STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
FOUR CORNERS HEALTHCARE CORP
TO DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L1522048304

v. **AHO Case Number 18.03-072R, D&O #20-06**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On October 23, 2019, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits of the protest of Four Corners Healthcare Corporation ("Taxpayer") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Mr. Dennis A. Banning, Esq. (New Mexico Financial Law, P.C.) appeared on behalf of Taxpayer, accompanied by Mr. Travis Shumway who also testified on behalf of Taxpayer.

Mr. David Mittle, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department"), accompanied by Mr. Danny Pogan, protest auditor, who also appeared as a witness for the Department.

Taxpayer Exhibits Nos. 1 – 15 and Department Exhibit A were admitted into the evidentiary record by stipulation without objection. Taxpayer requested that exhibits identifying patients/clients be sealed in order to preserve and maintain client confidentiality. The Department did not object. The Administrative Hearings Office subsequently entered an order sealing Taxpayer Exhibit Nos. 2, 4, 5, 6, 7, 8, 9, 10, and 15.

The issues in the protest are: (1) whether receipts derived from services funded by a federal program, not Medicare, are deductible from gross receipts under NMSA 1978, Section 7-9-77.1 (2016); (2) whether Taxpayer is entitled to a deduction pursuant to NMSA 1978, Section 7-9-93

(2016); and (3) whether Taxpayer is entitled to an exclusion pursuant to NMSA 1978, Section 7-9-4 (2000) as implemented by Regulation 3.2.4.9 (D) NMAC. As expounded in greater detail below, the Hearing Officer determined that Taxpayer did not establish entitlement to its claimed exclusions, exemptions, and deductions from gross receipts and for that reason, it did not establish entitlement to a refund of taxes previously remitted to the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Witnesses

1. Mr. Travis Shumway is a founder and majority owner of Taxpayer, Four Corners Healthcare Corporation. [Direct examination of Mr. Shumway]

2. Mr. Danny Pogan is a protest supervisor and auditor. He has been employed by the Department for more than 25 years. [Direct Examination of Mr. Pogan]

3. Mr. Pogan was assigned to the above-referenced protest in February of 2018. [Direct Examination of Mr. Pogan]

Taxpayer's Business Background

4. Taxpayer is a licensed skilled nursing provider delivering nursing services to patients having medical conditions resulting from exposure to chemicals during their employment at laboratories and mining operations. [Direct examination of Mr. Shumway; Taxpayer Ex. 13]

5. Taxpayer's business activities relevant to the protest arose from services provided under the Energy Employees Occupational Illness Compensation Program Act ("EEOICPA"). [Direct Examination of Mr. Shumway; Taxpayer Ex. 11; 42 U.S.C. Section 7384 *et seq*.]

6. EEOICPA was enacted in October 2000. Part B of the EEOICPA, effective on

July 31, 2001, compensates current or former employees, or their survivors, of the United States Department of Energy ("DOE"), its predecessor agencies, and certain of its vendors, contractors and subcontractors, who were diagnosed with a radiogenic cancer, chronic beryllium disease, beryllium sensitivity, or chronic silicosis, as a result of exposure to radiation, beryllium, or silica while employed at covered facilities. [42 U.S.C. Section 7384 *et seq*.]

7. The EEOICPA also provides compensation to individuals, or their eligible survivors, awarded benefits by the Department of Justice under Section 5 of the Radiation Exposure Compensation Act ("RECA"). Part E of the EEOICPA (enacted October 28, 2004) compensates DOE contractor and subcontractor employees, eligible survivors of such employees, and uranium miners, millers, and ore transporters as defined by RECA Section 5, for any occupational illnesses that are causally linked to toxic exposures in the DOE or mining work environment. [42 U.S.C. Section 7384 *et seq*.]

8. Taxpayer is headquartered in Blanding, Utah. It was established in 2009 and began serving patients in 2010. [Direct Examination of Mr. Shumway]

9. Taxpayer presently serves patients in approximately 30 states. [Direct examination of Mr. Shumway]

10. Taxpayer extended its business operations into New Mexico in 2013 or 2014. [Direct examination of Mr. Shumway]

11. Taxpayer operated in New Mexico during all relevant times under a limited liability company. The limited liability company is a separate entity from Taxpayer. [Cross Examination of Mr. Shumway]

12. Taxpayer maintains offices in Grants and Shiprock, New Mexico, with the majority of its patients residing in the northwestern corner of the state and being served from the

Shiprock office. [Direct examination of Mr. Shumway]

13. Taxpayer is licensed by the New Mexico Department of Health to maintain and operate a Home Health Agency in New Mexico. [Direct Examination of Mr. Shumway; Taxpayer Ex. 13]

14. Taxpayer employs or contracts with nursing professionals licensed inside and outside New Mexico, but pursuant to the Nursing Licensure Compact, of which New Mexico is a participating state, nursing professionals licensed in other participating states may provide nursing services in New Mexico without the need to acquire a New Mexico nursing license. Other participating states include Colorado, Arizona, and Utah. [Direct examination of Mr. Shumway]

15. Taxpayer does not employ or contract with medical doctors. [Direct examination of Mr. Shumway]

16. Since all of the conditions for which Taxpayer's patients receive care are terminal, Taxpayer's nursing services are typically provided through the end of the patient's life. [Direct Examination of Mr. Shumway]

17. Taxpayer serves Navajo Nation members residing within the Navajo Nation, as well as non-Navajo Nation residents in non-tribal areas of the northwestern quadrant of the state. [Direct examination of Mr. Shumway]

18. Mr. Shumway estimates that 100 percent of Taxpayer's patients are Medicare beneficiaries, 65 years of age or older. However, Medicare prohibits patients from receiving overlapping and simultaneous benefits under both the EEOICPA and the Medicare program. For that reason, Taxpayer's services are compensated by EEOICPA, not Medicare, even if the patient may also be a Medicare beneficiary. [Direct Examination of Mr. Shumway; Taxpayer Ex. 15]

19. Billing Medicare and EEOICPA for overlapping services is "double dipping" and prohibited. [Direct Examination of Mr. Shumway]

20. Patients receiving services under EEOICPA are required to acknowledge that the United States Department of Labor will be billed for services provided instead of Medicare, other entities, or third parties. [Taxpayer Exs. 4 – 10]

21. Mr. Shumway estimates that approximately 90 percent or more of its patients are Navajo tribal members. [Direct examination of Mr. Shumway]

22. Not all of Taxpayer's employees or contractors, who provide home health services, are licensed registered or practical nurses. Taxpayer's employees or contractors include non-licensed personnel as well, such as home health aides or certified nursing assistants. [Cross Examination of Mr. Shumway]

23. Mr. Shumway was unable to recall how many people Taxpayer employed but suggested he would not be surprised if Taxpayer presently employed 22 individuals and maintained contracts with 200 or more independent contractors. [Cross Examination of Mr. Shumway]

24. Mr. Shumway perceives the care that Taxpayer provides as equivalent to hospice care and palliative care services. [Direct examination of Mr. Shumway]

Qualifying for Taxpayer's Services Under the EEOICPA

25. Taxpayer's patients must be qualified by the federal government to receive services by establishing that they were exposed to certain chemicals during their employment. [Direct examination of Mr. Shumway]

26. After a patient is qualified, Taxpayer will refer the patient to a medical doctor to evaluate the patient and prescribe a health care plan, which may or may not include receiving

home health care services. [Direct examination of Mr. Shumway]

27. Once Taxpayer receives a Letter of Medical Necessity ("LMN"), it submits the LMN along with other information to the federal government which then makes a final determination regarding the services for which a patient will be eligible. [Direct examination of Mr. Shumway]

28. After obtaining approval for services from the federal government, Taxpayer will formulate a specific care schedule in consultation with the patient reflecting the services for which the patient was approved. [Direct examination of Mr. Shumway]

29. The frequency of in-home care per patient will vary depending on an individual patient's needs and will typically continue until a patient's death barring unusual circumstances. [Direct examination of Mr. Shumway]

Taxpayer's Applications for Refund

30. Having concerns about its profit margin, Taxpayer conferred with other similar providers in New Mexico which allegedly reported that they were not paying taxes in New Mexico. Taxpayer then contacted an attorney who purported to have information that not only identified providers that were not paying taxes, but also purportedly verified that Taxpayer was the only such entity in New Mexico that was paying taxes. [Direct examination of Mr. Shumway]

31. Taxpayer thereafter communicated with its Utah accountant as well as several New Mexico accountants which purportedly advised that Taxpayer was "tax exempt." [Direct examination of Mr. Shumway]

32. Taxpayer thereafter communicated with various individuals at the Department until it made contact with a supervisor, Mr. Duane R. Spitzer. [Direct examination of Mr.

Shumway]

33. After several communications, Mr. Spitzer composed an email on November 16, 2016 to Mr. Shumway which stated the following:

> Upon review of your companies [sic] services to provide Medicare beneficiaries in New Mexico home health care in accordance with NM Statute 7-9-77.1 (E.) Receipts of a home health agency from payments by the United States government or any agency thereof for medical, other health and palliative services provided by the home health agency to Medicare beneficiaries pursuant to the provisions of Title 18 of the federal Social Security Act may be deducted from gross receipts. It is the Departments position that payments received from the federal Department of Labor for medical services provided by your home health agency to Medicare beneficiaries may be deducted from gross receipts.
>
> If you need any other assistance, please do not hesitate to contact me.
>
> [Direct examination of Mr. Shumway; Taxpayer Ex. 1]

34. Mr. Spitzer's email repeated almost verbatim a significant portion of NMSA 1978, Section 7-9-77.1 (E) (2016), chiefly with respect for his explanation that "[r]eceipts of a home health agency from payments by the United States government or any agency thereof for medical, other health and palliative services provided by the home health agency to Medicare beneficiaries pursuant to the provisions of Title 18 of the federal Social Security Act may be deducted from gross receipts." The quoted portion of Mr. Spitzer's email derived from a recently enacted amendment to the law that had become effective nearly two weeks earlier on November 1, 2016[1]. [Taxpayer Ex. 1]

[1] 2016 N.M. SB 6 was signed by the governor on October 19, 2016. The bill contained an emergency clause meaning that the bill would take immediate effect on that date, except for sections specified in Section 9 of SB 9 to which the Legislature provided different dates. It specified that if the act took effect after October 1, 2016, then the effective date of certain provisions, including the section containing the amendment to Section 7-9-77.1 would be the first day of the month following the date the act took effect. Therefore, because the bill took immediate effect on October 19, 2016, the effective date of the 2016 version of Section 7-9-77.1, presently in effect, was November 1, 2016. *See* https://www.nmlegis.gov/Sessions/16%20Special/ExecMessages/senate/SB0006GovMsg.pdf

35. Mr. Spitzer's email did not make reference to the fact that payments from the Department of Labor were not made pursuant to Title 18 of the Social Security Act. Taxpayer's receipts from payments are instead made pursuant to Title 42 of the Energy Employees Occupational Illness Compensation Program Act ("EEOICPA") which is administered primarily by the U.S. Department of Labor. [Taxpayer Ex. 1; Administrative Notice (42 U.S.C. 7384 *et seq*.)]

36. Taxpayer filed 19 Applications for Refund on June 7, 2017, accompanied by amended CRS-1 returns. The Applications sought refunds for all periods in which it allegedly overpaid tax beginning in January of 2014 through September of 2016:

a.	January 2014:	$17,981.78
b.	February 2014:	$31,687.86
c.	March 2014:	$24,034.33
d.	April 2014:	$34,491.24
e.	May 2014:	$62,081.77
f.	June 2014:	$29,883.97
g.	July 2014 – September 2014:	$134,673.75
h.	October 2014 – December 2014:	$121,986.90
i.	January 2015 – March 2015:	$123,046.79
j.	April 2015 – June 2015:	$99,265.73
k.	July 2015 – September 2015:	$154,585.45
l.	October 2015 – December 2015:	$41,985.52
m.	January 2016 – March 2016:	$132,482.96
n.	April 2016:	$51,860.74
o.	May 2016:	$27,413.63
p.	June 2016:	$77,596.91
q.	July 2016:	$33,852.80
r.	August 2016:	$57,816.08
s.	September 2016:	$68,614.89

[Taxpayer Ex. 11]

37. The Applications for Refund and the amended CRS-1 returns provide no underlying supporting source documentation. [Taxpayer Ex. 11]

38. The Applications for Refund were submitted in the name of Four Corners

Healthcare Corporation rather than the local limited liability company. [Cross examination of Mr. Shumway; Taxpayer Ex. 11]

39. The amounts sought for refund represent amount overpaid in New Mexico only, and do not include revenue generated from business activities in other states. [Cross examination of Mr. Shumway]

40. Taxpayer's Applications for Refund indicated as the bases for the refund that "[Taxpayer] receives payments from the United States Government Department of Labor EEOICPA and is exempt under section 7-9-77.1. These payments from the Department of Labor were included in our New Mexico Gross Receipts[.]" [Taxpayer Ex. 11]

41. Taxpayer's Applications for Refund asserted no other grounds for its requests for refund. [Taxpayer Ex. 11]

42. On or about, July 13, 2017, the Department made a request for additional information to which Taxpayer did not respond. The Department requested, "Detail records utilized to prepared monthly CRS-1 reports to include: Invoice date, invoice amount, full detail customer name. [T]otals should tie to the amended monthly CRS-1 Totals." The request specified a deadline of August 15, 2017. [Direct Examination of Mr. Pogan; Department Ex. A]

43. Mr. Shumway had no recollection of seeing the Request for Additional Information but did recall discussing it at or near the time it would have been received by Taxpayer. [Cross Examination of Mr. Shumway; Department Ex. A-001]

44. Mr. Shumway could not state with certainty whether Taxpayer responded to the Request for Additional Information but explained he would have been very disappointed if the request had been overlooked or disregarded. [Cross Examination of Mr. Shumway]

45. A variety of records could have been beneficial to the Department's review of

Taxpayer's refund applications, none of which were provided despite the specific request. [Direct Examination of Mr. Pogan]

46. Records that could have assisted the Department in evaluating Taxpayer's claim for refund might have included: documents establishing the source of Taxpayer's receipts; contracts; billing statements or forms such as Medicare 1500 Form; remittance vouchers, or other documents permitting the Department to confirm the reliability of Taxpayer's claims and computations. [Direct Examination of Mr. Pogan]

47. Medicare 1500 Form reports services provided, including the qualifications of the person providing the service, as well as other information including demographics and patient information. [Cross Examination of Mr. Shumway]

48. Taxpayer's Applications for refund, in the total amount of $1,325,343.10 were denied on August 29, 2017 under Letter ID No. L1522048304. The basis provided for the denial was the receipts upon which the refund was premised were not derived from payments to Medicare beneficiaries pursuant to Title 18 of the Social Security Act. [Taxpayer Ex. 12]

49. On or about November 22, 2017, Taxpayer submitted a Formal Protest stating that "[t]he Taxpayer was advised by the State that the claimed deductions from gross receipts for payment from federal Department of Labor for medical services provided by the company to Medicare beneficiaries may be deducted from gross receipts." [Administrative File; Direct examination of Mr. Shumway; Taxpayer Ex. 1; Taxpayer Ex. 3]

Evidence Presented at Hearing in Support of and in Opposition to the Refund

50. Taxpayer could not specify what percentage of its services, or gross receipts deriving from those services, were generated by individuals not licensed as registered nurses and practical nurses. [Cross Examination of Mr. Shumway]

51. Taxpayer's Application for Refund did not reflect any adjustments to indicate what percentage of its receipts were derived from performing services in New Mexico, not within the boundaries of the Navajo Nation. [Cross Examination of Mr. Shumway]

52. Taxpayer estimated without reference to any evidence in the record that receipts derived from services performed in New Mexico, not on the Navajo Nation, was approximately 10 percent of its total receipts. [Cross Examination of Mr. Shumway]

53. The cumulative amount of Taxpayer's requested refund might include receipts derived from services provided by non-licensed personnel, such as home health aides or certified nursing assistants. [Cross Examination of Mr. Shumway]

54. Although Taxpayer provided written statements from individuals verifying their enrollment in the Navajo Nation, the statements were undated and did not specify that the declarants received services from Taxpayer within the boundaries of the Navajo Nation during the periods of time relevant to the protest. [Taxpayer Ex. 2]

55. A comparison of Taxpayer Ex. 2 (27 statements of individuals verifying Navajo Nation membership) with Taxpayer Exs. 4 through 10 (executed Admission Service Agreements proffered in each relevant year) identified two members consenting to care/services in the periods 2014 through 2016. [Taxpayer Ex. 2.1; Taxpayer Ex. 2.22; Taxpayer Ex. 7.011; Taxpayer Ex. 8.005]

56. A comparison of Taxpayer Ex. 2 (27 statements of individuals verifying Navajo Nation membership) with Taxpayer Exs. 4 through 10 (executed Admission Service Agreements) identified 16 members consenting to care/services in the periods 2011 through 2013. [Taxpayer Ex. 2.2; Taxpayer Ex. 4.16; Taxpayer Ex. 2.3 and 2.9 (duplicate of Taxpayer Ex. 2.3); Taxpayer Ex. 6.005; Taxpayer Ex. 2.4; Taxpayer Ex. 6.003; Taxpayer Ex. 2.5;

Taxpayer Ex. 4.017; Taxpayer Ex. 2.7; Taxpayer Ex. 5.029; Taxpayer Ex. 2.8; Taxpayer Ex. 6.021; Taxpayer Ex. 2.10; Taxpayer Ex. 5.008; Taxpayer Ex. 2.13; Taxpayer Ex. 4.001; Taxpayer Ex. 2.15; Taxpayer Ex. 4.018; Taxpayer Ex. 2.16; Taxpayer Ex.4.012; Taxpayer Ex. 2.17; Taxpayer Ex. 4.005; Taxpayer Ex. 2.20; Taxpayer Ex. 5.003; Taxpayer Ex. 2.21; Taxpayer Ex. 5.018; Taxpayer Ex. 2.26; Taxpayer Ex. 5.034; Taxpayer Ex. 2.27; Taxpayer Ex. 4.009; Taxpayer Ex. 2.28 – 2.31; Taxpayer Ex. 5.026]

57. Although Taxpayer's patients may not simultaneously receive Medicare and EEOICPA benefits for home health care services, both programs are funded by the federal government. [Direct Examination of Mr. Shumway]

58. It could not be determined why the tax rates specified in Taxpayer's Amended CRS-1 Returns fluctuated or why it reported the occasional use of special codes. [Direct Examination of Mr. Pogan; Cross Examination of Mr. Shumway; Taxpayer Ex. 11]

59. Taxpayer Exhibits 2, and 4 – 11 are not exhaustive. Taxpayer has more patients than those who were identified in the stated exhibits. [Cross Examination of Mr. Shumway]

60. Taxpayer acknowledged that its exhibits did not provide sufficient information to compute tax due, although Mr. Shumway acknowledged that the computation could be accomplished with other documents that Taxpayer did not admittedly provide or introduce at the hearing. [Cross Examination of Mr. Shumway]

61. Should Taxpayer prevail in its protest, then a portion of its refund might be applied to satisfy potential tax liabilities incurred with the Navajo Nation. [Cross Examination of Mr. Shumway]

62. Taxpayer did not provide verification that all of its patients for which it claims services were provided on the Navajo Nation, were actually provided within the boundaries of

the Navajo Nation. [Cross Examination of Mr. Shumway]

63. The Department evaluates refund claims under the statute in effect at the time the Application for Refund is submitted for review. Therefore, Taxpayer requests for refund were evaluated under NMSA 1978, Section 7-9-77.1 (2016). [Direct Examination of Mr. Pogan]

64. Mr. Shumway's impression is that Taxpayer is "tax exempt" based on discussions he has had with competitors, tax attorneys, tax professionals and members of the community. [Direct Examination of Mr. Shumway]

65. Taxpayer was unaware of any specific exclusions, exemptions, or deductions for which any of its competitors may have claimed or received. [Cross Examination of Mr. Shumway]

66. Records provided by Taxpayer were insufficient to enable the Department to verify Taxpayer's asserted entitlement to any exclusion, exemption, or deduction. [Direct Examination of Mr. Pogan; Taxpayer Exs. 1 – 15]

Procedural History of Protest

67. Taxpayer's protest of the denial of its refund applications was acknowledged by the Department on February 12, 2018 under Letter ID No. L0488545072. [Administrative File]

68. The Department filed a Hearing Request on March 29, 2018 in which it requested a hearing to address scheduling issues relating to Taxpayer's protest. [Administrative File]

69. On March 30, 2018, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing which set an initial hearing to occur on April 20, 2018. [Administrative File]

70. An initial scheduling hearing was conducted on April 20, 2018. Neither party objected that the hearing satisfied the 90-day hearing deadline provided by NMSA 1978, Section

7-1B-8 (A) (2015). [Administrative File; Record of Hearing (4/20/2018)]

71. On April 23, 2018, 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 December 4, 2018. [Administrative File]

72. On October 29, 2018, Mr. Don F. Harris, Esq. and Mr. Dennis A. Banning (NM Financial Law, P.C.) entered their appearance on behalf of Taxpayer. [Administrative File]

73. On November 20, 2018, Taxpayer filed a Motion to Convert Merits Hearing requesting that the hearing on the merits of its protest be continued and that a scheduling hearing occur in its place. [Administrative File]

74. On November 26, 2018, the Administrative Hearings Office entered an Order Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing. A second scheduling hearing subsequently occurred on December 4, 2018. [Administrative File]

75. On December 6, 2018, the Administrative Hearings Office entered a Second Scheduling Order and Notice of Administrative Hearing. Among other deadlines, a hearing on the merits of Taxpayer's protest was set for June 17, 2019. [Administrative File]

76. On April 25, 2019, the Administrative Hearings Office entered an Order Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing. The order vacated the hearing previously set for June 17, 2019 due to unanticipated circumstances, and set a third scheduling hearing to occur on May 15, 2019. [Administrative File]

77. On May 16, 2019, the Administrative Hearings Office entered a Third Scheduling Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the merits of Taxpayer's protest for October 23, 2019. [Administrative File]

78. On October 2, 2019, Taxpayer filed Position Statement for Merits Hearing

(hereinafter "Taxpayer's Prehearing Statement"). [Administrative File]

79. On October 2, 2019, the Department filed Department's Prehearing Statement. [Administrative File]

80. On November 1, 2019, the Administrative Hearings Office entered a Post Hearing Scheduling Order. [Administrative File]

81. On November 21, 2019, the parties filed a notice that they had stipulated to an agreement to extend the deadlines for their closing briefs. [Administrative File]

82. On November 27, 2019, Taxpayer filed its Post-Hearing Brief and a Motion to Supplement Record with Affidavit of Mr. Shumway. [Administrative File]

83. On December 10, 2019, the Department filed Department's Motion to Strike and Response Brief. The Motion to Strike opposed Taxpayer's Motion to Supplement filed on November 27, 2019. [Administrative File]

84. Taxpayer, as of entry of this Decision and Order did not respond to the Department's Motion to Strike, filed December 10, 2019. [Administrative File]

85. On March 6, 2020, the Administrative Hearings Office entered an Order Sealing Exhibits which formalized Taxpayer's unopposed request that exhibits identifying its clients be sealed. [Administrative File]

DISCUSSION

This protest originated from diverging views on whether Taxpayer was entitled to a deduction from gross receipts deriving from services provided pursuant to the EEOICPA under NMSA 1978, Section 7-9-77.1 (2016). That analysis begins with the plain meaning of the language of the statute and must eventually contemplate the effect of Mr. Spitzer's email of November 16, 2016 (Taxpayer Ex. 1).

The analysis will also consider the application of two other statutes, raised for the first time 21 days before the hearing and more than 22 months after filing its Formal Protest. *See* Taxpayer's Prehearing Statement. Those statutes are NMSA 1978, Section 7-9-4 (2010), as implemented by Regulation 3.2.4.9 (D) NMAC, and NMSA 1978, Section 7-9-93 (2016). The Hearing Officer does not call out the delay with the intention to criticize, but to emphasize that the delay may have deprived both parties of the opportunity to fully develop the record in reference to Taxpayer's alternative claims based on those statutes. This is particularly critical to Taxpayer's position since, as will be discussed momentarily, it is the one bearing the burdens of proof and persuasion.

There is minimal dispute regarding the general facts. Taxpayer is a home health agency engaged in business in New Mexico. The specific source of revenue relevant to this protest derives from services provided to individuals qualifying for home health services under the EEOICPA, administered by the United States Department of Labor.

Taxpayer by virtue of the geographic area in which it engages in business, serves a significant number of Native American patients on tribal lands, particularly the Navajo Nation. However, it also provides services under the EEOICPA to native and non-native patients on non-tribal lands. Although a significant segment of Taxpayer's clients might also be Medicare beneficiaries, the services central to this protest are not provided by Medicare nor delivered pursuant to Title 18 of the Social Security Act.

Taxpayer asserts entitlement to refunds for gross receipts taxes paid over a period of 33 months in the total amount of $1,325,343.10 on receipts derived from services provided pursuant to the EEOICPA.

Burden of Proof.

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), the term "gross receipts" is broadly defined to mean:

> [T]he 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.

"Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." *See* NMSA 1978, Section 7-9-3.3 (2003). Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that *all receipts* of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2002). Despite the general presumption of taxability of an entity engaged in business in New Mexico, taxpayers may also reduce their tax liability by asserting entitlement to the benefits of various deductions, exemptions, or exclusions.

Our courts have long adhered to the rule that tax statutes "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 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447; *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly).

Yet, *Wing Pawn Shop* also cautions that "[o]nce it is determined that a tax is applicable, after allowing for any statutory deduction, the statute permitting the deduction must be narrowly, yet reasonably construed. 'A tax statute must also be given a fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered.'" *See Wing Pawn Shop*, 1991-NMCA-024, ¶16 (*quoting Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67).

Misquotations of Law

As a preliminary observation, the Hearing Officer noted that Taxpayer's quotations of various statutes in Taxpayer's Closing Argument as well as in Taxpayer's Prehearing Statement reproduced prior versions of the law that were no longer in effect at the time Taxpayer filed its Applications for Refund, particularly with regard to Sections 7-9-77.1 and 7-9-93 which were both amended by Senate Bill 6 during the Second Special Session of 2016.

Because Taxpayer agreed that there was no dispute that the statute governing this protest was the version currently in effect, the Hearing Officer will presume that any misquotations of the statue were mere scrivener's error. [Record of Hearing: 01:43:15 – 01:47:00; 01:47:25 – 01:48:05; 02:41:50 – 02:43:12]. Accordingly, the Hearing Officer will construe Taxpayer's legal arguments under the current law, to the extent possible. If any argument relies on a provision that is clearly no longer in effect, then the argument as to that specific provision is rejected.

Application of NMSA 1978, Section 7-9-77.1 (2016)

From June 7, 2017 until October 2, 2019, Taxpayer's sole basis for relief stemmed from Section 7-9-77.1 (2016). Although Taxpayer's legal briefing asserted relief under Subsections A and E under the previous version of the law, the Hearing Officer will consider Taxpayer's claims

only under Subsection E of the current version of the statute. Subsection A in its present form is clearly not applicable because it applies only to the receipts of "health care practitioners" as defined at Section 7-9-77.11 (I) (3), which does not include home health agencies. Subsection E states:

> E. Receipts of a home health agency from payments by the United States government or any agency thereof for medical, other health and palliative services provided by the home health agency to medicare beneficiaries pursuant to the provisions of Title 18 of the federal Social Security Act may be deducted from gross receipts.

Taxpayer emphasizes that the receipts of the home health agency may derive from "any agency" of the federal government. Taxpayer is clearly correct in that regard, yet there is more to consider. Taxpayer further asserts that the receipts are deductible even if they are not derived from the Medicare program itself, so long as the receipts are derived from services provided to a Medicare beneficiary.

Although Taxpayer's interpretation may seem reasonable at first blush, it fails to give full effect to the phrase, "pursuant to the provisions of Title 18 of the federal Social Security Act." When given effect, that phrase not only requires that the receipts be derived from services provided for the benefit of Medicare beneficiaries, but also paid "pursuant to the provisions of Title 18 of the federal Social Security Act."

Otherwise stated, in order to reach the conclusion Taxpayer promotes, one must disregard the phrase "pursuant to the provisions of Title 18 of the federal Social Security Act" rendering Taxpayer's receipts deductible so long as they derive from "any agency" of the federal government for the benefit of a Medicare beneficiary, even if the service was not a Medicare benefit, such as with services provided pursuant to the Energy Employees Occupational Illness Compensation Program Act, a program not established or administered pursuant to Title 18 of the federal Social Security Act. It is instead established and administered pursuant to 42 U.S.C.

Section 7384, *et seq*.

Taxpayer's interpretation sidesteps several well-established and longstanding rules directing the methods by which tax statutes are to be construed. For example, statutes "must be construed so that no part of the statute is rendered surplusage or superfluous." *See Katz v. N.M. Dep't of Human Servs., Income Support Div.*, 1981-NMSC-012, ¶18, 95 N.M. 530, 624 P.2d 39. For that reason, the Hearing Officer is not at liberty to minimize or disregard any part of the statute and must give effect to the phrase, "pursuant to the provisions of Title 18 of the federal Social Security Act." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶7, 107 N.M. 540, 760 P.2d 1306 (statutes should be read in their entirety and each part construed with each and every other part "to produce a harmonious whole.").

In this case, the phrase "pursuant to the provisions of Title 18 of the federal Social Security Act" means that it is not enough to qualify for the deduction that the receipts derive from an agency of the federal government for the benefit of a Medicare beneficiary. The receipts must also be derived through Title 18 of the federal Social Security Act. Had that not been the Legislature's intention, then it could have omitted the entire phrase "pursuant to…" and relied solely on the term "Medicare" since that proper noun has become so engrained in our vernacular that one only need to apply the plain meaning rule to decipher the Legislature's intent when it used it. To illustrate, Meriam-Webster defines "Medicare" as "a government program of medical care especially for the aged." *See* "Medicare." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/Medicare. Accessed 28 Feb. 2020.

Therefore, because the term "Medicare" is capable of standing on its own and speaking for itself, the Legislature intended the subsequent phrase, "pursuant to…" to impose an additional requirement that the payments for the services provided to Medicare beneficiaries also

derive from a particular source, specifically Title 18 of the federal Social Security Act. Otherwise the phrase, "pursuant to the provisions of Title 18 of the federal Social Security Act" is rendered surplusage and superfluous.

The problems with Taxpayer's interpretation are further emphasized when evaluating its potential consequences. For example, Taxpayer's interpretation would exponentially expand the availability of the deduction to any receipts derived from federal government expenditures for any purpose so long as they were expended for the benefit of someone that is a Medicare beneficiary, whether or not the service is related to Medicare. That result is absurd because it effectively obliterates the intent of the Legislature as exemplified in the plain language of the statute to limit the deduction for receipts derived from a particular source for specified purpose. Yet, statutes are not to be construed in a manner that will defeat the purpose of the enactment or produce an absurd result. *See Padilla v. Montano*, 1993-NMCA-127, ¶23, 116 N.M. 398, 862 P.2d 1257. Moreover, Taxpayer's interpretation represents a construction that strictly construes the statute in favor of Taxpayer contrary to longstanding and well-established precedent that tax statutes should be construed strictly in favor of the taxing authority. *See Sec. Escrow Corp*, 1988-NMCA-068, ¶ 8, 107 N.M. 540, 760 P.2d 1306

Taxpayer presents reasonable questions underlying the policy of the Legislature, such as, "Why would the New Mexico legislature want to tax one source of benefits but not the other, when both sources come from the federal government?" *See* Taxpayer's Closing Argument, Page 4. However, those arguments are best left for the Legislature. "[I]t is not the business of the courts to look beyond the plain meaning of the words of a clearly drafted statute in an attempt to divine the intent of the Legislature." *See State v. Ellenberger*, 1981-NMSC-056, ¶6, 96 N.M. 287, 629 P.2d 1216. Instead, "[t]he intent of the Legislature is to be sought first in the meaning

of the words used, and when they are free from ambiguity no other means of interpretation should be resorted to." *See Arnold v. State,* 1980-NMSC-030, ¶11, 94 N.M. 381, 610 P.2d 1210.

In this case, the Legislature's policy considerations are embodied in its enactment, and the enactment is free from ambiguity. Not only does this construction faithfully adhere to our courts longstanding rules of statutory construction, but it also remains true to the well-established rule that "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Sec. Escrow Corp.*, 1988-NMCA-068, ¶8.

The Hearing Officer observed that Taxpayer's Closing Argument, at least with respect for its arguments relating to issues of statutory construction, cited no authority contradicting conclusions thus far reached. "When a party cites no authority for a proposition, we assume that, after a diligent search, it was unable to find authority for support." *See State Human Rights Comm'n v. Accurate Mach. & Tool Co.*, 2010-NMCA-107, ¶12, 149 N.M. 119, 245 P.3d 63.

This conclusion now requires that the effect of Mr. Spitzer's email be considered. Taxpayer argues that the email from Mr. Spitzer to Mr. Shumway should bind the Department in this protest, to Taxpayer's interpretation of the law.

The first point to consider is whether Taxpayer should be afforded statutory estoppel against the Department. NMSA 1978, Section 7-1-60 states:

> In any proceeding pursuant to the provisions of the Tax Administration Act, the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose or *in accordance with any ruling addressed to the party personally and in writing by the secretary*, unless the ruling had been rendered invalid or had

> been superseded by regulation or by another ruling similarly addressed at the time the asserted liability for tax arose.
>
> [Emphasis Added]

Taxpayer did not assert that its reliance was grounded on any regulation in effect at any relevant time. Instead, it asserted that its reliance was grounded on the statement contained in Mr. Spitzer's email which it proclaimed should be afforded the weight of a "ruling". However, the Legislature's use of the term "ruling" was not without thoughtful consideration. NMSA 1978, Section 9-11-6.2 (B) (2) states that "rulings shall be written statements of the secretary, of limited application to one or a small number of persons, interpreting the statutes to which they relate, ordinarily issued in response to a request for clarification of the consequences of a specified set of circumstances."

Perhaps without more, Mr. Spitzer's email might conceivably come within that definition, along with thousands of other communications from the Department to taxpayers on numerous subjects relating to state taxation. However, the Legislature did not intend for just any communication to be afforded the weight of a ruling. Section 9-11-6.2 (C) established specific requirements that must be satisfied in order for a statement to be afforded the weight of a "ruling," and therefore become binding on the Department.

Section 9-11-6.2 (C) requires, "[t]o be effective, any ruling or regulation issued by the secretary shall be reviewed by the attorney general or other legal counsel of the department prior to being filed as required by law, and the fact of the review shall be indicated on the ruling or regulation." *See also* Regulation 3.1.2.8 NMAC. Since Mr. Spitzer's email lacks these formalities, it clearly falls short of the requirements that would afford it the binding effect of a ruling under Section 7-1-60. Therefore, Mr. Spitzer's email represents neither a regulation nor a ruling and is

excluded from the categories of communications that would carry any binding effect under Section 7-1-60, noting that the statute is explicitly applicable to regulations and rulings only.

In the alternative, Taxpayer argues that if the email is not to be afforded the weight of a ruling, then it should be afforded the weight of an instruction, pointing out that instructions are presumed to be proper implementations of the law under NMSA 1978, Section 9-11-6.2 (G). This argument fails to persuade as well. Instructions are defined as "other written statements or directives of the secretary or secretary's delegate *not dealing with the merits of any law* but otherwise in aid of the accomplishment of the duties of the secretary." *See* NMSA 1978, Section 9-11-6.2 (B) (4) (Emphasis Added). First, there was no evidence to establish that Mr. Spitzer was the "secretary's delegate." Second, even if he was, Mr. Spitzer's email deals with the merits of the law.

However, perhaps the most significant observation regarding Mr. Spitzer's email is not what is states, but what it lacks, which is any suggestion that he possessed a precise and accurate understanding of the underlying facts. Mr. Spitzer appears to assume that receipts from the U.S. Department of Labor under the EEOICPA are payments made pursuant to Title 18 of the Social Security Act. However, the evidence clearly established that is not the case. In fact, as Mr. Shumway explained, seeking compensation under Title 18 of the Social Security Act for services provided under the authority of the EEOICPA is strictly prohibited. This observation leads to considering whether Taxpayer has potentially established entitlement to its refund through equitable estoppel.

The first step in evaluating the application of equitable estoppel is to simply recognize that its availability is uncertain in administrative proceedings. *See e.g. AA Oilfield Serv. v. N.M. State*

Corp. Comm'n, 1994-NMSC-085, ¶18, 118 N.M. 273, 881 P.2d 18 (equitable remedies are not part of the "quasi-judicial" powers of administrative agencies).

However, even if equitable estoppel were available in the context of an administrative proceeding, courts are reluctant to apply the doctrine against the state in cases involving the assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr.*, 1989-NMSC-015, ¶9, 108 N.M. 228, 770 P.2d 873. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." Yet in no circumstances may estoppel lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

In order for Taxpayer to establish equitable estoppel against the Department, Taxpayer must show that (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶26, 136 N.M. 440, 99 P.3d 690.

This is where the observation of the accuracy of the statement made in Mr. Spitzer's email becomes significant, because if he failed to demonstrate an accurate understanding of the facts, then a claim for equitable estoppel fails upon the first element in *Kilmer*. However, even if Mr. Spitzer's email were read as Taxpayer's suggested, it still fails to establish a claim for relief under the doctrine of equitable estoppel.

Kilmer also requires that Taxpayer show "*affirmative misconduct* on the part of the government." *See Kilmer*, 2004-NMCA-122, ¶26 (Emphasis Added). In addition to the lack of any evidence to establish that the Department had an accurate comprehension of the relevant

facts, there is also a palpable lack of evidence to suggest affirmative misconduct by any employee of the Department with whom Taxpayer communicated.

Therefore, the evidence is insufficient to establish any entitlement to statutory or equitable estoppel. However, even if Taxpayer's evidence on the issues of statutory or equitable estoppel was more persuasive, Taxpayer would still not be entitled to the relief it seeks because estoppel may not lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi*, 1993-NMSC-028, ¶18-19. As previously stated, Section 7-9-77.1 (E) (2016) requires that receipts be derived "pursuant to Title 18 of the federal Social Security Act." In this case, relevant receipts were derived through the EEOICPA, pursuant to 42 U.S.C. 7384 *et seq*., and Mr. Spitzer's email may not be construed in a manner that essentially re-writes the law to provide relief that is not already expressly provided.

Relief Under NMSA 1978, Section 7-9-93 (2016)

On October 2, 2019, Taxpayer raised for the first time, entitlement to a deduction under Section 7-9-93 (2016). As previously noted, Taxpayer concurred that the version of Section 7-9-93 relevant to its Applications for Refund would be the statute enacted and operative in 2016. In summary, Taxpayer's Applications for Refund were subsequently submitted for consideration, denied and protested in 2017.

Although the Administrative Hearings Office previously held *In the Matter of the Protest of HealthSouth Rehabilitation*, Decision and Order No. 16-16 (non-precedential), that entities such as home health agencies were entitled to a deduction under the previous version of Section 7-9-93 (2007), the statute relevant to that protest was significantly amended in 2016 to limit availability of its deduction to the receipts of a "health care practitioner."

The current version of Section 7-9-93 (A) (2016) provides no deduction for the receipts of a home health agency, even if it employs or contracts with health care practitioners. It states in relevant part:

> *Receipts of a health care practitioner* for commercial contract services or medicare part C services paid by a managed health care provider or health care insurer may be deducted from gross receipts if the services are within the scope of practice of the health care practitioner providing the service. Receipts from fee-for-service payments by a health care insurer may not be deducted from gross receipts.
>
> [Emphasis Added]

Section 7-9-93 (C) (3) (2016) thereafter continues to define the term "health care practitioner." A review of the definition reveals that entities such as home health agencies are excluded. Although it is true that Taxpayer may employ or contract with health care practitioners. The plain meaning of the statute nevertheless requires that the receipts eligible for deduction be the receipts of the health care practitioner, not the receipts of the entity that employed or contracted with them as previously permitted under the prior version of the law, as concluded by *HealthSouth*.

The Hearing Officer will not reinterpret Taxpayer's citations to the prior version of a statute as asserting that the prior statute should apply. Taxpayer concurred at the hearing that the statute enacted in 2016 and presently in effect, governed the outcome of its protest in reference to this specific claim, a position that is consistent with the rule that absent some explicit directive from the Legislature, the law in effect at the time of the relevant event will govern. *See Gea Integrated Cooling Tech. v. State Taxation & Revenue Dep't*, 2012-NMCA-010, ¶11, 268 P.3d 48; *Owens v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-37892, (Ct. App. Nov. 26, 2019) (non-precedential). "A statute does not operate retroactively just because it is applied to facts and conditions existing on its effective date, even though the condition results from events that

occurred prior to its enactment." *See Gea*, 2012-NMCA-010, ¶8. Taxpayer has not established right or entitlement to a deduction under Section 7-9-93 (2016).

Relief Under NMSA 1978, Section 7-9-4 (2010) and Regulation 3.2.4.9 (D)

On October 2, 2019, Taxpayer amended its protest to include a claim for relief under Section 7-9-4 and Regulation 3.2.4.9 (D) NMAC. Section 7-9-4 simply states:

> A. For the privilege of engaging in business, an excise tax equal to five and one-eighth percent of gross receipts is imposed on any person engaging in business in New Mexico.
>
> B. The tax imposed by this section shall be referred to as the "gross receipts tax".

Taxpayer's primary assertion under this statute arises from Regulation 3.2.4.9 (D) NMAC which in relevant part exempts certain receipts derived from performing services sold "to an Indian tribe or member thereof on that tribe's territory … if taxation of such receipts is prohibited by federal law." *See* Regulation 3.2.4.9 (D) (1) NMAC. The Department does not necessarily quarrel over the potential application of its regulation, but asserts that Taxpayer has nevertheless failed to carry its burden by proffering reliable and trustworthy evidence capable of establishing the amount of any refund to which Taxpayer should be entitled upon application of Subsection D of Section 3.2.4.9 NMAC.

Regulation 3.2.4.9 (D) (2) NMAC states "[t]he seller of the services must demonstrate that the service is sold to an Indian tribe or member thereof. The seller must also demonstrate that the service is performed on the tribe's territory. The documents demonstrating that the receipts are not subject to tax under Subsection D of Section 3.2.4.9 NMAC shall be retained in the seller's records." The first observation is that there is no evidence to establish that the Navajo Nation or any of its members are the buyers of Taxpayer's services. In contrast, the buyer of Taxpayer's services is the U.S. Department of Labor. However, setting this observation

momentarily aside, the Hearing Officer nevertheless finds that Taxpayer's claims to relief under Regulation 3.2.4.9 (D) (2) are undermined by its lack of adequate documentation.

For example, Taxpayer may establish the first element "by obtaining a statement signed by the purchaser that the purchaser is an Indian tribe or member thereof." In this regard, Taxpayer provided 27 statements from individuals stating their status as enrolled members of the Navajo Nation and providing their tribal census numbers. However, Taxpayer also acknowledged that the statements represented a mere sample of individuals to whom services were provided and were not exhaustive. In fact, there is nothing in the record on which to determine the true number of tribal members receiving services on tribal land.

Moreover, and more significantly, the value of the statements is diminished because they are undated and provide no method of computing the sum of receipts generated from services performed for those members within the boundaries of the Navajo Nation.

The second requirement "may be met if the seller keeps records adequate to document that the services are performed on the purchaser's tribe's territory." This is where the sufficiency of Taxpayer's records unquestionably falters because the majority of Taxpayer's records fail to reliably establish the location where Taxpayer provided services. For example, the principal category of record upon which Taxpayer relies is the Admission Service Agreement (Taxpayer Exs. 4 – 10). Yet, those agreements do not necessarily prove that services were actually provided or any means to compute the amount of receipts generated from those services. Even the location at which the services were provided is questionable because, in many cases, the addresses in the agreements were post office boxes. Once again, Taxpayer acknowledged that the agreements represented only a sample, and were not exhaustive. Taxpayer provided agreements for 76 individuals between 2011 and 2017, of which 20 were executed during the relevant periods.

Taxpayer attempted to alleviate the potential perception that the records it relied upon at the hearing were inadequate by offering to gather additional evidence to substantiate its claims, but the purpose of the hearing was not to conduct discovery. That opportunity had long since passed. In fact, the Department had requested detailed documents as far back as July of 2017, but Taxpayer never acted (Department Ex. A).

Despite observing several shortcomings with respect for the records provided, the most significant obstacle to Taxpayer's claims were that they failed to provide any means to compute the sum of receipts generated from services sold to the Navajo Nation or to members of the Navajo Nation, and provided within the boundaries of the Navajo Nation. This is a critical computation because the sum would represent the precise amount of Taxpayer's potential exclusion. Even though Mr. Shumway's testimony was generally credible, his estimate of the percentage of services performed within the boundaries of the Navajo Nation was speculative at best, not to mention that the buyer of the services was the U.S. Department of Labor, not the Navajo Nation or any of its members.

The best method of computing its liability was observance of NMSA 1978, Section 7-1-10 (A) (2007) which requires taxpayers to maintain records that will permit the accurate computation of state taxes, which would necessarily include records permitting the computation of applicable deductions, exemptions, or exclusions.

Taxpayer has not established, based on the totality of the evidence proffered, any entitlement to deductions, exemptions, or exclusions under Regulation 3.2.4.9 (D) (1) NMAC.

Federal Pre-Emption and
Sufficiency of the Evidence

At the conclusion of the hearing, Taxpayer requested the opportunity to submit briefing regarding the potential effect of federal preemption. Taxpayer claimed, with respect to the facts

underlying its protest that the "Department is in effect … pre-empting federal law and imposing New Mexico gross receipts on exempt receipts."

Clearly, if any part of the Gross Receipts and Compensating Tax Act conflicted with, or frustrated the EEOICPA, as Taxpayer suggested, then the state law must yield to the supreme law of the land. *See CSX Transp. v. Easterwood*, 507 U.S. 658, 663 (1993).

The general rule is that the historic police powers of the states will not be superseded, or preempted, by any federal act unless that was the clear and manifest purpose of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) *citing Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926); *See also Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 345 (1994).

The purpose of Congress may be ascertained in various ways. In ideal circumstances, Congress will merely state its intentions and purposes. However, this may not always occur in which courts may infer intent under various conditions. The first circumstance is where Congress has legislated so comprehensibly within an area that it has left no room for the state to supplement federal law. The second circumstance is where the state law conflicts with the federal law, making it impossible to comply with both, or creating an obstacle to the execution and accomplishment of congressional objectives embodied in the federal law. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989).

In this protest, there is no suggestion that Congress *expressly* preempted the New Mexico Gross Receipts and Compensating Tax Act. Taxpayer does not direct the Hearing Officer's attention to any language in the EEOICPA which directly or indirectly prohibited the imposition of any tax on the receipts of persons engaged in the business of providing services pursuant to the EEOICPA.

Other than the conclusory statement that taxpayer is engaged in a field of business "heavily regulated by the U.S. government" (Taxpayer's Closing Argument, Page 8), there is also nothing in the record on which to find that providing services pursuant to the EEOICPA is so heavily regulated that there is no room for the state's imposition of tax in New Mexico. Moreover, there is simply nothing in the record to suggest circumstances in which state law conflicts with federal law, creating the impossibility of complying with both, or creating an obstacle to the execution and accomplishment of congressional objectives embodied in the federal law. In other words, the imposition of tax under these facts does not create an obstacle to qualified individuals obtaining services under the EEOICPA.

Momentarily surmising that Taxpayer's primary concern relates not to a conflict between the EEOICPA and the Gross Receipts and Compensating Tax Act, but to the Department's purported desire to tax services provided to Navajo Nation members on Navajo Nation lands, Taxpayer's citation to *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, (1982) is unavailing. The situation at hand is clearly distinguishable from that in *Ramah* where the Court observed that the ultimate burden of the tax fell on the tribal organization. In this case, however, the burden of the tax falls on Taxpayer. There is no evidence to suggest that the burden of the tax has shifted in any manner to the Navajo Nation, any other tribal organizations in the areas served by Taxpayer, or their members. *See Ramah*, 458 U.S. 832 at 844. As the Department emphasizes, imposition of the gross receipts tax does not affect the quality of services any native or non-native individual will receive, nor increase financial burdens on any person or entity, except Taxpayer. That burden on Taxpayer, however, is imposed on all persons engaging in business in New Mexico. *See* Section 7-9-5.

In any event, regardless of the legal issue. Taxpayer's records are insufficient for accurately and reliably computing Taxpayer's liability and the amount of any resulting refund even if the Taxpayer successfully argued that Department's ability to tax services under these facts should be curtailed by federal law.

Taxpayer has the burden to establish by a preponderance of evidence its precise tax liability, and in doing so the amount of any refund to which it asserts entitlement. However, none of the records Taxpayer relied upon enabled the Department prior to the hearing, nor the Hearing Officer at the present time, the ability to accurately compute Taxpayer's gross receipts tax liability and the amount of any refund to which Taxpayer could be entitled. It is not the Department's burden to proof the amount of Taxpayer's refund. That burden has always rested upon Taxpayer.

Taxpayer's Motion to Supplement Record

On November 27, 2019, Taxpayer filed a Motion to Supplement the record with an affidavit. According to Taxpayer's motion, the affidavit was intended to introduce new evidence "without the need for filing additional documentation in the case." *See* Motion to Supplement, Page 1, Para. 3. The Department filed a Motion to Strike on December 10, 2019. Taxpayer did not file a response to the Department's Motion to Strike.

The Hearing Officer hereby denies the motion. On November 1, 2019, the Hearing Officer prepared and entered a Post-Hearing Scheduling Order which established deadlines for the parties to submit written legal arguments on two discreet issues.

The Post-Hearing Scheduling Order explicitly stated:

> IT IS FURTHER ORDERED that neither Taxpayer's post-hearing brief nor any response filed by the Department may exceed 15 pages, excluding a signature block and certificate of service. *The parties shall not reference facts not already in evidence, nor*

attempt to introduce new evidence. Reference to facts not in evidence shall be disregarded, and new evidence not already existing in the record of the hearing shall be summarily excluded.

[Emphasis Added]

Moreover, the Hearing Officer had previously explained that unless there was some agreement by the parties to supplement the record, that fairness required that any request to introduce new evidence at such a late stage in the protest should be denied. [01:40:40]. Since there was no stipulation among the parties for the submission of new evidence, because the Department opposed Taxpayer's Motion to Supplement, and because Taxpayer did not respond to the Department's Motion to Strike, the Hearing Officer agreed that Taxpayer's Motion to Supplement should be, and hereby is, DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of its Application for Refund, 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 protests under NMSA 1978, Section 7-1B-8 (2015).

C. A tax statute must be given a fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered. *Wing Pawn Shop*, 1991-NMCA-024, ¶16 (*quoting Chavez v. Comm'r of Revenue*, 1970-NMCA-15 116, ¶7, 82 N.M. 97, 476 P.2d 67)

D. Receipts deriving from services provided to Medicare beneficiaries, but compensated by the U.S. Department of Labor under the EEOICPA are not deductible under NMSA 1978, Section 7-9-77.1 (2016).

E. Receipts from service provided under the EEOICPA are not deductible under NMSA 1978, Section 7-9-93 (2016) because Taxpayer is not a "health care practitioner" as that term is defined at Section 7-9-93 (C) (3) (2016).

F. Every taxpayer shall maintain books of account or other records in a manner that will permit the accurate computation of state taxes under NMSA 1978, Section 7-1-10 (A).

G. Taxpayer's records were insufficient to establish entitlement to any deduction, exemption or exclusion under Regulation 3.2.4.9 (D) NMAC.

For the foregoing reasons, Taxpayer's protest **IS DENIED**.

DATED: March 6, 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 March 6, 2020, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interdepartmental Mail*

INTENTIONALLY BLANK IN DIGITAL COPY

John Griego
Legal Assistant
Administrative Hearings Office
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