STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SACRED GARDEN
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L0250953776

and

IN THE MATTER OF THE PROTEST OF
SACRED GARDEN
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L0279412272

v. **D&O No. 18-07**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on February 21, 2018 at 10:00 a.m. before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Joe Lennihan, Esq., appeared and represented Sacred Garden ("Taxpayer"). Mr. Joel White and Dr. Paula Lane appeared as witnesses and testified on Taxpayer's behalf. Staff Attorney, Ms. Cordelia Friedman, appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Mr. Nicholas Pacheco, accompanied Ms. Friedman for the Department.

The Department did not present evidence in the form of testimony or exhibits. Taxpayer did not seek to admit any exhibits during its presentation of evidence. After the conclusion of the presentation of evidence, and immediately prior to closing arguments, Taxpayer moved to admit the deposition of Melanie Feldkamp. Ms. Feldkamp was not called to testify in person. The Department objected. The objection was sustained due to the lateness of the request. Based on the

evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Background in Reference to Department's
Denial of Refund Issued under Letter ID No. L0250953776

1. On or about November 19, 2014, Taxpayer claimed a refund for gross receipts taxes paid for the periods of January 2011 through June 2014. The amount of the claimed refund was $275,914.61. [*See* Administrative File].

2. On June 1, 2015, the Department denied Taxpayer's application for refund for gross receipts taxes paid for the periods of January 2011 through June 2014 under Letter ID No. L0250953776. [*See* Administrative File].

3. Taxpayer executed a Formal Protest on May 29, 2015 of the denial of its application for refund for gross receipts taxes paid for the periods of January 2011 through June 2014 which was thereafter received by the Department's Protest Office on June 3, 2015. [*See* Administrative File].

4. On June 10, 2015, the Department acknowledged Taxpayer's Formal Protest under Letter ID No. L1264984112. [*See* Administrative File].

5. On August 11, 2015, the Department submitted a Hearing Request seeking a hearing on Taxpayer's Formal Protest. [*See* Administrative File].

6. On August 12, 2015, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference in which a scheduling conference was set for August 27, 2015. [*See* Administrative File].

7. On August 27, 2015, a Scheduling Order and Notice of Administrative Hearing was entered which in addition to establishing various prehearing deadlines, set a hearing on the

merits for May 11, 2016. [*See* Administrative File].

8. On October 2, 2015, Taxpayer filed a Certificate of Service indicating that it served the Department with Taxpayer's First Set of Interrogatories and First Request for the Production of Documents. [*See* Administrative File].

9. On November 4, 2015, Taxpayer filed a Certificate of Service indicating that it served the Department with Protestant-Taxpayer's Preliminary Witness & Exhibit List. [*See* Administrative File].

10. On November 5, 2015, the Department filed New Mexico Taxation and Revenue Department's Preliminary Witness and Preliminary Exhibit Lists. [*See* Administrative File].

11. On January 13, 2016, the Department filed a Substitution of Counsel indicating a change of counsel on its behalf. [*See* Administrative File].

12. On February 9, 2016, the parties filed a Joint Motion to Amend Scheduling Order. [*See* Administrative File].

13. On February 16, 2016, the Administrative Hearings Office entered a Continuance Order, Amended Scheduling Order, and Notice of Administrative Hearing which continued the hearing on the merits of Taxpayer's protest to October 6, 2016. [*See* Administrative File].

14. On March 21, 2016, Taxpayer filed a Certificate of Service indicating that it served the Department with Taxpayer's Second Set of Interrogatories and Request for the Production of Documents. [*See* Administrative File].

15. On April 26, 2016, the Department filed a Certificate of Service indicating that it served Taxpayer with a Certificate of Service. [*See* Administrative File].

16. On May 23, 2016, the Department filed a Substitution of Counsel indicating a

change of counsel on its behalf. [*See* Administrative File].

17. On July 5, 2016, the parties filed a Joint Motion to Amend Scheduling Order. [*See* Administrative File].

18. On September 7, 2016, the Administrative Hearings Office entered a Second Continuance Order, Second Amended Scheduling Order, and Notice of Administrative Hearing which continued the hearing on the merits of Taxpayer's protest to January 9, 2017. [*See* Administrative File].

19. On December 9, 2016, Taxpayer filed Taxpayer's Motion for Summary Judgment (hereinafter "Motion"). [*See* Administrative File].

20. On December 15, 2016, the Administrative Hearings Office entered a Notice of Reassignment of Hearing Officer for Administrative Hearing and Order Converting Merits Hearing to Motion Hearing. [*See* Administrative File].

21. On December 23, 2016, the Department filed New Mexico Taxation and Revenue Department's Unopposed Request for an Enlargement of Time Within Which to File a Response to Motion for Summary Judgment, Motion to Vacate Scheduled Hearing, and Request for Scheduling Conference to be Docketed. [*See* Administrative File].

22. On December 27, 2016, counsel for Taxpayer filed a Notice of Unavailability. [*See* Administrative File].

23. On December 28, 2016, the Administrative Hearings Office entered an order granting the Department's motion for an enlargement of time, vacating the scheduled hearing on Taxpayer's Motion, and setting a telephonic scheduling conference for February 10, 2017. [*See* Administrative File].

24. On January 20, 2017, the Department filed New Mexico Taxation and Revenue Department's Second Unopposed Request for Enlargement of Time Within Which to File a Response to Motion for Summary Judgment. [*See* Administrative File].

25. On January 30, 2017, the Administrative Hearings Office entered an order granting the Department's second motion for an enlargement of time within which to file a response to Taxpayer's Motion. [*See* Administrative File].

26. On January 31, 2017, the Department filed Department's Response to Protestant's Motion for Summary Judgment (hereinafter "Response").

27. On February 13, 2017, the Administrative Hearings Office entered a Notice of Hearing on Taxpayer's Motion for Summary Judgment. The hearing on Taxpayer's Motion was set for April 18, 2017. [*See* Administrative File].

28. A hearing on Taxpayer's Motion occurred on April 18, 2017. [*See* Administrative File].

29. On July 14, 2017, the Administrative Hearings Office entered an Order Denying Taxpayer's Motion for Summary Judgment. [*See* Administrative File].

30. On July 17, 2017, the Administrative Hearings Office entered a Notice of Second Telephonic Scheduling Conference setting a scheduling hearing to occur on August 14, 2017. [*See* Administrative File].

Background in Reference to Department's
Denial of Refund issued under Letter ID No. L027941227

31. On May 31, 2016, Taxpayer claimed a refund for all gross receipts taxes paid for the periods of July 2014 through January 2016. The amount of the claimed refund was $252,776.84. [*See* Administrative File].

32. On September 28, 2016, the Department denied Taxpayer's application for refund for all gross receipts taxes paid for the periods of July 2014 through January 2016 under Letter ID No. L0279412272. [*See* Administrative File].

33. Taxpayer, by and through its counsel of record, submitted a Formal Protest on December 14, 2016 to the denial of its refund application for the periods of July 2014 through January 2016. [*See* Administrative File].

34. On December 28, 2016, the Department acknowledged Taxpayer's protest to the denial of its refund claim for the periods of July 2014 through January 2016. [*See* Administrative File].

35. On February 8, 2017, the Department submitted a Hearing Request seeking a hearing in the protest to the denial of its refund claim for the periods of July 2014 through January 2016. [*See* Administrative File].

36. On February 8, 2017, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference in which a scheduling conference was set for February 10, 2017 on Taxpayer's protest to the denial of its refund claim for the periods of July 2014 through January 2016. [*See* Administrative File].

37. On February 13, 2017, the Administrative Hearings Office entered an Order Holding Protest in Abeyance.

Protests Consolidated

38. On August 16, 2017, the Administrative Hearings Office entered a Consolidation Order, Scheduling Order, and Notice of Administrative Hearing which consolidated Taxpayer's above-captioned and referenced protests. A hearing on the merits of the protests was noticed to

occur on February 21, 2018 at 10 a.m.

39. On February 7, 2018, the parties filed a Joint Prehearing Statement.

40. On February 21, 2018, a hearing on the merits of the consolidated protest occurred.

Previously Undisputed Material Facts

41. Taxpayer is a non-profit entity established under the laws of the State of New Mexico for the purpose of producing and dispensing medical marijuana under state law. [Motion, Page 3, ¶1; Joint Prehearing Statement, II-A].

42. Taxpayer is licensed by the department of health of the State of New Mexico to dispense medical marijuana. [Motion, Page 3, ¶3; Response, Page 1, ¶3a; Joint Prehearing Statement, II-B].

43. Although state law permits the possession and use of medical marijuana, possession and use of marijuana is illegal under federal law. [Motion, Page 3, ¶2; Joint Prehearing Statement, II-C].

Testimony of Taxpayer's Witnesses

44. Mr. Joel White is certified to utilize medical marijuana for multiple sclerosis (hereinafter "MS"). [Testimony of Mr. White].

45. Mr. White was diagnosed with MS in June of 1989. [Testimony of Mr. White].

46. Mr. White researched common pharmaceutical treatments for MS. [Testimony of Mr. White].

47. Mr. White found the common pharmaceutical treatments to be unacceptable due to side effects. [Testimony of Mr. White].

48. Mr. White made lifestyle changes to control the effects of MS. [Testimony of Mr.

White].

49. Upon suggestion of a friend, Mr. White utilized marijuana for the first time in 2009. Mr. White found the effect of marijuana on his symptoms to be favorable. [Testimony of Mr. White].

50. Mr. White consulted his primary care physician and requested that he complete the documents needed for participation in the medical marijuana program. Mr. White's physician indicated that he could not approve his participation due to restrictions placed on him by his employer. [Testimony of Mr. White].

51. Mr. White changed physicians due to restrictions placed on his former physician in reference to recommending medical marijuana. [Testimony of Mr. White].

52. Mr. White consulted a new physician who recognized the potential benefits of medical marijuana, but advised Mr. White to utilize pharmaceutical treatments for at least two years prior to considering medical marijuana. [Testimony of Mr. White].

53. Mr. White consulted a third physician who he located online. Upon examination and consultation with the third physician, Mr. White received a recommendation permitting him to utilize medical marijuana. [Testimony of Mr. White].

54. Mr. White possesses a medical marijuana card. [Testimony of Mr. White].

55. The medical marijuana card identifies Mr. White as authorized to acquire, possess, and ingest medical marijuana. [Testimony of Mr. White].

56. The medical marijuana card includes a bar code which enables the state to monitor transactions utilizing the card. [Testimony of Mr. White].

57. Mr. White ingests medical marijuana by vaporization, edibles, or gel caps.

[Testimony of Mr. White].

58. Mr. White consumes approximately one-half ounce, or 14 to 16 grams per month of medical marijuana. [Testimony of Mr. White].

59. Dr. Paula Lane has been a physician licensed in New Mexico since 1981 and is authorized to prescribe medications. [Testimony of Dr. Lane].

60. Dr. Lane's practice includes evaluating individuals for recommendation for use of medical marijuana. [Testimony of Dr. Lane].

61. In circumstances where a patient satisfies the requirements for use of medical marijuana, Dr. Lane will complete the forms for participation, which are then submitted to the appropriate state authority by the patient. [Testimony of Dr. Lane].

62. The manner utilized for recommending medical marijuana is not the same as procedures utilized for issuing prescriptions for prescription medications. [Testimony of Dr. Lane].

63. Dr. Lane believes that medical marijuana can be an effective treatment for certain medical conditions. [Testimony of Dr. Lane].

DISCUSSION

Taxpayer withdrew claims that it was entitled to refunds under NMSA 1978, Section 7-9-18 and Section 7-9-59. Therefore, the solitary issue before the Hearing Officer is whether receipts from dispensing medical marijuana are deductible pursuant to NMSA 1978, Section 7-9-73.2, which provides a deduction for receipts from the sale of prescription drugs. Taxpayer asserts that given the authority to utilize marijuana for medical purposes under state law, it should be afforded the same status as a *prescription drug*, therefore entitling Taxpayer to the corresponding deduction from gross

receipts. This is the identical issue previously addressed in the Order Denying Taxpayer's Motion for Summary Judgment (hereinafter "Order"). Although Taxpayer waived its opportunity to make oral legal argument at the conclusion of the hearing, the Hearing Officer will nevertheless re-address arguments previously made in its Motion, as well as the Department's responses thereto, as if Taxpayer had expressly renewed its legal arguments.

Because Taxpayer's claim for refund is premised on a deduction from gross receipts tax, specifically NMSA 1978, Section 7-9-73.2, "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; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly).

Prior to addressing the application of the deduction subject of the present protest, it is beneficial to briefly discuss the history of medical marijuana in New Mexico.

Medical Marijuana in New Mexico

For more than a decade, New Mexico has recognized medicinal benefits of marijuana under the Lynn and Erin Compassionate Use Act (hereinafter the "CUA"). The policy underlying the CUA is best stated by the Legislature of the State of New Mexico which has said "[t]he purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their

medical treatments." *See* NMSA 1978, Section 26-2B-2. The CUA took effect on July 1, 2007. *See* Laws 2007, ch. 210, §1.

Specific debilitating medical conditions are enumerated at NMSA 1978, Section 26-2B-3 (B). The department of health of the State of New Mexico is also empowered to identify other medical conditions for which medical marijuana may be appropriate. Some, but not all of the medical conditions recognized by the CUA include cancer, glaucoma, MS, epilepsy, HIV, and AIDS.

In order to be qualified, a patient must be diagnosed as having a debilitating medical condition and receive written certification from a practitioner that, in the practitioner's professional opinion, the potential health benefits of cannabis would likely outweigh the health risks to the patient. *See* NMSA 1978, Section 26-2B-3 (G) and (H). The written certification consists of a statement in a patient's medical record, or a statement signed by a patient's practitioner.

Only after a patient is qualified may he or she then obtain medical marijuana from a licensed producer. A "licensed producer" is "any person or association of persons within New Mexico that the department determines to be qualified to produce, possess, distribute and dispense cannabis pursuant to the Lynn and Erin Compassionate Use Act and that is licensed by the department." *See* NMSA 1978, Section 26-2B-3 (D). Taxpayer, in this protest, is a "licensed producer."

In addition to the foregoing, the CUA establishes exemptions from criminal and civil penalties for the medical use of marijuana under the CUA. Qualified patients, their primary caregivers, practitioners, and licensed producers are all immune from criminal liability so long as they adhere to the requirements of the CUA. *See* NMSA 1978, Section 26-2B-4.

Notwithstanding criminal immunity afforded by the CUA for the possession and distribution of medical marijuana under state law, possession and distribution of marijuana, even for medicinal

purposes, remains unlawful under federal law. *See* 21 U.S.C. Sections 812; 822; 823(f); *Gonzales v. Raich*, 545 U.S. 1, 27, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (Categorizing marijuana as a Schedule I substance, Congress has determined that marijuana does not have any acceptable medical purpose).

Except for one instance which will be addressed below, it may be for that reason that the CUA does not employ the terms "prescribe" or "prescription." A physician could potentially violate federal law, state law, or other rules or regulations governing their license to practice medicine if they were to prescribe a controlled Schedule I substance. Taxpayer nevertheless urges that the similarities between the production and sale of medical marijuana and common prescription medications should entitle it to the benefit of a deduction under Section 7-9-73.2.

Taxpayer's Business Activities under the CUA

As previously acknowledged, Taxpayer is a licensed producer authorized to dispense medical marijuana consistent with the CUA. Taxpayer is organized as a non-profit entity with at least one medical professional on the board of directors, and maintains a valid license issued by the secretary of the department of health. *See* Regulation 7.34.4.8 (I) NMAC.

Taxpayer's business activities are also subject to regulations promulgated by the department of health. *See* Regulation 7.34.4 NMAC. It is required to retain a license subject to annual renewal and adhere to minimum standards for facilities, security, training, and record keeping. *See* Regulation 7.34.4.8 (R); Regulation 7.34.4.23 NMAC.

With regard for its product, Taxpayer is restricted to limits on the amounts of medical marijuana it can maintain as inventory. *See* Regulation 7.34.4.8 (A) (2) NMAC. It is required to regularly test the quality of its product for various purposes, including the presence of microbiological contaminants, mycotoxins, residues, and the quantity of tetrahydrocannabinol (THC) and cannabidiol

(CBD). *See* Regulation 7.34.4.9 NMAC.

Taxpayer is prohibited from dispensing medical marijuana which exceeds the maximum concentration of THC or water content. *See* Regulation 7.34.4.9 NMAC. It is prohibited from certain sales practices, such as volume discounts or promotional sales based on quantity purchased. *See* Regulation 7.34.4.8 (A) (2) NMAC. It is also subject to strict requirements for packaging and labeling of its product, which dictates: a description of the number of units of usable cannabis contained within the product; instructions for use; warnings for use; instructions for appropriate storage; approved laboratory analysis, the results of strength and composition within ten percent (10%) of numbers shown on the package; the name of the strain, product facts, or a nutrition fact panel; a statement that the product is for medical use by qualified patients, to be kept away from children, and not for resale; and the name of the department-approved testing facility or facilities used for ingredient testing, and the types of testing conducted. *See* Regulation 7.34.4.12 (C) NMAC.

Having qualified for its producer's license and otherwise being in good standing with the department of health, Taxpayer is authorized to engage in the business of dispensing medical marijuana to qualified patients.

Similar to other taxpayers engaged in the business of selling goods or services, Taxpayer sells its goods, reports its gross receipts, and pays gross receipts tax to the Department. In this matter, Taxpayer seeks a refund of gross receipts taxes it claims were incorrectly paid. Taxpayer asserts entitlement to $275,914.61 for the periods from January of 2011 through June of 2014, and $252,776.84 for the periods from July of 2014 through January of 2016.

Deductions from 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, Section 7-9-4 (2002). Under NMSA 1978, Section 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, Section 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, Section 7-9-5 (2002). There is no dispute that Taxpayer is engaged in business. Consequently, all of its receipts are presumed subject to the tax. Despite the general presumption of taxability of an entity engaged in business in New Mexico, Taxpayer argues that it is entitled to deduct from its gross receipts the proceeds of sales from medical marijuana pursuant to the CUA and the regulations implementing it. The deduction upon which Taxpayer relies, and which forms the central legal issue for consideration states as follows:

> **7-9-73.2. Deduction; gross receipts tax and governmental gross receipts tax; prescription drugs; oxygen.**
>
> A. Receipts from the sale of prescription drugs and oxygen and oxygen services provided by a licensed medicare durable medical equipment provider may be deducted from gross receipts and governmental gross receipts.
>
> B. For the purposes of this section, "prescription drugs" means insulin and substances that are:
>
> (1) dispensed by or under the supervision of a licensed pharmacist or by a physician or other person authorized under state law to do so;
>
> (2) prescribed for a specified person by a person authorized under state

law to prescribe the substance; and

(3) subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353.

Principals of Statutory Construction.

Resolving the issue at protest requires the statutory construction of the deduction provided for prescription drugs at NMSA 1978, Section 7-9-73.2. Questions of statutory construction begin with the plain meaning rule. *See Wood v. State Educ. Ret. Bd.,* 2011-NMCA-20, ¶12. In *Wood*, ¶12 (internal quotations and citations omitted), the Court of Appeals stated "that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." A statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

"Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the statutes' application absurd, unreasonable, or unjust." *See City of Eunice v. State Taxation & Revenue Dep't*, 2014-NMCA-085, ¶8 (internal citations and quotations omitted). It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers,* 1998-NMSC-20, ¶28, 125 N.M. 401. Only if the plain language interpretation

would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read in harmony with the provisions of the remaining statute or statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14. *See also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law.").

"Prescription drugs" under Section 7-9-73.2 (B)

Section 7-9-73.2 establishes a deduction for prescription drugs. The question for consideration is then whether or not medical marijuana is a "prescription drug." Section 7-9-73.2 (B) establishes a three-part test.

1. Part 1 - Section 7-9-73.2 (B) (1)

The first element to consider is whether medical marijuana is "dispensed by or under the supervision of a licensed pharmacist or by a physician or other person authorized under state law to do so." There is no dispute that Taxpayer, as a licensed producer under the CUA, is authorized under state law to dispense medical marijuana. Taxpayer therefore satisfies the first element of the definition of prescription drugs under the deduction.

2. Part 2 - Section 7-9-73.2 (B) (2)

The disputed issues become more apparent when considering the second prong of the definition which requires that the drug be "*prescribed* for a specified person by a person authorized under state law to *prescribe* the substance[.]" (Emphasis Added). Taxpayer asserts that medical marijuana meets this requirement, cites to the *Oxford Dictionary*, and emphasizes "The generally-

accepted definition of 'prescription' is to advise and authorize the use of a (medicine or treatment) for someone." Taxpayer also refers to NMSA 1978, Section 7-9-73.3, which defines the term "prescribe" for the purposes of establishing a deduction from gross receipts for durable medical equipment and medical supplies. For the purposes of that section, "prescribe" is defined to mean "to authorize the use of an item or substance for a course of medical treatment." *See* NMSA 1978, Section 7-9-73.3 (G) (4).

In the matter at hand, the CUA's singular reference to "prescriptions" or "prescribe" is found in the definition of "practitioner." It defines a "practitioner" to mean "a person licensed to *prescribe* and administer drugs that are subject to the Controlled Substances Act." (Emphasis Added). *See* NMSA 1978, Section 26-2B-3 (E). Referring to the Controlled Substances Act, NMSA 1978, Section 30-31-2 (S), the Legislature defined the term "prescription" as follows:

> "[P]rescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, bearing the name and address of the prescriber, the prescriber's license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue and in accordance with the Controlled Substances Act or rules adopted thereto[.]

This definition is fundamentally identical with the definitions utilized in other enactments which similarly define the term "prescription." In the New Mexico Drug, Device and Cosmetic Act, NMSA 1978, Section 26-1-2 (I), the Legislature stated:

> "[P]rescription" means an order given individually for the person for whom prescribed, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, and bearing the name and address of the prescriber, the prescriber's license classification, the name and

> address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue[.]

For comparison, the Drug Precursor Act, NMSA 1978, Section 30-31B-2 (S), similarly provides:

> "[P]rescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto[.]

Likewise, the Pharmacy Act, NMSA 1978, Section 61-11-2 (CC), states as follows:

> "[P]rescription" means an order given individually for the person for whom prescribed, either directly from a licensed practitioner or his agent to the pharmacist, including electronic transmission or indirectly by means of a written order signed by the prescriber, that bears the name and address of the prescriber, his license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue[.]

It is evident that the New Mexico Legislature has consistently defined the term "prescription" to require: 1) an order for the person for whom is prescribed a controlled substance; 2) either directly from a licensed practitioner or the practitioner's agent; 3) to the pharmacist; 4) bearing the name and address of the prescriber; 5) the prescriber's license classification; 6) the name and address of the patient; 7) the name and quantity of the drug prescribed; 8) directions for use; and 9) the date of issue.

In this case, medical marijuana is not dispensed upon a prescription consistent with the Legislature's unvarying use of that term. In contrast, the Legislature avoided the term "prescription" in the CUA, and established an alternate process for patients to acquire medical marijuana that was unlike methods generally associated with common prescription drugs. In fact,

Taxpayer acknowledged in its Motion that the Legislature's thoughtful consideration of terms was intended to protect medical professionals from potential sanctions for "prescribing" marijuana. [*See* Motion].

The significance was that the CUA and implementing regulations require a practitioner to make a "recommendation" or "certification" in lieu of a "prescription." A "certification" or "recommendation" is different from a "prescription" in that they require that a practitioner attest: 1) to the diagnosis of the medical condition; 2) that the condition is debilitating; and 3) that potential risks and benefits of the use of medical cannabis for the condition have been discussed with the patient. *See* Regulation 7.34.3.8 (C) NMAC.

Unlike a "prescription," a "certification" or "recommendation" is not an *order* given individually for the person for whom is prescribed a controlled substance, either *directly* from a licensed practitioner or the practitioner's agent *to the pharmacist*, providing the *name and quantity* of the drug prescribed and *directions* for use. In other words, unlike a prescription, a "certification" or "recommendation" under the CUA does not direct, command, or order a pharmacist to dispense medication of a specific type and quantity to a patient in accordance with detailed directions for its use.

As previously explained, a statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. In this case, the Legislature selected its words thoughtfully. It did not use "prescribe" or "prescription" in the CUA for reasons Taxpayer acknowledged were cautiously considered.

Similarly, in reviewing Section 7-9.73.2, the Legislature did not employ "certification" or

"recommendation" when it fashioned the deduction for prescription drugs. Instead, it limited the availability of the deduction to those drugs that were "*prescribed* for a specified person by a person authorized under state law to *prescribe*." The terms "prescribe" and "prescription" have been consistently defined to direct, command, or order a pharmacist to dispense medication of a specific type and quantity to a patient in accordance with detailed directions for its use by a qualified medical practitioner.

Since the Hearing Officer is persuaded that the language utilized by the Legislature is clear and unambiguous, the Hearing Officer is prohibited from reading extra words into the statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

In this case, Section 7-9-73.2 (B) (2) makes sense as written. The only way to give it the effect Taxpayer urges is to insert language which the Legislature has not adopted. Although the Legislature may have intentionally avoided the terms "prescribe" or "prescription" when it drafted the CUA, it was not bound by the same concerns when establishing a deduction from gross receipts tax. For example, the Legislature could have amended Section 7-9-73.2 to expressly include "certifications" and "recommendations" without apprehension of adverse consequences on New Mexico practitioners or producers. However, the Legislature did not do so. The current version of NMSA 1978, Section 7-9-73.2 went into effect on July 1, 2007, the same day as the CUA. *See* 2007, ch. 361, § 3.

Taxpayer also previously asserted that New Mexico courts have considered medical marijuana akin to prescription drugs. *See Vialpando v. Ben's Automotive Services*, 2014-NMCA-084; *Lewis v. American General Media*, 2015-NMCA-090. However, *Vialpando* and *Lewis* did

not involve construction of a tax statute under the direction of *Wing Pawn Shop*, which established the guidelines by which tax statutes are to be construed. In contrast, *Vialpando* and *Lewis* considered the status of medical marijuana under the Worker's Compensation Act, and never contemplated whether gross receipts from the sale of medical marijuana should be deductible under the Gross Receipts and Compensating Tax Act.

For the reasons stated, medical marijuana fails to satisfy the second element of the definition of "prescription drugs" because it is not *prescribed* under Section 7-9-73.2 (B) (2) of the Gross Receipts and Compensating Tax Act.

3. Part 3 - Section 7-9-73.2 (B) (3)

The final requirement for deductibility under Section 7-9-73.2 (B) is that the substance be "subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353." Those restrictions represent yet another significant reason why Taxpayer is not entitled to the deduction it seeks. The relevant portions of the referenced federal law state:

> (1) A drug intended for use by man which—
>
> (A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
>
> (B) is limited by an approved application under section 505 [21 USCS § 355] to use under the professional supervision of a practitioner licensed by law to administer such drug,
>
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug

> contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

Evaluating the words chosen by the Legislature, there is no indication that it intended to permit a deduction for medical marijuana when it referenced 21 USCA Section 353 (b) (1). Rather, these sections tend to limit the deduction to drugs that are considered unsafe except under the supervision of a licensed practitioner, which may then only be dispensed upon a written *prescription.*

By referencing Subparagraph 1 of Subsection (b) of 21 USCA 353, the Legislature revealed its intention to rely on the expertise of the federal authorities, such as the Food and Drug Administration (FDA), to classify the types of drugs that should qualify for its prescription drug deduction. Had it not, then responsibility for categorizing countless prescription drugs would have been delegated elsewhere, perhaps to the Department itself.

Taxpayer previously claimed that medical marijuana satisfied this final prong of Section 7-9-73.2 (B) because it came within the class of drugs that were unsafe except under the supervision of a licensed practitioner. However, by classifying marijuana as a Schedule I substance, Congress determined that marijuana does not have any acceptable medical purpose and cannot be dispensed under a prescription. Accordingly, Congress has not determined that marijuana is unsafe except under supervision of a licensed practitioner. In contrast, Congress has determined that marijuana is *unsafe under all circumstances*, with the exception of FDA-approved research which is not subject of the current protest. *See Gonzales*, 545 U.S. at 27; *United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 490, 149 L.Ed.2d 722, 121 S. Ct. 1711 (2001).*

Therefore, if for the purpose of Section 7-9-73.2, the deduction is only available for a drug which, "*is not safe for use except under the supervision of a practitioner licensed by law to administer such drug,*" then marijuana is excluded. Congress has established that marijuana, as a

Schedule I drug, is not safe under any circumstances. Therefore, it is excluded from the class of drugs defined in subparagraph 1 of subsection (b) of 21 USCA 353, and fails to satisfy the third prong of Section 7-9-73.2 (B).

Given the forgoing, Taxpayer's reliance on Letter Rulings 430-03-1 (August 28, 2003) and 430-03-2 (August 28, 2003) is misplaced. Those Letter Rulings recognized deductions for chemotherapy medications, steroids, intrathecal baclofen, intrathecal morphine, and botulinum toxin. Neither ruling considered the deductibility of a Schedule I substance under the CUA. In fact, the CUA would not be enacted until 2007, years after the Department issued the referenced letter rulings.

For the stated reasons, medical marijuana does not satisfy the third and final element of the definition of "prescription drug."

Testimony of Mr. White and Dr. Lane

Except for the testimony of Mr. White and Dr. Lane, the material facts in the record remain unchanged since the Hearing Officer entered the Order Denying Taxpayer's Motion for Summary Judgment. Mr. White undeniably and regrettably experiences the debilitating effects of MS. He explained his personal experience with obtaining approval for use of medical marijuana and the process by which he acquires his supply. He testified to the amounts he ingests, his methods of ingestion, and its effects on his symptoms.

Dr. Lane expressed her belief that medical marijuana can be an effective treatment for certain medical conditions. She testified regarding her experience with evaluating patients for recommendation, and the similarities she perceives between recommending medical marijuana and other types of medical treatments, including prescription medications. Dr. Lane also readily

acknowledged that the process of recommending medical marijuana was not analogous to the process utilized for prescribing medications.

Overall, the testimony of Mr. White and Dr. Lane was generally informative, but mostly irrelevant for establishing Taxpayer's entitlement to a deduction from gross receipts. Neither witness conveyed a personal knowledge of facts relevant to Taxpayer's protest, but instead testified regarding their own respective experiences as a patient and a physician under the CUA. That is not to discount their respective perspectives, but their testimony may have been more suitable for a body engaged in formulating policy.

In contrast, the responsibility of the Administrative Hearings Office and the undersigned Hearing Officer is to render a decision in accordance with the law and the evidence presented. *See* NMSA 1978, Section 7-1B-6 (D) (2). In doing so, the Hearing Officer is expressly prohibited from engaging or participating "in any way in the enforcement or formulation of general tax policy other than to conduct hearings." *See* NMSA 1978, Section 7-1B-7 (A).

In conclusion, the Hearing Officer construes the deduction strictly in favor of the taxing authority and finds that the right to a deduction for medical marijuana is not "clearly and unambiguously expressed in the statute" or clearly established by Taxpayer. *See Wing Pawn Shop*. Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed timely, written protests to the Department's denials of its claims for refund, and jurisdiction lies over the parties and the subject matter of the protests consolidated herein.

B. Hearings were timely set and held within 90-days of Taxpayer's protests under NMSA 1978, Section 7-1B-8 (2015).

C. Medical marijuana is not a "prescription drug" under NMSA 1978, Section 7-9-73.2.

D. Taxpayer did not establish entitlement to refunds under NMSA 1978, Section 7-9-73.2 for the periods subject of the protests consolidated herein.

For the foregoing reasons, Taxpayer's protest **IS DENIED.**

DATED: February 26, 2018

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. 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

On February 26, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner: