



1 correctness of its assessments, or in the alternative, whether Taxpayer overcame the  
2 presumption; (2) whether imposition of civil penalty was proper, and if so, whether  
3 Taxpayer is entitled to any abatement; and (3) whether any portion of the assessment is  
4 precluded by the statute of limitations. As explained in greater detail in the subsequent  
5 discussion, the Hearing Officer determined that the Department is entitled to a presumption  
6 of correctness that Taxpayer did not rebut; that the Department acted within its authority in  
7 imposing penalty and that Taxpayer did not establish entitlement to any abatement; and that  
8 no portion of the assessment is precluded by the statute of limitations. Underlying the  
9 Hearing Officer's conclusions in each of these areas was a palpable lack of credible and  
10 trustworthy evidence in support of Taxpayer's claims. Therefore, Taxpayer's protest  
11 should be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

## 12 **FINDINGS OF FACT**

### 13 Procedural History

14 1. On June 28, 2018, the Department issued a Notice of Assessment of Taxes  
15 and Demand for Payment under Letter ID No. L1041624880 in the total amount of  
16 \$452,726.71 comprised of corporate income tax in the amount of \$277,399.00, interest in  
17 the amount of \$36,603.21 in interest, and a civil fraud penalty in the amount of  
18 \$138,724.50 for the periods from December 31, 2010 through December 31, 2016.  
19 [Administrative File]

20 2. On June 28, 2018, the Department issued a Notice of Assessment of Taxes  
21 and Demand for Payment under Letter ID No. L0634339120 in the total amount of  
22 \$634,511.36 comprised of withholding tax in the amount of \$24,450.97, withholding tax  
23 interest in the amount of \$3,320.51, gross receipts tax in the amount of \$361,375.97,

1 gross receipts tax interest in the amount of \$52,450.10, and civil fraud penalty in the amount of  
2 \$192,913.81 for the periods from January 31, 2010 through June 30, 2017. [Administrative File]

3 3. On June 28, 2018, the Department issued a Notice of Assessment of Taxes and  
4 Demand for Payment under Letter ID No. L2115366704 in the total amount of \$1,319.46  
5 comprised of workers compensation fee in the amount of \$490.20, workers compensation fee  
6 interest in the amount of \$79.26, and a civil fraud penalty in the amount of \$750.00 for the  
7 periods from March 31, 2010 through June 30, 2017. [Administrative File]

8 4. The total amount of tax, interest, and penalty due under the assessments was  
9 \$1,088,577.53 comprised of \$663,716.14 in tax, \$332,388.31 in penalty, and \$92,453.08 in  
10 interest. [Administrative File]

11 5. On September 27, 2018, the Department received Taxpayer's formal protest of all  
12 the assessments accompanied by numerous attachments. [Administrative File]

13 6. On October 15, 2018, the Department acknowledged under Letter ID No.  
14 L0988557488, the Taxpayer's protest of the assessment issued under Letter ID No.  
15 L1041624880. [Administrative File]

16 7. On October 15, 2018, the Department acknowledged under Letter ID No.  
17 L1641664688, the Taxpayer's protest of the assessment issued under Letter ID No.  
18 L0634339120. [Administrative File]

19 8. On October 15, 2018, the Department acknowledged under Letter ID No.  
20 L1054462128, the Taxpayer's protest of the assessment issued under Letter ID No.  
21 L2115366704. [Administrative File]

22 9. On November 30, 2018, the Department filed a request for a scheduling hearing  
23 in reference to the protests of assessments L1041624880, L0634339120, and L2115366704.

1 [Administrative File]

2 10. On December 4, 2018, the Administrative Hearings Office entered a  
3 Notice of Telephonic Scheduling Hearing setting a scheduling hearing for December 19,  
4 2018. [Administrative File]

5 11. On December 17, 2018, Taxpayer filed a Motion to Vacate Telephone  
6 Hearing Scheduled for December 19, 2018. Taxpayer expressly and unconditionally  
7 waived the 90-day hearing deadline under NMSA 1978, Section 7-1B-8 in order to  
8 facilitate its request for a continuance.[Administrative File]

9 12. On December 19, 2018, the Administrative Hearings Office entered a  
10 Continuance Order and Notice of Telephonic Scheduling Hearing. [Administrative File]

11 13. A Telephonic Scheduling Hearing was held on January 4, 2019. On  
12 January 8, 2019, the Administrative Hearings Office entered a Notice of Second  
13 Telephonic Scheduling Hearing which set a second scheduling hearing on June 14, 2019.  
14 [Administrative File]

15 14. On June 14, 2019, the Administrative Hearings Office entered a  
16 Scheduling Order and Notice of Administrative Hearing which in addition to establishing  
17 various deadlines, set a hearing on the merits of Taxpayer's protest for October 31 –  
18 November 1, 2019. [Administrative File]

19 15. On September 19, 2019, Taxpayer submitted a request for hearing on a  
20 Motion for an Order to Vacate Hearings [sic] Scheduled for October 29, 30, and 31, 2019  
21 [sic]. The request was accompanied by a proposed notice, an unsigned motion bearing the  
22 title provided in the request for hearing, and a police report in reference to an alleged  
23 commercial burglary. [Administrative File]

1           16.     Taxpayer alleged in its request for continuance, filed September 19, 2019, that its  
2 offices had been burglarized and that several computers containing relevant records had been  
3 stolen. [Administrative File]

4           17.     On October 18, 2019, the Administrative Hearings Office entered an Order  
5 Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing which set a  
6 scheduling hearing for October 30, 2019. [Administrative File]

7           18.     On October 30, 2019, the Administrative Hearings Office entered a Second  
8 Scheduling Order and Notice of Administrative Hearing which in addition to establishing various  
9 deadlines, set a hearing on the merits of Taxpayer's protest for February 24 – 26, 2020.  
10 [Administrative File]

11           19.     On December 4, 2019, the Administrative Hearings Office entered an Amended  
12 Second Scheduling Order and Notice of Administrative Hearing which served to alert the parties  
13 to a change in the location of the hearing. No other changes were made to the previously  
14 established order. [Administrative File]

15           20.     On February 3, 2020, Taxpayer filed Taxpayer Behles Law Firm PC's Prehearing  
16 Statement. [Administrative File]

17           21.     On February 4, 2020, the Department filed its Prehearing Statement.  
18 [Administrative File]

19           22.     On February 6, 2020, Taxpayer filed its Motion to Enter Judgment Against the  
20 New Mexico Taxation and Revenue Department [P]ursuant to Second Scheduling Order and  
21 Notice of Administrative Hearing Entered on October 30, 2019. [Administrative File]

22           23.     On February 14, 2020, the Department filed Department's Response to  
23 Taxpayer's Motion to Enter Judgment. [Administrative File]

1           24.    On February 18, 2020, the Administrative Hearings Office entered an  
2 Order Denying Taxpayer’s Motion Filed February 6, 2020. [Administrative File]

3           25.    On February 19, 2020, the Department filed its Amendment to Prehearing  
4 Statement. [Administrative File]

5           26.    On February 19, 2020, Taxpayer filed Taxpayer[’]s Reply to Department  
6 Response to Motion to Enter Judgment and Motion to Strike Amended Prehearing  
7 Statement Served February 19, 2020. [Administrative File]

8           27.    On February 20, 2020, the Department filed Department’s Response to  
9 Taxpayer’s Motion to Strike. [Administrative File]

10          28.    On February 20, 2020, Taxpayer filed Taxpayer[’]s Reply to TRD  
11 Response to Motion to Strike. [Administrative File]

12          29.    On February 21, 2020, the Administrative Hearings Office conducted a  
13 hearing and entered an Order Denying Taxpayer’s Motion Filed February 19, 2020.  
14 [Administrative File]

15          30.    On February 25, 2020, the Administrative Hearings Office entered a Post  
16 Hearing Scheduling Order setting the deadlines for the submission of written closing  
17 arguments and late-filed exhibits. [Administrative File]

18          31.    On March 26, 2020, Taxpayer filed its written closing argument.  
19 [Administrative File]

20          32.    On April 24, 2020, the Department filed The Department’s Closing  
21 Argument. [Administrative File]

22          33.    On May 8, 2020, Taxpayer filed its [Reply] to Department[’]s Closing  
23 Response Argument. [Administrative File]

Witnesses

1  
2           34.     Ms. Cabrini Sanchez is employed by the Department as a Tax Audit Supervisor.  
3 Ms. Sanchez did not directly perform the audit of Taxpayer, but supervised the work of the  
4 auditor who did, Ms. Josefina Lucero.<sup>1</sup> She has been with the Department for more than 18  
5 years. [Direct Examination of Ms. Sanchez]

6           35.     Ms. Sanchez has a degree in accounting from the College of Santa Fe. [Direct  
7 Examination of Ms. Sanchez]

8           36.     Ms. Mary Griego is employed by the Department as a protest auditor. She has  
9 been employed in that capacity since 2012 and has been involved in the protest from its  
10 inception. [Direct Examination of Ms. Griego]

11           37.     At all times relevant to the protest, Ms. Jennie Behles was an attorney licensed in  
12 the State of New Mexico. [Direct Examination of Ms. Behles]

13           38.     Mr. Robert J. Walley was an employee of Taxpayer. He managed the office and  
14 performed all accounting tasks including reporting and payment of taxes. [Direct Examination of  
15 Mr. Walley]

16           39.     Mr. Walley does not possess any expertise in the areas of state or federal taxation.  
17 [Cross Examination of Mr. Walley]

18           40.     Ms. Behles and Mr. Walley are married. [Direct Examination of Ms. Behles;  
19 Direct Examination of Mr. Walley]

20           41.     Despite being knowledgeable regarding their obligations to report and pay taxes  
21 [Direct Examination of Ms. Behles; Direct Examination of Mr. Walley], Mr. Walley and Ms.

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<sup>1</sup> As of the date of the hearing, Ms. Lucero had changed her surname to Salcido. However, in order to retain consistency with the underlying facts and avoid potential for confusion, the Hearing Officer will continue to refer to her as Ms. Lucero since all material facts involving Ms. Lucero refer to her by that name.

1 Behles have not filed federal or state personal income tax returns since 2009. [Direct  
2 Examination of Ms. Griego; Dept. Ex. D-010]

3 *Taxpayer Business and Tax Filing History*

4 42. At all relevant times, Taxpayer was a law firm established as a  
5 professional corporation under the laws of the State of New Mexico. As of February 2,  
6 2020, its corporate status remained active with the New Mexico Secretary of State.  
7 [Taxpayer Ex. 13 (Business ID No. 2265395)]

8 43. Taxpayer registered for a CRS-1 identification number on August 23,  
9 2002 and reported a business start date of August 15, 2002. Taxpayer subsequently  
10 reported its gross receipts on CRS-1 reports filed from September 2002 through October  
11 2010 and withholding tax from September 2002 through September 2010. [Dept. Ex. F-1]

12 44. Taxpayer's mailing address at all relevant times has remained P.O. Box  
13 7070, Albuquerque, NM 87194-7070. [Cross Examination of Mr. Walley]

14 45. Ms. Behles was primarily responsible for Taxpayer's law practice. Mr.  
15 Walley was primarily responsible for Taxpayer's office management tasks, including  
16 billing, accounting, recordkeeping, and tax reporting and payment. [Direct Examination  
17 of Ms. Behles; Direct examination of Mr. Walley]

18 46. Ms. Behles was not involved with Taxpayer's business operations,  
19 including maintenance of books, records, or accounting. [Direct Examination of Mr.  
20 Walley]

21 47. Mr. Walley had prior experience in the management of liquor serving  
22 establishments, but not in businesses engaged in providing legal services. [Direct  
23 Examination of Mr. Walley]



1           48.     Mr. Walley admitted that he had neither reported Taxpayer's gross receipts nor  
2 paid associated gross receipts tax since October 2010. [Direct Examination of Mr. Walley; Direct  
3 Examination of Ms. Griego; Dept. Ex. A; Dept. Ex. D-001 – D-002]

4           49.     There was similarly no record of Taxpayer reporting corporate income or paying  
5 associated corporate income tax in any relevant year despite the fact that Taxpayer had been  
6 registered with the Department since August 23, 2002 . [Direct Examination of Ms. Griego;  
7 Dept. Ex. B; Dept. Ex. D-003 – D-005; Dept. Ex. F]

8           50.     Taxpayer did not report employee withholdings from October 2010 through June  
9 2017. [Direct Examination of Ms. Griego; Dept. Ex. D-005 – D-007]

10          51.     There was similarly no record of Taxpayer paying worker's compensation fees in  
11 any relevant year. [Direct Examination of Ms. Griego; Dept. Ex. C; Dept. D-007 – D-008]

12          52.     Although Taxpayer remained an active corporation as of February 2, 2020,  
13 Taxpayer ceased conduct of business in April of 2018. It was succeeded by an entity called BLF,  
14 LLC, a single member limited liability company in which Ms. Behles was the single member.  
15 BLF, LLC was the entity through which Ms. Behles intended to practice law after Taxpayer  
16 ceased operations. [Direct Examination of Ms. Behles; Taxpayer Ex. 13 (Business ID No.  
17 5664578)]

18          53.     Mr. Walley did not file anything that could be characterized as a final tax return  
19 after Taxpayer ceased operating stating that he did not believe it would be necessary. [Direct  
20 Examination of Mr. Walley]

21          54.     Ms. Behles was under the impression that Subchapter S returns were being filed  
22 since that would have been an expected requirement of Taxpayer's creditors. [Direct  
23 Examination of Ms. Behles; Taxpayer Ex. 10]



1 were exacerbated by a bad ankle. [Direct Examination of Ms. Behles]

2 57. During the same period of time, Mr. Walley underwent treatment for prostate and  
3 skin cancer, meaning that from 2010 through 2017 and even through 2019, Mr. Walley was  
4 similarly absent from the office for substantial periods of time due to his health conditions.

5 [Direct Examination of Ms. Behles]

6 58. During the same period of time, in about 2011, Mr. Walley's mother was  
7 diagnosed with Alzheimer's disease requiring institutionalization. Ms. Behles' mother who lived  
8 in Nebraska was similarly institutionalized around the same period of time and died in 2018.

9 [Direct Examination of Ms. Behles]

10 59. Despite various health and other personal issues effecting both Ms. Behles and  
11 Mr. Walley during the audit period, Ms. Behles never sought assistance from a tax professional  
12 because she assumed that Mr. Walley was appropriately handling all tax reporting and payment  
13 responsibilities. [Cross Examination of Ms. Behles]

14 60. Despite her assumption that Mr. Walley was reporting income or receipts and  
15 paying applicable tax, Ms. Behles also attributed Taxpayer's lack of reporting and payment to  
16 Mr. Walley's asserted inability to comply with the Department's electronic filing requirements.

17 [Direct Examination of Ms. Behles]

18 61. Mr. Walley admitted that CRS-1 reports were not made after 2010 attributing the  
19 failure to file to two bouts of cancer and other "great trauma" he was experiencing at the time  
20 including the deaths of a brother, a nephew, a sister-in-law, and his mother's dementia. [Direct  
21 Examination of Mr. Walley]

22 62. Mr. Walley also maintained that he was unable to electronically report income or  
23 receipts and make payments of applicable tax because the systems necessary to do so were

1 unavailable to him, whether at home or in the hospital, and that the Department was  
2 nonresponsive to his requests for assistance. [Direct Examination of Mr. Walley]

3 63. Nevertheless well aware of Taxpayer's tax obligations, Mr. Walley  
4 asserted that he intended to file when he had the time. [Direct Examination of Mr.  
5 Walley; Cross Examination of Mr. Walley]

6 64. Prior to November 2010, Mr. Walley filed CRS-1 reports in paper form.  
7 He recalled the Department implementing mandatory electronic filing in 2010 or 2011  
8 which caused further difficulties in filing reports or making payments. Assistance, he  
9 perceived, was difficult to obtain and he had limited access to computers, particularly  
10 when he was away from the office for medical reasons. [Direct Examination of Mr.  
11 Walley]

12 65. The Department mailed non-filer letters to Taxpayer from November of  
13 2010 through the end of the audit period. [Direct Examination of Ms. Sanchez; Dept. Ex.  
14 F]

15 66. From 2003 to 2013, the Department also sent Taxpayer "non-filer,  
16 recomputation notice, assessment, statement of account with non-filers, return  
17 assessment, lien and levy, return assessment, abatement, and compliance letters" which  
18 should have alerted Taxpayer to its state of noncompliance. [Dept. Ex. F]

19 67. At no relevant time did Mr. Walley ever contact the Department's  
20 taxpayer advocate in reference to issues he was experiencing that may have been  
21 contributing to Taxpayer's failure to report and pay taxes. [Cross Examination of Mr.  
22 Walley]

23 68. At some point amid the period of time under protest, there was at least one

1 occasion in which Mr. Walley contacted the Department to explain that he was having difficulty  
2 with the electronic filing process and required assistance. [Direct Examination of Ms. Sanchez]

3 69. Ms. Behles admitted to having knowledge of Taxpayer's tax reporting and  
4 payment obligations, including CRS-1 reports. [Direct Examination of Ms. Behles]

5 The Underlying Audit and  
6 Post-Assessment Reviews

7 70. The Department commenced an audit of Taxpayer on July 31, 2017. [Dept. Ex. E-  
8 001]

9 71. At the onset of the audit, the Department made several unsuccessful attempts to  
10 communicate with Ms. Behles before Mr. Walley became involved as Taxpayer's primary point  
11 of contact. [Direct Examination of Ms. Sanchez; Dept Ex. G (Page B4.1 B4.2 - Date Range:  
12 7/10/17 – 8/1/2017)]

13 72. Ms. Behles denied ever receiving messages from the Department, perhaps  
14 because at least one message was left for an employee who was assertedly no longer employed  
15 by Taxpayer at the time a message would have been left. [Direct Examination of Ms. Behles;  
16 Dept. Ex. G (Page B4.1 – Date 7/24/2017)]

17 73. Mr. Walley denied recollection of any communications from the Department that  
18 could be interpreted as conveying a desire or need to speak with Ms. Behles. [Direct  
19 Examination of Mr. Walley]

20 74. Ms. Behles had minimal involvement with the audit, recalling that her only  
21 substantial interaction with the Department occurred on one occasion when she arrived at her  
22 office from the airport to be greeted by three individuals from the Department, one of whom was  
23 a revenue agent. The other Department employees present were Ms. Lucero and Ms. Sanchez.  
24 [Direct Examination of Ms. Behles]

1           75.     At the time of the visit recalled by Ms. Behles, Taxpayer was no longer in  
2 operation and Ms. Behles was practicing law under BLF, LLC because Taxpayer  
3 assertedly ceased operations toward the end of 2016 or in 2017. [Direct Examination of  
4 Mr. Walley]

5           76.     Mr. Walley recalled being informed during the same meeting that the  
6 Department intended to audit Taxpayer. A revenue officer was in attendance and that  
7 allegedly caused Taxpayer's staff to become anxious. [Direct Examination of Mr.  
8 Walley]

9           77.     Because the presence of a revenue agent raised concerns among  
10 Taxpayer's staff, Ms. Behles requested that the Department refrain from going to her  
11 office and instructed that it would compile and provide records relevant to the  
12 Department's audit. [Direct Examination of Ms. Behles]

13           78.     Despite Ms. Behles' instructions that the Department refrain from visiting  
14 her office and that her office would instead compile documents responsive to the  
15 Department's requests, Ms. Behles asserted that she did not fully comprehend the  
16 Department's intentions. [Direct Examination of Ms. Behles]

17           79.     At the meeting, Ms. Lucero provided a list of documents the Department  
18 was requesting, although Mr. Walley could not recall whether he was provided with  
19 anything in writing. [Direct Examination of Mr. Walley; Dept. Ex. G (Page B4-18 –  
20 B4.21 (Date 1/8/2018))]

21           80.     According to the Taxpayer Contact Log, the only in-person meeting  
22 occurred on or about January 8, 2018. However, the Department had initiated  
23 communications with Mr. Walley and informed him of its audit as early as August 7,

1 2017, after receiving a Taxpayer Information Authorization from Taxpayer permitting  
2 communications with Mr. Walley. [Dept. Ex. G (Page B4.4 (Date 8/7/2017); Page B4-18 –  
3 B4.21 (Date 1/8/2018))]

4 81. Mr. Walley suggested that he and Ms. Behles did not communicate regarding the  
5 audit, or the fact that Taxpayer had neglected to file tax returns, including CRS since 2010, until  
6 the first set of work papers were available for review at or about the same time as the meeting  
7 occurring on January 8, 2018. [Direct Examination of Mr. Walley; Dept. Ex. G (Page B4-18 –  
8 B4.21 (Date 1/8/2018))]

9 82. Although the Department attempted to maintain communications with Mr.  
10 Walley, he asserted there were frequent interruptions in communications due to the Department's  
11 alleged addressing errors and other circumstances. [Dept. Ex. G; Direct Examination of Mr.  
12 Walley]

13 83. Mr. Walley recalled frequent indications from Ms. Lucero that the Department  
14 could obtain documents that Taxpayer might not be able to obtain, including CRS-1 returns,  
15 income tax returns, and bank records. [Direct Examination of Mr. Walley]

16 84. Despite Mr. Walley's recollection of communications with Ms. Lucero, the  
17 Taxpayer Contact Log recorded the substance of communications between the Department and  
18 Taxpayer and the sorts of records the Department requested that Taxpayer provide. [Dept. Ex. G  
19 (B4.6 – B4.8 (Date 8/11/2017))]

20 85. Ms. Sanchez attended at least two meetings with Ms. Lucero and Mr. Walley. She  
21 had no recollection of Ms. Lucero suggesting in her presence that the Department would obtain  
22 Taxpayer's financial records through its own internal sources, thereby alleviating the burden  
23 placed on Taxpayer to compile and provide its records. [Direct Examination of Ms. Sanchez]

1           86.     Ms. Sanchez did not observe any indication from her records, particularly  
2 the Taxpayer Contact log, that the Department assertedly suggested that it would obtain  
3 Taxpayer’s financial records through its own independent sources. [Direct Examination  
4 of Ms. Sanchez]

5           87.     For reasons assertedly beyond its control, Taxpayer’s effort to produce  
6 records in response to the Department’s requests was severely impaired due to  
7 circumstances to be addressed separately. Taxpayer did provide the following documents  
8 from which the Department attempted to compute its outstanding tax liabilities: (1) bank  
9 statements for periods January 2011 – June 2017; (2) payments register for February  
10 2010 through December 2015; (3) W-2 Forms for 2014; (3) ES903A Forms for 2015 –  
11 2016. [Dept. Ex. D]

12           88.     The Department also requested the following summary of documents  
13 which Taxpayer did not, or could not provide: (1) federal individual income tax returns  
14 for years 2010 – 2016; (2) invoices or purchase orders from 2010 through March 2017;  
15 (3) customer contracts or agreements from 2010 through 2017; (4) bank statements for  
16 2010; (5) relevant federal and state income tax returns; (6) financial statements; (7) W-2  
17 Forms for 2010, 2011, 2013, 2015, 2016, and 2017; (8) ES903A Forms for 2010, 2011,  
18 2012, 2013, 2014, and 2017. [Direct Examination of Ms. Sanchez; Dept. Ex. D]

19           89.     The Department also referenced its internal sources as well as third-party  
20 sources including: (1) internally prepared workpapers, including gross receipts audit  
21 workpapers; (2) GenTax history; and (3) Department of Workforce Solutions data.  
22 [Direct Examination of Ms. Sanchez; Dept. Ex. D]

23           90.     Because New Mexico is a self-reporting state, the audit relevant to the



1 assessments relied heavily and primarily on Taxpayer's records with secondary reference to the  
2 Department's internal records. [Cross Examination of Ms. Sanchez]

3 91. Taxpayer was notified of the categories of records which would be essential to the  
4 computation of Taxpayer's purported liability. [Cross Examination of Ms. Sanchez]

5 92. The Department also reviewed and considered loan documents and attorney-client  
6 records produced by Taxpayer, but ultimately determined that the documents were not sufficient  
7 for computation of Taxpayer's tax liability in the period under audit. [Direct Examination of Ms.  
8 Sanchez]

9 93. Mr. Walley denied having any recollection of the Department informing him of  
10 how the documents would be utilized to compute Taxpayer's tax liability during its audit. [Direct  
11 Examination of Mr. Walley]

12 94. For the purpose of auditing and computing Taxpayer's gross receipts liability, Ms.  
13 Lucero reviewed: (1) operating account<sup>2</sup> bank statements from January 2011 to June 2017; and  
14 (2) a payments register from February 2010 to December 2015. [Direct Examination of Ms.  
15 Sanchez]

16 95. A comparison of records available from the Taxpayer, particularly the payments  
17 register, to its bank statement revealed such a large discrepancy that the Department determined  
18 that the payments register was not a reliable or trustworthy record. [Direct Examination of Ms.  
19 Sanchez; Taxpayer Ex. 4]

20 96. Taxpayer's payments register for the periods of January 2010 through December  
21 2015 suggested total receipts in the amount of \$970,988.46 in addition to other income reported

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<sup>2</sup> The record refers to "general account" and "operating account." For the purpose of consistency and to avoid potential confusion, the Hearing Officer will use the term "operating account" which describes the account Taxpayer utilized to deposit earned fees and to pay its operating expenses. In this protest, it is the account the Department relied upon to compute Taxpayer's asserted liabilities.

1 on Forms 1099 in the amount of \$987,252.00 for a total income of \$1,958,240.46. [Dept.  
2 Ex. E-042] In contrast, Taxpayer's bank statements revealed potential gross receipts in  
3 the amount of \$5,099,904.77. [Dept. Ex. E-042]

4 97. Because the discrepancy between the two methods was so large, it was  
5 reasonable for the Department to rely on what it perceived as the more trustworthy bank  
6 statements and provide Taxpayer the opportunity to come forward with documentation  
7 which would establish the portion of deposits that should not be included in the  
8 computation either because they were excludable, exempt, or deductible. [Direct  
9 Examination of Ms. Sanchez; Direct Examination of Ms. Griego]

10 98. Mr. Walley could not recall ever being informed that the payments register  
11 was not sufficient to computing Taxpayer's tax liability or that the Department would  
12 utilize alternative means to compute Taxpayer's liability. [Direct Examination of Mr.  
13 Walley]

14 99. Taxpayer Exhibit 4 purportedly represents Taxpayer receipts from January  
15 1, 2010 through December 31, 2015 (not encompassing the entire audit period) and  
16 served as the basis for the preparation of CRS-1 reports that would have been filed until  
17 filing ceased after October 2010. [Direct Examination of Mr. Walley; Taxpayer Ex. 4]

18 100. Despite indication otherwise, Mr. Walley estimated that Taxpayer  
19 generated approximately \$14,000.00 per month, or a total income of approximately  
20 \$1,200,000.00 over the course of the audit period. [Direct Examination of Mr. Walley]

21 101. The Department did not rely on a survey of attorney compensation in New  
22 Mexico to compute Taxpayer's income or to evaluate the reliability or accuracy of  
23 Taxpayer's records. [Direct Examination of Ms. Griego]

1           102. Ms. Behles asserted that having a better understanding of how the Department  
2 intended to compute Taxpayer's liability would have permitted Taxpayer to better identify  
3 records to assure an accurate computation. [Direct Examination of Ms. Behles]

4           103. Ms. Behles disputed that totaling Taxpayer's deposits in its operating account was  
5 an accurate or reliable method of computing Taxpayer's income for the purpose of also  
6 computing its tax liability. [Direct Examination of Ms. Behles]

7           104. Taxpayer contended that the following categories of deposits were erroneously  
8 included in the Department's computations of income: (1) disbursements from loans; (2) receipts  
9 generated from performance of services outside of New Mexico; (3) funds that were  
10 subsequently distributed to third parties, such as clients or other counsel; and (4) client funds that  
11 should have been but were not deposited to Taxpayer's trust account. [Direct Examination of Mr.  
12 Walley; Direct Examination of Ms. Behles]

13           105. Taxpayer's operating account would be expected to contain deposits of earned  
14 fees, but could also receive deposits from other sources, including loan proceeds. [Direct  
15 Examination of Ms. Sanchez]

16           106. Mr. Walley estimated that Taxpayer borrowed approximately \$600,000.00 from  
17 First National Bank of New Mexico, as well as from Mr. Walley's mother. [Direct Examination  
18 of Mr. Walley]

19           107. Taxpayer provided a number of loan documents to the auditor, but not all loan  
20 documents could be matched to deposits in the operating account, nor did Taxpayer establish  
21 through reliable testimony or documentation the amount in deposits from loan proceeds that  
22 should have been excluded from gross receipts. [Direct Examination of Ms. Sanchez]

23           108. The Department presumed that deposits to Taxpayer's operating account

1 represented fees for services provided unless Taxpayer presented documentation to  
2 establish otherwise. [Direct Examination of Ms. Sanchez]

3 109. Mr. Walley recalled Taxpayer providing some international and out-of-  
4 state services but observed as well that Taxpayer had “tons of in-state clients.” If  
5 additional details were essential, Mr. Walley indicated that he “could try to look it up.”  
6 [Direct Examination of Mr. Walley]

7 110. There was insufficient documentation provided by Taxpayer to establish  
8 what portion of Taxpayer’s income may have been derived from providing services  
9 outside the state of New Mexico. [Direct Examination of Ms. Griego]

10 111. Taxpayer also asserted that deposits to Taxpayer’s operating account  
11 would include funds which were subsequently redistributed to third parties, such as  
12 clients, parties, and other counsel, as illustrated in Taxpayer Ex. 7, but there was  
13 insufficient documentation to compute what portion of those deposits should be  
14 excludable, exempt, or deductible. [Direct Examination of Ms. Behles; Direct  
15 Examination of Ms. Sanchez; Direct Examination of Ms. Griego]

16 112. Another circumstance that might inaccurately increase the sum of deposits  
17 can be attributed to occasions where settlement funds intended for deposit in Taxpayer’s  
18 attorney trust account were erroneously deposited to Taxpayer’s operating account. Mr.  
19 Walley on occasion would then transfer money from Taxpayer’s operating account to  
20 Taxpayer’s attorney trust account. [Direct Examination of Mr. Walley] There was no  
21 evidence presented to establish the frequency or amounts of such errors.

22 113. The Department did not include as part of its audit any funds contained in  
23 Taxpayer’s trust account since it acknowledges that attorney trust accounts are prohibited

1 from containing fees earned by the attorney and are not receipts or income. [Direct Examination  
2 of Ms. Sanchez]

3 114. Disbursements from Taxpayer's attorney trust account to Taxpayer's operating  
4 account were rarely made in lump sum but were sometimes made in partial disbursements for a  
5 variety of reasons, explaining it was not unusual "to withhold some of the money back,"  
6 including amounts that would have comprised Taxpayer's fees. [Direct Examination of Mr.  
7 Walley]

8 115. Although the Department attempted to recognize all applicable exemptions,  
9 exclusions, and deductions, it also relied on Taxpayer to alert it to any errors in its computations  
10 accompanied by supporting documentation which might, for example, include loan proceeds  
11 erroneously characterized as fees derived from engaging in business in New Mexico. [Direct  
12 Examination of Ms. Sanchez]

13 116. Taxpayer provided no records relevant to income tax. Accordingly, the  
14 calculation of income tax relied on the computation of Taxpayer's gross receipts as computed in  
15 the Department's gross receipts tax audit work papers. [Direct Examination of Ms. Sanchez]

16 117. The assessment of withholding tax and the worker's compensation fee relied on:  
17 (1) 2014 IRS Forms W-2; (2) Forms ES903A for 2015 through 2016; (3) operating account bank  
18 statements from January 2011 to June 2017; (4) GenTax history of PIT returns; (5) third party  
19 verification through the records of the Department of Workforce Solutions. [Direct Examination  
20 of Ms. Sanchez]

21 118. Mr. Walley recalled making worker's compensation reports and payments on  
22 paper [Direct Examination of Mr. Walley], but no records were provided to establish when they  
23 would have been prepared or with whom or on what date they were filed.

1           119. Ms. Sanchez performed her final review of the audit prior to the exit  
2 conference occurring on or about March 23, 2018, which consisted of reading the audit  
3 narrative and comparing it to the workpapers. [Direct Examination of Ms. Sanchez]

4           120. Ms. Sanchez's review included examination of all the documents  
5 referenced in the audit together with documents provided by Taxpayer and information  
6 available to the Department through its internal systems, including GenTax. [Direct  
7 Examination of Ms. Sanchez]

8           121. Neither Ms. Sanchez nor Ms. Lucero had any involvement with the audit  
9 after the assessment and subsequent protest of the assessment. [Direct Examination of  
10 Ms. Sanchez]

11           122. The Department did not perceive any involvement or participation from  
12 Ms. Behles during the underlying audit of Taxpayer. Mr. Walley was Taxpayer's only  
13 point of contact despite unsuccessful attempts to communicate directly with Ms. Behles.  
14 [Direct Examination of Ms. Sanchez]

15           123. Records provided during the audit were fully considered by the auditor,  
16 peer review, supervisor review, and ATSS review. [Cross Examination of Ms. Sanchez]

17           124. The Department followed all applicable policies and procedures. Failure to  
18 adhere to a policy or procedure would have been detected during any one of the several  
19 reviews to which the audit was subjected prior to assessment. [Cross Examination of Ms.  
20 Sanchez]

21           125. The Department does not limit information that may be submitted by a  
22 taxpayer for consideration, nor is an auditor permitted to refuse such documents. [Cross  
23 Examination of Ms. Sanchez]

1           126. Ms. Sanchez detected no errors or discrepancies in the audit, which was provided  
2 in full to Taxpayer prior to the assessment with a copy of a ten-day letter. [Direct Examination of  
3 Ms. Sanchez; Dept. Ex. E]

4           127. Ms. Griego reviewed the assessment, formal protest, and other documents and  
5 contacted Mr. Walley to follow up and request additional documents, particularly any records  
6 that might show the source of revenue deposited into Taxpayer's operating account. [Direct  
7 Examination of Ms. Griego]

8           128. Mr. Walley recalled Ms. Griego making a request for deposit slips and correlating  
9 checks within the first few months of the protest being initiated. [Direct Examination of Mr.  
10 Walley]

11           129. Taxpayer, through Mr. Walley, informed Ms. Griego that documents had either  
12 been lost or destroyed. [Direct Examination of Ms. Griego; Direct Examination of Mr. Walley]

13           130. In total, Ms. Griego reviewed the protest including all documents prepared,  
14 acquired, and received up to the protest in addition to additional documents Mr. Walley provided  
15 in response to her inquiries subsequent to the protest. [Direct Examination of Ms. Griego]

16           131. Ms. Griego was similarly unable to trace the source of the majority of funds into  
17 Taxpayer's operating account. Therefore, there was no way of determining whether the source of  
18 a deposit was from engaging in business or from a loan or other source. [Direct Examination of  
19 Ms. Griego; Taxpayer Ex. 7; Taxpayer Ex. 8]

20           132. Ms. Griego did identify some adjustments in Taxpayer's favor. However, Ms.  
21 Griego did not make any changes to the actual assessment in anticipation that more adjustments  
22 could be warranted based on the evidence presented at the hearing on the merits of the protest.  
23 [Direct Examination of Ms. Griego]

1           133. As of the date of the hearing, Ms. Griego had identified a total of  
2 \$71,405.54 in receipts that should be excluded from taxation, including the sum listed on  
3 Department Ex. E-040. Excludable receipts included deposits which were rejected due to  
4 insufficient funds and loan disbursements, but final adjustments had not been calculated  
5 as of the date of the hearing upon the documents available to the Department at that time.  
6 [Direct Examination of Ms. Griego; Dept. Ex. E-040 (Grand Total, Column B)]

7           134. Ms. Griego's research failed to identify or acquire from Taxpayer other  
8 records that might be helpful for computing Taxpayer's tax liability such as federal or  
9 state tax returns. [Direct Examination of Ms. Griego]

10           135. Mr. Walley suggested he could have acquired records establishing the  
11 amount of deposits into Taxpayer's operating account that derived from loans as  
12 distinguished from receipts from services. [Direct Examination of Mr. Walley]

13           136. Ms. Griego did not audit Taxpayer's attorney trust account. The audit  
14 concentrated on the Taxpayer's operating account since that would be the account  
15 receiving earned fees for services. [Direct Examination of Ms. Griego]

16           137. The records Ms. Griego requested, but which were not provided, could  
17 have been used to reduce the Taxpayer's liability by identifying receipts that should have  
18 been exempt, excludable, or deductible from taxation. [Direct Examination of Ms.  
19 Griego]

20           138. The Department received minimal cooperation from the Taxpayer in  
21 providing documents. [Cross Examination of Ms. Griego]

22           139. Mr. Walley did provide Ms. Griego with some documents in response to  
23 her follow up inquiries, but several of those documents were outside the relevant audit



1 period. [Direct Examination of Ms. Griego]

2 140. Mr. Walley denied having any understanding of the Department's intention to  
3 identify non-taxable receipts by tracing the source of the receipts to the source of the deposits to  
4 the operating account. Accordingly, Mr. Walley perceives that he could have acquired  
5 supporting documents had the Department's requests been clearer. [Direct Examination of Mr.  
6 Walley]

7 141. Mr. Walley was able to acquire bank statements, but did not recall the Department  
8 requesting, during the audit, deposit slips or the checks that may have accompanied those deposit  
9 slips. [Direct Examination of Mr. Walley]

10 142. Taxpayer utilized QuickBooks accounting software throughout the audit period in  
11 addition to other attorney billing software, including Sage and Time Matters. [Direct  
12 Examination of Mr. Walley]

13 143. Mr. Walley was capable of generating reports from QuickBooks that would have  
14 provided information regarding receipts from providing legal services. [Direct Examination of  
15 Mr. Walley]

16 144. Fee application orders refer to amounts to be paid to Taxpayer including an  
17 amount for payment of gross receipts tax, but there was no way of knowing whether Taxpayer  
18 was actually paid under the terms of any of those orders. [Direct Examination of Ms. Sanchez]

19 145. Taxpayer further explained that the Department was prohibited from being at  
20 Taxpayer's place of business during normal business hours and that Taxpayer was attempting to  
21 acquire duplicate records from its bank. [Direct Examination of Ms. Griego]

22 *Destruction of Records*

23 146. Taxpayer's ability to produce records was assertedly impaired by an unintentional

1 destruction of documents. Ms. Behles recalled that the janitor hired by Taxpayer's  
2 landlord employed a janitor from Nepal. The janitor spoke only Nepalese and allegedly  
3 misunderstood the significance of some bins of documents, and "he took them out and he  
4 burned them." [Direct Examination of Ms. Behles]

5 147. Despite the landlord purportedly agreeing to compensate Taxpayer for  
6 reacquiring the records, Mr. Walley was unable to reproduce the records that had  
7 assertedly been destroyed over a "fairly long amount of time." [Direct Examination of  
8 Mr. Walley]

9 148. Although some records could potentially be replaced or reproduced, a  
10 second incident rendered that task more onerous. Taxpayer's place of business was  
11 reportedly burglarized during the pendency of the protest at which time computers  
12 containing Taxpayer's financials were stolen along with the systems to which those  
13 records were backed up. [Direct Examination of Ms. Behles]

14 149. The burglary occurred on or about July 31, 2020. Mr. Walley recalled  
15 three or four computers, including the backup system being stolen or damaged before the  
16 burglar was apparently scared away. [Direct Examination of Mr. Walley]

17 150. Mr. Walley suggested that it would have been a massive undertaking to  
18 reproduce records that were lost as a result of Taxpayer's burglary. [Direct Examination  
19 of Mr. Walley]

20 151. The Department did not independently investigate Taxpayer's assertions  
21 that its records had been lost or destroyed or that the records could not be reproduced.  
22 [Direct Examination of Ms. Griego]

23 *Additional Findings Regarding Imposition of Penalty*  
24 *and Potential Abatement*

1           152. At no time during the audit, particularly after the Taxpayer was alerted to its non-  
2 filing status under the relevant tax programs, did it ever seek to cure its status by filing an  
3 appropriate return. [Cross Examination of Ms. Sanchez]

4           153. In January of 2018, Ms. Lucero noted that Mr. Walley had disclosed having  
5 health issues which had delayed his ability to provide records relevant to the audit. However,  
6 there were no communications recorded in the contact log to suggest that health issues played  
7 any part in the failure to report, file, or pay taxes during the periods subject of the audit. [Direct  
8 Examination of Ms. Sanchez]

9           154. Ms. Sanchez did not note any communications from Taxpayer in reference to any  
10 health issues Ms. Behles may have been experiencing during the period under audit or during the  
11 actual audit. [Direct Examination of Ms. Sanchez]

12           155. Ms. Behles and Mr. Walley have participated in various business activities which  
13 have, or should have, alerted them to the various tax obligations associated with engaging in  
14 business in New Mexico. In addition to Taxpayer, Ms. Behles has also been associated with:  
15 Behles, Ottinger, O'Reilly, Daniels & Ball, P.A.; J.D. Behles & Associates, A Commercial Law  
16 Firm, P.C.; J.D. Behles & Associates, P.C.; B.L.F., L.L.C.; BLF Imports, L.L.C.; BLFM, L.L.C.;  
17 and AhMahr Nahr, Inc. [Taxpayer Ex. 13]

18           156. During the relevant period of time, Mr. Walley and Ms. Behles also operated a  
19 corporation called Ahmahr Nahr, Inc. which breeds and sells Basenjis<sup>3</sup> and derives income  
20 relating to that activity. However, the income of Ahmahr Nahr, Inc. has never been substantial in  
21 light of its expenses, which have been reported on Schedule K-1. [Direct Examination of Ms.  
22 Behles]

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<sup>3</sup> “The Basenji is a small, short haired hunting dog from Africa.” See <https://www.akc.org/dog-breeds/basenji/> (accessed December 3, 2020)

1           157. Ahmahr Nahr Inc. is not registered with the Department but reported  
2 significant loss on its Schedule K1 to Ms. Behles in 2007-2009 and 2011. [Direct  
3 Examination of Ms. Sanchez]

4           158. Mr. Walley was not involved with preparation or payment of tax returns or  
5 payments for Ahmahr Nahr, Inc. which have always been handled by Ms. Behles. [Direct  
6 Examination of Mr. Walley]

7           159. At all times relevant to the period under audit, a sampling of Taxpayer's  
8 settlement disbursements, invoices, retainer agreements, and hourly fee agreements  
9 demonstrated a consistent custom of charging gross receipts tax associated with any  
10 compensation to Taxpayer. [See e.g. Taxpayer Ex.7.0 (2011); 7.14 (2013); 7.34 (2015);  
11 7.38 (2015); 7.54 (2013); 7.58 (2015); 7.63 (2012); 7.71 (2016); 7.95 (2015); 7.100  
12 (2013); 7.105 (2017); 7.107 (2014); 7.117 (2015); 7.123 (2011)]

13           160. Mr. Walley asserted that he never discussed a civil fraud penalty with the  
14 Department, although he was aware that the Department was contemplating such penalty  
15 as early as January 8, 2018. [Direct Examination of Mr. Walley; Direct Examination of  
16 Ms. Sanchez]

17           161. Ms. Lucero determined that it was appropriate to assess a fraud penalty  
18 which was subsequently approved by supervisory personnel. [Direct Examination of Ms.  
19 Sanchez; Dept. Ex. F]

20           162. Mr. Walley was again notified of a civil fraud penalty on March 22, 2018.  
21 [Direct Examination of Ms. Sanchez]

22           163. Imposition of civil fraud penalty relied heavily on the fact that Taxpayer  
23 was knowledgeable of its tax obligations under New Mexico law but ceased self-

1 reporting. [Direct Examination of Ms. Griego]

2 164. Ms. Griego reviewed the assessment of the civil fraud penalty and concurred that  
3 its imposition was appropriate in this case. [Direct Examination of Ms. Griego; Dept. Ex. F]

4 165. Ms. Griego did not recall any communications with Taxpayer regarding medical  
5 issues of Mr. Walley or Ms. Behles. [Direct Examination of Ms. Griego]

6 166. Taxpayer did not file corporate income tax returns from the period ending  
7 December 31, 2010 through December 31, 2016. [Cross Examination of Ms. Griego]

## 8 **DISCUSSION**

9 Taxpayer's closing argument presented numerous points of contention which the Hearing  
10 Officer generally categorized in support of the following assertions: (1) whether the Department is  
11 entitled to a presumption of correctness, or in the alternative, whether Taxpayer overcame the  
12 presumption; (2) whether imposition of penalty was proper, and if so, whether Taxpayer is entitled  
13 to any abatement; and (3) whether any portion of the assessment is precluded by the statute of  
14 limitations.

### 15 **Presumption of Correctness**

16 Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the assessments of tax issued in this  
17 case are presumed correct and unless otherwise specified, for the purposes of the Tax  
18 Administration Act, "tax" includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X)  
19 (2013). Therefore, under Regulation 3.1.6.13 NMAC, the presumption of correctness under  
20 Section 7-1-17 (C) also extends to the Department's assessment of penalty and interest. *See*  
21 *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139  
22 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be  
23 given substantial weight).

1 As a result, the presumption of correctness in favor of the Department requires that  
2 Taxpayer carry the burden of presenting countervailing evidence or legal argument to show that  
3 it is entitled to abatements of the assessments. *See N.M. Taxation & Revenue Dep't v. Casias*  
4 *Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. “Unsubstantiated statements that [an] assessment  
5 is incorrect cannot overcome the presumption of correctness.” *See MPC Ltd. v. N.M. Taxation &*  
6 *Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12  
7 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden  
8 shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-  
9 NMCA-021, ¶13.

10 In circumstances where a taxpayer’s claim for relief relies on the application of an  
11 exemption or deduction, then “the statute must be construed strictly in favor of the taxing  
12 authority, the right to the exemption or deduction must be clearly and unambiguously expressed  
13 in the statute, and the right must be clearly established by the taxpayer.” *See Wing Pawn Shop v.*  
14 *Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649  
15 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-  
16 007, ¶9, 133 N.M. 447, 64 P.3d 474.

17 This protest also presents the issue of whether the Department properly assessed a 50-  
18 percent penalty for conduct it perceived as willful intent to evade or defeat a tax. *See NMSA*  
19 *1978, Section 7-1-69 (D)*. With concern for this distinct issue, the Department carries the burden  
20 of proving by a preponderance of evidence that the greater penalty should be imposed. *See*  
21 *Regulation 3.1.11.18 (B) (1) & (2) NMAC* (placing the burden on the Department to prove tax  
22 evasion by preponderance of evidence). *See also NMSA 1978, Section 7-1-78* (placing the  
23 burden on the Department in cases involving fraud or corruption). While Section 7-1-69 (D) does

1 not refer to “fraud,” it imposes a greater penalty for the “willful intent to evade or defeat a tax.”  
2 *Id.* “The issue of whether the taxpayer or other person exercised gross negligence or willful  
3 disregard for whether taxes were paid is an objective standard to be determined by the facts and  
4 circumstances.” *See* Regulation 3.1.11.18 (B) (3) NMAC.

### 5 **Computing Gross Receipts and Associated Taxes**

6 The evidence established that the first substantive step in the audit was to gather documents  
7 relevant to compute the amount of Taxpayer’s gross receipts over the course of the entire audit  
8 period. Not only did the Department intend to rely on those figures for the computation of gross  
9 receipts tax, but because of the overall lack of records relevant to other tax programs, the  
10 Department would come to rely on those figures for computing Taxpayer’s income tax as well.

11 The computation of gross receipts begins with their definition under the law. For the  
12 privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any  
13 person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). Under NMSA 1978, Section  
14 7-9-3.5 (A) (1) (2007), “gross receipts” is defined to mean:

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

21 Under the Gross Receipts and Compensating Tax Act, all gross receipts of a person engaged  
22 in business are presumed taxable. *See* NMSA 1978, Section 7-9-5 (2002). Conversely, receipts  
23 which are not derived from one of the listed activities are excluded from gross receipts, and not  
24 taxable under the Gross Receipts and Compensating Tax Act. For example, funds derived on  
25 credit are not derived from any of the listed activities and are excludable.

26 Despite the general presumption of taxability, taxpayers may also avail themselves of the benefits of

1 various deductions or exemptions, if applicable, in addition to asserting that its receipts are  
2 excludable from taxation under NMSA 1978, Section 7-9-3.5 as in the example provided for funds  
3 derived on credit. If a taxpayer's claim for relief relies on the application of an exemption or  
4 deduction, then "the statute must be construed strictly in favor of the taxing authority, the right to  
5 the exemption or deduction must be clearly and unambiguously expressed in the statute, and the  
6 right must be clearly established by the taxpayer." See *Wing Pawn Shop v. Taxation and Revenue*  
7 *Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); See  
8 also *TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d  
9 474.

10 In this case, the Department's computations would rely wholly on Taxpayer's records  
11 pursuant to NMSA 1978, Section 7-1-10 (A) (2007) which provides in relevant part that, "every  
12 taxpayer shall maintain books of account or other records in a manner that will permit the accurate  
13 computation of state taxes or provide information required by the statute under which the person is  
14 required to keep records."

15 The statute permits discretion to a taxpayer in that it does not specify precisely what records  
16 must be retained, so long as the records will permit an accurate computation. The Department,  
17 although providing some guidance, has similarly refrained from mandating the specific methods  
18 taxpayers utilize for its accounting and record keeping requirements. Regulation 3.1.5.8 (A) NMAC  
19 explains that "[b]ooks of account, documents and other records shall be kept and maintained by a  
20 taxpayer in a manner that will permit the accurate computation of state taxes[.]" It goes on to  
21 provide that, "[t]he adequacy or inadequacy of taxpayer records is a matter of fact to be determined  
22 by the secretary or secretary's delegate."

23 Moreover, "[t]axpayers have a duty to provide the secretary or secretary's delegate, upon



1 request, with books of account and other records upon which to establish a basis for taxation.”  
2 Regulation 3.1.5.8 (B) NMAC goes on to provide that “[f]ailure of a taxpayer to keep adequate  
3 books of account or other records will cause the department to use alternative methods to determine  
4 or estimate taxes due.” Regulation 3.1.5.8 (C) NMAC specifies a variety of alternative methods  
5 available to the Department in such circumstances, the first of which is the “bank deposit method.”  
6 *See* Regulation 3.1.5.8 (C) (1) NMAC.

7 The bank deposit method was the method utilized by the Department in the present case, but  
8 only after the Department determined that the records provided by Taxpayer did not “permit the  
9 accurate computation of state taxes.” Thus, it would be appropriate to now address the adequacy of  
10 Taxpayer’s records, and the reasonableness of the Department’s determination to employ alternate  
11 methods of computing tax.

#### 12 **Sufficiency of Taxpayer’s Records and the Determination to Employ Alternate Methods**

13 In summary, the Hearing Officer found that the Department’s determination of insufficiency  
14 and unreliability of Taxpayer’s records was reasonable. The majority of records provided by  
15 Taxpayer were grossly inadequate for accurately computing Taxpayer’s liability. Ultimately, the  
16 most complete and reliable source of information derived from Taxpayer’s operating account  
17 statements. Yet, when the figures contained in the bank statements were compared to the figures in  
18 other records Taxpayer provided, there was such a large discrepancy between the figures that the  
19 Department determined it was reasonable to rely entirely on the bank statements to compute gross  
20 receipts. The Department would then permit applicable exclusions, exemptions, and deductions as  
21 corroborated by Taxpayer’s records. However, even that task proved difficult for Taxpayer due to  
22 its overall lack of adequate records.

23 Taxpayer disclaimed responsibility for its lack of records, attributing the insufficiency to a

1 non-English speaking custodian who allegedly disposed of the records Taxpayer intended to  
2 provide to the Department for evaluation. Then, to the extent there was any possibility of those lost  
3 records being reproduced or replaced, that opportunity vanished. Taxpayer's office was assertedly  
4 burglarized and every computer or backup file was stolen.

5 The Hearing Officer regrettably found Taxpayer's evidence on these incidents to be  
6 unreliable and lacking credibility. The Hearing Officer observed that although the first asserted  
7 incident involving the non-English speaking custodian occurred during the underlying audit, there  
8 was no apparent reference to such incident in any contemporaneously-prepared documents from  
9 inception of the audit in August 2017 through the final exit conference in March 2018. Such  
10 incident would have represented a significant setback for a reasonable taxpayer which would  
11 promptly bring it to the Department's attention. For that reason, the Hearing Officer would expect  
12 that the Taxpayer Contact Log or some other communication contemporaneous to the audit would  
13 make some minimal reference to the incident. There was none. The earliest reference to the alleged  
14 incident which the Hearing Officer observed occurred in September of 2019, well after the  
15 assessments were issued and while the protest was already pending.

16 The Hearing Officer perceived the allegation of a subsequent burglary with the same degree  
17 of skepticism. Although Taxpayer's account of that incident is accompanied by a police report  
18 (contained in the Administrative File as an exhibit to a motion for a continuance), the Hearing  
19 Officer does not find that the police report lends any credence or weight to Taxpayer's testimony.

20 With respect to both incidents and their asserted detriment to Taxpayer's position, the  
21 Hearing Officer personally observed the demeanor of the witnesses, particularly the manner of Ms.  
22 Behles and Mr. Walley while testifying, and when viewing their interests, biases, and prejudices  
23 together with the reasonableness of their testimony, the Hearing Officer was simply not persuaded

1 that the incidents were the genuine cause of its inability to produce records.

2 The Hearing Officer observed that the Department had been seeking records since the  
3 inception of the audit in August of 2017. If the records had not been provided by the time of the exit  
4 conference approximately seven months later in March of 2018, then it was highly unlikely they  
5 were ever to be provided. The Taxpayer Contact Log (Dept. Ex. G) revealed more than 25 instances  
6 in which the Department contacted Taxpayer to request, follow-up, or make further inquiry  
7 concerning Taxpayer's records.

8 It was evident to the Hearing Officer that Taxpayer exercised unsatisfactory recordkeeping  
9 practices, but rather than acknowledge that, Taxpayer attributed its lack of records to a series of  
10 unfortunate events which the Hearing Officer found questionable. The Hearing Officer was  
11 persuaded that Taxpayer's poor recordkeeping and accounting practices were the primary cause of  
12 Taxpayer's inability to provide adequate or sufficient records, and that required the Department to  
13 resort to alternative methods of computing Taxpayer's liability. For that reason, it was necessary  
14 and reasonable for the Department to employ the bank deposit method which is expressly and  
15 explicitly permitted by regulation.

### 16 **The Bank Deposit Method**

17 In this case, the Department calculated the sum of all deposits from Taxpayer's bank  
18 account to identify a starting point for computing its gross receipts. Unlike records prepared and  
19 provided by Taxpayer, bank records are maintained by banks whose primary task is to provide an  
20 accurate accounting of deposits and withdrawals to the account. The Department then requested  
21 records from Taxpayer that it could then use to identify, and therefore subtract, sums of deposits  
22 which should not count as gross receipts because they were excludable, deductible, or exempt. Non-  
23 taxable deposits might include funds from loan disbursements, fees generated from performing

1 services outside of New Mexico, or even amounts from checks deposited but later reversed due to  
2 insufficient funds. These were the types of non-taxable events which the Department relied on  
3 Taxpayer to establish.

4 Both Ms. Sanchez and Ms. Griego credibly testified that Taxpayer received appropriate  
5 reductions for amounts that Taxpayer demonstrated through trustworthy documentation should be  
6 excludable, deductible, or exempt. But, in the absence of documentation to show otherwise, deposits  
7 were presumed taxable and included in the sum of Taxpayer's taxable receipts consistent with  
8 Section 7-9-5 (receipts presumed taxable). The Hearing Officer cannot find that the Department's  
9 methods were erroneous. In contrast, they were wholly authorized by law and necessary in light of  
10 Taxpayer's poor record keeping.

11 For example, Taxpayer argued that it was inappropriate for the Department to "gross up" all  
12 of the Taxpayer deposits to compute income. Instead, Taxpayer argued the Department should have  
13 used prior CRS-1 returns from 2010, the final year Taxpayer filed returns, to estimate gross receipts  
14 for every subsequent year under audit. Taxpayer provides no evidence to establish how that method  
15 would be more accurate than the method actually used; how ten months of reported gross receipts in  
16 2010 were more reliable than contemporaneous bank statements.

17 In the alternative, or perhaps as a supplement to ten months of CRS-1 returns from 2010,  
18 Taxpayer argued that gross receipts could be derived from its payments register (Taxpayer Ex. 4)  
19 which purportedly summarized Taxpayer's taxable transactions, totaling 161 transactions, from  
20 February 12, 2010 through December 31, 2015. It also referred to a collection of settlement  
21 disbursement sheets (Taxpayer Ex. 7). These documents, Taxpayer asserts, are useful to computing  
22 its gross receipts.

23 However, having carefully reviewed the exhibits, the Hearing Officer did not agree that they

1 were reliable at all. Taxpayer Ex. 7 contains a variety of documents, some of which are dated  
2 settlement disbursement documents. A cursory review reveals that they contain the names of clients,  
3 dates, and the amount of funds that Taxpayer would have expected to receive for its services in a  
4 particular case. One would expect, at a minimum, that a disbursement to Taxpayer, as detailed in a  
5 settlement disbursement, should be reflected in Taxpayer's payments register. Accordingly, one  
6 would expect that information from any given disbursement could easily be crosschecked against a  
7 corresponding entry in the payments register. Yet, when such comparison is made, there is minimal  
8 correlation between the exhibits. Taxpayer explains that disbursements may not have always  
9 occurred in lump sums, so perhaps the amount provided in the disbursement sheet would not match  
10 what was detailed in the payments register or bank accounts. However, even if the disbursement  
11 were accomplished in more than one payment, one would still expect to trace the source of receipts  
12 to a client name or some other consistent identifier.

13 For example, Taxpayer Ex. 7.54 reflects a settlement distribution dated October 1, 2013.  
14 Crosschecking that document to Taxpayer Ex. 4 reveals no transactions in the corresponding date  
15 range in the name of the client whose signature appeared on the distribution sheet. This example is  
16 not isolated. A similar observation is made when comparing the information contained in the  
17 disbursement statement at Taxpayer Ex. 7.58 to the payments register in Taxpayer Ex. 4. Once  
18 more, there is no entry in the payments register that corresponds with the date or which matches the  
19 name of the client whose signature appeared on the distribution sheet.

20 These observations illustrate why Taxpayer's disbursement sheets (Taxpayer Ex. 7) and  
21 payments register (Taxpayer Ex. 4) are unreliable for the purpose of computing gross receipts and  
22 Taxpayer's corresponding liability. They further underscore the reasonableness of the Department's  
23 determination that Taxpayer's bank accounts were a more reliable source of information. The

1 Hearing Officer agrees that the bank records in this case are more consistent, trustworthy, and  
2 reliable than Taxpayer's records.

3 Taxpayer also disputes the correctness of the audit and the resulting assessment because  
4 deposits that supposedly should have been categorized as excludable, deductible, or exempt were  
5 allegedly included in the sum which the Department determined to be taxable. Taxpayer does not  
6 seemingly acknowledge that the Department afforded substantial opportunity, right up to and  
7 including the hearing on the protest, to present evidence that could have addressed these concerns  
8 and potentially reduced its liability. The Taxpayer Contact Log (Dept. Ex. G) reveals no less than 25  
9 instances during the course of the audit that the Department requested documents of Taxpayer. Ms.  
10 Griego even testified that she was prepared to make adjustments during the hearing as Taxpayer  
11 presented its evidence.

12 Ultimately, Taxpayer's documentation was grossly insufficient and unreliable for computing  
13 the sum of non-taxable deposits, whether because they purportedly derived from services performed  
14 outside of New Mexico, were borrowed monies, or derived from another non-taxable source. For  
15 example, a closer review of Taxpayer Ex. 8 which consists of various loan documents confirms that  
16 Taxpayer, Ms. Behles, Mr. Walley, and other entities with which they were associated, borrowed  
17 money from First National Bank of New Mexico (Clayton) and Ms. Mary Walley (Mr. Walley's  
18 mother). Yet, those documents do not demonstrate the sum or the accounts to which those proceeds  
19 were deposited which is the critical issue when considering the accuracy of the bank deposit method  
20 of computing Taxpayer's gross receipts. Since the relevant issue is not how much Taxpayer's  
21 borrowed, but where those borrowed funds were deposited, the records contained in Taxpayer Ex. 8  
22 are of little weight.

23 The same is true for those portions of deposits that may have derived from providing

1 services outside of New Mexico, and for any other deposit that Taxpayer asserts should be  
2 excludable, deductible or exempt. Taxpayer's exhibits are entirely inadequate for making such  
3 computation.

4 Taxpayer also asserts that it occasionally deposited client funds into its operating account,  
5 which should not be categorized as gross receipts because they should have been deposited to its  
6 client trust account instead. Taxpayer presents no evidence to establish how often this occurred or in  
7 what amount. The lack of records in this regard is consistent with the Court's observations in *In re*  
8 *Behles*, 2019-NMSC-016, ¶28 in which the Court expressed dismay with Taxpayer's failure to  
9 maintain proper trust account records. *See In re Behles*, 2019-NMSC-016, ¶2.

10 Taxpayer also asserts that the Department should have considered a survey of attorney  
11 compensation commissioned by the State Bar of New Mexico<sup>4</sup> when considering the  
12 reasonableness of its computations. In other words, Taxpayer's liability should have been more  
13 closely associated with the results of the survey than with the sum of its bank deposits. The Hearing  
14 Officer is unpersuaded as there is not one scintilla of evidence to suggest that any survey would  
15 produce a computation that is more reliable than the method employed by the Department during  
16 the underlying audit in this protest.

17 Finally, Taxpayer argues that the Department's assessment is incorrect because it simply  
18 failed to request the proper records. Otherwise stated, had the Department provided more detailed  
19 requests, then Taxpayer could have provided records that would have assured a more accurate  
20 computation of its liability. Taxpayer's argument is simply unfounded and incredulous. The Hearing  
21 Officer is unpersuaded that a reasonable taxpayer in Taxpayer's position would choose to play "hide  
22 the ball" when confronted with the possibility of a substantial tax liability. Moreover, if such records

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<sup>4</sup> [https://www.nmbar.org/Nmstatebar/Publications\\_Resources/Compensation\\_Survey.aspx](https://www.nmbar.org/Nmstatebar/Publications_Resources/Compensation_Survey.aspx)

1 existed, Taxpayer could have provided them at the hearing. As previously noted, Ms. Griego  
2 testified upon Ms. Behles inquiries that she was prepared to make necessary adjustments in reliance  
3 on any records Taxpayer might proffer up to and during the hearing.

4 Most significant upon review of all of the evidence, however, is that not even Taxpayer  
5 attempted any computations based on the records proffered at the hearing to establish, at least from  
6 its perspective, the portion of receipts that it claimed should have been excludable, deductible, or  
7 exempt. Taxpayer merely submits its records with the expectation that relief might be extrapolated  
8 from them without any method or explanation. Taxpayer does not direct the Hearing Officer's  
9 attention to any portion of the records which the Hearing Officer can reasonably rely upon to afford  
10 the relief it seeks. The Hearing Officer with the evidence presented can merely speculate as to their  
11 mathematical significance to the audit and resulting assessment, but relief may not be afforded on  
12 speculation, guess, or conjecture. *See e.g. Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶22, 111  
13 N.M. 410, 806 P.2d 59.

14 Our courts have recognized that “[i]t is not the responsibility of . . . the trial court to  
15 search the record for evidence to support a claim or assertion. That responsibility belongs to the  
16 attorney.” *See State v. Maestas*, 2018-NMSC-010, ¶51, 412 P.3d 79. The same observation is  
17 pertinent in tax protest hearings as well. Evidence pertinent to a material issue must be identified  
18 by some reference to the relevant portions of an exhibit. Without some minimal reference, a fact  
19 finder should not be expected to search the record in an effort to determine whether there exists  
20 dormant evidence which might have some bearing on the outcome of a case. *See Adler v. Wal-*  
21 *Mart Stores*, 144 F.3d 664, 672 (10th Cir. 1998) (“[courts] have a limited and neutral role in the  
22 adversarial process, and are wary of becoming advocates who comb the record of previously  
23 available evidence and make a party’s case for it.”); *See also United States v. Dunkel*, 927 F.2d



1 955, 956 (7th Cir.1991) (“Judges are not like pigs, hunting for truffles buried in briefs”).

2 Accordingly, in the absence of something more compelling and persuasive, Taxpayer’s  
3 arguments resemble the sort of unsubstantiated statements that our courts have found to be  
4 insufficient to overcoming the statutory presumption of correctness.” *See MPC Ltd.*, 2003-  
5 NMCA-021, ¶13. Taxpayer cannot on one hand fail to maintain or produce accurate or reliable  
6 records, and then on the other hand complain that the Department’s assessments are not correct  
7 for lack of those same records, or because the Department did not request the *correct* records.

8 Therefore, the alternative method employed by the Department for computing Taxpayer’s  
9 gross receipts and associated tax liability in this case was reasonable and necessary under the  
10 circumstances. It produced the most accurate accounting of gross receipts possible, and to the  
11 extent Taxpayer perceived any shortcomings in the computations, Taxpayer had a reasonable  
12 opportunity to present records to address those issues, and the failure to effectively do so rests  
13 solely with Taxpayer.

14 Because the evidence established that Taxpayer never filed personal or corporate state or  
15 federal income tax returns, the Department relied on its calculations of Taxpayer’s gross receipts  
16 to also compute Taxpayer’s income tax liability. For the same reasons discussed herein,  
17 Taxpayer’s assault on the correctness of the assessment for income tax is similarly rejected.

18 The Hearing Officer also detected no errors with the computation of Taxpayer’s liabilities  
19 for withholding tax or worker’s compensation fees based on the evidence presented at the  
20 hearing.

### 21 **Statute of Limitations**

22 Taxpayer argued that the Department misapplied NMSA 1978, Section 7-1-18 when it  
23 assessed taxes, including interest and penalty, beyond the 3-year limitation on assessments.

1 Section 7-1-18 (A) states in relevant part that “no assessment of tax may be made by the  
2 department after three years from the end of the calendar year in which payment of the tax was  
3 due, and no proceeding in court for the collection of such tax without the prior assessment  
4 thereof shall be begun after the expiration of such period.”

5 Because the relevant assessments subject of this protest were made on June 28, 2018,  
6 they were undoubtedly timely as to any liability due in, or after 2015. Assessment of taxes due in  
7 earlier periods may also be assessed, but only as permitted by the exceptions to Section 7-1-18  
8 (A).

9 In this protest, the Department relied on two exceptions. The first exception permits that  
10 “[i]n case of the failure by a taxpayer to complete and file any required return, the tax relating to  
11 the period for which the return was required may be assessed at any time within seven years  
12 from the end of the calendar year in which the tax was due, and no proceeding in court for the  
13 collection of such tax without the prior assessment thereof shall be begun after the expiration of  
14 such period.” *See* NMSA 1978, Section 7-1-18 (C). Accordingly, this exception would permit  
15 assessment by virtue of “failure ... to complete and file any required return” due in 2011, as  
16 seven years from the end of the calendar year 2011 would be December 31, 2018.

17 The second exception permits that “[i]f a taxpayer in a return understates by more than  
18 twenty-five percent the amount of liability for any tax for the period to which the return relates,  
19 appropriate assessments may be made by the department at any time within six years from the  
20 end of the calendar year in which payment of the tax was due.” *See* NMSA 1978, Section 7-1-18  
21 (D). Accordingly, this exception would permit assessment by virtue of understating Taxpayer’s  
22 liability by more than 25 percent tax that would have been due in 2012, as six years from the end  
23 of the calendar year 2012 would be December 31, 2018.

1 Under each deadline, the relevant starting point for computing the deadline to assess is  
2 not the year in which the tax was incurred, but the year in which the tax was due. For example,  
3 corporate income tax may have been incurred in tax year 2010, but because it was not due until  
4 2011, the deadline to assess for 2010 would not begin to run until the end of 2011 because that  
5 was the year in which the tax was due.

6 In this protest, the assessment of withholding tax, gross receipts tax, and the civil fraud  
7 penalty issued under Letter ID. No. L0634339120 spanned all reporting periods from January 31,  
8 2010 to June 30, 2017. The evidence established that Taxpayer filed through October 2010 and  
9 assumed non-filer status in all subsequent periods. Accordingly, the assessment issued under  
10 Letter ID. No. L0634339120 is timely as to all periods in which tax was due in 2011, including  
11 any tax that was incurred in December 2010 which would have been due in January 2011.

12 Although an assessment of tax for periods preceding December 2010 might be presumed  
13 untimely, the audit narrative (Department Ex. D) and the Taxpayer Contact Log (Department Ex.  
14 G) suggested that Taxpayer executed a waiver of limitations for 2010, which Taxpayer did not  
15 dispute. Accordingly, NMSA 1978, Section 7-1-18 (F), which provides that “[i]f the taxpayer  
16 has signed a waiver of the limitations on assessment imposed by this section, an assessment of  
17 tax may be made or a proceeding in court begun without regard to the time at which payment of  
18 the tax was due.” For that reason, the assessment for all other periods in 2010, preceding  
19 December 2010, is also deemed timely.

20 The assessment of corporate income tax under Letter ID No. L1041624880 spanned all  
21 reporting periods from December 31, 2010 to December 31, 2016. The evidence established that  
22 Taxpayer never filed corporate income taxes or personal income taxes through which the income  
23 of the S-Corporation would have been reported. Accordingly, the assessment issued under Letter

1 ID. No. L1041624880 is timely as to all tax that was incurred in 2010, but not due until 2011. To  
2 the extent any doubt remains, Taxpayer did not dispute that it executed a waiver applicable to  
3 2010 pursuant to Section 7-1-18 (F).

4 The Department made a similar finding in reference to the assessment of worker's  
5 compensation fees under Letter ID No. L2115366704. Once again finding that Taxpayer was a  
6 non-filer during all relevant periods, the Department assessed it all periods from March 31, 2010  
7 to June 30, 2017. Once more, the waiver referenced in the Taxpayer Contact Log (Dept. Ex. G)  
8 and the Audit Narrative (Dept. Ex. D) encompasses any period of 2010 that would otherwise be  
9 excluded by Section 7-1-18 (C). Thus the assessment under Letter ID No. L2115366704 is  
10 timely.

11 All assessments at issue in the protest were timely and consistent with the limitations  
12 imposed by Section 7-1-18. To the extent Taxpayer might also assert that the Department is  
13 precluded from engaging in collection activities on timely-assessed liabilities, as implied in its  
14 closing argument, Section NMSA 1978, Section 7-1-19 permits collection activities for ten years  
15 from the date of an assessment. It states, “[n]o action or proceeding shall be brought to collect  
16 taxes administered under the provisions of the Tax Administration Act and due under an  
17 assessment or notice of the assessment of taxes *after the later of either ten years from the date of*  
18 *such assessment or notice[.]*” (Emphases Added)

### 19 **Penalty**

20 Under the facts presented, the Department determined that it would be appropriate to impose  
21 penalties in the amount of 50 percent of the assessed tax liabilities as required by NMSA 1978,  
22 Section 7-1-69 (D). That provision states, “[i]n the case of failure, with willful intent to evade or  
23 defeat a tax, to pay when due the amount of tax required to be paid, there shall be added to the

1 amount fifty percent of the tax or a minimum of twenty-five dollars (\$25.00), whichever is greater,  
2 as penalty.”

3 As previously noted, the Department carries the burden of proving by a preponderance of  
4 evidence that the greater penalty was warranted and should be imposed. See Regulation  
5 3.1.11.18 (B) (1) & (2) NMAC “The issue of whether the taxpayer or other person exercised  
6 gross negligence or willful disregard for whether taxes were paid is an objective standard to be  
7 determined by the facts and circumstances.” See Regulation 3.1.11.18 (B) (3) NMAC.

8 Regulation 3.1.11.18 (A) (1) NMAC provides in relevant part that “willful attempt to evade”  
9 or “willful attempt to evade or defeat” means “conscious awareness of the obligation to pay taxes  
10 coupled with either reckless disregard for, or gross negligence with respect to, whether the tax  
11 obligation is paid.”

12 It goes on to explain that a “willful attempt to evade or defeat” may include: (a) engaging in  
13 business while not filing tax returns coupled with the knowledge that the business is subject to tax.  
14 See Regulation 3.1.11.18 (A) (2) (a) NMAC.

15 The Regulation provides several examples of “willful attempt to evade or defeat a tax.” One  
16 example explains:

17 L is an attorney who is familiar with business and tax law and is  
18 the primary shareholder in PC, a professional corporation. PC has  
19 reported and paid gross receipts tax in the past. PC stops reporting  
20 and paying gross receipts tax; L is aware of this. L has willfully  
21 caused the evasion of PC’s taxes.

22 At all relevant times in this case, Ms. Behles was an attorney with decades of experience.  
23 Although she never did state during the hearing how long she had practiced law, the Court in *In*  
24 *re Behles* observed she had been “licensed to practice law in New Mexico for nearly fifty  
25 years[.]” See *In re Behles*, 2019-NMSC-016, ¶5. For decades, she also practiced in a variety of  
26 law firms bearing her name or her initials, suggesting that she had significant experience in

1 conducting business in New Mexico. Moreover, Ms. Sanchez and Ms. Griego noted that  
2 Taxpayer consistently filed its CRS-1 returns until the latter part of 2010 after which all  
3 reporting ceased.

4 In the meantime, a review of the settlement disbursement sheets and other documents  
5 contained in Taxpayer Ex. 7 demonstrate how it was Taxpayer's practice to consistently pass  
6 along and collect gross receipts tax on its share of settlement proceeds and earned fees. *See*  
7 Taxpayer Ex. 7; 7.6; 7.14; 7.34; 7.35; 7.54; 7.58; 7.63; 7.95; 7.101; 7.102; 7.105; 7.107; 7.109;  
8 7.117. The sample of settlement disbursement sheets contained in Taxpayer Ex. 7 indicates that  
9 Taxpayer would have collected tens of thousands of dollars in funds designated for tax.  
10 However, the evidence demonstrated that the money was never remitted to the Department.

11 To the extent Ms. Behles might claim to be ignorant of New Mexico tax laws, the  
12 Department pointed out that Ms. Behles' prior dealings with the Department, exemplified in  
13 Taxpayer Ex. 5, similarly contributed to her knowledge of Taxpayer's tax obligations under state  
14 law. Although Taxpayer argued that prior proceedings in reference to other entities with which  
15 Ms. Behles may have been associated was improper or irrelevant, it does lend further support for  
16 finding that Ms. Behles had some familiarity and knowledge with the tax laws of New Mexico.

17 The totality of these observations is significant because they establish to the satisfaction  
18 of the Hearing Officer that Ms. Behles was knowledgeable of Taxpayer's tax reporting and  
19 payment obligations. Nevertheless, neither Ms. Behles nor Mr. Walley actually ever disputed that  
20 fact.

21 Mr. Walley recognized the obligation to report and pay taxes, but explained he fell  
22 behind for a variety of reasons and intended to get caught up. Ms. Behles, on the other hand,  
23 claims that she never knew that Taxpayer stopped filing CRS-1 reports in late 2010 while also

1 asserting a variety of explanations for Taxpayer's lapse. The purported reasons included back  
2 surgeries, knee surgeries, cancer, family illnesses, death, and problems with the Department's  
3 electronic filing system. Yet, there was no evidence to suggest that any combination of the  
4 events cited resulted in an inability to prepare a return, make payment, or even procure the  
5 services of another person to assist Taxpayer with fulfilling its tax reporting and payment  
6 obligations.

7 Although the Hearing Officer might empathize with circumstances in which Ms. Behles  
8 and Mr. Walley found themselves, the Hearing Officer was unpersuaded that those  
9 circumstances justified discontinuing tax reporting and payment for years preceding the  
10 assessments without any outward attempts at corrective measures. Mr. Walley testified that he  
11 intended to get caught up, but never did, and there was no tangible indication in any relevant  
12 years that his stated intentions were genuine.

13 In contrast, the evidence established that the Department provided Taxpayer written  
14 notices of Taxpayer's delinquencies for years prior to conducting its audit, but Taxpayer never  
15 responded in any manner.

16 The evidence also established that Ms. Behles had been receiving mail at the same post  
17 office address during all relevant times, and that was the same address to which various  
18 notifications had been sent. To the extent Ms. Behles and Mr. Walley claimed to be ignorant of  
19 the mounting issues or the Department's various attempts to communicate, neither Ms. Behles  
20 nor Mr. Walley were very credible in that regard.

21 The Hearing Officer was persuaded by credible evidence that Taxpayer engaged in  
22 business while not filing tax returns combined with the knowledge that the business was subject to  
23 tax. Although Mr. Walley and Ms. Behles testified to the various trials and tribulations which

1 contributed to their failure to report and pay taxes, the Hearing Officer doubted that after so many  
2 years of disregarding Taxpayer's obligations, that Mr. Walley or Ms. Behles ever intended to take  
3 the appropriate steps to rectify years of willful disregard or gross negligence.

4 The Hearing Officer finds by a preponderance of evidence that the Department's  
5 assessment of penalty under the circumstances presented by the evidence was warranted and  
6 appropriate. *See* Regulation 3.1.11.18 (B) (3) NMAC. Taxpayer through Mr. Walley and Ms.  
7 Behles possessed a conscious awareness of the obligation to pay taxes coupled with either reckless  
8 disregard for, or gross negligence with respect to, whether the tax obligation is paid.

### 9 **Residual Points**

10 Taxpayer's primary arguments are all addressed in detail, but its closing argument  
11 presents numerous subordinate issues, all of which the Hearing Officer fully considered, but  
12 which require no further discussion. All such issues presented were given careful and thorough  
13 consideration, but ultimately deemed unpersuasive and are rejected.

14 Nevertheless, the Hearing Officer will briefly address the Taxpayer's assertion that the  
15 audit and resulting assessments arose from one or more reports from disgruntled individuals with  
16 whom Ms. Behles had prior dealings. The Hearing Officer first notes that there was no credible  
17 evidence to suggest the audit and assessment arose from vindictive motives. Instead, the  
18 evidence established that the Department was aware of Taxpayer's delinquencies well in advance  
19 of initiating the audit in 2017. Even if there were some evidence to suggest that the audit and  
20 resulting assessment arose from such report, that does not justify or provide a defense for years  
21 of Taxpayer disregarding its tax reporting and payment obligations. The Hearing Officer was  
22 unpersuaded that motive was a relevant issue in this matter.

23 Taxpayer also argued that the Department improperly disregarded its tax returns when



1 evaluating and computing its tax liability. However, Ms. Sanchez and Ms. Griego credibly  
2 testified that Taxpayer did not file tax returns. The Department appropriately emphasized that the  
3 tax returns contained in Taxpayer Ex. 10 displayed no indication of being filed and they were  
4 neither signed nor dated. That observation, when considered with the credible testimony of Ms.  
5 Sanchez and Ms. Griego that neither Taxpayer, nor Mr. Walley and Ms. Behles ever filed federal  
6 or state income taxes, supports the reasonableness of the Department's method of computation in  
7 this case. The Hearing Officer does not find the returns in Taxpayer Ex. 10 to be trustworthy or  
8 reliable.

9 Finally, Taxpayer continued to assert impropriety from the unavailability of Ms. Lucero  
10 to testify at the hearing. The cause for her unavailability is addressed in more detail in the  
11 Department's Amendment to Prehearing Statement that was filed on February 19, 2020. Despite  
12 Taxpayer's opposition to the substitution of Ms. Sanchez for Ms. Lucero, the Hearing Officer  
13 was persuaded that Ms. Sanchez was a competent witness with personal knowledge and that the  
14 absence of Ms. Lucero was not prejudicial to Taxpayer. To the extent Taxpayer could have  
15 assertedly relied on Ms. Lucero to testify on any matter that could have been perceived as  
16 favorable to Taxpayer's position, it was incumbent on Taxpayer to secure her appearance.  
17 Taxpayer made no effort to do so prior to being notified of Ms. Lucero's unavailability. *See*  
18 *Gallegos v. Yeargin W. Constructors*, 1986-NMCA-087, ¶14, 104 N.M. 623, 725 P.2d 599 (a  
19 party has the obligation to subpoena witnesses whose presence is indispensable to their case.)

20 Having considered all of the evidence and arguments, the Hearing Officer was persuaded  
21 that Taxpayer's protest should be GRANTED IN PART as to the adjustments to which Ms.  
22 Griego conceded the Taxpayer was entitled and DENIED with respect to all remaining issues.

1 **CONCLUSIONS OF LAW**

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

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

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

9 D. If a taxpayer presents sufficient evidence to rebut the presumption, then the  
10 burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*,  
11 2003-NMCA-021, ¶13.

12 E. Taxpayers have a legal obligation to retain records capable of accurately  
13 computing state taxes as required by NMSA 1978, Section 7-1-10 (A).

14 F. Upon determination that a taxpayer’s records are insufficient to accurately  
15 compute taxes, the Department may resort to alternative means of computing a tax obligation,  
16 which includes the bank deposit method provided by Regulation 3.1.5.8 NMAC.

17 G. Where a taxpayer’s claim for relief relies on the application of an exemption or  
18 deduction, “the statute must be construed strictly in favor of the taxing authority, the right to the  
19 exemption or deduction must be clearly and unambiguously expressed in the statute, and the  
20 right must be clearly established by the taxpayer.” *See Wing Pawn Shop v. Taxation and Revenue*  
21 *Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); *See*  
22 *also TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d  
23 474.

1 H. Taxpayer did not rebut the statutory presumption of correctness that attached to the  
2 assessments under NMSA 1978, Section 7-1-17 and the burden did not therefore shift to the  
3 Department to re-establish the correctness of its assessments.

4 I. The Department established by a preponderance of evidence that it appropriately  
5 assessed civil penalty in the amount of fifty percent for failure, with willful intent to evade or defeat  
6 a tax, to pay when due the amount of tax required to be paid. *See* NMSA 1978, Section 7-1-69 (D).

7 For the foregoing reasons, Taxpayer's protest should be GRANTED IN PART limited to  
8 the adjustments to which Ms. Griego conceded the Taxpayer was entitled, and DENIED with  
9 respect to all other issues in dispute. With regard for adjustments, Taxpayer's taxable receipts  
10 should be reduced by \$71,405.54 [FoF No. 133] with corresponding adjustments made to the  
11 amounts due for tax, penalty, and interest. Interest and penalty shall continue to accrue as  
12 permitted by law until paid in full.

13 DATED: December 31, 2020

14 

15 Chris Romero  
16 Hearing Officer  
17 Administrative Hearings Office  
18 P.O. Box 6400  
19 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On December 31, 2020, a copy of the foregoing Decision and Order was submitted to the  
15 parties listed below in the following manner:

16 *First Class Mail and Email*

*Email Only*

17  
18 INTENTIONALLY BLANK

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