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**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

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**IN THE MATTER OF THE PROTEST OF
RONALD J. DUNCAN
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1526243504**

18

v.

Case Number 21.03-015A, D&O # 21-17

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NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On June 4, 2021, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits in the matter of the protest of Ronald J. Duncan (“Taxpayer”) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Mr. Manny Talwar, Esq. appeared representing and accompanied by Taxpayer. Mr. Timothy Williams, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department (“Department”) accompanied by Mr. Nicholas Pacheco, protest auditor. Mr. Duncan testified on his own behalf. Mr. Pacheco testified for the Department.

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, 3, 4, 10, and 11 were proffered and admitted without objection. Taxpayer Exhibits 5, 6, 8, 9 and 12 were admitted over the Department’s objections. Taxpayer Exhibit 7 was not admitted as an evidentiary exhibit but was administratively noticed as a prior

1 Decision and Order of the Administrative Hearings Office.¹ The Department did not proffer
2 any exhibits nor reference any documents that were not already contained in the
3 administrative file for which the Hearing Officer took administrative notice.

4 The primary issues presented for consideration were whether: (1) Taxpayer's
5 income from performing dining delivery services was taxable as gross receipts under the
6 Gross Receipts and Compensating Tax Act; (2) if so, whether any portion of such income
7 was deductible, exemptible, or excludable from gross receipts; (3) whether Taxpayer's
8 records were sufficient to prove entitlement to a deduction, exemption, or exclusion from
9 gross receipts; (4) and whether Taxpayer should be afforded relief from the assessment due
10 to the Department's delay in requesting a hearing.

11 As explained in greater detail in the following discussion, the Hearing Officer
12 determined, with exception for cash gratuities derived in 2014, that Taxpayer failed to
13 establish by a preponderance of evidence that receipts derived from dining delivery services
14 were deductible, exemptible, or excludable from gross receipts. Moreover, the Hearing
15 Officer also determined that Taxpayer was not entitled to further relief due to the
16 Department's delay in requesting a hearing. IT IS DECIDED AND ORDERED AS
17 FOLLOWS:

18 **FINDINGS OF FACT**

19 1. On October 12, 2018, the Department issued a Notice of Assessment of
20 Taxes and Demand for Payment under Letter ID No. L1526243504 ("Assessment") in the
21 total amount of \$3,114.85. The total amount due was comprised of \$2,343.59 in gross
22 receipts tax, \$468.72 in penalty, and \$302.54 in interest for the periods from January 1,

¹ See *In the Matter of the Protest of Luscou Music*, Administrative Hearings Office D&O No. 16-27 (6/17/2016) (non-precedential)

1 2014, to December 31, 2015. [Administrative File]

2 2. On December 28, 2018, Taxpayer submitted a protest of the Assessment
3 to the Department's protest office. [Administrative File; Taxpayer Ex. 3; Direct Examination of
4 Mr. Duncan]

5 3. On January 28, 2019, the Department acknowledged the receipt of Taxpayer's
6 protest under Letter ID No. L0808425648. [Administrative File; Taxpayer Ex. 1; Direct
7 Examination of Mr. Duncan]

8 4. The protest acknowledgment letter under Letter ID No. L0808425648 provided as
9 follows:

10 If the department does not agree with your position or has not
11 received. documentation to substantiate your position, then a
12 formal hearing will be requested within 45 days of this letter with
13 the Administrative Hearings Office.

14 5. Mr. Duncan believed and asserted that the failure to request a hearing of the
15 Administrative Hearings Office within 45 days of the protest acknowledgment letter, under
16 Letter ID No. L0808425648, signified that the Department had conceded in full or in part to
17 Taxpayer's position. [Taxpayer Ex. 3; Direct Examination of Mr. Duncan]

18 6. Despite the belief that the Department's failure to request a hearing within the
19 timeframes stated signified some concession, Mr. Duncan acknowledged that even under the
20 most favorable circumstances, some gross receipts tax would still be due and owing. [Cross
21 Examination of Mr. Duncan; Taxpayer Ex. 3]

22 7. Taxpayer acknowledged reading the following notice provided in the protest
23 acknowledgment letter under Letter ID No. L0808425648:

24 Please be advised that interest on any amount of tax determined to
25 be due at the conclusion of your protest will continue to accrue
26 until such tax is paid. Interest accrues daily on the unpaid principal
27 of tax due. The interest rate can change on a quarterly basis. The

1 effective annual and daily interest rates are posted on the
2 Department's web page at www.tax.newmexico.gov or can be
3 obtained by contacting the Department. If applicable, penalty will
4 continue to accrue at a rate of 2% per month or part of a month (to
5 a maximum of 20%) on the principal amount of tax due until such
6 tax is paid. You may make payment of protested tax principal to
7 stop the accrual of penalty and interest.

8 8. Mr. Duncan did not make any additional efforts to follow-up on the status
9 of his protest after March 14, 2019. [Cross Examination of Mr. Duncan]

10 9. The Hearing Officer took administrative notice that 45 calendar days from
11 January 28, 2019, is March 14, 2019.

12 10. On March 12, 2021, the Department submitted a Hearing Request seeking
13 a scheduling hearing on Taxpayer's protest. A copy of the Hearing Request was copied to
14 Taxpayer and included New Mexico Taxation and Revenue Department's Answer to
15 Protest. [Administrative File]

16 11. Taxpayer perceived the Hearing Request as an attempt to pursue the
17 alleged tax liability beyond the permissible periods of time, nearly two years after the
18 Department acknowledged the protest under Letter ID No. L0808425648. [Direct
19 Examination of Mr. Duncan]

20 12. On March 15, 2021, the Administrative Hearings Office entered a Notice
21 of Telephonic Scheduling Hearing that set an initial scheduling hearing to occur on April
22 9, 2021. [Administrative File]

23 13. On April 9, 2021, the Administrative Hearings Office conducted an initial
24 scheduling hearing at which time Taxpayer objected that the hearing would satisfy the
25 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A). A duration of 28 days
26 elapsed from the date on which the Administrative Hearings Office received the
27 Department's Hearing Request, on March 12, 2021, until the hearing conducted on April

1 9, 2021. [Administrative File]

2 14. On April 9, 2021, the Administrative Hearings Office entered a Scheduling Order
3 and Notice of Remote Video Administrative Hearing which set a hearing on the merits of
4 Taxpayer's protest for May 17, 2021. [Administrative File]

5 15. On April 23, 2021, the Department filed New Mexico Taxation and Revenue
6 Department's Preliminary Witness and Exhibit List. [Administrative File]

7 16. On May 13, 2021, Taxpayer, by and through Mr. Manny S. Talwar, Esq. (Hurley,
8 Toevs, Styles, Hamblin & Panter, P.A.) filed a Joint Motion to Vacate Merits Hearing and
9 Schedule Status Conference. The motion represented Mr. Talwar's initial entry of appearance in
10 the protest. [Administrative File]

11 17. A remote video hearing was initiated on May 17, 2021. Upon inquiry of the
12 Hearing Officer, Taxpayer expressed his objection that the hearing would satisfy the 90-day
13 hearing requirement of NMSA 1978, Section 7-1B-8 (A). A duration of 66 days elapsed from the
14 date on which the Administrative Hearings Office received the Department's Hearing Request,
15 on March 12, 2021, until the hearing conducted on May 17, 2021. [Record of Hearing (May 17,
16 2021)].

17 18. On May 17, 2021, the Administrative Hearings Office entered an Order
18 Continuing Hearing, Scheduling Order and Notice of Remote Video Administrative Hearing
19 which continued the hearing on the merits of Taxpayer's protest to June 4, 2021. [Administrative
20 File]

21 19. A duration of 84 days elapsed from the date on which the Administrative
22 Hearings Office received the Department's Hearing Request, on March 12, 2021, until the
23 hearing on the merits of Taxpayer's protest was conducted and concluded on June 4, 2021.

1 20. The Assessment central to Taxpayer's protest derived from a Schedule C
2 Mismatch which occurs when the income reported on a taxpayer's Schedule C fails to
3 correlate with the receipts reported on the taxpayer's corresponding New Mexico CRS-1
4 return. [Direct Examination of Mr. Pacheco]

5 21. During the years in protest, Mr. Ronald J. Duncan derived income as an
6 independent contractor performing dining courier services for Delivered Dish Inc. [Direct
7 Examination of Mr. Duncan]

8 22. Receipts in the years in protest derived from a combination of delivery
9 fees and gratuities. [Direct Examination of Mr. Duncan]

10 23. All gratuities were paid in cash in 2014. [Direct Examination of Mr.
11 Duncan]

12 24. In 2015, gratuities were paid in cash or through the credit card transaction
13 which would then be remitted to Taxpayer by Delivered Dish, Inc. through a third-party
14 entity called Delivery Drivers, Inc. [Direct Examination of Mr. Duncan]

15 25. In 2014, Taxpayer reported \$12,922.00 in gross income on his 2014 Form
16 1040, Schedule C. The amount of \$12,922.00 represented the sum of the total income
17 reported by Delivery Driver, Inc. on Taxpayer's 2014 Profit & Loss Statement (Taxpayer
18 Ex. 5) and cash tips. [Direct Examination of Mr. Duncan]

19 26. The amount of Taxpayer's cash gratuities in that year may be derived by
20 computing the difference between his reported income of \$12,922.00 and the total
21 income reported by Delivery Drivers, Inc. of \$7,354.83. The difference establishes a total
22 sum of cash gratuities of \$5,567.17. [Taxpayer Ex. 4; Taxpayer Ex. 5; Direct
23 Examination of Mr. Duncan]

1 27. Taxpayer did not proffer records sufficient to compute gratuities in 2015, whether
2 derived from cash or other forms of remuneration (in a manner similar to the method employed
3 for computing gratuities in 2014). [Cross Examination of Mr. Duncan; Taxpayer Ex. 5]

4 28. Delivered Dish, Inc. was acquired by Grubhub, Inc. in the latter part of 2015.
5 [Taxpayer Ex. 6; Direct Examination of Mr. Duncan]

6 29. The acquisition of Delivered Dish, Inc. by Grubhub, Inc. has resulted in
7 significant difficulty in obtaining records which could have been helpful to evaluating the issues
8 in dispute, or establishing the amount of taxable and untaxable receipts in the years subject of the
9 Assessment. [Direct Examination of Mr. Duncan]

10 30. Taxpayer attempted to acquire records and other useful information from
11 Grubhub, Inc. in December of 2018, including a non-taxable transaction certificate (NTTC),
12 correspondence from Grubhub, Inc. explaining that it paid taxes on Taxpayer's transactions, or a
13 TS-22.² [Taxpayer Ex. 8; Direct Examination of Mr. Duncan; Cross Examination of Mr.
14 Duncan]

15 31. Taxpayer also contacted a former owner of Delivered Dish, Inc. in December of
16 2018, in which Taxpayer made a similar request for records. The owner informed Taxpayer that
17 he could not assist since he was no longer affiliated with, or employed by Delivered Dish, Inc.,
18 and referred Taxpayer to Grubhub, Inc. [Taxpayer Ex. 11; Direct Examination of Mr. Duncan]

19 32. Grubhub, Inc. did not provide any meaningful response from December of 2018
20 until the time of the hearing. [Taxpayer Ex. 8; Direct Examination of Mr. Duncan; Cross
21 Examination of Mr. Duncan]

22 33. Follow-up efforts to acquire records from Grubhub, Inc. from December of 2018

²Form TS-22DS, also known as TS-22 is an Agreement to Collect and Pay Over Taxes. It may be used when one taxpayer applies to the Department to pay gross receipts tax on behalf of another taxpayer.

1 through the date of the hearing were minimal due, at least in part, to Taxpayer's
2 perception that the Assessment and the resulting protest had become stale due to the
3 Department's delay. [Cross Examination of Mr. Duncan]

4 34. In similar fashion to the invoice admitted as Taxpayer Ex. 9, Delivered
5 Dish, Inc. and Grubhub, Inc. typically charged customers for the items purchased, a
6 delivery fee, and gross receipts tax on the total items purchased and the delivery fee.
7 Although a gratuity may be included as well, the gross receipts tax is computed as a
8 percentage of the items sold and the delivery fee only. [Taxpayer Ex. 9; Direct
9 Examination of Mr. Duncan]

10 35. Taxpayer did not proffer or possess at the time of the hearing a copy of
11 any contracts he had with Delivered Dish, Inc. or Grubhub, Inc. [Cross Examination of
12 Mr. Duncan]

13 36. Taxpayer is not privy to any New Mexico state tax liabilities incurred,
14 reported, and paid by Delivered Dish, Inc. or Grubhub, Inc. during any periods of time
15 from 2014 through the date of the hearing. [Cross Examination of Mr. Duncan]

16 37. Mr. Nicholas Pacheco has been employed by the Department for 20 years
17 as of the date of the hearing, six of which have been in his current position as a protest
18 auditor. [Direct Examination of Mr. Pacheco]

19 38. Taxpayer had a responsibility to maintain records sufficient for computing
20 his tax liability. [Direct Examination of Mr. Pacheco]

21 39. Prior to the hearing, Taxpayer did not provide any records that Mr.
22 Pacheco perceived as reliable for computing Taxpayer's gross receipts tax liability during
23 the years subject of the Assessment. [Direct Examination of Mr. Pacheco]

1 **DISCUSSION**

2 The primary issues in dispute are whether the Department erroneously assessed gross
3 receipts tax on receipts, including gratuities, derived from performing dining delivery services on
4 behalf of Delivered Dish, Inc. Taxpayer did not contest the assessment of interest or penalty. The
5 Department, although not necessarily disputing Taxpayer’s construction of the law, asserts that
6 Taxpayer’s records are simply insufficient for more precisely computing Taxpayer’s gross receipts
7 tax liability.

8 As part of the evaluation, the Hearing Officer is also called upon to consider the
9 consequences of the Department’s failure to request a hearing within the time limits in effect when
10 the Department acknowledged Taxpayer’s protest. As a preliminary issue, the Hearing Officer will
11 address Taxpayer’s claim that he should be afforded relief from the Assessment by virtue of the
12 Department’s undisputed failure to make a timely hearing request.

13 **Failure to Make a Timely Request for Hearing**

14 By the time the Administrative Hearings Office initially acquired awareness of this
15 protest, upon the Department filing its Hearing Request on March 12, 2021, Taxpayer’s protest
16 had been pending more than two years.

17 Mr. Duncan explained that the delay had caused him significant prejudice. He believed
18 that the apparent lack of activity on his protest suggested that the Department had conceded to
19 his position. For that reason, he mostly deserted any and all efforts to gather additional records
20 which could have been useful for computing his gross receipts tax liability for the years relevant
21 to the protest.

22 Yet, despite the Hearing Officer’s genuine empathy, Taxpayer was always obligated to
23 maintain records under NMSA 1978, Section 7-1-10. Apparent inactivity, in the absence of some

1 explicit declaration from the Department that the issues in dispute had been narrowed or
2 resolved, failed to justify or excuse Taxpayer’s failure to retain or obtain documents that could
3 have been relevant to his protest. *See* Regulation 3.1.5.15 (I) NMAC (requiring that all records
4 maintained under Section 7-1-10 continue to be preserved unless the Department has provided in
5 writing that the records are no longer required). In fact, the delay, although unwarranted, could
6 have easily been used for Taxpayer’s benefit. He had more than two years to assemble records he
7 did not already possess which could have been helpful to his position, especially when
8 considering that the burden rests on a taxpayer to overcome the presumption of correctness
9 which will be discussed in greater detail in the subsequent section. *See* NMSA 1978, Section 7-
10 1-17 (C) (2007)

11 Although the Hearing Officer is unpersuaded that the delay was prejudicial, the Hearing
12 Officer will go on to consider whether if even in the absence of prejudice, the Department’s failure
13 to make a timely hearing request still affords Taxpayer relief from the underlying Assessment. The
14 statute in effect at the time required that “[w]ithin forty-five days after receipt of a protest ... that
15 has not been resolved, the taxation and revenue department shall request from the administrative
16 hearings office a hearing[.]” *See* Section 7-1B-8 (A) (2015) (amended 2019). The Administrative
17 Hearings Office then had approximately 45 additional days in which to hold a hearing, or a total of
18 90 days from the date of the protest being filed. *See* Section 7-1B-8 (A) (2015) (amended 2019).

19 A review of the administrative file illustrates that the Department filed its Hearing Request
20 with the Administrative Hearings Office on March 12, 2021, representing 774 days from the date it
21 initially acknowledged Taxpayer’s protest of the Assessment on January 28, 2019. By this date, not
22 only had the deadline to request a hearing lapsed, but the 90-day deadline to hold the hearing had
23 also passed by approximately 22 months.

1 For this reason, and in addition to Taxpayer’s claim of prejudice, Taxpayer suggested that
2 the Assessment should be dismissed or his protest granted because of the Department’s untimeliness
3 in requesting a hearing. Taxpayer did not cite any authority for the proposition that his protest could
4 be granted on such grounds.

5 Taxpayer’s position on this issue is not new. Other taxpayers have previously asserted the
6 Department’s purported denial of the statutory right to a prompt hearing should afford relief from
7 the assessment. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-
8 NMCA-126, ¶ 12, 100 N.M. 632. However, the Court of Appeals in that case concluded that the
9 tardiness of public officers in performing their duties is not a defense to an action by the state.
10 This has represented the general rule of New Mexico for almost four decades and “is applicable
11 in these cases unless [the statute] makes it inapplicable.” *See Ranchers-Tufco*, 1983-NMCA-
12 126, ¶ 13.

13 In another example, a taxpayer argued that the failure of a hearing officer to render a
14 decision in 30 days, as required by statute, divested the hearing officer of jurisdiction. *See*
15 *Kmart Properties, Inc. v. Taxation and Revenue Dep’t.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177.
16 The court found that the tax statutory deadline was not jurisdictional because of the general
17 tardiness rule and the heavy statutory presumption of correctness that favors the Department.
18 *See Kmart*, 2006-NMCA-026, ¶ 54; *See also* NMSA 1978, Section 7-1-17 (C) (“Any assessment
19 of taxes or demand for payment made by the department is presumed to be correct.”)

20 Although the Department’s failure to file a request for hearing within the prescribed
21 timeframe contradicted the statute, the relief sought by Taxpayer is simply not available under the
22 law. *See* NMSA 1978, Section 7-1B-8 (2015) and (2019).

1 The Hearing Officer also considered whether Taxpayer could still be afforded partial
2 relief under the Assessment by virtue of a 2019 amendment to the Administrative Hearings
3 Office Act. Section 7-1B-8 (E) was amended in 2019 to permit a hearing officer to order that no
4 further interest accrue on a protested liability if the hearing officer found that the Department
5 failed to make a timely hearing request. *See* NMSA 1978, Section 7-1B-8 (E) (2019). No such
6 authority existed prior to the effective date of the 2019 enactment. Taxpayer did not necessarily
7 argue that the 2019 amendment should be retrospectively applied to the facts of Taxpayer’s
8 protest, even for the purpose of halting the accrual of interest, but the Hearing Officer
9 nevertheless contemplated whether it could apply. *See* Regulation 22.600.3.18 (E) NMAC
10 (providing that the issue of whether accrual of interest should be halted may be considered upon
11 the Hearing Officer’s own initiative).

12 First, the Hearing Officer observed that the amendment permitting for the accrual of
13 interest to be halted was not effective until June 14, 2019 which was after the Assessment,
14 resulting protest, and acknowledgment of protest. Conversely stated, the protest was already
15 pending at the time the amendment was enacted, even if a hearing had not yet been requested of
16 the Administrative Hearings Office. Hence, in order for the 2019 amendment to apply to the
17 facts of this protest, it would need to be applied retrospectively.

18 Second, although Taxpayer does not necessarily make such argument, any argument that
19 the statute should be applied retrospectively would need to overcome the presumption that “[a]
20 statute or rule operates prospectively only unless the statute or rule expressly provides otherwise
21 or its context requires that it operate retrospectively.” *See* NMSA 1978, Section 12-2A-8 (1997).
22 The 2019 amendment provides no such expression of intent, nor can retrospectivity be fluently
23 derived from its context. *See* 2019 N.M. Laws 157.

1 Third, the Hearing Officer is not inclined to favor a construction of the 2019 amendment
2 that could potentially offend Article IV, Section 34 of the New Mexico Constitution which
3 provides that, “[n]o act of the legislature shall affect the right or remedy of either party, or
4 change the rules of evidence or procedure, in any pending case.” Under the circumstances of this
5 protest, the Hearing Officer perceives the retroactive application of Section 7-1B-8 (E) (2019) as
6 affecting the rights or remedies of either party as well as changing the rules of procedure
7 governing the protest at the time it was initiated. For these reasons, the Hearing Officer declines
8 to apply Section 7-1B-8 (E) retrospectively. Therefore, the Hearing Officer is without authority
9 to halt the accrual of interest in this protest as permitted by the 2019 amendment to the
10 Administrative Hearings Office Act.

11 Therefore, the law governing this protest does not permit any relief from the Assessment
12 arising solely from the Department’s failure to make a timely request for hearing. To find
13 otherwise would undermine the statutory presumption of correctness under Section 7-1-17 (C),
14 the presumption of taxability under Section 7-9-5, and contradict the general policy of our courts
15 that cases should be decided on their merits. *See e.g. Gengler v. Phelps*, 1976-NMCA-114, ¶ 20,
16 89 N.M. 793, 797, 558 P.2d 62, 66 (The general policy of New Mexico courts favors deciding
17 cases on their merits).

18 **Presumption of Correctness**

19 Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Assessment of tax issued in this
20 case is presumed correct and unless otherwise specified, for the purposes of the Tax
21 Administration Act, “tax” includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X)
22 (2013). Therefore, under Regulation 3.1.6.13 NMAC, the presumption of correctness under
23 Section 7-1-17 (C) also extends to the Department’s assessment of penalty and interest. *See*

1 *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139
2 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be
3 given substantial weight).

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

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

20 **Computing Taxable Gross Receipts**

21 As a practical matter, one of the initial steps in any audit is to compute or verify the amount
22 of gross receipts. A subsequent step is to subtract from the taxpayer's total gross receipts those
23 amounts which are deductible or exempt or even excludable from the definition of gross receipts,

1 assuming excludable receipts were erroneously included in the computation. The difference
2 between total gross receipts and any applicable deductions or exemptions, or less any amounts that
3 should be excluded, is the amount of taxable gross receipts.

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

7 the total amount of money or the value of other consideration
8 received from selling property in New Mexico, from leasing or
9 licensing property employed in New Mexico, from granting a right to
10 use a franchise employed in New Mexico, from selling services
11 performed outside New Mexico, the product of which is initially
12 used in New Mexico, or from performing services in New Mexico.

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

15 But, as previously stated, a taxpayer’s actual obligation may be affected by any number
16 of applicable deductions or exemptions, or by presenting evidence that its receipts are excludable
17 from taxation under NMSA 1978, Section 7-9-3.5.

18 The evidence in this case established that the sources of Taxpayer’s receipts from
19 performing dining delivery services derived primarily from two sources for each transaction. The
20 first source may be categorized as gratuities consistent with the Department’s definition at
21 Regulation 3.2.1.18 (R) (2) NMAC. The second source may be categorized as delivery fees.

22 **Gratuities**

23 Regulation 3.2.1.18 (R) (2) NMAC provides that “[a] tip is a gratuity offered to service
24 personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip.
25 *Because the tip is a gratuity, it is not gross receipts.*” (Emphasis Added)

1 It is undisputed among the parties to this protest that gratuities are not gross receipts and,
2 in this case, Taxpayer received gratuities in each of the years subject of the protest. The primary
3 area of disagreement with respect for gratuities concentrates on how the amount of gratuities can
4 be accurately computed.

5 To establish the amount of cash gratuities in 2014, Taxpayer proffered his 2014 Form
6 1040, Schedule C (Part I) (Taxpayer Ex. 4) indicating that his gross income from providing
7 dining delivery services was \$12,922. Taxpayer also proffered his 2014 P&L Statement
8 (Taxpayer Ex. 5) which established that Taxpayer's total non-cash income from providing dining
9 delivery services was \$7,354.83. Taxpayer then credibly testified that the sum of his 2014 cash
10 gratuities was represented by the difference between the gross income as listed on his Schedule
11 C (Part I) and his total income as listed on the 2014 P&L Statement ($\$12,922 - \$7,354.83 =$
12 **\$5,567.17**). Finding Taxpayer's testimony to be credible, and Taxpayer Exhibits 4 and 5 to be
13 reliable and trustworthy, the Hearing Officer agreed that Taxpayer derived \$5,567.17 in cash
14 gratuities in 2014 and that the Assessment should be adjusted accordingly, to exclude that
15 amount from his gross receipts in 2014.

16 In reference to 2015, Taxpayer acknowledged that he did not have sufficient documents
17 to establish what portion of his receipts in 2015 constituted gratuities. He attributed the
18 deficiency to a change in methods employed by Delivered Dish, Inc. to pay its contractors.

19 The Hearing Officer agreed that the documents for 2015, unlike 2014, did not enable
20 Taxpayer, the Department, or the Hearing Officer to extract non-taxable receipts from taxable
21 receipts. For example, unlike for 2014, Taxpayer did not proffer his 2015 Form 1040 or Schedule
22 C which precluded the Hearing Officer from employing a computation similar to that relied on
23 for computing the prior year's gratuities. While Taxpayer's protest letter did contain a brief

1 discussion of Taxpayer's 2015 Form 1040 and its associated Schedule C, the summary provided
2 in the protest letter is far less reliable than the actual forms.

3 Moreover, unlike for 2014, Taxpayer's testimony lacked the sort of certainty that the
4 Hearing Officer observed when Taxpayer testified about the previous year. Ultimately, the
5 Hearing Officer was unpersuaded that Taxpayer established entitlement to any adjustments for
6 gratuities in 2015. That is not to say that Taxpayer's gratuities are taxable as gross receipts
7 because they are not. But in this case, Taxpayer had the burden to establish the amount of non-
8 taxable gratuities and was unable to do so on the evidence presented. In the absence of evidence
9 to the contrary, the presumption of correctness stands, as does the presumption of taxability. *See*
10 *Casias*, 2014-NMCA-099, ¶8; *MPC Ltd.*, 2003-NMCA-021, ¶13; Section 7-1-17 (C); Section 7-
11 9-5.

12 **Delivery Fees**

13 The next source of revenue is earned delivery fees in 2014 and 2015. Unfortunately, even
14 when viewing the totality of the evidence in the light most favorable to Taxpayer, it fails to
15 establish whether any of those fees are deductible, exemptible, or excludable under the Gross
16 Receipts and Compensating Tax Act.

17 The delivery fees were derived from engaging in business in New Mexico. For that
18 reason, they are presumed taxable as gross receipts under Section 7-9-5, subject of course, to any
19 applicable deductions or exemptions.

20 First, Taxpayer did not assert entitlement to any specific deduction or exemption, nor did
21 the evidence permit the Hearing Officer to infer which, if any, potentially applicable deductions
22 or exemptions could apply. Second, Taxpayer did not present evidence or argument in support of

1 a claim that his earned delivery fees should be excluded from gross receipts under NMSA 1978,
2 Section 7-9-3.5.

3 Although Taxpayer did make reference to NMSA 1978, Section 7-9-43 (nontaxable
4 transaction certificates and other evidence required to entitle persons to deductions) in his
5 opening statement and closing argument, those references alone, even when viewing the
6 evidence in the light most favorable to Taxpayer, simply do not permit the Hearing Officer to
7 decipher which specific deduction Taxpayer claims should relieve him from liability, nor
8 actually establish entitlement to such deduction should one be perceptible.

9 Without any intention to offend Taxpayer, the Hearing Officer must note that our courts
10 have recognized that “[i]t is not the responsibility of ... the trial court to search the record for
11 evidence to support a claim or assertion. That responsibility belongs to the attorney.” *See State v.*
12 *Maestas*, 2018-NMSC-010, ¶51, 412 P.3d 79. The same observation is pertinent in tax protest
13 hearings as well. A fact finder should not be expected to search the record in an effort to
14 determine whether there exists dormant evidence which might have some bearing on the
15 outcome of a case. Hearing officers, similar to judges, “have a limited and neutral role in the
16 adversarial process, and are wary of becoming advocates who comb the record of previously
17 available evidence and make a party’s case for it.” *See Adler v. WalMart Stores*, 144 F.3d 664,
18 672 (10th Cir. 1998); *See also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)
19 (“Judges are not like pigs, hunting for truffles buried in briefs”). For these reasons, Taxpayer has
20 not established entitlement to any deductions or exemptions from gross receipts by virtue of the
21 evidence presented or arguments made.

22 **Equitable Recoupment**

1 An assessment may also be abated when another person paid the amount of the tax “on
2 behalf of the taxpayer on the same transaction; provided that the requirements of equitable
3 recoupment are met.” *See* NMSA 1978, Section 7-1-28 (F) (2013). Taxpayer suggested this may
4 have been the case, with tax being paid by Delivered Dish, Inc, or perhaps even its successor,
5 Grubhub, Inc. Yet, Taxpayer could not be certain and the evidence provided no insight into the
6 practices of Delivered Dish, Inc. in the relevant years. In fact, the only hint at how Delivered
7 Dish, Inc. operated in 2014 and 2015 was a single invoice from Grubhub, Inc., not Delivered
8 Dish, Inc., in 2018 which was 3 to 4 years beyond the relevant period of time.

9 Equitable recoupment generally permits a party to assert a claim or defense that would
10 otherwise be barred by a statute of limitations when the claim arises from the same transaction.
11 *See City of Carlsbad v. Grace*, 1998-NMCA-144, ¶16, 126 N.M. 95, 966 P.2d 1178. The
12 purpose of the doctrine of equitable recoupment is to prevent the unjust enrichment of one party
13 due to another’s mistake and to bypass harsh applications of a procedural bar on limitations
14 periods. *See City of Carlsbad*, 1998-NMCA-144, ¶¶20-21.

15 In tax transactions, there are three elements that must be met for equitable recoupment to
16 apply. *See Teco Invs., Inc. v. Taxation & Revenue Dep’t*, 1998-NMCA-055, ¶8, 125 N.M. 103,
17 957 P.2d 532. There must be: 1) a single taxable event; 2) taxes assessed on that single event on
18 inconsistent theories; and 3) a strict identity of interest. *See Teco Invs., Inc.*, 1998-NMCA-055,
19 ¶8. Separate parties may still have a strict identity of interest. *See Teco Invs., Inc. v. Taxation &*
20 *Revenue Dep’t*, 1998-NMCA-055, ¶¶10-11.

21 In this case, there was insufficient evidence to establish any entitlement to relief under
22 NMSA 1978, Section 7-1-28 (F) (2013).

23 **Other Arguments**

1 Taxpayer made a number of arguments that might best be characterized as policy based.
2 However, it is not the function of the Administrative Hearings Office nor its hearing officers to
3 engage in the formulation of tax policy. In fact, NMSA 1978, Section 7-1B-7 (A) explicitly
4 prohibits hearing officers from engaging or participating “*in any way* in the enforcement or
5 formulation of general tax policy other than to conduct hearings.” (Emphasis Added).

6 For this reason, the Hearing Officer declines to comment further on the substance of
7 Taxpayer’s policy arguments, except to simply state that this decision reflects the Hearing
8 Officer’s view of the evidence presented and a faithful interpretation of how the law should
9 apply to that evidence.

10 Taxpayer also made a number of arguments that could be construed as appealing to the
11 sympathy of the Hearing Officer. Although the Hearing Officer did find Taxpayer to be affable
12 and the Hearing Officer could most definitely empathize with his position, those sentiments do
13 not influence the decision reached. Similar to the general rule of law reflected in New Mexico’s
14 Uniform Jury Instructions that “[n]either sympathy nor prejudice should influence [a] verdict[,]”
15 a hearing officer must set aside both sympathy and prejudice and remain faithful to the evidence
16 and rule of law.

17 For the reasons stated, Taxpayer’s protest is DENIED IN PART and GRANTED IN
18 PART.

19 CONCLUSIONS OF LAW

20 A. Taxpayer filed a timely, written protest to the Assessment. Jurisdiction lies over the
21 parties and the subject matter of this protest.

22 B. The Department did not make a timely request for hearing which precluded the
23 Administrative Hearings Office from conducting a hearing within 90 days of Taxpayer’s protest

1 under NMSA 1978, Section 7-1B-8 (2015) (amended 2019).

2 C. The Administrative Hearings Office conducted three hearings within 90 days of the
3 Department's hearing request, despite the fact that the hearing request was untimely by almost two
4 years under NMSA 1978, Section 7-1B-8 (2015) (amended 2019).

5 D. Taxpayer is not entitled to relief from the Assessment based on the failure of the
6 Department to make a timely hearing request under the 2015 version of the Administrative Hearings
7 Office Act. *See* Section 7-1B-8 (2015) (amended 2019)

8 E. Taxpayer is not entitled to a retrospective application of the 2019 amendment to the
9 Administrative Hearings Office Act which permits that the accrual of interest be halted for failure to
10 make a timely hearing request. *See* NMSA 1978, Section 7-1B-8 (2015) (amended 2019); *See*
11 NMSA 1978, Section 12-2A-8 (1997), N.M. Const. Article IV, Section 34.

12 F. All of Taxpayer's receipts were presumed subject to gross receipts tax under
13 NMSA 1978, Section 7-9-5 (2002).

14 G. Taxpayer carries the burden to present countervailing evidence or legal argument
15 to show that he is entitled to an abatement of an assessment. *See Casias Trucking*, 2014-NMCA-
16 099, ¶8.

17 H. If a taxpayer presents sufficient evidence to rebut the presumption, then the
18 burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*,
19 2003-NMCA-021, ¶13.

20 I. Taxpayer established by a preponderance of evidence that he derived \$5,567.17 in
21 cash gratuities in 2014. "Because the tip is a gratuity, it is not gross receipts[,]" and should be
22 excluded from gross receipts. *See* Regulation 3.2.1.18 (R) (2) NMAC; NMSA 1978, Section 7-9-
23 3.5.

1 J. Except for establishing the amount of gratuities earned in 2014, Taxpayer did not
2 otherwise overcome the presumption of correctness that attached to the Assessment. *See* Section 7-
3 1-17(C).

4 K. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest
5 under the assessment, which shall continue to accrue until the tax principal is satisfied.

6 L. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence
7 penalty and there is no basis under the facts of the protest to permit an abatement.

8 For the foregoing reasons, Taxpayer's protest should be, and hereby is, GRANTED IN
9 PART and DENIED IN PART. Taxpayer is entitled to an adjustment based on the conclusion
10 reached herein that cash gratuities in 2014 in the amount of \$5,567.17 should be excluded from
11 Taxpayer's gross receipts. Any further and additional relief from the Assessment is denied.

12 DATED: June 30, 2021

13 

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

19 **NOTICE OF RIGHT TO APPEAL**

20 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
21 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
22 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
23 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
24 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
25 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative

1 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
2 Hearings Office may begin preparing the record proper. The parties will each be provided with a
3 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
4 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
5 statement from the appealing party. *See* Rule 12-209 NMRA.

6 **CERTIFICATE OF SERVICE**

7 On June 30, 2021, a copy of the foregoing Decision and Order was submitted to the parties
8 listed below in the following manner:

9 *E-Mail*

E-Mail

10 INTENTIONALLY BLANK

11
12 _____
13 John D. Griego
14 Legal Assistant
15 Administrative Hearings Office
16 Post Office Box 6400
17 Santa Fe, NM 87502
18 PH: (505)827-0466
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