

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

4 **ROBERT & DEBBIE WADE**

5 **v.**

Case Number 23.05-022A
6 **D&O No. 24-05**

7 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

8 **DECISION AND ORDER**

9 On December 4, 2023, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits
10 administrative hearing in the matter of the tax protest of Robert & Debbie Wade (“Taxpayer” or
11 “Taxpayers”) pursuant to the Tax Administration Act and the Administrative Hearings Office
12 Act. At the hearing, Debra “Debbie” Alane Wade appeared by videoconference. Staff Attorney
13 Tim Williams appeared by videoconference, representing the opposing party in the protest, the
14 Taxation and Revenue Department (“Department”). Department protest auditor Lizette Rivera
15 appeared by videoconference as a witness for the Department. Taxpayer submitted exhibits 1, 2,
16 3, 4 and 5, and the Department submitted no exhibits. The hearing officer preserved an audio
17 recording of the hearing.

18 Based on the evidence in the record, after making findings of fact, the hearing officer finds
19 that Taxpayers failed to overcome the presumption of correctness that attached to the Department’s
20 initial assessment, and Taxpayers have also failed to meet the burden of proof to establish proper
21 filing of Personal Income Tax Returns for the tax years in question. The Department established that
22 the Assessment was made timely and properly. Therefore, the Taxpayer’s protest must be denied. IT
23 **IS DECIDED AND ORDERED AS FOLLOWS:**

1 **FINDINGS OF FACT**

2 **Procedural findings**

3 1. On July 7, 2022, the Department issued a Notice of Assessment of Taxes and
4 Demand for Payment informing Taxpayer that Personal Income Tax was owed in the amount of
5 \$3,563.57, penalty of \$712.72, and interest of \$547.27, for a total assessment of \$4,832.56.
6 [Letter ID# L0776069040].

7 2. Thereafter, on July 22, 2022, Taxpayer submitted protest form through a web-
8 based form, which shows a receipt date of “22-Jul-2022”. The protest challenged the assessment,
9 asserting that Taxpayers filed and paid all taxes for all the years covered by the assessment, and
10 claiming untimely notice of the assessment. Supplemental information from Taxpayer, bearing
11 no received stamp, contained W-2 employee wage and tax statements from both Robert W.
12 Wade and Debra A. Wade for tax years 2012, 2013, 2014, 2015, 2016, 2017, and 2018.
13 [Administrative File].

14 3. On November 30, 2022, the Department issued a letter acknowledging the protest
15 of personal income tax assessment. The acknowledgment letter identifies the assessment periods
16 of January 1, 2015 to December 31, 2018. The acknowledgment was issued 131 days after the
17 receipt of protest. [Letter ID# L0448895088].

18 4. On May 30, 2023, the Department filed a Request for Hearing asking that the
19 Taxpayer’s protest be scheduled for a scheduling hearing. The request for hearing was filed 181
20 days after the acknowledgment letter was issued. [Administrative File].

21 5. On May 30, 2023, the Department filed its Answer to Protest, alleging that
22 Taxpayers, a married couple, as residents of New Mexico, had failed to both file returns and pay

1 personal income tax. The Answer to Protest also alleged the protest auditor had contacted
2 Taxpayers and expected Taxpayers to supplement the record. [Administrative File].

3 6. On May 31, 2023, the Administrative Hearings Office filed and sent a Notice of
4 Telephonic Scheduling Hearing, setting the matter for a scheduling hearing on June 16, 2023.
5 Notice was provided to the parties by email and USPS First Class Mail. [Administrative File].

6 7. On June 16, 2023, the undersigned Administrative Hearing Officer conducted a
7 scheduling hearing by telephone conference. The Department was represented by Attorney Tim
8 Williams. The Taxpayer did not appear. An audio recording of the hearing was preserved. The
9 hearing occurred within 90-days of the Department's request for hearing. [Administrative File].

10 8. On June 20, 2023, the Administrative Hearings Office filed and sent a Notice of
11 Videoconference Administrative Hearing, setting the matter for a videoconference merits hearing
12 on August 15, 2023. Notice was provided to the parties by email and USPS First Class Mail.
13 [Administrative File].

14 9. On August 15, 2023, the undersigned Administrative Hearing Officer commenced
15 a videoconference merits hearing. The Department was represented by Attorney Tim Williams,
16 appearing by videoconference. Taxpayers Robert and Debbie Wade appeared by
17 videoconference. An audio recording of the hearing was preserved. The hearing occurred within
18 90-days of the Department's request for hearing. At the hearing, Taxpayer requested a
19 continuance, which was granted to allow time for the parties to review newly submitted
20 documentation. [Administrative File].

21 10. On August 15, 2023, the Administrative Hearings Office filed and sent an Order
22 Granting Continuance and Amended Notice of Videoconference Administrative Hearing to the
23 parties, notifying parties of a hearing to take place October 24, 2023 at 10:00 A.M. Mountain

1 time and the manner in which to participate by connecting to the videoconference, with a unique
2 URL. Notice was provided to the parties by email and by USPS First Class Mail. [Administrative
3 file].

4 11. On October 23, 2023, Taxpayers emailed a request for continuance of the
5 Videoconference Merits Hearing, and on the same day, the Department Attorney Tim Williams
6 emailed that there was no objection from the Department to the Taxpayer's request.
7 [Administrative File].

8 12. On October 23, 2023, the Administrative Hearings Office filed and sent an Order
9 Granting Second Continuance and Second Amended Notice of Videoconference Administrative
10 Hearing to the parties, notifying parties of a hearing to take place December 4, 2023, at 1:00
11 P.M. Mountain time and the manner in which to participate by connecting to the
12 videoconference, with a unique URL. Notice was provided to the parties by email and by USPS
13 First Class Mail. [Administrative File].

14 13. On December 4, 2023, the undersigned Administrative Hearing Officer
15 conducted a videoconference hearing. Taxpayer Debbie Wade appeared at the hearing and the
16 Department was represented by Attorney Tim Williams and protest auditor Lizette Rivera. The
17 Hearing Officer preserved an audio recording of the hearing (referred to hereinafter as Hearing
18 Record or HR). [Administrative File].

19 14. On December 4, 2023, the Department supplemented the record by forwarding to
20 the Administrative Hearings Office a series of emails from Taxpayers, which Taxpayers offered
21 as exhibits, containing PIT returns and attachments for tax years 2015, 2016, 2017, and 2018,
22 more specifically described in the Exhibit Log. [Administrative File].

1 **Substantive findings**

2 15. Taxpayers Robert (Bo) William Wade and Debra (Debbie) Alane Wade are a
3 married couple who at all times pertinent to this matter were residents of New Mexico, although
4 Taxpayers spent an unspecified amount of time in Arizona to assist elderly family members.
5 [Examination of D. Wade; Exhibits 1, 2, 3, 4, 5; Administrative File]

6 16. During tax year 2015, Taxpayers received income from their respective
7 employment. Debra's Form W-2 Wage and Tax Statement 2015 shows state tax withheld of
8 \$118.32. Robert's Form W-2 Wage and Tax Statement 2015 shows state tax withheld of
9 \$3,204.46. The PIT-1 return offered as evidence, shows state tax withholdings of \$3,323
10 (rounded). The PIT-1 return shows tax liability of \$3,877, and a balance of \$554. [Exhibit 1;
11 Examination of D. Wade; Administrative File].

12 17. The 2015 PIT-1 is dated October 1, 2016. Taxpayer could not provide evidence
13 that Taxpayer sought or obtained an extension for additional time to file the return. [Exhibit 1;
14 Examination of D. Wade; Administrative File].

15 18. Taxpayer could not provide evidence that the 2015 PIT-1 return had been sent by
16 mail. Taxpayer did not file electronically. Taxpayer admitted she did not remit payment for the
17 balance of \$554. [Exhibit 1; Examination of D. Wade; Administrative File].

18 19. During tax year 2016, Taxpayers received income from their respective
19 employment. Debra's Form W-2 Wage and Tax Statement 2016 shows state tax withheld of
20 \$140.63. Robert's Form W-2 Wage and Tax Statements 2016 shows state tax withheld of
21 \$1,186.96 and \$975.04. The PIT-1 return offered as evidence, shows state tax withholdings of
22 \$2,301 (rounded). The PIT-1 return shows tax liability of \$4,107, and a balance of \$1,806.
23 [Exhibit 4, 5; Examination of D. Wade; Administrative File].

1 20. The 2016 PIT-1 is dated October 15, 2017. Taxpayer could not provide evidence
2 that Taxpayer sought or obtained an extension for additional time to file the return. [Exhibit 4, 5;
3 Examination of D. Wade; Administrative File].

4 21. Taxpayer could not provide evidence that the 2016 PIT-1 return had been sent by
5 mail. Taxpayer did not file electronically. Taxpayer admitted she did not remit payment for the
6 balance of \$1,806. The document submitted appears not to be a copy, but a photograph of a re-
7 written form. [Exhibit 4, 5; Examination of D. Wade; Administrative File].

8 22. During tax year 2017, Taxpayers received income from their respective
9 employment. Debra's Form W-2 Wage and Tax Statements 2017 show state tax withheld of
10 \$18.67 and \$66.44. Robert's Form W-2 Wage and Tax Statement 2017 shows state tax withheld
11 of \$3,572.26. The PIT-1 return offered as evidence, shows state tax withholdings of \$3,658
12 (rounded). The PIT-1 return shows tax liability of \$2,951, and an overpayment (refund) balance
13 of \$707. [Exhibit 3; Examination of D. Wade; Administrative File].

14 23. The 2017 PIT-1 is dated April 13, 2018. Taxpayer could not provide evidence that
15 the 2017 PIT-1 return had been sent by mail. Taxpayer did not file electronically. [Exhibit 3;
16 Examination of D. Wade; Administrative File].

17 24. The IRS Account Transcript for the 2017 tax period shows the Taxpayers' Federal
18 return was filed April 13, 2020, not April 13, 2018, two years after it would have been due.
19 [Exhibit 3-3].

20 25. Taxpayers did not follow up on their claim for refund for overpayments made
21 during tax year 2017. [Examination of D. Wade].

22 26. Concerning the 2017 PIT-1 form, Taxpayer admitted that she recently filled it out,
23 using the information from the 2017 IRS transcript, and back-dated the document to April 13,

1 2018, in an attempt to align with the IRS transcript. The information she filled in just days prior
2 to the hearing. The document is not a photocopy of the actual return, but a re-writing of it, as
3 Taxpayer believed it to be. [Examination of D. Wade; Exhibit 3-1, 3-2, 3-4].

4 27. During tax year 2018, Taxpayer received income from their respective
5 employment. Debra's Form W-2 Wage and Tax Statement 2018 shows state tax withheld of
6 \$806.65. Robert's Form W-2 Wage and Tax Statement 2018 shows state tax withheld of
7 \$1,586.30. The PIT-1 return offered as evidence, shows state tax withholdings of \$2,392
8 (rounded). The PIT-1 return shows tax liability of \$3,617, and a balance of \$1,225. [Exhibit 2;
9 Examination of D. Wade; Administrative File].

10 28. Mrs. Wade testified that her role in preparation of the PIT-1 returns was limited to
11 transcribing in better handwriting what her husband, Mr. Wade, had filled in to draft forms.
12 [Examination of D. Wade; Administrative File].

13 29. Mrs. Wade testified that she did not recall seeking or obtaining filing extensions.
14 [Examination of D. Wade; Administrative File].

15 30. The 2018 PIT-1 is dated October 15, 2019. Taxpayer could not provide evidence
16 that Taxpayer sought or obtained an extension for additional time to file the return. [Exhibit 2;
17 Examination of D. Wade; Administrative File].

18 31. Taxpayer could not provide evidence that the 2018 PIT-1 return had been sent by
19 mail. Taxpayer did not file electronically. Taxpayer admitted she did not remit payment for the
20 balance of \$1,225. [Exhibit 2; Examination of D. Wade; Administrative File].

21 32. The Taxpayer's admission of nonpayment of outstanding liability is consistent
22 with the Department's GenTax records, which is a file maintenance program and contains files

1 for individual taxpayers going back at least twelve years. [Examination of L. Rivera;
2 Administrative File].

3 33. The Department applied credit for withholdings to the Taxpayer's liability after
4 the original assessment of outstanding tax, penalty and interest. Outstanding balances reflect
5 credits applied. [Examination of L. Rivera; Administrative File].

6 34. The GenTax records for Taxpayers indicated Taxpayers are nonfilers.
7 [Examination of L. Rivera; Administrative File].

8 35. The GenTax records for Taxpayers have no indication of requesting or receiving
9 extensions for filing or payment of taxes for any of the years at issue. [Examination of L. Rivera;
10 Administrative File].

11 36. For tax year 2015, as of the date of the hearing, the outstanding balance of tax,
12 penalty, and interest is \$1,164. [Examination of L. Rivera; Administrative File].

13 37. For tax year 2016, as of the date of the hearing, the outstanding balance of tax,
14 penalty, and interest is \$2,735.36. [Examination of L. Rivera; Administrative File].

15 38. For tax year 2018, as of the date of the hearing, the outstanding balance of tax,
16 penalty, and interest is \$1,892.70. [Examination of L. Rivera; Administrative File].

17 **DISCUSSION**

18 Taxpayers challenged the assessment of tax, penalty, and interest issued by the
19 Department as untimely and improper, as Taxpayers claimed to have filed income tax returns for
20 each of the years at issue. As proof of filing, Taxpayers presented photocopies and a backdated
21 re-write of their state PIT returns. Taxpayers provided no proof of mailing, delivery, electronic
22 submission, or contemporaneous payment to the State of New Mexico. For the reasons that
23 follow, the assessment is upheld.

1 **Presumption of correctness**

2 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
3 presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See*
4 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the
5 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*
6 NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation 3.1.1.16 (12/29/2000). Under
7 Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to
8 the Department’s assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel.*
9 *Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations
10 interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it
11 is a taxpayer’s burden to present some countervailing evidence or legal argument to show that
12 they are entitled to an abatement, in full or in part, of the assessment issued in the protest. *See*
13 *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8; *see also* Regulation
14 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the
15 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*
16 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

17 The Taxpayer’s burden established under the presumption of correctness is a burden of
18 producing evidence that tends to support Taxpayer’s position. *Gemini Las Colinas, LLC v. New*
19 *Mexico Taxation & Revenue Department*, 2023-NMCA-039, ¶ 16, 531 P.3d 622. Once the
20 Taxpayer has produced the evidence in support of Taxpayer’s position, the Department may
21 present its evidence in support of the assessment, then it is the responsibility of the Hearing
22 Officer to weigh the evidence and determine the outcome of the protest. *Id.*, ¶ 17.

1 Here, the issue was mailing. “Notices, returns, applications and payments, ... authorized
2 or required to be made or given by mail are timely if the postmark on the envelope made by the
3 United States postal service bears the date on or before the last date prescribed for filing the
4 notice, return or application or for making the payment.” Regulation 3.1.4.10 NMAC. In general,
5 case law supports that those who rely on mail for service have an initial duty to show that the
6 mailing occurred. *See Myers v. Kapnison*, 1979-NMCA-085, ¶ 8, 93 N.M. 215; *see also Gendron*
7 *v. Calvert Fire Ins. Co.*, 1943-NMSC-045, 47 N.M. 348, 143 P.2d 462 (actual receipt of notice
8 of insurance termination not required so long as evidence showed insurance company mailed
9 notice). Taxpayers presented evidence, in the form of uncorroborated testimony, copies of
10 Personal Income Tax (PIT-1) forms, and wage and income statement form W-2s to support
11 Taxpayer’s claims. The evidence presented does not extend to the primary issue of mailing and
12 submitting the returns. A copy of the return is not proof of properly filed returns. While Mrs.
13 Wade testified that the returns were mailed, there was no corroboration in the form of proof of
14 mailing. “Unsubstantiated statements that the assessment is incorrect cannot overcome the
15 presumption of correctness.” Regulation 3.1.6.12 NMAC. Therefore, in a strict sense, the
16 Taxpayers by producing no corroborating evidence to the claim of mailing, failed to overcome
17 the burden of production, therefore failed to overcome the presumption of correctness that
18 attached to the assessment. *Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue*
19 *Department*, 2023-NMCA-039, ¶ 16, 531 P.3d 622.

20 **Personal Income Tax Act.**

21 The assessment in this protest arises from an application of the Income Tax Act, NMSA
22 1978, Sections 7-2-1 through 7-2-39. In New Mexico, “tax is imposed...upon the net income of
23 every resident individual.” Section 7-2-3. Taxpayers did not protest the imposition of tax on their

1 income. Taxpayers testified that they had filed their state income taxes, but provided no records of
2 mailing, and admitted they did not pay any balances owing. Taxpayers argued that they should not
3 be deemed non-filers, for purposes of the statute of limitations for assessments.

4 The Department used the seven-year look-back period, based on non-filer status. “In the
5 case of the failure by a taxpayer to complete and file any required return, the tax relating to the
6 period for which the return was required may be assessed at any time with seven years from the end
7 of the calendar year in which the tax was due.” NMSA 1978, Section 7-1-18 (C) (2021). The
8 propriety of the timing of the assessment rests on the answer to the question of whether Taxpayers
9 filed New Mexico Personal Income Tax returns for the years 2015, 2016, 2017 and 2018.

10 To address this question, we begin with the most distant tax year covered under the
11 assessment. As to the tax year ending December 31, 2015, the Taxpayers presented a PIT-1 return
12 (Exhibit 1), attested to filing it by mail, keeping no proof of mailing, and admitted not
13 contemporaneously (or ever) paying the balance of tax due. The Department had no record of
14 receiving the Taxpayers’ 2015 PIT-1 return. Taxpayers testified their records were in disarray.
15 Taxpayers provided no proof of mailing and testified that they did not file electronically. The
16 document on its face appears to be a copy, and the copy shows a signature date of October 1, 2016.
17 The Taxpayer did not recall seeking an extension.

18 The factors to take into account in a determination of timeliness of filing returns are outlined
19 in Regulation 3.1.4.10 NMAC (7/7/2021). “Notices, returns, applications and payments ...required
20 to be made or given by mail are timely if the postmark on the envelope made by the United States
21 postal service bears the date on or before the last date prescribed for filing the notice, return or
22 application or for making the payment.” Regulation 3.1.4.10 (C)(1). Here, the Department did not
23 receive the return, so the Department records are void as to both the filing of the return and the

1 postmark date on the outside of a non-existent envelope. The Taxpayers did not maintain a copy of
2 any proof of the purported mailing, which could be possible if mailed by certified mail with an item
3 tracking number. “If a mailing is not received by the department, the contents of the mailing are not
4 timely.” Regulation 3.1.4.10 (C)(2) NMAC.

5 The absence of positive proof of sending the return, and the absence of Department records
6 showing receipt of the 2015 PIT-1 return is consistent and determinative of non-filing. “[E]very
7 taxpayer shall maintain books of account or other records in a manner that will permit the accurate
8 computation of state taxes.” NMSA 1978, Section 7-1-10 (2007). The Taxpayer’s testimony that
9 she believed she or her husband sent the return is insufficient without corroboration in the form of
10 proof of mailing or electronic filing. For tax year 2015, Taxpayers were properly labeled nonfilers.
11 *See* Regulation 3.1.4.10 NMAC.

12 Because of the nonfiler status of the Taxpayers, the Department assessed the delinquent
13 2015 tax, with penalty, and interest in 2022. “In the case of the failure by a taxpayer to complete
14 and file any required return, the tax relating to the period for which the return was required may be
15 assessed at any time with seven years from the end of the calendar year in which the tax was due.”
16 NMSA 1978, Section 7-1-18 (C) (2021). Payment of taxes are due “on or before the due date of the
17 resident’s or individual’s federal income tax return for the taxable year” which for personal income
18 tax for individuals is ordinarily the fifteenth of April of the year following. *See* NMSA 1978,
19 Section 7-2-12 (A) (2016). For income taxes which accrued in 2015, the tax payment would have
20 been due by Monday, April 18, 2016.¹ Therefore the end of the calendar year in which the 2015 tax
21 was due would have been December 31, 2016. The assessment of tax issued on July 7, 2022. A
22 simple calculation shows the assessment was issued five years, six months, and seven days after the

¹ New Mexico follows the Federal due dates. *See Tax Guide 2015 for Individuals, Pub. 17* available online at <https://www.irs.gov/pub/irs-prior/p17--2015.pdf> (last accessed 2/13/2024).

1 end of the calendar year the tax was due. The assessment of 2015 personal income tax, penalty, and
2 interest was timely, as it was within seven years of the end of the calendar year in which the tax was
3 originally due.

4 Turning then to tax year 2016, Taxpayer presented a PIT-1 return (Exhibit 4 and 5)
5 purported to be the same filed with the Department. Again, Taxpayer admitted that no payment was
6 made for the amount of tax due. The Department had no record of receiving the Taxpayers' 2016
7 PIT-1 return. Taxpayers provided no proof of mailing and testified that they did not file
8 electronically. Here, the return is dated as signed October 15, 2017. Taxpayer did not recall seeking
9 a filing extension. The same analysis applies to 2016 as to 2015. Since there was no proof of
10 Taxpayers' mailing, and no evidence of receipt by the Department, a copy of the return is
11 insufficient proof of actually sending the return.

12 The absence of positive proof of sending the return, and the absence of Department records
13 showing receipt of the 2016 PIT-1 return is consistent and determinative of non-filing. "[E]very
14 taxpayer shall maintain books of account or other records in a manner that will permit the accurate
15 computation of state taxes." NMSA 1978, Section 7-1-10 (2007). The Taxpayer's testimony that
16 she believed she or her husband sent the return is insufficient without corroboration in the form of
17 proof of mailing or electronic filing. For tax year 2016, Taxpayers were properly labeled nonfilers.
18 *See* Regulation 3.1.4.10 NMAC.

19 For income taxes which accrued in 2016, the tax payment would have been due by April 18,
20 2017.² Therefore the end of the calendar year in which the 2016 tax was due would have been
21 December 31, 2017. The assessment of tax issued on July 7, 2022. A simple calculation shows the
22 assessment was issued four years, six months, and seven days after the end of the calendar year the

² New Mexico follows the Federal due dates. *See Tax Guide 2016 for Individuals, Pub. 17* available online at <https://www.irs.gov/pub/irs-prior/p17--2016.pdf> (last accessed 02/13/2024).

1 tax was due. The assessment of 2016 personal income tax, penalty, and interest was timely, as it was
2 within seven years of the end of the calendar year in which the tax was originally due.

3 For 2017, Taxpayer presented a PIT-1 (Exhibit 3) purported to be the same filed with the
4 Department. The Department had no record of receiving the Taxpayers' 2017 PIT-1 return.
5 Taxpayers provided no proof of mailing and testified that they did not file electronically. Here, the
6 return is dated as signed April 13, 2018. The return shows an overpayment, and a request for refund.
7 However, Taxpayer acknowledged that she did not have a copy of the actual return, so she re-wrote
8 the return in the 2017 form and backdated it to the date she believed they had filed Taxpayers'
9 federal return, based on the IRS Account Transcript. The IRS Account Transcript shows the IRS
10 received the federal return not in 2018, but in 2020. Taxpayer did not recall following up with the
11 refund request. Since no tax was due for 2017 tax year, no assessment was made.

12 For 2018, Taxpayer presented a PIT-1 (Exhibit 2) purported to be the same filed with the
13 Department. Again, Taxpayer admitted that no payment was made for the amount of tax due. The
14 Department had no record of receiving the Taxpayers' 2018 PIT-1 return. Taxpayers provided no
15 proof of mailing and testified that they did not file electronically. Here, the return is dated as signed
16 October 15, 2019. The same analysis applies to 2018 as to 2015 and 2016. The assessment of taxes
17 for tax years 2015, 2016, and 2018 was appropriately within the timeframes established by the New
18 Mexico Legislature for Taxpayers as nonfilers.

19 For income taxes which accrued in 2018, the tax payment would have been due by April 15,
20 2019.³ Therefore the end of the calendar year in which the 2018 tax was due would have been
21 December 31, 2019. The assessment of tax issued on July 7, 2022. A simple calculation shows the
22 assessment was issued two years, six months, and seven days after the end of the calendar year the

³ New Mexico follows the Federal due dates. See *Tax Guide 2018 for Individuals, Pub. 17* available online at <https://www.irs.gov/pub/irs-prior/p17--2018.pdf> (last accessed 02/13/2024).

1 tax was due. The assessment of 2018 personal income tax, penalty, and interest was timely, as it was
2 within seven years of the end of the calendar year in which the tax was originally due. It was also
3 timely following the ordinary assessment statute NMSA 1078, Section 7-1-18 (A), which provides
4 for a three year period from the end of the calendar year in which payment of the tax was due,
5 within which to issue an assessment.

6 Credibility of witnesses plays a role in the decisions of the Hearing Officer. “It is the sole
7 responsibility of the trier of fact to weigh the testimony, determine the credibility of the witnesses,
8 reconcile inconsistencies, and determine where the truth lies.” *N.M. Taxation & Revenue Dep’t v.*
9 *Casias Trucking*, 2014-NMCA-099, ¶ 23, 336 P.3d 436; *see also In the matter of the Protest of*
10 *Trader Barb’s Old Town*, Decision and Order #23-10, issued May 10, 2023, 2023 WL 3601271
11 (non-precedential). Here, Taxpayer appeared credible, believing what she said to be true, and
12 Taxpayer honestly answered any questions posed, even when the truthful answer may have
13 repercussions to Taxpayers’ detriment. However, two things stand out to the hearing officer. First,
14 Taxpayer often testified to generalities, having no specific memory of mailing returns, using the
15 “we” form when referring to actions taken by herself, her husband, or both. She also indicated that
16 she was the scrivener, using her better penmanship to fill in forms, after her husband had gathered
17 information and made the calculations contained in the returns. Second, Taxpayer testified that she
18 re-created the 2017 PIT-1 return. On the 2017 PIT-1 Taxpayer testified that she even backdated the
19 signatures. The fact that one of the tax filings was re-created, based on a federal account transcript
20 suggests that Taxpayer took liberties with the presentation of evidence, presenting documents that
21 had been reconstructed as evidence of past filings because Taxpayer did not know or could not
22 recall the details of the purported previous filing, which makes it difficult to afford much persuasive
23 weight to Taxpayer’s recollections. In addition, the 2016 PIT-1 also appeared to be re-written. A

1 photocopy of the original filing accompanied by mailing information is the best evidence of timely
2 filing. The contents of the filing were not at issue here, only the proper timing of filing of the
3 returns. The documents presented are not an adequate reflection of what actually occurred, as some
4 were re-created, and Taxpayer had no specific recollection of the work which went into the filling of
5 forms or of mailing the forms timely.

6 **Penalty**

7 Under NMSA 1978, Section 7-1-69 (A) (2007), when a taxpayer fails to pay taxes due to
8 the State because of negligence or disregard of rules and regulations, but without intent to evade
9 or defeat a tax, the Department must impose a civil negligence penalty on that taxpayer. “There
10 shall be added to the amount assessed a penalty” under Section 7-1-69 (A). The statute also
11 provides a safety valve, stating “[n]o penalty shall be assessed against a taxpayer if the failure to
12 pay an amount of tax when due results from a mistake of law made in good faith and on
13 reasonable grounds.” Section 7-1-69 (B).

14 The use of the word “shall” makes the imposition of penalty mandatory in all instances
15 where a taxpayer’s actions or inactions meet the legal definition of “negligence.” *See Marbob*
16 *Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d
17 135 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to
18 the contrary).

19 Negligence can be found in several ways. Regulation § 3.1.11.10 NMAC (1/15/01) defines
20 “negligence” as “failure to exercise that degree of ordinary business care and prudence which
21 reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is
22 required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”
23 Non-filing of personal income tax returns and non-payment of the taxes is certainly negligence

1 under the circumstances at issue applied to this definition. *See El Centro Villa Nursing Center v.*
2 *Taxation & Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795, 779 P.2d 982 (Section 7-
3 1-69 (A) is designed specifically to penalize unintentional failure to pay tax.). Taxpayers offered no
4 lawful rationale for the non-payment of taxes. The non-payment of taxes when due was
5 undoubtably negligence.

6 **Interest**

7 When a taxpayer fails to make timely payment of taxes due to the state, “interest *shall* be
8 paid to the state on that amount from the first day following the day on which the tax becomes
9 due...until it is paid.” NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute,
10 regardless of the reason for non-payment of the tax, the Department has no discretion in the
11 imposition of interest, as the statutory use of the word “shall” makes the imposition of interest
12 mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶22,
13 (use of the word “shall” in a statute indicates provision is mandatory absent clear indication to the
14 contrary). The language of the statute also makes it clear that interest begins to run from the original
15 due date of the tax and continues until the tax principal is paid in full.

16 Taxpayers offered no rationale for the abatement of interest. Because of the mandatory
17 statutory interest governing the assessment of interest, both the Department and the hearing officer
18 lack discretion in the imposition of interest regardless of Taxpayer’s underlying circumstances. The
19 amount of interest accumulates until the underlying tax is paid.

20 **Conclusion.**

21 Taxpayer has an initial burden of production to overcome the presumption of correctness of
22 the assessments and the ultimate burden of persuasion by the preponderance of evidence to prevail
23 in this protest. *See Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Department*,

1 2023-NMCA-039, ¶ 29, 531 P.3d 622. Taxpayer presented evidence in the form of testimony and
2 documentation that return forms had been filled in, however, the evidence did not touch on mailing,
3 and was both insufficient to overcome the presumption of correctness and was not reliable, therefore
4 its evidentiary weight is discounted. Furthermore, no evidence but stated generalities was offered to
5 show Taxpayer’s claim of filing Personal Income Tax (PIT-1) returns for the years at issue. “It is the
6 sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the
7 witnesses, reconcile inconsistencies, and determine where the truth lies.” *N.M. Taxation & Revenue*
8 *Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23. Taxpayers were unable to overcome the
9 presumption of correctness in the assessment, and unable to overcome the burden of a
10 preponderance of proof or persuasion as to show the assessment was made in error. *See Gemini*,
11 2023-NMCA-039, ¶ 29. The Department showed that Taxpayers, as nonfilers, were subject to the
12 seven-year assessment period, and assessments were timely and correct. The Department showed
13 that the withholdings were credited to the Taxpayers’ outstanding debt. As of the date of the
14 hearing, the Taxpayers’ outstanding debt for 2015 was \$1,164; the outstanding debt for 2016 was
15 \$2,735.36; and the outstanding debt for 2018 was \$1,892.70. Interest accrues until tax is paid.

16 CONCLUSIONS OF LAW

17 A. The Taxpayer filed a written protest to Department’s Notice of Assessment [Letter
18 ID No. L0776069040] and jurisdiction lies over the parties and the subject matter of this protest.
19 *See* NMSA 1978, Section 7-1-24 (A), (B) and (E) (2019); *see also* NMSA 1978, Section 7-2-3
20 (1981) and Section 7-2-12 (2016).

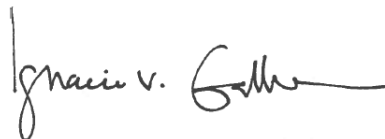
21 B. The first scheduling hearing was timely set and held within 90-days of the
22 Department’s hearing request under NMSA 1978, Section 7-1B-8 (F) (2019).

1 C. Taxpayer bears the burden of overcoming the presumption of correctness that
2 attached to the Department's Assessment. Taxpayer, by presenting testimony without proof of
3 mailing of returns, was unable to overcome the presumption of correctness. *See* NMSA 1978,
4 Section 7-1-17 (C) (2007); *see also* Regulation §3.1.8.10 NMAC (08/30/2001); *see also Gemini*
5 *Las Colinas, LLC v. New Mexico Taxation & Revenue Department*, 2023-NMCA-039, ¶ 16, 531
6 P.3d 622; *see also* Regulation 3.1.6.12 NMAC.

7 D. The Taxpayer's evidence, weighed against the Department's evidence was
8 insufficient to find by a preponderance of evidence that Taxpayers properly filed New Mexico
9 Personal Income Tax Returns for years 2015, 2016, 2017, and 2018. The Department met its burden
10 of establishing a preponderance of evidence to support that the Assessment was properly issued
11 within seven years of the end of the calendar year in which the tax would have originally been due.
12 *See* NMSA 1978, Section 7-1-18 (C) (2021); *see also Gemini Las Colinas, LLC v. New Mexico*
13 *Taxation & Revenue Department*, 2023-NMCA-039, ¶ 29, 531 P.3d 622.

14 For the foregoing reasons, the Taxpayers' protest **IS DENIED**.

15 DATED: March 8, 2024



16
17 Ignacio V. Gallegos
18 Hearing Officer
19 Administrative Hearings Office
20 Post Office Box 6400
21 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 March 8, 2024, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16
17 *INTENTIONALLY BLANK*
18