STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF **17-37**
PERMIAN MACHINERY MOVERS INC.
TO ASSESSMENTS
ISSUED UNDER LETTERS ID NOs.
L0975076400 and L0284286000

DECISION AND ORDER

A hearing occurred in the above-captioned protest on June 1, 2017 and June 2, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Mr. Oscar J. Ornelas, Esq., represented Permian Machinery Movers, Inc. ("Taxpayer"). Mr. Ramon "Ray" Chavez (Treasurer), Mr. Roy Chavez (Vice-President), and Ms. Rosemary Chavez (Secretary), appeared and testified on Taxpayer's behalf. Staff Attorney, Mr. Peter Breen, appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor, Mr. Andrick Tsabetsaye, appeared as a witness for the Department. Taxpayer Exhibits #1, #2, and #4 – #18, and Department Exhibits A – D were admitted into the record. Taxpayer did not proffer an exhibit #3. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. The Hearing Officer provided the parties through June 30, 2017 to submit proposed findings of fact and conclusions of law. The Taxpayer submitted proposed findings and conclusions on June 30, 2017. The Department did not submit proposed findings or conclusions. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 17, 2015, under Letter ID No. L0284286000, the Department assessed Taxpayer for $6,285.00 in corporate income tax, $1,233.14 in penalty, and $822.99 in

interest for a total assessment of $8,341.13 for the reporting periods from December 31, 2008 through December 31, 2014.

2. On December 17, 2015, under Letter ID No. L0975076400, the Department assessed Taxpayer for $143,464.78 in gross receipts tax, $28,342.22 in penalty, and $17,531.56 in interest for a total assessment of $189,338.56 for the reporting periods ending January 31, 2008 through May 31, 2015.

3. On March 16, 2016, counsel for Taxpayer executed Formal Protests of both assessments on Taxpayer's behalf. The Department received the protests on March 21, 2016. The protests were accompanied by Tax Information Authorization forms which authorized counsel to act on Taxpayer's behalf in reference to the matters in protest.

4. On March 24, 2016, the Department's Protest Office acknowledged receipt of both valid protests in this matter.

5. On May 3, 2016, the Department filed requests for hearings in these matters with the Administrative Hearings Office. The Administrative Hearings Office consolidated the protests for the purpose of administrative efficiency and economy.

6. On May 3, 2016, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Hearing, setting the consolidated matters for a scheduling hearing on June 3, 2016.

7. On June 3, 2016, within 90-days of the Department's receipt and acknowledgement of Taxpayer's protests, the Administrative Hearings Office conducted a scheduling hearing in the above-captioned matter. Neither party objected that conducting the scheduling hearing satisfied the 90-day hearing requirement under the statute while also allowing for discovery, motions, and other prehearing activities intended to allow the parties to prepare for an ample and fair

presentation of their respective cases pursuant to NMSA 1978, Sec. 7-1-24.1 and NMSA 1978, Sec. 7-1B-6 (D) (2016).

8. On June 3, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting various deadlines for discovery and motions, and setting the matter for a hearing on the merits on February 15 – 16, 2017.

9. On October 26, 2016, the Administrative Hearings Office received a Certificate of Service and two compact discs. The compact discs were promptly returned to counsel for the Taxpayer after explaining that the Administrative Hearings Office does not accept for filing any evidentiary exhibits addressing the merits of a protest, which should be proffered during the hearing. The Certificate of Service that accompanied the compact discs was filed on October 26, 2016.

10. On January 17, 2017, the Taxpayer filed its witness list.

11. On February 1, 2017, Taxpayer filed a Motion for Continuance. The Department did not oppose the Taxpayer's request.

12. On February 6, 2017, the Administrative Hearings Office issued a Continuance Order, Notice of Reassignment, Amended Scheduling Order, and Amended Notice of Administrative Hearing, which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protests for June 1 – June 2, 2017.

13. On May 17, 2017, the Department filed the Department's Pretrial Statement.

14. On May 17, 2017, the Taxpayer filed its Motion to Exclude Witness Testimony.

15. On May 18, 2017, the Taxpayer filed Taxpayer's Pretrial Statement.

16. On May 18, 2017, the Taxpayer filed Taxpayer's Second Amended Pretrial Statement.

17. On May 26, 2017, the Department filed its Response to Motion to Exclude Witnesses.

18. On May 26, 2017, Taxpayer filed Taxpayer's Reply to Department's Response to Taxpayer's Motion to Exclude Witness Testimony.

19. On June 30, 2017, Taxpayer filed Taxpayer's Proposed Findings of Fact and Conclusions of Law.

20. Taxpayer is a corporation organized under Texas law. It engages in business from three locations in Texas: El Paso, Odessa, and San Antonio. [Testimony of Ramon Chavez].

21. Taxpayer rents, sells, buys, trades, and services lift equipment, including forklifts and scissor lifts. It also sells replacement parts and accessories for lift equipment and provides training in the proper operation of such equipment. Taxpayer also provides rigging services which consist of relocating heavy equipment between locations. [Testimony of Ramon Chavez; Testimony of Roy Chavez].

22. The Taxpayer maintains record of its business transactions in the form of invoices. [Testimony of Ramon Chavez; Testimony of Roy Chavez; Taxpayer Exs. 1 – 15].

23. Due to the proximity of El Paso, Texas to the New Mexico-Texas border, Taxpayer's El Paso business location benefits from business from customers in New Mexico. Mr. Roy Chavez, in addition to other responsibilities for Taxpayer, manages the El Paso, Texas business location. [Testimony of Ramon Chavez; Testimony of Roy Chavez].

24. Taxpayer does not maintain employees, agents, business locations, inventory, or financial accounts in New Mexico, nor does Taxpayer advertise in New Mexico or otherwise actively solicit New Mexico business. [Testimony of Ramon Chavez; Testimony of Roy Chavez].

25. Taxpayer's sale's territory covers portions of southcentral and southeastern Texas including El Paso, Odessa, and San Antonio. Taxpayer's territory extends north into New Mexico to Albuquerque. [Testimony of Roy Chavez].

26. Taxpayer occasionally travels into New Mexico to deliver, pickup, service, inspect, or transport equipment for New Mexico-based and non-New Mexico-based customers doing business in New Mexico. [Testimony of Ramon Chavez; Testimony of Roy Chavez].

27. During the relevant periods of time, Taxpayer paid tax on New Mexico transactions to the State of Texas with the understanding that New Mexico did not impose a sales tax. Taxpayer was not aware of New Mexico's gross receipts tax. [Testimony of Ramon Chavez; Testimony of Rosemary Chavez].

28. The Department conducted a detailed field audit for the periods ending between January 1, 2008 and May 31, 2015. The detailed audit required that the field auditors review every invoice generated in every month within the period subject of audit. [Testimony of Andrick Tsabetsaye].

29. The audit at issue in the protest occurred in El Paso, Texas. [Testimony of Ramon Chavez; Testimony of Roy Chavez].

30. In response to the requests of the auditors conducting the audit of Taxpayer's business activities, the Taxpayer provided invoices of its transactions for the relevant periods of time. The auditors made no further inquiries of the Taxpayer. [Testimony of Ramon Chavez].

31. The Department did not present the testimony of any witnesses having personal, first-hand knowledge of the procedures employed by the field auditors, as well as interactions between the Taxpayer and the auditors regarding any documents under review.

32. Taxpayer presented thousands of pages of invoices divided into several separate categories of transactions, with each category containing examples of transactions the Department determined were taxable. [Taxpayer Exs. 1 – 15].

33. During the relevant periods of time, Taxpayer generated income from providing instructional services to forklift operators, also called "licensing" services. Instructional services, or licensing services, included classroom and behind-the-wheel training. Upon the successful conclusion of the course, students received certificates of completion. [Testimony of Roy Chavez; Taxpayer Ex. 1].

34. Taxpayer Exhibit 1 established that its receipts from providing licensing services, were $4,995.19, including any taxes that it may have collected and remitted to the State of Texas. From those invoices contained in Taxpayer Exhibit 1, the Department identified $2,865.00 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 1; Dept. Ex. C.].

35. Although invoices for licensing services may indicate a shipping method of "PMI Truck" to an address in New Mexico, the shipping method indicated resulted from a default setting in the Taxpayer's invoicing computer system. Instruction occurred exclusively in El Paso at Taxpayer's business location. Instruction services are not, nor have they ever been provided in New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 1].

36. During the audit period, Taxpayer generated income from rigging services. Rigging services consist of relocating equipment between locations. The services may occur between New Mexico locations, between a New Mexico location and a location in another state, or exclusively between out-of-state locations. In each example, the customer for whom services are provided may or may not have had a billing address in New Mexico. However, the address where a customer

was to be billed was not an accurate indicator of where the service was provided. [Testimony of Roy Chavez].

37. Taxpayer Exhibit 2 represents income generated from rigging services performed for customers having a billing address in New Mexico. The services were provided between two non-New Mexico locations. [Testimony of Roy Chavez; Taxpayer Ex. 2].

38. Although Taxpayer invoices contained in Taxpayer Exhibit 2 may refer to a New Mexico customer in the "Bill To" or "Ship To" section of a given invoice, the description of services provided on each invoice in Taxpayer Exhibit 2 explain the nature of the services in more detail, including the non-New Mexico locations where equipment was picked up and delivered. [Testimony of Roy Chavez; Taxpayer Ex. 2].

39. Taxpayer Exhibit 2 reveals that the total sum of receipts generated from non-New Mexico rigging services, meaning services provided between two non-New Mexico locations, during the audit period were $26,044.00 including tax collected and paid to the State of Texas. From those invoices contained in Taxpayer Ex. 2, the Department identified $6,119.00 as unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 2; Dept. Ex. C].

40. Taxpayer generated income from providing out-of-state, on-site service and repairs to non-New Mexico customers. Those services consisted of a technician traveling to the site where equipment was located to perform maintenance or repairs. In each invoice within this category of transactions, the services were provided outside of New Mexico. The location of the service was established by referencing the contact information contained on the invoice which directed the technician to the location where the services were provided, or by referring to the description of service provided on each invoice which described the location where the repairs were performed. [Testimony of Roy Chavez; Taxpayer Ex. 4].

41. Taxpayer Exhibit 4 contains invoices from non-New Mexico, on-site service and repairs in the amounts of $18,986.80 including taxes that were collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 4, the Department identified $15,020.76 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 4; Dept. Ex. C].

42. Taxpayer generated income from providing service and repairs to New Mexico customers at its facility in El Paso, Texas. These types of services occurred at Taxpayer's facility, in contrast to service and repairs occurring at a customer's jobsite. [Testimony of Roy Chavez; Taxpayer Ex. 5].

43. Taxpayer Exhibit 5 contains invoices from such services in the amounts of $67,997.36 including taxes that were collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 5, the Department identified $25,673.47 in unreported taxable gross receipts of which $290 was generated from separately charging for pickup or delivery services in New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 5; Dept. Ex. C].

44. Taxpayer generated income from selling goods, such as parts, which were sold and picked up from its business location in El Paso, Texas. Goods sold and picked up from its shop included sales to customers having billing addresses in New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 6].

45. Taxpayer Exhibit 6 contains invoices from sales of goods from Taxpayer's shop which buyers picked up from the shop. Taxpayer Exhibit 6 established total receipts in the amount of $24,360.78 including taxes that were collected and paid to the State of Texas. Invoices in this category of transactions indicate a shipping method of "Cust. Pickup" meaning that the goods were picked up by the customer. Of those invoices contained in Taxpayer Exhibit 6, the Department

identified $9,897.94 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 6; Dept. Ex. C].

46. Similar to the sale of other goods addressed in Taxpayer Exhibit 6, Taxpayer generated receipts from the sales of forklifts which the customer picked up from the Taxpayer's business location in El Paso, Texas. Taxpayer does not maintain any locations in New Mexico where customers may purchase or pickup forklifts. Receipts from forklift sales as illustrated from Taxpayer Exhibit 7 in this category of transactions were $187,528.81, including taxes that were collected and remitted to the State of Texas. The Department identified $95,445.41 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 7; Dept. Ex. C].

47. Taxpayer generated income from forklift rentals. Taxpayer Exhibit 8 contained invoices of transactions for forklift rentals to customers having billing addresses both within and without New Mexico which were delivered to non-New Mexico locations. Rentals within this category of transactions were delivered consistent with the information contained in the "Ship To" section of the invoice. None of the invoices indicate a New Mexico delivery site. Taxpayer Exhibit 8 illustrates $143,756.01 in receipts from this category of transactions, including taxes collected and paid to the State of Texas. The Department identified $98,945.64 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 8; Dept. Ex. C].

48. Taxpayer generated income from forklift rentals which the customer picked up from the Taxpayer's El Paso, Texas business location. Each invoice in this category of transactions indicated that the customer, some of whom had a billing address within New Mexico and some of whom did not, picked up the rental equipment from the Taxpayer's business location. Taxpayer Exhibit 9 illustrated that Taxpayer generated $88,950.81 from such rentals including taxes that were collected and remitted to the State of Texas. From those invoices contained in Taxpayer

Exhibit 9, the Department identified $70,964.25 in unreported taxable gross receipts tax. [Testimony of Roy Chavez; Taxpayer Ex. 9; Dept. Ex. C].

49. Taxpayer generated income from rigging services between New Mexico and other out-of-state locations. Invoice descriptions in this category of transactions provide further elaboration regarding the locations of pickup and delivery. Services in this category of transactions either originated or terminated in New Mexico. Taxpayer Exhibit 10 illustrated receipts in the amount of $42,755.50 in including taxes collected and paid to the State of Texas. From those invoices contained in Taxpayer Exhibit 10, the Department identified $42,570.50 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 10; Dept. Ex. C].

50. Taxpayer generated income from providing service and repairs in New Mexico. In each transaction within this category, Taxpayer's technicians traveled to, and performed services in, New Mexico. Taxpayer Exhibit 11 contained invoices totaling $56,177.52 in receipts, including taxes collected and remitted to the State of Texas. Of those invoices contained in Taxpayer Exhibit 11, the Department identified $54,704.23 in unreported taxable gross receipts. [Testimony of Roy Chavez; Taxpayer Ex. 11; Dept. Ex. C].

51. Taxpayer generated income from selling parts that it hand-delivered to customers in New Mexico. In each transaction within this category, Taxpayer sold parts and delivered the items to buyers in New Mexico. In each instance, the Taxpayer collected and paid sales taxes to the State of Texas. Taxpayer Exhibit 12 contained invoices totaling $9,746.00 in receipts including taxes collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 12, the Department identified $9,454.50 in unreported taxable gross receipts, including taxes collected and paid to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 12; Dept. Ex. C].

52. Similar to Taxpayer Exhibit 12, Taxpayer Exhibit 13 establishes that Taxpayer generated additional income from selling parts that it hand-delivered to customers in New Mexico. In each transaction within this category, Taxpayer sold parts and delivered the items to buyers in New Mexico. In each instance, the Taxpayer collected and paid sales taxes to the State of Texas. Taxpayer Exhibit 13 contained invoices totaling $17,057.00 in gross receipts including taxes collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 13, the Department identified $13,921.63 in unreported taxable gross receipts, including taxes collected and paid to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 13; Dept. Ex. C].

53. Taxpayer generated income from selling forklifts which Taxpayer delivered to New Mexico. In each transaction within this category, Taxpayer collected and paid taxes to the State of Texas. Taxpayer Exhibit 14 contained invoices totaling $306,281.53 in receipts including taxes collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 14, the Department identified $149,409.91 in unreported taxable gross receipts, including taxes collected and remitted to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 14; Dept. Ex. C].

54. Taxpayer generated income from renting forklifts that it delivered to locations in New Mexico. Taxpayer Exhibit 15 contained invoices totaling $1,365,240.95 in receipts including taxes collected and paid to the State of Texas. Of those invoices contained in Taxpayer Exhibit 15, the Department identified $1,220,820.46 in unreported taxable gross receipts, including taxes collected and paid to the State of Texas. [Taxpayer Ex. 15].

55. On occasion, and observed frequently among the invoices contained in Taxpayer Exhibit 15, the Taxpayer charged a tax that was typically itemized as “New Mexico Sales Tax (Voluntary).” The amounts of taxes collected pursuant to that itemization were paid to the State of

Texas, not New Mexico. [Testimony of Roy Chavez; Testimony of Rosemary Chavez; Taxpayer Exs. 1 – 15].

56. In the majority of circumstances, equipment was employed at the location where Taxpayer also delivered the equipment. Taxpayer was less knowledgeable regarding the location where its equipment was being employed when the customer picked up the equipment from its place of business. [Testimony of Roy Chavez].

57. Taxpayer occasionally visited sites where its leased equipment was being utilized for the purpose of inspecting, servicing, and performing maintenance. Such inspections usually occurred every 250 to 300 hours of operation or every three months depending on the duration of the lease. [Testimony of Roy Chavez].

58. Taxpayer reports and pays taxes on a monthly frequency to the State of Texas and all taxes collected during the audit period, whether or not designated for New Mexico, were paid to the State of Texas. [Testimony of Rosemary Chavez; Taxpayer Ex. 17; Taxpayer Ex. 18].

59. Taxpayer has not sought a refund for any taxes Taxpayer could potentially assert were erroneously paid to the State of Texas for any transactions occurring during the audit period. [Testimony of Rosemary Chavez].

60. Taxpayer did not consult or rely on the advice of competent tax professionals in evaluating its New Mexico tax obligations or liabilities for the periods subject of the audit and assessment subject of this protest. [Testimony of Rosemary Chavez].

61. Taxpayer was not aware of the New Mexico gross receipts tax. Taxpayer researched sales taxes in New Mexico, but because Taxpayer specifically inquired about a "sales tax" rather than a "gross receipts tax," the information Taxpayer obtained and acted upon was that New Mexico did not have a "sales tax." [Testimony of Ramon Chavez].

62. Taxpayer did not file CRS returns for any period in protest. Since Taxpayer was a non-filer, the Department was allowed to assess taxes seven years from the end of the calendar year in which the taxes were originally due, which was December 31, 2008. [Testimony of Andrick Tsabetsaye].

63. The Department conducted a detailed audit of Taxpayer. Department auditors reviewed every invoice from every month at issue and identified $3,378.257.60 in unreported taxable gross receipts of which $2,963,811.42 were deemed to be taxable. [Testimony of Andrick Tsabetsaye; Dept. Ex. C]

64. The Department did not make any adjustment to the audit to provide Taxpayer with a credit with respect to taxes it paid to Texas. The Department was unable to locate any authority for such an adjustment under the circumstances of this assessment. [Testimony of Andrick Tsabetsaye].

65. Mr. Tsabetsaye did not participate in the field audit. His role was limited to reviewing the detailed field audit subject of the protest. [Testimony of Andrick Tsabetsaye].

66. Mr. Tsabetsaye reviewed all of Taxpayer invoices against the information contained in the Department's Computation of Audited Gross Receipts [Dept. Ex. C] but due to computer issues, was unable to testify at the hearing regarding the details of his review of Taxpayer's invoices and any comparison he conducted to Department Exhibit C. [Testimony of Andrick Tsabetsaye].

67. Taxpayer was aware that some of the invoices included in Taxpayer's Exhibits 1 – 15 did not result in assessment of tax. [Testimony of Roy Chavez].

68. By and through its counsel of record, the Taxpayer withdrew its protest in reference to Letter ID No. L0284286000 in which the Department assessed Taxpayer for $6,285.00 in

corporate income tax, $1,233.14 in penalty, and $822.99 in interest for a total assessment of $8,341.13 for the reporting periods from December 31, 2008 through December 31, 2014. Consequently, the Taxpayer presented no evidence or argument in dispute of that assessment.

DISCUSSION

At the onset of the hearing, Taxpayer advised that it no longer disputed the assessment issued under Letter ID No. L0284286000 for $6,285.00 in corporate income tax, $1,233.14 in penalty, and $822.99 in interest for a total assessment of $8,341.13 for the reporting periods from December 31, 2008 through December 31, 2014. Consequently, the following discussion will address the remaining assessment for gross receipts tax, penalty, and interest under Letter ID No. L0975076400.

The Taxpayer is engaged in the business of selling goods, services, and leasing equipment from its El Paso, Texas business location. Although Taxpayer operates from two additional locations in Texas, only those operations in El Paso, Texas were relevant to this proceeding.

Some goods and services were delivered in New Mexico, and some were not, and the Taxpayer, for the most part, denied through its counsel that it had knowledge of where its leased equipment was employed. If the Taxpayer collected tax on a transaction that was potentially taxable in New Mexico, then the tax was remitted to the State of Texas in reliance on the fact that New Mexico did not have a state "sales tax." Taxpayer was admittedly unaware of New Mexico's Gross Receipts and Compensating Tax Act. Consequently, Taxpayer never filed returns in New Mexico for any period subject of its protest.

The Department conducted a detailed field audit of the Taxpayer's El Paso, Texas transactions and identified $3,378,257.60 in unreported gross receipts of which it concluded that $2,963,811.42 were taxable among no less than 1,828 transactions. [Dept. Ex. C]. Taxpayer

disputed the Department's audit and presented thousands of pages of invoices distributed among several categories of transactions which it asserted were not, or should not be taxable to New Mexico, and claimed that Taxpayer was entitled to receive a credit for taxes it paid to Texas on the same transactions.

The Taxpayer argued, with respect to at least a portion of the assessment, that the Department's assessment was barred by the statute of limitations. Otherwise, the issue to be decided in this case is whether a Texas-based Taxpayer owes gross receipts tax on the sale of goods, services, and lease payments on transactions with customers in New Mexico, and whether Taxpayer was entitled to receive a credit for taxes it paid to Texas on the same transactions under NMSA 1978, Sec. 7-9-79 (A).

Statute of Limitations

Taxpayer asserted that a portion of the assessment should be precluded by the statute of limitations. NMSA 1978, Section 7-1-18 (C) provides "[i]n case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required *may be assessed at any time within seven years from the end of the calendar year in which the tax was due*, and no proceeding in court for the collection of such tax without the prior assessment thereof shall be begun after the expiration of such period." In this case, the evidence established that Taxpayer never filed a required return, which in turn, provided the Department with seven years to assess Taxpayer from the end of the calendar year in which the tax was due.

The earliest period at issue in this protest was that ending January 31, 2008, meaning that the assessment of that period and every period following, was timely if issued at any point *within seven years from the end of the calendar year in which the tax was due*.

In this instance, gross receipts tax for the period ending January 31, 2008 would have been due "on or before the twenty-fifth day of the month following the month in which the taxable event occurs[,]" or specifically, February 25, 2008. *See* NMSA 1978, Sec. 7-9-11. The end of the calendar year, in which the tax was due, was therefore December 31, 2008. Consequently, the deadline in which to assess the Taxpayer for the earliest period at issue was seven years from December 31, 2008, which was December 31, 2015. The assessment at issue in this protest was issued on December 17, 2015 which was before December 31, 2015 and therefore within the applicable 7-year statute of limitations. Consequently, the assessment, dated December 17, 2015, was timely and within the period required by Section 7-1-18 (C).

Taxpayer's assertions that the statute of limitations precludes any periods contained in the assessment are rejected in favor of this longstanding, plain-language interpretation of Section 7-1-18 (C).

Prehearing Motion to Exclude Department Witnesses

On May 17, 2017, the Taxpayer filed a motion to exclude all Department witnesses except Mr. Tsabetsaye. The Department opposed the motion. The basis for the Taxpayer's motion was that the Department had not specifically disclosed the names of witnesses other than Mr. Tsabetsaye prior to filing its prehearing statement.

At the onset of the hearing, the Department indicated that the only witness it actually intended to present was Mr. Tsabetsaye. The Hearing Officer reserved ruling on the Taxpayer's motion finding that the issue was not ripe until the Department indicated an actual intention to call one or more of the witnesses subject of the Taxpayer's motion.

Because the Department never attempted to call any witnesses subject of the Taxpayer's motion, the motion became moot without requiring the Hearing Officer to rule.

The Department's Ongoing Evidentiary Objection

The Department objected at the hearing to the admission of any invoice for which the Taxpayer did not also present the live testimony of a witness having personal knowledge of the contents of that invoice. In other words, the Department asserted that a witness should be required to testify to each of the 1,872 invoices, individually. The Taxpayer claimed it would have been unduly burdensome to present testimony on each individual invoice. Rather, Taxpayer chose to separate its invoices into separate categories of transactions, present testimony to authenticate the records in that category of transactions, and present testimony regarding only a sample of documents from each category of transactions. The Hearing Officer recognized the Department's ongoing objections to Taxpayer's method of admitting its documents, which were all overruled.

Although the Rules of Evidence are not applicable in administrative hearings under the Administrative Hearing Office Act, the Hearing Officer considered their application for purposes of the legal residuum rule. *See Anaya v. New Mexico State Personnel Board*, 107 N.M. 622, 626, 762 P.2d 909, 913 (Ct.App. 1988).

The Department, in reference to several of the exhibits, stipulated to their authenticity and the fact that they were records maintained in the normal course of business. In circumstances where the Department did not offer such a stipulation, the Taxpayer presented the testimony of a competent witness who was able to identify and authenticate the documents consistent with the requirements of Rule 11-901, NMRA 2017 and establish that they were records of a regularly conducted activity consistent with Rule 11-803 (6), NMRA 2017.

Therefore, it was not necessary that Taxpayer present live testimony for every single one of the 1,872 invoices it offered. The records, having been properly identified and authenticated pursuant

to 11-901, spoke for themselves under a well-established and recognized exception to the rule against hearsay provided by 11-803 (6).

Presumption of Correctness

Under NMSA 1978, Sec. 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Sec. 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Sec. 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

Because Taxpayer is also claiming a deductions, exemptions or credits from gross receipts tax, for taxes it paid to Texas for transactions that were taxable in New Mexico, or for transaction in interstate commerce, Taxpayer must establish its right to claim the deduction, exemption, or credit.

"Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

Taxpayer also has the burden of establishing entitlement to a credit. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation*

& Revenue Dep't, 2005-NMCA-020, ¶9, 137 N.M. 50 (internal citations omitted). Under the rationale of *Team Specialty*, Taxpayer carries the burden of proving that it is entitled to the claimed credit. Nevertheless, although a credit must be narrowly interpreted and construed against a taxpayer, it still should be construed in a reasonable manner consistent with legislative language. *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶9, 107 N.M. 540 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner).

Gross Receipts Tax

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Sec. 7-9-4 (2002). Under NMSA 1978, Sec. 7-9-3.5 (A) (1) (2007), the term "gross receipts" is broadly defined to mean

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

"Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." *See* NMSA 1978, Sec. 7-9-3.3 (2003). Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, Sec. 7-9-5 (2002).

Categories Business Transactions

Taxpayer proffered 1,872 invoices, consisting of several thousand pages, among several categories of transactions. Taxpayer's counsel claimed that those invoices represented *all* of the transactions upon which the Department assessed tax in this matter.

A comprehensive review and comparison of every invoice contained in Taxpayer Exhibits 1 – 15, with Department Exhibit C, could not substantiate that assertion. No less than 600 invoices referenced in Department Exhibit C could not be traced to a corresponding invoice in Taxpayer Exhibits 1 – 15. This finding was consistent with the testimony of Mr. Roy Chavez who credibly testified that some of the invoices contained in Taxpayer's exhibits did not actually contribute to the assessment.

In total, the invoices contained in Taxpayer's Exhibits 1 – 15 which could be matched to taxable a transaction contained in Department Exhibit C represented $1,815,781.79 in taxable gross receipts. In contrast, Department Exhibit C identified the total sum of unreported gross receipts in the amount of $3,378,257.60, of which it concluded that $2,963,811.42 was taxable.

Therefore, the Taxpayer has failed to address approximately one-third of the total assessment representing $1,148,029.63 in unreported taxable gross receipts. The result is that the Taxpayer has failed to present evidence that would rebut the presumption of correctness with respect for that amount of unreported taxable gross receipts.

Because the Taxpayer bears the burden of overcoming the presumption of correctness that attached to the assessment in this case, the remainder of this decision will focus exclusively upon on the invoices presented by Taxpayer, provided in Taxpayer Exhibits 1 – 15, which the Department actually determined to be taxable when compared to Department Exhibit C.

The Taxpayer provided records in reference to the following categories of business transactions:

Category 1 (Taxpayer Exhibit 1) – Licensing Services Performed in Texas

Taxpayer Exhibit 1 contains 12 invoices for licensing services. The term "licensing services" is intended to describe the training and instructional programs that Taxpayer provides to customers in

the safe and proper operation of forklifts. Training includes classroom instruction and behind-the-wheel lessons, all of which occured exclusively at Taxpayer's place of business in El Paso, Texas. At no relevant time did Taxpayer provide such services in New Mexico. Despite information on the invoices in Taxpayer Exhibit 1 which indicates that "licensing services" were delivered by Taxpayer to addresses in New Mexico, Mr. Roy Chavez convincingly testified that all services within this category of transactions were provided in El Paso, Texas. Mr. Chavez credibly testified that information contained in the invoices which may have been interpreted otherwise was the product of the Taxpayer's invoicing software's default settings.

A comparison of Department Exhibit C to Taxpayer Exhibit 1 established that between July 13, 2009 and March 17, 2015, the Taxpayer generated approximately $4,995.19 from licensing services, including tax, of which the Department identified $2,865.00 as unreported taxable gross receipts. [Taxpayer Ex. 1; Dept. Ex. C].

However, since the licensing services subject of Taxpayer Exhibit 1 represent services performed exclusively in the State of Texas, they are excluded from the definition of "gross receipts" and are not taxable. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1).

Regulation 3.2.1.18 (A) and (E) NMAC also provide that only receipts derived from performing services in New Mexico are subject to gross receipts, with exceptions for research and development services, which do not apply under the circumstances of this protest.

Therefore, with respect to those transactions subject of Taxpayer Exhibit 1, the Hearing Officer was persuaded that the Taxpayer overcame the presumption of correctness and established that the audit and resulting assessment incorrectly identified $2,865.00 as unreported taxable gross receipts, when in fact, that amount was not taxable because it represented services performed in Texas.

The Department offered no evidence to thereafter reestablish the correctness of this portion of its assessment.

Category 2 (Taxpayer Exhibit 2) – Out-of-State Rigging Services (Non-New Mexico)

Taxpayer Exhibit 2 contains 15 invoices for rigging services. The term "rigging services" is intended to describe the service of relocating heavy equipment from one location to another. Such services may occur between locations exclusively within New Mexico, an out-of-state location and a location within New Mexico, or exclusively between out-of-state, non-New Mexico, locations. The invoices contained in Taxpayer Exhibit 2 were exclusively for out-of-state rigging services, which neither originated nor concluded in New Mexico. Although invoices in Taxpayer Exhibit 2 may have provided billinges address in New Mexico, the details of each invoice and the credible testimony of Mr. Roy Chavez established that the services were not provided in New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 2; Dept. Ex. C].

A comparison of Department Exhibit C to Taxpayer Exhibit 2 established that between August 18, 2009 and May 18, 2015, the Taxpayer generated $26,044.00 from out-of-state rigging services, of which the Department identified $6,119.00 as unreported taxable gross receipts. [Taxpayer Ex. 2; Dept. Ex. C].

However, since the rigging services subject of Taxpayer Exhibit 2 represent services not performed in New Mexico, they are excluded from the definition of "gross receipts" and are not taxable in the same manner discussed in the previous category of transactions. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.18 (A) & (E) (1) NMAC.

Therefore, the Hearing Officer was persuaded that Taxpayer Exhibit 2 established that the audit and resulting assessment incorrectly identified $6,119.00 as unreported taxable gross receipts when in fact, that amount was not taxable because it represented services performed in other states.

Although such services may have been performed for customers having a billing address in New Mexico, that alone was insufficient to establish that the receipts from those services were taxable as gross receipts because Section 7-9-3.5 (A) (1) requires that the services be performed *in* New Mexico. Having rebutted the presumption of correctness, the Department did not offer any evidence to reestablish the correctness of its assessment with respect to this category of transactions.

Category 3 (Taxpayer Exhibit 4) – Services and Repairs Not Performed in New Mexico

Taxpayer Exhibit 4 contains 30 invoices for services and repairs that the Taxpayer provided at out-of-state, non-New Mexico jobsites. This category of transactions involves Taxpayer's technician traveling to the location of equipment to be maintained, serviced, and repaired. Mr. Roy Chavez credibly testified that services within the category of transactions subject of Taxpayer Exhibit 4 were provided at a non-New Mexico location. In fact, except for one invoice, none of the remaining 29 invoices contain any references to New Mexico. As for the invoice which did contain a "Bill To" address in New Mexico, that invoice could not be located among the invoices the Department determined should be taxable in Department Exhibit C. [Taxpayer Ex. 4; Dept. Ex. C].

A comparison of Department Exhibit C to Taxpayer Exhibit 4 established that between March 5, 2008 and May 27, 2015, the Taxpayer generated $18,986.80 from out-of-state maintenance and repair services, of which the Department identified $15,020.76 as unreported taxable gross receipts. [Taxpayer Ex. 4; Dept. Ex. C].

Since the maintenance and repair services subject of Taxpayer Exhibit 4 represent services not performed in New Mexico, they are excluded from the definition of "gross receipts" and are not taxable. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.18 (A) & (E) NMAC.

Therefore, Taxpayer rebutted the presumption of correctness in reference to this category of transactions and the Department offered no evidence to reassert the correctness of the assessment. Consequently, Taxpayer Exhibit 4 established that the audit and resulting assessment incorrectly identified $15,020.76 as unreported taxable gross receipts when in fact, that amount was not taxable as services performed in New Mexico.

Category 4 (Taxpayer Exhibit 5) – Services and Repairs Performed at Taxpayer's Business Location in El Paso, Texas

Taxpayer Exhibit 5 contains 46 invoices for services and repairs that the Taxpayer provided at its El Paso, Texas business location. In four of those transactions, the invoices demonstrated that the Taxpayer picked up and delivered equipment to New Mexico before or after it was serviced and repaired in El Paso. However, in this category of transactions, Mr. Roy Chavez credibly testified that services, except for pickup or delivery services in New Mexico, were provided in El Paso, Texas. Although the invoices contained in Taxpayer Exhibit 5 refer to customers having a New Mexico address, either in the "Bill To" or "Ship To" fields, the descriptions of services provided established that the actual services were performed in El Paso, Texas, not New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 5].

A comparison of Department Exhibit C to Taxpayer Exhibit 5 established that between March 28, 2008 and May 16, 2015, the Taxpayer generated $67,997.36 from providing maintenance and repair services at its El Paso shop, of which the Department identified $25,963.47 as unreported taxable gross receipts. [Taxpayer Ex. 5; Dept. Ex. C]. Except for income generated from pickup and delivery in New Mexico, in the total amount of $290.00, all maintenance and repairs in this category of transactions occurred in Texas, not New Mexico. Since the services were performed in Texas, they

are excluded from the definition of "gross receipts" and are not taxable. See NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.18 (A) and (E) NMAC.

However, with respect for pickup and delivery to or from a New Mexico location, Regulation 3.2.1.18 (B) NMAC, provides that pickup and delivery is a service provided in New Mexico. Consequently, the receipts from that portion of the overall service is taxable in New Mexico. In this instance, that amount would be $290.00. *See* Regulation 3.2.1.15 (D) (3) NMAC.

With respect for the category of transactions subject of Taxpayer Exhibit 5, the Taxpayer rebutted the presumption of correctness for all but $290 representing charges for pickup and delivery in New Mexico. The Department did not offer any evidence to reestablish the correctness of its assessment as to the remaining portions of this category of transactions.

Category 5 (Taxpayer Exhibit 6) – Sales of Goods Picked Up from Taxpayer's Business Location in El Paso, Texas

Taxpayer Exhibit 6 contains 90 invoices for the sales of goods that the Taxpayer sold and delivered from its shop in El Paso, Texas. Mr. Roy Chavez credibly testified that in all circumstances within category of transitions, customers took possession of the goods at the Taxpayer's business location in El Paso, including customers with a billing address in New Mexico. [Testimony of Roy Chavez; Taxpayer Ex. 6]. The types of goods subject of this category of transactions represent replacement parts or accessories. Although Taxpayer also sells forklifts which could also come within this category of transactions, forklift sales are addressed as a separate category of transactions consistent with the method in which Taxpayer presented its protest.

A comparison of Department Exhibit C to Taxpayer Exhibit 6 established that between January 10, 2008 and May 20, 2015, the Taxpayer generated $24,360.78 in sales, including tax, from

its El Paso location, of which the Department identified $9,897.94 as unreported taxable gross receipts. [Taxpayer Ex. 6; Dept. Ex. C].

However, since the sales of goods did not occur in New Mexico, Taxpayer Exhibit 6 represents sales of goods in Texas which are excluded from the definition of "gross receipts" and are not taxable in New Mexico. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.14 (A) (1) NMAC.

When an interstate transaction occurs, *Kmart Corp. v. N.M. Taxation & Revenue Dep't.*, 2006-NMSC-006, ¶11, 139 N.M. 172, 131 P.3d 22 should be applied to the transaction to determine whether the sale is taxable in New Mexico. In *Kmart* the New Mexico Supreme Court set out a two-part analysis to determine whether the gross receipts tax applies in multistate transactions. The first part of the test is whether the Legislature intended to tax the sale of products from Taxpayer, an out-of-state corporation, to customers in New Mexico.

Generally speaking NMSA 1978, Section 7-9-2 (1966) provides that the gross receipts tax is intended to "provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax."

"Gross receipts" is defined as "the total amount of money or the value of other consideration received from selling property in New Mexico." *See* NMSA 1978, Section 7-9-3.5 (A) (1) (2007). In *Dell Catalog Sales, LP v. N.M. Taxation & Revenue Dep't.*, 2009-NMCA-001, ¶30, 145 N.M. 419, 199 P.3d 863, the court held that for purposes of determining whether an interstate transaction is a taxable sale under gross receipts tax law, the "destination principle" applies. The "destination principle" is defined as taxing the sale of goods that cross state lines at the point of destination or

where the goods are consumed, which may be different from the point of delivery and where title is transferred. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶18.02[1]. In *Dell*, the assumption was that the goods are consumed at their destination. *Dell Catalog Sales, LP,* 2009-NMCA-001, ¶28. It was clear from *Dell* that if an out-of-state seller sells goods that are delivered in New Mexico, and consumed in New Mexico, then gross receipts tax applies on the sale of the goods.

However, the *Dell* court also found that its analysis did not "apply in cases where the entire transaction occurs out-of-state and the parties are present out-of-state at the time and place of the transaction." *See Dell Catalog Sales, LP,* 2009-NMCA-001, ¶25. The court concluded that "in those circumstances, the transaction is clearly not a sale 'in NM' for purposes of the Act." *See Dell Catalog Sales, LP,* 2009-NMCA-001, ¶25.

In this category of transactions, subject of Taxpayer Exhibit 6, goods were picked up in El Paso, Texas. Taxpayer did not deliver goods in New Mexico. The leading treatise on state and local taxation argues that the crucial factor is where the buyer takes ***possession*** of the goods. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶18.02[1]. The courts are somewhat split over these interstate transactions where the use or consummation of tangible personal property is different from the destination. In *Williams Rentals, Inc. v. Tidwell*, 516 S.W.2d 614, 616 (Tenn. 1974) (quoting *Central Transport Co. v. Atkins*, 202 Tenn 512, 305 SW 940, 942 (1956), cert. denied, 355 U.S. 912, 78 S. Ct. 343 (1958) the Tennessee court upheld a sales tax on rental receipts from a lease of construction equipment where the equipment was delivered in Tennessee and the lease agreement was entered into in Tennessee.

However, the equipment was transported for use in job sites in Arkansas and Mississippi. The court held that the sale occurred in Tennessee because the equipment was delivered in Tennessee and the lease agreements were entered in Tennessee. *But see*, *Commercial Leasing, Inc. v. Johnson*, 160

Me. 32, 197 A.2d 323, 329 (1964) (the lease payments are only taxable to the state where the trailers were used and not purchased, but if the trailers are returned to the originating state for repairs, then the lease payments are taxable to the originating state).

New Mexico allows a deduction for receipts from transactions in interstate commerce if the tax would be unlawful under the United States Constitution. *See* NMSA 1978, Sec. 7-9-55 (1993). However, goods cannot be sold in more than one state. In this category of transactions, the orders were consummated in Texas, the seller was situated in Texas, and the buyers took possession of their newly acquired goods in Texas. Therefore, the Hearing Officer was persuaded that the sales occurred in Texas. Therefore, the receipts generated from the sale of goods in Texas are receipts from sales occurring in Texas.

The Hearing Officer was persuaded that Taxpayer Exhibit 6 established that the audit and resulting assessment incorrectly identified $9,897.94 as unreported taxable gross receipts when in fact, that amount was not taxable as property sold in New Mexico. Consequently, the Taxpayer rebutted the presumption of correctness with respect for invoices within this category of transactions and the Department did not introduce evidence upon which to reestablish the correctness of the assessment.

Category 6 (Taxpayer Exhibit 7) – Sales of Forklifts Picked Up by Buyer from Taxpayer's Business Location in El Paso, Texas

Taxpayer Exhibit 7 contains 9 invoices for the sales of forklifts that the customers picked up at Taxpayer's business location in El Paso, Texas. Mr. Roy Chavez credibly testified that in all circumstances within this category of transactions, the forklifts were purchased with the buyer taking possession at the Taxpayer's place of business in El Paso, Texas. A majority of the invoices establish the purchasers of the forklifts were customers having a billing address in New Mexico. However,

despite the customer's billing address, the forklifts were nevertheless purchased and delivered in Texas in similar fashion to other goods discussed in the prior category of transactions. [Testimony of Roy Chavez; Taxpayer Ex. 7].

In this category of transactions, a comparison of Department Exhibit C to Taxpayer Exhibit 7 established that between May 29, 2012 and May 12, 2015, the Taxpayer generated $187,528.81 in sales of forklifts, including tax, from its El Paso location, of which the Department identified $95,445.41 as unreported taxable gross receipts after allowing permissible deductions. [Taxpayer Ex. 7; Dept. Ex. C]. At least one invoice even contained a notation that the buyer intended to pay compensating tax in New Mexico.

The same analysis applies to the sale of forklifts as in the preceding category of transactions. The Hearing Officer was persuaded that the orders were consummated in Texas, the seller was situated in Texas, and the buyers took possession of their forklifts in Texas. Therefore, the Hearing Officer is also persuaded that the sales occurred in Texas. For that reason, the receipts generated from the sale of forklifts in Texas are receipts from sales occurring in Texas. Since the sales of forklifts in this category of transactions did not occur in New Mexico, but rather Texas, the invoices within this category of transactions represent the sale of goods in Texas, not New Mexico. The receipts from the sale of forklifts in Texas are therefore excluded from the definition of "gross receipts" and are not taxable. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.14 (A) (1) NMAC.

Therefore, Taxpayer Exhibit 7 established that the audit and resulting assessment incorrectly identified $95,445.41 as unreported taxable gross receipts when in fact, that amount was not taxable as property sold in New Mexico. The Taxpayer rebutted the presumption of correctness with respect to the invoices within this category of transactions and the Department did not offer any evidence to reestablish the correctness of its assessment.

Category 7 (Taxpayer Exhibits 8) – Rentals of Forklifts Delivered by Taxpayer to Non-New Mexico Delivery Locations

Taxpayer Exhibit 8 contains 105 invoices for the lease of forklifts that the Taxpayer delivered to non-New Mexico locations. Mr. Roy Chavez credibly testified that although many of the invoices established that the customer had a New Mexico billing address, deliveries were not made in New Mexico. Rather deliveries were made to non-New Mexico locations and there is nothing contained on the face of the invoices to establish otherwise. The majority of invoices subject of this category of transactions were for leases of forklifts for periods usually one month or less. [Testimony of Roy Chavez; Taxpayer No. 8].

A comparison of Department Exhibit C to Taxpayer Exhibit 8 established that between January 13, 2008 and May 12, 2015, the Taxpayer generated $143,756.01 in forklift rentals, including tax, that it delivered to its customers at locations not within New Mexico, of which the Department identified $98,945.64 as unreported taxable gross receipts. [Taxpayer Ex. 8; Dept. Ex. C].

Although the customers compensating the Taxpayer for the use of the forklifts had a New Mexico billing address, Mr. Roy Chavez credibly testified that forklifts under normal circumstances were employed at the location where they were also delivered. Mr. Roy Chavez credibly testified that the forklifts in this category of transactions were not delivered in New Mexico.

Regulation 3.2.1.17 NMAC establishes that "receipts derived from the rental or leasing of property employed in New Mexico are subject to gross receipts tax." Regulation 3.2.1.17 (A) (1) NMAC interprets the general provision under Section 7-9-3.5 (A) (1) that gross receipts includes leasing property employed in New Mexico. Both Section 7-9-3.5 and Regulation 3.2.1.17 (A) (1) require that the leased property be employed in New Mexico.

The evidence established that the forklifts subject of this category of transactions were not employed in New Mexico. Mr. Roy Chavez credibly testified that under normal circumstances, the forklifts were utilized at the point they were delivered. In this category of transactions, the forklifts were delivered to non-New Mexico jobsites and there was no evidence in the record to suggest that the forklifts were thereafter relocated for use in New Mexico by the Taxpayer or its customers. The Hearing Officer was persuaded that the Taxpayer rebutted the presumption of correctness with regard for this category of transactions. The Department did not introduce evidence to rebut the correctness of its assessment with concern for this category of transactions.

Because the evidence established that the property subject of the invoices in Taxpayer Exhibit 8 was not employed in New Mexico, the invoices subject of this category of transactions are excluded from the definition of "gross receipts" and are not taxable. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.17 NMAC.

Therefore, Taxpayer Exhibit 8 established that the audit and resulting assessment incorrectly identified $98,945.64 as unreported taxable gross receipts when in fact, that amount was not taxable as leased property employed in New Mexico. The Taxpayer successfully rebutted the presumption of correctness with respect to invoices within this category of transactions and the Department did not offer any evidence to reestablish the correctness of its assessment.

Category 8 (Taxpayer Exhibit 9) – Rental of Forklifts Picked Up by Customer from Taxpayer's Business Location in El Paso, Texas

Taxpayer Exhibit 9 contains 50 invoices for the rental of forklifts that the Taxpayer's customers picked up from the Taxpayer's business location in El Paso, Texas. Mr. Roy Chavez credibly testified that once a forklift was taken from the Taxpayer's place of business, it lacked further

knowledge regarding its location of use. The majority of leases in this category of transactions were for periods of one month or less. [Testimony of Roy Chavez; Taxpayer Ex. 9].

A comparison of Department Exhibit C to Taxpayer Exhibit 9 established that between September 10, 2009 and April 22, 2015, the Taxpayer generated $88,950.81 in leases, including tax, of forklifts from its El Paso, Texas location, of which the Department identified $70,964.25 as unreported taxable gross receipts. [Taxpayer Ex. 9; Dept. Ex. C].

In this category of transactions, there was no evidence to suggest that forklifts rented from Taxpayer's business location, which customers also picked up from its business location in El Paso, Texas, were then returned to New Mexico where they were employed. To find otherwise would require the Hearing Officer to rely on speculation, guess, and conjecture. Consequently, Taxpayer Exhibit 9 represents the lease of goods that were not employed in New Mexico, and are excluded from the definition of "gross receipts" and are not taxable. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.17 NMAC.

Therefore, Taxpayer Exhibit 9 established that the audit and resulting assessment incorrectly identified $70,964.25 as unreported taxable gross receipts when in fact, that amount was not taxable as leased property employed in New Mexico. The Department did not present any evidence to reestablished the correctness of its assessment

Category 9 (Taxpayer Exhibit 10) – Interstate Rigging Services Originating or Concluding in New Mexico

Taxpayer Exhibit 10 contains 19 invoices for rigging services in which equipment was relocated to or from a location in New Mexico, to or from another state. Mr. Roy Chavez credibly testified that the invoices subject of this category of transactions are similar to those discussed in

Category 2 above, except these services either originated or concluded in New Mexico, and crossed state lines. [Testimony of Roy Chavez; Taxpayer Ex. 10].

A comparison of Department Exhibit C to Taxpayer Exhibit 10 established that between January 3, 2008 and May 18, 2015, the Taxpayer generated $42,755.50 in rigging services to or from a New Mexico location and a non-New Mexico location, of which the Department identified $42,570.50 as unreported taxable gross receipts. [Taxpayer Ex. 10; Dept. Ex. C].

Taxpayer claimed that because the services provided within this category of transactions crossed state lines, they were non-taxable under the Commerce Clause of the United States Constitution. New Mexico allows a deduction for receipts from transactions in interstate commerce if the tax would be unlawful under the United States Constitution. *See* NMSA 1978, Sec. 7-9-55 (1993). Taxpayer's argument does not persuade.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (U.S. 1977), the United States Supreme Court established a four-part test to determine whether a state's attempts at taxation impermissibly interferes with the Commerce Clause: (1) whether there is a substantial nexus between a taxpayer and the taxing State; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the State.

Applying that test to the facts of this case, the New Mexico Gross Receipts and Compensating Tax Act does not violate the Commerce Clause. Taxpayer does not dispute having nexus with New Mexico. The tax is fairly apportioned and fairly related to services provided in New Mexico. The tax, under this category of transactions, only applies to service performed in New Mexico. When, as in this category of transactions, a service is performed both within and without New Mexico, the Department provides for the allocation of receipts from selling services

within and without the state so that only the service performed in New Mexico is taxable as gross receipts. *See* Regulation 3.2.1.18 B & C NMAC. Further, the plain language of New Mexico's Gross Receipts and Compensating Tax Act is neutral and does not discriminate against interstate commerce and applies equally to both in-state and out-of-state business because it only imposes taxes uniformly on those transactions coming with Section 7-9-3.5. *See Am. Trucking Ass'ns v. Mich. PSC*, 545 U.S. 429, 434 (U.S. 2005) (Supreme Court found that a neutral, non-discriminatory tax did not offend the Commerce Clause).

The Taxpayer did not rebut the presumption of correctness with regard for this category of transactions. Nor did the Taxpayer present evidence on the appropriate allocation of services between New Mexico and other states for any services within this category of transactions as provided by Regulation 3.2.1.18 (C) NMAC. Because the Hearing Officer will not speculate as to an appropriate allocation, the Taxpayer failed to rebut the presumption of correctness that attached to this portion of the Department's assessment.

Category 10 (Taxpayer Exhibit 11) – Services Provided by Taxpayer at Customers' Jobsites in New Mexico

Taxpayer Exhibit 11 contains 148 invoices for services that the Taxpayer provided at the customers' jobsites. Mr. Roy Chavez credibly testified that in all circumstances subject of this category of transactions, the equipment was serviced at a location within New Mexico and the Taxpayer charged and collected tax which it then remitted to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 11].

A comparison of Department Exhibit C to Taxpayer Exhibit 11 established that between January 17, 2008 and May 28, 2015, the Taxpayer generated $56,177.52 in jobsite services performed in New Mexico, including tax, of which the Department identified $54,704.23 as unreported taxable

gross receipts. [Taxpayer Ex. 9; Dept. Ex. C]. Two of the invoices were illegible. Similar to other categories of transactions subject of this protest involving services, the primary inquiry concerns the location where the service was provided. Taxpayer readily admitted that the services subject of this category of transactions were provided in New Mexico.

Since the maintenance and repair services subject of Taxpayer Exhibit 11 represent services performed within New Mexico, they come within the definition of "gross receipts" and are taxable as such. *See* NMSA 1978, Sec. 7-9-3.5 (A) (1); Regulation 3.2.1.18 (A) & (E) NMAC.

Category 11 (Taxpayer Exhibits 12 and 13) – Sale of Parts Hand-Delivered by Taxpayer to New Mexico Location

Because Taxpayer Exhibits 12 and 13 both address the sales of parts that the Taxpayer delivered to customers in New Mexico, they will be discussed jointly within this category of transactions. Taxpayer Exhibits 12 and 13 contain 14 invoices for the sale of parts that it delivered to customers in New Mexico. Taxpayer also emphasized the fact that it collected taxes on the invoices which it then remitted to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 12; Taxpayer Ex. 13]. Although forklifts could also be addressed in this category of transactions, they will be addressed separately consistent with the manner that Taxpayer presented its protest.

A comparison of Department Exhibit C to Taxpayer Exhibits 12 and 13 established that between March 3, 2008 and May 24, 2012, the Taxpayer generated $26,809.19 from the sale of parts that it delivered to customers in New Mexico, of which the Department identified $23,376.13 as unreported taxable gross receipts. [Taxpayer Ex. 12; Taxpayer Ex. 13; Dept. Ex. C].

Applying the analysis and reasoning of *Dell*, we refer once again to the "destination principal." In contrast with the previous discussion in which the Hearing Officer recognized that the entire transaction occurred out of state, the circumstances in the present category of transactions differ

significantly in that the Taxpayer crossed into New Mexico to deliver goods. As in *Dell*, the assumption is that the goods are consumed at the destination. *Dell*, 2009-NMCA-001, at ¶28. It is clear from *Dell* that if an out-of-state seller sells goods that are delivered in New Mexico, and consumed in New Mexico, then gross receipts tax applies on the sale of the goods.

Accordingly, the Taxpayer failed to rebut the presumption of correctness in reference to the sale of goods that it delivered to customers in New Mexico. The Department properly assessed gross receipts tax on the sum of $23,376.13 that it identified as unreported taxable gross receipts stemming from this category of transactions.

Category 12 (Taxpayer Exhibit 14) – Fork Lift Sales Delivered to New Mexico

Taxpayer Exhibit 14 contains 28 invoices for the sale of forklifts that the Taxpayer delivered to customers in New Mexico. Taxes collected from the sales were remitted to the State of Texas. [Testimony of Roy Chavez; Taxpayer Ex. 14].

A comparison of Department Exhibit C to Taxpayer Exhibit 14 established that between January 9, 2008 and October 10, 2014, the Taxpayer generated $306,281.53 from the sale of forklifts it delivered to New Mexico, including tax, of which the Department identified $149,409.91 as unreported taxable gross receipts. [Taxpayer Ex. 14: Dept. Ex. C].

Applying the analysis and reasoning of *Dell*, we refer yet again to the "destination principal." Similar to the preceding category of transactions in which the Taxpayer delivered goods to customers in New Mexico, the Taxpayer in this category of transactions also delivered forklifts to customers in New Mexico. Once again, consistent with *Dell*, if an out-of-state seller sells goods that are delivered in New Mexico, and consumed in New Mexico, then gross receipts tax applies on the sale of the goods.

Accordingly, the Taxpayer failed to rebut the presumption of correctness in reference to the sale of forklifts that it delivered to customers in New Mexico. The Department properly assessed gross receipts tax on the sum of $149,409.91 that it identified as unreported taxable gross receipts stemming from this category of transactions.

Category 13 (Taxpayer Exhibit 15) – Forklift Rentals Delivered by Taxpayer to Customers in New Mexico

Taxpayer Exhibit 15, the most voluminous of Taxpayer's exhibits, contains 1,310 invoices for the rental of forklifts which the Taxpayer delivered to locations in New Mexico. To the extent any taxes were collected, they were remitted to the State of Texas. [Testimony of Roy Chavez; Testimony of Rosemary Chavez; Taxpayer Ex. 15].

A comparison of Department Exhibit C to Taxpayer Exhibit 15 established that between January 7, 2008 and May 19, 2015, the Taxpayer generated $1,365,240.95 from the rental of forklifts delivered to New Mexico, of which the Department identified $1,220,820.46 as unreported taxable gross receipts. [Taxpayer Ex. 15; Dept. Ex. C]. Four of the invoices were illegible.

Regulation 3.2.1.17 NMAC provides that the lease payments are taxable gross receipts where the leased equipment was employed in New Mexico. Regulation 3.2.1.17 (A) (1) states "receipts derived from the rental or leasing of property employed in New Mexico are subject to gross receipts tax." Regulation 3.2.1.17 (A) (1) interprets the general provision under Section 7-9-3.5 (A) (1) that gross receipts includes leasing property employed in New Mexico. Both Section 7-9-3.5 and Regulation 3.2.1.17 (A) (1) require that the leased property be employed in New Mexico.

Regulation 3.2.1.17 (D) (2) provides a formula for apportioning the use of leased equipment in a multistate transaction. Regulation 3.2.1.17 (D) (3) provides that "[t]he department

will allow a person engaged in the business of leasing property employed both within and without New Mexico to use other methods of apportioning the receipts of such leasing activities upon showing that the other methods more accurately reflect the portion of employment of leased items within New Mexico."

Taxpayer's counsel suggested that Taxpayer lacked knowledge of where its customers employed the leased equipment. However, Mr. Roy Chavez credibly testified that under usual circumstances, equipment was employed at the location of delivery. In this category of transactions, all deliveries were made within New Mexico. [Testimony of Roy Chavez]. Accordingly, a reasonable inference may be drawn that the equipment was also employed in New Mexico.

Even if counsel's arguments were supported by evidence that Taxpayer was truly ignorant, ignorance of facts is insufficient to rebut the presumption of correctness. In fact, if ignorance of facts were a defense, then ignorance would always prevail. This would lead to absurd results and contradict the law of this state which places the burden on Taxpayer to present countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessments issued against it. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC.

The Hearing Officer does not view ignorance of material facts as countervailing evidence sufficient to entitle Taxpayer to an abatement of the assessment in this case. Despite any assertions of ignorance, Mr. Roy Chavez' testimony established that Taxpayer knew that its leased equipment

was usually being employed at the locations where Taxpayer delivered it. In this category of transactions, all deliveries were to customers in New Mexico.

The invoices within this category of transactions represent the lease of goods employed in New Mexico. In each instance, the forklifts were delivered to customers in New Mexico, who employed the equipment in New Mexico. Although, it may be possible that a customer could take the equipment out of state where it would be employed, that scenario would likely be rare among the 1,310 invoices the Taxpayer presented in this category of transactions. The Taxpayer did not rebut the presumption of correctness with concern for this category of transactions.

Credit for Taxes Paid to the State of Texas

When a gross receipts tax is stated separately on the books of a seller or lessor, as observed on numerous transactions contained in Taxpayer's invoices, the tax stated on the transactions within that reporting period shall be included in gross receipts. *See* NMSA 1978, Sec. 7-9-6; Regulation 3.2.6.8 NMAC; Regulation 3.2.6.9 NMAC.

However, Taxpayer asserts that it should be entitled to a credit for taxes that it collected on transactions taxable to New Mexico that it paid to the State of Texas, including those which were separately stated for New Mexico. Ms. Rosemary Chavez credibly testified that every tax collected, whether or not expressly designated for New Mexico, was paid to the State of Texas.

Taxpayer relies on NMSA 1978, Section 7-9-79 which provides a credit of compensating tax if a gross receipts, sales, compensating or similar tax has been levied by another state or political subdivision on the transaction. Section 7-9-79 (A) provides:

> If on property bought outside this state, a gross receipts, sales, compensating or similar tax has been levied by another state or political subdivision thereof on the transaction by which the person using the property in New Mexico acquired the property or a compensating, use or similar tax has been levied by another state on the use of the property subsequent to its acquisition by the person using

> the property in New Mexico and such tax has been paid, the amount of such tax paid may be credited against any compensating tax due this state on the same property.

However, the evidence in this protest did not establish that Taxpayer is a person *acquiring the property for use in New Mexico*, or that Texas *levied* a tax on sales or services taxable in New Mexico. Rather, Taxpayer asserts that Section 7-9-79 (A) should be read to provide a credit for taxes it erroneously paid to another state.

The Hearing Officer will not attempt to address the complexities of Texas tax law, but the Hearing Officer notes that Texas exempts taxes on the sales, including leases, of tangible personal property shipped outside the state by the facilities of the seller, and services performed outside the State of Texas. *See* V.T.C.A., Tax Code Section 151.330 (addressing interstate shipments, common carriers, and services across state lines); 151.105 (defining the term "sale" to include "leases").

It would contradict the Legislature's express intentions to conclude that it intended to permit a tax credit for taxes due to New Mexico which were paid in error to another state. NMSA 1978 Sec. 7-9-2 expressly provides that the purpose of the Gross Receipts and Compensating Tax is to "provide revenue for public purposes[.]" A credit for taxes erroneously paid to another state, which were rightfully due to New Mexico in the first instance, fails to provide revenue for the purposes intended by the Legislature. Therefore, Taxpayer failed to establish a right to a credit under Section 7-9-79 (A).

Penalty and Interest

Although Taxpayer's counsel indicated that Taxpayer does not contest the assessment of penalty, and did not address interest, the Hearing Officer will nevertheless address imposition of both.

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, Sec. 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full.

The Department has no discretion under Sec. 7-1-67 and must assess interest against Taxpayer from the time the tax was due, but not paid, until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and the Department is without legal authority to abate it despite the Taxpayer's lack of bad faith.

With concern for penalty, when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Sec. 7-1-69 (2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(*italics* added for emphasis).

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence" even if, like here, Taxpayer's actions or inactions were unintentional.

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was negligent under Regulation 3.1.11.10 (A), (B) & (C) NMAC due to inaction in failing to pay gross receipts tax when due resulting from the erroneous belief that the income derived from the business activity did not give rise to gross receipts tax obligations.

In instances where a taxpayer might come within the definition of civil negligence generally subject to penalty, Sec. 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not provide for abatement of penalty in this case.

The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty may be abated. Based on the evidence presented, none of the factors under Regulation 3.1.11.11 NMAC potentially apply in this proceeding.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. In contrast, there was no dispute that the issue giving rise to this protest was the result of Taxpayer's inadvertence, erroneous belief, or inattention. In other words, Taxpayer's conduct was

not in bad faith or with dishonest intentions. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 NMAC does not provide grounds for abatement of the penalty in this case. Therefore, Taxpayer has not overcome the presumption of correctness and failed to establish an entitlement to an abatement of penalty in this matter.

Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Had Taxpayer consulted a tax professional or made a more thorough inquiry regarding its tax responsibilities, the results might be different.

In conclusion, the Taxpayer rebutted the presumption of correctness with respect to the unreported taxable gross receipts contained in Taxpayer Exhibits 1, 2, 4, 5, 6, 7, 8, and 9 which also contributed to the actual assessment as provided in Department Exhibit C, representing a combined amount of claimed unreported taxable gross receipts of $325,221.47.

Taxpayer's protest with concern for the remainder of the unreported taxable gross receipts giving rise to the remainder of the assessment should be denied.

The protest of corporate income tax subject of Letter ID No. L0284286000 should also be denied because it was withdrawn by Taxpayer.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protests to the Department's assessments, and jurisdiction lies over the parties and the subject matter of the protests.

B. A hearing was timely set and held within 90-days of the protests under NMSA 1978, Sec. 7-1B-8 (2015).

C. Taxpayer withdrew its protest of the assessment issued under Letter ID No. L0284286000.

D. Taxpayer did not overcome the presumption of correctness that attached to the assessment under NMSA 1978, Sec. 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428 with respect to the invoices admitted as Taxpayer Exhibits 10, 11, 12, 13, 14, and 15 which actually contributed to the assessment in this matter.

E. The Taxpayer did overcome the presumption of correctness that attached to the assessment under NMSA 1978, Sec. 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428 with respect to the invoices admitted as Taxpayer Exhibits 1, 2, 4, 5, 6, 7, 8, and 9 which actually contributed to the assessment of gross receipts tax, penalty and interest under Letter ID No. L0975076400.

F. Taxpayer did not qualify for a credit against its outstanding liability under the assessment issued under Letter ID No. L0975076400 under NMSA 1978, Sec. 7-9-79 because Taxpayer was not a person acquiring property for use in New Mexico such that it would be entitled to a credit for compensating tax and because there was no evidence that Texas actually levied a tax on transactions that were taxable to New Mexico.

G. Taxpayer did not establish that the right to a deduction pursuant to NMSA 1978, Sec. 7-9-55 because Taxpayer did not prove that the application of the gross receipts tax would be unlawful under the United States constitution under the circumstances of this protest.

For the foregoing reasons, the Taxpayer's protest of the assessment issued under Letter ID No. L0975076400 **IS DENIED IN PART AND GRANTED IN PART.** The Department shall abate an amount of gross receipts tax, penalty, and interest on the amount of $325,221.47 that it

erroneously concluded were taxable gross receipts. The Taxpayer is order to pay the tax, penalty and interest remaining after the Department's abatement.

Furthermore, because Taxpayer withdrew the protest of assessment issued under Letter ID No. L0284286000, Taxpayer's protest of that assessment is **DENIED**.

DATED: September 13, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE