

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

**WILLIAM C. GARDNER, DDS**

v.

**AHO No. 23.03-010A, D&O No. 24-02**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

On November 3, 2023, Hearing Officer Dee Dee Hoxie, Esq. conducted a telephonic hearing on the protest. The Taxation and Revenue Department (Department) was represented by David Mittle, Staff Attorney. William C. Gardner, DDS (Taxpayer) was represented by its attorneys, Zachary McCormick and Kateri West. William Gardner (Individual) also appeared for the Taxpayer at the hearing. The parties agreed that the only outstanding issue<sup>1</sup> of the protest is the Taxpayer's motion for administrative costs and fees. Neither party requested a hearing on the Taxpayer's motion for administrative costs and fees. The parties agreed that a final decision and order could be issued based on the pleadings.

The main issue to be decided is whether the Taxpayer is the prevailing party and entitled to administrative costs and fees. Because the Department's position was based on a reasonable application of the law to the facts, the Hearing Officer finds in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

**Procedural findings.**

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<sup>1</sup> The Department provided a response to a notice of hearing. The Department acknowledged that there might be some minor discrepancy in the amounts assessed and the amounts in the formal abatements, but the Department confirmed that the underlying assessments have been abated and that the matter can proceed on the motion for costs and fees as the parties had agreed.

1           1.       On August 17, 2022, the Department issued 54 assessments to the Taxpayer for  
2 gross receipts tax and interest. On August 23, 2022, the Department issued two assessments to  
3 the Taxpayer for gross receipts tax and interest. [Admin. file].

4           2.       On September 27, 2022, the Taxpayer filed by email a timely written protest to  
5 the assessments. [Admin. file protest].

6           3.       On September 30, 2022, the Department acknowledged by email its receipt of the  
7 protest. [Admin. file].

8           4.       On March 30, 2023, the Taxpayer filed a request for hearing with the  
9 Administrative Hearings Office. [Admin. file request].

10          5.       On March 31, 2023, the Department filed its answer to the protest. [Admin. file].

11          6.       On May 3, 2023, a telephonic scheduling hearing was conducted, which was  
12 within 90 days of the request for hearing as required by statute. [Admin. file].

13          7.       On September 5, 2023<sup>2</sup>, the Taxpayer filed a motion for summary judgment (SJ  
14 Motion<sup>3</sup>). [Admin. file].

15          8.       On October 6, 2023, a telephonic scheduling hearing was conducted. At the  
16 hearing the parties announced that the Department intended to abate the assessments and that the  
17 Taxpayer would be filing a withdrawal. [Admin. file].

18          9.       On October 17, 2023, the Taxpayer filed its motion for administrative costs and  
19 fees (Taxpayer's Motion<sup>4</sup>). [Admin. file].

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<sup>2</sup> A comprehensive history of the protest may be acquired by referring to the administrative file.

<sup>3</sup> The SJ Motion included a declaration and exhibits. References to these attachments will be preceded by "SJ Motion".

<sup>4</sup> The Taxpayer's Motion included an affidavit and exhibits. References to these attachments will be preceded by "Taxpayer's Motion".

1           10.     On October 31, 2023, the Department filed its response (Department’s Response<sup>5</sup>)  
2 to the Taxpayer’s Motion. [Admin. file].

3           11.     At the hearing conducted on November 3, 2023, the Taxpayer requested to reply,  
4 and the request was granted. The Taxpayer filed its reply (Taxpayer’s Reply) on November 9,  
5 2023. [Admin. file].

6     **Substantive findings.**

7           12.     The Taxpayer is a Professional Corporation. [SJ Motion Exhibit 1].

8           13.     The Individual was the dentist who practiced at the Taxpayer and served as its  
9 registered agent and an officer of the Taxpayer. [SJ Motion Declaration; SJ Motion Exhibit 1].

10          14.     The Individual was indicted on tax fraud charges, with an ultimate disposition of a  
11 no contest plea to two counts filed on February 9, 2022 in the Bernalillo County District Court.  
12 [SJ Motion Exhibit 3; SJ Motion Exhibit 9].

13          15.     The investigation that led to the Individual’s indictment included the Individual,  
14 the Taxpayer, and another business entity. [Department’s Response Exhibit 1 through  
15 Department’s Response Exhibit 3].

16          16.     The investigation determined that the Taxpayer underreported its gross receipts  
17 and owed approximately \$220,000<sup>6</sup> in gross receipts taxes. [Department’s Response Exhibit 1-  
18 10].

19          17.     The assessments of gross receipts taxes were issued to the Taxpayer, and they  
20 were based on the receipts of the Taxpayer, not the Individual. [SJ Motion page 9].

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<sup>5</sup> The Department’s Response included exhibits. References to these attachments will be preceded by “Department’s Response”.

<sup>6</sup> The total of the assessments in the administrative file is \$267,433.90, which includes interest. The total indicated on the request for hearing is \$268,995.23.

1 18. The Taxpayer's underreporting was perpetrated by the Individual. [Department's  
2 Response Exhibit 1-10].

3 19. The Individual agreed to pay restitution of \$162,534.06 in unpaid taxes and  
4 interest as part of his plea agreement. [SJ Motion Exhibit 9].

5 20. Based on the plea agreement, the Department is treating the Individual and the  
6 Taxpayer as jointly and severally liable for \$162,534.06 in unpaid taxes and interest.  
7 [Department's Response page 3].

8 21. Based on the plea agreement, the Department intends to assess the Individual for  
9 the \$162,534.06 in unpaid taxes and interest. [Department's Response page 3].

10 22. To avoid unfairness and possibly double collections by the accounts receivable in  
11 the GENTAX system on the \$162,534.06, the Department decided to abate the assessments  
12 against the Taxpayer. [Department's Response page 3].

## 13 **DISCUSSION**

### 14 **Prevailing party.**

15 In an administrative proceeding on a tax protest, a taxpayer is entitled to an award of  
16 reasonable costs and fees, including attorney fees, incurred in connection with the proceeding "if  
17 the taxpayer is the prevailing party." NMSA 1978, § 7-1-29.1 (A) (2019). A taxpayer is the  
18 prevailing party if the taxpayer has substantially prevailed with respect to the amount in  
19 controversy or with respect to most of the issues or with respect to the most significant issues.  
20 See NMSA 1978, § 7-1-29.1 (C) (1). However, the taxpayer is not the prevailing party if the  
21 Department's position in the proceeding was based upon a reasonable application of the law to  
22 the facts of the case. See NMSA 1978, § 7-1-29.1 (C) (2). The Department's position shall be  
23 presumed to be unreasonable if it did not follow applicable published guidance or if the  
24 assessment was not supported by substantial evidence at the time it was issued. See *id.*

1 The Taxpayer argues that it is the prevailing party because the Department has conflated  
2 the Taxpayer with the Individual and because the Department opted to abate the assessment  
3 rather than respond to the SJ Motion. [Taxpayer’s Motion page 4]<sup>7</sup>. The Taxpayer argues that  
4 the Department “really meant to assess the individual taxpayer, and not the corporate one.”  
5 [Taxpayer’s Motion page 4]. The Taxpayer argues that the situation is substantially similar to  
6 the one in *Helmerich Payne Int’l Drilling Co. v. N.M. Taxation & Revenue Dep’t*, 2019-NMCA-  
7 054. [Taxpayer’s Motion page 4]. The Taxpayer admits that the Department has provided an  
8 explanation for its actions in this protest, which differs from the Department’s actions in  
9 *Helmerich*. [Taxpayer’s Motion page 4 and Taxpayer’s Motion page 5]. The Taxpayer argues  
10 that the Department actions were not reasonable, that it continues to conflate the Taxpayer with  
11 the Individual, and that the Taxpayer is a separate legal entity that was not subject to assessment  
12 based on the Individual’s plea agreement. [Taxpayer’s Reply].

13 A taxpayer is not automatically granted the status of “prevailing party” simply because  
14 the Department abates an assessment. *See* NMSA 1978, § 7-1-29.1. *See also High Desert*  
15 *Recovery v. N.M. Taxation & Revenue Dep’t*, 2020-NMCA-048 (holding that the Department’s  
16 initial assessment was reasonable even though a substantial part was incorrect and later abated by  
17 the Department). The Department’s position is presumed unreasonable if the assessment was not  
18 supported by substantial evidence when it was made. *See* NMSA 1978, § 7-1-29.1 (C) (2). In  
19 this protest, the Department’s position is that the Taxpayer is liable for the unpaid gross receipts  
20 taxes and interest that were assessed. [Department’s Response]. The Department’s position is  
21 based upon the tax fraud investigation and the criminal prosecution of the Individual.  
22 [Department’s Response and its attachments]. The tax fraud investigation found that the

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<sup>7</sup> The page numbers in the SJ Motion refer to the pages of the motion itself by count, as they are not numbered. Page numbers do not refer to the attachments unless the specific attachment is also identified in the citation.

1 Taxpayer was substantially underreporting its gross receipts and owed approximately \$220,000  
2 in gross receipts taxes. [Department's Response Exhibit 1-10]. Therefore, the Department's  
3 assessment of the Taxpayer was a reasonable application of the law to the facts at the time that  
4 the assessment was issued. *See* NMSA 1978, § 7-1-29.1.

5 The Department decided to abate the assessment for its own administrative convenience  
6 regarding issues with tracking payments in GENTAX and its intent to pursue collection of the  
7 taxes through the Individual<sup>8</sup> rather than the Taxpayer. [Department's Response]. The  
8 Department's decision to abate does not render the Department's position at the time of  
9 assessment unreasonable. *See* NMSA 1978, § 7-1-29.1. Because the Department's assessment  
10 of the Taxpayer was a reasonable application of the law to the facts, the Taxpayer is not the  
11 prevailing party. *See id.* Since the Taxpayer is not the prevailing party, the Taxpayer is not  
12 entitled to an award of costs and fees. *See id.*

### 13 CONCLUSIONS OF LAW

14 A. The Taxpayer filed a timely written protest to the assessment, and jurisdiction lies  
15 over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8 (2019).

16 B. The first hearing was timely set and held within 90 days of the request for hearing.  
17 *See id.* *See also* 22.600.3.8 NMAC (2020).

18 C. The Department abated the assessments, but the Taxpayer is not the prevailing party  
19 because the Department's assessment of the Taxpayer was a reasonable application of the law to the  
20 facts. *See* NMSA 1978, § 7-1-29.1. *See also Helmerich*, 2019-NMCA-054. *See also High Desert*,  
21 2020-NMCA-048.

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<sup>8</sup> This decision makes no findings, factual or legal, regarding the Department's ability to take its intended actions against the Individual for taxes incurred by the Taxpayer.

1 For the foregoing reasons, the Taxpayer's request for administrative costs and fees **IS**  
2 **DENIED.**

3 DATED: January 4, 2024.

4 *Dee Dee Hoxie*

5 Dee Dee Hoxie  
6 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 January 4, 2024, a copy of the foregoing Decision and Order was submitted to the  
3 parties listed below in the following manner:

4 *First Class Mail & Email*

*First Class Mail & Email*

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7 *INTENTIONALLY BLANK*