

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

**IN THE MATTER OF THE PROTEST OF
WARRIORS MANAGEMENT LLC
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0741418672**

v.

Case No. 21.07-044A, D&O 23-11

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On February 27, 2023, Hearing Officer Chris Romero, Esq., of the Administrative Hearings Office conducted an administrative hearing on the merits of the tax protest of Warriors Management, LLC (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act.

Mr. Tracy Sprouls, Esq. appeared in person for Taxpayer along with Mr. Nathan Manning and Mr. Tony Collyer, who both testified for Taxpayer. Staff Attorney, Mr. Peter Breen, Esq., appeared in person representing the opposing party in the protest, the Taxation and Revenue Department (Department), and was accompanied by Department tax auditors, Ms. Angelica Rodriguez and Ms. Lizette Rivera. Ms. Cheryl Tafoya, tax auditor, was also present for observation and training. Ms. Rivera testified for the Department.

Taxpayer Exhibits 1 – 9, and Department Exhibits A – E were admitted without objection upon stipulation of the parties. The Department also contemplated submission of a late filed exhibit but provided notice that it had encountered a delay attributed to GenTax, its computer system software. The exhibit would have presumably detailed the current status of the Department’s credit card reimbursement adjustments. Although the Department explained that it still intended to file the exhibit once the technical issues were resolved, the record closed on May

1 12, 2023 when after notice to the parties, the exhibit had still not been filed.

2 Taxpayer's main arguments for abatement of the assessment are that: (1) the computation
3 of gross receipts erroneously included reimbursements paid by affiliated companies for
4 authorized use of Taxpayer's credit card; (2) the computation of gross receipts erroneously
5 included proceeds from a loan from an affiliated entity; (3) and the computation of gross receipts
6 erroneously included investment funds that were refunded to Taxpayer. With respect for each
7 issue presented, the Department does not dispute the legal foundation for the relief Taxpayer
8 seeks, but instead disputes the adequacy of records presented to establish the right to such relief.

9 As explained in greater detail in the subsequent discussion, the Hearing Officer finds
10 based on the evidence and arguments presented that Taxpayer's records fall short of establishing the
11 exclusion of certain credit card reimbursements, but its records establish that the proceeds of a loan
12 and the refund of an investment should be excluded from the computation of gross receipts on
13 which the assessment is based. IT IS DECIDED AND ORDERED AS FOLLOWS:

14 **FINDINGS OF FACT**

15 *Witness Backgrounds*

16 1. Nathan J. Manning manages assisted living facilities operating in New Mexico
17 and Texas of which he is also part owner. [Direct Examination of Nathan Manning]

18 2. Mr. Manning shares ownership of Taxpayer with Michael Manning (his brother),
19 and Jay Manning (his father). Their respective interests are one-third apiece. [Direct Examination
20 of Nathan Manning; Cross examination of Nathan Manning; Taxpayer Ex. 9.1]

21 3. Mr. Manning manages Taxpayer's daily business activities. [Direct Examination
22 of Nathan Manning; Cross examination of Nathan Manning; Direct Examination of Anthony
23 Collyer]

1 4. Anthony Collyer is a certified public accountant practicing in Albuquerque, New
2 Mexico. [Direct Examination of Anthony Collyer]

3 5. Mr. Collyer is a private practitioner, not employed by Taxpayer. He has been
4 practicing in public accountancy for more than 40 years and has provided accounting and
5 bookkeeping services for Taxpayer and its related entities for approximately 8 years. [Direct
6 Examination of Anthony Collyer]

7 6. Lizette Rivera conducted Taxpayer's field audit in her previous position as a field
8 auditor. [Direct Examination of Lizette Rivera]

9 7. Since that time Ms. Rivera performed the field audit giving rise to the protest, Ms.
10 Rivera was elevated to a tax auditor supervisor for the Department. [Direct Examination of
11 Lizette Rivera]

12 *Taxpayer's Business Activities*

13 8. Taxpayer's business activities concentrate on providing various services for
14 commonly owned assisted living facilities, or as Mr. Manning explained, the provision of
15 "common owner entity services for our various assisted living homes." [Direct Examination of
16 Nathan Manning; Cross examination of Nathan Manning; Direct Examination of Anthony
17 Collyer]

18 9. By use of the term, "commonly owned," Mr. Manning referred to various assisted
19 living facilities in which he, his brother, and his father possess a mutual ownership. [Direct
20 Examination of Nathan Manning; Taxpayer Ex. 9]

21 10. In the network of facilities serviced by Taxpayer, some are affiliates of Taxpayer
22 and some are not. [Direct Examination of Nathan Manning; Taxpayer Ex. 9]

23 11. Taxpayer defines "affiliate" as "a business entity that directly or indirectly

1 through one or more intermediaries controls, is controlled by, or is under common control with
2 another business entity.” Taxpayer defines “control” in this context to mean an “equity
3 ownership in a business entity that represents at least 50 percent of the total equity of that
4 business entity.” [Direct Examination of Nathan Manning; Taxpayer Ex. 9.1]

5 12. According to Taxpayer Exhibit 9, a facility is not considered to be an affiliate
6 where Jay Manning has an ownership interest in his own right or through West Texas Warriors
7 (an entity in which Jay Manning owns 100 percent interest) if neither Michael Manning nor
8 Nathan Manning also possess an ownership interest. [Taxpayer Ex. 9]

9 13. Prior to March of 2017, Taxpayer provided services to 28 facilities of which nine
10 were affiliates and 19 were not. [Direct Examination of Nathan Manning; Taxpayer Ex. 9.1 –
11 9.4]

12 14. From March to December of 2017, Taxpayer provided services to 14 facilities of
13 which nine were affiliates and four were not. [Direct Examination of Nathan Manning; Taxpayer
14 Ex. 9.5 – 9.6]

15 15. After January of 2018, Taxpayer provided management services for 30 facilities
16 of which 26 were affiliates and four were not. [Direct Examination of Nathan Manning;
17 Taxpayer Ex. 9.7 – 9.9]

18 16. At all relevant times, Taxpayer compensated Mr. Manning with an occasional
19 distribution. Taxpayer did not compensate Mr. Manning with salary or wages. [Cross
20 Examination of Nathan Manning]

21 17. Taxpayer does not have any employees. [Cross examination of Nathan Manning]

22 *Alleged Income – Credit Card Usage Reimbursements*

23 18. Services Taxpayer provides include provision of credit with which facilities are
24 authorized to make necessary business purchases. Taxpayer pays the balance due at the end of

1 the billing period and obtains reimbursement from the facilities that incurred the authorized
2 charges. [Direct Examination of Nathan Manning; Cross Examination of Nathan Manning;
3 Direct Examination of Anthony Collyer]

4 19. Each facility or home is granted access to a credit account maintained by
5 Taxpayer which is then used by the facility or home for authorized business expenses which may
6 include purchases of groceries, household supplies, and home repairs. [Direct Examination of
7 Nathan Manning; Direct Examination of Anthony Collyer; Taxpayer Ex. 5]

8 20. A single credit card statement is received and paid by Taxpayer with each
9 individual facility subsequently reimbursing Taxpayer for its share of the balance due. [Direct
10 Examination of Nathan Manning; Direct Examination of Anthony Collyer; Taxpayer Ex. 5]

11 21. The benefit of the credit card arrangement is that a single credit card account
12 services all facilities in lieu of multiple individual credit accounts. [Direct Examination of
13 Nathan Manning]

14 22. Upon receipt of a credit card statement, it is deconstructed with each authorized
15 charge being assigned to each authorized facility for reimbursement of its share of charges.
16 [Direct Examination of Anthony Collyer; Taxpayer Exs. 5, 6, and 8]

17 23. Authorized facilities could reimburse Taxpayer through check, transfer, or cash.
18 [Direct Examination of Nathan Manning; Direct Examination of Lizette Rivera; Department Ex.
19 A-0254]

20 24. Taxpayer does not derive income from this activity because it does not charge
21 additional fees or interest on authorized facilities for use of the credit card. It only receives
22 reimbursement for actual charges incurred by authorized facilities. [Direct Examination of
23 Nathan Manning; Direct Examination of Anthony Collyer]

1 25. Purported reimbursements to Taxpayer’s credit card during the audit period by
2 authorized affiliated facilities was \$168,147.48 comprised of actual charges only. [Direct
3 Examination of Anthony Collyer]

4 26. The Department observed that records detailing charges and reimbursements
5 varied depending on how the reimbursement was made. For example, a cash reimbursement was
6 unlikely to be documented in as much detail as a reimbursement occurring by check which might
7 contain memo notations. [Direct Examination of Lizette Rivera; Department Ex. A]

8 27. The Department accepted many of the credit card reimbursements as nontaxable
9 reimbursed expenditures. However, those reimbursements for which the Department found
10 insufficient documentation, primarily relevant to cash reimbursements, were not afforded
11 adjustments as of the time the assessment was issued. [Direct Examination of Lizette Rivera]

12 28. The Department made subsequent adjustments which reduced the disallowed
13 amount to approximately \$40,000 in credit card reimbursements which were reflected in
14 Taxpayer’s records as cash receipts. The Department estimated the associated tax liability as “a
15 little over \$3,000.” [Direct Examination of Lizette Rivera]

16 *Alleged Income – Sales of Furniture, Flooring and Other Products*

17 29. Taxpayer, by virtue of access to various wholesale products, also sells furniture,
18 flooring, and other home-improvement related products to affiliated and non-affiliated entities.
19 [Direct Examination of Nathan Manning; Cross Examination of Nathan Manning; Direct
20 Examination of Anthony Collyer]

21 30. Furniture, flooring, and perhaps other goods to which Taxpayer had wholesale
22 access, could possibly be sold to both affiliated and non-affiliated parties in which cases
23 Taxpayer paid tax on the taxable amount of gross receipts. [Cross Examination of Anthony

1 Collyer]

2 *Alleged Income – Loan Proceeds*

3 31. Taxpayer acquired part ownership in High Desert Hospice, LLC in or about 2015.

4 [Direct Examination of Nathan Manning]

5 32. It acquired its 25-percent interest in High Desert Hospice, LLC in consideration
6 for a capital contribution in the amount of \$57,000. [Direct Examination of Nathan Manning]

7 33. Taxpayer did not have sufficient cash on hand to acquire a share of High Desert
8 Hospice, LLC so it borrowed a portion of the necessary funds from one of its affiliated entities,
9 Beehive Staffing Services Company. [Direct Examination of Nathan Manning]

10 34. The amount of the loan from Beehive Staffing Services Company was
11 \$34,000.00. [Direct Examination of Anthony Collyer; Taxpayer Ex. 1]

12 35. The terms of the loan were informal. There was no formal written loan agreement,
13 no terms specifying any payment of principal or interest, no UCC filings or other transfer of
14 security interests, no repayment terms, no maturity date, or other formal terms. It was merely a
15 transfer of funds among affiliated entities to be repaid interest free when circumstances
16 permitted. [Cross Examination of Nathan Manning]

17 36. The loan funds in the total sum of \$34,000 were received by Taxpayer in the
18 following payments:

Date	Amount
6/22/2015	\$4,000
8/5/2015	\$6,000
9/3/2015	\$6,000
11/18/2015	\$6,000
12/16/2015	\$6,000
3/31/2016	\$6,000
TOTAL	\$34,000

19 [Direct Examination of Anthony Collyer; Taxpayer Exs. 1 – 2; Department Exs.

1 A-0035 – A-0056, A-0123 – A-0125 (Statement Dates 6/2015 – 12/2015 and 3/2016 showing
2 credits and debits in each corresponding month); A-0633; A-0609; A-0615; A-0634; A-0638; A-
3 682; A-0683; A-0687; A-0729; A-0811; A-0819; A-0831; A-0833]

4 37. Within one or two days after receipt of a deposit, a corresponding check in an
5 amount equal to the deposit cleared and was debited from Taxpayer’s bank account. [Department
6 Ex. A-0056; A-0052; A-0049; A-0041; A-0037]

7 38. Taxpayer’s balance sheet reflects a running balance due to Beehive Staffing
8 Services in the amount of \$28,000 through calendar year 2015. [Department Ex. A-0067]

9 39. Despite occasional use of the term, “capital call,” the \$34,000.00 transferred to
10 Taxpayer represented the proceeds of a loan. The relationship between Beehive Staffing Services
11 Company and Taxpayer would not permit a capital call since Beehive Staffing Services
12 Company had no interest in Taxpayer and was therefore not a member on which a capital call
13 could be made. [Direct Examination of Anthony Collyer]

14 40. The Department did not allow an adjustment for the amount of the loan
15 (\$34,000.00) because it was dissatisfied with Taxpayer’s documentary evidence, or lack thereof,
16 formally establishing that the money represented the proceeds of a loan instead of gross receipts
17 derived from engaging in business. [Direct Examination of Lizette Rivera]

18 41. Taxpayer repaid the loan in full to Beehive Staffing Services Company in the
19 amount of \$34,000. Taxpayer was not obligated to pay interest or other fees. [Direct
20 Examination of Anthony Collyer]

21 *Alleged Income – Refund of Capital Contribution*

22 42. Taxpayer purchased its interest in High Desert Hospice, LLC for payments
23 totaling \$57,000.00 made in the following amounts on the dates specified below:

Date	Amount
5/14/2015	\$5,000
6/18/2015	\$4,000
8/5/2015	\$6,000
9/3/2015	\$6,000
10/21/2015	\$6,000
11/18/2015	\$6,000
12/16/2015	\$6,000
2/1/2016	\$6,000
2/19/2016	\$6,000
3/17/2016	\$6,000
TOTAL	\$57,000

1 [Direct Examination of Nathan Manning; Direct Examination of Anthony
2 Collyer; Taxpayer Ex. 1.2; Taxpayer Ex. 2; Department Exs. A-0035 – A-0058; A-0123 – A-
3 0132 (Statement Dates 5/2015 – 12/2015; 1/2016 – 3/2016 showing corresponding credits and
4 debits)]

5 43. A 2015 Schedule K-1 suggested that Taxpayer’s contribution to High Desert
6 Hospice in 2015 totaled \$39,000. (“Capital contributed during the year” in Section L). [Direct
7 Examination of Anthony Collyer; Taxpayer Ex. 3]

8 44. After some brief, but indeterminable duration of time, Taxpayer concluded that its
9 ownership in High Desert Hospice; LLC was not advantageous to its goals. It notified High
10 Desert Hospice, LLC of its desire to terminate ownership. High Desert Hospice, LLC agreed to
11 return Taxpayer’s capital contribution of \$57,000 in exchange for return of the 25-percent
12 ownership interest. [Direct Examination of Nathan Manning]

13 45. On April 7, 2016, Taxpayer executed a Member Dissociation Agreement which
14 specified that High Desert Hospice, LLC would refund Taxpayer’s contribution of \$57,000 in
15 exchange for relinquishment of its ownership interest. [Direct Examination of Nathan Manning;
16 Taxpayer Ex. 4]

17 46. On April 8, 2016, the next day, Taxpayer received an incoming wire transfer in

1 the amount of \$57,000 accompanied by a notation specifying “Capital Investment Repayment.”
2 [Direct Examination of Nathan Manning; Taxpayer Ex. 1.1; Department Ex. A-0119]

3 47. Taxpayer did not provide goods or services to High Desert Hospice, LLC at any
4 relevant time prior to termination of its ownership interest or in exchange for refund of its
5 investment. [Direct Examination of Nathan Manning; Cross Examination of Nathan Manning]

6 48. The Department accurately observed that the bank statement that recorded the
7 relevant transfer of \$57,000 on April 8, 2016 to Taxpayer was from an entity, not High Desert
8 Hospice, LLC, that was unfamiliar¹ to the Department. [Direct Examination of Lizette Rivera;
9 Department Ex. C-004 (Column F); Department Ex. A-0119 (date 04/8 indicating incoming wire
10 transfer of \$57,000.00); *See also* Department Ex. A-0837; Department Ex. A-0848]

11 49. This observation was significant to the Department because it signified “an
12 outside third-party transfer wire.” [Direct Examination of Lizette Rivera]

13 50. Other than the circumstances described herein, Taxpayer has had no other
14 relationship, business, familial, or otherwise, with High Desert Hospice, LLC. [Cross
15 Examination of Nathan Manning]

16 51. Ms. Rivera was unpersuaded that sufficient evidence existed to verify that the
17 funds at issue represented the refund of an investment. [Direct Examination of Lizette Rivera]

18 *Income Reported in 2017*

19 52. In 2017, Taxpayer reported costs of goods sold in the amount of \$237,915.00.
20 [Cross examination of Nathan Manning; Department Ex. A-0598 (Line 8)]

¹ A review of Department records may have revealed additional third-party information about the entity, but that information need not be addressed here. First, revealing information the Department learned about this entity, particularly from its own records during its review, may unnecessarily raise concerns for taxpayer confidentiality. Moreover, such information is not relevant because the material issue for which this testimony was offered was to merely establish that the refund was not technically paid by High Desert Hospice, LLC, but by another entity.

1 Demand for Payment under Letter ID No. L0741418672 for \$72,777.61 in gross receipts tax,
2 \$14,570.39 in penalty, and \$9,036.40 in interest for a total amount due of \$96,384.40.

3 [Administrative File (accompanying Request for Hearing filed 7/26/2021)]

4 60. On or about July 1, 2020, Taxpayer filed a Formal Protest (Form ACD-31094) of
5 the Assessment. [Administrative File (accompanying Request for Hearing filed 7/26/2021
6 (signed by Mr. Manning on July 1, 2020))]

7 61. On or about July 1, 2020 Taxpayer, by and through Mr. Manning, appointed Mr.
8 R. Tracy Sprouls as Taxpayer Qualified Representative for the purpose of the protest.
9 [Administrative File (accompanying Request for Hearing filed 7/26/2021 (signed by Mr. Sprouls
10 on July 22, 2020))]

11 62. On July 29, 2020, the Department acknowledged Taxpayer's protest under Letter
12 ID No. L1350563504. [Administrative File (accompanying Request for Hearing filed
13 7/26/2021)]

14 63. On July 26, 2021, Taxpayer filed a Request for Hearing in which it requested that
15 the Administrative Hearings Office place the protest on its docket and set a hearing to address
16 scheduling. [Administrative File]

17 64. On July 26, 2021, the Administrative Hearings Office entered a Notice of
18 Telephonic Scheduling Hearing that set an initial hearing in the protest for August 27, 2021.
19 [Administrative File]

20 65. On August 3, 2021, the Department filed its answer to Taxpayer's protest.
21 [Administrative File]

22 66. On August 27, 2021, the Administrative Hearings Office held a telephonic
23 scheduling hearing, which the parties agreed satisfied the requirement to hold a hearing within

1 90 days of the Department filing an answer to the protest. [Administrative File]

2 67. On August 27, 2021, the Administrative Hearings Office entered a Scheduling
3 Order and Notice of Administrative Hearing which along with other deadlines, set a hearing on
4 the merits of Taxpayer's protest for March 7, 2022. [Administrative File]

5 68. On February 14, 2022, the Department filed its pre-hearing statement.
6 [Administrative File]

7 69. On February 25, 2022, the Department filed a Notice of Pre-Filing of
8 Department's Exhibits along with 329 pages of accompanying exhibits. The exhibits, in
9 anticipation that they would be proffered at the hearing on the merits of the protest, were not
10 previewed. [Administrative File]

11 70. On February 25, 2022, the Department filed an Amended Witness List.
12 [Administrative File]

13 71. On February 28, 2022, Taxpayer filed an unopposed motion to continue the
14 hearing. [Administrative File]

15 72. On March 3, 2022, the Administrative Hearings Office entered an Order
16 Converting Merits to Scheduling Hearing. [Administrative File]

17 73. On March 14, 2022, the Administrative Hearings Office entered a Scheduling
18 Order and Notice of Administrative Hearing which set a hearing on the merits of Taxpayer's
19 protest to commence on August 8, 2022 and proceed through the following day, if necessary.
20 [Administrative File]

21 74. On June 3, 2022, the Department filed a Certificate of Service indicating that it
22 was proceeding with formal discovery. [Administrative File]

23 75. On June 14, 2021, the Department filed a Motion for Continuance and Request

1 for Procedural Conference. [Administrative File]

2 76. On June 16, 2022, the Administrative Hearings Office entered an Order Vacating
3 Merits Hearing and Notice of Telephonic Scheduling Hearing. [Administrative File]

4 77. On July 8, 2022, the Administrative Hearings Office entered a Notice of
5 Telephonic Scheduling Hearing upon the agreement of the parties. [Administrative File]

6 78. On September 7, 2022, Taxpayer filed an Amended Formal Protest alleging: “The
7 auditor included in taxable gross receipts (a) repayment of a loan; (b) return of Taxpayer's capital
8 investment in another entity; and (c) reimbursements of expenditures incurred on behalf of
9 affiliates through joint credit card accounts or through Taxpayer's purchase as agent for
10 affiliates.” [Administrative File]

11 79. On September 9, 2022, the Administrative Hearings Office entered a Scheduling
12 Order and Notice of Administrative Hearing which set a hearing on the merits of Taxpayer’s
13 protest to begin on February 27, 2023 and proceed as necessary through February 28, 2023.
14 [Administrative File]

15 80. On February 13, 2023, the Department filed its second pre-hearing statement
16 accompanied by 883 pages of exhibits. The exhibits, in anticipation that they would be proffered
17 at the hearing on the merits of the protest, were not previewed. [Administrative File]

18 81. On February 13, 2023, Taxpayer filed its pre-hearing statement. It also separately
19 submitted its own exhibits (not attached to its prehearing statement). The exhibits, in anticipation
20 that they would be proffered at the hearing on the merits of the protest, were not previewed.
21 [Administrative File]

22 82. On March 8, 2023, the Department filed a Notice Regarding Filing of Reimbursed
23 Expenses indicating that its software program was having issues generating computations that it

1 anticipated including in a late-filed exhibit (as discussed on the record of the hearing) and
2 suggested that the issue would be resolved in a matter of days. [Administrative File]

3 83. On May 4, 2023, the Administrative Hearings Office filed a Request for Update
4 observing that the exhibit the Department anticipated filing had still not been submitted. It
5 requested an update from the Department on the status of the anticipated submission on or before
6 Friday, May 12, 2023 and provided that the record would close on that date in the event no
7 response was received. No response was received. [Administrative File]

8 **DISCUSSION**

9 Taxpayer limited its protest to three specific issues for consideration under the New
10 Mexico Gross Receipts and Compensating Tax Act: (1) whether the proceeds of a purported loan
11 constitute gross receipts under the act; (2) whether the refund of a capital investment in another
12 business constitutes gross receipts under the act; and (3) whether reimbursements paid to
13 Taxpayer by affiliated entities for use of a credit card constitute gross receipts under the act.
14 These issues will be resolved primarily by reference to of NMSA 1978, Section 7-9-3.5 since
15 Taxpayer did not assert entitlement to any specific deduction or exemption in its written
16 amended protest or at the hearing.

17 Although the Department presented evidence that Taxpayer reported a modest profit in
18 2017, this fact is not necessarily in dispute. The same is true for the fact that Taxpayer derived
19 receipts from the sale of home improvement goods to affiliated and non-affiliated entities. The
20 evidence is helpful for the broader purpose of understanding Taxpayer's revenue flow and
21 history, but the issues on which Taxpayer concentrates are those three items listed above.
22 Taxpayer does not explicitly dispute reporting a profit in 2017 nor the fact that it derives revenue
23 from also selling certain goods.

1 **Presumption of Correctness.**

2 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
3 presumed correct. Consequently, Taxpayer has the burden to rebut the presumption. *See*
4 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶ 11, 84 N.M. 428. Unless otherwise specified, for the
5 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*
6 NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of
7 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and
8 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶
9 16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be
10 given substantial weight).

11 Accordingly, it is Taxpayer’s burden to present some countervailing evidence or legal
12 argument to rebut the presumption of correctness. *See N.M. Taxation & Revenue Dep't v. Casias*
13 *Trucking*, 2014-NMCA-099, ¶8; *Gemini Las Colinas, LLC v. N.M. Taxation & Revenue Dep't*,
14 2023-NMCA-___, ¶ 27, No. A-1-CA-38672 (March 13, 2023)

15 The question of whether a taxpayer has satisfied this initial burden of production is a
16 threshold legal determination in which the hearing officer decides whether a taxpayer has produced
17 some countervailing evidence tending to dispute the correctness of the assessment. *See Gemini*,
18 2023-NMCA-___, ¶¶ 21 – 23; 25. The Hearing Officer was persuaded in this protest that Taxpayer
19 satisfied its initial burden of production.

20 If a taxpayer, as Taxpayer did in this protest, satisfies the initial burden of production, then
21 the burden of production shifts to the Department to present evidence showing the correctness of its
22 assessment beyond mere assertions that a taxpayer’s evidence is unreliable or not credible. *See*
23 *Gemini*, 2023-NMCA-___, ¶ 29. The hearing officer is then to weigh the evidence presented from

1 both parties under the preponderance standard and ultimately determine whether a taxpayer has
2 carried its burden of persuasion in the protest. *Id.*

3 Because the Hearing Officer is persuaded that both parties satisfied their respective burdens
4 of production, the remainder of this Decision and Order will concentrate on the burden of
5 persuasion.

6 **Gross Receipts Tax.**

7 For the privilege of engaging in business in New Mexico, a gross receipts tax is imposed
8 on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2010). The
9 term “gross receipts” is defined to mean:

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

16 *See* NMSA 1978, Section 7-9-3.5 (A) (1) (2019)

17 “Receipts include payments received for one’s own account and then expended to meet
18 one’s own responsibilities.” *See MPC Ltd. v. New Mexico Taxation & Revenue Dept.*, 2003-
19 NMCA-021, ¶ 14, 133 N.M. 217, 220, 62 P.3d 308, 311. There is a statutory presumption that all
20 receipts of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2019).

21 “Engaging in business” is defined as “carrying on or causing to be carried on any activity with
22 the purpose of direct or indirect benefit.” *See* NMSA 1978, Section 7-9-3.3 (2019). *See also*
23 *Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403 (gross receipts applies to “all
24 activities or acts engaged in (personal, professional and corporate) or caused to be engaged in
25 with the object of gain, benefit[,] or advantage either direct or indirect.”)

26 As a practical matter, one of the initial steps in any audit is to compute or verify the amount

1 of gross receipts at issue. A subsequent step is to subtract from the taxpayer's total gross receipts
2 those amounts which are deductible, exempt, or even excludable from the definition of gross
3 receipts, if excludable receipts were erroneously included in the computation. The difference
4 between total gross receipts and any applicable deductions or exemptions is the amount of taxable
5 gross receipts.

6 As previously stated, Taxpayer's amended protest does not assert entitlement to a specific
7 deduction or exemption. Instead, the question is whether the money at issue, within the three
8 categories of purported receipts, comes within the definition of gross receipts and are therefore
9 presumed taxable.

10 Credit Card Usage Reimbursements

11 One of the benefits Taxpayer provides to its affiliated entities is provision of credit to make
12 business purchases, which might include groceries, home repairs, building supplies, or other similar
13 business-related expenses. Offering this service requires that Taxpayer maintain a credit card
14 account (American Express in this case) and distribute cards to its affiliated entities. Affiliated
15 entities use the card to make authorized purchases which American Express then bills to Taxpayer
16 in one single statement. Taxpayer pays the balance due in one payment, and then gets reimbursed by
17 each facility for its share of actual charges. Taxpayer does not charge affiliated facilities any
18 additional fees or interest for their use of the credit card. Facilities' obligations to Taxpayer are only
19 to make Taxpayer whole for the actual charges attributed to it in the billing period.

20 The Department's audit originally identified such reimbursements as gross receipts, but later
21 made adjustments in favor of Taxpayer as it provided documentation to satisfy the Department that
22 the reimbursements were excludable from gross receipts as reimbursed expenditures under Section
23 7-9-3.5 A (3) (f). That section excludes "amounts received solely on behalf of another in a disclosed

1 agency capacity” from the definition of gross receipts. According to the Department, it was satisfied
2 from the records Taxpayer provided that most of the reimbursements from this credit card usage
3 arrangement were excludable and it made appropriate adjustments.

4 However, the Department could not fully resolve this portion of the assessment in favor of
5 Taxpayer because it perceived that some purported reimbursements lacked sufficient documentation
6 to establish that they should be excluded in similar manner. The sort of reimbursements which the
7 Department could not substantiate were made by cash and not accompanied by any specific record
8 to attribute a cash receipt to a particular credit card reimbursement.

9 The Department asserted that the amount of purported reimbursements that could not be
10 substantiated was approximately \$40,000 resulting in a tax liability of “a little over \$3,000.”

11 Although the Department intended to provide a more precise figure in a late-filed exhibit, it did not
12 do so in part due to difficulties it reportedly encountered with GenTax, its tax management software
13 application.

14 On the other hand, Mr. Collyer credibly testified that all payments from Taxpayer to
15 American Express were comprised of money that its affiliates paid as reimbursement for their use of
16 the credit card. Considering Mr. Collyer’s testimony, the amount of reimbursed cash expenditures
17 could potentially be deduced by computing the sum of the payments made to American Express
18 during all relevant periods and then subtracting the amounts which the Department could verify in
19 those same periods. The result could hypothetically establish the maximum amount of non-taxable
20 reimbursed expenditures which could potentially equal the cash receipts the Department was unable
21 to validate.

22 Even if this method were viable, it is not reliable. A review of Taxpayer Ex. 5 reveals the
23 possibility that Taxpayer also used the credit card for its own business needs. This is demonstrated

1 by dozens of purchases by Mr. Nathan Manning and his brother who collectively own 66.6 percent
2 of Taxpayer. Even though the Manning brothers own other affiliated entities that could have
3 possibly incurred the charges, differentiation under the evidence presented relies too heavily on
4 speculation in that there is no way under the evidence presented to distinguish between expenses
5 incurred for Taxpayer's own business needs, which would not have been reimbursed, and the needs
6 of its affiliates for which it would have been reimbursed.

7 This observation demonstrates the uncertainties caused by the lack of records and the
8 reasonableness of the Department's position. The Hearing Officer was unpersuaded that Taxpayer
9 was entitled to further adjustments, beyond those which the Department reported had already been
10 made, to reduce Taxpayer's gross receipts by excluding additional amounts received solely on
11 behalf of another in a disclosed agency capacity.

12 Loan Proceeds

13 At some point in 2015, Taxpayer acquired a 25-percent interest in High Desert Hospice,
14 LLC, an entity situated and doing business in Utah. Taxpayer acquired its interest for \$57,000
15 which it paid in installments ranging from \$4,000 to \$6,000 per month between May 2015 and
16 March 2016.

17 Because Taxpayer did not have immediate access to \$57,000, Taxpayer borrowed a portion
18 of the funds, totaling \$34,000, from Beehive Staffing Services Company, an entity affiliated with
19 Taxpayer. Presumably given the affiliation, the loan was informal. The loan was unsecured and
20 lacked any formal terms and conditions addressing repayment, maturity, interest, penalties, or
21 other terms and conditions common to formal loans. The Department asserts that this lack of
22 formality and the resulting lack of documentation renders the purported loan proceeds taxable as
23 gross receipts under Section 7-9-5. Although the Department's position is not unreasonable, the

1 totality of the testimony and exhibits ultimately corroborates Taxpayer's position by the
2 preponderance of evidence.

3 The loan was funded in six parts. The first deposit occurred on June 22, 2015 in the
4 amount of \$4,000 (Taxpayer Ex. 1.1; Department Ex. A-0020; A-0022; A-0055; A-0633; A-
5 0682). On June 23, 2015, Check No. 1007 in the amount of \$4,000 cleared Taxpayer's bank and
6 was debited from its account (Department Ex. A-0056).

7 The second deposit occurred on August 6, 2015 in the amount of \$6,000 according to
8 Taxpayer's bank statements, although Taxpayer's own transaction summary suggests it occurred
9 on August 5, 2015 (Taxpayer Ex. 1.1; Department Ex. A-0024; A-0050; A-0634; A-0683). On
10 August 6, 2015, Check No. 2304 in the amount of \$6,000 cleared Taxpayer's bank and was
11 debited from its account (Department Ex. A-0052).

12 The third deposit occurred on September 3, 2015 in the amount of \$6,000 (Taxpayer Ex.
13 1.1; Department Ex. A-0026; A-0046; A-0609; A-0615; A-0634; A-683; A-0729; A-0733; A-
14 0736; A-0748; A-0756; A-0811; A-0831). On September 4, 2015, Check No. 2323 in the amount
15 of \$6,000 cleared Taxpayer's bank and was debited from its account (Department Ex. A-0049).

16 The fourth deposit occurred on November 18, 2015 in the amount of \$6,000 (Taxpayer
17 Ex. 1.1; Department Ex. A-0030; A-0039; A-0609; A-0615; A-0638; A-687; A-0811; A-0819;
18 A-0831). On November 19, 2015, Check No. 2387 in the amount of \$6,000 cleared Taxpayer's
19 bank and was debited from its account (Department Ex. A-0041).

20 The fifth deposit occurred on December 16, 2015 in the amount of \$6,000 (Taxpayer Ex.
21 1.1; Department Ex. A-0032; A-0035; A-0609; A-0615; A-0638; A-0729; A-0734; A-0736; A-
22 0748; A-0756; A-0811; A-0831). On December 18, 2015, Check No. 2401 in the amount of
23 \$6,000 cleared Taxpayer's bank and was debited from its account (Department Ex. A-0037).

1 As of the end of 2015, according to Department Ex. A and Taxpayer Ex. 1.1, Taxpayer
2 had received \$28,000 in money from Beehive Staffing Services Company. The amount borrowed
3 in 2015 was \$28,000 and consistent with the amount noted in a balance sheet indicating an
4 amount “Due to” Beehive Staffing Solutions Company (Department Ex. A-0067).

5 The sixth and final deposit occurred on March 17, 2026 according to Taxpayer’s bank
6 statements, although Taxpayer’s own transaction summary suggests it occurred on March 31,
7 2016 (Taxpayer Ex. 1.1; Department Ex. A-0123; A-0645). On March 18, 2016, Check No. 2476
8 in the amount of \$6,000 cleared Taxpayer’s bank and was debited from its account (Department
9 Ex. A-0125).

10 These observations are consistent with Taxpayer’s testimony about a loan, its purpose
11 and use. In each instance, the exhibits illustrate that a specified sum of money was received by
12 Taxpayer and almost immediately paid by check to a third party, entirely consistent with what
13 one would expect to see in such scenario (borrowing money to pay a debt). Moreover, a running
14 balance due was then noted in a balance sheet in which the “due to” amount for the end of 2015
15 (\$28,000) matched the sum of all 2015 deposits. Repayment, the circumstances of which are
16 discussed in the next section, is also consistent with a loan.

17 Although a close call, considering the totality of the evidence, the Hearing Officer is
18 persuaded that Taxpayer’s records established that \$34,000 should be excluded from the
19 computation of Taxpayer’s gross receipts as proceeds from a loan, and Taxpayer is entitled to a
20 corresponding adjustment of tax, interest, and penalty due.

21 Return of Investment

22 At some point prior to April 7, 2016, Taxpayer concluded that its ownership in High
23 Desert Hospice, LLC was not advantageous to its goals. High Desert Hospice, LLC and

1 Taxpayer entered into an agreement in which High Desert Hospice agreed to refund Taxpayer's
2 investment of \$57,000 in exchange for Taxpayer returning its 25-percent interest in High Desert
3 Hospice, LLC.

4 On April 7, 2016, High Desert Hospice, LLC and Taxpayer executed a Member
5 Dissociation Agreement (Taxpayer Ex. 4) which explained that "[Taxpayer] wishes to separate
6 and dissociate from control and ownership of [High Desert Hospice, LLC]." Accordingly, the
7 parties agreed that High Desert Hospice, LLC and Taxpayer would accomplish the dissociation
8 "by complete return of capital investment by [Taxpayer] to date in the amount of \$57,000 which
9 will be repaid in full and upon repayment will end all membership interests in [High Desert
10 Hospice, LLC]."

11 On April 8, 2016, the very next day after the parties executed the Member Dissociation
12 Agreement, Taxpayer received an incoming wire transfer in the amount of \$57,000 (Department
13 Exhibits A-0119; A-0837). The notation on the transfer as it appeared in Taxpayer's bank
14 statement (Department Ex. A-0119) read, "Capital Investment Repayment."

15 Taxpayer argues this deposit into its account did not represent gross receipts but is merely
16 a refund of an investment which does not come within the definition of gross receipts. The
17 Department does not seemingly contest the legal reasoning underlying that position, but once
18 again raises doubts regarding the sufficiency of Taxpayer's records, particularly with respect for
19 the entity that is identified as the source of the refund which is not High Desert Hospice, LLC or
20 any other entity familiar to the Department.

21 Although the Hearing Officer recognizes the Department's hesitation as reasonable, it is
22 not persuasive in light of the totality of the evidence presented at the hearing. The Hearing
23 Officer is convinced that the incoming wire transfer was what it purported to be which was a

1 refund on an investment in High Desert Hospice, LLC. First, the money was received the day
2 after the dissociation agreement was executed as contemplated by the agreement. Second, the
3 incoming wire transfer was for the same amount stated in the dissociation agreement (\$57,000).
4 Third, the notation in Taxpayer's bank statement stated, "Capital Investment Repayment."

5 The fact that the entity initiating the transfer was not High Desert Hospice, LLC does not
6 transform this money into gross receipts when all other evidence, including the testimony of
7 Taxpayer's witnesses, the Member Dissociation Agreement, Taxpayer's bank statements, as well
8 as the proximity of relevant events establish otherwise. The record evidence persuades by the
9 preponderance that the incoming wire transfer of \$57,000 was a return on an investment
10 regardless of whether the entity that transmitted the money was familiar to the parties. The
11 possibility that this incoming wire transfer served any other purpose is negligible.

12 Taxpayer's refund of \$57,000 should be excluded from the computation of Taxpayer's
13 gross receipts. Taxpayer's gross receipts tax obligation, including associated interest and penalty
14 should also be adjusted accordingly.

15 Penalty

16 Taxpayer did not explicitly protest the imposition of penalty nor address the issue at the
17 hearing. Being familiar with the facts and having reviewed the applicable law and accompanying
18 regulations, the Hearing Officer finds no basis in fact or law for abatement of penalty with
19 respect to any part of the assessment not adjusted in Taxpayer's favor.

20 For the reasons discussed herein, Taxpayer's protest should be GRANTED IN PART and
21 DENIED IN PART.

22 **CONCLUSIONS OF LAW**

23 A. Taxpayer filed a timely, written protest of the Department's assessment and

1 jurisdiction lies over the parties and the subject matter of this protest.

2 B. A hearing in the protest was timely held as required by NMSA 1978, Section 7-1B-8
3 which requires a hearing within 90 days of the Department filing an answer to a taxpayer's request
4 for hearing.

5 C. Under NMSA 1978, Section 7-1-10 A, taxpayers shall "maintain books of account
6 or other records in a manner that will permit the accurate computation of state taxes[.]"

7 D. Under NMSA 1978, Section 7-9-5 (2002), all of Taxpayer's receipts in New
8 Mexico are presumed subject to New Mexico's gross receipts tax unless the records maintained
9 under NMSA 1978, Section 7-1-10 A establish otherwise.

10 E. Under NMSA 1978, Section 7-1-67, Taxpayer is liable for accrued interest under
11 the assessment, adjusted consistently with this Decision and Order. Interest continues to accrue
12 until the tax principal is satisfied.

13 F. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds
14 that would allow for abatement of penalty under Section 7-1-69.

15 G. None of the indicators of non-negligence found under Regulation 3.1.11.11 NMAC
16 allow for abatement of penalty under the facts established in this protest.

17 For the foregoing reasons, Taxpayer's protest **IS GRANTED IN PART AND DENIED**
18 **IN PART**. Taxpayer shall be entitled to a reduction of its total gross receipts by \$91,000
19 (comprised of the sum of the loan in the amount of \$34,000 and the refund of its investment of
20 \$57,000) and corresponding adjustments to the associated gross receipts tax, interest, and
21 penalty. Taxpayer shall not be entitled to further adjustments for credit card reimbursements
22 except for those adjustments which the Department stated it had substantiated.

23 DATED: June 30, 2023



Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing on the parties listed below this 30th day of June,
3 2023 in the following manner:

4 *INTENTIONALLY BLANK*