STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
ACTIVE SOLUTIONS INCORPORATED
TO ASSESSMENT
ISSUED UNDER LETTER
ID NO. L0983824688

v. **No. 18-27**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing occurred in the above-captioned protest on May 30, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Mr. Robert D. Gorman, Esq. (Robert D. Gorman, P.A.), appeared representing Active Solutions Incorporated ("Taxpayer") accompanied by Mr. Todd Johnson, president of Active Solutions Incorporated, and Ms. Ramona Flores-Lopez, both of whom testified on Taxpayer's behalf. Mr. David Mittle, Esq., appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor, Ms. Mary Griego, appeared as a witness for the Department.

Taxpayer Exhibits 1, 2, 10, 11, and 16 were admitted into the record without objection. Taxpayer Exhibits 4, 5, 6, 8, 9, 12, 13, and 14 were admitted into the record over the Department's objections. Taxpayer Exhibit 3 was excluded from the evidentiary record, but retained as an exhibit for the record of the hearing and potential appellate review. Department Exhibit E was admitted into the record without objection. Department Exhibit D was admitted into the record over Taxpayer's objection. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Taxpayer also requested an opportunity to prepare a written

closing argument which was filed on June 15, 2018. The Department filed its closing argument on July 10, 2018. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 21, 2017, the Department assessed Taxpayer the amounts of $770,648.21 in gross receipts tax, $154,129.60 in penalty, and $63,673.54 in interest for a total tax assessment of $988,451.35 for the CRS reporting periods from January 31, 2010 through February 29, 2016 under Letter ID No. L0983824688 (hereinafter "Assessment"). [*See* Administrative File].

2. On June 19, 2017, Taxpayer, by and through its counsel of record executed a formal protest of the Assessment which was subsequently received in the Department's Protest Office on June 26, 2017. [*See* Administrative File].

3. On July 13, 2017, the Department acknowledged receipt of Taxpayer's formal protest under Letter ID No. L1192545584. [*See* Administrative File].

4. Although Taxpayer's formal protest referenced a second assessment under Letter ID No. L1406105904, Taxpayer's counsel of record acknowledged that the hearing is limited to the issues relevant to the Assessment issued under Letter ID No. L0983824688. [*See* Record of Hearing – 5/30/2018].

5. On August 15, 2017, the Department requested a scheduling hearing in this matter with the Administrative Hearings Office. [*See* Administrative File].

6. On August 18, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference setting this matter for a hearing on September 15, 2017. [*See* Administrative File].

7. A telephonic scheduling hearing occurred on September 15, 2017 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 satisfied the 90-day hearing requirement provided by NMSA 1978, Section 7-1B-8 (A). [*See* Record of Scheduling Hearing (9/15/2017)].

8. On September 19, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing setting a hearing on the merits of Taxpayer's protest for May 30, 2018 and establishing other associated deadlines. [*See* Administrative File].

9. On May 15, 2018, the parties filed their Joint Prehearing Statement. [*See* Administrative File].

10. On May 16, 2018, Taxpayer filed Taxpayer's Supplement to Prehearing Statement. [*See* Administrative File].

11. On May 23, 2018, Taxpayer filed Taxpayer's Unopposed Motion to Permit Telephonic Testimony. [*See* Administrative File].

12. On May 30, 2018, Taxpayer filed Taxpayer-Protestant's Expert Witness List while on the record of the hearing. [*See* Administrative File].

13. On June 15, 2018, Taxpayer filed Taxpayer's Closing Argument. [*See* Administrative File].

14. On June 19, 2018, Taxpayer filed Taxpayer's Motion to Strike Witness Testimony. [*See* Administrative File].

15. On June 22, 2018, the Department filed Department's Response to Taxpayer's Motion to Strike Witness Testimony and Request for Sanctions. [*See* Administrative File].

16. On July 2, 2018, Taxpayer's filed Taxpayer's Reply to Department's Response to

Motion to Strike Witness Testimony. [*See* Administrative File].

17. On July 10, 2018, the Department filed Department's Closing Argument. [*See* Administrative File].

18. Ramona Flores-Lopez is retired from the State of New Mexico. During 25 years in state employment, she worked in fields ranging from data processing to health planning. She worked in Medicaid for nine years and five years for the department of health where she acted as the director of the long-term services division. [Testimony of Ms. Flores-Lopez; *See* Taxpayer Exhibit 16].

19. During her career, she developed an expert comprehension of the various programs administered by those entities, as well as the applicable statutes, rules, regulations, procedures, and policies pertinent to them. She also participated in various capacities with the development and implementation of rules, procedures, or policies. [Testimony of Ms. Flores-Lopez].

20. One such program is the Developmental Disabilities Medicaid Waiver Program (hereinafter "DD Waiver"), a Medicaid program administered by the New Mexico department of human services under the authority and in conjunction with the federal government. [Testimony of Ms. Flores-Lopez].

21. As a federal-state program administered by the state, the federal government has established all terms and conditions governing the program, including statewide availability, non-discrimination, and comparability. However, the federal government has permitted states to seek waivers of certain non-core program provisions in order to serve specific population in need of specific services. [Testimony of Ms. Flores-Lopez].

22. Under such authority, the human services department has promulgated rules to

implement the DD Waiver, instituting various requirements for the administration of the program and addressing various areas such as eligibility, participation by service-provider agencies, compensation and reimbursement procedures, just to name a few. [Testimony of Ms. Flores-Lopez].

23. Under the provisions of the DD Waiver, the department of human services may also contract with another state agency to administer portions of the program. In New Mexico, the department of health administers the DD Waiver program under such agreement with the department of human services. [Testimony of Ms. Flores-Lopez].

24. Under its authority from the human services department, the department of health establishes more specific service requirements, consistent with pre-existing federal and state requirements. [Testimony of Ms. Flores-Lopez].

25. A variety of services are provided under the DD waiver, including case management services, supportive living services, nutrition services, nursing services, therapy services, community integration services, supported employment services, assistive technology services, environmental modification services, and other services that assist eligible individuals. [Testimony of Ms. Flores-Lopez].

26. The Family Living Program is one of the various services provided under the DD Waiver. The intent of the Family Living Program is to provide services to developmentally disabled individuals in the most natural-like environment possible, meaning in a setting as similar to a home as possible, as opposed to an institutional setting. [Testimony of Ms. Flores-Lopez; *See* Taxpayer Exhibit 1].

27. The department of health does not provide any direct services under the DD Waiver. Rather, it contracts with third parties to provide services. Agencies with which it has

historically contracted include for-profit and non-profit entities in New Mexico. Taxpayer is a for-profit entity. [Testimony of Ms. Flores-Lopez].

28. Conditions tending to qualify an individual as developmentally disabled can be very complex. Examples of such conditions can include autism spectrum disorders, autism, intellectual disabilities, or conditions affecting the brain or brain development, just to name a few. [Testimony of Ms. Flores-Lopez].

29. An eligible individual may apply for services by demonstrating clinical eligibility and by showing that they would qualify for admission into an intermediate care facility for individuals with intellectual and developmental disabilities, as well as by establishing income eligibility. [Testimony of Ms. Flores-Lopez].

30. Service providers, including Taxpayer, are required to adhere to various service standards. [Testimony of Ms. Flores-Lopez].

31. Service providers are regulated with the state mandating minimum hours of direct care staff, nursing staff, depending on the needs of the individual, including the amount of money that it may pay for services and care on behalf of an individual. [Testimony of Ms. Flores-Lopez].

32. The federal government has provided the right for qualified individuals to select a service-provider. The service provided is bound to the individual's selection and is generally prohibited from rejecting individuals who have selected it for providing services. [Testimony of Ms. Flores-Lopez].

33. Other conditions subject of regulation of service include case management activities, individual rights to select service-provider agencies, authority to deny services to individuals, nursing assessments, aspiration and pneumonia monitoring, community engagement,

and other details comprising more than 200 pages of requirements governing the delivery of services. [Testimony of Ms. Flores-Lopez].

34. Services are typically provided 24-hours per day. [Testimony of Ms. Flores-Lopez].

35. The department of health contracts with service-provider agencies to deliver services to eligible individuals, including Taxpayer. [Testimony of Ms. Flores-Lopez].

36. In turn, Taxpayer contracts with qualified individuals to deliver services to individuals in need of such services (hereinafter "direct service providers"). [Testimony of Ms. Flores-Lopez].

37. Compensation for services under the DD Waiver is established by a rate schedule. [Testimony of Ms. Flores-Lopez].

38. Service providers are paid upon submission of electronic invoices, providing specific information supporting the provider's request for payment. Service providers are required to retain documents supporting invoices. [Testimony of Ms. Flores-Lopez].

39. Failure to maintain records in support of a billed service could require a provider to reimburse the state for the service. [Testimony of Ms. Flores-Lopez].

40. Despite her knowledge regarding the DD Waiver program, and the regulations under which the program operates, Ms. Flores-Lopez has no expertise in the area of state taxation. [Testimony of Ms. Flores-Lopez].

41. Provider Agreements between providers such as Taxpayer and the state require that the providers be obligated for payment of gross receipts tax. [Testimony of Ms. Flores-Lopez].

42. Mr. Todd Johnson is Taxpayer's president, having founded Taxpayer in 2002.

[Testimony of Mr. Johnson].

43. During all times relevant to the protest, Taxpayer was under contract with the department of health as a service provider under the DD Waiver. [Testimony of Mr. Johnson; *See* Taxpayer Exhibit 1; Taxpayer Exhibit 2].

44. The terms and conditions of its contract, admitted as Taxpayer Exhibit 2, have remained substantially unchanged during all times relevant to the protest, although the term of the contract admitted as Taxpayer Exhibit 2 is limited to the term of July 1, 2014 to June 30, 2017. [Testimony of Mr. Johnson; *See* Taxpayer Exhibit 2].

45. Among various terms and conditions contained in the contract, Taxpayer's contract specifies that it is contingent on sufficient state funding, requires adherence to state and federal laws and regulations governing provision of services. [Testimony of Mr. Johnson; *See* Taxpayer Exhibit 2].

46. Taxpayer bills for its services through an online billing system, and is required to retain all records relevant to its billings for a period of seven years. Records include a variety of medical records, progress notes, goal tracking records, and essentially everything else that is relevant to the services provided to any individual. [Testimony of Mr. Johnson].

47. Taxpayer payments to its direct service providers are contingent on Taxpayer first being paid by the state. [Testimony of Mr. Johnson; *See* Taxpayer Exhibit 10].

48. Taxpayer is subject to audit to verify the provision of services and the proper maintenance of records. Where an audit may identify a deficiency, Taxpayer may be subject to sanctions, including the requirement that it reimburse the state for previously-compensated services. [Testimony of Mr. Johnson].

49. Mandatory corrective action to address audit deficiencies may also be imposed by

the state. [Testimony of Mr. Johnson].

50. Nearly all aspects regarding the delivery of Family Living Services are regulated by the state. [Testimony of Mr. Johnson; Testimony of Ms. Flores-Lopez].

51. Taxpayer paid gross receipts tax until 2013, at which time it stopped because it perceived itself as an agent of the state. [Testimony of Mr. Johnson].

52. Taxpayer has not read the regulations governing the exemption of receipts as reimbursed expenditures. [Testimony of Mr. Johnson].

53. Ms. Barbara Cholewka, Ms. Cindy Aragon, and Ms. Angie Griego are direct service providers having years of experience providing services. Each provides care for individuals residing with them in their homes. [Testimony of Ms. Cholewka; Testimony of Ms. Aragon; Testimony of Ms. Griego].

54. In order to qualify as a family living provider, Ms. Cholewka, Ms. Aragon, and Ms. Griego were required to adhere to and maintain compliance with a variety of state and federal requirements, including training, record keeping, and home maintenance. [Testimony of Ms. Cholewka; Testimony of Ms. Aragon; Testimony of Ms. Griego].

55. During any period of time they were under contract with Taxpayer, Taxpayer compensated them for their services with the understanding that Taxpayer would be compensated by the state. [Testimony of Ms. Cholewka; Testimony of Ms. Aragon; Testimony of Ms. Griego].

56. Neither Ms. Cholewka, Ms. Aragon, nor Ms. Griego received Forms 1099 because their income from providing services is not reportable under the Internal Revenue Code and the regulations implemented by the Internal Revenue Service. [Testimony of Ms. Cholewka; Testimony of Ms. Aragon; Testimony of Ms. Griego].

57. Taxpayer does not report compensation to direct service providers on Forms 1099 because that income qualifies for a difficulty of care exemption from taxation. [Testimony of Mr. Johnson; *See* Department Exhibit D].

58. The sole issue in dispute is the taxability of gross receipts derived from providing Family Living Services under the DD Waiver. [Testimony of Mr. Johnson].

59. Taxpayer's outstanding liability as of May 30, 2018, the date of he hearing, was $550,469.50 in gross receipts tax, $154,130.86 in penalty, and $91,278.21 in interest for a total outstanding liability of $795,878.57. [Testimony of Ms. Griego; *See* Department Exhibit E].

DISCUSSION

The chief issues in this protest are whether receipts derived from providing Family Living Services under the DD Waiver are excluded from gross receipts under the Gross Receipts and Compensating Tax Act. In no particular order, Taxpayer asserts (1) that such receipts should be excluded as "amounts received solely on behalf of another in a disclosed agency capacity" and (2) that its receipts should also be excluded pursuant to Regulation 3.2.1.12 E – F NMAC which excludes payments to individuals providing foster care, certain caretakers, and home care, from gross receipts.

However, prior to addressing the merits of these issues, the Hearing Officer will address several preliminary issues raised by Taxpayer.

Motion to Strike Testimony of Mary Griego.

On June 19, 2018, Taxpayer filed Taxpayer's Motion to Strike Witness Testimony, in which it asserted that Ms. Griego's testimony should be stricken for at least two reasons. First, it alleged that Ms. Griego improperly expressed expert opinion in the absence of expert qualifications. Second, it alleged that her personal knowledge of the relevant facts was limited to

a review of the audit documents because she had no personal involvement in the audit that gave rise to the Assessment subject of this protest.

The hearing in which Ms. Griego testified occurred on May 30, 2018. She was the sole and primary witness for the Department. During her testimony, Taxpayer, by and through its counsel of record, made objections to specific questions posed by the Department. In each instance, the Hearing Officer ruled on the objection, and the examination proceeded. Taxpayer then cross-examined Ms. Griego, and the Department had an opportunity to conduct a re-direct examination. At the conclusion of Ms. Griego's testimony, the Department rested its case, and with further discussion regarding the submission of written closing arguments, the hearing concluded.

This recitation of facts is pertinent because it illustrates that at no time during Ms. Griego's testimony did Taxpayer raise the expert-testimony objection now subject of Taxpayer's Motion to Strike Witness Testimony.

Although the Rules of Evidence do not apply in cases before the Administrative Hearings Office, the Hearing Officer may refer to them for guidance. In particular, Rule 11-103 (A) (1) NMRA 2017 requires that objections and motions to strike be timely. Accordingly, "evidentiary objections must be made at the time the evidence is offered." *See State v. Neswood*, 2002-NMCA-081, ¶18, 132 N.M. 505, 51 P.3d 1159; *See Macsenti v. Becker*, 237 F.3d 1223, 1230-31 (10th Cir. 2001) (deeming objection as untimely when party "did not object to the testimony when it was admitted during trial" but, rather, raised the objection "after the close of all of the evidence by a motion").

Taxpayer's Motion to Strike Witness Testimony was filed more than two weeks after the conclusion of Ms. Griego's testimony and the close of evidence. The motion was evidently

untimely, and for that reason, should be denied.

However, even if Taxpayer's objection could be perceived as timely, the Hearing Officer remains unpersuaded that Ms. Griego's testimony should be stricken. Although Ms. Griego may have expressed her opinion in reference to the function or implementation of the Department's regulations, or the statutes that it administers, the Department did not offer her as an expert in any field relevant to the protest. Instead, her testimony was limited to the work she performed as a protest auditor for the Department, her activities in reference to the protest at hand, her comprehension of relevant authority, and her conclusions as a protest auditor. As an employee of the Department, these areas were well within her personal knowledge and areas of experience.

Even if any portion of Ms. Griego's testimony could be regarded as expressing an expert opinion, the Hearing Officer remains unpersuaded that such testimony would be improper in light of the deference the Department is afforded in the interpretation of statutes and regulations implicating its expertise. *See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶17, 133 N.M. 97, 61 P.3d 806 ("in resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court generally will defer to the agency's interpretation if it implicates agency expertise.").

For the preceding reasons, Taxpayer's Motion to Strike Witness Testimony should be, and hereby is, denied.

Motion for Sanctions.

Contained within the Department's response to Taxpayer's Motion to Strike Witness Testimony was a single-paragraph motion for sanctions, to which Taxpayer responded in Taxpayer's Reply to Department's Response to Motion to Strike Witness Testimony. The Department argued that the sanction imposed should be the denial of Taxpayer's protest.

The record of the hearing in this matter will reflect that the relationship between counsel had become somewhat acrimonious by the time they appeared for the hearing. At one point, the Hearing Officer stopped the hearing due to flaring tempers and ordered both counsel to step out of the hearing room for a break. They were subsequently admonished on the record to maintain their composure. Although this would represent the first and only time their manner interrupted the hearing process, it did not represent the first or only time the Hearing Officer perceived behavior unbecoming of professionals in a professional setting.

A review of the motion for sanctions and the response thereto indicates that the relationship of counsel remains contentious. Rather than delve into the realm of who-did-what-to-whom, the Hearing Officer finds that the *interests of the parties* are best served by declining the invitation to oversee further squabbling between the parties' representatives, and instead address the merits of the protest. This is not to say that the Hearing Officer's preference for addressing the merits of a case will always prevail over imposing consequences for objectionable behavior. The Hearing Officer is merely unpersuaded that denial of the protest as such consequence is appropriate under the facts of this protest. The Department's request should be, and hereby is, denied.

Statute of Limitations.

Although the Assessment at issue in this protest refers to periods between January 31, 2010 to February 29, 2016, Ms. Griego testified that the amounts assessed were limited to the periods between January 1, 2013 through February 29, 2016. Taxpayer does not dispute Ms. Griego's testimony, but argues that the statute of limitations has lapsed for any taxes that would have been due in 2013 by virtue of the limitation contained in NMSA 1978, Section 7-1-18 (A) which provides that "no assessment of tax may be made by the department after three years from

the end of the calendar year in which payment of the tax was due[.]"

For example, the deadline for assessing gross receipts tax that would have been due during any period of time within 2013 would be three years from the end of the calendar year in which the tax was due, or three years from December 31, 2013. In this protest, that date would be December 31, 2016. The Assessment in this protest was issued on March 21, 2017.

Therefore, if Section 7-1-18 (A) were to apply, then the assessment of any tax that would have been due in 2013 would be barred by the statute of limitations. However, Mr. Johnson testified that Taxpayer stopped paying gross receipts tax on receipts from Family Living Services in 2013, with the understanding that receipts from those services were excludable. Accordingly, this would suggest one of two potential exceptions to the rule. "In case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required may be assessed *at any time within seven years from the end of the calendar year in which the tax was due*[.]" *See* NMSA 1978, Section 7-1-18 (B). However, Taxpayer did complete and file returns in 2013 in reference to other receipts. It just stopped reporting receipts from Family Living Services.

This suggests potential application of the next exception to the rule. "If a taxpayer in a return understates by more than twenty-five percent the amount of liability for any tax for the period to which the return relates, appropriate assessments may be made by the department *at any time within six years from the end of the calendar year in which payment of the tax was due*." *See* NMSA 1978, Section 7-1-18 (C).

Taxpayer argues that the Department failed to demonstrate that it understated its gross receipts by more than twenty-five percent, thereby entitling it to six years to assess taxes. The Department argues that the presumption of correctness places the burden on Taxpayer to prove

that the Department's Assessment of taxes in those years was barred. Although these arguments present interesting legal questions, the Hearing Officer needs only refer to the evidence on the record because Taxpayer Exhibit 12 provides sufficient information to establish that an understatement of more than twenty-five percent occurred *unless* Taxpayer can also establish that the gross receipts that it did not report were excludable or exempt. The sum of Taxpayer's gross receipts in 2013 was $6,095,606.90 from which it excluded $3,006,354.38 deriving from Family Living Services. This would signify an understatement exceeding twenty-five percent over the course of the year, and a month-by-month review of 2013 reveals equivalent results by individual month.

Consequently, the Department was not barred from assessing taxes due in 2013 in accordance with NMSA 1978, Section 7-1-18 (C).

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 established the 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.

Taxpayer claims that the receipts it received from the state for providing Family Living Services are not taxable because Taxpayer received payments "solely on behalf of another in a disclosed agency capacity." 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 crux of Taxpayer's argument is that it was "reimbursed" for approved expenditures incurred on the state's behalf in further of specific state programs. *See* Taxpayer's Closing Argument, Page 11. The problem with this generalization is that Taxpayer's evidence clearly established that it would not satisfy its own obligations to its direct service providers until it had received payment from the state. Therefore, there was no reimbursement of an actual expenditure because it was the understanding of Taxpayer as well as its direct service providers that Taxpayer would not pay for a service unless and until it was first paid. In other words, there was no reimbursement of an expenditure because it was Taxpayer's procedure to postpone actual expenditures until it was paid.

Nevertheless, even if Taxpayer's obligations to its service providers were expenditures, Taxpayer failed to establish that it incurred those expenditures in a disclosed agency capacity.

"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.

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 bind the state to an obligation created by an agent. However, assuming for the sake of argument, that the regulatory structure could be construed as creating such authority, it does not however satisfy the second element of *MPC* which requires that the beneficiary of the obligation also be informed of the right to proceed against the principal to enforce the obligation.

At no place in Taxpayer's Provider Agreement with the state, or within any cited statute or regulation does the state express any grant of authority consistent with the creation of a

disclosed agency relationship. A review of the Provider Agreement, however, does express a clear intention to renounce potential liability asserted by third parties, stating "[n]othing in this Provider Agreement shall be construed as creating any right of a recipient of service, or other third party, to enforce any provision of this Provider Agreement or to assert any claim against the [department], the HSD, or the [provider]." *See* Taxpayer Exhibit 2, Article 33 (a). Consequently, this language demonstrates the intention of the parties to prohibit conduct that could create an appearance of any right to proceed against the state to enforce the obligations created by Taxpayer.

Even if disclosure could be implied from the regulatory framework of the DD Waiver 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).

The Hearing Officer also notes, at least with respect to the state, that an implied grant of authority is not likely enforceable under NMSA 1978, 37-1-23 (A), which provides that "[g]overnmental entities are granted immunity from actions based on contract, *except actions based on a valid written contract*." (Emphasis Added).

The result is the same in the event Taxpayer were to assert that it was a disclosed agent for its direct services providers. Taxpayer and its direct services providers similarly renounce third party liability arising from their own agreements stating "[t]he parties intend that this

Agreement is solely for the benefit of the parties hereto and there shall be no third party beneficiaries to this Contract." *See* Taxpayer Exhibit 10, Section V, Para. 4.

The totality of the evidence established that payments 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.

The Regulatory Exclusions at Regulation 3.2.1.12 (E), (F), and (G) NMAC.

In addition to the foregoing, Taxpayer also claims that the Department erred by not recognizing the potential application of Regulation 3.2.1.12 (E), (F) and (G) to its gross receipts from providing Family Living Services under the DD Waiver. That regulation excludes receipts from specific activities by excluding them from the definition of "engaging in business." It provides:

> **3.2.1.12 ENGAGING IN BUSINESS**
> …
>
> E. Persons not engaging in business - foster parents: Individuals who enter into an agreement with the state of New Mexico to provide foster family care for children placed with them by the state are not thereby engaging in business. Receipts of the individuals from providing foster care pursuant to such an agreement are not receipts from engaging in business.
>
> F. Persons not engaging in business - certain caretakers: Individuals who enter into an agreement with the state of New Mexico to provide non-medical personal care and housekeeping assistance to low income disabled adults pursuant to the critical in home care program are not thereby engaging in business. Receipts of the individuals from such caretaking activities are not receipts from engaging in business.

> G. Persons not engaging in business - home care for developmentally disabled family members: Any individual who enters into an agreement with the state of New Mexico to provide home based support services for developmentally disabled individuals in the home of the developmentally disabled individuals or the home of the support provider and receives payments which under 26 USCA 131 are "qualified foster care payments" is not thereby engaging in business. Receipts of the individuals which are "qualified foster care payments" from providing such home based support services pursuant to such an agreement are not receipts from engaging in business.

Taxpayer asserts that the cited regulation demonstrates the state's intention to relieve itself from the obligation of paying gross receipts tax, arguing that "[s]ince the funds are provided by the [s]tate, it makes no sense to boost the [s]tate reimbursement costs by gross receipts tax." Taxpayer's argument is unpersuasive. The Legislature does not necessarily perceive the state purse as immune from gross receipts taxation. In fact, it has recognized that some of its activities are taxable. *See* NMSA 1978, Section 7-9-4.3 (imposing governmental gross receipts tax).

Moreover, Taxpayer's argument fails to consider that the obligation to report and pay gross receipts tax is not upon the state, but upon the entity engaged in business with the state. Although it is common for a business to pass the tax on to the consumer, which in this protest would be the state, it is not the consumer who bears the obligation of paying the tax. Rather, the obligation rests solely with the entity engaged in business. Regulation 3.2.4.8 NMAC states "[t]he gross receipts tax is imposed on persons engaging in business in New Mexico. Such persons are solely liable for payment of the tax; they are not 'collectors' on behalf of the state."

Whether or not a consumer is willing to incur the additional expense of a gross receipts tax is strictly between the business and its consumer. In this instance, Taxpayer acknowledged that the payment of gross receipts tax liability incurred under the Provider Agreement would rest

solely with Taxpayer. *See* Taxpayer Exhibit 2, Article 35 ("Any payment of gross receipts tax shall be the obligation of the [provider] as appropriate." Thus, contrary to Taxpayer's argument, the state is not offended by the concept of paying gross receipts taxes, but in this scenario, it clearly stated its intention that any liability for gross receipts taxes should rest solely with Taxpayer.

Interestingly, among the three regulations it cites, Taxpayer also fails to assert which of the three should apply to its business, if one should apply at all. The Hearing Officer observes that Regulation 3.2.1.12 E NMAC is pertinent only to foster parents, an activity not relevant to Taxpayer's protest. Regulation 3.2.1.12 F is also limited "to low income disabled adults *pursuant to the critical in home care program*.[,]" also not at issue in this protest.

The most-likely exclusion is Regulation 3.2.1.12 G which excludes from gross receipts those receipts deriving from "home care for developmentally disabled family members[.]" Regardless of which part of the regulation should apply, E, F or G, Taxpayer asserts that "[t]he Department's sole argument for denying the exclusion provided in the regulation is the argument that the cited exclusion only applies to natural persons, not juridical persons such as a corporation." It goes on to highlight that "person" is a term defined to include, among various entities, corporations. It further argues nothing in the law specifically defines "individual" as a living, human being, thereby restricting the application of the cited exclusions to *natural people*.

The Department pointed out that the definition of "person" includes "individual" as a subset of "person," along with other subsets including corporations and other legal entities. *See* NMSA 1978, Section 7-9-3 (I). It also cites to the definition of "individual" contained in the Income Tax Act, which "means a natural person, an estate, a trust or a fiduciary acting for a natural person, trust or estate[.]" *See* NMSA 1978, Section 7-2-2 (J); *But See Albuquerque Nat'l*

Bank v. Comm'r of Revenue, 1970-NMCA-123, ¶ 14, 82 N.M. 232, 478 P.2d 560 (declining to infer that the legislature intended for "individual," as defined in the Income Tax Act, to have the same meaning as the same, yet undefined term, in a separate tax statute).

Despite the foregoing, the Hearing Officer is persuaded that the decisive element in resolving the disagreement is in plain view.

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 N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401, 962 P.2d 1236. "These canons of statutory construction apply to regulatory and rule interpretation as well." *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶27, 127 N.M. 120, 978 P.2d 327. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881 (internal quotations and citations omitted), the New Mexico Court of Appeals stated:

> 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.

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*, 1999-NMSC-021, ¶27; *see also Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-086, ¶8 & ¶14, 118 N.M. 72, 878 P.2d 1021. 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, 212 P.3d 361. *See also* NMSA 1978, Section 12-2A-2 ("[u]nless a word or phrase is defined in the statute or rule

being construed, its meaning is determined by its context, the rules of grammar and common usage. A word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context.")

In this instance, the cited sections refer to "persons" and "individuals." The latter is not defined in the Gross Receipts an Compensating Tax Act or in the regulation in which it is used. However, upon careful review of the regulations, the Hearing Officer finds that it is not necessary to venture beyond the plain language of the cited regulations to determine that the Department, when it employed the term, "individual," was referring to living, natural people.

With regard for the most likely exclusion, Regulation 3.2.1.12 G NMAC, the Department's use of the term "individual" precedes its use of the word "who," which refers generally to living beings as opposed to objects. *See* https://www.merriam-webster.com/dictionary/who ("used as a function word to introduce a relative clause —used especially in reference to persons"). However, there is more. The exclusion subject of Regulation 3.2.1.12 G NMAC contains additional words that Taxpayer may have overlooked. For example, its heading states, "[p]ersons not engaging in business – home care for developmentally disabled *family members*[.]" (Emphasis Added). Corporations, unlike natural persons, do not have "family members." Similarly, Regulations 3.2.1.12 E NMAC makes reference to foster parents. Once again, corporations, unlike natural persons, cannot be "foster parents."

However, the clearest example of why the "individual" is intended to refer to natural persons stems from the use of the term in 3.2.1.12 G which goes on to make additional references to "developmentally disabled *individuals*[.]" Taxpayer's logic, provided that term "individual" is consistently applied, would result in absurdity because just as corporations cannot have family members or be foster parents, they also cannot be developmentally disabled.

It is clear that the Department's reference to "individuals" throughout Regulation 3.2.1.12 E, F, and G refers to natural persons, not corporations or other legal entities. Any other interpretation would produce absurd results. Taxpayer has failed to establish that it is entitled to any exclusions provided by Regulation 3.2.1.12 E, F, or G NMAC.

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 rebut that finding. Since the Department's assessment of penalty and interest is presumed correct, and the Taxpayer did not officer 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 protest was correct. Having failed to rebut the presumption of correctness that attached to the assessment, 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 from providing Family Living Services under the DD Waiver were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

D. The statutes, rules, policies, procedures, and contracts governing the relationship between the state and Taxpayer failed to establish a disclosed agency relationship in which Taxpayer had actual authority to bind the state to obligations 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 derived from providing

Family Living Services under the DD Waiver 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), Taxpayer is 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**. Taxpayer is hereby ordered to pay $550,469.50 in gross receipts tax, $154,130.86 in penalty, and $91,278.21 in interest for a total outstanding liability of $795,878.57, plus any interest accruing since May 30, 2018.

DATED: August 29, 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 August 29, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interoffice Mail*

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