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

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PROCESS EQUIPMENT & SERVICE COMPANY, INC.

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v.

AHO No. 18.10-270R

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TAXATION AND REVENUE DEPARTMENT

D&O No. 24-16

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DECISION AND ORDER ON REMAND

On October 21, 2024, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference hearing on the remand order from the Court of Appeals. The Taxation and Revenue Department (Department) was represented by David Mittle, Staff Attorney. Process Equipment and Service Company, Inc. (Taxpayer) was represented by its attorneys, Frank Crociata and Scott Woody. Mr. Crociata and Mr. Woody testified. The Hearing Officer took notice of all documents in the administrative file. The Department's exhibits A (brief in chief), B (answer brief), C (reply), D (opinion on appeal), and E (response to motion for fees) were admitted. The Taxpayer's exhibits¹ 1 (amended motion for fees), 2 (response to motion for fees), 3 (motion for leave), 4 (reply), 5 (order granting fees), and 6 (post-decision billing).

The main issue to be determined is the amount of fees that should be granted to the Taxpayer, based on their reasonableness and necessity. The Hearing Officer considered all of the evidence and arguments presented by both parties. Based on the evidence and arguments, the Hearing Officer finds that reasonable fees for Mr. Creely are for 40.8 hours at an hourly rate of \$344 per hour, that reasonable fees for Mr. Woody are for 48.6 hours at an hourly rate of \$305 per hour, and that there are no reasonable fees attributable to Mr. Crociata. Therefore, the total amount of fees that was reasonable and necessary is \$28,858.20, plus gross receipts tax. IT IS DECIDED AND ORDERED AS FOLLOWS:

¹ Many pages of the Taxpayer's exhibits are not clearly labeled. Page numbers will be cited if clear on the page or by counting up from the last clearly labeled page number on the same exhibit.

FINDINGS OF FACT

Procedural facts.

1. On January 31, 2020, the decision on the underlying protest in this matter was issued. The decision granted the Taxpayer's protest. *See In Re Protest of Process Equipment & Service Company, Inc.*, D&O #20-02 (Admin. Hearings Off., January 31, 2020) (non-precedential) (hereinafter D&O #20-02). [RP 535]².

2. The total amount³ at controversy in the underlying protest was \$167,841.50. *See* D&O #20-02. [RP 535].

3. On February 27, 2020, the Department appealed the decision. [Admin. file; Exhibit 1].

4. On July 25, 2023, the Court of Appeals issued its opinion on the appeal, affirming the decision. [Admin. file; Exhibit D]. *See Process Equip. & Serv. Co. v. N.M. Taxation & Revenue*, 2023-NMCA-060.

5. On February 16, 2024, the Court of Appeals issued an order granting the Taxpayer's motion for fees and remanding to the hearing officer for hearing to determine the amount of the fees based upon their reasonableness and necessity. [Admin. file; Exhibit 5].

6. The remand hearing was reassigned to the current Hearing Officer, and the parties were given the opportunity to propose a procedure and schedule on the remand order⁴. [Admin. file].

7. On August 5, 2024, the notice of administrative hearing was sent to the parties for a hearing on September 20, 2024. The notice required the parties to file their exhibits prior to the

² Citations to a document in the administrative file in the underlying protest will be cited to the Record Proper (RP) that was filed with the Court of Appeals. Citations will refer to the document by its first page number.

³ Two tax credits, one for \$88,014.00 and the other for \$79,827.50.

⁴ The complete procedural history on the remand hearing is contained in the administrative file.

1 hearing. The notice permitted exhibits pertinent to the issue of the hearing and permitted
2 exhibits to include copies of the pleadings filed with the Court of Appeals. [Admin. file].

3 8. On August 21, 2024, the Department filed its exhibits, and the Taxpayer filed its
4 exhibits. [Admin. file].

5 9. On August 28, 2024, the Department filed a motion to strike part of the
6 Taxpayer's exhibits. [Admin. file].

7 10. On September 6, 2024, the Taxpayer filed its response. [Admin. file].

8 11. On September 13, 2024, the order denying the motion was issued. [Admin. file].

9 12. On September 16, 2024, the Department filed a motion to vacate and reschedule
10 the hearing to allow the Department time to review the exhibits and prepare for the hearing. The
11 motion was initially denied, but it was later granted after a request for reconsideration. [Admin.
12 file].

13 13. On September 19, 2024, the amended notice was issued for a hearing to be held
14 on October 21, 2024. [Admin. file].

15 14. At the hearing on October 21, 2024, the Department requested a continuance and
16 argued that it was unprepared for the Taxpayer to present evidence at the hearing. [Admin. file].

17 15. The remand order indicated that the Taxpayer had the burden to prove the
18 reasonableness and necessity of the fees it was seeking and that the Department would be able to
19 participate fully in the hearing. [Exhibit 5].

20 16. The request for continuance was denied because the Department knew or should
21 have known that evidence could be presented at the hearing. [Exhibit 5]. *See also Kennedy v.*
22 *Dexter Consol. Schs.*, 2000-NMSC-025, ¶ 34-37, 129 N.M. 436 (holding that the party requesting
23 fees must provide detailed evidence to support their claim).

1 ***Substantive facts.***

2 17. The Taxpayer is requesting fees based on the lodestar method for the hours billed
3 by its three attorneys for the work done on the appeal. [Testimony; Exhibit 1].

4 18. The Taxpayer is also requesting additional fees for the work done by its attorneys
5 relating to the motion for fees, which occurred after the appeal decision was issued. [Testimony;
6 Exhibit 6].

7 19. The Taxpayer had three attorneys working on its appeal at various times. Those
8 attorneys were Mr. Creely, Mr. Crociata, and Mr. Woody. [Testimony; Exhibit 1].

9 20. Mr. Creely has extensive appellate experience with a specialist certification in
10 Texas, Mr. Crociata has extensive tax experience in New Mexico, and Mr. Woody has a Master
11 of Accounting and an LLM in tax. [Testimony; Exhibit 1.099-1.108].

12 21. The Taxpayer requested fees for the appellate work at a total⁵ of \$56,940.00 based
13 on 131.1 hours billed at rates from \$350 per hour to \$450 per hour. [Exhibit 1.016].

14 22. The Taxpayer requested fees for the work after the appeal decision at a total⁶ of
15 \$5,255.00 based on 13 hours billed at rates from \$400 per hour to \$450 per hour. [Exhibit 6].

16 23. At the hearing, the Taxpayer conceded that the original requested fee on the
17 appellate work should be reduced by \$1,275.00 because some of the time⁷ billed for Mr. Creely
18 was not directly related to the appeal and should not have been included. [Testimony].

19 24. Reducing the requested fees for the appellate work by \$1,275.00 results in a total⁸
20 of \$55,665.00.

⁵ This total excludes the gross receipts tax.

⁶ This total excludes the gross receipts tax.

⁷ Based on the hourly rate of \$425.00 per hour for Mr. Creely indicated in Exhibit 1, this is a reduction of three hours.

⁸ This total excludes the gross receipts tax.

1 25. Therefore, the total amount of fees⁹ that the Taxpayer is requesting is \$60,920.00
2 for the total appellate and post-decision work that was billed by its attorneys at rates from \$350
3 per hour to \$450 per hour. [Admin. file; Exhibit 1; Exhibit 6].

4 26. The Taxpayer's attorneys worked several hours that they did not bill to the
5 Taxpayer. [Testimony; Exhibit 1; Exhibit 6]. The Taxpayer calculated that the hours spent
6 working on the appeal were 181.0, but the Taxpayer was only billed for 131.1 hours, a difference
7 of 49.9 hours. [Exhibit 1.016].

8 27. Mr. Creely and Mr. Crociata were the Taxpayer's attorneys during the underlying
9 protest of this matter. *See* D&O #20-02. [Testimony; RP 535; Admin. file].

10 28. Mr. Creely and Mr. Crociata were the Taxpayer's attorneys when the appeal was
11 initiated in this matter, and Mr. Creely was the primary attorney on the appeal. [Testimony;
12 Admin. file; Exhibit 1; Exhibit A; Exhibit B; Exhibit C].

13 29. During the course of the appeal, which took over three years from filing to
14 decision, Mr. Woody joined Mr. Crociata and Mr. Creely in representing the Taxpayer. At some
15 point, Mr. Creely withdrew from representing the Taxpayer, and Mr. Woody took over as the
16 primary attorney for the Taxpayer. [Testimony; Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4;
17 Exhibit 5; Exhibit 6; Exhibit D; Exhibit E].

18 30. Most of Mr. Crociata's billed time was spent conferring with the other attorneys
19 and supervising their work on the appeal. [Testimony; Exhibit 1].

20 31. Mr. Woody required time to familiarize himself with the issues of the appeal and
21 the underlying protest. [Testimony].

⁹ This total excludes the gross receipts tax.

1 32. The appeal had some deadline extensions, an oral argument, a motion to
2 reconsider, and the Department applied for certiorari. [Testimony; Exhibit 1].

3 33. The Taxpayer's deadlines to respond to the Department's filings on the appeal
4 were generally very short, and the Taxpayer had notice of the date approximately 30 days before
5 the oral argument. [Testimony].

6 34. The Taxpayer's attorneys communicated primarily with the Taxpayer's
7 accountant, Mr. Mims, throughout the course of the appeal. [Testimony; Exhibit 1].

8 35. Mr. Crociata and Mr. Woody were not sure who paid the Taxpayer's invoices.
9 [Testimony].

10 36. The Taxpayer's invoices were sent to its accountant's offices. [Testimony;
11 Exhibit 1.078].

12 37. On most of the invoices, Mr. Woody had redacted the mailing address because he
13 was preparing the motion for fees on a short schedule and was redacting to avoid any possible
14 confidentiality breaches. [Testimony; Exhibit 1].

15 38. In 2017, a study commissioned by the State Bar of New Mexico was published
16 that used survey data from attorneys in New Mexico in 2016. [Testimony; Exhibit 4.021-4.104].

17 39. The study provided a mean (average) and median (midpoint where 50% fall
18 above/below) standard hourly billing rate for attorneys in a general field of law. [Exhibit 4.036;
19 Exhibit 4.069].

20 40. The average standard hourly billing rate for appellate work was \$262, and the
21 midpoint was \$250. [Exhibit 4.036; Exhibit 4.069].

22 41. The average for tax work was \$260, and the midpoint was \$248. [Exhibit 4.069].

1 42. The Taxpayer also provided results of two kinds of consumer law attorney fee
2 surveys across the United States from 2017-2018. [Exhibit 4.106-4.116].

3 43. The consumer law attorney fee survey indicated that the midpoint rate for all
4 attorneys whose practice was primarily general law in the Albuquerque/Santa Fe area was \$263.
5 [Exhibit 4.110]. The consumer law survey, bankruptcy edition from 2015-2016, indicated that
6 the midpoint rate for all attorneys whose practice was primarily general law in the metropolitan
7 area of New Mexico was \$250, and the midpoint in the northern area of the state was \$300.
8 [Exhibit 4.116].

9 44. Mr. Crociata's law firm for the attorneys practicing in the Santa Fe office is
10 currently charging rates from \$300 to \$560 per hour. [Testimony].

11 45. Mr. Creely charged the Taxpayer \$425.00 per hour, which was a discounted rate¹⁰
12 based, in part, on the relatively low dollar amount involved in the protest. [Exhibit 1.101].

13 46. Mr. Crociata charged the Taxpayer \$425.00 to \$450.00 per hour, which was
14 discounted from his standard rate¹¹ due to the relatively low dollar amount involved in the
15 protest. [Exhibit 1.104].

16 47. Mr. Woody charged the Taxpayer \$350.00 per hour, which was discounted from
17 his standard rate¹² due to the relatively low dollar amount involved in the protest. [Exhibit
18 1.108]. Mr. Woody also charged \$350.00 per hour to \$400.00 per hour. [Exhibit 1; Exhibit 6].

¹⁰ Mr. Creely's standard rate was not disclosed.

¹¹ Mr. Crociata's current standard rate at his current law firm is \$600 per hour. [Exhibit 6.006]. His standard rate at the previous law firm was not disclosed. His standard rate at the current law firm during the appeal appears to be \$550 to \$600 per hour. [Exhibit 1.073; Exhibit 1.077; Exhibit 1.082; Exhibit 1.097].

¹² Mr. Woody's current standard rate at his current law firm is \$460 per hour. [Exhibit 6.006]. His standard rate at the previous law firm was not disclosed. His standard rate at the current law firm during the appeal appears to be \$400 to \$460 per hour. [Exhibit 1.073; Exhibit 1.077; Exhibit 1.082; Exhibit 1.087; Exhibit 1.092; Exhibit 1.097].

1 48. Mr. Creely billed 56.6 hours to the Taxpayer at \$425 per hour, which the
2 Taxpayer now concedes should be reduced to a total of 53.6 hours¹³. [Exhibit 1.016;
3 Testimony].

4 49. Mr. Crociata billed 21.2 hours to the Taxpayer at \$425 per hour and 6.1 hours at
5 \$425 to \$450 per hour, a total of 27.3 hours. [Exhibit 1.016].

6 50. Mr. Woody billed 1.3 hours to the Taxpayer at \$350 per hour and 45.9 hours at
7 \$350 to \$400 per hour, a total of 47.2 hours. [Exhibit 1.016].

8 51. The requested billing originally included 4.9 hours for Mr. Creely's work and 2.1
9 hours for Mr. Crociata's work prior to February 27, 2020, which was before the appeal was filed.
10 [Exhibit 1.019 and Exhibit 1.023].

11 52. Some of the details on the billed time were redacted, for Mr. Creely 0.1 hours, for
12 Mr. Crociata 0.4 hours, and for Mr. Woody 1.2 hours. [Exhibit 1.058; Exhibit 1.072].

13 53. The Taxpayer did not explain how the time with redacted details was related to
14 the appeal. [Admin. file].

15 54. After the appeal decision, Mr. Woody billed 11.9 hours to the Taxpayer at \$400
16 per hour, and Mr. Crociata billed 1.1 hours to the Taxpayer at \$450 per hour. [Exhibit 6].

17 55. Of that post-decision time, 8 hours billed by Mr. Woody and the entire 1.1 hours
18 billed by Mr. Crociata were spent working on the motion for leave to file a reply that was
19 ultimately denied by the Court of Appeals. [Exhibit 6.004-6.005; Exhibit 5].

¹³ That is \$1,275 divided by the hourly rate of \$425, which equals 3.

1 **DISCUSSION**

2 “The taxpayer shall have the burden of proof, except as otherwise provided by law.”
3 22.600.3.24 (B) NMAC (2020). The Taxpayer has the “burden to prove the reasonableness and
4 necessity of the fees it is seeking.” [Exhibit 5].

5 **Award of fees is to the Taxpayer.**

6 When the Department appeals a decision of a hearing officer and the court upholds the
7 decision, “the court shall award reasonable attorney fees to the protestant.” NMSA 1978, § 7-1-25
8 (D) (2015). The Court of Appeals granted the Taxpayer’s motion for fees and remanded the matter
9 for hearing on the reasonableness and necessity of the fees. [Exhibit 5].

10 The Department argued that the Taxpayer did not incur any attorney fees because of the
11 contingency agreement between the Taxpayer and its accountant. [Exhibit E]. The Department
12 argued that the accountant’s firm paid the attorney fees because the invoices were sent to the
13 accountant’s firm. [Exhibit E; Exhibit 1.078]. The Department argued that the redaction of the
14 accountant’s address on most of the invoices was a deliberate attempt by the attorneys to obfuscate
15 who their client was. [Exhibit E; Exhibit 1]. The Department argued that the attorneys’ client was
16 actually the accountant and not the Taxpayer. [Exhibit E]. The Department argued that since the
17 accountant was the one who incurred fees but was not technically the protestant, the Taxpayer
18 should not be awarded any fees. [Exhibit E]. The Department cited no authority for its proposition
19 that the Taxpayer must be the one to have paid the fees in order to receive an award of fees.
20 [Exhibit E]. *See In re Gelinas*, 2020-NMCA-038, ¶ 6 (noting that when a party cites no authority,
21 one may presume that none exists).

22 There was no evidence of who actually paid the attorneys’ invoices for the Taxpayer. Mr.
23 Crociata and Mr. Woody did not know who paid the invoices because they do not handle their law

1 firm's account receivables. [Testimony]. The Taxpayer correctly points out that there was nothing
2 in the statute that requires a protestant to pay the fees directly in order to receive an award of
3 attorney fees. [Exhibit 4]. *See also* NMSA 1978, § 7-1-25 (D).

4 Fee-shifting provisions award the fees to the prevailing party, not to their attorneys. *See*
5 *Tome Land & Imp. Co. v. Silva*, 1973-NMSC-120, ¶ 12, 86 N.M. 87. In *Tome*, the losing party tried
6 to claim that there should be no award for attorney fees because the prevailing party's attorney fees
7 had already been paid. *See id.* at ¶ 10. "From this mind boggling chain of reasoning, it seems that
8 Tome seeks to take credit for amount paid or to be paid by the dissenters, Tome's adversaries and
9 the prevailing parties, to their attorney." *Id.* The court explained that the issue under the fee-
10 shifting provision was the reasonableness of the fees, not what the prevailing party's attorney was
11 actually paid and not the private arrangements between the prevailing party and their attorney. *See*
12 *id.* at ¶ 13-14. The subject matter of this hearing is similarly the reasonableness of the fees, not
13 what private arrangements exist between the Taxpayer, its accountant, and its attorneys. *See id.*
14 Moreover, the Court of Appeals has already ordered that the Taxpayer be awarded fees, and the
15 only issue of the hearing is how much that award will be based on the reasonableness and necessity
16 of the fees. [Exhibit 5]. Consequently, the Taxpayer will be awarded fees.

17 **Determining the reasonableness of fees.**

18 Generally, the court has broad discretion in determining the reasonableness of fees. *See*
19 *Calderon v. Navarette*, 1990-NMSC-098, ¶ 7, 111 N.M. 1. *See also In re N.M. Indirect Purchasers*
20 *Microsoft Corp.*, 2007-NMCA-007, ¶ 6, 140 N.M. 879. Each determination of fees is governed by
21 its own facts and circumstances, and the court may consider various factors to determine the
22 reasonableness of a fee. *See Calderon*, 1990-NMSC-098 at ¶ 10.

1 Several factors should be considered in determining the reasonableness of the fee, such as
2 the skill required, the nature and complexity of the controversy, the novelty and difficulty involved,
3 the amount involved, the time and labor required, the ability and experience of the attorneys, if the
4 attorneys are precluded from other work, and the fees customarily charged in the locality for similar
5 legal services. *See Fryar v. Johnsen*, 1979-NMSC-080, ¶ 10-11, 93 N.M. 485. *See also In re N.M.*
6 *Indirect Purchasers*, 2007-NMCA-007, ¶ 77. *See also Calderon*, 1990-NMSC-098 at ¶ 10. The
7 factors do not have equal weight, and not all factors need to be considered. *See In re N.M. Indirect*
8 *Purchasers*, 2007-NMCA-007, ¶ 78. The court may apply its own knowledge and expertise to
9 determine the value and necessity of the services rendered. *See Calderon*, 1990-NMSC-098 at ¶ 10.

10 The Taxpayer proposed that the fees be awarded based on the lodestar method. [Exhibit 1].
11 The lodestar method, multiplying the hours spent by counsel by an hourly rate, is generally the
12 preferred method of determining fees in a fee-shifting case as it provides an objective basis of
13 evaluation because both the number of hours and the hourly rate must be reasonable. *See In re N.M.*
14 *Indirect Purchasers*, 2007-NMCA-007, ¶ 34. *See also Rio Grande Sun v. Jemez Mountains Pub.*
15 *Sch. Distr.*, 2012-NMCA-091, ¶ 20, *cert. denied* No. 33,634, NMSC, August 2, 2012. *See also*
16 *Atherton v. Gopin*, 2012-NMCA-023, ¶ 7. *See also Behrens v. Gateway Court, LLC*, 2013-NMCA-
17 097, ¶ 36. *See also Puma v. Wal-Mart Stores East*, 2023-NMCA-005, ¶ 45. The Department did
18 not propose an alternative method for determination of the Taxpayer's attorney fees. [Exhibit E].
19 Therefore, the lodestar method will be used to determine the attorney fees in this matter.

20 The party requesting the fees must provide detailed evidence to support a lodestar
21 calculation. *See Kennedy*, 2000-NMSC-025, ¶ 34-37. In three instances, the hours billed had the
22 details redacted, 0.1 hours for Mr. Creely, 0.4 hours for Mr. Crociata, and 1.2 hours for Mr. Woody.
23 [Exhibit 1.058; Exhibit 1.072]. The Taxpayer did not provide additional evidence on these billed

1 hours with redacted details. Consequently, there is not sufficient evidence to establish that these
2 billed hours were reasonable and necessary, and they will be excluded from the award.

3 **Determining the reasonable representation.**

4 The Department argued that all of Mr. Crociata’s hours are unreasonable and should be
5 excluded because his time amounts to impermissible “piling on”, a situation when multiple
6 attorneys are billing for time and efforts when one should suffice. [Exhibit E]. The Taxpayer
7 argued at the hearing that normal civil practice can involve multiple attorneys who can reasonably
8 confer and work on the same case.

9 When the award of fees is based on a statute, the statute controls. *See Archuleta v. Safeway*
10 *Stores, Inc.*, 1986-NMCA-092, 104 N.M. 769. In *Archuleta*, the court was not permitted to award
11 fees to the plaintiff for two attorneys who had both represented the plaintiff throughout the
12 proceedings. *See id.* at ¶ 15. The “award for double representation was impermissible under
13 NMSA 1978, Section 52-1-54 (D) which speak of ‘attorney’ in the singular.” *Id.* The fee-shifting
14 statute does not limit the number of attorneys a party may engage, but “a reasonable fee will be
15 allowed only for single representation.” *Id.*

16 In this matter, “the court shall award reasonable *attorney* fees to the protestant.” NMSA
17 1978, § 7-1-25 (D) (emphasis added). Like *Archuleta*, this statute uses the singular “attorney”. *See*
18 *id.* *See also Archuleta*, 1986-NMCA-092 at ¶ 15. Therefore, the award of fees in this matter will be
19 limited to single representation. *See Archuleta*, 1986-NMCA-092. *See also* NMSA 1978, § 7-1-25.

20 The Taxpayer had three attorneys representing it throughout the course of its appeal.
21 [Testimony; Exhibit 1]. Mr. Creely was the primary representative until he withdrew. [Exhibit 1].
22 After Mr. Creely withdrew, Mr. Woody served as the primary representative. [Exhibit 1].
23 Therefore, Mr. Creely’s time as primary representative and Mr. Woody’s time as primary

1 representative will be combined and treated as a single representation for purposes of the statute in
2 awarding the Taxpayer “reasonable attorney fees”. *See* NMSA 1978, § 7-1-25 (D). *See also*
3 *Archuleta*, 1986-NMCA-092, ¶ 15.

4 Time billed by Mr. Woody during Mr. Creely’s primary representation will be excluded as
5 unreasonable and impermissible double representation. The only instance where Mr. Woody billed
6 time during Mr. Creely’s primary representation appears to be a total of 1.3 hours. [Exhibit 1.053].
7 Mr. Crociata’s representation overlaps with the representation by both Mr. Creely and Mr. Woody.
8 [Testimony; Exhibit 1]. Consequently, all of Mr. Crociata’s billed time will be excluded as
9 unreasonable and impermissible double representation, which is 27.3 hours during the appeal and
10 1.1 hours after the appeal decision, for a total of 28.4 hours. [Exhibit 1.016; Exhibit 6.005].

11 **Determining the reasonable number of hours.**

12 The Department argued that the number of hours claimed is not reasonable because the
13 Court of Appeals rejected the Taxpayer’s argument that the state tax credit should be treated the
14 same as a federal tax credit. [Exhibit E]. The Department argued that the time spent on an
15 unsuccessful argument is not reasonable and should not be included in the number of reasonable
16 hours. [Exhibit E].

17 Generally, the court should exclude time spent on unsuccessful claims from its
18 determination of an attorney fee. *See Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 41, 132 N.M.
19 459. The Taxpayer’s answer brief argued about the application of the state tax credit and its
20 similarity to the federal tax credit. [Exhibit B-016]. The Court of Appeals dealt with this argument
21 in a footnote in its decision. [Exhibit D-003]. *See Process Equip. & Serv. Co.*, 2023-NMCA-060,
22 fn. 1. However, the Taxpayer’s answer brief was filed in response to the Department’s brief in
23 chief, which included a section about the federal tax credit. [Exhibit A-033; Exhibit B]. “If the

1 decision upholds the hearing officer’s decision only in part, the award shall be limited to reasonable
2 attorney fees associated with the portion upheld.” NMSA 1978, § 7-1-25 (D). In this matter, the
3 underlying decision on the protest was affirmed in its entirety. [Exhibit D]. *See Process Equip. &*
4 *Serv. Co.*, 2023-NMCA-060. As the Taxpayer’s arguments on the federal tax credit were in
5 response to the Department’s brief in chief and the Taxpayer’s claims of the credit were upheld
6 in their entirety, the hours spent on those arguments were reasonable and necessary.
7 Consequently, those hours need not be excluded.

8 The Department also argued that the time spent on the Taxpayer’s motion for leave to file
9 a reply in the Court of Appeals should be excluded because the Court of Appeals ultimately
10 denied that motion. [Admin. file; Exhibit 3; Exhibit 4; Exhibit 5]. The Department’s response to
11 the Taxpayer’s initial motion for fees was not filed timely. [Exhibit 5]. Therefore, the Court of
12 Appeals considered the Taxpayer’s motion to be unopposed. [Exhibit 5]. Consequently, the
13 time spent by the Taxpayer’s attorneys on the motion for leave to file a reply to the Department’s
14 untimely response was not reasonable and necessary, and the eight hours billed by Mr. Woody
15 for that motion will be excluded. [Exhibit 6.004-6.005].

16 The Department argued that the number of hours that the Taxpayer’s attorneys have claimed
17 is not reasonable because the issues were not novel to the Taxpayer. [Exhibit E]. The Department
18 pointed out that the Taxpayer filed a prehearing statement at the protest level and an answer brief at
19 the appeal level. [Exhibit E]. At the hearing, the Department requested that the number of hours
20 billed be reduced by one-third. [Admin. file]. Mr. Creely and Mr. Crociata represented the
21 Taxpayer at the protest and on the appeal. [Testimony; Exhibit 1; Exhibit B]. At the protest level,
22 Mr. Creely filed a prehearing brief on behalf of the Taxpayer. [RP 148]. At the appeal level, Mr.
23 Creely filed an answer brief on behalf of the Taxpayer. [Exhibit B]. The arguments in each brief

1 are substantially similar and contain many of the same statutory and caselaw citations. [Exhibit B;
2 RP 148]. The answer brief is in a different format than the prehearing brief, likely to conform with
3 court rules. [Exhibit B; RP 148]. The answer brief also contains citations to the record proper that
4 were not included in the prehearing brief. [Exhibit B; RP 148].

5 Based on the details in the invoices, Mr. Creely billed 31.7 hours related to work done on
6 the answer brief. [Exhibit 1.053- 1.054; Exhibit 1.058]. Given the formatting differences, the
7 necessity of conforming pleadings to court rules, and the necessity of citing to the record proper, it
8 was reasonable and necessary for Mr. Creely to spend time working on the answer brief. However,
9 given the similarities between the prehearing brief and the answer brief, Mr. Creely's involvement
10 in preparing and submitting both of those documents, and Mr. Creely's intimate knowledge of the
11 underlying protest and its record as the attorney who represented the Taxpayer during the
12 underlying protest, the time billed on the answer brief is not reasonable and should be reduced by
13 one-third¹⁴. Therefore, 10.8 hours¹⁵ will be excluded.

14 At the hearing, the Department argued that the total hours billed should be reduced by one-
15 third. [Admin. file]. At the hearing, the Department argued that the appeal was not a complicated
16 issue and involved mainly statutory construction. [Admin. file]. The court found the issue of the
17 appeal "a question of first impression." See *Process Equip. & Serv. Co.*, 2023-NMCA-060, ¶ 8.
18 Mr. Woody was not representing the Taxpayer during the underlying protest. [Testimony]. It was
19 reasonable and necessary for Mr. Woody to spend time familiarizing himself with the issues and
20 with the record. See *Fryar*, 1979-NMSC-080. Moreover, the Department requested extensions and
21 filed a motion to reconsider in the appeal. [Admin. file; Testimony]. See *Pesch v. Boddington*

¹⁴ For purposes of this reduction, one-third is .34, while the remaining two-thirds is .66.

¹⁵ This is calculated by multiplying the hours billed by .34 and rounding up to the nearest decimal point.

1 *Lumber Co.*, 1998-NMCA-026, ¶ 11, 124 N.M. 666 (indicating that the conduct of the parties in
2 increasing litigiousness was a valid consideration in determining the reasonableness of fees).

3 The Taxpayer's attorneys billed for work performed after the decision and before the appeal
4 was filed. [Exhibit 1]. Mr. Creely billed 4.9 hours prior to the appeal being filed. [Exhibit 1.019;
5 Exhibit 1.0123]. The Taxpayer conceded that three of Mr. Creely's hours from pre-appeal time
6 should be excluded. [Testimony]. However, the Taxpayer did not explain why the 1.9 additional
7 hours billed prior to the appeal were reasonable and necessary for the appellate work. Therefore,
8 those 4.9 hours billed by Mr. Creely for work done prior to the appeal will be excluded¹⁶.

9 The Taxpayer's attorneys prepared extensively for the oral argument. [Testimony].
10 Because the Taxpayer had notice approximately 30 days before the oral argument, the Taxpayer's
11 attorneys had to prepare for the oral argument on a short schedule. [Testimony]. Based on the
12 details in the invoices, Mr. Woody billed for 36.9 hours actively preparing for and 0.7 hours
13 attending and presenting the oral argument at the Court of Appeals. [Exhibit 1.075]. This
14 represents approximately 80% of the time billed by Mr. Woody¹⁷ in the appeal. [Exhibit 1]. Given
15 the novelty of the issue on appeal, Mr. Woody's lack of familiarity with the underlying protest, and
16 the relatively limited time to prepare, the time billed to prepare for and present the oral argument
17 was reasonable and necessary. *See Fryar*, 1979-NMSC-080. *See Process Equip. & Serv. Co.*,
18 2023-NMCA-060.

19 A total of 131.1 hours were billed for the appellate work by the three attorneys. [Exhibit
20 1.016]. Mr. Crociata's portion was 27.3 hours and is excluded as unreasonable and impermissible

¹⁶ Mr. Crociata also billed some time prior to the appeal being filed, but that time is already excluded as unreasonable based on the impermissible double representation as discussed supra.

¹⁷ Mr. Woody's total was 47.2 hours billed, which includes some of the time that will be excluded as noted supra, but does not include any post-decision hours. [Exhibit 1.016]. The percentage is rounded to the nearest whole number.

1 double representation. [Exhibit 1.016]. *See also Archuleta*, 1986-NMCA-092. *See also* NMSA
2 1978, § 7-1-25. Mr. Creely's portion was 56.6 hours, which is reduced by 15.8 hours¹⁸. [Exhibit
3 1.016]. Mr. Woody's portion was 47.2 hours, which is reduced by 2.5 hours¹⁹. [Exhibit 1.016]. A
4 total of 13 hours were billed for the post-decision work. [Exhibit 6]. Mr. Crociata's portion was 1.1
5 hours and is excluded as impermissible double representation. [Exhibit 6]. *See also Archuleta*,
6 1986-NMCA-092. *See also* NMSA 1978, § 7-1-25. Mr. Woody's portion was 11.9 hours, which is
7 reduced by 8 hours for time that was not reasonable and necessary²⁰. [Exhibit 6.004-6.005]. The
8 Taxpayer's attorneys also spent additional time working on the appeal for which they did not bill
9 the Taxpayer. [Testimony; Exhibit 1; Exhibit 6]. However, the Hearing Officer finds that the
10 amount of time billed, as adjusted, is the time that was reasonable and necessary. Therefore, the
11 total number of hours that were reasonable and necessary by Mr. Creely were 40.8 hours²¹, and by
12 Mr. Woody were 48.6 hours²², for a combined total of 89.4 hours.

13 **Determining the reasonable hourly rate.**

14 The Department argued that an hourly rate is reasonable if it is comparable to fees charged
15 by other attorneys in the area for similar legal services. [Exhibit E-008]. At the hearing, the
16 Department argued that the hourly rates charged by the Taxpayer's attorneys exceed the comparable
17 market value of other attorneys in the area and argued that it should be reduced to \$260.00 per hour
18 with \$23,572.00 as the total²³ amount of fees awarded. [Admin. file]. The Department did not

¹⁸ As discussed supra, the total one-third reduction, 10.8 hours, of time billed on the answer brief, and 0.1 hours of redacted and unexplained time billed, and 4.9 hours of pre-appeal time billed.

¹⁹ As discussed supra, the 1.2 hours of redacted and unexplained time billed, and 1.3 hours of time billed while Mr. Creely was the primary representative.

²⁰ As discussed supra, for time spent on the motion for leave to reply.

²¹ $56.6 - 15.8 = 40.8$

²² $47.2 - 2.5 = 44.7$; $11.9 - 8 = 3.9$; $44.7 + 3.9 = 48.6$

²³ Dividing this total by \$260 per hour results in approximately 90.7 hours, rounded up to the nearest decimal point. Despite requesting that the total hours be reduced by one-third, the Department's suggested total reflects 1.3 hours more than those found to be reasonable supra.

1 present any evidence on comparable fees in the area. [Admin. file]. Although the Department
2 strenuously and repeatedly objected to Exhibit 4, the Department appears to be relying on it to assert
3 that \$260 per hour is a reasonable hourly rate. [Exhibit 4.069].

4 One factor to be considered in determining a reasonable hourly rate is comparable market
5 rates. *See Fryar*, 1979-NMSC-080, ¶10-11. *See In re N.M. Indirect Purchasers*, 2007-NMCA-007,
6 ¶ 77. *See also N.M. Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 28 (indicating
7 that the court appropriately considered an affidavit from an expert on the market value of attorney
8 fees in New Mexico in awarding \$400 per hour). Other factors to consider in determining a
9 reasonable hourly rate are the complexity of the case, the skill needed, the experience, the
10 reputation, and the ability of the attorneys who perform the services. *See Fryar*, 1979-NMSC-080,
11 ¶ 10-11. *See also In re N.M. Indirect Purchasers*, 2007-NMCA-007, ¶ 77.

12 The main evidence regarding comparable market rates in New Mexico comes from Exhibit
13 4. [Exhibit 4]. The comparable rates provided for tax work were \$248 to \$260 per hour. [Exhibit
14 4.069]. The comparable rates provided for appellate work were \$250 to \$262 per hour. [Exhibit
15 4.036; Exhibit 4.069]. The comparable rates provided for the Santa Fe and Albuquerque and
16 northern New Mexico areas were \$250 to \$300 per hour. [Exhibit 4.110; Exhibit 4.116]. The rates
17 charged by the Taxpayer's attorneys exceed the average and midpoint ranges provided for
18 comparison on tax work, appellate work, and for the Santa Fe and Albuquerque areas. [Exhibit 4].
19 However, extensive experience and expertise may justify a higher-than-average rate. *See In re N.M.*
20 *Indirect Purchasers*, 2007-NMCA-007, ¶ 65. *See also N.M. Found. for Open Gov't*, 2020-NMCA-
21 014, ¶ 28.

22 At the hearing the Department argued that the Taxpayer's attorneys should not be
23 considered to have specialized knowledge or expertise. [Admin. file]. The Department argued that

1 the Taxpayer's attorney was criticized by one of the justices during oral argument, was unprepared,
2 and made false statements in pleadings. [Admin. file]. Mr. Woody did not agree with the
3 Department's representation of what occurred at oral argument. [Testimony]. Mr. Woody
4 explained that the Department's complaint about the information in the pleading came from the
5 Taxpayer's reliance on the Department's statements in its docketing statement. [Testimony; Exhibit
6 C-016 to C-017; Exhibit 4].

7 Mr. Creely has been licensed to practice in New Mexico since 2016 and in Texas since
8 1983. [Exhibit 1.099]. Mr. Creely was a board-certified appellate attorney in Texas. [Exhibit
9 1.099]. Mr. Creely has handled numerous appeals in Texas courts and in federal courts. [Exhibit
10 1.099]. Mr. Creely has represented numerous clients in New Mexico, and many of his cases
11 involved significant sums and complex issues. [Exhibit 1.100].

12 Mr. Woody practices in New Mexico and has represented numerous clients in state and
13 federal courts, although Mr. Woody has been practicing only since 2017. [Exhibit 1.106]. Mr.
14 Woody has a master's degree in accounting and an LLM in tax. [Exhibit 1.106]. Many of Mr.
15 Woody's cases have involved significant sums and complex issues. [Exhibit 1.106].

16 The Taxpayer's attorneys have extensive experience and expertise in appellate and tax
17 practice, even if their representation of the Taxpayer during the appeal was imperfect. [Testimony;
18 Exhibit 1.099-1.108]. Therefore, a higher-than-average rate is justified. *See Fryar*, 1979-NMSC-
19 080. *See also In re N.M. Indirect Purchasers*, 2007-NMCA-007. Mr. Creely's rate exceeds the
20 highest average or midpoint comparable rate by more than \$100, and Mr. Woody's rate exceeds the
21 highest average or midpoint comparable rate by \$50 or more. [Exhibit 4]. Even considering
22 inflation between the time of the surveys and the dates of the appeal, and considering the skill, the

1 experience, and the expertise of the attorneys involved, the Hearing Officer finds that these rates are
2 excessive and unreasonable.

3 To determine the reasonable rate, the Hearing Officer will average²⁴ the lowest rate charged
4 by the attorney with the highest comparable rate²⁵ in their field of expertise. This average is
5 sufficient to account for the attorneys' expertise and skill as well as any possible inflation. This
6 average is also in the range of the law firm's current rates. For Mr. Creely, who was board-certified
7 in Texas in appellate work, the highest comparable rate for appellate work is \$262. For Mr. Woody,
8 who has an LLM in tax, the highest comparable rate for tax work is \$260. [Exhibit 4.036; Exhibit
9 4.069]. Therefore, Mr. Creely's reasonable rate is \$344 per hour²⁶, and Mr. Woody's reasonable
10 rate is \$305 per hour²⁷. Consequently, the reasonable fee for Mr. Creely's work is a total²⁸ of
11 \$14,035.20, and the reasonable fee for Mr. Woody's work is a total²⁹ of \$14,823.00, for a combined
12 total³⁰ of \$28,858.20. A party awarded attorney fees is also "entitled to all gross receipts taxes
13 attributable to the fees ultimately awarded on remand." *Rio Grande Sun*, 2012-NMCA-091, ¶ 26.

14 CONCLUSIONS OF LAW

15 A. This matter was remanded by the Court of Appeals for a hearing to determine the
16 amount of fees to be awarded to the Taxpayer, and jurisdiction lies over the parties and the subject
17 matter of this hearing. [Exhibit 5]. *See also* NMSA 1978, § 7-1B-8 (2019).

18 B. The Taxpayer will be awarded reasonable attorney fees. [Exhibit 5]. *See Tome*
19 *Land & Imp. Co.*, 1973-NMSC-120. *See* NMSA 1978, § 7-1-25.

²⁴ Rounded to the nearest dollar.

²⁵ As provided in Exhibit 4.

²⁶ $262+425=687$; $687/2=343.5$

²⁷ $260+350=610$; $610/2=305$

²⁸ $344 \times 40.8=14035.2$

²⁹ $305 \times 48.6=14823$

³⁰ This total does not include gross receipts tax.

1 C. The burden is on the Taxpayer to prove that the fees it is requesting are reasonable
2 and necessary. [Exhibit 5]. *See Kennedy*, 2000-NMSC-025. *See* 22.600.3.24. NMAC.

3 D. Several factors are considered in determining the reasonableness of fees, and the
4 court may rely on its own knowledge and expertise to determine the value and necessity of the
5 services rendered. *See Fryar*, 1979-NMSC-080. *See In re N.M. Indirect Purchasers*, 2007-NMCA-
6 007. *See Calderon*, 1990-NMSC-098. *See Rio Grande Sun*, 2012-NMCA-091. *See Atherton*,
7 2012-NMCA-023. *See Behrens*, 2013-NMCA-097. *See Puma*, 2023-NMCA-005. *See Pesch*,
8 1998-NMCA-026.

9 E. The lodestar method provides an objective basis for evaluating if the fees are
10 reasonable in a fee-shifting case, and the number of hours and the hourly rate must be
11 reasonable. *See Fryar*, 1979-NMSC-080. *See In re N.M. Indirect Purchasers*, 2007-NMCA-007.
12 *See Calderon*, 1990-NMSC-098. *See Rio Grande Sun*, 2012-NMCA-091. *See Atherton*, 2012-
13 NMCA-023. *See Behrens*, 2013-NMCA-097. *See Puma*, 2023-NMCA-005. *See Pesch*, 1998-
14 NMCA-026. *See* NMSA 1978, § 7-1-25.

15 F. The statute uses the singular “attorney”, which allows for a reasonable fee only for a
16 single representation. *See* NMSA 1978, § 7-1-25. *See Archuleta*, 1986-NMCA-092.

17 G. Time spent by Mr. Creely and Mr. Woody when their representation did not overlap
18 is considered a single representation. *See* NMSA 1978, § 7-1-25. *See Archuleta*, 1986-NMCA-092.

19 H. Time spent by Mr. Woody that overlapped with Mr. Creely’s representation was not
20 reasonable and was impermissible double representation. *See* NMSA 1978, § 7-1-25. *See*
21 *Archuleta*, 1986-NMCA-092.

1 I. Time spent by Mr. Crociata that overlapped with Mr. Creely's representation and
2 with Mr. Woody's representation was not reasonable and was impermissible double representation.

3 *See* NMSA 1978, § 7-1-25. *See Archuleta*, 1986-NMCA-092.

4 J. Unexplained time spent does not satisfy the burden of proving that the time was
5 reasonable. [Exhibit 1.058; Exhibit 1.072]. *See Kennedy*, 2000-NMSC-025.

6 K. Time spent prior to the appeal being filed was not reasonable and necessary for
7 the appeal. [Exhibit 1.019; Exhibit 1.023]. *See Kennedy*, 2000-NMSC-025.

8 L. Time spent by Mr. Creely on the answer brief was excessive and unreasonable
9 given his involvement with the underlying protests, and that time is reduced by one-third. *See*
10 *Fryar*, 1979-NMSC-080. *See In re N.M. Indirect Purchasers*, 2007-NMCA-007. *See Calderon*,
11 1990-NMSC-098.

12 M. Time spent by Mr. Woody on the motion for leave to reply was unreasonable and
13 unnecessary because the Department's response was untimely. [Exhibit 5]. *See Fryar*, 1979-
14 NMSC-080. *See In re N.M. Indirect Purchasers*, 2007-NMCA-007. *See Calderon*, 1990-NMSC-
15 098.

16 N. The total reasonable and necessary hours for Mr. Creely was 40.8 hours and for Mr.
17 Woody was 48.6 hours. *See Fryar*, 1979-NMSC-080. *See In re N.M. Indirect Purchasers*, 2007-
18 NMCA-007. *See Calderon*, 1990-NMSC-098.

19 O. The hourly rates charged by Mr. Creely and Mr. Woody were excessive and
20 unreasonable in comparison to the provided average and midpoint range of rates typically charged
21 in New Mexico for similar work. [Exhibit 4]. *See Fryar*, 1979-NMSC-080. *See In re N.M.*

22 *Indirect Purchasers*, 2007-NMCA-007. *See Calderon*, 1990-NMSC-098.

1 P. Mr. Creely and Mr. Woody had skill, experience, and expertise in appellate law and
2 tax law, respectively, that justifies an above-average hourly rate. [Exhibit 1.099-1.108]. *See Fryar,*
3 *1979-NMSC-080. See In re N.M. Indirect Purchasers, 2007-NMCA-007. See Calderon, 1990-*
4 *NMSC-098. See N.M. Found. for Open Gov't, 2020-NMCA-014.*

5 Q. Averaging the highest comparable rate in the field of expertise with the lowest
6 amount charged by the attorney provides the best method for determining the reasonable hourly rate
7 in this case, and it accounts for the attorneys' expertise and for the possible inflation. *See Fryar,*
8 *1979-NMSC-080. See In re N.M. Indirect Purchasers, 2007-NMCA-007. See Calderon, 1990-*
9 *NMSC-098.*

10 R. The reasonable hourly rate for Mr. Creely is \$344 per hour and for Mr. Woody is
11 \$305 per hour. *See Fryar, 1979-NMSC-080. See In re N.M. Indirect Purchasers, 2007-NMCA-*
12 *007. See Calderon, 1990-NMSC-098.*

13 For the foregoing reasons, the Taxpayer **IS AWARDED** reasonable and necessary attorney
14 fees in the amount of **\$28,858.20, plus gross receipts tax. IT IS SO ORDERED.**

15 DATED: November 22, 2024.

16 *Dee Dee Hoxie*

17 _____
18 Dee Dee Hoxie
19 Hearing Officer
20 Administrative Hearings Office
21 P.O. Box 6400
Santa Fe, NM 87502

22 NOTICE OF RIGHT TO APPEAL

23 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
24 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
25 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
26 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates

1 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
2 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
3 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
4 Hearings Office may begin preparing the record proper. The parties will each be provided with a
5 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
6 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
7 statement from the appealing party. *See* Rule 12-209 NMRA.

8 **CERTIFICATE OF SERVICE**

9 On November 22, 2024 a copy of the foregoing Decision and Order was submitted to the
10 parties listed below in the following manner:

11 *First Class Mail and Email*

First Class Mail and Email

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