

TITLE 3 TAXATION
CHAPTER 1 TAX ADMINISTRATION
PART 7 PROTEST

3.1.7.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe, NM 87504-0630
[10/31/96; 3.1.7.1 NMAC - Rn, 3 NMAC 1.7.1, 1/15/01]

3.1.7.2 SCOPE: This part applies to all taxpayers, their agents and representatives and all persons required to submit a return or information to the taxation and revenue department under any tax, tax act or other law administered and enforced pursuant to the Tax Administration Act.
[10/31/96; 3.1.7.2 NMAC - Rn, 3 NMAC 1.7.2, 1/15/01]

3.1.7.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[10/31/96; 3.1.7.3 NMAC - Rn, 3 NMAC 1.7.3, 1/15/01]

3.1.7.4 DURATION: Permanent.
[10/31/96; 3.1.7.4 NMAC - Rn, 3 NMAC 1.7.4, 1/15/01]

3.1.7.5 EFFECTIVE DATE: 10/31/96, unless a later date is cited at the end of a section in which case the later date is the effective date.
[10/31/96; 3.1.7.5 NMAC - Rn & A, 3 NMAC 1.7.5, 1/15/01]

3.1.7.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Tax Administration Act.
[10/31/96; 3.1.7.6 NMAC - Rn, 3 NMAC 1.7.6, 1/15/01]

3.1.7.7 DEFINITIONS: [Reserved]
[10/31/96; 3.1.7.7 NMAC - Rn, 3 NMAC 1.7.7, 1/15/01]

3.1.7.8 TAXPAYER ELECTION OF REMEDIES:

A. The election provided for in Section 7-1-23 NMSA 1978 is made when a taxpayer files a timely protest to an assessment or makes a timely claim for refund with the department. The taxpayer may not withdraw a protest, pay the assessment and then claim a refund without permission from the secretary or delegate.

B. There is no provision in the Tax Administration Act for a taxpayer to "Pay Under Protest".

C. Example 1: A taxpayer files a timely protest to a notice of assessment of taxes. Prior to the time for the administrative hearing under Section 7-1-24 NMSA 1978, the taxpayer realizes that, if the taxpayer had paid the assessment and claimed a refund, under Section 7-1-26 NMSA 1978 after the denial by the secretary of the claim for refund the taxpayer would be able to commence a civil action in the district court instead of having an administrative hearing on the protest. The taxpayer therefore commences the civil action and asks that the administrative proceedings be discontinued. The secretary will move to dismiss the action brought in district court on the grounds that the taxpayer has made an election to pursue the administrative remedy by filing the protest and is, therefore, precluded by Section 7-1-23 NMSA 1978 from pursuing a district court action.

D. Example 2: A taxpayer writes a letter to the department objecting to paying an assessment. The taxpayer does not state in the letter the nature of the complaint or the affirmative relief requested, nor is the complaint received within 30 days of the date of the assessment by the secretary. The taxpayer has not filed a protest as provided by Section 7-1-24 NMSA 1978. The taxpayer still has the right, however, to pay the assessment and claim a refund. Any one of the three defects noted above in the taxpayer's written objection would disqualify the document from being a valid protest.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.7.8 NMAC - Rn & A, 3 NMAC 1.7.8, 1/15/01]

3.1.7.9 ACCEPTANCE OF PAYMENT OF ASSESSMENT AFTER PROTEST: Tender by a taxpayer and acceptance by the secretary or secretary's delegate of payment of a protested assessment prior to resolution of the protest constitutes an agreement:

A. by the secretary to waive the taxpayer's election of remedies under Section 7-1-23 NMSA 1978 upon a resolution of the protest favorably to the taxpayer so as to permit the taxpayer to file a claim for refund for the portion of the protested assessment resolved in favor of the taxpayer; and

B. by the taxpayer to waive the accrual of interest on any refund arising from the portion of the protested assessment resolved in favor of the taxpayer.

[11/5/85, 8/15/90, 11/17/95, 10/31/96; 3.1.7.9 NMAC - Rn & A, 3 NMAC 1.7.9, 1/15/01]

3.1.7.10 DEFINITION OF "PROTEST" - PAYMENT OF UNPROTESTED AMOUNTS REQUIRED:

A. To be effective, a protest must be in writing, must be filed with the secretary within the time required and must the taxpayer, identify the tax or taxes involved, state the grounds for the taxpayer's protest and state the affirmative relief requested.

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

C. Any purported protest which does not comply with the requirements of Section 7-1-24 NMSA 1978 will not be accepted as a "protest" within the meaning of Section 7-1-24 NMSA 1978. The secretary may require the taxpayer to state with greater particularity the nature and basis of a protest and the relief sought. [7/19/67, 11/5/85, 8/15/90, 10/28/94, 10/31/96; 3.1.7.10 NMAC - Rn & A, 3 NMAC 1.7.10, 1/15/01]

3.1.7.11 TIME FOR PROTEST: Ordinarily, a protest must be made by a taxpayer within 30 days of the date of mailing by the department of the notice of assessment, or mailing or service upon the taxpayer of other notice or demand, or the date of filing or mailing of a tax return. As provided in Section 7-1-24 NMSA 1978, the secretary may, in the secretary's discretion, grant an extension of up to 60 days additional time to file a protest. Failure by a taxpayer to file a protest within a maximum of 90 days is jurisdictional, and the secretary is without authority to consider any protest filed after that period.

[7/19/67, 11/5/85, 8/15/90, 10/28/94, 10/31/96; 3.1.7.11 NMAC - Rn & A, 3 NMAC 1.7.11, 1/15/01]

3.1.7.12 STATEMENT OF GROUNDS OF A PROTEST:

A. A statement of the grounds for a protest must include an explanation of the law and facts supporting the protest. It should include for each ground asserted the legal basis under the constitution, statute, regulation, or case law for the challenge to the assessment or other action of the department and a summary of the evidence expected to be produced. A summary of the evidence to be produced means the facts expected to be proven by testimony and documentary evidence surrounding the taxpayer's transactions that support relief under the cited legal standards. It is the facts alleged, not the evidence to prove them, that must be stated. If the taxpayer changes the legal theory or facts supporting the protest, the taxpayer must file a supplemental statement of grounds for the protest prior to the date of the hearing or, if a scheduling order has been issued, by the date set in the scheduling order. For protests filed on or after July 1, 2000, the statement of grounds for the protest must be supplemented no later than ten (10) days prior to the date of the hearing or, if a scheduling order has been issued, by the date set in the scheduling order. A prehearing statement filed in conformance with a scheduling order issued by the hearing officer will qualify as a supplemental statement of grounds for the protest.

B. To accelerate the processing and review of the protest, copies of the evidence may be included with the statement of the grounds for protest. Evidence included with a protest still must be introduced and admitted at the formal hearing on the protest before it will be considered by the hearing officer.

C. Example: A taxpayer's protest of penalty and interest for late payment of gross receipts tax would be valid if it stated "Taxpayer, I.D. No. 00-123456-00-0, protests Assessment No. 1234567 issued December 14, 1993, imposing interest and penalty pursuant to Sections 7-1-67 and 7-1-69 NMSA 1978 (allegedly for late payment) on the grounds that taxpayer's payment of gross receipts tax for August, 1993, was timely delivered to the department on September 24, 1993". It would be helpful, but not necessary, to specify with submission of the statement of grounds what documentary or testimonial evidence will prove the facts alleged by the taxpayer, such as, "The date of delivery of the payment will be shown by the date of deposit on the canceled check." It would be even more helpful to attach a copy of the canceled check, which, in this circumstance, would probably permit the department to resolve the matter in the taxpayer's favor without even a hearing. The taxpayer may choose to submit the evidence at a later time, but not later than the hearing.

[3/11/94, 10/31/96; 3.1.7.12 NMAC - Rn, 3 NMAC 1.7.12, 1/15/01; A, 8/30/01]

3.1.7.13 INFORMAL CONFERENCES:

A. Upon the taxpayer's written request or the department's own initiative, the department will provide for an informal conference before setting a hearing on the protest. When requested, an informal conference will be scheduled at a time and place agreed to by both parties.

The secretary may attend or designate a delegate to attend. Both parties may bring representatives of their own choosing to the conference, and both parties may bring any records or documents that are pertinent to the issues to be discussed. An informal conference will be vacated if the parties resolve the protest prior to the scheduled date.

B. The purpose of the informal conference is to discuss the facts and the legal issues. The result of an informal conference will usually be one of the following:

- (1) an agreement that the taxpayer will withdraw all or part of the protest;
- (2) an agreement that the department will abate all or part of the assessment protested, or will refund all or part of the amount of refund claimed;
- (3) an agreement to enter into a closing agreement;
- (4) an agreement that one or more issues will be litigated upon stipulated facts or a statement of the case;
- (5) an agreement to schedule a formal hearing; or
- (6) any combination of the above agreements.

C. The taxpayer or the department may be given the opportunity to provide more facts if the situation warrants. There is no statutory restriction on the number of informal conferences that may be scheduled with a taxpayer but, after the initial informal conference, additional informal conferences will be scheduled only if the secretary believes that the additional informal conferences will be useful in resolving the issues. In the event that the taxpayer fails to appear at the informal conference without reasonable notice to the secretary, the protest may be scheduled for a formal hearing without further opportunity for an informal conference.

[11/5/85, 8/15/90, 10/31/96; 3.1.7.13 NMAC - Rn & A, 3 NMAC 1.7.13, 1/15/01, A, 8/30/01; A, 4/30/07]

HISTORY OF 3.1.7 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 67-1, Tax Administration Act, 7/19/67, filed 7/28/67.

R.D./OGAD Rule No. 1985, Regulations Pertaining to the Tax Administration Act, filed 11/5/85.

TRD Rule TA-90, Regulations Pertaining to the Tax Administration Act, Sections 7-1-1 to 7-1-82 NMSA 1978, filed 8/15/90.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 1.7, Tax Administration - Protest, filed 10/17/96.

3.1.7 NMAC, Tax Administration - Protest, filed 1/4/2001.