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## FISCAL IMPACT REPORT

	ORIGINAL DATE	2/26/19	
SPONSOR	LAST UPDATED	3/04/19	HB
SJC		CS/CS/SB129/SCORCS/ SJCS/aSF1#1	
SHORT TITLE	Tax Protests & Admin Hearings Office		SB
			ANALYST
			Hawker

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
AHO		\$450.1	\$450.1	\$900.2	Recurring	General Fund
TRD		\$784.0	\$784.0	\$1,568.0	Recurring	TRD
TRD		\$11.0	\$17.0	\$28.0	Nonrecurring	TRD
<b>Total</b>		\$1,245.1	\$1,251.1	\$2,496.2		

Parenthesis ( ) indicate expenditure decreases

Relates to Appropriation in the General Appropriation Act:

See *Fiscal Implications* section of this FIR for an analysis of AHO’s request, documenting the increased compensation costs. This request is for \$450.1 thousand annually to pay hearing officers at the level stipulated.

### SOURCES OF INFORMATION

LFC Files  
Judicial Compensation Commission 2018 Report

#### Responses Received From

Administrative Hearings Office (AHO)  
Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 to Senate Judiciary Committee Substitute for Senate Corporations and Transportation Committee Substitute for Senate Bill 129 changes the definition of “reasonable administrative costs” in Section 7-1-29.1 NMSA 1978 to include “employees of a New Mexico licensed certified public accounting firm or enrolled agents”.

#### Synopsis of Original Bill

Senate Judiciary Committee Substitute for Senate Corporations and Transportation Committee Substitute to Senate Bill 129 amends provisions of the Tax Administration Act related to tax protests and proceedings. Administrative Hearing Officer Compensation is set.

Section 1 amends Section 7-1-17 NMSA 1978, adds language clarifying a taxpayer who makes payment of “the undisputed amount” of taxes is not a delinquent taxpayer.

Section 2 amends Section 7-1-23 NMSA 1978, clarifying language as to how a taxpayer may dispute a tax liability. The taxpayer retains the right to dispute either by filing an administrative protest or by paying the liability and requesting a refund.

Section 3 amends Section 7-1-24 NMSA 1978 amending the administrative protest process the taxpayer must follow. The taxpayer may file a protest for assessed taxes without making payment on the assessed taxes. Timelines for the protest and the protest process are clarified.

Section 4 amends Section 7-1-26 NMSA 1978, pertaining to the taxpayers claim for credit, rebate, or refund. A claim for refund shall not be considered incomplete as long as the taxpayer provides sufficient information for TRD to make a determination. Language is added stating that in the case of an audit an overpayment of taxes is found “and if the taxpayer files a claim for refund for the overpayments identified in the audit” the overpayment may be credited against an underpayment of the same tax in another period.

Language is clarified throughout the section.

Section 5: amends Section 7-1-29.1 NMSA 1978, existing cost and fee provisions of the Tax Administration Act. The limits for costs and fees are increased from \$50 thousand to \$75 thousand. This section creates a new requirement that TRD report annually to LFC and the Revenue Stabilization Tax Policy Committee the costs it was required to pay under the costs and fees provisions.

Provides technical cleanup.

Section 6 provides technical cleanup of Section 7-1B NMSA 1978.

Section 7 amends Section 7-1B-6 NMSA 1978, the period review requirement of hearing officers is replaced with an annual performance review, including the use of surveys of practitioners.

Section 8 amends Section 7-1B-8 NMSA 1978. A new requirement is created for TRD to inform taxpayers of any deficiencies in their protest and afford them one opportunity during a 21-day window to correct those deficiencies. If the taxpayer filed the original protest deemed deficient within the 90-day protest deadline, and the taxpayer corrects the deficiencies within the permitted 21-day second chance window, the correct protest is to be deemed timely. If TRD still deems the protest deficient, the taxpayer may protest that determination before AHO.

Within Section 8, 8B and 8C create a dual-track protest hearing timeline, depending on whether an informal conference has been requested within 60 days of the filing protest.

Track one (8B) establishes if the taxpayer requests or agrees to an informal conference, TRD has 120 days from the date of the protest to conduct the informal conference. Within 30 days of completion of the informal conference, TRD must send the taxpayer a letter identifying which issues have been resolved and which issues remain in dispute. In the circumstance where an

informal conference has been requested, TRD is required to request a hearing with the AHO within 180 days of the protest.

Track two (8C) establishes, if no informal conference has been requested within 60 days, either party may request hearing with AHO, but TRD is mandated to do so no later than 90 days after the protest was filed.

Subparagraph 8D requires TRD to file a detailed statement of position along with its request for hearing filed with AHO or within 30 days of the taxpayer's filing of a request for hearing with AHO. The detailed statement of position requires TRD to respond and describe the legal and factual basis of TRD's position beyond an assertion of the presumption of correctness. TRD is allowed to amend its detailed statement of position up to 10 days before the hearing or as otherwise allowed by AHO in a scheduling order. If AHO determines TRD's amended statement of position results in unfair surprise or fundamental unfairness, the burden to overcome the presumption of correctness in the protest shifts from the taxpayer to TRD.

Subparagraph 8E establishes that, if TRD fails to meet any of the timelines under subsections 8A-D, the burden to overcome the presumption of correctness in the protest shifts from the taxpayer to TRD.

Subparagraph 8F provides timeframes in which AHO must set the protest for hearing on receipt of request for hearing from either the taxpayer or TRD. Additionally, the chief hearing officer must give 14 days notice of reassignment of hearing officer. Either party may exercise one peremptory right to disqualify the hearing officer within 10 days notice of reassignment so long as no discretionary ruling has been requested by the party and the party had not previously exercised their peremptory challenge. An excused hearing officer may no longer hear the matter.

Subparagraph 8G establishes a new requirement that AHO rule on dispositive motions, including a motion for partial summary judgement or a motion to dismiss at least 30-days before the hearing unless the parties consent to a different deadline in the scheduling order.

Subparagraph 8H expands the authorized representation requirements in actions before AHO to include employees of a certified public accounting firm as designated in writing by a taxpayer and their firm. Enrolled agents may represent taxpayers in all cases. Representatives are required to abide by their respective controlling professional or ethical standards of conduct before AHO. The party that does not have the presumption of correctness shall present its case first. "Enrolled agent" is defined for this subsection.

Subparagraph 8I requires the hearing officer to issue a decision and order containing findings of fact and law, as well as a thorough discussion of the reasoning used to support the order with citations to the record and applicable law.

Section 9 establishes the salary for hearing officers shall be 90 percent of the annual salary of a district court judge.

Provides technical cleanup.

## **FISCAL IMPLICATIONS**

AHO states SB129/SCORCS/SJCS will increase compensation costs for AHO as all hearing officers and the chief hearing officer have salaries less than 90 percent of the annual salary of a

district court judge. AHO estimates the fiscal impact of raising hearing officer salaries will be \$450,112 annually.

Total Increase for 10 Hearing Officers & Chief Hearing Officer	
Salary	\$354,575
Benefits	\$95,537
Total	\$450,112

Pursuant to 34-1-9 NMSA 1978, the salary of a district court judge is set equal to ninety-five percent of the annual salary of the chief judge of the court of appeals. This bill proposes that all hearing officers and the chief hearing officer salaries that are 90 percent of the annual salary of a district court judge. This is equivalent to 85.5 percent of the annual salary of the chief judge of the court of appeals.

As of July, 2017, “A National Center for State Courts study says New Mexico's District Court judges, who earn about \$118,000 a year, are the lowest paid in the nation. The \$131,174 annual salary of the state's Supreme Court justices is the second lowest, and about 23 percent lower than the national average, according to the commission.”<sup>1</sup>

Thus, assuming no increase in salary level for district court judges since 2017, an administrative hearing officer would be paid an annual salary of \$106,200 pursuant to the provisions of Section 9 of the bill.

**How much does a lawyer make in New Mexico?**

The average salary for a private practice lawyer is \$142,382. Salaries estimates are based on 569 lawyers surveyed in the Judicial Compensation Commission’s 2018 Report to the Legislative Finance Committee.

See **Administrative Implications** for a discussion of the equivalence of this proposed salary level to that of workers compensation administrative law judges. Also note that administrative tax law judges require substantial specialized education, training and experience to resolve the complex issues of tax law.

TRD states is will need to hire a minimum of 6 additional tax attorneys in the Legal Services Bureau. Additionally, TRD states decreasing the high vacancy rate in the Audit and Compliance Division to meet the demands of complying of the bill. TRD estimates it will cost \$784 thousand in recurring costs per year and \$11 thousand in FY20 and \$17 thousand in nonrecurring costs to implement SB 129/SCONCS/SJCS.

**SIGNIFICANT ISSUES**

SB129/SCORCS/SJCS provides an array of language cleanup, technical fixes, and other changes. New Mexico’s taxpayers need certainty that if they dispute a tax liability or if a claimed credit is denied, the dispute will be handled fairly and in a timely manner. The dispute resolution system must provide sufficient enforcement mechanisms so that disputes can be resolved efficiently.

AHO reports it currently meets some of the requirements within the bill. For example, under the State Personnel Act, annual reviews of hearing officers are conducted. The bill requires annual reviews. The chief hearing officer informally consults with tax practioners, and the bill formalizes this practice. AHO will be required to survey practitioners, and the agency has

already started developing a survey. Additionally, AHO already issues decisions that contain findings of fact, conclusions of law, citations to the record and case law, and a discussion containing an analysis of the case.

AHO notes taxpayers will now have a preemptive right to excuse a tax hearing officer. In certain tax subject matters, AHO only has one hearing officer with experience and knowledge of that subject matter, making a preemptory excusal especially challenging for AHO to manage without hiring another high level tax hearing officer with a broad-based knowledge and experience in all tax programs. AHO believes SB129/SCORCS/SJCS reinforces the need to fund the expansion high level tax hearing officer position AHO requested in the FY20 budget request process.

AHO is optimistic the informal conference provisions in SB129/SCORCS/SJCS will reduce the overall number of tax hearing requests that are submitted by TRD but remains concerned about potential issues caused by preemptory excusals.

TRD remarks the Section 7-1-24(D)(1) NMSA 1978 in SB 129/SCONCS/SJCS removes the requirement to pay undisputed amounts. The agency believes removing this requirement will incentivize taxpayers to delay payments and increase the outstanding taxes due to the state. No other language in the revised section allows for the collect by the TRD of undisputed amounts.

TRD suggests the survey of hearing officers in Section 7 include not just practioners but also include taxpayers and department attorneys to have a more comprehensive survey.

Section 8, subsections B and C: TRD states it has no objection to making clear that taxpayers are entitled to an informal conference and a good faith effort to resolve the issues prior to requesting a formal hearing. TRD says mandating the department hold an informal conference within a certain time period interferes with the department's ability to manage its cases. Some taxpayers will abuse this requirement by requesting multiple conferences, requesting a conference without providing requested documentation before the conference, or requesting a conference shortly before a merits hearing. The timing of the hearing should not be conditioned on the timing of the taxpayer's request. TRD further states it has a backlog of cases and other scheduling matter to consider and may determine that it is not ready to hold an informal conference, so that doing so would not be useful. The informal conference should be held far enough in advance of the formal hearing so that any matters that can be will have time to be resolved.

TRD note the extension to 180 days for resolution is good for all parties involved. The addition of other required documentation beyond a copy of the protest to accompany the request for a hearing as noted in SB 129/SCONCS/SJCS Section 7-1B-8(D) adds unnecessary burden on TRD. TRD states many protests are a low dollar amount and do not necessitate this type of effort. TRD suggests instead language to provide on complicated cases, the AHO would order the parties to provide position statements, witness lists and exhibits prior to the hearing.

Regarding representation at the hearing, TRD believes the best approach remains to have only the taxpayer, a lawyer, a certified public accountant, or an enrolled agent represent the taxpayer at the quasi-judicial hearing.

## ADMINISTRATIVE IMPLICATIONS

AHO states recruiting and retaining hearing officers who are experts in tax law has been a struggle. Creating a uniform salary for hearing officers that is 90 percent of the annual salary of a district court judge, the same salary that Worker’s Compensation Judges receive, will allow AHO to recruit and retain hearing officers who have more experience and expertise in tax law.

TRD will need to make changes to forms, instructions and publications, as well as related updates to the department website to convey the changes in definitions and processes. GenTax programming will be required to review case documentation and reference table configuration. TRD procedures and employee education will need to be developed and provided prior to the earliest effective date of SB 129/SCORCS/SJCS. The effective date of June 14, 2019 is not feasible. TRD suggests an effective date of October 1, 2019.

TRD states the requirements of writing additional reports and documentation and the tracking and reporting costs will place more work on the Legal Services Bureau. TRD observes the current staff of 5 or 6 lawyers will not be able to meet the requirements.

## TECHNICAL ISSUES

TRD has identified several technical issues with SB 129/SCORCS/SJCS:

Section 3: the term “claim” and other related terms do not have consistent meanings, this creates ambiguities for both taxpayers and hearing officers. TRD recommends terms be defined as follows:

- “Refund claim” or “claim a refund” means an application for a refund.
- “Credit application” or “apply for a credit” means the process of asking TRD grant the credit.
- “Grant a credit” means the approval given by TRD to a credit application.
- “Credit claim” or “claim a credit” means the use of the approved credit by the taxpayer to offset taxes owed.

Page 4, line 8 TRD suggests adding “assessment,” after “tax” for clarity.

Page 5, lines 7-12, TRD believes the deletion of language leads to ambiguity. Reinstating the deleted text will clarify how partial protests are handled and will encourage payments of disputed amounts.

Page 5, line 17 TRD suggests reinstating “or” and delete “and” so as to be consistent with Section 7-1-17(C) NMSA 1978.

Page 5, line 19 TRD suggests removing “the” after “of” for clarity.

Page 6, line 6 TRD suggests adding “penalty or interest” after “amount of tax” so as to be consistent with SB 129/SCORC/SJCS language.

Page 6, line 10 TRD believes the word “protest” is used in an incorrect context. TRD suggests returning to the original on lines 9 and 10 for clarity.

Page 9, line 5, after “make a determination” TRD suggests additional language to clarify existing law. TRD suggests: “If the department allows a claim, in whole or in part this does not constitute

a determination by the department that the tax refunded is not owed and nothing in this section shall be construed to prevent the department from auditing the taxes refunded or assessing any amount of that tax, provided that the assessment otherwise conforms to the requirements of the Tax Administration Act.”

Page 10, lines 1 and 2, TRD suggests reinserting “remedy invoked” after “first” for clarity.

Page 12, lines 7 through 14, TRD recommends the section be clarified as applying to only approved tax credits by adding the words “an approved business tax” on line 8 between the words “for” and “credit”.

Page 12, line 12 before the word “credit” TRD recommends adding “business tax” for clarity.

Page 12, line 14 after the word “denial” add “of the approved credit”. This change will conform the statute to the AHO decision *In the Matter of the Protest of Precheck, Inc.* D&O No. 18-29 issued September 14, 2018.

Page 14, line 5, TRD suggests changing the word “found” to “identified”.

Page 18, lines 13 – 15 do not strike the phrase, “where the final determination with respect to the tax, interest or penalty is made in”; page 18, line 17-18 do not strike the phrase “where the final determination is made by the” striking the phrases contravenes case law, giving AHO authority over the attorney fees when it may not have decided the substantive issues.

Page 23, line 11 after “to correct it” insert “as long as the period for correction does not exceed the deadline for the filing of the protest pursuant to Section 7-1-24 NMSA 1978.”

Page 23, lines 7 and 8, keep the reference to 7-1-24 NMSA 1978 for clarity.

Page 25, lines 21-23, TRD notes the proposed amendment that provides the hearing will be on the grounds stated in the taxpayer’s protest letter, providing no opportunity to amend, this is contrary to Section 7-1-24(C) NMSA 1978.

Page 28, lines 1 – 2, the language the party does not have the presumption of correctness presents first conflicts with statute. Section 7-1-17(D) NMSA 1978 states the department has the presumption of correctness and it is the taxpayer’s burden to prove its case. Per TRD the taxpayer must go first, unless there are special circumstances. TRD suggests this section be clarified that the administrative hearing officer be allowed to hear and decide motions concerning the order of arguments and evidence at a formal hearing, if the circumstances of the case suggest doing so would not be prejudicial.

Page 28, line 22, after “fact” TRD suggests adding “and conclusions of law”.