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**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

4 **IN THE MATTER OF THE PROTEST OF**
5 **INNER WORKS**
6 **TO DENIALS OF REFUNDS ISSUED UNDER**
7 **LETTERS ID NOs. L1069914928 AND L2143656752**
8

9 v.

AHO No. 18.08-190R, D&O No. 19-09

10 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

11 **DECISION AND ORDER**

12 On December 4, 2018, Hearing Officer Ignacio V. Gallegos, Esq. conducted a merits
13 hearing in the matter of the tax protest of Inner Works pursuant to the Tax Administration Act
14 and the Administrative Hearings Office Act. At the hearing, Mrs. Pritpal Kaur Khalsa and Mr.
15 Pritpal Singh Khalsa, owners of Inner Works (“Taxpayer”) appeared, and were represented by
16 their bookkeeper, Ms. Sat Mitar Khalsa¹. Staff Attorney Jama Fisk appeared representing the
17 opposing party in the protest, the State of New Mexico Taxation and Revenue Department
18 (“Department”), along with protest auditor Milagros Bernardo, who testified. All three people
19 appearing for Taxpayer testified on Taxpayer’s behalf. Taxpayer’s Exhibits 1 and 2 were
20 admitted into the record without objection. The Department’s Exhibits A through O were
21 admitted without objection, with caution that there are some admitted inaccuracies in the
22 Department’s exhibits. The Hearing Officer took administrative notice of all documents
23 contained in the administrative file. All exhibits are more fully described in the Administrative
24 Exhibit Log.

¹ The Hearing Officer notes that the Department objected to the designation of the bookkeeper as a “bona fide employee” under NMSA 1978, Section 7-1B-8 and Regulation 22.600.3.7 (B). Based on evidence presented, the Hearing Officer found that the bookkeeper was a bona fide employee not hired simply for the purposes of the tax protest.

1 5. Included in the protest letter concerning 2012 taxes were copies of the
2 Department's Notice of Abatement of Tax Assessment dated December 12, 2016 [Letter ID#
3 L1691128112] concerning 2012, and a statement of the grounds for the 2012 protest.
4 [Administrative file].

5 6. On June 6, 2018, the Department issued a letter acknowledging the receipt of the
6 Taxpayer's protest of the CRS refund denial letters. [Administrative file, Letter ID#
7 L0360853296].

8 7. On August 13, 2018, the Department filed a hearing request with the
9 Administrative Hearings Office, alleging the total amount at protest was \$2,182.92, and
10 requesting a scheduling hearing. [Administrative File].

11 8. On August 14, 2018, the Administrative Hearings Office issued a Notice of
12 Telephonic Scheduling to the parties, informing the parties that a telephonic hearing would be
13 held on September 4, 2018. [Administrative File].

14 9. On September 4, 2018, a telephonic scheduling hearing occurred before Ignacio
15 V. Gallegos, Hearing Officer, within 90 days of the Department's receipt of the protest.
16 Taxpayers and their representative Ms. Sat Mitar Khalsa appeared, but a representative from the
17 Department did not appear. [**9-4-18 CD 0:45-1:40, 12:40-17:00**].

18 10. On September 11, 2018, the Administrative Hearings Office issued a Scheduling
19 Order and Notice of Administrative Hearing, notifying the parties that the merits of the protest
20 would be heard on December 4, 2018 in Santa Fe, New Mexico. [Administrative File].

21 11. Mrs. Pritpal Kaur Khalsa and Mr. Pritpal Singh Khalsa (as spouse) are the owners
22 of Inner Works. [**12-4-18 1 CD 1:20-2:00, 1:47:50-1:48:05**].

1 12. Ms. Sat Mitar Khalsa is the bookkeeper for Inner Works, a small company. She
2 began working for Inner Works when the Department issued a notice of Limited Scope Audit,
3 but has continued working with them and will to continue to manage their books after the
4 conclusion of this protest. [12-4-18 1 CD 2:00-2:20, 19:45-21:00, 22:40-25:00, 35:50-44:11,
5 1:55:50-1:56:20].

6 **Gross Receipts Taxes in 2009**

7 13. Taxpayers filed CRS-1 reports and paid gross receipts taxes due for four quarters
8 of 2009. The original reports contained accounting mistakes, resulting in an overpayment of tax,
9 unbeknownst to the Taxpayer. [Exhibit N1; 12-4-18 1 CD 1:16:30-1:17:50, 1:32:00-1:33:45,
10 1:51:45-1:52:35, 2:36:50-2:37:15].

11 14. In 2014, the Department began a Limited Scope Audit of this Taxpayer for tax
12 years 2009, 2010, and 2011 triggered by an IRS Schedule C mismatch when compared against
13 New Mexico CRS-1 reports. [Exhibit 1-1; 12-4-18 2 CD 20:00-21:30].

14 15. The audit of 2009, 2010 and 2011 concluded on February 9, 2015 with a Notice
15 of Assessment for periods April 1, 2009 through December 31, 2009, in the amount of \$1,336.37
16 for gross receipts taxes due. Taxpayer did not pay the assessment. [Exhibit 2-1; Exhibit H;
17 Exhibit M2; 12-4-18 1 CD 1:04:30-1:08:05, 2:04:45-2:05:15; 12-4-18 2 CD 26:05-26:25].

18 16. On July 1, 2015, Taxpayer amended its CRS-1 reports for the 2009 reporting
19 periods and filed them. The amended reports applied a deduction for out-of-state sales, resulting
20 in an overpayment. [Exhibit 1-1; Exhibit N1 through N5; Exhibit O-1; 12-4-18 1 CD 1:16:20-
21 1:17:50].

22 17. The Taxpayer submitted the amended reports to the Department with an
23 Application for Refund form on July 1, 2015, requesting a refund of \$1,531.41, due to an

1 overpayment error it discovered in its original CRS reports. [Exhibit N1 through N5; Exhibit 1-
2 1; 12-4-18 1 CD 1:16:20-1:17:50, 1:34:40-1:35:30; Administrative file, protest letter
3 attachments].

4 18. Taxpayer was uncertain whether the 2009 refund application was mailed or
5 delivered in person to the Department. [12-4-18 1 CD 1:54:40-1:56:00].

6 19. The Department did not issue a denial or refund the alleged overpayment,
7 following delivery of the Taxpayer's refund application, and Taxpayer did not protest the
8 Department's inaction until this protest. The Department did not stamp the refund application as
9 received until March of 2018, nearly three years after the date on the application. [Exhibits F1,
10 N1 through N5; 12-4-18 1 CD 1:30:00- 1:33:00, 2:06:00-2:10:45].

11 20. On June 24, 2016, the Department issued an abatement of the assessment of taxes
12 due from the 2009 reporting periods, in the amount of \$1,336.37. However, the Department
13 neither refunded nor gave Taxpayer credit for the additional amount of the refund requested.
14 [Exhibit J].

15 21. The Department stamped as received the July 1, 2015 Application for Refund
16 request for on March 2, 2018. [Exhibit N1].

17 22. The Department issued a letter denying the Taxpayer's refund request for being
18 untimely on March 13, 2018. [Administrative File, Letter ID #L1069914928, see also FOF #1].

19 **Gross Receipts Taxes in 2012**

20 23. Taxpayer filed returns and paid gross receipts tax for the tax reporting periods of
21 2012, on December 18, 2012. [Exhibit O-4, Exhibit B-3].

22 24. At some point thereafter, while the other audit was pending, the Department
23 conducted an audit of the 2012 tax year. [Exhibit I; 12-4-18 1 CD 2:28:25-2:28:50].

1 25. Taxpayer submitted amended CRS tax returns for 2012 on July 6, 2015.
2 [Taxpayer Exhibit 1-1].

3 26. On July 30, 2015, the audit of the Taxpayer's 2012 tax reporting ended with an
4 assessment of taxes and the Department issued a letter informing the Taxpayer that \$6,646.68
5 was due for tax reporting periods between April 1, 2012 and December 31, 2012. Taxpayer did
6 not pay the assessment. [Exhibit I; **12-4-18 1 CD 2:05:20-2:05:45**].

7 27. On May 2, 2016, the Department issued a Notice of Abatement to Taxpayer for
8 2012 tax reporting, leaving a balance due of \$1,843.43. Taxpayer did not pay the balance.
9 [Exhibit K-1; Exhibit N6; **12-4-18 1 CD 2:05:20-2:05:45; 1:36:00-1:37:40, 1:40:00-1:41:00;**
10 Administrative file, protest letter; **12-4-18 2 CD 26:25-26:50**].

11 28. While communicating with the Department, throughout the audit process, the
12 Taxpayer experienced delays in receiving responses, changes in auditors, and alleged that
13 documents were mishandled by department employees. On the same score, Taxpayer's records
14 were not well-curated, and presented its evidence in summary form without supporting
15 documents. Taxpayer, when confronted with unpreparedness or lack of documentation, would
16 blame the Department with unsubstantiated allegations of fact. [Exhibit 1-1, 1-2; **12-4-18 1 CD**
17 **1:34:20-1:37:40, 2:08:00-2:08:50, 2:28:20-2:30:20, 2:36:30- 2:38:20**].

18 29. On December 12, 2016, the Department issued a Notice of Abatement to
19 Taxpayer for 2012 tax reporting, leaving a negative balance of -\$651.15 [Department Exhibit K-
20 2].

21 30. On January 27, 2017, the Taxpayer submitted an Application for Refund for 2012
22 tax liability, which attached the December 12, 2016 letter from the Department as evidence of
23 overpayment. [Exhibit 1-2; Exhibit N6, N7; **12-4-18 1 CD 2:02:50-2:04:20**].

1 *Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation
2 omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M.
3 447; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779
4 (Court of Appeals reviewed a refund denial through “lens of presumption of correctness” and
5 applied the principle that deductions underlying the claim for refund are to be construed
6 narrowly). Consequently, Taxpayer must show that it is entitled to the deduction that is the basis
7 of its claim for refund.

8 **2009 Gross Receipts Tax.**

9 **Does the discovery of overpayment following an audit assessment trigger or extend** 10 **the statute of limitation?**

11 In 2009, Taxpayer filed and paid its gross receipts taxes routinely. During this time and
12 thereafter, until an audit took place in 2014, the Taxpayer included even receipts from sales of
13 services to out-of-state purchasers, which Taxpayer did not know could be deductible under
14 NMSA 1978, Section 7-9-57 (2000). The Department did not dispute that the deductions would
15 have been proper, if taken at the time of original filing. The Department’s only challenge is to
16 the timeliness of the claim for refund.

17 After being informed that they would be audited, Taxpayers began to employ a
18 bookkeeper in order to help them comply with the departmental audit that began in 2014. In
19 sifting through the Taxpayer’s documents, the bookkeeper discovered the Taxpayer’s error in not
20 taking the deduction. Taxpayer informed the Department of the accounting error by filing
21 amended 2009 gross receipts tax returns for the applicable reporting periods, after the audit had
22 concluded with an assessment of taxes. Taxpayer made a claim for refund based on the amended
23 returns. The crux of the dispute is whether the refund claim was timely.

1 The refund statute in effect at the time of the amended filing, Section 7-1-26 (D) (2015,
2 amended 2017)², required that taxpayers file claims for refund within three years of the end of
3 the calendar year in which “the payment was originally due or the overpayment resulted from an
4 assessment by the department ... whichever is later.” Section 7-1-26 (D)(1)(a). Under the first
5 provision of the statute, i.e., the end of the calendar year in which the payment was originally
6 due, the payments for 2009 were due in 2009 and in January of 2010. *See* NMSA 1978, Section
7 7-9-11 (1969). December 31, 2010 is the end of the calendar year when the final payment would
8 have been due. Three years from that date would have passed December 31, 2013.

9 Taxpayer argues that the “overpayment resulted from an assessment by the department,”
10 attempting to extend the three-year statute of limitation beyond its initial three-year period and
11 forward past the conclusion of the audit assessment of 2015. Taxpayer readily admitted that it
12 did not pay the assessment of taxes for its assessed 2009 tax liability, following the audit
13 assessment in 2015. Taxpayers also readily admitted that the overpayment was due to their own
14 error in misunderstanding the gross receipts tax law when filing their own CRS reports, before
15 having a bookkeeper look at their account books. Under the statute, the cause of the
16 overpayment must be payment of an assessment made in error. Although the intricacies of the
17 law of causation are discussed at length in the common law, it can be summed up using the
18 uniform jury instruction:

19 Causation (proximate cause).

20 An [act] [or] [omission] [or] [(condition)] is a "cause" of
21 [injury] [harm] [(other)] if [, unbroken by an independent
22 intervening cause,] it contributes to bringing about the [injury] [harm]
23 [(other)] [, and if injury would not have occurred without it].

24 It need not be the only explanation for the [injury] [harm] [
25 (other)], nor the reason that is nearest in time or place. It is sufficient
26 if it occurs in combination with some other cause to produce the result. To be
27 a "cause", the [act] [or] [omission] [or] [(condition)],

² The law of this case is the law in effect at the time the subject matter of the protest arose, in 2015.

1 nonetheless, must be reasonably connected as a significant link to the
2 [injury] [harm]. UJI 13-305 NMRA.
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4 Using this as a guide, the act of assessing a tax is a “cause” of the overpayment, if it
5 contributes to bring about the injury of overpayment, and the injury would not have occurred
6 without it. Simply put, stumbling upon a discovery of chronic reporting errors which led to
7 overpayment is not the same as an overpayment that “resulted from” an assessment, although
8 there is a tenuous connection between the audit and the Taxpayer’s hiring of the bookkeeper.
9 Under the facts of this case, the overpayment was caused by an accounting error that occurred
10 well before the assessment took place. The additional three years for requesting a refund from
11 the date of assessment is inapplicable to the facts at hand, under Section 7-1-26 (D)(1). Under
12 New Mexico's self-reporting tax system, “every person is charged with the reasonable duty to
13 ascertain the possible tax consequences” of his or her actions. *Tiffany Construction Co. v.*
14 *Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. It is the duty of Taxpayer to determine
15 what taxes need to be reported and paid.

16 Nevertheless, although neither party suggested this as an alternative, Section 7-1-26
17 (D)(5) also has a provision extending the statute of limitation: “[W]hen a taxpayer has been
18 assessed a tax on or after July 1, 1993, under Subsection B, C or D of Section 7-1-18 NMSA
19 1978 and when the assessment applies to a period ending at least three years prior to the
20 beginning of the year in which the assessment was made, the taxpayer may claim a refund for the
21 same tax for the period of the assessment or for any period following that period within one year
22 of the date of the assessment unless a longer period for claiming a refund is provided in this
23 section.” Since the audit began in 2014 and 2009 taxes were not assessed until 2015, a logical
24 inference would be that the assessment was issued pursuant to either Subsection B, C or D of

1 Section 7-1-18, which each grant the Department the ability to look-back beyond the usual three-
2 year limit on assessments.

3 So, despite the fact that the Taxpayer did not overpay as a “result” of an assessment, the
4 periods at issue within the audit and assessment could still justify a refund, under subsection
5 (D)(5). The preconditions for a valid claim under (D)(5) are that the claim for refund is filed
6 within one year, pertains to the same tax program assessed, and is of a period subject to
7 assessment or thereafter. Regulation 3.1.9.12 (C) NMAC provides a pertinent example:

8 Taxpayer, a monthly filer, underreported by more than 25% gross
9 receipts taxes due in the period November 1988 through
10 December 1991. The department audits Taxpayer in 1993. On
11 May 1, 1993, the department assessed Taxpayer with respect to
12 underreported taxes for the entire period. In May 1993, the
13 November 1988 through December 1989 portion of the period is
14 beyond the time described in Subsection 7-1-18A NMSA 1978.
15 The taxpayer may claim a refund at any time until April 30, 1994
16 with respect to gross receipts taxes paid in the period November
17 1988 through December 1989.

18 Here, it was undisputed that the refund request was for the same tax program (GRT) and
19 pertained to the same period covered by the audit and assessment. Because the audit and its
20 subsequent assessment under NMSA 1978, Section 7-1-18 (B) (C) or (D) opened the door to the
21 extended statute of limitations, Taxpayer had one additional year to file a claim for refund of its
22 2009 gross receipts tax overpayment. The extended statute of limitations starting point is the
23 date of the assessment, February 9, 2015, and its ending point was February 8, 2016.

24 The Taxpayer contended that the refund request covering 2009 tax periods was sent,
25 either by mail or hand-delivered on July 1, 2015. If true, this would have been timely filed, since
26 it was filed before February 8, 2016. The Department challenged the Taxpayer’s testimony of
27 when it delivered the refund request, citing as evidence that the refund request covering the 2009
28 tax periods was not stamped as received by the Department until March 2, 2018 (almost two

1 years after the extended statute of limitations would have ended). Because a stamp on a
2 document, with no other competent evidence of first receipt on that date, cannot overcome the
3 substantial evidence of sworn in-person testimony subject to cross-examination, the Hearing
4 Officer adopts the Taxpayer’s position of when the claim for refund covering 2009 gross receipts
5 taxes was delivered.

6 The Taxpayer submitted their 2009 application for refund to the Department on July 1,
7 2015. The application for refund was timely, under the extended deadline allowed by Section 7-
8 1-26 (D)(5), because it was delivered before February 8, 2016.

9 **Taxpayer’s duty to protest the Department’s failure to take action on its application**
10 **for refund.**

11 Upon receipt of a claim for refund, the law (effective at the time of the claim) anticipates
12 that the Department will act, by issuing a refund or by issuing a denial letter within 120 days.³
13 Section 7-1-26 (B) states: “[t]he secretary or the secretary's delegate may allow the claim in
14 whole or in part or may deny the claim.” The statute uses the word “may” rather than the word
15 “shall.” New Mexico courts have interpreted this to mean that “the word “may” in the sentence
16 allowing the secretary to grant or deny a claim should be construed as permissive.” *Unisys Corp.*
17 *v. New Mexico Taxation & Revenue Dep’t*, 1994-NMCA-059, ¶ 8, 117 N.M. 609, 874 P.2d 1273;
18 *Thriftway Marketing Corp. v. State*, 1992-NMCA-092, 114 N.M. 578, 844 P.2d. 828. Although
19 Subsection B of the statute only allows two options (to allow or to deny), the *Unisys* court
20 determined that the section “gives the Secretary the choice of whether or not to act upon a refund
21 claim.” *Unisys*, 1994-NMCA-059, ¶16. The statute then anticipates three possibilities: that the
22 Department deny the claimed amount, that the Department refund the claimed amount, or that

³ The 2017 amendment extended this time from 120 to 180 days. *See* NMSA 1978, § 7-1-26 (D) (2017).

1 the Department take no action on the claim. *See* § 7-1-26 (B)(2). The statute in effect in 2015
2 allowed only one-hundred twenty days from the date of mailing or delivery of the claim for
3 refund for the Department to take action on the claim, which would have made the final date for
4 the Department to take action to October 29, 2015. *See* § 7-1-26 (B)(2). The evidence showed
5 that the Department did not deny the original claim for refund, and did not pay out the claimed
6 refund amount, therefore this case is one in which the Department did not take any action on the
7 Taxpayer's 2009 claim for refund.

8 There are specific obligations on Taxpayers whose refund claims are not acted upon
9 within the required time frame. *See* § 7-1-26 (B) and (C). The Taxpayer must choose one of the
10 two options provided by statute. The Taxpayer may file an administrative protest of the inaction
11 under (C)(1), or may file a civil suit in district court under (C)(2). It is undisputed that the
12 Taxpayer did not file a protest of the Department's inaction in district court. And the record is
13 clear that the Taxpayer filed this administrative protest of the department's refund denial on May
14 15, 2018. Under NMSA 1978, Section 7-1-24 (A)(3) (2015, amended 2017) the Taxpayer may
15 protest the "failure to allow or to deny a ... claim for refund." Under the same statute,
16 Subsection (D), the protest must be filed "within ninety days of the date of ... the date of denial
17 of a claim pursuant to Section 7-1-26 NMSA 1978 or the last date upon which the department
18 was required to take action on the claim but failed to take action." Since the Department's
19 inaction amounted to a denial of the claim by October 29, 2015, the Taxpayer was required to
20 protest the inaction within 210 days of the filing of the claim. The date by which the Taxpayer
21 was required to submit its protest of the denial by inaction was January 27, 2016. The protest of
22 the Department's denial by inaction of Taxpayer's refund claim filed July 1, 2015 was not filed
23 until May of 2018, and hence is untimely. *See Unisys, 1994-NMCA-059* (Court of Appeals held

1 that a claim for refund was time barred when taxpayer did not confront the department inaction
2 by timely filing either a protest or a civil action). The Department's 2018 denial of a refund for
3 2009 gross receipts tax overpayment was proper. The legislature has established a statute of
4 limitation so that the state will not be held liable for late-asserted claims so the ledger books may
5 be closed after a finite amount of time. The limits set out in Section 7-1-26 were intended "to
6 avoid stale claims, which protects the Department's ability to stabilize and predict, with some
7 degree of certainty, the funds it collects and manages." *Kilmer v. Goodwin*, 2004-NMCA-122,
8 ¶16, 136 N.M. 440, 99 P.3d 690.

9 **2012 Gross receipts tax.**

10 Taxpayer filed a return and paid its gross receipts tax for the period ending December 31,
11 2012, on December 18, 2012. Taxpayer amended its gross receipts tax returns for 2012 and filed
12 the amended return July 6, 2015. At the time the amended return was filed, the Department had
13 concluded an audit of the 2009, 2010, and 2011 years, and had informed the Taxpayers that an
14 audit of 2012 would be taking place. Having discovered that the Taxpayer could deduct for sales
15 of services to out-of-state purchasers, Taxpayer's 2012 amended return filing utilized the
16 deduction under NMSA 1978, Section 7-9-57. Department did not dispute that the deductions
17 were proper. Again, Department's main challenge is to the timeliness of the claim for refund.

18 Combined Reporting System returns (CRS -1) include Gross Receipts Tax among other
19 tax programs. Typically, the returns are due the 25th day of the month following the close of the
20 reporting period. *See* NMSA 1978, Section 7-9-11 (1969). In this instance, Taxpayer was a
21 quarterly filer. The CRS-1 report for the period ending December 31, 2012 would have been
22 due, and the tax due to be paid no later than January 25, 2013. *See* Section 7-9-11 and Section 7-
23 1-13 (2007, amended 2013).

1 Applying the refund statute in effect at the time of the 2012 reporting period CRS-1
2 amended filing, Section 7-1-26 (D)(1)(a), required that taxpayers file claims for refund within
3 three years of the end of the calendar year in which “the payment was originally due or the
4 overpayment resulted from an assessment by the department, ... whichever is later.” Under the
5 first provision of the statute, i.e., the end of the calendar year in which the payment was
6 originally due, the payments for 2012 were due in January of 2013. December 31, 2013 is the
7 end of the calendar year when the final payment would have been due. Three years from that
8 date would have passed December 31, 2016. Taxpayer claimed to have filed their 2012 refund
9 request on January 27, 2017, less than a month after the three-year limit had expired. Under the
10 three-year limit, the claim for refund was late.

11 Taxpayer argues that the “overpayment resulted from an assessment by the department,”
12 attempting to extend the three-year statute of limitation beyond its initial three-year period and
13 forward past the conclusion of the audit assessment of July 30, 2015. [Letter ID #L0750665776,
14 Exhibit I]. Taxpayer’s witnesses testimony differed as to whether the Taxpayer paid the
15 assessment. Mrs. Pritpal Kaur Khalsa, testified she did not pay the assessment, yet, Ms. Sat
16 Mitar Khalsa testified that Taxpayer paid the assessment (as indicated on the refund request) on
17 January 4, 2017 for the 2012 tax liability assessment, however, did not show any documentary
18 evidence of so doing. The Department’s evidence showed no payment made on the 2012 tax
19 liability [Exhibit L2], following the audit assessment in 2015. In this instance, the hearing
20 officer adopts the Department’s record-keeping of payments made, and considers that the
21 payment for 2012 tax liability was not following the assessment, but at the initial filing in 2012.
22 Unsubstantiated statements are insufficient to overcome the presumption of correctness. *See*
23 *MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217. *See also*

1 Regulation 3.1.6.12 (A) NMAC. As discussed above, the discovery of a reporting error which
2 led to overpayment is not an overpayment that “resulted from” an assessment. Under the statute,
3 the cause of the overpayment must be payment of an assessment made in error. Under the facts
4 of this case, the overpayment was caused by Taxpayer’s accounting error that occurred well
5 before the audit took place and the assessment was issued. The additional three years for
6 requesting a refund from the date of assessment is inapplicable to the facts at hand, under Section
7 7-1-26 (D)(1).

8 Nevertheless, as noted in the discussion above, Section 7-1-26 (D)(5) also has a provision
9 extending the statute of limitation: “[W]hen a taxpayer has been assessed a tax on or after July
10 1, 1993, under Subsection B, C or D of Section 7-1-18 NMSA 1978 and when the assessment
11 applies to a period ending at least three years prior to the beginning of the year in which the
12 assessment was made, the taxpayer may claim a refund for the same tax for the period of the
13 assessment or for any period following that period within one year of the date of the assessment
14 unless a longer period for claiming a refund is provided in this section.” Since the audit began in
15 2014 and 2012 taxes were assessed in 2015, a logical inference would be that the assessment was
16 issued pursuant to subsection A, and *not* pursuant to B, C or D of Section 7-1-18, which each
17 grant the Department the ability to look-back beyond the usual three-year limit on assessments.
18 Yet there was no evidence presented on this subject, other than the fact that the assessment was
19 issued before the expiration of the three-year limit on assessments under NMSA 1978, Section 7-
20 1-18 (A) (2013), and Taxpayers did not argue for it.

21 Because the Taxpayer did not overpay as a result of an assessment, and the tax periods at
22 issue within the audit and assessment were not extended beyond the original three-year limit of
23 subsection A, the one-year extension for filing claims for refund is not justified under subsection

1 (D)(5). The 2012 claim for refund due by December 31, 2016, as required by Section 7-1-26
2 (D)(1) and since it was not delivered to the Department until January 27, 2017, it was late by 27
3 days.

4 **Both 2009 and 2012 tax years.**

5 To the credit of the protest office staff members working the case, the Department took
6 measures to informally address the issues raised by the Taxpayer in both of the tax years at issue.
7 Ultimately, the Department abated all the assessed taxes, penalties, and interest for the 2009 tax
8 reporting periods on June 24, 2016 [Exhibit J, Letter ID#L0274044464]. The Department abated
9 all the assessed taxes, penalties, and interest for the 2012 tax reporting periods on May 2, 2016
10 [Exhibit K1, Letter ID #L0484017712] and December 12, 2016 [Exhibit K2, Letter ID
11 #L1691128112]. At the time of the hearing, Taxpayer owed no taxes for 2009 and 2012.

12 **Equitable tolling**

13 The Taxpayer believes that the statute of limitations should be equitably tolled since there
14 were so many delays, changes in auditors, and mishandled documents. It is not clear that the
15 Administrative Hearings Office has authority to exercise the equitable remedy the Taxpayer
16 seeks. *See* NMSA 1978, Section 7-1B-1 to -9 (2015). *See also* *AA Oilfield Serv. v. N.M. State*
17 *Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of
18 an administrative body did not empower it to grant equitable relief, such as estoppel, because the
19 authority is limited to making factual and legal determinations as authorized by the statute). *See*
20 *Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for
21 the proposition that an agency with quasi-judicial powers did not have authority to grant an
22 equitable remedy). Historically, the Administrative Hearings Office addresses all theories of
23 recovery and error presented. Some theories involve equitable considerations, but only as

1 determined by statute. *See* NMSA 1978, Section 7-1-28 (F) (equitable recoupment), Section 7-1-
2 17.1 (relief for an innocent spouse), Section 7-1-60 (estoppel).

3 Here, the relief of equitable tolling is not one which has been statutorily authorized under
4 the Tax Administration Act. *See* NMSA 1978, Section 7-1-1 to-83 (1965, as amended through
5 2018). Yet, the Hearing Officer’s role is that of the fact-finder. Part of the responsibility of fact-
6 finder is to make findings that support conclusions of law. Therefore, even if the Hearing
7 Officer is statutorily unable to grant the equitable relief requested, the next court of general
8 jurisdiction (Court of Appeals) may grant or deny the relief requested, based on findings made at
9 this initial fact-gathering level. “The Fourteenth Amendment guarantees every citizen the right to
10 procedural due process in state proceedings.” *Reid v. New Mexico Board of Examiners in*
11 *Optometry*, 1979–NMSC–005, ¶ 6, 92 N.M. 414, 589 P.2d 198 (internal quotation marks and
12 citation omitted). “Such proceedings must be administered by fair and impartial triers of fact
13 who are at a minimum ... disinterested and free from any form of bias or predisposition regarding
14 the outcome of the case.” *Caranangelo v. Albuquerque-Bernalillo County Water Utility*
15 *Authority*, 2014-NMCA-032, ¶ 64 (internal quotation marks omitted). “Triers of fact must
16 likewise be impartial and unconcerned in the result of the adjudication, and the rigidity of this
17 requirement applies more strictly to an administrative adjudication where many of the customary
18 safeguards affiliated with court proceedings have, in the interest of expedition and a supposed
19 administrative efficiency, been relaxed.” *Id.* (internal quotation marks omitted). “It is the sole
20 responsibility of the trier of fact to weigh the testimony, determine the credibility of the
21 witnesses, reconcile inconsistencies, and determine where the truth lies.” *N.M. Taxation &*
22 *Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23.

1 Federal courts have consistently rejected application of equitable tolling to tax refund
2 cases. In *United States v. Brockamp*, 519 U.S. 347 (1997), the United States Supreme Court
3 upheld strict enforcement of the three-year period for seeking federal tax refunds, even though
4 the taxpayer suffered from a mental disability that prevented him from filing a timely claim.
5 “Congress decided to pay the price of occasional unfairness in individual cases (penalizing a
6 taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax
7 enforcement system.” *Id.* at 352-353. Likewise, state courts reject the application of equitable
8 tolling in state tax cases. In *DaimlerChrysler Corp. v. Commonwealth*, 885 A.2d 117
9 (Pa.Cmwlth. 2005) the Pennsylvania court considered the case of an automobile manufacturer
10 who sought a refund of sales taxes paid on the sale of vehicles the manufacturer was
11 subsequently required to repurchase under the state’s lemon law. Because the repurchase
12 occurred after the three-year statute for obtaining refunds had expired, the manufacturer argued
13 that statute should be equitably tolled until the date the right to the refund first accrued. The court
14 disagreed, noting that statutes of limitation “are by definition arbitrary, and their operation does
15 not discriminate between the just and the unjust claim, or the voidable [sic] and unavoidable
16 delay.” *Id.* at 121, n.10. *See also, Neer v. State ex rel. Oklahoma Tax Commission*, 982 P.2d
17 1071 (Okla. 1999) (denying late-filed income tax refund based on credit for taxes paid to another
18 state, even though the right to the refund accrued after expiration of Oklahoma’s deadline for
19 claiming refunds); *CIG Exploration, Inc. v. State, Dept. of Revenue*, 880 P.2d 601 (Wyo. 1994)
20 (denying late-filed severance tax refund resulting from government’s order requiring taxpayer to
21 retroactively reduce its natural gas prices, even though order was entered after expiration of
22 Wyoming’s deadline for claiming refunds); *American Smelting & Refining Co. v. State Tax*
23 *Commission*, 397 P.2d 67 (Utah 1964) (denying late-filed corporate income tax refund resulting

1 from IRS adjustment, even though adjustment was made after expiration of Utah’s deadline for
2 claiming tax refund).

3 New Mexico courts have also applied a strict construction to statutes governing tax
4 refunds. In *Kilmer*, 2004-NMCA-122, ¶ 16, the New Mexico Court of Appeals noted that the
5 purpose of the deadlines set out in § 7-1-26 “is to avoid stale claims, which protects the
6 Department's ability to stabilize and predict, with some degree of certainty, the funds it collects
7 and manages.”

8 Equitable tolling allows a party to a lawsuit to extend the statute of limitations upon
9 showing that “the government did something which reasonably induced them to believe that the
10 statute of limitations was being tolled or had been extended.” *Malonek v. United States*, 923 F.
11 Supp. 1462, 1468 (1996). The evidence at hand does not contain any testimony, writings, or
12 other evidence that the Taxpayer received assurances from any of the various government
13 employees they worked with pertaining to an extended period of time within which they could
14 file a claim for refund. The doctrine of equitable tolling does not apply here. Despite
15 sympathizing with Taxpayer’s position as a small business navigating the maze of the state tax
16 code alone, controlling precedent dictates the outcome of this protest. For the stated reasons, the
17 Taxpayer’s protest is denied.

18 CONCLUSIONS OF LAW

19 A. Taxpayer filed a timely, written protest to the Department’s March 13, 2017 denials
20 of the claims for refund, and jurisdiction lies over the parties and the subject matter of this protest.

21 B. A hearing was timely set and held within 90-days of the Department’s
22 acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

1 C. The application for refund of 2009 gross receipts tax, filed July 1, 2015 was
2 untimely under NMSA 1978, Section 7-1-26 (D)(1) (2015).

3 D. The application for refund of 2009 gross receipts tax, filed July 1, 2015, following
4 the Department's assessment of taxes, was timely under Section 7-1-26 (D)(5) (2015).

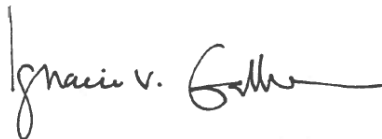
5 E. The Department took no action to refund Taxpayer or deny the 2009 gross receipts
6 tax refund request within 120 days of the refund request, as required by Section 7-1-26 (B) (2015).

7 F. Taxpayer did not protest the inaction of the Department, or file a civil action within
8 210 days of filing the 2009 refund application, as required by Section 7-1-26 (C) (2015). *See also*
9 *Kilmer v. Goodwin*, 2004-NMCA-122.

10 G. The application for refund of 2012 gross receipts tax, filed January 27, 2017 was
11 untimely under NMSA 1978, Section 7-1-26 (D)(1) (2015).

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

13 DATED: March 18, 2019.

14 

15 Ignacio V. Gallegos
16 Hearing Officer
17 Administrative Hearings Office
18 Post Office Box 6400
19 Santa Fe, NM 87502

20 **NOTICE OF RIGHT TO APPEAL**

21 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
22 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the

1 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
2 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
3 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
4 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
5 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
6 Hearings Office may begin preparing the record proper. The parties will each be provided with a
7 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
8 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
9 statement from the appealing party. *See* Rule 12-209 NMRA.

10 **CERTIFICATE OF SERVICE**

11 On March 18, 2019, a copy of the foregoing Decision and Order was submitted to the
12 parties listed below in the following manner:

13 *First Class Mail*

Interdepartmental Mail

14 INTENTIONALLY OMITTED

15 John Griego
16 Legal Assistant
17 Administrative Hearings Office
18 P.O. Box 6400
19 Santa Fe, NM 87502