

1 1. On October 23, 2017, the Department issued a Notice of Assessment of Taxes and
2 Demand for Payment under Letter ID No. L0097690416 in the total amount of \$309,185.49. The
3 assessment was comprised of gross receipts tax in the amount of \$187,922.79, gross receipts tax
4 penalty in the amount of \$39,076.28, gross receipts tax interest in the amount of \$21,959.64,
5 compensating tax in the amount of \$46,693.00, compensating tax penalty in the amount of
6 \$7,846.85, and compensating tax interest in the amount of \$5,686.93. [Administrative File]

7 2. On January 20, 2018, Taxpayer, by and through Mr. Jamie Fridley, CPA (REDW,
8 LLC) executed a formal protest of the assessment that was subsequently received in the
9 Department's protest office on January 24, 2018. [Administrative File]

10 3. The Department acknowledged Taxpayer's protest on January 29, 2018 under
11 Letter ID No. L1907202864. [Administrative File]

12 4. On March 14, 2018, the Department filed a Hearing Request with the
13 Administrative Hearings Office in which it requested a scheduling hearing. [Administrative File]

14 5. On March 15, 2018, the Administrative Hearings Office entered a Notice of
15 Telephonic Scheduling Hearing which set an initial scheduling hearing for April 13, 2018.
16 [Administrative File]

17 6. On April 16, 2018, the Administrative Hearing Office entered a Scheduling Order
18 and Notice of Administrative Hearing which in addition to other various deadlines set a hearing
19 on the merits of Taxpayer's protest for October 30, 2018. [Administrative File]

20 7. On September 13, 2018, Taxpayer's counsel of record entered their appearance
21 and moved to continue the hearing set for October 30, 2018. The Department did not oppose
22 Taxpayer's motion. [Administrative File]

1 8. On September 18, 2018, the Administrative Hearings Office entered a
2 Continuance Order, Amended Scheduling Order and Notice of Administrative Hearing which
3 among establishing various deadlines, continued the merits hearing to February 28, 2019.

4 [Administrative File]

5 9. On January 9, 2019, Taxpayer filed a Motion for Partial Summary Judgment and
6 a Motion to Compel. [Administrative File]

7 10. On February 7, 2019, Taxpayer filed Taxpayer's Prehearing Statement.

8 [Administrative File]

9 11. On February 8, 2019, the Department filed Department's Prehearing Statement.

10 [Administrative File]

11 12. On Saturday, February 23, 2019, the Hearing Officer received notice that he was
12 appointed to serve on the Judicial Nominating Committee that was scheduled to convene on
13 February 28, 2019. The Hearing Officer inquired through his assistant as to whether the matter
14 could be continued without the parties enduring any hardship or prejudice. Neither party
15 expressed objection or concern. [Administrative File]

16 13. On February 26, 2019, the Administrative Hearings Office entered a Continuance
17 Order and Amended Notice of Administrative Hearing. The hearing was continued to March 26,

18 2019. [Administrative File]

19 14. On February 27, 2019, the Administrative Hearings Office entered an Order
20 Denying Motion for Partial Summary Judgment. [Administrative File]

21 15. On February 28, 2019, the Department filed its Response to Motion for Partial
22 Summary Judgment. [Administrative File]

1 16. REDW, LLC is an accounting firm specializing in a wide range of accounting
2 services. [Direct Examination of Mr. Ortiz]

3 17. Mr. James Ortiz is employed by REDW, LLC as a senior manager in its tax
4 department. His specialty is state and local tax and his practice focuses on multistate sales and
5 use tax, multistate income tax, credits and incentives. [Direct Examination of Mr. Ortiz]

6 18. Taxpayer engaged REDW, LLC to perform audit defense services in the form of
7 tax consulting. [Direct Examination of Mr. Ortiz] REDW, LLC did not represent Taxpayer
8 during any year giving rise to the audit. [Cross Examination of Mr. Ortiz]

9 19. Other than his work for Taxpayer, by and through REDW, LLC, Mr. Ortiz has no
10 other relationship or association with Taxpayer. [Response to Hearing Officer's question]

11 20. Taxpayer is headquartered in California and is engaged in the business of
12 providing radiology services for rural health care facilities having a need for such services, but
13 not having the demand or resources necessary to maintain a fulltime radiology group. [Direct
14 Examination of Mr. Ortiz]

15 21. Taxpayer has agreements to provide radiology services to Carlsbad Medical
16 Center, LLC [Taxpayer Exs. 1 – 2], Roswell Hospital Corporation, doing business as Eastern
17 New Mexico Medical Center [Taxpayer Exs. 4 – 6], and Rehoboth McKinley Christian Health
18 Care Services [Taxpayer Ex 8]. [Direct Examination of Mr. Ortiz]

19 22. With regard for each facility, Taxpayer contracted to: (1) provide on-site
20 radiology services during specified hours; and (2) to be available for remote services, or
21 teleradiology, during all other times. [Direct Examination of Mr. Ortiz; Taxpayer Ex. 1.4 (Para.
22 1.0.4); Taxpayer Ex. 4.18 (Para. 2.9); Taxpayer Ex. 8.1 – 8.2 (Para. 1.1 (b))]

1 23. Accordingly, Taxpayer’s revenue under its contracts was derived from two
2 distinct sources: (1) revenue from providing on-site radiology services at facilities in New
3 Mexico; (2) revenue generated from a stipend or cash collections guarantee derived, at least in
4 part, from being available for and providing remote radiology services from locations outside of
5 New Mexico, for facilities inside New Mexico. [Direct Examination of Mr. Ortiz]

6 24. In reference to remote teleradiology services, when a health care facility had a
7 need for radiology services at a time when it did not have a radiologist present on-site, the
8 facility’s agreement with Taxpayer permitted it to transmit images to Taxpayer’s primary
9 location in California, which would then re-transmit the images to a radiologist for evaluation.
10 That radiologist would typically be located anywhere in the United States. [Direct Examination of
11 Mr. Ortiz]

12 25. Taxpayer’s contracts with each facility provided that Taxpayer was to directly bill
13 patients, insurers, or other responsible parties for radiology services provided. Consequently,
14 Taxpayer was not entitled to directly bill any of the facilities for radiology services. [Direct
15 Examination of Mr. Ortiz]:

16 a. Taxpayer’s agreement with Carlsbad Medical Center stated in relevant
17 part “Neither Facility nor [Taxpayer] shall charge the other for Services Provided pursuant to the
18 Agreement.” [Direct Examination of Mr. Ortiz; Taxpayer Ex. 1.1]

19 b. Taxpayer’s agreement with Roswell Hospital Corporation, doing business
20 as Eastern New Mexico Medical Center stated in relevant part “Facility and [Taxpayer] shall
21 make their own independent charges for Services to patients, and each shall independently bill
22 for and collect the charges due to them.” [Taxpayer Ex. 4.1]

1 c. Taxpayer’s agreement with Rehoboth McKinley Christian Health Care
2 Services stated in relevant part that “[Taxpayer] shall be responsible for, and solely entitled to,
3 billing and collection of all charges for the Coverage Services provided by the Radiologists
4 hereunder to patients at the Facility.” [Taxpayer Ex. 8.4]

5 26. In addition to revenue generated from patient billing, each facility also guaranteed
6 a specific amount of revenue in the form of a “cash collections guarantee” or a “stipend”:

7 a. Taxpayer’s agreement with Carlsbad Medical Center provided that
8 “Facility shall provide [Taxpayer] the cash collections guarantee set forth herein, subject to all
9 the terms and conditions of the Agreement, including but not limited to, [Taxpayer]’s obligations
10 to timely bill and collect for the Services.” [Direct Examination of Mr. Ortiz; Taxpayer Ex. 1.15
11 (Para. 4.1.4)] The amount of the cash collections guarantee, also referred to as a stipend, is
12 intended to compensate Taxpayer for afterhours coverage and other contractual obligations
13 incurred by Taxpayer, including a medical directorship and provision of interventional support
14 services. [Taxpayer Ex. 1.4 (Para. 1.0.5); Direct Testimony of Mr. Ortiz]

15 b. Taxpayer’s agreement with Roswell Hospital Corporation, doing business
16 as Eastern New Mexico Medical Center similarly provided that “Facility shall provide
17 [Taxpayer] the cash collections guarantee set forth herein, subject to all the terms and conditions
18 of the Agreement, including but not limited to, [Taxpayer]’s obligations to timely bill and collect
19 for the Services.” [Taxpayer Ex. 4.23 (Para. 3.1.1.4)]

20 c. The underlying basis for the cash collections guarantee is best explained
21 as follows: “The parties have determined that [Taxpayer] will require financial assistance from
22 Facility to induce [Taxpayer] to enter into the Agreement. Facility agrees to provide financial
23 assistance to [Taxpayer], so that [Taxpayer] will agree to provide the necessary Services that

1 Facility requires for the performance of essential patient care functions.” [Direct Examination of
2 Mr. Ortiz; Taxpayer Ex. 4.37]

3 d. Taxpayer’s subsequent contract with Eastern New Mexico Medical
4 Centers remained consistent with prior contracts but provided further elaboration in reference to
5 the elements for which the cash collections guarantee would compensate. It stated, “This is the
6 amount that [Taxpayer] has attested represents [Taxpayer]’s cost to provide the Services each
7 month, including, if applicable, a reasonable profit margin, as set forth in the pro forma
8 submitted by [Taxpayer]. When multiplied by twelve, this amount is the Annual Cash
9 Collections Guaranteed Amount.” [Direct Examination of Mr. Ortiz; Taxpayer Ex. 6.14]

10 e. The receipts of Rehoboth McKinley Christian Health Care Services are
11 not at issue in the protest because Taxpayer did not receive a stipend from that facility. [Direct
12 Examination of Mr. Ortiz]

13 27. The Department auditor’s audit narrative concluded that “[Taxpayer] received the
14 stipend, which is a cash collection guarantee, from CMC and ENMMC. Per the terms of the
15 contracts with these clients, if [Taxpayer]’s cash collections for a month are less the minimum
16 guarantee amount, the clients will pay [Taxpayer] for the difference. The stipend did not tie to
17 any specific reads performed by the radiologists.” [Direct Examination of Mr. Ortiz; Taxpayer
18 Ex. 10.4]

19 28. The Department made an allocation of all stipend payments finding that
20 approximately 65 percent of such payments should have been allocated to New Mexico.
21 [Testimony of Ms. Bernardo; Department Ex. B-59]

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

8 Therefore, it is Taxpayer’s burden to present countervailing evidence or legal argument
9 to establish entitlement to an abatement, in full or in part, of the assessment issued in the protest.
10 *See N.M. Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer
11 presents sufficient evidence to rebut the presumption, the burden shifts to the Department to
12 show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-
13 NMCA-21, ¶13, 133 N.M. 217.

14 The assessment in this protest arises from the application of the Gross Receipts and
15 Compensating Tax Act, in which New Mexico imposes a gross receipts tax for the privilege of
16 engaging in business, on the receipts of any person engaged in business in New Mexico. *See*
17 NMSA 1978, Section 7-9-4 (2002).

18 The term “gross receipts” is broadly defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007),
19 to mean:

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

1 “Engaging in business” is defined as “carrying on or causing to be carried on any activity
2 with the purpose of direct or indirect benefit.” *See* NMSA 1978, Section 7-9-3.3 (2003). There is
3 a statutory presumption that all receipts of a person engaged in such business are taxable. *See* NMSA
4 1978, Section 7-9-5 (2002).

5 The term “service” is defined to mean “all activities engaged in for other persons for a
6 consideration, which activities involve predominantly the performance of a service as
7 distinguished from selling or leasing property.” *See* NMSA 1978, Section 7-9-3 (M).

8 Taxpayer’s position in this protest fails due to insufficient evidence to rebut the presumption
9 of correctness of the relevant assessment. Although the Hearing Officer found the evidence on both
10 sides to be scant, the Department carries no burden until a taxpayer rebuts the presumption of
11 correctness. It is only at that point which the burden shifts to the Department to reestablish the
12 correctness of its assessment. In this protest, the burden never shifted, and the Department was
13 entitled to rely on its presumption.

14 The Hearing Officer found both the quantity and quality of evidence to be insufficient.
15 Taxpayer’s solitary witness, although quite knowledgeable in his field, simply lacked personal, first-
16 hand knowledge of Taxpayer’s business operations during the periods of time relevant to the
17 protest. This observation is in no way intended to be critical of Mr. Ortiz, who demonstrated an
18 exceptional breadth of knowledge. However, he was not necessarily the most qualified witness to
19 discuss Taxpayer’s business practices and operations during the periods of time preceding his
20 involvement in this protest.

21 In fact, the Hearing Officer observed that a considerable amount of Mr. Ortiz’ testimony
22 relied on information he obtained from sources that were not called upon to testify, which by
23 definition, is hearsay. *See* Rule 11-801(C) NMRA (defining “hearsay” as “a statement that (1) the

1 declarant does not make while testifying at the current trial or hearing, and (2) a party offers in
2 evidence to prove the truth of the matter asserted in the statement”).

3 Although the Department never raised this as an objection, perhaps because the rules of
4 evidence do not apply, and hearsay is generally admissible in administrative proceedings, excessive
5 hearsay can diminish the credibility of any witness because that witness is required to rely on the
6 accuracy and trustworthiness of others, not present to answer under oath for themselves. Mr. Ortiz is
7 an employee of REDW, LLC, an accounting firm. His testimony was well-received on matters
8 relevant to accounting. However, he was also called upon to discuss Taxpayer’s business operations
9 which was a matter that would have been more appropriately addressed by a witness having
10 personal knowledge in that subject matter. Yet, no one other than Mr. Ortiz and counsel appeared
11 on behalf of Taxpayer in this matter.

12 The consequence was a palpable void in Taxpayer’s case which should have been occupied
13 by a witness having personal, first-hand knowledge pertaining to the extent of Taxpayer’s relevant
14 business operations in or relating to New Mexico. That witness may have been Dr. Alix Vincent or
15 Dr. Samuel Salen. Their names appear throughout Taxpayer’s exhibits, yet they did not appear in
16 person, by telephone, or by videoconference, all of which are available to enhance a party’s ability
17 to appear, participate and present their case. *See* Regulation 22.600.3.10 NMAC.

18 Dr. Vincent, Dr. Salen, or perhaps another witness having personal, first-hand knowledge,
19 could have elaborated on a variety of issues that may have been relevant to consideration of
20 Taxpayer’s protest, including the sorts of services that were, or perhaps were not performed in New
21 Mexico in exchange for the stipends or cash collection guarantees, how those receipts were
22 determined, or how they might be affected by other sources of income such as direct patient billing
23 for services performed in New Mexico.

1 For example, testimony and argument asserted that the stipend was intended to induce
2 Taxpayer to contract with rural health care providers in New Mexico by compensating it for the
3 costs it incurred for providing after-hours, out-of-state, on-call coverage. None of the stipend
4 payments, it argued, should have been allocated to New Mexico or be subject to gross receipts tax
5 because “the stipend payment is a payment for services not performed” [Rec. 00:12:30].

6 Yet, Taxpayer’s exhibits seem to reveal that the stipend was also intended to compensate
7 Taxpayer for other functions as well, including a medical directorship and interventional support
8 services. Perhaps a witness with personal knowledge could have lent additional evidentiary support
9 to counsel’s argument or clarified why the Hearing Officer should view after-hours coverage in
10 isolation from other duties the stipend was intended to compensate. *See e.g.* Taxpayer Ex. 1.4
11 (Paras. 1.0.5 a – f)

12 Another example arises from Mr. Ortiz’ testimony that when a medical facility required
13 after-hours radiology services, it would transmit the images to Taxpayer in California, which would
14 then re-transmit the images to a radiologist that might be situated anywhere in the United States,
15 *except* New Mexico. Yet, it was obvious that Mr. Ortiz’ testimony relied on hearsay and lacked the
16 sort of foundation that might establish the testimony as trustworthy and reliable. A better source of
17 that evidence would once again be Dr. Vincent or Dr. Salen, or anyone having personal knowledge
18 not based on hearsay.

19 Mr. Ortiz’ effort to essentially stand in place for the Taxpayer was admirable, but he could
20 not ultimately substitute for the Taxpayer. The resulting quandary is that although Mr. Ortiz’
21 testimony was credible in matters for which he had personal, first-hand knowledge, his testimony in
22 reference to non-accounting issues was of little weight, as it relied exclusively on hearsay.

1 The legal residuum rule requires that an agency’s administrative decision be “supported
2 by some evidence that would be admissible under the rules” of evidence. *See Chavez v. City of*
3 *Albuquerque*, 124 N.M. 239, 241, 1997 NMCA 111, 947 P.2d 1059, 1061 (N.M. Ct. App. 1997).
4 As the New Mexico Court of Appeals explained in *Anaya v. New Mexico State Personnel Board*,
5 107 N.M. 622, 626, 762 P.2d 909, 913 (N.M. Ct. App 1988),

6 [t]he legal residuum rule does not require that all evidence
7 considered by the administrative agency be legally admissible
8 evidence, but only “that an administrative action be supported by
9 *some* evidence that would be admissible in a jury trial” *Duke City*
10 *Lumbar Co. v. New Env’tl Improvement Bd.*, 101 N.M. at 295, 681
11 *P.2d at 721.*

12 Mr. Ortiz’ testimony on all matters for which he did not possess personal knowledge falls
13 short of satisfying the legal residuum rule. This would essentially encompass all non-accounting
14 issues, including the nature and location of services Taxpayer provided in consideration for its
15 stipend or cash collection guarantee payments.

16 Taxpayer should note that nothing stated herein should be construed as criticism of Mr.
17 Jackson, Ms. Bruckner, or Mr. Ortiz. They were diligent and thorough. Yet their best efforts could
18 not overcome the void created by Taxpayer’s absence. The entirety of Taxpayer’s case in chief, not
19 including opening statements or closing arguments, was no more than 42 minutes given a
20 controversy involving more than \$260,000.00 in gross receipts tax, penalty and interest. The
21 Department’s case took no more than 14 minutes. This is not to suggest that the quantity of
22 evidence is more important than the quality of evidence, but to highlight the Hearing Officer’s
23 perception that the protest was supported by little of both.

24 Our courts have recognized that “[i]t is not the responsibility of . . . the trial court to
25 search the record for evidence to support a claim or assertion.” *See State v. Maestas*, 2018-
26 NMSC-010, ¶51, 412 P.3d 79. The Hearing Officer, similar to a judge has a limited and neutral

1 role in the adversarial process, and must be wary of assuming the role of an advocate who combs
2 the record to make a party's case for it." *See Adler v. Wal-Mart Stores*, 144 F.3d 664, 672 (10th
3 Cir. 1998).

4 Nevertheless, in the midst of what the Hearing Officer perceives as a paltry record, there
5 exists the compulsion to scour what is available to solidify one position over another and satisfy
6 the need to see justice done. In this case, the Hearing Officer repeatedly revisited, reexamined and
7 reevaluated the record, but found nothing to compel another outcome. The Hearing Officer must
8 find that Taxpayer did not present sufficient evidence to rebut the presumption that its receipts from
9 the stipend, or cash collection guarantee, were taxable, and for that reason, it also failed to overcome
10 the statutory presumption of correctness that attached to the assessment.

11 Taxpayer's protest should be denied.

12 CONCLUSIONS OF LAW

13 A. Taxpayer filed timely, written protests of the Department's assessment and
14 jurisdiction lies over the parties and the subject matter of the protests.

15 B. The hearing was timely set and held under NMSA 1978, Section 7-1B-8 (2015).

16 C. The assessment issued in this case is presumed correct and Taxpayer has the
17 burden to overcome the assessment. *See NMSA 1978, Section 7-1-17 (C) (2007); See Archuleta*
18 *v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

19 D. Taxpayer did not present countervailing evidence or legal argument to establish
20 entitlement to an abatement, in full or in part, of the assessment issued in the protest. *See N.M.*
21 *Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8.

22 E. The burden did not shift to the Department to show that the assessment is correct.
23 *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

1 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
2 Taxpayers remit payment in the amounts of \$187,922.79 in gross receipts tax, \$39,076.28 in gross
3 receipts tax penalty, \$21,959.64 in gross receipts tax interest, \$46,693.00 in compensating tax,
4 \$7,846.85 in compensating tax penalty, and \$5,686.93 in compensating tax interest, the sum of
5 \$16,088.86 in interest accruing since the assessment through the date of the hearing, and
6 additional interest accruing from the date of the hearing until the liability is satisfied.

7 DATED: July 16, 2019

8 

9 Chris Romero
10 Hearing Officer
11 Administrative Hearings Office
12 P.O. Box 6400
13 Santa Fe, NM 87502

14 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

2 On July 16, 2019, a copy of the foregoing Decision and Order was submitted to the parties
3 listed below in the following manner:

4 *First Class Mail*

Interagency State Mail

5
6 INTENTIONALLY BLANK

7
8 _____
9 John Griego
10 Legal Assistant
11 Administrative Hearings Office
12 P.O. Box 6400
Santa Fe, NM 87502