STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
TALBRIDGE CORPORATION
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0479267504

v. **Case Number 20.09-113A, AHO D&O No. 22-20**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On July 22, 2021, Hearing Officer Chris Romero, Esq., of the Administrative Hearings Office conducted an administrative hearing on the merits of the tax protest of Talbridge Corporation (hereinafter referred to as its proper name or occasionally as "Taxpayer") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. The hearing was conducted by videoconference, as permitted under NMSA 1978, Section 7-1B-8 (H) (2019) and Regulation 22.600.3.10 NMAC under the circumstances of the public health emergency presented by COVID-19.

Mr. Zachary McCormick, Esq. appeared for Taxpayer and was accompanied by its president, Ms. Teryle Morrow. Mr. Clark Thompson and Mr. Patrick Rodriguez also appeared as witnesses for Taxpayer. Staff Attorney Kenneth Fladager, Esq. appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department Protest Auditor Danny Pogan appeared as a witness for the Department.

Taxpayers Exhibits 1 – 9 and Department Exhibit A were admitted at the onset of the hearing upon stipulation of the parties.

The primary issue for consideration was whether the computation of taxable gross receipts erroneously included revenue that should have been excluded as receipts received solely on behalf of another in a disclosed agency capacity under NMSA 1978, Section 7-9-3.5 (A) (3) (f).

If not, then Talbridge Corporation presents secondary issues: (1) what amount of gross receipts would nevertheless be excludable as deriving from services performed outside of New Mexico; and (2) whether Talbridge Corporation is entitled to abatement of penalty associated with any potential liability due to its reliance on a certified public accountant.

As explained in greater detail in the subsequent discussion, the Hearing Officer determined that Taxpayer failed to establish by a preponderance of evidence that its taxable gross receipts included revenue that should have been excluded as receipts received solely on behalf of another in a disclosed agency capacity under NMSA 1978, Section 7-9-3.5 (A) (3) (f) because Talbridge Corporation was not an agent to a purported principal under the facts relevant to this protest.

With regard for the secondary issues, the Hearing Officer agreed that receipts purportedly derived out of state should be excluded from the computation of taxable gross receipts and that Talbridge Corporation was entitled to an abatement of penalty associated with liability due to its reliance on its certified public accountant. Therefore, Taxpayer's protest should be denied in part and granted in part. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Initiation of the Protest and Procedural History

1. On December 31, 2019, the Department issued under Letter ID No. L0479267504 a Notice of Assessment of Taxes and Demand for Payment to Taxpayer for $347,318.19 in gross receipts tax, $69,347.81 in penalty, and $68,308.10 in interest for a total assessment of

$484,974.10 for the periods from January 31, 2012 to April 30, 2019 ("Assessment"). [Administrative File]

2. On February 26, 2020, Taxpayer filed a formal protest of the Department's assessment. [Administrative File]

3. On March 17, 2020, the Department acknowledged receipt of Taxpayer's protest under Letter ID. No. L0372685488. [Administrative File]

4. On September 9, 2020, the Department filed a request for hearing on the protest with the Administrative Hearings Office, along with its answer to the issues raised in Taxpayer's protest. [Administrative File]

5. The Department's answer summarized the Department's opposition to Taxpayer's protest explaining that there was, "no legal or factual basis to find that the receipts are exempted from taxation under the disclosed agent exclusion from gross receipts tax." [Administrative File, Department's Answer, Page 2, Para. 2]

6. On September 10, 2020, the Administrative Hearings Office filed and served a Notice of Telephonic Scheduling Hearing which set an initial hearing in the matter for October 2, 2020. [Administrative File]

7. The initial telephonic scheduling hearing occurred on October 2, 2020 at which time neither party objected that the hearing would satisfy the 90-day hearing deadline under NMSA 1978, Section 7-1B-6 (D). The parties also agreed to a second telephonic scheduling hearing on January 8, 2021. [Administrative File]

8. On October 2, 2020, the Administrative Hearings Office filed and served a Notice of Second Telephonic Scheduling Hearing which set a hearing for January 8, 2021. [Administrative File]

9. On January 8, 2021, the Administrative Hearings Office filed and served a Scheduling Order and Notice of Administrative Hearing. The hearing was to occur on May 10, 2021. [Administrative File]

10. On March 16, 2021, Taxpayer filed an unopposed Motion to Reschedule Hearing. [Administrative File]

11. On March 17, 2021, the Administrative Hearings Office filed and served an Order Granting Unopposed Motion to Continue and Notice of Telephonic Scheduling Hearing. The order vacated the previously set hearing and set a scheduling hearing to occur on April 16, 2021. [Administrative File]

12. On March 17, 2021, subsequent to the previous order, the Administrative Hearings Office filed and served an Amended Notice of Telephonic Scheduling Hearing which moved the previous setting from April 16, 2021 to April 12, 2021 as a result of another scheduling conflict which had been overlooked. [Administrative File]

13. On April 13, 2021, the Administrative Hearings Office filed and served a Scheduling Order and Notice of Administrative Hearing which set a hearing on the merits of Taxpayer's protest for May 25, 2021. [Administrative File]

14. On May 4, 2021, the parties filed their respective prehearing statements. [Administrative File]

15. On May 24, 2021, the Department filed an Unopposed Motion for Continuance. [Administrative File]

16. On May 24, 2021, the Administrative Hearings Office filed and served an Order Granting Continuance and Notice of Administrative Hearing which continued the hearing on the merits of Taxpayer's protest to July 22, 2021. [Administrative File]

Testimony of Clark Thompson

17. Mr. Thompson resides in Los Alamos, New Mexico. [Testimony of Mr. Thompson]

18. Mr. Thompson was an electrical engineer having retired from the Los Alamos National Laboratory ("LANL") in 2005. He is now a consulting engineer. [Testimony of Mr. Thompson]

19. After Mr. Thompson's retirement from LANL in 2005, he began work with a group that would eventually evolve into an entity known as Area 52[1]. [Testimony of Mr. Thompson]

20. The initial mission of the group was to adapt a LANL-patented technology ("remote sensing using electromagnetic energy") for use in "downhole or remote sensing in the oil industry." [Testimony of Mr. Thompson]

21. Mr. Thompson was well-suited for such work in that electromagnetics represented a substantial portion of his professional expertise. [Testimony of Mr. Thompson]

22. Simplistically stated, the technology relied on the structure of an oilwell to transmit data which could be further evaluated. [Testimony of Mr. Thompson]

23. Remote sensing for use in the oil industry was the primary objective of the group for the first couple of years of its existence. [Testimony of Mr. Thompson]

24. The group expanded by recruiting other professionals having relevant experience, some of whom had also been employed by or retired from LANL. [Testimony of Mr. Thompson]

[1] It is unclear from the record whether Area 52 was formally incorporated or organized as a juridical entity. For that reason, use of the word "entity" or other synonymous term to describe Area 52 shall have no legal significance, but is intended only to refer to the collection of individuals associating themselves with that name.

25. The group would work out of their homes and garages to fashion prototype assemblies for use in the oilwell application. [Testimony of Mr. Thompson]

26. In 2006 or 2007, the group acquired space in Santa Fe and had evolved into a structured "engineering organization." [Testimony of Mr. Thompson]

27. The group eventually called itself Area 52 at which time roles among various team members were formalized and the group's mission was more clearly defined. [Testimony of Mr. Thompson]

28. From Mr. Thompson's perspective, the members of Area 52 were recruited by Mr. Manny Gonzales, a senior manager from Chevron, and Mr. Don Coates, who Mr. Thompson knew from LANL. [Testimony of Mr. Thompson]

29. Mr. Gonzales was the party primarily interested in the work that Area 52 was assembled to perform. [Testimony of Mr. Thompson]

30. Since individuals affiliated with Area 52 "were considered contract outsiders" or independent contractors, they set their own rates of compensation which Chevron could accept or reject. [Testimony of Mr. Thompson]

31. Mr. Gonzales informed Mr. Thompson and others involved, that Chevron required the individuals to be "self-employed" and to associate with an agency which would perform personnel or human resource services. [Testimony of Mr. Thompson]

32. Given the choice of two or more agencies with which to associate for human resource services, Mr. Thompson researched his choices and selected Talbridge Corporation from his list of Chevron-approved options. [Testimony of Mr. Thompson]

33. Not all individuals associated with Area 52 were required to utilize the same agency. [Testimony of Mr. Thompson]

34. Chevron informed Talbridge Corporation of the agreed-upon rates of compensation. [Testimony of Mr. Thompson]

35. Talbridge Corporation provided no input in establishing rates of compensation for any member of Area 52. [Testimony of Mr. Thompson]

36. Talbridge Corporation was responsible for payroll activities and other personnel/human resources tasks while the individuals affiliated with Area 52 focused on services for Chevron. [Testimony of Mr. Thompson]

37. Billable time was compiled and reported using Chevron-approved online applications. [Testimony of Mr. Thompson]

38. Chevron had the authority to approve or reject the charges. [Testimony of Mr. Thompson]

39. Individuals affiliated with Area 52 were ultimately compensated by Talbridge Corporation, not Chevron. [Testimony of Mr. Thompson]

40. Chevron, through Mr. Gonzales, provided input regarding the work Area 52 performed for Chevron, but did not provide daily supervision. [Testimony of Mr. Thompson]

41. Mr. Thompson devoted minimal thought to Talbridge Corporation unless there were payroll issues which needed attention. Otherwise, his primary focus was on his work with Area 52 for the benefit of Chevron. [Testimony of Mr. Thompson]

42. Talbridge Corporation paid employees on a biweekly basis. Had payment not been made, Mr. Thompson may have first inquired of Talbridge Corporation, but always considered Chevron to be the primary source of compensation and financial backing for Area 52's research and development. [Testimony of Mr. Thompson]

43. In addition to making payment to members of Area 52, such as Mr. Thompson, Talbridge Corporation also withheld earnings for taxes and benefits, if any. [Cross Examination of Mr. Thompson]

44. Not all individuals affiliated with Area 52 required benefits because many had already retired from LANL or elsewhere. [Cross Examination of Mr. Thompson]

45. Modifications to Mr. Thompson's compensation were determined exclusively by Mr. Thompson and by Chevron without any input from Talbridge Corporation. [Direct Examination of Mr. Thompson]

46. Area 52 ceased to exist in or after 2019 due to changes in Chevron's evolving business strategies which included moving away from the research and development that Area 52 was pursuing. [Testimony of Mr. Thompson; Testimony of Mr. Rodriguez]

Testimony of Mr. Patrick J. Rodriguez

47. Mr. Rodriguez resides in Santa Fe, New Mexico. He is a laser optics technician retired from the Los Alamos National Laboratory. [Direct Examination of Mr. Rodriguez]

48. In 2010 to 2014, he worked with Area 52. He took a hiatus from approximately 2014 to 2016. He resumed his work at Area 52 in 2017 and worked with the group until it dissolved. [Direct Examination of Mr. Rodriguez]

49. Mr. Rodriguez was specifically involved with assembly and testing prototype instruments that Area 52 was developing for use by Chevron. [Direct Examination of Mr. Rodriguez]

50. Similar to Mr. Thompson, Mr. Rodriquez was recruited to Area 52. [Direct Examination of Mr. Rodriguez]

51. Mr. Rodriguez identified as being "hired by Chevron." [Direct Examination of Mr. Rodriguez]

52. Mr. Rodriguez, similar to other individuals recruited to Area 52, was referred to Talbridge Corporation among options for payroll and other human resource or personnel services. [Direct Examination of Mr. Rodriguez]

53. Mr. Rodriguez perceived that Talbridge Corporation was "facilitating" his "employment with Chevron." Direct Examination of Mr. Rodriguez]

54. Mr. Rodriguez understood all work at Area 52 to be directed by Chevron, for Chevron's benefit. [Direct Examination of Mr. Rodriguez]

55. Mr. Rodriguez perceived that Chevron, not Talbridge Corporation, was obligated to make payment for his services with Area 52. [Direct Examination of Mr. Rodriguez]

56. Modification to Mr. Rodriguez' rate of compensation was determined by Chevron without input from Talbridge Corporation. [Direct Examination of Mr. Rodriguez]

57. Mr. Rodriquez' personal interactions with Chevron personnel were rare. [Direct Examination of Mr. Rodriguez]

Testimony of Ms. Morrow

58. Ms. Teryl Morrow is the president, CEO and 100-percent stock owner of Talbridge Corporation. [Direct Examination of Ms. Morrow]

59. Ms. Morrow resides in Houston, Texas. [Direct Examination of Ms. Morrow]

60. Talbridge Corporation is based in Houston, Texas. [Direct Examination of Ms. Morrow]

61. Talbridge Corporation is an employment agency engaging in the business of identifying client needs, recruiting, screening, and hiring individuals to fulfil those client needs. [Direct Examination of Ms. Morrow]

62. Providing contract workers for clients represented about 95 percent of Taxpayer's business in the years relevant to the protest. [Direct Examination of Ms. Morrow]

Talbridge Corporation's Relationship with Chevron

63. The relationship between Talbridge Corporation and Chevron, to provide contract workers, was formalized by a Professional Services Agreement in 2011. [Direct Examination of Ms. Morrow]

64. Chevron required the agreement in order to comply with various federal contracting requirements not relevant to this protest. [Direct Examination of Ms. Morrow]

65. Talbridge Corporation and Chevron executed a new agreement in or about 2015 (Taxpayer Ex. 1). [Direct Examination of Ms. Morrow]

66. There were no significant differences between the 2011 and 2015 agreements between Chevron and Talbridge Corporation. [Direct Examination of Ms. Morrow; Taxpayer Ex. 1]

67. Talbridge Corporation's work for Chevron informally expanded into "payrolling" individuals that Chevron had recruited to perform services with Area 52. [Direct Examination of Ms. Morrow]

68. In 2005, Chevron's Contractor Acquisition Program, then known as "Beeline," inquired about Talbridge Corporation's availability to provide payrolling services. Talbridge Corporation responded that it was available. [Direct Examination of Ms. Morrow]

69. The term "payrolling" was used to describe the personnel or human resource services that Talbridge Corporation performed for individuals associated with Area 52. [Direct Examination of Ms. Morrow]

70. "Payrolling" consisted of placing those individuals recruited by Chevron on Talbridge Corporation's payroll for the purpose of paying salaries or wages, withholding taxes, and providing benefits. [Direct Examination of Ms. Morrow]

The Distinction Between Services
Provided Under Professional Services Agreement and Payrolling

71. Talbridge Corporation's Professional Services Agreement with Chevron specified that Talbridge Corporation was an independent contractor and disclaimed any agency relationship between Chevron and Talbridge Corporation in reference to services provided under the agreement. [Direct Examination of Ms. Morrow; Taxpayer Ex. 1 (Para. 11]

72. The Professional Services Agreement at 1 (a) provided that services would be formally requested by a "Service Order," also referred to as a "Requisition." [Direct Examination of Ms. Morrow]

73. A "Service Order" or "Requisition" established the parameters of a job Chevron was looking to fill. [Direct Examination of Ms. Morrow]

74. The mechanics of the agreement, involving the use of a "Service Order" or "Requisition" did not apply to Talbridge Corporation's payrolling activities for Chevron. [Direct Examination of Ms. Morrow]

75. "Payrolling" did not require Talbridge Corporation to provide any services until Chevron and the individual had agreed on relevant terms and the individual had selected Talbridge Corporation from among a short list of Chevron-approved payrolling entities. [Direct Examination of Ms. Morrow]

76. Upon indicating that it would be able to provide such services, the individuals comprising the group that would eventually become Area 52 "interviewed" Talbridge Corporation to determine if they would engage it for payroll purposes. [Direct Examination of Ms. Morrow]

77. For individuals in New Mexico associated with Area 52 who selected Talbridge, it thereafter handled payroll services, including tax withholdings and benefits. [Direct Examination of Ms. Morrow]

78. Talbridge Corporation was one of several companies that were available for individuals to engage for payrolling purposes. [Direct Examination of Ms. Morrow]

79. Talbridge Corporation never recruited individuals for work at Area 52. [Direct Examination of Ms. Morrow]

80. Every employee in New Mexico associated with Area 52 was recruited and hired by Chevron according to terms and conditions established exclusively by Chevron. [Direct Examination of Ms. Morrow]

81. Talbridge followed Chevron's instructions including rates of compensation determined exclusively by Chevron and the employee. [Direct Examination of Ms. Morrow]

82. Payrolling services were beyond the scope of the Professional Services Agreement in that payrolling service did not involve recruiting or other activities covered by the contract. [Direct Examination of Ms. Morrow]

Billing Chevron for Payrolling Services and Maintenance of Billing Records

83. Service Orders or Requisitions were processed, billed, and paid through Chevron's Contractor Acquisition Program, then known as "Beeline." [Direct Examination of Ms. Morrow; Taxpayer Ex. 1 (Para. 4 (b) and 4 (c))]

84. A similar process as that employed under the Professional Services Agreement was employed for Talbridge Corporation's payrolling services. [Direct Examination of Ms. Morrow]

85. Area 52 employees entered their time into Chevron's designated system for review and approval. [Direct Examination of Ms. Morrow]

86. Upon approval, Talbridge Corporation would then access the data for computation of employee compensation and billing to Chevron. [Direct Examination of Ms. Morrow]

87. Invoices to Chevron would include employee compensation plus Talbridge Corporation's markup. [Direct Examination of Ms. Morrow]

88. Talbridge Corporation's markup for payrolling services for employees associated with Area 52 was significantly reduced since Talbridge Corporation incurred little expense in providing the services. [Direct Examination of Ms. Morrow]

89. Chevron paid each invoice 45 to 90 days after submission to Chevron through the Beeline. [Direct Examination of Ms. Morrow]

90. Beeline maintained billing and payment details, including salary and wage information per employee, along with any markups paid to Talbridge Corporation. [Direct Examination of Ms. Morrow; Taxpayer Ex. 1 (Para. 4 (b) and 4 (c))]

91. Physical invoices were never submitted to Chevron. All billing activities were accomplished electronically through the Contractor Acquisition Program or Beeline. [Cross Examination of Ms. Morrow]

92. Chevron knew how much was paid per employee in the form of reimbursement to Talbridge Corporation, plus the extra amount it paid as a markup for Talbridge Corporation's payrolling services. [Direct Examination of Ms. Morrow]

93. When Chevron evolved away from Beeline to another program, Talbridge lost access to the data maintained in the Beeline system. [Direct Examination of Ms. Morrow; Taxpayer Ex. 1 (Para. 4 (b) and 4 (c))]

Application for Technology Jobs and Research and Development Tax Credit

94. Subsequent to the Assessment, Talbridge Corporation applied for a Technology Jobs and Research and Development Tax Credit presuming that any credit could be applied to an asserted gross receipts tax liability. [Direct Examination of Ms. Morrow]

95. In denying the credit (not subject of this protest), the Department correctly observed that "Talbridge is an employment agency. Talbridge is located at 3131 Eastside Street, Suite 333, Houston Texas and does not have business locations in New Mexico." [Direct Examination of Ms. Morrow; Taxpayer Ex. 2 (Summary of Business Activity/Transactions in NM)]

96. In denying the credit, the Department also correctly concluded that, "Chevron Corporation contracted Talbridge to provide employees to complete some of their research and Development projects. Chevron Corporation reimbursed Talbridge for the wages claimed on the Technology Jobs and Research and Development Tax Credit Application." [Direct Examination of Ms. Morrow; Taxpayer Ex. 2.2]

97. The Department's denial also correctly observed, with concern for reimbursement of payrolled employees that, "the Technology Jobs and Research and Development Tax Credit Applications would be disallowed because the wages claimed were reimbursed by Chevron Corporation and the research and development projects were proprietary to Chevron Corporation, not Talbridge." [Direct Examination of Ms. Morrow; Taxpayer Ex. 2.2]

Chevron's Authority Over Talbridge Corporation

98. In the latter portion of 2014, Chevron elected to consolidate its "pre-identified candidate payrolling" with a single provider. [Direct Examination of Ms. Morrow; Taxpayer Exs. 3 and 4]

99. The term "pre-identified candidate payrolling" included individuals on Talbridge Corporation's payroll who were affiliated with Area 52. [Direct Examination of Ms. Morrow; Taxpayer Ex. 3]

100. On January 29, 2015, Chevron notified Talbridge Corporation that a mandatory form letter be distributed to payrolled employees which informed that, "As a part of broad cost-saving measures in motion at Chevron, the company has decided to consolidate all of their payroll service (pre-identified) contract employees that fall under that Contractor Acquisition Program (CAP) under one payroll service provider." [Direct Examination of Ms. Morrow; Taxpayer Ex. 4.1]

101. It went on to explain, "Chevron has selected a different firm from [Talbridge Corporation]" to be "the sole payroll service provider." The form letter was prepared by Chevron's Contractor Acquisition Program but was to be distributed by Talbridge Corporation on its own letterhead. [Direct Examination of Ms. Morrow; Taxpayer Ex. 4]

102. The memorandum from Mr. Robert Silvas continued with an explanation that, "Independent Professional Management (IPM) has been selected to take over all IT pre-identified candidate payrolling, and a go-live date of March 1, 2015 has been set by Chevron." [Direct Examination of Ms. Morrow; Taxpayer Ex. 3]

103. The form letter also informed payrolled employees that, "This transition is currently set to be completed by March 1st, 2015. As of this date you will become an employee of IPM and cease to be an employee of [Talbridge Corporation]. The transition is being managed by IPM with the assistance of CAP and Chevron. IPM will be in direct contact with you very soon to guide you through the transfer steps over the coming weeks." [Direct Examination of Ms. Morrow; Taxpayer Ex. 4]

104. The course of action reflected in the memorandum was developed and implemented exclusively by Chevron and its Contractor Acquisition Program without input from Talbridge Corporation. [Direct Examination of Ms. Morrow; Taxpayer Ex. 4]

105. Chevron prohibited Talbridge Corporation from modifying the letter in any way without its approval. [Direct Examination of Ms. Morrow; Taxpayer Ex. 4]

106. However, Mr. Silvas of the Contractor Acquisition Program permitted a modification for Area 52 employees who were predominantly payrolled by Talbridge Corporation. The modification approved for Area 52 added a sentence that read, "Additionally, IPM has a longstanding and successful history providing this service to contract employees working in Area 52 in Santa Fe. We know that you will be in good hands[.]" [Direct Examination of Ms. Morrow; Taxpayer Exs. 4 and 5]

107. Talbridge Corporation had approximately 60 payrolled employees nationwide, including employees affiliated with Area 52. [Direct Examination of Ms. Morrow]

108. The impending transition to IPM caused affected Talbridge Corporation employees to express various concerns with the costs of benefits. [Direct Examination of Ms. Morrow]

109. Such concerns were passed on from Talbridge Corporation to Chevron's Contractor Acquisition Program which had decision making authority for Chevron. [Direct Examination of Ms. Morrow]

110. In the case of one payrolled employee who expressed concerns regarding the higher cost of insurance with IPM, Chevron's Contractor Acquisition Program permitted her to remain employed by Talbridge Corporation as her payrolling entity so long as Talbridge reduced its rate to match that charged by IPM. [Direct Examination of Ms. Morrow; Taxpayer Ex. 6]

111. In another example of a payrolled employee expressing the desire to remain employed by Talbridge Corporation, the employee was informed directly by Chevron that retaining Talbridge Corporation as his payroller was not an option. Chevron communicated directly with other payrolled employees as well.

112. All concerns among payrolled employees and Chevron were addressed directly between Chevron and the employee with any decision being communicated to Talbridge Corporation by Chevron. [Direct Examination of Ms. Morrow]

113. Accordingly, Chevron was the entity that decided who could remain employed by Talbridge Corporation. [Direct Examination of Ms. Morrow; Taxpayer Ex. 6]

114. Talbridge Corporation lacked any authority to act on behalf of Chevron with respect to any employee concerns. [Direct Examination of Ms. Morrow]

115. Mr. Silvas at one time reprimanded Ms. Morrow of Talbridge Corporation because she had direct communication with an individual affiliated with Area 52, which Talbridge was payrolling. The individual's job title was "Chevron Manager" but was on Talbridge Corporation's payroll. Nevertheless, Talbridge Corporation received an infraction for the communication with an individual who the Contractor Acquisition Program perceived as a Chevron employee despite Talbridge Corporation's function as the employee's payroller. [Direct Examination of Ms. Morrow]

Gross Receipts Deriving from Services Performed in Texas

116. From 2013 through 2019, gross receipts paid for payroll was $7,124,258.14. The total payroll costs in the same period of time was $6,014,915.55. The difference of $1,109,343.19 reflected the amount Talbridge Corporation received in excess of the output. [Direct Examination of Ms. Morrow; Taxpayer Ex. 8]

117. Receipts identified as Talbridge Corporation's "markup" were performed in Houston, Texas. [Cross Examination of Mr. Pogan; Department's Pre-Hearing Statement filed May 4, 2021 (Page 3, Stipulation No. 10); Taxpayer Talbridge Corporation's Prehearing Statement filed May 4, 2021 (Page 3, Stipulation No. 10)]

Reliance on Tax Professionals

118. Since 2005, all Certified Public Accountants with whom Talbridge Corporation has consulted have consistently held the opinion that Talbridge Corporation's gross receipts tax reports should reflect no tax due. [Direct Examination of Ms. Morrow]

119. All relevant CRS-1 Reports were filed with the assistance of Certified Public Accountants, none of whom ever identified any errors or other concerns which would have alerted Ms. Morrow to any issues. [Direct Examination of Ms. Morrow]

Testimony of Mr. Danny Pogan

120. Mr. Danny Pogan is a protest auditor with the Department's protest office. Although he was employed by the Department for many years prior to the protest, he is now an independent contractor. [Direct Examination of Mr. Pogan]

121. Mr. Pogan has more than 25 years of experience with New Mexico's gross receipts tax. [Direct Examination of Mr. Pogan]

122. Mr. Pogan reviewed all documents relevant to the protest, including submissions by Talbridge Corporation. [Direct Examination of Mr. Pogan]

123. Mr. Pogan observed that all gross receipts reported in the years relevant to the protest were deducted, which resulted in no gross receipts tax liability in any of the reporting periods. [Direct Examination of Mr. Pogan; Department Ex. A]

124. Mr. Pogan did not observe any records to demonstrate that amounts billed to Chevron for reimbursement of payrolling expenses paid by Talbridge Corporation were

separately stated as required by Regulation 3.2.1.19 (2) NMAC. [Direct Examination of Mr. Pogan]

125. Mr. Pogan did not observe any facts that would indicate that Talbridge Corporation received reimbursement of expenditures incurred as a disclosed agent of Chevron. [Direct Examination of Mr. Pogan]

126. Talbridge Corporation was identified as employer for IRS Form W-2 for all employees that it payrolled in the relevant years. [Direct Examination of Mr. Pogan]

127. Talbridge Corporation filed quarterly Wage and Contribution Reports to the New Mexico Department of Workforce Solution with respect to all employees it payrolled, and paid workers compensation fees and unemployment taxes on behalf of those employees. [Direct Examination of Mr. Pogan]

128. Mr. Pogan was not aware of any prohibition against an agent filing a W-2. [Direct Examination of Mr. Pogan]

129. Mr. Pogan did not observe any documents that would establish reasonable reliance on a competent tax professional. [Direct Examination of Mr. Pogan]

130. Mr. Pogan did not observe any documents which to Mr. Pogan, would be sufficient to establish entitlement to a deduction, exemption, or exclusion from gross receipts taxation. [Direct Examination of Mr. Pogan]

131. Reimbursed expenses are gross receipts except as provided by Regulation 3.2.1.19 C (2) NMAC. [Direct Examination of Mr. Pogan]

132. The Department, although looking to the contract to understand the relationship between parties to that contract, will also consider other circumstances in determining whether a taxpayer is an agent or not for the purpose of evaluating whether a tax liability is incurred. [Re-Direct Examination of Mr. Pogan]

DISCUSSION

The central issue in dispute is whether the Department erroneously assessed gross receipts tax on revenue allegedly received solely on behalf of another in a disclosed agency capacity under Section 7-9-3.5 (A) (3) (f). The protest also presents two secondary issues, which if not rendered moot by the decision on the primary issue, must then be determined: (1) what, if any, non-taxable receipts derived from services performed outside of New Mexico, in Houston, Texas; and (2) whether Taxpayer is entitled to an abatement of penalty.

The Department asserts that its assessment is correct because: (1) there was no evidence to establish the essential elements of an agency relationship as contemplated by Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) NMAC; and that (2) there is no basis for the abatement of penalty due to an absence of documentary evidence establishing reliance on the advice of a competent tax professional after full disclosure.

The Department does not explicitly dispute that services performed outside of New Mexico are excludable from gross receipts, and observing the Department's lack of disagreement, the Hearing Officer finds that a reasonable application of the law to the facts unique to this protest allows for the abatement of tax associated with services the parties agreed were performed out of state.

Presumption of Correctness

Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Assessment of tax issued in this case is presumed 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 it 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, "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, exempt, or even excludable from the definition of gross receipts, assuming excludable receipts were erroneously included in the computation. The difference between total gross receipts and any applicable deductions or exemptions is the amount of taxable

gross receipts.

Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), "gross receipts" means:

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

New Mexico imposes the gross receipts tax on the receipts of any person engaged in business in New Mexico for the privilege of engaging in business. *See* NMSA 1978, Section 7-9-4 (2002). Consequently, all gross receipts of a person engaged in business in New Mexico are presumed taxable. *See* NMSA 1978, Section 7-9-5 (2002).

Statutory Exclusions from Gross Receipts pursuant to Section 7-9-3.5 (A) (3) (f)

NMSA 1978, Section 7-9-3.5(A) (3) (f) explicitly states that the term "gross receipts" excludes "amounts received solely on behalf of another in a disclosed agency capacity." The fact that a sum of money is received as a reimbursement of expenditures incurred in connection with the performance of a service does not mean it is mechanically excluded from the computation, "unless that person *incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity*." *See* Regulation 3.2.1.19 (C) (1) NMAC (Emphasis Added). It goes on to explain that "[a]n agency relationship exists *if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal*." *Id.*

The exclusion for amounts received solely on behalf of another in a disclosed agency capacity has a long history in New Mexico. As early as 1971, the Court of Appeals in *Westland Corporation v. Commission of Revenue*, 1971-NMCA-083, ¶38, 83 N.M. 29, observed that there was no justification under the facts of that case to impose gross receipts tax on the receipts of a person who served as a "friendly agent" for the limited purpose of "receiving and paying out sums

for debts or obligations owing" from another company.

More than 20 years later, the Court of Appeals in *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247 revisited the topic. *Carlsberg* concerned a property management group that operated an apartment complex on behalf of the property owner. The rent at the apartment complex was subsidized by a federal agency. The taxpayer claimed that the federal agency mandated the form of the agreement in place between that taxpayer and the owner. The agreement in *Carlsberg* referred to that taxpayer as "agent." Under an agency theory, the *Carlsberg* taxpayer argued that money it received from the owner for the reimbursement of taxpayer's employee wages was not subject to gross receipts tax.

Carlsberg observed "that a principal's control over the agent is the key characteristic of an agency relationship." *See Carlsberg*, 1993-NMCA-121, ¶12. It went on to explain that whether an agency relationship existed was a factual determination. *See Carlsberg*, 1993-NMCA-121, ¶16. It began its evaluation by reviewing the terms of the relevant agreement. In doing so, it emphasized the long-standing rule that when the contract is clear, the language of the contract determines the intent of the parties without further interpretation. It concluded that the relevant contract created an unambiguous agent-principal relationship, rejected the Department's requirement that an agent be disclosed, and adopted the rule that "if a party only receives money… of [] another's employment-related obligations, then an agency relationship exists sufficient to avoid taxation of those funds as gross receipts." *See Carlsberg*, 1993-NMCA-121, ¶15. The Court went on to observe that the level of control the owner of the apartment complex wielded over that taxpayer regarding that taxpayer's employees left that taxpayer with no control over the payment of the employees, and thus that taxpayer never possessed any interest in the funds in question used to pay the employees. *See Carlsberg*, 1993-NMCA-121, ¶19. The *Carlsberg* decision also noted that an indemnification clause requiring the owner to pay that taxpayer for employment related expenses supported its

holding. *See id.*

The Court of Appeals again had an opportunity to revisit the issue in 1995 when it considered *Brim Healthcare, Inc. vs. State*, 1995-NMCA-055, 119 N.M. 818. The question presented by *Brim* was whether an agency relationship excluded taxpayer's reimbursements from the gross receipts tax. In ultimately disagreeing with the taxpayer's position, the Court of Appeals identified several areas of distinction from the facts underlying *Carlsberg*. The most significant factor distinguishing *Brim* from *Carlsberg* was the absence of an indemnification clause in the agreement at issue in *Brim*. *See id*. But another distinction observed in *Brim* was that the contracts at issue expressly noted that the taxpayer was "not an agent… but rather [was] an independent contractor." Ultimately, the Court of Appeals agreed that the receipts central to the dispute were not received as "reimbursement of expenses as an agent." *See Brim*, 1995-NMCA-055, ¶18.

Although *Carlsberg* expressly rejected the Department's previous policy and regulation allowing for exemption of gross receipts only when there is a disclosed agency relationship, a subsequent legislative enactment limited the *Carlsberg* holding. *See MPC*, 2003-NMCA-021, ¶14. At the time the Court of Appeals issued its decision in *Carlsberg*, the gross receipts tax definition contained no provision excluding from gross receipts tax receipts received solely on behalf of another in a disclosed agency capacity. Subsequent to *Carlsberg*, the Legislature enacted an explicit and specific exclusion for receipts received in a disclosed agency capacity limiting the holding in *Carlsberg*, which upon first impression would seem to favor Talbridge Corporation in this situation but for the subsequent modification reflected by Section 7-9-3.5 (A) (3) (f).

In 2003, the Court of Appeals in *MPC* revisited the consequences of an agency relationship in the context of gross receipts tax for the first time under the subsequently enacted "disclosed agency" exception to the definition of "gross receipts." The Court cautioned that *Carlsberg* and *Brim* were both decided before the enactment of the explicit exclusion for receipts derived in the

capacity of a disclosed agent pursuant to Section 7-9-3.5(A) (3) (f), and for that reason, those cases had limited instructive value. *See MPC,* 2003-NMCA-021, ¶34.

MPC concerned a taxpayer that provided temporary staffing services to clients in New Mexico. *MPC* mostly relied on unwritten agreements with its clients, but did have some written agreements in place that established the terms and conditions of its services. For example, and similar to the facts underlying the present protest, *MPC's* clients supervised the activities of the assigned employees, but the client did not pay the employees. Instead, the taxpayer in that case paid its employees which in turn was paid by its clients. The taxpayer in *MPC* then went on to claim the totality of its receipts should be excluded from gross receipts because it "received the amounts purely as a conduit between its clients and its employees." *See MPC,* 2003-NMCA-021, ¶8.

The taxpayer's argument in *MPC* required the Court to consider both a regulation addressing joint employers and the statutory and regulatory elements for establishing a disclosed agency relationship. Similar to the matter at hand, the Court was called upon to consider the application of Regulation 3.2.1.19 (C) (1) NMAC interpreting and implementing Section 7-9-3.5 (A) (3) (f). In doing so, *MPC* observed Regulation 3.2.1.19 (C) (1) NMAC to mean that:

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

In other words, with specific reference to the case at hand: (1) Talbridge Corporation must possess the authority to bind Chevron to obligations Talbridge Corporation creates to the employee; and (2) the employee beneficiary of that obligation is informed by contract that he or she has a right to proceed against Chevron to enforce the obligation created by Talbridge Corporation.

The Court in *MPC* went on to further explain disclosure as follows, which consistent with Talbridge Corporation's interpretation, does not require the disclosure to be in writing:

> Section 7-9-3(F)(2)(f) requires a disclosure to the employee of an agency relationship. This breaks down into the requirements that there be a relationship by which the principal is liable (and knows he is liable) to the employee for payroll if the agent fails to pay, and that the agent disclose this relationship and obligation to the employee.

Restated for the facts now at hand, Section 7-9-3(F)(2)(f) requires: (1) that there be a relationship by which Chevron has actual knowledge of its liability to the employees of Talbridge Corporation for payroll if Talbridge Corporation fails to pay; and (2) that Talbridge Corporation disclose this relationship and obligation to the Talbridge Corporation employees.

Additionally, *MPC* further noted that Regulation 3.2.1.19 (C) required additional bookkeeping requirements that must be met in order to exclude receipts received as part of a disclosed agency capacity from gross receipts. *See MPC,* 2003-NMCA-021, ¶36.

Turning to the facts now under consideration, the Hearing Officer notes several similarities between the facts presented by Talbridge Corporation and *MPC.* Chevron like the taxpayer's clients in *MPC* supervises the day-to-day activities of the employees who are not directly compensated by Chevron, but technically employed and compensated by Talbridge Corporation. As with the taxpayer's clients in *MPC,* Chevron pays Talbridge Corporation a sum of money comprised of the employee's salary or wages, benefits, plus a fee (a "markup") for the services Talbridge Corporation provides.

The first item to evaluate is the relationship between Chevron and Talbridge Corporation. Although the record contains a Professional Services Agreement between Talbridge Corporation and Chevron, Talbridge Corporation emphasizes the agreement does not accurately represent the entirety of its business relationship with Chevron, but only represents the agreement with respect to the specific scope of work subject in that agreement. Ms. Morrow credibly explained that its payrolling services extended beyond the scope of work in the agreement, suggesting that the Hearing Officer look not to the Professional Services Agreement to understand the full range of

their relationship, but to their conduct. The Hearing Officer will observe, however, that the Professional Services Agreement explicitly disclaims an agency relationship, clarifying that the relationship of Talbridge Corporation to Chevron is one of independent contractor.

Paragraph 11 of the Professional Services Agreement clearly states, "Contractor is performing the Services as an independent contractor and not as an employee of Company and *none of Contractor's personnel shall be entitled to receive any compensation, benefits or other incidents of employment from Company*." (Emphasis Added) This language notifies Talbridge Corporation that it has no authority to create any legally enforceable obligations that any Talbridge Corporation employee could then enforce directly against Chevron.

Talbridge Corporation emphasizes that "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, 681, 515 P.2d 1283, 1285.

The Hearing Officer agrees that this is an appropriate place to begin, observing that Chevron sought services of Talbridge Corporation which did not precisely fit within the four corners of the Professional Services Agreement. For example, Ms. Morrow explained that the purpose of the Professional Services Agreement was to provide services consistent with Talbridge Corporation's business model, which as an employment agency, was to identify the needs of its clients, recruit, screen, and hire employees. However, with regard to Chevron's activities in New Mexico and employees affiliated with Area 52, it did none of those things. Instead, Chevron was the entity that identified its needs, recruited, screened, and selected individuals to be hired who were then referred to a list of third parties, including Talbridge Corporation, for payrolling purposes, a service not entirely within the scope of services to be

provided under the Professional Services Agreement.

If the employee ultimately selected Talbridge Corporation for payrolling, because the employees had a choice of payrollers, then it placed the individual on its payroll and charged Chevron for its payroll costs plus a markup. The markup, according to Ms. Morrow, was reduced because Talbridge Corporation was not providing its full range of services (i.e. payrolling under these circumstances did not require identifying client needs, recruiting, or screening). Although employees affiliated with Area 52 may have thought of themselves as Chevron employees, the fact that they were technically employed by Talbridge Corporation was not in dispute.

Thus far, the Hearing Officer agrees that the Professional Services Agreement did not fully address the sorts of services Talbridge Corporation provided with regard to payrolling. For that reason, it is appropriate to look to the conduct of the parties to determine if the acts performed by Talbridge Corporation on behalf of Chevron were "by their essential nature one[s] of agency[.]"

The Hearing Officer is unpersuaded that the relationship, by its essential nature, was one of agency. The record established that Chevron had very strict rules of engagement with Talbridge Corporation, which seemingly had no authority whatsoever in its dealings with Chevron. With regard for employees affiliated with Area 52, Chevron recruited the employees and established their rates of compensation. Chevron directed those employees to a list of entities who could "payroll" them. As Ms. Morrow explained, the employee then "interviewed" Talbridge Corporation, and if the employee ultimately selected Talbridge Corporation, it put the employee on its payroll as a Talbridge Corporation employee. It would then compensate the employee at a rate established exclusively by Chevron, withhold taxes, and provide employment benefits when so desired.

Talbridge would then invoice Chevron, through Chevron's required Contractor

Acquisition Program, for the actual costs of payrolling the employee plus a markup which Chevron would subsequently pay weeks to months later, according to Ms. Morrow.

In the meantime, according to Ms. Morrow, Chevron and its Contractor Acquisition Program seemingly had strict rules about Ms. Morrow and Talbridge Corporation even communicating with employees, whether employed by Chevron or not, in that on at least one occasion, Ms. Morrow described receiving an "infraction" for communicating with her own employee.

Chevron's control was apparent in other areas, too. For example, Chevron initially directed employees to a selection of payrollers, including Talbridge Corporation, but when it decided to explore and implement cost saving measures, it unilaterally eliminated all payrollers with the exception of one provider that offered it the lowest rate for services. It then required that all employees of Talbridge Corporation transfer to the new provider, with little to no input from any third parties, including Talbridge Corporation and the employees who were to be transferred.

When employees expressed concerns for a required transfer to another payrolling service, Talbridge Corporation, although sympathetic to the employee, ultimately referred the employee to Chevron. Chevron, not Talbridge Corporation, evaluated those employee concerns, and on at least one occasion addressed on the record, allowed the employee to remain with Talbridge Corporation so long as Talbridge Corporation reduced its "markup" to match the rate charged by Chevron's preferred payroller. Had Talbridge Corporation had any actual authority to act on Chevron's behalf, it may have resolved the employee concern on its own accord, but even it acknowledged that it was without any authority at all to act on behalf of Chevron, even with respect for its own employees.

These observations, individually and collectively, demonstrate that Talbridge Corporation had no discernable authority to act on behalf of Chevron, in any manner, whatsoever. These

examples demonstrate the lack of an agency relationship between Chevron and Talbridge Corporation, not its existence. At no time, at least from what was observed in the evidence, did Talbridge Corporation ever project itself as an agent of Chevron having authority to act on its behalf and bind it to any contractually enforceable obligations, presumably because it knew it did not have that authority to begin with. This represents the sort of relationship contemplated by the Professional Services Agreement which was one of an independent contractor in which "[n]either [Talbridge Corporation] nor [Chevron] shall be or become liable or bound by any representation, act or omission whatsoever of the other." *See* Taxpayer Ex. 1, Para. 11. Thus, even though "payrolling" services may have extended beyond the four corners of the Professional Services Agreement, the conduct of the parties remained consistent with the terms formally established therein, especially with respect to the restraint on Talbridge Corporation's authority to do anything in the name of Chevron, which might resemble an agency relationship.

The next question is whether Chevron had actual knowledge of any purported liability to any Talbridge Corporation employee that was created by Talbridge Corporation, assuming for the moment that Talbridge Corporation enjoyed such authority in the first place.

The evidence suggested that Chevron, at least from a practical perspective, sometimes perceived no distinction between its own employees and employees affiliated with Area 52 but who were "payrolled" by Talbridge Corporation. Yet, there was an obvious and predominant distinction fully intended by Chevron in that it chose not to place Area 52 employees on its own payroll in the first place, but chose to rely on Talbridge Corporation for payrolling instead.

In doing so, Chevron discharged itself from the responsibilities usually incurred by employers for the benefit of their employees, as well as a host of potential liabilities. Finding that Chevron knew of, or ever intended that Talbridge Corporation have authority to create liabilities on its behalf, despite all indication to the contrary, is inconsistent with the evidence from the

inception of Area 52 through its dissolution. Chevron never recognized nor acquiesced to the assertion that any Talbridge Corporation employee had the right to proceed directly against it to enforce any obligation if Talbridge Corporation first reneged on its obligations to the employee.

Although the evidence revealed how some employees affiliated with Area 52 may have believed they could pursue claims directly against Chevron, the Hearing Officer perceived a lack of foundation for those beliefs. For that reason, the Hearing Officer found their testimony on this point to be unpersuasive despite their amiability.

Last, but not least, there is simply no evidence on which to find that Talbridge Corporation communicated the nature of any purported agency relationship and accompanying obligations to Talbridge Corporation employees. This is most likely because Talbridge Corporation really had no reason to believe it was acting as Chevron's agent, given the fact that Chevron frequently controlled everything that Talbridge Corporation did with respect to its payrolling activities and never suggested that Talbridge Corporation had the authority to act independently on Chevron's behalf on any matter, whatsoever.

For these reasons, the Hearing Officer finds that receipts Talbridge Corporation derived from Chevron were not reimbursement of expenses incurred as agent on behalf of a principal while acting in a disclosed agency capacity. Consequently, those receipts fall within the definition of gross receipts and are therefore taxable under the New Mexico Gross Receipts and Compensating Tax Act unless otherwise excludable, deductible, or exempt.

As a final observation on this issue, the Hearing Officer noted the undisputed fact that Talbridge Corporation relied heavily on Chevron's Beeline service. When Beeline was discontinued in favor of another service, Talbridge Corporation's access to records was similarly discontinued. Thus, even if the Hearing Officer was persuaded that Talbridge Corporation satisfied the elements of a disclosed agency relationship, Taxpayer would have still fallen short, based on the evidence

presented, of establishing that it satisfied the additional bookkeeping requirements mandated by Regulation 3.2.1.19 (C). *See MPC,* 2003-NMCA-021, ¶36.

Out of State Services

Talbridge Corporation proposed that if its receipts from Chevron were taxable as gross receipts, as discussed in the preceding section, then at least a portion of the receipts from Chevron should still be excludable because they derived from services performed outside of New Mexico. The parties stipulated that "Chevron reimbursed Talbridge for the wages and benefits paid to the employees, plus a percentage of that amount to compensate Talbridge *for services provided by Talbridge in Houston*." Even though there does not appear to be much dispute among the parties with respect to the facts governing this issue, in that the parties seemingly concur that the markup was for services provided in Texas, the Hearing Officer will nevertheless evaluate whether the law permits the outcome Talbridge Corporation desires.

Talbridge Corporation's perspective is premised on the definition of gross receipts in Section 7-9-3.5 (A) (1) (2007) which provides that receipts derived from services performed outside of New Mexico are not taxable unless the product of the service was initially used in New Mexico, an exception employed primarily for use in the area of research and development during the relevant periods of time. *See e.g.* Regulation 3.2.1.18 E (1) ("Receipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provision of Section 7-9-13.1 NMSA 1978.") (2012, Amended 2021); FYI-105, REV.11/2021, Pages 4 - 5.

Although the standards governing the taxation of services performed outside of New Mexico have been evolving since *S. Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 201 L.Ed. 2d 403 (2018) (holding that out-of-state seller's physical presence in taxing state was not necessary for state to impose tax), those changes do not dictate the outcome of this protest.

Ms. Morrow testified that receipts representing Talbridge Corporation's "markup" derived from providing services outside New Mexico, in Texas. Those services would have consisted of various administrative functions necessary for payrolling, such as disbursing employment compensation, tax withholdings, potential benefit withholdings, reporting functions, and other necessary tasks associated with payrolling services.

On the other hand, the services associated with the "markup" were for the benefit of Talbridge Corporation's employees in New Mexico, who at all relevant times were performing services in New Mexico, for Chevron.

The Administrative Hearings Office has encountered this issue before and has previously observed the location of the taxpayer's employees to be persuasive. *See Matter of Protest of ATC Healthcare Services, Inc.* Decision and Order No. 16-55 (affirmed in *Matter of Protest of ATC Healthcare Services, Inc.*, A-1-CA-36081, 2019 WL 2092230 (N.M. Ct. App. May 7, 2019) (non-precedential); *see also Decision and Order in the Matter of the Protest of Adecco USA, Inc.*, No. 14-16 (non-precedential). These cases concluded that administrative services performed outside of New Mexico were nevertheless taxable in New Mexico because the taxpayers' employees were providing services in the state.

In this protest, those employees affiliated with Area 52, similar to *ATC* and *Adecco* were employed by Talbridge Corporation to perform services in New Mexico. For that reason, it would be consistent with previous decisions to simply observe that all of Talbridge Corporation's receipts, both those which can be characterized as reimbursements and "markup," derived from Talbridge Corporation's activities in New Mexico and should therefore be taxable in New Mexico.

Dissimilar to the facts at issue in *ATC* and *Adecco*, Talbridge Corporation had no physical presence in New Mexico. Its primary business location, as well as the location where it performed all of its payrolling activities, was Houston, Texas. There are other differences as well. Talbridge

Corporation, with respect to the activities of Chevron in New Mexico, did not identify, recruit, or screen employees for Chevron's New Mexico-based activities. Instead, Chevron initiated those discussions, Chevron established terms and conditions of compensation, and upon reaching an agreement with an individual, Chevron referred the person to Talbridge Corporation. It was then that individual who upon Chevron's instructions initiated the communication to Talbridge Corporation for payrolling. Conversely stated, Talbridge Corporation with respect to the administrative tasks necessary for payrolling, engaged in no New Mexico activity other than to be responsive to individuals who Chevron selected for payrolling.

These observations from the evidentiary record, as well as the apparent lack of dispute that some services were performed in Houston, Texas, require additional consideration of Regulation 3.2.1.18 B NMAC which provides that "[r]eceipts from services […] performed both within and without New Mexico are subject to the gross receipts tax *on the portion of the services performed within New Mexico*." (Emphasis Added)

Regulation 3.2.1.18 C (1) NMAC (2012, Amended 2021) goes on to specify the manner by which a taxpayer can establish the location of services performed when they extend to locations outside of New Mexico. The first method is through the use of cost accounting records which are not utilized in this protest. The second method is to prorate based on the percentage of service performed in New Mexico in comparison to all other locations. In this protest, that would require that services performed in New Mexico be divided by the percentage of services performed in New Mexico and Texas.

The result of that computation is precisely what Talbridge Corporation presented in the form of Taxpayer Ex. 8 and Ms. Morrow's credible testimony, which the Department did not dispute with contrary evidence or argument, and to which it also stipulated: "Chevron reimbursed Talbridge for the wages and benefits paid to the employees, plus a percentage of that amount to

compensate Talbridge *for services provided by Talbridge in Houston*."

It was clear to the Hearing Officer that the service Talbridge Corporation provided to Chevron was not in the form of research and development conducted by anyone at Area 52, but payrolling services for which the "markup" represented the performance of services exclusively in Texas. Talbridge Corporation did not recruit employees to Area 52 nor engage in any other payrolling activities in New Mexico. In fact, it was not even permitted by Chevron to communicate with employees in New Mexico, recalling the events in which Ms. Morrow testified that she was reprimanded by Chevron for communicating with an Area 52 employee.

For these reasons, the allocation presented by Talbridge Corporation is consistent with Regulation 3.2.1.18 C (1) NMAC (2012, Amended 2021), NMSA 1978, Section 7-9-3.5, and the stipulation of the parties that receipts representing Talbridge Corporation's markup were derived in Houston, Texas. The parties and other readers should nevertheless be aware that the rules governing the taxation of services performed outside of New Mexico continue to evolve. For example, the regulation referenced herein, as well as many others, saw significant revisions in 2021 that were intended to reflect developments in state taxation as recognized by *Wayfair*.

However, under the unique facts presented by this protest, the Hearing Officer agrees that that Talbridge Corporation is entitled to exclude its markup from its taxable gross receipts as permitted by Regulation 3.2.1.18 C (1) NMAC (2012, Amended 2021). Conversely stated, the relief Talbridge Corporation seeks with respect to this specific issue is not contrary to law under the facts presented.

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 case, Taxpayer is negligent for failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances or inadvertence, erroneous belief, or inattention.

However, Talbridge Corporation claims that it may still be eligible for relief from penalty under Regulation 3.1.11.11 NMAC which establishes eight indicators of non-negligence where penalty may be abated. Based on the evidence presented, Regulation 3.1.11.11 D NMAC is potentially applicable to this proceeding. It states:

> The following situations may indicate that a taxpayer has not been negligent or in disregard of rules and regulations and the secretary will consider these circumstances in deciding whether to assess civil penalty as provided by Section 7-1-69 NMSA 1978, or whether to abate assessed civil penalty as provided by Section 7-1-28 NMSA 1978:
>
> …
>
> 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;

Ms. Morrow credibly testified that she employed the services of several certified public accountants over the years to assist with its tax reporting and payment obligations, including its gross receipts tax reporting. According to Mr. Pogan's testimony, that reporting typically consisted of a report of gross receipts in the relevant reporting period and a corresponding deduction equal to gross receipts resulting in no tax due. In the meantime, at no time did any tax professional entrusted by Talbridge Corporation with the duty to report and pay its New Mexico gross receipts taxes suggest to Ms. Morrow that there were any concerns or questions with the accuracy of its reporting. Administrative notice of the standard CRS-1 long form contains an acknowledgment in which a taxpayer or taxpayer's agent "declare that I have examined this return including any accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete." A similar acknowledgment is required prior to electronically filing through the Department's Taxpayer Access Point (TAP) as well, although the user will not acknowledge the statement with a signature, but instead with a checkbox prior to submitting the return.

Under these circumstances, it was reasonable for Ms. Morrow to believe in good faith that Talbridge Corporation's gross receipts were being correctly reported and that its tax liability

was being correctly calculated. Knowing that the CPA would have access to all necessary and relevant information and be situated to identify any errors, coupled with an acknowledgment that the return and accompanying schedules and statements had been examined and were, to the best of the CPA's knowledge and belief, true, correct and complete, satisfies the elements of Regulation 3.1.11.11 D NMAC. Talbridge Corporation is therefore entitled to an abatement of penalty.

CONCLUSION

The parties presented thorough and compelling arguments in support of their positions. The dispositive issue with respect for Taxpayer's claim, however, is the fact that Talbridge Corporation clearly lacked authority as an agent to act for, or on behalf of Chevron, in any and all matters. For this reason, the Hearing Officer was ultimately unpersuaded that Talbridge Corporation was a disclosed agent of Chevron, for any purpose. Therefore, Talbridge Corporation did not establish entitlement to an abatement of gross receipts tax arising from amounts it asserted it "received solely on behalf of another in a disclosed agency capacity."

On the other hand, Talbridge Corporation established entitlement to a full abatement of penalty due to its reliance on tax professionals, as well as a portion of tax principal corresponding with the sum of non-taxable receipts that derived from providing out of state services.

Accordingly, the protest should be GRANTED IN PART and DENIED IN PART.

CONCLUSIONS OF LAW

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

B. A hearing was timely set and held within 90 days of Taxpayer's protest as required by NMSA 1978, Section 7-1B-8.

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

D. 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.

E. 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.

F. The Professional Services Agreement and other conduct of the parties failed to establish the existence of a disclosed agency relationship in which Taxpayer had the authority to bind the principal to an obligation created by the agent. *See* NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC. *See MPC*, ¶36.

G. There was insufficient evidence to establish the beneficiary of any purported obligation was informed by contract that he or she had a right to proceed against the purported principal to enforce any asserted liability created by the purported agent. *See* NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC. *See MPC*, ¶36.

H. Taxpayer was not a disclosed agent under NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC. *See MPC*, ¶36.

I. Since Taxpayer was not a disclosed agent under NMSA 1978, Section 7-9-3.5 (A) (3) (f) and Regulation 3.2.1.19 (C) (1) NMAC, Taxpayer's receipts from providing payrolling services were taxable gross receipts.

J. Receipts derived from services provided outside of New Mexico are not gross receipts. *See* NMSA 1978, Section 7-9-3.5 (A) (1) (2007).

K. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest

under the assessment, which shall continue to accrue until the tax principal is satisfied.

L. Under NMSA 1978, Section 7-1-69 (2007) and Regulation 3.1.11.11 NMAC, Taxpayer established entitlement to an abatement of penalty 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. *See* Regulation 3.1.11.11 D NMAC.

M. Delay in issuing a decision does not invalidate the jurisdiction of a hearing officer to make a ruling in a tax matter. *See KPI*, 2006-NMCA-026, ¶55, 139 N.M. 177, 192, *rev'd on other grounds and certiorari as to corporate income tax issues quashed, Kmart Corp. v. Taxation & Revenue Dep't.*, 2006-NMSC-006, 139 N.M. 172; *see also Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13 (delay in action is not a defense to enforcement in a tax action).

For the foregoing reasons, Taxpayer's protest should be, and hereby is, GRANTED IN PART and DENIED IN PART.

DATED: September 19, 2022

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 September 19, 2022, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail & E-Mail *First Class Mail & E-Mail*

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