STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
STAR HOSPICE, INC. **No. 15-29**
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0276790224

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 23, 2015 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Bobbi Kay Nelson, CPA, and James Ortiz of REDW, LLC appeared representing Star Hospice, Inc. ("Taxpayer"). Mr. Ravi Shakamuri, president of Taxpayer, appeared and testified. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #1-3 were admitted into the record. Department Exhibits A-E were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 22, 2014, the Department assessed Taxpayer for $80,040.94 in tax, $16,023.65 in penalty, and $11,843.65 in interest for a total tax assessment of $107,908.20 for the CRS reporting periods from January 31, 2008 through December 31, 2013. [Letter id. no. L0276790224].

2. On January 29, 2015, Taxpayer protested the assessment.

3. On February 9, 2015, the Department acknowledged receipt of Taxpayer's protest.

4. On March 5, 2015, the Department requested a hearing in this matter with the Hearings Bureau[1].

5. On March 17, 2015, the Hearings Bureau set this matter for a hearing on April 16, 2015 before Hearing Officer Monica Ontiveros.

6. On March 23, 2015, Taxpayer's representative Bobbi Kay Nelson moved to continue the April 16, 2015 hearing. The Department did not object to Taxpayer's request

7. On March 25, 2015, the Hearings Bureau continued the April 16, 2015 hearing date and sent notice of administrative hearing, rescheduling the hearing for April 21, 2015 before Hearing Officer Monica Ontiveros.

8. On April 21, 2015, a brief hearing occurred before Hearing Officer Monica Ontiveros in Santa Fe. Taxpayer Ex. #1 was admitted into the record. On the record, after discussing the issues and noting the necessity of a fact witness, and without objection from the Department, Hearing Officer Ontiveros continued that hearing.

9. On April 22, 2015, the Hearings Bureau issued an Amended Notice of Hearing and Order of Continuance, setting a new hearing date of May 14, 2015.

10. On May 13, 2015, Taxpayer again moved to continue the hearing because Taxpayer's witness had transportation difficulties and would not be able to make the May 15, 2015 hearing. The Department did not oppose the request.

11. On May 14, 2015, the Hearings Bureau issued an order continuing the May 14, 2015 hearing date and setting this matter for hearing on May 28, 2015.

[1] On July 1, 2015, pursuant to enacted Senate Bill 356, the Hearings Bureau became the Administrative Hearings Office ("AHO"). Since most of the events, except issuance of this decision, occurred before that date, the Hearings Bureau will be referenced in the findings of fact even though the decision is issued under AHO's caption.

12. On May 18, 2015, the Department moved to continue the May 28, 2015 hearing because of a conflicting CLE training at the time. Taxpayer did not oppose.

13. On May 19, 2015, the Hearings Bureau issued the "Final Continuance Order, Notice of Reassignment, and Amended Notice of Administrative Hearing," continuing the May 28, 2015 hearing, reassigning this matter from Hearing Officer Ontiveros to the undersigned hearing officer, and rescheduling the matter for hearing on June 23, 2015.

14. Taxpayer was a non-filer of CRS returns during the periods at issue in the audit period. [06-23-15 CD 1:27:45-1:28:33].

15. During the relevant tax periods, under contract agreement with the nursing home facilities, Taxpayer provided hospice nursing care services in nursing homes in New Mexico.

16. Taxpayer is a licensed hospice nursing service provider in New Mexico only authorized to provide clinical services in a residential setting related to the hospice diagnosis. Hospice services focus on providing comfort, quality of life, and pain management to the patients. [06-23-15 CD 0:43:19-30; 0:52:56-0:55:45].

17. Taxpayer is not a licensed nursing home provider and does not provide room and board services or curative services. [06-23-15 CD 0:42:00-0:43:48; 0:53:56-0:54:30].

18. Pertinent to this case is Taxpayer's receipts received from Medicaid for the patients' room and board at the nursing home facilities, which is the only amount in dispute in this protest. [06-23-15 CD 1:11:00-49].

19. Once a nursing home patient whom was medically eligible for hospice services selected Taxpayer to provide those hospice services, Taxpayer provided the hospice services while the nursing home facility continued to provide room and board to Taxpayer's hospice patients. [06-23-15 CD 0:18:44-0:40:02].

20. Taxpayer received payment from Medicare (or directly from the patient or other private insurance) for the hospice care services it provided. These receipts are not in dispute. [06-23-15 CD 0:18:44-0:40:02; 1:31:00-31].

21. Generally, the nature of the transactions at issue is as follow: the nursing home facility billed Taxpayer for the room and board it provided to Taxpayer's hospice patients. Under the respective contracts and applicable regulations, Taxpayer billed Medicaid for the nursing home room and board at the permissible Medicaid room and board rate. Medicaid paid Taxpayer 95% of the permissible room and board rate. Upon receipt of payment for the patient, Taxpayer in turn reimbursed the nursing facility at 100% of the Medicaid room and board rate. [Taxpayer Ex. #'s 2-3; Department Ex. A-C; 06-23-15 CD 0:18:44-0:40:02, 1:29:25-1:30:45; 1:31:31-51].

22. Upon receipt of the room and board payment from Medicaid, Taxpayer placed the money in a specific reimbursement account and transferred that money to the relevant nursing home within five-business days without keeping or retaining any percentage of the money. [Taxpayer Ex. 2-3; 06-23-15 CD 1:36:30-01:37:48].

23. Taxpayer had ability to negotiate in its contract whether to provide the nursing homes the exact 95% amount of room and board that Medicaid paid to Taxpayer or pay an additional amount up to 100% of the Medicaid room and board rate. Consistent with industry practice, voluntarily under the contract Taxpayer agreed to pay 100% of the room and board rate to the nursing homes even though Medicaid had only paid at 95% of that rate. [Taxpayer Ex. 2-3; 06-23-15 CD 0:56:40-1:03:34].

24. In particular, Taxpayer contracted with three nursing homes for the provisioning of hospice care services to residents of those homes: Good Samaritan Society, Hobbs Center, LLC, and Heartland Care of Hobbs.

25. Taxpayer contracted with the Good Samaritan Society at a nursing facility in Lovington to provide hospice care nursing services to eligible residents at the facility. [Department Ex. A].

26. Under the contract between Taxpayer and Good Samaritan Society, for Medicaid patients, Good Samaritan billed the patient's room and board to Taxpayer at 100% of applicable Medicaid room rate. [Department Ex. A12].

27. Under the contract between Taxpayer and Good Samaritan Society, the parties agreed that each party was an independent contractor. [Department Ex. A17].

28. Under the contract between Taxpayer and Good Samaritan Society, the parties acknowledged and agreed that neither party was an agent of the other party and that neither party had the authority to bind the other party to an oral or written agreement with any third party. [Department Ex. A17].

29. Taxpayer contracted with the Hobbs Center, LLC for the Hobbs Health Care Center nursing home facility in Hobbs, NM to provide hospice care nursing services to eligible residents at the facility. [Department Ex. B].

30. For Medicaid medical assistance patients, Hobbs Center, LLC, billed Taxpayer and Taxpayer agreed to reimburse Hobbs Center, LLC, "for not less than 95% but no more than 100% of the Medicaid Nursing Facility Room and Board Services rate…" [Department Ex. B9].

31. Under the contract between Taxpayer and Hobbs Center, LLC, the parties agreed that Taxpayer was an independent contractor. [Department Ex. B11].

32. Under the contract between Taxpayer and Hobbs Center, LLC, the parties agreed that Taxpayer was not "agent, employee, or partner" of the nursing home facility. [Department Ex. B11].

33. Taxpayer contracted with the Heartland Care of Hobbs nursing home facility in Hobbs, NM to provide hospice care nursing services to eligible residents at the facility. [Department Ex. C].

34. Under the contract between Taxpayer and Heartland Care of Hobbs, the parties agreed that both parties were independent contractors. [Department Ex. C6].

35. Under the contract between Taxpayer and Heartland Care of Hobbs, the parties agreed that "[n]either party is or is to be considered as, the agent of the other party for any purpose whatsoever. Neither party has authority to enter into contract or assume any obligations for the other party or make any warranties or representations on behalf of the other party." [Department Ex. C6].

36. Excluding the Medicaid receipts at issue in the protest, Taxpayer still had $269,788.84 in total receipts during the audit period subject to gross receipts tax. [Department Ex. E].

37. As of the date of hearing, Taxpayer owed $80,040.94 in tax, $16,023.65 in penalty, and $13,047.51 in interest for an outstanding total balance of $109,112.10. [Department Ex. D].

DISCUSSION

The question in this protest is two-fold. First, does Taxpayer receive payment from Medicaid for room and board services provided by nursing home for reimbursement to the nursing home, in a disclosed agency capacity? Secondly, assuming that Taxpayer was not a disclosed agent for purposes of receiving Medicaid payments for reimbursement, does that fact that the Medicaid regulations require Taxpayer to bill for the room and board services provided

by the nursing homes establish an agency relationship whereby those receipts are not subject to gross receipts tax?

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment of tax issued in this case is presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431. However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

Moreover, "[w]here 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.

Gross Receipts Tax and the Disclosed Agency Relationship Exception.

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). The term "gross receipts" is broadly defined to mean

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or *from performing services in New Mexico.*

NMSA 1978, Section 7-9-3.5 (A) (1) (2007) (emphasis added). "Receipts include payments received for one's own account and then expended to meet one's own responsibilities." *MPC LTD*, ¶14. There is no dispute in this case that Taxpayer was performing hospice services in New Mexico, for which Taxpayer received receipts both for its own account and to satisfy its responsibilities to the nursing homes.

There is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (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). *See also Comer v. State Tax Comm'n*, 1937-NMSC-032, ¶37, 41 N.M. 403 (gross receipts applies to "all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit[,] or advantage either direct or indirect.").

There is no dispute in this case that Taxpayer was engaged in the business of providing hospice services to nursing home residents. However, as part of its agency argument, Taxpayer suggested that since it was only performing hospice services (as permitted under its professional licensure) and not providing room and board services (prohibited under it license), it was not

receiving the room and board related receipts for performance of a service, and thus not subject to gross receipts tax. It is true that Taxpayer was contracting with the nursing homes to continue to provide room and board services while it only provided the hospice care services to the patients, but that does not alter the nature of the patient-Taxpayer transaction. The patients (or more often the patient's respective billing entity, whether that be private insurance, Medicaid, or Medicare) received a single bill for the combination of services provided. In other words, once the customer-patient was approved for hospice care, the patient's provider paid one bill to Taxpayer for all services rendered rather than a separate bill to Taxpayer for hospice services and another separate bill to the nursing homes for their residency at the nursing home. Even if Taxpayer only provided a provided a portion of the services and contracted out the remaining services, Taxpayer received payment for all services rendered and under Section 7-9-5, all of the receipts paid to Taxpayer under the transaction remained presumed subject to gross receipts tax, even if some of the receipts were simply used to satisfy Taxpayer's contractual obligations to the nursing home for the room and board services.

Turning to Taxpayer's main argument, Taxpayer claims that the receipts it received from Medicaid to reimburse the nursing homes for the room and board are not taxable because Taxpayer was an agent simply reimbursing the nursing homes for room and board. NMSA 1978, Section 7-9-3.5(A) (3) (f) states that excluded from gross receipts are "amounts received solely on behalf of another in a disclosed agency capacity." Under Regulation 3.2.1.19(C) (1) NMAC, "(a)n agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal."

Numerous New Mexico cases have addressed, within the context of gross receipts tax, whether an agency relationship exists and whether such relationship is sufficient to exclude

certain receipts derived from that relationship from the gross receipts tax. In 1971, in the case *Westland Corporation v. Commission of Revenue*, 1971-NMCA-083, ¶38, 83 N.M. 29, the New Mexico Court of Appeals remanded the matter because it did not find cause to impose gross receipts tax on the receipts of a person whom served as a "friendly agent" for the limited purpose of "receiving and paying out sums for debts or obligations owing" from another company.

In *Carlsberg Mgmt. Co. v. State*, 1993-NMCA-121, 116 N.M. 247, a case that Taxpayer cited for support in this protest, the New Mexico Court of Appeals again considered agency in the gross receipts tax context. The *Carlsberg* case involved a property management group that managed an apartment complex for the property's owner. *See id*., ¶3. The rent at the apartment complex was subsidized by a federal agency. *See id*. The *Carlsberg* taxpayer claimed that the federal agency mandated the form of the agreement in place with Taxpayer. *See id*. The agreement in Carlsberg referred to that taxpayer as "agent." *See Carlsberg*, ¶4. Under an agency theory, the *Carlsberg* taxpayer argued that money it received from the owner's reimbursing of the payment of employee wages were not subject to gross receipts tax. *See Carlsberg*, ¶5-11.

In *Carlsberg*, the New Mexico Court of Appeals indicated "that a principal's control over the agent is the key characteristic of an agency relationship." *See Carlsberg*, ¶12. Further, the New Mexico Court of Appeals noted that it was a factual determination whether there was an agency relationship between the principal and the agent. *See Carlsberg*, ¶16. The New Mexico Court of Appeals began that factual determination by looking at the terms of the agreement in place. *See id*. When the contract is unambiguous, the language of the contract determines the intent of the parties without further interpretation. *See Carlsberg*, ¶17. The New Mexico Court of Appeals found in *Carlsberg* that the contract created an unambiguous agent-principal relationship. *See id*.

While the *Carlsberg* Court of Appeals expressly rejected the Department's previous policy and regulation allowing for exemption of gross receipts only when there is a disclosed agency relationship, *see Carlsberg*, ¶19, that rejection is now ineffective in light of legislative action. *See MPC LTD.*, ¶24. At the time the Court of Appeals issued its decision in *Carlsberg*, the gross receipts tax definition contained no provision excluding from gross receipts tax receipts received solely on behalf of another in a disclosed agency capacity. Since that case, the Legislature has added the disclosed agency capacity language into Section 7-9-3.5 (A) (3) (f).

In 1995, in the case *Brim Healthcare, Inc. vs. State*, 1995-NMCA-055, 119 N.M. 818, the New Mexico Court of Appeals again had an opportunity to consider whether an agency relationship existed suffice to shield taxpayer's claimed reimbursements from the imposition of gross receipts tax. In rejecting that taxpayer's claim of an agency relationship, the Court of Appeals in *Brim*, ¶10, found numerous reasons why the facts in that case were distinguishable from *Carlsberg*. The most significant distinguishing factor was the lack of an indemnification clause in the agreement at issue in *Brim*. *See id*. But another distinction cited in *Brim* was that the contracts at issue expressly noted that the taxpayer was "not an agent… but rather is an independent contractor." Ultimately, the *Brim* Court of Appeals affirmed the hearing officer's conclusion that the money was not received as "reimbursement of expenses as an agent." *id*. at 18.

In 2003, the Court of Appeals in *MPC LTD.* again looked at agency relationships in the gross receipts context. In so doing, the Court of Appeals cautioned that *Carlsberg* and *Brim* were both decided before the Legislature's adoption of the "disclosed agency" language under Section 7-9-3.5(A) (3) (f), and therefore those cases only had limited instructive value. *See MPC LTD.* ¶34. Moreover, the Court of Appels in *MPC LTD*. also considered the Department's Regulation

3.2.1.19(C)(1) NMAC interpreting Section 7-9-3.5(A) (3) (f). The Court of Appeals in *MPC LTD.*, ¶36, construed Regulation 3.2.1.19(C)(1) NMAC to mean that:

> (1) the agent [taxpayer] has the authority to bind the principal… to an obligation… created by the agent [taxpayer], and (2) the beneficiary of that obligation… is informed by contract that he or she has a right to proceed against the principal… to enforce the obligation.

Additionally, the New Mexico Court of Appeals in *MPC LTD* noted that Regulation 3.2.1.19 (C) imposed additional bookkeeping requirements that must be met in order to exclude receipts received as part of a disclosed agency capacity from gross receipts. *See id*.

Applying the statute, the regulation, and the current case law discussed in *MPC LTD.*, ¶36, under the plain language of the contracts Taxpayer voluntarily entered, Taxpayer was not a disclosed agent of the nursing homes with the authority to bind the nursing homes to an obligation enforceable as to a third party. Like in *Brim* and unlike in *Carlsberg*, the contracts that Taxpayer entered into with the nursing home expressly disavowed any agency relationship between the parties. Both the nursing home and Taxpayer were noted as independent contractors. Additionally, although clearly tracking the financial transactions involving a patient, Medicaid, the nursing home, and Taxpayer, none of the transaction documented in Taxpayer Ex. #2 and #3 established that Taxpayer was an agent of the nursing homes, the patient, or Medicaid. Given the clear statutory requirement that only receipts received as part of a disclosed agency relationship are not gross receipts, an apparent or implied agency relationship is insufficient to shield the funds in this case from the gross receipts tax. Therefore, Taxpayer did not satisfy the requirements of Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C)(1) NMAC, as interpreted in *MPC LTD.*, ¶36.

Alternatively, Taxpayer argued that it was legally required to structure the transactions as was done in this case: once a patient was accepted into hospice, it was required to bill Medicaid

directly for the room and board services even though it was the nursing homes that provided that service and Taxpayer merely reimbursed the nursing homes for that room and board service. As support of this argument, Taxpayer cites Regulation 8.325.4.18 NMAC. Regulation 8.325.4.18 NMAC requires that the hospice service provider and the nursing facility enter into a cooperative agreement that hospice is responsible for hospice care and the nursing facility provides room and board. Under Regulation 8.325.4.18 NMAC, "[f]or Medicaid recipients living in a [nursing facility] who elect hospice care, Medicaid pays the hospice an additional per diem amount for the routine home care and continuous home care days for the [nursing facility] room and board services."

Taxpayer's argument is certainly noteworthy in the sense that Taxpayer believed regulatory requirements forced it to be the nursing home's agent for the purposes of billing Medicaid for the nursing home's room and board services and then reimbursing the nursing homes those payments. In other words, Taxpayer believed it was an agent as a matter of regulatory law[2]. But nothing under Regulation 8.325.4.18 NMAC actually required Taxpayer to enter into the contracts that disavowed the agency relationship with the respective nursing homes. Taxpayer was free to contract itself as an agent of the nursing homes for Medicaid billing purposes, but chose not to do so. In fact, Taxpayer acknowledged during testimony that it had some ability to negotiate its terms with the nursing homes and voluntarily entered an agreement where although it only received 95% of the Medicaid room and board rate from Medicaid, it agreed to pay the nursing homes 100% of the rate. If Taxpayer was merely an agent of the nursing homes for billing purposes, then one would expect Taxpayer to convey to the nursing home the exact amount it received from Medicaid rather than include an additional amount.

[2] The Department may want to consider Regulation 8.325.4.18 NMAC in revisiting its own Regulation 3.2.1.19(C)(1) NMAC, a regulation that may not adequately address the full gamut of potential agency relationships in complex transactions involving medical payments.

Given the strong contractual language rejecting agency in these transactions, at best Regulation 8.325.4.18 NMAC can be read to create apparent authority for Taxpayer to act as the nursing home's agent. As recently discussed in another decision and order issued addressing agency, *Santa Fe Tow and Emergency Lock & Key*, No. 15-21 (June 30, 2015), an apparent authority agency relationship is insufficient to shield a taxpayer from gross receipts tax because of the clear statutory and regulatory language requiring a disclosed agency relationship. Unless or until the Legislature changes Section 7-9-3.5(A) (3) (f), the agency relationship must be more than one of an apparent or implied authority in order to exclude the receipts from gross receipts tax.

Also in support of its claim that Regulation 8.325.4.18 NMAC created a required agency relationship, Taxpayer in closing argument cited Department Ruling 405-15-1, believing that the ruling stands for the proposition that anything required in order for the relevant operation of the facility are deductible. However, this is a significant overreading of that ruling, which focuses on a separate, narrow statutory deduction under Section 7-9-54.2 that has no general application under other provisions of the Gross Receipts and Compensating Tax Act or the question of a disclosed agency relationship.

In summary, Taxpayer did not establish it was a disclosed agent in this case because it had no authority to bind the nursing homes to a third party and the third party was not informed of its right to proceed against the principal to enforce the obligation. *MPC LTD.*, ¶36. Therefore, under NMSA 1978, Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C) (1) NMAC, Taxpayer was not a disclosed agent and the receipts it received for its own accounts and to satisfy its own obligations under its contracts with the nursing homes were subject to gross receipts tax. *See*

MPC LTD, ¶14.

Penalty and Interest.

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (statutory use of the word shall indicates mandatory requirement). The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer.

Under NMSA 1978, Section 7-1-69 (2007), when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word "shall", civil penalty must be added to the assessment. As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence."

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was a non-filer of gross receipts tax, which meets the legal definition of negligence

as defined under Regulation 3.1.11.10 NMAC. The Department's assessment of tax, penalty, and interest was appropriate. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set and held in compliance with NMSA 1978, Section 7-1-24.1 (A) (2013).

B. All of Taxpayer's receipts were presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002)

C. The contract between the nursing homes and Taxpayer provided that Taxpayer was not an agent of the nursing homes and prohibited Taxpayer from representing to third parties that Taxpayer was an agent of the nursing homes. Consequently, Taxpayer lacked authority to bind the nursing homes in contract with a third party and therefore was not a disclosed agent under NMSA 1978, Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C) (1) NMAC. *See MPC LTD.*, ¶36.

D. Since Taxpayer was not a disclosed agent under NMSA 1978, Section 7-9-3.5(A) (3) (f) and Regulation 3.2.1.19(C) (1) NMAC, all of Taxpayer's receipts from Medicaid were not excluded from gross receipts.

E. Taxpayer did not present sufficient evidence to prove it was entitled to an exemption or a deduction.

F. Under NMSA 1978, Section 7-1-67 (2007), Taxpayers are liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

G. Under NMSA 1978, Section 7-1-69 (2007), Taxpayers are liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC.

For the foregoing reasons, the Taxpayers' protest **IS DENIED**. As of the date of hearing, Taxpayer owed $80,040.94 in tax, $16,023.65 in penalty, and $13,047.51 in interest for an outstanding total balance of $109,112.10.

DATED: August 11, 2015.

Brian VanDenzen
Interim Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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 Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Officer may being preparing the record proper.