STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
HARRY R. BARNES
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1183035056

v. **AHO Case Number 22.05-029A, D&O No 22-025**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT FOR TAXPAYER

This matter came before the Administrative Hearings Office, Hearing Officer Chris Romero, Esq., upon a Motion for Summary Judgment Re: Fees Under Section 7-1-29.1 ("Motion") of Mr. Harry Barnes, Jr. ("Taxpayer"). The Motion was filed on September 13, 2022 pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Taxpayer is represented by Mr. Frank Crociata, Esq. The Taxation and Revenue Department ("Department") is represented by Ms. Cordelia Friedman, Esq. The Department, by and through Ms. Friedman, filed Department's Response to Taxpayer's Motion for Summary Judgment Requesting that Motion be Denied ("Response") on September 27, 2022. A hearing on the Motion occurred on December 6, 2022.

The facts and legal issues presented concentrate on whether Taxpayer is entitled to recoup a portion of costs and fees expended in defense of an assessment which Taxpayer alleges was unsupported by evidence at the time it was issued. Because the Hearing Officer agrees that under the facts presented, Taxpayer is entitled to relief under NMSA 1978, Section 7-1-29.1, Taxpayer's motion and protest should be granted. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Taxpayer's Motion presented 23 statements of undisputed material fact. The Department did not contest facts corresponding with statement numbers 1, 5 – 10, 12 – 14, and 16 – 22. [*See* Motion; Response (Page 4 - Section II)]

With respect for the balance, representing statement numbers 2 – 4, 11, 15, and 23, the Department asserts that it has insufficient information with which to admit or deny the asserted fact. These facts will also be deemed as true and uncontested. *See Carrillo v. Hoyl*, 1973-NMCA-149, ¶ 4, 85 N.M. 751, 752, 517 P.2d 73, 74. Although relying on "insufficient information" is a common and acceptable method of responding to the factual allegations in a complaint under the rules of civil procedure for the district courts (Rule 1-008 B), the same cannot be said of the burden placed on a non-moving party in contesting material facts presented in support for a motion for summary judgment.

Although favored procedurally, a non-moving party cannot rely solely on the allegations contained in its complaint or upon mere argument or contention to defeat a motion once a prima facie showing has been made. *See Oschwald v. Christie*, 1980-NMSC-136, ¶ 6, 95 N.M. 251, 253, 620 P.2d 1276, 1278.

The non-movant "must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence." *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 15, 139 N.M. 12, 17, 127 P.3d 548, 553; *Archuleta v. Goldman*, 1987-NMCA-049, ¶ 11, 107 N.M. 547, 551, 761 P.2d 425, 429 (a party opposing a motion for summary judgment must come forward with evidence to refute assertions of fact). Mere assertions of insufficient information with which to admit or deny fail to establish the existence of disputed material facts.

Material Facts

1. Taxpayer and Sarah L. Barnes ("Mrs. Barnes") are a married couple. [*See* Exhibit

1 to Motion (Affidavit of Harry Barnes, Jr. or "Barnes Aff.," ¶3)]

2. Taxpayer is the managing member of, and operates, Transmission & Distribution Services, LLC ("T&D Services"), a business that provides engineering and surveying services to the electric utility industry. [*See* Exhibit 1 to Motion (Barnes Aff., ¶5)]

3. T&D Services has its own New Mexico Gross Receipts Tax ("GRT") identification number and reports GRT directly to the Department. [*See* Exhibit 1 to Motion (Barnes Aff., ¶6)]

4. Mrs. Barnes is a duly licensed New Mexico attorney. [*See* Exhibit 1 to Motion (Barnes Aff., ¶ 7)]

5. Mrs. Barnes was employed by a law firm[1] ("Law Firm") from October 2012 through February 2016 and, during portions of the overall employment period, represented Law Firm's clients before the United States Social Security Administration ("SSA"). [*See* Exhibit 1 to Motion (Barnes Aff., ¶8)]

6. As a married couple, Taxpayer and Mrs. Barnes filed joint federal and New Mexico personal income tax returns for tax years 2015 through 2017. [*See* Exhibit 1 to Motion (Barnes Aff., ¶ 4)]

7. The Department conducted a Schedule C mismatch Gross Receipts Tax ("GRT") audit based on the Barnes' joint income tax returns for tax years 2015 through 2017 and issued a Notice of Intent to Assess-Gross Receipts, dated April 2, 2020 to both Taxpayer and Mrs. Barnes. [*See* Exhibit 1 to Motion (Barnes Aff., ¶ 9); Exhibit 2 to Motion (Notice of Intent to Assess – Gross Receipts ("Notice of Intent")); Department's Answer to Protest ("Answer"), at 3]

8. All of the alleged taxable gross receipts in the Notice of Intent derived from

[1] Although the name of the law firm is contained in the record, the Hearing Officer finds that referring to the law firm by name is not necessary to the discussion contained herein.

Forms 1099 from various parties, including the State of New Mexico and SSA, issued to Mrs. Barnes. [*See* Exhibit 1 to Motion (Barnes Aff., ¶10); Exhibit 3.2 – 3.3 (electronic communications between Taxpayer and Debbie Rael (May 1, 2020 – Aug. 20, 2020))]

9. Upon receiving the Notice of Intent, Taxpayer worked directly with Department employee, Debbie Rael, to try to resolve the matter. [*See* Exhibit 1 to Motion (Barnes Aff., ¶11); Exhibit 3 to Motion]

10. In May of 2020, by email and telephone conversations, Taxpayer informed Ms. Rael that the SSA 1099s, while incorrect as issued, related to Mrs. Barnes' employment with Law Firm and her representation of its clients before the SSA. [*See* Exhibit 1 to Motion (Barnes Aff., ¶¶ 12, 13); Exhibit 3.3 to Motion]

11. Also in May of 2020, Taxpayer sent Ms. Rael copies of nominee Forms 1099 that had been prepared from Mrs. Barnes back to Law Firm for years 2013, 2014 and 2017. These nominee Forms 1099 were intended to unwind or correct the Forms 1099 forms the SSA had issued, in name, to Mrs. Barnes for the same tax years. [*See* Exhibit 1 to Motion (Barnes Aff., ¶13); Exhibit 3.3 to Motion]

12. In August of 2020, Taxpayer further communicated to Ms. Rael information related to Law Firm and the Forms 1099 the SSA had issued, in name, to Mrs. Barnes. [*See* Exhibit 1 to Motion (Barnes Aff.,¶ 14); Exhibit 3.2 to Motion]

13. Under Letter ID L1183035056, dated September 16, 2020, the Department assessed $17,258.28 against Taxpayer (Mr. Barnes), individually. The assessment consisted of $12,475.46 in GRT, $2,495.09 in penalties, and $2,287.73 in interest. [*See* Exhibit 1 to Motion (Barnes Aff., ¶15); Exhibit 4 to Motion (Notice of Assessment and Demand for Payment, dated Sep. 16, 2020); Administrative File]

14. Due to Ms. Rael's adjustments during the review period, all of the alleged gross receipts that formed the tax base for the assessment against Taxpayer were observed to derive from the monies reflected in the Forms 1099 the SSA had issued to Mrs. Barnes. [*See* Exhibit 1 to Motion (Barnes Aff., ¶16); Exhibit Ex. 3.2 to Motion (Ms. Rael stated, "The remaining discrepancies are related to the SSA – 1099s."); Administrative File (Hearing Request – Exhibit No. 3 (Mrs. Barnes is identified as "Recipient" of the reported income.); Answer at 3 ("This matter began as a Schedule C mis-match assessment for non-payment of gross receipts taxes upon income reported to Taxpayer's wife on Federal Forms 1099-MISC.")]

15. Ms. Rael knew, prior to September 16, 2020, and the assessment of that date that the SSA Forms 1099 had been issued to Mrs. Barnes and that the forms related to Mrs. Barnes' work as an attorney employed by Law Firm. [*See* Exhibit 1 to Motion (Barnes Aff., ¶17)]

16. Taxpayer filed an initial Protest to the assessment on December 15, 2020. [*See* Exhibit 1 to Motion (Barnes Aff., ¶18)]

17. Taxpayer filed a Supplemental Protest on April 1, 2021, claiming, among other things, that the assessment was illegal and erroneous because none of the monies at issue constitute gross receipts of Mr. Barnes. The Supplemental Protest also requested recovery of costs under Section 7-1-29.1. [*See* Exhibit 1 to Motion (Barnes Aff., ¶20); Administrative File (Supplemental Protest)]

18. Taxpayer had an informal conference with the Department in mid-April, 2021. [*See* Exhibit 1 to Motion (Barnes Aff., ¶21); *See* Exhibit A to Response (Affidavit of Angelica Rodriguez or "Rodriguez Aff."), ¶4 (specifying the date of the conference to be April 16, 2021)]

19. The Department abated the assessment against Taxpayer, individually, in its entirety. [*See* Exhibit 1 to Motion (Barnes Aff.. ¶22); Exhibit 5 to Motion (Notice of Abatement,

dated April 26, 2021 - Letter ID L2063145392); Exhibit A to Response (Rodriguez Aff., ¶5)]

20. The Department issued a new assessment, dated April 20, 2021 against Mrs. Barnes under Letter ID L1302456752. This assessment included the same monies reflected in the SSA Forms 1099 for tax years 2015 through 2017 that had previously been assessed against Mr. Barnes. [*See* Exhibit 1 to Motion (Barnes Aff., ¶22); Exhibit 6 to Motion (Notice of Assessment and Demand for Payment, dated April 20, 2021 (Letter ID L1302456752)]

21. During the informal conference, the option of amending the assessment against Taxpayer, to identify Mrs. Barnes as the taxpayer, was discussed and offered to the Department. The Department declined this option and indicated it would have to issue a new assessment to Mrs. Barnes and that a separate protest process would be necessary for that new assessment. [*See* Exhibit 1 to Motion (Barnes Aff., ¶23); Exhibit A to Response (Rodriguez Aff., ¶15)]

22. The assessment against Mrs. Barnes was addressed in AHO Case No. 21.12-070A and Decision and Order No. 22-14[2].

23. To date, Mr. Barnes has paid more than $19,000 in attorney's fees in his protest, not including fees and costs associated with this Motion. $16,892 of those fees were incurred prior to the April 26, 2021 date of the Department's abatement and were incurred in order for his attorney to review the case and related documentation, research and prepare Taxpayer's Supplemental Protest, and represent him at the informal conference with the Department. [*See* Exhibit 1 to Motion (Barnes Aff., ¶¶ 19, 24, 25)]

Procedural History

24. On May 27, 2022, Taxpayer submitted a Request for Hearing of the assessment issued under Letter ID No. L1183035056 indicating that the issue submitted for determination

[2] The Decision and Order was appealed to the New Mexico Court of Appeals on June 24, 2022 and is on that court's general calendar in A-1-CA-40461.

was the application of Section 7-1-29.1 which provides for the recovery of administrative fees and costs. [Administrative File]

25. The Request for Hearing included a copy of Taxpayer's Supplemental Protest to Assessment Issued under Letter ID L1183035056 and included the following items as exhibits: (1) Notice of Assessment (Letter ID No. L L1183035056); (2) Tax Information Authorization; (3) Form 1099-MISC (2017); (4) Notices of Pending Collection Action under Letter ID No. L0163331760, L0022535856, L0411123376, L1096302256, L1434631856, L1668628144; (5) Information from SSA entitled "Direct Fee Payment to Representative and Form IRS 1099-MISC and 1099-NEC[;]" (6) instructions for Completing Form SSA-1696 and relevant form; (7) instructions for Registration for Appointed Representative Service and Direct Payment and relevant form; (8) instructions for submitting Requests for Business Entity Taxpayer Information; (9) SSA guidance for Registration Requirements for Direct Payments to Representatives; (10) redacted Fee Agreement and associated forms; (11) statement to SSA from Mrs. Barnes dated May 4, 2018; (12) Original Complaint filed by Taxpayer and Mrs. Barnes against Law Firm in the State of New Mexico, County of Bernalillo, Second Judicial District (D-0202-CV-2020-06619). [Administrative File]

26. On May 27, 2022, Taxpayer filed a Motion to Consolidate Re: Administrative Fees. The request sought to consolidate the present protest with the protest addressed in Decision and Order 22-14. [Administrative File]

27. On June 3, 2022, Taxpayer filed his Fee Accounting and Legal Argument. [Administrative File]

28. On June 7, 2022, Taxpayer supplemented its Request for Hearing with the following items: a copy of the assessment issued under Letter ID No. L1183035056 dated

September 16, 2020; correspondence acknowledging the protest under Letter ID No. L0053273008 dated January 29, 2021; and a Notice of Abatement of Tax Assessment dated April 26, 2021 under Letter ID No. L2063145392. [Administrative File]

29. On June 16, 2022, the Administrative Hearings Office entered an Order Denying Motion to Consolidate and Notice of Telephonic Scheduling Hearing. According to the order, the request for consolidation was denied for the following reason:

> The Request for Hearing was accompanied by a Motion to Consolidate Re: Administrative Fees ("Motion") also filed on May 27, 2022. The Motion sought to consolidate the above-captioned protest with Case No. 21.12-070A which was the subject of D&O 22-14 entered on May 25, 2022. The Department opposed the Motion. Given the procedural status of the latter, the request to consolidate at this time is DENIED in order to maintain a clear record for the potential appeal of D&O 22-14 and to avoid any confusion or uncertainty regarding the timeframes for perfecting an appeal under NMSA 1978, Section 7-1-25. *See Gelinas v. New Mexico Taxation & Revenue Dep't*, 2020-NMCA-038, ¶6, 472 P.3d 1231, 1234, cert. denied (May 11, 2020) ("[T]he rule governing a direct appeal of a hearing officer's decision establishes the filing timeline based on the issuance of the decision and order.")

30. The Department filed Department's Answer to Protest on June 27, 2022. [Administrative File]

31. A telephonic scheduling hearing occurred on July 15, 2022 at which time the parties agreed that the hearing satisfied the 90-day hearing requirement established by the Administrative Hearings Office Act. [Administrative File]

32. On July 15, 2022, the Administrative Hearings Office entered a Dispositive Motion Briefing Schedule. [Administrative File]

33. Taxpayer filed his Motion on September 13, 2022. The Department filed its Response on September 27, 2022. [Administrative File]

34. On October 5, 2022, the Administrative Hearings Office entered a Notice of Videoconference Hearing on Motion for Summary Judgment. [Administrative File]

35. On October 25, 2022, Taxpayer filed an unopposed Request for Continuance. [Administrative File]

36. On November 1, 2022, the Administrative Hearings Office entered an Amended Notice of Videoconference Hearing on Motion for Summary Judgment. [Administrative File]

37. Argument on the Motion and Response occurred by videoconference on December 6, 2022. [Administrative File]

DISCUSSION

In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664. If the movant for summary judgment makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331.

The issue presented in this case is appropriate for summary judgment. The question is whether Mr. Barnes is entitled to recoup a share of attorney's fees incurred in protesting an individual assessment issued solely against him. To reach a conclusion, Section 7-1-29.1 requires the Hearing Officer consider what the Department knew and when it knew it.

Taxpayer asserts that as of the date the Department issued its assessment against him, individually, that it possessed information which demonstrated that the receipts in question were in no way attributable to his engagement of business in New Mexico. Conversely stated, that the Department's assessment was not based on a reasonable application of law *to the facts* of the case, an issue for which the Department bears the burden of proof. *See* NMSA 1978, Section 7-1-29.1 (C) (2); *See Helmerich & Payne*, 2019-NMCA-054, ¶¶ 25, 26.

Some introduction is helpful prior to addressing that particular issue. Section 7-1-29.1(A) provides that a taxpayer shall be awarded "reasonable administrative costs" incurred in any "administrative proceeding" brought by or against the taxpayer and conducted in connection with determination of any tax, penalty, or interest when the tax at issue is governed by the Tax Administration Act and the taxpayer is the "prevailing party."

First, "administrative proceeding" means "*any procedure or other action before the Department* or the administrative hearings office." *See* Section 7-1-29.1 (B) (1) (emphasis added). Second, a taxpayer is the "prevailing party" if the taxpayer has either: (a) substantially prevailed with respect to the amount in controversy; or (b) substantially prevailed with respect to most legal issues, or the most significant legal issues, involved in the case. *See* Section 7-1-29.1 (C) (1) (a) & (b). Third, "reasonable administrative costs," means, among other things, the actual charges for fees and costs paid or incurred for attorney services in connection with the administrative proceeding. *See* Section 7-1-29.1 (B) (3) (b).

The undisputed facts establish that Mr. Barnes and Ms. Sarah L. Barnes are a married couple. They filed joint federal and New Mexico personal income tax returns for tax years 2015 through 2017. Concurrent with a significant portion of those years, from October of 2012 through February of 2016, Mrs. Barnes was employed by a law firm, and in that capacity, she represented the law firm's clients before the SSA.

On April 2, 2020, the Department issued a Notice of Intent to Assess-Gross Receipts and commenced an audit of Mr. Barnes' purported gross receipts. The intent to audit arose from the Department's detection of a Schedule C mismatch for tax years 2015 through 2017.

The mismatch arose from the detection of income reported on Taxpayer's Schedule C which was not also reported on Taxpayer's CRS-1s in the same tax periods. Further evaluation of

the facts at the time determined that the income included in the Schedule C, but not reported for gross receipts tax purposes, was attributable to compensation seemingly[3] paid to Mrs. Barnes by the SSA as reported on Forms 1099, as well as by the State of New Mexico for reasons attributed to her service in the New Mexico Legislature.

Having received the Notice of Intent to Assess-Gross Receipts, Mr. Barnes worked and communicated directly with Ms. Debbie Rael, employee of the Department, to resolve the matter. As of May of 2020, it was undisputed that Mr. Barnes informed Ms. Rael by email and telephone that the SSA 1099s, while incorrect (discussed in Decision and Order 22-14), related to Mrs. Barnes' employment with the law firm and, more precisely, her representation of its clients before the SSA. In other words, they were not in any way related to Mr. Barnes' business activities in New Mexico. Communications on this subject occurred through August of 2020 and were acknowledged by Ms. Rael, who in response to information provided by Mr. Barnes (Exhibit 3.2 to Motion), made various adjustments and then noted, "The remaining discrepancies are related to the SSA – 1099s[,]" which clearly identified Mrs. Barnes, not Mr. Barnes, as the recipient of income. [Administrative File (Hearing Request – Exhibit No. 3).

Despite the foregoing, the Department assessed $17,258.28 against Mr. Barnes individually. The assessment consisted of $12,475.46 in gross receipts tax, $2,495.09 in penalty, and $2,287.73 in interest issued under Letter ID L1183035056 and dated September 16, 2020. At this point, the Hearing Officer will also emphasize that the assessment was for gross receipts tax, *not* personal income tax.

Mr. Barnes filed a protest of the assessment on December 15, 2020, and supplemented the protest on April 1, 2021. Mr. Barnes asserted that the assessment was "illegal and erroneous"

[3] Additional details are contained in Decision and Order No. 22-14 which may explain the Hearing Officer's use of this particular adjective.

because none of the money which formed the basis for the assessment derived from his business activities in New Mexico, and for that reason, were not his gross receipts.

In mid-April of 2021, after an informal conference, the Department abated the assessment against Mr. Barnes. Although Mr. Barnes suggested that the assessment merely be amended to identify the correct taxpayer, in this case, Mrs. Barnes, the Department abated the assessment in full and then generated a new assessment against Mrs. Barnes. The Department never explained why it declined the suggestion. Once again, the assessment against Mrs. Barnes was protested and subject of Decision and Order 22-14.

Given the summarized facts, the Hearing Officer agrees that Taxpayer meets the definition of prevailing party for two reasons. First, Mr. Barnes prevailed with respect to the amount in controversy. The Department abated the entire assessment against him. *See Helmerich & Payne*, 2019-NMCA-054, ¶¶ 20, 21 (Department abatement issued before an AHO hearing confers prevailing party status on a taxpayer). Second, Mr. Barnes also prevailed with respect to the most significant legal issue in his case, which was whether the alleged tax base constituted taxable gross receipts to Mr. Barnes and was therefore pursued against the correct taxpayer.

Yet, Section 7-1-29.1, contains an exception to the rule. If the Department's position in the administrative proceeding was based on a reasonable application of law to the facts of the case, then the taxpayer's status as prevailing party will afford no relief. *See* Section 7-1-29.1 (C) (2). The Department bears the burden of proof on this issue. *See Helmerich & Payne*, 2019-NMCA-054, ¶¶ 25, 26.

Under Section 7-1-29.1 (C) (2), the Department's position is statutorily presumed not to constitute a reasonable application of law to the facts of the case under two circumstances. First, the Department's position cannot be reasonable if the Department failed to follow its own

published regulations, information releases, instructions, technical advice memoranda, announcements, or private letter rulings or letters issued to the taxpayer in the proceeding. *See* Section 7-1-29 (C) (2) (a) & (3) (deeming the position unreasonable if the Department fails to follow applicable published guidance). Second, the Department's position cannot be reasonable if the assessment giving rise to the administrative proceeding is not supported by substantial evidence, determined at the time of the issuance of the assessment. *See* Section 7-1-29.1 (C) (2) (b).

In essence, Section 7-1-29.1 provides taxpayers a remedy for having to defend themselves against an unreasonable assessment or Departmental overreach. *See Helmerich & Payne*, 2019-NMCA-054, ¶ 12. Nothing in the statute pardons Departmental inadvertence, lack of care, or inattentiveness.

If the Department's assessment was not supported by substantial evidence at the time the assessment was issued, the Department's position in the proceeding is not reasonable. If the Department does not follow its own published guidance in the proceeding, its position is not reasonable. Finally, even if neither presumption is met, the statute compels a fee award if AHO determines that the position the Department maintains in the proceeding is not a reasonable application of law to the facts of the case.

At the time it issued the assessment against Mr. Barnes, the Department had actual knowledge that the gross receipts underlying the assessment derived from Forms 1099 that the SSA had issued to Mrs. Barnes rather than to Mr. Barnes.

In other words, the Department knew, from previous communications with Mr. Barnes, before it issued the assessment that: (a) none of the alleged tax base constituted taxable gross

receipts to Mr. Barnes; and (b) all of the gross receipts at issue, if ultimately taxable, belonged to a different taxpayer – Mrs. Barnes.

At first blush, one may be disinclined to perceive a husband and wife as distinct and separate taxpayers under the New Mexico Gross Receipts and Compensating Tax Act, but this has long been the rule in New Mexico. In 2012, the New Mexico Court of Appeals ruled that only the person engaging in business and generating "gross receipts" at issue is the "taxpayer" for GRT purposes. *See Breen v. Taxation & Revenue Dep't*, 2012-NMCA-101, ¶31, 287 P.3d 379. In *Breen*, the court rejected the Department's attempts to treat a husband (a state employee) as the GRT "taxpayer" with respect to gross receipts his wife (an attorney) generated from her legal practice. *Id*. The court rejected the proposition that the husband was the "taxpayer" because the couple filed joint income tax returns or on notions of community property. *Id.*; *See also New Mexico Depo v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-011, ¶ 11, 485 P.3d 773, 776 (the single-member limited liability company is the liable taxpayer for GRT, not the single member in her individual capacity).

At the time of the assessment, the Department had no evidence that the alleged tax base constituted gross receipts to Mr. Barnes. In fact, communications leading up to the assessment provided actual notice that the alleged tax base could only be gross receipts of Mrs. Barnes, *not Mr. Barnes*. The Department's subsequent conduct seemingly reaffirmed that fact in that the Department fully abated the assessment against Mr. Barnes and issued a new assessment to Mrs. Barnes, based on the same alleged gross receipts. *See* D&O 22-014.

Mr. Barnes does not challenge the Department's policy of initiating GRT audits by reviewing a married couple's joint income tax returns. However, his request for fee recovery falls squarely within the language, purpose, and spirit of Section 7-1-29.1. In practical effect, Mr.

Barnes has had to incur legal expenses to avoid being held liable for GRT on monies that do not constitute "gross receipts" to him under law, that bear no relationship whatsoever to his business activities, and that the Department knew, before it issued the assessment, directly stemmed from Mrs. Barnes' work as an attorney employed by Law Firm.

The Hearing Officer agrees that the assessment against Mr. Barnes was not supported by substantial evidence at the time it was issued.

Mr. Barnes emphasized his pre-abatement suggestion to the Department that it amend the assessment against him to identify Mrs. Barnes as the correct taxpayer. The Department indicated that it could not do that, but that a new assessment against Mrs. Barnes would be required. It is unclear exactly why the Department could not amend the assessment as the Department provided no citation or explanation for that position. In making this observation, the Hearing Officer does not suggest any error with the Department's stance, only that its foundation is not articulated and the Hearing Officer will refrain from speculation on that question. The Hearing Officer notes that the Notice of Intent was addressed collectively to Mr. and Mrs. Barnes, but for reasons not readily apparent from the record, the assessment for GRT omitted Mrs. Barnes and focused exclusively on the individual it knew would not be liable for the tax. *See* Exhibit 3.2 – 3.3 (noting that after adjustments, all "remaining discrepancies are related to the SSA – 1099s.").

The Hearing Officer notices Ms. Rodriguez's sworn affidavit in which she explains, "At the time the Department assessed Mr. Barnes, it did not know his role in the spouse's business(es)." *See* Exhibit A to Response, ¶10. The Hearing Officer finds this statement unpersuasive. Exhibit 3 to the Motion contains a clear and concise explanation of the relevant facts to Ms. Rael, the employee at the Department with whom Mr. Barnes was communicating

regarding the issues, and who had authority to make appropriate adjustments. *See* Exhibit 3.2 to Motion. In this regard, Ms. Rael was the most competent witness to testify with respect to what she knew, and by extension, what the Department knew, at the time of the assessment. Ms. Rodriguez is highly qualified and respected but her testimony on this fact is speculative and unpersuasive because she cannot reliably testify to what Ms. Rael knew.

The Department also avers that its "initial review of the facts and evidence led its auditors to reasonably attribute the reported income on Taxpayer's SSA Federal Forms 1099-MISC to Taxpayer's wife, and by extension to him as the primary taxpayer on the married couple's jointly filed" income tax returns. Quite candidly, the Department's explanation corroborates Taxpayer's assertion that when the Department issued the assessment, it knew Mr. Barnes had no association to the income reported by the SSA for the years in question and was not the "taxpayer" under the rationale in *Breen*.

Regardless, the Department attributed one spouse's gross receipts to the other spouse based solely on the fact that the couple filed joint income tax returns and Mr. Barnes' name appeared first[4] in those returns. There is simply no known New Mexico authority in support of this proposition. In fact, all authority provides otherwise.

Thus, there is simply no authority in New Mexico for establishing gross receipts tax liability by one spouse through an assessment against the other. "[O]nly those persons who engage in business can be held liable for the gross receipts tax." *See Breen*, 2012-NMCA-101, ¶31. *See* Section 7-9-2 (levying a tax on the privilege of engaging in certain activities in New Mexico); Section 7-9-4(A) (imposing GRT on the "gross receipts" of persons engaging in business); Section 7-9-3.5 (A) (defining what activities generate "gross receipts"); NMAC

[4] Form 1040, for example only, does not refer to a "primary" or "secondary" taxpayer. For married couples filing jointly, it merely designates them in terms of "you" and "your spouse."

3.2.4.8 and 3.2.6.9 ((both stating that GRT is imposed on the person engaging in business and reiterating that the person conducting the taxable activities is "solely liable" for the tax); FYI-105, Gross Receipts and Compensating Tax – An Overview, at 5 ("the tax is imposed on the gross receipts of persons who conduct" the activities described in Section 7-9-3.5(A)).

In fact, given such authority, the Department's assessment against Mr. Barnes is also unreasonable under Section 7-1-29.1 (C) (2) (a) because the Department did not adhere to its regulations and publications governing the imposition and liability for gross receipts tax.

In summary, the Department cannot meet its burden under Section 7-1-29.1. From an evidentiary perspective, the Department knew, before it issued the assessment, that the receipts reflected in the Forms 1099 from the SSA did not report "gross receipts" paid to or received by Mr. Barnes. Instead, the assessment to Mr. Barnes was based on the couple's filing of joint income tax returns contrary to *Breen* and the Department's published regulations and guidance, all of which identify the person liable for GRT as the person who engaged in the activities that generated the receipts. The assessment was, therefore, not supported by substantial evidence at the time it was issued.

Therefore, the Taxpayer has established entitlement to recoup a portion of his cost and fees at the lesser of 20 percent of the amount of the settlement or judgment or $75,000. *See* Section 7-1-29.1(E).

Here, the Department assessed $17,258.28 against Mr. Barnes and later abated the entire assessment. The abatement amount comprises the judgment amount. *See Helmerich & Payne*, 2019-NMCA-054, ¶¶ 2, 29-31 (allowing fees at the then-existing cap of $50,000, which was less

than 20% of the abatement amount). Corresponding with the statutory cap, Mr. Barnes is entitled to the sum of $3,451.66 reflecting 20 percent of the amount assessed.[5]

For the reasons stated, Taxpayer's protest is GRANTED.

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. Taxpayer made a timely request for hearing and the Administrative Hearings Office conducted a timely hearing within 90 days of Taxpayer's protest under NMSA 1978, Section 7-1B-8 (2019).

C. The parties did not object that conducting the scheduling hearing satisfied the 90-day hearing requirements of Section 7-1B-8 (A) while still allowing meaningful time for completion of the other statutory requirements under Section 7-1B-6 (D). *See also* Regulation 22.600.3.8 (E) NMAC.

D. Taxpayer prevailed as to the entire amount in controversy when the assessment was abated and with respect for the primary legal issue in dispute. Consequently, the Taxpayer was the prevailing party. *See* NMSA 1978, § 7-1-29.1; *See Helmerich*, 2019-NMCA-054, ¶ 11

E. The Department did not follow applicable published guidance for correctly or properly identifying the liable taxpayer. *See* Section 7-1-29.1 C; *See Helmerich*, 2019-NMCA-054, ¶18.

F. The assessment giving rise to the proceeding was not supported by substantial evidence determined at the time of the issuance of the assessment. *See* Section 7-1-29.1 C (2); *See Helmerich*, 2019-NMCA-054, ¶18.

[5] Mr. Barnes emphasizes that his actual costs and fees of more than $19,000.00 far exceed the requested amount.

G. The sum of $3,451.66 represents 20 percent of the amount originally assessed. *See* Section 7-1-29.1 E.

H. "This taxpayer right is not dispensable. The statute says that a taxpayer 'shall' be awarded costs if it is the prevailing party. Section 7-1-29.1(A). The Department thus does not have the discretion to, in effect, deny costs to a prevailing-party taxpayer." *See Helmerich*, 2019-NMCA-054, ¶13.

For the reasons stated, Taxpayer's protest is GRANTED and he "shall be awarded a judgment …for reasonable administrative costs and reasonable litigation costs and attorney fees incurred in connection with the proceeding" in the amount of $3,451.66 pursuant to NMSA 1978, Section 7-1-29.1.

DATED: December 22, 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

I hereby certify that I served the foregoing on the parties listed below this 22nd day of December 2022 in the following manner:

First Class Mail and Email

First Class Mail and Email

INTENTIONALLY BLANK