STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE CONSOLIDATED PROTESTS OF	**D&O No. 23-07**
ISD RENAL, INC. TO THE DENIAL OF REFUND ISSUED ON APRIL 10, 2018	**No. 18.08-194R**
TOTAL RENAL CARE INC. TO DENIAL OF REFUND ISSUED ON APRIL 10, 2018	**No. 18.08-197R**
TOTAL RENAL CARE, INC. TO THE DENIAL OF REFUND ISSUED ON JANUARY 17, 2019	**No. 19.06-111R**
ISD RENAL, INC. TO THE DENIAL OF REFUND ISSUED ON JANUARY 18, 2019	**No. 19.06-112R**
TOTAL RENAL CARE INC. TO DENIAL OF REFUND ISSUED UNDER LETTER ID NO. L1054722736	**No. 20.06-79R**
ISD RENAL INC. TO DENIAL OF REFUND ISSUED UNDER LETTER ID NO. L0786287280	**No. 20.06-80R**

v.

NEW MEXICO DEPARTMENT OF TAXATION AND REVENUE

DECISION AND ORDER GRANTING SUMMARY JUDGMENT FOR TAXPAYERS

This matter came before the Administrative Hearings Office, Hearing Officer Chris Romero, Esq., upon the following: (1) ISD Renal, Inc. and Total Renal Care, Inc.'s Motion For Summary Judgment (filed May 6, 2022) ("Taxpayers' Motion"); (2) Department's Response to Motion for Summary Judgment (filed May 20, 2022) ("Department's Response"); and (3) Reply in Support of ISD Renal, Inc. and Total Renal Care, Inc.'s Motion for Summary Judgment (filed

June 3, 2022) ("Taxpayers' Reply").

A hearing on the foregoing motions was held on June 29, 2022. ISD Renal, Inc. and Total Renal; Care, Inc. (collectively "Taxpayers") appeared by and through Mr. John C. Anderson, Esq. The Taxation and Revenue Department ("Department") appeared by and through Mr. David Mittle, Esq.

The facts and legal issues presented concentrate on whether "end-stage renal disease facilities," also known as "dialysis centers" are eligible to deduct any gross receipts pursuant to NMSA 1978, Section 7-9-93 and Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006). Since the Court of Appeals in *Golden Services Home Health and Hospice and Unnamed Nursing and Rehabilitation Center v. Taxation and Revenue Dep't*, No. A-1-CA-36987, 2020 WL 2045956, mem. op. (NMCA, April 20, 2020) (non-precedential), *cert. denied,* No. S-1-SC-38341 (NMSC, November 17, 2020), looked upon the Department's regulations with approval, the Hearing Officer finds that Taxpayers are entitled to rely upon them in seeking the deduction provided by Section 7-9-93. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Except for inconsequential modifications, the following material facts 1 – 23 are reproduced from the statement presented in Taxpayers' Motion. All are accepted as true and undisputed. References to exhibits in Paras. 1 – 23 refer to exhibits in Taxpayers' Motion.

Material Facts

1. Total Renal Care, Inc.'s ("TRC") is a corporation organized under the laws of the State of California, with its principal place of business in Denver, Colorado. TRC is currently

registered with the New Mexico Secretary of State and has been so registered since 1992. *See* Affidavit of Jeannie Oh ("Oh Affidavit") ¶ 4, attached to Taxpayers' Motion.

2. ISD Renal, Inc. ("ISD") is a corporation organized under the laws of the State of Delaware, with its principal place of business in Denver, Colorado. ISD is currently registered with the New Mexico Secretary of State and has been so registered since 2006. *See id.* ¶ 5.

3. Taxpayers are wholly-owned subsidiaries of DaVita Inc., a corporation organized under the laws of the State of Delaware. *See id.* ¶ 2.

4. Taxpayers are in the business of providing dialysis services to patients suffering from end-stage renal disease. *See id.* ¶ 6.

5. From 2014 through April 2016, TRC operated three end-stage renal disease facilities (commonly known as dialysis clinics) in the State of New Mexico. From May 2016 through October 2016, TRC operated five end-stage renal disease facilities in New Mexico. *See id.* ¶ 7.

6. From 2014-2016, ISD operated one end-stage renal disease facility in the State of New Mexico. *See id.* ¶ 8.

7. At all times during their operation, all of Taxpayers' dialysis clinics in New Mexico have been duly licensed by the New Mexico Department of Health as end-stage renal disease facilities. *See id.* ¶ 9.

8. For the tax years at issue (2014-2016), among other sources of payment, TRC and ISD received payments from managed health care providers for the dialysis services provided at their end-stage renal disease facilities in New Mexico. Information concerning payments received by TRC and ISD are set forth in monthly tax filings provided to the Department. *See id.* ¶ 12.

9. Taxpayers also received payments for dialysis services from other sources, including Medicare and Medicaid, but those payments are not at issue in these consolidated matters. *See id.* ¶ 13.

10. For the tax periods at issue, managed health care providers entered into negotiated contracts with DaVita through which DaVita (and Taxpayers as subsidiaries) agreed to provide dialysis services to patients covered by the managed health care provider. *See id.* ¶ 14.

11. These contracts contain a negotiated fee schedule that establishes the amount the managed care provider would pay for the services provided by Taxpayers. *See id.* ¶ 14.

12. During the tax periods at issue, DaVita had contracts with the following managed health care providers to receive payments in exchange for the provision of dialysis services to individuals covered by their respective plans: (a.) Blue Cross Blue Shield of New Mexico; (b.) Aetna;(c.) United Healthcare; (d.) Cigna; (e.) Presbyterian Health Plan, Inc.; (f.) Selecthealth FKA Health Plans, Inc.; (g.) Medica Health Plans; and (h.) U.S. Department of Veteran's Affairs *See id.* ¶¶ 15-22.

13. For the tax years at issue, Taxpayers paid New Mexico gross receipts tax on the full amount of money they received for provision of dialysis services provided pursuant to these contracts. *See id.* ¶ 28.

14. Each above-referenced payer is a managed health care provider as that term is defined in NMSA 1978, § 7-9-93. *Id.* ¶¶ 14-23.

15. All dialysis services provided to patients through Taxpayers' end-stage renal disease facilities in New Mexico are overseen by a Registered Nurse licensed by the State of New Mexico. *See id.* ¶ 25. In particular, Centers for Medicare & Medicaid Services (CMS) regulations require that each shift at a dialysis center be overseen by a "charge nurse" who

"meets the practice requirements in the State in which he or she is employed." 42 C.F.R. § 494.140(b)(3). During the tax periods at issue, Taxpayers collectively employed 29 registered nurses who provided directly or oversaw administration of all dialysis services at the end-stage renal disease facilities. *Id.* ¶ 25.

16. Taxpayers provide dialysis services only pursuant to a prescription from a physician. When a patient is referred to Taxpayers' end-stage renal disease facilities for dialysis services, the center confirms that patient's coverage and DaVita's billing and collection team verifies the contractual payment rates contained in the contract with that managed health care provider. *See id.* ¶ 24.

17. After TRC or ISD provide dialysis services to a patient covered by a managed health care provider, an invoice is submitted to that managed health care provider. This invoice, commonly known in the medical field as a UB-04, reflects the services provided by TRC or ISD. The managed health care provider will then remit the agreed upon amount as compensation for the dialysis services provided. Such remittances are generally performed through a wire transfer of funds to DaVita's designated bank account. *See* Ex. 17 (providing example invoices); Ex. 18 (providing remittance forms documenting payments to Taxpayers); Exs. 2-3 (providing sample gross receipts tax returns filed by Taxpayers with the Department).

18. Neither TRC nor the centers it operates are licensed as an HMO, hospital, hospice, nursing home, outpatient facility, or intermediate care facility licensed under the Public Health Act. Oh Affidavit ¶ 33. Instead, the centers TRC operates are licensed exclusively as end-stage renal disease facilities under regulations promulgated pursuant to the Public Health Act. *Id.* ¶ 32.

19. Neither ISD nor the center it operates are licensed as an HMO, hospital, hospice, nursing home, outpatient facility, or intermediate care facility licensed under the Public Health Act. *Id.* ¶ 35. Instead, the center ISD operates is licensed exclusively as an end-stage renal disease facility under regulations promulgated pursuant to the Public Health Act. *Id.* ¶ 34.

20. Neither TRC nor the centers it operates are tax exempt organizations described in Section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended or renumbered. *Id.* ¶ 30.

21. Neither ISD nor the centers it operates are tax exempt organizations described in Section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended or renumbered. *Id.* ¶ 31.

22. Other than in connection with this case, TRC and ISD have not sought to deduct from their New Mexico taxes the payments they receive from insurers and managed health care providers. *Id.* ¶ 29.

23. TRC and ISD submitted claims for refund for the tax periods at issue, which the Department denied. TRC and ISD then timely submitted protests for those tax periods to the Administrative Hearings Office. The protests were consolidated. *Id.* ¶¶ 10-11.

Procedural History

The Hearing Officer intentionally omits events which are immaterial to the issues under consideration or which are unnecessary for establishing a historical setting for the ensuing discussion. A comprehensive history of the consolidated protests may be acquired by referring to the administrative files.

(Pre Golden Services)

Reporting Periods January 1, 2014 through January 31, 2015

TRC

24. On April 10, 2018, the Department issued a Full Refund Denial. The denial, which does not bear a Letter ID Number was in response to TRC's application for Refund periods "Jan 1, 2014 – Jan 31, 2015 in the amount of [$]63,081.00" explaining that TRC is not a "health care practitioner" as defined by Section 7-9-93. [Administrative File (accompanying Hearing Request filed August 22, 2018)]

25. On June 22, 2018, TRC's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed August 22, 2018)]

26. On July 3, 2018, the Department acknowledged TRC's protest under Letter ID No. L0513834800. [Administrative File (accompanying Hearing Request filed August 22, 2018)]

27. On August 22, 2018, the Department filed a Hearing Request in the matter of TRC's protest of the Department's denial of its Application for Refund. [Administrative File]

28. The Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing on August 22, 2018. The notice set a hearing for September 21, 2018. [Administrative File]

29. An initial scheduling hearing was held on September 21, 2018. Neither party objected that the hearing held on that date satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A). A second scheduling hearing was also set for October 23, 2018. [Administrative File]

ISD

30. On April 10, 2018, the Department issued a Full Refund Denial. The denial, which does not bear a Letter ID Number was in response to ISD's application for Refund periods

"Jan 1, 2014 – Jan 31, 2015 in the amount of [$]254,933.00" explaining that ISD "is not a 'health care practitioner' as defined by Section 7-9-93 NMSA 1978." [Administrative File (accompanying Hearing Request filed August 22, 2018)]

31. On June 22, 2018, ISD's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed August 22, 2018)]

32. On July 3, 2018, the Department acknowledged ISD's protest under Letter ID No. L2124447536. [Administrative File (accompanying Hearing Request filed August 22, 2018)]

33. On August 17, 2018, the Department filed a Hearing Request in the matter of ISD's protest of the Department's denial of its Application for Refund. [Administrative File]

34. The Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing on August 17, 2018. The notice set a hearing for September 12, 2018. [Administrative File]

35. An initial scheduling hearing was held on September 12, 2018. Neither party objected that the hearing held on that date satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A) and the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing. [Administrative File]

36. On October 24, 2018, the parties filed a Joint Motion to Consolidate and Hold in Abeyance. More precisely, the parties sought to consolidate the protests of TRC and ISD and to hold the protest in abeyance pending the outcome of *Golden Services* and a second, unnamed[1] nursing home facility.

37. On October 29, 2018, the Administrative Hearings Office entered a Consolidation

[1] The taxpayer in the appeal accompanying *Golden Services* was unnamed since the order from which the appeal arose was interlocutory in nature, not a final Decision and Order, and therefore not subject to disclosure under NMSA 1978, Section 7-8-1.3 D.

Order, Order Vacating Setting on Merits, and Order Holding Matter in Abeyance. [Administrative File]

Reporting Periods January 31, 2015 through December 31, 2015

TRC

38. On January 18, 2019, the Department issued a Full Refund Denial. The denial issued under Letter ID No. L1227401392 was in response to TRC's application for Refund periods "Jan 31, 2015 – Dec 31, 2015 in the amount of [$]67,327.00" explaining that TRC is not a "health care practitioner" as defined by Section 7-9-93. [Administrative File (accompanying Hearing Request filed June 17, 2019)]

39. On April 9, 2019, TRC's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed April 9, 2019)]

40. On April 11, 2019, the Department acknowledged TRC's protest under Letter ID No. L0754259120. [Administrative File (accompanying Hearing Request filed April 9, 2019)]

41. On June 17, 2019, the Department filed a Hearing Request in the matter of TRC's protest of the Department's denial of its Application for Refund. [Administrative File]

ISD

42. On January 17, 2019, the Department issued a Full Refund Denial. The denial issued under Letter ID No. L1719875760 was in response to ISD's application for Refund periods "Jan 31, 2015 – Dec 31, 2015 in the amount of [$]305,137.00" explaining that ISD is not a "health care practitioner" as defined by Section 7-9-93. [Administrative File (accompanying Hearing Request filed June 17, 2019)]

43. On April 9, 2019, ISD's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed June 17, 2019)]

44. On April 11, 2019, the Department acknowledged ISD's protest under Letter ID No. L0217388208. [Administrative File (accompanying Hearing Request filed June 17, 2019)]

45. On June 17, 2019, the Department filed a Hearing Request in the matter of ISD's protest of the Department's denial of its Application for Refund. [Administrative File]

46. On June 28, 2019, the Department, ISD, and TRC filed a Joint Motion to Consolidate and Hold in Abeyance in which the parties explained that the protest should be held in abeyance pending the outcome of *Golden Services* and a second, unnamed nursing home facility.

47. On July 15, 2019, the parties filed a Waiver of 90-day Requirement for a Hearing in which the parties explicitly waived the 90-day hearing requirement under Section 7-1B-8 (F). [Administrative File]

48. On June 16, 2019, the Administrative Hearing Office entered a Consolidation and Abeyance Order. [Administrative File]

49. An initial scheduling hearing occurred on July 14, 2017 at which time the parties agreed that the hearing satisfied the 90-day hearing requirement under NMSA 1978, Section 7-1B-8 (A). The parties also requested that the matter be held "in abeyance pending resolution of the scope and applicability of the §7-9-93 deduction[.]" [Administrative File]

50. The Hearing Officer takes administrative notice that the appeal referenced on the Order Holding the Matter in Abeyance was *Golden Services* and a second, unnamed nursing home facility.

Reporting Periods January 31, 2016 through October 31, 2016

TRC

51. On January 14, 2020, the Department issued a Full Refund Denial. The denial issued under Letter ID No. L1054722736 was in response to TRC's application for Refund

periods "Jan 31, 2016 – Oct 31, 2016 in the amount of [$]84,325.00" explaining that TRC is not a "health care practitioner" as defined by Section 7-9-93. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

52. On March 19, 2020, TRC's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

53. On May 11, 2020, the Department acknowledged TRC's protest under Letter ID No. L0445736624. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

54. On June 3, 2020, the Department filed a Hearing Request in the matter of TRC's protest of the Department's denial of its Application for Refund. The Hearing Request included a copy of the Department's Original Answer. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

55. On June 8, 2020, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing which set an initial scheduling hearing for July 1, 2020. [Administrative File]

ISD

56. On January 14, 2020, the Department issued a Full Refund Denial. The denial issued under Letter ID No. L0786287280 was in response to ISD's application for Refund periods "Jan 31, 2016 – Oct 31, 2016 in the amount of [$]335,772.00" explaining that ISD is not a "health care practitioner" as defined by Section 7-9-93. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

57. On March 19, 2020, ISD's protest was received in the Department's Protest Office. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

58. On May 11, 2020, the Department acknowledged ISD's protest under Letter ID

No. L1787913904. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

59. On June 3, 2020, the Department filed a Hearing Request in the matter of ISD's protest of the Department's denial of its Application for Refund. The Hearing Request included a copy of the Department's Original Answer. [Administrative File (accompanying Hearing Request filed June 3, 2020)]

60. On June 8, 2020, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing which set an initial scheduling hearing for July 1, 2020. [Administrative File]

61. On June 8, 2020, the Department, ISD, and TRC filed a Joint Waiver of 90 Day Requirement for a Hearing, and Motion to Consolidate and Hold Protests in Abeyance in which the parties explained that the protest should be held in abeyance pending the outcome of *Golden Services* and a second, unnamed nursing home facility.

62. On June 25, 2020, the Administrative Hearings Office entered a Consolidation Order, Order Vacating Telephonic Scheduling Hearing, and Order Holding Matter in Abeyance. [Administrative File]

Post Golden Services

63. On April 20, 2020, the New Mexico Court of Appeals entered its decision in the appeal for which the protest was stayed. *See Golden Services Home Health & Hospice v. Taxation & Revenue Dep't*, A-1-CA-36987, 2020 WL 2045956 (Apr. 20, 2020) (non-precedential)

64. On October 4, 2021, Taxpayers filed Taxpayers' Request for a Scheduling Hearing asserting that Taxpayers "[did] not believe the opinion in Golden Services [was] dispositive to their protests." [Administrative File]

65. On October 8, 2021, the Administrative Hearings Office entered an Order to Conduct Informal Conference and Notice of Telephonic Scheduling Hearing. [Administrative File]

66. On October 29, 2021, upon Taxpayers' request, the Administrative Hearings Office entered an Order Continuing Telephonic Scheduling Hearing to January 14, 2022. [Administrative File]

67. On January 25, 2022, the Administrative Hearings Office entered a Dispositive Motions Briefing Schedule and Notice of Hearing. [Administrative File]

68. On March 31, 2022, the parties requested that all pending protests be consolidated: AHO Cause Nos. 18.08-194R, 18.08-197R, 19.06-111R, 19.06-112R, 20.06-79R, and 20.06-80R. [Administrative File]

69. On May 6, 2022, Taxpayers filed Taxpayers' Motion. The Department filed Department's Response on May 20, 2022. Taxpayers filed Taxpayers' Reply on June 3, 2022. [Administrative File]

DISCUSSION

Taxpayers' Motion concentrates on whether, as end-stage renal disease facilities, Taxpayers are eligible to deduct amounts of gross receipts pursuant to NMSA 1978, Section 7-9-93, as construed by *Golden Services*, in conjunction with the Department's duly promulgated Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006).

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.

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.

Instead, 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).

Department's Contentions of Disputed Facts

In this case, the Department first contends that the Affidavit of Ms. Jeannie Oh, provided in support of Taxpayers' Motion, is not competent nor based on personal knowledge because she did not affirm that her testimony was based on personal knowledge. The Hearing Officer does not agree.

Ms. Oh states that she "is fully competent to testify to the matters set forth herein." *See* Affidavit of Jeannie Oh, Para 1. She proceeds to explain her employment history and how she is "familiar with the financial operation of TRC and ISD, including the services those companies provide, the sources from which those companies derive revenue, and the arrangements those companies maintained with managed health care providers for the tax years in issue." *See* Affidavit of Jeannie Oh, Para 2. Ms. Oh's affidavit then continues to discuss relevant business and tax matters in reasonable detail.

It is clear from reading Ms. Oh's affidavit that she is competent and knowledgeable in the facts giving rise to this protest and her testimony is material and relevant. It is obvious from the context of her testimony that she is personally knowledgeable in the matters at hand. "Sometimes personal knowledge may be inferred from the content or context of the affidavit." *See Felps v. Mewbourne Oil Co.*, Inc., 2020 WL 2543792, at *2 (D.N.M. May 19, 2020) (*citing* 11 Moore's Federal Practice, § 56.94[2][b]). "If personal knowledge is to be inferred, the basis for the inference must be contained in the affidavit or declaration." *Id*. In this case, similar to the general rule expounded by Moore's Federal Practice and followed by the courts citing it, the basis for Ms. Oh's personal knowledge is contained in her affidavit and a reasonable inference of personal knowledge can be drawn from her testimony.

Moreover, the technical Rules of Civil Procedure and the Rules of Evidence do not apply in administrative proceedings before the Administrative Hearings Office. *See* NMSA 1978, Section 7-1B-6. Instead, Regulation 22.600.3.24 C NMAC provides that "[r]elevant and material evidence shall be admissible." The Hearing Officer views Ms. Oh's affidavit and its contents as relevant and material.

Second, the Department challenges, through argument alone, several material facts relevant to Taxpayers' Motion. However, argument alone is inadequate for raising a genuine issue of material fact. As summarized previously, a non-moving party may not rely on mere argument to defeat a motion once a prima facie showing has been made. *See Oschwald*, 1980-NMSC-136, ¶ 6.

Finally, the Department argues that "the Department of Veterans Affairs ("VA") is not a managed health care provider[,]" contrary to facts asserted by Taxpayers. *See* Department's Motion, Page 13. The Department's stance in the present protests contradicts the Department's

viewpoint in *Robison* where the Department stipulated to the fact the VA was a managed health care provider. *See Robison*, Page 1; Page 3, Para 12. The Hearing Officer does not suggest that the Department should be estopped from changing its mind in this protest, but in light of the Department's view of the VA in *Robison*, combined with the absence of actual evidence to the contrary in this case, the Hearing Officer will accept as an undisputed fact that the VA is a managed health care provider for the purposes of this motion.

The Hearing Officer therefore finds that there are not any disputed issues of material fact in this protest and this matter is ripe for summary judgment.

Burden of Proof

"[T]axation is the rule and the claimant must show that his demand is within the letter as well as the spirit of the law." *See TPL, Inc. v. New Mexico Taxation & Revenue Dept.*, 2003-NMSC-007, ¶ 9, 133 N.M. 447, 451, 64 P.3d 474, 478 (*quoting Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep't*, 2002–NMSC–013, ¶ 11, 132 N.M. 226, 46 P.3d 687.

The Gross Receipts and Compensating Tax Act, for the privilege of engaging in business, imposes excise taxes of specified percentages on gross receipts on any person engaging in business in New Mexico. "To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4 (2010, Amended 2022). For the purpose of enforcing the tax, there is a presumption that all receipts of a person engaging in business in New Mexico are subject to gross receipts tax. *See* Section 7-9-5(A) (2019).

Taxpayers may, however, reduce their gross receipts tax obligations by availing themselves of deductions and exemptions authorized by the Legislature. "[D]eductions are a matter of legislative grace and a way of achieving [the Legislature's] policy objectives." *See*

Sutin, Thayer & Browne v. Revenue Div. of Taxation & Revenue Dept., 1985-NMCA-047, ¶ 17, 104 N.M. 633, 636, 725 P.2d 833, 836. The right to a deduction must be clear and unambiguous with a strict construction against the taxpayer. *See Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540; *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735; *Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97; *Pittsburgh and Midway Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

Consequently, "[a] taxpayer has the burden of showing that it comes within the terms of a statute permitting a tax deduction. *See Sutin, Thayer & Browne*, 1985-NMCA-047, ¶ 17. A "deduction must be denied in the absence of a showing of clear legislative intent to permit the deduction." *See Sutin, Thayer & Browne*, 1985-NMCA-047, ¶ 18.

Even if a taxpayer can establish a legal entitlement to a deduction, a taxpayer seeking a refund must support the amount of the refund claimed with credible documentation. *See* NMSA 1978, Section 7-1-26 (A) (5) and (C) (2019). Accordingly, it is not enough that a taxpayer establishes a legal right to a refund, but it must also come forward with evidence to establish the facts supporting the amount of the refund. *See TPL, Inc.*, 2003-NMSC-007, ¶ 9.

In this protest, however, there is no indication that the *amounts* of Taxpayers' requested refunds are in dispute. The relevant Full Refund Denial letters and the Department's Original Answer do not take issue with the amount of the refund, but instead deny the refunds based on the question of legal entitlement. The same observation is made with respect to Taxpayers' Motion, Department's Response, and Taxpayers' Reply. Thus, the critical issue upon which Taxpayers' request for relief rests is whether Taxpayers enjoy a legal entitlement to a deduction and corresponding refund under Section 7-9-93.

Entitlement to Section 7-9-93 and application of Regulations 3.2.241.13 and 3.2.241.17 NMAC

Taxpayers claim they are eligible for a deduction under Section 7-9-93 and Regulations 3.2.241.13 and 3.2.241.17 NMAC. In contrast, the Department argues that Taxpayers are precluded from the grace intended by the Legislature when it enacted Section 7-9-93, and the regulations upon which Taxpayers support their claim should be disregarded as void because they are "nonsensical when applied to non-practitioners because they do not perform services pursuant to a state license." *See* Department's Response, Page 24.

The reporting periods at issue extend from January 1, 2014 through October 31, 2016. Therefore, two versions of the statute were in effect during the relevant periods of time. Taxpayers' applications for refund, however, were all filed after the effective date[2] of the 2016 version of the statute. The version of the statute in effect prior to October 19, 2016, provided:

> Receipts from payments by a managed health care provider or health care insurer for commercial contract services or medicare part C services provided by a health care practitioner that are not otherwise deductible pursuant to another provision of the Gross Receipts and Compensating Tax Act may be deducted from gross receipts, provided that the services are within the scope of practice of the person providing the service. Receipts from fee-for service payments by a health care insurer may not be deducted from gross receipts. The deduction provided by this section shall be separately stated by the taxpayer.

The 2016 amendment, effective on October 19, 2016, provided:

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

[2] Section 10 of SB 6 stated "It is necessary for the public peace, health and safety that this act take effect immediately." The governor signed the bill on October 19, 2016. *See also* N.M. Const., Art. 4, Sec. 23.

Despite their differences, both versions of the statute have common elements: 1) receipts must be paid by a managed health care provider or health care insurer; 2) receipts are payments for commercial contract services or medicare part C services; and 3) the services were performed by a health care practitioner within the scope of their practice. *See id.* (2007 and 2016).

The Legislature again amended Section 7-9-93 in 2021. That version of the statute codified the regulations that the Department now asserts should be void. The significance of the 2021 amendment will be addressed momentarily.

Under the regulations, a business entity can qualify as a health care practitioner.

The Department's position with respect to the application of Section 7-9-93 (2007 and 2016) is that the deduction is not available to the category of business entities to which Taxpayers belong, meaning a "corporation, unincorporated business association, or other legal entity" as provided by Regulation 3.2.241.13 NMAC.

The Department argues that the deduction is limited to individual "health care practitioners" citing " *See Golden Services*, No. A-1-CA-36987, mem. op. While *Golden Services* resolved the application of Section 7-9-93 with respect to certain facilities, such as hospices and hospitals, its holding may not be as far-reaching as the Department proclaims. In other words, *Golden Services* did not necessarily find that *all* business entities were disqualified.

Golden Services explained that the statute "lends support to the conclusion that only health care practitioners could hold qualifying 'receipts from payments by a managed health care provider or health care insurer.'" *See Golden Services*, No. A-1-CA-36987, mem. op., ¶ 25. It further pronounced that the 2016 amendment "finalize[d] once and for all that the Legislature does not intend to bestow a tax deduction to simply 'any taxpayer' and thus non-practitioner transactions do not fall within the purview of" the statute. *Id.* at ¶ 26. Specifically, under the

facts of the decision, *Golden Services* held that "health care facilities … are not entitled to claim the deduction." *Id.* at ¶ 24.

Yet, *Golden Services* also looked upon certain regulations with approval as it contemplated the boundaries of the deduction. Those regulations, which *Golden Services* contemplated and ultimately determined to be proper implementations of the law were Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006), both of which further refined the boundaries within which eligible taxpayers could qualify for the deduction under Section 7-9-93.

Since 2006, Regulation 3.2.241.13 NMAC has continuously provided that, "[a] corporation, unincorporated business association, or other legal entity *may deduct under Section 7-9-93 NMSA 1978* its receipts from managed health care providers or health care insurers for commercial contract services…provided on its behalf by health care practitioners who own or *are employed by* the corporation, unincorporated business association or other legal entity[.]" *See* Regulation 3.2.241.13 NMAC (2006) (emphasis added). The regulation construes the definition of a "health care practitioner" to explicitly allow business entities to claim the deduction under Section 7-9-93. *See id.* The regulation, enacted in 2006, has remained effective through the present time, including under both the 2007 and 2016 iterations of Section 7-9-93, as well as the 2021 version which incorporated and codified the regulations the Department now renounces. *See id.*

However, not just any business entity qualifies as a health care practitioner under the regulation. *See id.* The health care practitioners who perform eligible services on the business entity's behalf must 1) own or 2) be employed by the business entity provided the business entity is *not* a 501 (C) (3) organization or "an HMO, hospital, hospice, nursing home, an entity that is

solely an outpatient facility or intermediate care facility licensed under the Public Health Act." *Id.*

Conversely stated, any entity coming within the exclusions contained in Regulation 3.2.241.13 A or B NMAC "is not a 'health care practitioner' as defined by Section 7-9-93[.]" *See* Regulation 3.2.241.17 NMAC. Similar to Regulation 3.2.241.13 NMAC, Regulation 3.2.241.17 NMAC has also been in effect since 2006 and remains effective at the present time.

Nonetheless, the Department argues that these regulations are void and invalid and should be disregarded by the tribunal. It states, "[s]ince the regulation 'expands' the definition of health care practitioner, it is void." *See* Department's Response, Page 24. It went on to claim that "[i]f the regulations are in conflict with, or contrary to Legislative intent behind Section 7-9-93, they are void." *Id*.

Yet, upon careful consideration, the Department's position with respect to its own regulations is unsound, particularly when *Golden Services* relied on those *same regulations* to find in favor of the Department, a ruling to which the Administrative Hearings Office has faithfully adhered when considering protests with facts analogous to *Golden Services*. *See Alta Vista Regional Hospital*, D&O 23-01 (1/13/2023); *Carlsbad Medical Center, LLC*, D&O 23-02 (1/13/2023); *Mimbres Memorial Hospital and Nursing Home*, D&O 23-03 (1/13/2023); *Lea Regional Hospital*, D&O 23-04 (1/18/2023); *Roswell Clinic Corporation*, D&O 23 – 05 (1/20/2023); *Roswell Hospital Corporation*, D&O 23 – 06 (1/20/2023). This protest does not present analogous facts.

The Department's Regulations Have the Force of Law

The Department is vested with the authority to promulgate regulations "to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax

Act." *See* 3.2.1.6 NMAC (2001). The authority stems from NMSA 1978, Section 9-11-6.2 (B) (1) (2015) which grants it the authority to enact regulations that interpret and exemplify the statutes to which they relate. The Department's regulations carry a presumption that they are a "proper implementation of the provisions of the laws[.]" *See* NMSA 1978, Section 9-11-6.2 (G). Like any other agency vested with legislative authority to promulgate rules and regulations, those rules and regulations "have the *force of law*." *See Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 1984-NMSC-042, ¶ 7, 101 N.M. 291, 292, 681 P.2d 717, 718 (Emphasis Added)

The Department's authority to enact regulations includes the power to amend or to repeal a regulation when it becomes necessary to do so "by reason of any alteration of any such law." *Id.* Since 2006, the Department has not amended or repealed Regulation 3.2.241.13 or Regulation 3.2.241.17 despite changes to the statute to which they relate. *See* 3.2.241.13 and 3.2.241.17 NMAC; *See also* NMSA 1978, Section 7-9-93 (2007) (2016) (2021). Consequently, the Department's regulations remain a published and presumptively proper implementation of the statute. *See id. See also* NMSA 1978, Section 9-11-6.2. *See also Golden Services*, No. A-1-CA-36987, mem. op. Therefore, it was reasonable for Taxpayers to rely on the published and presumptively proper regulations as a valid implementation of the statute in support of their request for refund since those regulations continue to have the force of law.

Consistent with Taxpayers' perspective, *Golden Services* found that there was no "basis to conclude that the Department's new regulations [enacted in 2006] were an improper interpretation of the statute" and that they were presumptively proper. *See Golden Services*, No. A-1-CA-36987, mem. op., ¶ 21. Those regulations to which *Golden Services* referred were

3.2.241.13 and 3.2.241.17, and are the regulations now at issue, which the Department contends are invalid and void. *See id.*

The Department made a similar argument that was ultimately rejected by another hearing officer in the protest of *Robison Medical Resource Group, LLC*, Administrative Hearings Office D&O 21-14, (May 27, 2021) 2021 WL 5299780 (non-precedential). In *Robison*, the hearing officer thoughtfully observed, "[t]he Department's argument contains an inherent contradiction, that the court's decision in *Golden Services*, which relied upon the validity of the regulations, has simultaneously rendered those regulations invalid." *See id.* at Page 12. That matter is presently on appeal in A-1-CA-39784, and despite the passage of time since this office considered the issue in *Robison*, the Department has still not amended or repealed the regulations which it contends should be disregarded as "nonsensical." *See* Department's Response, Page 24.

Yet as recently as November 24, 2020, a date subsequent to *Golden Services* but prior to *Robison*, the Department issued Ruling 420-20-02 in which it determined that a "for-profit New Mexico corporation" was entitled to a deduction under Regulation 3.2.241.13 NMAC and Section 7-9-93. It explained:

> Pursuant to department regulation 3.2.241.13 NMAC, X may deduct under section 7-9-93 NMSA 1978 its receipts from managed health care providers or health care insurers for commercial contract services provided on its behalf by healthcare practitioners employed by X.

This ruling seemingly contradicts the Department's perception that its own regulations are invalid or conflict with the law. Well after several statutory amendments and *Golden Services*, it continues to cite the regulation which, at least for the purpose of this protest, it calls "nonsensical." Yet, the ruling clearly explained that the for-profit corporation subject of the ruling was entitled to a deduction for receipts derived from eligible services provided by the

corporation's employees, a fact pattern not all that dissimilar to the facts now at hand, and it *cited* Regulation 3.2.241.13 NMAC in support for its conclusion.

It is also apparent that the observations regarding the validity of the Department's regulation in *Golden Services* and *Robison*, and ultimately this protest, are not entirely unreasonable. Taxpayers' Motion provides examples from the First Judicial District Court, Santa Fe County, in which similar observations about the scope of *Golden Services* and the applicability of the relevant regulations have been made. *See* Taxpayers' Motion (Exhibits 3 and 4). The Department emphasizes that those cases are all on appeal. Yet, while the Court of Appeals or Supreme Court have yet to weigh in on the continuing validity of those regulations, the fact that judges and hearing officers alike are perceiving the issue similarly lends credence to its reasonableness.

In *Golden Services*, the taxpayers were the types of health care facilities that the regulation *explicitly prohibited* from claiming the deduction under Section 7-9-93. *See id. See also* 3.2.241.13 and 3.2.241.17. In the underlying protests that led to the *Golden Services* appeal, this tribunal concluded that the regulations were improper because they placed additional limitations on the deduction, which were not found in the statute. *See Golden Services*, No. A-1-CA-36987, mem. op. The court reversed the decisions of the protests and found that the *regulations were proper*. *See id.*, at ¶ 20-21. The Court's reasoning is sound and clearly explained.

Thus, the Hearing Officer adheres to the guidance provided by *Golden Services* and agrees that the regulations continue to be proper and valid. *See id.* The Hearing Officer will also observe that the Department has had sufficient opportunity since *Golden Services* to amend or repeal and replace the regulations, but it has not yet done so. In fact, the regulations have been

undisturbed for more than 15 years despite intervening events, and only after *Golden Services* recognized that they were proper implementations of the law does the Department seemingly attempt to disown them, while still curiously citing them to other taxpayers as proper implementations of the law. *See* Taxpayers' Motion (Exhibit 2 - Ruling 420-20-02, Taxation and Revenue Department, Issued 11/24/2020, Effective 1/1/2016)

Codification of Regulations

In its critique of *Robison*, the Department asserts that "[i]f the regulations are in conflict with, or contrary to Legislative intent behind Section 7-9-93, they are void." As a general proposition, the Department's assertion is reasonable and accurate. *See Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139, ¶ 10, 84 N.M. 303, 305, 502 P.2d 406, 408. Yet, in 2021, the Legislature codified the regulations that the Department now claims to be invalid. Section 7-9-93 now reads:

> *Receipts of* a health care practitioner or *an association of health care practitioners* for commercial contract services or medicare part C services paid by a managed health care provider or health care insurer may be deducted from gross receipts if the services are within the scope of practice of the health care practitioner providing the service. Receipts from fee-for-service payments by a health care insurer may not be deducted from gross receipts.
>
> *See* Section 7-9-93 A (2021) (Emphases Added)

The term, "association of health care practitioners" is then defined at Section 7-9-93 C (1) (a – b) as:

> [A] corporation, unincorporated business entity or other legal entity organized by, owned by or employing one or more health care practitioners; provided that the entity is not:
>
> (a) an organization granted exemption from the federal income tax by the United States commissioner of internal revenue as organizations described in Section 501(c)(3) of the United States Internal Revenue Code of 1986, as that section may be amended or renumbered; or

> (b) a health maintenance organization, hospital, hospice, nursing home or an entity that is solely an outpatient facility or intermediate care facility licensed pursuant to the Public Health Act;
>
> *See* Section 7-9-93 (2021)

Although the 2021 version of the statute is not applicable, it is relevant to extracting the intention of the Legislature and demonstrates its concurrence with the regulations that the Department now asserts to be invalid and "contrary to the Legislative intent behind Section 7-9-93[.]" Conversely stated, if the Legislature did not agree with the Department's regulations implementing Section 7-9-93, or found the Court's reasoning in *Golden Services* disagreeable, it would have legislatively overruled them. Instead, it codified them. These events unambiguously express Legislative approval for the regulations, not a contradiction of Legislative intent or will as the Department proposes.

In fact, a deeper review of the Fiscal Impact Report prepared for House Bill 98 is enlightening. The Legislative Finance Committee, *with input from the Department*, described the regulatory codification as follows:

> These clarifications are in line with TRD's existing regulations and interpretation.
>
> *See* https://nmlegis.gov/Sessions/21%20Regular/firs/HB0098.PDF (Emphasis Added)

Thus, to suggest that the regulations do not apply because they are void, invalid, or nonsensical is incorrect. It even suggests the possibility that one party could gain an advantage in a dispute by simply changing the rules of the game, or in this case, ignoring them. Yet, the Legislature recognized the unfairness of such tactic by enacting NMSA 1978, Section 7-1-60 (1993), which clearly states:

> In any proceeding pursuant to the provisions of the Tax Administration Act, *the department shall be estopped from*

> *obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose*[.]

Because the Legislature clearly intended for the Department's regulations to be relied upon by taxpayers, it should be estopped from now contravening them consistent with Section 7-1-60.

Taxpayers are not Excluded Entities Under the Department's Regulations

The Department asserts that even if Regulation 3.2.241.13 and 3.2.241.17 were applicable, it should still prevail because Taxpayers are "outpatient facilities" and Regulation 3.2.241.17 NMAC specifies that "organizations licensed as a hospital, hospice, nursing home, an entity that is solely an outpatient facility or intermediate care facility under the Public Health Act" may not take the deduction. *See* Regulation 3.2.241.17 NMAC (2006).

The only potentially applicable category of facilities under the facts of this case concern "outpatient facilities." The Department does not assert that Taxpayers should be disqualified as a "hospital, hospice, nursing home" or "an intermediate care facility."

The Department contends the Taxpayer is nevertheless ineligible for the deduction provided by Section 7-9-93 because it is an "outpatient facility," meaning "an entity that is "solely an outpatient facility … under the Public Health Act." *See* Regulation 3.2.241.17 NMAC.

However, the evidence demonstrates that Taxpayers are not licensed as "outpatient facilities," but are licensed as "end-stage renal disease facilities" under Regulation 7.36.2.1 NMAC, enacted by the New Mexico Department of Health under the authority of the Public Health Act.

This observation is significant because the Department has reasonably relied on the expertise of the Department of Health under the Public Health Act to define the terms used to

implement the deduction. In this case, because the Department of Health perceives "end-stage renal disease facilities" differently from "outpatient facilities," the effect was to exclude end-stage renal disease facilities from its list of ineligible entities for the deduction. Outpatient facilities are licensed under Regulation 7.11.2 NMAC and includes only specific types of facilities, none of which are end-stage renal disease facilities. *See e.g.* Regulation 7.11.2.9. Instead, end-stage renal disease facilities are subject to Regulation 7.36.2 NMAC.

Moreover, the Legislature is aware of the difference between end stage renal disease facilities and outpatient care facilities. Despite the statuary distinction of terms, the Legislature did not include end state renal disease facilities in its list of excluded organizations like it did with outpatient facilities. For example, for the purposes of Section 7-9-77.1 (2016), "dialysis facility" is defined as an "end-stage renal disease facility as defined pursuant to 42 C.F.R. 405.2102[.]"

The Legislature updated the definition in 2022 to mean:

> "a facility that provides outpatient maintenance dialysis services or home dialysis training and support services, including a facility considered by the federal centers for medicare and medicaid services to be an independent or hospital-based facility that includes a self-care dialysis unit that furnishes only self-dialysis services[.]"

However, the amendment did not intend to change the historic definition of "dialysis center." Instead, "[o]n review, [Legislative Finance Committee] staff determined that the definition did not expand the coverage of the deduction but simply supplanted a reference to the [Code of Federal Regulations] with an explicit definition." *See* Fiscal Impact Report (https://nmlegis.gov/Sessions/22%20Regular/firs/HB0082.PDF). In other words, the amendment would no longer incorporate, by reference, a definition contained in the C.F.R. which might potentially offend Article IV, Section 18 of the New Mexico Constitution. *See e.g.* N.M. Const.,

Art. IV, Sec. 18 ("No law shall be revised or amended, or provision thereof extended *by reference to its title only*[.]") (Emphasis Added)

The fact that an end-stage renal disease facility may provide outpatient dialysis does not automatically mean that such a facility is also an outpatient facility. The Department of Health does not require Taxpayers to be licensed as outpatient facilities under its regulations. Taxpayers are instead licensed as end-stage renal disease facilities. Moreover, even if aspects of its business could arguably fall within the meaning of "outpatient facility," the relevant regulation requires that the "outpatient facility" have no other functions, limiting its exclusion to "an entity that is *solely* an out-patient facility[.]" *See* Regulation 3.2.241.17 (Emphasis Added).

Taxpayers are not outpatient facilities under the Public Health Act or the regulations of the Department of Health.

Taxpayers are Entitled to Deduction under Section 7-9-93

The taxpayers in *Golden Services* were health care facilities (hospice and nursing home) claiming the deduction under the statute, even though the regulation explicitly prohibited it. *See id.* In contrast, Taxpayers in this protest are not health care facilities precluded by the regulations and are claiming the deduction under the statute based on the language in the regulations that explicitly allow a business entity to claim the deduction for the health care practitioners that it employs. *See* 3.2.241.13 NMAC; *See also e.g.* Ruling 420-20-02 (Exhibit 2 to Taxpayers' Motion).

As the hearing officer in *Robison* observed, "[t]his is a crucial distinction, and *Golden Services* cannot resolve issues that it did not contemplate, which is part of the reason why unpublished decisions are non-precedential." *See Robison*, Page 13 (D&O 21-14) (non-precedential) *citing Golden Services*, No. A-1-CA-36987, mem. op. *See also Hess Corp. v. N.M.*

Taxation & Revenue Dep't, 2011-NMCA-043, ¶ 35, 149 N.M. 527 (indicating that unpublished opinions and orders are written solely for the benefit of the parties and have no controlling precedential value). *See also Inc. County of Los Alamos v. Montoya*, 1989-NMCA-004, ¶ 6, 108 N.M. 361 (noting that unpublished caselaw is not binding precedent). *See State v. Granillo-Macias*, 2008-NMCA-021, ¶ 11, 143 N.M. 455 (noting that unpublished orders, decisions, and opinions are not controlling and are written solely for the benefit of the parties). *See State v. Gonzales*, 1990-NMCA-040, ¶ 47-48, 110 N.M. 218 (noting that unpublished orders, decisions, and opinions are not meant to be controlling authority and that they rarely describe the context of the issue at length, which may be of controlling importance to the decision).

Since the regulation contemplates that a business entity which satisfies its criteria is a health care practitioner for purposes of claiming the deduction under the statute, Taxpayers arguments are consistent with the holding in *Golden Services* that a health care practitioner, as defined by the statute and valid regulations, is the taxpayer who may claim the deduction. *See Golden Services*, No. A-1-CA-36987, mem. op.

Taxpayers are not health care facilities. They are is not 501 (c) (3) organizations, nor are they hospitals, HMOs, hospices, nursing homes, or entities licensed under the Public Health Act as outpatient facilities or intermediate care facilities. *See also* 3.2.241.13 and 3.2.241.17 NMAC. Taxpayers are legal entities with receipts from managed health care providers for commercial contract services provided on their behalf by health care practitioners who are their employees; therefore, Taxpayers fall within the purview of the regulation. *See* 3.2.241.13 NMAC.

The Department's regulations are presumptively proper. *See* NMSA 1978, Section 9-11-6.2 (G). Regulation 3.2.241.13 and Regulation 3.2.241.17 both interpret Section 7-9-93 as allowing a business entity to claim the deduction, but only if the business entity is not one of the

listed health care facilities. *See* 3.2.241.13 and 3.2.241.17 NMAC. Both regulations apply to both versions of the statute in effect during the tax periods at issue. *See id.* The decision in *Golden Services* found that Regulation 3.2.241.13 and Regulation 3.2.241.17, specifically, were presumptively proper. *See Golden Services*, No. A-1-CA-36987, mem. op. ¶ 20-21.

Regulation 3.2.241.13 construes the definition of a health care practitioner and allows business entities to claim the deduction under Section 7-9-93. *See* 3.2.241.13 NMAC. Certain types of business entities that are health care facilities are prohibited from claiming the deduction under Section 7-9-93. *See id. See also* 3.2.241.17 NMAC. Taxpayers are not among the health care facilities prohibited from claiming the deduction. *See* 3.2.241.13 NMAC. If it were, then the regulation in conjunction with the decision in *Golden Services* would compel a different result. *See id. See also Golden Services*, No. A-1-CA-36987, mem. Op.; *Alta Vista Regional Hospital*, D&O 23-01 (1/13/2023); *Carlsbad Medical Center, LLC*, D&O 23-02 (1/13/2023); *Mimbres Memorial Hospital and Nursing Home*, D&O 23-03 (1/13/2023); *Lea Regional Hospital*, D&O 23-04 (1/18/2023); *Roswell Clinic Corporation*, D&O 23 – 05 (1/20/2023); *Roswell Hospital Corporation*, D&O 23 – 06 (1/20/2023).

Taxpayers' receipts meet the statutory and regulatory criteria for the deduction. *See id. See also* NMSA 1978, Section 7-9-93. Taxpayers also meet the Department's definition of a health care practitioner under the regulation. *See* 3.2.241.13 NMAC. Therefore, Taxpayers may claim the deduction under Section 7-9-93. *See* NMSA 1978, Section 7-9-93. *See also* 3.2.241.13 NMAC. *See also Golden Services*, No. A-1-CA-36987, mem. op. (allowing health care practitioners to take the deduction and upholding the regulation that expands health care practitioners to include business entities).

Conclusion

Regulations 3.2.241.13 and 3.2.241.17 are presumptively proper interpretations of Section 7-9-93 and they have the force of law. Thus, Taxpayers are entitled to a deduction under Section 7-9-93 as interpreted by those regulations and the Department should be estopped from renouncing them pursuant to NMSA 1978, Section 7-1-60. Taxpayers' Motion and protests should be, and hereby are, GRANTED.

CONCLUSIONS OF LAW

A. Taxpayers filed timely, written protests of the Department's denials of its refund applications and jurisdiction lies over the parties and the subject matter of this protest.

B. Initial hearings were timely set and held within 90 days of the protests as required by NMSA 1978, Section 7-1B-8 except in those protests in which the parties promptly filed a stipulated waiver of the hearing requirement.

C. From 2007, receipts from payments by a managed health care provider for commercial contract services provided by a health care practitioner within the scope of their practice may be deducted. *See* NMSA 1978, Section 7-9-93 (2007).

D. From 2019, receipts of a health care practitioner for commercial contract services paid by a managed health care provider may be deducted. *See* NMSA 1978, Section 7-9-93 (2016).

E. Under both versions of the statute, the regulations interpreted the statute to allow for legal entities to claim the deduction, if they are not certain types of health care facilities. *See* 3.2.241.13 and 3.2.241.17 NMAC (2006).

F. The regulations are presumptively a proper interpretation of the statute. *See* NMSA 1978, Section 9-11-6.2. *See also Golden Services*, No. A-1-CA-36987, mem. op.

G. Taxpayers' receipts were from managed health care providers for commercial contract services provided by health care practitioners within the scope of their practice, and the health care practitioners were employed by Taxpayers. Therefore, Taxpayers met the statutory and regulatory criteria for claiming the deduction. *See* NMSA 1978, Section 7-9-93. *See also* 3.2.241.13 NMAC.

H. Taxpayers are not a 501 (C) (3) organization, an HMO, a hospital, a hospice, a nursing home, or an outpatient facility or intermediate care facility licensed under the Public Health Act. Therefore, Taxpayers are not prohibited from claiming the deduction. *See* NMSA 1978, Section 7-9-93. *See also* 3.2.241.13 and 3.2.241.17 NMAC. *See also Golden Services*, No. A-1-CA-36987, mem. op.

I. The Department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the Department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose. *See* Section 7-1-60.

For the reasons stated, Taxpayers are entitled to summary judgment and their protests should be, and hereby are, GRANTED.

DATED: February 6, 2023

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 6th day of February, 2023 in the following manner:

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