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

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**IN THE MATTER OF THE PROTEST OF
DUSTY J. STONE
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1172525232**

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v.

AHO Case Number 19.04-055A, D&O 19-29

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NEW MEXICO TAXATION AND REVENUE DEPARTMENT

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DECISION AND ORDER

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On September 25, 2019, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits administrative hearing in the matter of the tax protest of Dusty J. Stone (“Taxpayer”) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Dusty J. Stone appeared representing himself, and as his only witness. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (“Department”). Department protest auditor Angelica Rodriguez appeared as a witness for the Department. Taxpayer presented affidavits showing the compiled sources of his income. Taxpayer’s and Department’s exhibits were admitted into the record without objection from either party and are more fully described in the Exhibit Log.

To summarize briefly, this protest involves Taxpayer’s 2011, 2012, and 2013 gross receipts tax. Taxpayer is a rancher who mainly raises and trains horses for sale. The Department assessed tax, penalty, and interest for unpaid tax, which Taxpayer protested, arguing that his sales and services were exempt from the imposition of gross receipts tax, pursuant to NMSA 1978, Sections 7-9-18 and 7-9-19. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the Hearing Officer finds that the Taxpayer failed to overcome

1 the presumption of correctness on all but one item, and Taxpayer's protest must be denied in part
2 and granted in part. IT IS DECIDED AND ORDERED AS FOLLOWS:

3 **FINDINGS OF FACT**

4 1. On October 17, 2018, under letter id. no. L1172525232, the Department issued a
5 Notice of Assessment of Taxes and Demand for Payment, indicating that Taxpayer owed gross
6 receipts tax in the amount of \$1,780.58, penalty in the amount of \$356.10, and interest in the
7 amount of \$379.74, for a total tax assessment of \$2,516.42 for gross receipts taxes for the years
8 beginning January 1, 2011 and ending December 31, 2013. [Administrative File].

9 2. The Taxpayer protested the assessment of taxes, penalty and interest in a letter
10 dated January 14, 2019, and stamped as received by the Department on January 14, 2019.
11 [Administrative File].

12 3. The Department acknowledged the Taxpayer's protest on February 19, 2019,
13 under letter id. no. L1558173872. [Administrative File].

14 4. The Department requested a hearing on the matter by filing a Hearing Request on
15 April 5, 2019. [Administrative File].

16 5. The Administrative Hearings Office issued a Notice of Telephonic Scheduling
17 Hearing on April 8, 2019, setting the matter for a telephonic scheduling conference on April 19,
18 2019. [Administrative File].

19 6. The parties filed a Joint Stipulated Motion for Continuance of Pre-Trial
20 Conference on April 10, 2019. [Administrative File].

21 7. On April 6, 2019, the parties filed a Joint Stipulated Motion to Continue from
22 Good Friday 2019 until after April 22, 2019. [Administrative file].

1 8. The Administrative Hearings Office issued an Order granting a continuance and
2 an Amended Notice of Telephonic Scheduling Hearing on April 17, 2019, resetting the matter
3 for a telephonic scheduling hearing on April 30, 2019. [Administrative File].

4 9. The undersigned Hearing Officer Ignacio V. Gallegos conducted the telephonic
5 scheduling conference on April 30, 2019, with the parties present. Neither the Department nor
6 the Taxpayer objected that conducting the scheduling hearing satisfied the 90-day hearing
7 requirements of Section 7-1B-8 (A) (2015). The Hearing Officer preserved a recording of the
8 hearing. [Administrative File].

9 10. The Administrative Hearings Office issued a Scheduling Order and Notice of
10 Administrative Hearing on May 1, 2019, setting discovery and motions deadlines, and a date for
11 the merits hearing on September 24, 2019 in Santa Fe, New Mexico. [Administrative File].

12 11. On July 29, 2019, the Taxpayer filed his Motion for Summary Judgment, along
13 with four exhibits attached. Taxpayer's MSJ Exhibit #4, letter ID #L1785062576, contained
14 information that a tax year 2018 refund of \$758.00 was used to offset the Taxpayer's 2011
15 liability under protest on April 9, 2019. [Administrative File].

16 12. On August 1, 2019, the Department filed its Response to Motion for Summary
17 Judgement. [Administrative File].

18 13. On August 26, 2019, the Taxpayer filed his Notice of Completion of Briefing.
19 [Administrative File].

20 14. On August 26, 2019, the Department filed its Response of the Department's
21 Controverting Notice of Completion of Briefing. [Administrative File].

22 15. On August 29, 2019, the Administrative Hearings Office, through the undersigned
23 Hearing Officer, issued an Order Denying Summary Judgment. [Administrative File].

1 16. On September 12, 2019, the Taxpayer filed his Reply to Response of the
2 Department's Controverting Notice of Completion of Briefing. The Taxpayer adeptly pointed out
3 that the Department had sent its response to his motion for summary judgment in emails to an
4 incorrect email address, despite having sent emails to the proper address in the
5 past.[Administrative File].

6 17. On September 25, 2019, the undersigned Hearing Officer, Ignacio V. Gallegos,
7 Esq. conducted a merits hearing in Santa Fe, New Mexico. The Hearing Officer preserved a
8 recording of the hearing. [Administrative File].

9 18. At the hearing, Taxpayer indicated that no remaining issues required resolution
10 prior to the hearing, effectively waiving the issues raised by the Department's improper service
11 of its documents. [Preliminary colloquy, CD 9:35-15:40].

12 19. Taxpayer is a rancher who raises and trains livestock. [Cross examination of
13 Dusty J. Stone, CD 28:00-29:20].

14 20. Taxpayer grew up on a ranch and has been ranching all his life. [Cross
15 examination of Dusty J. Stone, CD 31:30-32:00].

16 21. Taxpayer leases approximately seven hundred twenty acres, the bulk of which he
17 uses for grazing horses, mules and cattle. [Cross examination of Dusty J. Stone, CD 30:00-
18 31:30].

19 22. During the tax years at issue, Taxpayer also provided some day labor services to
20 other local ranchers. [Cross examination of Dusty J. Stone, CD 29:20-30:30].

21 23. Taxpayer reconstructed his 2011, 2012, and 2013 livestock sales and work
22 records by using his memory, old calendars and by speaking with people with whom he recalled
23 doing business. Taxpayer acknowledged it was difficult to piece together and he wished he had

1 kept records of sales and expenditures. [Cross examination of Dusty J. Stone, CD 34:10-36:10,
2 39:45-46:30; AHO examination of Dusty J. Stone, CD 56:05-57:30].

3 24. The Taxpayer's records were summarized into three affidavits, one covering each
4 tax year at issue. [Direct examination of Dusty J. Stone, CD 17:50-21:00; Cross examination of
5 Dusty J. Stone, CD 35:00-36:10; Taxpayer exhibits #1.1, 2.1, 2.2, 3.1].

6 25. Taxpayer testified that his receipts from branding and shipping livestock in 2012
7 were \$200.00, and in 2013 were \$360.00, totaling \$560.00. The ranchers who hired him did not
8 typically provide an IRS form 1099 for these services, which were less than \$600 on each
9 occasion. [Direct examination of Dusty J. Stone, CD 22:20-25:40].

10 26. Taxpayer provided a copy of one receipt for the sale of a Charolais bull at the
11 livestock auction in Clovis on August 15, 2012, for a sale price of \$1,294.00. [Cross examination
12 of Dusty J. Stone, CD 37:10- 38:15; Taxpayer Exhibit 2.2].

13 27. Taxpayer has no formal education in raising livestock or farming; the entirety of
14 his vocational training and education comes from experience on farms and ranches over 45
15 years. [Cross examination of Dusty J. Stone, CD 31:30-32:00].

16 28. Taxpayer would provide bills of sale to livestock customers who asked for them,
17 and did not keep a copy, but otherwise would complete a deal with a handshake. [Cross
18 examination of Dusty J. Stone, CD 44:10-46:40; AHO Examination of Dusty J. Stone, CD
19 56:05-57:30].

20 29. The Department protest auditor, Angelica Rodriguez, indicated that this Taxpayer
21 was audited because he filed IRS Form Schedule C for the tax years in question, without having
22 corresponding matching Combined Reporting System (CRS-1) returns for gross receipts for the
23 same periods. [Direct examination of Angelica Rodriguez, CD 1:04:55- 1:05:30].

1 the presumption, the burden shifts to the Department to show that the assessment is correct. *See*
2 *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

3 The burden is also on taxpayers to prove that they are entitled to an exemption or
4 deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't*,
5 2007-NMCA-050, ¶32, 141 N.M. 520, 157 P.3d 85; *See also Till v. Jones*, 1972-NMCA-046,
6 ¶21, 83 N.M. 743, 497 P.2d 745. “Where an exemption or deduction from tax is claimed, the
7 statute must be construed strictly in favor of the taxing authority, the right to the exemption or
8 deduction must be clearly and unambiguously expressed in the statute, and the right must be
9 clearly established by the taxpayer.” *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*,
10 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306. *See also Wing Pawn Shop v. Taxation &*
11 *Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649; *Chavez v. Comm'r of*
12 *Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

13 **Receipts under the Gross Receipts and Compensating Tax Act.**

14 The assessment in this protest arises from an application of the Gross Receipts and
15 Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-115, which imposes a tax for the
16 privilege of engaging in business, on the receipts of any person engaged in business in New Mexico.
17 *See* NMSA 1978, Section 7-9-4 (2002). The pertinent part of the statutory definition of “gross
18 receipts” under Section 7-9-3.5 (2007), includes “the total amount of money or the value of other
19 consideration received from selling property in New Mexico, ... or from performing services in
20 New Mexico.” There is no doubt that Taxpayer engages in the business of raising, training and
21 selling livestock and performing services for monetary gain in New Mexico.

22 There is a statutory presumption that all receipts of a person engaged in business activities
23 are taxable. *See* NMSA 1978, Section 7-9-5 (2002). However,, despite the general presumption of

1 taxability, a taxpayer may qualify for the benefits of various deductions and exemptions. Taxpayer
2 here claims he is entitled to the exemption for receipts for sales of agricultural products, pursuant to
3 NMSA 1978, Section 7-9-18 (2011), and for receipts from livestock feeding, pursuant to NMSA
4 1978, Section 7-9-19 (1992). In the course of testimony Taxpayer suggested that the day-labor work
5 was occasional, calling into question the applicability of Section 7-9-28 (1969). Taxpayer produced
6 no original supporting document showing a year, a quantity, or a sale price for any purported sale,
7 except one; the majority of his evidence was testimonial, with summaries of each year in testimonial
8 affidavits.

9 **Sufficiency of evidence for application of exemptions**

10 The question is whether the evidence is sufficient to meet the Taxpayer's burden to establish
11 that the income he claimed on his federal income tax return, Internal Revenue Service (IRS) form
12 Schedule C¹, was in fact exempt from the imposition of New Mexico's Gross Receipts tax under
13 any of the claimed exemptions. The Department contends that, without any contemporaneously
14 created document (a receipt or bill of sale) showing to whom a horse or mule was sold, the purchase
15 price, and the year of sale, the testimony alone is insufficient. The Taxpayer contends that, as an
16 eyewitness to the sale, who has reviewed old calendars and spoken with old customers, his own
17 memory is sufficient evidence of the transaction. "Substantial evidence is relevant evidence that a
18 reasonable mind might accept as adequate to support a conclusion." *State v. Largo*, 2012-NMSC-
19 015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted).

¹ Although the evidence shows Taxpayer filed the IRS Schedule C, the IRS Schedule F is intended for farming and ranching business income. See Publication 225, "Farmer's Tax Guide for use in preparing 2011 Returns," available online through the IRS website, <https://www.irs.gov> (<https://www.irs.gov/pub/irs-prior/p225--2011.pdf>). Last accessed on 11/12/19.

1 The State of New Mexico, Taxation and Revenue Department has published guidance for
2 taxpayers who file Personal Income Tax (PIT) returns. In 2011, the PIT-1 instructions² advised
3 taxpayers to keep copies of completed tax returns, books, records, schedules, statements and other
4 supporting documents “for at least ten years after you file.” *Id.* at 15. NMSA 1978, Section 9-11-6.2
5 (G) (2015), indicates: “[a]ny regulation, ruling, instruction or order issued by the secretary or
6 delegate of the secretary is presumed to be a proper implementation of the provisions of the laws
7 that are charged to the department, the secretary, any division of the department or any director of
8 any division of the department.” Likewise, and perhaps more compelling, the Tax Administration
9 Act, NMSA 1978, Section 7-1-10 (A) (2007), requires that “every taxpayer shall maintain books of
10 account or other records in a manner that will permit the accurate computation of state taxes.” The
11 regulation that accompanies this statute also provides that “[b]ooks of account, documents and other
12 records shall be kept and maintained by a taxpayer in a manner that will permit the accurate
13 computation of state taxes...If state taxes cannot be accurately or readily computed by the secretary
14 of secretary’s delegate from the records, the records are not sufficient or adequate.” Regulation
15 3.1.5.8 (A) NMAC (12/29/01). *See also Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶16, 84 N.M.
16 428, 504 P.2d 638 (“The taxpayer has a duty to provide the commissioner with books and records
17 upon which to establish a standard for taxation”) (specially concurring opinion).

18 The fact that Mr. Stone kept no organized business records is the key evidence in this
19 controversy. It is the Taxpayer’s duty to prove with substantial evidence that an exemption applies.
20 Without supporting documents entered into evidence, we are left with Mr. Stone’s word alone. “It is

² Available online through the New Mexico Taxation and Revenue Department website, [www.tax.newmexico.gov \(https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/77198ad7-cd40-4b6b-bc10-46dad4f66e4b?response-content-disposition=filename%3D%222011pit-1-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHBYG7I7TA&Signature=A33ksYHE6OVm9kli%2FIT%2BjdOoWi8%3D&Expires=1573595726\)](https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/77198ad7-cd40-4b6b-bc10-46dad4f66e4b?response-content-disposition=filename%3D%222011pit-1-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHBYG7I7TA&Signature=A33ksYHE6OVm9kli%2FIT%2BjdOoWi8%3D&Expires=1573595726). Last accessed 11/12/19.

1 the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the
2 witnesses, reconcile inconsistencies, and determine where the truth lies.” *N.M. Taxation & Revenue*
3 *Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23. Although Mr. Stone was very credible, cordial
4 and composed, his unsubstantiated statements are insufficient to overcome the presumption of
5 correctness that attached to the assessment. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-
6 NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308. *See also* Regulation 3.1.6.12 (A) NMAC (1/15/01).
7 Uncorroborated, unsupported testimony alone is insufficient to overcome statutory presumptions in
8 the federal context. *See In re O’Neill*, 134 B.R. 48, 50, 1991 Bankr. Lexis 1711 (testimony of proper
9 timely mailing is insufficient to overcome the presumption that returns were not filed, when IRS did
10 not receive timely return). *See Fernandez v. United States (IRS) (In re Fernandez)*, 2012 Bankr.
11 Lexis 5017, 2012-2 U.S. Tax Cas. (CCH) P50, 644 (taxpayer’s testimony alone is insufficient to
12 establish a return was filed, when IRS has no record of receipt).

13 The single actual receipt that Mr. Stone offered, coupled with his credible testimony that he
14 sold a Charolais bull at the livestock auction in Clovis on August 15, 2012, was sufficient to
15 overcome the presumption of correctness in that portion of the assessment. NMSA 1978, Section 7-
16 9-18 provides that (A) “Exempted from the gross receipts tax ... are the receipts from selling
17 livestock...” And as used in the exemption, “livestock” includes “all domestic or domesticated
18 animals that are used or raised on a farm or ranch, ...and also includes horses, asses, mules, [and]
19 cattle ...” Section 7-9-18 (C). A Charolais bull satisfies the “livestock” requirement for the
20 exemption. The exemption applies to this sale, the evidence was uncontroverted by the Department,
21 and the assessment should be adjusted accordingly.

1 **CONCLUSIONS OF LAW**

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

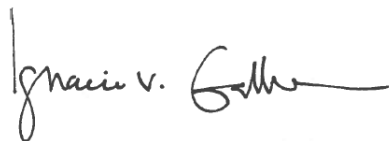
4 B. The hearing was timely set and held within 90-days of protest under NMSA 1978,
5 Section 7-1B-8 (2015).

6 C. Taxpayer was able to overcome the presumption of correctness for a single instance
7 of the sale of livestock on August 15, 2012 and is entitled to the exemption of tax on that sale. *See*
8 NMSA 1978, Section 7-9-18 (2011).

9 D. Taxpayer failed to meet his burden to overcome the presumption of correctness in
10 the balance of the Department’s assessment by his uncorroborated statements alone. *See* NMSA
11 1978 Section 7-1-17 (C) (2007). *See also MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-
12 NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308. *See also* Regulation 3.1.6.12 (A) NMAC (1/15/01).

13 For the foregoing reasons, the Taxpayer’s protest **IS GRANTED in part and DENIED in**
14 **part. IT IS ORDERED** that the Department abate the outstanding 2012 gross receipts tax, penalty,
15 and interest on the sale of livestock. The Taxpayer is responsible to pay the balance remaining under
16 the assessment.

17 DATED: November 27, 2019.

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19 

20 Ignacio V. Gallegos
21 Hearing Officer
22 Administrative Hearings Office
23 P.O. Box 6400
Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On November 27, 2019, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *First Class Mail*

Interdepartmental Mail

17 INTENTIONALLY BLANK

18 _____
19 John Griego
20 Legal Assistant
21 Administrative Hearings Office
22 P.O. Box 6400
23 Santa Fe, NM 87502