

1 **FINDINGS OF FACT**

2 **Procedural findings**

3 1. On November 20, 2020, the Department issued four Notice of Assessment of
4 Taxes and Demand for Payment letters to Taxpayer for the gross receipts and compensating tax
5 reporting periods of June, July, August, and September 2020. The assessments were for late-
6 filing penalties in the amounts of \$12,658.28 (June), \$7,917.87 (July), \$9,371.42 (August), and
7 \$2,495.42 (September). [Exhibit A, Letter ID# L0752123568 (June 2020); Exhibit B,
8 L1825865392 (July 2020); Exhibit C, L1880129200 (August 2020); Exhibit D, L0912178864
9 (September 2020); Administrative File].

10 2. On January 13, 2021, Taxpayer submitted a Tax Information Authorization,
11 allowing Brian Kelley and James Ford access to taxpayer information. [Administrative File].

12 3. Thereafter, Taxpayer submitted four ACD-301094 Formal Protest forms – to the
13 Department, one for each assessed month. Taxpayer alleged that payments were timely and
14 paper returns were filed, but the ongoing pandemic disrupted normal processes, leading to online
15 filing after regaining account access. The protest forms are dated incorrectly as 2/9/20 and were
16 submitted by email to the Department’s Protest Office on February 9, 2021. [Administrative
17 file].

18 4. On March 11, 2021, the Department issued a letter acknowledging a timely
19 protest of the four Assessment letters. [Administrative file; Letter ID# L1423225264].

20 5. On January 4, 2024, the Department filed a Request for Hearing asking that
21 Taxpayer’s protest be scheduled for a scheduling hearing, alleging the combined amount at
22 protest was \$42,525.26. [Administrative file].

1 6. On January 4, 2024, the Department filed an Answer to Protest asserting that
2 Taxpayer timely paid gross receipts, but a penalty was imposed for Taxpayer's failure to file
3 returns for the four corresponding monthly gross receipts tax reporting periods. [Administrative
4 file].

5 7. On January 9, 2024, the Administrative Hearings Office sent a Notice of
6 Telephonic Scheduling Hearing, giving the parties notice that a scheduling hearing would take
7 place by telephone on February 2, 2024. [Administrative file].

8 8. On January 30, 2024, the Department, through its Attorney Peter Breen, filed a
9 Stipulated Motion for Continuance of Scheduling Conference. [Administrative file].

10 9. On February 1, 2024, the Administrative Hearings Office sent an Order Granting
11 Continuance and Amended Notice of Telephonic Scheduling Hearing, giving the parties notice
12 that a scheduling hearing would take place by telephone on February 12, 2024. [Administrative
13 file].

14 10. On February 12, 2024, the undersigned Hearing Officer conducted a telephonic
15 scheduling hearing. Taxpayer's representative David Hillegass, CPA, and accountant Brian
16 Kelley appeared at the scheduling hearing by telephone. The Department was represented by
17 Staff Attorney Peter Breen. The parties present did not object that the hearing satisfied the 90-
18 day hearing requirement of Section 7-1B-8 (F) (2019). [Administrative file; Hearing Record of
19 February 12, 2024].

20 11. On February 12, 2024, the Administrative Hearings Office sent a Notice of
21 Second Telephonic Scheduling Hearing, giving the parties notice that a second scheduling
22 hearing would take place by telephone on April 10, 2024. [Administrative file].

1 18. In an average month, Mr. Kelly prepares and files 500-700 sales and use tax
2 returns for various clients in various states. [Administrative file; Examination of B. Kelley].

3 19. When preparing to file a June 2020 CRS-1 return for Taxpayer in July of 2020,
4 Mr. Kelley discovered that the username and password to login to Taxpayer Access Point (TAP)
5 was not functional. He contacted Taxpayer, who informed him that the employee associated with
6 the login information was no longer working for Taxpayer. Mr. Kelley worked with a different
7 Taxpayer employee, “Donna,” and understood that sometime thereafter, the Taxpayer employee
8 contacted the Department by telephone. As a result, he believed that the Department issued a
9 letter allowing Taxpayer’s tax login information to be reset. [Administrative file; Examination of
10 B. Kelley].

11 20. Department records show that the Department sent Taxpayer password reset
12 instructions and links to the email address on file for Taxpayer on August 25, 2020, on
13 September 21, 2020, on September 23, 2020, on September 25, 2020, again on September 25,
14 2020, and on October 26, 2020. [Administrative file; Examination of N. Pacheco; Exhibit F].

15 21. Mr. Kelley understood that Taxpayer received the letter allowing a reset of the
16 login information from the Department in October of 2020. Mr. Kelley understood that as a
17 result of receiving the letter, Taxpayer was able to reset the login information, and thereafter
18 provided access to Mr. Kelley for submission of returns. Mr. Kelley had no access to the letter,
19 and a letter was not provided in evidence. [Administrative file; Examination of B. Kelley].

20 22. Mr. Kelley is familiar with mail processes Taxpayer employs. The mail is
21 typically directed to an office in Wisconsin. From Wisconsin, all mail was redirected to an office
22 in North Carolina. From North Carolina, the mail was directed to another office in New Jersey.
23 Taxpayer’s employee with whom Mr. Kelley worked, Donna, was located in Piscataway, New

1 Jersey. During this time, due to the COVID-19 public health emergency, public health authorities
2 across the United States and around the world had issued social distancing measures intended to
3 prevent the spread of the COVID-19 virus, limit the burden on healthcare providers, and to save
4 lives. Mr. Kelley understood that among the restrictions were measures which affected the ability
5 for Donna to access Taxpayer's office building in New Jersey. Mr. Kelley and Donna were both
6 working remotely (from their respective homes) during this time. [Administrative file;
7 Examination of B. Kelley; Administrative notice].

8 23. Taxpayers returns for June, July, August, and September of 2020 were all
9 electronically submitted to the Department on November 6, 2020. [Administrative file;
10 Examination of B. Kelley; Examination of N. Pacheco; Exhibit E].

11 24. Nicholas Pacheco is a protest auditor for the New Mexico Taxation and Revenue
12 Department. [Administrative file; Examination of N. Pacheco].

13 25. Taxpayer's CRS-1 return for June of 2020 would have been due by July 25, 2020.
14 Taxpayer's CRS-1 return for July of 2020 would have been due by August 25, 2020. Taxpayer's
15 CRS-1 return for August of 2020 would have been due by September 25, 2020. Taxpayer's CRS-
16 1 return for September 2020 would have been due October 25, 2020. Each of the four returns for
17 the timeframes at issue were submitted to the Department after their due dates, on November 6,
18 2020. [Administrative file; Examination of N. Pacheco; Exhibit E].

19 26. Taxpayer timely paid gross receipts tax during the timeframes at issue.
20 [Administrative file; Examination of N. Pacheco].

21 27. The GenTax system is the Department's record-keeping system. When a
22 Department employee receives a call, the employee is required to enter a note into the GenTax
23 system. The system did not show any indication of phone calls from Taxpayer attempting to reset

1 the login information. It is unknown whether Department employees always follow their training
2 and enter a note for every call. [Administrative file; Examination of N. Pacheco].

3 28. After examination of the GenTax system, there was no indication that Taxpayer
4 had filed paper returns during the timeframes at issue. [Administrative file; Examination of N.
5 Pacheco].

6 29. No paper returns were presented as evidence of the claim that the returns were
7 filed initially using paper forms, nor was proof of mailing offered. [Administrative file;
8 Examination of N. Pacheco].

9 **DISCUSSION**

10 Taxpayer is a large corporation that does business across the United States and in New
11 Mexico. Taxpayer argued that for reasons outside of its control, due to the Coronavirus
12 pandemic, it was nonnegligent in the late filing of its CRS-1 returns for the months of June, July,
13 August, and September of 2020. For reasons detailed below, Taxpayer's evidence failed to
14 overcome the presumption of correctness which attached to the assessments.

15 **Presumption of correctness**

16 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
17 presumed correct. Accordingly, it is a taxpayer's burden to present some countervailing evidence
18 or legal argument to show that they are entitled to an abatement, in full or in part, of the
19 assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-
20 NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the
21 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*
22 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

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

7 **Returns reporting Gross Receipts and Compensating Tax, and penalties for late filing.**

8 The assessment in this protest arises from an application of the penalty provisions of the Tax
9 Administration Act. The assessment letters issued to Taxpayer imposed only penalties for late filing
10 of returns, under Section 7-1-69 (2008), since the underlying tax had already been timely paid.

11 Under the Gross Receipts and Compensating Tax Act, Taxpayers are required to pay taxes
12 imposed thereunder “on or before the twenty-fifth day of the month following the month in which
13 the taxable event occurs.” NMSA 1978, Section 7-9-11 (1969). In addition, “[e]very taxpayer shall,
14 on or before the date on which payment of any tax is due, complete and file a tax return in a form
15 prescribed...” NMSA 1978, Section 7-1-13 (B) (2021).¹ Under departmental regulations,
16 “Taxpayers who are registered for gross receipts, governmental gross receipts, compensating or
17 withheld income tax purposes must file a CRS-1 Combined Report Form for each reporting period
18 whether or not any tax is due.” Regulation 3.2.2.14 NMAC (4/30/2001).

19 The Department issued its assessments of penalties upon receipt of the late filed CRS-1
20 returns for the months of June, July, August, and September of 2020. Department records showed
21 no electronic nor paper returns had been filed earlier for the tax filing periods at issue. Taxpayer did

¹ NMSA 1978, Section 7-1-13 was amended in 2021, but the amendment did not affect this quoted language, which was the law at the time, under the 2013 enactment.

1 submit timely payments for the periods at issue, however, because no returns had accompanied the
2 payments, the payments were held in a suspense account.

3 *Coronavirus relief bill.*

4 Taxpayer argued that the relief for taxpayers due to the Coronavirus pandemic was
5 applicable here. House Bill 6², a bill offering taxpayers relief from some of the burdens attributed to
6 the Coronavirus pandemic, was passed at a special legislative session with bipartisan support in the
7 House (69 to 1) and Senate (42 to 0) of the New Mexico Legislature and signed into law by
8 Governor Michelle Lujan Grisham in June of 2020. Among other provisions not applicable here, the
9 bill provided for immediate relief from penalties imposed under Section 7-1-69 for “gross receipts
10 tax, local option gross receipts tax or compensating tax liabilities for failure to pay any of those
11 taxes that became due March 25, 2020 through July 25, 2020.” This section of law, though it covers
12 one of the four monthly tax periods at issue here (the month of June of 2020, which became due
13 July 25, 2020), has limitations to prevent its application to the assessments at issue.

14 We first look at the language of the law to determine if it is applicable to the facts and
15 circumstances at hand. The goal of statutory interpretation is to determine legislative intent, and in
16 doing so “[w]e look primarily to the language of the statute.” *Kilmer v. Goodwin*, 2004-NMCA-
17 122, ¶18 (internal citations omitted). If the statute is clear and unambiguous we need go no further.
18 *Id.* “The text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978,
19 Section 12-2A-19. The plain language of HB6 provides relief for liabilities imposed for “failure to
20 pay” taxes due. This Taxpayer timely *paid* the tax, but did not timely *file* the returns.

21 New Mexico law requires that “[e]very taxpayer shall, on or before the date on which
22 payment of any tax is due, complete and file a tax return in a form prescribed and according to the

² The full text of the bill can be found at the New Mexico Legislature website,
<https://www.nmlegis.gov/Sessions/20%20Special/final/HB0006.pdf> (last visited 01/23/25).

1 regulations issued by the secretary.” NMSA 1978, Section 7-1-13. The failure to file a return in a
2 timely manner is its own trigger for penalties. *See* NMSA 1978, Section 7-1-69 (“in the case of
3 failure due to negligence... to file by the date required a return...there shall be added to the amount
4 assessed a penalty”). Although HB6 provided relief for late payment penalties due to the pandemic,
5 it did not extend relief for failure to file returns on time. Since Taxpayer was penalized for late
6 filing—not late payment—the relief does not apply.

7 *Taxpayer Access Point (TAP) login and password.*

8 Taxpayer used GTM, a third-party accountancy firm, to report and pay Taxpayer’s New
9 Mexico gross receipts taxes. The accountant at GTM bearing these responsibilities reported to a
10 certain person within Taxpayer’s office in Pennsylvania. During the timeframes at issue, while in
11 the midst of the pandemic, Taxpayer’s login and password information that had been shared with
12 GTM did not allow access to the TAP website. The Department asserts that non-filing amounts
13 to negligence.

14 Negligence can be found in several ways. Regulation 3.1.11.10 NMAC (1/15/01) defines
15 “negligence” as “failure to exercise that degree of ordinary business care and prudence which
16 reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where
17 action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or
18 inattention.” Not filing gross receipts tax returns or paying the taxes on time is certainly
19 negligence by inaction (not timely filing) where action (timely filing) is required under this
20 definition.

21 Taxpayer’s reliance on a tax preparer, GTM, for timely filing and payment is cognizable as
22 an imperfect claim of nonnegligence. Regulation 3.1.11.11 NMAC (1/15/01) defines
23 “nonnegligence” by describing several situations which may indicate an absence of negligence,

1 allowing the Department to issue an abatement. The list provided in the regulation includes: “D. the
2 taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on
3 the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure
4 of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the
5 taxpayer's reliance on an agent.” Regulation 3.1.11.11 NMAC. The last clause of the regulation
6 explicitly denies “reliance on an agent” as an excuse for not timely filing a return.

7 Likewise, the nonnegligence regulation provides relief if “the taxpayer, disabled because of
8 injury or prolonged illness, demonstrates the inability to prepare a return and make payment and
9 was unable to procure the services of another person to prepare a return because of the injury or
10 illness.” See Regulation 3.1.11.11 (B). To the extent that Taxpayer’s arguments assert the
11 application of this provision, there is no evidence on record establishing that the absence of
12 Taxpayer’s employee was due to illness or injury. Similarly, there is no evidence that Taxpayer was
13 unable to obtain assistance in preparing the return due to such circumstances. Therefore, the
14 exception does not apply.

15 Here, Taxpayer was negligent by not timely filing, which inaction was predicated on not
16 having sufficient processes in place to allow access to the responsible person’s email by more than
17 one individual. In addition, the Department now allows delegation of multiple people to have access
18 to TAP accounts, with various levels of permission.³ There is no indication on record Taxpayer had
19 processes in place which would permit more than one individual login and password to perform
20 functions on its TAP account. There is no indication on record of any continuity or succession plan
21 in place whereby Taxpayer could assure continuity of business functions in the event of an
22 employee’s lengthy absence or departure.

³ See NM TRD website: <https://www.tax.newmexico.gov/wp-content/uploads/2021/12/New-TAP-functions.pdf> (last accessed 01/29/25).

1 Under NMSA 1978, Section 7-1-69 (2007), when a taxpayer fails to pay taxes due to the
2 State because of negligence or disregard of rules and regulations, but without intent to evade or
3 defeat a tax, the Department must impose a civil negligence penalty on that taxpayer. “There
4 shall be added to the amount assessed a penalty” under the statute. *Id.* The use of the word
5 “shall” makes the imposition of penalty mandatory in all instances where a taxpayer’s actions or
6 inactions meets the legal definition of “negligence.” *See Marbob Energy Corp. v. N.M. Oil*
7 *Conservation Comm’n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word “shall” in a statute
8 indicates provision is mandatory absent clear indication to the contrary). Provisions for relief
9 from the penalty for nonnegligence do not apply here.

10 **Conclusion**

11 Taxpayer did not overcome the presumption of correctness of the assessment by providing
12 evidence of injury or prolonged illness or reliance on an agent that might support a finding of
13 nonnegligence. The evidence provided by Taxpayer through its third party tax preparer, was
14 insufficient both for purposes of overcoming the presumption of correctness, and as substantive
15 proof that the taxpayer was entitled to relief from failure to file CRS-1 returns.

16 **CONCLUSIONS OF LAW**

17 A. Taxpayer filed a timely written protest to the four Notice of Assessment of Tax and
18 Demand for Payment letters issued under Letter ID numbers L0752123568 (June 2020),
19 L1825865392 (July 2020), L1880129200 (August 2020), L0912178864 (September 2020), and
20 jurisdiction lies over the parties and the subject matter of this protest. *See NMSA 1978, Section 7-1-*
21 *24 (D) (2019); see also NMSA 1978, Section 7-9-1, et seq.* (“Gross Receipts and Compensating
22 Tax Act”).

1 B. The hearing was timely set and held within 90-days of the Department’s request for
2 hearing under NMSA 1978, Section 7-1B-8 (F) (2019). Parties did not object that the scheduling
3 hearing satisfied the 90-day hearing requirement of Section 7-1B-8 (F). *See also* Regulation
4 22.600.3.8 (J) NMAC (8/25/20).

5 C. Any assessment of tax made by the Department is presumed to be correct.
6 Therefore, it is the taxpayer’s burden to come forward with evidence and legal argument to establish
7 that the Department’s assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-
8 17 (C) (2007).

9 D. “Tax” is defined to include not only the tax program’s principal, but also interest and
10 penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019). Assessments of penalties and interest therefore
11 also receive the benefit of a presumption of correctness. *See* Regulation 3.1.6.13 NMAC (1/15/01).

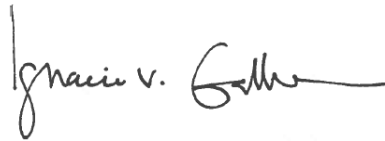
12 E. Taxpayer bears the burden of overcoming the presumption of correctness that
13 attached to the Department’s Assessment. Taxpayer provided no evidence that prolonged illness
14 or reliance on an agent afforded relief for not timely filing returns and was unable to overcome
15 the presumption of correctness. *See* NMSA 1978, Section 7-1-17 (C) (2007); *see also* Regulation
16 3.1.8.10 NMAC (08/30/2001); *see also* Regulation 3.2.2.14 NMAC (4/30/2001); *see also* *Gemini*
17 *Las Colinas, LLC v. New Mexico Taxation & Revenue Department*, 2023-NMCA-039, ¶ 16, 531
18 P.3d 622; *see also* Regulation 3.1.6.12 NMAC; *see also* *MPC Ltd. v. N.M. Taxation & Revenue*
19 *Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308.

20 F. Taxpayer’s evidence and legal argument, weighed against the Department’s
21 evidence and legal argument was insufficient to find by a preponderance of evidence that
22 Taxpayer was entitled to an abatement of penalties for not timely filing returns. *See* NMSA 1978,

1 Section 7-1-69; NMSA 1978, Section 7-1-13; *see also Gemini Las Colinas, LLC v. New Mexico*
2 *Taxation & Revenue Department, 2023-NMCA-039, ¶ 29, 531 P.3d 622.*

3 For the foregoing reasons, Taxpayer's protest **IS DENIED**.

4 DATED: February 10, 2025.



5
6 Ignacio V. Gallegos
7 Hearing Officer
8 Administrative Hearings Office
9 Post Office Box 6400
10 Santa Fe, NM 87502

11 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

2 On February 11, 2025, a copy of the foregoing Decision and Order was submitted to the
3 parties listed below in the following manner:

4 *First Class Mail and E-Mail*

First Class Mail E-Mail

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7 *INTENTIONALLY BLANK*