

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

4 **IN THE MATTER OF THE PROTEST OF**
5 **BRUCE WINCHELL**
6 **TO ASSESSMENT ISSUED UNDER**
7 **LETTER ID NO. L1688016048**

8 v. AHO Case Number 19.12-169A, **Decision and Order No. 20-05**

9 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

10 **DECISION AND ORDER**

11 On January 23, 2020, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits
12 administrative hearing in the matter of the tax protest of Bruce Winchell (Taxpayer) pursuant to
13 the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Mr.
14 Bruce Winchell (Taxpayer) appeared representing himself, accompanied by his spouse Mrs.
15 Neenah Winchell. Mr. Winchell was the Taxpayer's sole witness. Staff Attorney Peter Breen
16 appeared, representing the opposing party in the protest, the Taxation and Revenue Department
17 (Department). Department protest auditor Alma Lucero appeared as a witness for the
18 Department. Department observer Sherilynn Gonzales was also present. Mr. Winchell's
19 testimony was highly credible. Taxpayer offered Exhibits 1 through 9 and Department offered
20 Exhibits A and B. All exhibits were admitted into the record. The administrative file is
21 considered part of the record.

22 In quick summary, this protest involves an assessment of gross receipts tax for a gross
23 receipts tax non-filer with reported Schedule C income from three sources, sales from a tea shop in
24 Ohio, teaching at the University of New Mexico, and teaching out of state. Ultimately, after making
25 findings of fact and discussing the issue in more detail throughout this decision, the hearing officer
26 finds that the tea shop is located outside of New Mexico and is not subject to New Mexico gross

1 receipts tax. The Department has abated out of state income from teaching out of state, but
2 correctly stands by the assessment arising from in-state receipts from teaching. After making
3 findings of fact and discussing the issues in more detail throughout this decision, the hearing officer
4 finds that Taxpayer's protest must be granted in part and denied in part. IT IS DECIDED AND
5 ORDERED AS FOLLOWS:

6 **FINDINGS OF FACT**

7 **Procedural Findings**

8 1. On June 14, 2019, under Letter Id. No. L1688016048, the Department issued a
9 Notice of Assessment of Taxes and Demand for Payment to Taxpayer, indicating that Taxpayer
10 owed tax of \$141.92, penalty of \$33.14, and interest of \$27.94, for a total assessment of \$203.00
11 for tax reporting periods from January 1, 2012 to December 31, 2014. [Administrative File].

12 2. On June 28, 2019, Taxpayer submitted a Formal Protest letter, challenging the
13 assessment, alleging that the Schedule C income reported was not subject to New Mexico gross
14 receipts tax, because it was from Ohio. [Administrative File].

15 3. On July 2, 2019, under Letter Id. No. L0675351728 the Department issued a letter
16 acknowledging receipt of Taxpayer's protest. [Administrative File].

17 4. On December 17, 2019, the Department, through Attorney Peter Breen, submitted
18 a Request for Hearing to the Administrative Hearings Office, requesting a hearing on the merits
19 of Taxpayer's protest. [Administrative File].

20 5. On December 17, 2019, the Department, through Attorney Peter Breen, timely
21 submitted the Department's Answer to Protest to the Administrative Hearings Office.
22 [Administrative File].

1 6. On December 18, 2019, the Administrative Hearings Office sent a Notice of
2 Administrative Hearing to the parties, informing them of the scheduled merits hearing to take
3 place on January 23, 2020 at the Administrative Hearings Office in Santa Fe, New Mexico.
4 [Administrative File].

5 7. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
6 the merits hearing on January 23, 2020 with the parties present at the Administrative Hearings
7 Office in the Wendell Chino Building in Santa Fe, New Mexico. Neither the Department nor the
8 Taxpayer objected that conducting the hearing satisfied the 90-day hearing requirements of
9 Section 7-1B-8 (F) (2019). The Administrative Hearings Officer preserved a recording of the
10 hearing (“Hearing Record” or “H.R.”). [Administrative File].

11 8. At the conclusion of the hearing, the Administrative Hearing Officer allowed the
12 parties an additional two calendar months to conduct post-hearing discovery, which was
13 calculated to settle the matter. However, over the next few days, the post-hearing discovery
14 discussions dissolved, and the parties requested that the Hearing Officer issue a decision based
15 on the evidence available at hearing. [Administrative File; Department’s closing argument,
16 Hearing Record 1:31:25-1:33:30; Post hearing colloquy H.R. 1:33:50-1:40:10].

17 **Substantive Findings**

18 9. Taxpayers Bruce Winchell and spouse Neenah Winchell are individuals residing
19 in Albuquerque, New Mexico. Mr. Winchell maintains professional licensing as a patent lawyer
20 in the United States of America and in Canada, and with the State of Ohio and Tennessee bar
21 associations. [Administrative File, Direct examination of Bruce Winchell, H.R. 53:00-53:25;

1 Cross examination of Bruce Winchell, H.R. 1:00:25-1:01:00; Taxpayer Exhibit 1-1, 1-2, 1-4, 9-
2 1].

3 10. Neenah Winchell and her sister are co-owners of “At Portage Lakes, LLC” a
4 company registered in Ohio, whose tea shop and entire operations are situated in Akron, Ohio.
5 [Direct examination of Bruce Winchell, H.R. 18:30-21:50; Taxpayer exhibits 1-3, 2-1, 2-2, 3-1,
6 3-2, 4-1 through 4-4, 5-1 through 5-10].

7 11. Alma Lucero is the tax auditor currently assigned to the matter. Other auditors,
8 Nicholas Pacheco and Laura Gage initially followed the case. [Direct examination of Bruce
9 Winchell, H.R. 34:30-35:00, 35:30-38:05; Direct examination of Alma Lucero, H.R. 1:13:30-
10 1:15:30; Taxpayer exhibit 9-5].

11 12. The business “At Portage Lakes, LLC” is a registered Ohio limited liability
12 corporation, taxed as a sole proprietorship, and does no business in New Mexico. All sales
13 income was received in Ohio. [Direct examination of Bruce Winchell, H.R. 18:00-23:00, 38:05-
14 45:50; Taxpayer exhibit 2-1, 2-2, 3-1, 4-1 through 4-4, 5-1 through 5-10].

15 13. Mr. and Mrs. Winchell reported the income from “At Portage Lakes, LLC” on
16 IRS Form 1040, Schedule C for the year 2014, the only year at issue here. The 2014 Schedule C
17 incorrectly reported the business address in New Mexico (Section E). The Schedule C reported
18 business income of \$10,754.00 in gross receipts or sales (Line 1). [Direct examination of Bruce
19 Winchell, H.R. 15:30-16:30, 49:55-51:30; Cross examination of Bruce Winchell, H.R. 56:10-
20 56:40; Direct examination of Alma Lucero, H.R. 1:13:30-1:16:25; Taxpayer Exhibit 7-1, 8-1, 8-
21 2].

22 14. Mrs. Winchell and her sister reported the sales from “At Portage Lakes, LLC” to
23 the State of Ohio. In 2014, the combined sales, excluding food for consumption off-site, totaled

1 \$8,984.69. [Direct examination of Bruce Winchell, H.R. 15:30-18:00; Taxpayer Exhibit 5-5, 5-
2 6].

3 15. The difference between the amounts reported in the 2014 Ohio state sales tax
4 returns (\$8,984.69) and the IRS Schedule C (\$10,754.00) is the difference between Ohio taxable
5 gross sales and IRS Schedule C gross income from whatever source derived. The difference is
6 the amount excluded from Ohio state sales tax reports by virtue of the application of an exclusion
7 for sales of food for consumption off premises, which totaled \$1,769.31. [Direct examination of
8 Bruce Winchell, H.R. 15:30-18:30; Direct examination of Alma Lucero, H.R.1:16:40-1:19:30;
9 Taxpayer exhibit 9-5].

10 16. The Department auditors determined that the documents (Ohio sales tax returns)
11 Taxpayer initially provided when audited were incomplete and at hearing expressed that specific
12 additional documents (a year of sales summaries as well as a month of register tape) might clear
13 the discrepancy between the Schedule C income and the Ohio sales tax returns. Taxpayer was
14 reluctant to supply additional documents because the source documents requested were situated
15 in Ohio. [Direct examination of Bruce Winchell, H.R. 15:30-18:00, 18:25-18:45; Cross
16 examination of Bruce Winchell, H.R. 1:04:20-1:08:30; Opening statement of Peter Breen, HR
17 28:30-29:55; AHO examination of Bruce Winchell, H.R. 1:10:00-1:11:25; Direct examination of
18 Alma Lucero, H.R. 1:19:30-1:20:45].

19 17. In 2014, 2015, and 2016, Mr. Winchell gave presentations to out-of-state
20 gatherings of the American Chemical Society, pursuant to his expertise in intellectual property
21 law. As compensation, the American Chemical Society provided Mr. Winchell a stipend or
22 honorarium. The Department conceded that these were no longer at issue during the hearing.
23 [Direct examination of Bruce Winchell, H.R. 35:00-36:30, 46:20-48:20; Cross examination of

1 Bruce Winchell, H.R. 1:00:45-1:01:40; Taxpayer Exhibits 6-2, 6-3, 6-4, 7-1; Direct examination
2 of Alma Lucero, H.R. 1:16:05-1:17:10; Department Exhibit B].

3 18. In 2012 and 2013, Mr. Winchell received income from the University of New
4 Mexico. He considered this contract work in 2012, which he acknowledged he did report on a
5 Schedule C but did not report as New Mexico gross receipts in 2012. [Direct examination of
6 Bruce Winchell, H.R. 45:55-46:20; Cross examination of Bruce Winchell, H.R. 1:00:45-1:03:25;
7 Taxpayer Exhibit 6-1, 7-1].

8 19. Mr. Winchell received a W-2 from the University of New Mexico for wage
9 income. Department presented evidence that Mr. Winchell filed a Schedule C for this income,
10 and Mr. Winchell provided no evidence concerning whether he amended his 2012 federal tax
11 return to correct the error. [Direct examination of Bruce Winchell, H.R. 45:55-46:20; Cross
12 examination of Bruce Winchell, H.R. 1:00:45-1:01:40; Taxpayer Exhibit 6-1, 7-1].

13 **DISCUSSION**

14 Taxpayers' protest involves an assessment of gross receipts tax. At issue are 2012 income
15 Taxpayer received from teaching at the University of New Mexico, and 2014 income Taxpayer
16 received from a tea shop located in Akron, Ohio. The tea shop is located outside of New Mexico
17 and the income received therefrom is not subject to New Mexico gross receipts tax, therefore that
18 portion of the assessment is wholly abated. The assessment arising from in-state receipts from
19 teaching at the University of New Mexico were incorrectly reported as Schedule C income rather
20 than wage income, and without an amendment, that Schedule C income must also be reported as
21 gross receipts.

1 **Receipts under the Gross Receipts and Compensating Tax Act.**

2 The assessment in this protest arises from an application of the Gross Receipts and
3 Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-115, which imposes a tax for the
4 privilege of engaging in business, on the receipts of any person engaged in business in New Mexico.
5 *See* NMSA 1978, Section 7-9-4 (2002). There is a statutory presumption that all receipts of a person
6 engaged in business activities in New Mexico are taxable. *See* NMSA 1978, Section 7-9-5 (2002).
7 The pertinent part of the statutory definition of “gross receipts” under Section 7-9-3.5 (A)(1) (2007),
8 includes “the total amount of money or the value of other consideration received from selling
9 property in New Mexico, from leasing or licensing property employed in New Mexico, from
10 granting a right to use a franchise employed in New Mexico, from selling services performed
11 outside New Mexico, the product of which is initially used in New Mexico, or from performing
12 services in New Mexico.” The Department compared various years of the Taxpayer’s IRS Schedule
13 Cs to its own records of gross receipts returns and found Taxpayer filed no gross receipts returns in
14 2012 and 2014. The address listed for the business on the 2014 Schedule C is in Albuquerque, New
15 Mexico, so the Department inquired further, ultimately issuing an assessment because records
16 provided did not account for a mismatch between Taxpayer’s Federal and Ohio returns.

17 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
18 presumed correct. Consequently, Taxpayers have the burden to overcome the assessment. *See*
19 *Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise
20 specified, for the purposes of the Tax Administration Act, “tax” is defined to include interest and
21 civil penalty. *See* NMSA 1978, §7-1-3 (Z) (2019). Under Regulation 3.1.6.13 NMAC, the
22 presumption of correctness under Section 7-1-17 (C) extends to the Department’s assessment of
23 penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-

1 NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are
2 presumed proper and are to be given substantial weight). Accordingly, it is Taxpayers' burden to
3 present some countervailing evidence or legal argument to show that they are entitled to an
4 abatement, in full or in part, of the assessment issued in the protest. *See N.M. Taxation &*
5 *Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. When a taxpayer
6 presents sufficient evidence to rebut the presumption, the burden shifts to the Department to
7 show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-
8 NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308.

9 While there is no doubt that Taxpayer engaged in the business of selling tea and related
10 products, there is ample evidence that all monetary gain from this enterprise in 2014 is from the tea
11 shop physically situated in Ohio, not in New Mexico. Taxpayer provided Ohio sales tax returns, an
12 Ohio business registration certificate, a photograph of the location, and other documents in support
13 of the fact that the business is in Akron, Ohio. The placement of the Taxpayer's home address
14 rather than the business's Ohio address on the Schedule C is a simple scrivener's error and ought
15 not determine the outcome of this case. *See Buchine v. Comm'r*, 20 F.3d 173, 1994 U.S. App.
16 LEXIS 10242 (a scrivener's error concerning a tax year, i.e., 1984, on a waiver letter can be
17 overlooked when the parties' intent was to apply the waiver to a different year, i.e., 1981); *see also*
18 *Luker v. Eubanks (in re Eubanks)*, 444 B.R. 415, FN5, 2010 Bankr. LEXIS 4873 (a scrivener's error
19 does not affect credibility). A review of the IRS 2014 Schedule C instructions¹ shows that the
20 address line should have been the Ohio business address rather than the Taxpayer's home address.

¹ Internal Revenue Service publications are available online at:
<https://apps.irs.gov/app/picklist/list/priorFormPublication.html>. The 2014 Schedule C instructions can be found at:
<https://www.irs.gov/pub/irs-prior/i1040sc--2014.pdf> (last accessed 02/25/2020).

1 The responsibility rests on the Hearing Officer to make the legal determination as to the
2 location of the business. “It is the sole responsibility of the trier of fact to weigh the testimony,
3 determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth
4 lies.” *N.M. Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23. As noted
5 above, Mr. Winchell provided ample evidence supporting the fact that the business “At Portage
6 Lakes, LLC,” for which he filed a Schedule C, was conducted entirely outside of New Mexico. The
7 fact that Mr. Winchell keeps no business records for “At Portage Lakes, LLC” in New Mexico
8 underscores the fact that the entire business was conducted out of state. Mr. Winchell was very
9 credible, cordial and composed. Some scrivener’s errors are not immediately apparent. A tax
10 protestant can rebut the presumption of correctness by showing that the decision of the
11 Department is not supported by substantial evidence or the Department failed to follow relevant
12 statutory provisions. *See Floyd & Berry Davis Co. v. Bureau of Revenue*, 1975-NMCA-143, ¶8,
13 88 N.M. 576, 544 P.2d 291; *see also McConnell v. State ex rel. Bureau of Revenue*, 1071-
14 NMCA-181, ¶7, 83 N.M. 386, 492 P.2d 1003. The Taxpayer overcame the presumption of
15 correctness that attached to the assessment by showing the business was located outside of New
16 Mexico and did not fall within the territorial scope of the Gross Receipts and Compensating Tax
17 Act. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62
18 P.3d 308; *see also* Regulation 3.1.6.12 (A) NMAC (1/15/01); *see also* NMSA 1978, §§ 7-9-1
19 through 7-9-115. After the Taxpayer presented his evidence that all income from the company was
20 derived from Ohio, the Department provided no evidence to support a finding that the 2014
21 Schedule C income was sourced in New Mexico and was unable to rebut the Taxpayer’s evidence
22 of out-of-state business activity. While the initial assessment was justified because of the
23 Taxpayer’s initial addressing error, the evidence presented corrected the addressing error.

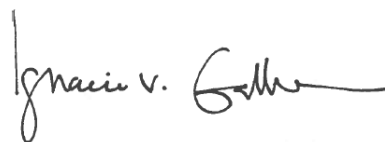
1 D. "Tax" is defined to include not only the tax program's principal, but also interest and
2 penalty. *See* NMSA 1978, Section 7-1-3 (Y) (2017). Assessments of penalties and interest therefore
3 also receive the benefit of a presumption of correctness. *See* Regulation 3.1.6.13 NMAC (1/15/01).

4 E. Taxpayer presented substantial evidence to overcome the presumption of correctness
5 that attached to the Department's assessment of 2014 business income, showing the business
6 income of "At Portage Lakes, LLC" was derived entirely from out-of-state activity. *See* NMSA
7 1978, Section 7-9-3.5 (A)(1) (2007); *see also* Regulation 3.2.1.14 (A) (12/30/03).

8 F. Taxpayer failed to meet his burden to overcome the presumption of correctness in
9 the Department's assessment of 2012 business income derived from teaching in New Mexico.
10 *See* NMSA 1978 Section 7-1-17 (C) (2007); *see also* *MPC Ltd. v. N.M. Taxation & Revenue*
11 *Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *see also* Regulation 3.1.6.12 (A)
12 NMAC (1/15/01).

13 For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND**
14 **DENIED IN PART. IT IS ORDERED** that the Department's assessment of tax, penalty and
15 interest for 2014 is abated in its entirety; the Department's assessment of tax, penalty and interest
16 for 2012 was proper, hence, gross receipts tax in the amount of \$26.18, penalty in the amount of
17 \$10.00, and interest in the amount of \$7.26, for a total 2012 assessment of \$43.44 is due. Interest
18 accrues until paid.

19 DATED: February 25, 2020.



20
21 Ignacio V. Gallegos
22 Hearing Officer
23 Administrative Hearings Office
24 P.O. Box 6400
25 Santa Fe, NM 87502

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 February 25, 2020, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *First Class Mail*

Interdepartmental Mail

17 INTENTIONALLY BLANK

18
19 _____
20 John Griego
21 Legal Assistant
22 Administrative Hearings Office
23 P.O. Box 6400
Santa Fe, NM 87502