 parties understood that the decision would be issued within 30 days after that final deadline.

4 The main issue to be decided is whether the Taxpayers are liable under the assessment.
5 The Taxpayers contend that the Department was prohibited from issuing the assessment because
6 they had previously issued an abatement. The Hearing Officer considered all of the evidence and
7 arguments presented by both parties. Because the law does not prohibit the Department from
8 issuing an assessment after an abatement, the Taxpayers agreed to be liable for the tax under the
9 terms of the managed audit, and the Taxpayers failed to overcome the presumption that the
10 assessment is correct, the Hearing Officer finds in favor of the Department. IT IS DECIDED
11 AND ORDERED AS FOLLOWS:

12 FINDINGS OF FACT

13 **Procedural history of the hearing.**

14 1. On May 20, 2021, the Department assessed the Taxpayers for personal income tax
15 (PIT) for the tax periods ending December 31, 2014 and December 31, 2015. The assessment
16 was for \$2,975.00 in tax. The assessment was made pursuant to a managed audit, so no penalty
17 was assessed, and no interest was assessed. [Testimony of Mr. Sanchez; Testimony of Mr.
18 Hence; Exhibit 2; Exhibit F].

19 2. On June 4, 2021, the Taxpayer filed a timely written protest to the assessment.
20 [Admin. file protest].

21 3. On June 9, 2021, the Department acknowledged its receipt of the protest.
22 [Admin. file L1532819888].

1 4. On November 8, 2021, the Department filed a request for hearing with the
2 Administrative Hearings Office with its answer to the protest. [Admin. file request].

3 5. On November 9, 2021, the Administrative Hearings Office sent notices for
4 telephonic scheduling hearing to the parties. [Admin. file].

5 6. On December 17, 2021, a telephonic scheduling hearing was conducted. The
6 parties agreed that the first telephonic scheduling hearing satisfied the requirements of the statute
7 as it was held within 90 days of the request for hearing. [Admin. file].

8 7. On December 20, 2021, the Administrative Hearings Office issued scheduling
9 orders with notices for the hearing on the merits to the parties. [Admin. file].

10 8. On April 12, 2022, due to a change in office location, the Administrative Hearings
11 Office issued amended scheduling orders (Amended Scheduling Order) with notices for the
12 hearing on the merits to the parties. [Admin. file].

13 9. On June 29, 2022, the Department filed its prehearing statement. [Admin. file].

14 10. On June 30, 2022 and again on July 11, 2022, the Taxpayers filed their prehearing
15 statement¹. [Admin. file].

16 11. On July 5, 2022, the Taxpayers requested and filed subpoenas, one for Ms.
17 Smyth, one for Mr. Sanchez, and one for the Secretary of the Department. [Admin. file].

18 12. On July 11, 2022, the Department filed a motion to quash (Motion to Quash) the
19 subpoena for the Secretary. [Admin. file].

20 13. On July 13, 2022, the Taxpayers filed a motion to dismiss the motion to quash.
21 [Admin. file].

¹ The same prehearing statement was filed twice, apparently once via electronic transmission and once via physical copy.

1 14. On July 13, 2022, the Department filed its response to the Taxpayers' motion.
2 [Admin. file].

3 15. On July 15, 2022, the Administrative Hearings Office issued an order granting the
4 motion to quash to the parties. [Admin. file].

5 16. On July 21, 2022, the hearing on the merits was held. [Admin. file].

6 17. At the hearing, the Taxpayers objected to the Department's exhibits, and the
7 Department objected to the Taxpayers' exhibits. [Admin. file].

8 18. The Hearing Officer announced that copies of the exhibits provided by both
9 parties at the hearing would be the officially filed exhibits. The filed exhibits would be scanned
10 and sent to the parties, the parties would have the opportunity to object to the substance of the
11 exhibits, and the parties would have the opportunity to respond to any objections that were filed.
12 [Admin. file].

13 19. The scanned exhibits were emailed to the parties on July 25, 2022. The parties
14 had until August 1, 2022 to file objections, and until August 8, 2022 to file responses. The
15 parties understood that the hearing would not be considered finished until the final deadline
16 passed. [Admin. file].

17 20. On July 28, 2022, the Taxpayers filed their objection (Taxpayers' Objection) to
18 the Department's exhibits. [Admin. file].

19 21. On August 1, 2022, the Department filed its objection (Department's Objection)
20 to some of the Taxpayers' exhibits. In the same document, the Department also responded to the
21 Taxpayers' objection to its exhibits. [Admin. file].

22 22. The Taxpayers did not file a response. [Admin. file].

1 23. The Department served the Taxpayers with copies of the exhibits prior to hearing
2 by sending them an email with a secure file-sharing link. [Exhibit H].

3 24. Mr. Hence admitted that he received the Department’s email, but he was not
4 familiar with the secure file-sharing program and did not download the exhibits. The Taxpayers
5 did not contact the Department with any questions or concerns regarding the secure file-sharing
6 program. [Testimony of Mr. Hence; Taxpayers’ Objection].

7 **Substantive facts.**

8 25. The Taxpayers’ federal adjusted gross income was modified by an IRS
9 adjustment for the 2014 and 2015 tax years. [Testimony of Mr. Sanchez].

10 26. The Taxpayers failed to file an amended PIT return within 180 days of the IRS
11 adjustment. [Testimony of Mr. Sanchez].

12 27. On or about September 18, 2020, the Department issued a notice of intent to
13 assess to the Taxpayers based on the IRS adjustment. The notice gave the Taxpayers 60 days to
14 respond. It also included an application for a managed audit and information on eligibility.
15 [Testimony of Mr. Sanchez; Exhibit G; Testimony of Mr. Hence].

16 28. The Taxpayers requested extensions of time to respond to the notice because they
17 were trying to recover their tax information for the 2014 and 2015 tax years. [Testimony of Mr.
18 Hence; Exhibit 3; Exhibit 6; Exhibit 7].

19 29. The Taxpayers did not retain copies of their tax records for those years, could not
20 recover their records from a defective hard drive, and have not been able to get copies from the
21 IRS. [Testimony of Mr. Hence; Exhibit 3; Exhibit 6; Exhibit 7].

1 30. The Department granted extensions of time to respond and to apply for a managed
2 audit to the Taxpayers. [Testimony of Mr. Sanchez; Testimony of Mr. Hence; Testimony of Ms.
3 Smyth; Exhibit 3].

4 31. An extension of time was not entered properly into the Department's computer
5 system, and an assessment was automatically generated after a previous deadline had passed.
6 Mr. Sanchez took responsibility for the mistake and apologized. [Testimony of Mr. Sanchez;
7 Exhibit A].

8 32. On March 8, 2021, the Taxpayers were assessed for PIT (the March assessment)
9 for the tax periods from January 1, 2014 to December 31, 2015. The assessment was for
10 \$2,953.00 in tax, \$590.60 in penalty, and \$671.90 in interest, for a total liability of \$4,215.50.
11 [Exhibit A].

12 33. On March 16, 2021, the Taxpayers signed the managed audit agreement. By
13 signing the agreement, the Taxpayers waived limitations on assessments and waived other
14 statutory remedies. [Testimony of Mr. Hence; Testimony of Mr. Sanchez; Exhibit C].

15 34. On March 23, 2021, the Department approved the Taxpayers' application for a
16 managed audit. [Testimony of Mr. Hence; Testimony of Mr. Sanchez; Exhibit C; Exhibit B].

17 35. The deadline to complete the managed audit was May 24, 2021. [Exhibit B].

18 36. A managed audit may be done only if a taxpayer has not already been assessed.
19 [Testimony of Mr. Sanchez; Exhibit G].

20 37. For the Taxpayers to receive the benefit of a managed audit, the previous
21 assessment had to be abated. [Testimony of Mr. Sanchez; Exhibit 3].

22 38. On April 19, 2021, the Department abated the March assessment. [Testimony of
23 Mr. Hence; Testimony of Mr. Sanchez; Exhibit 1; Exhibit E].

1 39. The Taxpayers and the Department reached an agreement as to the tax liability
2 and completed the managed audit. [Testimony of Mr. Hence; Testimony of Mr. Sanchez;
3 Exhibit 3].

4 40. During the managed audit, the Taxpayers made a \$500.00 payment. [Testimony
5 of Mr. Hence; Testimony of Mr. Sanchez; Exhibit 1].

6 41. The Department then issued the assessment according to the agreement reached in
7 the managed audit. The assessment did not reflect the \$500.00 payment. [Testimony of Mr.
8 Sanchez; Testimony of Mr. Hence; Exhibit 2; Exhibit F; Exhibit D; Exhibit 3].

9 42. The assessment afforded the Taxpayers the benefit of the managed audit, so no
10 penalty and no interest were assessed. [Testimony of Mr. Sanchez; Testimony of Mr. Hence;
11 Exhibit 2; Exhibit F].

12 43. The Taxpayers' account has been credited with the \$500.00 payment against the
13 assessed liability, leaving a current outstanding tax liability of \$2,475.00. [Testimony of Mr.
14 Sanchez].

15 44. Throughout the course of the audit, the managed audit, and the protest, the
16 Taxpayers have been frustrated by the perceived lack of response and communication from the
17 Department and the IRS. The Taxpayers have contacted various agencies² and made complaints
18 about the process. [Testimony of Mr. Hence; Exhibit 3; Exhibit 6].

19 45. The Taxpayers were grateful to be allowed to participate in a managed audit and
20 do not dispute that they owe the amount of tax assessed. [Testimony of Mr. Hence; Exhibit 3;
21 Exhibit D].

² Including but not limited to the Department's tax advocate, the Secretary of the Department, the VA, the Governor's office, and the Attorney General's office.

1 46. Despite their participation in and agreement to the managed audit, the Taxpayers
2 felt that the assessment was unjust because of the previous abatement. The Taxpayers feel that
3 they should be excused from paying their past due tax based on their frustration and emotional
4 distress. [Testimony of Mr. Hence; Exhibit 3].

5 DISCUSSION

6 **Burden of proof.**

7 The assessment issued in this case is presumed correct. *See* NMSA 1978, § 7-1-17 (C)
8 (2007). Consequently, the Taxpayers have the burden to overcome the assessment. *See*
9 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. *See also* *N.M. Taxation & Revenue*
10 *Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents sufficient evidence to
11 rebut the presumption, the burden shifts to the Department to show that the assessment is correct.
12 *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

13 **The request for hearing.**

14 The Taxpayers argue that their right to a hearing was frustrated by the Department's
15 delays. The Taxpayers argue that the protest was not handled expediently and only began to
16 move forward after several months, when Ms. Friedman was assigned to the case. Because the
17 Department filed the request for hearing by the statutory deadline, the Taxpayers' argument does
18 not prevail.

19 Neither party may request a hearing until 60 days after the protest was filed. *See* NMSA
20 1978, § 7-1B-8 (B) (2019). After 60 days, either party may request a hearing by filing the
21 request with the Administrative Hearings Office. *See id.* If the taxpayer has not already filed a
22 request, the Department must file a request no later than 180 days after the protest was filed. *See*
23 *id.*

1 The Taxpayers were in communication with two protest auditors after their protest was
2 filed. [Exhibit 3]. The protest was filed on June 4, 2021; therefore, either party could have filed
3 a request for hearing on or after August 3, 2021, which was 60 days after the protest was filed.
4 The Taxpayers did not file a request for hearing with the Administrative Hearings Office. The
5 Department was required to file a request for hearing no later than December 1, 2021³. The
6 Department filed the request for hearing with the Administrative Hearings Office on November
7 8, 2021, which was before the 180-day deadline. Therefore, the Department's request for
8 hearing was filed timely under the statute. *See* NMSA 1978, § 7-1B-8.

9 **The hearing procedures and exhibits.**

10 The Taxpayers objected to various issues related the hearing and hearing procedures.
11 Due process requires an opportunity to be heard in a meaningful time and meaningful manner. *See*
12 *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976). *See also State ex rel. Battershell v. City*
13 *of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989) (holding that in an administrative
14 hearing due process is flexible and should conform to the demands of a particular situation). *See*
15 *Dente v. State*, 1997-NMCA-099, 124 N.M. 93, overruled in part on other grounds by *State v.*
16 *Bargas*, 2000-NMCA-103, 129 NM 800. There is not a due process violation without a showing
17 of prejudice. *See Dente v. State*, 1997-NMCA-099, 124 N.M. 93. “An assertion of prejudice is not
18 a showing of prejudice.” *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562.

19 The Taxpayers argue that the Department did not follow the Amended Scheduling Order⁴
20 by filing its Motion to Quash after the deadline for filing motions. Motions were required to be
21 filed on or before 30 calendar days prior to the hearing. [Amended Scheduling Order]. The

³ This is 180 days from the date that the protest was filed.

⁴ Neither party perfectly followed the Amended Scheduling Order. For example, the Taxpayers' Exhibit 3 and the Department's Exhibit G are not marked and paginated correctly.

1 hearing was held July 21, 2022. Therefore, the final date for filing motions was ostensibly June
2 21, 2022. The Motion to Quash was filed on July 11, 2022, which was 20 days after the
3 deadline. The subpoena that was the subject of the Motion to Quash was issued on July 5, 2022,
4 which was 14 days after the motion-filing deadline of June 21, 2022. It is unreasonable to expect
5 the Department to file a motion before the action that was the subject of that motion had
6 occurred. Consequently, the Motion to Quash was filed timely in relation to the date that the
7 subpoenas were issued and could not have been filed by the earlier deadline since the subpoenas
8 were not issued until after that deadline. Moreover, the Taxpayers had a meaningful opportunity
9 to be heard on the Motion to Quash when they filed their motion to dismiss the motion to quash
10 on July 13, 2022, and the Taxpayers did not demonstrate prejudice.

11 The Taxpayers argue that the Secretary should have been subject to subpoena as her
12 name appeared on the abatement and on the assessments. Assessments are required to be issued
13 in the current Secretary's name. *See* NMSA 1978, § 7-1-17. Abatements are issued by the
14 Secretary or the Secretary's delegate. *See* NMSA 1978, § 7-2-28. These statutory provisions do
15 not require the Secretary to have personal knowledge of every assessment or abatement. *See id.*
16 *See also* NMSA 1978, § 7-1-17. The subpoena was quashed as the Secretary has no personal
17 factual knowledge regarding the Taxpayers' managed audit, abatement, and assessments.
18 [Motion to Quash]. The Taxpayers contacted the Secretary after they filed their protest. [Exhibit
19 3; Motion to Quash]. The Secretary directed the Taxpayers to continue to work with the
20 Department's attorney as their matter was under formal protest. [Motion to Quash; Exhibit 3].
21 The Taxpayers were given the opportunity to elicit testimony or other evidence and to make a
22 proffer of evidence regarding the Secretary's involvement in their managed audit and protest.
23 There was no evidence presented or proffered that the Secretary had any personal factual

1 knowledge regarding the Taxpayers' managed audit, abatement, or assessment prior to the
2 protest. Therefore, there is not a showing of prejudice based on the lack of testimony from the
3 Secretary.

4 The Taxpayers argue that the Department wrongly interrupted their questioning of Mr.
5 Sanchez. The Department requested to *voir dire* Mr. Sanchez, and the Taxpayers agreed to let
6 the Department ask questions at that time. Several minutes later the Taxpayers objected to the
7 length of the Department's questioning, and the Department immediately ceased asking
8 questions and the Taxpayers resumed their questioning. [Recording of hearing at 01:03-01:26⁵].
9 Formal rules of procedure do not apply to the hearing. *See* 7-1B-6 (D) (2019). The Taxpayers
10 agreed to the Department's interruption and were afforded a meaningful opportunity to ask their
11 own questions of Mr. Sanchez. Therefore, there was not a showing of prejudice.

12 The Taxpayers argue that the Department did not follow the Amended Scheduling Order
13 by failing to provide the Taxpayers with copies of the exhibits prior to the hearing. The
14 Taxpayers object to all of the Department's exhibits for that reason. [Taxpayers' Objection].
15 The Taxpayers admitted that the Department sent them the link for secure file-sharing prior to
16 the hearing. The Taxpayers were unfamiliar with the secure file-sharing program and feared that
17 it might be spam, a scam, a hack, or a virus. [Taxpayers' Objection]. Generally, an attempt to
18 serve documents must be made, but actual notice is not required. *See Cordova v. State*, 2005-
19 NMCA-009, 136 N.M. 713 (holding that the relevant inquiry concerning notice of property tax sale
20 does not include whether the notice was actually received). *See also Dusenbery v. United States*,
21 534 U.S. 161 (2002) (holding that reasonableness requires that the State attempt to provide actual
22 notice, but due process does not require actual notice).

⁵ Time is cited by hour and minute.

1 By providing the secure file-sharing link, the Department made a reasonable attempt to
2 serve copies of the exhibits prior to the hearing. The Department also advised the Taxpayers that
3 the exhibits were being sent via a secure link. [Exhibit H]. The Taxpayers did not notify the
4 Department of their concerns with the secure file-sharing link that they received, despite the fact
5 that the Department advised them to expect the link and that the link came in an email from the
6 same Department employee's email address used in other correspondence with the Taxpayers.
7 [Exhibit H; Exhibit 3]. The Taxpayers also admitted that they were familiar with all of the
8 documents that comprised the Department's exhibits, that most of the documents were
9 exchanged between the Department and the Taxpayers during the managed audit, and that at
10 least two of the Department's exhibits were the same as the Taxpayers' exhibits⁶. Consequently,
11 there was no showing of prejudice. The Taxpayers' objection to the Department's exhibits is
12 overruled.

13 The Department objects to the Taxpayers' Exhibit 2 and Exhibit 3 because they had
14 handwritten notes on them, to Exhibit 3 because the emails are not complete copies and include
15 at least one draft, and to Exhibit 6 and Exhibit 7⁷ for lack of relevance. [Department's
16 Objection]. The Department objects to the Taxpayers' exhibits because they do not match
17 exactly, due to the handwritten notes, the copies that were provided to the Department prior to
18 the hearing. The annotations on Exhibit 2 and Exhibit 3 do not substantively change the
19 underlying documents, Exhibit 3 is a sampling⁸ of the Taxpayers' correspondence with the
20 Department as well as other agencies regarding their tax issues, and Exhibit 6 and Exhibit 7 are

⁶ Exhibit 1 is substantively the same as Exhibit E. Exhibit 2 is substantively the same as Exhibit F.

⁷ The objection on Exhibit 7 is limited to references to tax years other than 2014 and 2015; however, Exhibit 7 does not mention any tax year. It is a letter about the Taxpayers' defective hard drive.

⁸ Several copies of the emails in Exhibit 3 have been cut off mid-paragraph or mid-sentence. As such, Exhibit 3 does not represent a complete record of the Taxpayers' correspondence, but it does provide a general overview of their communications with various agencies about their tax issues.

1 relevant to the Taxpayers' arguments regarding their attempts to reconstruct their tax records and
2 their lack of success. The Department's objections to the Taxpayers' exhibits are overruled.

3 **Personal income tax.**

4 New Mexico imposes a personal income tax upon the net income of every resident. *See*
5 NMSA 1978, § 7-2-3 (1981). New Mexico's adjusted gross income is based on the taxpayer's
6 federal adjusted gross income. *See* NMSA 1978, § 7-2-2 (2014). If the IRS issues an adjustment to
7 a taxpayer's federal adjusted gross income, the taxpayer has 180 days to file an amended New
8 Mexico PIT return reflecting the adjustment. *See* NMSA 1978, § 7-1-13 (C) (2013).

9 The Taxpayers admit that there was an adjustment made on their federal adjusted gross
10 income, and that they owed New Mexico personal income tax for the 2014 and 2015 tax years
11 based on the adjustment. The Taxpayers believe that the amount of income reported for the 2014
12 and 2015 tax years was incorrect, but they did not retain their tax records for those years, lost data
13 on a defective hard drive, and have been unsuccessful getting tax records from the IRS. Retention
14 of records is the Taxpayers' responsibility. *See* NMSA 1978, § 7-1-10 (2007). As the Taxpayers
15 did not have records, they failed to prove that their tax liability should be different, and the
16 assessment is presumed to be correct. *See* NMSA 1978, § 7-1-17. *See also Archuleta*, 1972-
17 NMCA-165, ¶11. *See also Casias Trucking*, 2014-NMCA-099, ¶8. Moreover, the Taxpayers
18 agreed to the managed audit and its outcome. [Exhibit C; Exhibit D].

19 **Managed audit assessment.**

20 The Department has discretion to make agreements for managed audits. *See* NMSA 1978, §
21 7-1-11.1 (2003). All managed audits agreements must satisfy the statutory requirements, which
22 include deadlines and waivers. *See id.* By entering into a managed audit agreement, the Taxpayers
23 waived limitations on assessments. *See id.* [Exhibit C]. Again, the Taxpayers admit that they owe

1 the tax and that they agreed to the managed audit. When any taxpayer is liable for taxes in excess of
2 \$25.00, the Department is required to assess. *See* NMSA 1978, § 7-1-17 (2007). Moreover, “[t]he
3 department *shall assess* the tax liability found to be due as the result of a managed audit”. NMSA
4 1978, § 7-1-11.1 (F) (2003) (emphasis added). The word “shall” indicates that the assessment of the
5 tax liability is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation*
6 *Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Therefore, the assessment based on the managed
7 audit agreement is appropriate.

8 **The abatement.**

9 The Taxpayers argue that the Department cannot assess them after issuing an abatement.
10 The Taxpayers cite no authority for this proposition. The Department has the authority to abate any
11 assessment that was “incorrectly, erroneously, or illegally made.” NMSA 1978, § 7-1-28 (A)
12 (2013). As Mr. Sanchez explained, the Taxpayers were erroneously issued the March assessment
13 because he failed to enter an extended deadline into the Department’s computer system correctly.
14 [Exhibit A]. Moreover, the Taxpayers could not engage in a managed audit if there was an
15 outstanding assessment. Therefore, the March assessment was issued incorrectly and erroneously,
16 and it was properly abated. *See* NMSA 1978, § 7-1-28 (A).

17 Nothing in the statute allowing abatements prohibits the Department from reassessing in the
18 future. *See* NMSA 1978, § 7-1-28. In fact, the ability to abate incorrect assessments suggests that
19 the Department can remedy an error and may issue a corrected, valid assessment. *See id.* Again,
20 the Department is required to assess on any liability of \$25.00 or more. *See* NMSA 1978, § 7-1-17.
21 There are some limitations on when assessments may be made. *See* NMSA 1978, § 7-1-18 (2013).
22 None of these limitations are based on whether an abatement had previously been issued. *See id.*
23 Generally, the limitations are all time deadlines within which the Department must assess. *See id.*

1 In the Taxpayers' case, the Department would have had three years to assess from the end of the
2 calendar year in which the filing of the amended return based on the IRS adjustment was required.
3 *See id.* However, the Taxpayers waived any such time limitations by signing the managed audit
4 agreement. [Exhibit C]. Therefore, the Department could assess at any time. *See* NMSA 1978, §
5 7-1-18.

6 **Duress and emotional distress.**

7 The Taxpayers argue that they should not be held to the managed audit agreement because
8 they entered it under duress. The Taxpayers argue that they felt they had no other options because
9 they were not able to get copies of their tax documents from the IRS and their copies had been lost.
10 Duress is not articulated as a defense in the Tax Administration Act. *See* NMSA 1978, § 7-1-1, *et.*
11 *seq.* However, contracts made under duress may be voided. *See Romero v. Bank of the Southwest,*
12 *2003-NMCA-124, ¶ 19, 135 N.M. 1.* The relevant inquiry for duress is whether the agreement was
13 caused by the wrongful act of another. *See Richards v. Allianz Life Ins. Co. of N. Am., 2003-*
14 *NMCA-001, ¶ 30, 133 N.M. 229 (October 7, 2002), cert. denied No. 27, 791 (NMSC, December*
15 *17, 2002).* *See also Skinner v. Lopez, No. A-1-CA-35817, mem. op., ¶ 16 (NMCA, August 23,*
16 *2018) (non-precedential) (detailing what types of wrongful acts may constitute duress).*

17 The Department's conduct was not wrongful; rather, the Department was required to make
18 an assessment when it learned that the Taxpayers owed more than \$25.00 in tax to New Mexico.
19 *See* NMSA 1978, § 7-1-17. The Department notified the Taxpayers of its intent to assess and gave
20 the Taxpayers the opportunity to respond with evidence of their tax records. [Exhibit G]. The
21 Taxpayers' inability to provide or to obtain copies of their own tax records, which they had a duty to
22 maintain, is not wrongful conduct by the Department. *See* NMSA 1978, § 7-1-10. The Department
23 also gave the Taxpayers the opportunity to engage in a managed audit. [Exhibit G]. A managed

1 audit is beneficial to a taxpayer, as it allows a taxpayer to avoid paying penalty and interest on an
2 unpaid tax liability. *See* NMSA 1978, § 7-1-11.1. The Taxpayers' argument to void the managed
3 audit can only work to their detriment. The consequence of voiding the managed audit agreement
4 would mean that the Department was free to assess the Taxpayers for the penalty and interest owed
5 on the past due tax. *See id.* *See also* NMSA 1978, § 7-1-17, § 7-1-67, and § 7-1-69. However,
6 there was no evidence that the Department's conduct was wrongful, and there is no basis for
7 voiding the managed audit for duress.

8 The Taxpayers argue that they should be excused from paying their past due tax based on
9 their emotional distress. The Taxpayers felt that the Department did not make timely responses to
10 their inquiries. The Taxpayers did not understand how they could be assessed after receiving an
11 abatement. The Taxpayers were frustrated with the responses of the Department and other agencies
12 to their inquiries. The Taxpayers argue that the tax advocates did not perform their duties. The
13 Taxpayers argue that the Department's conduct was an intentional infliction of emotional distress
14 and that they should not have to pay the tax due for that reason.

15 Intentional infliction of emotional distress is not articulated as a defense in the Tax
16 Administration Act. *See* NMSA 1978, § 7-1-1, *et. seq.* The Department did provide responses to
17 the Taxpayers' inquiries. [Exhibit 3]. Ms. Smyth testified that she saw only one email from the
18 Taxpayers, which had been forwarded to her from the Governor's office. She testified that she
19 investigated their inquiry, promptly replied to the Taxpayers, and informed them of the deadline
20 extension. The subsequent tax advocate answered questions and provided information about the
21 hearing process. [Exhibit 3.12]. Intentional infliction of emotional distress is a tort issue, and
22 government entities and employees are generally immune from liability for intentional infliction of
23 emotional distress when they are acting within the scope of their duties. *See Garcia-Montoya v.*

1 *State Treasurer's Office*, 2001-NMSC-003, ¶ 49, 130 N.M. 25. Determining tort liabilities is
2 beyond the scope of this hearing. *See* NMSA 1978, § 7-1B-8. Nevertheless, the Taxpayers did not
3 argue that the Department or its employees were acting beyond the scope of their duties; rather, the
4 Taxpayers were frustrated with the manner and speed with which they carried out those duties.

5 The Taxpayers' argument is essentially one for equitable estoppel. Equitable estoppel
6 may be found against the state where there is "a shocking degree of aggravated and overreaching
7 conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't*, 1998-
8 NMSC-011, ¶ 17, 125 N.M. 140. Equitable estoppel against the state is disfavored, especially in
9 cases involving taxes. *See Taxation and Revenue Dep't v. Bien Mur Indian Market*, 1989-
10 NMSC-015, ¶9-10, 108 N.M. 228. Equitable estoppel will not apply against the state when it
11 would be contrary to the requirements of statute or law. *See Rainaldi v. Pub. Employees Ret.*
12 *Bd.*, 1993-NMSC-028, ¶ 18-19, 115 N.M. 650. *See also In Re Kilmer*, 2004-NMCA-122, ¶ 26,
13 136 N.M. 440.

14 An essential element of equitable estoppel is that the Taxpayers relied on the
15 government's conduct to their detriment. *See In Re Kilmer*, 2004-NMCA-122, ¶ 27. The
16 Department's conduct in allowing the managed audit was to the Taxpayers' benefit, not to their
17 detriment. Moreover, there was no evidence that the Department or its employees acted beyond
18 the scope of their duties. Even if there were sufficient evidence of duress and intentional infliction
19 of emotional distress, the Administrative Hearings Office has not been granted statutory authority
20 to exercise an equitable judicial remedy. *See AA Oilfield Serv. v. N.M. State Corp. Comm'n*,
21 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an
22 administrative body did not empower it to grant equitable relief, such as estoppel, because the
23 authority is limited to making factual and legal determinations as authorized by the statute). *See*

1 *Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for
2 the proposition that an agency with quasi-judicial powers did not have authority to grant an
3 equitable remedy). *See also* NMSA 1978, § 7-1B-1, *et seq.*

4 **CONCLUSIONS OF LAW**

5 A. The Taxpayers filed a timely written protest to the assessment and jurisdiction lies
6 over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8.

7 B. The first hearing was timely set and held within 90 days of the request for hearing.
8 *See id.* *See also* 22.600.3.8 (J) NMAC (2020).

9 C. The Department filed a timely request for hearing within 180 days of the protest.
10 *See* NMSA 1978, § 7-1B-8. *See also* 22.600.3.8 NMAC.

11 D. The Taxpayers failed to file an amended PIT return with New Mexico after the
12 IRS adjustment to their federal adjusted gross income. *See* NMSA 1978, § 7-1-13 (C).

13 E. The Taxpayers agreed to a managed audit and waived time limitations on
14 assessment. *See* NMSA 1978, § 7-1-11.1.

15 F. The Department's assessment pursuant to the managed audit agreement was
16 appropriate and was not prohibited by the prior abatement of the erroneously issued March
17 assessment. *See id.* *See also* NMSA 1978, § 7-1-28, § 7-1-17, and § 7-1-18.

18 G. The Taxpayers failed to prove that equitable estoppel should apply for duress or
19 intentional infliction of emotional distress. *See Romero*, 2003-NMCA-124, ¶ 19. *See also*
20 *Richards*, 2003-NMCA-001, ¶ 30. *See also Skinner*, No. A-1-CA-35817, mem. op., ¶ 16 (non-
21 precedential). *See also Garcia-Montoya*, 2001-NMSC-003, ¶ 49. *See also AA Oilfield Serv.*,
22 1994-NMSC-085, ¶ 18. *See also Gzaskow*, 2017-NMCA-064, ¶35.

1 H. The Taxpayers failed to overcome the presumption that the assessment was correct.
2 See NMSA 1978, § 7-1-17. See also 3.3.1.9 NMAC. See also *Archuleta*, 1972-NMCA-165, ¶11.
3 See also *Casias Trucking*, 2014-NMCA-099, ¶8.

4 For the foregoing reasons, the Taxpayers' protest **IS DENIED. IT IS ORDERED** that the
5 Taxpayers are liable for \$2,475.00⁹ in outstanding personal income tax.

6 DATED: August 30, 2022.

7 Dee Dee Hoxie

8 Dee Dee Hoxie
9 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,

⁹ The assessment was for \$2,975.00. Again, the Department acknowledged that the Taxpayers made a \$500.00 payment during the managed audit that was not reflected on the assessment but has been since credited to their account. Therefore, the outstanding liability is \$2,475.00.

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 30, 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

7

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9 *INTENTIONALLY BLANK*