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

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**IN THE MATTER OF THE PROTEST OF
SOLUTIONS SALON, INC.
TO THE DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L0285340464**

8
9
v.

**Case No. 18.04-086R
D&O No. 19-24**

10
NEW MEXICO TAXATION AND REVENUE DEPARTMENT

11
DECISION AND ORDER

12 On July 19, 2019, Hearing Officer Dee Dee Hoxie, Esq. conducted a hearing on the
13 merits of the protest to the denial of refund. The Taxation and Revenue Department (Department)
14 was represented by Peter Breen, Staff Attorney. Angelica Rodriguez, Auditor, also appeared on
15 behalf of the Department. Solutions Salon, Inc. (Taxpayer) was represented by its attorney, Max
16 Best. Andrea Gutierrez and Chris Gutierrez, owners of the Taxpayer, also appeared for the
17 hearing. Randall Burnett, the Taxpayer's CPA, Tina Sorenson-Dill, and Gail Rierson also
18 appeared for the hearing. Mr. Burnett, Ms. Gutierrez¹, Ms. Rierson, and Ms. Sorenson-Dill
19 testified. The Hearing Officer took notice of all documents in the administrative file. The
20 Taxpayer's exhibits #1 (floor plan), #2 (brochure), #3 (photos), #4 (insurance), #5 (insurance),
21 #6 (insurance), #7 (insurance), #8 (phone bill), #9 (contracts), and #10 (abatement) were
22 admitted. A more detailed description of exhibits submitted at the hearing is included on the
23 Administrative Exhibit Coversheet. After the hearing, the Taxpayer filed a supplemental

¹ During Ms. Gutierrez's testimony, the Hearing Officer asked the witness to speak louder due to the microphone not registering her voice well. After the hearing, a review of the record confirmed that Ms. Gutierrez's testimony was barely audible. The original recording was saved. A second copy was saved after the section of Ms. Gutierrez's testimony was run through an audio-enhancement software. No other changes were made to the recording. A copy of both the original recording and the enhanced version will be included as part of the official administrative record.

1 statement. The Department was given the opportunity to respond. The Department's response
2 was timely filed, but it indicated service to the Taxpayer's CPA, rather than to its attorney.
3 Therefore, a copy of the Department's response was forwarded to the Taxpayer's attorney by the
4 Administrative Hearings Office on August 14, 2019. The Hearing Officer considered all of the
5 evidence and arguments presented by both parties.

6 The main issue to be decided is whether the Taxpayer's rentals of space in its building
7 should be treated as leases or as licenses. The Hearing Officer finds that there is insufficient
8 evidence to establish that the Taxpayer gave up possession and use of its spaces to the exclusive
9 dominion and control of its renters. Therefore, the rentals are licenses and are not subject to the
10 deduction. Consequently, the Hearing Officer finds in favor of the Department. IT IS

11 DECIDED AND ORDERED AS FOLLOWS:

12 **FINDINGS OF FACT**

13 1. On January 2, 2018, the Department issued a denial of the Taxpayer's claim for
14 refund of \$14,274.26 of gross receipts taxes for the tax period ending December 31, 2016.

15 [Administrative file].

16 2. On February 27, 2018, the Taxpayer filed a timely protest. [Administrative file].

17 3. On April 19, 2018, the Department filed a Request for Hearing asking that the
18 Taxpayer's protest be scheduled for a hearing. [Administrative file].

19 4. On May 16, 2018, a telephonic scheduling hearing was conducted. The hearing
20 occurred within 90 days of the protest.

1 5. On June 29, 2018, the Department filed its prehearing statement. On June 27,
2 2019, the Taxpayer filed its prehearing statement. [Administrative file].²

3 6. The Taxpayer is a cosmetology business and offers its clients services that include
4 skin care, massage, nail care, hair care, and waxing. [Testimony of Ms. Gutierrez, Testimony of
5 Ms. Rierson, Testimony of Ms. Sorenson-Dill, Exhibit #2, and Exhibit #9].

6 7. The Taxpayer's services are provided by independent contractors. [Testimony of
7 Ms. Gutierrez, Testimony of Ms. Rierson, Testimony of Ms. Sorenson-Dill, Exhibit #2, and
8 Exhibit #9].

9 8. The Taxpayer provides a booth or a room to its independent contractors where
10 they can perform the salon services. [Testimony of Ms. Gutierrez, Testimony of Ms. Rierson,
11 Testimony of Ms. Sorenson-Dill, and Exhibit #9].

12 9. The independent contractors enter into agreements with Ms. Gutierrez as the
13 lessor and owner of the Taxpayer and its building. [Testimony of Ms. Gutierrez, and Exhibit
14 #9].

15 10. Ms. Gutierrez and her husband own and operate the Taxpayer and its building.
16 [Testimony of Ms. Gutierrez]

17 11. The independent contractors are assigned a specific space by Ms. Gutierrez, the
18 specific space is not identified in the rental agreements, and the independent contractors may
19 decorate their spaces. The independent contractors provide their own supplies for salon services.
20 The independent contractors may only use their rented spaces to provide salon services.
21 [Testimony of Ms. Gutierrez, Testimony of Ms. Rierson, Testimony of Ms. Sorenson-Dill, and
22 Exhibit #9].

² Further procedural details are available in the administrative file. At the Taxpayer's request, the hearing on the merits was continued twice and a second telephonic scheduling hearing was conducted.

1 12. The independent contractors who are assigned a room have a door that they can
2 lock when they are not present. [Testimony of Ms. Gutierrez, and Testimony of Ms. Sorenson-
3 Dill].

4 13. The independent contractors have access to the Taxpayer's building, and some of
5 them have the security code. [Testimony of Ms. Gutierrez, Testimony of Ms. Rierson, and
6 Testimony of Ms. Sorenson-Dill].

7 14. The independent contractors are required to clean their spaces to Ms. Gutierrez's
8 satisfaction. The Taxpayer provides cleaning supplies to the independent contractors.
9 [Testimony of Ms. Gutierrez, Testimony of Ms. Rierson, Testimony of Ms. Sorenson-Dill, and
10 Exhibit #9].

11 15. Ms. Gutierrez has occasionally reminded an independent contractor to clean their
12 space. [Testimony of Ms. Gutierrez].

13 16. The independent contractors may obtain their own insurance, and several have
14 done so. [Testimony of Ms. Gutierrez, Exhibit #4, Exhibit #5, Exhibit #6, and Exhibit #7].

15 17. The independent contractors are only allowed to be present during the Taxpayer's
16 business hours unless they obtain special permission from Ms. Gutierrez. [Testimony of Ms.
17 Gutierrez, Testimony of Ms. Rierson, Testimony of Ms. Sorenson-Dill, and Exhibit #9].

18 18. The independent contractors are required to carry a line of professional products
19 for use with their clients and to sell to the Taxpayer's clients. They must obtain and keep a
20 cosmetology license. [Exhibit #9].

21 19. The independent contractors pay a weekly rental fee for their spaces. Their rental
22 fee includes utilities and the right to use common spaces and equipment. [Testimony of Ms.
23 Gutierrez, Testimony of Ms. Rierson, Testimony of Ms. Sorenson-Dill, and Exhibit #9].

1 The Taxpayer argues that the Department already settled the issue of this protest when it
2 abated an assessment against the Taxpayer in 2014. *See* Exhibit #10. Equitable estoppel may be
3 found against the state where there is “a shocking degree of aggravated and overreaching conduct
4 or where right and justice demand it.” *Wisznia v. State, Human Servs. Dep’t*, 1998-NMSC-011, ¶
5 17, 125 N.M. 140. Equitable estoppel against the state is disfavored, especially in cases
6 involving taxes. *See Taxation and Revenue Dep’t v. Bien Mur Indian Market*, 1989-NMSC-015,
7 ¶9-10, 108 N.M. 228. Equitable estoppel will not apply against the state when it would be
8 contrary to the requirements of statute or law. *See Rainaldi v. Pub. Employees Ret. Bd.*, 1993-
9 NMSC-028, ¶ 18-19, 115 N.M. 650. *See also In re Kilmer*, 2004-NMCA-122, ¶ 26, 136 N.M.
10 440. The only evidence that Exhibit #10 related to the issue of this protest was during Ms.
11 Gutierrez’s testimony. This evidence was insufficient to prove by preponderance that the
12 Department had already settled this issue with the Taxpayer. Moreover, the Taxpayer clearly did
13 not rely on the abatement because it continued to pay the gross receipts tax, as this protest is to a
14 denial of refund. Also, the issue of equitable estoppel is moot in the context of this protest
15 because the Administrative Hearings Office has not been granted statutory authority to exercise
16 an equitable judicial remedy. *See AA Oilfield Serv. v. N.M. State Corp. Comm’n*, 1994-NMSC-
17 085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an administrative body did
18 not empower it to grant equitable relief, such as estoppel, because the authority is limited to
19 making factual and legal determinations as authorized by the statute). *See Gzaskow v. Pub.*
20 *Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for the proposition
21 that an agency with quasi-judicial powers did not have authority to grant an equitable remedy).
22 *See also* NMSA 1978, § 7-1B-1, *et seq.*

23 **Gross receipts tax and the deduction.**

1 Anyone engaging in business in New Mexico is subject to the gross receipts tax. *See*
2 NMSA 1978, § 7-9-4. The Taxpayer paid gross receipts taxes on the receipts from its
3 independent contractors' payments of rent for their spaces. The Taxpayer is now claiming a
4 refund of the gross receipts taxes and arguing that it was entitled to deduct those receipts as they
5 were from the lease of real property. *See* NMSA 1978, § 7-9-53 (1998). "Receipts from the sale
6 or lease of real property...may be deducted from gross receipts." *Id.* However, "[r]eceipts
7 derived from a license to use real property may not be deducted from gross receipts". 3.2.211.17
8 (A) NMAC (2012). Therefore, the main issue is whether the Taxpayer's rental agreements for
9 use of specific spaces in its building should be treated as leases or licenses.

10 **Leases and licenses.**

11 Generally, a lease is an agreement where the property owner gives up possession and use
12 of the property for consideration for a definite term. *See Quantum Corp. v. State Taxation and*
13 *Revenue Dep't*, 1998-NMCA-050, ¶ 9, 125 N.M. 49. In order to be a lease, the tenant must
14 acquire definitive dominion and control over the property. *See id.* *See also Corr. Corp. of Am.*
15 *of Tenn. v. State*, 2007-NMCA-148, ¶ 18-21, 142 N.M. 779. *See also Cutter Flying Serv. V.*
16 *Prop. Tax Dep't*, 1977-NMCA-105, ¶ 16, 91 N.M. 215. *See Grogan v. New Mexico Taxation*
17 *and Revenue Dep't*, 2003-NMCA-033, ¶ 27, 133 N.M. 354. Generally, a license is a permission
18 to do something on the land of another and conveys no interest in the property. *See Tarin's Inc.*
19 *v. Tinley*, 2000-NMCA-048, ¶ 20, 129 N.M. 185. *See also S.S. Krege Co. v. Bureau of Revenue*,
20 1975-NMCA-015, ¶ 5, 87 N.M. 259. *See Grogan*, 2003-NMCA-033, ¶ 27. *See Cutter*, 1977-
21 NMCA-105, ¶ 14. *See Quantum*, 1998-NMCA-050, ¶ 10. A typical feature of a license is its
22 revocability. *See Tarin's*, 2000-NMCA-048, ¶ 21. *See Quantum*, 1998-NMCA-050, ¶ 15.

1 The Taxpayer argues that its rental agreements are leases because its rental agreements
2 are not revocable at-will and its independent contractors have control over their spaces. The
3 Taxpayer argues that its independent contractors are comparable to the renters in the *Quantum*
4 case and in Ruling 440-92-1.³

5 In Ruling 440-92-1, a space in an indoor mini-mall is leased to a tenant, who is given
6 exclusive possession of a specific space. *See* Ruling 440-921-1. “Indicia of a lease typically
7 include: the exclusive rights of the lessee to occupy a specific portion of property and to restrict
8 others’ entry thereon; mortgageability and assignability; survival and succession; responsibility
9 of lessee for maintenance and repair; unrestricted use of the property; and duration longer than
10 day-to-day.” *Id.* A license “is typically revocable, personal, not assignable or mortgageable, not
11 subject to succession upon death of the licensee, paid for on the basis of each use or as a
12 percentage of income from its use, limited to specific purposes, and non-exclusive.” *Id.* The
13 ruling recognizes that the agreement at issue had elements of both a lease and a license. *See id.*
14 The ruling ultimately determines that the agreement is a lease that is deductible because the
15 tenant had the exclusive use of the space, was responsible for the maintenance of the space, and
16 had the opportunity to determine the kind of retail of products that the tenant would retail from
17 the space. *See id.*

18 Where the renters had neither exclusive possession nor the right to restrict access, the
19 contracts did not convey an interest in real property. *See Grogan*, 2003-NMCA-033, ¶ 27. The
20 contracts simply gave the renters authority to set up or use space in the store. *See id.* The
21 lessor’s maintenance of the property indicates an equal and independent right to use the property.

³ The Taxpayer referred to Ruling 440-92-7-1 in its prehearing statement. Ruling 440-92-7-1 was not found. Given the argument made by the Taxpayer on the ruling’s context, as well as the similarity in the citation number, Ruling 440-92-1 was determined to be the correct ruling.

1 See *id.* at ¶ 29. Leases give tenants the right to possess the property against the world. See
2 *Cutter*, 1977-NMCA-105, ¶ 14. Licenses simply authorize a tenant to use the property in some
3 specific way. See *id.* The determination turns on whether the lessor relinquishes dominion and
4 control over the property to the lessee. See *Corr. Corp.*, 2007-NMCA-148, ¶ 21.

5 In *Quantum*, the taxpayer rented its building to non-profit organizations for bingo games
6 and only gave up possession and use of its property during brief periods of the tenant's use. See
7 *Quantum*, 1998-NMCA-050, ¶ 13. The Bingo Act did not permit a non-profit organization to be
8 a lessor and also conduct bingo games, and it required the organizations to list where they would
9 be conducting the games when they applied for licensure. See *id.* at ¶ 14-16. Failure to comply
10 with the Bingo Act could result in sanctions or criminal penalties. See *id.* at ¶ 18. Therefore, the
11 tenant's lack of exclusive control was necessary to comply with the restrictions of the Bingo Act.
12 See *id.* at ¶ 17. Payment of rent, possession for definite periods of time, exclusive possession of
13 safes and closets, and the inability to revoke at will were sufficient to conclude that the
14 agreements were leases given the provisions of the Bingo Act that prevented the agreements
15 from conforming to typical leases. See *id.* at ¶ 21. The Taxpayer argues that the Taxpayer's
16 control of the premises is akin to the *Quantum* case because the maintenance of the cosmetology
17 licenses require cleanliness. See 16.34.7.13 NMAC (2001) (requiring cosmetology-licensed
18 establishment owners and individual licensees to maintain standards of sanitation and comply
19 with safety rules). Given the specificity of the Bingo Act, the *Quantum* case is not applicable to
20 the Taxpayer's situation. See *id.* See also *Corr. Corp.*, 2007-NMCA-148, ¶ 20 (noting that the
21 holding of *Quantum* was dictated by the statutory requirements of regulating bingo gaming). See
22 also *Grogan*, 2003-NMCA-033, ¶ 30 (noting that the *Quantum* case was distinguishable and not
23 controlling or even instructive in different circumstances).

1 The first factor that indicates a lease is the exclusive right to occupy and to restrict the
2 access of others. *See* Ruling 440-92-1.⁴ *See also Quantum*, 1998-NMCA-050, ¶ 9. *See also*
3 *Grogan*, 2003-NMCA-033, ¶ 27. *See also Cutter*, 1977-NMCA-105, ¶ 14-16. *See also Corr.*
4 *Corp.*, 2007-NMCA-148, ¶ 21. Non-exclusivity is also the last factor that indicates a license.
5 *See* Ruling 440-92-1. The independent contractors have access to the Taxpayer’s building, but
6 few, if any of them, appear to have exclusive control and dominion over their space. Ms.
7 Rierson testified that her control of her space relies upon her presence and body language. Ms.
8 Sorenson-Dill testified that she can lock her room so that no one, except the Taxpayer’s owner,
9 can access it when she is not there. The independent contractors can personalize their spaces, but
10 allowing decorations is not enough to prove that the Taxpayer has given up possession and use of
11 the spaces, especially since the Taxpayer dictates what the independent contractors may use their
12 spaces for and advertises all of the services performed by the independent contractors as services
13 that the Taxpayer performs for its clients. *See* Exhibit #2, and Exhibit #9. The independent
14 contractors may only access the property during the Taxpayer’s business hours unless they have
15 special permission. *See* Exhibit #9. This factor weighs against finding that the agreements are
16 leases, and it weighs in favor of finding that the agreements are licenses.

17 The second and third factors that indicate a lease are whether it is mortgageable,
18 assignable, and subject to survival and succession. *See* Ruling 440-92-1. The Taxpayer’s
19 agreements do not meet these criteria. *See* Exhibit #9. Therefore, these factors weigh against
20 finding that the agreements are leases.

21 The fourth factor that indicates a lease is responsibility of the lessee for maintenance and
22 repair. *See* Ruling 440-92-1. The independent contractors are responsible for maintaining the

⁴ Although the ruling is not binding precedent, its factors defining leases and licenses are useful and persuasive on this issue.

1 cleanliness of their spaces. *See* Exhibit #9. However, the independent contractors must also
2 satisfy the Taxpayer’s demands on their cleanliness. *See* Exhibit #9. Given the regulatory
3 requirements for sanitation related to cosmetology businesses, this factor weighs slightly in favor
4 of finding that the agreements are leases. *See* 16.34.7.13 NMAC. *See also* *Quantum*, 1998-
5 NMCA-050 (taking into consideration the specific requirements of the Bingo Act in determining
6 whether the agreement was a lease).

7 The fifth factor that indicates a lease is an unrestricted use of the property. *See* Ruling
8 440-92-1. Again, the independent contractors are restricted to conducting business during the
9 Taxpayer’s business hours unless they obtain special permission. *See* Exhibit #9. The Taxpayer
10 also dictates how the independent contractors maintain the cleanliness of their spaces. *See*
11 Exhibit #9. The Taxpayer only allows the independent contractors to use their spaces for the
12 provision of salon services. *See* Exhibit #9. The independent contractors are required to carry a
13 line of professional products for use and sale. *See* Exhibit #9. Therefore, the independent
14 contractors’ use of the property is not unrestricted. This factor weighs against finding that the
15 agreements are leases.

16 The final factor that indicates a lease is a duration of more than day-to-day. *See* Ruling
17 440-92-1. The rental agreements are for a duration of week-to-week. *See* Exhibit #9. This
18 factor weighs in favor of finding that the agreements are leases.

19 The first factor that indicates a license is revocability. *See* Ruling 440-92-1. The
20 Taxpayer argues that the parties’ intent governs, and they did not intend for the agreements to be
21 revocable. The intent of the parties is important, but their intent is demonstrated best by the
22 contents of the written agreement. *See* *Quantum Corp.*, 1998-NMCA-050, ¶ 12. The
23 agreements do not say that they are revocable at-will, but they do allow the Taxpayer to

1 terminate the independent contractor's contract and "right to use the space rented" for
2 "irreconcilable differences" with other independent contractors or with the Taxpayer. *See*
3 Exhibit #9. Therefore, the Taxpayer's agreements are revocable for "irreconcilable differences".
4 *See* Exhibit #9. This factor weighs slightly in favor of finding that the agreements are licenses.

5 The next several factors that indicate a license are that it is personal, not mortgageable or
6 assignable, and not subject to succession upon death of the licensee. *See* Ruling 440-92-1. The
7 Taxpayer's agreements are personal to each independent contractor, are not mortgageable or
8 assignable, and are not subject to succession. *See* Exhibit #9. These factors weigh in favor of
9 finding that the agreements are licenses.

10 The next factor that indicates a license is payment upon each use or a percentage of
11 income from use. *See* Ruling 440-92-1. The Taxpayer's agreements require regularly weekly
12 payments, regardless of income or use. *See* Exhibit #9. This factor weighs in favor of finding
13 that the agreements are not licenses.

14 The final factor that indicates a license is whether it is limited to a specific purpose. *See*
15 Ruling 440-92-1. The independent contractors are limited to using their spaces for providing
16 salon services. *See* Exhibit #9. They are also required to meet other non-regulatory criteria,
17 such as carrying a line of products. *See* Exhibit #9. This factor weighs in favor of finding that
18 the agreements are licenses.

19 The Taxpayer's rental agreements have several factors of both a lease and a license.
20 More factors indicate that the agreements are licenses than indicate that the agreements are
21 leases. Again, the Taxpayer has the burden of proving that it is entitled to a deduction. *See*
22 *Kewanee Indus.*, 1993-NMSC-006, ¶ 29. Since it appears that the agreements more closely
23 resemble licenses than leases, the Taxpayer has failed to meet its burden.

1 **CONCLUSIONS OF LAW**

2 A. The Taxpayer filed a timely, written protest of the denial of refund, and jurisdiction
3 lies over the parties and the subject matter of this protest.

4 B. The first hearing was held within 90 days of protest, as required by statute. *See*
5 NMSA 1978, § 7-1B-8 (2015).⁵

6 C. The Taxpayer’s rental agreements more closely resemble licenses than leases. *See*
7 Ruling 440-92-1. *See Quantum*, 1998-NMCA-050. *See Grogan*, 2003-NMCA-033. *See Cutter*,
8 1977-NMCA-105. *See Tarin’s*, 2000-NMCA-048. *See S.S. Krege*, 1975-NMCA-015. *See Corr.*
9 *Corp.*, 2007-NMCA-148.

10 D. The Taxpayer failed to prove that it was entitled to take the deduction. *See* NMSA
11 1978, § 7-9-53. *See also* 3.2.211.17 NMAC. *See Kewanee Indus.*, 1993-NMSC-006. *See also*
12 *Sec. Escrow*, 1988-NMCA-068. *See also Wing Pawn Shop*, 1991-NMCA-024. *See also Chavez*,
13 1970-NMCA-116. *See also Pittsburgh and Midway Coal Mining*, 1983-NMCA-019. *See also*
14 *Rauscher, Pierce, Refsnes, Inc.*, 2002-NMSC-013.

15 For the foregoing reasons, the Taxpayer’s protest **IS DENIED**.

16 DATED: September 20, 2019.

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

23 **NOTICE OF RIGHT TO APPEAL**

⁵ This statute was amended in 2019. The statute referred to is the one in effect at the time this protest was filed.

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

12 **CERTIFICATE OF SERVICE**

13 On September 20, 2019, a copy of the foregoing Decision and Order was submitted to the
14 parties listed below in the following manner:

15 *First Class Mail*

Interdepartmental Mail

16 INTENTIONALLY BLANK

17
18 _____
19 John Griego
20 Legal Assistant
21 Administrative Hearings Office
22 P.O. Box 6400
Santa Fe, NM 87502