

FINDINGS OF FACT

1
2 1. On December 13, 2018, the Department assessed the Taxpayer for gross receipts
3 taxes. The assessment was for \$31,148.91 in tax, \$6,229.79 in penalty, and \$4,984.91 in interest,
4 for a total liability of \$42,363.61. [L1436242096]

5 2. On January 28, 2019, the Taxpayer filed a formal protest of the assessment.
6 [Administrative file]

7 3. On February 20, 2019, the Department acknowledged its receipt of the
8 Taxpayer’s protest. [Administrative file]

9 4. On April 30, 2019, the Department filed a Request for Hearing asking that the
10 Taxpayer’s protest be scheduled for a formal administrative hearing. [Administrative file]

11 5. The Taxpayer requested a continuance of the initial setting and waived the 90-day
12 requirement of the statute. [Administrative file]

13 6. On June 24, 2019, the Taxpayer filed his supplemental grounds for the protest and
14 moved to withdraw his previous waiver of the 90-day requirement. [Administrative file]

15 7. The supplemental grounds had two nontaxable transaction certificates (NTTCs)
16 attached to it. [Administrative file]

17 8. The Taxpayer lives and works in Texas. [Administrative file, Testimony of Mr.
18 Aguirre, Testimony of Taxpayer, Testimony of Ms. Rodriguez]

19 9. The Taxpayer manufactures wooden pallets and sells them to businesses that use
20 the pallets as part of their packaging when those businesses ship their products to their
21 customers. [Testimony of Mr. Aguirre, Testimony of Taxpayer, Testimony of Ms. Rodriguez]

22 10. Packaging materials are considered to be items that are resold when they are used
23 in this manner. [Testimony of Ms. Rodriguez]

1 and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled
2 to an abatement.

3 **Gross Receipts Tax.**

4 Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See*
5 NMSA 1978, § 7-9-4. After testimony and evidence was presented, the Department conceded
6 that it appears that the Taxpayer is engaged in business in Texas. The Taxpayer makes sales to
7 his customers at his location in Texas, and the customers get the pallets there. The Department
8 also conceded that even if the Taxpayer were doing business in New Mexico, the NTTCs
9 provided show that his sales would be deductible as sales for resell. *See* NMSA 1978, § 7-9-43
10 and § 7-9-47.

11 **90-day requirement.**

12 The Taxpayer argued that the Department failed to comply with the statute because it
13 referred the protest for hearing more than 45 days after the protest was filed. The Taxpayer
14 argued that the referral also occurred more than 90 days after the protest was filed and that
15 requiring the Taxpayer to waive the 90-day requirement in its request for continuance of the
16 initial setting was unfair since the 90-day deadline had already passed.

17 It is not clear whether the statutory requirement is intended to be jurisdictional as the
18 statute does not provide any remedy or relief for a failure to comply. *See* NMSA 1978, § 7-1B-8
19 (2015)¹. A hearing is required 90 days from the date of the "receipt of a protest filed pursuant to
20 Section 1-7-24 NMSA 1978." *Id.* Protests are filed with the Department, and the Department
21 files a request for hearing with the Administrative Hearings Office. *See id.* *See also* NMSA
22 1978, § 7-1-24. Although the Taxpayer mailed his protest on January 18, 2019, the Department

¹ The statute in effect at the time this protest was filed. The statute has since been amended.

1 received it and filed it on January 28, 2019. *See* 22.600.1.12 (H) NMAC (noting that date of
2 receipt is the date of filing). *See also* 3.1.4.10 NMAC (using the postmark to determine
3 timeliness of submission). The Department acknowledged its receipt of the Taxpayer’s protest
4 on February 20, 2019. [Administrative file]. The Department did not offer any explanation for
5 the delay in the acknowledgement. However, the regulations allow for the deadlines to
6 commence upon the Department’s acknowledgement of the protest. *See* 22.600.3.8 NMAC.
7 Even using the acknowledgement date of February 20, 2019, the Department was in violation of
8 the statute by failing to refer the protest for hearing within 45 days. *See id.* *See also* NMSA
9 1978, § 7-1B-8. The Department did not offer any explanation for its tardiness. The
10 Administrative Hearings Office was still able to set the initial hearing on May 17, 2019, which
11 was within 90 days of the Department’s acknowledgment of the protest. *See* 22.600.3.8 NMAC.
12 Therefore, the Taxpayer’s waiver of the 90-day requirement was appropriate when he requested
13 a continuance of the initial setting.

14 Another taxpayer previously argued that the Department denied it the statutory right to a
15 prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue*
16 *Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13.
17 The court found that the general rule is that the tardiness of public officer’s is not a defense to an
18 action by the state. *See id.* The court noted that the statute did not provide a consequence for
19 failure to comply with the requirements of a prompt hearing. *See id.* Therefore, “[t]he general
20 rule is applicable in these cases unless [the statute] makes it inapplicable.” *Id.* The statute here
21 does not provide a consequence for failure to comply with its requirements. *See* NMSA 1978, §
22 7-1B-8. Therefore, there is no defense based on the Department’s failure to comply with the

1 statute. *See Ranchers-Tufco*, 1983-NMCA-126. Given that the Taxpayer has prevailed on the
2 merits of the protest, this timeliness issue is moot and need not be decided.

3 **CONCLUSIONS OF LAW**

4 A. The Taxpayer filed a timely, written protest of the Department's assessment and
5 jurisdiction lies over the parties and the subject matter of this protest.

6 B. As the Department conceded at the hearing, the Taxpayer is doing business in Texas,
7 is not presently doing business in New Mexico, and is not presently subject to the New Mexico
8 gross receipts taxes. *See* NMSA 1978, § 7-9-4.

9 For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that
10 the assessment is hereby abated in full.

11 DATED: August 30, 2019.

12 *Dee Dee Hoxie*

13 _____
14 Dee Dee Hoxie
15 Hearing Officer
16 Administrative Hearings Office
17 P.O. Box 6400
Santa Fe, NM 87502

18 **NOTICE OF RIGHT TO APPEAL**

19 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
20 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
21 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
22 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
23 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
24 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative

1 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
2 Hearings Office may begin preparing the record proper. The parties will each be provided with a
3 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
4 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
5 statement from the appealing party. *See* Rule 12-209 NMRA.

6 **CERTIFICATE OF SERVICE**

7 On September 3, 2019, a copy of the foregoing Decision and Order was submitted to the
8 parties listed below in the following manner:

9 *First Class Mail*
INTENTIONALLY BLANK

Interdepartmental Mail

10
11
12
13
14
15

John Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502