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**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

4 **IN THE MATTER OF THE PROTEST OF**
5 **EL CASTILLO RETIREMENT RESIDENCES**
6 **TO DENIAL OF PROTEST ISSUED UNDER**
7 **LETTER ID NO. L1051055920**

8 v.

AHO No. 18.08-2080, D&O No. 19-19

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On April 2, 2019, Chief Hearing Officer Brian VanDenzen, Esq., conducted a summary
12 judgment motions hearing in the matter of the tax protest of El Castillo Retirement Residences
13 (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act.

14 At the hearing, Attorney R. Tracy Sprouls appeared representing Taxpayer. Staff Attorney
15 Cordelia Friedman appeared, representing the opposing party in the protest, the Taxation and
16 Revenue Department (Department).

17 On February 1, 2019, Taxpayer filed its Motion for Summary Judgment, along with
18 Taxpayer Motion Exhibits A (Notice of Assessment), B (Department Responses to Taxpayer's
19 Requests for Admissions and Interrogatories), C (Formal Protest), and D (The Department's
20 denial of protest letter). On March 8, 2019, the Department filed its response in opposition to
21 Taxpayer's motion for summary judgment, along with Department Motion Exhibit A (Taxpayer
22 Remedies). On March 15, 2019, the Department filed a notice of typographical error, correcting
23 the identified errors in its March 8, 2019 response. Beyond the motion exhibits attached to the
24 summary judgment pleadings, the record contains only the documents contained in the
25 administrative record and the oral legal arguments of the parties at the motion's hearing.

1 In quick summary, this protest involves the Department's automatic, summary denial of
2 Taxpayer's protest of \$224,867.10 in assessed compensating tax because of Taxpayer's failure to
3 pay \$1,025.20 in unprotested assessed withholding tax at the time of filing the protest. Ultimately,
4 after making findings of fact and discussing the issue in more detail throughout this decision, the
5 hearing officer finds that summary judgment is appropriate because the Department erred in
6 summarily denying Taxpayer's protest in this case. IT IS DECIDED AND ORDERED AS
7 FOLLOWS:

8 FINDINGS OF FACT

9 1. On December 21, 2017, under letter id. no. L0526650160, the Department issued
10 a Notice of Assessment of Taxes and Demand for Payment to Taxpayer for compensating tax
11 and withholding tax for the combined reporting system reporting periods of January 31, 2010
12 through March 31, 2017. [Taxpayer Motion Ex. A].

13 2. Included with the Department's assessment was an explanation of Taxpayer's
14 Remedies. This explanation includes a sentence that a taxpayer "must pay any outstanding
15 portion of the tax, penalty or interest that is not included in the protest." [Department Motion Ex.
16 A; Department's Response to SJ 2, uncontested fact #3].

17 3. On the December 21, 2017 Assessment, the Department listed the assessed
18 liabilities in two rows by the type of tax at issue:

19 a. Audit Compensating Tax: \$166,601.23 in compensating tax, \$33,291.40 in
20 penalty, and \$24,974.47 in interest for a total compensating tax liability of
21 \$224,867.10.

22 b. Audit Withholding Tax: \$800.87 in withholding tax, \$151.11 in penalty, and
23 \$73.22 in interest for a total withholding tax liability of \$1,025.20.

1 [Taxpayer Motion Ex. A].

2 4. On the December 21, 2017 Assessment, the total assessed liability was
3 \$225,892.20. [Taxpayer Motion Ex. A].

4 5. The \$224,867.10 compensating tax liability on the December 21, 2017 assessment
5 constituted 99.5%¹ of the total assessed liability of \$225,892.20. [Taxpayer Motion Ex. A].

6 6. The \$1,025.20 withholding tax liability on the December 21, 2017 assessment
7 constituted 0.5% of the total assessed liability of \$225,892.20. [Taxpayer Motion Ex. A].

8 7. On March 21, 2018, Taxpayer filed formal protest of the Department's
9 assessment, challenging the "entire assessment of \$166,601.23 in compensating tax, \$33,291.40
10 in penalty, and all interest accrued on the tax (\$24,974.47 as of December 21, 2017)." [Taxpayer
11 Motion Ex. C.1].

12 8. Taxpayer's March 21, 2018 protest did not challenge the imposition of
13 withholding tax, penalty, and interest totaling \$1,025.20 under the assessment. [Taxpayer Motion
14 Ex. C.1-4; Taxpayer's MIP of SJ 3, uncontested fact #4].

15 9. Taxpayer did not pay \$1,025.20 in the assessed withholding tax liability by
16 March 21, 2018. [Taxpayer's MIP of SJ 3, uncontested fact #4].

17 10. On April 11, 2018, under letter id. #L1051055920, the Department summarily
18 denied without hearing Taxpayer's protest relating to the \$224,867.10 in compensating tax
19 liability under the assessment because Taxpayer did not pay, enter into a payment plan, or protest
20 the \$1,025.20 in withholding tax liability under the assessment. [Taxpayer Motion Ex. D;
21 Taxpayer's MIP of SJ 3, uncontested fact #5].

¹ All percentages are rounded to the tenth decimal.

1 11. In denying the protest in the April 11, 2018 letter, the Department concluded that
2 by failing to protest, pay, or enter in a payment plan for the \$1,025.20 in withholding tax
3 liability, “the requirements of NMSA 1978 Section 7-1-24(C) (2017) have not been met [and]
4 therefore [Taxpayer’s] protest is denied.” [Taxpayer Motion Ex. D; Taxpayer Motion Ex. B.2;
5 Taxpayer’s MIP of SJ 3, uncontested fact #6].

6 12. The Department admitted that after it summarily denied Taxpayer’s protest of the
7 assessment, it declined to submit a request for hearing on Taxpayer’s protest of the assessment
8 under L0526650160 to the Administrative Hearings Office. [Taxpayer Ex. B.3; Taxpayer’s MIP
9 of SJ 3, uncontested fact #7].

10 13. On July 3, 2018, Taxpayer protested the Department’s denial of the protest under
11 letter L1051055920 of the assessment under L0526650160, seeking affirmative relief in the form
12 of an order directing the Department to forward its substantive protest of compensating tax
13 liability under assessment to the Administrative Hearings Office. [Administrative Record, Protest
14 attached to the Department’s Hearing Request].

15 14. On July 12, 2018, the Department acknowledged receipt of Taxpayer’s protest of
16 the Department’s denial of the protest of the assessment under L0526650160. [Administrative
17 Record, Acknowledgement Letter attached to the Department’s Hearing Request].

18 15. On August 27, 2018, the Department filed a request for hearing on the Taxpayer’s
19 protest of the denial of protest with the Administrative Hearings Office. The Department
20 requested a scheduling hearing. [Administrative Record, the Department’s Hearing Request].

21 16. On August 28, 2018, the Administrative Hearings Office scheduled this matter for
22 a scheduling hearing on September 14, 2018. [Administrative Record].

1 17. A scheduling hearing occurred on September 14, 2018, within 90-days of
2 Taxpayer's protest, where discovery deadlines, motions deadlines, and a hearing date were
3 selected. The parties did not object that the scheduling hearing satisfied the 90-day hearing
4 requirement under NMSA 1978, Section 7-1B-8 (A) (2015) while still allowing meaningful time
5 for completion of the other fair hearing statutory requirements under NMSA 1978, Section 7-1B-
6 6 (D) (2015). [Administrative Record, Scheduling Order and Notice of Administrative Hearing;
7 09-14-18 CD].

8 18. After a joint request to vacate the scheduled merits hearing and a subsequent
9 scheduling hearing where a new scheduling order was issued², on February 1, 2019, Taxpayer
10 timely filed its motion for summary judgment along with its memorandum in support of
11 summary judgment and its motion exhibits A-D. [Administrative Record].

12 19. On March 8, 2019, the Department filed its response in opposition to summary
13 judgment, as corrected by its March 15, 2019 notice of typographical error, along with its motion
14 exhibit A³. [Administrative Record].

15 DISCUSSION

16 This protest involves a question of law: whether it was appropriate for the Department
17 relying on NMSA 1978, Section 7-1-24 (C) (as amended in 2017) to summarily deny without
18 hearing Taxpayer's substantive protest of \$225,892.20 in compensation tax (amounting to 99.5%
19 of the total assessment) because of Taxpayer's failure to protest, pay, or enter a payment

² These procedural matters are not detailed further, as they are not particularly pertinent to resolving the merits of this protest; the Administrative Record speaks for itself as to these other pleadings and procedural actions.

³ Both parties submitted Motion's Exhibits A. Under Administrative Hearings Office regulations and under the Scheduling Order, taxpayers' exhibits are to be numbered and Department exhibits are to be lettered. However, since the record in this case is fairly simple, the risk of confusion is limited and the hearing officer decided not to change the identification of any of the parties' exhibits.

1 agreement on the remaining \$1,025.20 of assessed withholding tax (amounting to 0.5% of the
2 total assessed liability). Taxpayer moved for summary judgment, asking that the Administrative
3 Hearings Office find as a matter of law that the Department has not authority under Section 7-1-
4 24 (C) or otherwise to deny Taxpayer's protest without hearing and asking that the Department
5 be ordered to forward the substantive, underlying protest to the Administrative Hearings Office
6 for a protest hearing. The Department opposed summary judgment, arguing that summary
7 judgment was inappropriate because it asserted there was a dispute of fact as to whether there
8 was one or two assessments at issue and because it argued that its summary denial was required
9 because of Taxpayer's non-compliance with the mandatory language under Section 7-1-24 (C).
10 Taxpayer counters that Section 7-1-24 (C) does not specify a remedy if a taxpayer fails to pay or
11 enter a payment plan on the unprotested amounts under the assessment and that the Department
12 seeks to add additional words into that section that are not present in order to support its decision
13 to summarily deny Taxpayer's protest. Taxpayer further points to Department Regulation
14 3.1.7.10 (B) NMAC as the appropriate remedy in this case. After reviewing the law, the hearing
15 officer finds there are no material disputed facts and that Taxpayer is entitled to prevail under the
16 law.

17 **Standard of Review upon Summary Judgment.**

18 Summary judgment is appropriate when there is no genuine dispute as to any material
19 fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris,*
20 *Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713. In controversies involving a question of law, or
21 application of law where there are no disputed facts, summary judgment is appropriate. *See*
22 *Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664. If the movant for summary judgment
23 makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts

1 to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth*
2 *v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331.

3 Here, the Department asserted in its written response in opposition to summary judgment
4 and at the motion hearing that there is a dispute of material fact. According to the Department,
5 that material fact is whether the Department issued one assessment identifying two programs or
6 whether each tax program listed on the document constituted a separate assessment, resulting in
7 the issuance of two assessments. The hearing officer is not convinced by the Department's
8 argument that there is a genuine dispute of material fact on this point. Instead, the hearing officer
9 finds that whether there was one assessment or two assessments is a question of
10 how the law applies to the undisputed factual notice of assessment issued in this case. That is,
11 there is no genuine dispute that the notice of assessment was one document that listed two
12 separate tax program liabilities under the combined return system, but the legal question is
13 whether that undisputed factual document constituted one assessment or two. There is no
14 additional evidence from a fact-based witness that could meaningfully change or contest what is
15 contained on face of the notice of assessment because the question of whether the notice of
16 assessment constituted one or two assessments is a question of law not fact. Summary judgment
17 is appropriate to resolve a question of legal effect of an undisputed fact. *See Koenig*, 1986-
18 NMSC-066, ¶ 10 ("If the facts are not in dispute, but only the legal effect of the facts is
19 presented for determination, then summary judgment may properly be granted").

20 The hearing officer finds that there was one Notice of Assessment issued in the
21 underlying case, listing liabilities in two tax programs (compensating tax and withholding tax)
22 that are part of the combined reporting system (which also includes a third tax program, the gross
23 receipts tax, that is not at issue in this protest) the Department employs. Even if there was some

1 genuine dispute about whether there were one or two assessments in the underlying substantive
2 matter, such dispute is immaterial to resolution of the dispositive legal issue in dispute: the
3 proper statutory construction of Section 7-1-24 (C). This case is ripe for decision upon summary
4 judgment.

5 **Principles of Statutory Construction.**

6 As will be discussed in more detail throughout this discussion, this case involves
7 competing interpretations of Section 7-1-24 (C). Questions of statutory construction begin with
8 the plain meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12. In *Wood*, ¶12
9 (internal quotations and citations omitted), the Court of Appeals stated “that the guiding principle
10 in statutory construction requires that we look to the wording of the statute and attempt to apply
11 the plain meaning rule, recognizing that when a statute contains language which is clear and
12 unambiguous, we must give effect to that language and refrain from further statutory
13 interpretation.” A statutory construction analysis begins by examining the words chosen by the
14 Legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206
15 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face,
16 especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-
17 NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

18 It is a canon of statutory construction in New Mexico to adhere to the plain wording of a
19 statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions.
20 *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28,
21 125 N.M. 401. “Tax statutes, like any other statutes, are to be interpreted in accordance with the
22 legislative intent and in a manner that will not render the statutes' application absurd,
23 unreasonable, or unjust.” *City of Eunice v. State Taxation & Revenue Dep't*, 2014-NMCA-085,

1 ¶8 (internal citations and quotations emitted). If the plain language interpretation would lead to
2 an absurd result not in accord with the legislative intent and purpose it is necessary to look
3 beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-
4 NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read
5 in harmony with the provisions of the remaining statute or statutes dealing with the same subject
6 matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14. *See also Hayes v. Hagemeyer*,
7 1963-NMSC-095, ¶9, 75 N.M. 70 (“All legislation is to be construed in connection with the general
8 body of law.”). *See also N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-
9 NMSC-053, ¶ 20, 142 N.M. 533 (Legislature presumed to be aware of knowledge of relevant
10 statutes and the common law and thus statutes must be read in harmony with other statutes *in*
11 *pari materia*).

12 As the Court of Appeals recently reiterated,

13 [i]n construing a statute, we observe the general principles that the plain
14 language of a statute is the primary indicator of legislative intent and that
15 when several sections of a statute are involved, they must be read together
16 so that all parts are given effect.

17 *Helmerich Payne Int'l Drilling Co. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-36478,
18 2019-NMCA-**, ¶4, 2019 N.M. App. LEXIS 84, at *4 (Ct. App. June 27, 2019) (internal
19 citations omitted).

20 **The Right to Protest under the Tax Administration Act.**

21 The Tax Administration Act provides a taxpayer an opportunity to protest an assessment
22 issued by the Department. Specifically, under NMSA 1978, Section 7-1-24 (A) (as amended
23 through 2017), a taxpayer may dispute the assessment of any amount of tax. This ability to
24 protest is also enshrined in the New Mexico Taxpayer Bill of Rights contained in NMSA 1978,
25 Section 7-1-4.2 (G) (2017): “the right to seek review, through formal or informal proceedings, of

1 any findings or adverse decisions relating to determinations during audit or protest procedures in
2 accordance with the provisions of Section 7-1-24 NMSA 1978 and the Administrative Hearings
3 Office Act.”

4 Of course, this right to protest is not unlimited, as a taxpayer must comply with the
5 timelines and the substantive content requirements specified in Section 7-1-24. Case law
6 addressing the adequacy or deficiency of a tax protest looks primarily to whether the protest was
7 timely filed and whether the protest met the basic substantive content requirements of the protest
8 letter under the controlling statute. These two requirements, timeliness and substantive content of
9 the protest, have been found to be jurisdictional requirements necessary for a valid protest both
10 in decisions and orders of this agency⁴ and in numerous appellate cases.

11 In *Associated Petroleum Transp. v. Shepard*, 1949-NMSC-002, ¶6 & ¶11, 53 N.M. 52,
12 the New Mexico Supreme Court noted that a taxpayer’s inability to timely file a written protest
13 in accord with statutory in-writing and timeliness requirements deprived the State Tax
14 Commission of jurisdiction over the protest. More recently, the New Mexico Court of Appeals
15 ordered the dismissal of a property tax taxpayer’s complaints for refund when such complaints
16 were not timely filed in compliance with the Legislature’s statutorily imposed deadlines. *See*
17 *Chan v. Montoya*, 2011-NMCA-72, 150 N.M. 44. In *Lopez v. New Mexico Dep’t of Taxation &*
18 *Revenue*, 1997-NMCA-115, 949 P.2d 284, the New Mexico Court of Appeals carefully reviewed
19 the only letter sent within the then applicable 30-day protest deadline to see if it met the
20 minimum substance requirements to constitute a protest. The Court of Appeals in *Lopez* noted

⁴ See *In the Matter of the Protest of Reggie Olguin*, Administrative Hearings Office Amended Decision and Order No. 16-19 (June 16, 2016; non-precedential); See also *In the Matter of the Protest of Robert Hooper*, Administrative Hearings Office Decision and Order No. 16-20 (May 25, 2016; non-precedential); See also *In the Matter of the Protest of Michael Corwin*, Administrative Hearings Office Case Number 18.11-287A, Decision and Order No. 19-14 (May 24, 2019; non-precedential).

1 that Section 7-1-24 (at that time) imposed a 30-day time restriction on a protest. *See id.*, ¶6. The
2 Court of Appeals found that the only letter the *Lopez* taxpayer submitted by the statutory
3 deadline failed to identify the tax protested, the grounds for protest, and the relief requested, all
4 required substantive elements of a protest. *See id.* at ¶9. The Court of Appeals in *Lopez* therefore
5 affirmed that hearing officer’s conclusion that the *Lopez* taxpayer did not timely protest the
6 Department’s action. *See id.* The focus of the *Lopez* decision was on the timeliness of the protest
7 and whether the form of the letter itself contained the minimal substantive requirements
8 necessary to constitute a protest. In summary, this case law makes clear that failure to timely file
9 a protest containing the minimum substantive requirements deprives the Department of
10 jurisdiction to consider the matter. *See also* Regulation 3.1.7.11 NMAC (untimely protest
11 deprives Department of jurisdiction).

12 In this case, it is important to note that Taxpayer met the timeliness of protest
13 requirement under Section 7-1-24 (D) that this office and the courts have recognized as
14 jurisdictional. Taxpayer also met the substantive content requirements of a protest outlined under
15 NMSA 1978, Section 7-1-24 (B) (2017): that is, the written protest was filed, identified the
16 taxpayer and tax program at issue, and contained a statement of the grounds of the protest. As
17 such, Taxpayer’s protest met the Department’s regulatory requirement for an “effective” protest:
18 “To be effective, a protest must be in writing, must be filed with the secretary within the time
19 required and must [identify] [*sic*] the taxpayer⁵, identify the tax or taxes involved, state the
20 grounds for the taxpayer's protest and state the affirmative relief requested.” Regulation 3.1.7.10
21 (A) NMAC. In other words, the substantive content items that this office and the appellate
22 courts have looked at as necessary in previous decisions have been satisfied here. And by the

⁵ Regulation 3.1.7.10 (A) NMAC appears to be missing the word “identify,” which is the statutory requirement.

1 Department's own analysis, the document that Taxpayer timely filed in this case was an effective
2 protest. *See* Regulation 3.1.7.10 (A) NMAC.

3 **Construction of Section 7-1-24 (C) and its Application to this Protest.**

4 The issue in this case solely relates to Taxpayer's failure to pay the unprotected portion of
5 the protested assessment under Section 7-1-24 (C). Since the 2017 amendments, no cases of this
6 office or of the appellate courts have addressed this issue. Section 7-1-24 (C) reads

7 [i]n the case of an assessment of tax by the department, a protest may be
8 filed with or without payment of the assessed amount; provided that, if
9 only a portion of the assessment is in dispute, any unprotected amount of
10 tax, interest, or penalty shall be paid, or if applicable, an installment
11 agreement pursuant to Section 7-1-21 NMSA 1978 shall be entered into
12 for the unprotected amounts, on or before the due date of the protest.

13 Section 7-1-24 (C) begins by stating that a taxpayer need not pay the assessment in order to
14 protest. That is, a taxpayer need not first pay an assessment and seek a refund before challenging
15 the assessment. After the semi-colon, Section 7-1-24 (C) then continues to establish a mandatory
16 requirement that a taxpayer pay or enter a payment plan for any unprotected portions of the
17 assessment. As the Department correctly argues, the use of word "shall" expresses a duty,
18 obligation, requirement, or condition precedent. *See* NMSA 1978, § 12-2A-4 (1997). *See also*
19 *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use
20 of the word "shall" in a statute indicates provision is mandatory absent clear indication to the
21 contrary). However, unlike the Department's argument, the identification of the mandatory shall
22 language in the portion after the semi-colon does not end analysis because of some potential
23 conflicts both within Section 7-1-24 (C) and other tax statutes and regulations. *See N.M. Indus.*
24 *Energy Consumers*, 2007-NMSC-053, ¶ 20.

25 The two portions of Section 7-1-24 (C) separated by a semicolon, as least in so far as the
26 Department argues that failure to comply with the mandatory payment requirement of the second

1 portion requires the remedy of summary denial of the protest, are unclear, ambiguous and
2 potentially in conflict with each other, as the first portion states that a taxpayer may protest
3 without payment of the assessment while the second portion creates a mandatory payment
4 requirement of the uncontested portion of the assessment. The Department's proposed
5 interpretation is also potentially inconsistent with Section 7-1-4.2 (G)'s guarantee of a right to
6 formal review under the Administrative Hearings Office Act. There is also a potential conflict
7 with NMSA 1978, Section 7-1B-8 (2015, before 2019 amendment) of the Administrative
8 Hearings Office Act, which requires that when the Department finds a protest deficient that the
9 Department inform a taxpayer of the deficiency with the filed protest and give that taxpayer
10 opportunity to correct the deficiency, which did not occur here before the Department simply
11 denied the protest outright. Finally, there is also a potential conflict with one of the Department's
12 own long-standing regulation, Regulation 3.1.7.10 (B) (1/15/01). Because a literal reading of the
13 statute can be beguilingly simple, and because of the potential statutory and regulatory conflicts
14 identified in this discussion section, further review of the statutory and regulatory provisions is
15 necessary in order to effectuate the Legislature's intent in Section 7-1-24 (B). *See State ex rel.*
16 *Helman*, 1994-NMSC-023, ¶23, 117 N.M. 346 (the plain meaning rule requires some caution
17 because of its beguiling simplicity, particularly when there are potential contradictory statutory
18 provisions).

19 As Taxpayer argued, Section 7-1-24 (C) does not specify a remedy for non-compliance
20 with that clause. Nor, as Taxpayer argues, does Section 7-1-24 (C) include any language
21 requiring the Department to summarily deny the protest for a violation of that section as
22 happened here. At least in one case in the tax jurisprudence, when a statute is silent as to remedy for
23 failure to comply with a mandatory clause, further analysis beyond the plain reading of the

1 mandatory language in the statute was necessary in order to determine an appropriate remedy for the
2 violation. *Cf. Ranchers HNG Joint Project Joint v. Revenue Div., N.M. Taxation & Revenue Dep't*
3 *(In re Ranchers-Tufco Limestone Project Joint Venture)*, 1983-NMCA-126, ¶ 13, 100 N.M. 632,
4 674 P.2d 522.

5 The only remedy listed under Section 7-1-24 for non-compliance is identified under
6 subparagraph E. *See* §7-1-24 (E). Under Section 7-1-24 (E), when a protest is *not timely filed*,
7 the assessed liability becomes due and owing, the taxpayer waives the right to challenge that
8 amount except in the form of payment and claim for refund, and the Department may proceed to
9 collection. By its limiting language to instances where the protest is not timely filed, Section 7-1-
10 24 (E) does not address the specific situation under Section 7-1-24 (C) where a taxpayer fails to
11 pay the unprotested portion of an assessment. Section 7-1-24 (E)'s waiver of the right to
12 challenge the assessment remedy is expressly limited by the Legislature to an untimely protest.
13 In light of the limitation on Subparagraph E's waiver of protest remedy to untimely protests, and
14 in reading all subsections of Section 7-1-24 in harmony, the Legislature did not intend the waiver
15 of the right to protest to extend to non-compliance with Section 7-1-24 (C)'s unprotested portion
16 of the assessment payment requirement. So what is the appropriate remedy when a taxpayer fails
17 to pay the unprotested portion of an assessment?

18 The Department itself has historically provided a remedy for the exact situation addressed
19 by Section 7-1-24 (C). Under Department Regulation 3.1.7.10 (B) NMAC (1/15/01),

20 [i]f a notice of assessment of taxes includes taxes due under more than
21 one tax program, taxes assessed in that portion of the assessment not
22 being disputed by a taxpayer are due and payable. The secretary may
23 proceed to enforce collection of any tax which the taxpayer has not
24 protested and which is otherwise delinquent within the meaning of
25 Section 7-1-16 NMSA 1978.

1 Department regulations are presumed to be a proper interpretation of law. *See* NMSA 1978, § 9-
2 11-6.2 (G) (2015); *See also Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue,*
3 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed
4 proper and are to be given substantial weight). Rather than the summary denial action the
5 Department took in this case, according to the Department's own regulation, the remedy for
6 failing to pay the unprotested portion of an assessment is for the Department to proceed to
7 collection action against that unprotested and unpaid portion of the assessment.

8 Department Regulation 3.1.7.10 (C) NMAC (1/15/01) also lists another general remedy
9 for failure to comply with Section 7-1-24: "Any purported protest which does not comply with
10 the requirements of Section 7-1-24 NMSA 1978 will not be accepted as a 'protest' within the
11 meaning of Section 7-1-24 NMSA 1978. The secretary may require the taxpayer to state with
12 greater particularity the nature and basis of a protest and the relief sought." The first sentence of
13 Regulation 3.1.7.10 (C) NMAC obviously provides the Department some support for its
14 automatic denial of Taxpayer's protest in this matter because of Taxpayer's failure to timely pay
15 the unprotested portions of the assessment. However, because there is a more specific regulatory
16 provision under Regulation 3.1.7.10 (B) NMAC that specifically addresses what happens when a
17 taxpayer fails to pay an unprotested portion of the protested assessment, the more specific
18 remedy under Regulation 3.1.7.10 (B) NMAC applies rather than the more general remedy under
19 Regulation 3.1.7.10 (C) NMAC. *See Hi-Country Buick GMC, Inc. v. Taxation & Revenue Dep't*
20 *of N.M.*, 2016-NMCA-027, ¶ 21, 367 P.3d 862 (under principles of statutory construction, as
21 applied in the tax context, a more specific provision of law controls over a more general
22 provision of law when the laws address the same subject matter). *See also* NMSA 1978, §12-2A-
23 10 (B) (generally recognizing the general-specific construction concept for conflicting

1 regulations). *See also El Paso Elec. Co. v. N.M. PSC*, 1985-NMSC-085, ¶ 10, 103 N.M. 300, 706
2 P.2d 511 (Implying that the accepted rules of statutory construction apply to constructing a
3 regulation: “It is not necessary that a regulation be drafted with absolute precision, only that it
4 can be construed using known, accepted rules of construction.”).

5 Returning to Regulation 3.1.7.10 (B) NMAC (1/15/01), the Department argues that its
6 own regulation should be disregarded as a tool of interpretation of the 2017 amendments to
7 Section 7-1-24 (C) because Regulation 3.1.7.10 (B) NMAC (1/15/01) was promulgated some 16-
8 years before the statutory amendment. However, this argument to disregard its own regulation is
9 not persuasive for a few reasons. First, the Department had express authority to promulgate,
10 repeal, or change any rules relating to the Tax Administration Act including Regulation 3.1.7.10
11 (B) NMAC (1/15/01). Despite its own authority to act, the Department even to this day has not in
12 any manner repealed, revised, or otherwise superseded Regulation 3.1.7.10 (B) NMAC in light
13 of the 2017 amendments to Section 7-1-24. Because the Department took no action on the
14 regulation despite having the authority to do so, Regulation 3.1.7.10 (B) NMAC remains valid
15 legal authority as to the remedy for failure to pay an unprotested proportion of an assessment.

16 Secondly, part of the purpose of the Tax Administration Act is to ensure fair, efficient,
17 evenhanded, and effective administration of the state’s tax programs. That is, the Tax
18 Administration Act establishes rules that both sides in a tax dispute can rely on: as part of the
19 bargain of granting the Department broad powers to investigate and collect taxes (including a
20 presumption of correctness on assessments and broad collection instruments), the Tax
21 Administration Act also grants taxpayers certain fair process protections like the Taxpayer Bill
22 of Rights and some limited reliance interest on rulings and published regulations, see for

1 example statutory estoppel under NMSA 1978, Section 7-1-60 (1993)⁶. Allowing the
2 Department to disregard its own valid regulation when it has taken no affirmative action to
3 repeal or replace it undermines the purpose of the Tax Administration Act of even-handed, fair,
4 and efficient administration of the state's tax laws and undermines taxpayers' ability to rely on
5 the Department's published rules.

6 The third and most important reason why the Department's invitation to disregard its own
7 regulation is unpersuasive is because the Legislature presumably was aware of the Department's
8 long-standing, 16-year administrative construction of the protest provision as it relates to the
9 payment of an unchallenged portion of an assessment when it passed the 2017 amendments to
10 Section 7-1-24. *See N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20 (Legislature
11 presumed to be aware of the law in a subject area). *See also High Ridge Hinkle Joint Venture v.*
12 *City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (in matters of statutory
13 construction, the courts give weight to long standing regulations promulgated by the agency
14 charged with administering statutes). Perhaps this knowledge of the remedy under the regulation
15 is why the Legislature choose not to express a specific remedy for failure to pay the unprotested
16 portions of an assessment in the statutory language of Section 7-1-24 (C). Moreover, an
17 administrative construction of a similar statute or rule or a previous rule on the same subject
18 matter may provide guidance to statutory interpretation. *See NMSA 1978, § 12-2A-20 (B)*
19 *(1997)*. Therefore, the hearing officer declines to ignore Regulation 3.1.7.10 (B) NMAC
20 (1/15/01)'s established remedy for failure to pay the unprotested portion of an assessment in the
21 analysis of the construction and application of Section 7-1-24 (C).

⁶ The hearing officer only cites statutory estoppel as an example that the Tax Administration Act does contain some principles that taxpayers should and ought to be able to rely on formal rulings and regulations of the Department. Other than as an example of this broader principle, the hearing officer need not and does not rely on statutory estoppel in making the ultimate ruling in this case.

1 The specified remedy under Regulation 3.1.7.10 (B) NMAC (1/15/01) of proceeding to
2 collection on the unprotested amount is far different than summarily denying the protest as the
3 Department advocates here is required under its interpretation of Section 7-1-24 (C). The
4 Department's proposed construction seeks to narrowly interpret the second portion of Section 7-
5 1-24 (C) in a manner that would allow it to summarily deny a protest without hearing despite the
6 first portion of Section 7-1-24 (C) indicating that a taxpayer can protest without paying the
7 assessment, despite the established regulatory remedy for failure to pay the unprotested portion
8 of the assessment of proceeding to collection under 3.1.7.10 (B) NMAC, and despite the right of
9 review enshrined under Section 7-1-4.2 (G) of the Taxpayer Bill of Rights. This Department
10 approach and interpretation of statute is contrary to the principles of statutory construction
11 discussed throughout this decision. In fact, given the competing statutory and regulatory
12 provisions, interpreting the statute in a manner that the Department advocates here would render
13 the other statutory and regulatory provisions discussed inoperable and lead to an absurd result in
14 this case of denying the Taxpayer an opportunity to contest 99.5% (\$225,892.20) of the assessed
15 amount because Taxpayer failed to pay the 0.5% (\$1,025.20) of the unprotested amount.

16 Section 7-1-24 (C) must be read in harmony with other statutory provisions under the Tax
17 Administration Act, including Section 7-1-4.2 (G) of the Taxpayer Bill of Rights. *See N.M.*
18 *Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20. *See also Peabody Coalsales Co. v. N.M.*
19 *Taxation & Revenue Dep't*, No. A-1-CA-36632, 2019-NMCA- ***, ¶15, 2019 N.M. App.
20 Unpub. LEXIS 230, at *9 (Ct. App. June 12, 2019) (non-precedential but nevertheless applying
21 the harmonization statutory construction principle discussed in *N.M. Indus. Energy Consumers* to
22 a tax matter). Both provisions addressing similar subject matters under the Tax Administration
23 Act (in this case Section 7-1-24 and Section 7-1-4.2) must be given effect and must not be

1 interpreted in a manner that would result in unreasonable, absurd results. The construction that
2 harmonizes these two statutory provisions as well as resolves the apparent tension between the
3 first and second portions of Section 7-1-24 (C) in a manner that renders all provisions effective is
4 to recognize that the Legislature was aware of the longstanding administrative remedy
5 established under Regulation 3.1.7.10 (B) NMAC (1/15/01) and remained silent in the amended
6 statute as to the remedy because it intended that longstanding administrative remedy to continue
7 to apply in instances where a taxpayer fails to pay the unprotested portions of the assessment.
8 That is, the Legislature continued to give taxpayers the ability to protest without first paying the
9 assessment, as indicated by the first portion of Section 7-1-24 (C) and the Taxpayer Bill of
10 Rights under Section 7-1-4.2 (G), but in the second portion also granted the Department the
11 immediate statutory authority to proceed with collection of the unprotested portion of the
12 assessment, consistent with the administrative practice contained in Regulation 3.1.7.10 (B)
13 NMAC (1/15/01), rather than having to wait until the end of the hearing process to begin
14 collection of the uncontested amounts.

15 Although not critical to this ruling, it is worth parenthetically noting that the construction
16 adopted here has some similarity with an analogous approach where appellate courts have
17 favored a more liberal construction of notices of appeal provisions that are mandatory rather than
18 the treatment of discretionary appeal provisions. *Cf. Wakeland v. N.M. Dep't of Workforce Sols.*,
19 2012-NMCA-021, ¶ 15, 274 P.3d 766. The Taxpayer Bills of Rights gives taxpayers a right to
20 review (which under the Tax Administration Act is a protest), and conflicting and ambiguous
21 statutes under the Tax Administration Act ought to be construed in a manner consistent with that
22 general right, especially where that contested statute is silent as to a remedy and the Department
23 has a specific regulation addressing a remedy for the payment deficiency short of automatic

1 denial of a taxpayer's right to protest. This decision should not be overread beyond the fact
2 pattern of failing to pay an unprotested portion of an assessment as required by Section 7-1-24
3 (C): as previous decisions and orders and case law make clear, untimely protests or those protests
4 lacking the minimum substantive protests lack jurisdiction to be heard. For the foregoing
5 reasons, Taxpayer's motion for summary judgment on the protest is well-taken and **IS**
6 **GRANTED.**

7 CONCLUSIONS OF LAW

8 A. Taxpayer filed a timely, written protest of the Department's denial of the underlying
9 substantive protest and the subject matter of this protest.

10 B. The hearing was timely set and held within 90-days of protest under NMSA 1978,
11 Section 7-1B-8 (2015).

12 C. There are no genuine, material disputes of fact in this case, and therefore
13 summary judgment is appropriate in this matter. *See Koenig*, 1986-NMSC-066, ¶ 10 ("If the
14 facts are not in dispute, but only the legal effect of the facts is presented for determination, then
15 summary judgment may properly be granted").

16 D. The underlying substantive protest that was denied involved a single notice of
17 assessment listing liabilities from two of the three tax programs included in the combined reporting
18 system.

19 E. Under the Tax Administration Act, a taxpayer may dispute the Department's
20 assessment of any amount of tax by filing a protest in compliance with the statutory requirements
21 of NMSA 1978, Section 7-1-24.

1 F. A taxpayer's ability to protest an assessment, including seeking review formally
2 or informally through hearing before the Administrative Hearings Office, is enshrined in the
3 Taxpayer Bill of Rights. *See* NMSA 1978, § 7-1-4.2 (G) (2017).

4 G. NMSA 1978, Section 7-1-24 (C) (2017) does not require a taxpayer to pay the
5 assessed amount in order to protest the assessment, but it does impose a mandatory requirement that
6 a taxpayer pay or enter into a payment plan on any unprotested portion of the assessment by the
7 protest deadline. *See Marbob Energy Corp.*, 2009-NMSC-013, ¶22.

8 H. The Department's proposed interpretation of Section 7-1-24 (C) (2017) is
9 potentially internally inconsistent and in conflict with Section 7-1-24 (E) (limiting waiver of right to
10 protest to an untimely filing), Section 7-1-4.2 (G), Section 7-1B-8 (A), and its own regulations
11 3.1.7.10 (B) NMAC and 3.1.7.10 (A) NMAC, contrary to the requirement that statutes are to be
12 construed in manner to give other provisions both within the same statute and other statutory
13 provisions within the same body of law effect. *See Regents of the Univ. of New Mexico*, 1998-
14 NMSC-20, ¶28, 125 N.M. 401. *See also Trujillo*, 2009-NMSC-012, ¶22. *See also Hayes*, 1963-
15 NMSC-095, ¶9. *See also N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20.

16 I. A plain language reading of the mandatory "shall" language in Section 7-1-24 (C)
17 requires some caution because its beguiling simplicity is insufficient to resolve the unclear,
18 ambiguous, and conflicting language within that provision and in a manner consistent with related
19 statutory and regulatory provisions. *See State ex rel. Helman*, 1994-NMSC-023, ¶23.

20 J. Section 7-1-24 (C) does not expressly provide a remedy when a taxpayer fails to pay
21 or enter into a payment plan on any unprotested portion of the assessment by the protest deadline.

22 K. The remedy of waiver of right to protest expressed under Section 7-1-24 (E) is
23 limited to instances of untimely filing, which is not the circumstance identified under Section 7-1-24

1 (C) and thus reading the subsections in harmony the waiver of the right to protest is not a potential
2 remedy for a violation of Section 7-1-24 (C).

3 L. Regulation 3.1.7.10 (B) NMAC (1/15/01) specifies a remedy when a taxpayer
4 fails to pay the unprotested portion of assessment: the Department proceed to collection of that
5 unpaid, unprotested portion of the assessment.

6 M. Regulation 3.1.7.10 (B) NMAC (1/15/01) is a presumed proper interpretation of
7 statute. *See* NMSA 1978, § 9-11-6.2 (G) (2015); *See also Chevron U.S.A., Inc.*, 2006-NMCA-50,
8 ¶16. And since the Department has not subsequently repealed, replaced, or otherwise modified
9 its, Regulation 3.1.7.10 (B) NMAC remains a valid regulation and Department interpretation of
10 that section.

11 N. Since Regulation 3.1.7.10 (B) NMAC (1/15/01) was promulgated in its current
12 version in early 2001, some 16-years before the 2017, it is presumed that the Legislature was
13 aware of the longstanding administrative remedy for a taxpayer's failure to pay the unprotested
14 portion of a protested assessment when it enacted the 2017 amendment to Section 7-1-24, an
15 amendment that did not specify a remedy in the event a taxpayer failed to pay the unprotested
16 portion of an assessment. *See N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20
17 (Legislature presumed to be aware of the law in a subject area). *See also High Ridge Hinkle Joint*
18 *Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (in matters
19 of statutory construction, the courts give weight to long standing regulations promulgated by the
20 agency charged with administering statutes).

21 O. Since Regulation 3.1.7.10 (B) NMAC (1/15/01) addresses the specific situation
22 where a taxpayer fails to pay the unprotested portions of an assessment, the remedy specific
23 under Regulation 3.1.7.10 (B) NMAC (1/15/01) applies to such a situation described in Section

1 7-1-24 (C) over the more general remedy contained in Regulation 3.1.7.10 (C) NMAC (1/15/01).
2 *See Hi-Country Buick GMC*, 2016-NMCA-027, ¶ 21 (under principles of statutory construction,
3 as applied in the tax context, a more specific provision of law controls over a more general
4 provision of law when the laws address the same subject matter). *See also* NMSA 1978, §12-2A-
5 10 (B) (generally recognizing the general-specific construction concept for conflicting
6 regulations). *See also El Paso Elec. Co.* 1985-NMSC-085, ¶ 10, 103 N.M. 300 (Implying that the
7 accepted rules of statutory construction apply to constructing a regulation: “It is not necessary
8 that a regulation be drafted with absolute precision, only that it can be construed using known,
9 accepted rules of construction.”).

10 P. In order to effectuate the Legislature’s intent and make Section 7-1-24 (C)
11 consistent with other statutory and regulatory provisions related to protest under the Tax
12 Administration Act, Section 7-1-24 (C) must be read in harmony with other statutory provisions
13 under the Tax Administration Act, including Section 7-1-24 (E), Section 7-1-4.2 (G) of the
14 Taxpayer Bill of Rights and 7-1B-8 (A) of the Administrative Hearings Office Act. *See N.M.*
15 *Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20. *See also Peabody Coalsales Co. v. N.M.*
16 *Taxation & Revenue Dep’t*, No. A-1-CA-36632, 2019-NMCA- ***, ¶15, 2019 N.M. App.
17 Unpub. LEXIS 230, at *9 (Ct. App. June 12, 2019) (non-precedential but nevertheless applying
18 the harmonization statutory construction principle discussed in *N.M. Indus. Energy Consumers* to
19 a tax matter).

20 Q. The construction that harmonizes Section 7-1-24 (C) with other provisions of
21 relevant law identified above is that in the 2017 amendment to Section 7-1-24 (C) the Legislature
22 continued to give taxpayers the ability to protest without first paying the assessment, as indicated
23 by the first portion of Section 7-1-24 (C) but in the second portion also granted the Department

1 the statutory authority to proceed with immediate collection of the unprotested portion of the
2 assessment, consistent with the longstanding administrative practice contained in Regulation
3 3.1.7.10 (B) NMAC (1/15/01), rather than having to wait until the end of the hearing process to
4 collect and recoup the unprotested portion of the assessment.

5 For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that
6 the Department accept Taxpayer's underlying substantive protest and promptly submit a request for
7 hearing on that matter to the Administrative Hearings Office.

8 DATED: July 26, 2019.



9
10 Brian VanDenzen
11 Chief Hearing Officer
12 Administrative Hearings Office
13 P.O. Box 6400
14 Santa Fe, NM 87502

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 July 26, 2019, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16 *First Class Mail*

Interdepartmental Mail

17 INTENTIONALLY BLANK

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