

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
DAVID S RODRIGUEZ
DEL CORAZON HOSPICE
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1216767280**

and

**IN THE MATTER OF THE PROTEST OF
DEL CORAZON HOSPICE LLC
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0849274160**

v.

No. 18-15

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned and consolidated protests on March 29, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Mr. Wade Jackson, Esq. (Sutin, Thayer and Browne, P.C.), appeared representing Del Corazon Hospice, L.L.C. (“Taxpayer”). Mr. David S. Rodriguez, president and executive director of Taxpayer, appeared and testified. Staff Attorney, Mr. David Mittle, Esq., appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor, Ms. Amanda Carlisle, appeared as a witness for the Department. Taxpayer Exhibits 2, 3, 4, 8, 9, 10, 11, 12, 13, and 14 were admitted into the record. Department Exhibit A, reflecting the Taxpayer’s purported outstanding liability as of March 29, 2018, was filed with the permission of the Hearing Officer after conclusion of the hearing. Department Exhibit B, which reflected a correction to Department Exhibit A, was filed on April 5, 2018. All exhibits are more thoroughly

described in the Administrative Exhibit Coversheet. Taxpayer also requested an opportunity to submit proposed findings of fact and conclusions of law. The parties agreed that proposed findings of fact and conclusions of law were due on or before April 13, 2018. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On April 21, 2017, the Department assessed Taxpayer the amounts of \$503.10 in workers' compensation fees, \$100.62 in penalty, and \$32.97 in interest for a total sum of \$636.69 for the periods from March 31, 2011 through December 31, 2015 under Letter ID No. L0849274160. [See Administrative File].

2. On April 21, 2017, the Department assessed Taxpayer the amounts of \$219,420.85 in gross receipts tax, \$45,080.63 in penalty, and \$18,242.43 in interest for a total tax assessment of \$282,743.91 for the CRS reporting periods from June 30, 2011 through February 29, 2016 under Letter ID No. L1216767280. [See Administrative File].

3. On July 25, 2017, Taxpayer submitted its formal protest of the assessments. [See Administrative File].

4. On August 11, 2017, the Department acknowledged receipt of Taxpayer's formal protest under Letter ID No. L2012081456. [See Administrative File].

5. On September 25, 2017, the Department requested a scheduling hearing in this matter with the Administrative Hearings Office. [See Administrative File].

6. On September 27, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference setting this matter for a hearing on October 13, 2017. [See Administrative File].

7. On October 10, 2017, Taxpayer's counsel of record entered its appearance. [*See Administrative File*].

8. On October 13, 2017, a telephonic scheduling hearing occurred in which the parties agreed on a date to conduct a hearing on the merits of Taxpayer's protest as well as all other associated deadlines. The scheduling hearing was within 90 days of the protest and neither party objected that the hearing should satisfy the 90-day hearing requirement provided by NMSA 1978, Section 7-1B-8 (A). [*See Record of Scheduling Hearing (10/13/2017)*].

9. On October 17, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing formalizing the agreed upon date for a hearing on the merits of Taxpayer's protest and associated deadlines. [*See Administrative File*].

10. On November 2, 2017, Taxpayer filed a Certificate of Service of Taxpayer's First Set of Interrogatories. [*See Administrative File*].

11. On November 2, 2017, Taxpayer filed a Certificate of Service of Taxpayer's First Set of Requests for Production. [*See Administrative File*].

12. On November 30, 2017, the Department filed a Certificate of Service indicating that it served its Response to Taxpayer's First Set of Interrogatories and First Set of Requests for Production on Taxpayer's counsel of record. [*See Administrative File*].

13. On February 27, 2018, Taxpayer filed its Motion for Summary Judgment. [*See Administrative File*].

14. On March 13, 2018, the Department filed Department's Response to Motion for Summary Judgment. [*See Administrative File*].

15. On March 13, 2018, Taxpayer filed Taxpayer's Motion to Convert Hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See Administrative File*].

16. On March 14, 2018, Taxpayer and the Department filed their Joint Prehearing Statement. [*See Administrative File*].

17. On March 20, 2018, the Department filed the Department's Response to Taxpayer's Motion to Convert Hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See Administrative File*].

18. On March 23, 2018, the Administrative Hearings Office entered an Order Denying Motion for Summary Judgment which in addition to denying Taxpayer's request for summary judgment, also denied Taxpayer's requests that the hearing on the merits of the protest be converted to a hearing on Taxpayer's Motion for Summary Judgment and to hold merits of protest in abeyance. [*See Administrative File*].

19. David Rodriguez is the founder, president, and executive director of Taxpayer. [*Testimony of Mr. Rodriguez*].

20. In that capacity, Mr. Rodriguez oversees all of Taxpayer's operations. [*Testimony of Mr. Rodriguez*].

21. Prior to establishment Taxpayer, Mr. Rodriguez acquired, through previous employment, significant experience in the operation of hospice-care organizations. [*Testimony of Mr. Rodriguez*].

22. Mr. Rodriguez is also a licensed nurse with 40 years' experience and has been licensed as a nursing home administrator for 33 years. Mr. Rodriguez was also previously

employed by the department of health of the State of New Mexico where he served as director of its division of health improvement. [Testimony of Mr. Rodriguez].

23. Taxpayer is a licensed provider of hospice care services authorized by federal authorities to provide services to Medicare and Medicaid patients. [Testimony of Mr. Rodriguez].

24. Taxpayer provides hospice care service in Santa Fe and Espanola, New Mexico. [See Taxpayer Exs. 8 – 13; Testimony of Mr. Rodriguez].

25. Taxpayer does not provide room and board for patients its serves nor does it operate nursing home facilities. Rather, Taxpayer provides hospice care services in the location where the patient resides, including nursing home facilities. [Testimony of Mr. Rodriguez].

26. Taxpayer began providing hospice care services in January of 2012 at three nursing home facilities in Santa Fe and Espanola, New Mexico. [Testimony of Mr. Rodriguez].

27. Although Taxpayer commenced operations in January of 2012, it was prohibited from billing for its services until it satisfied the requirements for Medicare and Medicaid certification. [Testimony of Mr. Rodriguez].

28. Taxpayer obtained its Medicare certification in January of 2013 at which time it was permitted to bill retroactively to June 20, 2012. [Testimony of Mr. Rodriguez].

29. After receiving Medicare certification, Taxpayer applied for and received its Medicaid certification which was granted on or about March 6, 2013. Taxpayer was then permitted to bill Medicaid services retroactively to approximately March 20, 2012. [Testimony of Mr. Rodriguez].

30. Consequently, Taxpayer did not bill for Medicaid services performed prior to March 20, 2012, nor did it bill for Medicare services performed prior to June 20, 2012. [Testimony of Mr. Rodriguez].

31. There are two components through which Taxpayer provides hospice care services. The first arises through the direct-hospice benefit in which patients receive services. The second scenario arises from provision of the same services, but to a Medicaid recipient receiving institutional Medicaid living in a nursing home whose room and board is provided by the state. [Testimony of Mr. Rodriguez].

32. The majority of services, or approximately 95 percent, are provided by Taxpayer under the Medicare hospice benefit which provides compensation directly to Taxpayer at a per diem rate intended to compensate it for all care and services regardless of where the patient resides, such as in a nursing facility or in their own homes. [Testimony of Mr. Rodriguez].

33. The minority of services, or approximately 5 percent, are provided by Taxpayer through Medicaid for individuals residing in their homes or other non-institutional settings; under commercial contracts with insurance companies; or *pro bono*. [Testimony of Mr. Rodriguez].

34. Because New Mexico is classified as a pass-through state, Taxpayer bills Medicaid for all services performed on behalf of its patients, including room and board services provided and performed by the nursing home facilities in which the patients reside, as required by the regulations of the Centers for Medicare and Medicaid Services (hereinafter "CMS"). [Testimony of Mr. Rodriguez].

35. CMS coordinates services through its fiscal intermediary. Palmetto GBA serves as the fiscal intermediary for Medicare services under the Medicare hospice benefit. [Testimony of Mr. Rodriguez].

36. Medicaid utilizes four intermediaries, or medical care organizations in New Mexico: (1) United Health Care; (2) Molina Healthcare; (3) Presbyterian Healthcare Services; and (4) Blue Cross and Blue Shield of New Mexico. [Testimony of Mr. Rodriguez].

37. For services provided under Medicaid, Taxpayer bills specifically for hospice service for patients that may not be eligible for Medicare benefit but may qualify for Medicaid hospice services regardless of where they reside, whether in their homes or within an institutional setting. [Testimony of Mr. Rodriguez].

38. By virtue of regulatory framework, Taxpayer is primarily liable for payment to the nursing home facilities for their room and board services. [Testimony of Mr. Rodriguez; *See* Taxpayer Exs. 8 – 14].

39. Standard practice provides that the nursing home facility will bill Taxpayer for the patient's room and board within the facility. The bill contains the patient's personal identifying information, insurance information, the dates of service, the number of days within the dates of service, the nursing home's daily rate, the total amount due, as well as the patient's share of the total amount due. The amount billed to the Taxpayer is the difference between the total amount due and the amount of the patient's share. [*See* Taxpayer Ex. 14.1; Testimony of Mr. Rodriguez].

40. Taxpayer thereafter relies on the billing from the nursing home facility to prepare a detailed invoice to be submitted to the medical care organization. The invoice consists of

detailed room and board information for each day of the billing period for which payment is due for the patient's room and board. [See Taxpayer Ex. 14.2 – 14.3¹; Testimony of Mr. Rodriguez].

41. The bill from Taxpayer is transmitted electronically to the medical care organization. The medical care organization thereafter issues payment to Taxpayer. [See Taxpayer Ex. 14.4; Testimony of Mr. Rodriguez].

42. Hospice care services and room and board charges to Medicare and Medicaid are separately submitted. [Testimony of Mr. Rodriguez].

43. The managed care organization is thereafter entitled to a five percent (5%) discount which it implements in the form of payment to Taxpayer in the amount of 95 percent of the amount actually billed. [Testimony of Mr. Rodriguez].

44. Although Taxpayer receives payment for 95 percent of the charges actually billed for a patient's room and board, it is nevertheless contractually obligated to pay the full amount billed by the nursing home facility. [See Taxpayer Ex. 14.5; Testimony of Mr. Rodriguez].

45. Taxpayer is obligated to pay the nursing home facility for patient room and board within 30 days of receiving the nursing home facility's bill. [Testimony of Mr. Rodriguez; See Taxpayer Exs. 8 – 13].

46. Initial contracts between Taxpayer and the nursing home facilities in which it provided hospice care services expressly disclaimed any agency relationship between the nursing home facility and Taxpayer. Those contracts were each effective on November 1, 2011. [See Taxpayer Ex. 8.24; 9.24; 10.24 (Sections 17.12); Testimony of Mr. Rodriguez].

¹ Mr. Rodriguez indicated that there had been an inadvertent failure to fully redact patient-identifying information appearing in the header of Taxpayer Exhibit 14.2 – 14.3. Finding that the identity of the patient subject of Taxpayer Exhibit 14.2 – 14.3 is not relevant to the issues in this protest, the Hearing Officer redacted the patient's name. The Department did not object.

47. Subsequent contracts between Taxpayer and the nursing home facilities in which it provided hospice care services were amended effective November 1, 2012. The amended contracts still disclaimed any general agency relationship, but created a limited exception purporting to permit Taxpayer to serve as agent on behalf of the nursing home facilities for billing room and board to Medicaid. [See Taxpayer Ex. 11.14 – 11.15; 12.14 – 12.15; 13.14 – 13.15 (Sections 7.4; 9.1; 9.6; 15.3); Testimony of Mr. Rodriguez].

48. Despite the differences between contracts executed in 2011 and 2012, billing and payment protocols utilized by Taxpayer did not change. [Testimony of Mr. Rodriguez].

49. Taxpayer has not had, nor does it presently have the authority to bind any nursing homes in a contract with any third party, including any medical care organization through which it bills or receives payment for room and board, nor does it have authority to bind a medical care organization in contract with any nursing homes. [Testimony of Mr. Rodriguez].

50. None of the relevant agreements between the nursing home facilities and Taxpayer are required to be submitted to Medicaid or Medicare, nor have they actually been submitted. [Testimony of Mr. Rodriguez].

51. If any of the relevant contracts actually created a genuine agency relationship, the relationship has not actually been disclosed to the medical care organizations. [Testimony of Ms. Carlisle; Testimony of Mr. Rodriguez].

52. The Department perceives Taxpayer's payment to the nursing home facilities as a Taxpayer expenditure and the payment from the medical care organization as a reimbursement of that expenditure. [Testimony of Ms. Carlisle].

53. Taxpayer is contractually obligated to make timely payment for room and board services regardless of the amount of time elapsing between its billing to the managed care organization and receiving payment. [Testimony of Mr. Rodriguez].

54. Mr. Rodriguez has not been assessed in his personal capacity. His name is included on the assessment only for purposes of mailing. [Testimony of Ms. Carlisle].

55. Taxpayer speculated that the nursing homes paid gross receipts taxes on payments received for room and board. [Testimony of Mr. Rodriguez]. Due to significant statutory prohibitions on the Department's ability to disclose confidential taxpayer information, the Department was unable to confirm or deny such speculation. [Testimony of Ms. Carlisle].

56. Taxpayer's outstanding liability as of March 29, 2018 was \$290,967.68 reflecting the sum of \$219,420.85 in gross receipts tax, \$45,080.63 in penalty, \$18,242.43 in interest for a total balance of \$282,743.91 plus interest accruing through March 29, 2018 in the amount of \$8,223.77. [See Letter ID No. L1216767280; Dept. Ex. B].

57. The record lacks information to establish the present outstanding liability, if any, under Letter ID No. L0849274160.

DISCUSSION

The principal issue in this protest is whether Taxpayer's receipts from Medicaid, for the room and board of its patients residing in nursing home facilities, are excluded from gross receipts under the Gross Receipts and Compensating Tax Act as "amounts received solely on behalf of another in a disclosed agency capacity[.]" See NMSA 1978, Section 7-9-3.5 (A) (3) (f).

Although Taxpayer indicated in various pleadings that it intended to assert entitlement to deductions under NMSA 1978, Section 7-9-93 and NMSA 1978, Section 7-9-77.1, Taxpayer did not present evidence or argument in support of either deduction, nor did Taxpayer address either

deduction in Del Corazon Hospice, LLC's Proposed Findings of Fact and Conclusion of Law. For these reasons, the Hearing Officer finds that Taxpayer has waived or withdrawn its claims to deductions under Section 7-9-93 and Section 7-9-77.1.

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment from which this protest arises is presumed correct and the burden is on Taxpayer to overcome the presumption. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) encompasses 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, 134 P.3d 785, 791 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

For that reason, Taxpayer carries the burden to present countervailing evidence or legal argument to show that it is entitled to an abatement of an assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. "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-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-NMCA-021, ¶13.

"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.” See *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); See also *TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d 474.

Gross Receipts Tax and the Exception for a Disclosed Agency Relationship.

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 (2017). The Gross Receipts and Compensating Tax Act imposes a presumption that *all* receipts of a person engaged in business are taxable. See NMSA 1978, Section 7-9-5 (2002). “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). The term “gross receipts” is defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007) 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.

Our courts have construed receipts to “include payments received for one’s own account and then expended to meet one’s own responsibilities.” See *MPC*, ¶14.

In this protest, the parties do not dispute that Taxpayer performed hospice care services in New Mexico and that, in the course of providing those services, Taxpayer collected receipts for its own account and to satisfy its responsibilities to the nursing homes in which its patients resided. However, Taxpayer claims that the receipts it received from Medicaid to compensate the nursing home facilities for room and board are not taxable because Taxpayer received those payments “solely on behalf of another in a disclosed agency capacity.” It further argues that

Regulation 3.2.1.19 (C) (1) NMAC is not applicable because Taxpayer did not incur expenses requiring reimbursement. Rather, Taxpayer asserts it acted merely as the conduit through which payment flowed from Medicaid to the nursing home facilities. Regulation 3.2.1.19 (C) (1) NMAC provides:

The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by Section 7-9-3.5 NMSA 1978, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.

The Hearing Officer will first address the argument that receipts from Medicaid were not reimbursed expenditures. Although the evidence established that Taxpayer was not engaged in the business of providing room and board, it undoubtedly assumed individual responsibility to compensate the nursing home facilities for their room and board services, even if Taxpayer was authorized to obtain payment, or reimbursement, from Medicaid. Contracts between Taxpayer and each of the nursing home facilities in which it provided services required Taxpayer, *not* Medicaid, to make payment within 30 days after Taxpayer's receipt of the nursing home facility's invoice. *See* Taxpayer Exs. 8 (Sec. 11.4); 9 (Sec. 11.4); 10 (Sec. 11.4); 11 (Sec. 9.6); 12 (Sec. 9.6); 13 (Sec. 9.6).

At all times relevant to this protest, it was the practice of the nursing home facilities to generate invoices referencing each patient and the details upon which the amount due for each patient was calculated. [*See* Taxpayer Ex. 14.1]. Those invoices were submitted to Taxpayer, the date of which also established the due date for any forthcoming payment. Taxpayer, according to

its contracts, was thereafter *solely* responsible for making timely payment to the nursing home facilities.

Taxpayer, however, was also concurrently authorized to obtain payment from Medicaid for room and board services. Accordingly, Taxpayer in reliance on the bills received from the nursing home facilities also prepared its own invoices for room and board, and submitted them electronically to Medicaid via the medical care organization. Taxpayer's invoices provided the name and address of the patient, and the details underlying the charges. Except for the street address provided for a patient's place of residence, invoices did not specifically reference the name of any individual nursing home facility or signify that it was submitted on behalf of such facility. Rather, invoices were submitted visibly in the name of Taxpayer alone. [See Taxpayer Ex. 14.2 – 14.3].

The medical care organization thereafter reviewed the invoices and authorized payment. Payment was then made electronically, directly to Taxpayer, provided with the details of the payment relevant to each individual patient. The payment details do not specifically reference any nursing home facility, or contain any information to indicate that payment is tendered for further dispersal. [See Taxpayer Ex. 14.4].

With regard for where payments are deposited, there was no indication from the evidence presented whether payments from Medicaid are separately maintained or comingled with Taxpayer funds. However, Mr. Rodriguez candidly testified that Medicaid rarely processes payments in less than 30 days, requiring that Taxpayer advance payment from its own funds in order to assure timely payment is made to the nursing home facilities. Taxpayer's exhibits demonstrate those circumstances. Taxpayer Ex. 14.1 consists of an invoice from a nursing home facility to Taxpayer dated February 8, 2018. Although it is unclear when Taxpayer submitted its

own invoice to Medicaid, via the medical care organization, it is apparent that Taxpayer paid the invoice from the nursing home facility on February 27, 2018. [See Taxpayer Ex. 14.5]. Taxpayer thereafter received its payment, or reimbursement, from Medicaid on March 16, 2018. [See Taxpayer Ex. 14.4].

It is also useful to address the difference between the amounts billed by the nursing home facilities to Taxpayer, Taxpayer to Medicaid, and the amount which Medicaid thereafter pays to Taxpayer. Taxpayer Exhibits 14.1 and 14.5 provide that Taxpayer was billed and subsequently paid \$4,416.42 for room and board services. More than two weeks later, Taxpayer Exhibit 14.4 illustrated that Medicaid compensated Taxpayer \$4,109.83 for those same room and board services. The difference, Mr. Rodriguez explained, stemmed from Regulation 8.325.4.18 NMAC, which provides “reimbursement” at 95 percent of the Medicaid rate that it would pay directly to a nursing home facility, and Taxpayer’s contracts with the nursing home facilities in which Taxpayer agreed to compensate the nursing home facilities at the full Medicaid rate.

Accordingly, these facts illustrate and exemplify a scenario in which payments from Medicaid represent reimbursed expenditures which are taxable pursuant to Regulation 3.2.1.19 (C) (1), NMSA 1978, Section 7-9-3.5, and MPC, explaining that receipts include payments received for one’s own account and expended to meet one’s own responsibilities.

The next issue therefore centers on the relationship between Taxpayer, the nursing home facilities, and Medicaid, and specifically whether Taxpayer incurred the expenses in a *disclosed agency capacity*.

The New Mexico Supreme Court has acknowledged that “[t]he common law emphasizes the fiduciary nature of the agency relationship, which does not arise until ‘one person (a “principal”’) manifests assent to another person (an “agent”’) that the agent shall act on the

principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" See *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶17, 142 N.M. 235, 164 P.3d 934 quoting Restatement (Third) of Agency §1.01 (2006); See also *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶40, 143 N.M. 142, 173 P.3d 749; *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶26, 131 N.M. 772, 42 P.3d 1221.

Our courts have, on several occasions, considered the existence and consequence of the agency relationship on receipts generated amidst that relationship. *MPC* considered Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC and determined that reimbursement of expenses may be excluded from taxable gross receipts if those receipts stem from an agency relationship in which:

(1) the agent [taxpayer] has the authority to bind the principal... to an obligation... created by the agent [taxpayer], and (2) the beneficiary of that obligation... is informed by contract that he or she has a right to proceed against the principal... to enforce the obligation.

In this protest, the evidence failed to establish any authority for Taxpayer to act on a nursing home facility's behalf or subject to its control. Initial contracts between Taxpayer and nursing home facilities in 2011 expressly renounced the creation of any agency relationship whatsoever, and affirmed that the relationship of the parties was that of two independent contractors. Moreover, the contracts expressly disavowed creating any rights that might be enforceable by third-party beneficiaries. [*See Taxpayer Exs. 8 – 10 (Sections 17.11 – 17.12)*].

Subsequent contracts executed in 2012, continued to employ similar terms, but created a limited and narrow exception for the purpose of billing Medicaid, providing that the Taxpayer would serve as agent for the nursing home facility for that limited purpose. [*See Taxpayer Exs. 11 – 13 (Section 7.4; 9.1.A(i))*]. Otherwise, the 2012 contracts similarly renounced the creation of any other agency relationship, affirmed that the relationship of the parties was that of two

independent contractors, and disavowed creating any rights that might be enforceable by third-party beneficiaries. [See Taxpayer Exs. 11 – 13 (Sections 15.12 – 15.13)].

However, the Hearing Officer observed that the addition of language purporting to create a limited agency relationship did not confer any additional or newfound authority on Taxpayer. Taxpayer was already authorized to bill Medicaid for room and board services pursuant to Regulation 8.325.4.18 NMAC and did not require any additional authority from the nursing home facilities. Most significantly, however, is the fact that Mr. Rodriguez testified that regardless of the revisions to the contracts from 2011 to 2012, Taxpayer’s billing practices and procedures did not change as a result of the new language.

“The majority rule is that the manner in which the parties designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called.” *See Chevron Oil Co. v. Sutton*, 1973-NMSC-111, ¶4, 85 N.M. 679, 515 P.2d 1283; *See also Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, 135 N.M. 641, 92 P.3d 653. In this protest, the 2012 contracts certainly utilized specific keywords or catchphrases, but the evidence failed to demonstrate any conduct exemplifying a genuine agency relationship.

For instance, Mr. Rodriguez’s testimony and Taxpayer Exhibit 14 demonstrate that payments received by Taxpayer from Medicaid were electronically deposited to its account from which it also made its payments to the nursing home facilities. [See Taxpayer Ex. 14.5]. As previously discussed, there is no indication that payments from Medicaid were tendered to Taxpayer as an agent on behalf of its principal, or treated by Taxpayer in a manner that would differentiate, or segregate, those funds from its own. This is a relevant observation because general rules of agency discourage an agent from commingling a principal’s assets with its own,

and therefore, conduct intended to maintain a separation of assets may be indicative of a genuine agency relationship. For example, the Restatement (Third) of Agency, §8.12, states:

An agent has a duty, subject to any agreement with the principal,

(1) not to deal with the principal's property so that it appears to be the agent's property;

(2) not to mingle the principal's property with anyone else's; and

(3) to keep and render accounts to the principal of money or other property received or paid out on the principal's account.

Conversely, if the parties had an alternative agreement for the maintenance of their respective assets, then evidence on that agreement may have been relevant as well. Comment c of the Restatement (Third) of Agency, §8.12 instructs that “[a]n agent and a principal may agree that the agent may use the principal's property in a manner that creates the appearance that it is the agent's property. In the absence of such an agreement, an agent has a duty to the principal not to deal with the principal's property in this manner.” In this protest, where Taxpayer asserted that it was an agent dealing solely with the assets of its principal, it offered no evidence to demonstrate that it adhered to any procedures for maintaining the principal's purported assets in a manner consistent with the obligations of a genuine agent.

Despite the lack of outward conduct demonstrating the existence of an agency relationship, the Hearing Officer has no intention to merely disregard the language of the contract purporting to establish an agency relationship. Instead, the Hearing Officer applies the general rule that “[a] contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract.” See *Bank of N.M. v. Sholer*, 1984-NMSC-118, ¶6, 102 N.M. 78, 691 P.2d 465. In this protest, the contracts impose a strict limit on Taxpayer's agency, confining its authority to

requesting reimbursement from Medicaid only. [*See* Taxpayer Exs. 11 (Sec. 7.4); 12 (Sec. 7.4); 13 (Sec. 7.4)]. There is no further grant of authority within the contracts which is consistent with Mr. Rodriguez' testimony that the nursing home facilities *did not* confer authority to Taxpayer to bind them to obligations with third parties, including Medicaid.

Moreover, the Hearing Officer observed that Taxpayer was already entitled, through the regulatory framework of Regulation 8.325.4.18 NMAC, to seek reimbursement from Medicaid and did not require any grant of additional authority. This observation is significant because it illustrates that the newly-added agency language was not intended to modify established billing procedures, which is also consistent with Mr. Rodriguez' testimony that nothing actually changed, from a billing perspective, as a result of the 2012 revisions.

Consequently, the conduct of the parties, as well as the terms of their contracts, fails to establish a genuine agency relationship in which Taxpayer had authority to bind the nursing home facilities to obligations created by Taxpayer. With regard for the second prong of *MPC*, there is also no evidence to establish that the beneficiary of that obligation, if it had existed, was informed by contract that it had a right to proceed against the principal to enforce the obligation.

Mr. Rodriguez testified that neither Medicaid nor any other third party was actually informed by contract that it had a right to proceed against the nursing home facilities to enforce obligations it may have created, even if there was actual authority to do so, which the Hearing Officer did not find.

Even if disclosure could be implied from the regulatory framework of the Medicaid program, an apparent authority, or a constructive disclosure, is insufficient because of the clear statutory and regulatory language requiring that the relationship be disclosed. The Court of Appeals recently recognized, while applying *MPC* that “[a]n actual, affirmative statement

disclosing the agency relationship is necessary.” *See Bogle Management Co., Inc. v. N.M. Taxation & Revenue Dep’t*, No. A-1-CA-35641, dec. at 18 - 19 (N.M. Ct. App. Dec. 5, 2017) (non-precedential); *See Santa Fe Tow and Emergency Lock & Key*, No. 15-21 (June 30, 2015) (non-precedential).

In summary, Taxpayer did not establish it was a disclosed agent in this case with authority to bind the nursing home facilities to third-party obligations, and that the third parties were actually informed of their right to proceed against the nursing home facilities to enforce such obligations. *See MPC*, ¶36.

The totality of the evidence established that Taxpayer received payments from Medicaid on its own behalf as reimbursement for satisfying its own contractual obligations with the nursing home facilities. Those payments, tendered solely to Taxpayer, were not “amounts received solely on behalf of another in a disclosed agency capacity[.]” and are therefore not excludable from Taxpayer’s taxable gross receipts. *See NMSA 1978*, Section 7-9-3.5 (A) (3) (f); Regulation 3.2.1.19(C) (1) NMAC. Instead, the evidence established that the receipts at issue in this protest consisted of “payments received for one’s own account and then expended to meet one’s own responsibilities.” *See MPC*, ¶14.

Worker’s Compensation.

Although the caption utilized in this protest incorporates Letter ID No. L0849274160, which arose from the imposition of tax, penalty and interest under NMSA 1978, Section 52-5-19 of the Workers Compensation Act, Taxpayer’s protest is silent with regard for that assessment. Moreover, Taxpayer did not present evidence or argument relevant to rebutting the presumption of correctness that attached to that assessment. *See NMSA 1978*, Section 7-1-17 (C) (2007).

The Hearing Officer presumes that it was never the Taxpayer's intention to protest the assessment of tax, penalty and interest under NMSA 1978, Section 52-5-19 of the Workers Compensation Act. To the extent Taxpayer intended its protest to also address those matters, then Taxpayer's protest should be denied for the lack of sufficient evidence and arguments to overcome the presumption of correctness that attached to that assessment.

Equitable Recoupment

During Ms. Carlisle's cross-examination, Taxpayer inquired whether any of the nursing home facilities paid gross receipts tax on their receipts from relevant room and board services. Ms. Carlisle responded that answering that question would require that she divulge the confidential taxpayer information of those entities, contrary to NMSA 1978, Section 7-1-8. Taxpayer did not object and made no further inquiries relevant to that potential issue. Nevertheless, it was apparent that the Taxpayer intended to advance, or at least explore a theory of equitable recoupment.

An assessment may be abated when another person paid the amount of the tax "on behalf of the taxpayer on the same transaction; provided that the requirements of equitable recoupment are met." See NMSA 1978, Section 7-1-28 (F) (2013). Generally, equitable recoupment permits a party to assert a claim or defense that would otherwise be barred by a statute of limitations when the claim arises from the same transaction. See *City of Carlsbad v. Grace*, 1998-NMCA-144, ¶16, 126 N.M. 95, 966 P.2d 1178. The purpose of the doctrine of equitable recoupment is to prevent the unjust enrichment of one party due to another's mistake and to bypass harsh applications of a procedural bar on limitations periods. See *id.* at ¶20-21.

In tax transactions, there are three elements that must be met for equitable recoupment to apply. See *Teco Invs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-055, ¶8, 125 N.M. 103,

957 P.2d 532. There must be: 1) a single taxable event; 2) taxes assessed on that single event on inconsistent theories; and 3) a strict identity of interest. *See id.* Separate parties may still have a strict identity of interest. *See id.* at ¶ 10-11.

In this case, Taxpayer could not rely on the testimony of the Department to establish the elements of equitable recoupment given the statutory prohibitions on disclosing taxpayer return and return information. Taxpayer was not, however, prohibited from presenting its own evidence to establish those elements. Although Mr. Rodriguez testified to his belief that the nursing home facilities should have paid gross receipts, that testimony was speculative and unsupported by any foundation. Accordingly, Taxpayer did not establish the elements of equitable recoupment.

Penalty and Interest.

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.” *See* NMSA 1978, Section 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, 206 P.3d 135 (statutory use of the word shall indicates mandatory requirement). The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer.

Under NMSA 1978, Section 7-1-69 (2007), 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, by its use of the word “shall,” civil penalty must be added to the assessment. 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."

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's failure to pay gross receipts tax meets the legal definition of negligence as defined under Regulation 3.1.11.10 NMAC and Taxpayer presented no evidence or argument to the rebut that finding. Since the Department's assessment of penalty and interest is presumed correct, and the Taxpayer did not offer evidence or argument to rebut that presumption, the Department's assessment of penalty and interest was appropriate.

In conclusion, the Department's assessment of tax, penalty and interest in the above-captioned protests was correct. Having failed to rebut the presumption of correctness that attached to the assessments, Taxpayer's protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was timely set and held within 90 days of Taxpayer's protest as required by NMSA 1978, Section 7-1B-8 (A) (2015).

C. All of Taxpayer's receipts were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

D. The contracts between the nursing home facilities and Taxpayer failed to establish a disclosed agency relationship in which Taxpayer had actual authority to bind the nursing home

facilities in contracts with third parties, and Taxpayer was therefore not a disclosed agent under NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC. *See MPC*, ¶36.

E. Since Taxpayer was not a disclosed agent under NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC, Taxpayer's receipts from Medicaid for room and board services were taxable gross receipts.

F. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment, which shall continue to accrue until the tax principal is satisfied.

G. Under NMSA 1978, Section 7-1-69 (2007), Taxpayers are liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC.

Based on the foregoing, Taxpayer's protest is **DENIED**. As of March 29, 2018, Taxpayer's liability under Letter ID No. L0849274160 was \$290,967.68 reflecting the sum of \$219,420.85 in gross receipts tax, \$45,080.63 in penalty, \$18,242.43 in interest for a total balance of \$282,743.91 plus interest accruing through March 29, 2018 in the amount of \$8,223.77. [*See* Letter ID No. L1216767280; Dept. Ex. B].

DATED: April 27, 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 April 27, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail

Interagency Mail