STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
JAMES P. BENVENUTI
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0472790192

v. Case Number 19.07-149A, D&O No. 21-07

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On September 14, 2020, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits of the protest of James P. Benvenuti ("Taxpayer") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Dr. James P. Benvenuti appeared representing himself. Mr. David Mittle, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department") accompanied by Mr. Nicholas Pacheco, protest auditor.

The hearing occurred by videoconference pursuant to NMSA 1978, Section 7-1B-8 (H) under the circumstances of the ongoing public health emergency presented by COVID-19, as discussed in greater detail in Standing Order 20-02 which is made part of the record of the proceeding.

Taxpayer Exhibits 1, 2.1, 3, 4, 5.1 – 5.2, 5.4, 6.1 – 6.4, 8.1 – 8.2, 9.1 – 9.4, 10, and 25 and Department Exhibits A-042, A-047, A-053, and A-055 were admitted into the evidentiary record.

The primary issues presented for consideration were whether Taxpayer was entitled to a deduction from gross receipts pursuant to: (1) NMSA 1978, Section 7-9-93; (2) NMSA 1978, Section 7-9-77.1; and (3) whether Taxpayer was entitled to abatement of penalty under the Assessment. As explained in greater detail in the subsequent discussion, the Hearing Officer

determined that Taxpayer did not establish entitlement to any deduction and there were insufficient grounds for the abatement of penalty. Therefore, Taxpayer's protest should be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On May 24, 2019, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L0472790192 in the total amount of $23,017.64 comprised of gross receipts tax in the amount of $16,740.60, gross receipts tax interest in the amount of $2,940.92, gross receipts tax penalty in the amount of $3,348.12, and reflecting a credit or offset in the amount of $12.00 for the periods from January 1, 2013 through December 31, 2016 (hereinafter "Assessment"). [Administrative File]

2. On May 29, 2019, the Department received Taxpayer's Protest to Audit Assessment accompanied by numerous attachments. [Administrative File]

3. On May 31, 2019, the Department acknowledged the Taxpayer's protest of the Assessment under Letter ID No. L1315959984. [Administrative File]

4. On July 17, 2019, the Department filed a request for a scheduling hearing in reference to the protest of the Assessment. [Administrative File]

5. On July 19, 2019, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing setting a scheduling hearing for August 5, 2018. [Administrative File]

6. On July 23, 2019, Taxpayer filed a Brief for Status & Telephonic Scheduling Hearing. [Administrative File]

7. A Telephonic Scheduling Hearing was held on August 5, 2019 at which time there was no objection that conducting the scheduling hearing satisfied the 90-day hearing requirement of Section 7-1B-8 (A) while still allowing meaningful time for completion of the other statutory requirements under Section 7-1B-6 (D). [Administrative File]

8. On August 6, 2019, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protest for January 8, 2020. [Administrative File]

9. On August 13, 2019, Taxpayer filed a Prehearing Statement. [Administrative File]

10. On December 18, 2019, the Department filed Department's Prehearing Statement and an Unopposed Motion to Convert Merits Hearing to Scheduling Conference. [Administrative File]

11. On December 20, 2019, the Administrative Hearings Office entered an Order Converting Merits Hearing to Telephonic Scheduling Hearing. [Administrative File]

12. On January 8, 2020, the Administrative Hearings Office conducted a second scheduling hearing. [Administrative File]

13. On January 10, 2020, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protest to occur on April 1, 2020. [Administrative File]

14. On February 14, 2020, the Administrative Hearings Office entered a Notice of Reassignment of Presiding Hearing Officer. [Administrative File]

15. On February 14, 2020, Taxpayer filed a Reply to Notice of Reassignment indicating that he acknowledged the reassignment and expressed no objections. [Administrative File]

16. On February 17, 2020, the Department filed a Peremptory Election to Excuse the

hearing officer to whom the Taxpayer's protest was reassigned. [Administrative File]

17. On February 20, 2020, the Administrative Hearings Office entered a Notice of Reinstatement of Presiding Hearing Officer in which the undersigned Hearing Officer was reassigned to the protest. [Administrative File]

18. On March 11, 2020, the Department filed Department's Prehearing Statement. [Administrative File]

19. On March 11, 2020, Taxpayer filed Protest Hearing: Taxpayer's List of Exhibits. [Administrative File]

20. On March 16, 2020, due to the circumstances of the public health emergency presented by COVID-19, as detailed more fully in Standing Order 20-02 of the Chief Hearing Officer, the Administrative Hearings Office entered a Notice of Videoconference Administrative Hearing which converted the previously set in-person hearing to a remote, videoconference hearing. [Administrative File]

21. On March 24, 2020, the Department filed Department's Objection to Video or Telephonic Conference Under Standing Order #20-02 of the Chief Hearing Officer, Department's Waiver of Deadlines, and Department's Unopposed Amended Objection to Video or Telephonic Conference Under Standing Order #20-02 of the Chief Hearing Officer, ultimately requesting that the hearing on the merits be postponed. [Administrative File]

22. On March 26, 2020, the Administrative Hearings Office entered an Order Converting Merits Hearing to Telephonic Scheduling Hearing. [Administrative File]

23. On March 27, 2020, Taxpayer filed Taxpayer's Motion for Judgment on the Pleadings. [Administrative File]

24. On April 1, 2020, the Hearing Officer conducted a third scheduling hearing and entered a Scheduling Order and Notice of Administrative Hearing which in addition to other various deadlines, set a hearing on the merits of Taxpayer's protest for September 14, 2020. [Administrative File]

25. On April 16, 2020, the Department filed Department's Motion for Summary Judgment and Department's Response to Motion for Judgment on the Pleadings. [Administrative File]

26. On April 29, 2020, Taxpayer filed Taxpayer's Reply to Department's Motion for Summary Judgment. [Administrative File]

27. On May 21, 2020, the Department filed Department's Notice of Supplemental Authority. [Administrative File]

28. On August 5, 2020, the Administrative Hearings Office entered an Order Denying Taxpayer's Motion for Judgment on the Pleadings and Department's Motion for Summary Judgment. [Administrative File]

29. On August 17, 2020, the Taxpayer filed Taxpayer's Prehearing Statement. [Administrative File]

30. On August 24, 2020, the Department filed a Notice indicating that it would not be amending or supplementing its previous Prehearing Statement, filed on March 11, 2020. [Administrative File]

31. On September 8, 2020, the Administrative Hearings Office entered an Amended Notice of Administrative Hearing which converted the previously scheduled in-person hearing to a remote video conference hearing, once again under the circumstances presented by the public health emergency as discussed more fully in Standing Order 20-02 of the Chief Hearing Officer.

[Administrative File]

Merits of Taxpayer's Protest

32. Dr. James P. Benvenuti is a medical doctor in the field of psychiatry. He has been a physician for more than 50 years specializing in child psychiatry. [Direct Examination of Dr. Benvenuti; Dept. Ex. A-053]

33. During all times relevant to the protest, he was licensed in New Mexico and practiced in Albuquerque. [Direct Examination of Dr. Benvenuti; Dept. Ex. A-053]

34. Dr. Benvenuti practiced in California for an unspecified number of years prior to relocating to New Mexico. [Direct Examination of Dr. Benvenuti]

35. At some point after relocating to New Mexico but prior to the events giving rise to the present assessment and protest, the Department initiated an audit of Taxpayer's receipts. [Direct Examination of Dr. Benvenuti]

36. Taxpayer has never paid gross receipts taxes on receipts deriving from performing professional medical services in New Mexico. [Direct Examination of Dr. Benvenuti]

37. The Department apparently determined that Taxpayer's documentation in that audit was sufficient to conclude the audit without the assessment of any additional tax, interest, or penalty. [Direct Examination of Dr. Benvenuti]

38. Because the prior audit was concluded without assessment of any tax liability, Taxpayer presumed there were no issues with his tax accounting, reporting, or payment methods. [Direct Examination of Dr. Benvenuti]

39. There is no further information on which to evaluate the issues or facts underlying the previous audit or its eventual resolution and what effect it could have had

on the issues presented under the present Assessment and resulting protest.

40. For all relevant periods, Optum Health New Mexico was the Administrative Services Organization for the State of New Mexico. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 1]

41. Optum Health New Mexico ceased acting in that capacity on or about July 1, 2017. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 1]

42. Optum Health New Mexico contracted with Hogares, Inc. to provide behavioral health services for the district in which Albuquerque was situated. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 2]

43. Open Skies Healthcare, a 501(c)(3) non-profit organization, succeeded Hogares, Inc. as the district provider after Hogares, Inc.'s contract ended in or about 2013. [Direct Examination of Dr. Benvenuti]

44. Open Skies Healthcare engaged in the business of providing children and youth with behavioral health services, which included psychiatric services. [Direct Examination of Dr. Benvenuti]

45. Due to the nature of its operations and standing within the overarching behavioral health services framework of the State of New Mexico, Taxpayer's understanding was that Open Skies Healthcare received most, if not all funding from the Social Security Administration (SSA) and the Medical Assistance Division (MAD) of the Human Services Department of the State of New Mexico, owing at least in part to its contractual association with Optum Health New Mexico. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 7]

46. Taxpayer's professional association with Open Skies Healthcare began in 2013 and continued there during all times relevant to the audit and protest. [Direct Examination of Dr.

Benvenuti; Taxpayer Ex. 5.4]

47. Taxpayer's relationship to Open Skies Healthcare was that of an independent contractor having been placed by a third-party physician staffing service called Staff Care, Inc. [Direct Examination of Dr. Benvenuti]

48. Staff Care, Inc. "operates as a locum tenens staffing company." [Dept. Ex. A-055]

49. Taxpayer was not an employee of Open Skies Healthcare but performed services for Open Skies Healthcare through is placement by Staff Care, Inc. [Direct Examination of Dr. Benvenuti; Cross Examination of Dr. Benvenuti; Taxpayer Ex. 9]

50. Taxpayer's assignment to Open Skies Healthcare was formalized with an Assignment Confirmation Letter between Staff Care, Inc. and Taxpayer. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 8]

51. Taxpayer provided psychiatric services to Open Skies Healthcare patients, including children or youth experiencing conditions such as Attention-Deficit/Hyperactivity Disorder, Bipolar Disorder, and Schizophrenia. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 8]

52. Taxpayer recorded the time devoted to providing services to Open Skies Healthcare on time sheets provided by, and submitted to, Staff Care, Inc. [Direct Examination of Dr. Benvenuti; Dept. A-047]

53. Taxpayer was compensated exclusively by Staff Care, Inc. for his services. [Direct Examination of Dr. Benvenuti; Dept. A-047]

54. Open Skies Healthcare was compensated, at least in part, through Medicaid and Medicare funds managed through the Human Services Department of the

State of New Mexico. It was also compensated directly by the Children, Youth, and Families Department of the State of New Mexico for children and youth in foster care. [Direct Examination of Dr. Benvenuti; Taxpayer Ex. 7]

55. Taxpayer was compensated for his services through Staff Care, Inc., the physician service provider, at a rate of $115 per hour. [Direct Examination of Dr. Benvenuti]

56. Income that Taxpayer derived from Staff Care, Inc. for services provided to Open Skies Health Care was reported by Staff Care, Inc. on Forms 1099-MISC in each relevant year. Staff Care Inc. was consistently identified as "Payer" and Taxpayer was identified as "Recipient" in each applicable year. [Cross Examination of Dr. Benvenuti; Taxpayer Ex. 9]

57. Taxpayer has no agreements with Optum Health New Mexico or Open Skies Healthcare and lacks standing to enforce contractual obligations of either entity, if for example they denied payment for services performed. Taxpayer's agreement to provide services was exclusively with Staff Care, Inc. [Cross Examination of Dr. Benvenuti; Dept. Ex. A-042]

58. Taxpayer did not have access to any contract establishing the terms or conditions of the relationship between Staff Care, Inc. and Open Skies Healthcare or Optum Health New Mexico which may have explained the process through which Staff Care, Inc. was compensated for its services. [Cross Examination of Dr. Benvenuti]

59. Taxpayer did not have personal firsthand knowledge enabling him to identify the specific programs funding the precise services he provided. Consequently, there was no evidence to establish the source or amounts of receipts derived from any particular program, including Medicaid, Medicare, or other sources. [Cross Examination of Dr. Benvenuti]

60. Taxpayer did not have personal firsthand knowledge capable of establishing the process actually employed for billing his services. There was no evidence available to Taxpayer

to establish how Staff Care, Inc. was compensated or the source of the funds remitted to Staff Care, Inc. [Cross Examination of Dr. Benvenuti]

61. Taxpayer assertedly stopped work when he was assessed so that he could focus on the issues subject of the Assessment and resulting protest. [Direct Examination of Dr. Benvenuti]

62. Nicholas Pacheco is a Protest Auditor for the Department. He has been employed in that capacity for six years as of the date of the hearing. [Direct Examination of Mr. Pacheco]

63. Taxpayer came to the Department's attention through a Schedule C mismatch which indicated that Taxpayer's reported income on Schedule C of his federal tax returns was inconsistent with Taxpayer's CRS-1 filings with the Department for the same periods of time. [Direct Examination of Mr. Pacheco]

64. Mr. Pacheco reviewed the protest and concluded that Taxpayer was compensated as an independent contractor by Staff Care, Inc. His compensation was reported on IRS Forms 1099-MISC which typically reflect compensation to non-employee independent contractors. [Direct Examination of Mr. Pacheco]

65. Mr. Pacheco observed, consistent with Taxpayer's admissions, that there was no way of knowing which specific programs or sources, such as Medicaid, Medicare, or other sources, funded the services Taxpayer provided. [Direct Examination of Mr. Pacheco]

66. Taxpayer failed to report gross receipts deriving from Staff Care, Inc. in all years relevant to the protest. [Taxpayer Ex. 10]

67. Taxpayer relied on TurboTax and the publication of a local attorney in

making the determination that he would not incur a New Mexico gross receipts tax liability associated with receipts from providing services to, or through Staff Care, Inc. [Direct Examination of Dr. Benvenuti; Cross Examination of Dr. Benvenuti]

DISCUSSION

Taxpayer asserted that his receipts from services provided to Open Skies Healthcare, and paid by Staff Care, Inc., should be deductible and not taxable as gross receipts. The central issue is therefore whether Taxpayer was entitled to deductions under NMSA 1978, Section 7-9-93 or Section 7-9-77.1 for receipts paid by Staff Care, Inc. for services provided to Open Skies Healthcare. Taxpayer also asserted that Staff Care, Inc. was his agent, but that inquiry will be addressed subsequent to the broader discussion of the specific deductions claimed.

Taxpayer also presents secondary issues which the Hearing Officer will summarize as follows: whether Taxpayer was a non-filer in tax years 2013 – 2015; and whether penalty should be abated because any failure to report was based upon a mistake of law on good faith and on reasonable grounds or may otherwise come within the definition of non-negligence.

The Department contends that Taxpayer is not entitled to either deduction because Taxpayer's receipts derived from a staffing agency, not pursuant to a contract with a managed health care provider or health care insurer. The Department further asserts that Taxpayer's claim to relief should be denied because Taxpayer's evidence failed to establish the sum of receipts that derived from eligible funds, since each deduction requires that the deductible receipts derive from specific sources.

Prior to addressing Taxpayer's claims, however, it is necessary to discuss the burden which Taxpayer must overcome in order to prevail.

Presumption of Correctness

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

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

In circumstances where a taxpayer's claim for relief relies on the application of an exemption or deduction, as in the case at hand, "the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-

NMSC-007, ¶9, 133 N.M. 447, 64 P.3d 474.

It was apparent that Taxpayer had devoted countless hours preparing for his hearing. He was primed with citations to supporting authority and had given careful and meticulous thought to the facts he intended to present, and to the manner in which he wanted to present them. Overall, the depth of Taxpayer's preparation was admirable. However, rather than providing live testimony, Taxpayer merely read prepared, written testimony into the record. Taxpayer's insistence on reading testimony into the record undermined the reliability and credibility of that testimony, particularly as it relates to credibility and overcoming the presumption of correctness.

Whether Taxpayer is a Non-Filer

Although Taxpayer devotes most of his arguments to claiming deductibility of relevant receipts, he also raised some dispute in reference to the Department's assertion that "Taxpayer failed to report" and for that reason, it had authority to assess for years 2013, 2014, and 2015.

The Hearing Officer understands Taxpayer's argument on this topic as disputing the authority of the Department to assess tax, interest, or penalty beyond the period of time provided by NMSA 1978, Section 7-1-18 (A). That statute provides that, "no assessment of tax may be made by the department after three years from the end of the calendar year in which payment of the tax was due[.]" However, NMSA 1978, Section 7-1-18 (C) provides an exception to the general rule stating that "[i]n case of the failure by a taxpayer to complete and file any required return, the tax relating to the period for which the return was required may be assessed at any time within seven years from the end of the calendar year in which the tax was due[.]"

In disputing the Department's assertion that he is a non-filer, Taxpayer contends he reported the receipts at issue with his personal income taxes. Although it may be entirely accurate that Taxpayer's personal income tax returns incorporated the receipts specifically now

at issue, that does not necessarily satisfy the obligation to report under the New Mexico Gross Receipts and Compensating Tax Act.

A separate obligation arises to report gross receipts and remit gross receipts tax under the New Mexico Gross Receipts and Compensating Tax Act. *See* NMSA 1978, Section 7-1-13 (A) ("Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to tax until payment is made. Taxes are due on and after the date on which their payment is required until payment is made."). Regardless of whether Taxpayer filed personal income tax returns, Taxpayer did not meet the separate requirement to file CRS-1 returns to report gross receipts taxes.

In addition to, or perhaps in the alternative, Taxpayer also argued that he did report, but that because he claimed deductions equaling 100 percent of his total gross receipts, his reporting would have resembled a failure to report, but that it should have satisfied his reporting requirements. In other words, Taxpayer asserts that reporting zero gross receipts would have the same outward appearance as not reporting anything at all.

The Hearing Officer remains unpersuaded. Regulation 3.2.203.9 NMAC specifically requires:

> Persons engaging in business, except those persons all of whose receipts are exempted by the provisions of Sections 7-9-13 through 7-9-42 NMSA 1978 or other law, must register and *report their gross receipts to the department even if such receipts are deductible* under one or more provisions of Sections 7-9-46 through 7-9-78.1 or 7-9-83 through 7-9-90 NMSA 1978.
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> [10/21/86, 11/26/90, 11/15/96; 3.2.203.10 NMAC - Rn, 3 NMAC 2.45.10 & A, 5/31/01]

Although the regulation does not specifically identify Section 7-9-93, it did include every deduction provided by the New Mexico Gross Receipts and Compensating Tax Act as of the date it was promulgated in 2001. The original version of Section 7-9-93 was enacted in 2004, and although

the regulation has not been updated since 2001 to include Section 7-9-93 or other deductions enacted since, the Department's reporting requirements have remained consistent ever since 2001. Department publication, FYI-105, Gross Receipts & Compensating Taxes: An Overview (Rev. 07/2020 at Page 13), instructs:

> A deduction from gross receipts, like an exemption, results in an amount not subject to tax. However, unlike an exemption, **YOU MUST REPORT ON THE FORM CRS-1 BOTH THE GROSS RECEIPTS RECEIVED (in Column D) AND THE AMOUNT OF DEDUCTIONS YOU ARE ELIGIBLE TO CLAIM AGAINST THOSE GROSS RECEIPTS (in Column E).**
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> [Emphasis in Original]

For this reason, even if it is accurate that Taxpayer intended to claim a deduction from gross receipts totaling 100 percent of his gross receipts, he was still required to report his total gross receipts before claiming any deductions, not to mention satisfying any special reporting requirements associated with the deduction. *See e.g.* FYI-105, Gross Receipts & Compensating Taxes: An Overview (Rev. 07/2020 at Pages 22 - 24)

But moreover, and for reasons previously mentioned, the Hearing Officer did not find Taxpayer's testimony on this issue to be credible. Any suggestion by Taxpayer that he intentionally and knowingly equated not reporting with claiming a deduction totaling 100 percent was simply not credible. In any regard, reporting zero gross receipts, or in the alternative, not reporting at all, constituted a clear failure to report under the law.

Hence, the Department's perception that Taxpayer did not report in years 2013 through 2015 was legally and factually accurate. The Department was well within its authority to assess tax, interest, and penalty for all years relevant to the protest. *See* NMSA 1978, Section 7-1-18 (C).

Computing Taxable Gross Receipts

As a practical matter, one of the initial steps in any audit is to compute or verify the amount

of gross receipts. A subsequent step is to subtract from the taxpayer's total gross receipts those amounts which are deductible or exempt. The difference between total gross receipts and any applicable deductions or exemptions is the amount of taxable gross receipts.

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

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or *from performing services in New Mexico*.
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> [Emphasis Added]

Accordingly, under the Gross Receipts and Compensating Tax Act, all gross receipts of a person engaged in business are presumed taxable. *See* NMSA 1978, Section 7-9-5 (2002).

As previously stated, however, a taxpayer's actual obligation may be reduced by any number of applicable deductions or exemptions, or by presenting evidence that its receipts are excludable from taxation under NMSA 1978, Section 7-9-3.5 (*e.g.* services performed outside of New Mexico).

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

Application of Sections 7-9-93 and 7-9-77.1

NMSA 1978, Section 7-9-93 permits a deduction for the receipts of health care practitioners under specific circumstances. Subsection A states in relevant part:

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

There is no dispute that Taxpayer is a health care practitioner. However, the statute goes on to define critical terms, such as "commercial contract services" which means "health care services performed by a health care practitioner pursuant to a contract with a managed health care provider or health care insurer other than those health care services provided for medicare patients pursuant to Title 18 of the federal Social Security Act or for medicaid patients pursuant to Title 19 or Title 21 of the federal Social Security Act[.]" *See* Section 7-9-93 (C) (1).

In this case, Taxpayer never asserted that he contracted directly with Open Skies Health Care or even Optum Health New Mexico. In fact, he readily admitted that the only contract in which he was a party was between himself and Staff Care, Inc. However, Staff Care, Inc. is a staffing agency, not a "managed health care provider" or "health care insurer" as those terms are defined at Section 7-9-93 (C)(2) or (4).

For example, a "managed health care provider" means "a person that provides for the delivery of comprehensive basic health care services and medically necessary services to individuals enrolled in a plan through its own employed health care providers or by contracting with selected or participating health care providers. 'Managed health care provider' includes only those persons that provide comprehensive basic health care services to enrollees on a contract basis," and

goes on to enumerate certain organizations, associations, plans, and systems, none of which include physician staffing services such as Staff Care, Inc.

The same is true for the definition of "health care insurer" which means "a person that: (a) has a valid certificate of authority in good standing pursuant to the New Mexico Insurance Code to act as an insurer, health maintenance organization or nonprofit health care plan or prepaid dental plan; and (b) contracts to reimburse licensed health care practitioners for providing basic health services to enrollees at negotiated fee rates[,]" which once again does not include staffing services such as Staff Care, Inc.

Taxpayer nevertheless asserts that he is still entitled to the deduction since the receipts eventually remitted to him by Staff Care, Inc. are traceable to their point of origin, Open Skies Healthcare, which he claims is "a managed health care provider." Even if so, Taxpayer's argument still contradicts the requirements of the deduction because Taxpayer did not have a contract with Open Skies Healthcare contrary to the requirements expressed in Section 7-9-93 (C) (1) which requires that services be performed and compensated "pursuant to a contract with a managed health care provider or health care insurer." Taxpayer contracted with Staff Care, Inc., submitted his billable hours for services provided to Staff Care, Inc., and was paid by Staff Care, Inc. Meanwhile, Staff Care, Inc., at all times relevant to the protest was a staffing agency placing medical professionals on a temporary basis to fill temporary staffing shortages. Taxpayer has never had any direct contractual relationship with Open Skies Healthcare or Optum Health New Mexico.

Moreover, Staff Care, Inc. is simply not a "managed health care provider" or a "health care insurer." *See* NMSA 1978, Section 7-9-93 (C) (2) & (4). Instead, as seen in the example of Taxpayer's own association with Staff Care, Inc., it is engaged in the business of providing temporary placement of medical professionals. The Assignment Confirmation Letters clearly stated

that Taxpayer was providing "locum tenens coverage." The Latin term, *locum tenens*, generally means, "one filling an office for a time or temporarily taking the place of another —used especially of a doctor or clergyman[.]" *See* Merriam-Webster.com Dictionary, s.v. "locum tenens," accessed March 23, 2021, https://www.merriam-webster.com/dictionary/locum%20.

Since Staff Care, Inc. was the entity with which Taxpayer had a contract, and because Staff Care, Inc. was neither a "managed health care provider" or a "health care insurer," Taxpayer has not established eligibility to a deduction under Section 7-9-93.

However, even if the Hearing Officer agreed with Taxpayer that receipts from Staff Care, Inc. should nevertheless be deductible because they could have originated from a "managed care provider" or a "health care insurer," the Hearing Officer would nevertheless still find that Taxpayer has failed to meet his burden. The evidence fails to show how much of Taxpayer's receipts derived from services within the scope of Taxpayer's practice, as well as the specific source of the funds. Taxpayer readily admitted that he was not capable of identifying specific programs through which he was paid for services. Moreover, as the only physician among several psychologists, there is no way of knowing how much of Taxpayer's time, if any, was devoted to supervisory or administrative functions.

However, the predominant issue precluding the application of Section 7-9-93 is that Taxpayer's receipts were not "paid by a managed health care provider or health care insurer" as those terms are defined in the law.

Next, Taxpayer asserts that Staff Care, Inc. is a "third party claims administrator" under Regulation 3.2.241.9 NMAC which permits deductions under Section 7-9-93 for payments by third party claims administrators. However, Taxpayer presented no evidence to establish that Staff Care, Inc. is a third party claims administrator. The fact that Taxpayer submitted time sheets to Staff Care,

Inc. does not transform it from a locum tenens staffing agency into a third party claims administrator. *See e.g.* NMSA 1978, Section 59A-12A-2 (B) (defining the terms "administrator" and "third party administrator" under the New Mexico Insurance Code).

The evaluation of Section 7-9-77.1 follows a similar course. As with Section 7-9-93, the critical inquiry is once again the precise source of Taxpayer's receipts. Once again, all receipts were remitted by Staff Care, Inc. Moreover, Taxpayer again readily admitted that he was unable to establish the specific program funding any of his payments. In absence of such evidence, there is insufficient evidence to establish any of the critical elements underlying the application of Section 7-9-77.1 since that deduction depends significantly on identifying the specific programs funding the services provided.

For example, Taxpayer established that the services he provided for Open Skies Healthcare through Staff Inc, Inc. concentrated on behavioral health services to children and youth. This conclusion falls short of establishing that the receipts originated from "the United States government or any agency thereof for provision of medical and other health services … to medicare beneficiaries pursuant to the provisions of Title 18 of the federal Social Security Act[.]" *See* NMSA 1978, Section 7-9-77.1 (A); 42 U.S.C.A. §1395 et seq. (providing "Health Insurance for Aged and Disabled").

The same observation is made for other subsections of Section 7-9-77.1. For example, there is no evidence to establish that Taxpayer generated receipts from the federal TRICARE program, a "comprehensive managed health care program for the delivery and financing of health care services in the Military Health System." *See* Section 7-9-77.1 (B); 10 USC Sec. 1072 (7); 32 CFR §199.17.

There is also no evidence to conclude that any of the receipts at issue derived from the

"Indian health service of the United States department of health and human services for the provision of" services to its beneficiaries. *See* NMSA 1978, Section 7-9-77.1 (C).

In contrast, similar to the conclusion reached in reference to Section 7-9-93, the evidence could only establish that Taxpayer's receipts derived from Staff Care, Inc., a locum tenens staffing agency, and there was no further detail provided to determine the particular source of those funds or their eligibility under either deduction.

Consideration of Regulation 8.302.2 NMAC as Part of Analysis

Taxpayer asserts as a final contention that Staff Care, Inc. should be afforded the distinction of his business agent under Regulation 8.302.2.10 (A) (2) which permits MAD to make payment to a provider or to specified individuals or organizations for services, including "a business agent, such as billing service or accounting firm that provides statements and receives payment in the name of the provider; the agent's compensation must be related to the cost of processing the claims and not based on a percentage of the amount that is billed or collected or dependent upon collection of the payment."

The effect would be to create a direct payment link from a health care insurer or managed health care provider through his asserted business agent to Taxpayer. However, Taxpayer's assertion that Staff Care, Inc. is his business agent is misplaced. There is simply no evidence proffered upon which to conclude that Staff Care, Inc. is a "business agent" within the meaning of the cited regulation, promulgated by the New Mexico Human Services Department governing benefits administered by MAD.

Conversely stated, finding that Staff Care, Inc. was Taxpayer's business agent would rely entirely on speculation since there is no evidence on the record to explain how Staff Care, Inc. went about billing and collecting for the services it provided, or how it paid its locum tenens

providers. For example, did Staff Care, Inc. submit claims directly to MAD or other programs, or was it paid instead by its clients such as Open Skies Healthcare who handled the claim process separately? Even though Taxpayer attempted to present testimony on the procedures Staff Care, Inc. utilized to bill for services, the testimony was largely based on speculation. Moreover, Taxpayer's insistence on reading testimony into the record undermined the reliability and credibility of that testimony.

All the same, it is unlikely that the New Mexico Human Services Department intended its definition to have any effect on issues relating to taxation. Implementing the tax laws of this state or formulating tax policy is well beyond the scope of the authority granted to the Human Services Department. In contrast, the authority to implement and enforce the tax laws of this state are granted exclusively to the Department. *See* NMSA 1978, Section 9-11-6.

However, the Hearing Officer will still consider whether Staff Care, Inc. is a business agent for other purposes, not specifically under Regulation 8.302.2 NMAC. "The majority rule is that the manner in which the parties designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called." *See Chevron Oil Co. v. Sutton*, 1973-NMSC-111, ¶4, 85 N.M. 679, 515 P.2d 1283; *See also Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, 135 N.M. 641, 92 P.3d 653.

The New Mexico Supreme Court has acknowledged that "[t]he common law emphasizes the fiduciary nature of the agency relationship, which does not arise until 'one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *See Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶17, 142 N.M. 235,

164 P.3d 934 *quoting* Restatement (Third) of Agency §1.01 (2006); *See also Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶40, 143 N.M. 142, 173 P.3d 749; *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶26, 131 N.M. 772, 42 P.3d 1221.

Our courts have, on several occasions, considered the existence and consequence of the agency relationship on the taxability of receipts generated amid that relationship. In *MPC Ltd. v. New Mexico Taxation & Revenue Dept.*, 2003-NMCA-021, ¶ 37, 133 N.M. 217, 225, 62 P.3d 308, 316, the court defined the essential elements of an agency relationship within the issue of state taxation, particularly within the meaning of Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC. The court noted the following characteristics of the agency relationship:

> (1) the agent has the authority to bind the principal… to an obligation… created by the agent, and (2) the beneficiary of that obligation… is informed by contract that he or she has a right to proceed against the principal… to enforce the obligation.

In this protest, the evidence failed to establish any authority for Staff Care, Inc. to bind Taxpayer to obligations to any third party, such as Open Skies Healthcare. Although, Taxpayer might characterize his Assignment Confirmation Letter to provide services to Open Skies Healthcare as a binding agreement, there is no evidence that Open Skies Healthcare enjoys the ability to proceed directly against Taxpayer for any reason. Moreover, to the extent Taxpayer testified to the presence of various elements indicative of an agency relationship, Taxpayer's testimony was unreliable and not credible for the reasons previously explained.

Based on the limited information on the record, the Hearing Officer could presume that Taxpayer's failure to perform for Open Skies Healthcare may give rise to an action between Open Skies Healthcare and Staff Care, Inc., and Staff Care, Inc. might even proceed against Taxpayer, but there is nothing on the record to establish that Open Skies Healthcare enjoyed the ability to bypass Staff Care, Inc. and proceed directly against Taxpayer.

This observation is consistent with Taxpayer's testimony that he is not aware of any provisions that would permit him to proceed directly against Open Skies Healthcare, and there is nothing apparent from the evidence that would permit Open Skies Healthcare to proceed directly against Taxpayer. For these reasons, Staff Care, Inc. is not Taxpayer's agent.

For these reasons, Taxpayer has failed to carry his burden of establishing entitlement to a deduction under Sections 7-9-93 or 7-9-77.1, as required by applicable case law. *See Wing Pawn Shop*, 1991-NMCA-024, ¶16 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶9.

Penalty

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, NMSA 1978 Section 7-1-69 (2007) requires that:

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates that a provision is mandatory absent clear indication to the contrary).

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C)

"inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was negligent under all three definitions. Taxpayer failed to exercise a degree of ordinary business care and prudence which a reasonable taxpayer would exercise under like circumstances with regard for understanding his gross receipts tax obligations. As a result, Taxpayer failed to take action to report and pay gross receipts, a failure which was caused in part by erroneous belief or inattention.

In instances where a taxpayer might fall under the definition of civil negligence subject to penalty, Section 7-1-69 (B) provides an exception in that "[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." Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds that gross receipts tax did not apply to him when he failed to report and pay gross receipts tax. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty.

The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty may be abated. Based on the argument of Taxpayer and the evidence presented, only one factor under Regulation 3.1.11.11 NMAC is potentially applicable in this proceeding:

> D. the 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;

First, Taxpayer used TurboTax software to complete his federal and New Mexico personal income tax returns. Generally speaking, the software requests input of certain information and

computes a taxpayer's liability and any amount owed or due for refund. The software, although a helpful tool, does not substitute for "competent tax counsel or accountant." The Hearing Officer concurs with the observations of the United States Tax Court in *Morales v. Comm'r*, T.C. Memo 2012-341, 2012 Tax Ct. Memo LEXIS 342, 104 T.C.M. (CCH) 741, *affirmed*, 633 Fed. Appx. 884 (9th Cir. 2015) (non-precedential), which held that the use of tax preparation software is not a defense to negligence penalties.

Taxpayer also relies on a 2007 publication by a local attorney who is known to practice in the area of state taxation. However, while reference to a third-party publication is often helpful, that in itself also does not substitute for the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts. First, the publication does not speak on behalf of the Department, and cannot therefore bind the Department. Second, the author of the publication had no opportunity to consider the consequence of Taxpayer's specific circumstances. This is the reason why attorney publications will usually be accompanied by some notification that the information provided is for general informational purposes only and readers should seek advice from a tax professional for advice regarding specific tax issues. This is because truly informed advice requires a full disclosure of relevant facts, something that a general publication is incapable of providing.

The Department did not allege that the Taxpayer's inaction was with the intent to evade or defeat a tax. In contrast, there was no dispute that the issue giving rise to this protest was the result of Taxpayer's inadvertence, erroneous belief, or inattention. In other words, Taxpayer did not act with bad intentions. Yet, *El Centro Villa Nursing* established that the civil negligence penalty is appropriate for inadvertent error and Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty.

Having considered all of the evidence and arguments presented, including tangential issues that may have been raised but not specifically addressed herein, the Hearing Officer was persuaded that Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

For the foregoing reasons, Taxpayer's protest should be DENIED.

DATED: April 9, 2021

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

NOTICE OF RIGHT TO APPEAL

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

CERTIFICATE OF SERVICE

On April 9, 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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