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

**IN THE MATTER OF THE PROTEST OF**
**CONTINENTAL LAND RESOURCES**
**TO ASSESSMENT ISSUED UNDER**
**LETTER ID NO. L1440900400**

**v.** **D&O No. 20-04**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

# DECISION AND ORDER

On November 4, 2019, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits of the protest of Continental Land Resources ("Taxpayer") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Mr. R. Tracy Sprouls, Esq. (Rodey, Dickason, Sloan, Akin & Robb, P.A.) appeared on behalf of Taxpayer, accompanied by Mr. Terry Jennings, Mr. Ken Hammond, Mr. Dave Bolton, and Ms. Cathy Couch who all appeared and testified on behalf of Taxpayer.

Mr. Marek Grabowski, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department"), accompanied by Ms. Mary Griego, protest auditor, who also appeared as a witness for the Department. Mr. Danny Pogan was also present for the Department but was not called to testify.

Taxpayer Exhibit Nos. 1 – 39 and Department Exhibits A – H were admitted into the evidentiary record without objection. Taxpayer Exhibits 1 – 17 were received electronically and in hardcopy. Taxpayer Exhibits 18 – 39 consist of Microsoft Excel spreadsheets, and were received electronically only. All electronic submissions are contained on a thumb drive labeled "Hearing Exhibits 1 – 39."

The issues in the protest are: (1) whether receipts derived from various services are

excludable from gross receipts under NMSA 1978, Section 7-9-3.5 (2007); (2) whether Taxpayer is entitled to an exemption pursuant to NMSA 1978, Section 7-9-13.1 (1989) for services performed outside New Mexico, the product of which is initially used inside New Mexico; and (3) whether Taxpayer is entitled to a deduction pursuant to NMSA 1978, Section 7-9-57 (2000) for sales of certain services to an out-of-state buyer. As expounded in greater detail below, the Hearing Officer determined that Taxpayer established entitlement to its claimed exclusions, exemptions, and deductions from gross receipts and that it rebutted the presumption of correctness that attached to the assessment. Therefore, Taxpayer's protest should be granted subject to the liability taxpayer computed and conceded to be due. IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

*Procedural History*

1. On April 27, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L1440900400 ("Assessment"). [Administrative File]

2. The Assessment detailed the following amounts due for the periods from June 30, 2009 to December 31, 2015: gross receipts tax in the amount of $824,598.98; associated penalty in the amount of $164,919.80; and associated interest in the amount of $111,934.75. The total amount assessed was $1,101,453.53. [Administrative File]

3. Taxpayer filed a Formal Protest of the Assessment on July 24, 2017. [Administrative File]

4. The Department acknowledged Taxpayer's Formal Protest of the Assessment on August 10, 2017 under Letter ID No. L0308112688. [Administrative File]

5. On September 21, 2017, the Department submitted a Hearing Request indicating its desire for a scheduling hearing on the protest. [Administrative File]

6. On September 21, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference setting a hearing on October 13, 2017. [Administrative File]

7. An initial telephonic scheduling hearing occurred on October 13, 2017 at which time neither party objected that the hearing would satisfy the requirement that a hearing take place within 90 days of Taxpayer's protest. [Record of Hearing (10/13/2017)]

8. On October 16, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the merits of Taxpayer's protest to occur on June 12, 2018. [Administrative File]

9. On April 13, 2018, the Administrative Hearings Office entered an Order Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing. [Administrative File]

10. On May 4, 2018, the Administrative Hearings Office entered an Amended Scheduling Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the merits of Taxpayer's protest to occur on December 5, 2018. [Administrative File]

11. On November 16, 2018, the parties filed a Joint Motion to Vacate and Reschedule Formal Hearing or, in the Alternative, to Bifurcate. [Administrative File]

12. On November 20, 2018, the parties filed a Joint Prehearing Statement. [Administrative File]

13. On November 26, 2018, the Administrative Hearings Office entered an Order Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing. [Administrative File]

14. On December 6, 2018, the Administrative Hearings Office entered an Amended Scheduling Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the merits of Taxpayer's protest to occur on June 19, 2019. [Administrative File]

15. On April 25, 2019, the Administrative Hearings Office entered an Order Vacating

Hearing on Merits and Notice of Telephonic Scheduling Hearing. [Administrative File]

16. On May 16, 2019, the Administrative Hearings Office entered a Third Amended Scheduling Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the merits of Taxpayer's protest to occur on November 4, 2019. [Administrative File]

17. On August 20, 2019, the Department filed Department's Certificate of Service indicating that it served its First Set of Requests for Admission, Interrogatories and Requests for Production. [Administrative File]

18. On September 13, 2019, Taxpayer filed its Certificate of Service indicating that it served a First Set of Interrogatories and Requests for Production to the Department. [Administrative File]

19. On October 11, 2019, the Department filed a Department's Certificate of Service of Response to Taxpayer's First Set of Discovery Requests. [Administrative File]

20. On October 15, 2019, the parties filed their prehearing statements. [Administrative File]

21. On November 12, 2019, the parties filed a Joint Notice of Extension of Time to File Written Closing Arguments. [Administrative File]

22. On November 18, 2019, the parties filed a Joint Notice of Agreement to File Responses to Closing Arguments. [Administrative File]

23. On November 19, 2019, Taxpayer filed Taxpayer's Closing Argument, and the Department filed Taxation and Revenue Department's Closing Statement. [Administrative File]

24. On November 12, 2019, Taxpayer filed Taxpayer's Response to Department's Closing Statement. [Administrative File]

25. On November 22, 2019, the Department filed Taxation and Revenue

Department's Reply to Taxpayer's Closing Statement. [Administrative File]

*Witnesses*

26. Mr. Terry Jennings resides in Edmond, Oklahoma. He is co-owner of Continental Land Resources, Taxpayer. [Direct Examination of Mr. Jennings]

27. Mr. Ken Hammond resides in Roswell, New Mexico and managed Taxpayer's Roswell office during the relevant periods of time. He is a landman who specializes in title research services for clients in the oil exploration and production industry. He has worked in several states including North Dakota, Wyoming, Montana, Colorado, Utah, New Mexico and Texas. [Direct Examination of Mr. Hammond]

28. Mr. Dave Bolton resides in Oklahoma City, Oklahoma. He owns a small exploration and production company called Northfolk Operating, LP. He has been employed in the oil and gas industry for approximately 30 years and was formerly employed by Energen Resources Corporation and Chesapeake Oil. [Direct Examination of Mr. Bolton]

29. Ms. Cathy Couch resides in Oklahoma City, Oklahoma. She is employed as Taxpayer's in-house accountant. She has been employed by Taxpayer for almost 25 years. [Direct Examination of Ms. Couch]

30. Ms. Mary Griego is a protest auditor for the Department. She has worked in that capacity for approximately 7 years. She reviewed the audit which eventually resulted in the Assessment. [Direct Examination of Mary Griego]

*Taxpayer Background and Business Activities*

31. Taxpayer provides various services, including land title research and lease acquisition services relevant to real property in which its clients are interested in conducting oil and gas exploration and production activities. Such properties are referred to as "prospects."

[Direct Examination of Mr. Jennings]

32. The term "prospect" may also be utilized to identify a billing unit. [Direct Examination of Mr. Jennings]

33. In representative circumstances, Taxpayer's clients will identify a prospect, assign it an identifying name, and submit a request for Taxpayer to conduct title research to identify entities or individuals having potential ownership or leasehold interests in a prospect. [Direct Examination of Mr. Jennings]

34. A client may be interested in a prospect for various reasons including oil and gas exploration and production, installation of pipelines, or other purposes. Not every prospect researched will be pursued. [Direct Examination of Mr. Bolton; Cross Examination of Mr. Bolton]

35. Most of the work that Taxpayer has performed in New Mexico relates to prospects in Lea County and Eddy County, New Mexico which overlay a portion of the Permian Basin. [Direct Examination of Mr. Jennings]

36. The Permian Basin is a "large sedimentary basin in western Texas and southeastern New Mexico … noted for its rich petroleum, natural gas, and potassium deposits." [Administrative Notice, *Encyclopedia Britannica*, https://www.britannica.com/place/Permian-Basin]

37. Taxpayer has conducted services in most, if not all oil and gas producing states, including New Mexico. [Direct Examination of Mr. Jennings]

38. From 2010 to 2015, Taxpayer maintained an office in Roswell, New Mexico which was staffed by three individuals. The office was responsible for all geographic areas overlaying the Permian Basin plus all of New Mexico. [Direct Examination of Mr. Jennings]

39. However, Ms. Couch recalled that when Taxpayer had more work than it could effectively manage in its Roswell office, it would share management obligations with its out-of-state office locations, particularly in 2013, 2014 and 2015. [Direct Examination of Ms. Couch; Taxpayer Ex. 38]

40. Taxpayer's office in Roswell, New Mexico was managed by Mr. Hammond who was not employed by Taxpayer, but who provided management services to Taxpayer as an independent contractor. [Cross Examination of Mr. Jennings]

41. Services performed in Oklahoma might include preparation of report summaries, preparation for client meetings, or other various administrative functions, but most of the work relevant to Taxpayer's operations in New Mexico and the Permian Basin were managed from Taxpayer's Roswell office. [Cross Examination of Mr. Jennings]

42. Taxpayer currently has six employees, with most of its work performed by independent contractors, known in the industry as "petroleum landmen" or "field landmen." [Direct Examination of Mr. Jennings]

43. Field landmen are generally headquartered at their place of residence, which could be inside or outside New Mexico since current technology permits landmen remote access to many public records necessary for research. [Direct Examination of Mr. Jennings]

44. The internet and other forms of electronic communication permit most prospect work to be performed remotely meaning that few services require a field landman to be physically present in the state where the prospect is situated. [Direct Examination of Mr. Jennings]

45. Field landmen were therefore selected primarily on their qualifications and experience, not necessarily for their proximity to New Mexico or a prospect. For that reason,

many field landmen utilized by Taxpayer during the relevant periods of time were headquartered outside of New Mexico. [Direct Examination of Mr. Jennings]

46. If records relevant to a prospect were not available electronically, then it might be necessary to determine the place of the physical records and select a field landman within reasonable proximity to that location. [Direct Examination of Mr. Jennings]

47. Prospect inquiries from clients were generally directed to Taxpayer through Mr. Jennings in Oklahoma or Mr. Hammond in Roswell. However, assignment of a prospect to a field landman was usually determined at the Roswell office. [Direct Examination of Mr. Jennings]

48. Although a field landman was not required to be based in the state where the prospect was located, travel across state lines might be necessary depending on the circumstances involved in researching a prospect. If travel was required, then the field landmen would invoice Taxpayer for their travel expenses which Taxpayer then reimbursed. [Direct Examination of Mr. Jennings]

49. Record of travel expenses to New Mexico was significant because that would identify circumstances in which services were performed in New Mexico. [Direct Examination of Ms. Couch]

50. Upon conclusion of their research, the field landmen submitted their completed prospect reports to Taxpayer which then submitted the final product to its client. Depending on the circumstances, reports were initially received by the Roswell office or Taxpayer headquarters in Oklahoma prior to being delivered to its clients. [Direct Examination of Mr. Jennings]

51. Prospect reports were usually provided by Taxpayer to a client's in-house landman, generally referred to as the "company landman." [Direct Examination of Mr. Jennings]

52. Clients utilized the prospect reports for various purposes, and sometimes in combination with other information, to evaluate the feasibility of a prospect. Eventually, clients might determine to take no action on a prospect, actively pursue a prospect, or something in between. A client might also conclude that its next steps in reference to a prospect require a more in-depth report, such as an "ownership report." [Direct Examination of Mr. Jennings]

53. An ownership report identifies ownership interests in a prospect's minerals. Ownership interests tend to be dispersed widely among many entities or individuals spread across the United States and worldwide. Ownership reports assemble relevant chains of title to identify the scope and nature of ownership which assists clients in acquiring rights to property interests with which it is concerned, including leasing rights. [Direct Examination of Mr. Jennings]

54. In addition to title research, clients might also request that Taxpayer assist in securing leasing rights for the prospect. [Direct Examination of Mr. Jennings]

55. The scope and nature of services provided by Taxpayer is established in a Land Service Agreement which is usually signed by Mr. Jennings. Land Service Agreements have a standard term of one year and may govern one or more prospects which are usually identified by an exhibit to the agreement. [Cross Examination of Mr. Jennings; Department Ex. H]

56. Taxpayer bills its clients per prospect by the amount of time incurred by its field landmen, plus documented expenses, billable in-house services, and additional fees incurred. [Cross Examination of Mr. Jennings]

57. Invoices are then generated to Taxpayer's clients which incorporate the services of its field landmen, incurred expenses, and administrative fees. Client invoices are less detailed than the underlying data which they incorporate. For example, client invoices will not specify the

costs incurred by Taxpayer in contracting with a field landman, or even location of the field landman. [Direct Examination of Ms. Couch]

58. Although Taxpayer bills its clients for the reimbursement of the actual costs incurred by field landmen, there is a markup for services that ultimately contributes to Taxpayer's profit margin. [Direct Examination of Ms. Couch]

59. Taxpayer maintains records relevant to its pool of field landmen, including their addresses. [Cross Examination of Mr. Jennings]

60. Mr. Hammond managed Taxpayer's Roswell office from 1998 or 1999 until April 30, 2019 when he retired. At all relevant times during his association with Taxpayer, Mr. Hammond provided management services as an independent contractor, engaging in business through a limited liability company. [Direct Examination of Mr. Hammond]

61. In addition to general office management responsibilities, Mr. Hammond assisted in processing and supervising client prospect requests, which included the selection and supervision of field landmen. The majority of field landmen were located in Texas, but the available pool included New Mexico and extended as far away as Pennsylvania. Field landmen tend to be mobile, relocating as necessary to secure work. [Direct Examination of Mr. Hammond]

62. Mr. Hammond communicated frequently with clients doing business through Taxpayer's Roswell office. The locations of Taxpayer's clients and their company landmen are provided in Taxpayer Exhibit 39, and include, in addition to New Mexico, California, Colorado, Oklahoma, Texas, Arizona, and Alabama. [Direct Examination of Mr. Hammond]

63. Mr. Hammond was a point of contact for client prospect orders and other client communications, but orders and communications might also be handled through the Oklahoma

headquarters. [Cross Examination of Mr. Hammond]

64. A client's company landman would generally be Taxpayer's point of contact or the recipient of Taxpayer's prospect report or other product. [Cross Examination of Mr. Hammond]

65. Most of Mr. Hammond's time at the Roswell office, at least during the periods of time under audit, were devoted to supervision and administration with little time dedicated to active title work. [Cross Examination of Mr. Hammond]

66. To the extent there were ever any client billing disputes, those would be handled primarily by Mr. Jennings, although Mr. Hammond would inform Mr. Jennings of any pertinent facts relevant to the billing or the dispute. [Cross Examination of Mr. Hammond]

67. Taxpayer compensated Mr. Hammond for his services only. At no time did Taxpayer compensate Mr. Hammond for services performed by third-party field landmen. [Cross Examination of Mr. Hammond]

68. Mr. Bolton was previously employed as vice-president of land for Energen Resources Corporation. He was employed by Energen Resources Corporation for almost five years. [Direct Examination of Mr. Bolton]

69. During his tenure with Energen Resources Corporation, Mr. Bolton was responsible for overseeing all aspects of its operations relevant to land, including all land overlaying the Permian Basin. [Direct Examination of Mr. Bolton]

70. Prior to his employment with Energen Resources Corporation, Mr. Bolton was employed by Chesapeake Oil where he also oversaw land in various areas, once again including land overlaying the Permian Basin. [Direct Examination of Mr. Bolton]

71. Mr. Bolton's responsibilities at Energen Resources Corporation and Chesapeake

Oil, relevant to land, encompassed oversight of functions germane to mineral rights, surface rights, acquisitions, and divestitures, and included supervision of company landmen. [Direct Examination of Mr. Bolton]

72. During his tenure with Energen Resources Corporation and Chesapeake Oil, Mr. Bolton became familiar with Taxpayer's services and engaged it to perform contract land services. [Direct Examination of Mr. Bolton]

73. Taxpayer was an approved vendor for both Energen Resources Corporation and Chesapeake Oil and land managers were authorized to utilize Taxpayer's services to fulfil various needs for land-related services. [Direct Examination of Mr. Bolton]

74. During his tenure with both Energen Resources Corporation and Chesapeake Oil, Taxpayer would typically submit prospect reports to the assigned company landman or land manager assigned to a given geographic area, who would review the reports in preparation for weekly meetings to evaluate the merits of various prospects. [Direct Examination of Mr. Bolton]

75. Whether or not to advance efforts in relation to a prospect would be determined by the company's executive team upon consideration of various factors, including matters addressed in the prospect report. [Direct Examination of Mr. Bolton]

76. The executive teams for both Energen Resources Corporation and Chesapeake Oil were located outside New Mexico. [Direct Examination of Mr. Bolton]

77. Not every prospect report produced further action. It was not unusual for interest in a prospect to diminish for any variety of reasons, including those unrelated to the contents of a prospect report. [Direct Examination of Mr. Bolton]

*The Audit*

78. Ms. Couch was Taxpayer's point of contact with the Department during the audit.

[Direct Examination of Ms. Couch]

79. Ms. Couch is familiar with Taxpayer's services and its methods of invoicing and accounting. She prepared and compiled Taxpayer Exhibits 1 – 39 from data derived from Taxpayer's accounting software, Microsoft Dynamics SL. [Direct Examination of Ms. Couch]

80. Ms. Couch exported the data from Microsoft Dynamics SL to Microsoft Excel so that it could be scrutinized and analyzed. However, due to the large volume of data involved, she needed to divide the data among several spreadsheets. [Direct Examination of Ms. Couch]

81. Taxpayer Exhibits 1 – 39 accurately and completely summarize Taxpayer's accounting records relevant to its New Mexico activities during all periods pertinent to the assessment. [Direct Examination of Ms. Couch; Taxpayer Exhibits 1 – 39]

82. Near the onset of the audit, Ms. Couch understood that the Department's auditor wanted to review all data for invoices or receipts deriving from Taxpayer's New Mexico office in Roswell. Taxpayer provided records underlying tax years 2013, 2014, and 2015, and eventually supplemented that submission with data from tax years 2010, 2011, and 2012. [Direct Examination of Ms. Couch]

83. It was unclear to Ms. Couch early in the audit that the Department was interested in reviewing data for New Mexico prospects only, but as the audit progressed, there seemed to be a mutual understanding that New Mexico prospects represented the central area of examination, and that any assessment would derive from services performed in New Mexico. [Direct Examination of Ms. Couch]

84. Based on Ms. Couch's understanding of the Departments' outlook, she compiled and provided various types of data to the Department which she thought would assist in its evaluation. [Direct Examination of Ms. Couch]

85. The data was intended to present, in an accessible format, all factors relevant to the audit, such as the locations of the field landmen, the locations where services were performed, the locations of prospects, the locations of Taxpayer's clients, and the locations where the products of Taxpayer's services were delivered. [Direct Examination of Ms. Couch]

86. The amount of data was massive and compiled in several spreadsheets due to their size. For example, activities in 2010 were summarized in a single spreadsheet [Taxpayer Ex. 19] while 2011 required four spreadsheets organized by quarters [Taxpayer Exs. 25 – 28]. [Direct Examination of Ms. Couch]

87. Ms. Couch provided all requested information to the Department's auditor and offered to explain anything that might be helpful. [Cross Examination of Ms. Couch]

88. References in Taxpayer's exhibits to "Sub-Account N" relate to work that was managed at Taxpayer's Roswell office. [Direct testimony of Ms. Couch]

89. References in Taxpayer's exhibits to "Non-N" related to New Mexico prospects managed from out-of-state. [Direct testimony of Ms. Couch]

Location of Field Landman

90. Taxpayer Ex. 36 revealed that Taxpayer may have utilized field landmen from over 2,000 locations over the period subject of the audit. [Taxpayer Exhibit 36]

91. Taxpayer's initial step was to determine the location of its field landmen. The location or residences of field landmen were determined primarily by information the field landmen provided on their IRS Forms W-9 in each relevant year. [Direct Examination of Ms. Couch; Taxpayer Ex. 36]

92. Since it was anticipated that field landmen would relocate during the period being audited, Ms. Couch compiled all IRS Forms W-9 data into a spreadsheet which captured not only

the field landman's current address, but also permitted evaluation of the individual's historical information during the relevant period of time. [Direct Examination of Ms. Couch; Taxpayer Ex. 36]

Field Landman Services in New Mexico

93. A subsequent step required Taxpayer to identify instances in which a field landman traveled from their out-of-state location to New Mexico. The Department and Taxpayer agreed that invoices indicating out-of-state travel by a field landman to New Mexico would signify instances in which services were performed inside New Mexico. Examples of landman travel to New Mexico could include mileage, hotel or meal expenses. [Direct Examination of Ms. Couch; Taxpayer Exhibit 8; Taxpayer Exhibits 36 – 38]

94. Travel into New Mexico was identified by reference to the "Billing Tran Data" tabs in Taxpayer Exs. 19, 21 – 32 and referencing entries in the "Account Category" for items such as hotels, meals, or mileage. [Direct Examination of Ms. Couch]

Location of Prospect

95. Ms. Couch filtered New Mexico prospects from out-of-state prospects allowing the review of receipts specific to prospects located in New Mexico, the results of which revealed that Taxpayer processed thousands of invoices relevant to New Mexico. [Direct Examination of Ms. Couch; Taxpayer Exs. 37 – 38]

96. Ms. Couch separated New Mexico prospects from out-of-state prospects by referring to prospect names and locations. [Direct Examination of Ms. Couch]

Identifying Out-of-State Clients and Delivery of Taxpayer's Product

97. Ms. Couch also separated invoices to identify what services were sold to out-of-state buyers based on the address at which the invoice was sent because that was also the address

where the company landman receiving the product of the service was located. [Direct Examination of Ms. Couch; Taxpayer Exhibit 8; Taxpayer Exhibits 36 – 39]

The Audit

98. Communications between the Department and Taxpayer's representatives at the onset of the audit process demonstrate a significant amount of document disclosures including several spreadsheets, bank statements, state and federal tax return information, and charts of accounts. To the extent disclosures included invoices, those were primarily summarized and compiled in the form of spreadsheets, which according to the contact log, contain ".xlsx" file extensions, in addition to a sampling of actual invoices. [Cross Examination of Ms. Couch; Department Exs. C-012 – C-027; C-029 – C-33]

99. The Department's Audit Narrative suggests that all records requested of the Taxpayer were provided. [Department Ex. A-001 ("Records Requested Not Provided: N/A")]

100. The Department's Audit Narrative identifies two categories of documents relied upon for its examination: (1) Transaction Detail; and (2) Transaction Summary Report. [Department Ex. A-001; Department Ex. A-002]

101. The Department summarized "[t]he auditor used transaction detail, provided by the taxpayer, to calculate the gross receipts per audit. In order to verify the transaction details the auditor compared the transaction details with the transaction summaries." The auditor went on to confirm that "[a]ll years matched except for 2013." [Department Ex. A-002]

102. The audit determined that gross receipts derived from 1,459 invoices should be 100 percent taxable in the cumulative amount of $12,379,338.31. [Direct Examination of Ms. Couch; Taxpayer Exs. 20 (2010 in the amount of $2,921,478.59), 33 (2011 in the amount of $1,921,717.83), 34 (2012 in the amount of $1,508,254.51), 22 (2013 in the amount of

$2,083,680.41), 35 (2014 in the amount of $1,869,088.09), and 24 (2015 in the amount of $2,075,118.88); Department Ex. B-004]

103. The Department concentrated its review on Taxpayer's invoices to its client which was significant because the client invoices were less detailed than the underlying data that was relied upon to generate them. [Direct Examination of Ms. Couch]

104. A more reliable computation could have been achieved by also evaluating the invoices reflecting the expenses that Taxpayer incurred in providing services to its clients. Those underlying invoices contained data relevant to establishing where a landman was located, and when, where, and for whom services were performed, all of which could be relevant to whether or not Taxpayer's receipts would eventually be taxable. [Direct Examination of Ms. Couch]

105. The Department's review concluded that individual invoices from Taxpayer to its clients were either entirely taxable or entirely non-taxable when in actuality, an invoice could reasonably be both. The consequence was that Taxpayer was assessed taxes on receipts that were non-taxable while the Department may have also overlooked potential liabilities on receipts that Taxpayer would readily acknowledge were taxable. [Direct Examination of Ms. Couch; Taxpayer Exs. 20, 22, 24, 33, 34, 35]

106. In order to enable a more accurate computation, Ms. Couch further refined Taxpayer's billing data to more precisely identify Taxpayer's taxable and non-taxable receipts, and even retained the services of a database expert to assist in assembling complex portions of the underlying data in a manner that could be interpreted for the purpose of more accurately computing Taxpayer's tax liability. [Direct Examination of Ms. Couch; Taxpayer Exhibit 8; Taxpayer Exhibits 36 – 38]

107. Taxpayer established that the Department's audit overstated Taxpayer's gross

receipts by $3,643,516.87 because its actual gross receipts in the periods from 2010 through 2015 should have been $8,735,821.44. [Direct Examination of Ms. Couch; Taxpayer Exs. 20 (2010 in the amount of $1,034,630.27), 33 (2011 in the amount of $1,662,439.30), 34 (2012 in the amount of $1,297,718.43), 22 (2013 in the amount of $1,473,263.94), 35 (2014 in the amount of $1,423,938.60), and 24 (2015 in the amount of $1,843,830.90)]

108. Taxpayer further established that its taxable gross receipts, based only on the invoices which the Department concluded were fully taxable, should have totaled $1,526,213.00 reflecting receipts derived from services performed and delivered in New Mexico from 2010 through 2015. [Direct Examination of Ms. Couch; Taxpayer Exs. 20 (2010 in the amount of $226,744.42), 33 (2011 in the amount of $580,181.70), 34 (2012 in the amount of $513,403.90), 22 (2013 in the amount of $155,073.49), 35 (2014 in the amount of $45,723.51), and 24 (2015 in the amount of $5,085.98)]

109. In each given year of the audit, subtracting the overstated amounts from the Department computed amount results in the Taxpayer's computed amount for receipts. [Taxpayer Exs 20; 33; 34; 22; 35; 24] The material differences between the Department's computations and the Taxpayer computations in the relevant years may be summarized as follows:

2010

110. The Department determined that Taxpayer's underreported gross receipts were $2,921,478.59 in comparison to Taxpayer's computation in the amount of $1,034,630.27. [Department Ex. B; Taxpayer Ex. 20]

111. Out of all invoices the Department reviewed for 2010, Taxpayer established that only $226,744.42 was taxable as gross receipts for services performed and delivered to clients

inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 2 and 20]

a. Among the transactions examined for 2010 were 187 invoices representing $1,117,128.83 in receipts that the Department concluded should be fully taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico was $1,029,392.34, meaning that the Department overstated Taxpayer's gross receipts in 2010 by the difference of $87,736.49 in reference to those invoices. [Taxpayer Ex. 20]

b. Among the transactions examined were five invoices the Department stated were taxable gross receipts in the amount of $5,824.68, with exception for costs incurred for work performed in Oklahoma. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico was $5,237.93, meaning that the Department overstated Taxpayer's gross receipts in 2010 by the difference of $586.70 in reference to those invoices. [Taxpayer Ex. 20]

c. The Department imputed additional gross receipts in the amount of $1,797,972.24 to match income Taxpayer reported for its Sales Factor on its 2010 PTE-A. However, the Sales Factor amount reported in Taxpayer's 2010 PTE-A did not accurately reflect Taxpayer's New Mexico gross receipts because the sum reported for Sales Factor included revenue generated from the performance of services in Texas but supervised from Taxpayer's Roswell office. [Direct Examination of Ms. Couch; Taxpayer Ex. 20]

d. Taxpayer's gross receipts are more accurately measured by reference to the data contained in Taxpayer Exhibits 1 – 39 which established that the imputed amount overstated Taxpayer's gross receipts in 2010 in the sum of $1,797,972.24. [Taxpayer Ex. 20]

e. The Department determined that a trivial portion of Invoice 033830, totaling $43,697.64, was taxable in the amount of $552.84. Because the client was located in Oklahoma, and that is where the product of the service was also delivered, the Department overstated Taxpayer's gross receipts in 2010 by the difference of $552.84 in reference to that particular invoice. [Taxpayer Ex. 20]

2011

112. The Department determined that Taxpayer's underreported gross receipts were $1,921,717.83 in comparison to Taxpayer's computation in the amount of $1,662,439.30. [Department Ex. B; Taxpayer Ex. 33]

113. Out of all invoices the Department reviewed for 2011, Taxpayer established that $580,181.70 was taxable as gross receipts for services performed and delivered to clients inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 5 and 33]

a. Among the transactions examined for 2011 were 231 invoices that the Department determined were 100 percent taxable. The 231 invoices represented $1,794,757.62 in receipts that the Department concluded should be taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico was $1,540,940.03, meaning that the Department overstated Taxpayer's gross receipts in 2011 by the difference of $253,815.59 in reference to those invoices. [Taxpayer Ex. 33]

b. Perhaps resulting from some confusion due to a series of invoices being issued, subsequently voided, and then reissued, the Department determined that the sum of $13,189.06 deriving from those invoices should be taxable. However, the sum of the invoices

should have been $12,739.06 of which only $11,835.46 derived from performing services in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico, meaning that the Department overstated Taxpayer's gross receipts in 2011 by the difference of $1,353.60 in reference to those invoices. [Taxpayer Ex. 33]

c. The Department determined that the sum of $68,441.98 deriving from several invoices should be taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico was $64,497.30, meaning that the Department overstated Taxpayer's gross receipts in 2011 by the difference of $3,944.68[1] in reference to those invoices. [Taxpayer Ex. 33]

d. The Department determined that the sum of $43,144.80 deriving from several invoices should be taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico was $41,230.14, meaning that the Department overstated Taxpayer's gross receipts in 2011 by the difference of $1,914.66 in reference to those invoices. [Taxpayer Ex. 33]

e. The Department classified one invoice as taxable in the amount of $324.89. Taxpayer was unable to determine how the Department made its conclusion. The invoice represented $2,074.39 in receipts meaning that the Department understated Taxpayer's gross receipts by the difference of $1,750 in reference to that invoice. [Taxpayer Ex. 33]

2012

114. The Department determined that Taxpayer's underreported gross receipts were $1,508,254.51 in comparison to Taxpayer's computation in the amount of $1,297,718.43.

[1] Note d at Taxpayer Ex. 33 computes the overstatement as $5,065.38 but that appears to be a miscalculation. The difference between the "per Auditor report" and the "per Taxpayer all client" is $3,944.68 ($68,441.98 - $64,497.30).

[Department Ex. B; Taxpayer Ex. 34]

115. Out of all invoices the Department reviewed for 2012, Taxpayer established that $513,403.90 was taxable as gross receipts for services performed and delivered to clients inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 34 and 6]

a. Among the transactions examined for 2012, there were 140 invoices that the Department determined were 100 percent taxable in the amount of $808,826.70. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $698,758.80, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $110,067.90 in reference to those invoices. [Taxpayer Ex. 34]

b. Among the transactions examined for 2012, there were 73 invoices that the Department determined were 100 percent taxable in the amount of $426,375.15, with exception for costs incurred in Oklahoma. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $362,340.04, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $64,035.11 in reference to those invoices. [Taxpayer Ex. 34]

c. Among the transactions examined for 2012, there were 20 invoices that the Department determined were 100 percent taxable in the amount of $233,424.76, with exception for administrative costs or fees. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $197,637.98, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $35,786.78 in reference to those invoices. [Taxpayer Ex. 34]

d. Among the transactions examined for 2012 was one invoice that the Department determined was 100 percent taxable in the amount of $3,024.99, with exception for services performed in Oklahoma and unspecified costs. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $1,824.99, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $1,200.00 in reference to those invoices. [Taxpayer Ex. 34]

e. The Department determined that the sum of $16,768.88 deriving from several invoices should be taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $16,516.94, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $251.94 in reference to those invoices. [Taxpayer Ex. 34]

f. The Department identified an additional sum of $4,408.62 that it determined to be 100 percent taxable. Taxpayer conceded that the gross receipts deriving from those invoices were greater in the amount of $6,293.62, none of which should be taxable in New Mexico since neither the client nor the product of the service was delivered inside New Mexico. [Taxpayer Ex. 34]

g. The Department determined that the sum of $15,425.43 deriving from two invoices should be taxable. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $14,346.08, meaning that the Department overstated Taxpayer's gross receipts in 2012 by the difference of $1,079.35 in reference to those invoices. [Taxpayer Ex. 34]

2013

116. The Department determined that Taxpayer's underreported gross receipts were $2,083,680.41 in comparison to Taxpayer's computation in the amount of $1,473,263.94. [Department Ex. B; Taxpayer Ex. 22]

117. Out of all invoices the Department reviewed for 2013, Taxpayer established that $155,073.49 was taxable as gross receipts for services performed and delivered to clients inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 22 and 3]

118. The Department's evaluation for 2013 differed from other years reviewed because it did not analyze Taxpayer's expenses in determining the location where services may have been performed. Although the data was in the Department's possession like other years under review, the Department may have simply overlooked the data by unintentionally filtering the data from the applicable spreadsheet. [Direct Examination of Ms. Couch; Cross Examination of Ms. Couch; Taxpayer Ex. 22]

119. Taxpayer verified that the 2013 summary was complete. [Direct Examination of Ms. Couch; Cross Examination of Ms. Couch; Taxpayer Exhibit 21]

120. The file properties for Taxpayer Exhibit 21 (file named "Exh 21 - 2013 subacct N billing tran") indicate that the file has not been modified since "2/13/2017[.]" [Administrative Notice of file properties for Taxpayer Exhibit 21]

a. Among the transactions examined for 2013 were 378 invoices that the Department determined were 100 percent taxable in the amount of $1,995,828.80[2], but the actual

[2] Taxpayer Ex. 22, Note b, reflects a slightly different number resulting from a computation error. The sum of $310,270.65, $802,787.50, $310,270.65, and $572,500.00 is $1,995,828.80. Taxpayer's Note b states that the sum of the same figures is $1,995,582.80. The correction reduces Taxpayer's total gross receipts in the amount $522,564.86 instead of the amount stated in Note b ($522,318.86) although this correction does not affect the grand total "per Taxpayer" on Taxpayer Ex. 22.

receipts from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been were $1,473,263.94, meaning that the Department overstated Taxpayer's gross receipts in 2013 by the difference of $522,564.86. [Taxpayer Ex. 22]

b. Among the transactions examined for 2013 were 18 invoices that the Department determined were 100 percent taxable in the amount of $87,851.61, consisting of receipts derived entirely from services performed out of state, meaning that the Department overstated Taxpayer's gross receipts in 2013 by the difference of $87,851.61 in reference to those particular invoices. [Taxpayer Ex. 22]

2014

121. The Department determined that Taxpayer's underreported gross receipts were $1,869,088.09 in comparison to Taxpayer's computation in the amount of $1,423,938.60. [Department Ex. B; Taxpayer Ex. 35]

122. Out of all invoices the Department reviewed for 2014, Taxpayer established that $45,723.51 was taxable as gross receipts for services performed and delivered to clients inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 35 and 7]

a. Among the transactions examined for 2014 were 299 invoices that the Department determined were 100 percent taxable in the amount of $1,429,656.40. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $1,115,503.51, meaning that the Department overstated Taxpayer's gross receipts in 2014 by the difference of $314,152.89 in reference to those particular invoices. [Taxpayer Ex. 35]

b. There was one invoice that represented $561.42 in receipts that the Department concluded should be taxable with exception for fees or costs incurred in Oklahoma. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $555.28, meaning that the Department overstated Taxpayer's gross receipts in 2014 by the difference of $6.14[3] in reference to that invoice. [Taxpayer Ex. 35]

c. There were 22 invoices that represented $438,158.74 in receipts that the Department concluded should be 100 percent taxable, but which were managed from Oklahoma. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $307,879.81, meaning that the Department overstated Taxpayer's gross receipts in 2014 by the difference of $130,278.93 in reference to those particular invoices. [Taxpayer Ex. 35]

d. There was one invoice that represented $711.53 in receipts that the Department concluded should be taxable. However, the invoice did not contain receipts generated from services performed in New Mexico, meaning that the Department overstated Taxpayer's gross receipts in 2014 by the difference of $711.53[4] with concern for that specific invoice. [Taxpayer Ex. 35]

2015

123. The Department determined that Taxpayer's underreported gross receipts were $2,075,118.88 in comparison to Taxpayer's computation in the amount of $1,843,830.90.

[3] Taxpayer Ex. 35, Note b, indicates an overstatement in the amount of $81.14. The note goes on to describe Taxpayer's computations as $363.42 - $555.28 which clearly appear to be erroneous. The Hearing Officer computes the overstatement in reliance on the figures provided in the portion of the spreadsheet that corresponds to the referenced invoice.

[4] Taxpayer Ex. 35, Note d, indicates that gross receipts should be reduced by $1,711.53. However, it appears that this was most likely an error because the correct figure is $711.53. This correction does not affect the grand total "per Taxpayer" on Taxpayer Ex. 35.

[Department Ex. B; Taxpayer Ex. 24]

124. Out of all invoices the Department reviewed for 2015, Taxpayer established that $5,085.98 was taxable as gross receipts for services performed and delivered to clients inside New Mexico with the difference being excludable, exempt, and deductible. [Taxpayer Exs. 24 and 4]

a. Among the transactions examined for 2015 were 11 invoices that the Department determined were 100 percent taxable in the amount of $67,210.24. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $60,559.38, meaning that the Department overstated Taxpayer's gross receipts in 2015 by the difference of $6,650.86 in reference to those invoices. [Taxpayer Ex. 24]

b. Among the transactions examined for 2015 were 29 invoices that the Department determined were 100 percent taxable in the amount of $842,496.87. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $592,085.55, meaning that the Department overstated Taxpayer's gross receipts in 2015 by the difference of $250,411.32 in reference to those invoices. [Taxpayer Ex. 24]

c. Among the transactions examined for 2015 were 4 invoices that the Department determined were 100 percent taxable in the amount of $134,678.55. However, receipts generated from services performed in New Mexico, identified by landmen based in New Mexico or traveling to New Mexico should have been $131,175.65, meaning that the Department overstated Taxpayer's gross receipts in 2015 by the difference of $3,502.90 in reference to those particular transactions. [Taxpayer Ex. 24, Note c]

d. The Department's evaluation in 2015 did not seemingly consider 485 invoices representing work that was managed in New Mexico. The omission caused a discrepancy between the Department-computed gross receipts and the amount of gross receipts reported on Taxpayer's 2015 PTE-A. [Taxpayer Ex. 24]

e. In lieu of reviewing the invoices, the auditor imputed gross receipts based on Taxpayer's 2015 PTE-A in the amount of $1,030,733.22. Yet, Taxpayers actual receipts is slightly greater, meaning that the Department understated Taxpayer's gross receipts by $29,277.10 by relying on the gross receipts reported in the 2015 PTE-A. [Taxpayer Ex. 24]

The Department's Evidence

125. Based on the evidence offered during Taxpayer's presentation at the hearing, Ms. Griego acknowledged the possibility some adjustments could be warranted. [Direct Examination of Ms. Griego]

126. Ms. Griego observed that some of Taxpayer's clients also maintained offices in New Mexico, even if the product of Taxpayer's service was delivered to the client at an out-of-state location. [Direct Examination of Ms. Griego]

127. Ms. Griego did not participate in the handling of the underlying audit. [Cross Examination of Ms. Griego]

128. Ms. Griego was not aware of any documents that were requested, but not provided at the time of the audit. [Cross Examination of Ms. Griego]

Taxpayer's Gross Receipts

129. Taxpayer concedes that its taxable gross receipts are slightly greater than the amounts provided in Taxpayer Exhibits 20, 33, 34, 22, 35, and 24. The difference arises from the fact that the analysis generating those figures was limited only to the invoices the Department

reviewed and found to be taxable, while Taxpayer's review considered all invoices. [Direct Examination of Ms. Couch; Taxpayer's Closing Argument, Page 10]

130. Based on its own, in depth review, Taxpayer concedes that its taxable gross receipts are as follows, if afforded all claimed exclusions, exemptions, and deductions: $259,548.58 in 2010; $623,655.13 in 2011; $553,361.34 in 2012; $175,164.25 in 2013; $65,194.44 in 2014; and $5,278.37 in 2015. [Taxpayer Ex. 14; Taxpayer's Closing Argument, Page 10]

131. The Hearing Officer finds that the amounts conceded by Taxpayer to be due accurately state Taxpayer's taxable gross receipts in each respective year. [Taxpayer Ex. 14; Taxpayer's Closing Argument, Page 10]

## DISCUSSION

In addition to contesting the correctness of the assessments on various grounds, Taxpayer presents three issues for consideration which may potentially affect its purported liability under the assessment central to its protest: (1) whether receipts derived from various services are excludable from gross receipts under NMSA 1978, Section 7-9-3.5 (2007); (2) whether Taxpayer is entitled to an exemption pursuant to NMSA 1978, Section 7-9-13.1 (1989) for services performed outside New Mexico, the product of which is initially used inside New Mexico; and (3) whether Taxpayer is entitled to a deduction pursuant to NMSA 1978, Section 7-9-57 (2000) for sales of certain services to an out-of-state buyer.

### Presumption of Correctness

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Therefore,

under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) also 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-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

For that reason, the presumption in favor of the Department requires that Taxpayer carry 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.

In circumstances where a taxpayer's claim for relief relies on the application of an exemption or deduction, then "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**

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), "gross receipts" is 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*.
>
> (Emphases Added)

Under the Gross Receipts and Compensating Tax Act, all gross receipts of a person engaged in business are presumed taxable. *See* NMSA 1978, Section 7-9-5 (2002). Despite the general presumption of taxability, taxpayers may also avail themselves of the benefits of various deductions or exemptions, if applicable, or even assert that its receipts are entirely excludable from taxation under NMSA 1978, Section 7-9-3.5.

If a taxpayer's claim for relief relies on the application of an exemption or deduction, then "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.

**Discussion of Taxpayer's Documentary Evidence**

Prior to evaluating the correctness of the Department's assessment and the potential application of any relevant deduction, exemption, or exclusion, the Hearing Officer elects to address the Department's arguments leveled at the adequacy of Taxpayer's evidence. The Department asserts that regardless of how the law governing this protest is eventually construed, Taxpayer's protest should be denied for the alleged inadequacy of its evidence.

In specific opposition to the applicability of NMSA 1978, Section 7-9-57, the Department

begins by criticizing the quality and quantity of Taxpayer's records. It argues that Taxpayer should not be entitled to a deduction because Taxpayer allegedly failed to provide non-taxable transactions certificates ("NTTC" or "NTTCs") or other evidence acceptable to the secretary, as required by the statute, to prove that various sales were made to out-of-state buyers and that the initial use of the product of the service was made outside New Mexico. The Department also directs criticism at the form of Taxpayer's evidence, indicating that "Taxpayer's case at the hearing relied on Excel spreadsheets, without any supporting documentation." *See Taxation and Revenue Department's Closing Argument*, Page 1.

The Hearing Officer finds the Department's critique to be unwarranted for at least two reasons. First, the Department's audit narrative expresses no criticism in reference to the quality or quantity of Taxpayer's records. In fact, given the opportunity to detail "Records Requested Not Provided[,]" the auditor stated, "N/A." *See* Department Ex. A-001. The Hearing Officer construes "N/A" as an abbreviation for "not applicable." *See* Black's Law Dictionary, 1119 (9th ed. 2009). Therefore, "N/A" signifies, in the present context, that all records requested were provided.

In fact, a closer reading of the audit narrative reveals no concern with the overall quantity or quality of Taxpayer's records[5] and there is no suggestion that the deduction under Section 7-9-57 was denied for that reason. *See* Department Ex. A-002. This observation is significant because it suggests that perhaps the sufficiency of Taxpayer's records was not a matter of genuine concern to the Department, at least not until the protest stage.

Furthermore, the Department apparently relied on the same documents to assess Taxpayer in the first place. It is contradictory to rely on Taxpayer's records to compute and assess a liability on

[5] The audit narrative at Department Ex. A-002 suggests that the records provided for tax year 2013 were incomplete. The specifics of this issue are addressed in a subsequent discussion in which the Hearing Officer concluded that the records were not incomplete, but that data was likely overlooked due to user error.

one hand, and then condemn the quality of those same documents when presented by the Taxpayer in defense of the assessment. This leads to the Department's other argument in reference to the adequacy of Taxpayer's records, which is directed at its reliance on spreadsheets in supposed disregard of any underlying supporting documents.

Considering the abundance of records at issue, it was not unreasonable for the Department at the time of the audit, nor for the Hearing Officer at the hearing, to rely on spreadsheets summarizing the numerous transactions at issue. A review of the spreadsheets reveals that they contain *tens of thousands* of lines of data. In fact, the spreadsheets contained so much data, that Ms. Couch had to separate them into several distinct files. Requiring Taxpayer to present underlying documents on every transaction, or to substantiate or detail every line of data, would have been unreasonable.

Although the Rules of Evidence are not applicable to hearings under the Administrative Hearings Office Act or the Tax Administration Act, the Hearing Officer has often referred to them for guidance. In this case, the Rules of Evidence permit a proponent to use a "summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." In such cases, "[t]he proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." *See* Rule 11-1006, NMRA 2020. When summaries are therefore proffered in a manner consistent with Rule 11-1006, a qualified individual may testify to a summary of voluminous records which that person has examined without requiring that the records be presented in court. *See State v. Schrader*, 1958-NMSC-056, ¶¶11-14, 64 N.M. 100, 324 P.2d 1025. This is precisely what occurred in this protest.

Ms. Couch presented as qualified, competent, and credible to address Taxpayer's records and the spreadsheets she prepared to summarize them. As of the date of the hearing, she had worked

for Taxpayer for nearly 25 years and was extraordinarily conversant in every detail in the spreadsheets and the underlying records which they summarized. She even retained the services of an expert to assist in compiling portions of the underlying data into spreadsheets that might maximize the ability of the Department and the Hearing Officer to examine and comprehend the data.

The record is devoid of any prior assertion that the underlying records were not previously made available for the Department's review, and as previously explained, the audit narrative made no reference to documents being requested which were not actually provided. In fact, the Department's closing argument acknowledges that "[t]he Department prepared its work papers based on the invoices requested from, and provided by, Taxpayer." *See Taxation and Revenue Department's Closing Argument*, Page 1.

At a minimum, this statement signifies that Taxpayer made the underlying records available for examination, copying, or both, although the audit refers only to "Transaction Detail" and "Transaction Summary Report." In any event, this is significant because it suggests that the Department had a previous opportunity to evaluate Taxpayer's invoices and scrutinize the trustworthiness of its spreadsheets, even if the invoices were not separately proffered at the hearing.

Therefore, if the Department had any quarrels with the trustworthiness or reliability of invoices it did review, or with the accuracy of the subsequent spreadsheets, it did not raise those concerns in the audit or during the hearing. Instead, all exhibits, including the spreadsheets with which the Department now takes issue, were admitted into the evidentiary record without objection. This is notable because a party opposing introduction of a summary in lieu of the underlying records is obligated to object. *See State v. Peke*, 1962-NMSC-033, ¶ 33, 70 N.M. 108, 371 P.2d 226.

Under the circumstances of this protest, it was reasonable for Taxpayer to rely on summaries

presented in the form of several spreadsheets. Consistent with Rule 11-1006, it was not necessary for Taxpayer to present the records to substantiate every single line of data, which could easily exceed one-hundred thousand entries, especially in the absence of any objection from the Department. The reasonableness of this conclusion is further bolstered by the fact that the Department never presented evidence or argument assailing the accuracy, reliability, or trustworthiness of the spreadsheets. Instead, the primary dispute in reference to the spreadsheets concentrated on how the data was interpreted leading up to the assessment, not the accuracy or reliability of the data itself.

For the stated reasons, the Department's assertions regarding the adequacy of Taxpayer's evidence, as presented in its written closing statement, are not well taken.

**Taxpayer's Business Activities**

Taxpayer focuses on two categories of service that it provides to its clients. The first category involves preparation of title reports at the request of its clients. The clients use the reports to assist in evaluating prospects that could be located inside or outside of New Mexico. It asserts that the reports are delivered to the location of its client's headquarters, usually to the attention of the client's company landman.

The second category of services concerns lease negotiations. The work might be performed in any location where the interested parties and field landmen are located. The location where the work is performed is not necessarily tied to the location of the prospect. As Mr. Jennings explained, the locations of interested parties may be dispersed widely across many state and foreign boundaries. Regardless of which category of service is being provided, Taxpayer may utilize the services of field landmen either inside or outside of New Mexico since a significant amount of the work can be performed remotely given the convenience of the internet and other electronic methods

of accessing information or communicating.

Taxpayer does not dispute the taxability of services performed and delivered in New Mexico. Instead, Taxpayer asserts that it is entitled to a deduction for receipts deriving from the products of services delivered outside New Mexico pursuant to NMSA 1978, Section 7-9-57, an exemption for receipts derived from services performed out of state, even if the product of those services is delivered to New Mexico pursuant to NMSA 1978, Section 7-9-13.1, and an exclusion for receipts deriving from services both performed and delivered outside of New Mexico under NMSA 1978, Section 7-9-3.5 (A) (1).

The Department perceives the application of Section 7-9-57 as the primary issue in dispute. *See* Taxation and Revenue Department's Closing Statement, Page 1.

**Application of Section 7-9-57**

Section 7-9-57 (2000) provides a deduction from gross receipts tax for the sale of certain services to out-of-state buyers. It provides in relevant part:

> **Deduction; gross receipts tax; sale of certain services to an out-of-state buyer.**
>
> A. Receipts from performing a service may be deducted from gross receipts *if the sale of the service is made to an out-of-state buyer* who delivers to the seller either an appropriate nontaxable transaction certificate or other evidence acceptable to the secretary *unless the buyer of the service or any of the buyer's employees or agents makes initial use of the product of the service in New Mexico or takes delivery of the product of the service in New Mexico.*
>
> (Emphases Added)

The Department argues that Taxpayer may not qualify for a deduction under Section 7-9-57 without first proving that the product of its services was delivered out-of-state where the buyer also made its initial use. The Department therefore, begins its evaluation by re-examining the product of Taxpayer's services and casting uncertainty on whether the product of Taxpayer service is a report

or a lease, or the "procurement and management of independent contractor landmen, and the performance of administrative tasks necessary to support the work of those landmen." *See Taxation and Revenue Department's Closing Argument*, Page 2.

Product of Taxpayer's Service

Pinpointing the product of Taxpayer's service is critical because the nature of the final product will determine how and where it is delivered. The New Mexico Supreme Court has recognized that "the 'product' [of a service] is the 'direct result' or 'consequence' flowing from the service." *See TPL, Inc.*, 2003-NMSC-007, ¶12 *citing TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2000-NMCA-083, ¶13, 129 N.M. 539, 10 P.3d 863. As in *TPL*, the Hearing Officer will ascertain the "product of the service" by identifying the benefit the buyer received for the consideration paid. *See TPL, Inc.* 2003-NMSC-007, ¶12 *citing ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶11, 125 N.M. 244, 959 P.2d 969.

The evidence established that Taxpayer's clients paid for reports containing information that would inform and aid its decision-making processes. Whatever action the client took next in reference to a prospect was mostly irrelevant so long as that action was informed by Taxpayer's product. However, if the result was to pursue a lease with Taxpayer's assistance, then a subsequent product for the consideration paid was the benefit of utilizing Taxpayer's research and resources to communicate with interested parties with the objective of obtaining a lease for property rights. Obviously, not every attempt to secure a lease would be successful, so the final product of Taxpayer's lease acquisition services cannot necessarily be measured by the number of fully executed leases. However, the Hearing Officer concurs with Taxpayer in finding that the product of its services was reports, leases, or at a minimum, the effort devoted to acquiring a lease, even if that effort was unsuccessful.

The Hearing Officer is unpersuaded by the Department's characterization of Taxpayer's services as the procurement and management of independent contractor landmen, or the performance of administrative tasks necessary to support the work of those landmen. Taxpayer's clients required and paid for title reports and when applicable, assistance in the acquisition of leases.

Place of Initial Use

At this juncture, the Department's perception of the product of Taxpayer's service re-focuses on the location of the subject prospect in New Mexico. It argues that "[e]ven if the product of Taxpayer's services is interpreted to be the reports/leases, the 'initial use' of those is in New Mexico, and logically cannot be anywhere else." *See Taxation and Revenue Department's Closing Argument*, Page 5.

The New Mexico Supreme Court has explained that Section 7-9-57, "provides New Mexico businesses with a deduction from the gross receipts tax for services provided to out-of-state buyers. *Businesses are not eligible for the deduction, however, if the out-of-state buyer either makes initial use or takes delivery of the 'product of the service' in New Mexico*." *See TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶1, 133 N.M. 447, 64 P.3d 474 (Emphasis Added). Conversely, delivery of the product of the service or initial use must be made outside of New Mexico. The terms "initial use" or "initially used" mean "the first employment for the intended purpose[.]" *See* NMSA 1978, Section 7-9-3 (I) (2007).

The Department, admittedly relying on *dicta* in *TPL*, argues that initial use should be "imputed [to New Mexico] when real property is located within the state[,]" even if its owner were out-of-state. *See Taxation and Revenue Department's Closing Argument*, Page 5. The Department relies on the following statement from *TPL*, 2003-NMSC-007, ¶23:

> We do not agree that a buyer's use within the state can be imputed from the presence of personal property shipped into the state, as it

> can when real property is located within the state. An out-of-state buyer does not automatically make initial use or take delivery of services within New Mexico when services are performed upon its personal property sent to New Mexico. To the extent that [*Reed v. Jones*, 1970-NMCA-050, 81 N.M. 481, 468 P.2d 882] suggests otherwise, we now clarify that the buyer must perform some identifiable activity within the state that constitutes initial use or acceptance of delivery.

However, the Hearing Officer is not persuaded that *TPL* intended this statement to apply in the manner the Department suggests under these circumstances. The Department in *TPL* was arguing that "a buyer who is not personally present within the state and has no employees or agents within the state can still make initial use or take delivery of the product of service within the state." The Department in *TPL* relied on several examples of nonresidents engaging New Mexico businesses to provide services on their property in New Mexico. The Court summarized those examples, which in each instance involved a New Mexico business hired to provide services to an out-of-state buyer on real property owned by the buyer in New Mexico: lawn mowing services; a plumber hired to remove a clog from a sink; a carpet cleaning service hired to remove dirt from a carpet; a landscaping service hired to remove a tree from outside a home; or a crew hired to remove asbestos from a building. *See TPL*, 2003-NMSC-007, ¶21.

Yet, *TPL* explained "the key factor in any of these scenarios is the necessity that the services be performed upon the real property within New Mexico. The property owner, even if not personally present in New Mexico, would take delivery of the service at his or her real property within New Mexico, and would make use of the service, either personally or through an agent, at the real property in New Mexico." *See TPL*, 2003-NMSC-007, ¶21.

In this case, however, Taxpayer's clients do not own the prospects subject of their inquiries, and, unlike the examples in *TPL*, Taxpayer is not performing services *on real property owned, or even leased, by a client*. It is researching public title records, sometimes in person or sometimes

remotely, communicating with property owners sometimes located in New Mexico, but not always, or assisting with other tasks necessary for securing leasing rights for its clients, from wherever a field landman happens to be located. Taxpayer is not excavating land, surveying boundaries, drilling wells, maintaining structures, or providing other types of services on real property in New Mexico owned or even leased by its clients. For this reason, the Department's reliance on the quoted passage from *TPL* is unavailing. As Taxpayer suggests, if its clients already owned or leased the prospects subject of their inquiries, then its title or lease acquisition services would be wholly unnecessary to those clients. *See Taxpayer's Response to Department's Closing Statement*, Page 4.

In any event, the Department claims that Regulation 3.2.215.11 (B) NMAC supports its position stating that even if review and acceptance occurs outside of New Mexico, the initial use may only occur in New Mexico because it is directly tied to land in New Mexico. The example cited by the Department provides:

> X, an architect, prepares in New Mexico plans for a construction project to be built in New Mexico. On completion of the plans, X delivers the plans outside of New Mexico to the project owner for the owner's review and acceptance. After accepting the plans, the owner delivers the plans to the construction contractor who uses the plans during the construction of the project in New Mexico. Since the intended purpose of architectural plans is to serve as instructions for construction of a project, the initial use of the plans occurred when the contractor used the plans during the actual construction of the project in New Mexico. Therefore, X's receipts for preparing architectural plans for a construction project to be built in New Mexico are not deductible under the provisions of Section 7-9-57 NMSA 1978.

This example fails to reinforce the Department's position because the objective of any title report was to inform a decision that was made from a client's out-of-state headquarters, and reports were initially used for that intended purpose. Clients did not merely "review or accept" the reports from their out-of-state locations and then return them to New Mexico for use, as presented in the example. Instead, the client's review satisfied the intended purpose of the report by informing the

decision that the client's executive team would make from its out-of-state headquarters.

If the services involved acquisition of leasing rights, then the product of Taxpayer's service was to support the client's undertaking through various means facilitating acquisition of the lease. The support was delivered to the location where the benefit could be enjoyed, usually to the company headquarters and company landman. If lease acquisition efforts were successful, then the result might be acquisition of a lease vesting the client with legal authority to exercise control over whatever rights were conferred by the lease. *See e.g. Quantum Corp. v. State Taxation & Revenue Dep't*, 1998-NMCA-050, ¶9, 125 N.M. 49, 956 P.2d 848; *Cutter Flying Serv. v. Prop. Tax Dep't*, 1977-NMCA-105, ¶ 14, 91 N.M. 215, 572 P.2d 943. However, surely not all lease acquisition efforts would succeed, in which case the final product might be viewed only as the effort, even if unsuccessful, that was devoted to the acquisition. But, in scenarios where leases were successfully acquired, mere possession of the rights conferred by those leases should qualify as initial use in the places from which the client's possessed their authority to exercise control. Subsequent actions exerting the rights conferred by the lease would constitute subsequent uses.

The fact that the products of Taxpayer's services might be joined to land in New Mexico does not necessarily establish the basis to impose gross receipts tax on Taxpayer, as the Department suggests without any significant legal analysis. Consider the regulatory example of a writer who drafted a manuscript about deer hunting in New Mexico, which was purchased by an out-of-state publisher. *See* Regulation 3.2.215.10 (B) NMAC. The example concludes by stating the writer's receipts would be deductible upon proper documentation. The example does not assert that because the manuscript is relevant *only to hunting deer in New Mexico*, and is therefore also tied to land in New Mexico, that the initial use of the product of the service should be imputed to New Mexico, and the writer should owe gross receipts tax. Yet, deer hunting in New Mexico similarly shares a

connection to the land in New Mexico.

The Hearing Officer finds this example to be instructive, particularly with respect to the suggestion that the connection to land in New Mexico should be the prevailing factor in determining whether receipts derived from prospects in New Mexico are deductible. The hypothetical writer, similar to Taxpayer, performed a service, the product of which was delivered out of New Mexico for its initial use for its intended purpose. The hypothetical buyer of that product, similar to Taxpayer's clients, then utilized that product to derive some financial gain from a natural resource in New Mexico. The Department's position fails for inconsistency to the extent it claims Taxpayer's services should be taxable because of their connection to land in New Mexico, but the hypothetical writer's services, which also share a connection to land in New Mexico, should be deductible.

The evidence established to the satisfaction of the Hearing Officer, that Taxpayer's clients retained Taxpayer to research and report title information on prospects. The products of Taxpayer's services were subsequently delivered out-of-state where the client relied on the product to make informed decisions regarding New Mexico prospects, or in the case of a lease, enjoyed possession of the rights it conferred, or in the case of an unsuccessful acquisition, the benefit of Taxpayer's effort. Taxpayer was therefore entitled to a deduction under Section 7-9-57, and there was no basis to deny the deduction under the circumstances due to a perceived connection to the land.

NTTCs or Other Evidence Acceptable to the Secretary

The Department maintained that Taxpayer's claim to a deduction under Section 7-9-57 could not overcome its perceived lack of NTTCs or "other evidence acceptable to the secretary." Although it is accurate that the Taxpayer did not present any NTTCs at the hearing, that does not establish that it failed to present "other evidence acceptable to the secretary" at the time of the audit. Department Ex. D-014 appears to substantiate the Department's satisfaction with the quality of

Taxpayer's documentation by conceding in April of 2017 that adjustments were reasonable for out-of-state clients based on documents the auditor explained were "available" and "provided" to the Department. *See* Department Ex. D-014 (Entry 4/5/17). At no subsequent time did the Department assail the adequacy or reliability of those documents, nor contradict itself by stating that the records which it once found to be acceptable were in fact no longer "acceptable to the secretary."

Likewise, for reasons previously discussed, it was also entirely reasonable for Taxpayer at the hearing to rely on its many spreadsheets to establish the locations of its clients and the locations to which the products of its services were delivered. Yet again, Taxpayer's spreadsheets under the circumstances presented by this protest are permitted under the rules of evidence in both our state and federal district courts. *See* NMRA 2020, Rule 11-1006; USCS Fed Rules Evid R 1006. The spreadsheets were trustworthy and reliable and essentially substituted for the records the Department asserts were lacking, consistent with Rule 11-1006. Had the Department held the slightest apprehension about their reliability, then it surely would have introduced evidence to illustrate the basis for its concerns, or even object. That, however, did not happen.

Taxpayer's summaries, given their established foundation as well as the lack of any dispute regarding their trustworthiness and reliability also satisfy the requirements of Regulation 3.2.215.10 (A) NMAC on their own accord. That regulation explains " 'other evidence acceptable to the secretary' includes invoices, contracts, photostatic copies of checks and letters which show that the sale is to an out-of-state buyer and which indicate that the initial use of the product of the service did not occur in New Mexico." Although the examples provided by the regulation to not explicitly reference spreadsheets such as those proffered in this case, the Hearing Officer noted the Department's use of "include" which Black's Law Dictionary, 531 (9th ed. 2009), defines as "[t]o contain as a part of something." It continues to explain that "[t]he participle *including* typically

indicates a partial list" and that "some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing." (Emphasis in Original).

Consistent with that definition, New Mexico courts and numerous other jurisdictions have also recognized that:

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' is usually a term of enlargement, and not of limitation. It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated."

*See Mechant Bank & Trust Co. v. Meyer (In re Estate of Corwin)*, 1987-NMCA-100, ¶3, 106 N.M. 316, 317, 742 P.2d 528, 529, *quoting 2A N. Singer, Sutherland Statutory Construction Section* 47.07 (Sands 4th ed. 1984); *citing Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941); *Smyers v. Workers' Comp. Appeals Bd.*, 157 Cal.App.3d 36, 203 Cal.Rptr. 521 (1984); *Schwab v. Ariyoshi*, 58 Hawaii 25, 564 P.2d 135 (1977); *Janssen v. Janssen*, 331 N.W.2d 752 (Minn.1983).

As previously discussed, the spreadsheets underpinning Taxpayer's protest include all details essential to establishing Taxpayer's entitlement to a deduction, and also permits an auditor, or the Hearing Officer under the present circumstances to filter and sort data in order to view receipts deriving from services sold and delivered to out-of-state buyers. This is equivalent to the sort of detailed accounting referenced in Regulation 3.2.215.10 (C) (1) (c) NMAC, but on a larger scale.

The Department through its cross examination of Ms. Couch acknowledged that it possessed a sample of Taxpayer's invoices and selected one invoice, presumably at random, which Ms. Couch easily located in the spreadsheets and discussed in detail. The Department did not subsequently express any concerns or communicate any irregularities or errors between that invoice and its

corresponding entry in the spreadsheet, which the Hearing Officer perceived as further validation of the spreadsheet's accuracy. *See* Record of Hearing, Part 2 of 2, 00:51:00 – 00:57:30.

The Hearing Officer was persuaded that Taxpayer provided other evidence that should have been satisfactory to the secretary, and which the Department, in fact, did accept. For a second time, Taxpayer provided "other evidence [that should have been] acceptable to the secretary" in the form of its detailed spreadsheets which itemized the facts upon which its entitlement to a deduction under Section 7-9-57 should rest, the accuracy of which was never in dispute. The Department's arguments directed at the lack of NTTCs or "other evidence acceptable to the secretary" are not well taken.

In-State Presence of Client/Buyer

The Department also suggested through its examination of Ms. Griego that delivery of a product of services might also be imputed to New Mexico if the client entity maintained a business location in New Mexico. Although the Department devoted little effort to developing this argument, the Hearing Officer will nevertheless point out that Regulation 3.2.215.12 (B) NMAC speaks quite clearly to that possibility. That regulation demonstrates that the critical factor is not whether a taxpayer has a presence in the state, but the location where the product of the service was delivered and initially used for its intended purpose. In other words, a taxpayer would not be disqualified from obtaining the deduction if a buyer maintained an office in New Mexico so long as the product of the service was delivered outside of New Mexico where the buyer made its initial use for its intended purpose.

Beneficiaries of Section 7-9-57

Finally, the Department asserts that Taxpayer is not entitled to the benefit of a deduction under Section 7-9-57 because it is not an intended beneficiary of the deduction. Again, the argument

is unsupported by any significant legal analysis or other evidence. Taxpayer responded that Department's understanding of the Legislature's intentions is misinformed and mistaken.

New Mexico does not maintain a state-sponsored system for the recordation of legislative history. For that reason, New Mexico courts have abstained from divining what legislators read, heard, or thought as they deliberated any particular item of legislation, and have instructed that "[i]f the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history." *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶30, 125 N.M. 401, 962 P.2d 1236.

In construing a statute, the primary focus is to ascertain and give effect to the intent of the legislature. "Our interpretation of legislative intent comes primarily from the language used by the legislature, and we will consider the ordinary meaning of such language unless a different intent is clearly expressed." *See Roberts v. Sw. Cmty. Health Servs.*, 1992-NMSC-042, ¶12, 114 N.M. 248, 837 P.2d 442.

Referring to the ordinary meaning of the language contained in Section 7-9-57, it is readily apparent that the Legislature did not single out categories of taxpayers which it thought should benefit from the deduction under Section 7-9-57 or conversely disqualify others. Taxpayer's entitlement to the deduction should not be curtailed by restrictions the Legislature did not explicitly and clearly include in the law. As such, there is no basis on which to conclude that Taxpayer is not an intended beneficiary and should therefore be disqualified from eligibility for the deduction when it has otherwise satisfied all other elements of the law.

This construction not only adheres to the longstanding and well-established rules of our courts in cases such as *Wing Pawn Shop* and *TPL*, but it also reflects "a fair, unbiased, and reasonable construction" consistent with *Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7,

82 N.M. 97, 476 P.2d 67. Clearly, had the Legislature intended to disqualify any class of taxpayers, it would have done so. The Hearing Officer declines to read into the statute language that the Legislature did not itself include, especially when the law makes sense as written." *See Cmtys. for Clean Water v. N.M. Water Quality Control Comm'n*, 2018-NMCA-024, ¶14, 413 P.3d 877.

**Construction of NMSA 1978, Section 7-9-13.1 and Section 7-9-3.5.**

Although the Department perceives the primary issue in this protest as deriving from Section 7-9-57, Taxpayer's protest also relies on the application of NMSA 1978, Sections 7-9-13.1 and 7-9-3.5.

When read in isolation, Section 7-9-3.5 (A) (1) establishes that services performed outside New Mexico are taxable when the product of the service is initially used in New Mexico. However, that portion of the definition of gross receipts is generally regarded as applying only to services in the area of research and development since another statute, NMSA 1978, Section 7-9-13.1 (A), specifically *exempts* "from gross receipts tax the receipts from selling services performed outside New Mexico the product of which is initially used in New Mexico[,]" with the exclusion of "research and development services[.]" *See* NMSA 1978, Section 7-9-13.1 (B).

The Department has acknowledged the relationship between Section 7-9-3.5 and Section 7-9-13.1 on various occasions. In Regulation 3.2.1.18 (E) (1) NMAC, it stated that "[r]eceipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provisions of Section 7-9-13.1 NMSA 1978." As previously recognized, agency regulations interpreting a statute are presumed proper and are given substantial weight. *See Chevron U.S.A.*, 2006-NMCA-050, ¶16.

The Department has also distributed no less than two publications addressing the

relationship between NMSA 1978, Section 7-9-3.5 and Section 7-9-13.1. In *FYI-105 (Gross Receipts & Compensating Taxes: An Overview),* the Department summarized the general definition of "gross receipts" as "the total amount of money or other consideration received from selling property in New Mexico, leasing or licensing property employed in New Mexico, granting a right to use a franchise employed in New Mexico, performing services in New Mexico *or selling research and development services performed outside New Mexico the product of which is initially used in New Mexico*." *See* FYI-105, Rev. 05/18, Page 4 (Emphasis Added). This definition mostly adopted the statutory definition of "gross receipts" contained in Section 7-9-3.5, with obvious deviation for the purpose of incorporating the exemption contained in Section 7-9-13.1 (A).

Likewise, in *FYI-270 (Information on Research and Development),* the Department explained that "[r]esearch and development services performed outside New Mexico the product of which is initially used in New Mexico are subject to the gross receipts tax . . . *All other services performed outside New Mexico are exempt from the gross receipts tax (Section 7-9-13.1).*" *See* FYI-270, Rev. 3/14, Page 4 (Emphasis Added).

Accordingly, the Hearing Officer finds that the applicable statutes, regulations, and the Department's publications establish a definite and unambiguous rule that services performed outside New Mexico are exempt from the gross receipts tax, subject to an exception not germane to the facts of this protest because Taxpayers were not engaged in research and development. Consider Example 1 from FYI-270:

> A Colorado architectural firm with a branch office in Las Cruces, New Mexico has been hired by a New Mexico client to design a building in Raton, New Mexico. The Colorado firm performs all the work in Colorado and upon completion of the architectural plans, sends them to its New Mexico client. Because the service is performed outside New Mexico but the product of the service is initially used (that is, first employed for its intended purpose) in New Mexico, the Colorado firm does have gross receipts in New Mexico.

> Its receipts, however, are exempt from gross receipts tax under Section 7-9-13.1(A) NMSA 1978 because architectural design of a building is not a research and development service.

This example is comparable to scenarios in which Taxpayer's services are performed out-of-state and the product of the service is delivered in New Mexico, which momentarily shifts the Hearing Officer's attention back to Section 7-9-57 and the possibility that even if the products of Taxpayer's services were perceived as being delivered in New Mexico, because of their asserted connection to the land, Section 7-9-13.1 would nevertheless provide an exemption for the services that Taxpayer performed outside of New Mexico.

In any regard, the law clearly permits, and Taxpayer clearly established, entitlement to an exemption for services performed outside of New Mexico, even if the product of the service was initially used in New Mexico. *See* Section 7-9-13.1.

**The Correctness of the Assessment**

As explained, Taxpayer was entitled to the previously discussed deduction, exemption, and exclusion. The failure to adequately compute or credit those amounts is detrimental to the correctness of the Assessment.

Nevertheless, there are additional concerns which must also be addressed which similarly contradict the correctness of the Assessment. As previously discussed, Taxpayer disputes the way the Department extracted and interpreted invoice data from its spreadsheets. Ms. Couch credibly testified that in order to determine the location of services performed or delivery for initial use, the auditor only needed to refer to the location where the field landmen were based since that represented the location from which they performed services. Field landman locations were determined by referring to each field landman's IRS Form W-9 in each relevant year. Field landmen headquartered in New Mexico were presumed to also be performing services in New Mexico, and Taxpayer does not dispute the taxability of receipts from those services when the product of the

service was also delivered to New Mexico where it was initially used.

Out-of-state field landmen, on the other hand were presumed to be performing services from their out-of-state locations unless its invoices to the Taxpayer specified that costs had been incurred for travel to New Mexico. That would suggest that at least a portion of their services were performed in New Mexico. However, the Department interpreted travel to New Mexico as signifying that all services had been performed in New Mexico, rather than just a portion of services associated with the travel. Accordingly, the Department assessed gross receipts on 100 percent of the receipts even if only a fraction of the receipts were derived from services performed in New Mexico. Taxpayer, having concerns with the accuracy of the Department's methodology, encouraged it to review the more-detailed source data, but the Department declined. Taxpayer's request was not unreasonable, especially in light of the fact that Regulation 3.2.1.18 (C) NMAC permits the allocation of costs for identifying services performed in New Mexico and computing a corresponding amount of taxable receipts. *See* Regulation 3.2.1.18 NMAC.

Ms. Couch testified that it was imperative for the Department to evaluate the detailed invoices Taxpayer received from its field landmen, rather than rely solely on the invoices from Taxpayer to its clients. Invoices from field landmen specified details for the work performed on each individual prospect in contrast with invoices to Taxpayer's clients which aggregated data in a manner that obscured details necessary for a more precise tax computation. Ms. Couch credibly testified that she provided as much data as was requested and despite the best efforts of all involved, the Department may have overlooked, misunderstood, or disregarded feedback that could have aided its computations. For example, the Department may have unintentionally disregarded a significant amount of data because of an error filtering spreadsheet information. Yet, regardless of how the error occurred, this oversight represented an error that eventually merged with the final

audit and assessment.

Moreover, it appeared that in tax year 2010, the Department's auditor was unable to account for the difference between gross receipts reported on Taxpayer's Form PTE-A and receipts under NMSA 1978, Section 7-9-3.5 (A). The auditor assertedly resolved the difference by imputing additional gross receipts when the evidence established that the most accurate method of computing gross receipts was by reference to Taxpayer's records, not its Form 2010 PTE-A. As Ms. Couch explained, the amount reported as gross receipts on Taxpayer's PTE-As in 2010 was not accurate for the purpose of computing Taxpayer's gross receipts tax liability because the PTE-A included receipts from services performed out of state.

Based on the foregoing, Taxpayer established by a preponderance of the evidence that the Department's assessment was not correct. The evidence established errors or oversights that adversely effected the correctness of the audit and subsequent assessment. Moreover, Taxpayer demonstrated that its gross receipts tax liability could be accurately computed from its records, and did so in reliance on numerous spreadsheets, the reliability and accuracy of which was not disputed.

Taxpayer concedes that its taxable gross receipts are as follows, providing for all claimed exclusions, exemptions, and deductions, to which the Hearing Officer finds it should be entitled as discussed in previous sections: $259,548.58 in 2010; $623,655.13 in 2011; $553,361.34 in 2012; $175,164.25 in 2013; $65,194.44 in 2014; and $5,278.37 in 2015. [Taxpayer Ex. 14; *Taxpayer's Closing Argument*, Pages 8 – 9]

The Department's protest auditor, Ms. Griego, observed the testimony of every witness and from the Hearing Officer's perspective, appeared to diligently follow along with the discussion of all exhibits. When counsel for the Department asked her, whether based on Taxpayer's presentation of evidence, she believed any adjustments to the assessment could be warranted, she appeared to

carefully consider her response before candidly responding, "possibly, yes." *See* Record of Hearing, Part 2 of 2, 01:01:17. Although Ms. Griego's response to that question is not an admission that the Department's Assessment was incorrect, it does tend to acknowledge the reasonableness of the Taxpayer's position and its analysis with which the Hearing Officer agrees.

The Department did not re-establish the correctness of its assessment as provided by *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308.

Taxpayer's protest should be DENIED to the extent tax, interest, and penalty are due on those amounts of gross receipts it concedes are taxable and GRANTED with regard to all remaining issues.

**CONCLUSIONS OF LAW**

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

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

C. Taxpayer carries the burden to present countervailing evidence or legal argument to show that it is entitled to an abatement of an assessment. *See Casias Trucking*, 2014-NMCA-099, ¶8.

D. 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 Ltd., 2003-NMCA-021, ¶13.*

E. Taxpayer rebutted the statutory presumption of correctness that attached to the Assessment under NMSA 1978, Section 7-1-17.

F. The Department did not reestablish the correctness of the Assessment. *See MPC*

*Ltd.*, 2003-NMCA-021, ¶13.

G. Taxpayer is entitled to a deduction from gross receipts deriving from the sale of services to an out-of-state buyer under NMSA 1978, Section 7-9-57.

H. Taxpayer is entitled to an exemption from gross receipts for receipts derived from services performed outside the state, the product of which is initially used in New Mexico under NMSA 1978, Section 7-9-13.1.

I. Receipts from services both performed and delivered outside of New Mexico are excluded from gross receipts under NMSA 1978, Section 7-9-3.5.

For the foregoing reasons, Taxpayer's protest **IS DENIED** with respect to those amounts of gross receipts it concedes are taxable and **IS GRANTED** with respect to all other issues. Taxpayer shall be liable for gross receipts tax, interest, and penalty on the following amounts of gross receipts, with appropriate credit for amounts payments previously remitted: $259,548.58 in 2010; $623,655.13 in 2011; $553,361.34 in 2012; $175,164.25 in 2013; $65,194.44 in 2014; and $5,278.37 in 2015.

DATED: February 7, 2020

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

## NOTICE OF RIGHT TO APPEAL

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

## CERTIFICATE OF SERVICE

On February 7, 2020, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

*First Class Mail* *Interagency Mail*

INTENTIONALLY BLANK

John Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502