

1 receipts tax. Ultimately, after making findings of fact and discussing the issue in more detail
2 throughout this decision, the Hearing Officer finds that 1) Taxpayer overcame the presumption of
3 correctness; 2) that under the shifting burden of production, the Department did not produce
4 sufficient evidence to justify its assessment, and 3) even if the Department had met its shifting
5 burden, Taxpayer persuasively established by the preponderance that the receipts stemmed from
6 out-of-state sales. Therefore, Taxpayer ultimately prevails in this protest. IT IS DECIDED AND
7 ORDERED AS FOLLOWS:

8 **FINDINGS OF FACT**

9 1. On August 12, 2019, under letter id. no. L1785687216, the Department issued a
10 Notice of Assessment of Taxes and Demand for Payment to Trader Barbs Old Town LLC for
11 \$30,921.61 in gross receipts tax, \$6,184.33 in civil negligence penalty, and \$5,489.96 in interest,
12 for a total assessment of \$42,595.90 for the combined reporting periods of January 1, 2013
13 through December 31, 2016. [Administrative Record, Hearing Request Packet, Assessment].

14 2. On November 12, 2019, Taxpayer filed a formal protest of the Department's
15 assessment, along with a Supplemental Memo and a Tax Information Authorization for Mr.
16 Talwar and Mr. Haslam. [Administrative Record, Hearing Request Packet, Protest].

17 3. On November 26, 2019, the Department acknowledged receipt of Taxpayer's
18 protest. [Administrative Record, Hearing Request Packet, Acknowledgement Letter].

19 4. On May 22, 2020, the Department filed a request for hearing on the protest with
20 the Administrative Hearings Office, along with its formal answer to Taxpayer protest.
21 [Administrative Record, Hearing Request Packet, Request for Hearing].

22 5. This matter was initially consolidated with another related protest, Trader Barbs,
23 an assessment under letter id. no. L0413293744. However, over the course of this proceeding,

1 that other assessment was substantially abated and Taxpayer withdrew its protest of that other
2 assessment. Nevertheless, some evidence about that other related assessment was discussed and
3 presented at hearing because it provided background and context for the factual and procedural
4 history of this protest.

5 6. Barbara Pratt moved to New Mexico in 1966 to teach school in Albuquerque.
6 [Direct Testimony of Pratt].

7 7. Ms. Pratt started teaching and volunteering near Old Town in Albuquerque, where
8 she often walked around and explored, admiring the variety of local jewelry stores in that area.
9 Ms. Pratt dreamed of running a store like that someday in Old Town. [Direct Testimony of
10 Pratt].

11 8. In 1970, upon her son's birth, Ms. Pratt stopped teaching school, started making
12 custom jewelry herself, and started her business, Trader Barbs. A few years later, Trader Barbs
13 hired a silversmith and an inlay artist to assist in the business. [Direct Testimony of Pratt].

14 9. Trader Barbs attended regular, annual trade shows across the country (and outside
15 of New Mexico), selling its custom jewelry primarily and substantially to out-of-state customers.
16 [Direct Testimony of Pratt].

17 10. Examples of regular out-of-state trade shows where Trader Barbs sold its jewelry
18 include the Cheyenne Frontier Days in Cheyenne, Wyoming; the Illinois State Fair in
19 Springfield, Illinois; the Eastern Exhibition in West Springfield, Massachusetts; the National
20 Finals Rodeo in Las Vegas, Nevada; the Gem Show in Quartzite, Arizona; the Pima County Fair
21 in Tucson, Arizona; and the Arabian Show in Scottsdale, Arizona. [Direct Testimony of Pratt].

22 11. Ms. Pratt's husband Reid Pratt was instrumental in traveling to and setting up
23 Trader Barb's out-of-state trade shows, driving an RV, setting up displays for the jewelry from

1 storage in each state where the couple regularly attended the shows, and storing the displays after
2 the show in storage for the next year. [Direct and Cross-examination of Pratt].

3 12. At these out-of-state trade shows, many out-of-state customers would want the
4 jewelry they purchased customized in certain ways. After the trade shows, Trader Barbs would
5 return to New Mexico, produce these custom orders using its silversmith or inlay artist, and then
6 ship the completed, customized jewelry to the out-of-state customers. [Direct Testimony of
7 Pratt].

8 13. With her husband's encouragement, Ms. Pratt briefly changed its name from
9 Trader Barbs to Silver Classics, but Ms. Pratt did not care for that name and changed the
10 business name back to Trader Barbs. There is no evidence that this name change had any bearing
11 during the relevant assessment period. [Cross-examination of Pratt].

12 14. With encouragement of her husband, Ms. Pratt opened her store in Old Town
13 Albuquerque, a business named Trader Barbs Old Town, LLC. [Direct Testimony of Pratt].

14 15. Trader Barbs Old Town, LLC, is the entity identified in the Department's
15 assessment remaining at issue in this protest.

16 16. Trader Barbs Old Town LLC is a separate business and entity from Trader Barbs,
17 with separate books of account and a different business model in that it operated as a storefront
18 business in Old Town Albuquerque versus the out-of-state trade show work done by Trader
19 Barbs. [Redirect Testimony of Pratt].

20 17. Upon recommendations of their longtime CPA Robert Mattine, the Old Town
21 business was separate from Trader Barbs trade show business and the two entities kept separate
22 records of account, separate books, and separate books of banking deposits. [Direct Testimony of
23 Pratt].

1 18. While all the deposits ultimately went into one bank account, Ms. Pratt kept
2 separate deposit books for each entity. [Hearing Officer Questions of Pratt].

3 19. Ms. Pratt met one or twice a month with Taxpayer's CPA, Mr. Mattine, to review
4 the business and receipts and each transaction personally with him. [Direct and Cross-
5 examination Testimony of Pratt].

6 20. Trader Barbs Old Town, LLC, rented space in Old Town from the archdiocese.
7 During the last five-year lease agreement with the archdiocese, Ms. Pratt obtained an option to
8 terminate the lease because of her husband's declining health. [Direct Testimony of Pratt].

9 21. When Ms. Pratt's husband passed away, Ms. Pratt exercised the termination
10 clause on Trader Barbs Old Town LLC's lease, vacated her Old Town storefront, and ended that
11 line of business in approximately 2019. [Direct Testimony of Pratt].

12 22. After her husband passed away, Ms. Pratt focused solely on her out-of-state trade
13 show business, Trader Barbs. Because her husband was such a critical part of that business,
14 including assisting with driving and set-up at shows across the country, Ms. Pratt had to cut back
15 significantly on the number of annual trade shows she attended after his death. [Direct
16 Testimony of Pratt].

17 23. In July of 2018, Ms. Pratt's home suffered a monsoon flood, flooding her
18 basement and destroying many of the relevant business records (between 2013 and 2016) stored
19 in that basement of both Trader Barbs and Trader Barbs Old Town LLC. [Direct Testimony of
20 Pratt; Taxpayer Ex. #1].

21 24. After being in business for 52-years, Ms. Pratt employed a uniform system of
22 maintaining business records for both Trader Barbs and Trader Barbs Old Town LLC that she
23 used during the relevant period of the assessments. Although those particular records were
24 destroyed in the flood, her business records provided for 2017 are representative of the

1 transactions records she had in 2013, 2014, 2015, and 2016 before the flood destroyed them.
2 [Direct Testimony of Pratt; Taxpayer Ex. #2].

3 25. In its representative 2017 invoice records, Taxpayer would capture the customer's
4 names, address, date of order, phone number; type of merchandise and customization
5 instructions; and a shipping tracking number, date of shipment, and amount of shipping
6 insurance. [Redirect Testimony of Pratt; Taxpayer Ex. #2].

7 26. Ms. Pratt has operated her business in the same manner for 52-years in terms of
8 how she keeps her records, invoices customers, pays for shipping, does her banking, and pays
9 her taxes. The only thing different about the relevant period is her records were largely destroyed
10 in a flood, but her business practices did not change in that period. [Direct Testimony of Pratt].

11 27. Ms. Pratt's system ordinarily involves invoices in triplicate of every transaction
12 for each entity, showing the customers name, phone number, and address, nature of the order/
13 customization, date and destination of shipment, shipping insurance amount, and shipping
14 tracking numbers (either written on the invoice or stapled to back of the invoice). [Cross-
15 Examination of Pratt; Taxpayer Ex. #2].

16 28. The triplicate invoices from this period, including the tracking information, were
17 lost in the flood. [Cross-examination of Pratt].

18 29. Ms. Pratt customarily requested the customer's phone numbers as part of a
19 custom order, so she could contact them with questions about the order, let them know when a
20 product shipped, or other issues with the order. However, not all customers were willing to
21 provide their phone number. [Cross-examination of Pratt].

22 30. Against a Department suggestion to the contrary, Ms. Pratt credibly testified that
23 she did not write off or remove gross receipts tax for out-of-state customers who made in-store
24 purchases of ready-made deliverable products at her Old Town store front. This practice was

1 anathema to Ms. Pratt, who was operating a legitimate, long-time business, nor would it have
2 made financial sense, as the cost of shipping of the deliverable products out-of-state would
3 exceed the cost of the tax. Any ready-made, deliverable item sold in-state from her storefront
4 that were delivered at the store were subject to gross receipts tax and she paid the tax on those
5 transactions. However, she did not collect or pay the tax on custom orders shipped out-of-state.
6 [Cross and redirect examination of Pratt].

7 31. When customers of Taxpayer made in-store purchases in the Old Town store of
8 products that did not need customization, the customer (regardless of whether they lived in New
9 Mexico or were tourists from out-of-state) would take immediate delivery of those products in
10 the store and Taxpayer would collect and remit the applicable gross receipts tax. [Redirect
11 Testimony of Pratt].

12 32. When customers of Taxpayer made a custom order in the Old Town store, no
13 goods were exchanged in the store. Instead, Ms. Pratt would create the triplicate invoice for the
14 custom product (customer name, address, phone number, customization instructions for the
15 product), take a deposit, and then produce the customized jewelry. When the custom jewelry
16 work was completed, Ms. Pratt would contact the customer, get the full payment for the product,
17 and then ship it out to an out-of-state customer. [Redirect Testimony of Pratt].

18 33. For an in-state customers who made a customer order at Taxpayer's Old Town
19 storefront, Ms. Pratt would take a deposit on the product, produce the product, and then have the
20 customer return to the store to make final payment and pick up the product. [Hearing Officer
21 Questions of Pratt].

22 34. Other than pointing to the absence of Taxpayer's records in the relevant years
23 because of their loss in the flood, the Department presented no affirmative evidence of its own

1 supporting its concern that Taxpayer may have been discounting gross-receipts tax on purchases
2 made by out-of-state buyers with immediate delivery of a final product at its storefront location.

3 35. Because Trader Barbs Old Town LLC's complete records in 2013, 2014, 2015,
4 and 2016 were destroyed in the flood, Taxpayer reconstructed its records using partial shipping
5 records and knowledge of its customary business records and practice. [Direct Testimony of
6 Pratt; Taxpayer Ex. #4, #5, #6, and #7].

7 36. As part of its efforts to reconstruct the lost business records, Taxpayer reviewed
8 its US Bank business checking account for Trader Barbs Old Town LLC for all of 2014,
9 identifying checks made out to the United States Postal Service for shipping expenses, as written
10 on the "FOR" line. [Direct Testimony of Pratt; Taxpayer Ex. #9].

11 37. Since the United States Postal Service office was across the street from Trader
12 Barbs Old Town LLC, Ms. Pratt used that office almost exclusively (99% of the time) to ship
13 custom orders from the store. [Direct and Cross-Examination Testimony of Pratt].

14 38. Ms. Pratt's customary practice was to write the purpose of the check on the
15 "FOR" line of the check, such as noting that the payment was for shipping. [Direct Testimony of
16 Pratt].

17 39. Ms. Pratt's business expenses (including shipping expenses) were paid by the
18 issuance of checks and she did not use credit cards for business expenses. [Direct Testimony of
19 Pratt].

20 40. Ms. Pratt only shipped customized orders out of state. Local New Mexico
21 customers picked up customized orders from the store. [Direct Testimony of Pratt].

22 41. Using the shipping costs listed on the checks from the banking records,
23 Taxpayer's CPA Mr. Mattine prepared a comparative analysis estimating which portion of the

1 receipts were for out-of-state sales in conjunction with the shipping costs recorded on the checks.
2 [Direct Testimony of Pratt; Taxpayer Ex. #10].

3 42. Mr. Mattine, CPA, passed away during the pendency of this protest, in April of
4 2022, and thus was unavailable to explain the shipping analysis in detail. [Direct Testimony of
5 Pratt].

6 43. Taxpayer did have some business records, the store's copy of credit card receipts,
7 from the period of April 2014 that survived the flood because they were in a tall metal filing
8 cabinet. [Direct Testimony of Pratt; Taxpayer Ex. #10].

9 44. In absence of the complete sales records for the relevant periods destroyed in the
10 flood, Taxpayer was able to compare existing credit card receipts from Trader Barbs Old Town
11 LLC's to the bank deposits in order to partially recreate business sales record in April of 2014.
12 Taxpayer referred to this as a self-audit. [Direct Testimony of Pratt; Taxpayer Ex. #11, #12, &
13 13].

14 45. Taxpayer carefully worked through the various receipts, matching the amounts of
15 those receipts on Taxpayer Ex. #11 with bank statements in Taxpayer Ex. #12. [Direct
16 Testimony of Pratt; Taxpayer Ex. #11 & #12].

17 46. Taxpayer's self-audit categorized credit card receipts with an out-of-state phone
18 number as an out-of-state sale and those credit cards with an in-state phone number as an in-state
19 sale. This method was an admittedly imperfect method of reconstructing the lost records because
20 there are some instances of credit card receipts showing that the out-of-state customer swiped
21 their credit card in the store and physically signed the receipt, potentially indicative of an in-state
22 sale rather than the out-of-state sale classification. [Hearing Officer Questions of Pratt].

23 47. The credit card receipts list when the credit card information was entered
24 manually by Ms. Pratt (indicative that a customer was not in the store) or when a credit card was

1 swiped, which was indicative of the person being present at the store. [Hearing Officer Questions
2 of Pratt].

3 48. Even credit card receipts where the credit card was swiped in store or a customer
4 physically signed the receipt in the store (meaning they were present in the store), those
5 transactions still may have involved a customized order where the customized jewelry was not
6 complete and delivered at the time of signature of the credit card receipt. In other words, the
7 customized jewelry still needed to be made and then shipped out-of-state to the customer.
8 [Hearing Officer Questions of Pratt].

9 49. On the credit card receipts, there are times when at the top of the receipt it would
10 print it out as a phone order and sometimes it would print out a title as a sale. In theory, this
11 distinction could illustrate a call-in order versus a retail store order. However, Ms. Pratt indicated
12 that the credit card receipt titles were inconsistent and not-reliable compared to what she entered
13 into the credit card machine. [Hearing Officer Questions of Pratt].

14 50. Kira Petersen adopted the March 28, 2023, pre-filed testimony under oath at the
15 hearing. [Direct Testimony of Petersen; Taxpayer Ex. #16].

16 51. Ms. Petersen is legal assistant at the Hurley Law Firm. [Direct Testimony of
17 Petersen; Taxpayer Ex. #16].

18 52. Ms. Petersen was assigned by Taxpayer's counsel to use third-party software
19 program/internet application called PeopleFinders to research the address of Taxpayer's
20 customers identified in Taxpayer's April 2014 self-audit. [Direct Testimony of Petersen;
21 Taxpayer Ex. #16].

22 53. Ms. Petersen's understanding of the PeopleFinder service was that it
23 conglomerated publicly available information about a person into one report. [Direct Testimony
24 of Petersen; Taxpayer Ex. #16].

1 54. Ms. Petersen used her own personal name to test the validity of the information
2 from PeopleFinder and determined that it was accurate for providing her address information.

3 [Direct Testimony of Petersen; Taxpayer Ex. #16].

4 55. Ms. Petersen produced thirty PeopleFinder’s reports for Taxpayer’s customers in
5 the self-audit, all showing that they had out-of-state addresses. [Direct Testimony of Petersen;
6 Taxpayer Ex. #14; Taxpayer Ex. #16].

7 56. On April 10, 2019, Department Auditor Denise Marquez sent Mr. Pratt a letter
8 indicating that after reviewing summaries provided for tax year 2016, that year was “excluded
9 from further audit as all income for both Schedule C’s has been verified as non-taxable.”

10 [Taxpayer Ex. #3].

11 57. Protest Auditor Angelica Rodriguez has worked for the Department for 17 years,
12 including the last two years as a protest auditor. She has an associate degree in accounting from
13 Santa Fe Community College. [Direct Testimony of Rodriguez; Department Ex. M].

14 58. Under oath at the merits hearing, Protest Auditor Rodriguez adopted the following
15 pre-filed testimony:

- 16 a. July 9, 2021, pre-filed witness testimony [Department Ex. M];
- 17 b. December 16, 2021, pre-filed witness testimony [Department Ex. N];
- 18 c. March 16, 2022, supplemental pre-filed witness testimony [Department Ex.
19 O];
- 20 d. June 10, 2022, additional pre-filed witness testimony [Department Ex. P];
- 21 e. March 29, 2023, additional pre-filed witness testimony [Department Ex. Q].

22 [Direct Testimony of Rodriguez].

23 59. Protest Auditor Rodriguez acknowledges that substantiated out-of-state sales are
24 exempt from New Mexico Gross Receipts Tax. [Department Ex. M].

1 60. During the hearing process, Protest Auditor Rodriguez received and reviewed
2 alternative evidence related to Trader Barbs' trade show business and accompanying assessment.
3 Based on that extensive and lengthy review, the Department substantially abated that assessment
4 and Taxpayer withdrew the protest as to that assessment. [Pre-Filed Testimony of Rodriguez;
5 Department Ex. M, P, & Q].

6 61. Protest Auditor Rodriguez reviewed the respective, copies of original
7 bookkeeping records, separate ledgers, subledgers, and sale ledgers of Trader Barbs and Trader
8 Barbs Old Town LLC, along with the bank statements and all the credit card receipts for April
9 2014, for the relevant period as part of her review in this matter. [Cross-examination of
10 Rodriguez].

11 62. Taxpayer in fact paid and reported gross receipts tax in each of the relevant,
12 assessed years. However, because Taxpayer did not include the portion of sales Taxpayer
13 believed were attributable to out-of-state sales not subject to gross receipts tax, there was a
14 mismatch between the total Schedule C business income reported on Taxpayer's federal return
15 and what was reported to New Mexico on the CRS returns in the respective years. [Cross-
16 examination of Rodriguez].

17 63. Although she was willing to consider alternative evidence, Protest Auditor
18 Rodriguez was unconvinced that the credit card receipts with written out-of-state phone numbers
19 were sufficient to demonstrate an out-of-state sale, especially from a high tourist traffic area like
20 Old Town and in the era of cellphones not being as geographically tied to an area code as land
21 lines. [Pre-Filed Testimony of Rodriguez; Department Ex. M, P, & Q].

22 64. Protest Auditor Rodriguez contended that any sale made face-to-face from the
23 Old Town storefront, even if the product was shipped out-of-state, could be subject to gross
24 receipts tax depending on whether the risk-of-loss passed at the store or somewhere else; only

1 sales where the risk of loss passed out-of-state would not be subject to gross receipts tax. [Pre-
2 Filed Testimony of Rodriguez; Department Ex. Q; Cross-examination of Rodriguez].

3 65. Although she did not agree they were relevant to the time-period at issue in this
4 protest, Protest Auditor Rodriguez agreed that the illustrative 2017 invoices Taxpayer provided
5 with shipping information (including tracking numbers either written or attached) to an out-of-
6 state address showed transactions that were out-of-state sales not subject to gross receipts tax. In
7 other words, these 2017 invoices were sufficient to demonstrate out-of-state sales not subject to
8 gross receipts tax in that year. [Cross-examination of Rodriguez].

9 66. Protest Auditor Rodriguez agreed that if a person made a custom-order of jewelry
10 in the store but did not make final payment for that custom order until the product was shipped
11 out of state, that would also be an out-of-state sale not subject to gross receipts tax. [Hearing
12 officer Questions of Rodriguez].

13 67. After seeing all the evidence, Protest Auditor Rodriguez agreed that any manually
14 entered credit card payment reflected an out-of-state sale not subject to gross receipts tax.
15 [Hearing officer Questions of Rodriguez].

16 68. As of March 30, 2023, Protest Auditor Rodriguez indicated that Taxpayer still
17 owed \$30,921.61 in tax principal, \$6,184.32 in penalty, and interest of \$10,191.04. [Pre-filed
18 testimony of Rodriguez; Department Ex. K; Department Ex. Q].

19 69. At the end of the merits hearing, at initial suggestion of the Department, there was
20 discussion about the parties potentially consulting further on a sampling method to make further
21 adjustments/abatements to the outstanding assessment. The parties could not reach an agreement
22 on such a sampling method at that time. The hearing officer indicated on the record that he
23 would reserve ruling for 30-days to allow parties to confer further about that potential sampling
24 method. However, upon email inquiry of May 1, 2023 (and as of the date of this decision),

1 neither party reported any progress on a sampling method audit or potential
2 adjustments/abatement, making this matter ripe for a decision and order on that date.

3 DISCUSSION

4 Taxpayer in this protest seeks complete abatement of the assessed tax principal, penalty,
5 and interest for the reporting periods between 2013 and 2016 primarily because it contends that
6 receipts included in the assessment were attributable to non-taxable out-of-state sales.

7 Alternatively, Taxpayer also argues that the Department was statutorily and equitably estopped
8 from assessing taxes (at a minimum for tax year 2016 if not the entire period) based on the
9 Department's written April 10, 2019, clearance letter, which Taxpayer relied upon. Finally as
10 another alternative to its primary contention, Taxpayer argues that the assessment was beyond the
11 three-year statute of limitations under NMSA 1978, Section 7-1-18 (2013) because its self-audit
12 and efforts to reconstruct destroyed records showed that it had not underreported its taxes by the
13 25% threshold necessary to extend that period to six-years. In response, the Department alleges
14 that Taxpayer did not maintain adequate records sufficient to support that the sales from a high-
15 trafficked tourist area to out-of-state customers were really shipped out-of-state and thus not
16 subject to gross receipts tax. The Department also contends that neither statutory nor equitable
17 estoppel apply based on the 2019 letter. After considering the relevant presumption of
18 correctness, burdens of production and persuasion, and the actual evidence produced, Taxpayer
19 prevails in this protest on its primary contention.

20 ***The Presumption of Correctness, the Burden of Production, and the Burden of Persuasion.***

21 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
22 presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See*
23 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the

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

7 Accordingly, it is Taxpayer’s burden to present some countervailing evidence tending to
8 dispute the factual correctness of the assessment. *See* Regulation 3.1.6.12 (A) NMAC; *see also*
9 *N.M. Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436; *see also*
10 *Gemini Las Colinas, LLC v. N.M. Taxation & Revenue Dep’t*, ___-NMCA-___, ¶ 27, No. A-1-CA-
11 38672 (March 13, 2023)¹. This burden is one of production of evidence rather than of persuasion.
12 *See Gemini*, ¶21. The determination of whether a taxpayer has met this burden of production is
13 purely a legal determination about whether a taxpayer has made a threshold production of
14 evidence tending to dispute the assessment. *See Gemini*, ¶25.

15 When a taxpayer meets this burden of production by producing some evidence tending to
16 dispute the assessment, the burden shifts to the Department to show that the assessment is
17 correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-21, ¶13, 133 N.M. 217; *see*
18 *also Gemini*, §26, ¶29. This shifting burden is one of production, and once the burden of production
19 has shifted, “the [D]epartment must put forth evidence to show the correctness of its assessment—
20 that is, evidence sufficient to make the correctness of the department’s assessment a question of

¹ As of that date of issuance of this decision and order, there is no indication either on Odyssey or on the New Mexico Supreme Court’s online Certiorari Tables that certiorari has been request or granted on this recent opinion. The Supreme Court’s April 2023 Certiorari Table (the month where such a request would normally be expected), posted on Monday, May 8, 2023, did not include any reference to *Gemini*.

1 fact.” *Gemini*, ¶29. Under this burden shifting structure, the Department

2 cannot simply rely on the unreliability or incredibility of the taxpayer’s
3 evidence. Instead, the [D]epartment must produce evidence to justify its
4 assessment. If the [D]epartment’s evidence creates a question of fact about
5 the correctness of the assessment, it has fulfilled its burden of production,
6 and the case is ripe for the hearing officer to resolve factual disputes and
7 decide the protest on the merits.

8 *Id.*

9 If the protest reaches a merits determination stage after both parties have met their
10 respective burdens of production, the taxpayer maintains the burden of persuasion in the protest. *See*
11 *id* (“...the burden of persuasion remains on the taxpayer...”). The standard of proof in resolving the
12 protest is the preponderance of the evidence. *See id* (“...if the evidence is equipoise, the hearing
13 officer should deny the taxpayer’s protest.”).

14 In this case, as ruled upon on the record and this discussion makes clear, Taxpayer met the
15 legal threshold to overcome the presumption of correctness by producing some evidence tending to
16 dispute the factual accuracy of the assessment. Consequently, the burden of production shifted to
17 the Department to produce evidence to justify its assessment. As such, the hearing officer must first
18 determine whether the Department met its own burden of production to provide evidence sufficient
19 to create a question of fact about the correctness of its assessment beyond merely attacking the
20 reliability or credibility of Taxpayer’s evidence, and if so, as the fact finder weigh the competing
21 evidence from the parties to determine whether Taxpayer carried its burden of persuasion in the
22 protest by the preponderance of the evidence. *See Gemini*, ¶29.

23 ***Gross Receipts Tax and the Statutory Exclusion of Out-of-State Sales***

24 Under New Mexico’s Gross Receipts and Compensating Tax Act, for the privilege of
25 engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person

1 engaged in business. *See* NMSA 1978, § 7-9-4 (2010²). “Engaging in business” is defined as
2 “carrying on or causing to be carried on any activity with the purpose of direct or indirect
3 benefit.” NMSA 1978, § 7-9-3.3 (2003). Under the Gross Receipts and Compensating Tax Act,
4 there is a statutory presumption that all receipts of a person engaged in business are taxable. *See*
5 NMSA 1978, § 7-9-5 (2002). In this case, there is little doubt that Taxpayer was engaged in
6 business in New Mexico at its storefront location in Old Town, where it sold jewelry, customized
7 jewelry, and other items to a variety of customers, and therefore Taxpayer’s receipts are presumed
8 subject to gross receipts tax. When Taxpayer’s reported New Mexico gross receipts did not match
9 reported business income on Taxpayer’s federal Schedule C, the Department relied on that
10 mismatch and the presumption of taxability to generate the disputed assessment.

11 But the primary issue in this case revolves around whether the assessed gross receipts tax
12 reflected sales in New Mexico subject to gross receipts tax or sales of customized jewelry shipped
13 out-of-state to out-of-state customers statutorily excluded from the gross receipts tax. Under NMSA
14 1978, Section 7-9-3.5 (A) (1) (2007) (emphasis added), the term “gross receipts” in pertinent part is
15 broadly defined to include “the total amount of money or the value of other consideration received
16 from *selling property in New Mexico...*” For purposes of the Gross Receipts and Compensating Tax
17 Act, “selling” is defined as “a transfer of property for consideration or the performance of a service
18 for consideration.” NMSA 1978, §7-9-3 (A) (2007). In the context of determining whether a
19 transaction amounts to an intrastate or interstate sale, the New Mexico Court of Appeals has read
20 this “selling in New Mexico” statutory provision to be a destination-based principle rather than an
21 analysis of where the risk of loss passes, where the title passes, or how the Uniform Commercial

² Unless there was a pertinent substantive change, all statutes are cited to the statute in effect during the audit period, as numerous statutes have subsequently been amended but not in a manner that materially impacts the analysis of this protest.

1 Code would treat the sale. *See Dell Catalog Sales LP v. NM Taxation & Revenue Dept.*, 2009-
2 NMCA-001, ¶ 30-38, 145 N.M. 419, 425-427. In this case, if Taxpayer can demonstrate that the
3 receipts captured by the assessment reflect sales to out-of-state customers shipped with a delivery
4 destination outside of New Mexico, then those receipts would fall outside the “selling in New
5 Mexico” scope of the act and would not be subject to New Mexico gross receipts tax.

6 Whether Taxpayer’s sales fell under or outside the definition of “selling in New Mexico” is
7 primarily a threshold statutory exclusion question rather than a question about any specific statutory
8 deduction or exemption. However, in addition to a potential out-of-state sale not falling under the
9 plain definition of what constitutes a sale subject to the gross receipts tax, the Gross Receipts and
10 Compensating Tax Act does provide a statutory deduction for receipts from transactions made in
11 interstate commerce under NMSA 1978, Section 7-9-55 (1993). When claiming a sale is covered by
12 an applicable deduction, a taxpayer must establish entitlement to the claimed deduction. *See Wing*
13 *Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735. Under this
14 deduction, a taxpayer may deduct its receipts resulting from sales made in interstate commerce
15 where imposition of the gross receipts tax would violate the commerce clause. However, a sale
16 made to a non-resident who accepts delivery of the product in New Mexico is not protected by the
17 Section 7-9-55 interstate commerce deduction. *See* 3.2.213.12 (B) NMAC.

18 ***Taxpayer’s Evidence Sufficient to Meet Presumption of Correctness.***

19 As discussed, Taxpayer argues that the assessment reflected receipts for out-of-state sales
20 not subject to gross receipts tax. While the Department acknowledges that if substantiated such
21 sales are not subject to gross receipts tax, the Department contends that Taxpayer’s records were
22 inadequate substantiation that the receipts reflected out-of-state sales. Taxpayer’s records for the
23 audit period were unfortunately largely destroyed by a monsoon flood in 2018, a force majeure
24 outside of Taxpayer’s responsible control.

1 Nevertheless, in the absence of the complete records from this time frame, Taxpayer
2 introduced evidence of its long-time business practices through testimony of Ms. Pratt,
3 representative invoices and records from 2017 illustrative of its business practices, accounting
4 ledgers prepared by its now-deceased CPA, a shipping analysis of out-of-state sales prepared by
5 that same CPA, bank statements, bank deposit slips, credit card receipts from its self-audit of the
6 limited available records from April 2014, and public records information taken from an online
7 database for the customers in that self-audit showing out-of-state residency. As will be discussed
8 in more detail, the production of this evidence was sufficient for Taxpayer to meet its burden of
9 production and overcome the initial presumption of correctness.

10 In absence of the destroyed records, Ms. Pratt testified to her business practices of record-
11 keeping and sales transactions that applied during the audit period, testimony supported by
12 representative, illustrative records from 2017 [Taxpayer Ex. #2]. Specifically, she detailed the
13 invoicing process her business used before, during, and after the relevant assessment period.
14 Whether a customer called in a custom order or made a custom order at the store front, Ms. Pratt
15 would create an invoice in triplicate. On that invoice, she would capture the customer's name,
16 address, and phone number; the nature of the order and customization needed to complete the
17 order; and the shipping method, shipping costs, and the shipping tracking information either
18 written on or attached to the invoice. [Taxpayer Ex. #2]. The Department agreed that these
19 invoices were sufficient to support out-of-state sales for the 2017 time period.

20 Ms. Pratt's testimony also outlined the customized jewelry transaction process. When a
21 customer made an order for customized jewelry, whether in the store or over the phone, in
22 addition to completing the triplicate invoice, Ms. Pratt would take an initial deposit on the item
23 often via credit card and write the customer's phone number down on the credit card receipt
24 when possible. Having ready access to the customer's phone number provided Ms. Pratt with the

1 ability to call the customer if there were questions or issues about the customization or to notify
2 the customer when the customization was complete.

3 Upon completion of the customization, Ms. Pratt would call the customer to obtain full
4 payment for the item. If the customer resided out-of-state, the item would then be shipped to the
5 customer at their out-of-state address, with the shipping cost and tracking information added to
6 the triplicate invoice. If the customer lived in New Mexico, Ms. Pratt would require the customer
7 to pick up customized jewelry at the store front location, where the local customer paid for the
8 customized jewelry project, including the gross receipts tax on those sales.

9 Ms. Pratt testified that she would personally review each sales transaction with her
10 longtime CPA, Robert Mattine, on a monthly basis. Mr. Mattine, CPA, then prepared the
11 accounting ledgers for all of Ms. Pratt's businesses for 50-some years. Unfortunately, Mr.
12 Mattine, CPA, passed away in 2022 during the pendency of this protest, and thus it was difficult
13 to understand the reconstructed shipping analysis that Mr. Mattine, CPA, prepared for the
14 relevant period in the absence of his explanation. Even if the analysis is unhelpful without further
15 explanation from Mr. Mattine, CPA, this effort shows that Taxpayer undertook numerous
16 reasonable methods to make a good-faith effort to reconstruct the transactions where the invoices
17 were unfortunately destroyed in the flood.

18 In addition to Ms. Pratt's testimony and Mr. Mattine's analysis, Taxpayer presented a
19 self-audit for April 2014, using available credit card receipts with handwritten phone numbers in
20 comparison to bank deposit books and bank records to reconstruct out-of-state sales. As the
21 Department repeatedly argued, this analysis was perhaps an imperfect reconstruction because it
22 did not involve the actual invoices, which had been destroyed in the flood. But under the
23 circumstances of destroyed records, it was a reasonable alternative method to reconstruct those
24 lost records. Taxpayer also used a third-party website to verify that the addresses of the

1 customers in the self-audit were out-of-state, which is not particularly persuasive as to the
2 location of the sale but shows that Taxpayer was making good faith efforts to substantiate its
3 self-audit and reconstruct the lost invoices for the out-of-state sales.

4 All of these methods—Ms. Pratt’s detailed testimony about business practices supported
5 by the 2017 representative invoice records, Taxpayer’s April 2014 self-audit with reconstructed
6 records, and the shipping analysis—amounts to “some countervailing evidence tending to dispute
7 the assessment.” *See* Regulation 3.1.6.12 (A) NMAC; *See also Gemini*, ¶21. In addition to Ms.
8 Pratt’s testimony, Taxpayer substantiated the testimony with supporting documentary evidence in
9 the form of the 2014 self-audit, bank deposit books, credit card receipts, and the representative 2017
10 invoices, satisfying any argument that Regulation 3.1.6.12 (A) NMAC requires documentary
11 support beyond testimonial evidence. By producing this evidence, Taxpayer met its burden of
12 production to overcome the presumption of correctness. *See* Regulation 3.1.6.12 (A) NMAC; *See*
13 *also Gemini*, ¶21.

14 ***Department Evidence Insufficient to Meet Shifting Burden***

15 Consequently, as the hearing officer announced on the record, the burden shifted to the
16 Department to produce evidence to support its assessment. *See Gemini*, ¶29. This burden of
17 production shifting requires that the Department must do more than simply rely on any alleged
18 unreliability or incredibility of Taxpayer’s evidence, but instead must present evidence justifying its
19 assessment. *See id.* Without such production of Department evidence, there is no question of fact for
20 which the hearing officer can rule upon. *See id.* The Department’s case was fundamentally an attack
21 on Taxpayer’s evidence rather than any attempt to support the validity of the assessment, which is
22 inadequate to meet the shifting burden described recently by the Court of Appeals in *Gemini*. *See id.*

23 Under that rubric of the shifting burden of production, the Department’s presentation was
24 nearly entirely focused on attacking the reliability and credibility of Taxpayer’s records, the alleged

1 absence of records, and alleged flaws in Taxpayer's multiple efforts at reconstructing the records.
2 The Department pointed out that this case stemmed from a Schedule C mismatch. That is, the
3 amount of business income listed on Taxpayer's federal Schedule C income did not match the
4 receipts reported to New Mexico gross receipts in the relevant period. This is hardly a surprising
5 fact, given Ms. Pratt's insistence that Taxpayer did pay gross receipts tax on sales completed with
6 exchange of the goods at the Old Town store front, but did not pay the gross receipts tax on out-of-
7 state, customized jewelry sales shipped out-of-state.

8 As part of its criticism of Taxpayer's proposed alternative record reconstruction method, the
9 Department asserted that out-of-state phone numbers listed on sales receipts were insufficient
10 evidence because Old Town is a high tourist area with many out-of-state tourists making purchases
11 and because in the era of the cellphone, the connection between an area code and where someone
12 resides is far less meaningful than in the bygone landline era. Further, Protest Auditor Rodriguez did
13 not believe there was any business purpose for writing down the phone number on the credit card
14 receipts. However, Ms. Pratt explained the business purpose of writing the phone numbers on the
15 credit card receipts: to provide a quick contact number to address any issues related to the
16 customization process and to arrange for final payment upon completion of the order. Further, this
17 method was supported by the self-audit and the representative 2017 invoice records (which also
18 contained customer phone numbers). While the Department agreed that the 2017 invoice records
19 were sufficient to find that those 2017 sales were not subject to gross receipts tax, it was
20 unwilling to consider the 2017 invoice records as representative of the relevant assessment
21 period because it accused Taxpayer of having inadequate and substandard records.

22 What the Department repeatedly characterized in testimony and argument as substandard or
23 inadequate record keeping is explained largely by the loss of records during the monsoon flood, a
24 force majeure outside of the control of Taxpayer. Taxpayer's routine invoicing method, the separate

1 books of deposit, and regular monthly consultations with the accountant to review every transaction,
2 all support that Taxpayer was sufficiently diligent with record-keeping requirements in most
3 respects, but for the flood that destroyed the particular records at issue here.

4 In the event that a taxpayer's record are not available—like here—the Department is
5 authorized to use any reasonable method of estimating the tax liability. *See* NMSA 1978, § 7-1-11
6 (E) (2007); *see also* *Torridge Corp. v. Comm'r of Revenue*, 1972-NMCA-171, ¶¶ 11-13, 84 N.M.
7 610, 612, 506 P.2d 354, 356 (when records are destroyed by accident, the Department may use
8 reasonable alternative methods to reconstruct the lost records). Indeed, the Department's own
9 regulation contemplate the possibility that a taxpayer's record may have been destroyed by accident,
10 and in such a situation, the Department is permitted to use a bank deposit method to reconstruct the
11 lost records. *See* 3.1.5.9 NMAC. Although not directly pertinent to the facts of this case where
12 abatement of penalty is not the primary issue, the Department seems to understand that that physical
13 damage to records can occur beyond the reasonable control of a taxpayer permitting some relief
14 from penalty. *See* 3.1.11.11 (C) NMAC.

15 The Department, and in particular Protest Auditor Rodriguez, deserves credit for its hard
16 work, diligence, and willingness to accept alternative records in the other now-resolved
17 assessment, where the Department issued a substantial abatement. However, in this particular
18 protest, the Department did not present its own record reconstruction using any alternative method.
19 Instead, the Department demanded either the destroyed original records, and in the absence of those
20 records, stood by the initial Schedule C mismatch figures that triggered the assessment without
21 further attempts to substantiate those amounts as taxable. Short of those original, destroyed records,
22 the Department was reluctant to entertain virtually any of Taxpayer's proposed alternative methods

1 or alternative records before the hearing³ because of an unsubstantiated but theoretical possibility
2 that Taxpayer was engaged in a gross receipts tax avoidance scheme with sales to out-of-state
3 tourists making purchases at the Old Town store front location.

4 Fundamentally, the Department's case turns on an unsupported insinuation that because
5 Taxpayer operated in a high-tourist area like Old Town, because Taxpayer lacked detailed records
6 for the relevant period, and because cellphone numbers written on a credit card receipt have no
7 particular business purpose or relation to a customer's residency, the Department cannot rule out the
8 possibility that Taxpayer may have been engaged in a gross receipts tax avoidance scheme for any
9 customer with an out-of-state phone number. Because of this possibility, no matter how remote in
10 light of Ms. Pratt's testimony and presentation of other evidence, the Department was unwilling to
11 accept any of Taxpayer's proposed alternative methods to reconstruct the missing records. This does
12 not amount to any affirmative evidence supporting its assessment, but simply a hedge against a
13 theoretical possibility not actually supported in the record.

14 This puts Taxpayer in an impossible position of having to defend against unsupported
15 insinuation with records that no longer exist for reasons beyond Taxpayer's control despite
16 Taxpayer's production of alternative evidence tending to dispute the assessment. Given the absence
17 of evidence to support the Department's contention of a theoretical possibility of a gross receipts tax
18 avoidance scheme, and the substantial evidence produced by Taxpayer to the contrary, the hearing
19 officer declines to accept such an accusation of malfeasance. Consequently, because under the
20 shifted burden, the Department did not produce sufficient evidence to create a question of fact as to
21 the validity of the assessment, Taxpayer prevails in this protest.

³ Only at the end of the hearing did the Department suggest that Taxpayer's April 2014 self-audit may allow some partial abatements to the assessment. While that is commendable, the parties apparently were unable to reach an agreement in the post-hearing period on a sampling method relating to a potential abatement.

1 ***In arguendo, Taxpayer’s Evidence was Persuasive.***

2 In arguendo, even if the Department’s continuing reliance solely on the Schedule C
3 mismatch figures or other testimony it offered did amount to sufficient evidence to create a question
4 of fact related to its assessment, Taxpayer also carried its burden of persuasion in this case.

5 Weighing the evidence of the parties, including the documentary and credible testimonial record
6 evidence, Taxpayer established by the preponderance of evidence that the assessment primarily
7 related to out-of-state sales not subject to New Mexico gross receipts tax.

8 Part of Taxpayer’s persuasiveness stems from the credibility of Ms. Pratt’s testimony. In
9 New Mexico, it is a long-established principal of caselaw that the trier of fact must determine the
10 credibility of witness testimony and afford it appropriate weight. *See Chesher v. Shafter Lake Clay*
11 *Co.*, 1941-NMSC-035, ¶ 9, 45 N.M. 419, 115 P.2d 636, 638 (in a 1941 decision, the New Mexico
12 Supreme Court held that the trier of fact must determine witness credibility, a principal reiterated in
13 countless opinions issued in the intervening decades). As the Court of Appeals has repeatedly
14 stated within the context of a tax protest proceeding, it is the duty of the hearing officer as “...the
15 trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile
16 inconsistencies, and determine where the truth lies[.]” *See Casias Trucking*, 2014-NMCA-099, ¶
17 23. *See also Gemini*, ¶ 17. Consistent with that duty to determine credibility⁴ and weigh

⁴ Credibility is “the quality that makes something (as a witness or some evidence) worthy of belief. *See Black’s Law Dictionary*, 448 (9th ed. 2009). It requires a comprehensive “evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Generally, such overall comprehensive evaluation of testimony for credibility purposes involves consideration of some combination of seven main factors: 1) opportunity and capacity of a witness to know or observe relevant facts or an event; 2) consistency with or contradiction to other record evidence; 3) consistency or inconsistency with prior statements; 4) bias/motivations of witness or its absence; 5) character of witness; 6) inherent improbability/implausibility of testimony; and 7) demeanor while testifying. *See generally* Walter Orr, *Credibility* (National Judicial College October 1994); *See also* James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903, 907 (2000).

1 evidence, the hearing officer finds Ms. Pratt’s testimony was credible, compelling, and
2 persuasive for numerous reasons⁵.

3 The first and primary reason why her testimony was compelling was that it was supported
4 by the representative invoice records in 2017, showing her regular business practices that she
5 used during the relevant period. Although the Department did not concede that the 2017 records
6 had any bearing on the relevant audit period, it did indicate that those records were sufficient in
7 that year to support that the sales were out-of-state. Related to this primary reason her testimony
8 was credible, Ms. Pratt undertook painstaking efforts to reconstruct her records and engage in a
9 self-audit, all supported by objective bank records and in effort to show that she treated her in-
10 state and out-of-state sales tax obligations seriously and consistent with her long business
11 practices.

12 Another reason why Ms. Pratt’s testimony was credible was that she employed the
13 services of a CPA for that entire time and the CPA already made efforts to distinguish between
14 taxable and non-taxable transactions based on their monthly consultation where they discussed
15 every transaction. It seems improbable that Ms. Pratt would have any meaningful financial
16 incentive to routinely write-off gross receipts taxes from out-of-state customers made in store—
17 as the Department infers—when she had an independent CPA reviewing those transactions with
18 her regularly and already preparing gross receipts tax returns and payments on the other taxable
19 transactions. Ms. Pratt made numerous, good-faith efforts to reconstruct the lost records,
20 including relying on her longtime CPA (an independent professional with his own ethical and

⁵ While the testimony of Ms. Pratt was credible and ultimately more persuasive, the hearing officer has no doubt about the sincerity of the testimony of Auditor Rodriguez, who was an able witness who diligently worked these protests.

1 professional standards) and objective banking records, efforts unlikely for someone engaged in
2 the inferred tax avoidance scheme that the Department inferred was a possibility.

3 Finally, Ms. Pratt has operated her businesses—apparently successfully—in a similar
4 manner for some 50-years. Being involved in the business for so long gave her the knowledge
5 and capacity about how her business transactions worked and her customer base, information
6 critical in reconstructing the business practices in the absence of the destroyed records.
7 Longevity alone does not necessarily establish credibility, but long-term, consistent and
8 successful conduct combined with the absence of any actual evidence of financial or tax
9 malfeasance in conjunction with the other articulated reasons bolsters her credibility about what
10 the destroyed invoice records would show about the receipts in question.

11 But Taxpayer’s persuasiveness does not depend solely on Ms. Pratt’s credibility. Taxpayer’s
12 attempt to reconstruct the lost records provided reasonable—even if imperfect—alternative
13 evidence supporting that the receipts were for items shipped and delivered out-of-state. The April
14 2014 self-audit certainly is not as reliable as what the actual invoices would show, as even
15 Taxpayer’s counsel acknowledged, the reconstruction contained an occasional, potential
16 misclassification of a transaction. Of course, the actual invoices would have eliminated this
17 occasional misclassification, but those invoice records are not available because of the flood.
18 Taxpayer presented detailed records of the year after the audit, and credibly testified these records
19 were consistent with her many years of business practice and were the same type of records
20 maintained for the audit period but for their destruction in the flood. Again, the Department
21 acknowledged that these invoices were sufficient to show the sales in 2017 were out-of-state sales.

22 Without fully redescribing all of Taxpayer’s efforts to reconstruct the lost records as already
23 discussed above, Taxpayer went to great lengths to tie in the existing credit card receipts with
24 objective bank deposit statements, to look at shipping payment checks in relations to sales, and

1 review customer residency information for known sales, all within the context of Taxpayer's
2 longstanding business practices and recordkeeping. In the absence of the actual invoice records lost
3 in the flood, the overall reconstruction resulting from the April 2014 self-audit and supported by
4 Taxpayer's longstanding business practices as shown by the 2017 representative records was
5 reasonable, and more reasonable than the Department's continuing presumption that all transactions
6 were in-state sales because of the loss of records and the fact that the storefront was in a high-traffic
7 tourist area like Old Town. *See Casias Trucking*, 2014-NMCA-099, ¶16-18, ¶25 (not error for the
8 hearing officer to find in favor of taxpayer's imperfect but nevertheless credible testimony and
9 substantial objective evidence over the Department's method). Taxpayer's evidence was sufficiently
10 persuasive to establish that the assessment was for out-of-state sales statutorily excluded from gross
11 receipts tax, or in the alternative, deductible under Section 7-9-55.

12 ***Other Issues***

13 Although the hearing officer need not rule on Taxpayer's alternative grounds for the protest,
14 two other related matters merit a brief discussion. First, the Department objected to Taxpayer Ex. #3
15 as a confidential closing agreement and on relevancy grounds. That objection is overruled. Taxpayer
16 Ex. #3 is a written follow-up letter from the Department to Mr. Pratt indicating that it had reviewed
17 the records submitted in response to the notice of intent to assess and verified that Taxpayer's 2016
18 Schedule C income was not taxable, as well as a similar letter addressing 2002 taxes. Plainly, these
19 letters do not amount to closing agreements as described under NMSA 1978, Section 7-1-20 (A)
20 (requiring attorney general approval of a closing agreement), as both fail to show that the secretary,
21 the taxpayer, and the attorney general signed off on the letters. If the April 10, 2019, letter did
22 amount to a closing agreement, then it would have been conclusive as the liability under Section 7-
23 1-20 (D), rendering the Department's assessment invalid for that reason alone. Moreover, an earlier
24 determination by the Department that Taxpayer's 2016 Schedule C receipts—which ultimately

1 formed part of the basis of the assessment under protest—were not taxable is inarguably relevant in
2 this protest. What happened in 2002 has a far more tenuous connection to this protest, but that is
3 largely a question of weight of evidence rather than relevancy given relevancy’s broad construction
4 under New Mexico case law.

5 Throughout the merits hearing, the Department continually referred to midnight filings of
6 Taxpayer as an implied criticism or suggestion of non-compliance with a deadline. The only
7 midnight filing that occurred in this case was Taxpayer’s submission of renumbered exhibits, done
8 so at the direction of the hearing officer because the initial exhibits filed with the Administrative
9 Hearings Office on March 28, 2023, in preparation for the videoconference were mislabeled. Other
10 than the renumbering to accord with the Administrative Hearings Office exhibit practice, the
11 exhibits were substantively identical to what had previously been provided to the Department. This
12 is not particularly unusual in litigation—previously provided exhibits may be renumbered at the
13 beginning of the hearing, and even throughout the course of the hearing. If this happened at an in-
14 person hearing, the solution would be simply to affix an updated exhibit tag on the relabeled
15 exhibits. But because a videoconference hearing requires sharing of the screen and some remote
16 coordination before the hearing, it was necessary to direct Taxpayer to correct the exhibit numbers
17 before the hearing. This relabeling of previously submitted exhibits is not prejudicial to the
18 Department, especially when it also filed additional pre-filed testimony with attached exhibits at
19 5:02 pm on March 29, 2023 (a day after Taxpayer filed its original mislabeled exhibits and about
20 20-minutes after Taxpayer filed its hearing briefing).

21 ***Conclusion***

22 In summary, Taxpayer presented sufficient evidence tending to rebut the presumption the
23 correctness of the assessment. In turn, the Department did not present sufficient evidence to justify
24 its assessment. Even if the Department did meet its shifting burden of production, Taxpayer carried

1 its burden of persuasion by presenting evidence by the preponderance that the receipts in question
2 stemmed from out-of-sales. Therefore, Taxpayer’s receipts fell outside the statutory definition of
3 sales subject to gross receipts tax under Section 7-9-3.5 or in the alternative, were otherwise
4 appropriately deductible under Section 7-9-55. For all these reasons, Taxpayer’s protest is well-
5 taken and should be granted.

6 CONCLUSIONS OF LAW

7 A. Taxpayer filed a timely, written protest to the Department’s assessment, and
8 jurisdiction lies over the parties and the subject matter of this protest.

9 B. The hearing was timely set and held within 90 days of the filing of the hearing
10 request and accompanying Department answer under NMSA 1978, Section 7-1B-8 (2019).

11 C. Taxpayer met its burden of production to produce some evidence tending to show
12 that the Department’s assessment was incorrect, shifting the burden of production to the
13 Department. *See* Regulation 3.1.6.12 (A) NMAC; *See also Gemini*, ¶21.

14 D. Other than attacking the reliability and credibility of Taxpayer’s evidence, the
15 Department did not meet its burden of production to put on its own evidence showing the
16 correctness of its assessment. *See Gemini*, ¶29.

17 E. Taxpayer witness Ms. Pratt provided credible and convincing evidence by the
18 preponderance, supported by a reasonable record reconstruction and representative 2017 illustrative
19 records, showing that the assessment was for receipts attributable to out-of-state sales not subject to
20 gross receipts tax.

21 F. Taxpayer’s receipts from the out-of-sate sales fell outside the statutory “selling in
22 New Mexico” definition of sales subject to gross receipts tax under Section 7-9-3.5. Alternatively,
23 Taxpayer established that the sales qualified for the interstate commerce deduction under Section 7-
24 9-55.

1 For the foregoing reasons, the Taxpayer protest **IS GRANTED**. The Department is ordered
2 to abate the assessment in its entirety.

3 DATED: May 10, 2023.



4
5 Brian VanDenzen
6 Chief Hearing Officer
7 Administrative Hearings Office
8 P.O. Box 6400
9 Santa Fe, NM 87502

10 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

2 On May 10, 2023, a copy of the foregoing Decision and Order was submitted to the parties
3 listed below in the following manner:

4
5 ***INTENTIONALLY BLANK***