STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
GORDON E JOHNSON
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1823067824

v.

Case Number 20.12-142A
D&O 21 – 10

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On February 15, 2021, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits of the protest of Gordon E. Johnson pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Mr. Gordon E. Johnson and Mrs. Mary Johnson (collectively referred to herein as "Taxpayer") appeared representing themselves. Mr. Johnson testified on behalf of Taxpayer. Mr. David Mittle, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department") accompanied by Ms. Alma Tapia, protest auditor. The Department called Mrs. Johnson and Ms. Tapia to testify.

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 (Contract), 2 (License Information), and 3 (Forms 1099) were admitted. The Department did not proffer any exhibits.

The primary issues presented for consideration were whether Mrs. Johnson's income from performing nursing services was deductible from gross receipts pursuant to NMSA 1978, Section 7-9-93 or Section 7-9-77.1; and (2) whether Taxpayer was entitled to abatement of penalty under the

assessment. With regard for the primary issue in dispute, the Department argued that even if Taxpayer derived income from providing nursing services, it was not deductible because she did not receive it from a qualifying entity. As explained in greater detail in the subsequent discussion, the Hearing Officer determined that Taxpayer did not establish by a preponderance of evidence an entitlement to any deduction, but the Hearing Officer was satisfied that the evidence and surrounding circumstances justified an abatement of penalty based on a mistake of law made in good faith and on reasonable grounds. Therefore, Taxpayer's protest should be denied with regard to tax and interest, but granted with respect to penalty. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On June 17, 2020, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L1823067824 in the total amount of $11,163.74 comprised of gross receipts tax in the amount of $7,932.84, gross receipts tax interest in the amount of $1,644.36, and gross receipts tax penalty in the amount of $1,586.54 for the periods from January 1, 2013 through December 31, 2017 (hereinafter "Assessment"). [Administrative File]

2. On June 26, 2020, the Department received Taxpayer's protest of Assessment accompanied by attachments including: Forms 1099 for years 2013, 2014, 2015, 2016, and 2017 (admitted as Taxpayer Ex. 3); and New Mexico Board of Nursing Licensure Information (admitted as Taxpayer Ex. 2). [Administrative File]

3. On July 15, 2020, the Department acknowledged receipts of Taxpayer protest under Letter ID No. L0416577200. [Administrative File]

4. On July 22, 2020, the Department requested additional information from Taxpayer, specifically "copies of the contract you had with Tungland Corporation" and any other information the Taxpayer may perceived as helpful. [Administrative File]

5. On August 10, 2020, Taxpayer provided additional information to the Department which included a copy of an agreement with The Tungland Corporation that Taxpayer had to provide services, responsive to the Department's request dated July 22, 2020 (admitted as Taxpayer Ex. 1). [Administrative File]

6. On December 1, 2020, the Department filed a request for a hearing in reference to the protest of the Assessment. [Administrative File]

7. On December 1, 2020, the Department filed Department's Original Answer to Taxpayer's protest. [Administrative File]

8. On December 1, 2020, the Administrative Hearings Office entered a Notice of Videoconference Administrative Hearing which set a hearing on the merits of Taxpayer's protest for February 15, 2021. [Administrative File]

Merits of Taxpayer's Protest

9. Mr. Gordon Johnson and Mrs. Mary Johnson are married. [Direct Examination of Mr. Johnson]

10. Mrs. Johnson was, at all times relevant to the protest, a registered nurse in the State of New Mexico licensed pursuant to the provisions of the Nursing Practice Act (License No. R37185). [Direct Examination of Mr. Johnson; Taxpayer Ex. 2]

11. Mrs. Johnson was, during all times relevant to the protest, an independent contractor to The Tungland Corporation (hereinafter "Tungland") providing nursing services on its behalf. [Direct Examination of Mr. Johnson; Taxpayer Ex. 1]

12. Upon information and belief, the services that Tungland provided did not require the services of more than one nurse. For that reason, Mrs. Johnson was the only registered nurse with whom Tungland contracted and the only nurse providing services by or through Tungland. [Direct Examination of Mr. Johnson]

13. Tungland was in the business of providing services under the State of New Mexico's Developmental Disabilities Waiver program. [Direct Examination of Mr. Johnson]

14. In her capacity as a register nurse for Tungland, Mrs. Johnson conducted client assessments, attended routine medical appointments, prepared patient care plans, attended and participated in meetings, and conferred with physicians on behalf of individuals receiving services through Tungland under the Developmental Disabilities Waiver program. [Direct Examination of Mrs. Johnson]

15. Mrs. Johnson was paid by Tungland for services provided to Tungland. [Direct Examination of Mrs. Johnson]

16. Mrs. Johnson did not have a contract with the State of New Mexico. [Direct Examination of Mrs. Johnson]

17. Mrs. Johnson did not have recourse against the State of New Mexico for any failure of Tungland to pay for her services. [Direct Examination of Mrs. Johnson]

18. Taxpayer relied on the deductions provided at NMSA 1978, Section 7-9-93 and NMSA 1978, Section 7-9-77.1 in concluding that Mrs. Johnson's receipts from Tungland were not taxable, as well as accompanying instructions for completing and submitting CRS-1 returns. [Direct Examination of Mr. Johnson]

19. Mr. Johnson also relied on information substantially similar to that

contained on Page 23 in FYI-105 (Rev. 7/2019) but admittedly overlooked the special reporting requirements that were contained therein. [Direct Examination of Mr. Johnson; Cross Examination of Mr. Johnson]

20. Receipts paid to Tungland derived from transactions that were separate and distinguishable from the transactions under which Tungland paid Mrs. Johnson for her services. [Direct Examination of Ms. Tapia]

21. Mrs. Johnson did not have any familial relationship to any of the clients with whom she worked under her contract with Tungland. [Cross Examination of Mrs. Johnson]

22. Mrs. Johnson's receipts derived directly from Tungland. [Direct Examination of Ms. Tapia]

DISCUSSION

Taxpayer asserted that Mrs. Johnson's receipts from services performed as a registered nurse to Tungland should be deductible from Taxpayer's taxable 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 Tungland for services rendered for, or on behalf of, Tungland.

The Department contends that Taxpayer is not entitled to either deduction because Taxpayer's receipts did not derive from a qualified entity, but instead derived from Tungland for services provided to Tungland.

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 she 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.

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*.
>
> [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).

But, as previously stated, 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).

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.
>
> [Emphasis Added]

There is no dispute that Taxpayer is a health care practitioner under NMSA 1978, Section 7-9-93 (C) (3) (k). However, it is not enough under the statute that Mrs. Johnson is a health care practitioner. The statute requires that the receipts derive from specific sources for particular types of services, or as the Department appropriately described it, from a "qualified source."

For example, only receipts paid by managed health care providers and health care insurers are deductible, and then those receipts must derive from providing specific types of services, particularly "commercial contract services" and "medicare part C services."

The statute defines those terms. "Commercial contract services" 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).

The New Mexico Court of Appeals recently observed that:

> [T]he Legislature defined "commercial contract services" in the statute to require services be performed "pursuant to a contract" between a health care practitioner and a managed health care provider or insurer. Similarly, "health care insurer" is also defined as a person that "contracts to reimburse licensed health care practitioners for providing basic health care services[.]" Such specificity requiring a contract with a "health care practitioner" lends support to the conclusion that only health care practitioners could hold qualifying "receipts from payments by a managed health care provider or health care insurer."

See Golden Services Home Health & Hospice v. Taxation & Revenue Dep't, 2020 WL 2045956, at *7 (N.M. Ct. App. Apr. 20, 2020) (non-precedential).

In this case, Taxpayer did not assert nor did she present evidence to establish that she contracted directly with a qualified entity. In contrast, Mrs. Johnson explained that the only contract in which she was a party was between herself and Tungland, but there was no further evidence to

establish that Tungland could qualify as 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. However, there is insufficient evidence on which to conclude that Tungland would qualify as any one of those entities.

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[.]" Once again, there is insufficient evidence on which to determine that Tungland could qualify as a "health care insurer" as defined in the statute.

Because there was insufficient evidence to establish that Tungland was a managed health care provider or health care insurer, or that Mrs. Johnson's receipts derived from providing "commercial contract services" and "medicare part C services" as those terms are defined by the law, Mrs. Johnson did not establish entitlement to a deduction under Section 7-9-93.

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 paid by Tungland to Mrs. Johnson and there was no evidence to establish any of the critical elements underlying the application of Section 7-9-77.1.

Similar to Section 7-9-93, Section 7-9-77.1 begins with the source of receipts, and in the case of Section 7-9-77.1 (A), those receipts must be received by the Taxpayer from "the United States government or any agency thereof for provision of medical and other health services by a health care practitioner or of medical or other health and palliative services by hospices or nursing homes to medicare beneficiaries pursuant to the provisions of Title 18 of the federal Social Security Act[.]"

In Mrs. Johnson's situation, there was no evidence on which to conclude that her receipts were paid directly by "the United States government or any agency thereof" for provision of the sorts of services specified. *See* NMSA 1978, Section 7-9-77.1 (A); 42 U.S.C.A. §1395 et seq. (providing "Health Insurance for Aged and Disabled").

Instead, Taxpayer's receipts derived directly from Tungland, and the source of its receipts (money paid to Tungland) is not relevant to the application of the deduction. The same observations are made for other subsections of Section 7-9-77.1.

Effect of Regulation 3.2.1.12 (G) NMAC

Although not directly addressed by Taxpayer, the Hearing Officer at the suggestion of the Department took notice of Regulation 3.2.1.12 (E), (F), and (G) NMAC which exclude certain activities from the definition of "engaging in business." Of those three subsections, the only provision potentially relevant to the Developmentally Disabled Waiver program is Regulation 3.2.1.12 (G) NMAC which states:

> G. Persons not engaging in business - home care for developmentally disabled family members: Any individual who enters into an agreement with the state of New Mexico to provide home based support services for developmentally disabled individuals in the home of the developmentally disabled individuals or the home of the support provider and receives payments which under 26 USCA 131 are "qualified foster care payments" is not thereby engaging in business. Receipts of the

> individuals which are "qualified foster care payments" from providing such home based support services pursuant to such an agreement are not receipts from engaging in business.

However, this regulation is irrelevant to the facts of this protest because Ms. Johnson readily admitted that she did not have any contract with the State of New Mexico and further clarified that she had no direct means of redress against the State of New Mexico in the event Tungland ever failed to satisfy its contractual obligations to her. Regulations 3.2.1.12 (E) and (F) are also not applicable as they address receipts from programs not germane to the facts of this protest.

Therefore, to the extent Taxpayer asserts any relief under Regulation 3.2.1.12 (E), (F), or (G) NMAC, those provisions do not apply under the facts of this case and afford Taxpayer no relief from the Assessment.

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.
>
> [Emphasis Added]

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 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." In this instance, the Department acknowledged that Taxpayer consulted the Department's publications, but either misinterpreted or misunderstood the information provided. Under those circumstances, the Department stated that it would not object to the abatement of penalty. The Department's standpoint is commendable because the Hearing Officer is unaware of any other circumstances in which a taxpayer relied on a misinterpretation or misunderstanding of an otherwise correct and accurate Department publication and still qualified for an abatement of penalty. *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).

But the circumstances of this protest are not typical. The interpretation and application of NMSA 1978, Section 7-9-93 had been passionately disputed among reasonable and judicious minds for several years until finally resolved by *Golden Services*, 2020 WL 2045956 (N.M. Ct. App. Apr. 20, 2020) (non-precedential).

That is not to say that a history of disagreement among reasonable minds in reference to the interpretation or application of a law should always justify an abatement of penalty. The circumstances underlying the abatement of penalty in this case are unique. Not only were the

Department and Hearing Officer satisfied by the evidence presented, particularly Mr. Johnson's credible testimony that Taxpayer made a mistake of law in good faith and on reasonable grounds, but recent judicial history exemplifies the basis for such mistake. Two of three judges considering the clarity of Section 7-9-93 in *Golden Services* observed, "we perceive ambiguity in the structure and wording of the statute." *See Golden Services*, 2020 WL 2045956, at *4 (N.M. Ct. App. Apr. 20, 2020). The third judge, although concurring with the result reached in *Golden Services*, did not agree that the statute was ambiguous. *See Golden Services*, 2020 WL 2045956, at *9 (N.M. Ct. App. Apr. 20, 2020) (Judge Z. Ives specially concurring) (non-precedential).

Hence, the circumstances in this case are unique in that experienced and knowledgeable attorneys, hearing officers, and even judges have expressed divergent views regarding the interpretation and application of Section 7-9-93. In this case, it would be unreasonable and patently unfair to find that Mr. and Mrs. Johnson, who are not legally trained, did not make a mistake of law in good faith and on reasonable grounds when legally trained and experienced minds have grappled to reconcile their differing views of the statute. Penalty should be abated.

Having considered all of the evidence and arguments presented, the Hearing Officer was persuaded that Taxpayer's protest should be DENIED with regard to the assessment of gross receipts tax and interest, but GRANTED with respect to any penalty assessed and since accruing,

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's Assessment, 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. 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.

F. 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.

G. Taxpayer did not establish an entitlement to a deduction from gross receipts under NMSA 1978, Section 7-9-93 or Section 7-9-77.1 because Taxpayer's receipts did not derive from an eligible entity.

H. Any error in reporting or failing to report arose from a mistake of law made in good faith and on reasonable grounds. *See* NMSA 1978, Section 7-1-69 (B).

For the foregoing reasons, Taxpayer's protest should be DENIED IN PART and GRANTED IN PART. Taxpayer shall pay the remaining balance of any outstanding gross receipts tax plus interest accruing until paid in full. Assessed penalty shall be ABATED.

DATED: April 27, 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 27, 2021, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

E-Mail and First-Class Mail
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