STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
READY TECH-GO LLC **No. 18-38**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L2136609088

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On November 21, 2017, Chief Hearing Officer Brian VanDenzen, Esq., conducted a merits administrative hearing in the matter of the tax protest of Ready Tech-Go LLC (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Attorneys Justin Sawyer and Timothy Van Valen appeared representing Taxpayer. Taxpayer Vice President David Guenther appeared as a Taxpayer witness. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Tom Dillon, CPA, appeared as a witness for the Department. Taxpayer Exhibits #1-10 and Department Exhibits A, B, and D (C was not tendered) were admitted into the record, as described in the detailed exhibit logs included in the record.

The main issue presented in this protest is whether Taxpayer's receipts from providing medical staffing services in New Mexico were received by Taxpayer in a disclosed agency capacity and thus not subject to gross receipts tax. Secondarily, Taxpayer argued that its other receipts were attributable to out-of-state sales, not subject to tax. Alternatively, Taxpayer argued that even if its receipts were otherwise subject to gross receipts tax, those receipts may be deducted under NMSA 1978, Section 7-9-77.1 (2007) or NMSA 1978, Section 7-9-93 (2007). Finally, Taxpayer argued that even if found liable, it should not owe penalty because it made a

mistake of law in good faith and on reasonable grounds. After making findings of fact and discussing the arguments and the pertinent legal authority in more detail throughout this decision, it is clear that that Taxpayer's receipts were not received in a disclosed agency capacity, not deductible as an out-of-state service, and not deductible under either Section 7-9-77.1 or 7-9-93. Therefore, since all of Taxpayer's receipts were subject to gross receipts tax, Taxpayer's protest must be denied.

FINDINGS OF FACT

Jurisdictional and Procedural History[1]

1. On September 6, 2012, under letter id. no. L2136609088, the Department assessed Taxpayer $276,568.24 in gross receipts tax, $55,313.67 in penalty, and $36,546.19 in interest for a total assessed liability of $368,428.10 for the combined reporting system reporting periods between March 31, 2004 and March 21, 2011.

2. On September 26, 2012, pursuant to NMSA 1978, Section 7-1-24 (before 2013 amendments), the Department granted Taxpayer a 60-day extension to file a protest, giving Taxpayer until December 5, 2012 to file a protest.

3. On December 4, 2012, Taxpayer protested the assessment.

4. On December 13, 2012, the Department acknowledged receipt of Taxpayer's protest.

[1] Most of the procedural history is not germane to resolution of the protest. Nevertheless, given the age of the protest such history provides important context.

5. On March 20, 2015, the Department filed a request for hearing with the Hearings Bureau[2]. This was the first time that the Hearings Bureau knew of this case or had any role to play in this matter.

6. On March 25, 2015, the Hearings Bureau set this matter for a telephonic scheduling hearing on April 24, 2015.

7. After conducting the April 24, 2015, scheduling hearing, on April 27, 2015, the Hearings Bureau issued a Scheduling Order and Notice of Administrative Hearing, setting this matter for a merits hearing on October 15, 2015.

8. On September 14, 2015, the parties jointly moved to vacate the scheduling order deadlines and for a continuance of the October 15, 2015 hearing date.

9. On September 18, 2015, the Administrative Hearings Office issued a continuance order, amended scheduling order and notice of administrative hearing, vacating the October 15, 2015 merits hearing and resetting this matter for hearing on May 17, 2016.

10. On December 17, 2015, the parties filed a joint motion to vacate scheduling order and for a continuance of the May 17, 2016 merits hearing date because of vacancies in the Department's Legal Service Bureau and because of Taxpayer's attorney's competing case load.

11. On December 31, 2015, the Administrative Hearings Office issued a second continuance order, amended scheduling order and notice of administrative hearing, vacating the May 17, 2016 merits hearing and resetting this matter for hearing on November 7, 2016.

[2] On July 1, 2015, pursuant to the Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 through 9 (2015), the Hearings Bureau left the Taxation and Revenue Department and became the independent Administrative Hearings Office (AHO). For events before July 1, 2015, the Hearings Bureau will be used even though this decision is issued under AHO's caption. AHO will be used for events after July 1, 2015.

12. At request of the parties, on August 8, 2016 certain deadlines under the December 31, 2015, second scheduling order were extended, while the hearing date of November 7, 2016, remained unchanged.

13. On October 7, 2016, the Department filed a motion to compel discovery.

14. On October 18, 2016, Taxpayer filed its response to the motion to compel discovery, requesting a two-week extension to provide the discovery and its intent to file a motion for continuance in light of the recent departure of Taxpayer's lead counsel on the case from the representing law firm.

15. On October 19, 2016, the Administrative Hearings Office granted the Department's motion to compel, giving Taxpayer until October 31, 2016 to provide the requested discovery.

16. On October 27, 2016, Taxpayer, by and through its temporary counsel, filed an opposed motion to reset scheduling order and continue pending deadlines in light of the departure of Taxpayer's previous lead counsel.

17. On October 28, 2016, the Department filed a response opposed to Taxpayer's motion for continuance.

18. On October 30, 2016, Taxpayer filed a reply to the Department's response in opposition to the continuance request.

19. On October 31, 2016, Taxpayer filed its motion to withdraw Ms. Chappelle from representing Taxpayer, substitution in previous lead counsel Timothy Van Valen as counsel of record, and requesting a continuance.

20. On November 3, 2016, a new Department attorney, Richard Pener, entered his appearance in this matter.

21. On November 4, 2016, the Administrative Hearings Office issued an order allowing all substitutions of counsels, continuing the matter, and setting a new hearing date on March 30, 2017.

22. On March 20, 2017, the parties filed a joint motion to continue the hearing because the Department's counsel was unable to adequately prepare for hearing in light of his caseload and because Taxpayer's attorney had a family medical emergency and a large caseload.

23. On March 29, 2017, the Administrative Hearings Office granted the continuance in light of the family medical emergency addressed in the joint continuance request.

24. On June 14, 2017, the parties again jointly moved to continue the matter because of a medical emergency involving Taxpayer's lead counsel.

25. On June 23, 2017, the Administrative Hearings Office issued a continuance order in light of the medical emergency circumstance, rescheduling this matter for hearing on November 21, 2017.

26. The merits hearings in this matter in fact finally occurred on November 21, 2017.

27. On December 21, 2017, the Department filed its final, written closing argument in this matter.

28. On December 22, 2017, Taxpayer filed its final, written closing argument in this matter, making this matter ripe for a decision at that time.[3]

[3] Under *Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-026, ¶55, 139 N.M. 177, 192 (overturned on other grounds), delay in issuing decision beyond 30-days does not deprive hearing officer authority to decide a tax protest case.

Substantive Findings

29. Taxpayer is a LLC, with ReadyTech Go, Inc. as the parent company. All related companies are referred to as RTG Medical.

30. Taxpayer is a medical staffing agency that provides medical professional staffing to medical facilities across the country.

31. Taxpayer is located in Fremont, Nebraska.

32. Taxpayer has no offices in New Mexico or any other location other than Nebraska.

33. Taxpayer does all of its business over the telephone.

34. David Guenther is the Vice President of Operations and Chief Financial Officer for Taxpayer, and has been since 2003.

35. Taxpayer staffed approximately 200 of its employees across the country during the audit period.

36. Taxpayer staffed employees in New Mexico medical facilities throughout the audit period.

37. Taxpayer did not establish, and Mr. Guenther could not recall, how many employees Taxpayer staffed at New Mexico medical facilities during the audit.

38. All Taxpayer's medical personnel staffed at medical facilities are issued W-2's rather than 1099s.

39. Taxpayer paid payroll taxes on all its medical personnel employees in New Mexico.

40. Taxpayer paid unemployment insurance and worker's compensation insurance for all employees working in New Mexico during the audit period.

41. Taxpayer has never received any determination that it is a joint employer from the Department of Labor or the IRS.

42. Taxpayer receives requests from medical facilities to find and staff medical professionals at those facilities.

43. The medical facilities interview the medical professional candidates provided by Taxpayer and other medical staffing companies like Taxpayer.

44. The medical facility decides which potential candidate to hire. If it is a medical professional that Taxpayer identified, then the medical facility and Taxpayer reach a contract and terms of payment over the typical 13-week contract period.

45. After the medical facility and Taxpayer agree on the rate of hourly pay, then Taxpayer agrees with the medical professional on their rate of hourly pay.

46. Taxpayer keeps the difference in rate of hourly pay established with the client medical facility and the rate of hourly pay Taxpayer pays its medical professional employees.

47. The client medical facility decides the start and completion date of the work under the contract.

48. The facilities control the work schedule of the assigned medical personnel.

49. The client medical facility provides an orientation to Taxpayer's medical professional employees.

50. The medical professionals work at the client medical facility using the medical facility's uniforms.

51. The facilities have the ability to hire and fire the assigned medical personnel.

52. The facilities supervise the day-to-day job performance of the assigned medical personnel.

53. Taxpayer pays the medical professionals on a weekly basis.

54. Taxpayer bills the medical facilities every seven to eight weeks.

55. In its invoices to the client medical facility, Taxpayer does not separately state (or bill) for reimbursement expenses.

56. It is not common within Taxpayer's industry for employee staffing firms to separately bill reimbursed salary costs for the employee to the client. Instead, the staffing firms generally charge one set price to the medical facilities.

57. Taxpayer contracted with Santa Fe Imaging during the audit period. [Taxpayer Ex. #2]

58. Under Taxpayer's contract with Santa Fe Imaging, the medical facility indemnifies Taxpayer from all claims stemming under the agreement. [Taxpayer Ex. #2.2, ¶7, ¶9].

59. Under Taxpayer's contract with Santa Fe Imaging, Taxpayer is an independent contractor prohibited from representing itself as an agent of the medical facility for any purpose other than the provision of the contracted services. [Taxpayer Ex. #2.2, ¶8].

60. Under Taxpayer's contract with Santa Fe Imaging, "personnel supplied by [Taxpayer] are deemed to be employees, subcontractors or agents of [Taxpayer], and will not, for any purpose, be considered employees, subcontractors, or agents" of the medical facility. [Taxpayer Ex. #2.2, ¶8].

61. Under Taxpayer's contract with Santa Fe Imaging, the medical facility pays for the services rendered under the contract. [Taxpayer Ex. #2.1].

62. Taxpayer contracted with Carlsbad Medical Center during the audit period. [Taxpayer Ex. #3]

63. Under Taxpayer's contract with Carlsbad Medical Center, the medical facility indemnifies Taxpayer from all claims stemming under the agreement. [Taxpayer Ex. #3.1, ¶8].

64. Taxpayer contracted with Hospital Services Corporation twice during the audit period. [Taxpayer Ex. #4 & #5]

65. Hospital Services Corporation sent out a request for proposal for its staffing needs for a 13-week period, specifying the hourly rate it was willing to pay for the positions it sought to fill. [Taxpayer Ex. #4.2].

66. Under its agreement with Taxpayer, Hospital Services Corporation selected the medical professionals from the referred pool of candidates. [Taxpayer Ex. 4.20-21 & #5.16]

67. Hospital Services Corporation provided the orientation for the selected medical professionals under its agreement with Taxpayer. [Taxpayer Ex. 4.20 & #5.15]

68. Under its agreement with Taxpayer, Hospital Services Corporation had the ability to reject the selected medical professional if the medical professional did not meet the job requirements. [Taxpayer Ex. 4.20]

69. Under its agreement with Taxpayer, Hospital Services Corporation may not hire the medical professional during the initial 13-week contract period without penalty. [Taxpayer Ex. 4.22-23 & 5.19]

70. Under Taxpayer's 2010 contract with Hospital Services Corporation, the medical facility indemnified Taxpayer from all claims stemming under the agreement. [Taxpayer Ex. #5.24]

71. Under Taxpayer's contracts with Hospital Services Corporation, the parties disavowed any agency relationship and established that Taxpayer was fully liable for tax withholding and reporting requirements for its employees, employee benefits, worker's

compensation coverage and unemployment coverage for its employees. [Taxpayer Ex. 4.27 & #5.24].

72. Taxpayer contracted with Santa Fe Nursing Operations LLC during the audit period. [Taxpayer Ex. #7]

73. Under Taxpayer's contract with Santa Fe Nursing Operations LLC, the medical facility indemnified Taxpayer from all claims stemming under the agreement. [Taxpayer Ex. #7.1]

74. Under Taxpayer's contract with Santa Fe Nursing Operations LLC, Taxpayer is an independent contractor of the facility and the supplied medical personnel are deemed employees of Taxpayer and may not be considered employees, subcontractors or agents of the medical facility. [Taxpayer Ex. #7.1, ¶7]

75. Taxpayer contracted with PHC-Las Cruces, Inc., during the audit period. [Taxpayer Ex. #8]

76. Under Taxpayer's contract with PHC-Las Cruces, Inc., the medical facility provides the work environment, the orientation to the medical professional, and reviews the performance of the medical professional. [Taxpayer Ex. #8]

77. Under Taxpayer's contract with PHC-Las Cruces, Inc., the medical facility may not hire Taxpayer's medical professional employee during the agreement period without a penalty. [Taxpayer Ex. #8].

78. Taxpayer's contract with PHC-Las Cruces, Inc., indemnifies Taxpayer from all claims stemming under the agreement. [Taxpayer Ex. #8.8]

79. Under Taxpayer's contract with PHC-Las Cruces, Inc., Taxpayer is an independent contractor of the facility. [Taxpayer Ex. #8.1]

80. Taxpayer contracted with the Department of Veterans Affairs, but Mr. Guenther could not recall whether this contract was relevant to the audit period. [Taxpayer Ex. #6]

81. In general, during the audit period, payment of the medical professional employees came from the submission of time cards. The medical professional filled out and signed an official time card under Taxpayer's letterhead. A representative of the medical facility also signed the time card. Below the representative of the medical facility's signature line, the time card included the statement that "the above signature approves [Taxpayer] to bill in full the contracted hospital for the above stated hours. Failure to comply may make the client facility liable to the maximum penalty allowed by law." [Taxpayer Ex. #9]

82. Taxpayer's agreement with its medical professional employees indicates that the professional is an employee of Taxpayer. Although each agreement indicates the name of the facility where the work will be performed, at no point does the written agreement disclose any sort of agency relationship or whether the medical professional has any rights or remedies against the facility. [Taxpayer Ex. #1].

83. Nevertheless, Mr. Guenther believes that the medical professionals understand that ultimately it is the facility that pays them.

84. Although there was no evidence of the total number of employees staffed in New Mexico during the entire audit period, Taxpayer did a survey of nineteen employees who had worked in New Mexico during the audit period. [Taxpayer Ex. #10]

a. Eight employees (42%) believed that Taxpayer was an agent of the facility at which the employee worked. [Taxpayer Ex. #'s 10.1, 10.6, 10.7, 10.8, 10.9, 10.10, 10.16, and 10.16]

b. Three employees (16%) indicated that Taxpayer was not an agent of the facility. [Taxpayer Ex. #'s 10.11, 10.13, & 10.15]

c. Three employees (16%) provided mixed or non-responsive answers of whether Taxpayer was an agent of the facility. [Taxpayer Ex. #'s 10.3, 10.5, & 10.19]

d. Five employees (26%) provided no answer (or an indeterminable/illegible answer in the case of Ex. #10.2) about whether Taxpayer was an agent of the facility. [Taxpayer. Ex. #'s 10.2, 10.4, 10.12, 10.14, & 10.17]

85. Taxpayer presented no other evidence of an express statement to its employees of the existence of an agency relationship between Taxpayer and the client medical facility or the employee's right of action against the client medical facility.

86. As of the date of hearing, the Department alleged that Taxpayer owed $279,494.80 in assessed gross receipts tax, $55,635.47 in penalty, and $84,114.83 in interest, for a total outstanding liability of $419,245.10. [Department Ex. D]

DISCUSSION

In this case, Taxpayer provides staffing of medical professionals to various medical facilities across the country, including numerous facilities in New Mexico, during the audit period. If one of Taxpayer's medical professional employees matches a staffing need at a facility, the facility contracts with Taxpayer to use Taxpayer's services for a 13-week term. The facility pays Taxpayer a fixed hourly rate for the services provided by Taxpayer's employees at the facility during that period. Taxpayer in turn pays it employees that are staffing the facility a lesser hourly rate and pockets the difference between the facility's rate and the rate of pay to the employee. When the Department assessed gross receipts tax on all of Taxpayer's receipts earned in New Mexico under this arrangement, Taxpayer timely protested the assessment under the Tax

Administration Act. For unexplained reasons, the Department took four years to request a hearing on that protest[4]. At that protest hearing, and in subsequent written closing argument, Taxpayer challenged the imposition of gross receipts tax and penalty on the numerous grounds summarized in the introductory paragraph. Ultimately, after reviewing the applicable law in relation to the evidence presented, the hearing officer denies Taxpayer's protest.

Presumption of Correctness.

The statutory presumption of correctness under the Tax Administration Act frames any analysis of Taxpayer's protest issues. Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC, Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21,

[4] Delay in action is not a defense to enforcement in a tax action. *See Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13. Moreover, as the findings of fact make clear, both parties bear shared responsibility for the prehearing delay in this matter, as both parties repeatedly requested continuances for health and resource reasons.

¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC, Ltd.*, 2003 NMCA 21, ¶13.

Gross Receipts Tax and the Disclosed Agency Relationship Exception.

Taxpayer's main argument at protest is that Taxpayer's receipts from providing medical staffing services to medical facilities in New Mexico were received by Taxpayer in a disclosed agency capacity and thus excluded from taxable gross receipts under NMSA 1978, Section 7-9-3.5(A)(3)(f) (2007). As part of this argument in its brief, Taxpayer asserted that it had the authority to bind the healthcare facility to an obligation with the healthcare professionals as evidenced by the time cards and facility approval of those time cards, the indemnification clauses, and the facilities' day-to-day control of the workers. Taxpayer also argued that the agency relationship was disclosed because the healthcare professionals were aware that Taxpayer was acting as an agent for the healthcare facilities, as shown by the employee survey and the statement on the time cards. Finally, as part of this main argument, Taxpayer claims that Regulation 3.2.1.19 (C)(2) is ultra vires of Section 7-9-3.5(A)(3)(f) (2007). Taxpayer's argument on the disclosed agency relationship are not ultimately persuasive either factually or legally.

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, § 7-9-4 (2002). The term "gross receipts" is broadly defined to mean

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

NMSA 1978, Section 7-9-3.5 (A) (1) (2007). “Receipts include payments received for one’s own account and then expended to meet one’s own responsibilities.” *MPC LTD v. TRD*, 2003-NMCA-021, ¶14, 133 N.M. 217. There is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 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.” NMSA 1978, § 7-9-3.3 (2003). *See also Comer v. State Tax Comm'n,* 1937-NMSC-032, ¶37, 41 N.M. 403 (gross receipts applies to “all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect."). Here, Taxpayer was engaged in the business of providing temporary staffing employees working in New Mexico for remuneration, subjecting Taxpayer to gross receipts tax under the engaging in business definition contained under Section 7-9-9.3 and the presumption of taxability provision of Section 7-9-5 unless Taxpayer can demonstrate some deduction or exemption from the gross receipts tax.

NMSA 1978, Section 7-9-3.5(A) (3) (f) states that excluded from gross receipts are “amounts received solely on behalf of another in a disclosed agency capacity.” Under Regulation 3.2.1.19(C)(1) NMAC, “(a)n 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.” Regulation 3.2.1.19(C)(2) NMAC requires that any reimbursements for expenses incurred as an agent be separately stated on the respective invoice and marked as reimbursements in the agent’s books and records.

Numerous New Mexico cases have addressed, within the context of gross receipts tax, whether an agency relationship exists and whether such relationship is sufficient to exclude certain

receipts derived from that relationship from the gross receipts tax. In 1971, in the case *Westland Corporation v. Commission of Revenue*, 1971-NMCA-083, ¶38, 83 N.M. 29, the New Mexico Court of Appeals remanded the matter because it did not find cause to impose gross receipts tax on the receipts of a person whom served as a "friendly agent" for the limited purpose of "receiving and paying out sums for debts or obligations owing" from another company.

In *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247, a case that Taxpayer cited for support in this protest, the New Mexico Court of Appeals again considered agency in the gross receipts tax context. The *Carlsberg* case involved a property management group that managed an apartment complex for that property's owner. *See id*., ¶3. The rent at the apartment complex was subsidized by a federal agency. *See id*. The *Carlsberg* taxpayer claimed that the federal agency mandated the form of the agreement in place between that taxpayer and the owner. *See id*. The agreement in *Carlsberg* referred to that taxpayer as "agent." *See Carlsberg*, ¶4. Under an agency theory, the *Carlsberg* taxpayer argued that money it received from the owner's reimbursing of the payment of employee wages were not subject to gross receipts tax. *See Carlsberg*, ¶5-11.

In *Carlsberg*, the New Mexico Court of Appeals indicated "that a principal's control over the agent is the key characteristic of an agency relationship." *See Carlsberg*, ¶12. Further, the New Mexico Court of Appeals noted that it was a factual determination whether there was an agency relationship between the principal and the agent. *See Carlsberg*, ¶16. The New Mexico Court of Appeals began that factual determination by looking at the terms of the agreement in place. *See id*. When the contract is unambiguous, the language of the contract determines the intent of the parties without further interpretation. *See Carlsberg*, ¶17. The New Mexico Court of Appeals found in *Carlsberg* that the contract created an unambiguous agent-principal relationship. *See id*. The

Carlsberg's Court of Appeals rejected the Department's requirement that an agent be disclosed, and instead adopted a California rule that "if a party only receives money… of [] another's employment-related obligations, then an agency relationship exists sufficient to avoid taxation of those funds as gross receipts." *See Carlsberg*, ¶15. The Court of Appeals ultimately determined in *Carlsberg* that the level of control the owner of the apartment complex wielded over that taxpayer vis-à-vis that taxpayer's employees left that taxpayer with no control over the payment of the employees, and thus that taxpayer never possessed any interest in the funds in question used to pay the employees. *See Carlsberg*, ¶19. The *Carlsberg* decision also noted that an indemnification clause requiring the owner to pay that taxpayer for employment related expenses supported its holding. *See id*.

In 1995, in the case *Brim Healthcare, Inc. vs. State*, 1995-NMCA-055, 119 N.M. 818, the New Mexico Court of Appeals again had an opportunity to consider whether an agency relationship existed suffice to shield that taxpayer's claimed reimbursements from the imposition of gross receipts tax. In rejecting that taxpayer's claim of an agency relationship, the Court of Appeals in *Brim*, ¶10, found numerous reasons why the facts in that case were distinguishable from *Carlsberg*. The most significant distinguishing factor was the lack of an indemnification clause in the agreement at issue in *Brim*. *See id*. But another distinction cited in *Brim* was that the contracts at issue expressly noted that the taxpayer was "not an agent… but rather is an independent contractor." Ultimately, the *Brim* Court of Appeals affirmed the hearing officer's conclusion that the money was not received as "reimbursement of expenses as an agent." *id*. at 18.

While the *Carlsberg* Court of Appeals expressly rejected the Department's previous policy and regulation allowing for exemption of gross receipts only when there is a disclosed agency relationship, *see Carlsberg*, ¶19, subsequent legislative action has limited the *Carlsberg* holding.

See MPC LTD v. TRD, 2003-NMCA-021, ¶14, 133 N.M. 217. At the time the Court of Appeals issued its decision in *Carlsberg*, the gross receipts tax definition contained no provision excluding from gross receipts tax receipts received solely on behalf of another in a disclosed agency capacity. Since that case, the Legislature has expressly added the disclosed agency capacity language into Section 7-9-3.5 (A) (3) (f). In 2003, the Court of Appeals in *MPC, Ltd.* again looked at agency relationships in the gross receipts context, albeit for the first time under the Legislature's express "disclosed agency" exception to the gross receipts definition. In so doing, the Court of Appeals cautioned that *Carlsberg* and *Brim* were both decided before the Legislature's adoption of the "disclosed agency" language under Section 7-9-3.5(A) (3) (f), and therefore those cases only had limited instructive value. *See MPC, Ltd.*, 2003-NMCA-021, ¶34.

MPC, Ltd. addressed a taxpayer (Manpower) that provided temporary staffing services to its clients in New Mexico. *See id*. ¶1. Manpower had mostly verbal contracts with its clients, but did have a few written agreements in place. *See id*. ¶4. Manpower's clients supervised the activities of the assigned employees, but the client did not pay the employees. Instead, the clients paid Manpower, which in turn then paid the employee's wages, benefits, and withholdings. *See id*. ¶5. Manpower claimed these receipts should not be included in gross receipts because it "received the amounts purely as a conduit between its clients and its employees." *id*. ¶8. These facts are remarkably similar to the facts at issue in this protest.

Manpower's argument in *MPC, Ltd.* required the Court of Appeals to consider both a regulation addressing joint employers[5] and the statutory and regulatory disclosed agent

[5] A great deal of the analysis in *MPC, Ltd.* focused on a regulation and issue addressing a joint employer relationship. That issue is not relevant here, as Taxpayer does not claim or present evidence that it is a joint employer. In fact, during the Department's cross-examination, Mr. Guenther testified that it has not sought nor received any ruling from the Department of Labor or the IRS finding Taxpayer as a joint employer.

requirements. In addition to addressing how the Legislative addition of the disclosed agency exclusion under Section 7-9-3.5 (A) undermined the *Carlsberg* holding, *see id.* ¶24, the Court of Appeals in *MPC, Ltd.* also considered the Department's Regulation 3.2.1.19(C)(1) NMAC interpreting Section 7-9-3.5(A) (3) (f). The Court of Appeals in *MPC, Ltd.*, ¶36, construed Regulation 3.2.1.19(C)(1) NMAC to mean that:

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

The *MPC, Ltd.*, ¶37, Court of Appeals continued by stating:

> Section 7-9-3(F)(2)(f) requires a disclosure to the employee of an agency relationship. This breaks down into the requirements that there be a relationship by which the principal is liable (and knows he is liable) to the employee for payroll if the agent fails to pay, and that the agent disclose this relationship and obligation to the employee.

Additionally, when interpreting Regulation 3.2.1.19 (C)(2), the Court of Appeals noted that it imposed additional bookkeeping requirements that must be met in order to exclude receipts received as part of a disclosed agency capacity from gross receipts. *See MPC, Ltd.*, ¶36. In discussing Regulation 3.2.1.19 (C) (2), the Court of Appeals did not find that provision ultra vires to Section 7-9-3.5. In fact, the Court of Appeals accepted without limitation the bookkeeping requirements of Regulation 3.2.1.19 (C) (2) as a condition of the disclosed agency exclusion from tax. As such, there is no basis to accept Taxpayer's argument and invitation in this protest to find Regulation 3.2.1.19 (C) (2) ultra vires. *See also Bogle Management Co., Inc. v. Tax. and Rev. Dep't.*, No. A-1-CA-35641, (NM Ct. App. 2017) (unpublished memorandum opinion, non-precedential; relying heavily on *MPC, Ltd.* in analyzing similar issue and rejecting invitation to invalidate the same regulation). *MPC, Ltd.* formed the basis of a recent 2017 New Mexico Court

of Appeals unpublished memorandum decision resolving a similar case as this protest. *See Bogle Management,* No. A-1-CA-35641. While it is clear that Taxpayer disagrees with the analysis and the ultimate conclusion of the disclosed agency issue in *MPC, Ltd*., the clear holding in *MPC, Ltd.*, and its recent application by the Court of Appeals in *Bogle*, established that *MPC, Ltd.*, remains controlling in resolving the disclosed agency issue in dispute in this protest.

Within this legal framework, Taxpayer's arguments regarding disclosed agency are not supported by the findings of fact and do not meet the standard set by the controlling legal authority in *MPC, Ltd*. Contrary to Taxpayer's characterizations of the factual record, the hearing officer does not find that Taxpayer could bind its healthcare facility clients to an obligation to pay the healthcare professionals and that healthcare professionals were informed of their right to proceed against the healthcare facilities to enforce the obligation.

It is true that most of the contracts included an indemnification clause, which does provide some support for Taxpayers contention, like in *Carlsberg*. However, like in *Brim*, ¶18, virtually every contract at issue clearly established that Taxpayer was not an agent of the healthcare facilities and could not bind the healthcare facilities. The contracts established that the healthcare professionals were the employees of Taxpayer. Indeed, Taxpayer paid the healthcare professionals hourly wages that Taxpayer determined, paid the unemployment and worker's compensation taxes, managed the wage withholdings, managed payroll taxes, and issued each healthcare professional a W-2 at the end of the year. The medical facilities in fact were prohibited from hiring the healthcare professionals during the typical 13-week contract term without penalty, a significant limitation on the client healthcare facilities' control over Taxpayer's employees.

Taxpayer's assertion that the healthcare facilities controlled the healthcare professionals' day-to-day work, while certainly true, like in *MPC, Ltd.*, ¶34, is not particularly persuasive in

resolution of the protest. And Taxpayer's assertion minimizes the control Taxpayer had over the healthcare professionals. The healthcare professionals were Taxpayer's employees. Taxpayer received the bids for positions from the facilities and tried to match Taxpayer's medical professionals for placement at the healthcare facilities. Once Taxpayer referred one of its healthcare professionals as a match for the healthcare facility's positions, the healthcare facility interviewed Taxpayer's healthcare professional (and competing staffing agencies') candidates, selected which healthcare professional fit the position, provided the orientation to the healthcare professional, provided the workplace and equipment, and set the hours of work during the 13-week contract period. In turn, Taxpayer set the wages for the healthcare professionals, paid the employee benefits, withheld the personal income taxes, managed the payroll taxes, and paid the workers compensation and unemployment insurance for the workers. The healthcare facilities could only hire the healthcare employees without financial penalty after the 13-week contract expired. In fact, this ability of Taxpayer to impose penalties for the client's poaching of an employee before the 13-week contract expired gave Taxpayer a level of control over the employees far higher than the taxpayer found to be an agent in *Carlsberg*, ¶16, making the facts of this case distinguishable from that case.

Despite Taxpayer's argument about the importance of the healthcare facilities apparent day-to-day control of the healthcare professionals, the facts of this protest as they relate to control are quite similar to those in *MPC, Ltd*. Like in *MPC, Ltd.*, Taxpayer's healthcare facility clients manage the day-to-day activities of Taxpayer's healthcare professionals. *See MPC, Ltd.*, ¶5. It was Taxpayer, like Manpower in *MPC, Ltd*., that paid the employees' wages, benefits, and withholdings. *See id*. In other words, the apparent control Taxpayer relies on heavily in this protest bears striking similarity to the facts of *MPC, Ltd*., and like the Court of Appeals in *MPC,*

Ltd. determined, that control alone is insufficient to establish a disclosed agency exclusion from gross receipts tax.

Indeed, the facts and arguments made in *MPC, Ltd.* closely parallel the facts and arguments made in this protest even beyond the question of control. Taxpayer's reliance on the time cards and the surveys are quite similar to Manpower's assertion in *MPC, Ltd.* that all of its clients and employees "all knew the details of the relationship and whom was doing what for whom." *MPC, Ltd.*, ¶26.The Court of Appeals in *MPC, Ltd.* found that such general knowledge alone was insufficient to trigger the disclosed agency exclusion from gross receipts. *See also Bogle Management*, No. A-1-CA-35641, ¶18 (unpublished, non-precedential memorandum opinion; finding that long-standing relationship between all parties and alleged clear knowledge of the agency relationship was insufficient in the absence of an affirmative statement disclosing the agency relationship).

Taxpayer misplaces its reliance on the time cards because it significantly overreads the liability statement contained on the time cards. Taxpayer argues that because both the employee and a representative of the medical facility signed each time card, which contained a liability statement, Taxpayer was binding the facility to pay the employees and informing the employees of their right to collect against the facility for non-payment. The liability statement on the time card was located under the facility signature line, and stated that "[t]he above signature approves [Taxpayer] to bill in full the contracted hospital for the above stated hours. Failure to comply may make the client facility liable to the maximum penalty allowed by law."

Contrary to Taxpayer's argument, this statement appears to be addressing the liability between Taxpayer and the facility rather than between Taxpayer's employees and the facility. The first sentence allows Taxpayer to bill in full for the time worked. Taxpayer's argument requires

reading “medical professional employees” into the liability statement, particularly into the second sentence, which already has an ambiguous application. However, the medical employees are simply not referenced in either sentence. The application of the second sentence is ambiguous on its face, but in conjunction with the first statement, appears to establish that if the facility fails to pay the billed hours, it could be liable to Taxpayer for the full amount allowed by law. Even if the second sentence were somehow intended to address the employees, it does not meet the *MPC, Ltd.* and *Bogle* standard of expressly advising the employees that Taxpayer is the agent of the facility and that the employees have the ability to enforce their obligation against the facility.

Because of this ambiguity in conjunction with other evidence in this case supporting a contrary interpretation of the liability clause, the time card is not the panacea that Taxpayer wishes it to be. Taxpayer paid the employee wages on weekly basis while Taxpayer only billed the facilities every seven to eight weeks. Regardless of whether the facilities in fact ever paid Taxpayer, Taxpayer had already paid the wages to the employees. By considering this factual backdrop, the ambiguity about the application of the second sentence of the time card liability clause appears resolved: since the pattern is Taxpayer’s employees were already paid, in the event that the facility ever subsequently failed to pay the hours billed, it would be Taxpayer not the employees that would pursue legal action against the facility. The liability clause does not establish that the employees themselves had any rights to pursue collection against the facilities, let alone that they were expressly informed of such rights.

The employee survey, while certainly interesting, is not nearly as strong of evidence as Taxpayer suggests. First, there is no evidence about the sample size of the survey and whether it was in fact representative of all of Taxpayer’s employees in New Mexico during the audit period. Second, the results themselves were far more mixed than Taxpayer’s arguments assumed. Only a

plurality of the people surveyed believed there was an agency relationship, with nearly as many people expressing either uncertainty about the question or a belief that no such relationship existed. Finally, and perhaps most importantly, regardless of the employee's beliefs, the survey does not make clear that the employees were informed that Taxpayer was the disclosed agent of the client medical facilities, and that the employees had a potential cause of action against the facilities in the event of the failure to pay wages to the employees.

Because the contracts make clear that no agency relationship existed between Taxpayer and the medical facilities, thus preventing Taxpayer from binding the medical facilities to a third party, Taxpayer resorts to arguing that the bargained for, arms-lengths contractual terms must be ignored in favor of the substance of the transaction. While that might be true in other contexts, particularly in employment law where such approach makes far more sense, it has not been found to be compelling when analyzing when a taxpayer can avoid gross receipts tax under the disclosed agency exclusion. *See MPC, Ltd*. Even in *Carlsberg*, ¶7, which was legislatively reversed, the Court of Appeals stated that when the contract language is unambiguous, the language of the contract determines the intent of the parties regarding an agency relationship without further interpretation. *See also Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 31, 314 P.3d 688.

Despite Taxpayer's attempt at repacking the facts of this protest into something distinct from *MPC, Ltd.*, or challenging the legal analysis in *MPC, Ltd.*, the salient similarities between the facts and arguments here and in *MPC, Ltd*., dictate the application of the Court of Appeals holding *MPC, Ltd*.: in the absence of a clear, affirmative statement disclosing the agency relationship, there is insufficient evidence to overcome the presumption of correctness or to establish the disclosed agency exclusion from gross receipts tax. Taxpayer's arguments related to the doctrines of ratification and apparent authority fail to persuade, as they fall outside of the analytical

framework of the disclosed agent taxation issue established by the controlling case *MPC, Ltd*. Moreover, Taxpayer admitted that consistent with industry practice, its billings did not clearly indicate which amounts were being billed as reimbursements, as required by Regulation 3.2.1.19 (C) (1) NMAC in order to meet the regulatory definition of a disclosed agent. The fact that it would be contrary to industry practice does not change the regulatory requirements. On those grounds, Taxpayer further did not satisfy the requirements of Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C)(1) NMAC, as interpreted in *MPC, Ltd.*, ¶36. Therefore, there is no legal or factual basis to find that the receipts are exempted from taxation under the disclosed agent exclusion from gross receipts tax.

Services Performed in New Mexico.

Taxpayer also argues that money it received beyond its claimed reimbursements are not subject to gross receipts under NMSA 1978, Section 7-9-13.1 because those receipts represented consideration for performing service outside of New Mexico. Section 7-9-13.1(A) provides that "exempted from the gross receipts tax are the receipts from selling services performed outside New Mexico the product of which is initially used in New Mexico."

Taxpayer's argument fails to persuade. While Taxpayer argues that it had no offices in New Mexico (or anyplace other than Nebraska for that matter), Taxpayer had New Mexico employees that it placed at New Mexico healthcare facilities during the audit period. Rather than related to the situation exempted under Section 7-9-13 where a taxpayer performed services outside of the state, the product of which is initially used in New Mexico, in this case Taxpayer's payroll services were related to the payment of services performed by its employees in New Mexico. *See Decision and Order in the Matter of the Protest of Adecco USA, Inc.*, No. 14-16 (non-precedential, but insightful). Further, the services are deemed performed in New Mexico under Regulation

3.2.1.18(D)(1) NMAC. *See Bogle Management,* No. A-1-CA-35641, ¶22-23 (unpublished, non-precedential memorandum opinion; citing same regulation as basis of finding administrative services in similar fact pattern are deemed performed in New Mexico).

Taxpayer Not Entitled to Health Care Services Deduction.

Taxpayer argued that even if it was otherwise subject to gross receipts tax, its receipts were deductible from gross receipts tax under NMSA 1978, Section 7-9-77.1 (2007) and NMSA 1978, Section 7-9-93 (2007). "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447. After reviewing the language of the two deductions and the facts of this case, Taxpayer did not carry its burden to establish entitlement to the two cited deductions.

In pertinent part, Section 7-9-77.1 (A) allows a deduction for "receipts of a health care practitioner from payments by the United States government or any agency thereof for provision of medical and other health services by a health care practitioner or of medical or other health and palliative services by hospices or nursing homes to medicare beneficiaries…" Similarly, Section 7-9-93 (A) provides that:

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

While these deductions might apply to Taxpayer's healthcare facility clients, they would not extend to the staffing company providing healthcare professionals to the facility because of the nature of services rendered. Taxpayer cites *In the Matter of the Protest of HealthSouth Rehabilitation*, Decision and Order No. 16-16 (May 11, 2016; non-precedential) in support of its argument. But *Healthsouth* has little bearing on the analysis of these deductions under the facts of this protest, as Taxpayer is not in the business of performing medical service to medicare beneficiaries. *Healthsouth* addressed which form of entity that provided healthcare services could be eligible for the deduction and in no way suggests that an entity engaged solely in providing staffing services to a medical facility might be able to claim these disputed deductions. Taxpayer is engaged in the business of providing staffing to medical facilities. It is the facilities, not the staffing company, that provide the services potentially subject to the deduction under Section 7-9-77.1 and 7-9-93.

Even if it arguably could be said that these deductions might apply to a third-party staffing company, Taxpayer made no effort in this case to detail that its receipts were traceable to payments from a managed health care provider or health care insurer, a requirement of Section 7-9-93. Given that Taxpayer bore that burden of establishing entitlement to the deduction, failure to present any such evidence on those statutory requirements means that Taxpayer is not entitled to the deduction under Section 7-9-93.

Penalty.

Taxpayer argued that in the event it was found liable for the assessed tax principal, penalty should nevertheless be abated because any error it made in this matter resulted from a mistake of law made in good faith and on reasonable grounds.

When a taxpayer fails to pay taxes due to the State because of negligence or disregard of

rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

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

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). 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." Taxpayer meets this definition of negligence, and thus is potentially subject to civil negligence penalty under Section 7-9-69.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Here, there is no evidence that Taxpayer engaged in any formal consultation or study of the issue before determining that it believed it owed no New Mexico CRS taxes. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the

taxpayer "relied on any informed consultation" in deciding not to pay tax). *See also In the Matter of the Protest of Santa Fe Tow and Emergency Lock & Key*, Decision and Order No. 15-21 (June 30, 2015) (non-precedential; hearing officer abated penalty on a disclosed agent case when that taxpayer presented evidence that a CPA had advised the receipts were non-taxable reimbursements under the disclosed agency exclusion).

To support its claim for the good-faith, mistake of law abatement of penalty, Taxpayer cites a previous decision and order of this hearing officer addressing a similar disclosed agency fact pattern, *In the Matter of the Protest of ATC Healthcare Services Inc.*, Decision & Order 16-55 (Nov. 30, 2016; non-precedential and currently under appeal). *See also In the Matter of the Protest of Bogle Management Co., Inc.*, Decision & Order 16-17 (May 16, 2016; non-precedential; affirmed on appeal; hearing officer abated penalty under similar fact pattern). While *ATC* dealt with a virtually identical disclosed agent issue, there was an additional issue related to franchise fees that was a critical factor in the subsequent abatement of penalty in that case. In *ATC*, that taxpayer's treatment of the non-taxation of franchise fees was actually correct for part of the audit period until a court decision was legislatively overruled. Since the treatment of the franchise fees was correct for part of the assessed audit period, it followed that *ATC* had reasonable legal grounds to not pay the tax, and thus the mistake of law provision clearly applied. Unlike the franchise fee issue in *ATC*, in this protest there was no period of overlap. In this protest, the audit period commenced after the Legislature had affectively overruled *Carlsberg* by adding the disclosed agent language into statute and the year after the Court of Appeals issued its decision in *MPC, Ltd*.

To illustrate the importance of the franchise fee component in the abatement of penalty in *ATC*, since issuance of *ATC*, this hearing officer has also declined to abate penalty under a similar legal analysis. *See In the Matter of the Protest of All Medical Personnel, Inc.*, Decision & Order 17-

35 (August 8, 2017; non-precedential). Similarly, another hearing officer at the Administrative Hearings Office recently declined to abate penalty on a disclosed agent case *In the Matter of the Del Corazon LLC.*, Decision & Order 18-15 (April 27, 2018; non-precedential).

Given the presumption of correctness that attaches to penalty, the absence of any proof that Taxpayer made an informed decision or consultation about whether the receipts were non-taxable as reimbursements, and the fact that none of the audit period predates that Legislative overruling of *Carlsberg* or the Court of Appeals issuance of *MPC, LTD.*, the hearing officer is not persuaded that Taxpayer made a mistake of law in good faith and on reasonable grounds in this case. Penalty remains due and owing as assessed in this matter.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's assessment and jurisdiction lies over the parties and the subject matter of this protest.

B. Under NMSA 1978, Sec. 7-9-5 (2002), all of Taxpayer's receipts in New Mexico are presumed subject to New Mexico's gross receipts tax.

C. Taxpayer did not overcome the presumption of correctness of the amount of tax principal, penalty, and interest that attached to the assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

D. Taxpayer failed to establish legally and factually that it was a disclosed agent of its clients, as interpreted by Regulation 3.2.1.19(C)(1) NMAC and *MPC, Ltd. v. TRD*, 2003-NMCA-021, 133 N.M. 217, and thus the receipts in question are not excludable from gross receipts taxation under NMSA 1978, Section 7-9-3.5(A) (3).

E. Taxpayer did not carry its burden of establishing its right and entitlement to the claimed deductions under NMSA 1978, Section 7-1-77.1 or NMSA 1978, Section 7-9-93. *See*

Wing Pawn Shop v. Taxation and Revenue Department, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted).

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

G. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction in failing to file and pay gross receipts tax during the relevant period met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

H. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds that would allow for abatement of penalty under Section 7-1-69 (2007).

I. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty under the facts established in this protest.

For the foregoing reasons, Taxpayer's protest **IS DENIED**. Taxpayer is ordered to pay the remaining assessed tax, penalty, and interest. As of the date of hearing, Taxpayer owed $279,494.80 in assessed gross receipts tax, $55,635.47 in penalty, and $84,114.83 in interest, for a total outstanding liability of $419,245.10

DATED: November 21, 2018

Brian VanDenzen, Esq.
Chief 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 November 21, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner:

First Class Mail *Interoffice Mail*

INTENTIONALLY BLANK

John Griego
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Taxation & Revenue Department
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