



1 given one week, until November 10, 2022, to reply to the Department's response. On November  
2 17, 2022, the Hearing Officer issued an order for clarification with a deadline of November 23,  
3 2022.

4 The main issue to be decided is whether the Taxpayer owes penalty and interest for  
5 making a late payment on the cigarette tax. A secondary issue that was raised at the hearing is  
6 what amount of penalty and interest the Taxpayer owes. The Hearing Officer considered all of  
7 the evidence and arguments presented by both parties. Because the Taxpayer's payment of the  
8 cigarette tax was late, the Hearing Officer finds in favor of the Department. IT IS DECIDED  
9 AND ORDERED AS FOLLOWS:

10 **FINDINGS OF FACT**

11 1. On October 18, 2021, the Department issued an assessment to the Taxpayer for  
12 the tax period of August 2021. The assessment was for cigarette tax of \$2,993,400.00, penalty of  
13 \$59,868.00, and interest of \$3,690.47 for a total liability of \$3,056,958.47. [Admin. file  
14 L1368179632; Testimony of Ms. Clay; Testimony of Mr. Pacheco; Exhibit E].

15 2. On or about November 17, 2021, the Taxpayer filed a timely written protest to the  
16 denial of refund. [Exhibit 1]. The Taxpayer filed additional documents indicating its protest on  
17 January 10, 2022 and on January 28, 2022. [Admin. file protest].

18 3. On January 6, 2022 and on January 22, 2022, the Department acknowledged its  
19 receipt of the protest. [Admin. file L0709751728 and L1197886384].

20 4. On July 21, 2022, the Department filed a request for hearing with the  
21 Administrative Hearings Office. [Admin. file request].

22 5. On August 22, 2022, a telephonic scheduling hearing was conducted, which was  
23 within 90 days of the request as required by statute. [Admin. file].

1           6.       On November 1, 2022, the Department filed its response to Exhibit #1 and  
2 submitted additional evidence. [Department's Response; First Affidavit of Mr. Pacheco; Exhibit  
3 H].

4           7.       On November 9, 2022, the Taxpayer filed its reply to the Department's response.  
5 [Taxpayer's Reply].

6           8.       On November 17, 2022, the Hearing Officer issued an order for clarification and  
7 gave the Department until November 23, 2022 to provide the ordered calculation results.  
8 [Admin. file].

9           9.       On November 23, 2022, the Department filed its response to the order with  
10 another affidavit. [Second Affidavit of Mr. Pacheco].

11          10.       On August 16, 2021, the Taxpayer made a purchase order for cigarette tax stamps  
12 (the first August purchase order) for a total cigarette tax liability of \$2,993,400.00. [Testimony  
13 of Ms. Clay; Testimony of Mr. Pacheco; Exhibit F].

14          11.       On August 20, 2021, the Taxpayer paid the cigarette tax on the first August  
15 purchase order. [Testimony of Ms. Clay; Testimony of Mr. Pacheco; Exhibit A].

16          12.       On August 23, 2021, the Taxpayer made a purchase order for cigarette tax stamps  
17 (the second August purchase order) for a total cigarette tax liability of \$3,000,000.00.  
18 [Testimony of Ms. Clay; Testimony of Mr. Pacheco; Exhibit G].

19          13.       The payment for all cigarette taxes accrued in August 2021 was due on September  
20 25, 2021. [Testimony of Ms. Clay; Testimony of Mr. Pacheco]. *See* NMSA 1978, § 7-12-7  
21 (2019).

1           14.     The Taxpayer paid the cigarette taxes on the first August purchase order in  
2 August, but it failed to pay the cigarette taxes for the second August purchase order by  
3 September 25, 2021. [Testimony of Ms. Clay; Testimony of Mr. Pacheco].

4           15.     Ms. Clay is responsible for making the Taxpayer's tax payments, and she did not  
5 realize that the Taxpayer placed the second August purchase order after the first August purchase  
6 order had already been paid. [Testimony of Ms. Clay].

7           16.     On October 20, 2021, Ms. Clay logged into the Department's TAP system and  
8 paid the September purchase order. [Testimony of Ms. Clay; Testimony of Mr. Pacheco; Exhibit  
9 A; Exhibit B; Exhibit C; Exhibit D].

10          17.     The Taxpayer received the assessment, and Ms. Clay was made aware of the  
11 assessment. [Testimony of Ms. Clay].

12          18.     On October 27, 2021, Ms. Clay logged into the Department's TAP system and  
13 made another payment on the cigarette taxes. [Testimony of Ms. Clay; Testimony of Mr.  
14 Pacheco; Exhibit A; Exhibit B; Exhibit 1].

15          19.     Ms. Clay was confused by the TAP system's display and paid the amount due on  
16 the October invoice, but the payment was intended to be for the second August purchase order.  
17 The amount paid on October 27<sup>th</sup> was \$2,993,286.00. [Testimony of Ms. Clay; Exhibit 1].

18          20.     On November 16, 2021, the Department acknowledged that the October 27<sup>th</sup>  
19 payment would be applied to the second August purchase order per the Taxpayer's request and  
20 explained that there was \$114.00 still unpaid in cigarette tax principal. [Testimony of Ms. Clay;  
21 Exhibit 1; Second Affidavit of Mr. Pacheco].

22          21.     The additional \$114.00 owed was paid on November 30, 2021. [First Affidavit of  
23 Mr. Pacheco].

1           22.     The Department's email also indicated that the amount of penalty and interest had  
2 increased from the total in the assessment of \$63,558.47 to \$127,117.15. [Testimony of Ms.  
3 Clay; Exhibit 1].

4           23.     Initially, the Department's recalculation of the penalty and interest was based on  
5 the difference between the assessment date on October 18, 2021 and the date that it applied the  
6 payment to the second August purchase order on November 16, 2021. [Exhibit 1; Testimony of  
7 Mr. Pacheco; First Affidavit of Mr. Pacheco].

8           24.     After acknowledging the payment date of October 27, 2021, the Department  
9 contends that the amount of penalty and interest at is still correct at \$127,119.56 because the  
10 payment occurred two days past one month after the original due date on September 25, 2021<sup>1</sup>.  
11 [Exhibit H; Second Affidavit of Mr. Pacheco].

12           25.     The amount of additional penalty and interest owed on the \$114.00 that remained  
13 unpaid from October 27, 2021 until November 30, 2021 is a total of \$2.60, with \$2.28 in penalty  
14 and \$0.32 in interest. [Second Affidavit of Mr. Pacheco].

15           26.     The Taxpayer's failure to pay the cigarette taxes on the second August purchase  
16 order by its due date was not done intentionally. [Testimony of Ms. Clay].

17           27.     The Taxpayer usually schedules payment of the cigarette taxes closer to the due  
18 date, which is in the month following the accrual of the tax liability. [Testimony of Ms. Clay;  
19 Exhibit A; Exhibit B].

20           28.     During August 2021, the Taxpayer was undergoing some changes, and their usual  
21 routine was disrupted. Because their usual procedures were not followed, the August payment  
22 was made in August rather than in September. [Testimony of Ms. Clay].

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<sup>1</sup> Because penalty accrues at the rate of two percent per month or any fraction of a month. *See* NMSA 1978, § 7-1-69.

1           29.     The August payment was made before the second August purchase order was  
2 placed. [Testimony of Ms. Clay; Testimony of Mr. Pacheco].

3           30.     Due to the ongoing changes at the Taxpayer, the second August purchase order  
4 was not communicated to Ms. Clay. [Testimony of Ms. Clay].

5           31.     Due to the Taxpayer's usual procedures<sup>2</sup>, Ms. Clay did not find it unusual to see a  
6 balance due on the TAP screen that would amount to two purchase orders when she made the tax  
7 payment. [Testimony of Ms. Clay; Exhibit C; Exhibit D].

8           32.     After better internal communications at the Taxpayer, Ms. Clay realized that the  
9 Department had issued the assessment and promptly logged into the TAP system again and made  
10 an additional payment. [Testimony of Ms. Clay; Exhibit A; Exhibit B; Exhibit 1].

11          33.     The Department admitted that the TAP system did not make it readily visible  
12 when there was an unpaid outstanding balance, that it was contacting its IT department on the  
13 issue, and explained which links should be used to get the system to recognize that the payment  
14 was being made on a previous unpaid balance rather than the current balance. [Exhibit 1].

15          34.     The Department also admitted that the payment on the second August purchase  
16 order was received on October 27, 2021, although it was not officially applied to the second  
17 August purchase order until November 16, 2021. [Testimony of Mr. Pacheco; Exhibit 1; Second  
18 Affidavit of Mr. Pacheco].

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<sup>2</sup> To make a purchase order early in the month and then to pay the previous month's purchase order close to the due date on the 25<sup>th</sup> of the following month.

1 **DISCUSSION**

2 **Burden of proof.**

3 The assessment issued in this case is presumed correct. *See* NMSA 1978, § 7-1-17 (C)  
4 (2007). Unless otherwise specified, for the purposes of the Tax Administration Act, “tax” is  
5 defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (Z) (2019). The presumption  
6 of correctness extends to the Department’s assessment of penalty and interest. *See* 3.1.6.13  
7 NMCA (2001). *See also* *Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-  
8 NMCA-50, ¶16, 139 N.M. 498 (agency regulations interpreting a statute are presumed proper and  
9 are to be given substantial weight). Consequently, the Taxpayer has the burden to overcome the  
10 assessment. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. *See also N.M.*  
11 *Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents  
12 sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the  
13 assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-21, ¶13,  
14 133 N.M. 217.

15 **Cigarette tax.**

16 There is an excise tax for the privilege of selling cigarettes in New Mexico. *See* NMSA  
17 1978, § 7-12-3 (2019). Packages of cigarettes sold in New Mexico must have a tax stamp  
18 affixed. *See* NMSA 1978, § 7-12-5 (2010). “Payment for tax stamps shall be made on or before  
19 the twenty-fifth day of the month following the month in which the sale of stamps by the  
20 department is made.” NMSA 1978, § 7-12-7 (G) (2019).

21 The Taxpayer conceded that it owed cigarette tax for both purchase orders of tax stamps  
22 made in August 2021. [Testimony of Ms. Clay]. The payment for the purchase of tax stamps in  
23 August 2021 was due on September 25, 2021. *See* NMSA 1978, § 7-12-7. The Taxpayer

1 conceded that it failed to pay the cigarette tax that it owed on the second August purchase order  
2 by the payment deadline of September 25, 2021. [Testimony of Ms. Clay].

3 **Assessment of penalty.**

4 The Taxpayer argues that it should not be assessed penalty because its failure to pay the  
5 tax on the second August purchase order was not intentional, the TAP system does not  
6 adequately identify past due balances and how to pay them, the Taxpayer has a timely payment  
7 history, and the Taxpayer has taken steps to ensure that such a mistake does not happen again in  
8 the future. Penalty “shall be added to the amount assessed” when a tax is not paid at the time  
9 that it is due, even when the failure to pay is because of negligence rather than an intent to evade  
10 the tax. NMSA 1978, § 7-1-69 (A) (2007) (emphasis added). The word “shall” indicates that the  
11 assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*  
12 *Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

13 The Taxpayer argues that it was not negligent. The Taxpayer argues that the lack of  
14 clarity on the Department’s TAP system is to blame for the Taxpayer’s failure to realize that  
15 there was an outstanding tax balance. The Taxpayer also argues that it should not be subject to  
16 penalty when the Department is not subject to penalty for its mistakes. If a taxpayer is not  
17 negligent, penalty may be excused. *See* 3.1.11.11 NMAC (2001) (listing several factors, such as  
18 consulting an accountant, that indicate non-negligence). A taxpayer’s actions do not become  
19 non-negligent based on the Department’s mistakes after the assessment. *See id.* Negligence  
20 includes “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or  
21 inattention.” 3.1.11.10 NMCA (2001). A taxpayer’s lack of knowledge or erroneous belief that  
22 the taxpayer did not owe the tax is considered to be negligence for purposes of assessment of



1 penalty. *See id.* *See also Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90  
2 N.M. 16.

3           The Department's TAP system is not to blame for the Taxpayer's failure to timely pay  
4 the tax on the second August purchase order. The Taxpayer placed the second August purchase  
5 order after it paid the first August purchase order. [Exhibit A; Exhibit B; Exhibit F; Exhibit G;  
6 Testimony of Ms. Clay; Testimony of Mr. Pacheco]. Therefore, the TAP system could not  
7 display a balance on the second August purchase order when Ms. Clay paid the first August  
8 purchase order; the second August purchase order had not yet been made. [Exhibit A; Exhibit F;  
9 Exhibit G]. Because of the lack of communication within the Taxpayer's departments, Ms. Clay  
10 did not realize that she needed to make another payment for the second August purchase order by  
11 September 25, 2021. [Testimony of Ms. Clay]. Because of her lack of knowledge, Ms. Clay did  
12 not login to the TAP system again until October 20, 2021, when she was making the payment for  
13 the September 2021 purchase order. [Exhibit A; Exhibit B; Exhibit C; Exhibit D; Testimony of  
14 Ms. Clay]. After making the payment for the September 2021 purchase order and receiving  
15 some internal communications, Ms. Clay logged into the TAP system again on October 27, 2021.  
16 [Exhibit A; Exhibit B; Testimony of Ms. Clay; Testimony of Mr. Pacheco]. Ms. Clay knew that  
17 the Taxpayer had been assessed for a late payment, but she did not know the amount of the  
18 assessment because the documents were not forwarded to her from the Taxpayer's other  
19 department. [Testimony of Ms. Clay]. Ms. Clay paid what she thought was the outstanding  
20 balance on October 27, 2021, using the amount that she was able to view on the TAP system.  
21 [Testimony of Ms. Clay; Exhibit 1]. The amount shown on that TAP system at that time was the  
22 amount of the October 2021 purchase order. [Exhibit 1]. Consequently, the payment made on

1 October 27, 2021 was short of the assessment on the tax principal by \$114.00, which was  
2 subsequently paid on November 30, 2021. [Exhibit 1; Affidavit of Mr. Pacheco].

3 The Taxpayer failed to prove that it was not negligent; rather, the Taxpayer admitted that  
4 its own changes of procedure and lack of interdepartmental communications caused the second  
5 August purchase order to go unpaid. Although the Taxpayer did not intend to evade its tax  
6 obligations, its failure to pay the tax when it was due on September 25, 2021 was due to its  
7 negligence. Therefore, the penalty was properly assessed.

8 **Assessment of interest.**

9 Interest “shall be paid” on taxes that were not paid on or before the date on which they  
10 were due. NMSA 1978, § 7-1-67 (A) (2013). Again, the word “shall” indicates that the  
11 assessment of interest is mandatory. *See Marbob Energy Corp.*, 2009-NMSC-013. The  
12 assessment of interest is not designed to punish taxpayers, but to compensate the state for the  
13 time value of unpaid revenue. Because the tax was not paid when it was due, interest was  
14 properly assessed.

15 **The amount of penalty and interest due.**

16 The Department initially argued that the bulk of the tax principal on the second August  
17 purchase order was not paid until November 16, 2021. [First Affidavit of Mr. Pacheco;  
18 Testimony of Mr. Pacheco]. The Department later acknowledged that the bulk of the assessment  
19 was deemed paid on October 27, 2021, but it still contends that the additional interest and  
20 penalty are due because the payment occurred one month and two days late. [Second Affidavit  
21 of Mr. Pacheco]. *See* NMSA 1978, § 7-1-69 (A) (2007) (calculating penalty at two percent per  
22 month or any fraction of a month). *See also* NMSA 1978, § 7-1-67 (imposing interest on unpaid  
23 tax). *See also* 3.1.10.18 NMAC (2001) (indicating the interest rate per year and how daily

1 interest is calculated). The Department calculated the total penalty and interest due at  
2 \$127,119.56. [Exhibit H; Second Affidavit of Mr. Pacheco].

3 At the hearing, the Department acknowledged that payment within 10 days of the  
4 assessment would result in no additional penalty and interest. [Exhibit E; Testimony of Mr.  
5 Pacheco]. The Department indicated that the additional penalty and interest in Exhibit H would  
6 be abated and withdrew Exhibit H. [Testimony of Mr. Pacheco]. After Exhibit 1 was submitted,  
7 the Department resubmitted Exhibit H as accurate based on the November date that the  
8 Department acknowledged and accepted the October 27<sup>th</sup> payment as the payment on the second  
9 August purchase order. [Department's Response; First Affidavit of Mr. Pacheco]. The  
10 Department again changed its position and acknowledged that the second August purchase order  
11 was deemed paid on October 27, 2021, but it continues to argue that the additional penalty and  
12 interest are due because the payment was still one month and two days late. [Second Affidavit of  
13 Mr. Pacheco]. The Department's final argument does not address the fact that the bulk of the  
14 assessment was paid within 10 days of the assessment. [Second Affidavit of Mr. Pacheco].

15 Most of the assessment was paid on October 27, 2021, which was within 10 days of the  
16 assessment, which was made on October 18, 2021. [Exhibit E]. Therefore, no further penalty  
17 and interest accrued on the amount of \$2,993,286.00. [Exhibit E; Exhibit 1; Testimony of Ms.  
18 Clay; Testimony of Mr. Pacheco]. Penalty and interest continued to accrue only on the unpaid  
19 \$114.00 until it was paid on November 30, 2021. [First Affidavit of Mr. Pacheco; Exhibit 1;  
20 Second Affidavit of Mr. Pacheco]. *See* NMSA 1978, § 7-1-67 and § 7-1-69. The total additional  
21 penalty and interest on the \$114.00 is \$2.60. [Second Affidavit of Mr. Pacheco]. Therefore, the  
22 total penalty and interest owed by the Taxpayer is \$63,561.07.<sup>3</sup>

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<sup>3</sup> The assessed penalty of \$59,868.00 plus the additional \$2.28; the assessed interest of \$3,690.47 plus the additional \$0.32.

1 **CONCLUSIONS OF LAW**

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

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

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

8 D. Assessments of penalty and interest were required and appropriate under the statutes.  
9 *See* NMSA 1978, § 7-1-67 and § 7-1-69.

10 E. The Department acknowledged that \$2,993,286.00 of the assessment was paid on  
11 October 27, 2021, and that payment was made within 10 days of the assessment. Consequently, no  
12 additional penalty or interest accrued on that amount. *See* Exhibit E.

13 F. Because the Taxpayer paid the remaining \$114.00 owed in the assessment on  
14 November 30, 2021, additional penalty and interest accrued on that amount. *See* NMSA 1978, § 7-  
15 1-67 and § 7-1-69.

16 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that  
17 Taxpayer is liable for \$59,870.28 in penalty and \$3,690.79 in interest for a total outstanding  
18 liability of \$63,561.07. As the total liability in Exhibit H exceeds the total outstanding liability,  
19 \$63,558.49 in Exhibit H is **HEREBY ABATED**.

20 DATED: November 30, 2022.

21 *Dee Dee Hoxie*  
22 Dee Dee Hoxie  
23 Hearing Officer  
24 Administrative Hearings Office  
25 P.O. Box 6400  
26 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On November 30, 2022, a copy of the foregoing Decision and Order was submitted to the  
15 parties listed below in the following manner:

16 *First Class Mail and Email*

*First Class Mail and Email*

17  
18  
19  
20 *INTENTIONALLY BLANK*