STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
ATC HEALTHCARE SERVICES INC. **No 16-55**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1425478976

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on September 2, 2015, before Brian VanDenzen, Chief Hearing Officer. Attorney Timothy R. Van Valen appeared representing ATC Healthcare Services, Inc. ("Taxpayer"). Staff Attorney Peter Breen appeared representing the Taxation and Revenue Department ("Department"). The matter came before the Chief Hearing Officer on the Taxpayer's Motion for Summary Judgment filed on July 17, 2015 and the Department's Response thereto filed on August 14, 2015 in which the Department also moved for summary judgment. On August 24, 2015, upon request of Taxpayer, the formal merits hearing scheduled in this matter was converted to a summary judgment merits hearings, upon which this decision is rendered.

The Taxpayer's motion presents a statement of facts which the Department does not dispute. Based on the undisputed facts, review of exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On August 16, 2012, the Department assessed Taxpayer $226,176.97 for Gross Receipts Tax, $45,235.43 in penalty, and $73,260.11 in interest for a combined total assessment of $344,672.51 for the CRS reporting periods from January 31, 2004 through August 31, 2010.

2. On August 21. 2012, Taxpayer asked for an extension of time in which to file the protest.

3. On August 21, 2012, pursuant to NMSA 1978, Section 7-1-24 (before 2013 amendments), the Department granted Taxpayer an extension until November 14, 2012 to file a protest.

4. On November 13, 2012, Taxpayer timely protested the Department's assessment.

5. On December 5, 2012, the Department acknowledged receipt of Taxpayer's protest.

6. On April 3, 2014, the Department requested a hearing in this matter with the Administrative Hearings Office's predecessor, the Hearings Bureau[1].

7. On April 9, 2014, the Hearings Bureau issued Notice of Administrative Hearing, setting this matter for a hearing on January 27, 2015.

8. On January 23, 2015, Taxpayer moved to continue the scheduled January 27, 2015 hearing because of witness unavailability, the possibility of further settlement discussions with the Department, and the possibility that if not resolved, this case would be amenable to resolution via summary judgment.

9. On January 23, 2015, the Hearings Bureau issued a Continuance Order, Limited Scheduling Order, and Amended Notice of Administrative Hearing, vacating the January 27, 2015 hearing, setting summary judgment motions deadlines, and rescheduling the hearing until September 3, 2015.

[1] On July 1, 2015, pursuant to the Administrative Hearings Office Act, the Hearings Bureau left the Taxation and Revenue Department and became the independent Administrative Hearings Office ("AHO"). For events before July 1, 2015, the Hearings Bureau will be used even though this decision is issued under AHO's caption. AHO will be used for events after July 1, 2015.

10. On July 7, 2015, Taxpayer filed its motion for summary judgment in this matter, along with supporting exhibits #1 (along with affidavit sub-exhibits A, the franchise agreement, and B, the audit report) and #2.

11. On July 20, 2015, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing, resetting the hearing to one day earlier, September 2, 2015.

12. On August 14, 2015, the Department filed its Response for Motion for Summary Judgment, along with supporting exhibits A (the franchise agreement, which is largely illegible) and B (the audit report), cross-moving for summary judgment in its favor.

13. On August 19, 2015, Taxpayer moved to convert the September 2, 2015 merits hearing into a summary judgment hearing. Although the Department apparently opposed the motion, it did not file any written objection or argument.

14. On August 24, 2015, the Administrative Hearings Office issued an order converting the the September 2, 2015 from a merits hearing to a summary judgment motion.

Undisputed Material Facts

15. Taxpayer, ATC Healthcare Services, Inc., is a Georgia corporation with its principal place of business in New York during the relevant audit period.

16. Taxpayer entered into a Franchise Agreement with Care Connection, Inc. (“CCI”), a New Mexico company, in 1998. The Franchise Agreement did not become effective until signed by Taxpayer on January 19, 1998 in New York. [Exhibit A].

17. Under the Franchise Agreement, CCI operated a franchise ATC Healthcare Services Center in New Mexico that offered and sold temporary medical healthcare personnel

service, programs, products, and activities in accord with Taxpayer's developed style, system, and technique of business operation described in terms of the Franchise Agreement.

18. Under the Franchise Agreement, Taxpayer licensed its trademark to CCI solely for use in the operation of CCI's franchised business.

19. Taxpayer terminated the Franchise Agreement with CCI on May 12, 2009.

20. CCI was required to develop and exploit the market for its business within New Mexico.

21. CCI was responsible for marketing and developing its franchised business.

22. CCI was required to use Taxpayer's forms and maintain minimum insurance levels.

23. CCI employed staff to manage and administer its operations. Such staff was paid directly by CCI.

24. In full compliance with Taxpayer's manuals, system, and policies, CCI was responsible for recruiting, training, interviewing, screening, testing, and selection of temporary healthcare workers to be assigned to clients. [Ex. A, p.33, ¶12.13].

25. CCI assigned and placed healthcare workers to its clients based on their clients' needs.

26. CCI hired and fired healthcare workers working for the Center.

27. CCI determined the salaries and benefits to be paid to its healthcare workers.

28. CCI set rates for customers to pay for the healthcare workers.

29. CCI paid bonuses and other premiums to recruited healthcare workers directly.

30. Taxpayer was the legal employer of CCI's temporary employees and was "responsible for compensating such temporary employees." [Ex. A, p. 10, ¶5].

31. CCI temporary employees recorded time on Taxpayer's timecards, displaying Taxpayer's name prominently.

32. Taxpayer processed payroll for the temporary healthcare workers and issued appropriate tax forms to those workers.

33. Taxpayer was responsible for compensating the temporary healthcare workers based on the information provided by CCI.

34. Taxpayer had no discretion in the amounts paid to temporary healthcare workers.

35. The Franchise Agreement obligated CCI to achieve stated amounts of Gross Margin or be subject to being deemed in default and automatic termination of the Franchise Agreement.

36. The Franchise Agreement required CCI to tell its customers to direct all payments to Taxpayer.

37. The Franchise Agreement required CCI to identify itself as an independent franchisee of Taxpayer, and to place notice of the independent ownership on all forms, business cards, stationary, advertising, signs, and other materials.

38. Under the Franchise Agreement, Taxpayer was prohibited from making any guarantee or representation or incur any debt on behalf of CCI.

39. Under the Franchise Agreement, CCI was an independent contractor and not an agent of Taxpayer.

40. The Franchise Agreement stated that "[n]othing in this agreement shall be construed so as to create a partnership, joint venture or agency" between the parties. [Ex. A, p. 41, ¶14.01].

41. CCI could not obligate Taxpayer to any obligations not provided for in the Franchise Agreement.

42. CCI management and administrative staff were not employees of Taxpayer.

43. CCI made weekly business reports to Taxpayer.

44. All obligations of the Franchisor-Taxpayer under the Franchise Agreement were to Franchisee-CCI alone, and no other party was entitled to relief for breach or enforce any obligation under the agreement. [Ex. A, p.28, ¶11.13].

45. Under the Franchise Agreement, CCI agreed to indemnify Taxpayer from all losses and expenses incurred under the agreement. [Ex. A, p. 31, ¶12.11].

46. Taxpayer had the right to inspect CCI's business facilities and operations to determine compliance with the terms of the Franchise Agreement.

47. Under the Franchise Agreement, Taxpayer provided CCI with a confidential operating manual, initial and periodic training on business operations, instructions, techniques, data, forms, computer hardware, software, and promotional materials.

48. Under the Franchise Agreement, Taxpayer performed all billing, payroll, billing, credit, and collection activities for CCI.

49. Taxpayer approved potential CCI client credit and credit limits.

50. Taxpayer performed all billing of CCI's clients.

51. Under the Franchise Agreement, to facilitate collections, all accounts receivable of CCI's business were "the property of" Taxpayer.

52. Taxpayer was responsible for collection of all invoices until collected or deemed to be uncollectable.

53. In the event of delinquent invoices, the Franchise Agreement provided a mechanism for allocating the loss between CCI and Taxpayer.

54. All money collected by Taxpayer on behalf of CCI went directly to a separate bank account.

55. Taxpayer deducted all direct costs (which by definition included payroll costs for the temporary employees) and its share of gross margins and fees under the Franchise Agreement for its collections made by Taxpayer. [Ex. A, p.10, ¶5].

56. Under the Franchise Agreement, CCI paid Taxpayer an initial fee, forty percent of CCI's gross margins, and a 40% royalty of all CCI revenues from sales or services not otherwise addressed under the Franchise Agreement.

57. Under the Franchise Agreement, gross margin was net sales, minus direct costs (which included the direct costs of payment of wages and benefits of the temporary employees). [Ex. A, p.7-9, ¶4.02-4.03].

58. Starting on October 8, 2010, the Department conducted an audit of Taxpayer for the reporting periods of January 1, 2004 through August 31, 2010.

59. In the audit narrative, an uncontested factual exhibit tendered by both Taxpayer and the Department, the auditor expressly concluded that Taxpayer's receipts related to the provisioning of health care staffing to Indian Health Service facilities were deductible from gross receipts taxation under NMSA 1978, Section 7-9-93 and thus were allowed as exceptions in the audit. [Taxpayer Ex. #2, pages AN1.4 through AN1.7; Dept. Ex. B].

60. As a result of that audit, the Department issued the Notice of Assessment described in finding of fact #1.

DISCUSSION

There are multiple issues involved in this protest. The first issue is whether money Taxpayer received from CCI's clients for payment of the temporary healthcare workers and for payment of CCI's portion of gross margins amounted to money received solely in a disclosed agency capacity, and thus was not subject to gross receipts tax. The second issue centers around whether money Taxpayer received from CCI for grant of a franchise and license to use a trademark before June 27, 2007 was subject to gross receipts tax or whether it constituted consideration for selling property outside of New Mexico. Closely related to this second issue is whether after June 27, 2007, money Taxpayer received for the grant of a trademark license to CCI was not subject to gross receipts tax under the definition of "property" as provided in NMSA 1978, Section 7-9-3 (J) (2007). The third issue is whether the billing, collections, credit approval and payroll processing services Taxpayer performed occurred outside of New Mexico and thus were not subject to gross receipts tax. The fourth issue is whether money Taxpayer received from the Indian Health Services are deductible under NMSA 1978, Section 7-9-93. And the final issue is whether, in the event that Taxpayer is found liable for payment of assessed tax, Taxpayer is nevertheless entitled to abatement of penalty because Taxpayer was nonnegligent under NMSA 1978, Section 7-1-69.

Burden of Proof and Standard of Review.

Pursuant to NMSA 1978, Section 7-1-17 (C), the assessment issued in this case is presumed correct. The Taxpayer has the burden to overcome the presumption of correctness that attached to the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purpose of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, § 7-1-3 (X). Under Regulation 3.1.6.13

NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Moreover, "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664. If the movant for summary judgment makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331. Even if the nonmoving party does not file their own motion for summary judgment, summary judgment may be granted to the nonmoving party if there is no genuine dispute of fact, they are entitled to judgment as a matter of law, and the moving party was generally on notice of the nonmoving party's counter-claim in its response to the moving party's summary judgment pleading. *See Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479.

Principals of Statutory Construction.

As will be discussed in more detail, resolving the issue at the protest involves statutory construction of the definition of various terms in the Gross Receipts and Compensating Tax Act. Questions of statutory construction begin with the plain meaning rule. *See Wood v. State Educ. Ret. Bd.,* 2011-NMCA-20, ¶12. In *Wood*, ¶12 (internal quotations and citations omitted), the Court of Appeals stated “that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” A statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See, Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

“Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the statutes' application absurd, unreasonable, or unjust." *City of Eunice v. State Taxation & Revenue Dep't*, 2014-NMCA-085, ¶8 (internal citations and quotations emitted). It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers,* 1998-NMSC-20, ¶28, 125 N.M. 401. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-

NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read in harmony with the provisions of the remaining statute or statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14. *See also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law.").

Gross Receipts Tax and the Disclosed Agency Relationship Exception.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, § 7-9-4 (2002). The term "gross receipts" is broadly defined to mean

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

NMSA 1978, Section 7-9-3.5 (A) (1) (2007). "Receipts include payments received for one's own account and then expended to meet one's own responsibilities." *MPC LTD v. TRD*, 2003-NMCA-021, ¶14, 133 N.M. 217. There is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (2002). "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2003). *See also Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403 (gross receipts applies to "all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect."). Here, Taxpayer was engaged in the business of granting a license to use as a franchise employed in New Mexico and in providing temporary staffing employees working in New Mexico, activities for which it received remuneration, potentially subjecting it to gross receipts under the engaging in business definition contained under Section 7-9-9.3 and the presumption of taxability provision of Section 7-9-5.

Taxpayer argues that it was simply acting as a disclosed agent in accepting the receipts from CCI clients for the payment to or for the benefit of CCI's temporary healthcare workers and thus was not subject to gross receipts tax. Similarly, Taxpayer argued that money it received from CCI's clients and then remitted to CCI as its contractually mandated portion of gross margin was not subject to gross receipts tax because Taxpayer again was merely acting in a disclosed agency capacity.

NMSA 1978, Section 7-9-3.5(A) (3) (f) states that excluded from gross receipts are "amounts received solely on behalf of another in a disclosed agency capacity." Under Regulation 3.2.1.19(C) (1) NMAC, "(a)n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal."

Numerous New Mexico cases have addressed, within the context of gross receipts tax, whether an agency relationship exists and whether such relationship is sufficient to exclude certain receipts derived from that relationship from the gross receipts tax. In 1971, in the case *Westland Corporation v. Commission of Revenue*, 1971-NMCA-083, ¶38, 83 N.M. 29, the New Mexico Court of Appeals remanded the matter because it did not find cause to impose gross receipts tax on the receipts of a person whom served as a "friendly agent" for the limited purpose of "receiving and paying out sums for debts or obligations owing" from another company.

In *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247, a case that Taxpayer cited for support in this protest, the New Mexico Court of Appeals again considered agency in the gross receipts tax context. The *Carlsberg* case involved a property management group that managed an apartment complex for that property's owner. *See id*., ¶3. The rent at the apartment complex was subsidized by a federal agency. *See id*. The *Carlsberg* taxpayer claimed that the federal agency mandated the form of the agreement in place between that taxpayer and the owner. *See id*. The agreement in Carlsberg referred to that taxpayer as "agent." *See Carlsberg,* ¶4. Under an agency theory, the *Carlsberg* taxpayer argued that money it received from the owner's reimbursing of the payment of employee wages were not subject to gross receipts tax. *See Carlsberg*, ¶5-11.

In *Carlsberg*, the New Mexico Court of Appeals indicated "that a principal's control over the agent is the key characteristic of an agency relationship." *See Carlsberg,* ¶12. Further, the New Mexico Court of Appeals noted that it was a factual determination whether there was an agency relationship between the principal and the agent. *See Carlsberg*, ¶16. The New Mexico Court of Appeals began that factual determination by looking at the terms of the agreement in place. *See id*. When the contract is unambiguous, the language of the contract determines the intent of the parties without further interpretation. *See Carlsberg,* ¶17. The New Mexico Court of Appeals found in *Carlsberg* that the contract created an unambiguous agent-principal relationship. *See id*. The *Carlsberg's* Court of Appeals rejected the Department's requirement that an agent be disclosed, and instead adopted a California rule that "if a party only receives money… of [] another's employment-related obligations, then an agency relationship exists sufficient to avoid taxation of those funds as gross receipts." *See Carlsberg,* ¶15. The Court of Appeals ultimately determined in

Carlsberg that the level of control the owner of the apartment complex wielded over that taxpayer vis-à-vis that taxpayer's employees left that taxpayer with no control over the payment of the employees, and thus that taxpayer never possessed any interest in the funds in question used to pay the employees. *See Carlsberg*, ¶19. The *Carlsberg* decision also noted that an indemnification clause requiring the owner to pay that taxpayer for employment related expenses supported its holding. *See id*.

In 1995, in the case *Brim Healthcare, Inc. vs. State*, 1995-NMCA-055, 119 N.M. 818, the New Mexico Court of Appeals again had an opportunity to consider whether an agency relationship existed suffice to shield taxpayer's claimed reimbursements from the imposition of gross receipts tax. In rejecting that taxpayer's claim of an agency relationship, the Court of Appeals in *Brim*, ¶10, found numerous reasons why the facts in that case were distinguishable from *Carlsberg*. The most significant distinguishing factor was the lack of an indemnification clause in the agreement at issue in *Brim*. *See id*. But another distinction cited in *Brim* was that the contracts at issue expressly noted that the taxpayer was "not an agent… but rather is an independent contractor." Ultimately, the *Brim* Court of Appeals affirmed the hearing officer's conclusion that the money was not received as "reimbursement of expenses as an agent." *id*. at 18.

While the *Carlsberg* Court of Appeals expressly rejected the Department's previous policy and regulation allowing for exemption of gross receipts only when there is a disclosed agency relationship, *see Carlsberg*, ¶19, subsequent legislative action has limited the *Carlsberg* holding. *See MPC LTD v. TRD*, 2003-NMCA-021, ¶14, 133 N.M. 217. At the time the Court of Appeals issued its decision in *Carlsberg*, the gross receipts tax definition contained no provision excluding from gross receipts tax receipts received solely on behalf of another in a disclosed agency capacity. Since that case, the Legislature has expressly added the disclosed agency capacity language into Section 7-9-3.5 (A) (3) (f). In 2003, the Court of Appeals in *MPC LTD.* again looked at agency relationships in the gross receipts context, albeit for the first time under the Legislature's express "disclosed agency" exception to the gross receipts definition. In so doing, the Court of Appeals cautioned that *Carlsberg* and *Brim* were both decided before the Legislature's adoption of the "disclosed agency" language under Section 7-9-3.5(A) (3) (f), and therefore those cases only had limited instructive value. *See MPC LTD.* 2003-NMCA-021, ¶34.

MPC LTD. addressed a taxpayer (Manpower) that provided temporary staffing services to its clients in New Mexico. *See id*. ¶1. Manpower had mostly verbal contracts with its clients, but did have a few written agreements in place. *See id*. ¶4. Manpower's clients supervised the activities of the assigned employees, but the client did not pay the employees. Instead, the clients paid Manpower, which in turn then paid the employee's wages, benefits, and withholdings. *See id*. ¶5. Manpower claimed these receipts should not be included in gross receipts because it "received the amounts purely as a conduit between its clients and its employees." *id*. ¶8.

Manpower's argument in *MPC LTD.* required the Court of Appeals to consider both a regulation addressing joint employers[2] and the statutory and regulatory disclosed agent requirements. In addition to addressing how the Legislative addition of the disclosed agency exclusion under Section 7-9-3.5 (A) undermined the *Carlsberg* holding, *see id.* ¶24, the Court of

[2] A great deal of the analysis in *MPC LTD.* focused on a regulation and issue addressing a joint employer relationship. However, neither party in the present protest made arguments related to a joint employer relationship regulation or that issue. It is undisputed that Taxpayer was the temporary employee's legal employer. Further, Taxpayer made no argument and presented no evidence to establish it was a joint employer. Consequently, that issue will not be materially addressed further.

Appels in *MPC LTD*. also considered the Department's Regulation 3.2.1.19(C)(1) NMAC interpreting Section 7-9-3.5(A) (3) (f). The Court of Appeals in *MPC LTD.*, ¶36, construed Regulation 3.2.1.19(C)(1) NMAC to mean that:

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

The *MPC LTD.* ¶37, Court of Appeals continued by stating:

> Section 7-9-3(F)(2)(f) requires a disclosure to the employee of an agency relationship. This breaks down into the requirements that there be a relationship by which the principal is liable (and knows he is liable) to the employee for payroll if the agent fails to pay, and that the agent disclose this relationship and obligation to the employee

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

Applying the statute, the regulation, and the current case law discussed in *MPC LTD.*, ¶36, while there was some support that Taxpayer was a disclosed agent for payroll purposes such as an indemnification clause in the Franchise Agreement, overall Taxpayer's argument fails in this case because Taxpayer did not establish that the temporary employees or CCI's clients were informed by contract or otherwise in a meaningful manner that they had a right to proceed against CCI to enforce their respective obligation. While the temporary employees and CCI's clients may have had notice generally that CCI was an independent franchisee of Taxpayer, that does not as Taxpayer argues, establish that those employees and clients knew they could proceed against CCI to collect outstanding payroll or contractual obligations or seek other appropriate remedies. In fact, all of the temporary employees' time cards, paychecks, benefits, etc. prominently displayed Taxpayer's information, suggesting to those employees that Taxpayer was their legal employer and that Taxpayer, not CCI, was the entity they would need to address regarding any salary, paycheck, benefits, or withholdings issues.

Moreover, while Taxpayer advocates in its motion for the adoption of the more enlightened and flexible disclosed agent notice approach espoused in Restatement (Third) of Agency § 1.04(4) for determining when a third party was on notice of a disclosed agency relationship, there is no current New Mexico authority that applies this more relaxed approach to the disclosed agency exclusion of gross receipts tax under Section 7-9-3.5(A)(3)(f). In rejecting the Department's more formal disclosed agency concept in *Carlsberg*, the New Mexico Court of Appeals imposed a much more flexible standard closer to what Taxpayer's advocates for in this protest. However, that more flexible approach was promptly rejected by the Legislature's statutory change that expressly added the previously rejected "disclosed agent" language into the statute. The Department's regulation does not adopt or incorporate the Restatement (Third) of Agency in interpreting the disclosed agency requirement. And rather than espousing a more flexible approach that Taxpayer advocates for notice of a disclosed agency relationship, the current controlling Court of Appeals decision on the issue in *MPC LTD.* flatly rejected the notion that employees merely having awareness of the relationship between a principal and an agent was sufficient evidence in the absence of a contract to establish that the employees were aware of their ability to enforce their obligations. *See MPC LTD.*, ¶38. In fact, in laying out what was required under the Department regulation, the *MPC LTD.* court seemed to indicate that the disclosure must be accomplished by contract. *See MPC LTD.*, ¶36 (disclosed agency capacity requirements include that "the beneficiary of that obligation… is informed by contract that he or she has a right to proceed against the principal… to enforce the obligation."). There is insufficient evidence in this case that the temporary employees hired by CCI but legally employed by Taxpayer were on notice that they could proceed against CCI to enforce the payroll and benefit obligations. Equally, there is insufficient evidence on this record that CCI's clients had collection and billing remedies against CCI when they were instructed to remit and interact exclusively with Taxpayer on those issues.

Under the Franchise Agreement between Taxpayer and CCI, CCI was an independent contractor that could not bind Taxpayer with any third party. The Franchise Agreement expressly disavowed any agency relationship between the parties. Further, Taxpayer was prohibited from making any guarantee or representation or incur any debt on behalf of CCI. Under the Franchise Agreement, Taxpayer could not be held liable for any such guarantees or representations made by CCI. Under the Franchise Agreement, no third party had the ability to enforce the provisions of the agreement in the event of either parties' breach. All of CCI's accounts receivable were in fact the property of Taxpayer and Taxpayer had the duty to collect on all outstanding invoices. The Franchise Agreement included a method to allocate losses between Taxpayer and CCI in the event an account was deemed uncollectible. This does not seem to be typical for an agent-principal role, where one would expect the principal to bear the full lose rather than allocate some portion of the loss to the agent. Taxpayer was the legal employer of the employees it now claims were the beneficiaries of its agency relationship with CCI. Taxpayer did not establish it was a disclosed agent in this case because it had no authority to bind CCI to a third party and the third party, in this instance the employees and the clients, were not informed of their right to proceed against the principal to enforce the obligation. *MPC LTD.*, ¶36. Given the clear statutory requirement that only receipts received as part of a disclosed agency relationship are not gross receipts, an apparent or implied agency relationship is insufficient to shield the funds in this case from the gross receipts tax.

Moreover, Taxpayer did not present any evidence that CCI's clients billings clearly indicating which amounts were being billed as reimbursements, as required by Regulation 3.2.1.19(C)(1) NMAC in order to meet the regulatory definition of a disclosed agent. In light of the above analysis of the controlling statutory language and case law, Taxpayer's challenge to that regulation and citing of various rulings addressing other taxpayers rather than this particular Taxpayer or this exact factual situation are not persuasive. Therefore, Taxpayer did not satisfy the requirements of Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C)(1) NMAC, as interpreted in *MPC LTD.*, ¶36.

Applicability of Gross Receipts Tax to Franchise Agreements and Franchise Royalties

Taxpayer makes multiple arguments related to why the payments of franchise fees and royalties are not subject to gross receipts tax. Taxpayer asserts that the pre-June 28, 2007 (the effective date of a Legislative statutory change) franchise receipts are not taxable under the then controlling statutory language as interpreted by *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212. After June 28, 2007, Taxpayer further argues that its receipts attributable to the grant of a franchise and trademark license under the Franchise Agreement are not subject to gross receipts tax because trademarks were removed from the definition of property as part of the 2007 post-Sonic Legislative amendments to the Gross Receipts and Compensating Tax Act.

In *Sonic Indus.*, the New Mexico Supreme Court found that receipts under a franchise agreement were receipts from selling property outside of New Mexico, not subject to gross receipts tax under the statutory definitions applicable in 2006. *See Sonic Indus.* 2006-NMSC-038, ¶14. In light of the controlling holding in *Sonic Indus.*, as Taxpayer argues, Taxpayer is entitled to the abatement of any portion of the assessment related to franchise fees received, specifically the 40% gross margins collected from CCI, before the 2007 definitional change because that represented the sale of property outside of New Mexico. While the Department argues that the presence of employees in New Mexico distinguishes this matter from *Sonic Indus*, the 40% of gross margin Taxpayer received as franchise fees/royalties excluded the actual cost of the employees, which were already found subject to gross receipts tax in the above discussion. In other words, under the definitions and calculations of the Franchise Agreement, the 40% gross margin Taxpayer retained did not include the receipts related to the payment of employees. Just as in *Sonic Indus.*, before the 2007 Legislative amendment, the 40% gross margin were receipts derived from the sale of franchise property rights outside of New Mexico. Thus, this 40% gross margin before June 27, 2007 was not subject to gross receipts tax and that portion of the assessment must be abated.

However, in an apparent effort to subject receipts of licensing a franchise employed in New Mexico to gross receipts tax despite the *Sonic Indus.* holding, the Legislature expressly added the franchise clause to the definition of gross receipts tax under Section 7-9-3.5(A)(1) in 2007. Although cited above, in light of this change, it is important to reiterate the definition of “gross receipts” under NMSA 1978, Section 7-9-3.5 (A) (1) (2007):

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

There are numerous sub-clauses within this statutory definition of gross receipts. For instance, the sale of a service is listed in its own clause, while the sale of property is listed in another clause. As will be discussed in more detail, receipts related to licensing a franchise in New Mexico are listed in their own clause while receipts from selling, leasing, or licensing property are listed in separate clauses. Indeed, the entire franchise clause was added to the gross receipts definition by the Legislature in 2007, after the New Mexico Supreme Court’s decision in *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212.

Taxpayer nevertheless argues that an additional change in 2007 to the definition of property entitles its to relief from payment of portions of the franchise fees related to trademark license under the Franchise Agreement. In pertinent part and again as a result of the Legislature’s 2007 post-*Sonic* amendments, the Legislature defines “property” under NMSA 1978, Section 7-9-3 (J) (2007), as “real property, tangible personal property, licenses other than the licenses of copyrights, trademarks or patents and franchises.” However, as will be more fully addressed, this Legislative action of expressly adding the distinct franchise clause to Section 7-9-3.5 (A)(1) separate from the property clauses of that section clearly indicates its general intent to subject the licensing fees of a franchise employed in New Mexico to gross receipts tax separate from the clause addressing the sale of property.

As it relates to the Gross Receipts and Compensating Tax Act, the Legislature has not defined the term “franchise.” In the absence of a specific definition of “franchise,” rules of statutory construction require that the term “franchise” be given its plain meaning. Referring to Black’s Law Dictionary (10th Edition, 2014), the term “franchise” is defined “[t]o grant (to another) the sole right of engaging in a certain business or in a business using a particular trademark.” Moreover, the term “franchise” has been the subject of discussion before the New Mexico Court of Appeals. In *Sonic Industs., Inc. v. State,* 2000-NMCA-087, ¶23, 129 N.M. 657, *rev’d on other grounds in Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212, the Court of Appeals set forth what it concluded to be the traditional definition of a franchise:

> In its simplest terms a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, the franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchiser and the franchiser undertakes to assist the franchisee through advertising, promotion and other advisory services.

(internal citations omitted).

The Department has also promulgated a regulation defining “franchise.” Regulation 3.2.1.7 (E) NMAC states that

> (1) A “franchise” is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor's trademark or trade name in the ope4ration of the franchisee's business.
>
> (2) Example: Y, a pie company of Cambridge, Massachusetts, grants

> to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a "one-time" payment or for a continuing percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

Under NMSA 1978, Section 9-11-6.2 (G), a Department regulation is presumed to be a proper implementation of the provisions of the laws under the Department's purview. *See also Chevron U.S.A., Inc.*, 2006-NMCA-50, ¶16.

The Department's regulatory definition of that term under Regulation 3.2.1.7 (E) NMAC is generally consistent with the Black's Law Dictionary definition of the term "franchise" and the Court of Appeals' conception of that term in *Sonic Industs*. The commonality of these three conceptions of the term "franchise" establish that the plain meaning of that term as used in Section 7-9-3.5 (A) (1) includes a franchisees' use of the franchisors' trademark. There is simply nothing to indicate that the Legislature has intended an interpretation of the term "franchise" that materially differs from the traditional definition of the term, which includes the granting of a license to use a trademark as an element of granting a franchise.

Presumably aware of the Department's regulation defining "franchise" at Regulation 3.2.1.7 (E) NMAC and of the Court of Appeals' conception in *Sonic Industs*, a reasonable inference may also be drawn from the Legislature's inaction in response to this administrative interpretation that the definition promulgated by the Department is consistent with its intent for the term "franchise". *Sonic* at ¶25, *citing State ex rel. Stratton v. Roswell Indep. Schs*, 111 N.M. 495, 503.This plain meaning reading of the term "franchise" is also consistent with the Legislature's 2007 amendments to the

Gross Receipts and Compensating Tax Act, reversing the Supreme Court's holding in *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212.

Within the framework of what constitutes a franchise for the purposes of the act, there is no requirement that the Department unbundle, for gross receipts purposes, the grant of a license to use Taxpayer's trademarks from other elements of the Franchise Agreement. The Court of Appeals squarely addressed this unbundling issue in *Sonic Industs., Inc. v. State*, 2000-NMCA-087, 129 N.M. 657. However, in overruling the Court of Appeals on other grounds in *Sonic Industs., Inc. v. State*, 2006-NMSC-038, 141 P.3d 1266, the Supreme Court determined it was unnecessary to address the issue of whether a franchisor's licensing of its trademarks to New Mexico franchisees were bundled elements of a taxable New Mexico grant of a franchise. Consequently, the Supreme Court in *Sonic*, by neither affirming nor overruling the New Mexico Court of Appeals on this specific question, did not reject the Court of Appeal's legal analysis of this particular issue. *See Sangre De Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M. 343, 348 (1972) (the general rule is that a case is not authority for a proposition it has not considered).

In *Sonic Industs., Inc. v. State*, 2000-NMCA-087, 129 N.M. 657, the Court of Appeals found that the rights created by the subject franchise agreement consisted of a bundle of intangible, intellectual property rights typically associated with franchises together with support services. *Id.* at ¶28. In *Sonic*, the Court of Appeals determined that "a franchise is to be treated as a compound or 'bundled' form of property, which typically includes a license to use franchiser's trademark[.]" *Id*. at ¶28. In that case, the Court of Appeals rejected claims that the Department was required to break a franchise into its various components in order to determine the taxability of franchise fees. *Id*. at ¶26. The Court of Appeals reasoning applies in this case as well. A "franchise" is to be treated as a compound or "bundled" form of property which the Department is not required to separate into various components to determine taxability of franchise fees.

During the audit period, Taxpayer had engaged in the business of selling franchises employed in New Mexico, which was subjected to tax after the post-*Sonic,* 2007 Legislative amendments to the Gross Receipts and Compensating Tax Act. An essential component of the franchise is a license to utilize the trademarks of the franchiser. The trademarks provide a mechanism by which patrons will immediately recognize the service and goods and associate those services and goods with the goodwill accompanying that trademark. As stated in *N.M. Taxation & Revenue Dep't v. Barnesandnoble.com LLC,* 2012-NMCA-063, ¶29:

> When a company acquires trademarks and goodwill, the essence of what it obtains is the right to inform the public that it is in possession of the special experience and skill symbolized by the name of the original concern, and of the sole authority to market its products. The value of what it obtains is tied to the underlying business that generates the goodwill associated with the trademarks. If there is no business and no good will, a trademark symbolizes nothing. Goodwill is bound to the business with which it is associated, and can no more be separated from a business than reputation from a person.

Contrast this with an alternative scenario which may be a better example of the intended application of the exclusion for "licenses other than the licenses of copyrights, trademarks or patents" from the definition of property in Section 7-9-3 (J) (2007). If Taxpayer sold a trademark license to a manufacturer of t-shirts which then imprinted the trademark on a shirt which it sold, then use of that trademark is not being conveyed as part of a franchise, but as a stand-alone transaction. Under Section 7-9-3 (J), the exclusion for licenses of the trademark would apply and the Taxpayer receipts from selling a trademark license would not be taxable as gross receipts because they are specifically excluded from the definition of "property." There is further support for this interpretation of Section

7-9-3 (J) (2007) when considering that this application harmonizes with NMSA 1978, Section 7-9-47 (1994), which provides a deduction for receipts from selling tangible personal property or licenses when the buyer resells the tangible personal property or license either by itself or in combination with other tangible personal property or licenses in the ordinary course of business.

In summary, returning to Section 7-9-3.5 (A) (1), there are separate clauses for the sale of a service, the sale of property, and the sale of a license to use a franchise employed in New Mexico. The application of the law described in the manner above is most consistent with the Legislature's use of the separate clauses contained in Section 7-9-3.5 (A) (1) of the sale of property and the sale of a license to a franchise employed in New Mexico. While the definition of "property" under Section 7-9-3 (J) certainly modifies that word for the sale of property clause under Section 7-9-3.5 (A) (1), it does not modify the clause addressing franchise, as a trademark is an essential element of the bundle of items that constitute a franchise. As the example above illustrates, the stand-alone sale of a trademark does not constitute the sale of property under Section 7-9-3.5 (A) (1) in light of the exclusion contained in Section 7-9-3 (J). But the sale of a license to use a franchise employed in New Mexico necessarily includes the sale of the trademark, and thus the receipts from the license of the trademark under the franchise agreement are subject to the gross receipts tax under Section 7-9-3.5 (A) (1)'s franchise clause. This interpretation is not only consistent with the plain meaning of the term "franchise," but harmonizes the various provisions of the Gross Receipts and Compensating Tax Act, another favored approach of statutory construction.

Performance of a Service Outside of New Mexico.

Taxpayer also argues that money it received as consideration for the billing, collections, credit approval and payroll processing are not subject to gross receipts under NMSA 1978, Section 7-9-13.1

because those receipts represented consideration for performing service outside of New Mexico. Section 7-9-13.1(A) provides that "exempted from the gross receipts tax are the receipts from selling services performed outside New Mexico the product of which is initially used in New Mexico."

This argument is not persuasive for two reasons. First, the services in question were performed to pay its New Mexico employees (Taxpayer was the legal employer of the workers in New Mexico). Rather than related to the situation exempted under Section 7-9-13 where a taxpayer performed services outside of the state, the product of which is initially used in New Mexico, in this case Taxpayer's payroll services were related to the payment of services performed by its employees in New Mexico. *See Decision and Order in the Matter of the Protest of Adecco USA, Inc.*, No. 14-16 (non-precedential, but insightful).

Secondly, Taxpayer granted CCI the right to use a franchise employed in New Mexico, which as discussed is a taxable activity under Section 7-9-3.5 (A) (1) after the 2007 amendments. Under the terms of the Franchise Agreement, Taxpayer allowed CCI to operate its franchise in New Mexico. The activities performed by Taxpayer in this case were part and parcel of the terms of that Franchise Agreement for which CCI paid Taxpayer franchise fees for right to use the franchise in New Mexico. Again, to require the Department to unbundle certain aspects of a franchise agreement/royalties based on the franchisors performance location, is not consistent with the legislative language under Section 7-9-3.5 (A) (1). Nor is it required under the exemption described by Section 7-9-13.1(A), which does not contemplate the receipts of a franchisor.

<u>Indian Health Service Receipts.</u>

Taxpayer argued that its receipts from the Indian Health Services are deductible from the selling of the services of healthcare practitioner to a managed health care facility under NMSA 1978, Section 7-9-93. The Department argued in its response that such receipts were not included as taxable in the audit or under the assessment, and thus the Department indicated that this was an area of honest confusion that should be left to resolution through informal consultation of the parties. However, in the interest of administrative efficient and in the interest of issuing a final order, a ruling on the uncontested facts in this matter is appropriate, especially because there does not appear to be any dispute of fact or any actionable wrong at protest on this particular issue.

In the audit narrative, an exhibit that both parties tendered in as part of their respective summary judgment pleadings that is uncontested, the auditor clearly stated over the course of three pages that Taxpayer substantiated that its receipts from providing temporary employee services to Indian Health Service facilities were deductible under Section 7-9-93. Therefore, the auditor concluded that those receipts would be excluded from the audit as nontaxable. This conclusion appears consistent with Section 7-9-93. Hence, since those receipts were not included in the assessment based on the uncontested evidence, Taxpayer is not subject to taxation for the Indian Health Service receipts in this matter and there is no grounds to grant further relief on this issue.

<u>Penalty</u>.

Taxpayer argued that in the event it was found liable for the assessed tax principal, penalty should nevertheless be abated because any error it made in this matter resulted from a mistake of law made in good faith and on reasonable grounds. The Department argues that Taxpayer was a non-filer and exhibited carelessness. Consequently, the Department continues to aver that Taxpayer was negligent and subject to civil negligence penalty in this matter under the applicable statute and regulations.

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

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

(*italics* added for emphasis).

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." Taxpayer meets this definition of negligence, and thus is potentially subject to civil negligence penalty under Section 7-9-69.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." As the evolving case law and amended statutes reflecting the Legislature's intent to overturn certain aspects of that case law discussed in this decision indicate, the applicability of gross receipts taxes to franchise fees and receipts of a disclosed agent during this audit period clearly show varying, at times contrasting, and evolving interpretations of the law. Indeed, during the first half of the audit period, Taxpayer's interpretation of the taxability of the franchise fees was legally correct. And while *MPC LTD.* predated the audit and is much more emphatic on the agency issue, *Carlsberg* still provided Taxpayer with some reasonable but ultimately unpersuasive legal argument that it was a disclosed agent as distinguished from the facts of *MPC LTD*. In light of these varying and evolving cases and statutes, Taxpayer's mistake in this case was a mistake of law made in good faith and on reasonable grounds. Therefore, civil negligence penalty shall be abated under Section 7-1-69 (B).

CONCLUSIONS OF LAW

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

B. There is no genuine dispute as to any material fact, summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

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

D. Taxpayer failed to establish legally and factually that it collected receipts not subject to gross receipts tax under NMSA 1978, Section 7-9-3.5(A) (3) as a disclosed agent of CCI, as interpreted by Regulation 3.2.1.19(C)(1) NMAC and *MPC LTD v. TRD*, 2003-NMCA-021, 133 N.M. 217.

E. Before June 27, 2007, Taxpayer's franchise royalties of 40% gross margin earned from its agreement with CCI were not subject to New Mexico gross receipts tax under the rationale and holding expressed in *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212 because they represented a sale of property outside of New Mexico.

F. After June 27, 2007, when the Legislature legislatively overturned *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212 by amending NMSA 1978, Sec. 7-9-3.5 (2007) to include receipts associated with the granting of license to use a franchise employed in New Mexico, Taxpayer is obligated to pay gross receipts on the total amount of money or value of other consideration received from granting CCI a right to use a franchise employed in New Mexico, including trademarks associated with the franchise.

G. A franchise is to be treated as a compound or bundled form of property, which includes a license to use Taxpayer's trademarks. *Sonic Industs., Inc. v. State*, 2000-NMCA-087, 129 N.M. 657 (overruled on other grounds); Regulation 3.2.1.7 E NMAC.

H. The Department is not required to unbundle a franchise agreement for the purposes of assessing gross receipt taxes.

I. Taxpayer's receipts from providing temporary employees to Indian Health Service facilities were found at audit to be deductible from gross receipts tax under NMSA 1978, Section 7-9-93, leaving no material issue of fact or law in dispute regarding that issue.

J. Taxpayer established that it made a mistake of law, in good faith and on reasonable grounds, and thus is not subjected to civil negligence penalty under NMSA 1978, Section 7-1-69 (B).

For the foregoing reasons, Taxpayer's protest is PARTIALLY GRANTED AND PARTIALLY DENIED. The Department is ordered to abate all assessed tax related to the pre-

June 27, 2007 franchise fees and royalties reflective of the 40% gross margin and the assessed penalty. Taxpayer is ordered to pay the remaining assessed tax and interest.

DATED: November 30, 2016

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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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. 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 being preparing the record proper.