STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
A & W RESTAURANTS, INC. **No. 16-49**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1323919824

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on September 30, 2015, before Brian VanDenzen, Chief Hearing Officer. Staff Attorney Peter Breen appeared representing the Taxation and Revenue Department ("Department"). Attorney Timothy R. Van Valen appeared representing A & W Restaurants, Inc. ("Taxpayer"). The matter came before the Chief Hearing Officer on the Taxpayer's Motion for Partial Summary Judgment filed on July 6, 2015 and the Department's Response thereto filed on August 3, 2015 in which the Department also moved for summary judgment.

The Taxpayer's motion presents a statement of facts which the Department does not dispute. Based on the undisputed facts, review of exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On September 27, 2013, the Department assessed Taxpayer $25,554.31 for Gross Receipts Tax and $3,795.02 in interest for a combined total of $29,349.33 for the periods from June 30, 2007 to December 31, 2011.

2. Taxpayer filed a timely protest of the assessment on December 23, 2013.

3. On January 17, 2014, the Department requested a hearing in this matter with the Administrative Hearings Office. A scheduling conference was set for March 11, 2014.

4. On March 12, 2014, a Scheduling Order and Notice of Administrative Hearing was entered which in addition to establishing various prehearing deadlines, set a hearing on the merits for June 15, 2015.

5. Upon Taxpayer's unopposed motion, the scheduling order entered on March 12, 2014 was vacated and a second telephonic status conference was set for May 1, 2015.

6. On May 19, 2015, a Second Scheduling Order and Notice of Motion Hearing was entered which established the deadlines for the Taxpayer and the Department to file motions for summary judgment, cross-motions, responses, and replies, and set a hearing on such motions for September 16, 2015. The deadline for motions was June 26, 2015.

7. On June 26, 2015, the Taxpayer and the Department stipulated to an Order Extending Summary Judgment Deadline to July 6, 2015.

8. Taxpayer filed its Motion for Partial Summary Judgment on July 6, 2015 (hereinafter "Taxpayer's Motion").

9. The Department filed a Response to Motion for Summary Judgment on August 3, 2015 which also contained a cross-motion requesting that summary judgment be granted in favor of the Department.

10. On September 16, 2015, a Continuance Order and Amended Notice of Motion Hearing was filed which continued the hearing on the motions for summary judgment to September 30, 2015, the date upon which the parties appeared through their counsel and presented oral arguments in the above-captioned matter.

<u>Undisputed Material Facts</u>

11. Taxpayer entered into contracts with New Mexico businesses entitled "Franchise Agreement." [Taxpayer's Motion, Page 2, ¶2]

12. Section 1 of the Franchise Agreement, entitled "Grant of License" grants a franchisee a limited license to use specific trademarks identified in an appendix to the Franchise Agreement, subject to the terms and conditions of the Franchise Agreement. [Taxpayer's Motion, Page 2, ¶3]

13. The authority to utilize the trademarks is limited exclusively to use in connection with sales from a single restaurant established under the Franchise Agreement. [Taxpayer's Motion, Page 2, ¶4]

14. Section 7 of the Franchise Agreement establishes the amounts that a franchisee is to pay Taxpayer. The Franchise Agreement provides for the following:

a. An initial license fee paid concurrent with the execution of the Agreement;

b. A grand opening promotional deposit;

c. A continuing royalty fee equal to 5% of "gross sales" as consideration for the limited trademark license; and

d. A continuing advertising fee equal to 4% of "gross sales" to be used for national advertising.

[Taxpayer's Motion, Page 3, ¶9]

15. The continuing royalty fee and the continuing advertising fee are paid on a monthly basis and are calculated based on the prior month's gross sales. [Taxpayer's Motion, Page 3, ¶10]

16. The Department audited Taxpayer for gross receipts tax for the periods from January 1, 2006 through December 31, 2011. [Taxpayer's Motion, Page 3, ¶11]

17. The Department concluded that the continuing royalty fee was subject to gross receipts tax because the payments by franchisees to Taxpayer represented receipts from "granting a right to use a franchise employed in New Mexico." [Taxpayer's Motion, Page 4, ¶15]

18. As a result of a statutory modification effective June 15, 2007, the Department limited its examination to royalty fees paid to Taxpayer after June 14, 2007. [Taxpayer's Motion, Page 4, ¶16]

DISCUSSION

The primary issue in this matter is whether the Department correctly determined that the continuing royalty fee paid by franchisees to Taxpayer constituted "gross receipts" subjecting it to the New Mexico Gross Receipts and Compensating Tax Act. Taxpayer asserts that the continuing royalty fee is consideration for Taxpayer's grant of a limited license to utilize its trademarks. It claims that the fee is therefore exempt from gross receipts tax under the definition of "property" as provided in NMSA 1978, Section 7-9-3 (J) (2007). In contrast, the Department asserts that the royalty fees paid are taxable as gross receipts because they are receipts from granting the right to use a franchise employed in New Mexico, subject to gross receipts tax under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), and that the bundle of rights that is part of a franchise includes the grant of a trademark.

<u>Burden of Proof and Standard of Review.</u>

Pursuant to NMSA 1978, Section 7-1-17 (C), the assessment issued in this case is presumed correct. The Taxpayer has the burden to overcome the presumption of correctness that attached to the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

Unless otherwise specified, for the purpose of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, § 7-1-3 (X). 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).

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 N.M. 713. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez,* 1986-NMSC-066, ¶10-11, 104 N.M. 664. 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. Even if the nonmoving party does not file their own motion for summary judgment, summary judgment may be granted to the nonmoving party if there is no genuine dispute of fact, they are entitled to judgment as a matter of law, and the moving party was generally on notice of the nonmoving party's counter-claim in its response to the moving party's summary judgment pleading. *See Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479. Despite the fact that Taxpayer only filed a motion for partial judgment rather than full summary judgment and the Department only filed a cross-claim as part of its response against Taxpayer's motion for partial summary judgment, both parties agreed on the record during the motion hearing that this case was ripe for a final decision and order on full summary judgment because there was no genuine dispute of fact and resolution of the protest turned on a question of application of law.

Principals of Statutory Construction.

As will be discussed in more detail, resolving the issue at the protest involves statutory construction of the definition and application of the terms "franchise" and "property" as used in the Gross Receipts and Compensating Tax Act. At its simplest level, the Department argues that Taxpayer must pay gross receipts tax on the granting of all rights to a New Mexico franchisee under the Franchise Agreement given that the base definition of gross receipts includes receipts from sales of a franchise employed in New Mexico while Taxpayer argues that trademark rights must be unbundled from the Franchise Agreement because trademarks are excluded from the definition of property subject to gross receipts tax.

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. "Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the statutes' application absurd, unreasonable, or unjust." *City of*

Eunice v. State Taxation & Revenue Dep't, 2014-NMCA-085, ¶8 (internal citations and quotations emitted). It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read in harmony with the provisions of the remaining statute or statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14. *See also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law.").

Gross Receipts Tax, Franchise Agreements, and Franchise Royalties

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). Under NMSA 1978, Section 7-9-3.5 (A) (1) (2007), 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.

There are numerous sub-clauses within this statutory definition of gross receipts. For instance, the sale of a service is listed in its own clause, while the sale of property is listed in another clause. As will be discussed in more detail, receipts related to licensing a franchise in New Mexico are listed in their own clause while receipts from selling, leasing, or licensing property are listed in separate clauses. Indeed, the entire franchise clause was added to the gross receipts definition by the Legislature in 2007, after the New Mexico Supreme Court's decision in *Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212.

"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). Since Taxpayer is an entity engaged in the business of granting a right to use a franchise, all of Taxpayer's receipts from granting the right to use a franchise employed in New Mexico are presumed subject to gross receipts tax under Section 7-9-5.

Nevertheless, despite this general presumption of taxability of an entity engaged in the business of selling a license to use a franchise in New Mexico, Taxpayer argues that gross receipts tax are not applicable to receipts associated with the sale of a trademark in light of the definition of property under the Gross Receipts and Compensating Tax Act. In pertinent part and again as a result of the Legislature's 2007 post-*Sonic* amendments, the Legislature defines "property" under NMSA 1978, Section 7-9-3 (J) (2007), as "real property, tangible personal property, licenses other than the licenses of copyrights, trademarks or patents and franchises." Taxpayer asserts that the receipts from fees received in consideration for granting a trademark license to a franchisee come within the statutory exception for "licenses other than the licenses of copyrights, trademarks or patents" in Section 7-9-3 (J). Consequently, Taxpayer avers that the Department must unbundle the various components of its Franchise Agreement, consider the selling of a license for the use of Taxpayer's trademark a separate, stand-alone transaction distinct from other components of the Franchise Agreement, and thus not impose gross receipts tax on that unbundled portion of the Franchise Agreement. The Department, in contrast, asserts that the sale of the license to use Taxpayer's trademark is but one component of a bundled transaction for granting of a right to use a franchise employed in New Mexico, which is subject to gross receipts tax under the franchise clause in Section 7-9-3.5 (A) (1).

As it relates to the Gross Receipts and Compensating Tax Act, the Legislature has not defined the term "franchise." In the absence of a specific definition of "franchise," rules of statutory construction require that the term "franchise" be given its plain meaning. Referring to Black's Law Dictionary (10th Edition, 2014), the term "franchise" is defined "[t]o grant (to another) the sole right of engaging in a certain business or in a business using a particular trademark." Moreover, the term "franchise" has been the subject of discussion before the New Mexico Court of Appeals. In *Sonic Industs., Inc. v. State*, 2000-NMCA-087, ¶23, 129 N.M. 657, *rev'd on other grounds in Sonic Indus. v. State*, 2006-NMSC-038, 140 N.M. 212, the Court of Appeals set forth what it concluded to be the traditional definition of a franchise:

> In its simplest terms a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, the franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchiser and the franchiser undertakes to assist the franchisee through advertising, promotion and other advisory services.

(internal citations omitted).

The Department has also promulgated a regulation defining "franchise." Regulation 3.2.1.7 (E) NMAC states that

> (1) A "franchise" is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor's trademark or trade name in the operation of the franchisee's business.
>
> (2) Example: Y, a pie company of Cambridge, Massachusetts, grants to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a "one-time" payment or for a continuing percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

Under NMSA 1978, Section 9-11-6.2 (G), a Department regulation is presumed to be a proper implementation of the provisions of the laws under the Department's purview. *See also Chevron U.S.A., Inc.*, 2006-NMCA-50, ¶16.

The Department's regulatory definition of that term under Regulation 3.2.1.7 (E) NMAC is generally consistent with the Black's Law Dictionary definition of the term "franchise" and the Court of Appeals' conception of that term in *Sonic Industs*. The commonality of these three conceptions of the term "franchise" establish that the plain meaning of that term as used in Section 7-9-3.5 (A) (1) includes a franchisees' use of the franchisors' trademark. There is simply nothing to indicate that the Legislature has intended an interpretation of the term "franchise" that materially differs from the traditional definition of the term, which includes the granting of a license to use a trademark as an element of granting a franchise.

Presumably aware of the Department's regulation defining "franchise" at Regulation 3.2.1.7 (E) NMAC and of the Court of Appeals' conception in *Sonic Industs,* a reasonable inference may also be drawn from the Legislature's inaction in response to this administrative interpretation that the definition promulgated by the Department is consistent with its intent for the term "franchise". *Sonic* at ¶25, *citing State ex rel. Stratton v. Roswell Indep. Schs,* 111 N.M. 495, 503.

This plain meaning reading of the term "franchise" is also consistent with the Legislature's 2007 amendments to the Gross Receipts and Compensating Tax Act made after the Supreme Court's decision in *Sonic Indus. v. State,* 2006-NMSC-038, 140 N.M. 212. In *Sonic Indus.*, the New Mexico Supreme Court found that receipts under a franchise agreement were receipts from selling property outside of New Mexico, not subject to gross receipts tax under the statutory definitions applicable in 2006. *See Sonic Indus.* 2006-NMSC-038, ¶14. However, in an apparent effort to subject receipts of licensing a franchise employed in New Mexico to gross receipts tax despite the *Sonic Indus.* holding, the Legislature expressly added the franchise clause to the definition of gross receipts tax under Section 7-9-3.5(A)(1). While Taxpayer argues that the 2007 definitional change to "property" meant that the Legislature did not intend to extend gross receipts tax to the license of the trademark under a franchise agreement, this Legislative action of expressly adding the distinct franchise clause to Section 7-9-3.5 (A)(1) separate from the property clauses of that section clearly indicates its general intent to subject the licensing fees of a franchise employed in New Mexico to gross receipts tax.

The remaining question is whether the Department erred in refusing to unbundle, for gross receipts purposes, the grant of a license to use Taxpayer's trademarks from other elements of the Franchise Agreement. The Court of Appeals squarely addressed this unbundling issue in *Sonic*

Industs., Inc. v. State, 2000-NMCA-087, 129 N.M. 657. However, in overruling the Court of Appeals on other grounds in *Sonic Industs., Inc. v. State*, 2006-NMSC-038, 141 P.3d 1266, the Supreme Court determined it was unnecessary to address the issue of whether a franchisor's licensing of its trademarks to New Mexico franchisees were bundled elements of a taxable New Mexico grant of a franchise. Consequently, the Supreme Court in *Sonic*, by neither affirming nor overruling the New Mexico Court of Appeals on this specific question, the legal analysis of this particular issue by the Court of Appeals remains undisturbed. *See Sangre De Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M. 343, 348 (1972) (the general rule is that a case is not authority for a proposition it has not considered).

In *Sonic Industs., Inc. v. State*, 2000-NMCA-087, 129 N.M. 657, the Court of Appeals found that the rights created by the subject franchise agreement consisted of a bundle of intangible, intellectual property rights typically associated with franchises together with support services. *Id.* at ¶28. The Court of Appeals found that the rights and services transferred pursuant to the agreement subject of that case were consistent with the traditional definition of a franchise.

In the protest at hand, Taxpayer is a business engaged in granting franchises employed in New Mexico. According to the Franchise Agreement, it "has the exclusive right to operate and grant licenses to others to operate, under the trademarks set forth in Appendix I (the "Trademarks"), a system of restaurants that are uniform in their basic appearance and operation (the "A&W Restaurants")[.]" *See* Taxpayer's Motion, Exhibit B, ¶A.

In addition to use of trademarks, the Franchise Agreement addresses numerous topics to which a franchisee is required to adhere, including: the Taxpayer's systems and procedures; the purchases of equipment and supplies including food, paper products, furnishings, and fixtures; adherence to building construction and maintenance standards; training; advertising and promotional programs intended to enhance the collective success of all franchisees; record keeping and inspection of the restaurant.

This arrangement clearly comes within the definition of "franchise" and is similar to the agreement in *Sonic* in which the Court of Appeals determined that "a franchise is to be treated as a compound or 'bundled' form of property, which typically includes a license to use franchiser's trademark[.]" *Id.* at ¶28. In that case, the Court of Appeals rejected claims that the Department was required to break a franchise into its various components in order to determine the taxability of franchise fees. *Id*. at ¶26. The Court of Appeals reasoning applies in this case as well. A "franchise" is to be treated as a compound or "bundled" form of property which the Department is not required to separate into various components to determine taxability of franchise fees.

In reviewing the entirety of the Franchise Agreement in this case, the effect of unbundling the grant of a trademark from the remainder of the agreement is inconsistent with the purpose of the Franchise Agreement. For example, the Franchise Agreement declares that the failure to pay any royalty, including the continuing royalty fee at issue in this protest, is a breach and default which if not cured, will result in the termination of the Franchise Agreement. *See* Taxpayer's Motion, Exhibit B, Sec. 17.1. If Taxpayer's intended that the trademark license be unbundled from the rest of the agreement, as it argued at the hearing on this matter, then the failure to pay the royalty fee would only result in the revocation of the license to use the unbundled trademark while all other components of the remaining bundle under the Franchise Agreement would remain undisturbed, largely to the benefit of the defaulting franchisee. The result would be a restaurant operating as a franchise in every way, but devoid of all trademarks of the franchisor and without having to pay for one of the essential components of the agreements. This does not seem consistent with Taxpayer-franchisor's intent in entering into the agreement.

Taxpayer has engaged in the business of selling franchises employed in New Mexico. An essential component of the franchise is a license to utilize the trademarks of the franchiser. The trademarks provide a mechanism by which patrons will immediately recognize the service and goods and associate those services and goods with the goodwill accompanying that trademark. As stated in *N.M. Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 2012-NMCA-063, ¶29:

> When a company acquires trademarks and goodwill, the essence of what it obtains is the right to inform the public that it is in possession of the special experience and skill symbolized by the name of the original concern, and of the sole authority to market its products. The value of what it obtains is tied to the underlying business that generates the goodwill associated with the trademarks. If there is no business and no good will, a trademark symbolizes nothing. Goodwill is bound to the business with which it is associated, and can no more be separated from a business than reputation from a person.

Contrast this with an alternative scenario which may be a better example of the intended application of the exclusion for “licenses other than the licenses of copyrights, trademarks or patents” from the definition of property in Section 7-9-3 (J) (2007). If Taxpayer sold a trademark license to a manufacturer of t-shirts which then imprinted the trademark on a shirt which it sold, then use of that trademark is not being conveyed as part of a franchise, but as a stand-alone transaction. Under Section 7-9-3 (J), the exclusion for licenses of the trademark would apply and the Taxpayer receipts from selling a trademark license would not be taxable as gross receipts because they are specifically excluded from the definition of “property.” There is further support for this interpretation of Section 7-9-3 (J) (2007) when considering that this application harmonizes with NMSA 1978, Section 7-9-47 (1994), which provides a deduction for receipts from selling tangible personal property or licenses when the buyer resells 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.

In summary, returning to Section 7-9-3.5 (A) (1), there are separate clauses for the sale of a service, the sale of property, and the sale of a license to use a franchise employed in New Mexico. The application of the law described in the manner above is most consistent with the Legislature's use of the separate clauses contained in Section 7-9-3.5 (A) (1) of the sale of property and the sale of a license to a franchise employed in New Mexico. While the definition of "property" under Section 7-9-3 (J) certainly modifies that word for the sale of property clause under Section 7-9-3.5 (A) (1), it does not modify the clause addressing franchise, as a trademark is an essential element of the bundle of items that constitute a franchise. As the example above illustrates, the stand-alone sale of a trademark does not constitute the sale of property under Section 7-9-3.5 (A) (1) in light of the exclusion contained in Section 7-9-3 (J). But the sale of a license to use a franchise necessarily includes the sale of the trademark, and thus the receipts from the license of the trademark under the franchise agreement are subject to the gross receipts tax under Section 7-9-3.5 (A) (1)'s franchise clause. This interpretation is not only consistent with the plain meaning of the term "franchise," but harmonizes the various provisions of the Gross Receipts and Compensating Tax Act, another favored approach of statutory construction. Therefore, without any genuine dispute of material fact, the Department is entitled to summary judgment as a matter of statutory construction and application of law.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's assessment and jurisdiction lies over the parties and the subject matter of this protest.

B. Because, as the parties agreed during the summary judgment motion hearing, there is no genuine dispute as to any material fact, summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

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

D. Under NMSA 1978, Sec. 7-9-3.5 (2007), Taxpayer is obligated to pay gross receipts on the total amount of money or value of other consideration received from granting a right to use a franchise employed in New Mexico, including trademarks associated with the franchise.

E. A franchise is to be treated as a compound or bundled form of property, which includes a license to use Taxpayer's trademarks. *Sonic Industs., Inc. v. State*, 2000-NMCA-087, 129 N.M. 657 (overruled on other grounds); Regulation 3.2.1.7 E NMAC.

F. The Department is not required to unbundle a franchise agreement for the purposes of assessing gross receipt taxes.

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

DATED: October 17, 2016

____

Brian VanDenzen
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 (2015), 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 Office may being preparing the record proper.