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

IN THE MATTER OF THE PROTEST OF
THE GEO GROUP, INC.
TO DEPARTMENT'S FAILURE TO GRANT OR DENY A REFUND **No. 14-36**

DECISION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on July 22, 2014, before Brian VanDenzen, Chief Hearing Officer. Chief Legal Counsel Brad Odell appeared representing the Taxation and Revenue Department ("Department"), along with protest auditor Andrick Tsbetsaye. Attorney Timothy R. Van Valen appeared representing The GEO Group, Inc. ("Taxpayer"). Josh Cohen and Josh Killian of Ryan, LLC also appeared for Taxpayer. This matter was presented on the parties' cross-motions for summary judgment filed on February 28, 2014. On April 7, 2014, both parties filed their respective responses to the other parties' motions for summary judgment. On June 13, 2014, the Department supplemented its Motion for Summary Judgment and Taxpayer supplemented its response to the Department's Motion for Summary Judgment. On June 27, 2014, Taxpayer replied to Department's Supplement to Motion for Summary Judgment. All affidavits attached to the parties' summary judgment pleadings are admitted into the record. The parties submitted 15 stipulations of fact and stipulated to the admission of exhibits A-F, all of which are incorporated into the administrative record in this matter. Based on the Stipulation of Facts, review of stipulated exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 28, 2012, Taxpayer timely filed a claim for refund of $875,417.00 in state and local gross receipts tax for the reporting periods of December 31, 2008 through December 31, 2009. [Stipulation of Facts #2-5].

2. The Department took no action to either approve or deny Taxpayer's claim for refund within 120-days. [Stipulation of Facts #6].

3. On July 24, 2013, Taxpayer timely filed a protest to the Department's failure to allow or deny Taxpayer's claim for refund. [Stipulation of Facts #7].

4. On August 1, 2013, the Department acknowledged receipt of Taxpayer's protest.

5. On September 9, 2013, the Department requested a hearing in this matter with the Hearings Bureau.

6. On September 10, 2013, the Hearings Bureau set this matter for a telephonic Scheduling Conference on September 25, 2013.

7. On September 25, 2013, a Scheduling Conference in this matter occurred, setting the merits hearing for March 27, 2014.

8. On February 14, 2014, the parties filed their Stipulation of Facts, incorporated herein.

9. On February 28, 2014, Taxpayer filed its Motion for Summary Judgment and Brief in Support of Motion. On that same day, the Department filed its Motion for Summary Judgment.

10. On March 13, 2014, Taxpayer moved to vacate and reschedule the hearing on the merits and motion for hearing on motions for summary judgment.

11. On March 25, 2014, the Hearings Bureau granted Taxpayer's motion to vacate and reschedule, setting a summary judgment motion hearing on April 14, 2014 and a merits hearing on July 23, 2014.

12. On April 2, 2014, the Hearings Bureau issued a Notice of Reassignment of Hearing Officer.

13. On April 7, 2014, the Department filed its response to Taxpayer's Motion for Summary Judgment. On that same date, Taxpayer also filed its response to the Department's motion for summary judgment.

14. On April 9, 2014, the parties jointly move to continue the April 14, 2014 summary judgment motion hearing. On the same date, the parties also jointly moved to amend responses to motion for summary judgment.

15. On April 15, 2014, the Hearings Bureau issued an order granting the continuance request and resetting summary judgment motion hearing on July 22, 2014.

16. On May 14, 2014, Taxpayer filed its Special Request for Hearing.

17. On May 23, 2014, the Hearings Bureau issued an order granting request for setting and amended notice of administrative hearing scheduling the merits hearing for November 5, 2014.

18. On June 11, 2014, staff attorney Peter Breen entered his appearance in this matter, substituting for former staff attorney Aaron Rodriguez.

19. On June 12, 2014, the parties moved to change the joint prehearing statement deadline. That request was granted through Hearings Bureau order on June 16, 2014.

20. On June 13, 2014, the Department filed its supplement to its motion for summary judgment.

21. On June 13, 2014, Taxpayer filed its supplement to its response to the Department's motion for summary judgment.

22. On July 18, 2014, Chief Legal Counsel Brad Odell entered his appearance as co-counsel on behalf of the Department.

23. On July 22, 2014, the summary judgment motion hearing occurred.

24. On October 15, 2014, the Hearings Bureau issued an order vacating the November 5, 2014 merits hearing pending ruling on the parties' cross motions for summary judgment.

25. Taxpayer is a private prison company that contracted to construct, manage, and operate the Town of Clayton's jail and detention facility ("Clayton Jail[1]") in the Town of Clayton ("Clayton"), Union County, New Mexico.

26. Taxpayer timely paid gross receipts tax to the state in 2008 and 2009 for its receipts derived from its operation of the Clayton Jail and detention facility.

27. Clayton funded the construction of the Clayton Jail using tax-exempt project revenue bonds. Clayton retained all ownership, subject to security interests under the bonds, of the Clayton Jail. [Stipulated Ex. B8].

28. On September 21, 2006, the New Mexico Corrections Department ("NMCD") reached an agreement ("NMCD Agreement") with the Town of Clayton to house NMCD prisoners at the Clayton Jail operated by Taxpayer. [Stipulated Ex. C].

[1] The facility, once completed and operational, was named the Northeastern New Mexico Detention Facility. [Stipulated Ex. D]

29. The NMCD Agreement required Clayton to "house all NMCD inmates in full compliance with Standards, Court Orders, and NMCD Polices set forth in subsection 1.1 through 1.6… and shall operate, maintain and manage the Jail in compliance with all applicable federal and state constitutional requirements and laws." [Stipulated Ex. C1].

30. In subsection 1.1 through 1.6 of the NMCD Agreement, Clayton was required to operate the Clayton Jail in accord with American Correctional Association Standards, the Monitor's standards, all federal, state, and local codes applicable to the Jail, court orders, NMCD policies, and the policies of other sending agencies to the Clayton Jail. [Stipulated Ex. C1-2].

31. Under the NMCD Agreement, NMCD agreed to pay Clayton a per diem rate, an incremental service fee, a facility fee, and a base service fee. [Stipulated Ex. C2-6].

32. The NMCD Agreement required ACA Accreditation by Clayton or its independent contractor Taxpayer at the Clayton Jail within 18-months of the service commencement date. [Stipulated Ex. C6]. The service commencement date is the date when Clayton began providing or caused to begin providing management and operations services at the Clayton Jail. [Stipulated Ex. C2]

33. The NMCD Agreement required Taxpayer to provide an operational plan for all Clayton Jail inmates that met all applicable standard. [Stipulated Ex. C8].

34. Under the NMCD Agreement, NMCD paid for inmate health care and mental health services. [Stipulated Ex. C10-12].

35. Under the NMCD Agreement, Clayton was required to provide meaningful programming of eight hours per day five days a week, educational and vocational programming,

substance abuse/addiction education, library services, legal services, adequate recreation, and inmate religious programs to NMCD inmates. [Stipulated Ex. C13-18].

36. Under the NMCD Agreement, Clayton was required to provide clothing, linens, laundry services, hygiene supplies, and cell furnishings for NMCD inmates. [Stipulated Ex. C18].

37. Under the NMCD Agreement, Clayton was required to provide food service to NMCD inmates. [Stipulated Ex. C19].

38. Under the NMCD Agreement, Clayton was required to provide adequate staffing at the Clayton Jail. [Stipulated Ex. C24].

39. On or about September 20, 2006, Taxpayer and Clayton entered into a Jail Provision and Operations Agreement ("Qualified Management Agreement"). [Stipulated Ex. B].

40. Under the Qualified Management Agreement, Clayton selected Taxpayer in accord with NMSA 1978, Section 33-3-26 and 33-3-27 for the "provision and operation" of the Clayton Jail in accord with applicable standards. [Stipulated Ex. B1].

41. Taxpayer agreed under the Qualified Management Agreement, in referencing the NMCD Agreement, to "assume such responsibilities and obligations of Clayton relating to the provision and operation of the Jail." [Stipulated Ex. B1].

42. Under the Qualified Management Agreement, Taxpayer was required to "pay any applicable New Mexico Gross Receipts Tax." [Stipulated Ex. B4-5; Stipulated Ex. B20].

43. Under the Qualified Management Agreement, Taxpayer was required to provide a 625 bed jail to Clayton in accord with all applicable standards. [Stipulated Ex. B7].

44. Under the Qualified Management Agreement, Taxpayer was required to "operate the Jail and house and care for Clayton's male and female inmates …" [Stipulated Ex. B8].

45. Taxpayer was an independent contractor under the Qualified Management Agreement. [Stipulated Ex. B20].

46. Subject to the terms of the Qualified Management Agreement, Taxpayer had the "sole right to supervise, manage, operate, control, and direct the performance of the details incident to its duties…" under Qualified Management Agreement. [Stipulated Ex. B20].

47. In the Scope of Services section, Taxpayer was required to manage, provide or perform 23 services under the Qualified Management Agreement: Employee background checks, screening, and training; adequate staffing at the jail; an inmate classification system; inmate religious services; food service; laundry and clothing services; transportation and off-site security; telecommunications; inmate educational, vocational, and therapeutic programming; inmate volunteer programs; inmate health care; recreation and exercise programming; a library of literary, educational, and legal materials; visitation services; commissary services; essential supplies and equipment; fiscal management; serious incident reporting procedures; maintenance of physical plant; inmate programming activity; disciplinary rules, regulations, and grievance process; development of use of force policy and training in accord with applicable standards; and with Clayton's consent, selection of the jail administrator. [Stipulated Ex. B9-16].

48. Under the Qualified Management Agreement, Clayton had the right to house non-Clayton inmates at the jail. [Stipulated Ex. B16].

49. Taxpayer was required under the Qualified Management Agreement to obtain American Correctional Association accreditation within 18-months of completion of the Clayton Jail. Taxpayer was also required to contact ACA about accreditation within six months of the services commencement date. [Stipulated Ex. B17]. The service commencement date was the date that

Taxpayer began providing management and operations services at the Clayton Jail. [Stipulated Ex. B2].

50. Under the Qualified Management Agreement, Clayton paid Taxpayer a monthly service fee that included the sum of the NMCD fixed monthly service fee, the NMCD per diem rate, a Clayton Monthly service fee, and any other per diems collected for the housing of non-NMCD and non-Clayton inmates at the Clayton Jail. [Stipulated Ex. B17-18].

51. Under the Qualified Management Agreement, Taxpayer billed NMCD and other governmental agencies allowed to house prisoners at the Clayton Jail directly rather than through Clayton. [Stipulated Ex. B19].

52. Under the Qualified Management Agreement, Clayton was not liable for non-Clayton prisoners, including NMCD or other governmental agency prisoners. [Stipulated Ex. B24].

53. On or about May 7, 2010, Taxpayer sought and obtained accreditation of the Clayton Jail from the American Correctional Association, Commission on Accreditation for Corrections. [Stipulated Ex. D].

54. On October 3, 2013, after the initiation of this protest, Lizzy Vedamanikam of the Department's Protest Office told Taxpayer that she could not obtain approval of Taxpayer's claim for refund. [Stipulation of Facts #8].

55. On October 23, 2013, Lizzy Vedamanikam also provided Taxpayer with 60-days notice to obtain any applicable non-taxable transaction certificates ("NTTC or NTTCs"). [Stipulation of Facts #8].

56. On October 25, 2013, Clayton executed a Type 2 NTTC covering the purchase of a license for resale to Taxpayer. [Stipulation of Facts #9; Stipulated Ex. A].

57. Taxpayer provided the Department with the executed Type 2 NTTC on December 2, 2013, within the 60-day deadline. [Stipulation of Facts #9].

DISCUSSION

The primary issue in this matter is whether for the purposes of NMSA 1978, Section 7-9-47 (1994), Taxpayer provided Clayton a license, which Clayton resold to the NMCD for the housing of NMCD inmates at the Clayton Jail in the regular course of its business. Taxpayer moved for summary judgment, arguing it was entitled to a deduction under Section 7-9-47 because it was selling a license to Clayton to house prisoners in an accredited facility, which Clayton in turn resold to NMCD. The Department moved for summary judgment, arguing that that Taxpayer was selling services to Clayton rather than a license, which the Department argued as a matter of law did not qualify for the claimed deduction under Section 7-9-47. Taxpayer also argued that since it timely accepted the proper type 2 NTTC from Clayton in good faith, the NTTC is conclusive of its entitlement to claimed deduction.

Burden of Proof and Standard of Review.

Although the Department did not issue Taxpayer an assessment in this matter, Taxpayer still has the burden of establishing it was entitled to the claimed refund at issue. Taxpayer's claim for refund is premised on a deduction from gross receipts tax. "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*,

1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness" and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Consequently, Taxpayer still must show that it is entitled to the deduction that is the basis of its claim for refund.

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713. If the movant for summary judgment makes a prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331. Both parties moved for summary judgment motion in this matter and as such both sides implicitly acknowledged that there were no genuine disputes of fact, making this matter ripe for a decision upon summary judgment to the party entitled to prevail as a matter of law.

Gross Receipts Tax and the Claimed Deduction

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, § 7-9-4 (2002). "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2003). Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (2002).

For the purposes of this case, Taxpayer is engaged in business in New Mexico in provisioning, operating, and managing the Clayton Jail. As such, all receipts of Taxpayer are presumed subject to New Mexico's gross receipts tax. Taxpayer did timely pay gross receipts tax on its receipts from operating the Clayton Jail, but now seeks a refund based on the claimed deduction.

In this case, Taxpayer's claim for refund is premised on the deduction for sale of tangible personal property or licenses for resale found under Section 7-9-47. Section 7-9-47 states that:

> Receipts from selling tangible personal property or licenses may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must resell the tangible personal property or license either by itself or in combination with other tangible personal property or licenses in the ordinary course of business.

License is not specifically defined either under Section 7-9-47 or broadly defined under the Gross Receipts and Compensating Tax Act or under the Tax Administration Act. *See Quantum Corp. v. State Taxation & Revenue Dep't,* 1998-NMCA-050, ¶10, 125 N.M. 49. In the absence of a statutory definition, the New Mexico Court of Appeals turned to Black's Law Dictionary to define "license" as "[a] permission, by a competent authority to do some act which without such authorization would be illegal or would a trespass or a tort…" *N.M. Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶7, 85 N.M. 565; *See also Quantum Corp*., ¶10.

The fundamental question in this case is whether Taxpayer was providing a license to Clayton for resale to NMCD potentially deductible under that section or was instead predominately performing a service. NMSA 1978, Section 7-9-3 (M) (2007) defines "service" as "all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property." Section 7-9-3 (M)

indicates that "[i]n determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling."

In constructing the Qualified Management Agreement between Taxpayer and Clayton, the form does not determine the character of the instruments; instead, it is the intention of the parties as shown by the contents of the instruments that controls. *See Transamerica Leasing Corporation v. Bureau of Revenue*, 1969-NMCA-011, ¶17, 80 N.M. 48. Looking at the Qualified Management Agreement and the NMCD Agreement, it is clear that the intention of the parties was that Clayton contracted for the provision of services: the provisioning/building, operation, and management of the Clayton Jail in accord with relevant law and standards.

There is no indication in the content or structure of the NMCD Agreement that Clayton and NMCD considered the transaction the sale of a license. If this transaction was not the sale a license, then the license Taxpayer claims to have sold to Clayton was not resold to NMCD in Clayton's regular course of business, as required under Section 7-9-47. The NMCD Agreement between Clayton and the NMCD required Clayton to "house all NMCD inmates in full compliance with Standards, Court Orders, and NMCD Polices…" The NMCD Agreement listed numerous services that Clayton was required to provide in order to comply with requisite policies and procedures. Clayton or Taxpayer was required to obtain American Correctional Association Accreditation within 18-months of the service commencement date, which is the date that Clayton began to perform the management and operation services at the jail. In other words, Clayton, through Taxpayer, was performing the contracted services even before accreditation was in place. Along with the importance of the services throughout the document, this provision suggests that the services were the predominate portion of the NMCD agreement.

Services were also the predominant component of the Qualified Management Agreement between Clayton and Taxpayer. Under that agreement, Taxpayer was required to provision—as in contract for the design and construction of the facility—a jail for Clayton, and had the sole right to supervise, manage, operate, control the Clayton Jail. The Qualified Management Agreement identified more than 20 services that Taxpayer was required to arrange, perform, or manage. These services included the critical security, training of officers, maintenance of facility, medical, and food services necessary to operate a jail. Without performance of most of these services, Taxpayer could not have operated the facility as a correctional facility because these services were necessary for Taxpayer, as operator of the Clayton Jail, to fulfill its duty of maintaining public order and holding prisoners in secure custody. *See Methola v. County of Eddy*, 1980 NMSC 145, ¶17, 95 N.M. 329 (jailers are charged with a public duty to maintain order and hold persons in custody). Without these core contracted services involving security, training, staffing, and operational standards, Clayton could not have entered into agreement with Taxpayer. *See* NMSA 1978, Section 33-3-27 (2007) (setting minimum comprehensive standards for a private independent contractor for the operation of jail before approval of operation agreement).

The payment structure in this case included both per diems and general facility fees. Although the per diem rate does not necessarily establish a license because those fees pay for core significant daily services, the general facility fee is clearly the payment for the provisioning of myriad services at the facility. The general facility fee further supports that the Qualified Management Agreement was predominately for the performance of services.

Regarding accreditation, the Qualified Management Agreement did also require Taxpayer to obtain accreditation within 18-months of the completion of the facility that Taxpayer was tasked with

finishing. Taxpayer was also required to contact ACA within six months of beginning to perform its operational and managerial services at the Clayton Jail. Constructing the jail, operating the jail, and managing the jail are services, and the agreement contemplated that these services would be performed even before Taxpayer obtained accreditation.

The accreditation that Taxpayer was required to obtain was not the nature of the transaction between Taxpayer and Clayton, but a condition of continuing operation of the Jail after the first 18-months. The predominant component of the agreement between Taxpayer and Clayton was performing the services necessary to operate, manage, and maintain a detention facility in accord with legal requirements and standards, which after 18-months included accreditation. Without performance of these services, there would be no secure facility for Clayton to house any inmates.

Taxpayer argues that the services contracted for and rendered are merely incidental to the license in a similar manner to the incidental services rendered by a hotel as part of the guest's license to use the room for the evening. This argument does not persuade. A hotel may still provide its essential function—the licensing of a room for the evening—even when an incidental service like providing cable television or climate control do not function. If the complimentary breakfast promised at a hotel never materializes, a person may leave the hotel grounds to get something to eat around the corner. However, if a jail fails to provide food service, a prisoner is not at liberty to walk to the local coffee shop for breakfast.

Unlike the incidental services of a hotel, the contracted services Taxpayer provided are critical to providing a functioning and lawful correctional facility. Without trained guards, security protocols, and maintained premises, a jail cannot meets is essential function as a secure detention facility. Nor can a correctional facility meets its rehabilitation purpose without the programming

services contained in the Qualified Management Agreement. Without appropriate medical care, legal visits, and court transportation services, a correctional facility cannot comply with its legal obligations. Without all of those services, the ostensible license that Taxpayer claims would be meaningless for the purposes of housing NMCD prisoners because there would not be a functional correctional facility. *See* Section 33-3-27 (setting minimum comprehensive standards for a private independent contractor for the operation of jail before approval of operation agreement).

The Qualified Management Agreement between Taxpayer and Clayton was predominately about Taxpayer's performance of services, satisfying the definition of a "service" under Section 7-9-3 (M).

Corrections Corp. of America v. State of N.M., 2007-NMCA-148, 142 N.M. 779 presents a similar set of facts to this case, although with a few notable distinctions. In *Corrections Corp.*, ¶1, the taxpayer sought a refund of gross receipts tax because it claimed its agreements to house prisoners for governmental agencies at facilities that taxpayer owned and operated constituted a lease not subject to gross receipts tax under a different applicable deduction. Because *Corrections Corp.* was arguing that its agreement was a lease, the case involved a different deduction than at issue here. The agreements in *Corrections Corp.*, ¶3-10, were quite similar to the Qualified Management Agreement at issue in this case. The taxpayer in *Corrections Corp.*, ¶6, charged the governmental entities on a per diem basis, similar to this protest, though it must be noted that Taxpayer receives both a per diem rate and monthly service fee. Unlike the present protest where Clayton was the owner of the Clayton Jail, the *Corrections Corp.* taxpayer owned the prison facilities outright. The Court of Appeals in *Corrections Corp.*, ¶28, ultimately held that the contract was not a lease that qualified for the claimed deduction in that case because the "government entities did not pay a fixed amount in exchange for the guarantee of physical real property to house inmates…" After reaching its holding, the Court of Appeals in

Corrections Corp., ¶28, suggested that the arrangement between that taxpayer and the governmental agencies was "more like" the arrangement between hotels and lodgers than leases of real property. That does not mean, as Taxpayer argues, that the Court of Appeals found in *Corrections Corp.*, ¶28, that arrangement was a license, especially since this statement appears to be dicta after the Court of Appeals had already reached its holding.

The Court of Appeals in *Corrections Corp.*, ¶29, reiterates that its holding was an accord with the presumption of taxation and the requirement that deduction be construed narrowly. The Court of Appeals stated that "[w]e find nothing in our law to support CCA's position that we should expand the definition of 'lease for real property…' to include agreements between governmental entities and private prison companies." *Corrections Corp.*, ¶29. That same principal would certainly apply to Taxpayer's attempt to expand the concept of a license to include Taxpayer's agreement to provision, manage, and operate Clayton's jail. In the absence of clear proof that Taxpayer sold a license for resale, there is nothing to suggest that the Legislature intended Section 7-9-47 to apply to Taxpayer's provision, management, and operation of the Clayton Jail.

Even assuming that Taxpayer sold a license, as the Department argues, there is an issue in this protest as to whether that license was resold. Taxpayer billed NMCD directly for NMCD inmates housed at the Clayton Jail. Clayton was not liable for payment of non-Clayton inmates at the Clayton Jail. The direct billing between Taxpayer and NMCD without any Clayton liability indicates that Clayton was not reselling to NMCD.

Good Faith Acceptance of a NTTC.

Taxpayer argued during the summary judgment motion hearing that its timely acceptance of the correct type 2 NTTC timely executed by Clayton entitled it to the safe harbor protection of

NMSA 1978, Section 7-9-43 (A) (2011). In support of this argument, Taxpayer cited *Leaco Rural Tel. Coop. v. Bureau of Revenue*, 1974-NMCA-076, ¶15, 86 N.M. 629 and a decision and order of the Hearings Bureau, *In the Matter of the Protest of Rio Grande Electric Co., Inc*, No. 13-16 (June 10, 2013) to support its argument[2].

NMSA 1978, §7-9-43(A) (2011) grants taxpayers a good-faith acceptance, conclusive evidence safe harbor in some circumstances:

> [w]hen the seller or lessor accepts a nontaxable transaction certificate within the required time and in good faith that the buyer or lessee will employ the property or service transferred in a nontaxable manner, the properly executed nontaxable transaction certificate shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's or lessor's gross receipts.

In other words, the statute grants the seller of the nontaxable property or service safe harbor from taxation when the seller timely accepts a properly executed NTTC in good faith from the buyer. Regulation 3.2.201.15 NMAC (05/31/01) discusses good faith acceptance of a NTTC:

> Acceptance of [NTTCs] in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time of each transaction. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered or services performed thereafter are of the type covered by the certificate.

As recently made clear in another Hearings Bureau decision and order *In the Matter of the Protest of Adecco USA*, No. 14-16 (May 22, 2014), even under the broader reading of the safe harbor exception applied by the Hearings Bureau in *In the Matter of the Protest of Case Manager* and *In the Matter of the Protest of Rio Grande Electric Co., Inc*, the safe harbor protection only applies when the underlying transaction itself is covered by a recognized deduction. That is, the safe harbor

[2] *Rio Grande Electric Co., Inc.* was premised on the Hearings Bureau decision and order *In the Matter of Case Manager (Theresa Maestas)*, No. 13-12 (May 15, 2013). *In the Matter of Case Manager* is currently on appeal.

provision cannot serve to make a taxable transaction not covered by any deduction into a nontaxable transaction merely by possession of a NTTC. In *McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599, the Court of Appeals held that the good faith safe harbor provision did not protect a seller from taxation "unless the certificate covered the receipts in question." The court went on to say that since there was "no certificate applicable" for the type of services that taxpayer provided, the Department's denial of the deduction was proper. *See McKinley*, ¶13. Although perhaps dicta, the Court of Appeals stated in *Gas Co. v. O'Cheskey*, 1980-NMCA-085, ¶12, 94 N.M. 630 that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." In order for the safe harbor provision to apply, the receipts in question must otherwise be covered by a recognized deduction. That is not the case in this protest.

Because Taxpayer did not establish it was entitled to the Section 7-9-47 deduction, the transaction is not covered by a recognized deduction, Taxpayer cannot rely on its acceptance of the NTTC in good faith to convert this taxable transaction into a nontaxable transaction. Because there is no genuine dispute of material fact and the Department is entitled to judgment as a matter of law, the Department's summary judgment motion is granted. Consequently, Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's failure to grant or deny Taxpayer's claim for refund and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Under NMSA 1978, § 7-9-3.3 (2003), Taxpayer is engaged in business in the management and operation of Clayton's Jail in Clayton, Union County, New Mexico.

C. Under NMSA 1978, Section 7-9-5 (2002), all of Taxpayer's receipts in New Mexico are presumed subject to New Mexico's gross receipts tax.

D. Taxpayer had the burden to establish its claim for refund premised on the deduction articulated under NMSA 1978, Section 7-9-47 (1994), a deduction that must be narrowly construed. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779.

E. The Qualified Management Agreement between Taxpayer and Clayton predominately involved the performance of services, satisfying the definition of "services" under NMSA 1978, Section 7-9-3 (M) (2007) subject to gross receipts tax.

F. As a matter of law, without establishing that the transaction involved the sale of a license for resale, Taxpayer did not meet its burden of establishing it was entitled to the deduction under NMSA 1978, Section 7-9-47 (1994). *See Corr. Corp. of Am. of Tenn. v. State*, ¶29.

G. Because there is no genuine dispute as to any material fact and the Department is entitled to judgment as a matter of law, summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

For the foregoing reasons, Taxpayer's protest is DENIED.

DATED: November 20, 2014.

Brian VanDenzen, Esq.
Chief Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.