

1 IT IS DECIDED AND ORDERED AS FOLLOWS:

2 **FINDINGS OF FACT**

3 *Jurisdictional and Procedural Findings¹.*

4 1. On April 24, 2017, the Department sent Taxpayer a letter denying Taxpayer’s
5 claim for a net operating loss on its corporate income tax returns “because [n]et operating loss
6 established on a separate [corporation] entity cannot be claimed on a consolidated/combined
7 return.” [Taxpayer Ex. #17; Department Ex. I; Direct of Mary Griego].

8 2. On July 24, 2017, Taxpayer protested the Department denial of the claim of net
9 operating loss. [Administrative Record, Protest; Direct of Mary Griego].

10 3. On August 10, 2017, the Department acknowledged receipt of Taxpayer’s protest.
11 [Administrative Record, Hearing Request Packet; Department Ex. J; Direct of Mary Griego].

12 4. On September 20, 2017, the Department requested a hearing on the protest with
13 the Administrative Hearings Office, an agency separate and independent of the Department
14 tasked with conducting fair and impartial administrative hearings pursuant to the Administrative
15 Hearings Office Act, NMSA 1978, Section 7-1B-1 through 9 (2015). [Administrative Record,
16 Hearing Request Packet].

17 5. On September 21, 2017, the Administrative Hearings Office scheduled this matter
18 for a telephonic scheduling hearing on October 13, 2017. [Administrative Record].

19 6. On October 13, 2017, a scheduling hearing occurred in this matter. The parties
20 did not object that conducting that scheduling hearing satisfied the 90-day hearing requirement
21 under NMSA 1978, Section 7-1B-8 (A) (2015) while allowing meaningful time for completion

¹ Not every procedural event or filing is noted in this section. The administrative record speaks for itself as to those other events, pleadings, and orders.

1 of the other required fair hearing requirements found under NMSA 1978, Section 7-1B-6 (D)
2 (2015).

3 7. On June 19, 2018, a motions hearing occurred in this matter on the Department's
4 motion for summary judgment. The Department's motion for summary judgment focused
5 exclusively on its argument that Taxpayer failed to timely protest and preserve its refund claims.

6 8. On July 12, 2018, the Administrative Hearings Office issued an order denying the
7 Department's motion for summary judgment, ordering further production, and requiring the
8 parties to request a new setting upon completion of discovery.

9 9. On December 31, 2018, the Administrative Hearings Office issued an order
10 denying sanctions and notice of administrative hearing, scheduling the merits hearing on March
11 7, 2019.

12 ***Substantive Findings***

13 10. Marcel Maier is an officer of Taxpayer, serving as head of taxation for Taxpayer
14 since 2005. Mr. Maier has a bachelor's degree in business administrative and a master's degree
15 in science of taxation. [Direct Testimony of Marcel Maier 03-07-19 CD 00:32.21-00:33:00].

16 11. Dan Armer, CPA, has been an employee at TRD for approximately 20-years. Mr.
17 Armer, CPA, has a bachelor of science in accounting. Mr. Armer is a CPA in New Mexico. Mr.
18 Armer is currently the Supervisor of the Corporate Income Tax Audit Unit. [Direct Testimony of
19 Dan Armer].

20 12. Mr. Armer reviewed all of Taxpayer's pertinent returns in this protest. [Direct
21 Testimony of Dan Armer].

1 13. According to Mr. Armer, the CIT-1 Return Instructions expressly indicate that a
2 taxpayer must attach Federal Form 1120. [Hearing Officer Questions of Dan Armer].

3 14. The Hearing Officer takes administrative notice that the CIT-1 2011 and 2012
4 Instructions state “Federal Form 1120 (pages 1 through 5 ONLY) [r]equired of all
5 corporations... The New Mexico return **IS NOT** complete and **WILL NOT** be processed if
6 these forms are missing.” [2011 and 2012 CIT-1 Instructions, p. 3² (Emphasis in Original)].

7 15. At the hearing and without objection from either party, the Hearing Officer took
8 administrative notice of two previous protests Taxpayer had filed, one of which involved the
9 claim for a refund that resulted in a public decision and order and another involving the claim for
10 a credit that was resolved after an order granting Taxpayer partial summary judgment. [Direct
11 Testimony of Mary Griego; 03-07-19 CD 04:00:00-38].

12 2011 Corporate Income Tax Returns.

13 16. On September 17, 2012, Taxpayer filed its original 2011 corporate income tax
14 (CIT-1) return with the Department. [Taxpayer Ex. #1; Direct Testimony of Marcel Maier 03-07-
15 19 CD 00:33:10-00:33:48].

16 17. Enclosed with its September 17, 2012, original 2011 CIT-1 return, Taxpayer
17 included a copy of its federal income tax return for 2011. [Taxpayer Ex. #1.14; Direct Testimony
18 of Marcel Maier 03-07-19 CD 00:34:10-31].

19 18. Taxpayer reported \$23,624,155 in taxable income on its original 2011 CIT-1
20 return. [Taxpayer Ex.#1.3; Direct Testimony of Dan Armer].

² On the record, the hearing officer gave notice to the parties of taking of administrative notice of the 2011 and 2012 instructions, and neither party objected. *See* 03-07-19 CD 03:27:54-03:28:18.

1 19. Taxpayer did not claim a net operating loss on line 5 of its original 2011 CIT-1
2 return, leaving that line blank. [Taxpayer Ex. #1.3; Direct Testimony of Marcel Maier 03-07-19
3 CD 00:33:48-00:34:04; Direct Testimony of Dan Armer].

4 20. Taxpayer reported \$64,002.00 in tax on its original 2011 CIT-1 return. [Taxpayer
5 Ex. #1.3; Direct Testimony of Dan Armer].

6 21. Taxpayer reported \$334,356.00 in overpaid corporate income tax on its original
7 2011 CIT-1 return, which Taxpayer requested be carried over and applied to its 2012 liability.
8 [Taxpayer Ex. #1.3; Direct Testimony of Dan Armer].

9 22. On August 27, 2013, Taxpayer informed the Department via letter, that the IRS
10 had completed its audit of Taxpayer's 2010 and 2011 tax years. Taxpayer provided the
11 Department with a schedule of changes to New Mexico taxable income in 2010 and 2011, Form
12 4549, and CIT-1 returns for 2010 and 2011, as originally filed. [Taxpayer Ex. #2; Direct
13 Testimony of Marcel Maier 03-07-19 CD 00:35:02-44].

14 23. The IRS audit resulted an increase of Taxpayer's 2011 federal taxable income by
15 \$12,786,774.00. [Taxpayer Ex. #2.4; Direct Testimony of Dan Armer].

16 24. On May 2, 2014, Taxpayer filed its first amended 2011 CIT-1 return with the
17 Department, in response to the IRS RAR adjustment. The amended return showed a total taxable
18 income of \$36,410,889.00 and a tax liability of \$39,140.00. Taxpayer included a check for
19 \$39,140.00 with its return. [Taxpayer Ex. #3; Direct Testimony of Marcel Maier 03-07-19 CD
20 00:36:31-00:37:20; Direct Testimony of Dan Armer].

21 25. Taxpayer did not claim a net operating loss on line number 5 of its first amended
22 2011 corporate income tax return, which was blank. [Taxpayer Ex. #3.3; Direct Testimony of
23 Marcel Maier 03-07-19 CD 00:37:20-47; Direct Testimony of Dan Armer].

1 26. On September 11, 2015, Taxpayer filed its second amended 2011 CIT-1 return,
2 and checked “amended-other” as the nature of that return. That return hereinafter will be
3 referred to as the September 11, 2015 Amended Other 2011 return. [Taxpayer Ex. #4; Direct
4 Testimony of Marcel Maier 03-07-19 CD 00:39:22-47; Direct Testimony of Dan Armer].

5 27. On the September 11, 2015 Amended Other 2011 return, Taxpayer listed
6 \$26,258,832.00 in taxable income, different then the May 2, 2014 RAR adjustment amended
7 return reported taxable income of \$36,410.889.00. [Taxpayer Ex. #4.3, compared to Ex. #3.3;
8 Direct Testimony of Dan Armer].

9 28. Attached to Taxpayer’s September 11, 2015 Amended Other 2011 return was
10 Statement 1 (Page 1 detail and Explanation of Changes), Statement 2 (Members of Consolidated
11 or Combined Group), Statement 3 (spreadsheet detail comparing original and amended returns),
12 and statement 4 (Net Operating Loss detail), Summary of Form 1120-Statement, Federal Form
13 1122, and copies of the previously filed amended return. [Taxpayer Ex. #4.6-29].

14 29. Taxpayer’s September 11, 2015 Amended Other 2011 return did not include a
15 copy of the Federal Form 1120 and instead only included a summary statement and the RAR
16 report. [Taxpayer Ex. #4; Cross-examination of Marcel Maier; Direct of Dan Armer].

17 30. The Department requested the Federal Form 1120 with this return to verify why
18 the taxable income amount was different from the original return, reconcile it with the RAR
19 adjustment amounts, and reconcile it with the information contained on the form 1120. [Direct of
20 Dan Armer].

21 31. Taxpayer’s September 11, 2015 Amended Other 2011 return claimed an
22 overpayment \$365,431.00 in tax. [Taxpayer Ex. #4.3; Direct Testimony of Dan Armer].

1 32. Taxpayer's September 11, 2015 Amended Other 2011 return claimed a refund in
2 overpaid taxes of \$31,075.00. [Taxpayer Ex. #4.3; Direct Testimony of Marcel Maier 03-07-19
3 CD 00:39:52-00:40:07; Direct Testimony of Dan Armer].

4 33. Taxpayer did not claim a net operating loss on line 5 of its September 11, 2015
5 Amended Other 2011 return but did include a net operating loss on line 1 in that the net
6 operating loss value was removed from line. [Taxpayer Ex. #4.3; Taxpayer Ex. #4.8; Direct
7 Testimony of Marcel Maier 03-07-19 CD 00:40:08-00:43:32].

8 34. The Department did not grant Taxpayer's claimed refund on the September 11,
9 2015 Amended Other 2011 return. [Department Ex. D; Direct Testimony of Marcel Maier 03-07-
10 19 CD 00:39:55-00:40:07, 00:43:37-46; Direct Testimony of Dan Armer].

11 35. On September 25, 2015, under letter id. no. L1282975792, the Department sent
12 Taxpayer a document entitled "RETURN ADJUSTMENT NOTICE, Refund Due." [Taxpayer
13 Ex. #5; Department Ex. D; Direct Testimony of Marcel Maier 03-07-19 CD 00:44:05-55; Direct
14 Testimony of Dan Armer].

15 36. The September 25, 2015 Return Adjustment Notice indicated on the first page
16 that Taxpayer had a negative, refundable balance of \$31,075.00, the same amount Taxpayer
17 claimed on the September 11, 2015 Amended Other 2011 return. [Taxpayer Ex. #5.1;
18 Department Ex. D.1; Direct Testimony of Marcel Maier 03-07-19 CD 00:44:22-00:46:21].

19 37. The September 25, 2015 Return Adjustment Notice included routing information
20 allowing the refund to be directly deposited, a section that Taxpayer filled out and submitted to
21 the Department for transfer of the refund into Taxpayer's account. [Taxpayer Ex. #5.1;
22 Department Ex. D.1; Direct Testimony of Marcel Maier 03-07-19 CD 00:45:29-46; Cross-
23 Examination of Dan Armer].

1 38. The payment and routing information contained on the bottom of the September
2 25, 2015 Return Adjustment Notice was not contained on the subsequent refund denial letter.

3 [Compare Taxpayer Ex. #5.1 with Taxpayer Ex. #6.1; Cross-Examination of Dan Armer].

4 39. On the second page of the September 25, 2015 Return Adjustment Notice, the
5 Department indicated “Refund denied. Federal 1120 not provided.” [Taxpayer Ex. #5.2;
6 Department Ex. D.2; Direct Testimony of Marcel Maier 03-07-19 CD 00:46:21-00:48:14; Direct
7 Testimony of Dan Armer].

8 40. Taxpayer never received the refund it believed it would receive under the
9 September 25, 2015 Return Adjustment Notice. [Direct Testimony of Marcel Maier 03-07-19
10 CD 00:46:21-00:48:14].

11 41. Taxpayer never filed an acknowledged protest of the September 25, 2015 Return
12 Adjustment Notice with the Department. [Direct Testimony of Mary Griego].

13 42. Taxpayer called the Department after the receipt of the September 25, 2015
14 Return Adjustment Notice about the Department’s notation about the lack of the Federal Form
15 1120. Taxpayer was confused because the Federal Form 1120 had previously been included in its
16 original and amended returns. [Direct Testimony of Marcel Maier 03-07-19 CD 00:48:15-
17 00:50:15].

18 43. Taxpayer again submitted the Federal Form 1120 via facsimile and mail to the
19 Department considering the communication before the end of December 2015. [Direct
20 Testimony of Marcel Maier 03-07-19 CD 00:48:15-00:50:15; 0:55:00-24].

21 44. On January 25, 2016, under letter id. no. L0684479024, the Department mailed
22 Taxpayer a letter denying Taxpayer’s claim for refund of \$31,075.00 in 2011 corporate income
23 tax. The Department’s letter cited the statute of limitations as grounds for denying the refund and

1 listed Antoinette Schmitt as a contact person at the Department for questions. [Taxpayer Ex. #6;
2 Direct Testimony of Marcel Maier 03-07-19 CD 00:50:51-00:53:04, 00:55:56-00:56:08].

3 45. In response to the Department’s January 25, 2016 letter, Taxpayer called
4 Department employee Antoinette Schmitt. As a result of that conversation, Taxpayer provided
5 additional documentation to the Department. [Direct Testimony of Marcel Maier 03-07-19 CD
6 00:55:56-00:57:14].

7 46. On February 17, 2016, in response to the Department’s January 25, 2016, denial
8 of refund letter, Taxpayer submitted a letter to the Department with additional items for review
9 as discussed in a telephone call with the Department on February 9, 2016. [Taxpayer Ex. #7;
10 Direct Testimony of Marcel Maier 03-07-19 CD 00:55:56-00:59:01].

11 47. In that February 17, 2016 Taxpayer letter, Taxpayer “respectfully request[ed] a
12 refund of \$31,075 for the 2011 tax year as a result of its correction of an error that occurred
13 while reporting the result of the Federal 2010-2011 audit on August 26, 2013 and subsequently
14 filing the RAR amended return on May 2, 2014.” [Taxpayer Ex. #7; Direct Testimony of Marcel
15 Maier 03-07-19 CD 00:55:56-00:59:01].

16 48. Enclosed with the February 17, 2016, Taxpayer letter, Taxpayer included the
17 previously filed tax returns with the attached Federal Form 1120. [Taxpayer Ex. #7; Direct
18 Testimony of Marcel Maier 03-07-19 CD 00:58:42-57].

19 49. After submission of the February 17, 2016 letter, the Department did not pay the
20 claimed refund. [Direct Testimony of Marcel Maier 03-07-19 CD 00:59:00-05].

21 50. On March 4, 2017, under letter id. no. L1223661872, the Department sent
22 Taxpayer a document entitled “RETURN ADJUSTMENT NOTICE,” showing a zero balance on

1 Taxpayer's account for 2011 corporate income taxes. [Taxpayer Ex. #13; Direct Testimony of
2 Marcel Maier].

3 51. The March 4, 2017 Return Adjustment Notice indicated on the second page that
4 Taxpayer's reported payment(s) were incorrect. [Taxpayer Ex. #13.2; Direct Testimony of
5 Marcel Maier].

6 52. On March 14, 2017, Taxpayer prepared a memorandum of a phone conversation
7 with the Department regarding what was still required for Taxpayer's 2011 and 2012 refund
8 claims. [Taxpayer Ex. #12; Direct Testimony of Marcel Maier].

9 53. On March 16, 2017, Taxpayer submitted a letter to the Department attaching
10 supporting documentation and continuing to seek a refund of \$31,075.00 for 2011 corporate
11 income tax. The letter attached Taxpayer's Amended Federal Form 1120 [Taxpayer Ex. #14;
12 Taxpayer Ex. #14.24; Direct Testimony of Marcel Maier].

13 54. Included with its March 16, 2017 letter, Taxpayer provided another completed
14 amended return for the 2011, signed on March 15, 2017. That return included a net operating
15 loss on line 5. [Taxpayer Ex. 14.12; Cross Examination of Marcel Maier; Direct Testimony of
16 Dan Armer].

17 55. Taxpayer included with its March 16, 2017 letter its net operating loss schedules,
18 documents previously provided with the amended return. [Taxpayer Ex. 14.16-23; Direct
19 Testimony of Marcel Maier].

20 56. While the amended return signed on March 15, 2017 appeared to be accurate, it
21 was not filed within three years of the end of the calendar year when the tax was due. [Taxpayer
22 Ex. 14-12; Direct Testimony of Dan Armer].

1 57. On March 31, 2017, under letter id. no. L0024246576, the Department sent
2 Taxpayer a document entitled “RETURN ADJUSTMENT NOTICE,” showing a zero balance on
3 Taxpayer’s account for 2011 corporate income taxes. [Taxpayer Ex. #16; Direct Testimony of
4 Marcel Maier; Direct Testimony of Dan Armer].

5 58. The March 31, 2017 Return Adjustment Notice indicated on the second page that
6 Taxpayer’s New Mexico NOL (net operating loss) had been adjusted, disallowed with an
7 incomplete or unattached schedule, and that a net operating loss established by a separate entity
8 could not be claimed on a consolidated/combined return. [Taxpayer Ex. #16.2; Direct Testimony
9 of Marcel Maier; Direct Testimony of Dan Armer].

10 2012 Corporate Income Tax Returns.

11 59. On September 12, 2013, Taxpayer filed its 2012 CIT-1 New Mexico Corporate
12 Income and Franchise Tax Return, reporting an overpayment of \$259,672.00 in corporate
13 income tax. The filing included a copy of Taxpayer’s 2012 Federal Form 1120 filing. [Taxpayer
14 Ex. #8; Direct Testimony of Marcel Maier 03-07-19 CD 01:01:36-01:03:28; Direct Testimony of
15 Dan Armer].

16 60. Taxpayer reported a net operating loss on line 5 of its original 2012 CIT-1
17 corporate income tax return of \$11,310,704.00. [Taxpayer Ex. #8.2; Direct Testimony of Marcel
18 Maier 03-07-19 CD 01:02:10-15; Direct Testimony of Dan Armer].

19 61. Taxpayer reported \$74,684.00 in total New Mexico income and franchise tax,
20 payments of \$334,356.00, and a refund due of \$259,672.00. [Taxpayer Ex. 8.2; Direct Testimony
21 of Dan Armer³].

³ Mr. Armer testified that Taxpayer listed “\$359,672.00” on line 29 of Taxpayer Ex. #8.2, however that line indicates \$259,672.00. Mr. Armer’s testimony appears to have inadvertently read the “2” as a “3” during his testimony. The hearing officer relies on the number listed on the evidentiary exhibit.

1 62. On January 3, 2014, under letter id. no. L1103171024, the Department sent
2 Taxpayer a document entitled “RETURN ADJUSTMENT NOTICE,” showing a zero balance on
3 Taxpayer’s account for 2012 corporate income taxes. [Department Ex. L.1; Direct Testimony of
4 Mary Griego].

5 63. The January 3, 2014 Return Adjustment Notice indicated on the second page that
6 Taxpayer’s New Mexico net operating loss had been adjusted. [Department Ex. L.2; Direct
7 Testimony of Mary Griego].

8 64. The Department’s GenTax system shows that a \$230,682.69 refund was redeemed
9 by Taxpayer on January 17, 2014. [Department Ex. M; Direct Testimony of Dan Armer].

10 65. The Department has no record of Taxpayer protesting remaining claimed amount
11 of refund adjusted on the January 3, 2014 return adjustment notice or of issuing an
12 acknowledgment of protest related to that letter. [Direct Testimony of Mary Griego].

13 66. On May 2, 2014, Taxpayer filed it amended 2012 CIT-1 form with New Mexico,
14 checking the “Amended-RAR” box for the version of the return (hereinafter, Taxpayer’s 2012
15 Amended-RAR return). [Taxpayer Ex. #9.1; Direct Testimony of Marcel Maier 03-07-19 CD
16 01:03:40-01:03:15; Direct of Dan Armer].

17 67. Taxpayer’s 2012 Amended-RAR return did not include a net operating loss on
18 line 5 of that return and that line was blank. [Taxpayer Ex. 9.3; Direct Testimony of Marcel
19 Maier; Direct of Dan Armer].

20 68. In contrast to the refund claimed in the original return, Taxpayer’s 2012
21 Amended-RAR return reported an outstanding corporate income tax liability of \$1,815.00.
22 [Taxpayer’s Ex. 9.3; Direct of Dan Armer].

1 69. On October 30, 2015, Taxpayer filed its second amended 2012 CIT-1 return and
2 checked “amended-other” as the nature of that return (hereinafter, Taxpayer’s 2012 Amended-
3 Other return). [Taxpayer Ex. #10; Direct Testimony of Dan Armer].

4 70. Taxpayer’s 2012 Amended-Other return did include a claim for a net operating
5 loss on line 5 of the return. [Taxpayer Ex. #10.3; Direct Testimony of Marcel Maier].

6 71. Taxpayer’s 2012 Amended-Other return claimed a refund of \$30,934 in overpaid
7 2012 corporate income tax. [Taxpayer Ex. #10.3; Direct Testimony of Marcel Maier; Direct
8 Testimony of Dan Armer].

9 72. Attached to Taxpayer’s 2012 Amended-Other return was Statement 1 (Page 1
10 detail, members of the consolidated or combined group), Statement 2 (spreadsheet detail
11 comparing original and amended returns), statement 3 (NOLD – IRC §382 Limitation detail),
12 statement 4 (Net Operating Loss detail, BII Holding Corp), statement 5 (Net Operating Loss
13 detail, Just Care, Inc.), Summary of Form 1120-Statement, Federal Form 1122, and copies of the
14 previously filed amended return. [Taxpayer Ex. #10.6-26].

15 73. Taxpayer’s 2012 Amended-Other return did not include a copy of the Federal
16 Form 1120 and instead only included a summary statement and the RAR report. [Taxpayer Ex.
17 #10; Cross-examination of Marcel Maier].

18 74. The Department did not issue a refund based on Taxpayer’s 2012 Amended-Other
19 return and did not send a notice of denial of that claim. [Direct Testimony of Marcel Maier;
20 Direct Testimony of Dan Armer].

21 75. Taxpayer provided additional information to the Department but did not file a
22 formal protest for not receiving a refund after the filing of Taxpayer’s 2012 Amended-Other
23 return. [Direct Testimony of Marcel Maier].

1 76. On March 4, 2017, under letter id. no. L0320248112, the Department sent
2 Taxpayer a document entitled “RETURN ADJUSTMENT NOTICE,” showing a zero balance on
3 Taxpayer’s account for 2012 corporate income taxes. [Taxpayer Ex. #11; Direct Testimony of
4 Marcel Maier].

5 77. The March 4, 2017 Return Adjustment Notice indicated on the second page that
6 Taxpayer’s reported payment(s) were incorrect. [Taxpayer Ex. #11.2; Direct Testimony of
7 Marcel Maier].

8 78. On March 16, 2017, Taxpayer submitted a letter to the Department attaching
9 supporting documentation and continuing to seek a refund of \$30,904 for 2012 corporate income
10 tax. [Taxpayer Ex. #15; Direct Testimony of Marcel Maier].

11 79. As cited in F.O.F. #1, on April 24, 2017, the Department sent Taxpayer a letter
12 denying Taxpayer’s claim for refund based on Taxpayer’s net operating loss claim. [Taxpayer
13 Ex. #17; Department Ex. I; Direct Testimony of Marcel Maier].

14 80. Even with the information provided on the various returns and at the hearing, Mr.
15 Armer had insufficient information to determine whether Taxpayer substantively met the
16 requirements for a net operating loss deduction refund because without a spreadsheet it was
17 unclear when the separate entity first claimed the net operating loss deduction, whether those
18 entities had filed in New Mexico, and the relationship between the entities and Taxpayer in terms
19 of the nature of the acquisition. [Cross examination of Dan Armer; Hearing Officer Questions of
20 Dan Armer].

21 81. Mr. Armer was unable to determine whether the time limitations on a net
22 operating loss or the acquisition requirements were met to allow for a net operating loss
23 deduction in this matter. [Hearing Officer Questions of Dan Armer].

1 **DISCUSSION**

2 In this protest, Taxpayer seeks a refund of 2011 and 2012 corporate income tax based on
3 the net operating loss carryover deductions from net corporate income in those years. The
4 underlying facts in this case are quite convoluted by the number of amended and incomplete
5 returns filed by Taxpayer, the Department’s often opaque return adjustment notices, and the
6 Department’s myopic focus solely on asserted timeliness of protest issues, an issue not raised in
7 the Department’s denial of claim for refund. However, the issue of timeliness of protest and
8 preservation of the claims for refund need not be resolved because even assuming Taxpayer were
9 to prevail on this questions there is insufficient evidence on the record to establish that Taxpayer
10 had meritorious claims for refund based on the net operating loss carryover deduction.

11 **Burden of Proof at Protest.**

12 Taxpayer seeks a refund of 2011 and 2012 corporate income taxes. When seeking a
13 refund, Taxpayer has the burden to establish its entitlement to the claim for refund and
14 accompanying interest. *See* Regulation 3.8.10 (A) NMAC. Taxpayer’s claim for refund is
15 premised on a net operating loss carryover exclusion from net corporate income subject to tax is
16 similar to a claim for a deduction. When a taxpayer claims a deduction, “the right to the
17 exemption or deduction must be clearly and unambiguously, expressed in the statute, and the
18 right must be clearly established by the taxpayer.” *Wing Pawn Shop v. Taxation and Revenue*
19 *Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc.*
20 *v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-7, ¶9, 133 N.M. 447. When claiming a refund,
21 particularly a refund premised on a claimed deduction, the issue must be analyzed through the
22 “lens of presumption of correctness.” *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17,

1 142 N.M. 779 (Court of Appeals reviewed a refund denial through “lens of presumption of
2 correctness”).

3 **The Evidence is Insufficient to Support the Merits of Taxpayer’s NOL CIT Refund Claims.**

4 In this case, Taxpayer seeks a refund of 2011 and 2012 corporate income taxes based on a
5 claim for a net operating loss deduction on its combed returns in those years. Despite the
6 Department’s near singular focus at hearing on the timeliness of the refund claim and alleged
7 deficiencies in timely preserving the refund claim through a protest, the issue actually at protest is
8 whether Taxpayer qualified for a net operating loss deduction. The Department’s denial letter did
9 not cite the statute of limitations as a basis for denying Taxpayer’s claim. Instead, in the protested
10 letter with letter id. no. L2110448944, the Department denied Taxpayer’s refund request “because
11 [n]et operating loss established on a separate corps entity cannot be claimed on
12 consolidated/combined return.” See **Taxpayer Ex. #17**. This letter put Taxpayer on notice of the
13 Department’s reason for denial of the claim, and that is the action that Taxpayer’s protested. If there
14 was a statute of limitations issue on the claim for refund, the Department would have been aware of
15 it at the time it denied the claim under letter id. no. L2110448944 but it did not cite it as a grounds
16 for the denial of the protest. Taxpayer’s protest focused on entirely on challenging the grounds
17 cited by the Department in the denial, and those grounds articulated in the protest letter are the
18 primary issue of dispute in this protest.

19 A contextual overview of the Corporate Income and Franchise Tax Act and net operating
20 losses provides the foundation for resolving the issue at protest. Under the Corporate Income and
21 Franchise Tax Act, New Mexico imposes a tax on the *net income* of every domestic corporation and
22 every foreign corporation engaged in the transaction of business in New Mexico. See NMSA 1978,

1 § 7-2A-3 (1986) (emphasis added). In pertinent part, NMSA 1978, Section 7-2A-2 (H) (1999)⁴
2 (emphasis added) defines “‘net income’ as base income adjusted to exclude⁵:

3 (4) for taxable years beginning on or after January 1, 1991, an
4 amount equal to the sum of *any net operating loss carryover*
5 deductions to that year claimed and allowed, provided that the
6 amount of any net operating loss carryover from a taxable year
7 beginning on or after January 1, 1991 may be excluded only as
8 follows:

9
10 (a) in the case of a timely filed return, in the taxable year
11 immediately following the taxable year for which the return is filed;
12 or

13
14 (b) in the case of amended returns or original returns not
15 timely filed, in the first taxable year beginning after the date on
16 which the return or amended return establishing the net operating
17 loss is filed; and

18
19 (c) in either case, if the net operating loss carryover exceeds
20 the amount of net income exclusive of the net operating loss
21 carryover for the taxable year to which the exclusion first applies, in
22 the next four succeeding taxable years in turn until the net operating
23 loss carryover is exhausted; in no event may a net operating loss
24 carryover be excluded in any taxable year after the fourth taxable
25 year beginning after the taxable year to which the exclusion first
26 applies.

27 In other words, Section 7-2A-2 (H) (4) allows a net operating loss carryover deduction only as
28 specified (the carryover may not extend past five years and there are no carrybacks after 1991). This
29 is confirmed by Section 7-2A-2 (J), where the Legislature defines a “net operating loss carryover”
30 as “the amount, or any portion of the amount, of a net operating loss for any taxable year that,
31 pursuant to Paragraph (3) or (4) of [Section 7-2A-2 (H)] of this section, may be excluded from base
32 income.”

⁴ The citation is to version of the statute applicable to the 2011 and 2012 corporate income tax year; the statute was amended in 2014 and again in 2017.

⁵ Section 7-2A-2 (H) (3) also addresses net operating losses, but only for taxable years before January 1, 1991, a period not at issue in this matter.

1 In New Mexico, under NMSA 1978, Section 7-2A-2 (C) (1999), "base income"

2 means that part of the taxpayer's income defined as taxable income
3 and upon which the federal income tax is calculated in the Internal
4 Revenue Code for income tax purposes plus, for taxable years
5 beginning on or after January 1, 1991, the amount of the net
6 operating loss deduction allowed by Section 172(a) of the Internal
7 Revenue Code, as that section may be amended or renumbered,
8 and claimed by the taxpayer for that year; "base income" also
9 includes interest received on a state or local bond.

10 The term "plus" in Section 7-2-2 (C) requires that a taxpayer add back the amount of net
11 operating losses claimed on the federal return to derive a New Mexico base income. That is,
12 rather than adopting Section 172(a) of the Internal Revenue Code's treatment of net operating
13 loss deductions, the New Mexico Legislature requires a taxpayer to add that amount back in
14 order to arrive at the New Mexico base income. Reading the base income definition in harmony
15 with Section 7-2A-2 (H), once a taxpayer adds the claimed federal net operating losses back to
16 establish the New Mexico base income, Section 7-2A-2 (H)(4) allows a taxpayer then to exclude (or
17 subtract out) the net operating loss carryovers expressly allowed under that section to derive the
18 New Mexico taxable net income. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of*
19 *Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401 (statutes are also to be interpreted in a manner to give
20 the entire statute effect and not render portions of the statute superfluous).

21 The mechanics of this calculation are seen in the structure of the 2011 and 2012 CIT-1
22 returns, admitted into the record as various exhibits. Line 1 of page 2 of the return requires
23 Taxpayer to enter the federal taxable income before federal net operating losses had been subtracted
24 out on the federal return. *See* for example **Taxpayer Ex. #1.3**. Line 2 allows for the addition for
25 municipal bond interest. *See id.* Line 3 allows for subtractions for other federal special deductions.
26 *See id.* The New Mexico base income is determined by adding line 1 and line 2, and then
27 subtracting out line 3, the result of which is then listed on line 4 of the CIT-1 return as the New

1 Mexico base income. *See id.* From the base income amount on line 4, a taxpayer then can subtract
2 the New Mexico net operating loss carryover listed on line 5 to eventually calculate the New
3 Mexico net taxable income on line 9. *See id.*

4 For the tax year 2011, Taxpayer's returns (with one exception) failed to include any claim
5 for a net operating loss on line 5, as required. Taxpayer did not list any claimed New Mexico net
6 operating loss on line 5 of its September 17, 2012 original 2011 CIT-1 return. *See Taxpayer Ex.*
7 **#1.3.** Similarly, Taxpayer claimed no net operating loss deduction on its first amended 2011 CIT-1
8 return. *See Taxpayer Ex. #3.3.* On Taxpayer's September 11, 2015 Amended Other 2011 return,
9 Taxpayer again failed to list a claim for a net operating loss deduction on line 5 of the return. *See*
10 **Taxpayer Ex. #4.3.**

11 Taxpayer believed that the net operating loss amount, even if not listed on line 5, had
12 already been backed out of line 1 on the CIT-1, as shown by the net operating loss schedules later in
13 the return. Taxpayer contends that the Department could simply overlook Taxpayer's error by
14 comparing its line 1 reported income to the income number listed on the net operating loss
15 schedules, thereby divining that Taxpayer erred in listing net operating losses on line 1 instead of
16 line 5. The idea that the Department must search through a return and reconcile numbers from
17 later schedules in the return in order to correct a reporting error not readily apparent on the face of
18 the return is contrary to Taxpayer's obligations to establish clear entitlement to a deduction under
19 *Wing Pawn Shop*, 1991-NMCA-024, ¶16. *Cf. also Getty Oil Co. v. Taxation & Revenue Dep't*,
20 1979-NMCA-131, 93 N.M. 589, 603 P.2d 328 (Department not required to make changes to filing
21 method based on a taxpayer error in selecting the reporting method). New Mexico is a self-
22 reporting tax state and Taxpayer bears a reasonable responsibility to report its tax obligations,
23 which would logically extend to providing the requisite information in accord with the form's

1 instructions. *Cf. Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M.
2 16. Line 1 of the CIT-1 is titled “[t]axable income before federal NOL & special deductions,” which
3 makes quite clear that Taxpayer was not at liberty to deduct out its net operating loss on that line.
4 *See* §9-11-6.2 (G) (Instructions are presumed to be proper implementation of the law); *See also*
5 *Getty Oil*, 1979-NMCA-131, ¶8. As a sophisticated corporate entity⁶ with experience in filing state
6 tax returns, there is nothing unreasonable or unfair about requiring Taxpayer to list its net operating
7 loss on the proper line rather than requiring the Department to divine that Taxpayer had removed
8 the net operating loss income from line 1. Regardless of Taxpayer’s stated belief that the net
9 operating loss had been included by its unstated exclusion from line 1, through that September 11,
10 2015 Amended Other 2011 return Taxpayer had never in fact never properly claimed a net
11 operating loss deduction on line 5, and as such, there was no basis for the Department to grant a
12 refund premised on net operating loss carryover deduction for the 2011 corporate income tax year.

13 The one instance where Taxpayer did claim a net operating loss deduction on line 5 was
14 outside the statute of limitations for a claim for refund. On March 15, 2017, after the statute of
15 limitations to the refund claim had lapsed on the 2011 corporate income tax return, Taxpayer finally
16 submitted an amended return that claimed a net operating loss deduction on line 5. However, since
17 this amended return was filed after the statute of limitations had lapsed, the Department is
18 prohibited from a granting a refund on that return. *See Kilmer v. Goodwin*, 2004-NMCA-122, 136
19 *N.M. 440* (the Department lacks authority to grant stale refund claim).

20 Nevertheless, Taxpayer raised the September 25, 2015, return adjustment repeatedly as
21 evidence to its entitlement to its claimed 2011 corporate income tax refund. That September 25,

⁶ Mr. Maier testified repeatedly about Taxpayer’s filing obligations in 20-30 states and its diligent efforts to file correct and complete information for a return. *See* for example testimony of Marcel Maier 03-07-19 CD 01:49:00-01:51:54.

1 2015, return adjustment notice was indeed suggestive on the first page that Taxpayer was owed a
2 refund of \$31,075.00. However, on the second page of that return adjustment notice clearly stated
3 that the refund was denied because form 1120 was not provided with amended return. As the CIT-1
4 instructions make abundantly clear, the CIT-1 return is not complete until the Federal Form 1120 is
5 included. *See* NMSA 1978, § 9-11-6.2(G) (the Department’s instructions are presumed to be a
6 proper implementation of the law). Having not listed the net operating loss on line 5, having not
7 included the required Federal Form 1120, and being expressly told that the refund was denied for
8 the lack of the Federal Form 1120 on the second page, Taxpayer could not reasonably expect to
9 receive the refund it thought it was owed.

10 For tax year 2012, Taxpayer’s various returns were inconsistent with claiming a net
11 operating loss deduction on line 5. Taxpayer did claim a line 5 net operating loss deduction on its
12 original 2012 CIT-1 return, but failed to do on its May 2, 2014, 2012 Amended-RAR return. *See*
13 Taxpayer Ex. #'s 8.2 and 9.3. On Taxpayer’s October 30, 2015 2012 Amended-Other return,
14 Taxpayer did include a line 5 net operating loss deduction. *See* Taxpayer Ex. # 10.3. However,
15 because Taxpayer did not include the Federal Form 1120, the October 30, 2015 2012 Amended-
16 Other return was incomplete when filed. Because this last return was incomplete, the Department
17 was unable to act on it, leaving the previously filed May 2, 2014, 2012 Amended-RAR return
18 without a claim for a net operating loss line 5 deduction in place.

19 Even if Taxpayer would have properly, completely, and timely filed CIT-1 returns in 2011
20 and 2012 claiming a line 5 net operating loss deduction, and assuming *in arguendo* Taxpayer timely
21 protested the Department’s inaction on every claim, Taxpayer simply assumed without proving at
22 hearing that those claims would be proper. In other words, Taxpayer did not squarely challenge the
23 Department’s basis of the denial of the refunds: “because [n]et operating loss established on a

1 separate corps entity cannot be claimed on consolidated/combined return.” While Taxpayer argued
2 in opening and closing remarks that it was not in dispute that Taxpayer was otherwise entitled to the
3 net operating loss claim, that claim that the it was not in dispute is not supported in the record⁷. The
4 only evidence related to the net operating losses was the schedules provided with the returns and a
5 conclusory statement of Mr. Marcel that it was his understanding Taxpayer qualified for the net
6 operating loss deduction⁸. However, as Mr. Armer testified, the returns and supporting
7 documentation including the schedules provided were insufficient to determine whether Taxpayer
8 substantively met the requirements for a permissible New Mexico net operating loss deduction as it
9 relates to determining whether the net operating loss originated on a separate entity return filed in
10 New Mexico, the date of first claiming that net operating loss, and the entity’s relationship to and
11 acquisition by Taxpayer. *See* F.O.F. #80-81. Additional information is critical in this case because
12 New Mexico’s treatment of net operating loss carryovers varies from the federal treatment of net
13 operating loss carryovers, and the supporting documentation would be important to determine
14 whether Taxpayer actually met the New Mexico requirements for acquisition of the entities and
15 timeliness of the original entity’s claim for the net operating loss.

16 Taxpayer’s net operating loss schedules refer only to federal net operating losses under §382
17 of the Internal Revenue Code⁹, but that information alone is not determinative of the question of
18 New Mexico’s net operating loss deduction. Rather than adopt the federal treatment of net operating
19 loss deductions under §172(a), the Legislature in Section 7-2A-2 (H) determined the extent of an
20 allowable net operating loss carryover deduction in New Mexico. Anything not included in Section

⁷ Additionally, there is nothing in the administrative record where the Department conceded or stipulated that Taxpayer was otherwise substantively entitled to the net operating loss deduction but for the timeliness of protest/preservation issue.

⁸ Direct Testimony of Marcel Maier 03-07-19 CD 01:35:02-01:36:56.

⁹ *See Taxpayer Exhibits #'s 4.9-12, 10.8-12, 14.20-24, 15.12-15.*

1 7-2A-2 (H)'s allowance for a net operating loss carryover deduction, even if allowed federally as a
2 net operating loss deduction, was not expressly contemplated by the Legislature as a permissible
3 deduction in New Mexico. *See Wing Pawn Shop*, ¶16, 111 N.M. 735 (deductions from tax must
4 construed narrowly in favor of taxing authority and the right to such deduction must be clearly
5 established by the taxpayer). Because the Legislature requires taxpayers to add back the federal net
6 operating loss deduction before then establishing a specific exclusion in New Mexico for net
7 operating loss carryovers under Section 7-2A-2 (H) (4), the Legislature did not intend to uniformly
8 adopt the federal treatment of net operating losses. *See Mt. States Tel. & Tel. Co. v. N.M. State*
9 *Corp. Comm'n*, 1986-NMSC-019, ¶31, 104 N.M. 36 (while the Internal Revenue Code establishes
10 a starting point for calculating New Mexico corporate income tax, New Mexico “does not
11 incorporate or adopt the Internal Revenue Code and Treasury Regulations word for word”).

12 Additionally, by regulation, the Department has established some specific rules about when
13 a corporation may claim a net operating loss first used by another corporation or first reported under
14 another filing method. Taxpayer filed as a combined group, meaning the return involved multiple
15 controlled entities and subsidiaries. And by identifying the net operating loss as relating to §382 of
16 the Internal Revenue Code, which sets limitations on a net operating loss carryforwards following
17 an ownership change, the question of the nature of the acquisition of the corporation that first
18 reported the net operating loss and the nature of the acquisition become critical to assess whether
19 Taxpayer is entitled to a net operating loss deduction under two Department regulations that dictate
20 potentially different results on the net operating loss deduction. In pertinent part, Regulation
21 3.4.1.11 (A) NMAC reads¹⁰:

22 Net operating loss carryovers and carrybacks shall be in accordance with
23 Subsections A through E of Section 3.4.1.9 NMAC but in no case shall a net

¹⁰ The rest of the regulation establishes a method of calculating base income by preparing a pro forma, simulated federal return.

1 operating loss established for the corporation reporting on a separate
2 corporation basis be excluded from the base income of any other corporation
3 or from the base income reported on any combined or consolidated return for
4 any group of corporations.

5 In contrast, under Regulation 3.4.1.9 (C)(1) NMAC,

6 [t]he net operating loss carryover of a corporation or corporations acquired
7 by the taxpayer or otherwise included, as for example, through a change in
8 reporting method, in the taxpayer's return for a taxable year may be excluded
9 from New Mexico base income only to the extent the Internal Revenue Code
10 and regulations issued thereunder would permit deduction of such loss
11 carryovers for federal income tax purposes for that taxable year by that
12 taxpayer.

13 In order to determine which of these regulations would apply to Taxpayer, the Department and
14 ultimately the hearing officer needed additional information about when the net operating loss was
15 first claimed, by which entity, whether that entity filed New Mexico corporate income tax returns
16 and under which reporting method, and about Taxpayer's acquisition of the entity.

17 Given the returns filed and the evidence presented at hearing, the hearing officer agrees with
18 Mr. Armer's statement there is insufficient evidence to determine whether Taxpayer has a
19 meritorious claim to net operating loss deduction at the heart of the two refund claims. To no avail,
20 the hearing officer has reviewed the testimony and searched the record for information necessary to
21 answer the basic questions about when each entity first claimed the net operating loss, whether the
22 respective entities filed in New Mexico under the separate entity method, and those entities
23 relationship to Taxpayer vis-à-vis the acquisition. Taxpayer's numerous return filings in each tax
24 year often omitted the requisite net operating loss deduction at line 5 and did not include the
25 required Federal Form 1120 necessary to make a complete return. The net operating loss schedules
26 seemed to establish the details of the federal net operating loss entitlement, but lacked the
27 information, as discussed earlier in this paragraph, necessary to determine whether Taxpayer met
28 the requirements for a New Mexico net operating loss deduction. Without this information, the

1 hearing officer agrees with Mr. Armer’s assessment there is not enough information to determine
2 whether Taxpayer’s claim for the net operating loss carryover deduction in 2011 and 2012 was
3 meritorious. Taxpayer ultimately is responsible for these errors, omissions, and incomplete returns,
4 *cf. Getty Oil*, ¶15 (in ruling against taxpayer on main issue, court emphasized it was the taxpayer’s
5 error on its own return that led to the controversy), all of which make it very difficult to determine
6 whether Taxpayer had a meritorious claim. Given the challenges of reconciling the numerous
7 returns filled with omissions, Mr. Armer’s testimony that he would have needed Taxpayer to submit
8 a detailed spreadsheet of the net operating losses consistent with New Mexico’s net operating loss
9 requirements is persuasive. Since Taxpayer carries the burden to establish entitlement to the refund
10 claims at issue in this protest, Taxpayer’s protest must be denied on those grounds alone
11 notwithstanding the Department’s other challenges to the validity of the protest and timeliness of
12 preservation of the refund claim.

13 CONCLUSIONS OF LAW

14 A. Taxpayer filed a timely, written protest of the Department’s denial of claim for
15 refund and jurisdiction lies over the parties and the subject matter of this protest.

16 B. As the parties did not object, holding the October 13, 2017 Scheduling Hearing
17 satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (2015).

18 C. Under Section 7-2A-3 and Section 7-2A-8.3, Taxpayer was required to pay CIT on
19 its “net income” from the unitary corporation.

20 D. Section 7-2A-2 (C) defines “base income” as taxable income plus the amount of a
21 deduction for net operating loss as allowed by Section 172 (a) of the Internal Revenue Code. This
22 section requires Taxpayer to add back the amount of net operating losses claimed on the federal

1 return pursuant to Section 172(a) of the Internal Revenue Code in order to derive a New Mexico
2 base income. In other words, New Mexico does not adopt federal treatment of net operating losses.

3 E. Under Section 7-2A-2 (H), “net income” includes “base income adjusted to exclude”
4 the items specified in that section, which allows for deduction of net operating losses as adjusted by
5 New Mexico law rather than in conformity with federal net operating losses.

6 F. Mechanically, claims for New Mexico net operating losses are required on line 5 of
7 the CIT-1 return and the CIT-1 return is not complete until the Federal Form 1120 is attached.
8 Taxpayer was required to follow the Department’s filing instructions on the return and the
9 Department was not required to correct Taxpayer’s reporting errors in order to grant Taxpayer a
10 refund premised on the net operating loss deduction. *See Wing Pawn Shop*, 1991-NMCA-024, ¶16.
11 *Cf. also Getty Oil Co.*, 1979-NMCA-131, *Cf. also Tiffany Construction Co.*, 1976-NMCA-127, ¶5,
12 90 N.M. 16. *See also* §9-11-6.2 (G).

13 G. Under Regulation 3.4.1.11 (A) NMAC, a net operating loss first established by a
14 corporation filing on a separate corporation basis be excluded from the base income of any other
15 corporation or on a combined or consolidated return. In contrast, Regulation 3.4.1.9 (C)(1) NMAC
16 allows a net operating loss for a company acquired to the extent not in conflict with federal law.
17 There is insufficient information to determine which regulation would apply to Taxpayer’s claim.

18 H. Taxpayer presented insufficient evidence to meet its burden of establishing
19 entitlement to its refund claim, premised on the net operation loss carryover deduction. *See*
20 Regulation 3.8.10 (A) NMAC; *see also Wing Pawn Shop* 1991-NMCA-024, ¶16; *See also TPL*,
21 *Inc.*, 2003-NMSC-7, ¶9; *see also Corr. Corp. of Am. of Tenn.*, 2007-NMCA-148, ¶17, 142 N.M.
22 779 (Court of Appeals reviewed a refund denial through “lens of presumption of correctness”).

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

2 DATED: June 28, 2019.

3
4

Brian VanDenzen
5 Chief Hearing Officer
6 Administrative Hearings Office
7 P.O. Box 6400
8 Santa Fe, NM 87502

9 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

2 On June 28, 2019, a copy of the foregoing Decision and Order was submitted to the parties
3 listed below in the following manner:

4 *First Class Mail*

Interdepartmental Mail

5 INTENTIONALLY BLANK

6
7 _____
8 John Griego
9 Legal Assistant
10 Administrative Hearings Office
11 P.O. Box 6400
12 Santa Fe, NM 87502