STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF HEALTHSOUTH REHABILITATION TO THE DEPARTMENT'S DENIALS OF REFUND ISSUED UNDER LETTER ID NOs. L0659599312 and L0488685616 and THE DEPARTMENT'S FAILURE TO GRANT OR DENY REFUND CLAIM

No. 16-16

DECISION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

A formal hearing on the above-referenced protest was scheduled to be held on April 12, 2016 at 9:00 a.m. before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") and HealthSouth Rehabilitation (Taxpayer) requested that the formal hearing be converted into a hearing on the Motion for Summary Judgment filed by Taxpayer. Attached to the Motion for Summary Judgment are: Affidavit of David Nevill, Chief Executive Officer of HealthSouth Rehabilitation Hospital of New Mexico and Affidavit of Joshua Killian. The Chief Hearing Officer, Brian Van Denzen, issued an Order on March 29, 2016 converting the formal hearing into a hearing on the Motion for Summary Judgment. The Department was represented by Julia Belles, Esq. and Taxpayer was represented by Timothy R. Van Valen, Esq. Also appearing at the hearing for Taxpayer were Josh Cohen, Josh Killian and Brian Browdy, Esq. from the Ryan, LLC professional tax consulting firm.

In addition to the pleadings and filings referred to in the Findings, the record contains the Notice of Telephonic Scheduling Conference, Scheduling Order and Notice of Administrative

Hearing, Entry of Appearance, Consolidation Order, Scheduling Order and Notice of Administrative Hearing, HealthSouth Rehabilitation Hospital of New Mexico's Preliminary Witness and Exhibit List, New Mexico Taxation and Revenue Department's Preliminary Witness and Preliminary Exhibit Lists, Second Notice of Telephonic Scheduling Conference, Amended Scheduling Order and Notice of Administrative Hearing, two Certificates of Service (12/15), Joint Stipulation Extending Deadline for Filing Stipulated Facts and Exhibits, Order Extending Deadline, Certificate of Service (1/14/16), Stipulation, Taxpayer's Motion for Summary Judgment[1] , Taxation and Revenue Department's Response to HealthSouth Rehabilitation Hospital of New Mexico's Motion for Summary Judgment, Joint Motion to Convert Formal Hearing Date on HealthSouth's Motion for Summary Judgment and Vacate Other Deadlines Subject to Being Reset at a Later Date, Order Converting Merits Hearing to Summary Judgment Hearing and Vacating Other Scheduling Order Deadlines, Notice of Reassignment of Hearing Officer for Administrative Hearing, Order Amending the Caption, Order Staying the Department's Failure to Grant or Deny Refund Claim, Order Requesting Additional Briefing and Taxpayer's Memorandum on Order Requesting Additional Briefing Dated May 4, 2016. The Hearing Officer took judicial notice of FYI-202 Gross Receipts Tax and Health Care Services, NEW (8/04) and FYI-202 Gross Receipts Tax and Health Care Services, (7/2014). The Department did not object to the Hearing Officer taking judicial notice of the Department's FYIs.

Based on the evidence in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

---

[1] With regard to the exhibits attached to the Motion for Summary Judgment, there was no "exhibit to Stipulation 13b" attached to the Motion. Instead there are attached two exhibits to Stipulation 12b. The correct exhibit to Stipulation 13b should be Letter Id No. L0488685616 which is part of the record.

FINDINGS OF FACT

Gross Receipts Refunds

Tax Period ending December 31, 2011

1. On December 30, 2014, Taxpayer applied for a refund of gross receipts tax in the amount of $262,391.13 for tax period ending December 31, 2011.

2. On March 17, 2015, the Department denied the refund in the amount of $262,391.00. **[Letter ID No. L06595599312].**

3. The Department denied the refund because Taxpayer was a hospital and failed to meet the definition of "health care provider." **[Letter ID No. L06595599312].**

4. Taxpayer filed its protest on April 23, 2015.

5. On May 6, 2015, the Department acknowledged the protest. **[Letter ID No. L0145784784].**

Tax Period ending December 31, 2014

6. On February 12, 2015, Taxpayer applied for a refund of gross receipts tax in the amount of $731,768.24 for tax period ending December 31, 2014.

7. On June 4, 2015, the Department denied the refund in the amount of $731,768.00. **[Letter ID No. L0488685616].**

8. The Department denied the refund because Taxpayer was a hospital and failed to meet the definition of "health care provider." **[Letter ID No. L0488685616].**

9. Taxpayer filed its protest on July 8, 2015.

10. On July 22, 2015, the Department acknowledged the protest. **[Letter ID No. L1180536880].**

Compensating Tax

Tax Period January 1, 2012 through December 31, 2014

11. On February 12, 2015, Taxpayer applied for a refund of compensating tax in the amount of $27,436.00 for tax period January 1, 2012 through December 31, 2014.

12. The Department neither denied nor granted the refund.

13. Taxpayer filed its protest on July 8, 2015.

14. On July 22, 2015, the Department acknowledged the protest. **[Letter ID No. 1072795696].**

15. During the hearing, Taxpayer requested that the compensating tax portion of the protest be stayed. The Department did not object and the stay was granted.

16. All three protests were consolidated on July 29, 2015.

Stipulations

17. The Department and Taxpayer entered into stipulations on February 2, 2016. **[Stipulation filed on 2/2/16].**

18. Taxpayer operated an inpatient rehabilitation hospital in Albuquerque, New Mexico ("hospital") and still does today. **[Stip. #3].** Taxpayer is referred to in the Stipulation as both a hospital and a facility.

19. At this hospital, Taxpayer provides specialized rehabilitative care to patients recovering from a wide variety of conditions, including strokes and other neurological disorders, brain and spinal cord injuries, and burn and arthritis. **[Stip. #4; Affidavit of Nevill #6].**

20. The hospital is staffed by, among others, physicians, physical therapists, occupational therapists, social workers, and speech-language pathologists. **[Stip. #5].**

21. Taxpayer receives payment for services performed by the foregoing professionals. **[Affidavit of Nevill #8].**

22. These payments are made to Taxpayer under contracts with persons that provide for the delivery of comprehensive basic health care services and medically necessary ancillary services by contracting with selected or participating health care providers. These persons provide comprehensive basic health care services to enrollees on a contract basis. **[Affidavit of Nevill #9].**

23. The Department has conceded the issue that Taxpayer is entitled to the deduction for receipts from payments by federal Medicare administrators and therefore is entitled to a refund of $144,040.00 for tax period ending December 31, 2011.[2] **[Stip. #9(a)].**

24. The Department has conceded the issue that Taxpayer is entitled to the deduction for receipts from payments by federal Medicare administrators and therefore is entitled to a refund of $448,693.00 for tax period ending December 31, 2014. **[Stip. #11(a); Affidavit of Killian #4].**

25. The amount of gross receipts tax at issue is $118,350.00 for tax period ending December 31, 2011. **[Stip. #9(b)].**

26. The amount of gross receipts tax at issue is $282,783.00 for tax period ending December 31, 2014. **[Stip. #11(b)].**

27. The parties stipulated at the hearing that the services for which Taxpayer wanted to take the deduction were separately stated. **[CD 2, 4-12-16, 12:16-13:50].**

28. The Department's failure to grant or deny the refund claim in the amount of

---

[2] The Hearing Officer utilizes the tax period stated on the refund denial.

$27,436.00 for tax period January 1, 2012 through December 31, 2014 is stayed.

DISCUSSION

The two issues presented are whether NMSA 1978, Section 7-9-93 (2007) prohibits certain taxpayers from using the deduction and whether the Department may promulgate regulations that restrict which taxpayers may use the deduction found in NMSA Section 7-9-93 (2007), even though the statutory deduction does not limit which taxpayers may use it.

Burden of Proof and Standard of Review

The courts have held that "where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶16, 111 N.M. 735, 740, 809 P.2d 649, 654.

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, 719, 242 P.3d 280, 286. 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, 334, 825 P.2d 1241, 1245.

Taxpayer's main argument is that the plain language of the Section 7-9-93 allows for **any** taxpayer to take the deduction. The Department argues that only "people" are entitled to take the deduction and the word "people" means that only a health care practitioner may take the

deduction. Further, the Department argues that regulations 3.2.241.13 (5/31/06) and 3.2.241.17 NMAC (5/31/06) exempt Taxpayer from using the deduction.

Section 7-9-93 Deduction

Section 7-9-93 provides that:

> A. Receipts **from payments by** a managed health care provider or health care insurer for commercial contract services or medicare part C services provided by a health care practitioner that are not otherwise deductible pursuant to another provision of the Gross Receipts and Compensating Tax Act may be deducted from gross receipts, provided that the services are within the scope of practice of the person providing the service. Receipts from fee-for-service payments by a health care insurer may not be deducted from gross receipts. The deduction provided by this section shall be separately stated by the taxpayer. (Emphasis added). NMSA 1978, §7-9-93(A) (2007).

Questions of statutory construction begin with the plain meaning rule. *See, Wood v. State Educ. Ret. Bd.,* 2011-NMCA-20, ¶12. In *Wood*, ¶12 (internal quotations and citations omitted), the Court of Appeals stated "that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." A statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See, Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

In this case, in reading the plain meaning of Section 7-9-93, there is **no** restriction on which group of taxpayers may take the deduction. In reading the plain meaning of Section

7-9-93, it does not restrict who may take the deduction. It only imposes requirements as where the receipts come from (managed health care provider or health care insurer) and if the services were performed by a health care practitioner. The health care practitioner must provide the services to a taxpayer "within the scope of practice of providing the service." §7-9-93(A). It is clear that the intended deduction is for receipts received from a managed health care provider for services performed by a health care practitioner, but there is no statutory restriction as to which taxpayer may use the deduction.

In deciding how the Department interprets its own statute, its publications are useful. The Department has promulgated a publication, *FYI-202 Gross Receipts Tax and Health Care Services,* which may be found on its website: http://www.tax.newmexico.gov/forms-publications.aspx. The publication interprets Section 7-9-93 and the Department's regulations 3.2.241.13 NMAC (5/31/06) and 3.2.241.17 NMAC (5/31/06) as permitting only health care providers to take the deduction pursuant to Section 7-9-93. It provides that, "a corporation, unincorporated business association, or other legal entity may take the deduction under Section 7-9-93 NMSA 1978 if it fulfills all the following conditions: "(4) (t)he corporation or unincorporated business association is not: (b) an HMO, hospital, nursing home or hospice; or (c) solely an outpatient facility licensed under the Public Health Act." **[*FYI-202 Gross Receipts Tax and Health Care Services, (7/2014) page 5*].** Thus, hospitals are excluded from taking the deduction.

However, after Section 7-9-3 was enacted by the Legislature in 2004, the Department issued *FYI-202 Gross Receipts Tax and Health Care Services, NEW (8/04).* In its first publication issued after Section 7-9-93 was enacted by the Legislature, the Department permitted

for-profit hospitals to use the deduction. **[*FYI-202 Gross Receipts Tax and Health Care Services, NEW (8/04), page 5, example 4*].** The example clearly permits for-profit hospitals to use the deduction.

It is unclear why the Department changed its interpretation regarding why hospitals could not take the deduction pursuant to Section 7-9-93. It is clear that in changing its position, it did not seek Legislative approval, but instead enacted regulations that conformed with its revised position. At the hearing, the Department did not present any explanation as to what the purpose was in limiting the deduction to taxpayers who are employed as health care providers or health care providers who owned the corporation. While the Department did not make this argument, the limitation on the deduction by the Department may be an attempt to limit the receipts that are deductible by limiting which type of corporation may take the deduction.

The Department's treatment of Taxpayer with respect to NMSA 1978, Section 7-9-77.1 (2007) which is a very similar deduction to Section 7-9-93 is an interesting contradiction. Section 7-9-77.1 does not limit which taxpayer may take the deduction. It only identifies which receipts may be deducted: payments made by the United States government for provision of medical and other health services and any person, which is defined broadly under NMSA 1978, Section 7-1-3(O) (2009). The Department has conceded that Taxpayer may use this deduction. **[Affidavit of Killian #4].** It is not clear why the Department conceded this issue if Section 7-9-77.1 does not specifically delineate which taxpayers may take the deduction.

The Department's argument, in essence, is that Section 7-9-93 is at best ambiguous. The Department argues that the deduction is only available between the health care provider providing and billing the services and the managed health care provider or health care insurer

remitting payment. The Department states in its Response that the legislative intent of Section 7-9-93 is to allow only "people" who are health care providers to use the deduction because the Department's own regulation restricts the use of the deduction to "people" (corporations may take the deduction according to the Department's regulation 3.2.241.13 NMAC). The Department concedes that the definition of "people" is not found within Section 7-9-93, but only within its own regulation. The court has held that "(w)here an ambiguity or doubt exists as to the meaning or applicability of a tax statute, it should be construed most strongly against the taxing authority and in favor of those taxed." *Hess Corp. v. N.M. Taxation*, 2011-NMCA-43, ¶ 12, 252 P.3d 751, 755. In addition, *Hess* in quoting 3A Norman J. Singer, *Sutherland Statutory Construction*, §66:2 at 19 (6th ed. 2003) states that "it is a well established rule not to extend their (statutes) provisions by ***implication*** beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out and where there is doubt they are construed most strongly against the government and in favor of the citizen." Thus, at best Section 7-9-93 is ambiguous and the Department should not extend by implication a requirement not specifically found within Section 7-9-93.

Regulations and Presumption of Correctness

The Department's argument, essentially, is that it has the authority to promulgate regulations that limit the deduction even though the statute does not place a limitation on which taxpayers may use it. Regulation 3.2.241.17 NMAC (5/31/06) narrows the definition of who may take the deduction because it states that even if the taxpayer is an organization owned exclusively by health care practitioners, but is licensed as a hospital, then it is not allowed to take the deduction. Regulation 3.2.241.13 NMAC (5/31/06) provides that:

> (a) corporation, unincorporated business association, or other legal entity may deduct, under Section 7-9-93 NMSA 1978, its receipts from managed health care providers … provided on its behalf by health care practitioners who own or are employed by the corporation, unincorporated business association or other legal entity.

But in any event, exempted from the type of taxpayer that may use the deduction is "an HMO, hospital, hospice, nursing home, an entity that is solely an outpatient facility or intermediate care facility…". 3.2.241.13(B) NMAC (5/31/06).

Regulation 3.2.214.13[3] allows some corporations to take the deduction so long as the corporation is not an HMO or hospital. Thus, both of the regulations restrict the availability of the deduction to small organizations, including corporations, who are owned by health care practitioners or where health care practitioners are employed, but in no event may a hospital take the deduction.

Generally speaking, a regulation is presumed to be a proper implementation of the provisions of the laws that are charged to the Department. NMSA 1978, Section 9-11-6.2(G) (2015). Thus, regulations 3.2.241.13 and 3.2.241.17 NMAC (5/31/06) are presumed to be correct; however, the Department may only promulgate regulations that interpret and exemplify the statutes to which they relate. NMSA 1978, Section 9-11-6.2(B)(1) (2015). The issue, then, is whether regulations 3.2.241.13 NMAC (5/31/06) and 3.2.241.17 NMAC (5/31/06) interpret or exemplify Section 7-9-93 or whether they place a limit outside of the plain meaning of Section 7-9-93.

---

[3] It should be noted that regulation 3.2.241.10 NMAC (10/16/06) defines a term "independent practice association" that is not found within Section 7-9-93. Section 7-9-93 refers to "***individual*** practice associations."

In deciding whether a regulation interprets or exemplifies a statute, a regulation may not abridge or otherwise limit the scope of the related statutory enactment. *See*, *Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139,¶¶ 10-12, 84 N.M. 303, 305-306. In *Rainbo Baking Co.*, the court held that the Commissioner of Revenue may not promulgate a regulation that would nullify a deduction authorized by the Legislature. In *Rainbo*, the Commissioner promulgated a regulation that required a nontaxable transaction certificate to be in the possession of the buyer at the time of the audit, which contradicted the statute which only required the buyer to have in its possession a nontaxable transaction certificate. A regulation may not add a requirement that the Legislature has not granted it.

In *Gonzales v. Educ. Retirement Bd.,* 1990-NMSC-024, 109 N.M. 592, 788 P.2d 348, the Court held that the Educational Retirement Board could not enact a regulation that was "unreasonable or irrelevant." In *Gonzales*, the Board, by regulation, required a member who was requesting an award of disability benefits to hold no property interest in a bus contract. The Court said that there was nothing within the statutory grant of authority to award disability benefits which authorized the Board to refuse to accept an application for disability if the applicant continued to have a property interest in a bus contract. The Court held that the Board did not have the "statutory power to create unreasonable or irrelevant requirements within the application process before it considers the application." *Gonzales* 109 N.M. at 594, 788 P.2d at 350. Thus, the Board's regulation was held to create an unreasonable or irrelevant requirement.

In conclusion, the Hearing Officer could find no grant of authority allowing the Department to limit the deduction found in Section 7-9-93 as set out in the Department's regulations. Taxpayer has rebutted the presumption that regulations 3.2.241.13 NMAC (5/31/06)

and 3.2.241.17 NMAC (5/31/06) interpret or exemplify Section 7-9-93; but instead the regulations nullify the deduction found within Section 7-9-93 available to Taxpayer. The Hearing Officer concludes that there is no authority in Section 7-9-93 to prohibit Taxpayer from using the deduction under Section 7-9-93. Taxpayer's refund claims are GRANTED.

CONCLUSIONS OF LAW

A. Taxpayer filed timely written protests to the Department's denial of claims for refund issued under Letter Id No. L0659599312 and L0488685616 and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set as required by NMSA 1978, Section 7-1-24.1(A) (2013).

C. Holding the June 12, 2015 telephonic scheduling hearing satisfied the 90-day hearing requirement found in NMSA 1978, Section 7-1B-8 (2015).

D. Pursuant to regulation 3.1.8.10(A) NMAC (8/30/01), it is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to a refund.

E. There is no genuine dispute as to any material fact.

F. Taxpayer met the requirements found within Section 7-9-93 and is entitled to use the deduction.

G. Section 7-9-93 does not prohibit Taxpayer, a for-profit hospital or facility, from taking the deduction against its gross receipts.

H. As a matter of law, regulations 3.2.241.13 NMAC (5/31/06) and 3.2.241.17 NMAC (5/31/06) limit the availability of the deduction found in Section 7-9-93 contrary to the statutory language found in Section 7-9-93.

I. The Department improperly denied Taxpayer's claims for refund for gross receipts tax in the amounts of $118,350.00 for tax period ending December 31, 2011 and $282,783.00 for tax period ending December 31, 2014.

J. The Department shall pay interest on the refunded amount in accordance with NMSA 1978, Section 7-1-68 (2011).

K. Because there is no genuine dispute as to any material fact and Taxpayer is entitled to judgment as a matter of law, summary judgment is appropriate in this matter. See *Romero v. Philip Morris, Inc*., Inc., 2010-NMSC-035, ¶7, 148 NM 713, 719, 242 P.3d 280, 286. For the foregoing reasons, the Taxpayer's protest **IS GRANTED.**

DATED: May 11, 2016

Monica Ontiveros

Monica Ontiveros
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 (2015), the Taxpayer has 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* NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final. A party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneously with the filing of the Notice with the Court of Appeals so that the Administrative Hearings Office may prepare the record proper.