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

**IN THE MATTER OF THE PROTEST OF
VISTA STAFFING SOLUTIONS INC.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0797491376**

v. Case Number 19.03-027A, D&O 23 - 09

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On December 8, 2021, Hearing Officer Chris Romero, Esq., of the Administrative Hearings Office conducted an administrative hearing on the merits of the tax protest of Vista Staffing Solutions, Inc. (hereinafter “Vista” or “Taxpayer”) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. The hearing was conducted in person and videoconference, as permitted under NMSA 1978, Section 7-1B-8 (H) (2019) and Regulation 22.600.3.10 NMAC under the circumstances of the public health emergency presented by COVID-19. The record closed on September 22, 2022 with the filing of Taxpayer’s written rebuttal argument.

Mr. Marc Simonetti, Esq., Mr. Evan Hamme, Esq., Mr. Robert Desiderio, Esq., and Ms. Janette Duran, Esq., appeared in person for Vista along with Ms. Carolyn Koo and Ms. Chandra Westergaard, who appeared by videoconference.

Staff Attorneys, Mr. David Mittle, Esq., appeared in person, and Mr. Kenneth Fladager, Esq., appeared by videoconference and in person, representing the opposing party in the protest, the Taxation and Revenue Department (Department).

Mr. John Murphy, Ms. Alma Amador, Ms. Marcy Coca, and Ms. Lizette Rivera appeared as witnesses. Mr. Murphy and Ms. Coca were called by Vista and appeared by videoconference.

1 Ms. Amador was called by Vista and appeared in person. Ms. Rivera was called by the
2 Department and appeared by videoconference.

3 Taxpayer Exhibits 1 – 15 and 18, and Department Exhibits A – B were admitted without
4 objection upon stipulation of the parties.

5 Vista’s main arguments for abatement of the assessment are that: (1) Vista did not
6 conduct its business activities within the State of New Mexico; (2) amounts paid to Medical
7 Professionals should be excluded from taxation as reimbursed expenditures of an agent in a
8 disclosed agency capacity; (3) civil negligence penalty should not apply because it assertedly
9 exercised reasonable business care and prudence and because its interpretation of its reporting
10 and payment obligations was grounded on good faith and reason. Vista also argued in
11 Petitioner’s Reply Brief (written rebuttal closing) in favor of the application of NMSA 1978,
12 Sections 7-9-93 and 7-9-77.1.

13 As explained in greater detail in the subsequent discussion, the Hearing Officer finds
14 based on the evidence and arguments presented that Vista is not entitled to an abatement of the
15 assessment for the reasons stated. IT IS DECIDED AND ORDERED AS FOLLOWS:

16 **FINDINGS OF FACT**

17 A written transcript of the proceedings was prepared by Vista and provided to the
18 Department and the Administrative Hearings Office. Citations to the written transcript adhere to
19 the following general convention: Volume No.: Page No.: Line No. – Line No. or Volume No.:
20 Page No.: Beginning Line No. – Page No.; Ending Line No.

21 Neither Vista nor the Department alerted the Hearing Officer to any perceived errors in
22 the transcript, and the Hearing Officer did not independently detect any errors either. However,
23 because the official audio recording represents the official record of proceedings, any

1 discrepancy between the audio recording and the written transcript should be resolved by
2 reference to the recording.

3 Vista's Business Operations

4 1. Vista is a medical staffing agency that provides medical professional placement
5 services to medical facilities across the country. [12-8-21 2:3:24 – 25; 12-8-21 2:4:1 – 2;
6 Taxpayer Ex. 9.1; Stip. ¶ 3]

7 2. Since 2015, Vista has been a wholly owned subsidiary of Envision Healthcare
8 Corp. [Stip. ¶ 1; Taxpayer Ex. 11; 12-8-21 1:31:6 – 7; 12-8-21 2:3:21 – 23]

9 3. Vista is a Utah corporation with its principal place of business and headquarters in
10 Utah. [12-8-21 1:33:5 – 7; Stip. ¶ 2]

11 4. Healthcare operators maintain facilities for, and operate programs to facilitate, the
12 provision of comprehensive healthcare services to patients (“Healthcare Operators”). [12-8-21
13 1:35:19 – 36:3; 12-8-21 1:45:19 – 21]

14 5. Among other services, Vista provides professional placement services to
15 Healthcare Operators consisting of hospitals, healthcare facilities, and health programs. [12-8-21
16 1:33:20 – 34:7]

17 6. Healthcare Operators require duly licensed professionals, including physicians,
18 nurse practitioners, physician assistants, and certified registered nurse anesthetists (“Medical
19 Professionals”), to perform healthcare services for patients at the Healthcare Operators’
20 locations. [12-8-21 1:34:22 – 36:3]

21 7. Vista maintains a network of licensed advanced Medical Professionals and makes
22 referrals from such network to its Healthcare Operator clients. [12-8-21 1:37:3 – 15; Stip. ¶ 3]

23 8. When Vista successfully places a Medical Professional with a Healthcare

1 Operator, such Medical Professional then provides healthcare services to patients at a Healthcare
2 Operator's location. [Stip. ¶ 3; Taxpayer Ex. #2.3, § I.A, definition of "Agency Healthcare
3 Provider."]

4 9. Vista's primary externally measured metric is NPS scores, which is "like best of
5 staffing." [12-8-21 2:7: 4 – 7]

6 Vista's Process Generally

7 *Sales Function*

8 10. Vista's functions include sales, recruiting, support, and billing functions to
9 perform its services. [12-8-21 1:34:9 – 35:7]

10 11. Vista develops relationships with Healthcare Operators that are potential new
11 clients and maintains relationships with Healthcare Operators that are existing clients. [12-8-21
12 1:39:2 – 6]

13 12. Vista communicates with Healthcare Operators regarding opportunities to
14 perform staffing services for the Healthcare Operators. [12-8-21 1:39:2 – 6]

15 13. Vista develops and maintains relationships with Healthcare Operators to access
16 and obtain additional staffing opportunities. [12-8-21 1:38:5 – 39:9]

17 *Staffing Function*

18 14. Vista's "value proposition is that [Healthcare Operators are] trying to find
19 healthcare providers. And we [i.e., Vista] not only have a relationship with thousands of health
20 care providers, but even if we don't have a relationship with someone immediately, we are able
21 to recruit based on our experience and our expertise. So we are able to do the job of recruiting of
22 that healthcare professional to our client organizations in a more cost-effective way than they're
23 able to do it themselves because of our relationships and because of our expertise." [12-8-21

1 1:37:5 – 15.]

2 15. Healthcare Operators make requests to Vista to “find and staff medical
3 professionals.” [12-8-21 2:10 – 25; 12-8-21 2:11:1 – 3]

4 16. Upon inquiry from a Healthcare Operator, Vista will assist in the identification
5 and placement of a Medical Professional having the necessary expertise to satisfy the Healthcare
6 Operator’s personnel needs. [12-8-21 1:38:5 – 45:9; Stip. ¶ 20; Ex. 4, ¶ 2]

7 17. Vista’s professional placement function includes a scheduling function, which “is
8 in charge of making the match” between the Medical Professional and Healthcare Operator. [12-
9 8-21 1:39:10 – 14]

10 18. When Vista identifies a Medical Professional, Vista evaluates the Medical
11 Professional to verify the Medical Professional’s training and education. [12-8-21 1:34:1 – 5; 12-
12 8-21 1:41:1 – 16]

13 19. If Vista identifies a qualified Medical Professional, Vista provides that identified
14 Medical Professional with relevant information about the opportunity. [12-8-21 1:42:3 – 25]

15 20. If the Medical Professional is interested in the opportunity, Vista will refer the
16 Professional to the Healthcare Operator and inform the Healthcare Operator of the Medical
17 Professional’s qualifications and availability. [12-8-21 1:42:1 – 43:5]

18 21. Healthcare Operators review the Medical Professional’s information and decide
19 whether to accept the referral. [12-8-21 1:42:1 – 43:5]

20 22. Vista will put the Medical Professional through a credentialing process, which
21 includes verifying education and licensure and checking for malpractice claims. [12-8-21 1:41:2
22 – 16; Ex. 2.4 (Locum Tenens Agreement, Healthcare Personnel Requirements, III(A))]

23 23. The Healthcare Operators have the right to interview the Medical Professional

1 candidates provided by Vista. [12-8-21 2:11:4 – 18]

2 24. The Healthcare Operator decides which potential candidate to accept for an
3 independent contractor assignment. [12-8-21 2:11:16 – 18]

4 25. If a Healthcare Operator decides to staff its facility with a Medical Professional
5 Vista identified, then the Healthcare Operator and Vista negotiate Vista’s payment terms.
6 [Taxpayer Ex. 2.10 (Locum Tenens Agreement, Healthcare Personnel Requirements,
7 III(A)(1)(a))]

8 26. Healthcare Operators and Vista agree on a rate of compensation for Vista. [12-8-
9 21 2:11:21 – 23; Taxpayer Ex. 2.10 (Locum Tenens Agreement, Healthcare Personnel
10 Requirements, III(A)(1)(a))]

11 27. Medical Professionals negotiate their own rate of hourly pay. [12-8-21 2:13:1 – 4;
12 Taxpayer Ex. 2.11 (Locum Tenens Agreement, Healthcare Personnel Requirements, III(A)(3))]

13 28. The Healthcare Operators decide the start and completion date of the work under
14 the contract. [12-8-21 2:12: 14 – 16]

15 29. The Healthcare Operator provides an orientation for the Medical Professional.
16 [12-8-21 2:13:15 – 17]

17 30. The Healthcare Operators control the work schedule of the Medical Professional.
18 [12-8-21 2:14:12 – 17]

19 31. Medical Professionals work at the Healthcare Operator’s medical facility and
20 dress in accordance with the Healthcare Operator’s dress code. [12-8-21 2:13:24 – 14:1]

21 32. Healthcare Operators supervise the day-to-day job performance of the assigned
22 Medical Professional. [12-8-21 2:14:12 – 17]

23 33. Healthcare Operators retain the ability to terminate the assignment of Medical

1 Professionals. [12-8-21 2:14: 5 – 9]

2 34. Vista stays in contact with the Medical Professional throughout the assignment
3 and through termination of the assignment. [12-8-21 1:45:4 – 6]

4 35. During the audit period, payment of the Medical Professionals came from
5 submission of timecards approved by the Healthcare Operator. [12-8-21 1:73:2 – 6; 12-8-21
6 2:22:7]

7 36. The timecards may or may not have been on Vista’s letterhead. [12-8-21 2:22:8 –
8 15]

9 37. Vista generally pays Medical Professionals twice a month. [12-8-21 1:46:10 – 11;
10 19 – 21; 12-8-21 1:73:2 – 6; 12-8-21 2:14:18 – 22]

11 38. Vista pays Medical Professionals before it is paid by the Healthcare Operator.
12 [12-8-21 2:14:23 – 25]

13 *Support Function*

14 39. If the Medical Professional accepts the placement, Vista continues to participate
15 in the transaction. [12-8-21 1:43:25 – 45:9; 12-8-21 1:54:11 – 55:5]

16 40. After a placement, Vista “engages” the Medical Professional on the Healthcare
17 Operator’s behalf, i.e., obtains the Medical Professional’s legal agreement to perform healthcare
18 services at Healthcare Operator’s location. [12-8-21 1:43:25 – 45:17; 12-8-21 1:57:9 – 58:25]

19 41. Once the Medical Professional is engaged, Vista discloses the Healthcare
20 Operator’s identifying information and “onboards” the Medical Professional, i.e., provides the
21 Medical Professional documents regarding the Healthcare Operator’s policies and practices and
22 other information relevant to the placement. [12-8-21 1:56:19 – 23]

23 42. During the onboarding process, Vista verifies the Medical Professional’s

1 credentials and, if necessary, assists the Medical Professional to obtain necessary permits or
2 licenses to perform healthcare services in the Healthcare Operator’s jurisdiction. [12-8-21 1:41:2
3 – 3; 12-8-21 1:41:2 – 23]

4 43. Further, during the onboarding process, Vista may assist the Medical Professional
5 to determine plans for travel and lodging near the Healthcare Operator’s location. [12-8-21
6 1:43:25 – 45:8]

7 44. During the “charting” process, Vista provides formal documentation to the
8 Medical Professional specifying the regulatory requirements to perform healthcare services at the
9 Healthcare Operator’s location. [12-8-21 1:57:9 – 23]

10 45. During the onboarding and charting process, Vista obtains the Medical
11 Professional’s agreement to contract terms and conditions between the Healthcare Operator and
12 the Professional. [12-8-21 1:57:16 – 58:2]

13 46. After engagement, onboarding, and charting, the Medical Professional travels to
14 and begins performing healthcare services at Healthcare Operator’s location. [12-8-21 1:43:25 –
15 45:9]

16 47. Vista does not direct or control Medical Professionals providing healthcare
17 services. [Taxpayer Ex. #4.2]

18 48. Vista facilitates the transactions between Medical Professionals and Healthcare
19 Operators during the term of the engagement. [12-8-21 1:43:25 – 45:9]

20 49. Medical Professionals prepare work records reflecting their time and services
21 provided to patients at a Healthcare Operator’s location. [12-8-21 1:45:10 – 17; 12-8-21 1:60:5 –
22 15]

23 50. Vista collects these work records and disburses compensation to the Medical

1 Professional based on the work records on the Healthcare Operator’s behalf. [12-8-21 1:44:21 –
2 22; 12-8-21 1:46:3 – 23; Taxpayer Ex. # 2.14]

3 51. Following a placement, Healthcare Operators are not permitted to contract for the
4 Medical Professional’s services directly for a specified period. [12-8-21 1:43:12 – 18]

5 52. Vista administers the Medical Professionals’ engagements to prevent Healthcare
6 Operators from “contract[ing] that provider [i.e., Medical Professional] directly outside our
7 relationship for some period of time . . . usually two years.” [12-8-21 1:43:15 – 18]

8 53. The engagement process “is what ensures that if we make that introduction [of the
9 Medical Professional to the Healthcare Operator], that they [i.e., the Professional] don’t call the
10 health care operator and say . . . why don’t you just hire me directly. . . . [T]he contract is] both
11 ways and our adherence to having them always in place is what ensures that we’re able to do
12 business.” [12-8-21 1:55:11 – 16]

13 54. There are two reasons why maintaining communications with Healthcare
14 Operators and Medical Professionals throughout an engagement creates business opportunities
15 for Vista:

- 16 a. First, “one of the ways [Vista does] business is through
17 extensions” of a Professional placement with a Healthcare
18 Operator; and
- 19 b. Second, Vista “also need[s] to know very clearly as that
20 [placement] is coming to a close because [it] would try to place
21 that provider [i.e., Medical Professional] somewhere else.” [12-
22 8-21 1:45:4 – 9]

23 *Billing Function*

24 55. Vista bills the Healthcare Operator for both Vista’s services and the Medical
25 Professional’s healthcare services. [Stip. ¶ 33]

26 56. Vista retains records that state: (i) the amount Vista receives as compensation for

1 its services; and (ii) the amounts Vista accepts from Healthcare Operators for Professionals'
2 compensation. [12-8-21 1:63:6 – 64:9; Stip. ¶ 34]

3 57. Vista's invoices to Healthcare Operators do not separately state the amounts
4 billed for the services of Medical Professionals and the amount billed for Vista's service fee. [12-
5 8-21 2:31:13 – 16; Taxpayer Ex. 18.5]

6 58. Healthcare Operators bill healthcare payors, such as insurance companies,
7 managed care organizations, and government healthcare insurance programs (e.g., Medicare), for
8 Medical Professionals' services. [Taxpayer Exs. 2.14; 5.1]

9 *Vista's Business Locations*

10 59. Vista maintains offices in Utah; Houston, Texas; and Georgia. [12-8-21 1:33:8 –
11 16; Stip. ¶ 21]

12 60. During the period from January 1, 2010, through May 31, 2017 ("Audit Period"),
13 Vista had offices in Wisconsin and Texas that have since closed. [12-8-21 1:33:11 – 13]

14 61. At no time whatsoever has Vista ever had an office in New Mexico. [12-8-21
15 1:33:14 – 16]

16 62. Vista does most of its business over the telephone, e-mail, or other electronic
17 means, although it occasionally visits client sites. [12-8-21 2:4:10 – 15]

18 63. Vista's employees work from Vista's offices outside of New Mexico. [12-8-21
19 1:35:8 – 16; Stip. ¶ 22]

20 64. During the Audit Period, Vista occasionally allowed employees to work remotely
21 but it did not have an employee work remotely from a location inside New Mexico. [12-8-21
22 1:35:8 – 16]

23 65. It was likely that during the audit period, Vista's representatives met with Vista's

1 clients in New Mexico. [12-8-21 2:5:11 – 16]

2 66. Vista’s employees are divided into three relevant departments: Operations, Front
3 Office Support, and Sales. [12-8-21 1:34:9 – 35:7]

4 67. The Sales Department employees perform the sales function, i.e., seek to identify
5 new potential clients and obtain new opportunities with existing clients. [12-8-21 1:34:9 – 14]

6 68. The Operations Department employees include recruiters and schedulers, and
7 these employees perform the core recruiting activities, including maintaining Vista’s
8 Professional network, reviewing client openings, identifying potential candidates, and
9 communicating with clients and Medical Professionals regarding referrals and placements. [12-
10 8-21 1:34:15 – 21]

11 69. The Front Office Support employees perform the support function, including
12 preparing contracts and other paperwork to engage the Medical Professionals, onboarding the
13 Professional on Healthcare Operators’ behalf, verifying the Medical Professionals’ credentials,
14 and charting the Professionals. [12-8-21 1:34:22 – 35:3]

15 70. Vista also has back-office personnel that fulfill the billing function, including
16 generating and maintaining Vista’s billing records. [12-8-21 1:35:4 – 7]

17 71. Vista’s Operations, Front Desk, and back-office employees do not travel to client
18 locations or meet Medical Professionals in person. [12-8-21 1:35:8 – 16]

19 72. Vista’s Sales Department employees may visit existing or potential clients to sell
20 Vista’s services. [12-8-21 2:4:18 – 5:10]

21 *Vista’s Transactions with New Mexico Healthcare Operators and New Mexico Clients*

22 73. During the Audit Period, Vista contracted with Healthcare Operators with
23 locations in New Mexico. [Taxpayer Ex. 2; Taxpayer Ex. 3]

1 74. Specifically, Vista performed professional placement services for members of the
2 New Mexico Hospital Association. [Stip. ¶ 8]

3 75. New Mexico Hospital Association is a private member organization of
4 approximately forty-five Healthcare Operators (“Private Healthcare Operators”). [Stip. ¶ 8]

5 76. Vista also provided professional placement services for New Mexico Healthcare
6 Operators that are operated by the Indian Health Service (“IHS”), an agency of the U.S.
7 Department of Health and Human Services. [Stip. ¶ 12]

8 *Contracts for New Mexico Healthcare Operators*

9 77. Vista and the New Mexico Healthcare Operators entered into Locum Tenens
10 Agreements (“LT Agreements”). [Taxpayer Ex. 2]

11 78. Vista and Medical Professionals entered into Professional Services Placement
12 Agreements (“PSP Agreements”). [Taxpayer Ex. 4]

13 79. New Mexico Healthcare Operators and Medical Professionals entered into
14 Reassignment Agreements. [Taxpayer Ex. 5; Stip. ¶ 18]

15 *Locum Tenens Agreements*

16 80. Healthcare Operators Services Corporation (“HSC”) is a subsidiary of the New
17 Mexico Hospital Association, which is a member organization of approximately forty-five
18 hospitals. [Stip. ¶ 8; 12-8-21 2:8:21 – 25; 12-8-21 2:9:1]

19 81. HSC represents the New Mexico Healthcare Operators Association members
20 [Healthcare Operators] in negotiating locum tenens agreements for the provision of Medical
21 Professionals through companies like Vista. [Stip. ¶ 9; 12-8-21 2:9:17 – 20]

22 82. HSC is located in New Mexico. [12-9-21 3:62:22 – 23]

23 83. Vista and HSC entered into an LT Agreement, dated June 3, 2009, which is a

1 standard LT Agreement representative of Vista’s LT Agreements with New Mexico Healthcare
2 Operators. [Stip. ¶ 10; 12-8-21 1:49:20 – 50:1; Taxpayer Ex. 2]

3 84. The LT Agreement is a custom contract used by HSC for all staffing agencies.
4 [12-8-21 1:49:23 – 25; 12-8-21 1:51:21 – 25]

5 85. Vista and HSC negotiated and entered into the New Mexico Locum Tenens
6 Program, 2009 – 2011 Locum Tenens Agreement; Physicians, Physician Assistants, Certified
7 Nurse Practitioners and Certified Registered Nurse Anesthetists dated June 3, 2009. [Ex. 2.2 (LT
8 Agreement at Art. 1); Stip. ¶ 10]

9 86. Vista entered into LT Agreements with the New Mexico Healthcare Operators.
10 [Stip. ¶ 4; Taxpayer Ex. 2; Taxpayer Ex. 3]

11 87. LT Agreements specify that Healthcare Operators “are located both in rural and
12 urban settings [in New Mexico], and all have needs for locum tenens placements to a greater or
13 lesser degree.” [Taxpayer Ex. 2.2 (LT Agreement, Purpose)]

14 88. LT Agreements provide that, “HSC seeks to secure physician, physician
15 assistants, certified nurse practitioners, and certified registered nurse anesthetists, locum tenens
16 services for member facilities and other health care entities, participating institutions, and their
17 affiliated physician groups who elect to participate....” [Taxpayer Ex. 2.2 (LT Agreement,
18 Purpose)]

19 89. Vista’s LT Agreements with Government Healthcare Operators are contracts that
20 comply with IHS requirements. [Stip. ¶ 13.]

21 90. The LT Agreements control the legal terms for the services Vista provides to New
22 Mexico Healthcare Operators. [12-8-21 1:50:2 – 8; 12-8-21 1:52:4 – 7; Taxpayer Ex. 2.4 (§
23 III.A, “Agency Requirements”)]

1 91. A standard LT Agreement defines the parties as follows:

2 a. “Participating Institution means an NMHA [i.e., New Mexico
3 Hospital Association] member institution or other customer
4 healthcare entity, and/or its designated affiliated physician
5 groups participating in this Agreement [i.e., the Healthcare
6 Operators].” [Taxpayer Ex. 2.3]

7 b. “Agency means those agencies selected to enter into contracts
8 with HSC and Participating Institutions under the Locum
9 Tenens Program [i.e., Vista].” [Taxpayer Ex. 2.3]

10 c. “Agency Healthcare Provider means the Agency’s independent
11 contractors providing healthcare services to a Participating
12 Institution under this Agreement [i.e., the Professionals]. The
13 Participating Institution and HSC acknowledge that the Agency
14 Healthcare Providers are not the Agency’s employees but are
15 independent contractors.” [Taxpayer Ex. 2.3]

16 92. Medical Professionals are not Vista employees. [Taxpayer Ex. 4, ¶ 11); Stip. ¶ 24]

17 93. HSC receives a monthly fee from Vista to participate in the Locum Tenens
18 Program. [Taxpayer Ex. 2.14 (LT Agreement, Administrative Fee to HSC); 12-8-21 2:10:2 – 5]

19 94. Vista used telephone and email to communicate with its New Mexico Healthcare
20 Operator contacts regarding referrals. [12-8-21 2:4:10 – 15]

21 95. Vista used telephone and email to communicate with Medical Professionals
22 regarding placements with the New Mexico Healthcare Operators. [12-8-21 2:4:10 – 13]

23 96. The standard LT Agreements state:

24 “Prior to the assignment of an agency Healthcare Provider to a
25 Participating Institution: Agency shall assure that an independent
26 contractor agreement is executed between the Agency [i.e., Vista]
27 and the Agency Healthcare Provider [i.e., Medical Professionals]
28 ... Such fully executed independent contractor agreement shall be
29 maintained in the Agency’s file concerning the Agency Healthcare
30 Provider.” [Taxpayer Ex. 2.4, § III.A.2]

31 97. The LT Agreement specified terms to which Vista and the Medical Professionals
32 must agree for Vista to refer, and for Medical Professional to accept, a referral under the LT

1 Agreement. [Taxpayer Ex. 2.4 – 2.6]

2 98. The standard LT Agreements state:

3 “Prior to the assignment of an Agency Healthcare Provider [i.e.,
4 Medical Professional] to a Participating Institution [i.e., Healthcare
5 Operator]: Agency shall . . . inform[] the Agency Healthcare
6 Provider [i.e., Medical Professional] of the matters set forth in this
7 Agreement [i.e., the LT Agreement] which begins with the words
8 ‘Agency shall inform Agency Healthcare Provider,’ or words to
9 that effect.” [Taxpayer Ex. 2.4, § III.A.2]

10 99. During the onboarding process, Vista provides the controlling LT Agreement to
11 Medical Professionals for their review. [12-8-21 1:54:11 – 55:7]

12 100. The standard LT Agreements state:

13 “Agency shall contractually obligate each Agency Healthcare
14 Provider to comply with timely medical documentation on each
15 patient. Agency shall contractually obligate Agency Healthcare
16 Provider to complete such documentation prior to the Agency
17 Healthcare Provider leaving the Participating Institution’s
18 premises. In addition, Agency shall contractually obligate Agency
19 Healthcare Provider to adhere to the clinical check-out procedures
20 as prescribed by the Participating Institution including such
21 procedures related to the change of shifts to ensure that the next
22 practitioner is provided with the information necessary to
23 understand the status of each patient, and the plan for evaluation
24 and care of each patient.” [Taxpayer Ex. 2.6, § III.A.10]

25 101. The standard LT Agreements state:

26 “Agency [i.e., Vista] shall inform each Agency Healthcare
27 Provider [i.e., Medical Professionals] of his or her responsibility to
28 understand, and Agency shall contractually obligate the Agency
29 Healthcare Provider to, comply with all state and federal laws and
30 regulation and all policies and procedures of the Participating
31 Institution [i.e., Healthcare Operators] at which an Agency
32 Healthcare Provider serves related to the confidentiality of
33 protected healthcare information and medical records.” [Taxpayer
34 Ex. 2.6, § III.A.9]

35 102. The standard LT Agreements attach an “Agency Healthcare Provider Contractual
36 Obligation Reference,” which states:

1 “Agency [i.e., Vista] is solely responsible for contractually
2 obligating the Agency Healthcare Provider [i.e., Medical
3 Professional] to comply with certain terms and conditions, and for
4 informing [the Medical Professional] of certain matters, as
5 expressly set forth in the General Terms and Conditions of the
6 Agreement [i.e., the LT Agreement].” [Taxpayer Ex. 2.46]

7 103. The “Agency Healthcare Provider Contractual Obligation Reference” provides a
8 seven-page reference for Vista regarding the multitude of terms to which Vista must
9 contractually obligate the Medical Professionals. [Taxpayer Ex. 2.46 – 52]

10 104. The LT Agreements provide a required billing process that ensures patients
11 receive a single bill for healthcare services received at Healthcare Operator locations. [12-8-21
12 1:60:3 – 61:25; Taxpayer Ex. 2.11, § III.A.3]

13 105. The LT Agreements require the Healthcare Operators to compensate Vista for its
14 services and Medical Professionals for their healthcare services. [Stip. ¶¶ 31 – 32]

15 106. The LT Agreements require Medical Professionals to execute a reassignment
16 letter (“Reassignment Agreement”) to legally grant Healthcare Operators the right to bill for
17 Medical Professionals’ healthcare services. [12-8-21 1:67:6 – 20; Taxpayer Ex. 2.14, § III.D.2]

18 107. The LT Agreements state:

19 “Participating institution [i.e., Healthcare Operators] shall bill,
20 collect and retain all professional fees due for services provided
21 under this Agreement [i.e., Medical Professionals’ healthcare
22 services under the LT Agreement] in accordance with Medicare
23 reassignment rules, and other applicable rules and regulations.”
24 [Taxpayer Ex. 2.14, § III.D.1]

25 108. The LT Agreements state:

26 Agency will provide Participating Institution with a signed
27 Reassignment Agreement for each Agency Healthcare Provider
28 physician [i.e., Medical Professionals] assigned to Participating
29 Institution.” [Taxpayer Ex. 2.14, § III.D.2]

30 109. Vista’s and the Healthcare Operators’ have an “independent contractor

1 relationship.” [Taxpayer Ex. 2.26 (LT Agreement, Independent Contractor, ¶ XIV)]

2 110. Healthcare Operators agree to indemnify Vista and Medical Professionals for
3 “any and all claims, suits, fines, penalties, or damages which may arise from” Healthcare
4 Operators’ billing and collection. [Taxpayer Ex. 2.14, § III.D.3]

5 111. The LT Agreements require Vista to issue bills with all relevant support,
6 including Medical Professionals’ timesheets. [12-8-21 1:60:3 – 15; Taxpayer Ex. 2.11, § III.A.3]

7 112. The LT Agreements provide a list of necessary information for Vista’s billing
8 records, including the Medical Professionals’ name; the dates the Medical Professional
9 performed healthcare services; the area of the Medical Professional’s practice; the Medical
10 Professional’s hours; whether the Medical Professional performed services on a regular,
11 overtime, holiday, or “on-call” basis; the rate or rates for the services; and the total amount
12 Healthcare Operators owe Vista and Medical Professionals. [12-8-21 1:61:4 – 18; Taxpayer Ex.
13 2.13, § III.B.1]

14 113. The LT Agreements require Vista to retain books and records related to the
15 required billing procedures. [12-8-21 1:63:6 – 64:9; Taxpayer Ex. 2.29, § XIX, “Access to Books
16 and Records.”]

17 114. The LT Agreements state:

18 “Agency shall, until the expiration of four years after the providing
19 of services pursuant to this Agreement, retain all of its books,
20 documents and records, which are necessary to certify the nature
21 and extent of all costs and sums paid by or to Participating
22 Institutions under this Agreement. Such books, records and
23 documents shall be made available to the Secretary of Health and
24 Human Services, the Comptroller General, or their duly authorized
25 representatives on request.” [Taxpayer Ex. 2.29, § XIX]

26 115. The LT Agreements grant Healthcare Operators the right of access to Vista’s
27 books and records to ensure compliance with the LT Agreement’s billing process. [12-8-21

1 1:63:6 – 65:10; Taxpayer Ex. 2.9-10, § II.E, “HSC Audit.”]

2 116. The LT Agreements state:

3 “HSC may conduct random audits, at HSC’s expense, for
4 contractual compliance, either on-site or at HSC offices, of the
5 Agency’s application, screening and billing files of Agency
6 Healthcare Providers who have ... provided services pursuant to
7 this Agreement.” [Taxpayer Ex. 2.9, § II.E, “HSC Audit.”]

8 *Professional Services Placement Agreements*

9 117. The PSP Agreement establishes the legal relationship between Vista and Medical
10 Professionals. [Taxpayer Ex. 4 (PSP Agreement); Stip. ¶ 16); 12-8-21 1:69:20 – 24]

11 118. The PSP Agreement defines the Medical Professional as “Professional;” Vista as
12 the “Company;” and Healthcare Operators as the “Client.” [Taxpayer Ex. 4.1; 12-8-21 1:71:5 –
13 8]

14 119. Under the PSP Agreement, Medical Professionals assign to Vista all rights to
15 receive payments from Healthcare Operators for placements made pursuant to this agreement.
16 [Taxpayer Ex. 4.1, ¶ 3; 12-8-21 1:72: 13 – 17]

17 120. Under the PSP Agreement, a Medical Professional’s relationship with Vista is one
18 of independent contractor. [Taxpayer Ex. 4.2, ¶ 11]

19 121. Under the PSP Agreement, a Medical Professional’s relationship with a
20 Healthcare Operator is one of independent contractor. [Taxpayer Ex.4.1, ¶ 2]

21 122. Under the PSP Agreement, a Medical Professional has “no authority to bind
22 [Vista].” [Taxpayer Ex. 4.3, ¶ 24(d)]

23 123. Under the PSP Agreement, “[i]t is agreed that [Vista] is an agent for [Medical]
24 Professional and [Healthcare Operators] in arranging Locum Tenens placements.” [Taxpayer Ex.
25 4.2, ¶ 11]

26 124. Healthcare Operators are not a party to, nor have they seen, the PSP Agreement

1 between Vista and a Professional. [12-8-21 2:29:9 - 12]

2 125. At no point does the PSP Agreement disclose any sort of agency relationship or
3 whether the Medical Professional has any rights or remedies directly against the Healthcare
4 Operator. [Taxpayer Ex. 4]

5 126. Under the PSP Agreement, additional terms and conditions are provided in a
6 Placement Letter. [Taxpayer Ex. 4 ,¶ 3]

7 127. After a Medical Professional accepts a placement, Vista provides the PSP
8 Agreements for Medical Professionals to review and execute. [12-8-21 1:71:13 – 22]

9 128. Under the PSP Agreement, Professionals are independent contractors from Vista
10 and any client. [Stip. ¶ 25; Taxpayer Ex. 4.2]

11 129. Medical Professionals are not Vista employees. [Stip. ¶ 24; Taxpayer Ex. 4.2]

12 130. The standard PSP Agreements state:

13 “[Medical] Professional’s relationship to Company [i.e., Vista]
14 under this Agreement, and [Medical] Professional’s relationship to
15 any Client, shall be and remain that of independent contractor.
16 [Medical] Professional shall not exercise any control of any nature
17 over the manner in which [Vista] conducts its activities under this
18 Agreement. [Vista] shall not exercise any control of any nature
19 relating to the manner in which or means by which [Medical]
20 Professional performs professional medical services or reaches
21 decisions in the practice of medicine in any placement.” (Taxpayer
22 [Ex. 4.2]

23 131. The PSP Agreements provide:

24 “It is agreed that [Vista] is an agent for [Medical] Professional and
25 Clients [i.e., Healthcare Operators] in arranging Locum Tenens
26 placements, and [Vista] is neither an employment agency nor an
27 employee leasing company.” [Taxpayer Ex. 4.2]

28 132. The PSP Agreements disavow any agency relationship between Vista and the
29 Medical Professionals:

30 “No Authority to Bind [Vista]. [Medical] Professional has no

1 authority to enter into contracts or agreements on behalf of [Vista].
2 This agreement does not create a partnership or any agency
3 relationship between the parties [i.e., Vista and the Professional].”
4 [Taxpayer Ex. 4.3]

5 133. Under the PSP Agreement, Vista agrees to disburse the Medical Professionals’
6 compensation from amounts Vista receives from Healthcare Operators. [Stip. ¶ 26; Taxpayer Ex.
7 4.1, § 3]

8 134. The PSP Agreements state:

9 “[Medical] Professional assigns to Company [i.e., Vista] all rights
10 to receive payments from Clients [i.e., Healthcare Operators] for
11 placements made pursuant to this Agreement. From the amounts
12 received, [Vista] will pay over to [Medical] Professional [the]
13 amount as agreed for each placement.” [Taxpayer Ex. 4.1, § 3]

14 135. The PSP Agreements require Medical Professionals to enter into Reassignment
15 Agreements that grant Healthcare Operators the exclusive right to bill for the Medical
16 Professionals’ healthcare services performed at Healthcare Operators’ locations. [Stip. ¶ 27;
17 Taxpayer Ex. 4.1-4.2, §§ 3, 13]

18 136. The reassignment is in accordance with Medicare rules and other applicable
19 regulations. [Taxpayer Ex. 5 (Reassignment Agreement, ¶¶ “A” and “B”)]

20 137. The standard PSP Agreements state:

21 “[Medical] Professional agrees that all billings for services
22 rendered to patients during any placement under this Agreement
23 shall be and remain the property of, and shall be invoiced and
24 collected by, the Client [i.e., Healthcare Operators]. [Medical]
25 Professional grants to such Client the authority to endorse and
26 deposit as appropriate all checks and other instruments or items
27 that may be payable to [Medical] Professional with respect to such
28 services rendered by [Medical] Professional.” [Taxpayer Ex. #4.2
29 § 13]

30 *Reassignment Agreements*

31 138. The LT Agreements and PSP Agreements require Medical Professionals to

1 execute a Reassignment Agreement. [Taxpayer Ex. 2.14, § III.D.2; Taxpayer Ex. 4.2 § 13; Stip.
2 ¶¶ 18 – 19]

3 139. Vista provides Reassignment Agreements to Medical Professionals that are
4 consistent with the sample Reassignment Agreement attached to the LT Agreement. [12-8-21
5 1:75:24 – 76:4; Taxpayer Ex. 5]

6 140. Medical Professionals execute the Reassignment Agreements to assign their
7 billing and collection rights to the Healthcare Operators. [Stip. ¶¶ 28, 29]

8 141. The Reassignment Agreements state:

9 “It is hereby agreed that only Hospital [i.e., Healthcare Operator]
10 shall bill, collect and retain fees received from the Medicare
11 program and all other applicable payers for the professional
12 medical services furnished by the Physician [i.e., Medical
13 Professional] at the Hospital. The Physician will not bill or collect
14 fees from the Medicare program, patients, or any other applicable
15 payer for any service furnished by Physician at the Hospital. The
16 Hospital will timely submit to the appropriate Medicare contractor
17 a Form CMS- 855R, which includes a Reassignment of Benefits
18 Statement authorizing the reassignment of Physician’s benefits to
19 the Hospital.” [Taxpayer Ex 5.1]

20 142. Healthcare Operators then bill certain payors, including insurance companies,
21 managed care organizations, and government programs, for Medical Professionals’ healthcare
22 services. [Taxpayer Exs. 2.14; 5.1]

23 *Fees From New Mexico Transactions*

24 143. Healthcare Operators compensate Vista for both Vista’s services and services
25 furnished by Medical Professionals. [Stip. ¶¶ 31 – 32; 12-8-21 1:46:19 – 47:1; 12-8-21 1:47:2 –
26 25; Taxpayer Ex. 15]

27 144. Medical Professionals receive compensation for their services based on their
28 hours worked. [12-8-21 1:46:3 – 23]

29 145. Medical Professionals prepare and submit timesheets to Healthcare Operators and

1 Vista. [12-8-21 1:45:10 – 17; 12-8-21 1:60:5 – 15]

2 146. Vista uses the timesheets to disburse to Medical Professionals their compensation
3 for healthcare services performed at Healthcare Operators' locations. [12-8-21 1:46:3 – 7]

4 147. Vista bills Healthcare Operators for both Vista's service fee and for Medical
5 Professionals' healthcare service fees. [Stip. ¶ 33]

6 148. Healthcare Operators transmit to Vista the Medical Professionals' fees for
7 healthcare services provided to patients at Healthcare Operators' locations along with Vista's
8 service fees. [Stip. ¶¶ 30 – 32; Taxpayer Ex. 2.13 (LT Agreement, Program Terms and
9 Classifications, III((B)(1))]

10 149. Under the LT Agreement, Vista shall submit and invoice to Healthcare Operators
11 at least once a month for services performed by Medical Professional during the prior month.
12 [Taxpayer Ex. 2.13 (LT Agreement, Program Terms and Classifications, III((B)(1))]

13 150. Under the LT Agreement, the parties, including Medical Professional's
14 relationship with Healthcare Operators, disavowed any agency relationship and established the
15 relationship between the parties as independent contractors. [Taxpayer Ex. 2.26 (LT Agreement,
16 Independent Contractor)]

17 151. Under the LT Agreement, HSC explicitly disclaimed any responsibility regarding
18 any payment a Healthcare Operators might owe Vista. [Taxpayer Ex. 2.13 (LT Agreement,
19 Program Terms and Classifications, III(B)(3))].

20 152. Under the LT Agreement, the Healthcare Operator will indemnify Vista and the
21 Medical Professional only for billing and collection "claims, suits, fines, penalties, and damages
22 which may arise from participating institution's billing and collection activities related to
23 services provided by the agency and agency health care provider." [Taxpayer Ex. 2.14 (LT

1 Agreement, Program Terms and Classifications, D(3))]

2 153. Under the LT Agreement, HSC explicitly disclaimed any duty to indemnify
3 Medical Professionals for any losses or damages for negligence or other wrongful conduct.

4 [Taxpayer Ex. 2.25 (LT Agreement, Indemnification, XIII(B))]

5 154. For the Audit Period, New Mexico Healthcare Operators disbursed a total of
6 \$43,427,732.12 to Vista, which included both Vista's service fees of \$14,772,315.71 and
7 Medical Professionals' healthcare service fees of \$28,655,425.43. [Stip. ¶ 5; Taxpayer Ex. 7.1 –
8 7.2]

9 155. For the Audit Period, New Mexico Hospital Association members disbursed
10 \$32,926,192.32 to Vista, which included both Vista's service fees of \$10,394,724.88 and
11 Medical Professionals' healthcare service fees of \$22,531,476.44. [Stip. ¶ 6; Taxpayer Ex. 7.1 –
12 7.2; 12-8-21 1:34:15 – 21]

13 156. Vista's contract with HSC controls the services provided by Vista to all New
14 Mexico Private Healthcare Operators. [Stip. ¶ 11]

15 157. For the Audit Period, IHS agencies disbursed \$10,501,539.80 to Vista, which
16 included both Vista's service fees of \$4,377,590.83 and Medical Professionals' healthcare
17 service fees of \$6,123,948.99. [Stip. ¶ 7; Taxpayer Ex. 7.1 – 7.2; 12-8-21 1:34:15 – 21]

18 158. Vista's LT Agreements with Gallup Indian Medical Center control the services
19 provided by Vista to Government Healthcare Operators that paid the majority of Vista's
20 \$10,501,539.80 receipts from Government Healthcare Operators. [Stip. ¶ 15]

21 159. Vista did not know how many independent contractors it placed with New
22 Mexico Healthcare Operators during the audit period. [12-8-21 2:7:18 – 22]

23 160. All independent contractors staffed at Healthcare Operators in New Mexico by

1 Vista were issued 1099s rather than W-2s by Vista during the audit period. [12-8-21 2:8:9 – 11]

2 161. Vista has never received any determination that it is a joint employer from the
3 Department of Labor or the Internal Revenue Service. [12-8-21 2:8:17 – 20]

4 162. Vista agrees to pay Medical Professional's for their services with amounts
5 received from Healthcare Operators with any excess amount being retained by Vista as
6 compensation for its services. [Taxpayer Ex. 4.1, ¶ 3; Stip. ¶ 26; 12-8-21 2:12:9 – 13]

7 163. Vista bills the Healthcare Operators at least once a month but not more than four
8 times a month. [Taxpayer Ex. 2.13 (LT Agreement, Program Terms and Classifications,
9 III(B)(3); 12-8-21 2:15:1 – 6]

10 164. Vista's invoice does not break out Vista's fee and the Medical Professional's fee.
11 [12-8-21 2:31:13 – 16; Taxpayer Ex. 18.5 (Invoice)]

12 165. Healthcare Operators are to pay Vista within 60 days after receipt of a complete
13 and accurate invoice and timesheets. [12-8-21 1:59:20 – 22; Taxpayer Ex. 2.11 (LT Agreement,
14 Program Terms and Classifications, III(B)(3))]

15 166. The LT Agreement informs Vista it was responsible for applicable gross receipts
16 tax. [Taxpayer Ex. 2.10 (LT Agreement, Program Terms and Classifications, III(A)(1)(a)]

17 167. Vista's parent companies' tax department determined that Vista did not have a
18 filing obligation with New Mexico. [12-8-21 2:18:4 – 8; 12-8-21 2:18:21 – 25]

19 168. There was no showing that Vista's parent companies' tax department had any
20 specific expertise in New Mexico gross receipts tax. [12-8-21 2:19:1 – 2]

21 169. Vista did not file New Mexico Gross Receipts Tax returns during the Audit
22 Period. [Stip. ¶ 36]

23 170. As a result of the audit, the Department issued a Notice of Assessment of Taxes

1 and Demand for Payment under Letter ID No. L0797491376 (“Assessment”) to Vista on
2 September 25, 2018. [Stip. ¶ 41]

3 171. The Assessment is for New Mexico Gross Receipts Tax in the amount of
4 \$2,090,515.39, interest of \$379,924.37, and a civil negligence penalty of \$418,103.08. [Stip. ¶
5 42]

6 172. On December 30, 2018, Vista filed a Formal Protest with the New Mexico
7 Taxation and Revenue Department Protest Office contesting the Assessment in its entirety. [Stip.
8 ¶ 43]

9 Procedural History

10 173. On March 21, 2019, the Department filed a Hearing Request with the
11 Administrative Hearings Office. [Administrative File]

12 174. The Hearing Request was accompanied by a copy of the Assessment, Vista’s
13 Formal Protest, and a written acknowledgement of Vista’s Formal Protest dated February 4,
14 2019. [Administrative File]

15 175. On March 25, 2019, the Administrative Hearings Office entered Notice of
16 Telephonic Scheduling Hearing which set an initial hearing in the protest for April 12, 2019.
17 [Administrative File]

18 176. An initial telephonic scheduling hearing occurred on April 12, 2019 at which time
19 neither party objected that the hearing would satisfy the 90-day hearing requirement of Section
20 7-1B-8 (A). [Administrative File]

21 177. On April 15, 2019, the Administrative Hearings Office entered an Order to
22 Conduct Informal Conference and Notice of Second Telephonic Scheduling Hearing. The second
23 telephonic scheduling hearing was set to occur on October 11, 2019. [Administrative File]

1 178. A second telephonic scheduling hearing occurred on October 11, 2019 at which
2 time Vista expressed the desire to engage in further discussion with the Department and
3 reconvene for scheduling in four months. The Department did not object and a hearing was set
4 for January 10, 2020. [Administrative File]

5 179. The Administrative Hearings Office entered a Notice of Third Telephonic
6 Scheduling Hearing on October 17, 2019. [Administrative File]

7 180. On November 13, 2019, Mr. Hamme, counsel for Vista, filed an Affidavit of Non-
8 Admitted Lawyer and Registration Certification of Non-Admitted Lawyer recording his
9 admission *pro hac vice* consistent with Rule 24-106 NMRA. [Administrative File]

10 181. On January 10, 2020, the Administrative Hearing Office entered a Notice of
11 Fourth Telephonic Scheduling Hearing after Taxpayer requested additional time to engage in
12 additional discussions with the Department. The hearing was set for February 28, 2020.
13 [Administrative File]

14 182. On March 5, 2020, the Administrative Hearings Office entered a Notice of
15 Telephonic Status Hearing set for May 1, 2020. The parties agreed to a status hearing in lieu of a
16 scheduling hearing due to the progress the parties mutually perceived as significantly narrowing
17 or resolving issues. Subsequent status hearings were noticed and held on: June 12, 2020; July 6,
18 2020; September 4, 2020; October 2, 2020; November 16, 2020; January 15, 2021; February 12,
19 2021; March 12, 2021. [Administrative File]

20 183. On March 12, 2021, the Department advised that the protest could not be resolved
21 without a hearing. Because Vista's counsel desired an additional opportunity to confer with his
22 client, scheduling was set to occur on April 2, 2021. A Notice of Telephonic Scheduling Hearing
23 was entered on March 16, 2021. [Administrative File]

1 184. A Notice of Telephonic Scheduling Hearing was entered on April 5, 2021 after
2 the parties agreed that they would benefit from additional discussions. The Administrative
3 Hearings Office entered a Notice of Telephonic Scheduling Hearing which set a hearing for May
4 7, 2021. [Administrative File]

5 185. On May 13, 2021, the Administrative Hearings Office entered a Scheduling Order
6 and Notice of Administrative Hearing which set a hearing on the merits of Vista's protest to
7 commence on October 25, 2021. [Administrative File]

8 186. On July 21, 2021, the parties filed a joint motion to revise discovery and motions
9 deadlines. [Administrative File]

10 187. On July 23, 2021, the Administrative Hearings Office entered an Amended
11 Scheduling Order and Notice of Administrative Hearing which adopted the deadlines to which
12 the parties stipulated. [Administrative File]

13 188. On August 12, 2021, the parties filed a second joint motion to revise discovery
14 and motions deadlines. [Administrative File]

15 189. On August 13, 2021, the Administrative Hearings Office entered a Second
16 Amended Scheduling Order and Notice of Administrative Hearing which adopted the deadlines
17 to which the parties stipulated. [Administrative File]

18 190. On September 30, 2021, the parties filed a third joint motion to revise discovery
19 and motions deadlines. [Administrative File]

20 191. On October 4, 2021, the Administrative Hearings Office entered a Third
21 Amended Scheduling Order and Notice of Administrative Hearing which adopted the deadlines
22 to which the parties stipulated. [Administrative File]

23 192. On October 6, 2021, the Administrative Hearings Office entered a Notice of

1 Telephonic Status Hearing which upon agreement of the parties, was set for October 7, 2021.

2 [Administrative File]

3 193. On October 7, 2021, the Administrative Hearings Office conducted a status
4 hearing and entered an Order Vacating and Resetting Administrative Hearing for December 8,
5 2021. [Administrative File]

6 194. On November 29, 2021, the Administrative Hearings Office entered a Notice of
7 Telephonic Status Hearing which set a status hearing for the same day with the agreement of the
8 parties. [Administrative File]

9 195. On November 30, 2021, Mr. Robert Desiderio, Esq. and Ms. Janette Angelica
10 Duran, Esq. entered their appearances as co-counsel for Vista. [Administrative File]

11 196. On December 1, 2021, Mr. Desiderio filed a Proof of Compliance with *Pro Hac*
12 *Vice* Requirements indicating that Mr. Simonetti, was authorized to appear before the
13 Administrative Hearings Office on behalf of Vista. [Administrative File]

14 197. On December 1, 2021, the Department and Vista filed their respective prehearing
15 statements. [Administrative File]

16 198. On December 10, 2021, the Administrative Hearings Office entered a Post
17 Hearing Briefing Schedule. [Administrative File]

18 199. On March 21, 2022, Vista filed Petitioner's Post-Hearing Closing Argument.
19 [Administrative File]

20 200. On March 24, 2022, the Department filed Department's Motion to Strike Vista's
21 Post Hearing Closing Argument. [Administrative File]

22 201. On March 25, 2022, Vista submitted an email to the Administrative Hearings
23 Office, which was also simultaneously copied to the Department, which explained that the

1 parties had conferred and agreed that Taxpayer would withdraw and resubmit its Post Hearing
2 Brief with all objectionable material removed. The Department verified its intent to withdraw its
3 Motion to Strike Vista’s Post Hearing Closing Argument. [Administrative File¹]

4 202. On March 28, 2022, Vista filed Petitioner’s Post-Hearing Closing Brief.
5 [Administrative File]

6 203. On August 24, 2022, the Department filed Department’s Closing Brief.
7 [Administrative File]

8 204. On September 22, 2022, Vista filed Petitioner’s Reply Brief. [Administrative File]

9 **DISCUSSION**

10 As a preliminary observation, the parties diverge on the terminology used to describe
11 Vista’s services. Vista describes its services as “recruitment.” The Department favors “staffing.”
12 Upon considering the facts established by the evidence, the arguments of counsel, and
13 Taxpayer’s formal name of “Vista *Staffing* Solutions, Inc.,” the Hearing Officer will use the
14 terms “staff” or “staffing” to describe Vista’s services throughout the following discussion being
15 cognizant that the term is less significant to the analysis than the actual conduct of the parties.

16 However, the distinction for Vista is significant because it asserts that a staffing service
17 satisfies the needs of its clients by placing its own “employees,” while a “recruiting” company
18 satisfies the same need through identification of “independent contractors” and facilitation of
19 their placement. For reasons that will be further explained in the following discussions, the
20 Hearing Officer perceives the distinction as trivial and insignificant to the determination of
21 Vista’s tax liability.

22 In this protest, the evidence established that during the audit period, Vista staffed Medical

¹ The items referenced herein remain in the Administrative File, but were not reviewed or considered during the preparation of this Decision and Order.

1 Professionals to various medical facilities across the country, including several facilities in New
2 Mexico from where it derived receipts, exceeding \$40 million, for the services of Medical
3 Professionals and its own service fees combined. *See* Taxpayer Ex. 7.

4 In summary, if one of Vista's independent contractor Medical Professionals matched the
5 staffing need of a Healthcare Operator, the Healthcare Operator could contract with Vista for
6 placement of that Medical Professional in its facility to provide medical services.

7 In return, the Healthcare Operator paid Vista a fixed hourly rate for the services provided
8 by the Medical Professional plus an additional fee for Vista's services. At all relevant times,
9 Vista was obligated to compensate the Medical Professional for their services and authorized to
10 retain any excess amount as its fee. When the Department assessed gross receipts tax on all of
11 Vista's receipts earned in New Mexico under this arrangement, Vista timely protested the
12 Assessment under the Tax Administration Act.

13 Vista asserts that the Assessment should be abated for the following reasons: (1) Vista
14 did not conduct its business activities within the State of New Mexico; (2) amounts paid to
15 Medical Professionals should be excluded from taxation as reimbursed expenditures of an agent
16 in a disclosed agency capacity; (3) civil negligence penalty should not apply because it assertedly
17 exercised reasonable business care and prudence and because its interpretation of its reporting
18 and payment obligations was grounded on good faith and reason. Vista also argued in
19 Petitioner's Reply Brief (written rebuttal closing) in favor of the application of NMSA 1978,
20 Sections 7-9-93 and 7-9-77.1.

21 **Presumption of Correctness.**

22 Under NMSA 1978, Section 7-1-17 (C) (2007), the Assessment issued in this case is
23 presumed correct. Consequently, Taxpayer has the burden to rebut the presumption. *See*

1 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶ 11, 84 N.M. 428. Unless otherwise specified, for the
2 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*
3 NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of
4 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and
5 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50, ¶
6 16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be
7 given substantial weight).

8 Accordingly, it is Taxpayer’s burden to present some countervailing evidence or legal
9 argument to rebut the presumption of correctness. *See N.M. Taxation & Revenue Dep’t v. Casias*
10 *Trucking*, 2014-NMCA-099, ¶8; *Gemini Las Colinas, LLC v. N.M. Taxation & Revenue Dep’t*,
11 ___-NMCA-___, ¶ 27, No. A-1-CA-38672 (March 13, 2023)² The question of whether a taxpayer
12 has satisfied this initial burden of production is a threshold legal determination in which the hearing
13 officer determines whether a taxpayer has produced some countervailing evidence tending to
14 dispute the correctness of the assessment. *See Gemini*, ___-NMCA-___, ¶¶ 21 – 23; 25. Vista satisfied
15 its initial burden of production.

16 If a taxpayer, as Vista did in this protest, satisfies the initial burden of production, then the
17 burden of production shifts to the Department to present evidence showing the correctness of its
18 assessment beyond mere assertions that a taxpayer’s evidence is unreliable or not credible. *See*
19 *Gemini*, ___-NMCA-___, ¶ 29. The hearing officer is then to weigh the evidence presented from both
20 parties under the preponderance standard and determine whether a taxpayer has carried its burden of
21 persuasion in the protest. *Id.*

22 Because the Hearing Officer is persuaded that both parties satisfied their respective burdens

² Because this is such a recent opinion from the Court of Appeals, it is unknown at the time of this Decision and Order whether certiorari will be sought, let alone whether it might be granted or denied.

1 of production, the remainder of this Decision and Order will concentrate on their respective burdens
2 of persuasion.

3 **Gross Receipts Tax.**

4 “The purpose of the Gross Receipts and Compensating Tax Act is to provide revenue for
5 public purposes by levying a tax on the privilege of engaging in certain activities within New
6 Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise
7 result from the importation into the state of property without payment of a similar tax.” *See* NMSA
8 1978, Section 7-9-2 (1966); *Dell Catalog Sales LP v. NM Taxation & Revenue Dept.*, 2009-NMCA-
9 001, ¶ 29, 145 N.M. 419, 425, 199 P.3d 863, 869 (“Our gross receipts tax seeks to achieve fairness
10 between out-of-state sellers and New Mexico sellers who sell to New Mexico customers.”)

11 For the privilege of engaging in business in New Mexico, a gross receipts tax is imposed
12 on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2002). The
13 term “gross receipts” is defined to mean:

14 [T]he total amount of money or the value of other consideration
15 received from selling property in New Mexico, from leasing or
16 licensing property employed in New Mexico, from granting a right to
17 use a franchise employed in New Mexico, from selling services
18 performed outside New Mexico, the product of which is initially used
19 in New Mexico, or from performing services in New Mexico.

20 *See* NMSA 1978, Section 7-9-3.5 (A) (1) (2007)

21 “Receipts include payments received for one’s own account and then expended to meet
22 one’s own responsibilities.” *See MPC Ltd. v. New Mexico Taxation & Revenue Dept.*, 2003-
23 NMCA-021, ¶ 14, 133 N.M. 217, 220, 62 P.3d 308, 311. There is a statutory presumption that all
24 receipts of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2002).
25 “Engaging in business” is defined as “carrying on or causing to be carried on any activity with
26 the purpose of direct or indirect benefit.” *See* NMSA 1978, Section 7-9-3.3 (2003). *See also*

1 *Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403 (gross receipts applies to “all
2 activities or acts engaged in (personal, professional and corporate) or caused to be engaged in
3 with the object of gain, benefit[,] or advantage either direct or indirect.”)

4 The first question to consider is whether Vista was engaged in business in New Mexico.
5 The answer will assist in evaluating if, or to what extent, Vista is subject to New Mexico’s Gross
6 Receipts and Compensating Tax Act.

7 Engaging in Business in New Mexico

8 As previously stated, engaging in business means “carrying on or causing to be carried on
9 any activity with the purpose of direct or indirect benefit.” Here, Vista was engaged in placing
10 Medical Professionals in Healthcare Operator facilities, in New Mexico, in order to provide
11 services for remuneration, in New Mexico. It was from this activity, the placement of a Medical
12 Professional, that Vista received a direct benefit in the form of compensation.

13 This business activity satisfies the definition of “engaging in business” and activates the
14 presumption of taxability under NMSA 1978, Section 7-9-5. However, Vista may still avail itself
15 of applicable deductions, exemptions, or relevant statutory exclusions to reduce its liability. The
16 evaluation will begin with the definition of “gross receipts” and proceed with a discussion of
17 whether any portion of Vista’s receipts are excluded by definition.

18 Statutory Exclusion for Selling Services Performed Outside New Mexico

19 The definition of “gross receipts” includes “money or the value of other consideration
20 received from ... performing services in New Mexico[.]” *See* Section 7-9-3.5 A (1) (2017). Vista
21 asserts that it derives gross receipts from selling “recruiting” services, and because those services
22 are performed exclusively outside of New Mexico, its receipts derived from selling those services
23 are not taxable to New Mexico under the definition of “gross receipts.”

1 Among other points, Vista emphasizes that: (1) its business activities were performed
2 outside of New Mexico; (2) it has never maintained a New Mexico business office; (3) it has never
3 maintained employees in New Mexico.

4 However, Vista's argument is not persuasive. Recruiting, although a component of the
5 service provided, was not an activity from which Vista generated income. Instead, Vista
6 generated income through the successful placement of Medical Professionals, in New Mexico,
7 with Healthcare Operators, in New Mexico, to provide services for remuneration, in New
8 Mexico. Receipts derived as a direct result of the placement, not from the recruiting activities
9 that may have assisted the placement.

10 Conversely stated, Vista generates no income from its out-of-state services alone,
11 including recruiting activities. Receipts are derived only from placing a Medical Professional in a
12 New Mexico healthcare facility and deriving a recurring fee from that placement. Of course,
13 Vista certainly performs out-of-state tasks to facilitate the placement, whether they be identifying
14 qualified professionals, assisting them with obtaining necessary New Mexico credentials, or
15 assisting with travel and lodging, but those tasks are all performed for the purpose of securing
16 the placement. Those services are neither sold *à la carte* nor do they produce any revenue in the
17 absence of a placement, in New Mexico.

18 It is only after Vista successfully brokers a placement in New Mexico that it derives
19 receipts for its services. Then, in order to maximize its return, it assures through its contracts
20 with Healthcare Operators and Medical Professionals that it remains an essential party to the
21 ongoing transaction. Healthcare Operators and Medical Professionals are explicitly prohibited
22 from contracting directly with each other in order to prevent them from excluding Vista from the
23 ongoing transaction.

1 Moreover, Vista’s ongoing involvement in the placement enhances Vista’s opportunity to
2 develop, establish, and maintain its market in New Mexico. Theoretically, once a placement is
3 made, Vista has an advantage in making additional placements, either with the same operator or
4 others who may become familiar with Vista through its work for other operators.

5 Once again, Vista robustly asserts that its business is “recruiting” and that activity occurs
6 exclusively out of state, but this does not fully describe Vista’s objective. Vista’s revenue clearly
7 derives from: (1) the placement of Medical Professionals *in New Mexico*; (2) who provide services
8 *in New Mexico*; (3) under the protection of or subject to the laws *of New Mexico*. *See e.g.* Taxpayer
9 Ex. 2.29 (“The validity, construction and effect of this Agreement shall be governed by the laws of
10 the State of New Mexico.”)

11 Exemption for Receipts from Sale of Out-of-State Services at Section 7-9-13.1

12 Despite the determination that Vista’s receipts derived from the sale of services performed
13 in New Mexico, the Hearing Officer will also consider the potential application of NMSA 1978,
14 Section 7-9-13.1 which states: “exempted from the gross receipts tax are the receipts from selling
15 services performed outside New Mexico the product of which is initially used in New Mexico.”

16 “Where an exemption or deduction from tax is claimed, the statute must be construed
17 strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and
18 unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.”
19 *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶ 16, 111 N.M. 735
20 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-7, ¶
21 9, 133 N.M. 447.

22 This tribunal in a previous case from 2014 determined that Section 7-9-13.1 applied to
23 services in which a tangible “product” is produced. *See In the Matter of the Protest of Adecco*

1 *USA, Inc.*, Decision and Order 14-16, 2014 (May 22, 2014) (non-precedential). The hearing
2 officer in that case observed the contract central to the protest “did not produce a product which
3 was the result of a service performed outside of New Mexico” so the exemption provided by
4 Section 7-9-13.1 did not apply. The Hearing Officer agrees.

5 Yet, even if Section 7-9-13.1 did apply, Vista still falls short of establishing entitlement
6 to its application. Vista explained that its service product was referrals of Medical Professionals,
7 and Healthcare Operators merely used such referrals to fill placements in New Mexico. This
8 position is not persuasive because Healthcare Operators do not pay Vista for referrals or the
9 work it performs in preparation to make such referrals. Healthcare Operators pay for actual
10 placements at their facilities located in New Mexico.

11 The analysis is analogous to *ITT Educ. Services, Inc. v. Taxation & Revenue Dept. of*
12 *State of N.M.*, 1998-NMCA-078, 125 N.M. 244, 959 P.2d 969, in which the Court of Appeals
13 observed that the focus should be on the service contracted for and where it is performed.

14 The taxpayer in *ITT* was a nationwide technical-vocational school with several facilities
15 in New Mexico. It argued that receipts for curriculum development, financial aid services, and
16 job placement services, all of which were performed outside New Mexico, were not subject to
17 the New Mexico gross receipts tax. *ITT* claimed, “each of the activities *ITT* performed outside
18 New Mexico was free standing, substantial, substantively different than ‘teaching,’ and not
19 ‘merely incidental to’ or a ‘component of’ teaching which *ITT* actually performed in New
20 Mexico.” See *ITT*, 1998-NMCA-078, ¶ 9. In this case, Vista seems to make a similar distinction
21 between its recruiting activities and its placement activities from which it derives fees.

22 The Court of Appeals observed “the fact that *ITT* prepared for teaching out of state does
23 not change the fact that the service occurs in state. Focusing on the service contracted for and

1 where ITT performs it, ITT's primary service clearly takes place in New Mexico.” *See ITT*, 1998-
2 NMCA-078, ¶ 13; *See also Mountain States Advert., Inc. v. Bureau of Revenue*, 1976-NMCA-
3 058, 89 N.M. 331, 552 P.2d 233.

4 The same logic applies here. Just as ITT performed some services outside of New
5 Mexico, the focus rests on the service contracted for and where that service is performed.
6 Healthcare Operators contracted for Locum Tenens services in New Mexico (*See Taxpayer Ex.*
7 2.2 (Para. I – Purpose)). Although accomplishing that service may have required out-of-state
8 effort, such as recruiting, that fact does not overcome the reality that Vista derived its revenue
9 exclusively from placements made inside New Mexico.

10 Thus, focusing on the service contracted for and where Vista performs it, Vista’s primary
11 service clearly takes place in New Mexico and it consists of the actual placement of Medical
12 Professionals at facilities in New Mexico in exchange for compensation. Healthcare Operators
13 contract for placement of Medical Professionals. Placements are accomplished in New Mexico.
14 Recruiting can occur from any of Vista’s locations, but that activity generates no income for
15 Vista without a subsequent placement.

16 Vista did not establish any right to relief under the exemption contained in NMSA 1978,
17 Section 7-9-13.1 because the evidence failed to establish that the services for which Healthcare
18 Operators contracted were performed or sold outside of New Mexico. To the contrary, the
19 evidence established that the service for which the parties contracted, which was to place
20 Medical Professionals with New Mexico Healthcare Operators occurred in New Mexico.

21 Exclusion of Receipts Received Solely on Behalf of Another in a Disclosed Agency Capacity

22 Vista asserts that compensation received from Healthcare Operators and paid to Medical
23 Professionals represented amounts received solely on behalf of another in a disclosed agency

1 capacity which should be excluded from the computation of taxable gross receipts. *See* NMSA
2 1978, Section 7-9-3.5 A (3) (f) (2007).

3 That provision excludes from gross receipts “amounts received solely on behalf of
4 another in a disclosed agency capacity.” The Department, under Regulation 3.2.1.19 (C) (1)
5 NMAC, determines that “(a)n agency relationship exists if a person has the power to bind a
6 principal in a contract with a third party so that the third party can enforce the contractual
7 obligation against the principal.” If such relationship should exist, then Regulation 3.2.1.19 (C)
8 (2) NMAC further requires that any reimbursements for expenses incurred as an agent be
9 separately stated on the respective invoice and marked as reimbursements in the agent’s books
10 and records.

11 Although *MPC Ltd.* has been the seminal case for more than two decades, the law
12 establishing the current analysis has been developing for more than 50 years beginning in
13 *Westland Corporation v. Commission of Revenue*, 1971-NMCA-083, ¶38, 83 N.M. 29. In that
14 case, the New Mexico Court of Appeals found no support for the imposition of gross receipts tax
15 on the receipts of a person who served as a “friendly agent” for the limited purpose of “receiving
16 and paying out sums for debts or obligations owing” from another company.

17 In *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247, the New Mexico
18 Court of Appeals again considered agency in the gross receipts tax context. *Carlsberg* involved a
19 property management group that managed an apartment complex for that property’s owner. The
20 rent at the apartment complex was subsidized by a federal agency. The taxpayer claimed that the
21 federal agency mandated the form of the agreement in place between that taxpayer and the owner
22 and that agreement identified the taxpayer as “agent.” *See Carlsberg*, ¶¶ 3-4. Under an agency
23 theory, the taxpayer argued that money it received from the owner’s reimbursements of

1 payments of employee wages was not subject to gross receipts tax. *See Carlsberg*, ¶5-11.

2 The New Mexico Court of Appeals explained “that a principal’s control over the agent is
3 the key characteristic of an agency relationship.” *See Carlsberg*, ¶12. Further, the Court of
4 Appeals instructed that it was a factual determination whether there was an agency relationship
5 between a purported principal and agent. The Court of Appeals began that factual determination
6 by looking at the terms of the relevant agreement and explained that when the contract is
7 unambiguous, the language of the contract determines the intent of the parties without further
8 interpretation. *See Carlsberg*, ¶¶ 16-17. The Court of Appeals went on to conclude that the
9 contract created an unambiguous agent-principal relationship and rejected the Department’s
10 requirement that an agent be disclosed, instead opting to adopt a California rule that “if a party
11 only receives money either as an advance for future payment of, or reimbursement for past
12 payment of, another's employment-related obligations, then an agency relationship exists
13 sufficient to avoid taxation of those funds as gross receipts. *Carlsberg*, 1993-NMCA-121 (*citing*
14 *Programming-Enterprises, Inc. v. City of Los Angeles*, 215 Cal.App. 3d 281, 263 Cal.Rptr. 558
15 (Ct.App.1989).

16 The Court of Appeals ultimately determined that “[t]he level of control [o]wner exercised
17 over [t]axpayer left [t]axpayer with no discretion concerning when and how much to pay the
18 employees.” For this reason, it concluded that the taxpayer “never possessed funds representing
19 the wages paid to the on-site employees to use as [t]axpayer saw fit.” *See Carlsberg*, 1993-
20 NMCA-121, ¶ 19. Also of importance to the Court of Appeals was the fact that the relevant
21 agreement contained an indemnification clause requiring the owner to pay the taxpayer for
22 employment expenses. *Id.*

23 In *Brim Healthcare, Inc. vs. State*, 1995-NMCA-055, 119 N.M. 818, the Court of

1 Appeals again had an opportunity to consider whether an agency relationship existed to exclude
2 that taxpayer’s claimed reimbursements from the imposition of gross receipts tax. In rejecting the
3 taxpayer’s claim of an agency relationship, the Court observed several reasons why the facts in
4 that case were distinguishable from *Carlsberg*. The most significant distinguishing factor was the
5 lack of an indemnification clause in the agreement at issue in *Brim*. *See id.* Yet, another
6 distinction cited in *Brim* was that the relevant contracts expressly noted that the taxpayer was
7 “not an agent... but rather is an independent contractor.” Ultimately, *Brim* affirmed the hearing
8 officer’s conclusion that the money was not received as “reimbursement of expenses as an
9 agent.” *See Brim*, ¶18.

10 While *Carlsberg* expressly rejected the Department’s previous policy and regulation
11 allowing for exemption of gross receipts only when there is a disclosed agency relationship, a
12 subsequent legislative enactment limited the *Carlsberg* holding. *See MPC*, 2003-NMCA-021,
13 ¶14.

14 At the time of *Carlsberg*, the gross receipts tax definition contained no provision
15 excluding from the computation of gross receipts tax any receipts received solely on behalf of
16 another in a disclosed agency capacity. After *Carlsberg*, the Legislature enacted an explicit
17 provision excluding receipts of a disclosed agent from the definition of “gross receipts.” *See*
18 Section 7-9-3.5 (A) (3) (f). The new provision simply read that “gross receipts” excluded
19 “amounts received solely on behalf of another in a disclosed agency capacity.”

20 In 2003, the Court of Appeals in *MPC, Ltd.* considered agency relations in the context of
21 the gross receipts tax system for the first time since enactment of the exclusion. In so doing, the
22 Court of Appeals cautioned that *Carlsberg* and *Brim* were both decided before the Legislature’s
23 enactment of the “disclosed agency” exclusion under Section 7-9-3.5 (A) (3) (f), and therefore

1 those cases had limited instructive value. *See MPC, Ltd.*, 2003-NMCA-021, ¶34.

2 *MPC, Ltd.* involved a taxpayer that provided temporary staffing services to its clients in
3 New Mexico. Although that taxpayer had mostly verbal contracts with its clients, there were a
4 few written agreements in place. The taxpayer’s clients supervised the activities of the assigned
5 employees, but the client did not pay the employees. Instead, the clients paid the taxpayer which
6 in turn, then paid the employee’s wages, benefits, and withholdings. The taxpayer claimed those
7 receipts should not be included in gross receipts because it “received the amounts purely as a
8 conduit between its clients and its employees.”

9 The argument in *MPC, Ltd.* required the Court of Appeals to consider both a regulation
10 addressing joint employers³ and the statutory and regulatory disclosed agent requirements. In
11 addition to addressing how the enactment of the disclosed agency exclusion under Section 7-9-
12 3.5 (A) effected the *Carlsberg* holding, the Court of Appeals also considered application of
13 Department Regulation 3.2.1.19 (C) (1) NMAC which interpreted and implemented Section 7-9-
14 3.5 (A) (3) (f).

15 The Court of Appeals in *MPC, Ltd.*, ¶36, construed Regulation 3.2.1.19 (C) (1) NMAC to
16 mean that:

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

22 The Court of Appeals continued by stating:

23 Section 7-9-3 (F) (2) (f) requires a disclosure to the employee of an
24 agency relationship. This breaks down into the requirements that

³ *MPC, Ltd.* devoted significant discussion to a regulation addressing a joint employer relationship which is not in dispute in this protest. In fact, during the Department’s cross-examination of Mr. Murphy, he acknowledged that Vista has not sought nor received any ruling from the Department of Labor or the IRS finding Vista to be a joint employer.

1 there be a relationship by which the principal is liable (and knows
2 he is liable) to the employee for payroll if the agent fails to pay,
3 and that the agent disclose this relationship and obligation to the
4 employee.

5 Additionally, when interpreting Regulation 3.2.1.19 (C) (2), the Court of Appeals noted
6 that it imposed additional bookkeeping requirements that must be met in order to exclude
7 receipts received in a disclosed agency capacity from gross receipts. *See MPC, Ltd.*, ¶36.

8 *MPC, Ltd.* remains controlling and has been central to the analysis of this issue since it
9 was published approximately 20 years ago. Within this framework, Vista's claim to the disclosed
10 agency exclusion is not supported by the facts or sufficient to satisfy the basic elements
11 expounded by *MPC, Ltd.*

12 First, the Hearing Officer is not persuaded that Vista had authority to obligate Healthcare
13 Operators in a contract with Vista's Medical Professionals, or that Vista's Medical Professionals
14 were informed of any right to proceed directly against the Healthcare Operators to enforce such
15 obligations if they existed.

16 The Hearing Officer recognizes that Vista was under a contractual obligation with
17 Hospital Service Corporation to require certain terms and conditions in contracts between Vista
18 and its Medical Professionals, but those requirements do not transform Vista into an agent
19 satisfying the agency requirements in *MPC, Ltd.* *See e.g.* Taxpayer Ex. 2.46. Vista simply had no
20 authority to bind Hospital Service Corporation or any Healthcare Operators to contractual
21 obligations with Vista's Medical Professionals. Moreover, the relevant agreements fail to permit
22 Medical Professionals to proceed directly against Hospital Service Corporation or any of its
23 Healthcare Operators if they perceived that Vista had failed to satisfy any of its contractual
24 obligations to them (i.e. the right for a Medical Professional to proceed directly against a
25 Healthcare Operator if Vista failed to compensate the Medical Professional).

1 If such authority could be implied in the LT Agreement, such implication was nullified
2 by the explicit disclaimer of an agency relationship at Taxpayer Ex. 2.26 (Sec. XIV) which
3 clearly and unambiguously states:

4 “Nothing in this Agreement shall be construed as creating anything
5 other than an independent contractor relationship between Agency
6 [Vista], Agency Healthcare Provider [Medical Professional], HSC
7 [Healthcare Service Corporation] and participating Institutions
8 (Including their respective employees, contractors or affiliate
9 entities).”

10 It goes on to essentially disclaim any and all obligations that might arise over the duration
11 of a placement, including provision of benefits and withholding of or payment of applicable
12 taxes.

13 In contrast, Vista emphasizes other provisions in Taxpayer Ex. 2 in which it is agreeing
14 to certain obligations with respect to its Medical Professionals, but none of those provisions
15 suggest creation of a disclosed agency relationship as contemplated by *MPC, Ltd.* in that those
16 provisions are not authorizing or otherwise suggesting that Vista has the authority to contract on
17 behalf of Healthcare Service Corporation or any other Healthcare Operator.

18 To the extent support for such authority may be extrapolated from the indemnification
19 clause at Taxpayer Ex. 2.25 – 2.26 (Sec. XIII), the Hearing Officer observed that each provision
20 in which either Healthcare Service Corporation or Vista agreed to indemnify, defend, and hold
21 harmless contained an explicit exclusion for “Agency Healthcare Providers,” which under the LT
22 Agreement means Vista’s Medical Professionals. *See* Taxpayer Ex. 2.3 (Sec. I.B (definition of
23 “Agency Healthcare Provider”). Another indemnification clause at Taxpayer Ex. 2.14 (Sec.
24 III.D.3) does not create any enforceable obligation between a Healthcare Operator and Vista and
25 its Medical Professionals unless arising from the Healthcare Operator’s medical billing or
26 collection errors. In other words, for example only, if a billing error resulted in an overpayment

1 by a payor for which the payor sought reimbursement from the Medical Professional, then the
2 Medical Professional could seek indemnification from the Healthcare Operator that received the
3 overpayment. *See e.g.* Taxpayer Ex. 2.37.

4 But on the whole, the LT Agreement, when read in its entirety, does not authorize Vista
5 to bind a principal in a contract with a third party so that the third party can enforce the
6 contractual obligation against the principal. *See MPC, Ltd.*, 2003-NMCA-021, ¶ 37.

7 Because the relevant agreements make clear that no agency relationship existed between
8 Vista and Healthcare Service Corporation, or any Healthcare Operators, Vista's assertions that it
9 was an agent consistent with the guidance of *MPC, Ltd.* is simply not supported by the evidence.

10 The same observations are true for assertions that Vista could be a disclosed agent of the
11 federal government and Indian Health Services (IHS). A review of the primary contract
12 (Taxpayer Ex. 3) failed to reveal any explicit terms that could be construed as granting Vista the
13 authority of an agent to the federal government, or any of its agencies, consistent with the
14 elements illustrated in *MPC, Ltd.*

15 Even if there was sufficient evidence for the Hearing Officer to find that Vista had actual
16 authority to bind a Healthcare Operator to an obligation made to a Medical Professional, Vista's
17 claim to the exclusion would still fail.

18 Vista must also prove that the beneficiary of such obligation (or in this case, the Medical
19 Professional) is informed by contract that he or she has a right to proceed against the principal
20 (Healthcare Service Corporation or any other Healthcare Operator) to enforce the obligation.

21 Vista emphasizes several places in the various agreements where Medical Professionals
22 were made aware of Vista's role in their placements, stressing frequent use of the term "agent."
23 For example, Vista highlights that Vista and its Medical Professionals entered into PSP

1 Agreements in which Vista was identified as “agent for [Medical] Professional and Clients in
2 arranging Locum Tenens placements.” *See* Taxpayer Ex. 4.2 (Para. 11). Having reviewed this
3 clause, as well as all the others to which the Hearing Officer was directed, in addition to
4 reviewing the contracts in full, the Hearing Officer was unable to conclude that Medical
5 Professionals were explicitly informed of any right to proceed directly against Healthcare
6 Service Corporation or any Healthcare Operators, nor did the Hearing Officer observe any
7 provisions actually establishing such right, except perhaps in the limited situation involving
8 “claims, suits, fine[s], penalties, and damages which may arise from [Healthcare Operator’s]
9 billing and collection activities relating to services provided by [Vista] and [Medical
10 Professional].” *See* Taxpayer Ex. 2.14.

11 This, however, does not create the authority for Medical Professionals to proceed with
12 claims directly against Healthcare Operators if, for example, Vista fails or refuses to pay Medical
13 Professionals for their services. Use of the word, “agent,” without some evidence of actual
14 authority consistent with *MPC, Ltd.*, did not prove existence of an actual disclosed agency
15 relationship in which Vista had the authority of an agent as contemplated by *MPC, Ltd.* or the
16 regulations it considered. Along the same line, there is also no indication that Healthcare Service
17 Corporation or any Healthcare Operators knew they would be liable directly to a Medical
18 Professional if Vista failed to compensate them for their services under a Placement Agreement.

19 Finally, even if Vista had established the essential elements under *MPC, Ltd.*, its claim
20 against the Assessment under the disclosed agency exception would still fall short because there
21 is insufficient evidence to establish adherence to Regulation 3.2.1.19 (C) (2) which establishes
22 mandatory and minimal bookkeeping requirements necessary to exclude receipts received as a
23 disclosed agent. *See MPC, Ltd.*, ¶36.

1 Regulation 3.2.1.19 C (2) NMAC (2010, Rp. 10/13/2021) provides that “[r]eceipts from
2 the reimbursement of expenses incurred as agent on behalf of a principal while acting in a
3 disclosed agency capacity are not included in the agent’s gross receipts if the expenses are
4 *separately stated on the agent’s billing to client* and are identified in the agent’s books and
5 records as reimbursements of expenses incurred on behalf of the principal party.” (Emphasis
6 Added). In this case, Mr. Murphy, upon reference to one of Vista’s invoices (Taxpayer Ex. 18.5)
7 admitted on cross-examination, without any attempt to correct or clarify on re-direct
8 examination, that Vista’s invoices do not contain any differentiation between amounts due to
9 Medical Professionals and service fees due to Vista. (Hrg’ Tr. 2:31:13 – 16). Vista nevertheless
10 claims that its clients knew that their payments to Vista included payments for the services of
11 Vista’s Medical Professionals. However, this argument is unavailing since the regulations
12 require something more specific which Vista admittedly did not do.

13 For these reasons, Vista has not satisfied the requirements of Section 7-9-3.5 (A) (3) (f)
14 and Regulation 3.2.1.19 (C) (1) NMAC, as construed by *MPC, Ltd.*, ¶36. Accordingly, there is
15 insufficient evidence on which to conclude that money received by Vista to be paid to Vista’s
16 Medical Professionals is excluded from taxation. Such receipts, under the facts of this case, are
17 taxable. *See MPC, Ltd.*, 2003-NMCA-021, ¶14 (“Receipts include payments received for one’s
18 own account and then expended to meet one’s own responsibilities.”)

19 The Hearing Officer notes that the Legislature, in 2022, enacted a definition for the term
20 “disclosed agency” which became effective on July 1, 2022. *See* NMSA 1978, Section 7-9-3 D
21 (2022). The Legislature then amended the definition of “disclosed agency” in 2023 that will
22 become effective on July 1, 2023. *See* 2023 New Mexico Laws Ch. 85 (S.B. 147). Because there
23 is no explicit or contextual indication of the Legislature’s intention for either the 2022 or the

1 2023 enactments to apply retrospectively, they are not considered in this protest. *See* NMSA
2 1978, Section 12-2A-8 (“A statute or rule operates prospectively only unless the statute or rule
3 expressly provides otherwise or its context requires that it operate retrospectively.”) The audit
4 periods underlying the Assessment in this protest extend from 2010 to 2017 and precede the
5 more recently enacted and amended “disclosed agency” definition by several years.

6 Whether Certain Receipts are Consideration to Vista

7 In the alternative to Vista’s argument that it was a disclosed agent as discussed in the
8 previous section, Vista asserts that the receipts that funded the compensation paid to the Medical
9 Professionals for their services were not consideration to Vista. Vista’s position that receipts
10 which may have been expended to compensate Medical Professionals were not “consideration”
11 similarly fails to persuade.

12 “Consideration is the bargained-for exchange between the parties.” *See Smith v. Vill. of*
13 *Ruidoso*, 1999-NMCA-151, ¶ 33, 128 N.M. 470, 478, 994 P.2d 50, 58. The definition of the term
14 as provided at Regulation 3.2.1.7 B NMAC explains that “consideration” in the gross receipts tax
15 context is “any benefit, interest, gain or advantage to one party, usually the seller, or any
16 detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or
17 service given, suffered, or undertaken by the other party, usually the buyer.”

18 It usually applies in the gross receipts tax context when someone engaging in business is
19 compensated with something of value other than money. Note that the definition of gross
20 receipts includes the “total amount of money *or the value of other consideration* received[.]” *See*
21 Section 7-9-3.5. For example, this might apply in situations where an auto mechanic repairs a
22 carpenter’s truck and the carpenter, in exchange for the service, builds the mechanic a bookshelf, in
23 which case the value of the bookshelf would form the basis for the gross receipts tax owed by the

1 mechanic. *See also* Regulation 3.2.1.14 C NMAC.

2 Taxpayer asserts that the term is significant because receipts received and paid to Medical
3 Professionals did not represent consideration, or anything of value, to Vista. It relies on *Stohr v.*
4 *New Mexico Bureau of Revenue*, 1976-NMCA-118, ¶ 12, 90 N.M. 43, 47, 559 P.2d 420, 424 for the
5 proposition that “[c]onsideration’ does not include amounts to cover incidental purchases for
6 another when the taxpayer does not receive an independent benefit from such amounts.” Reliance
7 on *Stohr* under the facts at issue in this protest is problematic. More than 40 years have elapsed
8 since *Stohr* during which time the relevant statute has been amended and *MPC, Ltd.* has laid the
9 groundwork for the present-day analysis. That is not to suggest that *Stohr* is no longer good law, but
10 its analysis in the context of this protest is limited in similar manner to *Carlsberg, Brim*, and any
11 other case which was decided under the prior version of the law. Moreover, *MPC, Ltd.* also
12 observed under circumstances more analogous to the issues presented in this protest that, “[r]eceipts
13 include payments received for one’s own account and then expended to meet one’s own
14 responsibilities.” *See MPC, Ltd.*, 2003-NMCA-021, ¶14.

15 Moreover, Vista’s receipt of those funds did convey a benefit in that having control of the
16 money flow was advantageous to its business strategy. Mr. Murphy explained that Vista’s ongoing
17 involvement in the transaction augmented opportunities to establish, maintain, and expand its New
18 Mexico market.

19 Double Taxation

20 Vista suggests that it should not be liable for the tax consequences of its independent
21 contractors (Medical Professionals) because each taxpayer is liable for the tax consequences of
22 its own activities. The Hearing Officer agrees that this reflects the general policy of New
23 Mexico.

1 However, to the extent Vista asserts that application of New Mexico’s gross receipts tax
2 under the circumstances in this protest results in an impermissible double taxation, that argument
3 is unsupported by the evidence. The fact that both Vista and its Medical Professionals might⁴
4 both be liable for gross receipts tax on receipts received by Vista and paid to Medical
5 Professionals is not necessarily prohibited. New Mexico imposes a gross receipts tax on the
6 receipts of a person or entity engaged in business. In this instance, Vista is a distinct and separate
7 taxpayer from the Medical Professionals. Even though a portion of the receipts derived in a
8 placement transaction eventually get passed on to the Medical Professional as compensation for
9 their services, it is still paid to Vista in satisfaction for the placement. The Medical Professional
10 receives their share through Vista for performing medical services for the Healthcare Operator.

11 Healthcare Operator’s payments to Vista and Vista’s subsequent payments to Medical
12 Professionals constitute separate transactions in the absence of a genuine disclosed agency
13 relationship. Only those payments from Healthcare Operators to Vista have been assessed as
14 Vista’s gross receipts. This does not constitute double taxation. *See House of Carpets, Inc. v.*
15 *Bureau of Revenue*, 1973-NMCA-034, ¶ 19, 84 N.M. 747, 750, 507 P.2d 1078, 1081.

16 **Taxpayer Not Entitled to Health Care Services Deductions.**

17 The Department argued that Vista’s Post-Hearing Brief ostensibly waived claims for
18 relief under NMSA 1978, Section 7-9-93 and 7-9-77.1 because it did not present any argument in
19 support of relief under those statutes. Vista proceeded to argue application of those statutes in its
20 Reply Brief. The Hearing Officer agrees with the Department’s perspective on waiver. Issues
21 raised for the first time in a reply brief will not be considered. *See Hale v. Basin Motor Co.*,

⁴ The Hearing Officer will not speculate with respect to the potential tax liability of Medical Professionals because that issue is not before the tribunal. “Every person is charged with the reasonable duty to ascertain the possible tax consequences of his action.” *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, ¶ 5, 90 N.M. 16, 17, 558 P.2d 1155, 1156

1 1990-NMSC-068, ¶ 23, 110 N.M. 314, 321, 795 P.2d 1006, 1013.

2 However, this will not preclude the Hearing Officer from discussing the issue anyway to
3 complete the record. The application of NMSA 1978, Sections 7-9-93 and 7-9-77.1 was
4 previously raised even though it was not expressly argued in Taxpayer’s Post-Hearing Brief. *See*
5 *e.g.* Taxpayer Ex. 13.8.

6 As previously observed, “[w]here an exemption or deduction from tax is claimed, the
7 statute must be construed strictly in favor of the taxing authority, the right to the exemption or
8 deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly
9 established by the taxpayer.” *See Wing Pawn Shop*, 1991-NMCA-024, ¶ 16; *See also TPL*, , 2003-
10 NMSC-7, ¶ 9. After reviewing the language of the two deductions and the facts of this case, Vista
11 did not establish entitlement to the two cited deductions.

12 In pertinent part, Section 7-9-77.1 (A) provides a deduction for “receipts of a health care
13 practitioner from payments by the United States government or any agency thereof for provision
14 of medical and other health services by a health care practitioner or of medical or other health
15 and palliative services by hospices or nursing homes to medicare beneficiaries...”

16 Similarly, Section 7-9-93 (A) provides:

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

27 While these deductions might potentially apply to some of Vista’s Healthcare Operator
28 clients, their benefits would not extend to, nor encompass, a business that generates revenue

1 from placing Medical Professionals with those Healthcare Operators because of the nature of
2 services provided and how they are billed. Vista is not in the business of performing medical
3 services. Vista is engaged in the business of providing staffing services to medical facilities. It is
4 the facilities, not the staffing company, that provide the services potentially subject to the
5 deductions under Sections 7-9-77.1 and 7-9-93.

6 Even if the deductions did apply to a third-party staffing company, Vista did not
7 demonstrate that its receipts were eligible for deduction as payments from a qualifying entity. In
8 order to qualify for a deduction under Section 7-9-93, a taxpayer must establish that receipts
9 received were paid by a managed health care provider or health care insurer. *See e.g. Benvenuti*
10 *v. New Mexico Taxation & Revenue Dep't*, 2022 WL 17959156, at *3 (N.M. Ct. App. Dec. 27,
11 2022) (non-precedential). The same is true for Section 7-9-77.1 which requires both that the
12 services be provided pursuant to Medicare and that the people receiving the services be Medicare
13 beneficiaries. *See e.g. Four Corners Healthcare Corp. v. New Mexico Taxation & Revenue*
14 *Dep't*, 2022 WL 17663616, at *4 (N.M. Ct. App. Dec. 14, 2022) (non-precedential).

15 Vista's evidence, however, established that payments were received from Vista's
16 Healthcare Operator clients. The Healthcare Operator clients compensated Vista for its services
17 and the services of its Medical Professionals on an hourly basis (i.e. hourly rate \times number of
18 hours worked). *See* Taxpayer Ex. 18. Vista did not bill Healthcare Operators or qualified payors
19 for specific medical services performed for the benefit of eligible patients. This is significant
20 because a Medical Professional working a 12-hour shift would be compensated based on those
21 hours regardless of the number of patients they treated or the service they rendered.

22 For this reason, there is no evidence in which to conclude that any qualifying entity (a
23 managed health care provider or health care insurer in the case of Section 7-9-93 or Medicare

1 under Section 7-9-77.1) would compensate a Healthcare Operator, Vista, or a Medical
2 Professional for merely being on duty or on call for a specified number of hours, yet that was the
3 obligation Healthcare Operators incurred to Vista and Vista incurred to Medical Professionals
4 (payment per hour at a specified rate). Vista did not establish entitlement to either deduction
5 under the evidence presented.

6 **Penalty.**

7 Vista argued that in the event it was found liable for the assessed tax principal, penalty
8 should nevertheless be abated because it acted with reasonable business care and prudence and was
9 not negligent. Moreover, it also asserts that error, if any, resulted from a mistake of law made in
10 good faith and on reasonable grounds.

11 When any taxpayer fails to pay taxes due to the State because of negligence or disregard
12 of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69
13 (2007) requires:

14 there *shall* be added to the amount assessed a penalty in an amount
15 equal to the greater of: (1) two percent per month or any fraction of
16 a month from the date the tax was due multiplied by the amount of
17 tax due but not paid, not to exceed twenty percent of the tax due
18 but not paid.

19 (Emphasis Added)

20 The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances
21 where a taxpayer's actions or inactions meet the legal definition of "negligence." *See Marbob*
22 *Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the
23 word "shall" in a statute indicates the provision is mandatory absent clear indication to the
24 contrary). Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to
25 exercise that degree of ordinary business care and prudence which reasonable taxpayers would
26 exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C)

1 “inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.”
2 Taxpayer meets this definition of negligence, and thus is potentially subject to civil negligence
3 penalty under Section 7-9-69. This conclusion is reached due to the absence of any reliable and
4 trustworthy evidence which would have established that Vista exercised a degree of ordinary
5 business care and prudence which reasonable taxpayers would exercise under like circumstances.
6 Vista’s reliance on its “tax department” or its “tax compliance department,” without more
7 explanation of the information it relied upon in making its determination that tax reporting and
8 payment was not necessary, is insufficient to relieve Vista of liability for penalty.

9 However, in instances where a taxpayer might otherwise fall under the definition of civil
10 negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: “[n]o
11 penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due
12 results from a mistake of law made in good faith and on reasonable grounds.” Here, there is no
13 evidence that Taxpayer engaged in any formal consultation or study of the issue before
14 determining that tax reporting and payment were not required. *See C & D Trailer Sales v.*
15 *Taxation and Revenue Dep’t*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there
16 was no evidence that the taxpayer “relied on any informed consultation” in deciding not to pay
17 tax). *See also In the Matter of the Protest of Santa Fe Tow and Emergency Lock & Key*, Decision
18 and Order No. 15-21 (June 30, 2015) (non-precedential) (hearing officer abated penalty on a
19 disclosed agent case when that taxpayer presented evidence that a CPA had advised the receipts
20 were non-taxable reimbursements under the disclosed agency exclusion).

21 In this case, Taxpayer is negligent for failure to exercise that degree of ordinary business
22 care and prudence which reasonable taxpayers would exercise under like circumstances or

1 inadvertence, erroneous belief, or inattention. Vista has not established entitlement to an abatement
2 of penalty.

3 Overall, the parties presented thorough and compelling arguments in support of their
4 positions. Yet, Vista nevertheless failed to persuade the Hearing Officer through its evidence and
5 arguments that it was entitled to the relief sought.

6 For the reasons discussed herein, Vista's protest should be DENIED.

7 CONCLUSIONS OF LAW

8 A. Taxpayer filed a timely, written protest of the Department's Assessment and
9 jurisdiction lies over the parties and the subject matter of this protest.

10 B. Under NMSA 1978, Section 7-9-3.3 (2002), Taxpayer engaged in business in New
11 Mexico.

12 C. Under NMSA 1978, Section 7-9-5 (2002), all of Taxpayer's receipts in New
13 Mexico are presumed subject to New Mexico's gross receipts tax.

14 D. Taxpayer failed to establish legally and factually that it was a disclosed agent of
15 its clients, as interpreted by Regulation 3.2.1.19 (C) (1) NMAC and *MPC, Ltd. v. TRD*, 2003-
16 NMCA-021, 133 N.M. 217, and thus the receipts in question are not excludable from gross
17 receipts taxation under NMSA 1978, Section 7-9-3.5 (A) (3).

18 E. Taxpayer did not establish entitlement to deductions under NMSA 1978, Section
19 7-1-77.1 or NMSA 1978, Section 7-9-93. *See Wing Pawn Shop v. Taxation and Revenue*
20 *Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted).

21 F. Taxpayer did not establish entitlement to exemption under NMSA 1978, Section
22 7-9-13.1. *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111
23 N.M. 735 (internal citation omitted).

1 G. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest
2 under the Assessment. Interest continues to accrue until the tax principal is satisfied.

3 H. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence
4 penalty because Taxpayer's inaction in failing to file and pay gross receipts tax during the relevant
5 period met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

6 I. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds
7 that would allow for abatement of penalty under Section 7-1-69 (2007).

8 J. None of the indicators of non-negligence found under Regulation 3.1.11.11 NMAC
9 allow for abatement of penalty under the facts established in this protest.

10 For the foregoing reasons, Taxpayer's protest **IS DENIED**. Taxpayer is ordered to pay
11 the assessed tax, penalty, and interest.

12 DATED: April 7, 2023

13 

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

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.
13

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing on the parties listed below this 7th day of April,

3 2023 in the following manner:

4 *First Class U.S. Mail and Email*

First Class U.S. Mail and Email

5
6 *INTENTIONALLY BLANK*