

1                                    **STATE OF NEW MEXICO**  
2                                    **ADMINISTRATIVE HEARINGS OFFICE**  
3                                    **TAX ADMINISTRATION ACT**

4 **IN THE MATTER OF THE PROTEST OF**  
5 **TOTAL MANAGEMENT SYS INC.**  
6 **TO ASSESSMENT ISSUED UNDER**  
7 **LETTER ID NO. L0485786416**

8 **v.**    **AHO No. 18.01-019A**  
9    **D&O 19-20**

10 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

11    **DECISION AND ORDER**

12                On May 13, 2019, Hearing Officer Chris Romero, Esq., conducted a hearing on the  
13 merits of the tax protest of Total Management Systems Inc. (“Taxpayer”) pursuant to the Tax  
14 Administration Act and the Administrative Hearings Office Act. Mr. Benjamin C. Roybal, Esq.  
15 appeared on behalf of Taxpayer, accompanied by witnesses, Mr. Prakash Sundaram, Ms.  
16 Krithika Sundaram, Mr. Donald Miller, CPA, and Mr. Bruce Malott, CPA. Mr. Miller and Mr.  
17 Malott testified as Taxpayer’s designated expert witnesses.

18                Mr. Marek Grabowski, Esq. appeared on behalf of the opposing party in the protest, the  
19 Taxation and Revenue Department (“Department”), accompanied by Ms. Mary Griego, protest  
20 auditor, and Mr. Ron Scott, CPA, who appeared as witnesses for the Department. Mr. Scott  
21 appeared as the Department’s designated expert witness.

22                Taxpayer Exhibits 1 – 7 and Department Exhibits A, G, H and L were admitted into the  
23 evidentiary record without objection.

24                The issue in the protest is whether Taxpayer is entitled to an abatement of assessed gross  
25 receipts tax, and associated penalty and interest by virtue of the deduction provided by NMSA  
26 1978, Section 7-9-69 (2015) which permits a business to deduct from its gross receipts those  
27 amounts deriving from providing administrative, managerial, accounting and customer services

1 for an affiliate on a nonprofit or cost basis. As explained in further detail, the Hearing Officer  
2 determined that the Taxpayer's methodology for calculating the costs of its services is reasonable,  
3 and that the receipts from affiliated hotels compensate Taxpayer upon a nonprofit or cost basis.  
4 Receipts from services to non-affiliated hotels are not at issue. IT IS DECIDED AND  
5 ORDERED AS FOLLOWS:

#### 6 **FINDINGS OF FACT**

7 1. On September 22, 2017, the Department issued a Notice of Assessment of Taxes  
8 and Demand for Payment ("Assessment") under Letter ID No. L0485786416 which assessed the  
9 sum of \$276,963.88 comprised of \$205,593.83 in gross receipts tax, \$41,118.83 in gross receipts  
10 tax penalty, \$25,385.69 in gross receipts tax interest, \$3,720.43 in withholding tax, \$744.11 in  
11 withholding tax penalty, and \$400.99 in withholding tax interest for the periods from January 31,  
12 2009 through June 30, 2016. [Administrative File; Taxpayer Ex. 2]

13 2. The Assessment arose from an audit covering the same periods of time subject of  
14 the Assessment, although there were no amounts assessed specifically for tax years 2009 and  
15 2010. [Direct Examination of Ms. Griego; Taxpayer Ex. 1]

16 3. On December 15, 2017, Taxpayer filed a protest with the Department's protest  
17 office. The file stamp on the protest indicates that it was received on December 18, 2017.  
18 [Administrative File]

19 4. The Department acknowledged Taxpayer's protest on December 19, 2017 under  
20 Letter ID No. L0928117552. [Administrative File]

21 5. On January 24, 2018, the Department submitted a Hearing Request to the  
22 Administrative Hearings Office in which it requested a scheduling hearing to address scheduling  
23 pertinent to Taxpayer's protest. [Administrative File]

1           6.       On January 24, 2018, the Administrative Hearings Office entered a Notice of  
2 Telephonic Scheduling Hearing which set a scheduling hearing for February 9, 2018.

3 [Administrative File]

4           7.       On January 30, 2018, Taxpayer's counsel of record filed an Unopposed Motion to  
5 Continue. [Administrative File]

6           8.       On February 6, 2017, the Administrative Hearings Office entered an Amended  
7 Notice of Telephonic Scheduling Hearing which reset the date for an initial scheduling hearing  
8 for February 27, 2018. [Administrative File]

9           9.       An initial telephonic scheduling hearing was held on February 27, 2018 and  
10 occurred within 90 days of Taxpayer's protest. [Administrative File]

11          10.      On February 27, 2018, the Administrative Hearings Office entered a Notice of  
12 Second Telephonic Scheduling Hearing that set a hearing for May 4, 2018. [Administrative File]

13          11.      On May 4, 2018, the Administrative Hearings Office entered a Notice of Third  
14 Telephonic Scheduling Hearing that set a hearing for July 6, 2018. [Administrative File]

15          12.      On July 6, 2018, the Administrative Hearings Office entered a Notice of Fourth  
16 Telephonic Scheduling Hearing that set a hearing for September 7, 2018. [Administrative File]

17          13.      On September 7, 2018, the Administrative Hearings Office entered a Scheduling  
18 Order and Notice of Administrative Hearing which in addition to establishing other deadlines, set  
19 a hearing on the merits of Taxpayer's protest for May 13, 2019. [Administrative File]

20          14.      On February 27, 2019, the Department filed a Certificate of Service indicating  
21 that it had served its First Set of Requests for Admission, Interrogatories and Requests for  
22 Production on counsel for Taxpayer. [Administrative File]

1           15.     On March 26, 2019, Taxpayer filed a Certificate of Service indicating that it had  
2 served its Amended First Set of Interrogatories and Amended First Requests for Admissions on  
3 counsel for the Department. [Administrative File]

4           16.     On April 2, 2019, the Department filed a Certificate of Service indicating that it  
5 had served its responses to Taxpayer's Amended First Requests for Admission and Amended  
6 First set of Interrogatories on counsel for Taxpayer. [Administrative File]

7           17.     On April 3, 2019, Taxpayer filed a Certificate of Service indicating that it had  
8 served Taxpayer's Response to the Department's First Set of Requests for Admission,  
9 Interrogatories and Requests for Production on counsel for the Department. [Administrative File]

10          18.     On April 22, 2019, Taxpayer filed a Certificate of Service indicating that it had  
11 served its Prehearing Statement on counsel for the Department. [Administrative File]

12          19.     On April 23, 2019, the Department filed Taxation and Revenue Department's  
13 Prehearing Statement. [Administrative File]

14          20.     On May 6, 2019, Taxpayer filed Protestant's Amended Prehearings Statement  
15 accompanied by separate Certificate of Service indicating that it was also served on counsel for  
16 the Department. [Administrative File]

17          21.     Taxpayer is a corporation owned by the Sundaram family which was established  
18 to provide management and administrative services to several hotels also owned by the  
19 Sundaram family. It is owned by Mr. Prakash Sundaram, his parents, and his sister. [Direct  
20 Examination of P. Sundaram]

21          22.     Mr. Sundaram is the President and CEO of Taxpayer. He has served in those  
22 capacities since 2013, although he has been associated with Taxpayer since its inception in 1993.  
23 [Direct Examination of P. Sundaram]

1           23.     From 1993 until 2013, Mr. Sundaram served as Taxpayer's vice-president and  
2 senior vice-president, and eventually succeeded his father as President and CEO. Mr.  
3 Sundaram's father is still active in family business matters, but no longer serves as Taxpayer's  
4 President or CEO. [Direct Examination of P. Sundaram]

5           24.     Mr. Sundaram's father is founder of Taxpayer and serves as chairman of  
6 Taxpayer's board of directors. [Direct Examination of P. Sundaram]

7           25.     Taxpayer was originally established to allocate management fees to other legal  
8 entities, owned by the Sundaram family, which also owned and operated various hotel properties,  
9 and to provide the entity through which family members would be compensated as employees of  
10 Taxpayer for their work for the family's various hotels. [Direct Examination of P. Sundaram]

11          26.     Taxpayer employs six individuals, including Mr. Sundaram and five members of  
12 his family. [Cross Examination of P. Sundaram]

13          27.     In his capacity as President and CEO of Taxpayer, his responsibilities include  
14 overseeing daily operations, reviewing profit and loss statements, conducting management  
15 meetings, and evaluating customer service information for all the hotels which Taxpayer  
16 manages. [Cross Examination of P. Sundaram]

17          28.     During the audit period, Mr. Sundaram also spent substantial amounts of time  
18 traveling among the various hotels, some of which were under construction at the time. He relied  
19 on a vehicle that was owned by Eagle Investors, the entity that owned the real property of one of  
20 the affiliated hotels. Eagle Investors is also owned by Mr. Sundaram's family. [Cross  
21 Examination of P. Sundaram]

22          29.     Mr. Sundaram, in addition to his work for Taxpayer, is also engaged in a variety  
23 of other business activities, including general construction through Sundaram Builders, Inc. He

1 holds a GB98 contractor's license which allows him to act as a general contractor for a variety of  
2 projects, including projects for both affiliated and nonaffiliated hotels serviced by Taxpayer.

3 [Cross Examination of P. Sundaram]

4 30. Mr. Sundaram's mother is secretary treasurer of the Taxpayer corporation who  
5 also performs some bookkeeping functions. [Direct Examination of P. Sundaram]

6 31. Mr. Sundaram's spouse, Ms. Krithika Sundaram, is senior vice-president of  
7 finance for Taxpayer responsible for accounting and bookkeeping functions for all hotels, as well  
8 as overseeing human resources and payroll. [Direct Examination of P. Sundaram; Direct  
9 Examination of K. Sundaram]

10 32. Mr. Sundaram's sister is senior vice-president for sales, marketing, and revenue  
11 management for Taxpayer, which includes setting and adjusting daily room rates for the hotels.  
12 [Direct Examination of P. Sundaram]

13 33. Mr. Sundaram's brother-in-law is senior vice-president for information  
14 technology and operations for Taxpayer who oversees technology aspects of the hotels as well as  
15 daily operations. [Direct Examination of P. Sundaram]

16 34. Taxpayer compensates Mr. Sundaram and each of his family members as salaried  
17 employees with healthcare and retirement benefits. [Direct Examination of P. Sundaram]

18 35. Taxpayer manages a total of eight hotels at the present time, with a ninth hotel  
19 under construction as of the date of the hearing. Six of the eight hotels are family owned  
20 affiliates. Taxpayer pays gross receipts tax on fees generated from services provided to non-  
21 affiliated hotels. [Direct Examination of P. Sundaram; Cross Examination of P. Sundaram;  
22 Direct Examination of D. Miller]

1           36.     Non-affiliate hotels are defined as those hotels in which Mr. Sundaram has an  
2 ownership interest, but which do not include his other family members as owners. [Re-Direct  
3 examination of P. Sundaram]

4           37.     Taxpayer provides a variety of services to affiliate and non-affiliate hotels  
5 including: (1) human resources for more than 200 employees; (2) sales and marketing; (3)  
6 revenue management; (4) accounting and budget management; and (5) tax returns. [Direct  
7 Examination of P. Sundaram]

8           38.     Taxpayer's services are typical among third-party management companies  
9 similarly engaging in the business of providing hotel management services. [Direct Examination  
10 of P. Sundaram]

11          39.     Hotels, whether affiliated or not, pay a fee for Taxpayer's management services.  
12 [Direct Examination of P. Sundaram]

13          40.     Taxpayer does not have formal contracts with its affiliated hotels, primarily  
14 because those hotels, or the entities that own them, have owners in common with Taxpayer, in  
15 that they are all owned by the Sundaram family. [Direct Examination of P. Sundaram]

16          41.     Taxpayer calculates its fees to cover costs without making a profit so that it can  
17 avail itself of the deduction provided by NMSA 1978, Section 7-9-69 which states that  
18 “[r]eceipts of a business entity for administrative, managerial, accounting and customer services  
19 performed by it for an affiliate upon a nonprofit or cost basis and receipts of a business entity  
20 from an affiliate for the joint use or sharing of office machines and facilities upon a nonprofit or  
21 cost basis may be deducted from gross receipts.” [Direct Examination of P. Sundaram]

1           42.     Taxpayer did not protest the portion of the assessment regarding withholding tax  
2 and associated penalty and interest. [Direct Examination of P. Sundaram; Direct Examination of  
3 K. Sundaram]

4           43.     Taxpayer protested the assessment with regard for gross receipts tax and  
5 associated penalty and interest based on the plain language of Section 7-9-69 and the advice of  
6 its certified public accountants. [Direct Examination of P. Sundaram]

7           44.     In tax years 2009 until 2012, Taxpayer charged a flat fee for services determined  
8 by the actual costs incurred for providing services divided by the number of affiliated hotels  
9 served. However, tax years 2009 and 2010 are not under protest because although they were part  
10 of the audit, they were not assessed. [Direct Examination of P. Sundaram]

11          45.     In 2011, Taxpayer's revenue exceeded its expenses and it reported a profit. In  
12 2012, its expenses exceeded its revenue and it reported a loss. The fee in both years was  
13 determined by dividing Taxpayer's business expenses by the number of hotels, which in this case  
14 was three. [Direct Examination of K. Sundaram; Taxpayer Ex. 4]

15          46.     Beginning in tax year 2013, Taxpayer modified its fee formula to reflect a  
16 percentage of each hotel's revenue. The sum of the fees from affiliated hotels were intended to  
17 compensate Taxpayer for its services at a cost or nonprofit basis. The modification was intended  
18 to conform with and accommodate the requirements of the financial institutions with which  
19 Taxpayer or its affiliated entities conducted business. [Direct Examination of P. Sundaram]

20          47.     Taxpayer initiated a method of setting its fee for management services by:  
21           a.     determining the sum of its expenses, including but not necessarily limited to  
22                 salaries, retirement, healthcare, office space, taxes, licensing and fees,  
23                 depreciation, utilities, equipment and supplies, the sum representing the total



1 cost of providing services which Taxpayer expected to recover from its  
2 affiliated hotels;

3 b. projecting the revenue generated by each affiliate hotel for the upcoming year  
4 based on prior performance and evaluation of other forecasting tools;

5 c. reducing the projection to a percentage per hotel which then represents its  
6 share of Taxpayer's costs;

7 d. expenses and income are then monitored and adjusted as necessary to reduce  
8 the chance that the fee per hotel could exceed costs, generating a profit for  
9 Taxpayer in the given year.

10 [Direct Examination of P. Sundaram; Direct Examination of D. Miller]

11 48. In 2013, Taxpayer had three hotels. The fee charged to each hotel ranged from 6  
12 to 8 percent of each hotel's revenue. Taxpayer's revenue in that year exceeded its expenses and it  
13 consequently reported a profit. [Direct Examination of K. Sundaram; Taxpayer Ex. 4]

14 49. In 2014, Taxpayer had three hotels. The fee charged to each hotel ranged from 8  
15 to 10 percent of each hotel's revenue. Taxpayer's expenses exceeded its revenue and it reported a  
16 loss. [Direct Examination of K. Sundaram; Taxpayer Ex. 4]

17 50. In 2015, Taxpayer had six hotels. The fee charged to each hotel ranged from 6 to  
18 9 percent of each hotel's revenue. Taxpayer's expenses exceeded its revenue and it reported a  
19 loss. [Direct Examination of K. Sundaram; Taxpayer Ex. 4]

20 51. In 2016, Taxpayer had six hotels. The fee charged to each hotel ranged from 5 to  
21 6 percent of each hotel's revenue. Taxpayer's expenses exceeded its revenue and it reported a  
22 loss. [Direct Examination of K. Sundaram; Taxpayer Ex. 4]

1           52.     The cumulative result from 2011 through 2016 was a loss in which the cumulative  
2 expenses exceeded the cumulative revenue over the course of the audit period. The total loss  
3 over that duration of time was \$88,596.00. [Direct Examination of K. Sundaram; Direct  
4 Examination of D. Miller; Taxpayer Ex. 4; Taxpayer Ex. 5; Taxpayer Ex. 6]

5           53.     Since 1993, Taxpayer has generated a loss, and has never been intentionally  
6 profitable for a sustained duration of time. [Direct Examination of P. Sundaram]

7           54.     Taxpayer has conducted its business in this manner since 1993 based on the  
8 advice of its certified public accountant, Mr. Howard Britt, CPA<sup>1</sup>, regarding strategies for  
9 reducing its potential tax liabilities by satisfying the elements of establishing entitlement to the  
10 deduction under Section 7-9-69. [Cross Examination of P. Sundaram]

11          55.     In 1993, Mr. Sundaram was among the individuals involved in establishing  
12 Taxpayer, and had specific recollection of reading Section 7-9-69, and concluding that it clearly  
13 established entitlement to a deduction that Taxpayer could utilize consistent with the advice from  
14 Mr. Britt. [Cross Examination of P. Sundaram]

15          56.     Mr. Britt advised based on Section 7-9-69 that Taxpayer should come as close as  
16 possible to breaking even but always err on the side of sustaining a loss. [Cross Examination of  
17 P. Sundaram]

18          57.     Neither Mr. Sundaram nor anyone else associated with establishing Taxpayer ever  
19 concluded it would be useful or necessary to seek a ruling from the Department in reference to  
20 the application of the deduction provided by Section 7-9-69, finding that the statute spoke for  
21 itself. [Cross Examination of P. Sundaram]

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<sup>1</sup> Mr. Sundaram testified that Mr. Britt was deceased. The Hearing Officer took administrative notice of an obituary confirming that he died in 2014. See <https://www.dignitymemorial.com/obituaries/mesa-az/howard-britt-6133062>.

1           58.     Mr. Britt provided accounting services from 1993 until the late 1990s, including  
2 filing CRS returns. [Cross Examination of P. Sundaram]

3           59.     Taxpayer thereafter retained the services of Mr. Bill Hinkle, CPA, who worked  
4 with Taxpayer until his retirement in approximately 2005. Mr. Hinkle's advice regarding the  
5 applicability of Section 7-9-69 was consistent with the previous advice of Mr. Britt. [Cross  
6 Examination of P. Sundaram]

7           60.     Taxpayer thereafter retained the services of Mr. Steven Parrish, CPA, whose  
8 advice was consistent with the previous advice from Mr. Britt and Mr. Hinkle. Mr. Sundaram  
9 could not recall the dates in which Taxpayer worked with Mr. Parrish but it was between that  
10 period of time between Mr. Hinkle and Mr. Donald Miller, CPA, who succeeded him. [Cross  
11 Examination of P. Sundaram]

12           61.     Mr. Donald Miller, CPA presently serves as Taxpayer's accountant and has  
13 served in that capacity since 2011. He has prepared Taxpayer's federal and state income tax  
14 returns and has assisted Taxpayer in matters arising from the Department's audit. [Direct  
15 Examination of D. Miller]

16           62.     Mr. Miller's advice is consistent with all previous advice provided to Taxpayer in  
17 that Taxpayer is entitled to deduction under Section 7-9-69 since it provided services to affiliated  
18 hotels upon a nonprofit or cost basis. [Direct Examination of D. Miller]

19           63.     Whether Taxpayer provided services upon a cost or nonprofit basis is determined  
20 by basic accounting. The law does not require or suggest any specific formula for determining  
21 whether Taxpayer is providing services upon a cost or nonprofit basis. [Direct Examination of D.  
22 Miller]

1           64.     Establishing a fee for services utilizing a percentage-based method does not  
2 necessarily establish a performance-based fee. Instead, the percentage-based method merely  
3 distributes a share of Taxpayer's costs among the affiliated hotels. [Direct Examination of D.  
4 Miller]

5           65.     Had Taxpayer not adjusted its percentages, then the growth of each hotel's  
6 revenue over time would have caused Taxpayer's receipts to eventually exceed its costs. Instead,  
7 the percentage charged per hotel has continuously been adjusted since 2013, including  
8 downward adjustments, to avoid making a profit. [Direct Examination of D. Miller]

9           66.     Mr. Ron L. Scott is a certified public accountant with more than 30 years'  
10 experience. Neither Section 7-9-69, nor any regulations or rulings require any specific  
11 methodology for determining the cost of providing services. [Cross Examination of R. Scott]

12           67.     The starting point of Taxpayer's methodology is to identify its expenses.  
13 Taxpayer's expenses are ordinary and necessary. They are also typical and reasonable in  
14 comparison to other entities engaged in similar business activities. [Direct Examination of D.  
15 Miller]

16           68.     Although possible, it is neither feasible nor obligatory that Taxpayer track and  
17 allocate every cost among its affiliated hotels, such as units of time expended by individuals for  
18 the benefit of one or more hotels. [Direct Examination of D. Miller]

19           69.     Wages paid to Taxpayer's employees are reasonable based on Mr. Miller's  
20 experience. [Cross Examination of D. Miller]

21           70.     To the extent there are fluctuations among Taxpayer's various costs from year to  
22 year, that may be attributable to the method by which the expenses are categorized for income  
23 tax purposes and are not indicative of any irregularity. [Direct Examination of D. Miller]



1 Although Taxpayer also provides services to non-affiliated hotels, Taxpayer pays gross receipts  
2 tax on those receipts and they are not at issue in this protest.

3 **Presumption of Correctness & Burden of Proof.**

4 Under NMSA 1978, Section 7-1-17 (C) (2007), the Assessment from which this protest  
5 arises is presumed correct and the burden rests on Taxpayer to overcome the presumption. *See*  
6 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise  
7 specified, for the purposes of the Tax Administration Act, “tax” includes interest and civil  
8 penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the  
9 presumption of correctness under Section 7-1-17 (C) similarly extends to the Department’s  
10 assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation &*  
11 *Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503, 134 P.3d 785, 791 (agency regulations  
12 interpreting a statute are presumed proper and are to be given substantial weight).

13 For that reason, Taxpayer carries the burden to present countervailing evidence or legal  
14 argument to show that it is entitled to an abatement of an assessment. *See N.M. Taxation &*  
15 *Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. “Unsubstantiated  
16 statements that the assessment is incorrect cannot overcome the presumption of correctness.” *See*  
17 *MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d  
18 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the  
19 presumption, then the burden shifts to the Department to re-establish the correctness of the  
20 assessment. *See MPC*, 2003-NMCA-021, ¶13.

21 If a taxpayer’s claim for relief relies on the application of an exemption or deduction,  
22 then “the statute must be construed strictly in favor of the taxing authority, the right to the  
23 exemption or deduction must be clearly and unambiguously expressed in the statute, and the

1 right must be clearly established by the taxpayer.” *See Wing Pawn Shop v. Taxation and Revenue*  
2 *Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted); *See*  
3 *also TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d  
4 474.

5 **Gross Receipts Tax and the Deduction for Administrative and Accounting Services.**

6 The Assessment in this protest arises from the application of the Gross Receipts and  
7 Compensating Tax Act, in which New Mexico imposes a gross receipts tax for the privilege of  
8 engaging in business, on the receipts of any person engaged in business in New Mexico. *See*  
9 NMSA 1978, Section 7-9-4 (2002).

10 The term “gross receipts” is defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007), to  
11 mean:

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

18 “Engaging in business” is defined as “carrying on or causing to be carried on any activity  
19 with the purpose of direct or indirect benefit.” *See* NMSA 1978, Section 7-9-3.3 (2003). The  
20 term “service” is defined to mean “all activities engaged in for other persons for a consideration,  
21 which activities involve predominantly the performance of a service as distinguished from  
22 selling or leasing property.” *See* NMSA 1978, Section 7-9-3 (M).

23 There is a statutory presumption that all receipts of a person engaged in such business are  
24 taxable. *See* NMSA 1978, Section 7-9-5 (2002). Yet, despite the general presumption of taxability,  
25 a taxpayer may qualify for the benefits of various deductions and exemptions.

1 Taxpayer was clearly engaged in the business of providing a variety of services to several  
2 hotels owned and operated by the Sundaram family, albeit through various business entities, and it  
3 claims entitlement to the deduction provided by Section 7-9-69 (A) which states in relevant part:

4 Receipts of a business entity for administrative, managerial,  
5 accounting and customer services performed by it for an affiliate  
6 upon a nonprofit or cost basis and receipts of a business entity from  
7 an affiliate for the joint use or sharing of office machines and  
8 facilities upon a nonprofit or cost basis may be deducted from gross  
9 receipts.

10 The parties expressed no dispute regarding the relationship of Taxpayer to its affiliated  
11 hotels, or that the types of services it provided were within the categories of administrative,  
12 managerial, accounting and customer services. Instead, the critical disagreement arises from  
13 whether the services were provided “upon a nonprofit or cost basis,” the method through which  
14 Taxpayer calculated the cost of doing business, and perhaps to a lesser extent, the formula through  
15 which it divided those costs among its affiliated hotels.

16 It is a canon of statutory construction in New Mexico to adhere to the plain wording of a  
17 statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions.  
18 *See Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401,  
19 962 P.2d 1236. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d  
20 881 (internal quotations and citations omitted), the New Mexico Court of Appeals stated:

21 the guiding principle in statutory construction requires that we look  
22 to the wording of the statute and attempt to apply the plain  
23 meaning rule, recognizing that when a statute contains language  
24 which is clear and unambiguous, we must give effect to that  
25 language and refrain from further statutory interpretation.

26 Extra words should not be read into a statute if the statute is plain on its face, especially if it  
27 makes sense as written. *See Johnson v. N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶27,  
28 127 N.M. 120, 978 P.2d 327; *see also Amoco Prod. Co. v. N.M. Taxation & Revenue Dep’t*, 1994-



1 NMCA-086, ¶8 & ¶14, 118 N.M. 72, 878 P.2d 1021. Only if the plain language interpretation  
2 would lead to an absurd result not in accord with the legislative intent and purpose is it necessary  
3 to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan*  
4 *Soc’y*, 2009-NMSC-036, ¶11, 146 N.M. 473, 212 P.3d 361.

5 Although the Department skillfully argued that Section 7-9-69 could be susceptible to  
6 competing interpretations, the Hearing Officer finds the plain language of the statute to be clear  
7 and unambiguous. The applicable portion of the statute clearly provides a deduction for the  
8 receipts of a business entity for administrative, managerial, accounting and customer services  
9 performed by it for an affiliate upon a nonprofit or cost basis. The Hearing Officer shall therefore  
10 refrain from further construction and reading extra words into the statute because it is plain on its  
11 face and makes sense as written.

12 To the extent there could be any room for disagreement, then the source of that conflict  
13 arises from the absence of any statutory or regulatory approved method of computing profits or  
14 costs for the purpose of applying the deduction. During all periods relevant to this protest, Taxpayer  
15 calculated its costs as the sum of all expenses. It then identified the difference between its revenue  
16 and costs to determine whether it produced a profit. In other words, it employed the most basic  
17 method simply articulated as “income minus expenses.” Mr. Miller and Mr. Malott credibly testified  
18 this methodology was reasonable and the Hearing Officer agreed. In all but two years, Taxpayer’s  
19 costs exceeded its receipts, although there was a cumulative loss exceeding \$88,000 over the  
20 duration of the entire audit period.<sup>2</sup>

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<sup>2</sup> Although the Hearing Officer internally contemplated whether the deduction could be cumulatively applied, as suggested by Taxpayer, or whether it needed to be claimed by individual reporting period, the Department expressed no opposition to Taxpayer’s cumulative approach.

1 Taxpayer's witnesses credibly and persuasively testified that the entirety of its operation was  
2 dedicated to providing administrative, managerial, accounting and customer services to its affiliated  
3 hotels, including human resources, sales and marketing, revenue management, accounting,  
4 budget management, and tax reporting and payment. Since all costs were expended to provide  
5 those services, it was reasonable to rely on the sum of those costs as the starting point for  
6 determining whether those services were provided at cost or without profit. In this regard, Mr.  
7 Miller and Mr. Malott credibly testified based on their many years of certified public accounting  
8 that Taxpayer's expenses in the relevant periods of time, including their wages and benefits, were  
9 reasonable.

10 In fact, the evidence established that Taxpayer employed a more conservative approach to  
11 compensating its employees than necessary. Mr. Miller suggested that Taxpayer's employees might  
12 even be underpaid and explained that it could avail itself of a more appealing and costlier retirement  
13 program and still keep its costs within what is considered reasonable.

14 The Department did not necessarily express disagreement with the reasonableness of  
15 Taxpayer's costs, but argued that it should be required to account for the cost of every service to  
16 each affiliated hotel, perhaps in similar fashion to the method an attorney or accountant tracks time  
17 and costs in providing services to clients. The consensus among all witnesses was that tracking time  
18 and costs in that manner was possible, yet Taxpayer persuasively argued that it would not be  
19 feasible under the circumstances of this protest, nor was it required by Section 7-9-69. The Hearing  
20 Officer agrees. Under the facts of this protest, where the sum of all expenses are incurred for the  
21 purpose of providing services to Taxpayer's affiliates, it is not necessary for Taxpayer to divide and  
22 categorize those services or their cost among the hotels in the same manner that an attorney or  
23 accountant might bill time or costs to clients, although that would be within its prerogative if it so

1 desired. Accordingly, the Hearing Officer agrees that Taxpayer's method of determining the costs of  
2 services is reasonable under the facts of this case.

3 The next issue concerns the method by which Taxpayer thereafter allocated its costs, in the  
4 form of its management fee, to the various affiliates that it serviced. The evidence established that  
5 each affiliate paid a portion of Taxpayer's total costs in proportion to the revenue it generated. Mr.  
6 Miller credibly testified that this method did not generate a performance-based fee, but was a  
7 reasonable method employed to determine the affiliate's share of Taxpayer's total costs. He  
8 explained quite effectively that Taxpayer's various fee adjustments were intended to negate any  
9 profit, and that leaving the relevant percentage unchanged would surely generate an unwanted  
10 profit. Recalling Ms. Sundaram's testimony regarding the fluctuation of Taxpayer's fees illuminates  
11 Mr. Miller's proposition. In some years, the percentage of each hotel's share *decreased*. Had  
12 Taxpayer not been intentionally evading a profit, then one would expect the percentage to remain  
13 stagnant, or gradually increase, but that did not happen.

14 The consequence was that over the course of the audit period, Taxpayer sustained a  
15 cumulative and intentional loss in which the revenue intended to compensate it for services was  
16 purposefully less than the cost of those services.

17 Therefore, construing the statute strictly in favor of the taxing authority, the Hearing  
18 Officer finds that the right to a deduction under Section 7-9-69 is clearly and unambiguously  
19 expressed, and that Taxpayer has demonstrated its entitlement to a deduction under the facts of this  
20 case. Taxpayer shall not, however, be entitled to administrative costs pursuant to NMSA 1978,  
21 Section 7-1-29.1 (2015) because even though the Hearing Officer ultimately found in Taxpayer's  
22 favor, the Department's position, although determined incorrect under the facts presented, was

1 based on a reasonable application of the law to the facts of the protest under Section 7-1-29.1 (C)  
2 (2).

3 Taxpayer's protest should be GRANTED.

4 **CONCLUSIONS OF LAW**

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

7 B. The hearing was timely set and held within 90-days of protest under NMSA 1978,  
8 Section 7-1B-8 (2015).

9 C. Taxpayer is entitled to a deduction from gross receipts derived from administrative,  
10 managerial, accounting and customer services it performed for its affiliates upon a nonprofit or cost  
11 basis. *See* NMSA 1978, Section 7-9-69 (2015).

12 D. Taxpayer shall not be entitled to costs and fees because the Department's position  
13 was based on a reasonable application of the law to the facts. *See* NMSA 1978, Section 7-1-29.1  
14 (2015).

15 For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that  
16 the Assessment be ABATED.

17 DATED: July 29, 2019

18 

19 Chris Romero  
20 Hearing Officer  
21 Administrative Hearings Office  
22 P.O. Box 6400  
23 Santa Fe, NM 87502  
24

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On July 29, 2019, a copy of the foregoing Decision and Order was submitted to the parties  
15 listed below in the following manner:

16 *First Class Mail*

*Interagency Mail*

17  
18 INTENTIONALLY BLANK

19  
20 \_\_\_\_\_  
21 John Griego  
22 Legal Assistant  
23 Administrative Hearings Office  
24 P.O. Box 6400  
Santa Fe, NM 87502