



1 calculated, hence no additional credit was due. Ultimately, after making findings of fact and  
2 discussing the issue in more detail throughout this decision, the hearing officer finds that Taxpayer's  
3 protest must be denied. The denial of refund was proper. IT IS DECIDED AND ORDERED AS  
4 FOLLOWS:

## 5 **FINDINGS OF FACT**

### 6 **Procedural Findings**

7 1. On April 30, 2019, under Letter Id. No. L0479945904, the Department issued a  
8 Return Adjustment Notice (proposed assessment), indicating that Taxpayer's refund request was  
9 denied by adjusting Line 20 and Line 30 of Taxpayer's 2018 Personal Income Tax return. The  
10 letter indicated that Taxpayer owed tax of \$4,709.00, penalty of \$28.28, and interest of \$0.74,  
11 with a credit of \$4,409.71, for a total proposed assessment of \$328.31 for tax reporting period  
12 from January 1, 2018 to December 31, 2018. [Administrative File].

13 2. On July 29, 2019, Taxpayer submitted a protest letter, challenging the assessment,  
14 alleging that Taxpayer had followed instructions from the tax preparation program TurboTax  
15 when reporting income. The protest letter was stamped as received by the Department Protest  
16 Office on August 1, 2019. Taxpayer provided additional supporting documentation consisting of  
17 Taxpayers' 2018 Arkansas personal income tax return, Taxpayers' 2018 New Mexico personal  
18 income tax return, Taxpayers' 2018 IRS Form 1040 personal income tax return, as well as  
19 estimated tax payment vouchers for 2018 and 2019. [Administrative File].

20 3. On August 6, 2019, under Letter Id. No. L1068453040 the Department issued a  
21 letter acknowledging receipt of Taxpayer's protest. [Administrative File].

1           4.       On January 6, 2020, the Department, through Attorney Kenneth Fladager,  
2 submitted a Request for Hearing to the Administrative Hearings Office, requesting a scheduling  
3 hearing on Taxpayer’s protest. [Administrative File].

4           5.       On January 6, 2020, the Department, through Attorney Kenneth Fladager, timely  
5 submitted the Department’s Answer to Protest to the Administrative Hearings Office.  
6 [Administrative File].

7           6.       On January 6, 2020, the Administrative Hearings Office sent a Notice of  
8 Administrative Hearing in Albuquerque to the parties, informing them of the scheduled merits  
9 hearing to take place on February 6, 2020 at the Administrative Hearings Office in Albuquerque,  
10 New Mexico. [Administrative File].

11          7.       The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted  
12 the merits hearing on February 6, 2020 with the parties present at the Administrative Hearings  
13 Office in the Compass Bank Building in Albuquerque, New Mexico. Neither the Department  
14 nor Taxpayer objected that conducting the hearing satisfied the 90-day hearing requirements of  
15 Section 7-1B-8 (F) (2019). The Administrative Hearings Officer preserved a recording of the  
16 hearing (“Hearing Record” or “H.R.”). [Administrative File].

17       **Substantive Findings**

18          8.       Taxpayers Dennis Miller and spouse Kerry Miller are individuals residing in  
19 Albuquerque, New Mexico. [Administrative File, Direct examination of Dennis Miller,  
20 H.R.16:00-16:20; 27:50-28:20].

1           9.       Alma Lucero is the tax auditor assigned to the protest. She has been a  
2 Department tax auditor for less than one year. [Direct examination of Alma Lucero, H.R. 47:40-  
3 48:05].

4           10.       Mr. Dennis Miller is a retired engineer. Mr. Miller is not a trained accountant nor  
5 has a background in New Mexico tax law. [Administrative File, Direct examination of Dennis  
6 Miller, H.R.16:00-16:25; Cross examination of Dennis Miller, H.R. 41:10-41:15].

7           11.       Mr. Miller utilized TurboTax to help him submit 2018 tax returns to the Federal  
8 Internal Revenue Service (IRS), the State of New Mexico, and the State of Arkansas. TurboTax  
9 is an off-the-shelf tax preparation program. TurboTax is not a New Mexico Certified Public  
10 Accountant (CPA) or an attorney. Mr. Miller relied on the software to correctly fill in his tax  
11 returns, after he provided input data. [Administrative File; Direct examination of Dennis Miller,  
12 H.R. 10:10-10:30; Cross examination of Dennis Miller, H.R. 41:10-41:45; Department Exhibit  
13 A; Department Exhibit B].

14           12.       Mr. Miller and family members co-own a limited liability corporation (LLC)  
15 which does business in Arkansas. The LLC owns land upon which advertising billboards are  
16 located, producing rental income. In 2018, the LLC sold real estate property as a result of an  
17 eminent domain purchase, resulting in capital gains income. A CPA completed the LLC's tax  
18 returns and provided Mr. Miller, as an owner, a Schedule K-1. [Administrative File, Direct  
19 examination of Dennis Miller, H.R. 17:00-18:00; Cross examination of Dennis Miller, H.R.  
20 41:50-43:00; AHO examination of Dennis Miller, H.R. 43:45-45:50].

21           13.       Taxpayer allocated the LLC's income from the Arkansas billboard rental and the  
22 income from the capital gains from his Schedule K-1 on the New Mexico PIT-B. Line 5, Column  
23 1 of the PIT-B reflects the combined capital gain income from the LLC and other investments.

1 Line 5, Column 2 reflects the New Mexico portion of the capital gain income, from other  
2 investments. The difference between the two columns reflects Taxpayer's share of the sale of  
3 the LLC's real estate in Arkansas. Line 6, Column 1 reflects the billboard rental income. The  
4 New Mexico percentage of income is calculated on Line 12 and amounts to 46.9809% of total  
5 income reported on Line 11. Line 13 reflects the total New Mexico tax, including both the New  
6 Mexico percentage and the non-New Mexico percentage. Line 14 reflects the New Mexico tax  
7 on the New Mexico percentage of income. Line 14 is repeated on Line 18 of the PIT-1.

8 [Administrative File (i.e., IRS Form 4797, p. 73 of 141, Schedule K-1, p. 108-111 of 141); Direct  
9 examination of Dennis Miller, H.R. 22:00-23:20; AHO examination of Dennis Miller, H.R.  
10 43:45-46:45; Direct examination of Alma Lucero, H.R. 49:45-53:25; Department Exhibit B-004,  
11 B-001].

12 14. Taxpayer, when prompted by TurboTax, completed the worksheet and requested  
13 credit for taxes paid to the State of Arkansas, in the amount of \$4,514. [Administrative File;  
14 Direct examination of Dennis Miller, HR 27:50-31:25; Department Exhibit B-001].

15 15. Taxpayer relied on calculations of TurboTax, which computed an overpayment of  
16 New Mexico tax, and requested a refund. [Administrative File; Direct examination of Dennis  
17 Miller, H.R. 31:50-34:10; Department Exhibit B].

18 16. Taxpayer acknowledged that he misstated the estimated tax overpayment, because  
19 when he realized he would be overpaying he modified his estimated payment. The tax software  
20 utilized by the Department indicated that Taxpayer made estimated payments totaling \$3,761.00.  
21 Mr. Miller forgot to update TurboTax to reflect the reduced estimated payment amount.  
22 [Administrative File; Direct examination of Dennis Miller, H.R. 36:10-39:50; Direct  
23 examination of Alma Lucero, H.R. 48:50-49:45].



1 **Presumption of correctness**

2 The presumption of correctness under NMSA 1978, Section 7-1-17 (C) (2007) does not  
3 strictly attach in this matter because the protest does not stem from the issuance of an assessment  
4 under Section 7-1-17. Taxpayers nevertheless have the burden to establish that they were  
5 entitled to their claim for credit pursuant to Regulation §3.1.8.10 NMAC (08/30/2001) and must  
6 establish entitlement to the claimed refund. The denial of Taxpayers' claim for refund is viewed  
7 under the lens of a presumption of correctness. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-  
8 NMCA-148, ¶17 & ¶29, 142 N.M. 779.

9 Tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted  
10 and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*,  
11 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4. Under the rationale of *Team Specialty Prods*,  
12 Taxpayers carry the burden of proving that they are entitled to the claimed credit. Although a  
13 credit must be narrowly interpreted and construed against a taxpayer, it still should be construed  
14 in a reasonable manner consistent with legislative language. *See Sec. Escrow Corp. v. State*  
15 *Taxation & Revenue Dep't*, 1988-NMCA-068, ¶9, 107 N.M. 540. Consequently, Taxpayers  
16 must show that they are entitled to the credit that is the basis of their claim for refund, and that  
17 the Department acted in error in issuing the return adjustment denying the refund and denying  
18 one of the two credits at issue.

19 **Credit granted by allocation and apportionment of income under Section 7-2-11.**

20 New Mexico taxes the net income of every resident individual and certain non-resident  
21 individuals. *See NMSA 1978, Section 7-2-3 (1981)*. The tax bracket a taxpayer fits into is based on  
22 a taxpayer's taxable income. *See NMSA 1978, Section 7-2-7 (2005)*. When a taxpayer has income  
23 that is taxable both within New Mexico and outside of New Mexico, Section 7-2-11 allows that

1 taxpayer to allocate and apportion certain categories of income between New Mexico and the other  
2 state or states. The application of this credit serves to reduce the tax imposed under Section 7-2-7  
3 by the percentage of net income sourced from out of state (the non-New Mexico percentage), with  
4 some exclusions (i.e., wages and retirement income). See Section 7-2-11 (B). The 2018 Personal  
5 Income Tax (PIT-1) instructions<sup>1</sup> require taxpayers who claim this credit for non-New Mexico  
6 income to file the PIT-B form.

7 Dennis Miller is a New Mexico resident and an individual. He owns a share of an LLC in  
8 Arkansas which is a pass-through business entity. Although none of the corporate documents were  
9 entered into evidence, the Schedule K-1 was included in the hearing packet along with the Form  
10 4797 for Sale of Business Property, indicating this is a pass-through entity. During the 2018 tax  
11 year, the LLC had two sorts of income. The first sort was rental income from being in the business  
12 of providing roadside billboards located in Arkansas. The second sort was a long-term capital gain  
13 from the sale (by eminent domain) of real estate located in Arkansas. Both of those items of income  
14 were wholly achieved in the State of Arkansas. Mr. Miller filed an Arkansas non-resident personal  
15 income tax return reporting the income in Arkansas, allocating the entire capital gain income and  
16 the total rental income to the State of Arkansas, and he paid taxes to the State of Arkansas. Because  
17 Taxpayer is an individual, not a business, the income is allocated to the State of Arkansas as  
18 nonbusiness income.

19 Taxpayers filed a joint Personal Income Tax return with the State of New Mexico, as is  
20 required for state residents. Taxpayer completed the 2018 PIT-B New Mexico Allocation and

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<sup>1</sup> 2018 PIT-1 instructions are published and available on the Department's forms and publications website:  
[www.tax.newmexico.gov/forms-publications.aspx](http://www.tax.newmexico.gov/forms-publications.aspx). In particular, see <https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/a0278373-9d7d-4ec7-ac7a-c4d879d6f796?response-content-disposition=filename%3D%222018pit-1-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHYGD7I7TA&Signature=6ta%2F%2BzblpX1G58Pf fa0bT0NDcvI%3D&Expires=1585850588> (last accessed 4/02/2020).

1 Apportionment schedule. The PIT-B reports no business or farm income on Line 8, showing  
2 Taxpayer considered the income at issue nonbusiness income, not requiring apportionment. Line 5  
3 shows the capital gain income. The PIT-B instructions require “[a]ll taxpayers with income from  
4 the sale or exchange of property allocate and apportion the income or loss on line 5, column 1,  
5 based on the location of the income-earning property or activity.” The line 5, column 1, entry  
6 reflects the income from the sale of Arkansas real estate property. Column 2 excludes the income  
7 allocated to Arkansas. This was proper.

8 Line 6 then requires ordinary income of pass-through entities to be reported. On Line 6,  
9 column 1, Taxpayer placed the income from the LLC’s billboard rentals. The PIT-B instructions<sup>2</sup>  
10 require taxpayers to “[a]llocate distributions of ordinary income (losses) to partners, members or  
11 owners of partnerships, limited liability companies, and Sub-Chapter S corporations, based on  
12 where the income-producing activities occur.” The allocation of rental income to Arkansas was  
13 proper.

14 Taxpayers reported Federal adjusted gross income of \$349,112 (line 9 of PIT-1). New  
15 Mexico taxable income was reported to be \$212,922 (line 17 of PIT-1). On the PIT- B, Taxpayers  
16 calculated that the New Mexico income was \$164,016 (line 9, column 2, PIT-B). The calculation  
17 for the New Mexico percentage of income resulted in a New Mexico percentage of 46.9809 percent.  
18 The non-New Mexico percentage therefore was 53.0191 percent. If New Mexico taxed the entire  
19 income of these Taxpayers, using the tax rate tables, the total tax would be \$10,023 (line 13, PIT-B).

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<sup>2</sup> 2018 PIT-B instructions are published and available on the Department’s forms and publications website: [www.tax.newmexico.gov/forms-publications.aspx](http://www.tax.newmexico.gov/forms-publications.aspx). In particular, see <https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/341427aa-f0df-4353-b9a0-4fa54c9d3b52?response-content-disposition=filename%3D%222018pit-b-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHBYGD7I7TA&Signature=gPmqkNDcl09WCgzrti24qvzrYPs%3D&Expires=1586447958> (last accessed 4/09/2020).

1 Instead, because the tax from income out of state was credited, the tax imposed was only the New  
2 Mexico percentage of \$10,023, which calculated to \$4,709.00 (line 14, PIT-B).

3 This comports to NMSA 1978, Section 7-2-11(B) and (C) (2016). After allocation and  
4 apportionment, the law allows “[a] taxpayer may claim a credit in an amount equal to the amount of  
5 tax determined to be due under Section 7-2-7 or 7-2-7.1 NMSA 1978 multiplied by the non-New  
6 Mexico percentage.” In our case, the tax was calculated using the tax table and was multiplied by  
7 the New Mexico percentage, 46.9809 percent. The non-New Mexico percentage, 53.0191 percent,  
8 was not taxed, hence Taxpayer did receive credit for the non-New Mexico percentage of his income  
9 in this manner. The Millers were right to claim this credit (valued at \$5,314), and the Department  
10 acted properly in granting it.

11 Causing some consternation among the parties was the fact that neither allocation nor  
12 apportionment are defined in New Mexico Statutes. However, the concepts are fairly  
13 straightforward. “Allocation is the process of sourcing income to one state.” Bender’s State  
14 Taxation: Principles and Practice, § 3.09. “Apportionment” is the process of dividing interstate  
15 income among participating states, so that the individual states can impose tax. Apportionment  
16 formulas “do not trace the origin of items of income to a particular state.” Bender’s State Taxation:  
17 Principles and Practice, § 3.10.

18 In sum, Taxpayers properly apportioned their income between the states of New Mexico and  
19 Arkansas. Taxpayers received \$5,314 of credit against their New Mexico tax liability by doing so.  
20 Hence, their New Mexico liability was reduced from \$10,023 to only \$4,709.

21 **Credit for tax paid to another state under Section 7-2-13.**

1 In addition to the tax credit for income allocated to another state, Taxpayers claimed a credit  
2 for taxes paid to another state. The statute NMSA 1978, Section 7-2-13 (2013) which grants the  
3 credit reads:

4 When a resident individual is liable to another state for tax upon income derived  
5 from sources outside this state but also included in net income under the Income Tax  
6 Act *as income allocated or apportioned to New Mexico* pursuant to Section 7-2-11  
7 NMSA 1978, the individual, upon filing with the secretary satisfactory evidence of  
8 the payment of the tax to the other state, shall receive a credit against the tax due this  
9 state in the amount of the tax paid the other state with respect to income that is  
10 required to be either allocated or apportioned to New Mexico. However, in no case  
11 shall the credit exceed the amount of the taxpayer's New Mexico income tax  
12 liability on that portion of income that is required to be either allocated or  
13 apportioned to New Mexico on which the tax payable to the other state was  
14 determined. The credit provided by this section does not apply to or include income  
15 taxes paid to any municipality, county or other political subdivision of a state.  
16 (emphasis added).

17 The phrase "income allocated or apportioned to New Mexico" has been emphasized because it  
18 limits the credit to those items of income that are either from New Mexico sources, or from sources  
19 outside of New Mexico that are required to be allocated and apportioned to New Mexico, as  
20 determined by Section 7-2-11. There are some instances in which income earned out-of-state can  
21 be allocated to New Mexico, but these exceptions do not apply here. See Regulation 3.3.11.11 (A)  
22 NMAC (12/14/00) ("All compensation received while a resident of New Mexico shall be allocated  
23 to this state whether or not such compensation is earned from employment in this state."); see also  
24 Regulation 3.3.11.13 (B) (NMAC) (12/14/00) ("Retirement income of a resident is allocable to New  
25 Mexico, regardless of the source of the retirement income..."). Because Mr. Miller had already  
26 allocated the LLC's income in question to Arkansas, any income allocated to Arkansas is not  
27 allocated to New Mexico, is not taxed by New Mexico (see above section concerning the credit  
28 provided by Section 7-2-11) and any tax paid to Arkansas is hence not credited against New Mexico  
29 taxes.

1 **Use of TurboTax software.**

2 Taxpayer used TurboTax software to complete his Federal, New Mexico and Arkansas  
3 personal income tax returns. The software did not alert him to the double-dipping error caused by  
4 both allocating income and requesting credit for taxes paid on the income allocated to Arkansas.  
5 This reflects a deficiency in the software. This tribunal agrees with the United States Tax Court  
6 which, in *Morales v. Comm’r*, T.C. Memo 2012-341, 2012 Tax Ct. Memo LEXIS 342, 104 T.C.M.  
7 (CCH) 741, *affirmed*, 633 Fed. Appx. 884 (9th Cir. 2015) (non-precedential), held that the use of  
8 tax preparation software is not a defense to negligence penalties. While the error was certainly  
9 unintentional on the part of Taxpayers, the error does not amount to nonnegligence as defined by  
10 Regulation 3.1.11.11 NMAC (1/15/01), hence a reduction in penalty under the Department’s  
11 “proposed assessment” is not justified. *See* NMSA 1978, Section 7-1-69 (B) (2007).

12 **Estimated tax payments**

13 Taxpayer made estimated tax payments to New Mexico in 2018 and 2019. Three estimated  
14 tax payments were equal, consisting of \$1,100.00 each. Taxpayer submitted one reduced payment  
15 of \$461.00. However, Taxpayer did not update the entries on the TurboTax software, so the  
16 software reported payments of \$4,400 when in fact only \$3,761 was paid. The Department’s  
17 return adjustment was justified in this respect as well. However, the return adjustment notice  
18 corrected the estimated tax paid to \$3,830, which was unexplained, and essentially credited  
19 Taxpayer with having paid \$69 more. Since the amount of the reduction was not at issue, and  
20 the record was not developed on the subject, the hearing officer will not sua sponte make a  
21 determination as to what the correct amount was.

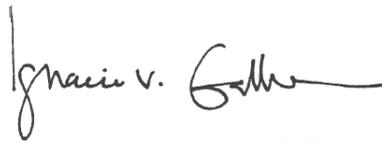
22 **Conclusion.**



1 E. Taxpayer failed to meet his burden to show that he was entitled to receive an  
2 additional credit for taxes paid to another state for income allocated or apportioned to New  
3 Mexico under NMSA 1978 Section 7-2-13.

4 For the foregoing reasons, Taxpayer's protest **DENIED. IT IS ORDERED** that the  
5 Department's denial of refund contained within the Return Adjustment Notice and proposed  
6 assessment of tax, penalty and interest for 2018 was correct. Taxpayer has already paid the  
7 proposed assessment, so nothing more is due.

8 DATED: April 13, 2020.

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Ignacio V. Gallegos  
Hearing Officer  
Administrative Hearings Office  
P.O. Box 6400  
Santa Fe, NM 87502

16 **NOTICE OF RIGHT TO APPEAL**

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

1 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
2 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
3 statement from the appealing party. *See* Rule 12-209 NMRA.

4 **CERTIFICATE OF SERVICE**

5 On April 13, 2020, a copy of the foregoing Decision and Order was submitted to the parties  
6 listed below in the following manner:

7 *First Class Mail*

*Interdepartmental Mail*

8 INTENTIONALLY BLANK  
9

10 \_\_\_\_\_  
11 John Griego  
12 Legal Assistant  
13 Administrative Hearings Office  
14 P.O. Box 6400  
Santa Fe, NM 87502