



1 that the Taxpayer's tardiness was negligence, even though it was inadvertent. Therefore, the protest  
2 is denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

### 3 FINDINGS OF FACT

4 1. On December 5, 2018, the Department assessed the Taxpayer for withholding tax,  
5 penalty, and interest for the tax period ending October 31, 2016. The assessment was for  
6 \$160.93 tax, \$843.38 penalty, and \$13.95 interest. [L1243107504]

7 2. On December 10, 2018, the Department assessed the Taxpayer for penalty for the  
8 tax period ending September 30, 2016. The assessment was for \$1,194.70. [L0765014192]

9 3. On December 10, 2018, the Department assessed the Taxpayer for penalty for the  
10 tax period ending November 30, 2016. The assessment was for \$800.69. [L1838756016]

11 4. On January 7, 2019, the Taxpayer filed a formal protest to all three assessments.  
12 [Administrative file]

13 5. On February 19, 2019, the Department acknowledged its receipt of the  
14 Taxpayer's protest. [Administrative file]

15 6. On April 2, 2019, the Department filed a Request for Hearing asking that the  
16 Taxpayer's protest be scheduled for a formal administrative hearing. [Administrative file]

17 7. On April 3, 2019, the Administrative Hearings Office issued a notice of  
18 administrative hearing. [Administrative file]

19 8. The hearing was held within ninety day of the Department's acknowledgement of  
20 the protest. *See* 22.600.3.8 (E) NMAC (2018).

21 9. In November 2018, the Taxpayer discovered its withholding tax returns for  
22 September 2016, October 2016, and November 2016 (the returns) had not been filed.

23 [Testimony of Carol Sandoval]

1           10.     The returns were all due in 2016. [Testimony of Carol Sandoval, Testimony of  
2 Mary Griego, Exhibits B, D, and F]

3           11.     The failure to file the returns was discovered by Ms. Sandoval when she was  
4 filing the October 2018 tax return. [Testimony of Carol Sandoval]

5           12.     Ms. Sandoval submitted the October 2018 tax return, but then realized that the  
6 year had been entered as 2016, instead of 2018. [Testimony of Carol Sandoval]

7           13.     Ms. Sandoval reviewed the submissions and realized that the three months of  
8 returns in 2016 had not been filed. [Testimony of Carol Sandoval]

9           14.     Ms. Sandoval was unsure why the returns were not filed, but speculated that it  
10 was due to changes made to the website around that time that separated or changed the location  
11 of the buttons for making payments and for filing returns, which she failed to notice or  
12 understand at the time. [Testimony of Carol Sandoval]

13           15.     Upon discovering its error, the Taxpayer took action and filed the returns. The  
14 returns were filed in November 2018. [Testimony of Carol Sandoval, Testimony of Mary  
15 Griego, Exhibits B, D, and F]

16           16.     Because the October 2016 was initially filed with October 2018's information, the  
17 return for that month was resubmitted and amended to reflect the correct amounts for October  
18 2016. [Testimony of Carol Sandoval]

19           17.     The returns were filed approximately two years after their due dates. [Testimony  
20 of Carol Sandoval, Testimony of Mary Griego, Exhibits B, D, and F]

21           18.     The Taxpayer's withholding taxes for September 2016, October 2016, and  
22 November 2016 were paid timely, and the Department conceded that the Taxpayer did not owe

1 tax or interest for the October 2016 tax period. [Testimony of Carol Sandoval, Testimony of  
2 Mary Griego, Exhibits A, C, and E]

### 3 DISCUSSION

#### 4 **Burden of Proof.**

5 Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17.  
6 Tax includes, by definition, the amount of tax principal imposed and, unless the context  
7 otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, §  
8 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-  
9 070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,  
10 and it is the Taxpayer’s burden to present evidence and legal argument to show that it is entitled  
11 to an abatement.

#### 12 **Penalty.**

13 Penalty shall be assessed whenever a taxpayer fails to file a return by the date a return is  
14 required, if the failure is due to negligence or a disregard of the rules and regulations without an  
15 intent to evade or defeat the tax. *See* NMSA 1978, § 7-1-69 (A) (2007). The word “shall” in a  
16 statute indicates that the provision is mandatory, not discretionary. *See Marbob Energy Corp. v.*  
17 *N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Negligence includes  
18 “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”  
19 3.1.11.10 (C) NMAC (2001).

20 The Taxpayer timely paid its taxes in September, October, and November 2016 using the  
21 online system. The Taxpayer failed to click on the right link to fill out and submit the returns for  
22 those months, apparently due to some changes that had been made to the website. The Taxpayer  
23 argued that the website’s changes, separating or changing the location of the two buttons for

1 payments and filing, was tantamount to affirmatively misleading the Taxpayer. *See* 3.1.11.11 (A)  
2 2001 (indicating that it is not negligence if the taxpayer proves that a department employee  
3 affirmatively misled the taxpayer). The Taxpayer also argued that the Department should have  
4 notified the Taxpayer immediately of its lack of returns because it had payments in its system  
5 without corresponding returns. The Department explained that the system does not automatically  
6 notify taxpayers of inconsistent filings and payments. To mislead means “to lead in a wrong  
7 direction or into a mistaken action or belief often by deliberate deceit”. *Merriam Webster’s*  
8 *Collegiate Dictionary* 794 (11<sup>th</sup> ed. 2014). Under New Mexico's self-reporting tax system, “every  
9 person is charged with the reasonable duty to ascertain the possible tax consequences” of his or her  
10 actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16.

11 The Taxpayer’s employee might have been initially confused by a change in the website,  
12 but that does not mean that the website affirmatively led the Taxpayer to believe that the return had  
13 been filed when it had not actually been filed. Likewise, the Department’s silence does not  
14 affirmatively lead to the conclusion that a return is filed. The Taxpayer admitted that its failure to  
15 file the return was an oversight, and the Taxpayer acted promptly to correct the mistake when it was  
16 discovered. Here, Taxpayer admitted its payments and filings were self-directed. Therefore, the  
17 Taxpayer is ultimately responsible for its oversight in terms of filing the return through the online  
18 system. *See Tiffany Construction Co.*, 1976-NMCA-127. Although the Taxpayer’s mistake was  
19 inadvertent, it is still negligence. *See In the Matter of the Protest of Spelman Investments*, Decision  
20 and Order No. 17-49 (Admin. Hearings Office, December 15, 2017, non-precedential) (holding that  
21 it was negligence for purposes of the penalty statute when the taxpayer’s failure to file the returns on  
22 time was based on an inadvertent error based on changes to the Department’s computer). *See also*  
23 *Grogan v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-033, ¶ 32, 133 N.M. 354 (holding that the

1 taxpayer's action met the regulatory definition of negligence); *Phillips Mercantile Co. v. N.M.*  
2 *Taxation & Revenue Dep't*, 1990-NMCA-006, ¶ 17, 109 N.M. 487 (confirming that negligence  
3 includes inadvertent error); and *Hess Corp. v. N.M. Taxation & Revenue Dep't*, 2011-NMCA-043, ¶  
4 38, 149 N.M. 527 (holding that penalty was properly assessed for an inadvertent error because it is  
5 negligence).

6 **Tax and interest on L1243107504.**

7 The Taxpayer was also assessed for tax and interest for the tax period ending on October 31,  
8 2016. The Taxpayer explained that the tax was paid when it was due, but that the return initially  
9 filed for this tax period was actually the one for October 31, 2018, which is how the Taxpayer  
10 realized that it had neglected to file the returns for the three months in 2016. The Department's  
11 assessment for that month was based on the amounts initially reported, which were actually for the  
12 2018 tax period. The Department confirmed that the tax return for October 2016 had been amended  
13 after the assessment was automatically generated by the system. The Department also confirmed  
14 that the full amount of tax for October 31, 2016 was paid when it was due. *See* Exhibit C.  
15 Therefore, no interest or tax is due. *See* NMSA 1978, § 7-1-67 (2013). Penalty is still owed since  
16 the return was filed late. *See* NMSA 1978, § 7-1-69.

17 **CONCLUSIONS OF LAW**

18 A. The Taxpayer filed a timely written protest of the Department's assessments and  
19 jurisdiction lies over the parties and the subject matter of this protest.

20 B. The hearing was timely set and held within 90 days of protest. *See* NMSA 1978,  
21 Section 7-1B-8 (2015). *See also* 22.600.3.8 (E) NMAC (2018).

22 C. The Taxpayer's failure to file the returns in 2016 was due to negligence. *See*  
23 3.1.11.10 (2001).

1 D. The Taxpayer's late filing of the returns is subject to penalty. *See* NMSA 1978, § 7-  
2 1-69.

3 E. The Taxpayer timely paid the tax owed for the tax period ending October 31, 2016,  
4 so the tax and interest were not owed. *See id.* *See* NMSA 1978, § 7-1-67.

5 For the foregoing reasons, the Taxpayer's protest **IS DENIED IN PART and GRANTED**  
6 **IN PART. IT IS ORDERED** that Taxpayer is liable for a total of \$1,194.70 penalty for the  
7 September 2016 tax period, \$843.38 penalty for the October 2016 tax period, and \$800.69  
8 penalty for the November 2016 tax period, for a total outstanding liability of \$2,838.77. The tax  
9 and interest for the October 31, 2016 are hereby ABATED.

10 DATED: May 16, 2019.

11 *Dee Dee Hoxie*

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

17 **NOTICE OF RIGHT TO APPEAL**

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

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

5 **CERTIFICATE OF SERVICE**

6 On May 16, 2019, a copy of the foregoing Decision and Order was submitted to the parties  
7 listed below in the following manner:

8 *First Class Mail*

*Interdepartmental Mail*

9 INTENTIONALLY BLANK

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