

1 receipts tax of \$69,532.56, penalty of \$1,390.65, and interest of \$163.83, for a total liability of
2 \$71,087.04. [Admin. file L0430147696; Testimony¹].

3 2. On November 30, 2022, the Taxpayer filed a timely written protest by email.
4 [Admin. file protest].

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

7 4. On August 29, 2023, the Department filed a request for hearing and answer to the
8 protest with the Administrative Hearings Office. [Admin. file request].

9 5. On October 6, 2023, a telephonic scheduling hearing was conducted, which was
10 within 90 days of the request as required by statute. [Admin. file].

11 6. The Taxpayer files monthly gross receipts tax. [Testimony].

12 7. For the tax period ending August 31, 2022², the Taxpayer's gross receipts tax
13 payment and return were due on September 25, 2022. [Testimony].

14 8. The Taxpayer filed a gross receipts tax return on September 19, 2022.
15 [Testimony; Exhibits C through G].

16 9. The Taxpayer failed to make its gross receipts tax payment when it filed its return
17 and failed to make its payment by the September 25th due date. [Testimony; Exhibits A through
18 G].

19 10. The Taxpayer was assessed for the unpaid gross receipts tax, penalty, and interest
20 on October 17, 2022. [L0430147696].

¹ All references to testimony mean the testimony given by Mr. Bartholomew as he was the only witness who testified at the hearing.

² All references to the Taxpayer's return or payment relate to this tax period.

1 11. The Taxpayer paid the assessed gross receipts tax on November 8, 2022, but it did
2 not pay the penalty or interest. [Testimony; Exhibits A and B].

3 12. Since the Taxpayer's payment was made more than 10 days after the assessment,
4 additional penalty and interest accrued. [Testimony; L0430147696].

5 13. The penalty due is \$2,781.30, and the interest due is \$483.87. Therefore, the
6 Taxpayer's total current liability under the assessment is \$3,265.17. [Testimony].

7 DISCUSSION

8 **Burden of proof.**

9 "The taxpayer shall have the burden of proof, except as otherwise provided by law."
10 22.600.3.24 (B) NMAC (2020). Assessments by the Department are presumed to be correct. *See*
11 *NMSA 1978, § 7-1-17 (2007)*. *See El Centro Villa Nursing Ctr. v. Taxation and Revenue*
12 *Department*, 1989-NMCA-070, 108 N.M. 795. *See also Archuleta v. O'Cheskey*, 1972-NMCA-
13 165, ¶11, 84 N.M. 428. *See also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-
14 NMCA-099, ¶8. The presumption extends to the assessment of penalty and interest. *See* 3.1.6.13
15 NMAC (2001). "The effect of the presumption of correctness is that the taxpayer has the burden of
16 coming forward with some countervailing evidence tending to dispute the *factual correctness* of the
17 assessment". 3.1.6.12 (A) NMAC (2001) (emphasis added). *See Gemini Las Colinas, LLC v. N.M.*
18 *Taxation & Revenue Dep't*, 2023-NMCA-039. *See also* 22.600.1.18 and 22.600.3.24 NMAC.

19 **Assessment of penalty and interest.**

20 The Taxpayer presented no evidence and conceded on the facts. The Taxpayer was required
21 to pay the tax and file the return on September 25, 2022. The Taxpayer's return was filed before the
22 deadline, but the tax was paid late. In its written protest, the Taxpayer indicates that the failure to

1 pay the tax at the time that the return was filed was an inadvertent error. The Taxpayer requested a
2 waiver of penalty.

3 When a tax is not paid by the due date or a return is not filed by its due date, “there *shall*
4 be added to the amount assessed a penalty”. NMSA 1978, § 7-1-69 (A) (2021) (emphasis
5 added). Interest “shall be paid” on taxes that were not paid on or before the date on which they
6 were due. NMSA 1978, § 7-1-67 (A) (2013). The word “shall” indicates that the assessments of
7 penalty and interest are mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
8 *Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Penalty is added based on the
9 greater of the amount of tax due but unpaid or on the amount of tax liability established in the
10 late-filed return, calculated by multiplying the appropriate amount by “two percent per month or
11 any fraction of a month” from the due date. NMSA 1978, § 7-1-69 (A) (1) and (A) (2).

12 Interest only accrues when tax is owed but not paid on the due date, and it accrues only
13 until the tax is paid. *See* NMSA 1978, § 7-1-67. There is no provision for excusing interest. *See*
14 NMSA 1978, § 7-1-67. *See also* 3.1.10.18 NMAC (2001).

15 If a taxpayer is not negligent, penalty may be excused. *See* 3.1.11.11 NMAC (2001)
16 (listing several factors, such as consulting an accountant, that indicate non-negligence). The
17 Taxpayer presented no evidence at the hearing, and the written protest admits that the failure to
18 pay the tax when it was due was an unintentional mistake. Negligence includes “inadvertence,
19 indifference, thoughtlessness, carelessness, erroneous belief or inattention.” 3.1.11.10 NMCA
20 (2001). The Taxpayer’s failure to pay the tax when it was due was negligent. *See id.* *See also*
21 *Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16.

1 **CONCLUSIONS OF LAW**

2 A. The Taxpayer filed a timely written protest of the Department’s assessment, and
3 jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8
4 (2019).

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

7 C. Because the Taxpayer paid the tax late, penalty and interest were owed. *See* NMSA
8 1978, § 7-1-67 and § 7-1-69.

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

11 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that
12 Taxpayer is liable for \$2,781.30 in penalty and \$483.87 in interest for a total outstanding liability
13 of \$3,265.17.

14 DATED: December 7, 2023.

15 Dee Dee Hoxie
16 Dee Dee Hoxie
17 Hearing Officer
18 Administrative Hearings Office
19 P.O. Box 6400
20 Santa Fe, NM 87502

21 **NOTICE OF RIGHT TO APPEAL**

22 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
23 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
24 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this

1 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
2 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
3 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
4 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
5 Hearings Office may begin preparing the record proper. The parties will each be provided with a
6 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
7 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
8 statement from the appealing party. *See* Rule 12-209 NMRA.

9 **CERTIFICATE OF SERVICE**

10 On December 7, 2023, a copy of the foregoing Decision and Order was submitted to the
11 parties listed below in the following manner:

12 *First Class Mail and Email*

First Class Mail and Email

13
14 *INTENTIONALLY BLANK*