



1 of “gross receipts” as defined by the Gross Receipts and Compensating Tax Act, NMSA 1978,  
2 Section 7-9-3.5 (A) (2007, amended 2019), and if so, whether those licenses were sold or  
3 employed in New Mexico; (3) whether Taxpayer’s receipts should be excludable or exempt as  
4 services performed outside of New Mexico, also under NMSA 1978, Section 7-9-3.5 (A) (2007,  
5 amended 2019), and NMSA 1978, Section 7-9-13.1 (1989); and (4) whether Taxpayer is entitled to  
6 an abatement of penalty under NMSA 1978, Section 7-1-69 (2007) or Regulation 3.1.11.11 NMAC.

7 As expounded in greater detail below, the Hearing Officer determined that Taxpayer is not  
8 entitled to relief from the assessment by virtue of the Department’s untimely hearing request and  
9 that it did not rebut the presumption of correctness that attached to the assessment by establishing  
10 that its receipts should be excluded from taxation or that it is entitled to a deduction or exemption on  
11 those receipts. Finally, the Hearing Officer concluded that there was a lack of evidence to find that  
12 Taxpayer was entitled to abatement of penalty. Therefore, Taxpayer’s protest should be denied. IT  
13 IS DECIDED AND ORDERED AS FOLLOWS:

#### 14 **FINDINGS OF FACT**

##### 15 Witnesses

16 1. Ms. Dana Allen is a certified public accountant and vice president of indirect tax  
17 at McKesson Corporation. She has been employed at McKesson Corporation since 2009. [Direct  
18 Examination of Ms. Allen; Cross Examination of Ms. Allen]

19 2. At all relevant times, McKesson Corporation was Taxpayer’s parent corporation.  
20 Although McKesson Corporation has since sold Taxpayer, McKesson Corporation and Ms.  
21 Allen remain authorized to represent Taxpayer in this protest. [Direct Examination of Ms. Allen;  
22 Taxpayer Exs. 8 – 10]

23 3. Ms. Allen, although employed by Taxpayer’s parent corporation, was never

1 employed by Taxpayer. [Cross Examination of Ms. Allen]

2 4. To the extent Ms. Allen, in the scope of her employment at McKesson  
3 Corporation would have worked on any matters relevant to Taxpayer's business operations, it  
4 would have concentrated on taxation issues. She was not engaged in Taxpayer's daily operations.  
5 [Cross Examination of Ms. Allen]

6 5. Ms. Allen's personal knowledge of facts relevant to the protest was acquired  
7 through research she conducted either unrelated to or subsequent to the audit, assessment and  
8 protest. Her research consisted of discussions with Taxpayer's employees, reference to internal  
9 materials, and public sources including the internet. [Cross Examination of Ms. Allen]

10 6. Ms. Allen's knowledge of Taxpayer's business activities germane to the protest  
11 developed primarily from her research. Ms. Allen has no personal knowledge of Taxpayer's  
12 business operations. [Cross Examination of Ms. Allen]

13 7. Ms. Lisa J. Farmelo resides in Tijeras, New Mexico. She has a background in  
14 medical billing and had been employed by Taxpayer since 2008. At all relevant times she was a  
15 client manager responsible for monitoring and evaluating the back-end revenue cycle process  
16 which included monitoring and evaluating key performance indicators, which she called "KPI,"  
17 which consisted of charges, cash, payor edits, denial rate, gross collection rates, and aging  
18 accounts, all of which enable her to assist in devising strategies for enhancing a client's  
19 procedures for collecting revenue. [Direct Examination of Ms. Farmelo]

20 8. Although Ms. Farmelo is generally familiar with the services Taxpayer provided,  
21 her expertise was admittedly concentrated on her individual responsibilities and services she  
22 personally performed. [Direct Examination of Ms. Farmelo]

23 9. Ms. Mary Griego is a protest auditor with the Department. [Direct Examination of

1 Ms. Griego]

2 Taxpayer's Business Activities and Assessment of Taxes

3 10. At all relevant times, Taxpayer was engaged in the business of providing billing  
4 and accounts receivable services to physicians and physician groups. [Direct Examination of Ms.  
5 Allen; Taxpayer Ex. 4; Taxpayer Ex. 7.1 (Item 7.2)]

6 11. Although Taxpayer may serve several clients in New Mexico, the receipts in  
7 dispute in the present protest were derived from Taxpayer's business with ABQ Health Partners,  
8 LLC and its predecessors (hereinafter collectively referred to as "ABQ Health"). [Direct  
9 Examination of Ms. Allen; Taxpayer Ex. 2.7; Taxpayer Ex. 4]

10 12. ABQ Health is located in New Mexico and according to its contract with  
11 Taxpayer, also "provides practice management and accounts receivable management services to  
12 physicians and physicians groups[.]" [Taxpayer Ex. 4.1]

13 13. ABQ Health generated the entirety of its receipts from services provided in New  
14 Mexico. [Direct Examination of Ms. Farmelo]

15 14. A vital component of the services Taxpayer provided to ABQ Health required use  
16 of computer software furnished by Taxpayer to ABQ Health known as "Flowcast," the "Flowcast  
17 System," or the "Lovelace System" (hereinafter referred to as "Flowcast"). [Direct Examination  
18 of Ms. Allen]

19 Flowcast

20 15. The Flowcast software is licensed to Taxpayer by IDX, a General Electric  
21 company. Taxpayer thereafter passes on the entire cost of the software to ABQ Health in  
22 exchange for the authority to utilize the software. [Direct Examination of Ms. Allen; Taxpayer  
23 Ex. 4]

1           16.     Flowcast is housed on servers located outside of New Mexico, but accessible to  
2 ABQ Health personnel located in New Mexico. [Direct Examination of Ms. Allen]

3           17.     ABQ Health compensated Taxpayer for the sum of 525 Flowcast licenses of  
4 which ABQ Health purportedly employed no more than 365 licenses in New Mexico. [Direct  
5 Examination of Ms. Allen; Taxpayer Ex. 7.2 (Item 8); Taxpayer Ex. 7.3 (Item 10)]

6           18.     Taxpayer bills the cost of Flowcast to ABQ Health on a monthly basis. [Direct  
7 Examination of Ms. Allen; Taxpayer Ex. 4.5 (Sec. 19); Taxpayer Ex. 5 (e.g. Ex. 5.1, Line 15)]

8           19.     For example, Taxpayer Ex. 5.1 illustrates a monthly fee in the amount of  
9 \$179,167.00 charged to ABQ Health for use of the “Flowcast System” during that billing period.  
10 [Direct Examination of Ms. Allen; Taxpayer Ex. 2.7; Taxpayer Ex. 5.1 (Line 15)]

11           20.     The balance of the receipts stemming from ABQ Health, not specifically deriving  
12 from compensation for access or use of Flowcast, represented compensation for accounts  
13 receivable services, calculated as a percentage of receipts collected on behalf of ABQ Health.  
14 For example, Taxpayer Exhibit 5.1 illustrates how Taxpayer billed ABQ Health a percentage of  
15 “Flowcast Posted Cash” calculated as 0.0420 percent of \$9,536,983.17, totaling \$400,553.29 due  
16 for that billing period. “Flowcast Posted Cash” is the sum of ABQ Health’s receipts in that  
17 period with the percentage representing Taxpayer’s commission. [Taxpayer Ex. 5.1 (Line 1)]

18           21.     Although “Flowcast Posted Cash” may have been computed and derived through  
19 the use of Flowcast, it was not paid as consideration for use of Flowcast, but rather for services  
20 rendered to ABQ Health. [Direct Examination of M.s Allen]

21           22.     The Department did not differentiate income derived from furnishing Flowcast  
22 from income derived from providing services using Flowcast. The Department categorized both  
23 streams of income as deriving from licensing Flowcast for use by ABQ Health. [Direct

1 Examination of Ms. Allen; Taxpayer Ex. 2.9]

2 23. Ms. Allen has no personal knowledge of the Flowcast software, except that it is  
3 used in the area of billing for medical services. [Cross Examination of Ms. Allen]

4 24. Ms. Allen has never personally operated nor observed the operation of Flowcast  
5 and her knowledge of the software is very general. [Cross Examination of Ms. Allen]

6 25. Ms. Farmelo has a limited knowledge of Flowcast which she described as a  
7 billing program that she rarely used for purposes other than data gathering. [Direct Examination  
8 of Ms. Farmelo; Cross Examination of Ms. Farmelo]

9 26. Despite a request from the Department, Taxpayer did not provide the “Flowcast  
10 System purchase invoice” or any agreement specifying terms and conditions for the use of the  
11 Flowcast System between Taxpayer and ABQ Health. [Taxpayer Ex. 2.8 (Records Requested Not  
12 Provided)]

13 Accounts Receivable Services

14 27. Compensation to Taxpayer for Flowcast represented only a portion of Taxpayer’s  
15 receipts generated through its business with ABQ Health. Another portion of receipts in dispute  
16 was derived from providing accounts receivable services, some of which was performed both  
17 inside and outside of New Mexico. [Direct Examination of Ms. Allen; Taxpayer Ex. 5; Direct  
18 Examination of Ms. Farmelo]

19 28. Although various tasks related to provision of accounts receivable services were  
20 performed at Taxpayer’s location in Lewiston, Maine, Taxpayer maintained anywhere from three  
21 to 21 employees in New Mexico during the relevant period of time to perform various functions  
22 necessary for the delivery of its services. [Direct Examination of Ms. Allen; Taxpayer Ex. 7.1  
23 (Item 5); Taxpayer Ex. 7.4 (Item 22)]

1           29.     The presentation of evidence concentrated primarily on three employees stationed  
2 in New Mexico. Two of those employees were a client relationship manager and client  
3 relationship specialist whose primary functions were “[m]aintain[ing] day to day relationship  
4 with client; respond to client questions; conduct regular meetings to establish mutual goals,  
5 [accounts receivable] targets, client business strategies; act as facilitator between client and out  
6 [of] state operational staff performing services, and resolve client issues.” [Taxpayer Ex. 7.1  
7 (Item 5); Direct Examination of Ms. Farmelo]

8           30.     The third employee stationed in New Mexico was a client service representative  
9 whose primary functions were to act as “[p]rimary resource for all reporting; support of Revenue  
10 Cycle Operations, [and] account management[.]” [Taxpayer Ex. 7.1 (Item 5)]

11           31.     New Mexico was also the location from which Taxpayer, by and through Ms.  
12 Farmelo, personally monitored ABQ Health’s key performance indicators, which was Ms.  
13 Farmelo’s primary responsibility as client relationship specialist. [Direct Examination of Ms.  
14 Farmelo]

15           32.     Functions that Ms. Farmelo performed in New Mexico for the benefit of Taxpayer  
16 and ABQ Health, included:

- 17           a.     “Provide fee schedule consultation, evaluation and development. [Second Re-  
18 Direct Examination of Ms. Farmelo; Taxpayer Ex. 4.8 (Para. (o))]
- 19           b.     Provide monthly management reporting between the fifteenth and the twenty  
20 first day of the following month to include:
- 21                 i.     “monthly/yearly financial comparative trends by payclass and  
22 procedure[.]”
- 23                 ii.    “referring physician reports by physician, procedure and dollar  
24 volume[.]”
- 25                 iii.   “charge and payment analysis total and by payclass[.]”
- 26                 iv.   “location productivity profile and summary[.]”

- 1 v. “aging payment report[.]”
- 2 vi. “general accounts receivable summary[.]”
- 3 vii. “physician documentation feedback (if applicable)[.]”
- 4 viii. “incoming patient calls (number, average time, number dropped)[.]”
- 5 ix. “Ad-hoc reports, containing information applicable to Affiliate’s
- 6 practice only (such ad-hoc reports may be subject to an additional
- 7 fee)[.]”

8 [Second Re-Direct Examination of Ms. Farmelo; Taxpayer Ex. 4.8  
9 (Para. (t))]

- 10 c. “Provide current knowledge of governmental regulations, third-party payer
- 11 activities, competition, economic changes and other outside influences
- 12 affecting Affiliate(s).” [Second Re-Direct Examination of Ms. Farmelo;
- 13 Taxpayer Ex. 4.8 (Para. (u))]
- 14 d. “Provide annual charge review and analysis/projections;” [Second Re-Direct
- 15 Examination of Ms. Farmelo.” Taxpayer Ex. 4.8 (Para. (w))]
- 16 e. “Provide annual impact analysis of Medicare reductions and/or participation
- 17 evaluation and recommendation.” [Second Re-Direct Examination of Ms.
- 18 Farmelo; Taxpayer Ex. 4.8 (Para. (x))]
- 19 f. “Perform quarterly clinic documentation reviews and provide Client with
- 20 results within thirty (30) days thereafter and work with the Operations
- 21 Steering Committee to address issues raised.” [Second Re-Direct Examination
- 22 of Ms. Farmelo; Taxpayer Ex. 4.9 (Para. (ss))]

23 33. Ms. Farmelo compiled data and assembled it in a presentation that she would then  
24 personally present on a monthly basis to ABQ Health’s management personnel. [Cross  
25 Examination of Ms. Farmelo]

26 34. Based on Ms. Farmelo’s evaluations and input, ABQ Health’s management could  
27 make corrections or implement adjustments to its procedures with the goal of enhancing its cash  
28 flow. Ms. Farmelo would typically work with ABQ Health’s director of revenue cycle or chief  
29 financial officer. [Direct Examination of Ms. Farmelo]

30 35. Improvements to ABQ Health’s cash flow, stemming from Ms. Farmelo’s work,



1 might increase ABQ Health's receipts which would correspondingly increase Taxpayer's  
2 receipts since its receipts were computed as a percentage of receipts collected for ABQ Health.

3 [Taxpayer Ex. 5.1 (Line 1)]

4 36. At all relevant times, Ms. Farmelo performed her work in New Mexico, dividing  
5 her time between the client's location in Albuquerque, New Mexico, and her home, also in New  
6 Mexico. [Direct Examination of Ms. Farmelo; Department Ex. M001]

7 37. Between 2011 and 2016, Ms. Farmelo estimated she was physically present up to  
8 four days per week at ABQ Health's primary business location in Albuquerque, New Mexico.

9 However, because ABQ Health no longer provides space to Ms. Farmelo, due to space  
10 limitations, she now performs the majority of her work from her home in Tijeras, New Mexico.

11 [Cross Examination of Ms. Farmelo]

12 38. Ms. Farmelo described her initial function for Taxpayer as "the bridge" between  
13 the Lewiston, Maine operations and ABQ Health in which it was her mission to initiate, nurture  
14 and maintain relationships between Taxpayer and ABQ Health. [Cross Examination of Ms.

15 Farmelo]

16 39. Because a significant component of Ms. Farmelo's duties consisted of initiating  
17 and nurturing a positive relationship between ABQ Health and Taxpayer, it was essential that she  
18 establish a physical presence which might consist of participating in social events like office

19 celebrations or group activities. [Cross Examination of Ms. Farmelo]

20 40. Taxpayer's Practice Management Agreement acknowledged that a fair amount of  
21 work would be required to occur at ABQ Health's business location in New Mexico, which

22 required that ABQ Health "[p]rovide adequate office space with equipment required by

23 [Taxpayer] (including but not limited to telephones, internet access, copier, facsimile machine,

1 etc.) for [Taxpayer's] eight (8) to twelve (12) full-time employees on-site at [ABQ Health].  
2 [Taxpayer] will provide the personal computers needed by [Taxpayer] and its above-mentioned  
3 employees." [Taxpayer Ex. 4.10 (Para. (s))]

4 41. Ms. Farmelo acknowledged receiving support from other personnel stationed both  
5 inside and outside of New Mexico, particularly in reference to the compilation of data, but Ms.  
6 Farmelo was the primary individual responsible for assembling and presenting data to ABQ  
7 Health. [Re-Direct Examination of Ms. Farmelo]

8 42. One individual assisting with the compilation of data is Ms. Jiao Ding whose  
9 function it was to produce raw data for further analysis of ABQ Health's revenue cycle. Ms.  
10 Ding is a client service representative residing in New Mexico where she also performed services  
11 for ABQ Health in the scope of her employment for Taxpayer. [Direct Examination of Ms.  
12 Farmelo, Taxpayer Ex. 7.1 (Item 5)]

13 43. Ms. Farmelo's immediate supervisor, Mr. Roger Carl, was a client relationship  
14 manager and was one of the individuals stationed in New Mexico. Mr. Carl not only supervised  
15 Ms. Farmelo but was also available to assist with various matters relevant to Taxpayer's work for  
16 ABQ Health. [Direct Examination of Ms. Farmelo; Taxpayer Ex. 7.1 (Item 5)]

17 44. Personnel in Lewiston, Maine handled the aspects of services that could be  
18 handled remotely, such as claims corrections or software updates. [Cross Examination of Ms.  
19 Farmelo]

20 45. Ms. Allen was uncertain regarding the percentage of work that any Taxpayer  
21 employees performed in New Mexico in furtherance of its work for ABQ Health. [Cross  
22 Examination of Ms. Allen]

23 46. Ms. Allen admitted that she was unaware of any time or cost accounting records

1 that might assist in computing the percentage of services performed within and without New  
2 Mexico and was unaware of any approval from the Department of an alternative method of  
3 allocating gross receipts among jurisdictions contributing to the provision of services. [Cross  
4 Examination of Ms. Allen]

5 47. The remainder of the receipts in dispute, representing approximately 10 percent of  
6 the total was derived from work performed for other clients, not ABQ Health, for billing and  
7 accounts receivable management services. Taxpayer presented no evidence in contradiction of  
8 that portion of the assessment. [Taxpayer Ex. 2.7 – 2.9]

9 48. Although it would have been standard procedure for Taxpayer to seek the advice  
10 of tax professionals, Ms. Allen could not state with any degree of certainty whether Taxpayer  
11 actually consulted any tax professionals on state tax issues relevant to the current assessment and  
12 protest. [Inquiry of Ms. Allen from Hearing Officer.]

13 49. None of the tax professionals with whom Taxpayer would have consulted, if it  
14 had done so, were New Mexico licensed attorneys or certified public accountants. [Follow-up  
15 inquiry of Ms. Allen from Mr. Pender for the Department]

#### 16 Procedural History of Protest

17 50. On December 27, 2017, the Department under Letter ID No. L1532005168  
18 assessed Taxpayer the sum of \$1,620,689.00 consisting of gross receipts tax in the amount of  
19 \$1,215,911.11, penalty in the amount of \$244,479.09, and interest in the amount of \$160,298.80  
20 for the periods from January 31, 2010 to July 31, 2016. [Administrative File]

21 51. On March 27, 2018, the Department's Protest Office received Taxpayer's protest,  
22 submitted by and through Ms. Dana Allen and McKesson Corporation. [Administrative File]

23 52. On April 12, 2018, the Department acknowledged the receipt of Taxpayer's

1 protest under Letter ID No. L0653592368. [Administrative File]

2 53. On September 20, 2018, the Department filed a Hearing Request which requested  
3 a scheduling hearing on Taxpayer's protest. [Administrative File]

4 54. More than 150 days elapsed from the date the Department acknowledged  
5 Taxpayer's protest until the date the Department filed a Hearing Request with the Administrative  
6 Hearings Office. [Administrative File]

7 55. The Department's Hearing Request served as the initial notification to the  
8 Administrative Hearings Office that a protest was filed and that a hearing was desired.  
9 [Administrative File]

10 56. On the same day the Department filed its Hearing Request, on September 20,  
11 2018, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing  
12 setting an initial scheduling hearing for October 5, 2018. [Administrative File]

13 57. On October 9, 2018, the Administrative Hearings Office entered a Scheduling  
14 Order and Notice of Administrative Hearing which in addition to other various deadlines, set a  
15 hearing on the merits of Taxpayer's protest for May 15, 2019. [Administrative File]

16 58. On January 22, 2019, Taxpayer filed an unopposed motion which in addition to  
17 requesting the extension of various deadlines, sought to continue the hearing on the merits of its  
18 protest. [Administrative File]

19 59. On January 24, 2019, the Administrative Hearings Office entered an Order  
20 Vacating Hearing on Merits and Notice of Telephonic Scheduling Hearing which set a  
21 scheduling hearing on February 22, 2019. [Administrative File]

22 60. On February 22, 2019, the Administrative Hearings Office entered a Notice of  
23 Third Telephonic Scheduling Hearing which set a scheduling hearing on March 22, 2019.

1 [Administrative File]

2 61. On March 25, 2019, the Administrative Hearings Office entered a Notice of  
3 Fourth telephonic Scheduling Hearing which set a scheduling hearing on May 31, 2019.

4 [Administrative File]

5 62. On May 31, 2019, the Administrative Hearings Office entered a Notice of Fifth  
6 telephonic Scheduling Hearing which set a scheduling hearing on July 19, 2019. [Administrative  
7 File]

8 63. On July 19, 2019, the Administrative Hearings Office entered a Notice of Sixth  
9 telephonic Scheduling Hearing which set a scheduling hearing on September 20, 2019.

10 [Administrative File]

11 64. On September 20, 2019, the Administrative Hearings Office entered a Scheduling  
12 Order and Notice of Administrative Hearing which among other deadlines, set a hearing on the  
13 merits of Taxpayer's protest for February 3, 2020. [Administrative File]

14 65. On January 13, 2020, the Department filed Prehearing Statement of the New  
15 Mexico Department of Taxation and Revenue. [Administrative File]

16 66. On January 13, 2020, Taxpayer electronically filed its Prehearing Statement. The  
17 same Prehearing Statement was re-filed on January 22, 2020 by First Class U.S. Mail.

18 [Administrative File]

19 67. On January 15, 2020, upon the request of counsel for the Department, the  
20 Administrative Hearings Office issued an Administrative Subpoena for the appearance of Ms.  
21 Lisa J. Farmelo to appear and testify at the hearing on the merits of Taxpayer's protest on  
22 February 3, 2020. [Administrative File]

23 68. On January 31, 2020, Change Healthcare Technology Enabled Services, LLC,

1 filed a motion to quash or modify the Administrative Subpoena for the appearance of Ms.  
2 Farmelo. [Administrative File]

3 69. At some time prior to the hearing, Change Healthcare Technology Enabled  
4 Services, LLC, acquired Taxpayer from McKesson Corporation. [Direct Examination of Ms.  
5 Farmelo]

6 70. On January 31, 2020, the Department filed a response to the motion seeking to  
7 quash or modify the Administrative Subpoena for the appearance of Ms. Farmelo.  
8 [Administrative File]

9 71. On Friday evening, January 31, 2020, the Hearing Officer held a telephonic  
10 hearing on the motion to quash or modify the Administrative Subpoena for the appearance of  
11 Ms. Farmelo. The hearing was not formally noticed due to the expedited nature of the relief  
12 requested and the fact that the hearing on the merits of the protest was set to occur on Monday,  
13 February 3, 2020. [Record of Hearing 1/31/2020]

14 72. The Hearing Officer granted the motion on the record of the hearing occurring  
15 Friday, January 31, 2020 by modifying the subpoena to permit Ms. Farmelo to appear and testify  
16 telephonically rather than require her to appear in person. [Record of Hearing 1/31/2020]

17 73. Taxpayer's total outstanding liability, as of the date of the hearing is  
18 \$1,745,389.77 comprised of \$1,210,041.66 in gross receipts tax, \$245,473.68 in penalty, and  
19 \$289,874.43 in interest. [Direct Examination of Ms. Griego; Department Ex. Q]

### 20 **DISCUSSION**

21 Taxpayer presents the following issues for consideration which it asserts should reduce or  
22 eliminate its purported liability under the assessment: (1) whether Taxpayer is entitled to relief  
23 solely by virtue of the Department's untimely request for hearing which exceeded the timelines

1 provided under NMSA 1978, Section 7-1B-8 (A) (2015, amended 2019); (2) whether receipts  
2 generated from the provision of software, Flowcast, represents the licensing of property within the  
3 definition of “gross receipts” in NMSA 1978, Section 7-9-3.5 (A) (2007, amended 2019), and if so,  
4 whether licenses were sold or employed in New Mexico; (3) whether Taxpayer’s receipts should be  
5 excludable or exempt as services performed outside of New Mexico, also under NMSA 1978,  
6 Sections 7-9-3.5 (A) (2007, amended 2019) and 7-9-13.1 (1989); and (4) whether Taxpayer is  
7 entitled to an abatement of penalty under NMSA 1978, Section 7-1-69 (2007) or Regulation  
8 3.1.11.11 NMAC.

### 9 **Timeliness of Department’s Hearing Request**

10 The parties did not dispute the fact that the Department’s request for a hearing in this protest  
11 was untimely. The statute in effect at the time required that the Department, within 45 days from  
12 receipt of the protest, request a hearing from the Administrative Hearings Office, which was then to  
13 conduct a hearing within 90 days from the date of Taxpayer’s protest. *See* NMSA 1978, Section 7-  
14 1B-8 (A) (2015, amended 2019). However, a review of the administrative file illustrates that the  
15 Department filed its Hearing Request with the Administrative Hearings Office on September 20,  
16 2018, representing 161 days from the date it initially acknowledged Taxpayer’s protest of the  
17 assessment on April 12, 2018.

18 Based on the foregoing, Taxpayer asserted that the assessment should essentially be  
19 nullified and its protest granted because of the Department’s untimeliness in requesting a hearing.  
20 Taxpayer, however, cites no authority for the proposition that its protest may be granted on  
21 technical grounds not associated with the merits of the protest, essentially averting the effects of  
22 both the presumption of taxability under NMSA 1978, Section 7-9-5 and the presumption of  
23 correctness under NMSA 1978, Section 7-1-17 (C) (2007).

1 At the time the protest was initiated, there was no statutory authority for the Hearing  
2 Officer to dismiss a protest for failure to make a timely hearing request. *See id.* The statute has  
3 since been amended, but the amendment still provides no authority to award the sort of relief  
4 Taxpayer seeks as a remedy for the Department’s untimeliness under the circumstances of this  
5 protest. Under the present law, the Department’s failure to comply with the statutory deadlines  
6 could warrant an order halting the ongoing accrual of interest on a protested liability. *See*  
7 NMSA 1978, Section 7-1B-8 (E) (2019).

8 However, Taxpayer does not explicitly seek relief under the 2019 version of Section 7-  
9 1B-8 (E) (2019). Even if it did, the amendment did not become effective until June 14, 2019,  
10 well after the assessment and resulting protest, and any argument that the statute should be  
11 applied retrospectively would need to overcome the presumption that “[a] statute or rule operates  
12 prospectively only unless the statute or rule expressly provides otherwise or its context requires  
13 that it operate retrospectively.” *See* NMSA 1978, Section 12-2A-8 (1997). The 2019 amendment  
14 provides no such expression of intent, nor can retrospectivity be fluently derived from its  
15 context. *See* 2019 N.M. Laws 157.

16 Reference to the 2019 statute is nevertheless helpful because had the Legislature intended  
17 that dismissal of an assessment be a remedy for the Department’s failure to adhere to a deadline,  
18 then it could have specified as such in the law, but it did not. Instead, the only remedy it  
19 expressly allowed was to halt further accrual of interest on the protested liability.

20 Taxpayer’s position on this issue is not novel. Other taxpayers have previously asserted  
21 the Department’s purported denial of the statutory right to a prompt hearing should afford relief  
22 from the assessment. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*,  
23 1983-NMCA-126, ¶ 12, 100 N.M. 632. However, the Court of Appeals has concluded that the



1 tardiness of public officers in performing their duties is not a defense to an action by the state.  
2 *See id.* That has represented the general rule of New Mexico for almost four decades and “is  
3 applicable in these cases unless [the statute] makes it inapplicable.” *Id.*

4 In another example, a taxpayer argued that the failure of a hearing officer to render a  
5 decision in 30 days, as required by statute, divested the hearing officer of jurisdiction. *See*  
6 *Kmart Properties, Inc. v. Taxation and Revenue Dep’t.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177.  
7 The court found that the tax statutory deadline was not jurisdictional because of the general  
8 tardiness rule and the heavy statutory presumption of correctness that favors the Department.  
9 *See id.* at ¶ 54.

10 Although the Department’s failure to file a request for hearing within the prescribed  
11 timeframe contradicted the statute, the relief sought by Taxpayer is not available under the law.  
12 *See* NMSA 1978, Section 7-1B-8 (2015) and (2019). Taxpayer’s request that the assessment be  
13 dismissed and its protest granted on the basis of an untimely hearing request is denied.

14 **Merits of the Protest**  
15 **and the Presumption of Correctness**

16 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is  
17 presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act,  
18 “tax” includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Therefore,  
19 under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) also  
20 extends to the Department’s assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State*  
21 *ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency  
22 regulations interpreting a statute are presumed proper and are to be given substantial weight).

23 For that reason, the presumption in favor of the Department requires that Taxpayer carry  
24 the burden to present countervailing evidence or legal argument to show that it is entitled to an

1 abatement of an assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-  
2 NMCA-099, ¶8, 336 P.3d 436. “Unsubstantiated statements that the assessment is incorrect  
3 cannot overcome the presumption of correctness.” *See MPC Ltd. v. N.M. Taxation & Revenue*  
4 *Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12 NMAC.  
5 If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the  
6 Department to re-establish the correctness of the assessment. *See MPC*, 2003-NMCA-021, ¶13.

7 In circumstances where a taxpayer’s claim for relief relies on the application of an  
8 exemption or deduction, then “the statute must be construed strictly in favor of the taxing  
9 authority, the right to the exemption or deduction must be clearly and unambiguously expressed  
10 in the statute, and the right must be clearly established by the taxpayer.” *See Wing Pawn Shop v.*  
11 *Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649  
12 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-  
13 007, ¶9, 133 N.M. 447, 64 P.3d 474.

#### 14 **Gross Receipts Tax**

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

19 The term “gross receipts” is broadly defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007,  
20 amended 2019), to mean:

21 the total amount of money or the value of other consideration  
22 received from selling property in New Mexico, from leasing or  
23 licensing property employed in New Mexico, from granting a right to  
24 use a franchise employed in New Mexico, from selling services  
25 performed outside New Mexico, the product of which is initially  
26 used in New 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*  
4 NMSA 1978, Section 7-9-5 (2002).

#### 5 **Discussion of Taxpayer’s Evidence**

6 Taxpayer’s position in this protest ultimately fails due to insufficient evidence to rebut the  
7 presumption of correctness of the assessment. Although the Hearing Officer found Ms. Allen to be  
8 pleasant and credible, she candidly acknowledged a lack of personal knowledge underlying  
9 substantive aspects pertinent to Taxpayer’s operations. Her expertise in the area was clearly in  
10 taxation, but thorough evaluation of the merits of Taxpayer’s position required a more thorough  
11 presentation of evidence in support of the material facts.

#### 12 Flowcast

13 Ms. Allen asserted that Taxpayer’s services for ABQ Health relied on the use of Flowcast.  
14 Taxpayer acquired 525 Flowcast licenses from IDX, or General Electric, and subsequently  
15 permitted their use by ABQ Health in exchange for compensation from ABQ Health. Although  
16 ABQ Health may not have used all 525 licenses, it still incurred the obligation to pay Taxpayer for  
17 them.

18 Taxpayer does not apparently view this arrangement as the licensing of software. Instead,  
19 according to Ms. Allen, “[Taxpayer] recovers the cost of the Flowcast software from [ABQ  
20 Health]” suggesting that compensation for use of Flowcast represents something other than the sale  
21 of a license to use the software. [Direct Examination of Ms. Allen, 00:29:40 – 00:30:35].

22 It takes the same stance in response to interrogatories propounded by the Department,  
23 stating that the “[Flowcast] software program was not sold nor licensed to [ABQ Health].

1 [Taxpayer] licenses Flowcast software from GE and provides to [ABQ Health] some of the  
2 [Taxpayer] licenses for use by [ABQ Health] employees.” See Taxpayer Ex. 7.1 (Item 7.1). Stated  
3 differently elsewhere in the same exhibit, Taxpayer states, “[ABQ Health] did not have a license to  
4 use the Flowcast software.” See Taxpayer Ex. 7.2 (Item 8).

5 In evaluating Taxpayer’s position, the first inquiry may be to merely identify what rights  
6 ABQ Health acquired from Taxpayer to use Flowcast if indeed, it did not acquire licenses.  
7 “Particularly with regard to computer software, [Courts] have recognized that copyright owners  
8 may create licensing arrangements so that users acquire only a license to use the particular copy of  
9 software and do not acquire title that permits further transfer or sale of that copy without the  
10 permission of the copyright owner.” See *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1180  
11 (9th Cir. 2011). Accordingly, “running copyrighted software, without ownership of the copyright or  
12 a license to run the software, constitutes copyright infringement.” See *Iconix, Inc. v. Tokuda*, 457 F.  
13 Supp. 2d 969, 995 (N.D. Cal. 2006).

14 Therefore, the rule as summarized in *UMG Recordings* and *Iconix* suggests that ABQ  
15 Health could lawfully run Flowcast only under one of two possible situations: (1) ABQ Health  
16 owned Flowcast (which it clearly does not under the evidence presented); or (2) ABQ Health was a  
17 licensed user. The third scenario urged by Taxpayer, in which ABQ Health comes within neither  
18 situation, hints at the possibility of an unauthorized use that the Hearing Officer presumes Taxpayer  
19 did not intend.

20 Since the Hearing Officer will not infer based on the evidence presented that ABQ Health’s  
21 use of Flowcast was unauthorized, the only other means of affording ABQ Health the authorized  
22 use of Flowcast would be through licensing. Regrettably, the record is devoid of any licensing  
23 agreements among IDX or General Electric, Taxpayer, and ABQ Health, that established the terms

1 and conditions for ABQ Health to use Flowcast. The Audit Narrative indicates that this was an area  
2 of further inquiry, but Taxpayer did not apparently provide the information the Department  
3 requested. *See* Taxpayer Ex. 2.8 (Records Requested Not Provided).

4 Yet it would be entirely unreasonable to infer that ABQ Health paid Taxpayer the sum of  
5 \$7,860,277.00 for what could amount to an unauthorized use of Flowcast. In contrast, this is  
6 consistent with licensing despite Taxpayer's assertions to the contrary. It was therefore reasonable  
7 for the Department to characterize Taxpayer's receipts for "Flowcast System" as deriving from  
8 selling licenses to use software.

9 The Gross Receipts and Compensating Tax Act provides two methods through which  
10 Taxpayer could be liable for gross receipts tax for the sale of Flowcast licenses. The first scenario is  
11 when the sale occurs in the State of New Mexico because "gross receipts" includes the "total  
12 amount of money or the value of other consideration received from selling property in New  
13 Mexico[.]" The second scenario arises from "licensing property employed in New Mexico." *See*  
14 Section 7-9-3.5 (A). In either scenario, the term "license" comes within the definition of "property"  
15 under NMSA 1978, Section 7-9-3 (J) (2007).

16 In these contexts, the Department has promulgated Regulation 3.2.1.27 (B) NMAC which  
17 provides, "[t]he definition of property includes licenses. The sale of a license to use software  
18 constitutes a sale of property and comes within the definition of gross receipts." *See* Regulation  
19 3.2.1.27 (B) (1) NMAC.

20 Therefore, unless Taxpayer acquired title to Flowcast, which the evidence does not  
21 establish, then the only thing Taxpayer could lawfully convey to ABQ Health was some type of  
22 license authorizing its use, and when that conveyance is accomplished in exchange for  
23 consideration, that is selling of a license, or the licensing of property, as contemplated by Section 7-

1 9-3.5 (A) (2007, amended 2019) and Regulation 3.2.1.27 (B) NMAC. The Hearing Officer is unable  
2 to conclude based on the evidence presented that the auditor erred in deciding the receipts from  
3 “Flowcast System” derived from the sale of a license to use software.

4 Ms. Allen argued that even if Taxpayer were engaged in the sale of software licenses for use  
5 of Flowcast, ABQ Health only employed approximately 69 percent of the licenses in New Mexico,  
6 clearly relying on the portion of Section 7-9-3.5 (A) which establishes that “gross receipts” includes  
7 “licensing property *employed* in New Mexico[.]” (Emphasis Added). Therefore, Ms. Allen asserts  
8 that taxable receipts, if any, should be proportionately adjusted. In other words, the entire sum of  
9 receipts deriving from the “Flowcast System” should be proportionately reduced to reflect the  
10 percentage of licenses actually employed in New Mexico.

11 However, Ms. Allen’s argument falters due to a lack of evidence to establish the facts upon  
12 which it relies because there is simply no reliable or trustworthy evidence to substantiate her  
13 statements that only 365 of the entire lot of 525 licenses were employed inside New Mexico. As  
14 stated previously, unsubstantiated statements cannot overcome the presumption of correctness.  
15 *See MPC Ltd.*, 2003-NMCA-021, ¶13. Having searched the evidentiary record, the Hearing  
16 Officer is unable to corroborate and otherwise substantiate Taxpayer’s verbal assertions that  
17 ABQ Health did not employ all 525 licenses in New Mexico. For that reason, the Hearing  
18 Officer is unable to conclude based on the evidence presented that this argument, in any way,  
19 should disturb the presumption of correctness.

#### 20 Location of Performance of Services

21 Taxpayer asserted error with the Department’s conclusion, at the time of the audit, that a  
22 portion of receipts not derived from providing access to the “Flowcast System” should also be  
23 taxable as software licensing. Taxpayer underscores that these receipts were not in consideration for

1 affording access to Flowcast but were generated from providing services which it claims were  
2 performed outside of New Mexico.

3 The Hearing Officer agrees with Taxpayer that receipts not specifically generated from  
4 providing access to Flowcast were actually derived through the performance of services. Although  
5 Taxpayer did not raise such argument, the Hearing Officer nevertheless considered upon is own  
6 initiative whether that fact alone was sufficient to overcome the presumption of correctness that  
7 attached to the assessment.

8 The Hearing Officer concluded that the assessment was still correct, even if for the wrong  
9 reason. Services performed in New Mexico are taxable pursuant to the same statute as the sale of  
10 property or the licensing of property employed in New Mexico. *See* Section 7-9-3.5 (A). Moreover,  
11 all receipts of a person engaging in business in New Mexico are presumed taxable. *See* Section 7-9-  
12 5. Mis-categorizing receipts deriving from one source of income does not defeat the general rule of  
13 taxability if the receipts should have been classified as taxable under another source of income, and  
14 in this case, mis-categorization of receipts did not alter the amounts purportedly due under the  
15 assessment.

16 Nevertheless, Taxpayer aptly argued from the onset of the hearing that its receipts from  
17 providing services should not be taxable because the services it provided were performed outside of  
18 New Mexico. Taxpayer relied on Section 7-9-3.5 (A) as well as Section 7-9-13.1 (A) which  
19 exempts from the gross receipts tax “receipts from selling services performed outside New Mexico  
20 the product of which is initially used in New Mexico.”

21 Once again, Taxpayer’s position relies entirely on Ms. Allen’s testimony which presents a  
22 significant evidentiary concern because, as previously stated, Ms. Allen admittedly lacks personal  
23 knowledge underlying substantive aspects of Taxpayer’s operations and presented no other

1 evidence to substantiate her testimony, which is required to rebut the presumption of correctness.

2 *See MPC Ltd., 2003-NMCA-021, ¶13*

3 In contrast, the Department presented the testimony of Ms. Lisa Farnelo who during all  
4 relevant times was employed by Taxpayer and worked and resided in New Mexico and who, in her  
5 own words, served as the “bridge” between ABQ Health and Taxpayer. One of her functions, which  
6 she described, was to build relationships with ABQ Health. These functions extended beyond the  
7 specific services she performed and even included participating in social functions like potlucks and  
8 baby showers.

9 Yet, the evidence established that Ms. Farnelo was far more than Taxpayer’s goodwill  
10 ambassador. She performed vital functions essential to the overall provision of Taxpayer’s services  
11 and did so *in New Mexico*. She met on a monthly basis with ABQ Health to evaluate its key  
12 performance indicators, or “KPI,” which it would then rely upon in making adjustments that were  
13 intended to enhance its cash flow and profitability. She produced and provided: fee schedule  
14 consultation, evaluation and development services; monthly data and management reports; reports  
15 identifying monthly/yearly financial comparative trends by payclass and procedure; referring  
16 physician reports by physician, procedure and dollar volume; charge and payment analysis total and  
17 by payclass; location productivity profile and summary; aging payment report; general accounts  
18 receivable summary; physician documentation feedback; evaluation of incoming patient call data  
19 such as number of calls, average call time, and number of calls dropped; ad-hoc reports containing  
20 information applicable to client’s practice. She consulted on governmental regulations, third-party  
21 payer activities, competition, economic changes and other factors potentially affecting ABQ Health.  
22 She provided annual charge review and analysis/projections. She provided annual impact analysis  
23 of Medicare reductions and participation evaluation and recommendations. She prepared quarterly



1 clinic documentation reviews, provided ABQ Health with her conclusions, and worked with it to  
2 address issues.

3 Ms. Farmelo was also not the only person in New Mexico performing services on behalf of  
4 Taxpayer for ABQ Health. Ms. Farmelo testified that Ms. Jiao Ding and Mr. Roger Carl were also  
5 instrumental in work performed for ABQ Health. Mr. Carl was a client relationship manager who  
6 supervised Ms. Farmelo. He also shared in Taxpayer's efforts to maintain a local, day-to-day  
7 relationship with ABQ Health, which meant being available to answer questions, conduct regular  
8 meetings to establish goals, targets, and client business strategies, or being available to resolve client  
9 issues. *See* Taxpayer Ex. 7.1. Ms. Ding, a local client service representative, was instrumental in  
10 gathering data, and providing local assistance with revenue cycle operations and account  
11 management. *See id.*

12 Although the Department did not dispute the contention that some services could have been  
13 performed outside of New Mexico, it emphasized during its cross examination of Ms. Allen that  
14 Taxpayer lacked evidence which might allocate a percentage of services among New Mexico and  
15 other jurisdictions. Situations such as this are not unusual. The Department promulgated Regulation  
16 3.2.1.18 (B) NMAC which establishes the general rule that “[r]eceipts from services, other than  
17 research and development services and services subject to the Interstate Telecommunications Gross  
18 Receipts Tax Act, *performed both within and without New Mexico are subject to the gross receipts*  
19 *tax on the portion of the services performed within New Mexico.*” (Emphasis Added).

20 The regulation goes on to provide methods through which taxpayer can compute the amount  
21 of tax due for the portion of receipts generated from services performed in New Mexico. Regulation  
22 3.2.1.18 (C) NMAC provides that “[a]llocating receipts from selling services performed within and  
23 without New Mexico” may be accomplished in several ways. The most pertinent method under the

1 circumstances of this protest provides as follows at Regulation 3.2.1.18 (C) (1) NMAC:

2           When a prime contractor performs services both within and without  
3 New Mexico, cost accounting records which reasonably allocate all  
4 costs to the location of the performance of the service shall be used  
5 to determine the amount of services performed in New Mexico. If  
6 adequate cost accounting records are not kept for the allocation of  
7 costs to specific locations, the receipts from performing such services  
8 shall be prorated based on the percentage of service actually  
9 performed within New Mexico. The percentage shall be calculated  
10 by dividing the time spent by the prime contractor in performing  
11 such services in New Mexico by the total contract time spent  
12 performing services everywhere. Other reasonable methods of  
13 prorating such services may be acceptable if approved by the  
14 department in advance of performing the services.

15           Taxpayer in this case, however, did not introduce any such records of the type described by  
16 the regulation. Instead, Taxpayer explained that it allocated 7.14 percent of its receipts to New  
17 Mexico “by dividing the number of [Taxpayer] employees residing in New Mexico (6) by the total  
18 number of [Taxpayer ] employees nationwide (84) *in 2007.*” *See* Taxpayer Ex. 7.3 (Item 11)  
19 (Emphasis Added).

20           However, this methodology, adopted by Taxpayer in 2007, does not comport with  
21 Regulation 3.2.1.18 NMAC and there was no evidence to establish that it had ever been approved  
22 by the Department. Moreover, there was no evidence in which to find that it accurately extracted a  
23 taxable percentage of receipts derived from services performed within and without New Mexico.

24           In contrast, the evidence established that employees in New Mexico made significant  
25 contributions to Taxpayer’s business operations. Although other jurisdictions made contributions,  
26 Taxpayer offered no evidence on which the contributions of various jurisdictions could be measured  
27 in order to extract the percentage of New Mexico’s contribution in relation to all others.

28 **Penalty**

1           When a taxpayer fails to pay taxes due to the State because of negligence or disregard of  
2 rules and regulations, but without intent to evade or defeat a tax, NMSA 1978, Section 7-1-69  
3 (2007) requires that:

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

9                   (Emphasis Added)

10           The statute's use of the word "shall" makes the imposition of penalty mandatory in all  
11 instances where a taxpayer's actions or inactions meet the legal definition of "negligence." *See*  
12 *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32  
13 (use of the word "shall" in a statute indicates that a provision is mandatory absent clear indication to  
14 the contrary).

15           Regulation 3.1.11.10 NMAC defines negligence in three ways: (A) "failure to exercise that  
16 degree of ordinary business care and prudence which reasonable taxpayers would exercise under  
17 like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence,  
18 indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer  
19 was negligent because it failed to accurately compute, report and pay its gross receipts tax  
20 obligations under A, B, and C.

21           On occasions where a taxpayer might fall under the definition of civil negligence  
22 generally subject to penalty, Section 7-1-69 (B) provides a limited exception in that "[n]o penalty  
23 shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a  
24 mistake of law made in good faith and on reasonable grounds."

25           Ms. Allen requested that penalty be abated but did not specify on what grounds she  
26 sought such relief. Upon inquiry of the Hearing Officer, Ms. Allen explained her presumption

1 that Taxpayer would have sought out tax advice but the Hearing Officer perceived her response  
2 as speculative, at best. Even if there were some degree of certainty that Taxpayer sought out  
3 advice, there is nothing in the record to establish what the advice entailed or the facts on which it  
4 relied, nor is there any evidence to establish the qualifications, and therefore the competency, of  
5 the person rendering the advice. Consequently, there is insufficient evidence in the record to  
6 establish that the mistake of law provision of Section 7-1-69 (B) should provide for an abatement  
7 of penalty in this case. *See C & D Trailer Sales v. Taxation & Revenue Dep't*, 1979-NMCA-151,  
8 ¶¶8-9, 93 N.M. 697, 604 P.2d 835 (penalty upheld where there was no evidence that the taxpayer  
9 “relied on any informed consultation” in deciding not to pay tax).

10 Further grounds for abatement of civil negligence penalty are provided by Regulation  
11 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty  
12 may be abated. Based on the argument of Taxpayer and the evidence presented, there is  
13 insufficient evidence on which to apply any one of the factors under Regulation 3.1.11.11  
14 NMAC.

15 It is Taxpayer’s duty to ascertain the tax consequences of its actions. *See Tiffany Constr.*  
16 *Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶ 5, 90 N.M. 16, 558 P.2d 1155. Taxpayers cannot  
17 “abdicate this responsibility [to learn of tax obligations] merely by appointing an accountant as its  
18 agent in tax matters.” *See El Centro Villa Nursing Center v. Taxation and Revenue Department*,  
19 1989-NMCA-070, ¶14, 108 N.M. 795.

20 The Department does not allege that Taxpayer’s actions or inactions were intended to  
21 evade or defeat a tax. But even if arising from inadvertence or erroneous belief, *El Centro Villa*  
22 *Nursing* provides that civil negligence penalty is appropriate and Regulation 3.1.11.11 (D) NMAC  
23 offers no basis for the abatement of penalty.



1 assessment under NMSA 1978, Section 7-1-17.

2 G. Taxpayer's revenue subject of the assessment was properly categorized as "gross  
3 receipts" under NMSA 1978, Section 7-9-3.5 (A) and Section 7-9-5.

4 H. Taxpayer did not establish entitlement to an exemption from gross receipts for  
5 revenue derived from services performed outside the state, the product of which is initially used in  
6 New Mexico under NMSA 1978, Section 7-9-13.1.

7 I. Taxpayer did not present sufficient evidence to establish that it was entitled to an  
8 abatement of penalty. *See* NMSA 1978, Section 7-1-69; Regulation 3.1.11.11 NMAC

9 For the foregoing reasons, Taxpayer's protest **IS DENIED**. Taxpayer's total outstanding  
10 liability, as of the date of the hearing is \$1,745,389.77 comprised of \$1,210,041.66 in gross  
11 receipts tax, \$245,473.68 in penalty, and \$289,874.43 in interest, with adjustments for any  
12 payments made, and accrual of interest and penalty, from the date of the hearing until paid in  
13 full.

14 DATED: May 12, 2020

15 

16 Chris Romero  
17 Hearing Officer  
18 Administrative Hearings Office  
19 P.O. Box 6400  
20 Santa Fe, NM 87502  
21

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On May 12th, 2020, a copy of the foregoing Decision and Order was submitted to the  
15 parties listed below in the following manner:

16 *First Class Mail*

*Interagency State Mail*

17 INTENTIONALLY BLANK

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