STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
BRYAN E. HUSKISSON
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0499356336

v.

Case Number 20.05-070A
Decision and Order No. 21-03

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On December 4, 2020, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the merits of the matter of the tax protest of Bryan E. Huskisson (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Bryan E. Huskisson appeared, accompanied by his certified public accountant (CPA), Dennis R. Kennedy, representing Taxpayer. Staff Attorney Cordelia Friedman appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Angelica Rodriguez appeared as a witness for the Department. Taxpayer submitted Exhibits 1 and 2 prior to the hearing, which the Department objected to for lack of foundation and as hearsay, however, as explained later in this decision, Taxpayer's exhibits are admitted. The Department offered Exhibits A through H at the hearing and Department exhibits were admitted with no objection. Exhibits are more fully described in the Exhibit Log. The administrative file is considered part of the record. The hearing occurred by videoconference.

In quick summary, this protest involves Taxpayer's claim that no gross receipts tax, penalty, or interest should be assessed against the Taxpayer because as a statutory employee sports coach any wage income is exempt from gross receipts tax. The Department contended that the Taxpayer

was engaged in business, and all receipts are presumed taxable. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the Hearing Officer finds that Taxpayer's evidence does not overcome the presumption of correctness that attached to the assessment. The protest is denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural Findings

1. On October 23, 2019, under Letter Id. No. L0499356336, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Taxpayer, assessing Taxpayer Project Gross Receipts Tax of $2,191.62, Penalty of $438.34 and Interest of $427.49 for a total assessment of tax due of $3,057.45 for tax reporting periods beginning January 1, 2012 and ending December 31, 2016. [Administrative File; Department Exhibit G].

2. On November 5, 2019, Taxpayer submitted a Protest letter, alleging that the Department was incorrect in its assessment because Taxpayer alleged he was an "employee of NMYSA" and not subject to gross receipts. The letter was stamped as received by the Department Protest Office on November 8, 2019. [Administrative File].

3. On November 26, 2019, under Letter Id. No. L1645372080 the Department issued a letter informing the Taxpayer that the Department acknowledged receipt of Taxpayer's protest for tax period beginning January 1, 2012 and ending December 31, 2016. [Administrative File].

4. On March 11, 2020, Executive Order 2020-004 was issued by the State of New Mexico's Governor Michelle Lujan Grisham, declaring a public health emergency within the State of New Mexico due to the novel coronavirus disease (COVID-19). [Administrative File].

5. On March 12, 2020, the first Public Health Emergency Order was issued in response to the COVID-19 pandemic by the New Mexico Department of Health, Kathyleen M. Kunkel, Cabinet Secretary [Administrative File].

6. On March 13, 2020, Brian VanDenzen, Chief Hearing Officer of the Administrative Hearings Office, issued Standing Order No. 20-02, entitled "Emergency Order Requiring Remote Hearings Under Tax Administration Act and Property Tax Code During Public Health Emergency." The Standing Order required hearings to occur by video or audio conference, unless an in-person hearing was requested in a manner outlined in the order. [Administrative File].

7. On May 20, 2020, the Department submitted a Request for Hearing to the Administrative Hearings Office, requesting a scheduling hearing on the Taxpayer's protest. The Request for Hearing stated that the total at issue was $3,057.45. [Administrative File].

8. On May 20, 2020, the Department submitted an Answer to Protest to the Administrative Hearings Office, indicating that Taxpayer's income reported on a Federal Form 1099 was claimed as self-employment without reporting state gross receipts. [Administrative File].

9. On May 21, 2020, the Administrative Hearings Office mailed a Notice of Telephonic Scheduling Hearing to the parties, setting the matter for a telephonic scheduling hearing on June 11, 2020. [Administrative File].

10. At the telephonic scheduling hearing of June 11, 2020, the parties appeared. Mr. Dennis Kennedy, CPA appeared on behalf of the Taxpayer, who also appeared. Attorney Cordelia Friedman appeared on behalf of the Department, accompanied by protest auditor Angelica Rodriguez. The parties did not object that conducting the scheduling hearing satisfied

the 90-day hearing requirements of Section 7-1B-8 (F) (2019) while still allowing meaningful time for completion of the other statutory requirements under Section 7-1B-6 (D) (2015). *See also* Regulation § 22.600.3.8 (E) NMAC. The Hearing Officer preserved a recording of the hearing. [Administrative File].

11. On June 11, 2020, the Administrative Hearings Office mailed a Notice of Second Telephonic Status/Scheduling Hearing to the parties, setting the matter for a telephonic scheduling hearing on July 21, 2020. [Administrative File].

12. On June 18, 2020, Taxpayer, through Dennis Kennedy, CPA, filed a Motion for Summary Judgement [sic]. [Administrative File].

13. On July 1, 2020, the Department filed its Response to Protestant's Motion for Summary Judgment. [Administrative File].

14. On July 21, 2020, a second telephonic scheduling hearing and motion hearing occurred. At the telephonic hearing Mr. Dennis Kennedy, CPA appeared on behalf of the Taxpayer, who also appeared. Attorney Cordelia Friedman appeared on behalf of the Department. The parties argued the merits of the Motion for Summary Judgment. The Hearing Officer preserved a recording of the hearing. [Administrative File].

15. On July 21, 2020, the undersigned Administrative Hearing Officer issued an Order Denying Taxpayer's Motion for Summary Judgment for lack of a factual record. [Administrative File].

16. On July 21, 2020, the Administrative Hearings Office mailed a Scheduling Order and Notice of Hearing to the parties, setting various deadlines and setting the matter for a videoconference merits hearing on December 4, 2020. [Administrative File].

17. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted the merits hearing on December 4, 2020 with the parties and witnesses present by videoconference. The Administrative Hearings Officer preserved an audio recording of the hearing in three parts ("Hearing Record" or "H.R.1," "H.R.2," and "H.R.3"). [Administrative File].

Substantive Findings

18. Taxpayer Bryan E. Huskisson is a soccer coach who works in New Mexico. He has been coaching for thirty years. [Administrative File; AHO examination of B. Huskisson, H.R.1, 1:02:00-1:02:10].

19. Taxpayer contracts with soccer clubs for his coaching service, generally one club per season (a 10-month season), although in 2014 he also contracted with a second club for a summer camp. Taxpayer submitted no contract for review, so the terms of the contract are not able to be determined. [Administrative File; Direct examination of B. Huskisson, H.R.1, 45:50-46:30; Cross examination of B. Huskisson, H.R.1, 53:00-54:15, AHO examination of B. Huskisson, H.R.1 56:00-57:40; Recross examination of B. Huskisson, H.R.1, 57:40-59:05; Direct examination of A. Rodriguez, H.R.1, 1:12:10-1:12:30].

20. Taxpayer follows the guidelines mandated by the club and the city when coaching. Taxpayer provides balls and cones. [Administrative File; Direct examination of B. Huskisson, H.R.1, 37:50-41:30; AHO examination of B. Huskisson, H.R.1, 1:02:15-1:03:10].

21. Taxpayer's compensation from the soccer club is the product of the fixed contractual per-lesson rate multiplied by the number of lessons provided, not a fixed salary. [AHO examination of B. Huskisson, H.R.1, 1:01:20-1:02:00].

22. Taxpayer does not solicit customers. [AHO examination of B. Huskisson, H.R.1, 1:02:50-1:03:05; Taxpayer exhibits 1 and 2].

23. Taxpayer filed form PIT-B in tax years 2013, 2014, 2015 and 2016, but did not provide copies for review. Taxpayer received Form 1099s for the years in question, but did not provide copies for review. The Department obtained an abstract of the 1099s and determined that they listed the type of income as "non-employee compensation." [Department Exhibit B-9 (line 18); Department Exhibit C-7 (line 18); Department Exhibit D-9 (line 18); Department Exhibit E-8 (line 18); Cross examination of A. Rodriguez, H.R.2, 10:00-11:00].

24. Taxpayer used the services of Dennis Kennedy, CPA to complete and file federal and state personal income tax returns for each of the years in question, 2012-2016. [Administrative File; Cross of B. Huskisson, H.R.1, 54:15-55:40].

25. Taxpayer is unfamiliar with the IRS form SS-8 and has did not recall submitting a SS-8 form request for determination of status (employee or independent contractor) from the IRS. No SS-8 form was provided in support of Taxpayer's claim. [Administrative File; AHO examination of B. Huskisson, H.R.1, 1:04:15-1:04:30; Direct examination of A. Rodriguez, H.R.1, 1:25:40-1:31:45; Cross examination of A. Rodriguez, H.R.1, 1:58:00-2:00:00; Redirect examination of A. Rodriguez, H.R.1, 2:02:20-2:03:00, Recross examination of A. Rodriguez, H.R.1, 2:03:00-2:05:45].

26. In the tax years at issue, Taxpayer submitted federal form Schedule C-EZ (Net Profit from Business – sole proprietorship) for business income and expenses. There is a box on the Schedule C-EZ in which a taxpayer may claim the income as statutory employee wages, however the box was not checked. [Department exhibits A-4 (2012) (Part II, line 1), B-6 (2013) (Part II, line 1), C-4 (2014) (Part II, line 1), D-6 (2015) (Part II, line 1), E-3 (2016) (Part II, line

1); Direct examination of A. Rodriguez, H.R.1, 1:14:00-1:16:20, 1:21:50-1:25:40, 1:25:40-1:31:45; 1:33:50-1:39:00].

27. In the tax years at issue, Taxpayer submitted federal form Schedule SE (Self-Employment Tax). [Department exhibits A-5 (2012), B-7 (2013), C-5 (2014), D-7 (2015), E-4 (2016)].

28. Angelica Rodriguez is a protest tax auditor with the Department and is familiar with the tax protest at hand. [Administrative File; Direct examination of A. Rodriguez, H.R.1, 1:12:30-1:14:00].

29. Taxpayer did not report income from coaching services that had been reported on the federal Schedule C-EZ to New Mexico on a CRS-1 tax return. [Direct examination of A. Rodriguez, H.R.1, 1:39:00-1:42:35].

30. The Department issued a letter informing the Taxpayer of the Department's intent to assess gross receipts taxes, penalty and interest on June 6, 2019, providing an opportunity to provide additional information or to request a managed audit. The Taxpayer did not respond with information about the receipts in question or to request a managed audit. [Direct examination of A. Rodriguez, H.R.1, 1:41:00-1:43:30; Department Exhibit F].

31. Interest on the assessment accrues until the assessment is paid, the assessment balance of tax, penalty and interest at the time of the hearing was $3,163.68. [Direct examination of A. Rodriguez, H.R.1, 1:44:00-1:47:15; Department Exhibit G, H].

DISCUSSION

Taxpayer Bryan E. Huskisson is a part-time soccer coach who was paid for providing coaching services within New Mexico. Taxpayer relied on advice provided by his Certified Public Accountant when submitting his federal and state tax returns. Taxpayer argued that he is

a statutory employee rather than an independent contractor. Taxpayer was credible but did not provide any documentary evidence to support his position. Evidence presented was insufficient to overcome the presumption of correctness of the Department's assessment. The law does not allow the abatement of gross receipts tax, penalty, and interest when evidence does not overcome the presumption of correctness.

Presumption of correctness

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation § 3.1.1.16 (12/29/2000). Under Regulation § 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it is a taxpayer's burden to present some countervailing evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217, 62 P.3d 308.

Gross Receipts and Compensating Tax Act.

The assessment in this protest arises from an application of the Gross Receipts and Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-117, which imposes a tax for the privilege of engaging in business, on the receipts of any person engaged in business in New Mexico. *See* NMSA 1978, Section 7-9-4 (2010). The definition of "engaging in business" under Section 7-9-3.3 (2019), is relevant: "'engaging in business' means carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." There is a statutory presumption that all receipts of a person engaged in business activities are taxable. *See* NMSA 1978, Section 7-9-5(A) (2019). Yet, despite the general presumption of taxability, a taxpayer may qualify for the benefits of various deductions and exemptions.

The statutory definition of "gross receipts" under Section 7-9-3.5 (2019) states, in pertinent part: "'gross receipts' means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico." Taxpayer argued that while he provided a coaching service, the income was not derived from work as an "independent contractor," but from compensation as an "employee" of the soccer clubs he worked for. The Department contends that despite its requests, Taxpayer provided no evidence of a federal designation as a statutory employee, nor evidence of the factors that go into a determination of whether he fits the statutory definition of employee.

Taxpayer's secondary claim is that the Department erred in assuming the income reported on Schedule C was in fact business income. It is this assertion that should be examined first.

Was the Department unreasonable in connecting Schedule C-EZ reporting to gross receipts?

Because the computer audit that initiated the tax assessment was based on a Schedule C mismatch, Taxpayer's claim is that the Department made a sort of leap of faith in its determination that income reported on Schedule C-EZ filings necessarily entailed liability for gross receipts. While it may be true that at times reported Schedule C-EZ income does not require gross receipts tax reporting, whether it does requires examination of the facts of the particular situation. And, since the Department is entitled to the presumption that all receipts of a person "engaging in business" are taxable, it is Taxpayer's burden to present some evidence or legal argument to show that the Taxpayer is entitled to an abatement, in full or in part, of the assessment issued in the protest. *See* Section 7-9-3.3 (2019) and Section 7-9-5(A) (2019); *see also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. Taxpayer filed a Schedule C-EZ for business income and expenses, and when the Department assessed the business, Taxpayer claimed it was the responsibility of the Department to prove that the receipts were taxable gross receipts. In doing so, Taxpayer attempted to shift the burden to the Department to prove his Schedule C-EZ income was business-related. The two exhibits[1] submitted by Taxpayer contained (1) Taxpayer's interrogatories and requests for production of documents, and (2) Department's responses to the requests. The requests presented in the Taxpayer's exhibits provide an example of Taxpayer's

[1] Taxpayer Exhibits 1 and 2 were prefiled in accordance with the Scheduling Order. However, the Department objected that the exhibits lacked foundation and were hearsay. *See* discussion of prefiled exhibits H.R.1 at 18:30-25:35. The Department acknowledged that the answers to the same questions posed in the Taxpayer's interrogatories and requests for production of documents (Exhibit 1) and the Department's answers to the same (Exhibit 2) could be presented at hearing, since testimony was the preferred method of obtaining that evidence, and if the answers were contradictory to the exhibit, to use the exhibit for impeachment. Mr. Kennedy, being unfamiliar with the formal court process, did not take the opportunity to do so. Under the Administrative Hearings Office Act, the strict rules of evidence do not apply, and reliable hearsay is admissible. *See* NMSA 1978, Section 7-1B-6 (D) (1); *see also* Regulation § 22.600.3.24 (D) (8/25/2020). Because the legal residuum rule applies in administrative hearings, hearsay cannot be the sole basis for a factual finding. *See Young v. Bd. of Pharmacy*, 1969-NMSC-168, ¶¶ 15-17, 81 N.M. 5, 462 P.2d 139. The Department's answers to interrogatories and requests for production were sworn to be true by the Department attorney, and answers supplied were from the Department's witness at the hearing, so foundation is adequate. Finding no prejudice exists in allowing the exhibits, the Department's request for greater formality was overly cumbersome on a non-attorney representative, and finding the responses are consistent with Taxpayer's testimony, on the sole issue of whether Taxpayer held himself out to the public to solicit business, Taxpayer's exhibits are admitted.

attempt at burden shifting – requesting of the Department evidence that Taxpayer held himself out publicly as an independent contractor. However, the burden of proof rests firmly with the Taxpayer. *See* Regulation § 22.600.3.24 (B) NMAC (8/25/2020). The burden is on a taxpayer to prove that the taxpayer is entitled to an exemption or deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,* 2007-NMCA-050, ¶141 N.M. 520, 157 P.3d 85; *see also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743, 497 P.2d 745. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306*; see also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649; s*ee also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

In this particular situation, the Department was not unreasonable in concluding that the Schedule C-EZ income Taxpayer reported was business income from coaching. Taxpayer is a self-described soccer coach and has been for thirty years, working with various soccer clubs. The use of Schedule C-EZ is tailored to business income, and the use thereof creates a strong likelihood that the coaching income is business income. On the form itself the Schedule C-EZ indicates its use is for "Net Profit from Business (Sole Proprietorship)."[2] In the Schedule C instructions, the fact that the schedule is tailored to business income is made clear. On the first page, in big, bold letters, is

[2] Prior year Schedule C-EZ forms are available on the IRS website. *See* 2012 Schedule C-EZ, https://www.irs.gov/pub/irs-prior/f1040sce--2012.pdf (last visited 1/28/2021); *see also* 2013 Schedule C-EZ, https://www.irs.gov/pub/irs-prior/f1040sce--2013.pdf (last visited 1/28/2021); *see also* 2014 Schedule C-EZ https://www.irs.gov/pub/irs-prior/f1040sce--2014.pdf (last visited 1/28/2021); *see also* 2015 Schedule C-EZ, https://www.irs.gov/pub/irs-prior/f1040sce--2015.pdf (last visited 1/28/2021); *see also* 2016 Schedule C-EZ https://www.irs.gov/pub/irs-prior/f1040sce--2016.pdf (last visited 1/28/2021).

the title "Profit or Loss From Business." In the IRS's Publication 334, guiding the use of the Schedule C-EZ, the word "business" appears not only in the title "Tax Guide for Small Business," but throughout the publication.[3] There is no doubt that Taxpayer reported business income when he filed Schedule C-EZ in each of the years at issue.

The same is true concerning the use of the PIT-B form for New Mexico Personal Income Taxes. The documents in evidence show that Taxpayer filed a PIT-B form in tax years 2013, 2014, 2015 and 2016. While not everyone who uses the PIT-B must have business income, the form is used for business income as it relates to personal income. The PIT-B[4] is for allocation and apportionment of income. Allocated income is "non-business income" and is not applicable here. *See* Instructions for 2016 PIT-B. Apportioned income is "business and farm income" which includes "income reported on federal Schedules C, C-EZ, F, or other schedules that characterize income as business-related." *Id*. The Department was not unreasonable in connecting the dots between Schedule C-EZ filings and PIT-B filings as related to the Taxpayer's business activity of coaching. Taxpayer, by coaching, was "carrying on … any activity with the purpose of direct or indirect benefit," which is engaging in business. Section 7-9-3.3(2019). And, again, there is a

[3] Prior year Schedule C-EZ usage instructions are provided by "Publication 334: Tax Guide for Small Business" and are available on the IRS website. *See* 2012 Pub 334, https://www.irs.gov/pub/irs-prior/p334--2012.pdf (last visited 1/28/2021); *see also* 2013 Pub 334, https://www.irs.gov/pub/irs-prior/p334--2013.pdf (last visited 1/28/2021); *see also* 2014 Pub 334 https://www.irs.gov/pub/irs-prior/p334--2014.pdf (last visited 1/28/2021); *see also* 2015 Pub 334, https://www.irs.gov/pub/irs-prior/p334--2015.pdf (last visited 1/28/2021); *see also* 2016 Pub 334 https://www.irs.gov/pub/irs-prior/p334--2016.pdf (last visited 1/28/2021). Likewise, Schedule C instructions contain advice on when the use of Schedule C-EZ is appropriate. *See* 2012 Schedule C instructions, https://www.irs.gov/pub/irs-prior/i1040sc--2012.pdf (last visited 1/27/2021); *see also* 2013 Schedule C instructions https://www.irs.gov/pub/irs-prior/i1040sc--2013.pdf (last visited 1/27/2021); *see also* 2014 Schedule C instructions https://www.irs.gov/pub/irs-prior/i1040sc--2014.pdf (last visited 1/27/2021); *see also* 2015 Schedule C instructions https://www.irs.gov/pub/irs-prior/i1040sc--2015.pdf (last visited 1/27/2021); *see also* 2016 Schedule C instructions https://www.irs.gov/pub/irs-prior/i1040sc--2016.pdf (last visited 1/27/2021).

[4] Instructions for 2016 PIT-B Schedule of New Mexico Allocation and Apportionment of Income, p.1. PIT-B prior year instructions are available on the Department's forms and publications website. *See* https://www.tax.newmexico.gov/forms-publications/ (last visited 1/28/2021).

presumption that business income from services performed in New Mexico are taxable as gross receipts. *See* Section 7-9-4 (2010)..

A Determination of Employee or Independent Contractor is not necessary.

Federal background:

Taxpayer's argument that he was an employee contemplates federal law and state law. However, the issue will not be discussed in great detail because the Taxpayer's argument goes against every tax return he filed during the time at issue, as discussed below. For a cursory discussion, we turn to the federal context first. Taxpayer, through his representative, alleged the existence of acts of congress that made all youth sports coaches statutory employees, but did not cite the law. A diligent search for such a law did not reveal any such act (although in Publication 15-A, there is a notation that employees of 501(c)(3) organizations meant to foster "national or international amateur sports competition" are exempt from taxes themselves, but are required to pay, on behalf of their employees, Social Security and Medicare taxes – yet no evidence was presented that the soccer clubs were national or international in scope). In the motion for summary judgment and in closing arguments, Taxpayer cited 26 CFR 31.3121 (d)(1)(C), IRS Revenue Ruling 87-41 for a twenty-factor test, and the case of the Fairfield Soccer Association.

While these considerations are helpful in determining whether Mr. Huskisson meets the definition of an employee, the argument is in essence smoke and mirrors, a distraction from the fact that all his tax filings show Taxpayer claimed status as a business and received benefits of doing so. *See Stohr v. New Mexico Bureau of Revenue*, 1976- NMCA-118, ¶8, 90 N.M. 43, 559 P.2d 420 ("[t]he taxpayer must not attempt to show one scheme for federal tax purposes, and a nontaxable event for purposes of state gross receipts tax"). And while federal determinations are helpful, they are not conclusive of the status of a worker under state law. Here, the evidence of federal tax

returns claiming business income and expenses contradicted the testimony taken at the hearing. Neither 1099s, nor SS-8[5], nor affidavits, nor contracts were provided to lend credence to Taxpayer's claims, to flesh out the details of the agreement between the contracting parties, or to determine the level of control and supervision that each held. Taxpayer's testimony, although admissible and credible, bore little weight with the Hearing Officer because the claims were unsupported by documentary evidence. The inquiry is fact intensive, and objective sources of the facts were not provided. Further, it was shown that the documents do not support the claims, since the abstract of the 1099s obtained by the Department designate the income as "non-employee compensation."

Taxpayer appears to want both the benefits of calling the 1099 receipts "business income" from self-employment in the federal personal income tax context for the potential to file a Schedule C-EZ for expense deductions, but wants to be considered an "employee" for gross receipts tax purposes to avoid imposition of gross receipts taxes. At least based on the record presented, Taxpayer cannot have it both ways in this protest: by claiming the income in question as business income and taking expense deductions related to that income on the Schedule C-EZ, Taxpayer is presumed to be a person engaged in business for gross receipts tax purposes.

New Mexico foreground:

Taxpayer argued that as a statutory or common law "employee" his earnings are wages, and as such are exempt from gross receipts reporting and tax payment. *See* NMSA 1978, Section 7-9-17 (1969). The Department argued that Taxpayer has not shown he is an employee, and has

[5] Publication 15-A, cited by Taxpayer, informs taxpayers "[i]f you want the IRS to determine whether or not a worker is an employee, file Form SS-8 with the IRS." The SS-8 form instructions indicate that the purpose of the form is for firms and workers "to request a determination of the status of a worker under the common law rules for purposes of federal employment taxes and income tax withholding." The worker is the only person required to sign the form. Notably, Mr. Huskisson did not request federal review for a determination of his worker status. Available on the IRS forms and publications website: form SS-8 instructions at https://www.irs.gov/pub/irs-pdf/iss8.pdf (last visited 12/2/2020); Employer's Supplemental Tax Guide, Pub. 15-A is available at https://www.irs.gov/pub/irs-pdf/p15a.pdf (last visited 12/3/2020).

claimed business income, therefore his business earnings are taxable as gross receipts. *See* NMSA 1978, Section 7-9-5(A) (2019).

The documents in evidence show that Taxpayer filed a PIT-B form in tax years 2013, 2014, 2015 and 2016. The PIT-B[6] is for allocation and apportionment of income. Allocated income is "non-business income" and is not applicable here. *See* Instructions for 2016 PIT-B. Apportioned income is "business and farm income" which includes "income reported on federal Schedules C, C-EZ, F, or other schedules that characterize income as business-related." *Id.*

Taxpayer's argument is, again, contrary to his years of filed tax returns. The Hearing Officer considers the evidence presented, and when evidence is insufficient or contradictory, the presumption of taxability must prevail. *See* Section 7-1-17. The evidence presented here is quite different from the evidence presented in a similar case. *See The protest of Larry J. Gonzales,* Decision and Order #15-41 (N.M. Admin. Hearings Office, December 29, 2015, non-precedential). In the *Gonzales* case, Mr. Gonzales was a full-time employee of the Albuquerque Public Schools (APS) as a math and physical education instructor. He had been employed as a basketball coach and athletic director at the school where he worked. Albuquerque Youth Basketball League (AYBL) and the APS contracted with one another to provide APS facilities for AYBL practice and events. The contract required that an APS employee be present while AYBL conducted activities. Mr. Gonzales, as part of his duties as athletic director, and at the direction of the school principal, supervised these AYBL sporting events in the school gym. He closed the gym when the event concluded. Here, in contrast, Mr. Huskisson did not provide evidence of his other full-time employment, or whether it was related in any way to sports. Mr. Huskisson did not provide

[6] Instructions for 2016 PIT-B Schedule of New Mexico Allocation and Apportionment of Income, p.1. The PIT-B prior year instructions are available on the Department's forms and publications website. *See* https://www.tax.newmexico.gov/forms-publications/ (last visited 1/28/2021).

evidence of a contract – between himself and the team, or between himself and the league. He did not provide evidence that there was any sort of league, what the profit or non-profit status of the league or team was, or who, if anyone, was his "boss" or "employer." Taxpayer's assertions contained in the protest letter and the Motion for Summary Judgement [sic] suggest (without providing evidence) that New Mexico Youth Soccer Association (NMYSA), was the purported employer. Testimony, however, suggested that the specific clubs were the employer. Testimony suggested that the league, the clubs, and the state of New Mexico all had a role in guiding the activity in terms of location. Yet, Mr. Huskisson was free to provide coaching instruction without oversight and guidance and supplied soccer balls and cones for practice. Although the record was riddled with technical issues, the direct examination of Mr. Huskisson covered only a fraction of the "roadmap" devoted to determination of employee status.

While school-related sporting officials (referees, umpires, scoring judges) are exempted from gross receipts tax reporting, and there may be a strong public policy against requiring sports coaches to pay gross receipts taxes, as the imposition of additional tax, penalty and interest may discourage competent and caring individuals from participating in the pursuit of this meaningful civic activity, developing public tax policy is not the role of the Hearing Officer. *See* NMSA 1978, 7-9-41.4 (2009); *see also* Regulation § 3.2.1.18 (K) (12/14/2012); *see also* NMSA 1978, Section 7-1B-7(A) (2015). Nevertheless, it is clear from the statute that coaches are specifically excluded from the exemption from gross receipts tax reporting contained in Section 7-9-41.4, and because the statute is narrow in this way, one must assume the absence was intentional. *See Hammack v. New Mexico Taxation and Revenue Dep't*, 2017-NMCA-086, ¶ 32, 406 P.3d 978.

The tax documents provided in evidence show that Taxpayer claimed self-employment business income and expenses on federal reporting, claimed business income on PIT-B in state

reporting, but filed no gross receipts tax returns. Taxpayer's claims at the hearing asks the Hearing Officer to allow the benefits of self-employment without the responsibility of self-employment. "[T]axpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer must not attempt to show one scheme for federal tax purposes, and a nontaxable event for purposes of state gross receipts tax." *Stohr v. New Mexico Bureau of Revenue*, 1976- NMCA-118, ¶8, 90 N.M. 43, 559 P.2d 420.

Independent Contractor

Although the determination is moot, as noted above, in order to satisfy the parties that all avenues have been explored, an analysis of whether Taxpayer, considering only the evidence presented at hearing, is an employee or independent contractor follows.

Beginning with federal enactments of law, 26 USC 3306 provides a variety of definitions under the Internal Revenue Code, including the term employee. "For purposes of this chapter, the term "employee" has the meaning assigned to such term by section 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply." 26 USC 3306 (i). Turning then to 26 USC 3121 (d), the definition of "employee" – most of which is inapplicable to the argument presented here – includes "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 USC 3121 (d)(2).

For the "usual common law rules" we turn to the federal regulations which draw distinctions between employees and independent contractors. *See Anglim v. Empire Star Mines Co.*, 129 F.2d 914 (9th Cir. 1942) (regulations do no more than reiterate familiar principles of common law). The code of federal regulations provides the relevant distillation of common law in its section titled

"Who are employees." *See* 26 CFR 31.3121(d)-1. The section concerning common law employees indicates that the relationship of employer and employee controls. *See* Section 31.3121 (d)-1(c).

The part indicates that:

> (2) Generally such [employer-employee] relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
>
> (3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

The particular facts of a case control the determination. The 20-factor test contained in "Revenue Ruling 87-41" that was mentioned by Taxpayer's representative is available on the IRS website, only in its distilled form, as a section of a publication entitled "Present law and background relating to worker classification for federal tax purposes." And concerning the case of "Fairfield Soccer Association" mentioned by Mr. Kennedy in his closing argument, I could find no such reported case[7].

[7] Though no legal research search engine provided results, a google.com search showed that The New York Times reported on a settlement between the IRS and the Fairfield United Soccer Association, which deals only with the individuals in that case. The association agreed to begin withholding taxes from coach employee wages, since the

The facts indicate that the location of the sports coaching was dictated by the soccer club, but the manner and means of teaching soccer was left to the independent judgment of the coach, Taxpayer. Since "an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done" Mr. Huskisson had control. There is no evidence of the right to discharge. The facts obtained at the hearing indicate that Taxpayer provided cones and soccer balls (tools), but the location of practice (place to work) was at the discretion of the soccer club. Since "furnishing of tools and the furnishing of a place to work" is characteristic of an employer, and the soccer club only provided one of the two, this factor cuts both ways. Finally, we return to the independent judgment of the coach: "if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor." Under the circumstances here, Taxpayer was an independent contractor under federal law since no other person or entity controlled the means and methods of his coaching.

Under New Mexico law, the inquiry is slightly different, but yields the same result. Taxpayer must show the income was in fact employee compensation, i.e., "wages, salaries, commissions and any other form of remuneration paid to employees for personal services." *See* NMSA 1978, Section 7-2-2 (C) ("compensation" defined). Here, the definition of an employee is relevant. Regulation § 3.2.105.7 NMAC (5/15/01) provides a seven-part test:

> (1) is the person paid a wage or salary;
> (2) is the "employer" required to withhold income tax from the person's wage or salary;
> (3) is F.I.C.A. tax required to be paid by the "employer";
> (4) is the person covered by workmen's compensation insurance;
> (5) is the "employer" required to make unemployment insurance contributions on behalf of the person;
> (6) does the person's "employer" consider the person to be an employee;

IRS classified the coaches as employees. *See* https://www.nytimes.com/2007/08/02/nyregion/02soccer.html (last visited 2/2/2021). This is not binding precedent.

> (7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

In answering the questions, the Hearing Officer considers not only the answers provided by Mr. Huskisson at the hearing but also the tax documents he submitted as truthful. For the first question, yes, it is clear Taxpayer was paid a wage or a salary. For the second, third, fourth, fifth and sixth questions, the evidence provides no answer, since there is no evidence concerning the purported "employer," i.e., the various soccer clubs or the soccer league, and whether they are required to withhold income tax, pay F.I.C.A. tax, provide workmen's compensation insurance, or whether the employer considered this Taxpayer to be an employee. For the seventh question, the Taxpayer testified that the "employer" dictated where and when the coaching took place but did not exercise control over his means of accomplishing a result, i.e., soccer teaching methods.

Because each of the indicia have to be present to make the presumption that a person is an employee, and only two of the seven questions have answers in evidence, there is no presumption that Taxpayer was an employee. However, "even if one or more of the indicia are not present" a person may still be considered an employee. Regulation § 3.2.105.7 (B) NMAC.

In New Mexico, the question of whether a person is an employee or independent contractor turns on control. *See Harger v. Structural Servs.*, 1996-NMSC-018, ¶12, 121 N.M. 657 P2d. *See also Rock v. Comm'r of Revenue*, 1972-NMCA-012, ¶5, 83 N.M. 478, P2d. New Mexico courts have looked to the Restatement (Second) of Agency §220 for guidance on the question of employee versus independent contractor. *See Celaya v. Hall*, 2004-NMSC-005, ¶11, 135 N.M. 115 P2d. In addition to control, the New Mexico Supreme Court noted that the Restatement (Second) of Agency §220 identifies numerous other factors for consideration:

> 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the

> instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business. Furthermore, a complete analysis may require an assessment not only of the relevant factors enumerated in the Restatement, but of the circumstances unique to the particular case.

Celaya v. Hall, 2004-NMSC-005, ¶15 (citations omitted).

Applying the criteria under Regulation § 3.2.105.7 (B) NMAC and case law to the facts of this case, Taxpayer established that he provides soccer balls, cones and nets (instrumentalities), and uses facilities made available by the soccer club. The "employer" does not supervise his coaching. Coaching, generally, is not supervised, except by sports fans and parents of participants. Since the means of accomplishing the result is not dictated by the "employer" soccer clubs or soccer league, leaving the means of teaching students up to the independent judgment of the coach, this relationship appears to fail the test for employee status. *See* Regulation § 3.2.105.7 (C)(2) NMAC.

Penalty.

Under NMSA 1978, Section 7-1-69 (A) (2007), when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, the Department must impose a civil negligence penalty on that taxpayer. "There shall be added to the amount assessed a penalty" under Section 7-1-69 (A). The statute also provides a safety valve, stating "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Section 7-1-69 (B).

The use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d

135 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

Negligence can be found in several ways. Regulation § 3.1.11.10 NMAC (1/15/01) defines "negligence" as "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; inaction by taxpayers where action is required; inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." Failing to file gross receipts tax returns is certainly negligence under the circumstances at issue applied to this definition. *See El Centro Villa Nursing Center v. Taxation & Revenue Department*, 1989-NMCA-070, ¶ 10, 108 N.M. 795, 779 P.2d 982 (Section 7-1-69 (A) is designed specifically to penalize unintentional failure to pay tax.).

Evidence presented a potential defense of "nonnegligence" or a "mistake of law made in good faith and on reasonable grounds." *See* Regulation § 3.1.11.11 NMAC (1/15/01) and Section 7-1-69(B). "Nonnegligence" may be found in a list of eight situations which "may indicate" an absence of negligence, allowing the Department to issue or the Hearing Officer to order an abatement. At issue is only one provision which could apply, under subsection (D), "taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts; failure to make a timely filing of a tax return, however, is not excused by the taxpayer's reliance on an agent." Regulation § 3.1.11.11 (D). This is a case in which Taxpayer did not file gross receipts returns, so even reliance on his agent does not excuse the negligence in failing to do so under the regulation. *See* Regulation § 3.1.11.11 (D); *see also C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶ 8-9, 93 N.M. 697, 604 P.2d 835 (penalty upheld where there was no evidence that the taxpayer relied on "informed consultation and advice" in

deciding not to pay tax); *see also El Centro Villa Nursing Center v. Taxation & Revenue Dep't*, 1989-NMCA-070, ¶ 14 (a taxpayer cannot abdicate the responsibility to learn of tax obligations merely by appointing an accountant as its agent in tax matters).

It is the role of the Hearing Officer, as the trier of fact, "to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies." *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 23. Since the testimony was unsubstantiated, Taxpayer's testimony alone is not sufficient to overcome the presumption of correctness that attached to the assessment. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13; s*ee also* Regulation § 3.1.6.12 (A) NMAC (1/15/2001). The vast majority of the statements of the CPA representative were conclusory, assuming that evidence not presented to the Department in pre-hearing negotiations, and not presented to the Hearing Officer during the hearing, would support the conclusion. Items that would have been helpful to the determination that Taxpayer satisfied the requirements of law as an employee would have been the soccer club contracts, an SS-8 form, and form 1099s. But because Taxpayer provided no contract, no SS-8, and no form 1099s, the testimony while credible is not substantial. Therefore, the Taxpayer did not overcome the presumption of correctness in the penalty. Taxpayer's evidence does not support abatement of penalties imposed under the assessment.

Interest

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest

mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The assessment of interest was proper, and the interest accrues until payment.

Conclusion.

It is a taxpayer's burden to prove with substantial evidence that the assessment of penalty and interest was in error. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). Taxpayer was credible but the evidence presented was often contradictory or vague and failed to provide evidence on key issues that are part of the relevant inquiry and failed to overcome the contradictions provided in his own tax returns. "It is the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies." *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 23. Although Mr. Huskisson was cordial and composed, Taxpayer was unable to overcome the presumption of correctness. The assessment will be upheld.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of Tax and Demand for Payment issued under Letter ID number L0499356336, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-24 (D) (2017).

B. A scheduling hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2019). Parties did not object that the scheduling hearing satisfied

the 90-day hearing requirement of Section 7-1B-8. *See also* Regulation § 22.600.3.8 (E) NMAC (02/01/2018).

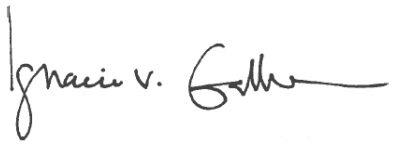
C. Any assessment of tax made by the Department is presumed to be correct. Therefore, it is the taxpayer's burden to come forward with evidence and legal argument to establish that the Department's assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-17 (C) (2007).

D. "Tax" is defined to include not only the tax program's principal, but also interest and penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation § 3.1.1.16 (12/29/2000). Assessments of penalties and interest therefore also receive the benefit of a presumption of correctness. *See* Regulation § 3.1.6.13 NMAC (1/15/01).

E. Taxpayer failed to meet his burden to show that he was entitled to receive an abatement of gross receipts tax, penalty, and interest. *See* NMSA 1978, Section 7-1-69 (A) (2007); *see also* Regulation § 3.1.11.11 (B) and (D) NMAC (1/15/01); *see also* NMSA 1978, Section 7-1-67 (2007); *see also Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d 135 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary).

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. **IT IS ORDERED** that the Department's issuance of the Assessment was proper, and Taxpayer is responsible for payment of the gross receipts tax, penalty, and interest for a total of $3,163.68 (as of the date of the hearing).

DATED: February 12, 2021.



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

NOTICE OF RIGHT TO APPEAL

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

CERTIFICATE OF SERVICE

On February 12, 2021, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

Email *Email*

INTENTIONALLY BLANK

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