BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
DEAN BALDWIN PAINTING, INC. **No. 06-08**
ID NO. 02-378897-00-6
TO AUDIT ASSESSMENT 2761318

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 28, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Dean Baldwin Painting, Inc. ("Taxpayer") was represented by Phil Brewer, its attorney. At the close of the hearing, a briefing schedule was established. The final brief was filed on May 3, 2006, at which time the matter was submitted for decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is engaged in business in Roswell, New Mexico, and is registered with the Department for payment of gross receipts, compensating, and withholding taxes, which are required to be paid monthly under the Department's combined reporting system ("CRS"). (Dept. Ex. A, GN1-GN2).

2. In October 2001, the Department commenced a field audit of the Taxpayer. (Dept. Ex. A, GN1).

3. On March 13, 2002, the Department issued Assessment No. 2761318 to the Taxpayer in the total amount of $355,288.93, representing $241,325.34 gross receipts tax,

$5,485.86 compensating tax, $24,681.13 penalty, and $83,796.60 interest due for the period April 1998 through June 2001. (Attachment to Request for Hearing).

4. On June 11, 2002, the Taxpayer filed a written protest to the assessment of gross receipts tax, which was accepted as timely pursuant to a retroactive extension of time granted by the Department. (Attachments to Request for Hearing).

5. The Taxpayer is engaged in the business of painting airplanes used by airlines, corporations, and cargo companies for the commercial transportation of passengers and cargo, and by the United States government for military purposes. (Transcript ("Tr.") 19, 21).

6. During the period at issue in this protest, all of the airplanes painted by the Taxpayer were flown into and out of the Taxpayer's Roswell, New Mexico, facility by the customer's flight crew, who were employees of the customer. (Tr. 56, 61-62).

7. These flights were made under "ferry permits" issued by the Federal Aviation Administration ("FAA"), which allowed the airplanes to be flown to and from a specified maintenance location, but prohibited the presence of paying passengers or cargo on such flights. (Tr. 22, 55-56).

8. Pursuant to FAA regulations, the airplanes arriving at and leaving the Taxpayer's Roswell facility did not carry paying passengers or cargo and were typically flown by the customer's maintenance flight crew instead of its regular flight crew. (Tr. 22, 56, 61-62, 64).

9. Title to the airplanes never passed to the Taxpayer, but remained with the customer. (Tr. 21; TP Exs. 3 & 4, Art. III(B)).

10. The Taxpayer's customers often provided technical representatives who remained on site at the Taxpayer's Roswell facility to act as a liaison with the Taxpayer. (Tr. 56-57).

11. The Taxpayer's mechanics were certified to perform inspections to insure that a customer's airplane was safe to fly once the paint job was completed, but were not authorized to recertify the airplane to carry paying passengers or cargo. (Tr. 57-58, 60).

12. In order to recertify the airplane for commercial service, the customer's pilot flew the airplane from Roswell to another location where it was inspected and recertified to carry paying passengers or cargo. (Tr. 22, 57-58).

13. The inspection at this secondary location also included an inspection of the paint work done by the Taxpayer, such as the paint's gloss, adhesion, and mill thickness. (Tr. 36, 58-59, 66-67).

14. On occasion, a customer had a complaint concerning the paint job. When that happened, the airplane was returned to Roswell for additional work or one of the Taxpayer's employees traveled to the customer's location to perform the repairs. (Tr. 36-37, 65-66).

15. The Department's assessment of gross receipts tax against the Taxpayer was based on the auditor's finding that receipts from the following 16 customers had not been reported, or had been reported but improperly deducted from the Taxpayer's gross receipts:

Lockheed Martin Corp.	Pinnacle Air Cargo
SkyWest Airlines	Mesa Airlines
Great Lakes Aviation	Air Transportation International
Larry Jessen	Kitty Hawk Aircargo
Great Southwest Aviation	Sky King, Inc.
Avmax Group, Inc.	Airborne Express
Bombardier Aerospace	America West
Air Midwest	Mesa Pilot Development

(Dept. Ex. A, C3.1-C3.11 & C6.3-C6.5).

16. The Taxpayer produced written contracts for work performed for two of these 16 customers: Paint Services Agreement No. GTA 99002 with SkyWest Airlines dated April 1,

1999 (TP Ex. 4); and Paint Services Agreement No. GTA 99003 with Pinnacle Air Cargo Enterprises, Inc. dated April 8, 1999 (TP Ex. 3/Dept. Ex. B).

17. Article III of each Paint Services Agreement required the customer to deliver the aircraft to the Taxpayer in Roswell and the Taxpayer to redeliver the painted aircraft to the customer in Roswell. (TP Ex. 3, p. 5; TP Ex. 4, p. 4).

18. Article V of each Paint Services Agreement required the Taxpayer to provide on-site office space for the customer's technical representatives, who were "empowered to authorize and accept performance of the services and/or additional services including, but not limited to, the procurement of materials, sign work authorizations, sign purchase orders, and to accept the redelivery of the aircraft." (TP Ex. 3, p.6; TP Ex. 4, p.5).

19. Article X of each Paint Services Agreement warranted that the Taxpayer's paint job would be free from defects for a specified period: the warranty given to Pinnacle Air Cargo Enterprises expired after 600 flight hours or one calendar year from redelivery date, whichever came first; the warranty given to SkyWest expired after 2000 flight hours or two calendar years from redelivery date, whichever came first. (TP Ex. 3, p. 7; Ex. 4, p. 6).

20. In addition to the two Paint Services Agreements, the Taxpayer produced copies of three written proposals for its services: a July 9, 1999 letter to Great Lakes Aviation (TP Ex. 2); an August 27, 1999 letter to SkyWest Airlines (TP Ex. 5); and an October 4, 1999 letter to Mesa Airlines (TP Ex. 1).

21. The Taxpayer's proposal letters to Great Lakes Aviation and Mesa Airlines indicated that the parties would subsequently enter into "a Paint Services Agreement," but no agreements were located by the Taxpayer. (TP Ex. 2, last page; TP Ex. 1, last page; Tr. 26).

22. The Taxpayer's August 27, 1999 proposal letter to SkyWest made two references to "the Paint Services Agreement" (TP Ex. 5, Article III, ¶¶ A and B); the only Paint Services Agreement between the Taxpayer and SkyWest produced by the Taxpayer was the April 1, 1999 Paint Services Agreement No. GTA 99002.

23. The terms set out in the Taxpayer's three proposal letters were similar to, but less detailed than, the terms of the Taxpayer's Paint Services Agreements. (TP Exs. 1, 2 & 5 compared with TP Exs. 3 & 4).

24. Except for the two written agreements and three written proposals, which were located by an employee of the Taxpayer who had been asked to search the Taxpayer's computer records (Tr. 26), the Taxpayer did not provide any written documentation evidencing the terms of the jobs it performed for the 16 customers set out in the audit report.

25. The procedure for transferring physical possession of repainted airplanes to the Taxpayer's customers was the same for all jobs performed during the audit period. In each case, the customer's own flight crew took physical possession of the airplane at the Taxpayer's Roswell, New Mexico, facility and flew the airplane from Roswell to a location determined by the customer. (Tr. 47-48).

26. When the Taxpayer painted several airplanes for a customer, those airplanes might be flown to several different locations after leaving Roswell. The Taxpayer did not know the location to which a particular airplane would be flown until the customer filed a flight plan at the time its employees took possession of the airplane in Roswell. (Tr. 32, 51).

27. The Taxpayer stipulated that Pinnacle Air Cargo Enterprises, Inc. took delivery of the product of the Taxpayer's services under Paint Services Agreement No. GTA 99003 in

Roswell, New Mexico, and that gross receipts tax of $43,520.04 is due on $669,539.11 of receipts, which are all of the receipts from the jobs the Taxpayer performed for Pinnacle during the audit period. (TP Proposed Finding of Fact 11; Tr. 34; Dept. Ex. A, C6.3 & C3.1-C3.3).

28. The Taxpayer stipulated that SkyWest Airlines took delivery of the product of the Taxpayer's services under Paint Services Agreement No. GTA 99002 in Roswell, New Mexico, and that gross receipts tax of $17,015.57 is due on $261,778 of receipts from that contract. (TP Proposed Finding of Fact 12; Tr 34).

29. During the audit period, the Taxpayer had receipts of over $1 million from services performed for SkyWest Airlines, broken down as follows:

Month	Year	SkyWest Receipts
January	1999	$ 101,240.00
February	1999	$ 69,112.00
March	1999	$ 84,096.00
April	1999	$ 118,990.00
May	1999	$ 166,586.00
September	1999	$ 77,943.18
October	1999	$ 112,995.00
November	1999	$ 144,708.10
December	1999	$ 86,440.00
January	2000	$ 26,650.00
February	2000	$ 53,300.00
March	2000	$ 21,825.00
June	2001	$ 15,000.00
Total Receipts		$1,078,885.28

The Taxpayer's stipulation concerning its gross receipts tax liability on receipts from SkyWest is limited to tax on $261,778 of the $285,576 of receipts[1] the Taxpayer earned from paint jobs

[1] The Taxpayer painted twelve SkyWest airplanes in April and May of 1999 at a cost of $23,798 per plane. (Dept. Ex. A, C6.3; TP Ex. 4 at page 4). The Taxpayer apparently overlooked the receipts from one of these twelve jobs when adding up its receipts for this period.

performed for SkyWest between April 1, 1999 (the date the Paint Services Agreement was entered into) and August 27, 1999 (the date of the Taxpayer's letter proposal to SkyWest). It does not include tax on the remaining $793,309.28 of receipts from services performed for SkyWest before and after those dates. (Dept. Ex. A, C6.2, C6.3, C6.5, C3.1, C3.2 & C3.11).

30. The Department stipulated that pursuant to NMSA 1978, § 7-9-62.1, the Taxpayer is entitled to deduct its receipts from painting commercial and military aircraft over 65,000 pounds during reporting periods after the statute's effective date of July 1, 2000. As a result of this stipulation, the Taxpayer is entitled to an abatement of $5,534.09 of gross receipts tax, plus related penalty and interest, attributable to $85,139.92 of work the Taxpayer performed after July 1, 2000 for America West and Kitty Hawk Aircargo.[2] (Tr. 74-75, 77; Dept. Ex. A, C3.4, C3.5, C3.7-C3.9 & C.3.11).

DISCUSSION

The issue to be decided is whether the Taxpayer is entitled to claim the gross receipts tax deduction provided in NMSA 1978, § 7-9-57 for payments it received during reporting periods April 1998 through June 2001. The Taxpayer maintains that all of the receipts at issue were from painting services performed at its Roswell, New Mexico, facility for customers who qualified as out-of-state buyers under § 7-9-57, which states:

> Receipts from performing a service may be deducted from gross receipts if the sale of the service is made to an out-of-state buyer…unless the buyer of the service or any of the buyer's employees or agents makes initial use of the product of the service in New Mexico or takes delivery of the product of the service in New Mexico.

[2] Effective July 1, 2005, § 7-9-62.1 was amended to expand the deduction to receipts from performing services on aircraft over 10,000 pounds gross landing weight. As a result of this amendment, virtually all of the Taxpayer's receipts will be deductible from July 1, 2005 forward.

It is the Taxpayer's position that a customer did not take delivery of the product of the Taxpayer's services until the customer inspected and accepted the paint job and did not make initial use of the repainted airplane until it was recertified to carry paying passengers or cargo. The Taxpayer argues that because acceptance and recertification occurred outside New Mexico, it was entitled to claim the deduction provided in § 7-9-57. It is the Department's position that both delivery and initial use of the Taxpayer's painting services occurred in Roswell, New Mexico, when the customer's pilot took physical possession of the repainted airplane and flew the plane from Roswell to a location designated by the customer.

Burden of Proof. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C). *See also, MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308. In addition, NMSA 1978, § 7-9-5 creates a statutory presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Accordingly, it is the Taxpayer's burden to come forward with evidence to show that it is not liable for gross receipts tax on its receipts from performing painting services in New Mexico.

Delivery. For purposes of claiming the deduction in § 7-9-57, the Taxpayer maintains that its customers did not take delivery of the product of the Taxpayer's painting services until the paint job was inspected and accepted at the customer's out-of-state maintenance facility. There are two problems with the Taxpayer's argument: (1) an absence of legal authority equating the term "delivery" with the term "acceptance;" and (2) an absence of proof as to whether the parties intended delivery to occur at the time of acceptance or that acceptance of the Taxpayer's painting services occurred outside New Mexico.

(1) Delivery v. Acceptance. In this case, the product of the Taxpayer's service was a repainted airplane. Although there is no dispute that each of the Taxpayer's customers took physical possession of its repainted airplane at the Taxpayer's facility in Roswell, New Mexico, the Taxpayer argues that the customer did not "take delivery" of the airplane for purposes of § 7-9-57 until the customer inspected and accepted the paint job at a secondary maintenance location. In making this argument, the Taxpayer is reading the statutory phrase "takes delivery of the product of the service" as "accepts the product of the service."

The Taxpayer has not provided any legal authority to support its argument that the term "delivery" is synonymous with the term "acceptance" or that delivery cannot take place as long as the buyer has a right of rejection. In general, commercial law makes a clear distinction between delivery and acceptance. For example, NMSA 1978, § 55-2-602 of the Uniform Commercial Code ("UCC") states that "[r]ejection of goods must be within a reasonable time *after* their delivery or tender." (emphasis added). The official comment to § 55-2-602 notes that a "tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance." *See also, Oda Nursery v. Garcia Tree & Lawn*, 103 N.M. 438, 440 (1985) (buyer failed to reject plants within a reasonable time after delivery). NMSA 1978, § 55-2-513 provides that when goods are delivered to the buyer, the buyer "has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner." These provisions of the UCC clearly contemplate that delivery of goods may occur prior to a buyer's inspection and acceptance of those goods.

The UCC does not apply to a sale of services. Nevertheless, there does not appear to be any legal authority or rationale to support the Taxpayer's argument that the buyer of a service

does not take delivery of the product of the service until after the buyer has accepted or rejected the seller's work. In its legal memorandum, the Taxpayer cites to the New Mexico Supreme Court's decision in *TPL, Inc. v. New Mexico Taxation & Revenue Department*, 2003 NMSC 7, 133 N.M. 447, 64 P.3d 474 (2002) to support its position, arguing that:

> the Supreme Court's analysis in *TPL, Inc*. that the place where possession of post-service items takes place is not dispositive of where delivery occurs is applicable to the facts in this case.

TP's Memorandum, p. 3. In *TPL*, the court held that the product of a service performed on property shipped into the state by an out-of-state buyer was not initially used or delivered to the buyer in New Mexico when the buyer had no employees, agents, or other physical presence in the state. In reaching this decision, the court reviewed the court of appeals' holding in the case of *Reed v. Jones*, 81 N.M. 481, 468 P.2d 882 (Ct. App. 1970), which involved a bread delivery truck that a Texas bakery sent to Roswell, New Mexico, for repairs:

> Upon completion of the repairs, the truck was returned to Texas. *Id*. The garage argued that it was entitled to the tax deduction because the bakery used the truck in Texas, not New Mexico. The Court of Appeals held that the services were taxable because "initial use occurred in New Mexico." *Id* at 482, 468 P.2d at 883. In its factual discussion, the court noted that once repaired, "the truck was driven back to Amarillo, Texas." *Id*. The court's use of passive voice is unfortunate because the question under the statute is whether the buyer made initial use of the service in New Mexico.
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> The Department argues that it is irrelevant whether or not the buyer in that case came to New Mexico to retrieve the truck. It was sufficient, the Department argues, that the buyer had the benefit of a functioning vehicle, and the vehicle "was rendered fit for driving in New Mexico." We do not agree that a buyer's use within the state can be imputed from the presence of personal property shipped into the state, as it can when real property is located within the state. An out-of-state buyer does not automatically make initial use or take delivery of services within New Mexico when services are performed upon its personal property sent to New Mexico. To the extent that *Reed* suggests otherwise, we now clarify that the buyer must perform some identifiable activity within the state that constitutes initial use or acceptance of delivery.

TPL, Inc., 2003 NMSC 7, ¶¶ 22-23. Here, the facts establish that the buyer of the Taxpayer's services—unlike the buyer in *TPL*—did "perform some identifiable activity" within New Mexico. First, the customer's employees flew the airplane to be painted to the Taxpayer's facility in Roswell, New Mexico. In many cases, the customer had a technical representative on-site in Roswell to act as a liaison with the Taxpayer while the painting services were performed. Once the painting work was completed, the customer's employees took physical possession of the repainted airplane in Roswell and flew the plane from Roswell to a location selected by the customer. Although the buyer could later determine that the Taxpayer's services did not conform to the parties' agreement, this does not negate the fact that the product of that service (*i.e.*, the repainted airplane) was delivered to the buyer in New Mexico.

(2) Evidence Concerning Place of Delivery and Acceptance. Even assuming that delivery occurred at the time of acceptance, the evidence in this case does not establish that acceptance of the Taxpayer's services occurred anywhere other than Roswell, New Mexico. NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." The only records the Taxpayer produced to support the deductions it claimed in connection with its receipts from the 16 customers listed in the audit report were two Paint Services Agreements and three proposal letters. There is no documentation to establish the terms of the Taxpayer's agreements with its other customers, or even that those customers qualified as out-of-state buyers.[3] The documents

[3] For example, Great Southwest Aviation, one of the 16 customers listed in the audit report, is identified as the "local FBO" (fixed base operator) in the Taxpayer's July 9, 1999 proposal letter to Great Lakes Aviation (*see also*, ¶ IV(B) of the October 4, 1999 proposal letter to Mesa Airlines regarding refueling services). This indicates that Great Southwest Aviation may not have been an "out-of-state buyer" and, in the absence of evidence documenting the nature of the Taxpayer's transactions with Great Southwest, calls into question the Taxpayer's claim to a § 7-9-57 deduction for its receipts from this customer.

that were produced do not support the Taxpayer's position that the product of its service was delivered and accepted outside New Mexico.

The Paint Services Agreements with Pinnacle Air Cargo Enterprises and SkyWest Airlines establish that delivery of these customers' repainted airplanes occurred in Roswell, New Mexico. The proposal letters to SkyWest Airlines, Great Lakes Aviation and Mesa Airlines are silent concerning the place of delivery, but indicate that the parties would enter into a formal Paint Services Agreement before work began. Barbara Baldwin, the Taxpayer's CEO, testified that she was "at a loss" to explain why this provision was included in the three proposal letters. (Tr. 43, 47). When asked why the proposals would reference a Paint Services Agreement if the Taxpayer did not anticipate entering into such an agreement, Ms. Baldwin stated (Tr. 42):

> I don't remember. We had a marketing man that worked for us, and I don't remember when he left. I think he was only with us six months, and I believe he used those contracts while we always used these contracts, and I don't remember those contracts. That's why I always argue that there was no delivery. I don't have those contracts. I mean, I did have them, but I didn't have them until he pulled them out…. I don't ever remember making a Paint Services Agreement.

Ms. Baldwin clearly was not aware of the fact that the Taxpayer, for at least some period of time, used a Paint Services Agreement specifying that delivery and acceptance of repainted airplanes would be made at the Taxpayer's facility in Roswell. It was only after an employee of the Taxpayer was asked to search the Taxpayer's computer files that these agreements came to Ms. Baldwin's attention. Based on the Taxpayer's lack of records, there is no way of knowing whether other Paint Services Agreements—also providing for delivery in Roswell—existed between the Taxpayer and the other 16 customers for which deductions were claimed.

The evidence relating to the Taxpayer's work for SkyWest Airlines highlights the weakness of the Taxpayer's arguments concerning the delivery and acceptance of its services.

During the audit period, the Taxpayer had over $1 million of receipts from painting services performed for SkyWest. The Taxpayer stipulated that it was liable for gross receipts tax on only $261,778 of these receipts, which represents payment for work performed between April 1, 1999, the date the Paint Services Agreement between the Taxpayer and SkyWest was entered into, and August 27, 1999, the date of the Taxpayer's proposal letter to SkyWest. The Taxpayer maintains that although the April 1, 1999 Paint Services Agreement specifies that delivery and acceptance of SkyWest's repainted airplanes took place in Roswell, different terms applied to the other paint jobs the Taxpayer performed for SkyWest before and after that contract.

Barbara Baldwin attempted to explain the asserted difference in delivery terms, testifying that when operating under the Paint Services Agreement, SkyWest assigned engineers to monitor the Taxpayer's work in Roswell. She stated that these representatives were authorized to accept the Taxpayer's paint job in Roswell, while the lower-level SkyWest representatives assigned to later jobs were not. She indicated that SkyWest felt the need to have special people on-site in April 1999 because the Taxpayer was "a new shop." (Tr. 48). The problem with this explanation is that the Taxpayer had already performed $254,448 worth of work for SkyWest during the three months immediately preceding the April 1999 contract. (Dept. Ex. A, p. C6.2). The Taxpayer contends that delivery and acceptance of those earlier paint jobs did not take place in Roswell and were not subject to New Mexico gross receipts tax. Ms. Baldwin did not explain why SkyWest felt the need to have special personnel on-site to accept the work the Taxpayer performed during April and May of 1999, but not during the previous or succeeding months.

Ms. Baldwin's admission that SkyWest (and Pinnacle Air Cargo Enterprises) accepted repainted airplanes on-site in Roswell also conflicts with her testimony that customers were

unable to accept the product of the Taxpayer's services in Roswell because certain aspects of the work could not be checked until after the first flight. (Tr. 36). It should be noted that under the warranty set out in the Taxpayer's written agreements and proposals, a customer had one year (and in some cases two years) to register complaints concerning the Taxpayer's workmanship. The fact that an airplane was delivered to and accepted by SkyWest and other customers in Roswell would not preclude those customers from seeking corrective work at a later date under the Taxpayer's warranty.

The Taxpayer maintains that its August 27, 1999 proposal letter to SkyWest changed the terms in effect under the April 1, 1999 Paint Services Agreement so that delivery and acceptance of SkyWest's repainted airplanes no longer occurred in New Mexico. The only references to "delivery" in the August 27 proposal letter are as follows (TP Ex. 5):

> Article V states that: "Each aircraft will be delivered to SkyWest Airlines within five (5) days of delivery to Dean Baldwin Painting, Inc.'s Roswell facility."
>
> Article VI states that: "SkyWest Airlines agrees to remit to Dean Baldwin Painting, Inc. one hundred percent (100%) of the firm fixed costs, (+/-) any settlements or credits due, within seven (7) days of redelivery of each aircraft to SkyWest Airlines."
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> Article VIII states that the Taxpayer's warranty of the work performed under the proposal shall expire after 1250 flight hours or at the expiration of two calendar years "from the aircraft delivery date, which ever first occurs."

There is nothing in this language to support the Taxpayer's position that the delivery of repainted airplanes to SkyWest occurred in a location other than Roswell, New Mexico. In addition, the proposal explicitly refers to work to be performed or accomplished under "the Paint Services Agreement." This could mean that the terms of the April 1, 1999 Paint Services Agreement between the Taxpayer and SkyWest (the only such agreement produced by the Taxpayer) continued to apply to their business dealings. It could also mean that a new Paint Services

Agreement was entered into which the Taxpayer has been unable to locate, the terms of which are therefore unknown. The same conclusion applies to the proposal letters to Mesa Airlines and Great Lakes Aviation, both of which indicated that the parties would enter into a Paint Services Agreement before work began.

As discussed above, Barbara Baldwin was not aware of the Taxpayer's use of written agreements requiring delivery and acceptance of repainted airplanes to be made to the customer in New Mexico. Ms. Baldwin acknowledged that she did not remember details of specific transactions and could only determine whether work was performed for a particular customer by reviewing the Taxpayer's monthly sales figures. (Tr. 26-28). Such figures would not, however, provide information concerning the terms for delivery and acceptance of the Taxpayer's services. Ms. Baldwin could not rely on the Taxpayer's records for this information, because those records were inadequate and did not include written documentation to establish the terms under which the Taxpayer and its customers were operating. Based on the conflicts between Ms. Baldwin's testimony and the documentary evidence presented, and on Ms. Baldwin's admitted lack of knowledge and memory, I do not find her testimony that delivery and acceptance of customers' repainted airplanes occurred outside New Mexico to be credible.

New Mexico law holds that where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). In this case, there is undisputed evidence that the product of at least some of the Taxpayer's services was delivered to the Taxpayer's customers in New

Mexico. There is also evidence that the procedure for transferring physical possession of repainted airplanes to the Taxpayer's customers was the same for all jobs performed during the audit period, *i.e.*, the customer's own employees took physical possession of the airplanes at the Taxpayer's facility in Roswell, New Mexico. On the other side of the argument, the Taxpayer has not provided any credible evidence to establish that delivery of the product of its services occurred outside New Mexico.

Initial Use. The deduction provided in § 7-9-57 is not available to a taxpayer if the buyer of the taxpayer's service makes initial use of the product of the service in New Mexico. The facts of this case are virtually identical to the facts presented in *Reed v. Jones, supra*, discussed in the previous section. There, the court of appeals rejected the taxpayer's argument that initial use of the repaired bread truck did not occur until the truck was placed in service for local bread deliveries in Texas. The court's holding applies equally to the Taxpayer's argument in this case that initial use of repainted airplanes did not occur until the planes were placed in service carrying passengers and cargo outside New Mexico. In *TPL*, the state supreme court overruled *Reed* only to the extent it could be read to apply to an out-of-state buyer without any employees, agents or other physical presence in New Mexico. In all other respects, the court of appeals' holding concerning initial use was left intact and serves as binding precedent in this case.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to Assessment No. 2761318, and jurisdiction lies over the parties and the subject matter of this protest.

B. During the audit period at issue, the Taxpayer's customers took delivery of the product of the Taxpayer's service in New Mexico.

C. During the audit period at issue, the Taxpayer's customers made initial use of the product of the Taxpayer's service in New Mexico.

IT IS THEREFORE ORDERED:

The Department shall abate the $5,534.09 of gross receipts tax, plus related penalty and interest, attributable to $85,139.92 of work the Taxpayer performed after July 1, 2000 for America West and Kitty Hawk Aircargo.

The Taxpayer shall pay the balance of Assessment No. 2761318, including penalty and interest accrued to the date of payment.

DATED May 8, 2006.