

1 and interest of \$235.57, for a total liability of \$5,254.35. [Admin. file L0154722416; Testimony
2 of Mr. Avila; Testimony of Ms. Rivera].

3 2. On October 25, 2022, the Taxpayer filed a timely written protest to the
4 assessment. [Admin. file protest].

5 3. On February 28, 2023, the Department acknowledged its receipt of the protest.
6 [Admin. file L0134714480].

7 4. On August 28, 2023, the Department filed a request for hearing with the
8 Administrative Hearings Office with its answer to the protest. [Admin. file request].

9 5. On September 15, 2023, a telephonic scheduling hearing was conducted, which
10 was within 90 days of the request as required by statute. [Admin. file].

11 6. The Taxpayer's gross receipts taxes and return were due on July 25, 2022.
12 [Testimony of Mr. Avila; Testimony of Ms. Rivera].

13 7. The Taxpayer filed its gross receipts tax return on August 3, 2022. [Testimony of
14 Mr. Avila; Testimony of Ms. Rivera].

15 8. The Taxpayer owed gross receipts tax of \$250,939.00. [Admin. file protest;
16 Testimony of Mr. Avila; Testimony of Ms. Rivera].

17 9. The Taxpayer paid the gross receipts tax on August 9, 2022. [Admin. file;
18 Testimony of Mr. Avila; Testimony of Ms. Rivera].

19 10. Because the Taxpayer filed its return and paid its taxes after the July 25, 2022 due
20 date, the Department assessed the Taxpayer with penalty and interest. [Admin. file
21 L0154722416; Testimony of Mr. Avila; Testimony of Ms. Rivera].

22 **DISCUSSION**

23 **Burden of proof.**

1 “The taxpayer shall have the burden of proof, except as otherwise provided by law.”
2 22.600.3.24 (B) NMAC (2020). Assessments by the Department are presumed to be correct. *See*
3 NMSA 1978, § 7-1-17 (2007). *See El Centro Villa Nursing Ctr. v. Taxation and Revenue*
4 *Department*, 1989-NMCA-070, 108 N.M. 795. *See also Archuleta v. O'Cheskey*, 1972-NMCA-
5 165, ¶11, 84 N.M. 428. *See also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-
6 NMCA-099, ¶8. The presumption extends to the assessment of penalty and interest. *See* 3.1.6.13
7 NMAC (2001). “The effect of the presumption of correctness is that the taxpayer has the burden of
8 coming forward with some countervailing evidence tending to dispute the *factual correctness* of the
9 assessment”. 3.1.6.12 (A) NMAC (2001) (emphasis added). *See Gemini Las Colinas, LLC v. N.M.*
10 *Taxation & Revenue Dep't*, 2023-NMCA-039. *See also* 22.600.1.18 and 22.600.3.24 NMAC.

11 **Assessment of penalty and interest.**

12 The Taxpayer conceded that it was required to pay the tax and file the return on July 25,
13 2022. The Taxpayer conceded that it filed its return on August 3, 2022 and paid the tax on August
14 9, 2022, which made the filing and payment late.

15 When a tax is not paid by the due date or a return is not filed by its due date, “there *shall*
16 be added to the amount assessed a penalty”. NMSA 1978, § 7-1-69 (A) (2021) (emphasis
17 added). Interest “shall be paid” on taxes that were not paid on or before the date on which they
18 were due. NMSA 1978, § 7-1-67 (A) (2013). The word “shall” indicates that the assessments of
19 penalty and interest are mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
20 *Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

21 Interest only accrues when tax is owed but not paid on the due date, and it accrues only
22 until the tax is paid. *See* NMSA 1978, § 7-1-67. There is no provision for excusing interest. *See*
23 NMSA 1978, § 7-1-67. *See also* 3.1.10.18 NMAC (2001). If a taxpayer is not negligent, penalty

1 may be excused. *See* 3.1.11.11 NMAC (2001) (listing several factors, such as consulting an
2 accountant, that indicate non-negligence).

3 The Taxpayer argues that it was not negligent. Mr. Avila explained that the Taxpayer
4 was striving to file its taxes correctly, that he realized that he would not have the return ready by
5 the deadline because he was still making sure that he was calculating things correctly, and that he
6 called the Department’s helpline to inquire about the consequences of filing a return a few days
7 late. Mr. Avila was told by an unidentified Department employee that there would be a \$5.00
8 late fee for filing a few days late. The Taxpayer decided that a \$5.00 late fee was not too
9 onerous and decided to file late to ensure that it was filing correctly and accurately.

10 Penalty is added based on the greater of the amount of tax due but unpaid or on the
11 amount of tax liability established in the late-filed return, calculated by multiplying the
12 appropriate amount by “two percent per month or any fraction of a month” from the due date.
13 NMSA 1978, § 7-1-69 (A) (1) and (A) (2). In cases with no tax due, which would show a tax
14 liability of zero in a return, there is still a penalty due, which is the \$5.00 minimum. *See* NMSA
15 1978, § 7-1-69 (A) (3).

16 Negligence includes “inadvertence, indifference, thoughtlessness, carelessness, erroneous
17 belief or inattention.” 3.1.11.10 NMCA (2001). The Taxpayer’s decision to file late because it
18 mistakenly believed it would be subject to a \$5.00 fee is not proof of non-negligence. *See*
19 3.1.11.11 NMAC. A taxpayer’s lack of knowledge or erroneous belief is considered to be
20 negligence for purposes of assessment of penalty. *See id.* *See also Tiffany Const. Co., Inc. v.*
21 *Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16.

22 **Estoppel.**

1 The Department can be estopped from taking action against a taxpayer when the party's
2 action or inaction was due to a regulation in effect at the time or a ruling addressed to the party
3 personally in writing by the secretary that was in effect at the time that the liability arose. *See*
4 NMSA 1978, § 7-1-60 (1993). Rulings must meet certain criteria. *See id.* *See also* NMSA
5 1978, § 9-11-6.2 (2015). To be effective, a ruling must be reviewed by the attorney general or
6 other legal counsel of the Department and the ruling must reflect that such review was done. *See*
7 NMSA 1978, § 9-11-6.2 (C). A ruling must be signed by the secretary and by counsel to show
8 that such a review took place. *See* 3.1.2.8 NMAC (2000). Rulings are also required to be
9 written statements that interpret specific statutes. *See* NMSA 1978, § 9-11-6.2 (B) (2). A verbal
10 conversation is not sufficient to estop the Department from taking action under the statute. *See*
11 NMSA 1978, § 7-1-60.

12 The Taxpayer argues that it was misled by the Department employee. The Taxpayer
13 argues that its actions were caused by the information provided by the Department's helpline,
14 and that they were misguided. The Taxpayer essentially argues for equitable estoppel.

15 Equitable estoppel may be found against the state where there is "a shocking degree of
16 aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State,*
17 *Human Servs. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140. Generally, statements of opinion on
18 matters of law do not give rise to estoppel when the facts are known to both parties. *See*
19 *Rainaldi v. Pub. Employees Ret. Bd.*, 1993-NMSC-028, ¶ 16, 115 N.M. 650. Equitable estoppel
20 against the state is disfavored, especially in cases involving taxes. *See Taxation and Revenue*
21 *Dep't v. Bien Mur Indian Market*, 1989-NMSC-015, ¶9-10, 108 N.M. 228. Equitable estoppel
22 will not apply against the state when it would be contrary to the requirements of statute. *See*

1 *Rainaldi*, 1993-NMSC-028, ¶ 18-19. *See also In re Kilmer*, 2004-NMCA-122, ¶ 26, 136 N.M.
2 440.

3 Mr. Avila's testimony did not provide details of the conversation that he had with the
4 Department's employee when he called the helpline. The evidence provided was that the
5 Taxpayer asked about filing a late return, but there was no evidence that the Taxpayer asked
6 about filing a late return with a substantial tax liability. The statements by the Department's
7 employee to the Taxpayer were accurate for a return with zero tax liability, which would be
8 subject to the \$5.00 minimum penalty. *See* NMSA 1978, § 7-1-69. Therefore, there is no
9 evidence that the Department's employee engaged in conduct that was aggravated, overreaching
10 or misleading, and equitable estoppel does not apply. *See Wisznia*, 1998-NMSC-011. Moreover,
11 applying equitable estoppel in this case would be contrary to the requirements of the penalty
12 statute. *See* NMSA 1978, § 7-1-69. *See also Rainaldi*, 1993-NMSC-028. *See also Kilmer*,
13 2004-NMCA-122. *See also AA Oilfield Serv. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶
14 18, 118 N.M. 273 (holding that the quasi-judicial powers of an administrative body are limited to
15 making factual and legal determinations as authorized by the statute). *See also Gzaskow v. Pub.*
16 *Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for the proposition
17 that an agency with quasi-judicial powers did not have authority to grant an equitable remedy).

18 CONCLUSIONS OF LAW

19 A. The Taxpayer filed a timely written protest of the Department's assessment, and
20 jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8
21 (2019).

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

1 C. Because the Taxpayer filed its return and paid its tax liability after the due date,
2 penalty and interest were owed. *See* NMSA 1978, § 7-1-67 and § 7-1-69.

3 D. The Taxpayer failed to prove that it was not negligent. Consequently, the penalty
4 was applied appropriately. *See* § 7-1-69. *See also* 3.1.11.10 NMCA and 3.1.11.11 NMCA.

5 E. The Taxpayer failed to prove that estoppel should apply. *See* NMSA 1978, § 7-1-
6 60. *See also* *Wisznia*, 1998-NMSC-011. *See also* *Bien Mur Indian Market*, 1989-NMSC-015.
7 *See also* *Rainaldi*, 1993-NMSC-028. *See also* *In re Kilmer*, 2004-NMCA-122

8 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
9 Taxpayer is liable for \$5,018.78 in penalty and \$235.57 in interest for a total outstanding liability
10 of \$5,254.35.

11 DATED: November 15, 2023.

12 *Dee Dee Hoxie*

13 _____
14 Dee Dee Hoxie
15 Hearing Officer
16 Administrative Hearings Office
17 P.O. Box 6400
Santa Fe, NM 87502

18 **NOTICE OF RIGHT TO APPEAL**

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

1 Hearings Office may begin preparing the record proper. The parties will each be provided with a
2 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
3 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
4 statement from the appealing party. *See* Rule 12-209 NMRA.

5 **CERTIFICATE OF SERVICE**

6 On November 15, 2023, a copy of the foregoing Decision and Order was submitted to the
7 parties listed below in the following manner:

8

9 *INTENTIONALLY BLANK*