STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
ALL MEDICAL PERSONNEL INC. **No. 17-35**
TO ASSESSMENT
ISSUED UNDER LETTER ID NO. L0322274864

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on April 26, 2017 before Brian VanDenzen, Esq., Chief Hearing Officer of the Administrative Hearings Office, in Santa Fe. At the hearing, Stephen Walwrath, CPA, appeared, representing All Medical Personnel, Inc. ("Taxpayer"), along with testifying witness Taxpayer Chief Financial Officer Michael Siegel. Staff Attorney Melinda Wolinsky appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Department auditor Lan Ngo appeared as a witness for the Department. Taxpayer Exhibits #1-8 and Department Exhibits B, D, and E were admitted into the record, as described in the detailed exhibit logs included in the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On May 5, 2016, under letter id. no. L0322274864, the Department assessed Taxpayer $80,978.75 in gross receipts tax, $16,009.31 in penalty, and $8,794.76 in interest for the combined reporting system reporting periods between March 31, 2009 and September 30, 2015.

2. On July 27, 2016, Taxpayer protested the assessment through Mr. Stephen M. Walrath, CPA. The Department received this protest letter on July 29, 2016.

3. On September 19, 2016, the Department filed a request for hearing with the New Mexico Administrative Hearings Office, an agency independent of the Department since enactment of the 2015 Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 *et seq*.

4. On September 20, 2016, the Administrative Hearings Office issued Notice of Telephonic Scheduling Conference, setting this matter for a scheduling hearing on October 21, 2016.

5. On September 28, 2016, Taxpayer moved to continue the October 21, 2016, scheduling hearing, which the Department did not oppose.

6. On September 30, 2016, the Administrative Hearings Office sent out an Amended Notice of Telephonic Scheduling conference, moving the scheduling hearing from October 21, 2016 to October 18, 2016.

7. On October 18, 2016, a Scheduling Hearing in the above-captioned matter in fact occurred. The parties did not object that conducting that hearing within 90-days met the statutory 90-day hearing requirement while allowing meaningful time to satisfy the statutory discovery, motion, and fair hearing requirements under NMSA 1978, Section 7-1B-6 (D) (2015).

8. On October 19, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting (among numerous other deadlines) the merits hearing for April 26 and 27, 2017.

9. Both Taxpayer and the Department filed their preliminary witness and exhibit lists on December 5, 2016.

10. On April 11, 2017, Taxpayer submitted an email reporting that it had not received a response from the Department about preparing the Joint Prehearing Statement required under the Scheduling Order. Taxpayer attached its protest letter and its filed preliminary exhibit and witness list as its portion of the Joint Prehearing Statement.

11. On April 12, 2017, the Department filed its Prehearing Statement.

12. The merits hearing occurred as scheduled on April 26, 2017.

13. Taxpayer is a staffing agency that specializes in finding and recruiting medical professionals and then facilitates the staffing and payment of these professionals at large, centralized healthcare companies that have broad, decentralized health care facilities.

14. Taxpayer has three offices: one in Tampa, Florida that handles payroll, its headquarters in Hollywood, Florida, and another in Dallas, Texas focused on recruiting.

15. During the relevant period, Taxpayer had no offices, no inventory, and no salespeople in New Mexico.

16. Taxpayer could not rule out that one of its recruiters may have come into New Mexico a few times at some point during the relevant period as part their recruiting efforts for employees and facilities.

17. During the relevant period, Taxpayer placed approximately 100 employees in New Mexico health care facilities.

18. Taxpayer had no written contracts in place with these approximately 100 employees.

19. 97% of Taxpayer's placement of employees in New Mexico were for Blue Cross Blue Shield of New Mexico healthcare facilities.

20. Taxpayer entered into a service agreement with HCSC, which includes Blue Cross and Blue Shield of New Mexico, to provide professional services. [Taxpayer Ex. #8].

21. The service agreement established that Taxpayer, including its employees and subcontractors, was an independent contractor not entitled to any benefits from HCSC. [Taxpayer Ex. #8.6].

22. Under the service agreement, Taxpayer was solely responsible for employment/contractual issues, payment of wages and benefits, and for the collection and remittance of required withholding taxes or other taxes concerning its own employees and/or subcontractors performing the contracted professional services. [Taxpayer Ex. #8.6].

23. Under the service agreement, Taxpayer was required to maintain adequate Worker's Compensation insurance coverage for all individuals performing the contracted professional services. [Taxpayer Ex. #8.6-7].

24. Under the service agreement, Taxpayer and HCSC were not to be construed to be agents or principals of the other, partners, joint ventures, or members, and neither had the authority to bind the other party. [Taxpayer Ex. #8.7].

25. Under the service agreement, HCSC was required to pay Taxpayer for the employee services rather than the contingent worker directly. [Taxpayer Ex. #8.7].

26. The service agreement indicates that Taxpayer provides the employees who actually performed the services. [Taxpayer Ex. #8.7].

27. The service agreement did not mention, establish, or otherwise reference that Taxpayer and HCSC had a joint employer relationship.

28. Taxpayer presented no evidence that either the Department of Labor or the IRS has determined that it was a joint employer with the New Mexico facilities.

29. Taxpayer did not establish it was registered employee leasing agency in New Mexico.

30. Taxpayer services were almost exclusively secured through a vendor management system ("VMS'), an electronic and web-based application, managed by a company in Illinois called Fieldglass, a division of SAP, a large German multinational corporation.

31. The healthcare facility in New Mexico contracts with the VMS to provide an electronic tool that allows staffing companies to compete for staffing a posted position on VMS.

32. The VMS contracts with staffing companies, including Taxpayer, to provide potential candidates to fill positions posted by the facilities that also contract with the VMS.

33. A manager needing a staffing position at a facility would post an order for a contingent worker on VMS. [Taxpayer Ex. #2].

34. Upon receipt of the request from the facility, VMS sends out an electronic message to all contracted staffing agencies about the facility's need for a contingent worker. [Taxpayer Ex. #2].

35. Taxpayer receives the request and immediately searches its own database of employees to determine if it has an employee that matches the criteria for the job. If Taxpayer does not have a qualified candidate, it may post its own advertisement for the position and recruit an employee that matches the criteria of the facility's job posting. Taxpayer will then contact the potential candidates to gauge interest in the position. [Taxpayer Ex. #2].

36. Taxpayer will then submit a list of candidates and their credentials into the VMS. [Taxpayer Ex. #2].

37. The facility then reviews the submitted candidates from all the staffing firms that provided a response in VMS. The facility then selects who to interview and who to hire for the position. [Taxpayer Ex. #2].

38. Each week, the selected worker enters their time into VMS. [Taxpayer Ex. #2].

39. The facility supervisor than reviews the posted time for approval in VMS. [Taxpayer Ex. #2].

40. Upon approval of the time, Taxpayer paid the contingent worker from its own funds via direct deposit without waiting for payment from the facility. [Taxpayer Ex. #2].

41. There is no evidence that the facility prepaid an amount towards wages, benefits, or taxes that Taxpayer could draw from in paying its employee's wages.

42. Taxpayer does not bill the facility for the wages paid; instead, the VMS adds up the total hours and bills the facility directly, with the VMS then providing Taxpayer payment upon receipt of the funds from the facility. [Taxpayer Ex. #2].

43. Taxpayer provides a contingent worker to the facility, but the facility directs and controls the work performed by the worker, decides whether to retain or terminate the worker's work at the facility, and determines the length of the work.

44. The New Mexico facility provides the working facility for the contingent workers.

45. The New Mexico facility determines the level of instruction and the amount of training for the contingent worker.

46. Taxpayer's contingent workers are integrated into the work of the New Mexico healthcare facility.

47. The New Mexico facility sets the hours for the work and determines whether it is a full-time or part-time position.

48. Taxpayer determines the method and frequency of payment of the contingent worker.

49. The New Mexico healthcare facility provides all the tools of the job for the contingent worker.

50. Taxpayer's contingent workers may work for multiple companies.

51. The New Mexico healthcare facility can remove a contingent worker from its facility by discussing the matter with Taxpayer or dismissing them from work immediately if they do something inappropriate while at the facility.

52. Taxpayer may retain the employee if they are a good employee even after the facility requests that the employee in question not return to work at the facility.

53. Taxpayer does not lease employees.

54. Taxpayer is not a medical provider in the sense that it does not bill for providing medical service; instead Taxpayer provides employees to facilities that perform and bill for medical services.

55. Taxpayer issues the paycheck directly to its employee placed at a New Mexico facility.

56. Taxpayer issues the checks before the facility has even provided payment through the VMS.

57. If the facility fails to pay the VMS or if the VMS does not pay Taxpayer for any reason, Taxpayer is out the amount of money it had already paid the employees.

58. Taxpayer provides W-2s to its employees staffed in New Mexico.

59. Taxpayer pays worker's compensation for the employees it staffs at the New Mexico facility.

60. Taxpayer pays FICA on the wages earned by its employees staffed in New Mexico.

61. Taxpayer pays unemployment insurance for the employees it staffs at the New Mexico facility.

62. Taxpayer profits on the spread or markup between the actual cost of salary, benefits, and payroll costs paid to or on behalf of its employees staffed in New Mexico and the total hourly rate amount the New Mexico facility pays Taxpayer.

63. After 13-weeks, the employee that Taxpayer places with the New Mexico facility can be hired directly onboard to the facility without penalty or payment to Taxpayer.

64. The Department selected Taxpayer for audit, conducted by Department Auditor Lan Ngo. [Dep. Ex. D].

65. The audit covered periods from January 1, 2010 through September 30, 2015. [Dep. Ex. D.AN1.1].

66. As part of the audit, Auditor Ngo sent Taxpayer a questionnaire about its activity in New Mexico. On that questionnaire, Taxpayer acknowledged it performed a service in New Mexico by providing temporary employees who work for Taxpayer's five clients in New Mexico. [Dept. Ex. E].

67. Using the Department's information sharing agreement with the IRS, Auditor Ngo researched the W-2 forms issued by Taxpayer to employees located in New Mexico during the relevant period.

68. Because Taxpayer did not provide detailed records as part of the audit, the Department had to use alternative methods to determine Taxpayer's potential tax liabilities.

69. Using these alternative methods, which included referring to the W-2 information from the IRS, Auditor Ngo determined that Taxpayer had underreported its tax liability on its filed returns by more than 25%.

70. Auditor Ngo determined that Taxpayer was liable for outstanding gross receipts tax, penalty, and interest totaling $105,782.82 from reporting periods January 1, 2010 through September 30, 2015. [Dept. Ex. D, page C5.42 through C5.43].

71. Auditor Ngo did not prepare the formal Notice of Assessment in this case.

72. Auditor Ngo had no information as to why the assessment indicated the reporting periods from March 31, 2009 through September 30, 2015, but confirmed that the assessed amount matched the total $105,782.82 of liability she found in reporting periods from January 1, 2010 through September 30, 2015.

DISCUSSION

There are four major issues in this protest. First, Taxpayer argues that it has a joint employer relationship with HCSC for the contingent workers it provides to HCSC at New Mexico facilities, and therefore Taxpayer is not liable for the assessed tax. Second, Taxpayer argued that since it has no physical presence, office, or staff in New Mexico, it lacks nexus with New Mexico and is not subject to state taxation. Third, Taxpayer argues that under Public Law 86-272, as codified under 15 USCS § 381, Taxpayer's asserted *de minimus* activities in New Mexico, which it argues do not even amount to mere solicitation of sales, are not subject to New Mexico taxation. Finally, Taxpayer argued that even if found potentially subject to New Mexico's taxing authority, its joint employer activities in New Mexico with the healthcare service provider HCSC entitled it to claim a healthcare services deduction. Before addressing the issues that Taxpayer raised in the protest letter and at hearing, the record requires consideration of two other jurisdictional issues in this matter involving the scope of Taxpayer's protest letter and the statute of limitations on a Department assessment.

Presumption of Correctness.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. 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). Accordingly, it is Taxpayer's burden to present some countervailing

evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. “Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd.*, 2003 NMCA 21, ¶13.

Jurisdictional Matter.

Whether raised or not, it is well established that jurisdictional matters are always germane to the tribunal. Two such matters, which were discussed and addressed by both parties on the record, require further discussion. During the hearing, there was discussion of two other assessments of tax other than the May 5, 2016 assessment of $80,978.75 in gross receipts tax, $16,009.31 in penalty, and $8,794.76 in interest for the combined reporting system reporting periods between March 31, 2009 and September 30, 2015. Taxpayer expressed some desire on the record to also challenge the assessment of Corporate Income Tax from the December 31, 2009 through December 31, 2015 reporting periods and the PTW Remitter assessment from December 31, 2001 through December 31, 2015,

NMSA 1978, Section 7-1-24 (B) (2015) lists the substantive requirements of a protest:

> …Every protest shall identify the taxpayer and the tax credit, rebate, property or provision of the Tax Administration Act involved and state the grounds for the taxpayer's protest and the affirmative relief requested. The statement of grounds for protest shall specify individual grounds upon which the protest is based and a summary statement of the evidence, if any, expected to be produced supporting each ground asserted; provided that the taxpayer may supplement the statement at any time prior to ten days before the hearing conducted on the protest pursuant to the

> provisions of the Administrative Hearings Office Act or, if a scheduling order has been issued, in accordance with the scheduling order…

Two regulations address what is substantively required of a protest. To be an effective protest under Department Regulation 3.1.7.10 NMAC (01/15/01), the purported protest must be in writing, filed with the secretary, identify the taxpayer and taxes at issue, state the grounds of protest, and state the affirmative relief requested. Under Regulation 3.1.7.10 (C) NMAC (01/15/01), while a document not complying with the statute is not considered a protest, the Secretary may require more specificity from a taxpayer in those instances where a protest letter lacks sufficient grounds for protest. The second regulation addressing the substantive requirements of a protest is Regulation 3.1.7.12 NMAC (08/30/01). Regulation 3.1.7.12 (A) NMAC (08/30/01) requires a statement of the grounds of protest, an explanation of the law and facts supporting the protest, a legal basis to challenge the assessment, and a summary of the evidence expected to be produced. Further, Regulation 3.1.7.12 (C) NMAC (08/30/01) provides an example of an appropriate protest.

Even reading Taxpayer's protest letter broadly, Taxpayer simply did not challenge the corporate income tax and PTW Remitter assessments in this case. Taxpayer's protest letter only listed its CRS number, which corresponded only to the assessment of gross receipts tax. Taxpayer's protest letter only listed the reporting periods identified on the gross receipt tax assessment and only indicated in the protest letter that the tax provision at issue was the gross receipts tax. Taxpayer did not identify the letter identification numbers of the other two assessments and did not list those other tax programs at issue, despite the requirement to list the relevant provision of the Tax Administration Act at issue under Section 7-1-24 (B).

Taxpayer had 90-days to protest the Department's assessments by filing a written protest with the Secretary. *See* NMSA 1978, Section 7-1-24 (2015). In pertinent part under Section 7-1-

24 (C) (emphasis added), such protest "*shall be filed within ninety days* of the date of the mailing to or service upon the taxpayer by the department…" Section 7-1-24 (C)'s use of the word "shall" makes it an absolute requirement that a taxpayer file a protest within 90-days. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). Accordingly, Department Regulation 3.1.7.11 NMAC finds that the 90-day protest period is jurisdictional and that the Department lacks authority to consider an untimely protest. Department regulations interpreting a statute are presumed proper and are to be given substantial weight. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498.

Case law further affirms that the statutory deadline for filing a protest is jurisdictional. In *Associated Petroleum Transp. v. Shepard*, 1949-NMSC-002, ¶6 & ¶11, 53 N.M. 52, the New Mexico Supreme Court noted that a taxpayer's inability to timely follow the then-in-place designated protest procedure deprived the State Tax Commission of jurisdiction over the protest. More recently, the New Mexico Court of Appeals ordered the dismissal of a property tax taxpayer's complaints for refund when such complaints were not timely filed in compliance with the Legislature's statutorily imposed deadlines. *See Chan v. Montoya*, 2011-NMCA-72, 150 N.M. 44. In *Lopez v. New Mexico Dep't of Taxation & Revenue*, 1997-NMCA-115, 124 N.M. 270, the Court of Appeals had opportunity to consider whether a taxpayer timely and properly filed a protest against the Department's notice of audit. At the administrative tax protest hearing, the tax hearing officer found that the *Lopez* taxpayer had failed to timely protest the Department's audit under Section 7-1-24 (which then required a protest within 30-days rather than 90-days under the current statute). *See id.*, ¶6. The Court of Appeals in *Lopez* noted that Section 7-1-24 imposed a 30-day time restriction on a protest. *See id.*, ¶6. The Court of Appeals

in *Lopez* affirmed that hearing officer's conclusion that the *Lopez* taxpayer did not timely protest the Department's audit. *See id*., ¶9.

Taxpayer did not protest the assessment of corporate income tax and the PWT remitter assessment in this matter by the 90-day jurisdictional deadline. Nor, despite receiving numerous notices only listing the assessment of gross receipts tax, did Taxpayer attempt to amend its protest letter within the statutory timeframe or by the deadline set in the Scheduling Order in this case. Because Taxpayer did not timely challenge those assessments, the hearing officer lacks jurisdiction to consider any challenges related to PTW remitter assessment or the corporate income tax assessment[1].

The second jurisdictional issue is that the Department's formal notice of assessment in this case included nine-months of time that was prohibited under the relevant statute of limitations for assessments. The Tax Administration Act ("TAA") places limitations on the Department's ability to assess a tax. Generally, under NMSA 1978, Section 7-1-18 (A) (2013), the Department has "three years from the end of the calendar year in which payment of the tax was due" to assess a tax liability, unless otherwise expressly allowed in the remaining subparagraphs of that section. Pertinent to this case is Section 7-1-18 (D)[2], where if a taxpayer underreports a tax liability by more than 25%, the Department has six years from the end of the calendar year in which payment of the tax was due to issue an assessment. In this case, if Taxpayer is subject to New Mexico taxation, than there is no dispute that Taxpayer underreported its tax liability by more than 25%, meaning that the Department would have six years from the end of the calendar year in which the tax was due to assess Taxpayer.

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[1] Although the corporate income tax assessment is not before this tribunal, at least with respect to the nexus and Public Law 86-272 analysis, the analysis and conclusion regarding gross receipts tax, nexus, and Public Law 86-272 would largely apply and extend to the imposition of corporate income tax against Taxpayer.

[2] Department Auditor Lan Ngo credibly testified that Taxpayer had filed its returns but had underreported its tax liability by more than 25%.

The Department assessed Taxpayer on May 5, 2016 for gross receipts tax, penalty, and interest for CRS reporting periods from March 31, 2009 through September 30, 2015. However, under Section 7-1-18 (D), the Department was prohibited from assessing any tax for the CRS reporting periods from March 31, 2009 through November 30, 2009 because those periods were beyond six years from the end of the calendar year in which the tax were originally due, which was 2009 for that respective period. *See* NMSA 1978, Section 7-9-11 (gross receipts tax due on the 25th day of the month following the taxable event). Consequently, the reporting periods March 31, 2009 through November 30, 2009 are ordered stricken from the Department's assessment. While Department Auditor Ngo indicated in her testimony and audit paperwork that the amount of tax assessed came only from the reporting period ending on January 31, 2010 (which is within the statute of limitation), out of an abundance of caution, the Department is ordered to carefully review the assessment and audit in conjunction with Taxpayer's representative to determine whether any portion of the assessed amount stems from the reporting periods outside of the statute of limitations. If so, that amount (and associated penalty and interest) must be abated from the assessment.

ISSUE ONE: Gross Receipts Tax, Joint Employer Relationship, and Disclosed Agency

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). "Receipts include payments received for one's own account and then expended to meet one's own responsibilities." *MPC LTD v. TRD*, 2003-NMCA-021, ¶14, 133 N.M. 217. 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.").

Although the issue will be addressed in more detail in the next section, despite Taxpayer's arguments to the contrary, Taxpayer is clearly engaged in the business of performing a service in New Mexico: placing its New Mexico employees as temporary staffing at New Mexico healthcare facilities for remuneration. While Taxpayer somehow believed the VMS isolated its activities from the state and shielded it from state nexus, at least for the purposes of New Mexico's gross receipts tax, there simply is no way to ignore the fact that Taxpayer receives financial benefit from staffing its New Mexico employees at New Mexico health care facilities. Taxpayer is responsible for paying the wages to the employees in New Mexico, paying the taxes on the New Mexico employees including the wage withholdings and FICA, pays the employees worker's compensation and unemployment insurance in New Mexico. Thus, under Section 7-9-5, it is presumed that all of Taxpayer's receipts derived from performing its employee staffing service in New Mexico are subject to gross receipt tax, and Taxpayer must overcome this presumption as well as the presumption of correctness of the assessment. *See MPC LTD*, ¶12. Taxpayer argues that it overcomes these presumptions because it is a joint

employer with the New Mexico facilities and thus the amount received in that capacity is excluded from gross receipts tax.

Under NMSA 1978, Section 7-9-3.5(A) (3) (f) (2007), 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. While the first three cases predate the Legislature's amendment expressly adding the "disclosed agency capacity" language to the gross receipts tax exclusion, they nevertheless provide context to the issue. 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, 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 that 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 between that taxpayer and the owner. *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*. The *Carlsberg's* Court of Appeals rejected the Department's requirement that an agent be disclosed, and instead adopted a California rule that "if a party only receives money… of [] another's employment-related obligations, then an agency relationship exists sufficient to avoid taxation of those funds as gross receipts." *See Carlsberg*, ¶15. The Court of Appeals ultimately determined in *Carlsberg* that the level of control the owner of the apartment complex wielded over that taxpayer vis-à-vis that taxpayer's employees left that taxpayer with no control over the payment of the employees, and thus that taxpayer never possessed any interest in the funds in question used to pay the employees. *See Carlsberg*, ¶19. The *Carlsberg* decision also noted that an indemnification clause requiring the owner to pay that taxpayer for employment related expenses supported its holding. *See id*.

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.

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, subsequent legislative action has limited the *Carlsberg* holding. *See MPC LTD v. TRD*, 2003-NMCA-021, ¶14, 133 N.M. 217. 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 expressly added the disclosed agency capacity language into Section 7-9-3.5 (A) (3) (f).

In 2003, the Court of Appeals in *MPC LTD.* again looked at agency relationships in the gross receipts context, albeit for the first time under the Legislature's express "disclosed agency" exception to the gross receipts definition. 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.* 2003-NMCA-021, ¶34. *MPC LTD.* addressed a taxpayer (Manpower) that provided temporary staffing services to its clients in New Mexico. *See id*. ¶1. Manpower had mostly verbal contracts with its clients, but did have a few written agreements in place. *See id*. ¶4. Like in the present protest, Manpower's clients supervised the activities of the

assigned employees, but the client did not pay the employees. The clients paid Manpower and Manpower paid the employee's wages, benefits, and withholdings. *See id*. ¶5. Like in the present case, Manpower did not have any contracts or agreements in place with its employees and did not communicate to the employees that they had a right of action against Manpower's clients for payroll obligations. *See id*. ¶38. Manpower neverthless claimed these receipts should not be included in gross receipts because it "received the amounts purely as a conduit between its clients and its employees." *id*. ¶8.

Manpower's argument in *MPC LTD.* required the Court of Appeals to consider both a regulation addressing joint employers and the statutory and regulatory disclosed agent requirements. In addition to addressing how the Legislative addition of the disclosed agency exclusion under Section 7-9-3.5 (A) overruled that portion of the *Carlsberg* holding, *see id.* ¶24, 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 (the client)… to an obligation (to the employee) created by the agent [taxpayer], and (2) the beneficiary of that obligation (the employee) is informed by contract that he or she has a right to proceed against the principal (the client) to enforce the obligation.

The *MPC LTD.* ¶37, Court of Appeals continued by stating:

> Section 7-9-3(F)(2)(f) requires a disclosure to the employee of an agency relationship. This breaks down into the requirements that there be a relationship by which the principal is liable (and knows he is liable) to the employee for payroll if the agent fails to pay, and that the agent disclose this relationship and obligation to the employee

Additionally, when interpreting Regulation 3.2.1.19 (C), the Court of Appeals noted that it 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 MPC LTD.*, ¶36. The Court of Appeals doubted whether the joint employer relationship discussed in Regulation 3.2.1.19 (E) NMAC (2000 and 2003, before 2010 repeal) required a full scale trial using federal law as opposed to a taxpayer simply presenting a Department of Labor determination to that effect. *See MPC LTD.*, ¶39.

While Taxpayer tries to distinguish its operation from *MPC LTD.*, there does not appear to be any meaningful distinction and *MPC LTD.'s* analysis and holding applies in this matter. The intermediary VMS hiring, payable hours, and billing system does not fundamentally alter Taxpayer's relationship with its employees and the New Mexico facilities, which are highly consistent with the *MPC LTD.* facts.

Applying the statute, the regulation, and the current case law discussed in *MPC LTD.*, ¶36, Taxpayer was not a disclosed agent with receipts received solely on behalf of another. Taxpayer had a clear contract in place with HCSC indicating that Taxpayer was solely responsible for any employment issues, payment of wages and benefits, and submission of taxes for the employees in questions. Under the agreement, the workers Taxpayer provided were Taxpayer's employees. Moreover, under the agreement, Taxpayer was an independent contractor without authority to bind HCSC in any manner with a third party. Critically under the *MPC LTD.*, rationale, Taxpayer presented no evidence that its employees were informed in any manner of an agency relationship between Taxpayer and HCSC or their ability to enforce payroll and benefit obligations against HCSC. *See MPC LTD.*, ¶37 ("Section 7-9-3(f)2(f) requires a disclosure to the employee of the agency relationship"). In fact, Taxpayer indicated that it would pay its employees even if HCSC (or any of its customers) failed to make payment to Taxpayer as required under the agreements. Taxpayer did not attempt in any manner to establish that its billings through the VMS to HCSC reflected that the amount billed was a reimbursement, as

required by Regulation 3.2.1.19(C)(1) NMAC in order to meet the regulatory definition of a disclosed agent. 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.*, ¶36-37.

Nevertheless, Taxpayer argues that under the IRS' 20 factor employee-independent contract test and the Department of Labor's regulation, 29 C.F.R. 791.2, Taxpayer has a joint employer relationship with the New Mexico facilities where Taxpayer provides staffing and thus Taxpayer asserts it is not subject to New Mexico taxation. Taxpayer faulted the Department's lack of consideration of federal law on joint employer relationships during the audit as part of its argument. However, Taxpayer's argument about the Department failing to consider and determine the issue under federal law overlooks New Mexico's own independent authority to impose a gross receipts tax on businesses engaged in business in this state, ignores *MPC LTD*., and relies on a regulation no longer in affect.. *See Holt v. N.M. Dep't of Taxation & Revenue*, 2002- NMSC-34, ¶6, 133 N.M. 11 (state has the authority to assess and collect tax independent of IRS).

Taxpayer presented Exhibit #5, a print out of Regulation 3.2.1.19 (E) NMAC (2000 and 2003, before 2010 repeal) as support of its claim that its asserted joint employer relationship shields it from gross receipts taxation in New Mexico. Under Regulation 3.2.1.19 (E) NMAC (before 2010 repeal), the receipts from employee leasing will not be subject to the gross receipts tax if the party engaged in employee leasing is a "'joint employer', as that term is used by the United States department of labor for purposes of enforcing federal labor law….Such receipts instead are receipts of a disclosed agent on behalf of others." However, that previous regulation establishing that the receipts of joint employers were not subject to gross receipts tax was repealed by the 2010 amendment to that regulation and thus does not apply in this case (the 2009 portion of the assessment beyond the statute of limitations has already been rejected in the

previous discussion section). *Compare* 3.2.1.19 (E) NMAC (2003) and 3.2.1.19 NMAC (2010) (subsection E, addressing the joint employer relationship, has been removed from the regulation). Even if such a regulation exempting joint employers remained in force, the New Mexico Court of Appeals has expressed doubts in dicta as to whether that now repealed regulation "contemplated… a full scale trial on whether employers are joint employees under federal labor law" as a opposed to presentation of the Department of Labor determination to that end. *MPC LTD*, 2003-NMCA-021, ¶39 (footnote 3). Taxpayer presented no information that either the Department of Labor or the IRS had made a specific determination that Taxpayer was a joint employer of the employees[3]. Nor did Taxpayer establish it was an employee-leasing firm, another condition of the joint employer exception to taxation under that repealed regulation[4].

Because the applicable regulation has been repealed, because facts of this protest largely mirror the facts in *MPC*, and because Taxpayer was not a disclosed agent of the New Mexico facilities where it provided staffing and thus did not meet the statutory disclosed agent requirement, there is no need to do a full scale trial of the IRS 20-factor test or the Department of Labor regulation in this matter in order to determine if Taxpayer was a joint employer. As already discussed, Taxpayer in fact paid the employees' wages, issued W-2s to the employees, withheld tax from the employees, paid the withholding tax and other payroll tax on the employees, paid worker's compensation and unemployment insurance on the employees. The agreement indicated that the facility was prohibited from hiring Taxpayer's employees for 13-weeks after placement without penalty, which cuts against Taxpayer's assertion of being a joint

[3] Taxpayer did provide 29 CFR 825.106 (b) (1) as support, which states generally that "joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer." However, similar to the general Department of Labor information provided in *MPC*, that general statement is not enough to show that Taxpayer in this case had been found to be joint employer. *See MPC LTD*, ¶39 (footnote 3).
[4] Similarly, Taxpayer failed to establish it was registered as an employee leasing business under the New Mexico Employee Leasing Act, NMSA 1978, §§ 60-13A-1 to -14 (1995), as also discussed in *MPC LTD.*, ¶20-30 & ¶35.

employer with the facility. Similarly, Taxpayer also indicated that even if the facility asked that the employee not return to work at the facility, Taxpayer would maintain the employee if they were otherwise a good employee, again cutting against the joint employer relationship argument. Contractually, Taxpayer and not the facilities was the party liable for the payment of all wages, taxes, and other associated requirements like worker's compensation and unemployment insurance for the contingent workers.

ISSUES TWO AND THREE: Nexus and P.L. 86-272

Taxpayer argued that it lacked nexus with New Mexico because all business was done through the intermediary VMS system and that even if it had nexus, Taxpayer was protected by Public Law 86-272 because its activities in New Mexico were *de minimus* and ancillary to sales. After a brief analysis of each argument, it is clear that Taxpayer's arguments are not legally or factually supported.

Part of Taxpayer's nexus and Public Law 86-272 argument seems to revolve around the fact that the solicitation and payment for Taxpayer's services was done through the VMS system in interstate commerce rather than by a local office or staff in New Mexico. However, Taxpayer's argument demonstrates a misunderstanding of both those concepts as well as the nature of a gross receipts tax. The gross receipts tax is not a true transactional tax like a sales tax (though it is well understood at this point to have some hybrid elements of a sales tax), but a tax imposed on the total receipts of a person engaged in business in New Mexico for services performed in New Mexico. Here, even if the sale of the service and payment of the service was consummated over the internet in an interstate transaction on the VMS, Taxpayer nevertheless had employees in New Mexico that performed the work for which Taxpayer ultimately derived gross receipts, potentially subjecting it to New Mexico gross receipts tax so long as the assessment in this case does not otherwise violate the due process or commerce clause.

While nexus can be a complicated area of the law, the fact that Taxpayer has New Mexico employees present in the state, and that the presence of those employees provide Taxpayer a New Mexico market in which to sell its staffing services within the state, make that analysis quite simple in this case. New Mexico may impose a state tax on a company with a substantial nexus with New Mexico. A company must at a minimum have a physical presence in the taxing state in order to meet the constitutional substantial nexus for taxation requirement. *See Quill Corporation v. North Dakota*, 504 U.S. 298 (1992) (upholding the *Bellas Hess* bright line physical presence rule for taxation under the Commerce Clause). While Taxpayer may have had no company offices, assets, or sales force employed in New Mexico, having approximately 100 employees physically present and working in New Mexico satisfies the substantial nexus requirement for imposition of state taxation. *See Scripto, Inc. v. Carson*, 362 U.S. 207, 211-212 (U.S. Mar. 21, 1960); *see also Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 562 (U.S. Jan. 22, 1975); *see also National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (U.S. Apr. 4, 1977); *see also Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232 (U.S. June 23, 1987). Without the presence of these employees in New Mexico, Taxpayer would have nothing to provide to the New Mexico facilities, making the presence of these employees in the state substantial to Taxpayer's ability to develop, establish, and maintain a market for its business in New Mexico. *See Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232 (U.S. June 23, 1987); *see also Dell Catalog Sales L.P. v. Taxation and Revenue Department of the State of New Mexico*, 2009-NMCA-001, 145 N.M. 419, cert. denied, 129 S.Ct. 1616.

Taxpayer's Public Law 86-272 argument requires very little analysis or discussion because the facts of this protest clearly fall outside the plain statutory language restriction of that provision. Congress enacted Public Law 86-272, as codified under 15 USCS § 381, in response to a decision of the United States Supreme Court in *Northwestern States Portland Cement Co. v.*

Minnesota, 358 U.S. 450 (1959) and business concerns about uncertainty of when and under what circumstances a state may tax a foreign corporation engaged in interstate commerce for solicitation of sales of tangible personal property in other states. *See Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279 (U.S. Dec. 18, 1972) (discussing the history and purpose of Public Law 86-272). Public Law 86-272 confers immunity from state income taxes on foreign corporations whose only business activities in a state consist of the solicitation of orders of tangibles for interstate sales. In pertinent part, Public Law 86-272 reads (bold added for emphasis):

> P. L. 86-272—The Interstate Income Law
> Title I—Imposition of Minimum Standard
>
> Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State **for sales of tangible personal property**, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
>
> (b) . . . .
>
> (c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors, whose activities on behalf of such person in such State

> consist solely of making sales, or soliciting orders for sales, of tangible personal property.
>
> (d) For purposes of this section—
>
> (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
>
> (2) the term "representative" does not include an independent contractor.

Under the plain language of Public Law 86-272, which states it's for solicitation "for sales of tangible property," its application is restricted to instances where a company is soliciting sales of tangible personal property. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶6.18 (3rd ed. 2001-2015) (statute carefully limited to the selling of tangible person property and excludes sale of services). Taxpayer is not selling tangible personal property, meaning that Taxpayer's activities are outside of the scope of the Public Law 86-272 protection regardless of whether Taxpayer merely solicited sales of a service or had *de minimus* activities in this state. Consequently, Taxpayer's arguments about the protections of Public Law 86-272 are not germane or persuasive in this protest.

In summary, Taxpayer had substantial nexus based on the physical presence of approximately 100 employees in the state, subjecting it to New Mexico tax. Because Taxpayer was not selling tangible personal property, Public Law 86-272 does not shield Taxpayer from New Mexico taxation in this case.

ISSUE FOUR: Whether Taxpayer qualifies for a health care services deduction?

Taxpayer argued that even if it was otherwise subject to gross receipts tax, its receipts were deductible from gross receipts tax under NMSA 1978, Section 7-9-93 (2007). Taxpayer claimed that since it was providing employees to a healthcare provider as a joint employer, its

receipts also should fall under that deduction or a general healthcare deduction it asserts (but does not prove) applied to the facility.

"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.

Taxpayer repeatedly used the phrase general health care services deduction while arguing at the hearing for a deduction of gross receipts tax. There is no general deduction that encompasses all receipts attributable to rendering any service associated with a private entity in the health care industry, as Taxpayer seemed to believe. Instead, New Mexico has a few specific deductions that involve specific and discrete elements of rendering some aspect of health care services. A taxpayer does not qualify for such deductions merely because they provide services within the broader healthcare industry (except for one non-applicable circumstance discussed further below). Instead, a taxpayer can only qualify for a deduction if they legally and factually meet each specific legal requirements of the specific deduction at issue.

Taxpayer did cite FYI-202, which identifies the deduction at issue under Section 7-9-93. 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).

A general assertion that Taxpayer provided staffing in the healthcare field and thus is entitled to the general healthcare services deduction is a far cry from establishing entitlement to this specific statutory deduction. Taxpayer made no effort in this case to detail that its receipts were traceable to payments from a managed health care provider or health care insurer, a requirement of Section 7-9-93. Nor did Taxpayer make any effort to demonstrate that all of the employees at issue provided the services in question as health care practitioners, as required under the statutory deduction. In fact, Taxpayer acknowledged that not all of its staff were actual practitioners, but instead may have been support workers-clerical staff working in a health care facility. Given that Taxpayer bore that burden of establishing entitlement to the deduction, failure to present any such evidence on those statutory requirements means that Taxpayer is not entitled to the deduction under Section 7-9-93.

Another other possible basis of the claimed deduction, which Taxpayer did not expressly raise, is NMSA 1978, Sections 7-9-77 (2014), which does contain a deduction for rendering medical health care services by statutorily identified health practitioners for providing Medicare services. However, Taxpayer again did not make any effort to demonstrate that the specific staff it provided met the statutory practitioner requirements and that the services were rendered to Medicare beneficiaries. Taxpayer also cited NMSA 1978, Section 7-9-4.3 and Regulation 3.2.21.9 NMAC as justifications to why its rendering of healthcare services was not taxable. However, that section and regulation creates an exclusion from application of governmental gross receipts taxes to licensed governmental entities providing primarily healthcare services, which are not at issue in this protest since Taxpayer and the facilities are not governmental entities. In summary, Taxpayer did not establish entitlement to any claimed deduction for providing staffing in the medical profession.

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.*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). 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 until Taxpayer satisfies the tax principal.

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, NMSA 1978 Section 7-1-69 (2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid.

(*italics* added for emphasis).

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." *See Marbob Energy Corp.*, ¶22.

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." Taxpayers failure to file and pay New Mexico gross receipts tax under its erroneous belief that it did not have nexus with New Mexico despite having New Mexico employees constitutes negligence subject to penalty under Section 7-1-69. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶9-11, 108 N.M. 795.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Here, there is no evidence that Taxpayer engaged in any formal consultation or study of the issue before determining that it believed it owed no New Mexico CRS taxes. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty in this case.

Additionally, there was no evidence that might arguably support abatement of penalty under Regulation 3.1.11.11 NMAC. The only provision under Regulation 3.1.11.11 NMAC that might possibly found is subparagraph H, which states that

> with regard to an out-of-state business when a good faith doubt exists as to whether the taxpayer has established nexus with New Mexico and whether the state has jurisdiction over the taxpayer and its transactions into New Mexico for current or prior reporting periods, the business volunteers to enter into an agreement with the department to register, report and pay gross receipts tax, corporate income tax or franchise tax or to collect and remit compensating tax as an agent under the provisions of Section 7-9-10 NMSA 1978.

In this case, Taxpayer presented no evidence it volunteered to enter into an agreement with the Department, as required for this subsection to apply. Consequently, Taxpayer is liable for both penalty and interest.

CONCLUSIONS OF LAW

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

B. The scheduling hearing was timely set within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015) and the parties did not object that the scheduling hearing satisfied the timely hearing requirement of that statute while also affording sufficient time to conduct discovery and the other fair hearing requirements articulated under NMSA 1978, Section 7-1B-6 (2015).

C. Under Section 7-1-18 (D), the Department was prohibited from assessing any tax for the CRS reporting periods from March 31, 2009 through November 30, 2009 because those periods were beyond six years from the end of the calendar year (2009) in which the tax were originally due. *See* NMSA 1978, Section 7-9-11 (gross receipts tax due on the 25th day of the month following the taxable event).

D. Under NMSA 1978, Section 7-9-3.3 (2003), Taxpayer was engaged in the business of providing staffing services by placing its New Mexico employees into New Mexico healthcare facilities.

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

F. Taxpayer failed to establish legally and factually that it collected receipts not subject to gross receipts tax under NMSA 1978, Section 7-9-3.5(A) (3) as a disclosed agent of HCSC and its other New Mexico clients, as interpreted by Regulation 3.2.1.19 (C) (1) NMAC and *MPC LTD v. TRD*, 2003-NMCA-021, 133 N.M. 217.

G. New Mexico had sufficient nexus to impose gross receipts tax on Taxpayer based on Taxpayer's approximately 100 employees physically present in the state, which were essential to Taxpayer developing and maintaining a market in the state. *See Tyler Pipe Industries Inc.*, 483 U.S. 232. *See also Dell Catalog Sales L.P.*, 2009-NMCA-001. *See also BN.com*, 2013-NMSC-023. *See also Scripto, Inc. v. Carson*, 362 U.S. 207, 211-212 (U.S. Mar. 21, 1960); *see also Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 562 (U.S. Jan. 22, 1975); *see also National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (U.S. Apr. 4, 1977).

H. Since Taxpayer was not selling tangible personal property, Public Law 86-272 does not apply and does not shield Taxpayer from state taxation.

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

J. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty because Taxpayer's inaction in failing to file and pay gross receipts tax during the relevant period met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

K. Taxpayer did not establish a good faith, mistake of law made on reasonable grounds that would allow for abatement of penalty under Section 7-1-69 (2007).

L. None of the indicators of nonnegligence found under Regulation 3.1.11.11 NMAC allow for abatement of penalty under the facts established in this protest.

M. Taxpayer did not overcome the presumption of correctness of the amount of tax principal, penalty, and interest that attached to the assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

For the foregoing reasons, the Taxpayers' protest **IS PARTIALLY GRANTED AND IS PARTIALLY DENIED**. **IT IS ORDERED THAT** the assessed reporting periods March 31, 2009 through November 30, 2009 beyond the statute of limitations are stricken from the

Department's assessment and that the Department carefully review the assessment/audit to determine whether any portion of the assessed amount stems from the reporting periods outside of the statute of limitations. Since the Department did not provide an updated spreadsheet of liabilities as of the hearing date, the Department **IS FURTHER ORDERED** to provide Taxpayer with a statement of account showing Taxpayer's current outstanding liabilities (less any amount removed from the prohibited period beyond the statute of limitations) with an updated current interest calculation. **IT IS FINALLY ORDERED** that Taxpayer pay the updated tax, penalty, and interest. Under NMSA 1978, 7-1-67, interest continues to accrue until ta principal is satisfied.

Dated: August 8, 2017

Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
Post Office 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. 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 begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 8th day of August 2017 in the following manner: