STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
TIMBERLINE ENVIRONMENTAL SERVICES, LLC
TO THE ASSESSMENT
ISSUED UNDER LETTER ID NO. L1944095536

v. **AHO No. 18.05-117A, D&O No. 21-05**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On June 26, 2020, Hearing Officer Dee Dee Hoxie, Esq. conducted a telephonic status hearing on the protest to the assessment of Timberline Environmental Services, Inc. (Taxpayer). The Taxation and Revenue Department (Department) was represented by David Mittle, Staff Attorney. Mary Griego, Auditor, also appeared on behalf of the Department. The Taxpayer was represented by its attorney, Joe Lennihan. The parties agreed that the protest should be decided on the pleadings. The parties agreed to submit stipulated facts and arguments on the legal issues. Exhibits 1 through 14 were attached to the stipulated facts. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The final arguments were due on January 21, 2021. The Hearing Officer requested additional facts in an order for clarification, which were due on February 19, 2021. The Taxpayer and the Department responded to the request on February 18, 2021.

The main issue to be decided is whether the Taxpayer's services were deductible. The Taxpayer claims a deduction under Section 7-9-57. The Hearing Officer considered all of the evidence and arguments presented by both parties. Because the initial use or delivery of the product of the service occurred in New Mexico, the Hearing Officer finds in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 19, 2018, under letter id. no. L1944095536, the Department issued an assessment to the Taxpayer for gross receipts taxes from January 31, 2010 through May 31, 2017. The assessment was for tax of $45,082.10, penalty of $9,016.42, and interest of $7,069.35, for a total liability of $61,167.87. [L1944095536].

2. On April 11, 2018, the Taxpayer filed a timely written protest to the assessment. [Administrative file].

3. On April 16, 2018, the Department acknowledged its receipt of the protest. [Administrative file].

4. On May 18, 2018, the Department filed a request for hearing with the Administrative Hearings Office. [Administrative file].

5. On June 1, 2018, the Taxpayer waived the 90-day requirement of the statute when it requested a continuance of the initial hearing that was set.[1] [Administrative file].

6. On June 29, 2018, the first telephonic scheduling hearing was conducted, which was within 90 days of the protest as required[2]. [Administrative file].

7. On July 13, 2018, a second telephonic scheduling hearing was conducted, and a date for a hearing on the merits was selected. [Administrative file].

8. The hearing on the merits was continued several times at the requests of the parties. The hearing on the merits was ultimately set for April 17, 2020. [Administrative file].

[1] At the time that the protest was filed, the statute required a hearing be held within 90 days of the receipt of the protest. *See* NMSA 1978, § 7-1B-8 (2015). The statute now requires a hearing be held within 90 days of the Department's request for hearing. *See* NMSA 1978, § 7-1B-8 (2019).
[2] Both parties failed to appear at the first hearing.

9. On March 23, 2020, the parties filed a stipulated request to stay and to set a status hearing because of the recently declared public health state of emergency[3]. [Administrative file].

10. On June 26, 2020, the telephonic status hearing was conducted. At that hearing, the parties agreed to submit stipulated facts and arguments and requested that the protest be decided on the pleadings. The request was granted, and deadlines were given. [Administrative file].

11. After several extensions of time, the final deadlines were set for November 16, 2020 to submit the stipulated facts, for arguments on January 11, 2021, and for final responses on January 21, 2021. [Administrative file].

12. The parties timely filed the stipulated facts (SF) with exhibits 1 through 14 (Ex. #), their arguments (Taxpayer's Brief and Department's Motion), and their responses (Taxpayer's Response and Department's Reply). [Administrative file].

13. On January 28, 2021, the Hearing Officer issued an order for clarification requesting additional facts, with a deadline of February 19, 2021 for submission of facts or a motion for evidentiary hearing. The Taxpayer filed additional facts on February 18, 2021 (AF). The Department filed its response on February 18, 2021 and did not contest the AF. [Administrative file].

14. The Taxpayer is incorporated in California, has its principal place of business in California, and did not have an office or keep equipment in New Mexico during its performance of services in New Mexico. [SF, p. 1, ¶ 1].

15. The Taxpayer performs demilitarization and disposal services for the U.S. military. [SF, p. 1, ¶ 1].

[3] The public health state of emergency remains ongoing at the time of this decision.

16. The U.S. Air Force Air Combat Command (ACC)[4], one of ten major commands that make up the Air Force, is headquartered at Langley Joint Air Force Base in northern Virginia, and the Air Force secretariat is located at the Pentagon in Arlington, Virginia. [SF, p. 1, ¶ 2].

17. In 2011, the ACC requested bids for the demilitarization and disposal of items at 30 training facilities in 20 different states, including two range sites in New Mexico (Oscura range and Melrose range). [SF, p. 2, ¶ 5; Ex. #2; Ex. #4].

18. Demilitarization and disposal of range debris must be done according to the federal standards and regulations. [SF, p. 2, ¶ 3-4; Ex. #2, Ex. #3].

19. The ACC informed bidders that New Mexico assesses gross receipts tax on business conducted within the state and that tax is imposed on the basis of revenue derived from business operations within the state without regard to the location of the entity. Bidders were presumed to include this cost of doing business in their bids. [SF, p. 4, ¶ 10; Ex. #4].

20. Taxpayer prepared a bid to perform the demilitarization services and submitted the bid to Langley. [SF, p. 4, ¶ 11].

21. The Taxpayer was awarded the contract. [SF, p. 4, ¶ 11; Ex. #5].

22. Pursuant to the contract, the Taxpayer was to perform range residue removal services, that is to demilitarize and remove munitions debris, from the Oscura test range located within White Sands Missile Range in New Mexico. [SF, p. 4, ¶ 12; Ex. #6]. Pursuant to the contract, the Taxpayer was to perform range residue removal services, that is to demilitarize and

[4]In the context of this decision, the ACC includes other federal agencies or offices, such as the Acquisition Management Integration Center, which assisted the ACC in its contracts for range residue removal and are also headquartered in Virginia.

dispose of range debris, at the Melrose test range, located near Cannon Air Force Base in New Mexico. [SF, p. 7, ¶ 20; Ex. #10].

23. The Taxpayer's responsibilities under the contract included inspecting the range site, preparing work and quality control plans for the demilitarization and disposal of range debris, determining if the materials were hazardous, rendering such materials safe or removing them from the process if they could not be rendered safe, reducing the materials to marketable salvage, and disposing of materials that were not marketable. [SF, p. 3, ¶ 6; Ex. #2; AF].

24. The Taxpayer's services took place at a designated range holding area, usually locations of one to five acres at each range site, where the military had deposited the range debris. [AF, p. 3, ¶ 7 and its affidavit].

25. The Taxpayer was also required to submit a work site plan before it began work and to submit a final report when the work was finished. [SF, p. 3, ¶ 7; Ex. #2, Ex. #4; Ex. #6; Ex. #10].

26. The contract did not pass the title to any of the property processed or demilitarized to the Taxpayer. [SF, p.4, ¶ 8; Ex. #2.; Ex. #7, Ex. #11].

27. The contract designates Langley as the place where supplies and services will be inspected, accepted, and delivered. [SF, p. 4, ¶ 9; Ex. #4; Ex. #6; Ex. #10].

28. In 2012, the Taxpayer sent a team of employees to inspect the Oscura range and submitted a work plan to Langley. The Taxpayer coordinated with the Oscura range's manager in preparing its work plan. [SF, p. 5, ¶ 14; Ex. #8].

29. After the work plan was approved, the Taxpayer inspected the Oscura range's debris for hazardous materials and remediated or removed such materials. [SF, p. 5-6, ¶ 15; Ex. #9].

30. The Taxpayer brought several pieces of heavy machinery to the Oscura range for use in the demilitarization[5] of the remaining debris. [SF, p. 6, ¶ 16; Ex. #9].

31. The Taxpayer reduced 1047 tons of range debris from the Oscura range into salvageable/recyclable scrap, which was sold to a salvage yard in Texas. [SF, p. 6, ¶ 17; Ex. #9].

32. The Taxpayer disposed of 187 tons of unsalvageable debris from the Oscura range at a landfill in New Mexico. [SF, p. 6, ¶ 18; Ex. #9].

33. The Taxpayer's final report on the Oscura range was delivered to the ACC at Langley and to the range manager in New Mexico. [SF, p. 6-7, ¶ 18; Ex. #6].

34. The Taxpayer's gross receipts for work done at the Oscura range totaled $570,520.00, from August 2012 to September 2013. [SF, p. 7, ¶ 19; Ex. #8].

35. In 2013, the Taxpayer sent a team of employees to inspect the Melrose range and submitted a work plan to Langley. The Taxpayer coordinated with the Melrose range's manager in preparing its work plan. [SF, p. 8, ¶ 21; Ex. #10; Ex. #12].

36. After the work plan was approved, the Taxpayer inspected the Melrose range's debris for hazardous materials and remediated or removed such materials. [SF, p. 8, ¶ 22; Ex. #13].

37. The Taxpayer brought special equipment to the Melrose range for use in the demilitarization of the remaining debris. [SF, p. 8, ¶ 22; Ex. #13].

38. The Taxpayer reduced 320.6 tons of range debris from the Melrose range into recyclable materials, which were sold to a salvage yard in New Mexico. [SF, p. 8, ¶ 23; Ex. #12; Ex. #13].

[5] That is to crush or to shear the debris into pieces that meet the federal standards and regulations.

39. The Taxpayer disposed of 20.7 tons of unsalvageable debris from the Melrose range at a landfill in New Mexico. [SF, p. 8-9, ¶ 23; Ex. #13].

40. The Taxpayer's final report on the Melrose range was delivered to the ACC at Langley and to the range manager in New Mexico. [SF, p. 9, ¶ 23; Ex. #10].

41. The Taxpayer's gross receipts for work done at the Melrose range totaled $313,170.00, from September 2013 to February 2014. [SF, p. 9, ¶ 24; Ex. #12].

42. The Taxpayer did not pay New Mexico gross receipts tax on its receipts from the services that it performed at the Oscura range or at the Melrose range. [SF, p. 9, ¶ 25; Ex. #14].

43. The Taxpayer believed its services were not subject to the gross receipts tax because the work was performed for the ACC. [SF, p. 9, ¶ 25; Ex. #14].

DISCUSSION

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17 (C) (2017). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

Gross receipts tax.

Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See* NMSA 1978, § 7-9-4 (2010). To engage in business in New Mexico means "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2019)[6]. Gross receipts include the total amount received "from performing services in New Mexico." NMSA 1978, § 7-9-3.5 (A) (1) (2019). There is a statutory presumption that "all receipts

[6] The most current version of statutes and regulations will be referenced unless there is a relevant substantive change between it and the version in effect at the time that the Taxpayer's services were rendered.

of a person engaging in business are subject to the gross receipts tax." NMSA 1978, § 7-9-5 (A) (2019). The Taxpayer admits that it was performing range residue removal services in New Mexico, which are the subject of this assessment. [SF, p. 3-9]. Therefore, the Taxpayer's receipts for engaging in business in New Mexico by providing its services to the Oscura range and to the Melrose range were subject to the gross receipts tax.

The Taxpayer argues that it is entitled to a deduction under Section 7-9-57. [Taxpayer's Brief]. The burden is on the Taxpayer to prove that it is entitled to an exemption or deduction. *See Pub. Servs. Co. v. N.M. Taxation & Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. Because of the presumption that receipts are subject to the gross receipts tax, any exemption or deduction must be clearly established by the taxpayer who is claiming it. *See Kewanee Indus., Inc. v. Reese* 1993-NMSC-006, ¶ 29, 114 N.M. 784. "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." *Sec. Escrow Corp. v. State Taxation & Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. Tax statutes should be given fair and unbiased construction, without favor or prejudice to either party, so that the legislative intent is effectuated, and the public interest is furthered. *See Wing Pawn Shop v. Taxation & Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. *See also Pittsburgh & Midway Coal Mining Co. v. Revenue Div.*, 1983-NMCA-019, 99 N.M. 545. Because exemptions to gross receipts tax are to be strictly construed, taxation is the rule. *See Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep't*, 2002-NMSC-013, ¶ 11, 132 N.M. 226.

Section 7-9-54.

"Receipts from selling tangible personal property to" a government agency may be deducted from gross receipts, but the portion of those receipts attributable to the performance of a service for a government agency are not deductible. NMSA 1978, § 7-9-54 (A) (2018). *See also* 3.2.212.9 NMAC (A) (2001). The Department argues that this statute "explicitly bars any deduction from gross receipts for the sale of services to government agencies," irrespective of any other statutory deductions. [Department's Motion, p. 1]. The Department argues that Section 7-9-54 prevents the Taxpayer from taking a deduction under Section 7-9-57 because its services were performed for a government agency. [Department's Motion, p. 5-8].

The first step in statutory interpretation is to look at the plain language of the statute and to refrain from further interpretation if the plain language is not ambiguous. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, 146 N.M. 24. Statutes are to be applied as written unless a literal use of the words would lead to an absurd result. *See N.M. Real Estate Comm'n. v. Barger*, 2012-NMCA-081, ¶ 7. If a statute is ambiguous or would lead to an absurd result, then it should be construed in accordance with the legislative intent or spirit and reason for the statute, even though it may require a substitution or addition of words. *See id. See also State ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346. *See also Kewanee Indus., Inc.*, 1993-NMSC-006. When a statute is ambiguous or would lead to an absurd result, it should be construed according to its obvious purpose. *See T-N-T Taxi Co. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-016, ¶ 5, 139 N.M. 550. The heading of a statute may be considered in its interpretation, but the heading does not limit or change the plain meaning of the text of the statute. *See State v. Gutierrez*, 2020-NMCA-045, ¶ 15.

Section 7-9-54 has the heading "[d]eduction; gross receipts tax; governmental gross receipts tax; sales to governmental agencies." NMSA 1978, § 7-9-54. Generally, the receipts from selling tangible personal property to a governmental agency may be deducted from gross receipts. *See id.* However, "the deduction *provided by this subsection* does not apply to: …that portion of the receipts from performing a 'service' that reflects the value of tangible personal property utilized or produced in performance of such service." *Id.* (emphasis added). The Legislature's choice of words expresses a clear intent that the exclusions contained in Section 7-9-54 only limit the availability of that section. There is no expression of an intent to disallow all deductions for receipts derived from services sold to governmental agencies. Otherwise, the Legislature would not have limited its scope with the use of a single determiner, "this." The Department's own regulation also provides that "[r]eceipts from the sale of a service to a governmental agency are not deductible *pursuant to Section 7-9-54 NMSA 1978*." 3.2.212.9 (A) NMAC (emphasis added). In its argument, the Department emphasizes the part of the regulation that sale of a service to a government agency is not deductible and fails to address the part of the regulation that limits it to Section 7-9-54. [Department's Motion, p. 6]. The regulation demonstrates an interpretation of the law consistent with the enactment itself, that the exclusion contained in Section 7-9-54 only applied to Section 7-9-54. There is no indication in the regulation that the statute was interpreted to enact a wider or broader general prohibition on all receipts derived from services sold to governmental agencies. *See* 3.2.212.9 NMAC. Instead, the Department simply echoed the language that was already contained in the statute, limiting the availability of that single deduction. *See id.* Moreover, the Department's argument is inconsistent with the caselaw. *See TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, 133 N.M. 447 (holding that Section 7-9-57 afforded a deduction for the sale of a service to a

governmental agency). *See also In re the Protest of Sandia Corp.*, Decision & Order No. 19-11, p. 74-80 (Admin. Hearings Office, April 19, 2019) (non-precedential) (rejecting the Department's argument that Section 7-9-54 precluded deductions from being taken under Section 7-9-57 and finding that the Department's position was inconsistent with caselaw and its own publications).

Section 7-9-57.

Generally, sales of a service to an out-of-state buyer who provides a nontaxable transaction certificate or other suitable evidence may be deducted from gross receipts "unless the buyer of the service or any of the buyer's employees or agents makes initial use of the product of the service in New Mexico or takes delivery of the product of the service in New Mexico." NMSA 1978, § 7-9-57 (A) (2000). The statute only requires that a buyer be out-of-state. *See id.* It does not explicitly classify or exclude receipts based solely on the identity of a buyer, such as a governmental agency. *See id.*

Out-of-state buyer.

The Department argues that the ACC is not an out-of-state buyer because "[i]ts headquarters may be out-of-state, but it has a presence is [sic] in every state, including New Mexico." [Department's Motion, p. 9]. The Department made a similar argument, which did not prevail, in *TPL*. *See TPL*, 2003-NMSC-007, ¶ 5 (noting that the Department argued that the federal government and all of its military agencies are present in New Mexico). Moreover, the Department's own regulation says that a buyer who has a presence in New Mexico may still take the deduction under Section 7-9-57 when the product of the service performed in New Mexico is delivered and initially used outside of New Mexico. *See* 3.2.215.12 (B) NMAC (2000). Therefore, the fact that a governmental agency may have a presence in New Mexico does not

prohibit the Taxpayer from claiming the deduction under Section 7-9-57 so long as the product of the service is delivered to the buyer outside of New Mexico, and the buyer makes the initial use of the product of the service outside of New Mexico.

Initial use or delivery of the product of the service.

The Taxpayer argues that the contract provided that all deliverables were deemed delivered in Virginia. [Taxpayer's Brief, p. 8]. The contract between the parties does not decide the issue of state taxation. *See Holt v. N.M. Dep't. of Taxation & Revenue*, 2002-NMSC-034, ¶ 25, 133 N.M. 11 (holding "that the Department has the authority to examine information or evidence in order to determine or establish an individual's tax liability.") The Taxpayer argues that it is entitled to the deduction because the product of its service is identical to that in *TPL*. [Taxpayer's Brief, p. 7; Taxpayer's Response, p. 4]. Although the Taxpayer's situation is similar to *TPL*, there are several crucial differences that lead to a different conclusion in this protest.

In *TPL*, the court found that concerns about competition were paramount to the interpretation of the deduction because "[t]here was no requirement that the services be performed in New Mexico." *TPL*, 2003-NMSC-007, ¶ 30. The services in *TPL* were performed on personal property that was not located in New Mexico prior to the contract. *See id.* at ¶ 22, ¶ 25. The court did not impute use or delivery on movable personal property that was shipped into New Mexico for service. *See id.* at ¶ 23. Unlike *TPL*, the range debris was in New Mexico prior to the Taxpayer's contract. [Ex. #4]. Unlike *TPL*, the Taxpayer was required to perform its services within New Mexico, as it had to do on-site inspections and coordinate its plans with the range managers. [Ex. #4]. When the range site was closed by the manager, the Taxpayer was unable to perform its services. [Ex. #9]. The ACC informed bidders about New Mexico taxes, which is a clear indication that the ACC intended for the services to be performed in New

Mexico. [Ex. #4]. The contract required the Taxpayer to deliver copies of its final reports to the range managers in New Mexico. [Ex. #4].

In *TPL*, a New Mexico company was providing demilitarization services for an out-of-state governmental agency. *See TPL*, 2003-NMSC-007. The Taxpayer is a California company providing demilitarization services in New Mexico for an out-of-state governmental agency. [SF, p. 1, ¶ 1]. In *TPL*, the court found that the deduction under Section 7-9-57 was restricted "to situations where competition with firms from other states is of paramount concern because the service could be performed equally well in any state." *TPL*, 2003-NMSC-007, ¶ 20. Hence, according to the court's rationale, the deduction is meant to prevent New Mexico companies from being "at a competitive disadvantage in facing firms from other states if required to pay gross receipts tax on these contracts." *Id.*, at ¶ 30. In contrast to the situation in *TPL*, where the court determined that the deduction would ensure a level playing field for in-state companies providing services in New Mexico that could have been performed elsewhere, the Taxpayer is an out-of-state company providing services in New Mexico that were required to be performed in New Mexico. Therefore, the Taxpayer was not at a competitive disadvantage to any other company because any company that was required to perform these services in New Mexico would be subject to the New Mexico gross receipts tax. *See id. See also Wing Pawn Shop*, 1991-NMCA-024, ¶ 16 (noting that tax statutes should be construed to effectuate the legislative intent). *See also Chavez*, 1970-NMCA-015, ¶ 7. Thus, the rationale underlying the decision in *TPL* is not applicable to the facts and claim for deduction in the Taxpayer's protest.

To identify the product of the service, one must "determine what benefit the buyer received". *TPL*, 2003-NMSC-007, ¶ 12. *See also N.M. Taxation & Revenue Dep't v. Dean Baldwin Painting, Inc.*, 2007-NMCA-153, ¶ 9, 143 N.M. 189. It can be difficult to distinguish

between the service itself and the product of the service. *See TPL*, 2003-NMSC-007, ¶ 13. In *TPL*, the court found that the product of the service was "freedom from responsibility for dangerous munitions." *Id.* at ¶ 16. The Taxpayer argues that the product of its service was the same as that in *TPL*. [Taxpayer's Brief, p. 7; Taxpayer's Response, p. 4]. However, the Taxpayer's contracted services were more specific than those in *TPL*. [Ex. #4]. *See also TPL*, 2003-NMSC-007. Like *TPL*, the Taxpayer provided demilitarization services. [Ex. #4; SF, p. 1, ¶ 1]. *See also TPL*, 2003-NMSC-007. Unlike *TPL*, the Taxpayer's services were required to occur at two specific range sites in New Mexico. [SF, p. 4-7; Ex. #4; Ex. #6; Ex. #10]. *See also TPL*, 2003-NMSC-007. Consequently, the product of the Taxpayer's service was remediated range sites in New Mexico. When services are performed to improve a piece of real property, the initial use and delivery of the product of the service is necessarily where the real property is located. *See TPL*, 2003-NMSC-007, ¶ 21. In such situations, a buyer need not be physically present to make initial use or take delivery. *See id.* "[T]he key factor in any of these scenarios is the necessity that the services be performed upon the real property within New Mexico." *Id.*

Since the court's decision in *TPL*, the issue of the deduction under Section 7-9-57 has been addressed a few times in protests. *See In re the Protest of Dean Baldwin Painting, Inc.*, Decision & Order No. 06-08 (Admin. Hearings Office, May 8, 2006) (non-precedential). *See In re the Protest of JTC, Inc.*, Decision & Order No. 18-17 (Admin. Hearings Office, June 6, 2018) (non-precedential). *See In re the Protest of Advanced Envtl. Solutions, Inc.*, Decision & Order No. 18-42 (Admin. Hearings Office, December 3, 2018) (non-precedential). *See In re the Protest of Sandia Corp.*, Decision & Order No. 19-11.

In *Dean Baldwin Painting*, the taxpayer painted airplanes that were flown into New Mexico for the service, a situation more closely related to that in *TPL* than the Taxpayer's

situation. *See In re the Protest of Dean Baldwin Painting, Inc.*, Decision & Order No. 06-08. The hearing officer found that the initial use or delivery of the product of the service occurred in New Mexico because the taxpayer's crew took possession of the painted airplanes in New Mexico and then flew them back to the taxpayer's hub. *See id.* The court found that the initial use of the painted airplanes, for their intended purpose of carrying passengers or cargo, did not occur in New Mexico. *See Dean Baldwin Painting, Inc.*, 2007-NMCA-153, ¶ 10. However, the court upheld the conclusion that delivery of the product of the service occurred in New Mexico when the taxpayer's crew took possession of the painted airplanes, a fact that distinguished the taxpayer's case from *TPL*. *See id.* at ¶ 25-27.

In *JTC*, the taxpayer primarily painted large architectural structures and provided blasting and coating services. *See In re the Protest of JTC, Inc.*, Decision & Order No. 18-17. The hearing officer found that the taxpayer was not entitled to the deduction for several reasons, including that the product of the taxpayer's service was for inclusion in a construction project in New Mexico. *See id.* at p. 14.

In *Advanced*, the taxpayer provided services by removing hazardous materials. *See In re the Protest of Advanced Envtl. Solutions, Inc.*, Decision & Order No. 18-42. The hearing officer found that the product of the service was initially used or delivered in New Mexico because it involved the removal of hazardous materials from specific sites in New Mexico. *See id.*

In *Sandia*, the taxpayer provided research and development services on a wide variety of projects, including software programs and sensors. *See In re the Protest of Sandia Corp.*, Decision & Order No. 19-11. The hearing officer found that the products of the services were delivered and initially used on projects, such as the space shuttle, outside of New Mexico. *See id.* Consequently, the taxpayer was entitled to take the deduction. *See id.*

When personal property is shipped into New Mexico for service, a taxpayer's eligibility for the deduction under Section 7-9-57 will depend on where the product of that service is initially used and delivered, that is whether it occurs inside of or outside of New Mexico. *See TPL*, 2003-NMSC-007. *See also Dean Baldwin Painting, Inc.*, 2007-NMCA-153. When the product of the service is initially used and delivered outside of New Mexico, a taxpayer is entitled to the deduction under Section 7-9-57. *See TPL*, 2003-NMSC-007. *See also In re the Protest of Sandia Corp.*, Decision & Order No. 19-11. When the product of the service directly involves a specific location inside of New Mexico, then the product of the service is initially used or delivered at that location within New Mexico, and a taxpayer is not entitled to take the deduction under Section 7-9-57. *See TPL*, 2003-NMSC-007. *See also In re the Protest of JTC, Inc.*, Decision & Order No. 18-17. *See also In re the Protest of Advanced Envtl. Solutions, Inc.*, Decision & Order No. 18-42. The product of the Taxpayer's service is two range sites located within New Mexico that have been remediated of their range debris. As remediated range sites in New Mexico cannot be used or delivered anywhere other than in New Mexico, the ACC's initial use or delivery occurred within New Mexico, and the Taxpayer is not entitled to the deduction. *See* NMSA 1978, § 7-9-57.

Assessment of Penalty.

Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3 (Z) (2019). *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Penalty "*shall* be added to the amount assessed" when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). However, a taxpayer will generally not be negligent when the taxpayer relied on advice from tax

counsel or an accountant. *See* 3.1.11.11 NMAC (2001). The Taxpayer did not argue or provide evidence to show that it was not negligent. Therefore, penalty was properly assessed.

Assessment of Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob*, 2009-NMSC-013, ¶ 22. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest of the Department's assessment and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8.

B. The hearing was timely set and held within 90 days of the protest. *See id.*

C. The Taxpayer's receipts for performing services in New Mexico were subject to the gross receipts tax. *See* NMSA 1978, §§ 7-9-3.5, 7-9-4, and 7-9-5.

D. Sales of services to out-of-state governmental agencies may be eligible for deduction under Section 7-9-57 as Section 7-9-54 does not abrogate or limit the application of deductions under any other subsection. *See* NMSA 1978, § 7-9-54 and § 7-9-57.

E. Sales of services to governmental agencies that have a presence in New Mexico may be eligible for the deduction under Section 7-9-57 if the product of the service is delivered and initially used outside of New Mexico. *See* NMSA 1978, § 7-9-57. *See also* 3.2.215.12 (B) NMAC.

F. The product of the Taxpayer's service was remediated range sites in New Mexico; therefore, the buyer made initial use or took delivery of the product of the service in New Mexico,

and the Taxpayer was not entitled to the deduction under Section 7-9-57. *See* NMSA 1978, § 7-9-57. *See also TPL*, 2003-NMSC-007.

G. The Taxpayer failed to establish that it was entitled to take the deduction and failed to overcome the presumption that the assessment was correct. *See Pub. Servs. Co.*, 2007-NMCA-050, ¶32. *See also Till*, 1972-NMCA-046. *See also* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. **IT IS ORDERED** that Taxpayer is liable for the total assessment of $61,167.87. Interest continues to accrue until tax principal is paid.

DATED: March 17, 2021.

Dee Dee Hoxie

Dee Dee Hoxie
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

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

which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On March 17, 2021, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

Email *Email*

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