



Burdens, Presumptions, and Evidentiary Standards in Tax Protest Disputes

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Introductions and Agenda



- Introduction of AHO work and staff
- Brief Summary of Key Legal Concepts & the Presumption of Correctness
- Federal Origins of the Presumption of Correctness
- New Mexico History of the Presumption of Correctness
- Recent New Mexico Case Law Addressing the Presumption of Correctness and Evidentiary Standards in Tax Disputes
- Other Presumptions and Burdens in NM Tax Law
- Presumption of Correctness in other state and local jurisdictions
- Conclusion and Questions



Key Foundational Legal Definitions



- **Burden of Proof:** A general term addressing who must prove their claim/case and with what evidence. More precisely, the burden of proof entails two distinct and important concepts:
 1. **Burden of Production:** A burden to produce enough evidence supporting the claim/case to have the issue decided by the factfinder/decisionmaker.
 2. **Burden of Persuasion:** The burden to convince or persuade the factfinder/decisionmaker of the claim/case.
- **Standard of Proof:** The degree/level/quality of evidence necessary in a specific case for a party to prevail. Examples:
 - **Preponderance of Evidence:** Proof that is more likely than not. The default standard in most civil and administrative law cases, including tax protests.
 - **Clear and Convincing Evidence:** Highly probable or reasonably certain; more than preponderance but less than beyond a reasonable doubt; only pertinent in tax fraud penalty cases.
 - **Proof Beyond a Reasonable Doubt:** The elevated standard in a criminal case but not applicable in tax protests except for criminal fraud prosecutions.
- **Evidence:** Witness testimony, documents, or tangible objects that tend to prove or disprove the existence of an alleged fact.
- **Weight of Evidence:** The judge or factfinder determines the relative value/persuasiveness/credibility of the competing evidence.



What is the Presumption of Correctness?

- A broad federal, state, and local tax law concept that the initial determinations of an outstanding tax deficiency or an assessment made by tax administrators are presumed reasonable and correct unless or until a taxpayer can demonstrate to the contrary.
- In New Mexico, the presumption of correctness comes from statute:

“[a]ny assessment of taxes or demand for payment made by the [taxation and revenue] department *is presumed to be correct.*” Section 7-1-17 (C) NMSA 1978.
- Under Tax. & Rev. Regulation 3.1.6.12 NMAC, the “effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary.”



Federal Origins of the Presumption of Correctness

Beginning nearly a century ago, the U.S. Supreme Court recognized, accepted, and adopted the presumption of correctness in federal tax matters.

- In 1927, the U.S. Supreme Court implied that the determination of the IRS Commissioner furnished a prima facie showing of correctness. *See Wickwire v. Reinecke*, 275 U.S. 101, 105 (1927).
- In 1933, in writing for the unanimous majority of the U.S. Supreme Court, Justice Cardozo put it clearly: the “[IRS Commissioner] ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong.” *Welch v. Helvering*, 290 U.S. 111, 115 (1933).



Federal Policy Reasons for the Presumption

- ♦ In *Bull v. United States*, 295 U.S. 247, 260 (1935), the U.S. Supreme Court provided an early policy explanation behind the presumption of correctness:

Because taxes are considered necessary for the functioning of government, “...the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer.”

- ♦ Other Federal Policy Reasons for the Presumptions:

- ♦ Ensure swift collection of government revenue and encourage taxpayers, who possess the best evidence of transactions, to maintain adequate record keeping. *See Carson v. U. S.*, 560 F.2d 693, 696 (5th Cir. 1977).



Federal Application of Presumption of Correctness

- ◆ Once the IRS commissioner makes a determination and issues a notice of deficiency, the courts generally will not look beyond the notice of deficiency unless and until a taxpayer produces evidence that the notice of deficiency is not supported.
- ◆ Once a taxpayer has shown the notice of deficiency is not supported, the burden shifts to the IRS commissioner to establish the correctness of its assessment.
- ◆ A limited exception to the presumption of correctness in federal jurisprudence is the so-called “naked assessment.”
 - ◆ A naked assessment typically involves an assessment of alleged unreported income, where a taxpayer would be required to prove a negative to overcome an assessment. *See Portillo v. C.I.R.*, 932 F.2d 1128, 1133 (5th Cir. 1991).



Federal Exceptions to the Presumption



The Naked Assessment

- The U.S. Supreme Court has found that a naked assessment without any supporting evidence or utterly lacking in rational foundation is not entitled to the presumption of correctness. *See United States v. Janis*, 428 U.S. 433, 441–42 (1976).
- Most addressed decision and quote on that topic comes from the 5th Circuit in *Carson v. U. S.*, 560 F.2d 693, 696 (5th Cir. 1977):

“The tax collector's presumption of correctness has a herculean muscularity of Goliathlike reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact.”
- Although stronger in some federal circuits than others, this is generally a narrow and rare doctrine where a taxpayer can show that the assessment is excessive and arbitrary with no rational foundation. *See Cavallaro v. Comm'r of Internal Revenue*, 842 F.3d 16, 21 (1st Cir. 2016).

Change in Theory

- If the IRS commissioner asserts a new theory of liability inconsistent with the original determination in the notice of deficiency, the IRS commissioner assumes the burden of proof and must prove the alternative theory. *See Estate of Schneider v. C. I. R.*, 29 T.C. 940, 956 (1958), acq., IRS Announcement Relating to: Schneider, Smith (IRS ACQ Dec. 31, 1959).



B. If such taxpayer does make application for hearing as provided in section 26 of the Tax Administration Act, he nevertheless becomes a delinquent taxpayer upon his failure to appear, in person or by authorized representative, at the hearing set or upon his failure to perfect an appeal from any decision or part thereof adverse to him to the next higher appellate level, as provided in that section, unless he makes payment of the total amount of all taxes assessed and remaining unabated or furnishes security for the payment thereof.

Section 20. ASSESSMENT OF TAX--PRESUMPTION OF

CORRECTNESS OF ASSESSMENT.--

A. If at any time the commissioner or his delegate determines that any taxpayer is liable for taxes that are due and that have not been previously assessed to him, he or his delegate shall promptly assess the amount thereof to the taxpayer.

B. Assessments of tax are effective

(1) when a return of a taxpayer is received by the bureau showing a liability for taxes;

(2) when a document denominated "Notice of Assessment of Taxes," issued in the name of the commissioner, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed by him to the state, demanding of him the immediate payment thereof and briefly informing him of the remedies available to him; or

(3) when an effective jeopardy assessment is made as provided by section 60 of the Tax Administration Act.

C. Any assessment of taxes made by the bureau is presumed to be correct.

D. When taxes have been assessed to any taxpayer and

(17)

Origins of the Presumption of Correctness in New Mexico

- ♦ NM origins of the presumption of correctness date back to the 1965 passage of the first Tax Administration Act (Laws 1965, Ch. 248, §20). *See* Section 72-13-32 (C) N.M.S.A. 1953 (1965).
- ♦ First articulated expressly in case law by the New Mexico Supreme Court in 1971, “an assessment made by the bureau is presumptively correct.” *Regents of New Mexico Coll. of Agric. & Mech. Arts v. Acad. of Aviation, Inc.*, 1971-NMSC-087, ¶ 15, 83 N.M. 86, 89.
- ♦ A taxpayer can overcome the presumption of correctness by either:
 - 1) Showing that the taxing authority did not follow statutory provisions in making the assessment; **or**
 - 2) Presenting evidence tending to dispute the factual correctness of the assessment.

See McConnell v. State ex rel. Bureau of Revenue, 1971-NMCA-181, ¶ 7, 83 N.M. 386, 387–88.





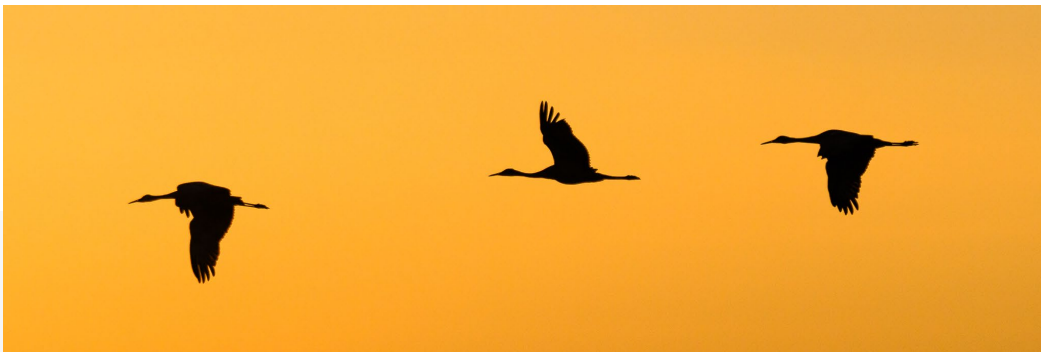
Early Developments of Presumption of Correctness in NM Case Law

- ♦ 1972:
 - ♦ A taxpayer has the burden of proof to negate the presumption of correctness by making a showing of incorrectness. *See Torridge Corp. v. Commissioner of Revenue*, 1972-NMCA-171, ¶ 13-15.
 - ♦ Presenting conflicting evidence supporting competing inferences was insufficient to overcome the presumption of correctness or reverse the determination of the commissioner of revenue. *See Archuleta v. O'Cheskey*, 1972-NMCA-165.
- ♦ 1976:
 - ♦ A taxpayer must clearly overcome the presumption of correctness that attaches to a Tax. & Rev. assessment. *See Stohr v. N.M. Bureau of Revenue*, 1976-NMCA-118, ¶5.
 - ♦ Presumption of correctness applies to assessment of civil negligence penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, ¶2.
- ♦ 1980:
 - ♦ Taxpayer's presentation of supporting testimony, bank statements, and cancelled checks was insufficient to overcome the presumption of correctness, leaving the commissioner's assessment conclusive. *See Hawthorne v. Dir. of Revenue Div. Taxation & Revenue Dept*, 1980-NMCA-071, ¶5-6.



Evolution of the NM Presumption of Correctness: Burden Shifting

- ♦ A taxpayer can overcome the presumption of correctness by showing the assessment was not in accord with statutory provisions or by presenting evidence to dispute the factual correctness of an assessment. *See Co-Con, Inc. v. Bureau of Revenue*, 1974-NMCA-134, ¶ 25.
- ♦ When a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.
- ♦ When a hearing officer is persuaded by a taxpayer's evidence over the Department's conflicting evidence, the burden shifts to Tax. & Rev. "to prove the correctness of its assessment." In failing to reestablish the correctness of assessment, there is no basis to reverse the hearing officer's ruling in favor of the taxpayer. *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶26, 336 P.3d 436.



2023 Court of Appeals *Gemini Las Colinas* Opinion

- ♦ In March of 2023, the NM Court of Appeals clarified the presumption of correctness framework in a tax protest proceeding “by answering legal questions of first impression in New Mexico:
 - (1) what a protesting taxpayer must do to overcome the presumption of correctness, and whether evidentiary weighing is appropriate at this stage; and
 - (2) if a taxpayer overcomes the presumption, precisely what kind or kinds of burden shift to the Department and which party ultimately bears the burden of persuasion.”

Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Dep't, 2023-NMCA-039, ¶13.
- ♦ In answering these two questions, the Court of Appeals also provided clarity and precision about the interplay (if any) between the presumption of correctness, the burden of production, the burden of persuasion, and the standard of proof.





Gemini Las Colinas Opinion Factual Background

- ♦ After an assessment, the taxpayer protested that Tax. & Rev. had overvalued taxpayer’s rental receipts by relying on a federal form, resulting in an assessment exceeding actual liability. *See Gemini Las Colinas, LLC*, ¶6.
- ♦ At hearing, taxpayer presented testimony disputing Tax. & Rev.’s methodology of relying on the federal form to determine rental values and presenting two alternative methods it claimed were more accurate to calculate its rental receipts. *See id.* ¶9.
- ♦ The Hearing Officer denied *Gemini Las Colinas*’ protest before the Administrative Hearings Office, stating that since Taxpayer had not proven by the preponderance that the Department’s assessment was incorrect or that the Taxpayer’s proposed evidence and method on rental receipts valuation was more reliable, “Taxpayer did not overcome the presumption of correctness...” *See id.* ¶10.
- ♦ Taxpayer appealed to the Court of Appeals, arguing that the hearing officer has misapplied the presumption of correctness to require that a taxpayer prove by the preponderance of evidence that the assessment was incorrect. *See id.* ¶12.



Gemini Las Colinas' Ordered Framework

- ♦ In ruling for Taxpayer in the appeal, the Court of Appeals articulated a precise, ordered **three-part framework** to apply to tax protests:

First Stage, Initial Taxpayer Burden of Production: Under the presumption of correctness, the taxpayer bears the initial *burden of production* to present some countervailing evidence (other than unsubstantiated statements) tending to dispute the factual or legal correctness of the assessment.

- ♦ This stage involves purely a legal question about sufficiency of evidence, not a factual determination about the quality, reliability, credibility or persuasiveness of taxpayer's evidence.
- ♦ If taxpayer as a matter of law fails to produce evidence tending to dispute the correctness of the assessment, Tax. & Rev. prevails without presenting its own case and the hearing officer need not act as a fact-finder in the matter.

See Gemini Las Colinas, LLC, ¶21-25.



Gemini Las Colinas' Ordered Framework, part two

Second Stage, Shifting Burden of Production: If taxpayer rebuts the presumption of correctness, the burden of production shifts to Tax. & Rev. to put forth evidence showing the correctness of its assessment. *See id.* ¶29.

- ♦ Once a taxpayer has met the presumption of correctness, the presumption of correctness disappears entirely from the case. *See id.* ¶38.
- ♦ Tax. & Rev. cannot meet this shifting burden of production simply by standing on the presumption of correctness or challenging the alleged unreliability or incredibility of taxpayer's evidence. *See id.* ¶29 & ¶38.
- ♦ Instead, Tax. & Rev. must produce some evidence to justify its own assessment. *See id.* ¶29.

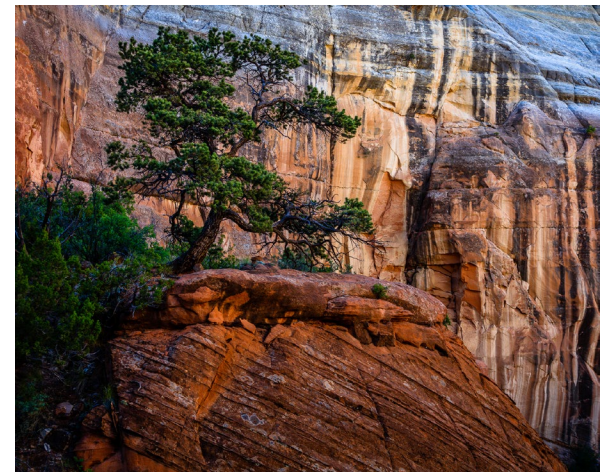


Gemini Las Colinas' Ordered Framework

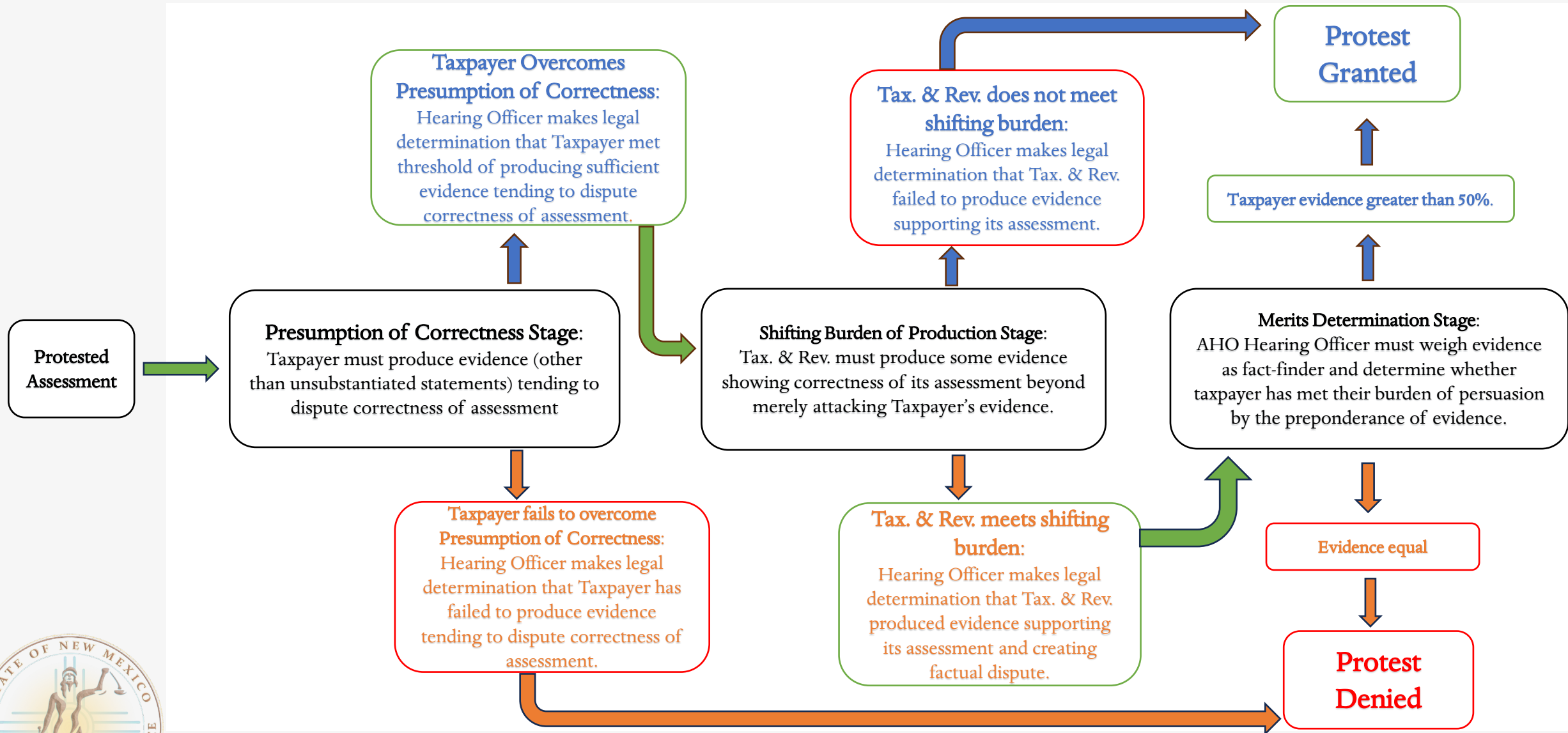
Third Stage, Merits Determination: If Taxpayer initially has overcome the presumption of correctness and if Tax. & Rev. has met its shifting burden to produce evidence of the correctness of the assessment, the hearing officer must weigh the evidence in their capacity as the fact-finder to resolve the protest. *See id.* ¶29.

- ♦ Taxpayer retains the burden of persuasion throughout the proceeding, including at the merits determination stage.
 - ♦ If taxpayer's evidence meets the preponderance of evidence standard—that is, evidence that is more likely than not—then taxpayer has carried its burden of persuasion and should prevail on the protest.
 - ♦ However, if the evidence is evenly balanced, then taxpayer's protest should be denied.

See id. ¶27-29.



Gemini Las Colinas' Ordered Framework Flowchart





PESCO: Weighing of Evidence / Credibility in a Tax Protest Hearing

- ♦ In July of 2023, the Court of Appeals issued a published decision in *PESCO* affirming an AHO ruling in favor of a taxpayer on a claim for a Technology Jobs and Research and Development Tax Credit. *Process Equip. & Serv. Co., Inc. v. New Mexico Taxation Revenue Dep't*, 2023 NMAC ____, 31, 2023 WL 4874874 (N.M. Ct. App. July 25, 2023, No. A-1-CA-38779).
- ♦ In the appeal, Tax. & Rev. challenged whether credible witness testimony amounted to sufficient evidence when there was other conflicting testimony about the nature of the methodology employed by the taxpayer seeking the credit.
- ♦ The Court of Appeals rejected Tax. & Rev.'s appeal relating to the sufficiency of evidence:
“...[Tax. & Rev.'s] argument overlooks the testimony from [the witness], and the fact that it is well-settled in New Mexico that **the testimony of a single witness, if found credible by the fact-finder, is sufficient to constitute substantial evidence.** *Id.* at ¶ 31, *8 ; *See also Casias Trucking*, 2014-NMCA-099, ¶23.





Other Presumptions and Burdens in NM Tax Law

- ♦ **All Receipts Presumed Taxable:** Under NMSA 1978, Section 7-9-5, there is a presumption that all receipts of a person engaging in business are subject to GRT.
- ♦ **Deductions and Exemptions:** The claiming taxpayer has burden to clearly establish entitlement both factually and legally, with deductions and exemptions construed narrowly in favor of taxing authority. *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735.
- ♦ **Credits:** Tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted and strictly construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*, 2005-NMCA-020, ¶9, 137 N.M. 50.
- ♦ **Refunds:** When claiming refunds, a taxpayer's refund claim must be analyzed through the "lens of presumption of correctness." *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17, 142 N.M. 779.



Presumption of Correctness in Other States/Local

- ♦ The imposition of a burden of proof on a taxpayer is the rule rather than the exception in State and Local Taxation across the country.
 - ♦ 45 of 50 states place the initial burden on taxpayers to overcome a property tax valuation or tax assessment. *See* CCH State Tax Editors 2016 (Chart).

Table 1. Assignment of burden of proof in the United States

State	Who Bears the Burden	Legislation	Source
Alabama	Taxpayer	Ala Code sec. 40-2A-7(b)(5)c	CCH State Tax Editors 2016
Alaska	Taxpayer	AS 29.45.210 , AS 43.56.130	CCH State Tax Editors 2016
Arizona	Taxpayer bears the burden of proof, but the department bears the burden of proof relating to factual issues.	ARS 42-1255	CCH State Tax Editors 2016; Davis 2001
Arkansas	Taxpayer	Sec. 26-18-313, A.C.A	CCH State Tax Editors 2016
California	Taxpayer, can shift to assessor for single-family homes	Sec. 167, Rev. & Tax Code, Reg. 321, 18 CCR	CCH State Tax Editors 2016
Colorado	Taxpayer	Sec. 39-1-113(1.5), CS	CCH State Tax Editors 2016
Connecticut	Taxpayer	75 C. 281	CCH State Tax Editors 2016
Delaware	Taxpayer	Sec. 8312, Tit.9 Code	CCH State Tax Editors 2016
District of Columbia	Taxpayer	Reg. Sec. 2014.1	CCH State Tax Editors 2016
Florida	Taxpayer	Sec. 194.301, F.S.; rules 12D9.001 through 12D9.038	CCH State Tax Editors 2016
Georgia	Assessor	Reg. s560-11-12-01 through Reg. s560-11-12-09 and Reg. s560-11-13-01 through Reg. s560-11-13-11	CCH State Tax Editors 2016
Hawaii	Taxpayer	Form: BFS-RP-p-51 from Honolulu County	CCH State Tax Editors 2016
Idaho	Taxpayer	IC sec. 63-502	CCH State Tax Editors 2016
Illinois	Circuit Court: taxpayer has burden PTAB: burden of persuasion unstated, burden of production shifts from taxpayer to assessment officials		Davis 2001
Indiana	Taxpayer	50 IAC 17-6-3	CCH State Tax Editors 2016
Iowa	Taxpayer; however, when the complainant offers competent evidence by two disinterested witnesses that the market value of the property is less than what the assessor determined, the burden of proof shifts to the assessor	Sec. 441.21(3), Code of Iowa	CCH State Tax Editors 2016
Kansas	Assessor	Sec. 79-1602, KSA	CCH State Tax Editors 2016
Kentucky	Taxpayer	KRS 133.120 (3)(c)	CCH State Tax Editors 2016
Louisiana	Assessor	RS 47: s 1969.1 A	CCH State Tax Editors 2016
Maine	Taxpayer		CCH State Tax Editors 2016
Maryland	Taxpayer		Davis 2001
Massachusetts	Taxpayer	Sec. 12A. CH. 58A, G.L	CCH State Tax Editors 2016
Michigan	Taxpayer has the burden to establish the true cash value and the property, but the assessor has the burden with regards to equalization	Sec. 205.737, M.C.L.	CCH State Tax Editors 2016
Minnesota	Taxpayer	Sec. 278.05(3)	CCH State Tax Editors 2016 ;Davis 2001
Mississippi	Unknown		Not addressed in either CCH State Tax Editors 2016 or Davis 2001
Missouri	Taxpayer		Davis 2001
Montana	Taxpayer		Davis 2001
Nebraska	Taxpayer	<i>Bottom v Clay County Board of Equalization</i> (NB CtApp 1998) 7 NebApp 162.	CCH State Tax Editors 2016
Nevada	Taxpayer	NRS 361.356.1	CCH State Tax Editors 2016
New Hampshire	Taxpayer		Davis 2001
New Jersey	Taxpayer	<i>Properties v City of Jersey City</i> , NJ SuperCT, AppDiv, No. A-2205-9711, 13/3/98. CCH New Jersey	CCH State Tax Editors 2016
New Mexico	Taxpayer	NM Stat Ann Sec. 7-38-6, 3 NMAC 6,7,13	CCH State Tax Editors 2016
New York	Taxpayer		Davis 2001
North Carolina	Taxpayer		Davis 2001
North Dakota	Taxpayer		Davis 2001
Ohio	Taxpayer initially, respondent thereafter		Davis 2001
Oklahoma	Taxpayer		Davis 2001
Oregon	Taxpayer	Sec. 305.427, ORS	CCH State Tax Editors 2016
Pennsylvania	Taxpayer	24 P.S. s581.69, 72 P.S. s4844.1	CCH State Tax Editors 2016
Rhode Island	Taxpayer		Davis 2001
South Carolina	Taxpayer		Davis 2001
South Dakota	Taxpayer	SL 1917, ch 130, s2: RC 1919, s 6814; SDC 1939, s 57.0803	CCH State Tax Editors 2016
Tennessee	Assessor	Tenn. Code Ann. S 68-5-1405	CCH State Tax Editors 2016
Texas	Assessor	Sec. 41.43 Tax Code	CCH State Tax Editors 2016
Utah	Taxpayer	Publication 31, Utah State Tax Commission, May 2013, CCH Utah Tax Reports, 400-848	CCH State Tax Editors 2016
Vermont	Taxpayer		Davis 2001
Virginia	Taxpayer	Sec. 58.1-3984(A), Code	CCH State Tax Editors 2016
Washington	Taxpayer	RCW 84.40.0301	CCH State Tax Editors 2016
West Virginia	Taxpayer		Davis 2001
Wisconsin	Taxpayer	Sec. 70.47(8)(g), Wis. Stats	CCH State Tax Editors 2016
Wyoming	Taxpayer	Rule ch. 9, Sec. 6, WY DR	CCH State Tax Editors 2016



Limited exceptions in State and Local Taxation

A few states place burden on taxing authority as to contested factual issues in some circumstances:

Missouri

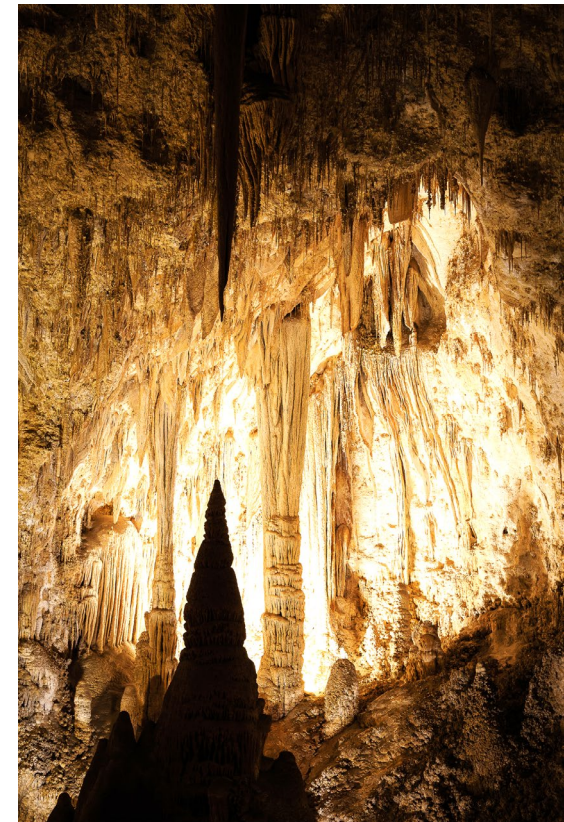
- No presumption of correctness to an assessor's property valuations.
- Mo. Department of Revenue has burden of proof on factual issues when:
 - 1) A taxpayer has *adequate records* available for inspection;
 - 2) A taxpayer *produces evidence* establishing a reasonable dispute.

See Mo. Rev. Stat. 136.300

Arizona

- AZ tax department has burden of proof on factual issues in a judicial proceeding when:
 - 1) A taxpayer *asserts* a reasonable dispute;
 - 2) taxpayer has *fully cooperated* with Department in providing *reasonably requested information*;
 - 3) taxpayer maintained *reasonable records*.

See A.R.S. 42-1255.



Some limited exceptions in State and Local Taxation: Changes in Theory or Policy Underlying Assessment

Missouri (again)

- ♦ When the taxing authority presents a new theory for liability during judicial review, the Missouri Supreme Court emphasized that the tax director had the burden of proof. *See Office Depot, Inc. v. Dir. of Revenue*, 484 S.W.3d 793, 797 (Mo. 2016).

Massachusetts

- ♦ Although not directly within the lens of the presumption of correctness, Massachusetts prohibits an assessment of tax when the assessment is based on a policy change not formally announced/published. *See* Mass. Gen. Laws Ann. ch. 62C, § 26 (West).



Some limited exceptions in State and Local Taxation:

Assessors Property Tax Valuations

Florida

- ♦ Assessor only entitled to presumption of correctness on valuation if they first demonstrate that assessment complied with statutory criteria and was consistent with professionally accepted appraisal practices.

See Fl Stat. § 194.301

Georgia

- ♦ Board of Tax Assessors has presumption of correctness as to facts but has burden of proving opinions of value and validity of proposed assessment by preponderance of evidence. *See Ga. Code Ann. § 48-5-311 (West).*



Conclusion and Questions

