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

**IN THE MATTER OF THE PROTEST OF**
**WEST ROCK INC. d/b/a MILE HIGH RECOVERY** **No. 13-10**
**TO ASSESSMENT ISSUED UNDER**
**LETTER ID NO. L0843328896**

## DECISION AND ORDER

An oral argument in the above captioned protest occurred on March 28, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Attorney Joe Lennihan appeared for West Rock Inc. d/b/a Mile High Recovery ("Taxpayer"). Staff Attorney Ida M. Luján appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Andrick Tsabetsaye of the Department also appeared. The parties stipulated to the admission of Exhibits 1-15, as more thoroughly described in the Administrative Protest Hearing Exhibit Log. In addition to the exhibits, the parties submitted comprehensive stipulation of facts in this matter rather than conduct an evidentiary hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On November 30, 2006, the Department selected Taxpayer for a field audit for a period from January 1, 2001 through October 31, 2006. [Stipulated Fact ("SF") #1 and Stipulated Ex. #1].

2. The Department detected during the audit that Taxpayer understated its tax liability in tax years 2001 through 2004 by more than 25%. [SF #2 and Stipulated Ex. #1.6].

3. As a result of the audit, on December 3, 2008, the Department assessed Taxpayer under letter identification number L0843328896 for $168,352.47 in gross receipts tax and $100,756.82 in gross receipts tax interest for a then-total gross receipts assessment of $269,109.29. [SF #4 and Stipulated Ex. #2].

4. The Department also assessed Taxpayer $1750.82 in withholding tax, and $516.02 in withholding tax interest for the Combined Reporting System periods from January 31, 2001 through October 31, 2006. However, Taxpayer does not protest its liability for withholding tax. [SF #3, Stipulated Ex. #2].

5. On December 16, 2008, Taxpayer requested a 60-day extension to protest the assessment. [SF #5, Stipulated Ex. #3].

6. On January 15, 2009, the Department granted Taxpayer a 60-day extension to protest the assessment. [SF #5, Stipulated Ex. #4].

7. On March 2, 2009, Taxpayer protested the Department's assessment. [Stipulated Ex. #5].

8. The Department acknowledged receipt of Taxpayer's protest on March 6, 2009.

9. Taxpayer has conceded liability for the assessed withholding tax of $549.02 and accrued interest of $207.62 as of March 28, 2013. [SF #10 & #14].

10. During the pendency of this protest, the Department abated $32,976.16 in gross receipts tax and $19,721.34 in related interest. The parties also resolved the

disclosed agency issue identified in the parties' August 24, 2013 *Joint Prehearing Statement*. [SF #10].

11. The parties stipulated that of the remaining portion of the gross receipts assessment, Taxpayer only protests the portion of Taxpayer's gross receipts attributable to the services it performed for federally-chartered credit unions ("FCU" or "FCUs") within New Mexico. Over the audit period, Taxpayer had a total of $613,953.20 in gross receipts from its transactions with FCUs. [SF #14 & #15].

12. On March 17, 1995, Taxpayer incorporated in New Mexico as a for-profit corporation, and remained so incorporated at all relevant times. [SF #8 & #9].

13. Taxpayer engaged in the business of providing intrastate and interstate automobile repossession/recovery services to financial institutions, other lenders, and dealers possessing a perfected security interest in the recovered automobiles, recreational vehicles, trailers, boats, all terrain vehicles, and motorcycles (collectively referenced herein as "vehicles"). [SF #11].

14. During the relevant period, Taxpayer was duly authorized under New Mexico law by the State Corporation Commission (now known as the Public Regulation Commission) and the Regulation and Licensed Department to repossess vehicles. [SF #12 & #13, Stipulated Ex. #9 & #10].

15. The parties made numerous stipulations of fact [SF #25-31, 33-35] that provide historical background, structural background, and a policy background on FCUs and how FCUs differ from banks. Those stipulations of fact are helpful in providing context and are adopted as findings. [SF #25-31, 33-35].

16. When a consumer loan for the purchase of a vehicle is originated through a FCU, the FCU imposes a lien on the vehicle, recorded on the vehicle's title. [SF #16].

17. Rather than maintain its own vehicle recovery staff, when a borrower defaults on vehicle loan, FCUs generally contract with private recovery businesses to repossess the vehicle. [SF #17].

18. During the relevant period, Taxpayer performed vehicle repossession services for FCUs as an independent contractor. [SF #11, SF #15].

19. Taxpayer only repossess vehicles upon receipt of a written authorization from FCUs. The written authorization sometimes identifies Taxpayer as an agent of the FCU for the purpose of collecting or repossessing the collateral covered by a contract in default. The written authorizations customarily includes a hold harmless agreement and indemnifies Taxpayer against claims that may be brought against Taxpayer including but not limited to claims for court costs, reasonable attorney fees, and other expenses of litigation. [SF #18].

20. Taxpayer is not a party to FCUs' loans with FCUs' customers, does not have an interest in the title of the recovered vehicles, and does not claim a lien or any other interest in any of the recovered FCUs vehicles. [SF #19].

21. FCUs pay Taxpayer a flat rate between $300 and $350 per tow for vehicle recovery/repossession. Taxpayer receives no payments if Taxpayer fails to recover an assigned vehicle. [SF #21].

22. Taxpayer performs two types of vehicle repossession: voluntary and involuntary. In voluntary repossession, the FCU and its borrowers agree between themselves that the FCU through Taxpayer may proceed to recover a particular vehicle at

a particular time and place. In involuntary repossession, no arrangement is made and Taxpayer recovers the vehicles by any lawful means. [SF #20].

23. Upon successful vehicle repossession, Taxpayer turns over the vehicle to FCUs. Without any substantive participation from Taxpayer, FCUs may engage in post-repossession negotiations on the vehicle, place the vehicle up for auction through a third party auctioneer to recover deficiencies on the defaulted loan, or otherwise dispose of the vehicle. [SF #22].

24. The parties stipulated that upon their information and belief, FCUs located in New Mexico have no uniform practice regarding payment of New Mexico gross receipts tax on the purchase of services. [SF #36].

25. FCUs that Taxpayer performed repossession services for during the relevant period refused to pay invoiced gross receipts taxes, requested that gross receipts taxes not be invoiced to them, or provided Taxpayer with "sales tax exemption" certificates issued to the FCUs by the National Credit Union Administration ("NCUA"). [SF #23, Stipulated Ex. #11 & #12].

26. Taxpayer did not invoice and did not collect gross receipts tax from FCUs for Taxpayer's vehicle repossession services during the relevant period. [SF #24].

27. Taxpayer did not remit gross receipts tax to the Department for its receipts from the FCUs during the relevant period. [SF #24].

28. As of the date of hearing, Taxpayer owed $135,376.31 in assessed gross receipts tax plus $106,712.91 in interest as calculated on March 28, 2013, for a total outstanding liability of $242,845.86. [SF #10].

## DISCUSSION

The issue to be decided is whether Taxpayer is liable for New Mexico gross receipts tax on its receipts from performing vehicle recovery/repossession services as a contractor for FCUs in New Mexico. In this case, Taxpayer is an independent contractor performing services for FCUs. Taxpayer is not a FCU or an employee of a FCU. The Department does not dispute that consistent with the Supremacy Clause and 12 U.S.C. § 1768 it cannot impose New Mexico gross receipts tax directly on the receipts of FCUs[1]. Taxpayer argues that when working as an independent contractor repossessing vehicles for the FCUs, Taxpayer necessarily "stands in the shoes" of the FCUs so as to make Taxpayer integral to the operation of an essential FCU function. Therefore, Taxpayer avers that its receipts from the FCUs are immune from state taxation. In the alternative, Taxpayer argues that 12 U.S.C. § 1768 provides third parties working with FCUs state tax immunity.

There is a statutory presumption that any assessment of tax made by the Department is correct. *See* NMSA 1978, § 7-1-17(C) (2007); *See also MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308. There is also a presumption that all receipts of a person engaging in business in New Mexico are subject to gross receipts tax. *See* NMSA 1978, Section 7-9-5 (2002); *See also Grogan v. New Mexico Taxation and Revenue Department*, 2003-NMCA-033, ¶ 11, 133 N.M. 354, 62 P.3d 1236, *cert. denied*, 133 N.M. 413, 63 P.3d 516 (2003). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to

[1] Consistent with the requirements of 12 U.S.C. §1768, under Regulation 3.2.4.10 NMAC (4/30/01), FCUs are exempt from a tax upon their gross receipts.

an abatement, in full or in part, of the assessment issued against it. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Under the Supremacy Clause of the United States Constitution, Art. VI. Cl. 2, no State may impose a tax directly upon the United States. *See United States v. New Mexico*, 455 US 720, 733, 102 S. Ct. 1373, 1382 (1982). The United States' state tax immunity under the Supremacy Clause extends to federal instrumentalities. *See McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 4 L. Ed. 579 (1819). A FCU is a federal instrumentality entitled to the Supremacy Clause's state tax immunity. *See United States v. Michigan*, 851 F.2d 803, 807 (6th Cir. Mich. 1988). Moreover, under 12 U.S.C. § 1768, the property, the "franchises, capital, reserves, surpluses, and other funds, and [the] income" of federally chartered credit unions are "exempt from all taxation" by any State or local government. Therefore, under the Supremacy Clause and 12 U.S.C. § 1768, no State can levy a tax directly on a FCU. *See Michigan at 807*.

Of particular importance to the resolution of this protest is *United States v. New Mexico*, 455 US 720, 102 S. Ct. 1373 (1982). In *New Mexico*, the United States Supreme Court discussed the historical origins of the Supremacy Clause tax immunity doctrine, the narrowing evolution of that doctrine, and the limits of the applicability of that doctrine to third parties doing business with the federal government[2]. *New Mexico* dealt with the State of New Mexico's attempts to impose gross receipts tax on three independent contractors working with the federal government's Department of Energy laboratories in New Mexico. *See id*. at 722-725, 1376-1378.

[2] The findings in *New Mexico* vis-à-vis the federal government are equally applicable to the Federal Instrumentality—the FCUs—at issue in this protest

The Supreme Court in *New Mexico* noted that the "limits on the immunity doctrine are…as significant as the rule itself." *id*. at 734, 1382. The Supreme Court found that the immunity doctrine does not protect the federal government from a tax that "has an effect on the United States" or instances where the federal government bears the entire economic burden of a tax. *id*., citing *Alabama v. King & Boozer*, 314 U.S. 1, 9-13, (1941). Nor, according to the Supreme Court in *New Mexico*, does the immunity doctrine protect the "earnings of a contractor providing services to the [Federal] Government." *id*. at 734, 1383, citing *James v. Dravo Contracting Co.*, 302 U.S. 134, 150 (1937). The Supreme Court also found that that Supremacy Clause immunity doctrine "cannot be conferred simply because the tax is paid with government funds." *id*. 735, 1383, citing *United States v. Boyd*, 378 U.S. 39, 41 (1964).

Under the modern approach adopted by the United States Supreme Court in *New Mexico*, constitutional immunity to a state tax only applies to a private taxpayer when that person "stand[s] in the Government's shoes." *id*. at 736, 1383 (internal citations omitted). As the Supreme Court expounded,

> a state tax is impermissible when the taxed entity is "so intimately connected with the exercise of a power or the performance of a duty" by the Government that taxation of it would be "'a direct interference with the functions of government itself.'" *New Mexico* at 736, 1383 (internal citations omitted).

Because the three independent contractors working under contract with the Federal labs "could not be termed constituent parts of the Federal Government" that would entitle them to constitutional immunity from taxation, *id*. at 740, 1386, the Supreme Court ultimately upheld the imposition of New Mexico's gross receipts tax on the three private subcontractors. *id*. at 744, 1388. *See also James v. Dravo Contracting Co.*, 302 U.S. 134,

161 (1937) (upholding West Virginia's gross receipts tax on an independent contractor of the federal government because tax did "not interfere an any substantial way with the performance of federal functions").

Two other points in *New Mexico* are relevant to the resolution of this protest. First, the Supreme Court stated that the case *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954) "stands only for the proposition that the State may not impose a tax the legal incidence of which falls on the Federal Government." *id.* at 742, 1387 (internal citations omitted). Second, the Supreme Court did not disagree with the federal government's concession that the legal incidence of New Mexico's gross receipts tax fell on the contractors rather than the federal government. *See id.* at 738, 1385. Those two points apply to this protest: as will be discussed in more detail below, the legal incidence of New Mexico's gross receipts tax in this case does not fall on the FCUs but on Taxpayer, who is engaged in vehicle repossession services in New Mexico. *See* NMSA 1978, Section 7-9-4 (2010). Therefore, since the legal incidence of New Mexico's gross receipts tax does not fall on the FCUs, *Kern-Limerick* does not control the outcome of this protest.

To the extent that *Kern-Limerick* has impact on the resolution of this protest, it comes from the Supreme Court's distinguishing between *Alabama v. King & Boozer*, 314 U.S. 1, 9-13, (1941), where a tax was found permissible against a government contractor, and the facts in front of it in *Kern-Limerick*. In finding the tax in front of it unsustainable under Supremacy Clause tax immunity, the *Kern-Limerick* Supreme Court found that "*King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States." *Kern-Limerick* at 122.

In *United States v. Kabeiseman*, 970 F.2d 739, 741 (10th Cir. Wyo. 1992), the United States Court of Appeals for the Tenth Circuit provided a good summary of the modern view on the Supremacy Clause state tax immunity doctrine:

> In sum, then, under current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals.

The legal incidence of the tax was also an important consideration in the 10th Circuit's *Kabeiseman* decision. In *Kabeiseman*, the 10th Circuit had to consider the State of Wyoming's imposition of a sales tax on diesel fuel and a license tax on gasoline used upon a private contractor under contract with the United States to operate a federally owned fuel facility. *See id*. at 740. Because the 10th Circuit found that the legal incidence of the sales tax fell on the purchaser of diesel fuel—the federal government—rather than the private contractor, it invalidated Wyoming's imposition of the diesel tax under the Supremacy Clause. *See Kabeiseman* at 742-743. *See also United States v. Lohman*, 74 F.3d 863 (8th Cir. 1995) (8th Circuit Court of Appeals found that if the legal incident of a tax fell on the federal government, then the Supremacy Clause prohibited that tax). However, citing *New Mexico*, the 10th Circuit upheld the imposition of the use tax on the gasoline because the legal incidence of tax fell on the first user to withdraw the gasoline—the private contractor—rather than the owner of the gasoline, the federal government. *See Kabeiseman* at 743-744.

The legal incidence of tax in the context of Supremacy Clause tax immunity was also discussed in *United States v. California Bd. of Equalization*, 650 F.2d 1127 (9th Cir. Cal. 1981). In that case, the 9th Circuit Court of Appeals noted that the "legal incidence of a

tax falls on the party who the legislature intends will pay the tax." *id*. at 1130-1131 (internal citations omitted). Also in that case, *id*. at 1131, the 9th Circuit Court of Appeals found that

> [t]he constitution only prohibits the state from levying a tax on the United States; it does not prohibit the state from enacting a taxing scheme whose effect is to increase prices paid by the United States. Therefore, there is no constitutional violation if the state levies a tax on a lessor to the United States and the lessor recoups this tax payment by raising the lease price increasing the economic burden to the United States.

*United States v. Michigan*, 851 F.2d 803 (6th Cir. Mich. 1988) is another case that deals both with FCUs and the role that the legal incidence of tax plays in the Supremacy Clause analysis. In *Michigan*, the 6th Circuit Court of Appeals considered whether a Michigan sales tax unconstitutionally imposed a tax on purchases by FCUs. *See id*. at 804. Relying partially on Congress' desire for tax immunity for FCUs articulated by 12 U.S.C. § 1768, the *Michigan* 6th Circuit found that FCUs are federal instrumentalities entitled to the same Supremacy Clause state tax immunity protection as the United States government. *id.* at 807. Like a direct tax on the federal government, the 6th Circuit Court of Appeals found that any direct tax on FCUs as federal instrumentalities is unconstitutional. *See id*. at 807. However, the 6th Circuit Court of Appeals found that a "tax is not unconstitutional… if the legal incidence of the tax falls on a party who deals with the federal government and merely the economic burden of the tax is passed on to the United States by that party." *id*. at 807. Because the court determined that legal incidence of Michigan's sales tax fell on the purchaser—in that case the FCUs—rather than the seller, the 6th Circuit in *Michigan* ultimately found that the Supremacy Clause tax immunity protected the FCUs from Michigan's sales tax.

Applying the case-law to the facts of this case, Taxpayer is not entitled to tax immunity under the Supremacy Clause or under 12 U.S.C. §1768. New Mexico is not attempting to tax directly the FCUs. The legal incidence of New Mexico gross receipts tax falls on the person engaged in business, which in this case is Taxpayer. *See* NMSA 1978, Section 7-9-4 (2010) (New Mexico gross receipts tax imposed upon a person engaging in business); *see also* Regulation 3.2.4.8 NMAC (4/30/01) (a person engaged in business is solely liable for gross receipts tax and are not collectors on behalf of state); *See also Tiffany Construction Company v. Bureau of Revenue*, 96 N.M. 296, 300, 629 P.2d 1225, 1229 (1981). While New Mexico's imposition of gross receipts directly on Taxpayer might have the effect of creating an additional economic burden on FCUs, the above-discussed case law overwhelming holds that the Supremacy Clause does not prohibit a state tax merely because it increases the costs to the federal government/instrumentality.

In instances like here where the legal incidence of tax is not imposed directly on the federal government/instrumentality, the only way a third party like Taxpayer can be protected by Supremacy Clause tax immunity is if Taxpayer "stands in the government shoes" to the point that taxing Taxpayer would be a direct interference with the functions of FCUs. *New Mexico* at 736, 1383 (internal citations omitted). Taxpayer argues in this case that because Taxpayer has no legal authority to repossess a vehicle on its own absent a FCUs' authorization, and was indemnified from legal action while repossessing FCUs' vehicles, Taxpayer stands in the shoes of the FCU when repossessing FCUs' vehicles.

While the FCUs indemnified Taxpayer when repossessing vehicles, there is no evidence that FCUs are unique in that regard or that Taxpayer did not have similar indemnification agreements when repossessing vehicles for other banks and credit unions.

Moreover, Taxpayer can only ever repossess any vehicle when authorized by the vehicle's lien holder, whether that be a FCU or another bank. In other words, there simply is no evidence that Taxpayer's arrangements with FCUs are unique to FCUs' business structure or whether those arrangements merely reflect standard practices of all financial institutions involved in the vehicle repossession business. If those business practices represent industry standards, then the FCUs' indemnification of Taxpayer and the FCUs' granting of authority to repossess a vehicle do not necessarily establish that Taxpayer was integral to FCUs' business. If anything, these two facts demonstrate that the FCUs contracted with Taxpayer for limited and specific purposes, just like the *New Mexico* contractors.

Indeed, the facts of this case are not markedly different from the facts in *New Mexico*. Just like the facts of *New Mexico*, Taxpayer is a privately owned corporation where the FCUs have no role in the day-to-day operations or any ownership interest in Taxpayer's corporation. *See New Mexico* at 740, 1386. Taxpayer does vehicle repossession services on behalf of other banking clients, not just FCUs. Taxpayer is a for-profit corporation engaged in business in New Mexico, and therefore required to pay New Mexico gross receipts tax on all other receipts absent a specific exemption or deduction. *See* NMSA 1978, § 7-9-4 (2010). As the Supreme Court in *New Mexico* explained, "[o]nce it is conceded that the contractors are independent taxable entities, it cannot be disputed that that their gross income is taxable." *id*. at 741, 1386. Quoting from its earlier decision in *United States v. Boyd*, 378 U.S. 39, 48 (1964), the Supreme Court concluded that the contractors in *New Mexico* were for-profit entities engaged in a commercial transaction and were not incorporated into the government structure for purpose of claiming immunity from state taxation. *See New Mexico* at 739-740, 1385.

At least two of the three independent contractors in *New Mexico* played more integral parts in the operation of the federal government's laboratories than Taxpayer did in this protest when repossessing vehicles. In *New Mexico,* one of the contractors managed the federal government's Sandia Laboratories. *New Mexico* at 723, 1377. Another contractor provided a "variety of management, maintenance, and related functions" for Los Alamos National Laboratory. *id*. at 724, 1377. While the federal government maintained significant control over the contractors in *New Mexico,* the management services the contractors provided nevertheless imply that the contractors played some continuing role in the day-to-day operations of the laboratories. Yet, despite playing a day-to-day role in the operations of the laboratories, the Supreme Court in *New Mexico, id*. at 740-741, 1386, did not find those contractors integral:

> [t]he congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.

If playing a role in the day-to-day operations of the labs was insufficient to stand in the shoes of the government, then Taxpayer's vehicle repossession service, a limited service with a carefully designed purpose, does not qualify as integral and therefore Taxpayer does not stand in the FCUs shoes in this circumstance.

Moreover, FCUs have a choice in how to proceed with vehicle repossession services: FCUs can hire their own employees to perform repossession services or can hire outside contractors. The fact that FCUs always have a choice in whether to hire a contractor or hire an internal employee to repossess vehicles strongly suggests that state taxation is not a "direct interference with the functions…" of FCUs or with the FCUs'

ability to recover vehicles. *See New Mexico* at 736, 1383 (internal citations omitted).While FCUs may prefer to hire outside contractors instead of internal employees for cost reasons, the Supremacy Clause does not shield the FCUs from the potential increased economic burden that the imposition of gross receipts tax on the outside contractor might cause. While FCUs may have directed Taxpayer to not invoice gross receipts tax, under the above-discussed case law, Taxpayer is free to increase its contract prices in order to account for Taxpayer gross receipts liabilities.

Taxpayer also argued that in the alternative that if the Supremacy Clause tax immunity by itself did not preclude Taxpayer's gross receipts tax liability, then the protections of 12 U.S.C. §1768 made Taxpayer's gross receipts from the FCUs immune from taxation. As part of this argument, Taxpayer argues that the language itself contained in 12 U.S.C. §1768 affords protection to agents or contractors of FCUs. Taxpayer also argues that 12 U.S.C. §1768 must be read broadly for legislative intent because at the time the United States Congress promulgated it in 1934, Supremacy Clause immunity had a broader application to third parties conducting business with the federal government/instrumentality.

In pertinent part, 12 U.S.C. §1768 reads

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority

> of the State or political subdivision thereof in which the Federal credit union is located…

Despite Taxpayer's argument, nothing in the plain language of 12 U.S.C. §1768 suggests that it extends to third party contractors or agents of FCUs.

While Taxpayer argues for the broader Supremacy Clause tax immunity interpretation in effect in 1934, in the context of conferring state tax immunity, Congress' intent as expressed in statute "should not be expanded or modified in any degree by the judiciary." *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 192 (U.S. 1987), citing *Smith v. Davis*, 323 U.S. 111, 119 (U.S. 1944). In order for a court to grant implied state tax immunity, congress must speak with clarity. *See Rockford Life Ins. Co. at* 191-192. As the Supreme Court required in *New Mexico, see id*. at 737, 1384, if Congress wished to extend immunity to third party contractors, it needed to do so expressly by specifying particular contracts or particular programs immune from state taxation. Absent express language extending immunity to third parties contracting with the FCUs, there is no basis to do so under 12 U.S.C. §1768.

In summary, because the incidence of New Mexico gross receipts tax falls on the Taxpayer, because Taxpayer does not stand in the shoes of the FCUs and is not integral to the operations of the FCUs when repossessing vehicles, and because 12 U.S.C. §1768 does not expressly provide immunity to third party contractors working with FCUs, Taxpayer's protest is denied.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment, letter id. no. L0843328896. Jurisdiction lies over the parties and the subject matter of this protest.

B. The legal incidence of New Mexico's gross receipts tax for Taxpayer's independent contracting services fell on Taxpayer, not on the FCUs. *See* NMSA 1978, § 7-9-4 (2010); *see also* Regulation 3.2.4.8 NMAC (4/30/01); s*ee also Tiffany Construction Company v. Bureau of Revenue,* 96 N.M. 296, 300, 629 P.2d 1225, 1229 (1981).

C. While FCUs are federal instrumentalities entitled to state tax immunity, Taxpayer does not stand in the shoes of the FCUs and therefore Taxpayer is not entitled to state tax immunity. *See United States v. New Mexico*, 455 US 720, 102 S. Ct. 1373 (1982)

D. Without a clear expression that 12 U.S.C. §1768 extends to third party contractors, Taxpayer is not immune from state taxation under the statute. *See Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 192 (U.S. 1987), citing *Smith v. Davis*, 323 U.S. 111, 119 (U.S. 1944); *See also United States v. New Mexico*, 455 US 720, 737, 102 S. Ct. 1373, 1384 (1982).

For the foregoing reasons, the Taxpayer's protest **IS DENIED.** Taxpayer owes $135,376.31 in assessed gross receipts tax plus $106,712.91 in interest (calculated as of March 28, 2013 hearing date). Taxpayer owes $549.02 in withholding tax and accrued interest of $207.62 (calculated as of March 28, 2013 hearing date). Pursuant to NMSA 1978, Section 7-1-67 (2007), interest continues to accrue until tax principal is paid.

DATED: April 30, 2013.

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