

Tax Protest Hearing Process

Joint Presentation before the Revenue Stabilization and Tax Policy Committee

by TRD Secretary John Monforte and AHO Chief Hearing Officer Brian VanDenzen

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Objectives and Limitations of Presentation

- ▶ To provide an overview of the Administrative Hearings Office (“AHO”), the tax protest process, and the distinct roles that the Taxation and Revenue Department (“TRD”) and AHO Play in that process.
- ▶ To highlight a few areas where statutory changes could improve the efficiency of the hearing process.
- ▶ By statute and regulation, the Administrative Hearings Office is **prohibited** from:
 - ▶ Engaging in the formulation of tax policy (Section 7-1B-7 NMSA 1978);
 - ▶ Discussing the merits of pending matters before AHO (Section 7-1B-7 NMSA 1978 and Reg. 22.6002.17 NMAC);
 - ▶ Revealing confidential, taxpayer information (Section 7-1-8.1 through 8.10 NMSA 1978);
 - ▶ Making any public statements, commitments, or pledges about a particular matter or issue that might reasonably be expected to affect the outcome of the matter or create a question about the fairness of a proceeding or the impartiality of the hearing officer. (Reg. 22.6002.17 NMAC)



Creation of the Administrative Hearings Office

- ▶ Before 2015, tax protests hearings were heard by the Hearings Bureau of TRD.
- ▶ There was a movement to make the Hearings Bureau an independent hearing office separate from TRD, which finally came to fruition in 2015 with the passage and enactment of the bipartisan Administrative Hearings Office Act, Section 7-1B-1 through 9 NMSA 1978.
- ▶ TRD's Hearings Bureau staff became the new Administrative Hearings Office, an agency independent of TRD.
- ▶ AHO is administratively attached to DFA, however, DFA plays no supervisory role over AHO.
- ▶ Why an Independent Hearings Office?
 - ▶ A majority of states (at last check, 35 states plus the District of Columbia) now have an independent tax tribunal similar to the Administrative Hearings Office.
 - ▶ Some states placed the independent tax tribunal in the judiciary, but most states kept the tax tribunal in the executive branch but separate from the taxing agency.
 - ▶ In 2018, California became most recent state with an independent tax tribunal.
 - ▶ There is a broader trend in state government to move all executive branch administrative hearings to one central, independent panel of Administrative Law Judges ("ALJs").



The Work of AHO

- ▶ AHO conducts and adjudicates state administrative protest hearings under the Tax Administration Act, the Property Tax Code, the Motor Vehicle Code, and the Implied Consent Act. This results into two essential hearing types:
 1. Implied Consent Act, DWI license revocation hearings.
 - ▶ AHO conducts between 3,000-6,000 of these hearings across the state each year.
 - ▶ AHO has had 8 ALJ-hearing officer positions that focus mostly on conducting Implied Consent Act hearings.
 2. State Tax Protest Hearings pursuant to the Tax Administrative Act. A taxpayer is challenging TRD's assessment, denials of refunds, credits, notices of property valuation, etc.
 - ▶ 3.25 full time Administrative Law Judge-hearing officers positions: one high level ALJ who handles a full tax docket, one who handles a $\frac{3}{4}$ docket of medium level tax protests, another who handles a $\frac{3}{4}$ docket of easier to medium tax protest cases from our Albuquerque office, and myself, with a $\frac{3}{4}$ docket of complex tax cases.
 - ▶ 50-70 cases per year is a manageable tax protest case load for a dedicated tax ALJ.
- ▶ Including all case types, each AHO ALJ conducted an average of 448 hearings in FY18.



Tax Administration Act and Tax Protests

- ▶ The Tax Administration Act (TAA), Section 7-1-1 through 82 NMSA 1978, establishes the general procedural rules for administration of most of the state's tax programs.
- ▶ Section 7-1-24 NMSA 1978 of the TAA gives taxpayers the ability to protest and dispute:
 - ▶ An assessment of tax;
 - ▶ The application of any provision of the TAA against a Taxpayer except the issuance of a subpoena or summons; or
 - ▶ The denial of or failure either to allow or deny:
 - ▶ Credit or rebate; or
 - ▶ claim for refund.
- ▶ Similarly, the Taxpayer Bill of Rights under Section 7-1-4.2 NMSA 1978 gives taxpayers the right to seek review of TRD's actions under the TAA.



Filing a Tax Protest with TRD

- ▶ Section 7-1-24 NMSA 1978 requires taxpayers to file a written protest with TRD within 90-days of TRD's challenged action. See *also* Section 7-1B-8 (A) NMSA 1978.
 - ▶ For protests regarding a claim for refund, taxpayers have two options to contest TRD's decision on the refund claim
 - 1) File an administrative protest with TRD pursuant to Section 7-1-24; or
 - 2) Bypass the administrative protest process by filing a civil action (lawsuit) directly in the District Court in Santa Fe. (Section 7-1-26 NMSA 1978).
 - ▶ Filing of one (either a protest or civil suit) precludes the other option.
- ▶ Upon receipt of a taxpayer protest, TRD's Protest Bureau reviews the protest to ensure it meets the statutory requirements and sends an acknowledgment of receipt of a valid protest to the taxpayers.
 - ▶ TRD assigns a protest auditor and TRD attorney to review and work the protest.
 - ▶ If TRD and a taxpayer are unable to resolve the protest, TRD is required within 45 days of acknowledgement of the protest to request a hearing with AHO. See Section 7-1B-8 (A) NMSA 1978; See *also* 22.600.3.8 NMAC.
 - ▶ AHO does not become involved in the protest until TRD submits its request for hearing 45-days after the taxpayer files the protest.



AHO Schedules the Protest Hearing

- ▶ Upon receipt of a request for hearing on a protest, the Chief Hearing Officer reviews the protest letter and TRD's request for hearing form.
- ▶ Based on assessment of the complexity of the case, and the preference of TRD in the request for hearing, the Chief Hearing Officer sets the case for a hearing under a **two-track hearing process** implemented in 2013.
 - ▶ Track One: For simple cases the case is set for a **merits hearing** within 90-days of TRD's acknowledgement of receipt of a protest. (Section 7-1B-8 (A) NMSA 1978).
 - ▶ In FY2018, TRD requested a Merits Hearing in **39% of new cases**.
 - ▶ Track Two: For more complex, litigious cases, where the parties anticipate extensive discovery and motions practice before conduct of the merits hearing, as permitted under Section 7-1B-6 (D) NMSA 1978, the matter is set for a **scheduling hearing** within 90-days.
 - ▶ In FY2018, TRD requested a Scheduling Hearing in **61% of new cases**.



Scheduling Hearings

- ▶ Conducting the scheduling hearing within 90-days harmonizes two statutory provisions:
 - ▶ The mandate to conduct a hearing within 90-days under Section 7-1B-8 NMSA 1978;
 - ▶ The mandate to allow for a fair and ample opportunity for both sides to present their case, including allowing for a discovery process and for submission of motions, as required under Section 7-1B-6(D) NMSA 1978.
- ▶ Upon objection to conducting the scheduling hearing, a merits hearing will promptly be set. See Reg. 22.600.3.8 NMAC.
 - ▶ In the five years of using this approach, a taxpayer has objected to a scheduling hearing fewer than 10 times.
- ▶ During the scheduling hearing, ideally the parties have reviewed the case and are meaningfully prepared to discuss the issues in the protest.
 - ▶ The AHO ALJ tries to use their own knowledge and experience of tax law to get the parties to focus productively and efficiently on working the case; sometimes this turns into a form of light mediation.
 - ▶ By getting the parties engaged and communicating during the Scheduling Hearing, AHO often finds there are areas of potential agreement needing further exploration.
- ▶ At the Scheduling Hearing, discovery and motions deadlines are set, and a formal merits hearing date(s) is set.



Merits Protest Hearing

- ▶ With agreement of both parties, under Section 7-1B-8(B) NMSA 1978, the protest hearing can occur via videoconference, a process we have implemented under our new hearing regulations, 22.600.3.10 NMAC.
- ▶ The protest hearing is a confidential, closed proceeding unless a taxpayer requests it to be an open hearing. See Section 7-1B-8 (B) NMSA 1978.
- ▶ A taxpayer may be represented by a bona fide employee, an attorney, or a certified public accountant at the protest hearing. In personal income tax cases only, an enrolled agent may also represent a taxpayer. See Section 7-1B-8 (B) NMSA 1978.
- ▶ Generally, taxpayers have the burden of proof during the hearing to overcome the presumption of correctness that attached to TRD's assessment. See Section 7-1-17 (C) NMSA 1978. Under case law, taxpayers also generally have the burden to establish entitlement to claim for refund or claim for credit.
 - ▶ Under case law, if a taxpayer overcomes the presumption of correctness in the case, the burden then shifts to TRD to reestablish the correctness of its action.
 - ▶ Taxpayers present their case first, including exhibits/documents and witness testimony.
 - ▶ TRD then presents its case, including its witnesses and its exhibits/documents.
 - ▶ All witness testimony is given under oath and is subject to cross-examination.
 - ▶ The parties each get an opportunity to make a closing argument.



Resolving/Disposing of a Tax Protest

- ▶ After conclusion of the hearing, the parties may request and the assigned Administrative Law Judge may require submission of additional legal briefing, proposed findings of fact, and proposed conclusions of law. See Section 7-1B-6(D)(2) NMSA 1978 and Regulation 22.600.3.25 NMAC.
- ▶ Once the record is complete, the ALJ reviews the hearing record and prepares a written final decision and order, which contains the following:
 - ▶ Detailed Findings of Fact, often with specific citations to the supporting evidence or the specific testimony supporting the finding.
 - ▶ A detailed discussion section addressing the arguments of the parties and analyzing the factual and legal issues presented in the matter.
 - ▶ Conclusions of Law in the matter.
- ▶ The final decision and order has multiple audiences:
 - ▶ The two parties in dispute in the hearing;
 - ▶ The Court of Appeals, as the reviewing body;
 - ▶ Although AHO's final decision and order has no formal legal precedence (stare decisis or controlling authority), TRD, tax professionals, and taxpayers rely on them in addressing (and avoiding) similar issues. Thus decisions must be understandable.
 - ▶ The Legislature, LFC and LCS staff can also review the decision and orders for general guidance about what statutory areas that could be addressed by the Legislature.
 - ▶ All merits decisions and orders are public documents, available for review at <http://www.tax.newmexico.gov/tax-decisions-orders.aspx>.
 - ▶ AHO also has an email distribution list for decisions.



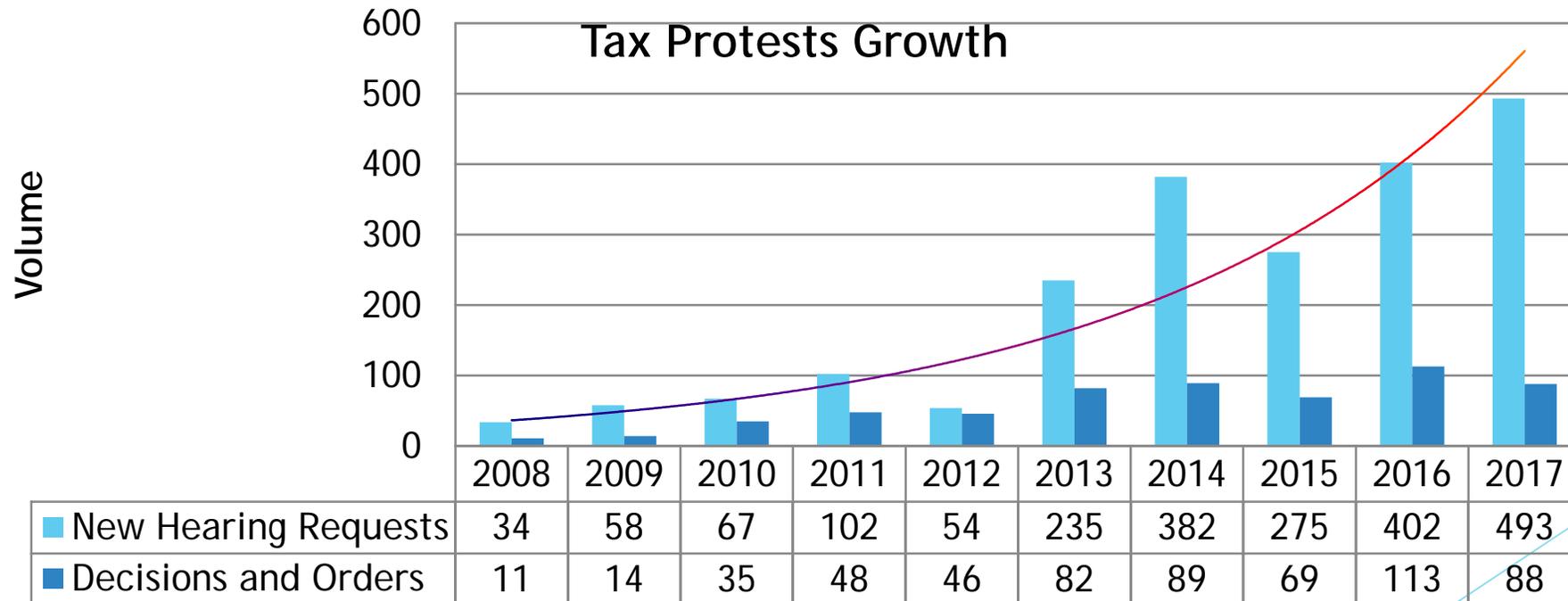
Factors Impacting the Time to Dispose of a Tax Protest Hearing

- ▶ The complexity of the case: bigger, more complex cases simply take longer to fairly adjudicate.
- ▶ Whether there is a similar case on appeal: appeals can take between six months to two years to resolve.
- ▶ Whether a taxpayer is waiting for IRS adjustments.
- ▶ The preparation, resources, and knowledge of the parties
 - ▶ Whether the parties need extensive exchange of information and discovery before conducting the hearing, as allowed under Section 7-1B-6 NMSA 1978.
 - ▶ The knowledge of the parties before AHO about substantive and procedural tax law.
 - ▶ The resources of TRD, who is a party to every AHO hearing, to efficiently address cases.
- ▶ The size of the tax docket and availability of an AHO ALJ to conduct a hearing, review the record, and write the decision while still managing and conducting other cases on the tax docket.



Growth in the Tax Docket (by Calendar Year)

Calendar Year	New Hearing Requests (cases) Filed	Decisions and Orders Issued
2008	34	11
2009	58	14
2010	67	35
2011	102	48
2012	54	46
2013	235	82
2014	382	89
2015	275	69
2016	402	113
2017	493	88



Dispositions by Fiscal Year

- ▶ In Fiscal Year 2016, AHO received **406** new tax protest hearing requests.
 - ▶ **375 (92%)** of those cases are resolved and closed (though some decisions are still under appeal).
 - ▶ There are still **9 active protest cases** and **22 stayed cases** (paused pending appeal resolution) from FY16 on the docket with \$14 million in outstanding assessments and \$59 million in outstanding refund claims.
 - ▶ The average disposition time as of April 2018 for FY16 cases is **223 days**.
- ▶ In Fiscal Year 2017, AHO received **345** new tax protest hearing requests.
 - ▶ **261 (75%)** of those cases are resolved and closed (though some decisions are still under appeal).
 - ▶ There are still **52 (15%) active protest cases** and there are **32 (10%) cases that are stayed** pending resolution of an appeal from FY17, with \$79 million in outstanding assessments and \$77 million in outstanding refund claims.
 - ▶ The average disposition time as of April 2018 for FY17 cases is **193 days**.
- ▶ In Fiscal Year 2018, the Administrative Hearings Office received **482** new tax protest hearing requests.
 - ▶ Rather than the target effective docket of 50-70 tax hearings per year for a dedicated tax ALJ position, with the current volume of new tax protest cases each of the 3.25 ALJ positions focused on tax hearings have twice that case load.
 - ▶ Approximately **64% (317)** of those cases are resolved and closed (though some decisions are still under appeal).
 - ▶ Approximately **36% (165)** of those cases filed in Fiscal Year 2018 still remain on the docket.
 - ▶ There is \$55 million in outstanding assessment and \$95 million in outstanding claims for credits/refunds in the open FY18 cases.
 - ▶ The average disposition time of resolved cases for FY18 cases is **193 days**.



Appeals

- ▶ By statute, both parties have a right to appeal a tax protest decision and order directly to the New Mexico Court of Appeals. See Section 7-1B-8 (C) NMSA 1978.
- ▶ Currently, there are at least 27 AHO decisions and orders under appeal before the Court of Appeals. At least four of the pending appeal issues could potentially significantly narrow the scope or resolve many of the outstanding issues in stayed and pending cases before AHO:
 - ▶ Construction Cost Segregation Issue (*Weil Construction*, Appeal No. A-1-CA-35845, Taxpayer appeal filed 9/14/2016)
 - ▶ Medical Deduction under 7-9-93 NMSA 1978 (*Golden Services*, Appeal No. A-1-CA-36987, TRD appeal filed 1/18/2018)
 - ▶ Chemical reagent deduction under 7-9-65 NMSA 1978 (*Tucson Electric*, No. A-1-CA-35781, Taxpayer appeal filed 7/21/2016, & *Peabody Coalsales Company*, No. A-1-CA-36632, Taxpayer appeal filed 8/29/2017)
 - ▶ High Wages Jobs Tax Credit cases on appeal (*Par Five Energy Services, LLC*, No. A-1-CA-37231, Taxpayer appeal filed 4/20/18, & *Mosaic Potash Carlsbad, Inc.*, No. A-1-CA-37303, Taxpayer appeal filed 5/11/2018).
- ▶ An appeal has an approximate average disposition time of 18-months. If the decision is appealed further to the New Mexico Supreme Court, or federally, the appeals period will be longer.
- ▶ Historically, the Administrative Hearings Office has been affirmed/mostly affirmed on main issue by the Court of Appeals in approximately 76% of cases.



Ways to Improve Hearing Disposition Efficiency

- ▶ Indiana recently made four significant changes to its protest process with the aim of improving protest resolution efficiency to 120-days:
 - ▶ Gave taxpayers the traditional standard route of protest, having a hearing, and then receiving a final decision;
 - ▶ Gave taxpayers option to file a protest without a formal hearing but instead ask for a secondary review by the Indiana DOR;
 - ▶ Gave taxpayers a fast-track settlement protest option, where within two weeks of filing of the protest the taxpayers submit a written offer of settlement along with a detailed justification why settlement is appropriate;
 - ▶ Gave taxpayers option to in the protest to resubmit to audit with new documents or evidence instead of formal hearing process.
- ▶ According to Indiana DOR officials, these changes made significant, positive impacts:
 - ▶ Reduced average disposition time of pending protests;
 - ▶ Reduced the overall tax protest docket significantly;
 - ▶ Reduced year-over-year protests by 41%;
 - ▶ The number of tax protest cases appealed was reduced by 70%.
- ▶ Not all of these solutions would be right for New Mexico, but are worth further consideration.
- ▶ Any changes to New Mexico's tax protest hearing process needs to be considered within the limitations of the anti-cancellation of debt clause of the New Mexico constitution (Art. IV, § 32).
 - ▶ This is why New Mexico does not have an offer and compromise program like the IRS or many states.
 - ▶ To develop an offer and compromise program would require an amendment to that constitutional provision.
 - ▶ TRD's current statutory limitation to only settle cases where it has a reasonable, good faith doubt about the assessed liability.



Statutory Changes to Improve Hearing Disposition Efficiency

▶ Nevertheless, even within the limitations of that the constitutional clause, there are still some statutory mechanisms that could improve efficiency:

- ▶ Give taxpayers some ability to direct the process at the time of filing the protest:
 - ▶ Request a traditional litigation track (the current hearing process).
 - ▶ Request a reconsideration of audit in light of extra documentation not initially considered, tolling hearing deadlines.
 - ▶ Request a review of the TRD determination with a taxpayer advocate without a formal hearing. Or statutorily empower the taxpayer advocate to review and submit a recommendation (along with TRD and Taxpayer response) to AHO for adoption.
 - ▶ A fast-track settlement/informal conference/mediation process.
 - ▶ Statutory timeframes could either be relaxed or tolled during this process;
 - ▶ Taxpayers could present an offer of settlement supported by grounds establishing reasonable doubt as to liability within a defined period (2-weeks in Indiana) and then an informal conference with TRD could be required within a defined period;
 - ▶ Could be useful in addressing taxpayer and business community concerns that the process has become more litigious and complex.
- ▶ The fast-track settlement proposal option would also be a natural starting point to incorporate a formalized, statutory mediation process:
 - ▶ If no progress is made at the informal conference, Taxpayer could have the option to request mediation about their proposed settlement before matter gets scheduled for a formal hearing.
 - ▶ Although mediation should not be mandatory, statutes and rules could create some meaningful incentives for good-faith participation in mediation process before the formalized hearing process begins.
- ▶ Soften hearing deadlines:
 - ▶ Give TRD 90-days to work a protest before they are required to request a hearing;
 - ▶ Then give AHO 90-days to conduct the hearing from TRD's request for setting, extendable by request of the taxpayer or for other justified reasons.



Statutory Changes to Improve Hearing Disposition Efficiency (Continued)

- ▶ Strengthen disincentives for needless litigation and appeals by statute.
 - ▶ Statutory changes to both increase the minimum assessment threshold (currently \$25.00) and make clear that cases lesser than that amount cannot be pursued by TRD through formal hearing at AHO.
- ▶ Clarify concurrent TRD-AHO subpoena authority and add an enforcement mechanism for AHO's subpoena power.
- ▶ A comprehensive and modern case and docket management software would allow AHO to improve hearing efficiency and make tracking of efficiency and other statistical information more possible.
- ▶ Resources: statutory changes alone do not increase efficiency without addressing resource limitations.
 - ▶ Increase the number of, and classification of, dedicated tax hearing officer/ALJs.
 - ▶ Provide funding to increase training opportunities for ALJs in tax law.
 - ▶ TRD needs more attorneys, protest auditors, and taxpayer advocates.
 - ▶ Providing additional resources into improving the efficiency of the process benefits both the state in projecting and collecting revenue with certainty, and the business/taxpaying community in projecting their own risk and opportunity in locating in New Mexico or expanding their New Mexico business.
- ▶ More broadly, the model and structure of the AHO and the Administrative Hearings Office Act could be expanded into a central panel of ALJs who handle all executive agency administrative hearings needs.
 - ▶ This is the national trend because it is both a good government initiative and because it generally leads to cost and resource efficiency.
 - ▶ States that have adopted that central panel model have not gone back to agencies conducting their own hearings.



Historical and Current Placement Or Why are We Talking About This

- ▶ Continued discussion about non-economic factors in the revenue forecast.
- ▶ Lack of Language Consistency.
- ▶ Lack of Application Consistency.
- ▶ Seeking Balance between the Protection of the General Fund and Economic Development.
- ▶ Causal relationship between economic downturn and an increase in protests.



Snapshot Example

- ▶ In 2016, the Protest Office acknowledged 1,900 formal protests.
- ▶ Approximately 1,800 protests were closed.
- ▶ Of those that were closed, approximately 1,200 were resolved by the protest office, usually penalty and interest cases and corrections or lack of documents.
- ▶ The percentage is about 67%-70% resolved at the protest level and 30%-33% legal handles through litigation (Protest or District Court).



Tax Refund Protests at TRD

	FY13	FY14	FY15	FY16	FY17	FY18
Number of Protests Filed	326	501	471	797	609	578
Number of Protests Resolved	269	410	370	760	539	536
Cumulative Number of Protests Outstanding at End of FY	57	145	133	120	185	227

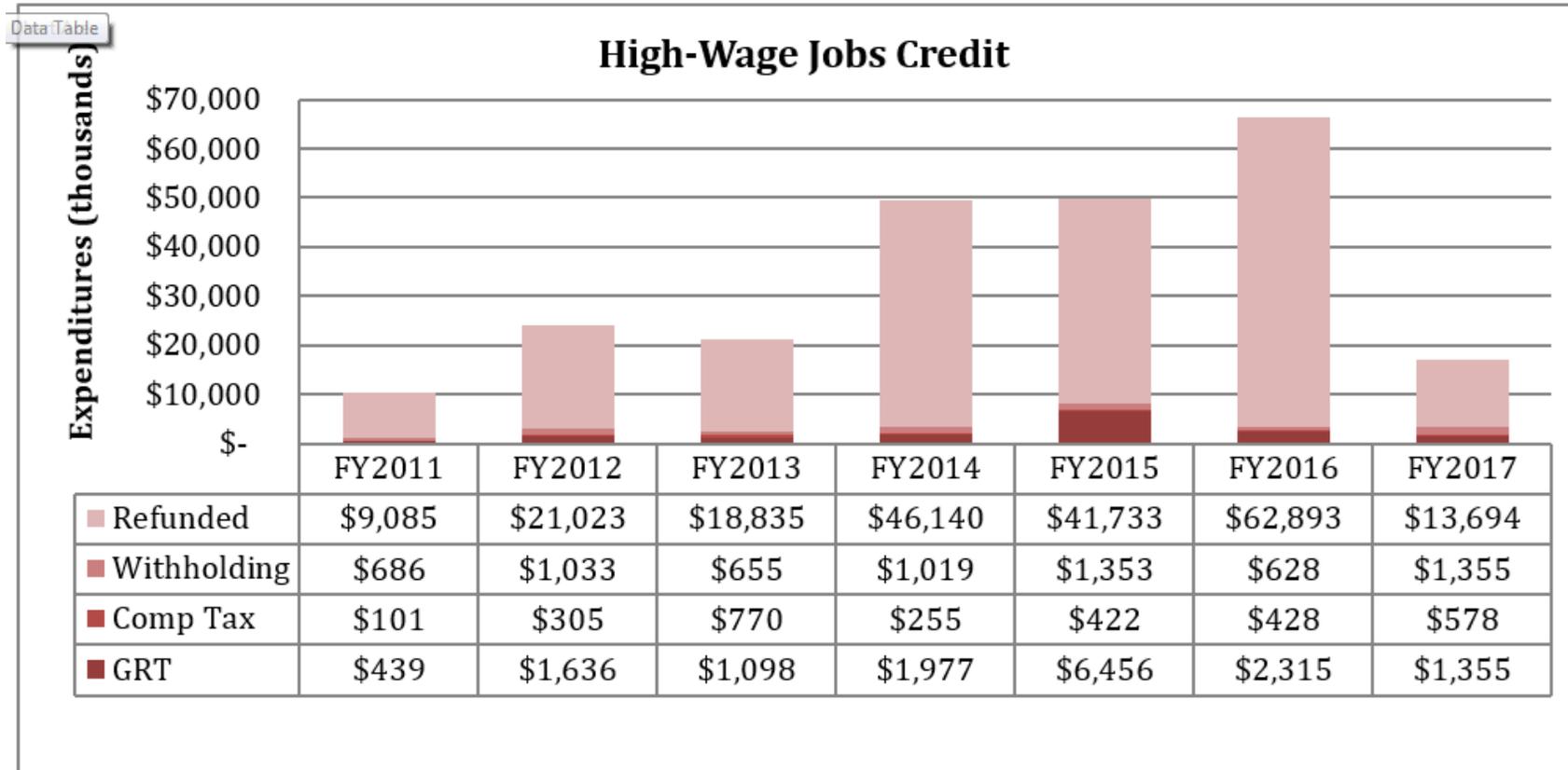


Top Five List of Reasons for Protest

Top Five Protest Issues by FY (identify issues and magnitude of protest value for each issue)	FY13	FY14	FY15	FY16	FY17	FY18
Issue 1	High-wage Tax Credit	Missing Documents				
Issue 2	Missing documents	Disallowed net operating loss				
Issue 3	Disallowed net operating loss	Disallowed net operating loss	Disallowed net operating loss	Chemical Reagent	Chemical Reagent	Erroneous reporting gross receipts tax
Issue 4	Missing payment	Missing payment	Hospital Credit 7-9-63 & 77.1			
Issue 5	Statute of Limitation	Statute of Limitation	Cost Segregation	Cost Segregation	Statute of Limitation	High-wage Tax Credit

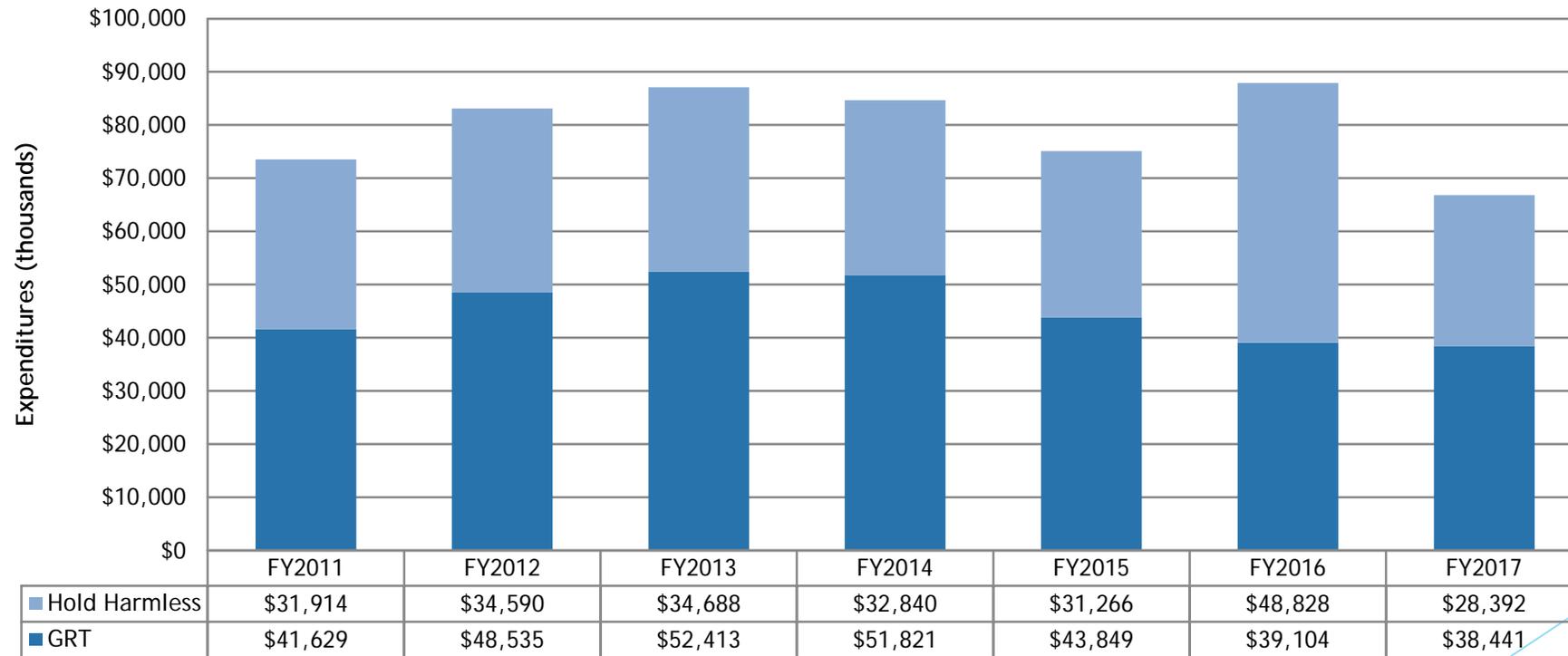


High-Wage Jobs Credit



Hospital Credit

Health Care Practitioner Services Deduction



Chemical Reagent

- ▶ Chemical reagent deduction under 7-9-65 NMSA 1978 (*Tucson Electric*, No. A-1-CA-35781, Taxpayer appeal filed 7/21/2016, & *Peabody Coalsales Company*, No. A-1-CA-36632, Taxpayer appeal filed 8/29/2017)
- ▶ Single largest risk category from a financial perspective
- ▶ Second series type of reagent cases currently scheduled on the hearing calendar in October 2018
- ▶ Various bills in the 2018 legislative session considered Section 7-9-65 NMSA 1978.



Comparison and Context

- ▶ In December 2016, the Center on State Taxation produced a report based upon a balanced scorecard on tax administration fairness and independent appeal processes. The following are listed as best practices in the evaluation:
 - ▶ Independent appeals forum
 - ▶ Taxpayers must not be forced to pay or post a bond prior to an independent hearing and resolution of a dispute
 - ▶ The record for further appeals must be established before an independent body
 - ▶ The arbiter at the hearing must be well-versed in the intricacies of state laws and concepts
- ▶ New Mexico scored a B+ (tied for fifth best in the country) and up from a D at the beginning of the administration.
- ▶ With the creation of the Independent Hearings Office in 2015, “New Mexico is now considered one of COST’s top-ranked states for fair and efficient tax administration.”



Ways to Improve from a TRD Perspective

- ▶ Development of the Business Credit Unit.
 - ▶ Five FTE within the Office of the Secretary that include an attorney and economist to assist day-to-day determinations and develop long term policy
 - ▶ Best Practice
- ▶ Strengthening the Legal Bureau.
 - ▶ Adding additional staff
 - ▶ Re-class of at least four positions to Attorney 4 for purposes of retention and recruitment
 - ▶ Inclusion of cases into GenTax.
- ▶ Tax Incentive Statute Construction.
- ▶ Small Business Managed Audit Campaign.
- ▶ Additional Regulations.
 - ▶ High-Wage Jobs Tax Credit
 - ▶ Cost Segregation



Questions

- ▶ Before we address your questions, it is important to reiterate some of AHO's limitations on addressing:
 - ▶ Questions dealing with the formulation of substantive tax policy (Section 7-1B-7 NMSA 1978);
 - ▶ Questions addressing the merits of any pending matters before AHO (Section 7-1B-7 NMSA 1978 and Reg. 22.6002.17 NMAC);
 - ▶ Questions that might require addressing such a small pool of taxpayers that it could be considered revealing confidential, taxpayer information (Section 7-1-8.1 through 8.10 NMSA 1978);
 - ▶ Questions that might require making any public statements, commitments, or pledges about a particular matter likely to be before AHO. (Reg. 22.6002.17 NMAC)
- ▶ In light of these limitations, AHO may have to defer to TRD to answer some of your questions.
- ▶ With that, we stand for questions.

