STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
CCA OF TENNESSEE
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1081049392

v. **D&O No. 18-21**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on May 21, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Andrew Simons, Esq. and Ms. Suzanne Wood Bruckner, Esq. (Sutin, Thayer, & Browne, P.C.), appeared representing CCA of Tennessee (hereinafter "Taxpayer") and were accompanied by Mr. David Garfinkle, Taxpayer's Chief Financial Officer, who also testified on Taxpayer's behalf.

Mr. David Mittle, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (hereinafter "Department") and was accompanied by Ms. Shurong Li, auditor, who also testified on behalf of the Department. Mr. Joe Alejandro and Mr. Samuel Peat, both employees of the Department, were also in attendance but were not called upon to testify.

Taxpayer Exhibits 1 through 4 and Department Exhibits C and E were admitted into the evidentiary record. Although not admitted as an exhibit, Taxpayer's complete protest, inclusive of all exhibits attached thereto, was also accepted for filing in the Administrative File. All exhibits are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In April of 2014, the Department approved a refund of gross receipts tax purportedly overpaid by Taxpayer for reporting periods between January 1, 2010 and December 31, 2012. [*See* Department Exhibit C].

2. Asserting entitlement to that refund, Taxpayer reported that it overpaid gross receipts tax on the sale of licenses to Torrance County which the county thereafter re-sold to the United States Marshal's Service (hereinafter "USMS"). [*See* Taxpayer Exhibit C].

3. In support of that claim for refund, Taxpayer provided a Type 2 Non-Taxable Transaction Certificate (hereinafter "NTTC" or "Type 2 NTTC") and electronic correspondence from Ms. Rebecca A. Abbo, the Department's Audit Bureau Chief, purportedly approving the use of the Type 2 NTTC for establishing entitlement to a deduction under NMSA 1978, Section 7-9-47. [*See* Department Exhibit C; Taxpayer Exhibit 3; Taxpayer Exhibit 4].

4. Prior to seeking that refund, Ryan, LLC, by and through an email dated October 12, 2012, from Ms. Lori Johnson to Ms. Abbo, requested information from the Department regarding the use of a Type 2 NTTC for receipts deriving from the re-sale of licenses sold to Torrance County, and subsequently re-sold to USMS. Ms. Johnson explained "that [Taxpayer was] selling a license to Torrance County and Torrance County [was] reselling that license to USMS." [*See* Taxpayer's Motion for Partial Summary Judgment, Exhibit B].

5. On December 12, 2012, Ms. Abbo wrote "[w]e do agree that you can accept a type 02 NTTC for the receipts derived from house the [sic] inmates from USMS." [*See* Taxpayer Exhibit 3.1.]

6. The Department subsequently approved that refund claim in the amount of $3,996,196.01 for the periods between January 1, 2010 through December 31, 2012. [*See* Taxpayer Exhibit C].

7. To the extent Ms. Abbo's conclusion relied on facts provided by Ms. Johnson in prior emails, at least one such email contained a misstatement of material fact. In particular, Ms. Johnson previously stated, "[j]ust to clarify, the NTTC relates to the portion of Torrance County receipts derived from housing USMS inmates. *The receipts are not coming directly from the USMS to CCA*." (Emphasis Added). [*See* Taxpayer Exhibit 3.1].

8. Contrary to the representation that receipts were not coming directly from USMS to Taxpayer, Taxpayer was indeed billing USMS directly, and USMS was making direct payment back to Taxpayer. [Testimony of Mr. Garfinkle; *See* Department Exhibit E].

9. The representation that "[t]he receipts are not coming directly from the USMS to CCA[,]" was incorrect. [Testimony of Mr. Garfinkle].

10. A subsequent audit of the periods between January 1, 2010 and September 30, 2015 concluded that Taxpayer was not entitled to the refund that had been previously approved. The auditor concluded that Taxpayer was not engaged in the business of selling licenses, but even if it were, it was not selling them for re-sale as descried in Ms. Johnson's email. Rather, the audit concluded that the sales were made directly by Taxpayer to USMS. [*See* Taxpayer Exhibit C; Taxpayer Exhibit E; Testimony of Ms. Li].

11. On November 9, 2016, the Department assessed Taxpayer the amounts of $2,686,632.18 in gross receipts tax, $537,326.43 in gross receipts tax penalty, $410,122.78 in gross receipts tax interest, $52.87 in withholding tax, $15.57 in withholding tax penalty, and $15.08 in withholding tax interest for a total assessment in the amount of $3,634,154.91 under Letter ID No. L1081049392 for the periods from January 31, 2010 through September 30, 2015. [*See* Administrative File].

12. The amount assessed included funds that had previously been paid to the

Department, but subsequently refunded to Taxpayer pursuant to its claim for refund that had been approved in April of 2014. [*See* Department Exhibit C].

13. On December 7, 2016, Taxpayer, by and through Mr. Josh Cohen, Ryan, LLC, executed a Formal Protest of the assessment that was subsequently received by the Department's Protest Office on December 13, 2016. [*See* Administrative File].

14. On December 28, 2016, the Department acknowledged receipt of Taxpayer's protest under Letter ID No. L1534382384. [*See* Administrative File].

15. On February 7, 2017, the Department filed a Hearing Request in which it requested an initial scheduling hearing for the purpose of identifying a date for a hearing on the merits of Taxpayer's protest and establishing associated prehearing deadlines. [*See* Administrative File].

16. On February 8, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a telephonic scheduling hearing for March 3, 2017. [*See* Administrative File].

17. On March 3, 2017, a telephonic scheduling hearing occurred at which time the parties did not object that the hearing was within 90 days of the date of Taxpayer's protest and that the hearing satisfied the 90-day hearing requirement. [*See* Administrative File].

18. On March 3, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's protest for July 17, 2017. [*See* Administrative File].

19. On April 28, 2017, counsel for Taxpayer filed an Entry of Appearance, a Certificate of Service of Taxpayer's First Set of Requests for Admission, a Certificate of Service of Taxpayer's First Set of Requests for Production, and a Certificate of Service of Taxpayer's First

Set of Interrogatories. [*See* Administrative File].

20. On May 24, 2017, Taxpayer filed its Motion for Partial Summary Judgment, including various exhibits. [*See* Administrative File].

21. On June 8, 2017, the Department filed Department's Motion to Strike Affidavit and Response to Taxpayer's Motion for Partial Summary Judgment. [*See* Administrative File].

22. On June 16, 2017, Taxpayer filed Taxpayer's Unopposed Motion to Convert Hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

23. On June 23, 2017, Taxpayer filed Taxpayer's Response to Department's Motion to Strike Affidavit. [*See* Administrative File].

24. On June 27, 2017, the Administrative Hearings Office entered its Order Changing Merits Hearing to Motion Hearing and Holding Hearing on Merits in Abeyance. [*See* Administrative File].

25. On July 17, 2017, the parties, by and through their counsel, appeared in person to be heard on their pending motions. [*See* Administrative File].

26. On July 20, 2017, Taxpayer filed its Motion to Reconsider Denial of Request to Supplement Record. [*See* Administrative File].

27. On July 25, 2017, the Department filed Department's Reply to Taxpayer's Motion to Reconsider Denial of Request to Supplement Record. [*See* Administrative File].

28. On August 1, 2017, the Administrative Hearings Office entered an Order Granting Motion to Reconsider Denial of Request to Supplement Record, Denial of Department's Motion to Strike Affidavit of Josh Cohen, and Denial of Taxpayer's Motion for Partial Summary Judgment. [*See* Administrative File].

29. On July 12, 2017, the Department filed a Certificate of Service referencing service of the Department's Response to Taxpayer's First Set of Discovery. [*See* Administrative File].

30. On October 18, 2017, the Administrative Hearings Office entered a Notice of Status Conference setting a status hearing on November 2, 2017. [*See* Administrative File].

31. A status hearing occurred on November 2, 2017 in which the parties indicated they were ready to proceed to hearing on the merits of the protest. The Administrative Hearings Office subsequently entered an Order Lifting Abeyance, Scheduling Notice, and Notice of Administrative Hearing that set a hearing on the merits of the protest for May 21, 2018 and established other associated prehearing deadlines. [*See* Administrative File].

32. On December 29, 2017, Taxpayer filed Taxpayer's Motion to Compel. [*See* Administrative File].

33. On January 16, 2018, the Department filed Department's Response to Taxpayer's Motion to Compel. [*See* Administrative File].

34. On January 17, 2018, Taxpayer filed Supplement to Taxpayer's Motion to Compel. [*See* Administrative File].

35. On January 26, 2018, the Administrative Hearings Office, upon its own initiative, entered Order Permitting Supplemental Response to Motion to Compel. [*See* Administrative File].

36. On February 15, 2018, the Administrative Hearings Office entered Order Partially Granting Taxpayer's Motion to Compel. [*See* Administrative File].

37. On February 21, 2018, the Department filed Department's Motion to Reconsider Order Partially Granting Taxpayer's Motion to Compel. [*See* Administrative File].

38. On February 27, 2018, the Taxpayer filed Taxpayer's Response to Department's Motion to Reconsider Order Partially Granting Taxpayer's Motion to Compel. [*See* Administrative

File].

39. On February 28, 2018, the Department filed Department's Request to File a Reply to Taxpayer's Response to the Department's Motion to Reconsider the Order Partially Granting Taxpayer's Motion to Compel. [*See* Administrative File].

40. On March 2, 2018, the Department filed a Certificate of Service referencing service of the Department's Supplemental Response to Taxpayer's First Set of Discovery. [*See* Administrative File].

41. On March 5, 2018, the Department filed a Certificate of Service referencing service of the Department's First Set of Discovery on the Taxpayer. [*See* Administrative File].

42. On March 13, 2018, the Administrative Hearings Office entered an Order Denying Reconsideration of Order Partially Granting Taxpayer's Motion to Compel. [*See* Administrative File].

43. On April 23, 2018, the Department filed Taxation and Revenue Department's Unopposed Motion to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

44. On May 4, 2018, the Administrative Hearings Office entered an Order Denying Taxation and Revenue Department's Unopposed Motion to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

45. On May 7, 2018, the parties filed their Joint Prehearing Statement. [*See* Administrative File].

46. On May 9, 2018, Taxpayer filed a Certificate of Service regarding service of Taxpayer's Answers and Responses to Taxation and Revenue Department's First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents and a verification executed by Mr. David Garfinkle. [*See* Administrative File].

47. On May 15, 2018, the Department filed Department's Motion to Compel and for Sanctions and Request for an Expedited Order. [*See* Administrative File].

48. On May 15, 2018, Taxpayer filed Taxpayer's Response to Department's Motion to Compel. [*See* Administrative File].

49. On May 16, 2018, Taxpayer filed its Notice of Errata and Corrections to Taxpayer's Response to Department's Motion to Compel. [*See* Administrative File].

50. On May 17, 2018, as a preliminary matter prior to commencing the presentation of evidence, the Hearing Officer heard argument regarding Department's Motion to Compel and for Sanctions and Request for an Expedited Order. The Hearing Officer denied the motion on the record prior to the parties proceeding with their respective presentations on the merits of the protest. [*See* Record of Hearing on Merits].

51. Mr. Garfinkle is employed as Chief Financial Officer for CoreCivic of Tennessee, previously known as CCA of Tennessee, Taxpayer. [Testimony of Mr. Garfinkle].

52. At all relevant times, Mr. Garfinkle's employment responsibilities, included supervising Taxpayer's accounting and tax divisions, among other tasks. His office is located in Nashville, Tennessee. [Testimony of Mr. Garfinkle].

53. At all relevant times, Taxpayer was the owner of real property known as the Torrance County Detention Center (hereinafter "TCDC"). [Testimony of Mr. Garfinkle].

54. TCDC was one of approximately 65 similar facilities owned and operated by Taxpayer in 19 states and the District of Columbia. [Testimony of Mr. Garfinkle].

55. TCDC was designed to confine approximately 1,000 inmates. It was constructed of concrete and steel and contained furniture, fixtures, and equipment. It was surrounded by empty land and recreation areas secured by razor-wire perimeter fencing. The entire complex consisted

of approximately five acres. [Testimony of Mr. Garfinkle].

56. TCDC commenced operations in 1990 and permanently closed in 2016. [Testimony of Mr. Garfinkle].

57. During all relevant times, it housed inmates on behalf of Torrance County under a Contract for Inmate Confinement (hereinafter "CIC"). [Testimony of Mr. Garfinkle; *See* Taxpayer Exhibit 1].

58. The CIC provided that Taxpayer would "incarcerate and detain" Torrance County inmates which it would deliver to Taxpayer for incarceration. [Testimony of Mr. Garfinkle; *See* Taxpayer Exhibit 1, Section 1].

59. Taxpayer was obligated under the CIC to provide various services at TCDC, including admitting and booking inmates "in accordance with [Taxpayer] policy[,]" creating and maintaining records, transporting inmates and providing associated guard services for inmates requiring off-site medical services, providing suitable storage and safekeeping of inmate property, affording on-site routine medical care, and establishment of job programs. [Testimony of Mr. Garfinkle; *See* Taxpayer Exhibit 1].

60. Taxpayer also provided other ancillary services at the TCDC, which included provision of water, utilities, waste removal, laundry, maintenance, meals, and on-site guard services. [Testimony of Mr. Garfinkle].

61. In consideration for its performance under the CIC, Torrance County compensated Taxpayer the sum of $52.00 per adult male inmate, and $54.00 per adult female inmate, for each date or part thereof in which the inmate was incarcerated at TCDC. [Testimony of Mr. Garfinkle; *See* Taxpayer Exhibit 1].

62. Taxpayer billed Torrance County on a monthly basis, and Torrance County was

then obligated to remit payment within 30 days. [*See* Taxpayer Exhibit 1].

63. The CIC provided that it could only be amended, changed or modified by written agreement of the parties. It also recognized that all agreements, covenants and understandings between the parties regarding the purpose of the contract had been incorporated into the contract. [*See* Taxpayer Exhibit 1].

64. The CIC also provided that Torrance County would not be authorized to assign or transfer any interest in the contract without Taxpayer's prior written approval. [*See* Taxpayer Exhibit 1].

65. On or about April 1, 2002, Torrance County entered into an Intergovernmental Service Agreement (hereinafter "ISA") with the USMS providing for the incarceration of federal inmates at TCDC. [*See* Taxpayer Ex. 2.1, Section 2].

66. Although the ISA provided for the incarceration of USMS inmates at TCDC, Taxpayer was not a party to the contract. [*See* Taxpayer Exhibit 2.1, Section 5; Taxpayer Exhibit 2.12, Section 14; Testimony of Mr. Garfinkle].

67. The ISA was executed on behalf of Torrance County by the Chairman of the Torrance County Commission.[*See* Taxpayer Exhibit 2.1, Section 14; Taxpayer Exhibit 2.12, Section 14].

68. Under the ISA, Torrance County, not Taxpayer, was obligated to accept and provide for the secure custody, care and safekeeping of federal prisoners for the USMS. [*See* Taxpayer Exhibit 2].

69. The ISA prohibited assignment or transfer of any interest in the agreement, and specifically provided that "[n]one of the principal activities of the project-support effort shall be contracted out to another organization without prior approval of USMS." [*See* Taxpayer Exhibit

2].

70. Despite the foregoing, Taxpayer directly invoiced USMS for its performance under the ISA, which in turn remitted payment directly to Taxpayer. [Testimony of Mr. Garfinkle; *See* Department Exhibit C; Department Exhibit E].

DISCUSSION

The dominant issue in this protest is whether, for the purposes of claiming a deduction from gross receipts under NMSA 1978, Section 7-9-47 (1994), Taxpayer sold licenses to Torrance County which Torrance County subsequently resold to the USMS for the detention of federal inmates at the TCDC, in the ordinary course of business.

Taxpayer claims it was entitled to a deduction under Section 7-9-47 because it sold licenses to Torrance County which Torrance County subsequently resold to USMS. In contrast, the Department maintains that Taxpayer was selling services to Torrance County, rather than licenses, which the Department argued as a matter of law did not qualify for the claimed deduction under Section 7-9-47. In addition, and to the extent that the object of the transactions could be characterized as licenses, the Department asserts that they were not resold to USMS, but were direct sales by Taxpayer to USMS.

The secondary issue is whether Taxpayer was entitled to good faith, safe harbor protection when it accepted a Type 2 NTTC from Torrance County in reliance on an email from the Department indicating that Taxpayer could accept an NTTC for the receipts derived from incarcerating USMS inmates.

Burden of Proof

Assessments by the Department are presumed to be correct. *See* NMSA 1978, Section 7-1-17. Tax includes, by definition, the amount of tax principal imposed, and unless the context

otherwise requires, "the amount of any interest or civil penalty relating thereto." *See* NMSA 1978, Section 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't,* 1989-NMCA-070, 108 N.M. 795, 779 P.2d 982. Therefore, the assessment issued to Taxpayer is presumed to be correct, and it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

The burden is also on Taxpayer to prove that it is entitled to an exemption or deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,* 2007-NMCA-050, ¶141 N.M. 520, 157 P.3d 85; *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743, 497 P.2d 745. "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." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306. *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649. *See also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

Gross Receipts Tax

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, Section 7-9-4 (2002). "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." *See* NMSA 1978, Section 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, Section 7-9-5 (2002).

Despite the general presumption of taxability, a taxpayer may qualify for the benefits of various deductions and exemptions.

At all relevant times to this protest, Taxpayer was engaged in business in New Mexico, specifically as the owner and operator of TCDC. As such, Taxpayer's receipts are presumed subject to New Mexico's gross receipts tax. In fact, Taxpayer timely paid gross receipts tax on its receipts from operating TCDC from 2010 through 2012, but subsequently applied for and received a refund for those periods, which the Department now seeks to recoup through the assessment.

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

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

With regard for the meaning of "license," "[o]ur legislature has not defined 'license' in any of our statutes. When not defined, we will use a word according to its ordinary meaning unless a different intent is clearly indicated." *See Quantum Corp. v. State Taxation & Revenue Dep't*, 1998-NMCA-050, ¶10, 125 N.M. 49, 956 P.2d 848 The New Mexico Court of Appeals in *Quantum* relied on Black's Law Dictionary to define "license" as "permission by competent authority to do an act which, without such permission, would be illegal, a trespass, a tort, or otherwise not allowable." *Id.*, *citing N.M. Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶7, 85 N.M. 565, 514 P.2d 616.

The initial inquiry in this case is whether Taxpayer sold a license to Torrance County that was potentially deductible, or whether the subject of the sale was predominately a service. The term,

"service" is defined at NMSA 1978, Section 7-9-3 (M) to mean "all activities engaged in for other persons for a consideration, *which activities involve predominantly the performance of a service as distinguished from selling or leasing property*." (Emphasis Added). The definition goes on to provide that "[i]n determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling."

In construing the CIC, which established the terms and conditions of the transactions at issue, one must be cognizant that "[u]nder general law, the character of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument." *See Transamerica Leasing Corp. v. Bureau of Revenue*, 1969-NMCA-011, ¶17, 80 N.M. 48, 450 P.2d 934. The evidence in this protest established that the intention underlying the CIC was to contract for the provision of services, and that any interest in the real property was subordinate to the provision of those services.

Pursuant to Section 1 of the CIC, Taxpayer's obligations under the contract were to "incarcerate and detain at the [TCDC][.]" In doing so, Torrance County intended to transfer a function of government to a private contractor in exchange for consideration, as permitted by NMSA 1978, Sections 33-3-1 to -27. Although Taxpayer asserted that the TCDC, referring to the real property, was the central component of the CIC, the Hearing Officer remained unpersuaded because a jail such as TCDC, without attendant services, would unlikely satisfy Torrance County's obligations under state or federal law.

For example, the United States Supreme Court has explained that the Constitution of the United States. "does not mandate comfortable prisons . . ., but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment[.]" *See Farmer v. Brennan*, 511

U.S. 825, 832 (1994) (internal citations omitted). "The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates[.]'" *Id.* at 832 - 833, *citing Hudson v. Palmer*, 468 U.S. 517, 526-527, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984).

This observation is significant because it exemplifies that services, not necessarily real property, were the predominant feature of the transaction intended by the CIC because a building, constructed of concrete, steel, and secured by razor wire, could not alone satisfy Torrance County's duties under the law. Rather, the law required more than a secure building.

In order to assure humane conditions of confinement, including adequate food, clothing, shelter, medical care, and reasonable measures to guarantee the safety of inmates, Torrance County relied upon Taxpayer to provide services within that building. *See Methola v. Cty. of Eddy*, 1980-NMSC-145, ¶17, 95 N.M. 329, 622 P.2d 234 ("We have previously held that '[a] jailer is an officer in the public domain, charged with the duty to maintain public order.'").

In contrast, had acquisition of an interest in the real property at TCDC been Torrance County's objective, then it could have theoretically acquired an interest in the real property under a lease agreement and retained direct responsibility for attendant services. It did not do so, opting instead for an arrangement whereby services, not real estate, was the predominant component of the transaction.

There is no other indication in the content or structure of the CIC that Torrance County or Taxpayer perceived the transaction as the conveyance of a license. The term "license" does not appear in the CIC nor does it contain any language that could suggest the intention to convey a license.

Likewise, there is nothing in the ISA between Torrance County and the USMS to indicate that either party perceived that agreement to establish the re-sale of such license. Instead, Section 8 of the ISA cover page (Taxpayer Exhibit 2.1) clearly states that "[t]his agreement is for the housing, safekeeping and subsistence of federal prisoners, in accordance with the contents set forth herein." A similar statement appears in Article I stating "[t]he Local Government agrees to accept and provide for the secure custody, care and safekeeping of federal prisoners in accordance with state and local law, standards, policies, procedures, or court orders applicable to the operations of the facility." The ISA is similarly silent in reference to "license" or any terms that could suggest a license. Similar to the CIC, the predominant component in the ISA providing for the incarceration of USMS inmates was also services. The ISA was unambiguous that it was primarily concerned with the secure custody, care and safekeeping of federal prisoners in accordance law, standards, policies, procedures, or applicable court orders. Adequate performance under the ISA would require provision of services.

Other than those provisions already referenced, perhaps no provision embodies the intention of the parties better than Article IX, Paragraph 3. It states in relevant part that the USMS shall be notified of any significant change in the facility, including significant variations in inmate populations, which cause a significant change in the "level of *services* under this [ISA]." *See* Taxpayer Exhibit 2.6. This is one of several references within the ISA to "services," which although not dispositive with respect to the intent of Torrance County or USMS, is indicative of how they perceived the purpose of the ISA.

Taxpayer did not deny that services were a substantial part of the CIC or ISA, but suggested that the services contracted for, and rendered, were incidental to the license permitting use of the real property, in a manner similar to the services rendered by a hotel as part of a guest's license to occupy

a room. Taxpayer relies on *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, 142 N.M. 779, 170 P.3d 1017. In *Corr. Corp.*, the taxpayer sought a refund of gross receipts tax because it asserted that its agreements to incarcerate prisoners for governmental agencies constituted leases not subject to gross receipts tax under a deduction relevant to that case, but not relevant to issue in this protest.

The Court of Appeals held that the pertinent contracts were not leases eligible for the relevant deduction because "government entities did not pay a fixed amount in exchange for the guarantee of physical real property to house inmates[.]" The Court went on to remark that the agreement in dispute was "more like" an arrangement between hotels and lodgers, than leases of real property. *Id.*

Accordingly, Taxpayer asserts that it sold licenses in a manner consistent with the Court's comment. However, the Court's comment in *Corr. Corp.* is not binding for several reasons. First, the comment is a clear example of *dicta* because it is not essential to the Court's holding. *See Bassett v. Sheehan*, 2008-NMCA-072, ¶9, 144 N.M. 178, 184 P.3d 1072 (defining "dictum" as a statement that is unnecessary to a holding). Second, it is well established that cases are not authority for propositions not considered. *See State v. Erickson K.*, 2002-NMCA-058, ¶20, 132 N.M. 258, 46 P.3d 1258. As previously stated, the principal issue in *Corr. Corp.* involved the deductibility of a lease. The proposition that the transactions at issue represented licenses *was not considered*. Finally, the comment in *Corr. Corp.*, when considered in the proper context does not actually suggest that the facts in this protest establish the existence of licenses. Instead, the Court, in that case merely drew a comparison to licenses, commenting the arrangement at issue was "more like" licenses than leases. It did not find that they were licenses.

Even upon further consideration, the analogy between jails and hotels reveals several shortcomings that the Court did not consider or deliberate because that was unnecessary to its holding

and not presented for its consideration. However, because those issues are central to the present matter, the Hearing Officer is required to elaborate.

Unlike a scenario in which a guest in a hotel may be dissatisfied with the quality of food, the cleanliness of a room, or the temperature of the pool, the failure to provide proper services in a detention facility could have adverse consequences on several levels. First, the failure to provide appropriate services might implicate personal rights secured by the New Mexico and United States Constitutions. *See* N.M. Const. Art. II, §13; USCS Const. Amend. 8; *See Farmer*, 511 U.S. at 832. Second, a failure to provide adequate services may expose the public purse to liability. *See e.g. Methola v. Cty. of Eddy*, 1981-NMCA-048, 96 N.M. 274, 629 P.2d 350. Third, a failure to provide appropriate services may pose danger to the community. *See e.g. Duran v. Anaya*, 642 F. Supp. 510, 527 (D.N.M. 1986) (in a state which experienced one of the deadliest prison riots in American history, it should be obvious that the public interest is served by the issuance of a preliminary injunction prohibiting the state from reducing various services). In contrast, one who is displeased with the accommodations they received in a hotel might take the issue up with management, demand a refund, write a negative review on the internet, or in the most serious situations, file a lawsuit, none of which will result in the deprivation of a constitutionally protected right, or worse.

Nevertheless, *Corr. Corp.* goes on to remind the reader that its holding is an accord with the presumption of taxation and the rule that deductions are to be narrowly construed, stating, "[w]e find nothing in our law to support CCA's position that we should expand the definition of 'lease for real property…' to include agreements between governmental entities and private prison companies." That same principle certainly applies to the extension of a license to include jail cells under Section 7-9-47.

To the extent any scintilla of skepticism persists, the next topic of discussion concerns an issue not directly addressed by either party at the hearing, but which should nevertheless be acknowledged and addressed. Accordingly, even if the Hearing Officer would have been persuaded that the parties were indeed engaging in the sale and re-sale of licenses, there is no evidence to establish the next essential element of the deduction: "[t]he buyer (Torrance County) delivering the nontaxable transaction certificate must resell the tangible personal property or license either by itself or in combination with other tangible personal property or licenses *in the ordinary course of business*." *See* NMSA 1978, Section 7-9-47. The statute does not define the phrase "in the ordinary course of business." However, the Court of Appeals has stated, "we believe that the phrase 'ordinary course of business' contemplates some evidence that the transaction at issue is customary, normal, or regular within the company's own business or within the relevant industry at large." *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't*, 2007-NMCA-050, ¶35, 141 N.M. 520, 157 P.3d 85.

Taxpayer did not call any witnesses having personal knowledge of Torrance County's "business." If Taxpayer intended to assert that the transaction occurred in the ordinary course of Torrance County's business, then the presumption of correctness required it to come forth with that evidence. It did not. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8 (it is taxpayer's burden to present countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it). However, the Hearing Officer may take administrative notice of the law, which does not expressly contemplate that purchasing licenses for re-sale would be a customary, normal, or regular part of Torrance County's governmental functions.

In contrast, the business of a county is prescribed by state law. NMSA 1978, Section 4-37-1 explains "this grant of powers to the counties are those powers necessary and proper to provide for

the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." There is insufficient evidence to permit any inference that purchasing and re-selling licenses for the incarceration of federal prisoners comes within those powers such that it might be determined that those transactions are within its ordinary course of business.

Good Faith Acceptance of an NTTC and Estoppel

Taxpayer argued that its timely acceptance of a Type 2 NTTC executed by Torrance County entitled it to the safe-harbor protection of NMSA 1978, Section 7-9-43 (A) (2011). It asserts further reliance on the email from Ms. Abbo [Taxpayer Exhibit 3.1] indicating that the Department would accept a Type 2 NTTC for the transactions, presumably as had been described in writing by Ms. Johnson.

NMSA 1978, Section 7-9-43(A) (2011) provides:

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

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

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

As previously discussed *In the Matter of the Protest of Adecco USA*, No. 14-16 (May 22, 2014), even under the broader reading of the safe harbor exception applied *In the Matter of the Protest of Case Manager* and *In the Matter of the Protest of Rio Grande Electric Co., Inc*, the safe harbor protection only applies when the underlying transaction is covered by a recognized deduction. That is, the safe harbor provision cannot transform a taxable transaction, not within any established deduction, into a nontaxable transaction by mere possession of an NTTC. In *McKinley Ambulance Serv. v. Bureau of Revenue*, 1979-NMCA-026, ¶ 10, 92 N.M. 599, 592 P.2d 515, the Court of Appeals held that the good faith safe harbor provision did not protect a seller from taxation "unless the certificate covered the receipts in question." The Court of Appeals went on to say that since there was "no certificate applicable" for the type of services that taxpayer provided, the Department's denial of the deduction was proper. *See McKinley*, ¶13. In *Gas Co. of N.M. v. O'Cheskey*, 1980-NMCA-085, ¶12, 94 N.M. 630, 614 P.2d 547, the court also stated that "[t]he issuance of a 'Nontaxable Transaction Certificate' does not operate to transform an otherwise taxable transaction into a nontaxable transaction." In order for the safe harbor provision to apply, the receipts in question must otherwise be covered by a recognized deduction. However, the Hearing Officer has concluded that Taxpayer is not entitled to a deduction because it was not selling licenses, it was not selling for re-sale, and the re-sales were not made in the ordinary course of business.

With respect for the email from Ms. Abbo, Taxpayer essentially asserts that the Department should be estopped from assessing Taxpayer because it relied on Ms. Abbo's email that supposedly approved, in writing, the use of the Type 2 NTTC to establish a deduction under NMSA 1978, Section 7-9-47.

The problem with Taxpayer's position stems from the undisputed fact that the information provided to Ms. Abbo, which she presumably relied upon, was *incorrect*. Ms. Johnson's email to Ms.

Abbo, intending to *clarify* the issue at hand, stated: "[j]ust to clarify, the NTTC relates to the portion of Torrance County receipts derived from housing USMS inmates. *The receipts are not coming directly from the USMS to CCA*." *See* Taxpayer Exhibit 3.1 (Emphasis Added).

However, Mr. Garfinkle candidly testified that, contrary to the information provided to Ms. Abbo, Taxpayer directly invoiced USMS, and USMS responded with direct payment to Taxpayer. Although Taxpayer argued that it was acting as agent for Torrance County, such that Taxpayer stood in the place of Torrance County in its capacity as agent, evidence in support of that position was minimal and unpersuasive. Instead, the CIC and ISA, neither of which expressly established or recognized such relationship, placed strict limitations on the authority of the parties to transfer and assign rights without the express written approval of the other party. Taxpayer presented nothing to indicate that either party had granted any other party rights which were not expressly contained in either the CIC or ISA. Therefore, the Hearing Officer was not persuaded that Taxpayer acted as an agent, thereby effectively curing the defect in the facts that the Department relied upon.

Nevertheless, NMSA 1978, Section 7-1-60 (1993) provides for statutory estoppel in certain circumstances. In pertinent part, the Department is estopped from acting when a taxpayer's actions were "in accordance with any regulation effective during the time the asserted liability for tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary[.]" The evidence presented in this protest did not establish that the Taxpayer's actions, at the time the various transactions occurred, were in accordance with any regulation effective during the time the asserted liability arose or in accordance with any ruling addressed to Taxpayer personally in writing by the secretary.

Nevertheless, Ms. Abbo expressed clear and unambiguous agreement that the Department would accept a Type 2 NTTC for the types of transactions Taxpayer described. Accordingly,

Taxpayer's argument may be construed as asserting a claim for equitable estoppel, as opposed to statutory estoppel. However, the availability of equitable estoppel for providing the relief the Taxpayer seeks is questionable in an administrative protest hearing. *See AA Oilfield Serv. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶18, 118 N.M. 273, 881 P.2d 18 (equitable remedies are not part of the "quasi-judicial" powers of administrative agencies).

Even if it were available in this context, courts are reluctant to apply the doctrine of equitable estoppel against the state in cases involving the assessment and collection of taxes. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr.*, 1989-NMSC-015, ¶9, 108 N.M. 228, 770 P.2d 873. In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *See Bien Mur*, 1989-NMSC-015 at ¶9. Statements not reduced to writing are generally not grounds to grant equitable estoppel. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440, 99 P.3d 690. Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Pub. Emps. Ret. Bd.*, 1993-NMSC-028, ¶18 - 19, 115 N.M. 650, 857 P.2d 761.

Under *Kilmer*, ¶26 (internal citations omitted), in order for a taxpayer to establish an equitable estoppel claim against the Department, a taxpayer must show that:

> (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury.

The claimant must also show "affirmative misconduct on the part of the government." *id.* at ¶27 (internal citations omitted). In this case, Taxpayer's argument would fail on the first element in that the Department was not aware of the true facts. Rather, the facts it presumably relied upon were

admittedly incorrect and neither Ms. Johnson, Taxpayer, or anyone else on Taxpayer's behalf sought to correct the misstatement of fact.

Since Taxpayer did not establish that the receipts derived from the transactions in issue were deductible, Taxpayer cannot rely on its acceptance of the NTTC to convert this taxable transaction into a nontaxable transaction. To the extent Taxpayer purports to rely in good faith on Ms. Abbo's email, such reliance is also unreasonable. The facts that Ms. Abbo relied upon were undeniably and undisputedly incorrect.

Penalty and Interest

Although Taxpayer devotes minimal resources to protesting the assessment of penalty and interest, the Hearing Officer will nevertheless briefly address those issues.

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." *See* NMSA 1978, Sec. 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d 135. 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. In this case, the Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from when the tax was originally due until Taxpayer pays the gross receipts tax principal in this matter.

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).

Again, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence." *See Marbob.*

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required;" or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer was negligent under Regulation 3.1.11.10 (A) (B) & (C) NMAC, because Taxpayer failed to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances to report and pay gross receipts tax when due. As previously discussed, any purported reliance on Ms. Abbo's email was unreasonable since the facts that Ms. Abbo presumably relied upon in expressing the conclusion in her email were incorrect.

In instances where a taxpayer might fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception in that "[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 made an informed judgment or determination based on reasonable grounds that gross receipts tax did not apply to the services subject of this protest. *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). Again, any reliance on Ms. Abbo's email was unreasonable given the material misstatement of fact it presumably relied upon. Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty in this case.

The other grounds for abatement of civil negligence penalty are found under Regulation 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty may be abated. Based on the evidence presented, only one factor under Regulation 3.1.11.11 NMAC is potentially applicable in this protest:

> A. the taxpayer proves the taxpayer was affirmatively misled by a department employee[.]

As previously explained herein, the evidence failed to establish that Taxpayer was affirmatively misled. Rather, the conclusion provided in Ms. Abbo's email was presumably in reliance on Taxpayer's facts which were fundamentally flawed.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's assessment in the amount of $3,634,154.91 issued under Letter ID No. L1081049392 for the periods from January 31, 2010 through September 30, 2015, and jurisdiction lies over the parties and the subject matter of this protest.

B. A timely hearing occurred within 90 days of the date of Taxpayer's protest pursuant to NMSA 1978, Section 7-1B-8 (A).

C. Under NMSA 1978, Section 7-9-5 (2002), Taxpayer's gross receipts derived from engaging in business in New Mexico are presumed taxable.

D. Taxpayer had the burden to establish entitlement to a deduction under NMSA 1978, Section 7-9-47 (1994).

E. Deductions must be narrowly construed. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779.

F. The CIC and ISA predominately involved the performance of services pursuant to NMSA 1978, Section 7-9-3 (M) (2007).

G. Taxpayer did not meet its burden of establishing it was entitled to the deduction under NMSA 1978, Section 7-9-47 (1994).

H. Because no deduction or certificate covered the transaction at issue, Taxpayer did not establish good-faith acceptance of the NTTCs and thus was not entitled to safe harbor protection under NMSA 1978, Section 7-9-43 (A). *See McKinley Ambulance Serv. v. Bureau of Revenu*e, 1979-NMCA-026, ¶10, 92 N.M. 599.

I. Taxpayer is not entitled to statutory estoppel pursuant to NMSA 1978, Section 7-1-60 (1993) and has not presented sufficient evidence to satisfy the minimum elements necessary to assert a claim for equitable estoppel under *Kilmer v. Goodwin*, 2004-NMCA-122, ¶28, 136 N.M. 440, 99 P.3d 690.

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

K. Under NMSA 1978, Sec. 7-1-69 (2007), Taxpayer is liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC

L. Taxpayer did not establish non-negligence under Regulation 3.1.11.11 NMAC.

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

DATED: July 19, 2018

Chris Romero
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. 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

On July 19, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interagency Mail*