

1 credible. His testimony in conjunction with the other evidence provided was sufficient to
2 establish that the Taxpayer made the payments and was entitled to claim the FPT credit for 2016.
3 The Hearing Officer finds in favor of the Department in part and in favor of the Taxpayer in part.
4 IT IS DECIDED AND ORDERED AS FOLLOWS:

5 FINDINGS OF FACT

6 1. On May 4, 2018, under letter i.d. no. L2067232560, the Department issued a
7 denial of the application for FPT credit for 2015 to the Taxpayer, indicating that the application
8 was not submitted within one year of the last expenditure. [Administrative file, Testimony of
9 Mr. O'Dowd, Testimony of Ms. Castro].

10 2. On May 4, 2018, under letter i.d. no. L0542684976, the Department issued a
11 denial of the application for FPT credit for 2016 to the Taxpayer, indicating that there was no
12 proof of payment on the invoices. [Administrative file, Testimony of Mr. O'Dowd, Testimony
13 of Ms. Castro].

14 3. On August 1, 2018, the Taxpayer filed a protest to the denials of its applications
15 for the FPT credit. [Administrative file].

16 4. On August 16, 2018, the Department acknowledged its receipt of the Taxpayer's
17 protest. [Administrative file].

18 5. On December 5, 2019, the Administrative Hearings Office learned of the
19 Taxpayer's protest when the Department filed a request for hearing.¹ [Administrative file].

¹ At the time that the protest was filed, the statute required that the Department request a hearing within 45 days of the protest and that a hearing be held within 90 days of the protest. *See* NMSA 1978, § 7-1B-8 (2015). The statute currently requires that the Department request a hearing within 180 days of the protest and that a hearing be set within 90 days of the request for hearing. *See* NMSA 1978, § 7-1B-8 (2019). Under both versions of the statute, the Department's request was delinquent.

1 6. On December 5, 2019, the Administrative Hearings Office sent notice of hearing
2 to the parties and set the hearing for December 20, 2019. [Administrative file].

3 7. On December 10, 2019, the Taxpayer filed a request to continue the hearing and
4 did not waive the 90-day requirement because the protest was filed more than a year earlier.
5 [Administrative file].

6 8. On December 10, 2019, the Department opposed the request to continue. On
7 December 17, 2019, the Department withdrew its opposition and consented to the request to
8 continue. [Administrative file].

9 9. On December 18, 2019, the request was granted and amended notice was sent to
10 the parties, and the hearing was set for January 17, 2020. [Administrative file].

11 10. The hearing was continued on January 17, 2020 due to inclement weather.
12 [Administrative file].

13 11. On January 22, 2020, the parties were sent amended notice of hearing, and the
14 hearing was set for March 13, 2020. [Administrative file].

15 12. The Taxpayer is a film production company that had direct production
16 expenditures and postproduction expenditures directly attributable to the production of a film or
17 commercial audiovisual project in New Mexico in 2015 and 2016. [Testimony of Mr. O'Dowd,
18 Exhibit A, Exhibit B].

19 13. Applications for the FPT credit are submitted first to the Film Office of the New
20 Mexico Economic Development Department (Film Office). [Testimony of Mr. O'Dowd,
21 Testimony of Ms. Castro].

22 14. The Film Office makes a determination if the film production company is eligible
23 to claim the FPT credit. [Testimony of Mr. O'Dowd, Testimony of Ms. Castro].

1 15. If the Film Office determines that the film production company is not eligible to
2 claim the FPT credit, it will notify the film production company that its application was rejected.

3 [Testimony of Mr. O’Dowd, Testimony of Ms. Castro].

4 16. If the Film Office determines that the film production company is eligible to
5 claim the FPT credit, it sends the application to the Department to be processed. [Testimony of
6 Mr. O’Dowd, Testimony of Ms. Castro]. *See also* NMSA 1978, § 7-2F-1 (M) and (N) (2019).

7 *See also* NMSA 1978, § 7-2F-6 (F) and (G) (2016).

8 17. The Taxpayer filed an application for the FPT credit for 2015 (the 2015
9 application) with the Film Office on October 9, 2017, and it was sent to the Department after the
10 Film Office determined that the Taxpayer was eligible to claim the FPT credit. [Testimony of
11 Mr. O’Dowd, Testimony of Ms. Castro, Exhibit A].

12 18. The paid invoices for the 2015 application indicate that they were paid on
13 November 3, 2015 and December 7, 2015. [Exhibit A].

14 19. The Taxpayer filed an application for the FPT credit for 2016 (the 2016
15 application) with the Film Office on October 9, 2017, and it was sent to the Department after the
16 Film Office determined that the Taxpayer was eligible to claim the FPT credit. [Testimony of
17 Mr. O’Dowd, Testimony of Ms. Castro, Exhibit B].

18 20. The paid invoices for the 2016 application indicate that they were paid on April
19 19, 2017. [Exhibit B, Administrative file].

20 21. Two of the invoices provided with the 2016 application, invoice #101866 and
21 invoice #101859, indicate that they were paid. [Exhibit B]. The Taxpayer provided a third
22 invoice for 2016 with the protest, invoice #101874, which is also paid-stamped. [Administrative
23 file].

1 22. The Taxpayer only applied for the FPT credit on expenditures that were not
2 subject to a non-taxable transaction certificate (NTTC) and to which the gross receipts tax had
3 been applied. [Testimony of Mr. O’Dowd, Exhibit A, Exhibit B]. *See also* NMSA 1978, § 7-
4 2F-1 and § 7-2F-6.

5 23. The Department rejected the 2016 application because the Taxpayer did not
6 produce canceled checks that reflected the amounts paid for each invoice. [Testimony of Ms.
7 Castro].

8 24. The Taxpayer frequently made payments using one check that included combined
9 expenditures from more than one invoice, so the Taxpayer did not have canceled checks to match
10 the amount of each invoice. [Testimony of Mr. O’Dowd, Exhibit C].

11 25. The Taxpayer produced a letter from the vendor that thanked it for always paying
12 its invoices in full and on time. The Taxpayer also produced copies of invoices that were
13 stamped as paid. [Administrative file, Testimony of Mr. O’Dowd, Exhibit A, Exhibit B].

14 26. The Taxpayer met with representatives of the Film Office in the fall of 2017 to
15 discuss its 2015 and 2016 applications for the FPT credit. [Testimony of Mr. O’Dowd].

16 27. The representatives from the Film Office had been communicating with the
17 Taxpayer for several months about their initial rejection of the 2015 and 2016 applications.
18 [Testimony of Mr. O’Dowd].

19 28. The representatives from the Film Office advised that they were not able to find
20 any evidence at their office that the Taxpayer had filed the 2015 and 2016 applications.
21 [Testimony of Mr. O’Dowd].

1 At the time that the protest was filed, the Department was required to file a request for
2 hearing within 45 days of the receipt of the protest. *See* NMSA 1978, § 7-1B-8 (A) (2015). A
3 hearing was required to be set within 90 days of the protest. *See id.* However, there was no
4 statutory or regulatory authority for the Hearing Officer to dismiss a previously filed protest for
5 unreasonable and unjustified delays. *See id.* *See also* 22.600.3.8 NMAC (2018). Under the
6 current statute, the Department is required to file a request for hearing within 180 days of the
7 protest. *See* NMSA 1978, § 7-1B-8 (B) (2019). If the Department fails to comply with the
8 statutory deadlines, the Hearing Officer may order that no further interest will accrue on a
9 protested liability. *See* NMSA 1978, § 7-1B-8 (E) (2019). The statutory remedy does not
10 encompass all types of protests; it is only for protests to a liability. *See id.* The current statute
11 requires that the Administrative Hearings Office set a hearing within 90 days of the
12 Department's request for hearing. *See* NMSA 1978, § 7-1B-8 (F) (2019). The Administrative
13 Hearings Office set a hearing to take place on December 20, 2019, well within 90 days of the
14 receipt of the request for hearing. That hearing was continued at the Taxpayer's request. The
15 hearing was then set for January 17, 2020, also within 90 days of the receipt of the request for
16 hearing. That hearing was continued due to inclement weather. The hearing was then set for
17 March 13, 2020, when it was ultimately heard, which was 99 days after the receipt of the request
18 for hearing.

19 Another taxpayer previously argued that the Department denied it the statutory right to a
20 prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue*
21 *Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13.
22 The court found that the general rule is that the tardiness of public officers is not a defense to an
23 action by the state. *See id.* The court noted that the statute did not provide a consequence for

1 failure to comply with the requirements of a prompt hearing. *See id.* Therefore, “[t]he general
2 rule is applicable in these cases unless [the statute] makes it inapplicable.” *Id.* Another taxpayer
3 argued that the failure of the hearing officer to render a decision in 30 days, as required by
4 statute, divested the hearing officer of jurisdiction. *See also Kmart Properties, Inc. v. Taxation*
5 *and Revenue Dep’t.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177. The court found that the tax
6 statutory deadline was not jurisdictional because of the general tardiness rule and the heavy
7 statutory presumption of correctness that favors the Department. *See id.* at ¶ 54. The court
8 found that the statutory deadline did not affect the essential power to decide complex and time-
9 consuming protests. *See id.* at ¶ 55. Although the Department’s failure to file a request for
10 hearing within 45 days or within 180 days of its receipt of the Taxpayer’s protest was a violation of
11 the statute, there is no administrative remedy that can be granted. *See NMSA 1978, § 7-1B-8*
12 (2015) and (2019).

13 **Untimely application for credit.**

14 To receive the FPT credit, a taxpayer must apply, and its “application *shall be submitted*
15 *within one year* of the date of the last direct production expenditure in New Mexico or the last
16 postproduction expenditure in New Mexico.” NMSA 1978, § 7-2F-1 (P) (2019) (emphasis
17 added). The word “shall” in a statute indicates that the provision is mandatory, not discretionary.
18 *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M.
19 24. The Taxpayer’s last qualified expenditures for the 2015 application were made on December
20 7, 2015, which is the last paid-stamped date on the invoices. [Exhibit A]. Therefore, the
21 deadline to apply for FPT credit on those expenditures was December 7, 2016. *See NMSA 1978,*
22 *§ 7-2F-1.* The Taxpayer’s application was filed on October 9, 2017. Consequently, the
23 Taxpayer’s 2015 application for FPT credit was not timely.

1 The Taxpayer argued that it initially submitted the 2015 application in a timely manner.
2 Mr. O’Dowd explained that he is dealing with ongoing cognitive problems caused by a traumatic
3 brain injury. His medical issues sometimes cause him to neglect certain aspects of the
4 Taxpayer’s business and record-keeping. The Taxpayer could not recall exactly when it initially
5 filed the 2015 application with the Film Office, did not have copies of what was filed, and
6 admitted that its meeting with the Film Office regarding the 2015 application occurred in the fall
7 of 2017. Therefore, the Taxpayer failed to provide sufficient proof to show that its 2015
8 application was submitted timely.

9 The Taxpayer argued that it relied on the promises made by the Film Office that its
10 application would be accepted as long as it was filed before the end of 2017. The statute does
11 not give the Film Office or the Department the authority to extend the application deadline. *See*
12 NMSA 1978, § 7-2F-1. *See also In Re Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 24, 136 N.M.
13 440 (holding that the Department did not have the authority to allow claims made beyond the
14 statute of limitations). Statutory deadlines for applying for a tax credit are mandatory. *See Team*
15 *Specialty Prods.*, 2005-NMCA-020, ¶ 1. *See also Vivigen, Inc. v. Minzner*, 1994-NMCA-027, ¶
16 23, 117 N.M. 224 (holding that a taxpayer was not entitled to seek a tax credit after the statute of
17 limitations had passed). Because the Taxpayer’s 2015 application was not filed timely as
18 required by the statute, it was properly denied.

19 **Sufficient proof of payment.**

20 The Taxpayer’s 2016 application was filed within one year of the last direct production or
21 postproduction expenditures. The Department did not dispute that the 2016 application was filed
22 timely. The Department argued that the Taxpayer failed to show that the expenditures were not
23 subject to a NTTC and that the gross receipts tax had been applied. *See* NMSA 1978, § 7-2F-1

1 and § 7-2F-6. The Taxpayer pointed out that the invoices for the 2016 application show that
2 “sales tax” was applied. *See Exhibit B. See Protest in Administrative File.* The Taxpayer
3 explained that it used a NTTC on some projects and not on others. The Taxpayer provided
4 invoices that showed when a NTTC was used, and they showed no “sales tax” on the invoice
5 with \$0.00 noted in that box. *See Exhibit A.* The Taxpayer only applied for the FPT credit on
6 projects when it did not use a NTTC and the transactions were charged the gross receipts tax.
7 *See NMSA 1978, § 7-2F-1 and § 7-2F-6. See also Exhibit B.* The testimony is consistent with
8 the invoices, and together they are sufficient to show that the projects were charged the gross
9 receipts tax, noted as “sales tax” on the invoices, and that a NTTC was not used.

10 The Taxpayer did not provide canceled checks that matched the amounts of the invoices
11 on the qualified expenditures. For that reason, the Department concluded that the Taxpayer
12 failed to prove that it paid the qualified expenditures and denied the 2016 application. The
13 Taxpayer explained that it did not have canceled checks that matched the invoice amounts
14 because it regularly paid several invoices or parts of several invoices on one check. The
15 Taxpayer provided invoices that were paid-stamped and provided a letter from its vendor that
16 thanked it for paying all of their invoices in full and on time. The Taxpayer’s position and
17 explanations of its payment practices have been consistent for the duration of the protest, and
18 even since before the protest was filed. *See Exhibit C. See also Protest in Administrative File.*
19 Therefore, I found the Taxpayer’s testimony to be credible. Based upon the totality of the
20 evidence, including the testimony, the paid-stamped invoices, and the vendor’s letter, the
21 Taxpayer presented sufficient evidence to show that it paid the invoices. Therefore, the
22 Department’s reason for denying the application was successfully rebutted. Consequently, the
23 Taxpayer is entitled to claim the FPT credit for the 2016 application.

1 **CONCLUSIONS OF LAW**

2 A. The Taxpayer filed a timely, written protest of the Department’s denials of its
3 applications for the film production tax credit and jurisdiction lies over the parties and the subject
4 matter of this protest. *See* NMSA 1978, § 7-1-24 (2017). *See also* NMSA 1978, § 7-1B-8.

5 B. Hearings were set within 90 days of the receipt of the request for hearing, as
6 required by statute, but they were continued at the Taxpayer’s request and due to inclement weather.
7 *See* NMSA 1978, § 7-1B-8 (2019).

8 C. The Taxpayer’s 2015 application for the film production tax credit was not filed
9 timely. Therefore, it was properly denied. *See* NMSA 1978, § 7-2F-1.

10 D. The Taxpayer presented sufficient evidence to rebut the Department’s reason for
11 denying the 2016 application for the film production tax credit. Therefore, it is granted. *See* NMSA
12 1978, § 7-2F-6 (2016).²

13 For the foregoing reasons, the Taxpayer’s protest **IS DENIED IN PART AND**
14 **GRANTED IN PART. IT IS ORDERED** that Taxpayer’s application for the 2016 film
15 production tax credit is **HEREBY GRANTED**.

16 DATED: April 24, 2020.

17 *Dee Dee Hoxie*
18 Dee Dee Hoxie
19 Hearing Officer
20 Administrative Hearings Office
21 P.O. Box 6400
22 Santa Fe, NM 87502

² Section 7-2F-1 covers film projects that commenced prior to January 1, 2016, and Section 7-2F-6 covers film projects that commenced on or after January 1, 2016. *See* NMSA 1978, § 7-2F-1 and § 7-2F-6.

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On April 24, 2020, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16 *Email*

Email

17 INTENTIONALLY BLANK

18
19 _____
20 John Griego
21 Legal Assistant
22 Administrative Hearings Office
23 P.O. Box 6400
Santa Fe, NM 87502