STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
GOLDEN SERVICES HOME HEALTH AND HOSPICE, **No. 17-50**
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L1636159024

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 20, 2017 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. David Mittle, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. W.T. Martin, Jr., attorney for Golden Services Home Health and Hospice (Taxpayer), appeared for the hearing. The Hearing Officer took notice of all documents in the administrative file. Courtesy copies of law, articles, and cases were admitted as exhibits at the parties' request as Department's "A", "B", "C" and "F", and Taxpayer's #1 through #8. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 12, 2016, the Department assessed the Taxpayer for gross receipts tax, penalty, and interest for the tax periods from January 31, 2009 through December 31, 2014. The assessment was for $140,786.55 tax, $27,488.53 penalty, and $14,440.27 interest. The Taxpayer was also assessed for withholding tax, penalty, and interest.
2. On November 9, 2016, the Taxpayer filed a formal protest letter.

3. On December 28, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. On January 4, 2017, the Administrative Hearings Office issued a notice of telephonic scheduling hearing.

5. The telephonic scheduling hearing was conducted on January 11, 2017. The hearing was held within ninety days of the protest.

6. At the request of the parties, a second telephonic scheduling hearing was conducted on May 15, 2017. On May 17, 2017, the scheduling order was issued.

7. The parties jointly requested a modification to the scheduling order. On June 29, 2017, an amended scheduling order was issued.

8. On August 16, 2017, the Taxpayer filed a motion for summary judgment. On September 11, 2017, the Department filed its response.

9. On September 26, 2017, the Taxpayer requested leave to file a reply.

10. On September 29, 2017, the Administrative Hearings Office issued a notice of hearing on the summary judgment motion.

11. On October 3, 2017, an order granting leave to reply was issued.

12. The Taxpayer's reply was filed on October 17, 2017. Notwithstanding its filing date, the Department filed its sur-response and motion to strike the reply on October 16, 2017.

13. On October 17, 2017, the Taxpayer filed its response to the motion to strike.

14. At the hearing on October 20, 2017, the Department's motion to strike was denied, but its sur-response was allowed.

15. At the hearing, the Taxpayer acknowledged that the summary judgment motion did not address the issue of the withholding tax, penalty, and interest that were included in the

assessment. The Taxpayer requested time to ascertain whether it intended to pursue that part of the protest. The Taxpayer was granted two weeks to file a withdrawal or notice of intent to pursue.

16. The Taxpayer filed a withdrawal of protest on the withholding tax issue.

17. The parties agreed that, if the protest was withdrawn on the withholding tax issue, there were no issues of material fact. The parties agreed that the outcome of the motion for summary judgment was dispositive and that a final order either granting or denying the protest could be issued.

18. The Taxpayer provides hospice services from health care practitioners. The services are within the scopes of practice of the health care practitioners. The services provided are commercial contract services or medicare part C services that are paid for by managed health care providers or by health care insurers and are not otherwise deductible (collectively, services).

19. During the tax years in question, the Taxpayer claimed a deduction from its gross receipts taxes for the receipts of payments made for these services under Section 7-9-93.

20. The Department audited the Taxpayer and denied the deductions under Section 7-9-93, which resulted in the assessment.

21. The Legislature recently amended Section 7-9-93, and the bill's title indicated that it was to clarify the type of health care provider that may take certain deductions.

DISCUSSION

The issue to be decided is whether the Taxpayer was entitled to take the deductions under Section 7-9-93, and what effect the 2016 amendment to that statute would have on the Taxpayer's rights.

The Taxpayer argues that a decision and order issued in 2016 is dispositive, was rightly decided, and should be followed under the principles of *stare decisis* and collateral estoppel. *See In the Matter of the Protest of HealthSouth Rehabilitation*, Decision and Order No. 16-16. The Taxpayer also argues that Section 7-9-93 did not contain a statutory restriction on which taxpayer was allowed to take the deduction. The Taxpayer argues that the regulations that purport to limit the deduction should be disregarded as they do not exemplify or interpret the statute. The Taxpayer argues that the regulations place an impermissible limitation on the plain language of the statute. The Taxpayer argues that the amendment to the statute still does not limit who may take the deduction. The Taxpayer argues that if the amendment is found to create such a limitation, then it is a change in the law, and should be applied prospectively.

The Department argues that the *HealthSouth* decision was wrongly decided and that the regulations were a proper interpretation of the statute. The Department argues that *stare decisis* and collateral estoppel do not apply. The Department argues that the amendment to the statute enacted after the *HealthSouth* decision shows the legislative intent of the deduction. The Department argues that the amendment should be treated as a clarification that applies retroactively.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct,

and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

The burden is on the taxpayer to prove that it is entitled to an exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. "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." *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97.

Motions for summary judgment are appropriate when there is no genuine issue of material fact and the judgment is a matter of law. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 12. *See also Roth v. Thompson*, 1992-NMSC-011, 113 N.M. 331. *See also Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 1967-NMSC-086, 77 N.M. 730. The parties agreed that there were no disputes as to the material facts. The parties also agreed that the outcome of the summary judgment motion would be dispositive to the issues of the hearing and that a final decision and order either granting or denying the protest should be issued.

Stare decisis and Collateral Estoppel.

Administrative decisions are not given the weight of precedence. *See Hess Corp. v. N.M. Taxation and Revenue Dep't*, 2011-NMCA-043, ¶ 35, 149 N.M. 527 (noting that an unpublished decision is written solely for the benefit of the parties and is not controlling precedent). *See also* Rule 12-405 NMRA (2012) (stating that unpublished decisions are not precedent but may still be

persuasive). Therefore, *stare decisis* does not apply to the *HealthSouth* decision. *See Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661 (noting that the doctrine of *stare decisis* means an adherence to precedent).

Collateral estoppel is a judicially created doctrine to foster judicial economy by preventing the re-litigation of issues previously decided. *See Shovelin v. Cent. N.M. Elec. Coop. Inc.*, 1993-NMSC-015, 115 N.M. 293. Several factors must be met before collateral estoppel will apply. *See id.* Collateral estoppel against the state is very limited and only applies if right and justice require it. *See Johnson & Johnson v. Taxation and Revenue Dep't*, 1997-NMCA-030, 123 N.M. 190. However, the issue of collateral estoppel is moot in the context of this protest because the Administrative Hearings Office has not been granted statutory authority to exercise an equitable judicial remedy. *See AA Oilfield Serv. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an administrative body did not empower it to grant equitable relief, such as estoppel, because the authority is limited to making factual and legal determinations as authorized by the statute). *See Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for the proposition that an agency with quasi-judicial powers did not have authority to grant an equitable remedy). *See also* NMSA 1978, § 7-1B-1, *et seq*.

Deduction under Section 7-9-93 pre-amendment.

The Taxpayer argues that the statute does not limit the entity that may take the deduction, and that the regulations that attempt to create such a limitation are improper. The Department argues that the deduction is limited to health care practitioners and that health care facilities, such as the Taxpayer, cannot take the deduction. The Department relies on its regulations, one of

which modifies the definition of "health care practitioner", and argues that the legislative intent of the statute is consistent with the regulations.

> Receipts from payments by a managed health care provider or health care insurer for commercial contract services or medicare part C services provided by a health care practitioner that are not otherwise deductible pursuant to another provision of the Gross Receipts and Compensating Tax Act may be deducted from gross receipts, provided that the services are within the scope of practice of the person providing the service. Receipts from fee-for service payments by a health care insurer may not be deducted from gross receipts. The deduction provided by this section shall be separately stated by the taxpayer. NMSA 1978, § 7-9-93 (A) (2007).

The deduction was based on receipts from payments by managed health care providers or from health care insurers, if those payments met certain conditions. *See id.* The required conditions were 1) the payments were for commercial contract services or medicare part C services; 2) the payments were for services provided by a health care practitioner; 3) the payments were not otherwise deductible; and 4) the payments were for services within the scope of practice of the health care practitioner who provided the service. *See id.* The statute defined many of the terms used. *See* NMSA 1978, § 7-9-93 (B) (2007).

The first step in statutory interpretation is to look at the plain language of the statute and to refrain from further interpretation if the plain language is not ambiguous. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, 146 N.M. 24. Statutes are to be applied as written unless a literal use of the words would lead to an absurd result. *See New Mexico Real Estate Comm'n. v. Barger*, 2012-NMCA-081, ¶ 7. The parties stipulated to the facts in this case, and all of the payments at issue satisfied the statutory criteria. The Taxpayer took deductions on its receipts from payments made by managed health care providers or health care insurers. The payments were for commercial contract services or medicare part C services, the payments were for services provided by health care practitioners, the payments were not

otherwise deductible, and the payments were for services within the scope of practice of the health care practitioners who provided the services. The statute is not ambiguous. *See* NMSA 1978, § 7-9-93 (2007). The statute does not restrict who may or may not take the deduction. *See id.* The statute provided for any taxpayer who had receipts of qualifying payments to take the deduction. *See id.* Therefore, the Taxpayer was entitled to take the deduction under the statute.

The regulations.

A regulation prohibits "[a]n organization, whether or not owned exclusively by health care practitioners, licensed as a hospital, hospice, nursing home, … an outpatient facility or intermediate care facility" from taking the deduction. *See* 3.2.241.17 NMAC (2006). The regulation indicates that such a facility "is not a 'health care practitioner' as defined by Section 7-9-93". *Id.*

Another regulation actually allows for "[a] corporation, unincorporated business association, or other legal entity" to take the deduction for payments on services performed "on its behalf by health care practitioners who own or are employed by the corporation, unincorporated business association or other legal entity". 3.2.241.13 NMAC (2006). However, the regulation creates an exception to that allowance when that entity is a 501 (C) (3) organization or "an HMO, hospital, hospice, nursing home, an … outpatient facility or intermediate care facility". *Id.* These excepted entities may not take the deduction. *See id.*

The purpose of the Department's regulations are "to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act." 3.2.1.6 NMAC 2001. The Department has authority to enact regulations that interpret and exemplify the statutes to which they relate. *See* NMSA 1978, § 9-11-6.2 (B) (1) (2015). The Department's regulations also carry a presumption that they are a "proper implementation of the provisions of the laws".

NMSA 1978, § 9-11-6.2 (G). However, the Department cannot create a regulation in order "to impose a limitation on the deduction which the Legislature did not prescribe." *Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139, ¶ 11, 84 N.M. 303. Regulations cannot "abridge, enlarge, extend or modify the statute creating the right or imposing the duty." *Id.* at ¶ 10. Regulations that attempt to do so are void. *See id.* When a statute and a regulation address the same issue, they are in conflict if following one would reach a different result than following the other. *See State v. Bowden*, 2010-NMCA-070, ¶10, 148 N.M. 850.

Following the statute as it was written would allow any taxpayer with receipts from qualifying payments to take the deduction. *See* NMSA 1978, § 7-9-93 (2007). Following the regulations would restrict the deduction to taxpayers that are not hospitals, hospices, nursing homes, and certain other types of entities. *See* 3.2.241.13 and 3.2.241.17 NMAC (2006). Therefore, the statute is in conflict with the regulations since following one would lead to a different result than following the other. *See State v. Bowden*, 2010-NMCA-070, ¶10. When statutes and regulations are inconsistent, the statute prevails. *See id.* at ¶ 12. *See also Picket Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49. A regulation cannot overrule a statute. *See Jones v. Employment Servs. Div.*, 1980-NMSC-120, 95 N.M. 97. Therefore, the regulations were void as they attempted to abridge or modify the statute as it was written. *See Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139, ¶ 10. Consequently, the Taxpayer was not prohibited by the regulations from taking the deductions.

Current version of Section 7-9-93.

The Taxpayer argues that even under the current statute, the deduction is not restricted to health care practitioners. In 2016, the deduction provision was amended. Now the deduction is for "[r]eceipts *of a health care practitioner* for commercial contract services or medicare part C

services paid by a managed health care provider or health care insurer". NMSA 1978, § 7-9-93 (2016) (emphasis added). There is a substantial difference between a deduction for the receipts of qualifying payments and a deduction for the "[r]eceipts of a health care practitioner". *See id.* Under the current statute and its regulations, the Taxpayer does not meet the definition of a health care practitioner. *See id. See* 3.2.241.13 and 3.2.241.17 NMAC (2006). Therefore, under the current statute and its regulations, the Taxpayer would not be entitled to take the deduction.

Legislative intent and retroactive application.

The Department argues that the current version of the statue should apply to the Taxpayer. The Department argues that the amendment is functionally a codification of the regulation that restricted which taxpayer may take the deduction. The Department argues that the Legislature explicitly indicated in the bill that the amendment was to clarify the type of health care practitioner who may take the deduction. The Department argues that clarifications of ambiguous statutes should be given retroactive effect. The Department also argues that the amendment should serve as evidence of the legislative intent of the previous version of the statute. The Taxpayer argues that the amended statute constitutes a fundamental change that should apply only prospectively.

A statute should be given the effect of the plain meaning of its words. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 12, 149 N.M. 455. All statutes, whether ambiguous or not, should still be construed in accordance with the legislative intent behind the statute and should not lead to an absurd result, even though it may require a substitution or addition of words. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346. *See also Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, 114 N.M. 784. *See also State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6. When a statute is ambiguous or leads to an absurd result, it should be construed

according to its obvious purpose. *See T-N-T Taxi Co. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-016, ¶ 5, 139 N.M. 550. However, extra words should not be read into a statute, if its plain meaning is unambiguous and it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120. A statute is ambiguous if it is susceptible to more than one interpretation. *See United Nuclear Corp. v. Revenue Div.*, 1982-NMCA-067, ¶ 7, 98 N.M. 296. When something is expressed or defined in the statute, then the statute is not ambiguous. *See id.* at ¶ 19.

A statute is presumed to operate prospectively unless the Legislature expresses a clear intent to give it retroactive effect. *See Swink v. Fingado*, 1993-NMSC-013, ¶ 28, 115 N.M. 275. The purpose of a statute may be determined in part by the title of the act, including whether it said it was meant to clarify. *See id.* at ¶ 31. When the purpose of an amendment is to clarify existing law, the amendment may be deemed curative and given retroactive effect. *See id.* at ¶ 35. However, an amendment may only be considered a clarification if it does not contravene a previous construction of the law. *See id. See also Phelps Dodge Corp. v. Revenue Div. of Dep't of Taxation*, 1985-NMCA-055, ¶ 11, 103 N.M. 20. Moreover, an amendment may only be considered a clarification if the original statute was unclear or ambiguous. *See Wasko v. N.M. DOL, Employment Sec. Div.*, 1994-NMSC-076, ¶ 9, 118 N.M. 82. *See also N.M. Real Estate Comm'n v. Barger*, 2012-NMCA-081, ¶ 18. Substantive changes to a statute may only be applied prospectively. *See Phelps Dodge Corp.*, 1985-NMCA-055, ¶ 14-15. A clarification occurs when, rather than changing an existing law, an amendment serves to make explicit what was previously implicit in the law. *See Wood*, 2011-NMCA-020, ¶ 25.

Again, the statute was not ambiguous as it defined what types of payments could be deducted from gross receipts. *See* NMSA 1978, § 7-9-93 (2007). The statute made sense as it

was written, and it did not lead to an absurd result. *See id.* Nothing in the statute as it was written indicated that the intent of the statute was to limit the deduction to a certain type of taxpayer. *See id.* The *HealthSouth* decision details how the Department originally treated the deduction in the same way that the Taxpayer applied it, and only later restricted the type of taxpayer by enacting its regulations. Since the statute was not ambiguous, made sense as it was written, and did not lead to an absurd result, the subsequent amendment and the title of its bill are not sufficient to overcome the plain meaning of the statute as it was written. *See Phelps Dodge Corp.*, 1985-NMCA-055 (holding that an amendment was not a clarification and could not apply retroactively even when the language expressed a retroactive intent and indicated it was a correction since the original intent had been misconstrued). The subsequent amendment is also not a clarification as it effects a substantive change, and the amended statute applies prospectively. *See id.*

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to assessment issued under Letter ID number L1636159024, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was entitled to deduct its receipts from qualifying payments under the statute, notwithstanding the regulatory restriction. *See* NMSA 1978, § 7-9-93 (2007). *See* 3.2.241.13 and 3.2.241.17 NMAC (2006). *See Rainbo Baking Co.*, 1972-NMCA-139. *See State v. Bowden*, 2010-NMCA-070.

C. The subsequent amendment of the statute was a substantive change in the law, and the change does not apply retroactively. *See* NMSA 1978, § 7-9-93 (2007 and 2016). *See Phelps Dodge Corp.*, 1985-NMCA-055. *See Wood*, 2011-NMCA-020. *See Swink*, 1993-NMSC-013.

D. The Taxpayer has overcome the presumption that the assessment of tax was correct. *See* NMSA 1978, § 7-1-17. *See Sec. Escrow Corp.*, 1988-NMCA-068. *See Wing Pawn Shop*, 1991-NMCA-024. *See Chavez*, 1970-NMCA-116.

For the foregoing reasons, the Taxpayer's protest **is GRANTED**, and the assessment is HEREBY ABATED.

DATED: December 20, 2017.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.