

1 2. On May 10, 2018, the Taxpayer filed a timely written protest to the assessment of
2 penalty. The Taxpayer paid \$745,672.15 of the assessment, which was the total of the gross
3 receipts tax principal and the interest. [Exhibit A.5-A.10; Testimony of Ms. Rivera].

4 3. On May 16, 2018, the Department acknowledged its receipt of the protest.
5 [Exhibit A.12; Testimony of Ms. Rivera].

6 4. On July 10, 2023, the Administrative Hearings Office first learned of this protest
7 when the Department filed a request for hearing and its answer to the protest. [Exhibit A.1].

8 5. On August 2, 2023, a telephonic scheduling hearing was conducted, which was
9 within 90 days of the request as required by statute¹. [Admin. file].

10 6. On October 5, 2023, the Department filed a notice of service for discovery.
11 [Admin. file; Exhibit D].

12 7. On November 3, 2023, the Taxpayer filed a response to the Department's request
13 for discovery. [Admin. file].

14 8. On November 6, 2023, the Department filed a motion to compel. [Admin. file].

15 9. The Taxpayer did not respond to the motion. [Admin. file].

16 10. On November 28, 2023, the order on the motion to compel was issued. Due to
17 the Taxpayer's lack of cooperation with discovery and failure to comply with the scheduling
18 order, the Taxpayer's ability to present evidence at the hearing on the merits was limited to
19 documents already filed and to the testimony of Mr. Phu. [Admin. file].

20 11. In its protest, the Taxpayer conceded that it owed gross receipts tax and interest,
21 which it paid. The Taxpayer's protest was limited to the assessment of penalty. [Exhibit A.5-
22 A.8].

¹ The statute in effect at the time that the request for hearing was filed. *See* NMSA 1978, § 7-1B-8 (2019).

1 law made in good faith and on reasonable grounds.” NMSA 1978, § 7-1-69 (B). A mistake of law
2 is a mistake about the legal effect of a known fact. *See State v. Hubble*, 2009-NMSC-014, ¶ 22, 146
3 N.M. 70 (quoting from dictionary). Moreover, if a taxpayer is not negligent, a penalty may be
4 excused. *See* 3.1.11.11 NMAC (2001) (listing several factors that indicate non-negligence).
5 Negligence includes “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or
6 inattention.” 3.1.11.10 NMAC (2001). It also includes failure to act where action is required and
7 the failure to exercise the degree of ordinary business care and prudence that reasonable taxpayers
8 would exercise in similar circumstances. *See id.* Generally, a taxpayer’s reliance on an agent to
9 perform acts, such as filing returns, is not an excuse for penalty. *See* 3.1.11.11 NMAC.

10 The Taxpayer failed to present any evidence to establish that its failure to pay the tax when
11 it was due was based on a mistake of law made in good faith and on reasonable grounds. *See*
12 NMSA 1978, § 7-1-69. The Taxpayer also failed to present any evidence to establish that its failure
13 to pay the tax when it was due was not negligent. *See* 3.1.11.10 and 3.1.11.11 NMAC. Therefore,
14 the Taxpayer failed to overcome the presumption of correctness on the penalty assessment. *See*
15 NMSA 1978, § 7-1-17. *See also Gemini Las Colinas, LLC*, 2023-NMCA-039.

16 **Untimely request for hearing.**

17 The Taxpayer argued that the hearing was unfair and that it was prejudiced by the
18 Department’s delay in requesting a hearing. The Taxpayer explained that the employees who were
19 working on the audit in 2018 are no longer employed there. [Testimony of Mr. Phu]. The Taxpayer
20 explained that it no longer had records related to the audit that was conducted in 2018 because their
21 record retention policy is three years. [Testimony of Mr. Phu]. The Taxpayer explained that their
22 audit file had been closed as they did not hear from the Department after the acknowledgment letter.
23 [Testimony of Mr. Phu; Exhibit A.12]. The Taxpayer explained that the letter says there will be

1 review of the protest, and “[i]f the department does not agree with your position or has not received
2 documentation to substantiate your position, then a formal hearing will be requested within 45 days
3 of this letter”. [Exhibit A.12; Testimony of Mr. Phu; Testimony of Ms. Rivera]. Since no hearing
4 was requested within 45 days of that letter, the Taxpayer believed that the Department agreed with
5 their position and that no further action would be taken. [Testimony of Mr. Phu]. Consequently,
6 the Taxpayer closed its audit file, which was destroyed after three years pursuant to their record
7 retention policy. [Testimony of Mr. Phu].

8 The Taxpayer filed its protest on May 10, 2018. [Exhibit A]. The Department
9 acknowledged the protest on May 16, 2018. [Exhibit A]. The Administrative Hearings Office first
10 learned of the Taxpayer’s protest when the Department filed the request for hearing on July 10,
11 2023, which was more than five years after the protest was made and acknowledged. [Exhibit A.1].
12 The current statute requires that the Administrative Hearings Office set a hearing within 90 days of
13 the Department’s request for hearing. *See* NMSA 1978, § 7-1B-8 (F) (2019). The Administrative
14 Hearings Office conducted the first hearing in this protest on August 2, 2023, which was less than
15 90 days from July 10, 2023, the date that the hearing was requested. [Admin. file].

16 At the time that the protest was filed, the Department was required to file a request for
17 hearing within 45 days of the receipt of the protest. *See* NMSA 1978, § 7-1B-8 (A) (2015). A
18 hearing was required to be set within 90 days of the protest. *See id.* Under the previous version of
19 the statute, the Department should have filed a request for hearing no later than July 1, 2018². *See*
20 *id.* Under the current statute, the Department is required to file a request for hearing within 180
21 days of the protest. *See* NMSA 1978, § 7-1B-8 (B) (2019). Under the current version of the statute,

² That is 45 days from the acknowledgment date, as permitted by the regulation in effect at the time. *See* 22.600.3.8 NMAC (2018).

1 the Department’s request for hearing should have been filed no later than November 13, 2018³. *See*
2 NMSA 1978, § 7-1B-8 (2019). Under both the previous version and the current version of the
3 statute, the Department’s request for hearing was filed several years after the statutory deadline. *See*
4 NMSA 1978, § 7-1B-8 (2015 and 2019).

5 Under the previous version of the statute, there was no potential remedy for the
6 Department’s failure to comply with the statutory deadline. *See* NMSA 1978, § 7-1B-8 (2015).
7 Under the current version of the statute, the Hearing Officer may order that no further interest will
8 accrue on a protested liability if the Department fails to comply with the statutory deadline. *See*
9 NMSA 1978, § 7-1B-8 (2019). The statute does not provide for other remedies, such as the excusal
10 of penalty or for the granting of a protest, based on the Department’s failure to comply with the
11 statutory deadlines. *See id.*

12 Another taxpayer previously argued that the Department denied it the statutory right to a
13 prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue*
14 *Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13.
15 The court found that the general rule is that the tardiness of public officers is not a defense to an
16 action by the state. *See id.* The court noted that the statute did not provide a consequence for
17 failure to comply with the requirements of a prompt hearing. *See id.* Therefore, “[t]he general
18 rule is applicable in these cases unless [the statute] makes it inapplicable.” *Id.*

19 Another taxpayer argued that the failure of the hearing officer to render a decision in 30
20 days, as required by statute, divested the hearing officer of jurisdiction. *See also Kmart*
21 *Properties, Inc. v. Taxation and Revenue Dep’t.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177. The
22 court found that the tax statutory deadline was not jurisdictional because of the general tardiness

³ That is 180 days from the acknowledgment date, as permitted by the current regulation. *See* 22.600.3.8 NMAC (2020).

1 rule and the heavy statutory presumption of correctness that favors the Department. *See id.* at ¶
2 54. The court found that the statutory deadline did not affect the essential power to decide
3 complex and time-consuming protests. *See id.* at ¶ 55.

4 The Department argued that the Taxpayer is in the same position that it was in 2018 with
5 respect to the amount of penalty owed. Penalty accrues at two percent per month from the tax
6 due date, with a cap at 20%⁴ of the total tax due. *See* NMSA 1978, § 7-1-69. As the tax periods
7 involved were from 2009 to 2016, and the assessment occurred in 2018, the penalty as assessed
8 had already reached its maximum cap of 20% (10 months) from the tax due dates⁵. *See id.*
9 Therefore, the Department's delay did not affect the amount of penalty the Taxpayer owed.

10 The Department argued that the Taxpayer has the responsibility to keep records and that
11 the Taxpayer has a history of failing to produce documents and lack of cooperation with the
12 Department. [Exhibit C; Exhibit D]. The Department also argued that there was no remedy
13 available for the Taxpayer. The only statutory remedy available to a taxpayer when the
14 Department fails to comply with deadlines regarding a hearing is for the halting of interest. *See*
15 NMSA 1978, § 7-1B-8 (2019). Interest only accrues on unpaid tax principal. *See* NMSA 1978,
16 7-1-67 (2013). The Taxpayer paid the tax principal and the interest when it was assessed.
17 Therefore, interest was halted at that time. Although the Department's failure to file a request for
18 hearing within 45 days or within 180 days of its receipt of the Taxpayer's protest was a violation of
19 the statute, there is no administrative remedy that can be granted as interest has already been
20 halted. *See* NMSA 1978, § 7-1B-8 (2015) and (2019).

⁴ That is 10 months.

⁵ The latest tax period at issue was May 2016, which would have payment due in June 2016. Ten months from the last due date at issue would have been April 2017.

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 failed to pay the tax when it was due, penalty was owed. *See*
8 NMSA 1978, § 7-1-69.

9 D. The Taxpayer failed to provide evidence that it was not negligent and failed to
10 provide evidence that it made a mistake of law based on good faith and reasonable grounds.
11 Consequently, the Taxpayer failed to overcome the presumption of correctness, and the penalty
12 stands as assessed. *See id.* *See also* 3.1.11.10 NMAC and 3.1.11.11 NMAC. *See also Gemini Las*
13 *Colinas, LLC, 2023-NMCA-039.*

14 E. The Department failed to comply with the statutory deadline for requesting a
15 hearing. *See* NMSA 1978, § 7-1B-8 (2015 and 2019). However, the Department’s failure does
16 not excuse the Taxpayer from paying penalty. *See id.*

17 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that the
18 Taxpayer is liable for \$130,068.40 in penalty as previously assessed.

19 DATED: January 4, 2024.

20 Dee Dee Hoxie
21 Dee Dee Hoxie
22 Hearing Officer
23 Administrative Hearings Office
24 P.O. Box 6400
25 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 January 4, 2024, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *First Class Mail & Email*

First Class Mail & Email

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19 *INTENTIONALLY BLANK*