**STATE OF NEW MEXICO**
**ADMINISTRATIVE HEARINGS OFFICE**
**TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF**
**LOBO SPORTS PROPERTIES LLC**
**TO ASSESSMENTS**
**ISSUED UNDER LETTERS**
**ID NOs. L0708319536 and L2130581808**

**and**

**IN THE MATTER OF THE PROTEST OF**
**ICEBERG VENTURES INC.**
**TO ASSESSMENT**
**ISSUED UNDER LETTER**
**ID NOS. L1056839984 and L1116711216**

**v.** **D&O 19-25**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

## DECISION AND ORDER

On April 23, 2019, Hearing Officer Chris Romero, Esq., conducted a hearing on the merits of the tax protest of Lobo Sports Properties, LLC and Iceberg Ventures, Inc. (collectively "Taxpayer") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. Taxpayer appeared by and through its counsel of record, Mr. Tracy Sprouls, Esq., accompanied in person by Ms. Katrina Brandle. Ms. Jennifer Heim, Mr. Aaron Worsham, and Mr. Kevin Farlow appeared by telephone to testify for Taxpayer. Ms. Brandle testified in person.

Mr. Marek Grabowski, Esq. appeared on behalf of the opposing party in the protest, the Taxation and Revenue Department ("Department"), and was accompanied by Ms. Ruth Beach, Ms. Angelica Rodriguez, and Mr. Jeffrey Squires, Esq., all of whom testified in-person for the Department.

Taxpayer Exhibits 1 – 23 and Department Exhibits A, AA, B, BB, C, CC, D, DD, E, EE, EEE, F, FF, H, HH, I, III, J – Q, QQ, and R – Z were admitted into the evidentiary record

without objection. In addition to hardcopies of select exhibits, the parties also supplied USB flash drives containing electronic copies of their exhibits, some of which were editable. The parties subsequently supplemented the evidentiary record with noneditable hard copies of those exhibits.

The issues in the protest are whether: (1) any portion of Taxpayer's receipts are derived from sublicensing intellectual property, which is excluded from the definition of property under NMSA 1978, Sections 7-9-3 (J) (2007) and 7-9-3.5 (A) (1) (2010); (2) whether Taxpayer is entitled to claim a deduction from its gross receipts for interstate radio broadcasts pursuant to NMSA 1978, Section 7-9-55 (C) (1993); (3) whether Taxpayer is entitled to a deduction for uncollectible debts pursuant to NMSA 1978, Section 7-9-67 (1994); and (4) whether there is a basis to abate penalty and interest for the untimely return and associated payment of a pass-through withholding remitter.

Based on the evidence provided, the Hearing Officer finds that Taxpayer has not rebutted the presumption of correctness that attached to the assessments relevant to the protest and that Taxpayer's protest should be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

*Identification of Taxpayer*

1. Lobo Sports Properties, LLC and Iceberg Ventures, Inc. (collectively "Taxpayer") are subsidiaries of Learfield IMG College ("Learfield"). [Department Ex. A-1007; Department Ex. B-002].

*Introduction of Witnesses*

2. Ms. Jennifer Heim is the vice-president and corporate controller at Learfield. She is also a certified public accountant. [Direct Examination of Ms. Heim]

3. Ms. Katrina Brandle is employed at Learfield where she oversees its research and analytics department. [Direct Examination of Ms. Brandle]

4. Mr. Aaron Worsham is the senior vice-president of affiliate relations and broadcast operations for Learfield. He has been in the radio broadcast industry for more than 35 years, and with Learfield since 1999. [Direct Examination of Mr. Worsham]

5. Mr. Kevin Farlow is employed by Learfield and serves as the interim general manager for Lobo Sports Properties, LLC. Although he resides in Texas, he is frequently present in New Mexico. When present in New Mexico, he conducts his functions from the office that Learfield maintains within the UNM athletic department in Albuquerque. [Direct Examination of Mr. Farlow]

6. Mr. Jeffrey L. Squires, Esq. is an attorney practicing in intellectual property rights, including copyrights and trademarks. He has practiced in that area of law since 1973 and has been a member of several organizations dedicated to the specialty, including the International Trademark Association, the Copyright Society of the U.S.A., and the American Intellectual Property Law Association. [Direct Examination of Mr. Squires]

7. Ms. Ruth Beach is an auditor with the Department and managed the audits relevant to the consolidated protests. She has been employed in that capacity for more than ten years. [Direct Examination of Ms. Beach]

8. Ms. Angelica Rodriguez is a protest auditor. She has been employed in various capacities by the Department for approximately 14 years and is the protest auditor assigned to the consolidated protests. [Direct Examination of Ms. Rodriguez]

*Taxpayer's Business Activities*

9. Taxpayer is engaged in providing various services to the athletic department of

the University of New Mexico ("UNM"), which for purposes relevant to this protest, include procuring and managing sponsorships for UNM athletic programs and producing radio broadcasts of UNM athletic events. [Taxpayer Ex. 1; Taxpayer Ex. 2; Department Ex. A; Department Ex. B; Department Ex. C]

10. The rights and responsibilities of UNM and Taxpayer are established in a Multi-Media Rights and Sponsorship Rights Licensing and Royalty Agreement ("Initial Agreement"), and a subsequent First Revised and Restated Multi-Media Rights and Sponsorship Rights Licensing Agreement ("Revised Agreement"). [Taxpayer Ex. 1; Department Ex. A; Taxpayer Ex. 2; Department Ex. B]

11. The general purpose of the Initial Agreement and Revised Agreement is to generate income for UNM and its athletic programs through a variety of revenue sources. The sources of potential revenue that are particularly relevant to this protest derive from radio broadcasts and the procurement of sponsorships. [Taxpayer Ex. 1; Department Ex. A; Taxpayer Ex. 2; Department Ex. B; Department Ex. C]

12. The Revised Agreement states "it is the Parties' intention to maximize the opportunities that will foster interest in the athletic programs and growth in both the amounts and the potential sources of revenue under this Agreement." [Department Ex. B-003 (Sec. 1.2)]

13. The Revised Agreement accomplishes the intentions of the parties, in part, by licensing "Multi-Media Rights" deriving from UNM's athletic programs, which the parties define as:

> [T]he exclusive sales and marketing rights, as hereinafter set forth, with exceptions as set forth herein, to inventory, including print, media, sponsor, existing or new signage not already contracted to other parties, and other promotional and sponsorship rights for football, men's and women's basketball games, men's baseball games and other intercollegiate sports; now existing or to exist in

> the future, promotional rights for home basketball games and, if the University obtains rights from the host venue, all games played at neutral venues where the University is designated as the home team; temporary and permanent signage and promotional rights for all the University home football games (and, if the University obtains rights from the host venue, all games played at neutral venues where the University is designated as the home team); radio play-by-play broadcast rights and coaches' shows; and selected television broadcast rights for football and men's and women's basketball; official athletic website sponsorship; and any other sponsor-related or promotional rights to the University's athletic programs that may be subsequently agreed to between the Parties. The fact that a particular right is not identified … as a "Multi-Media Right" is not intended to diminish Learfield's Multi-Media Rights under this Agreement if such right(s) are specifically provided for elsewhere in this Agreement.
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> [Department Ex. B-002 – B-003]

14. The Revised Agreement also provides for Taxpayer's use of UNM's trademarks[1], subject to the terms and conditions of other trademark-licensing agreements to which UNM is a party, particularly its agreement with Collegiate Licensing Company. The Revised Agreement provides that:

> [T]he University licenses Learfield the non-exclusive right to use the University Athletic Department's name and its and [sic] the University's trademarks, service marks, logos or symbols, and trade dress including the likeness, appearance, and voice of its Personnel (collectively, "Marks") at no cost to Learfield in connection with (a) Learfield's use of the licensed Multi-Media Rights and (b) its securing Sponsorships and other revenue generating opportunities for the University, in accordance with the terms of this Agreement.
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> [Department Ex. B-006 (Sec. 1.6)]

15. Any use of UNM's trademarks "is subject to being previously reviewed and approved in writing by the University to assure Learfield's compliance with the University's

[1] For the purpose of this discussion, the term "trademark," whether singular or plural, is synonymous with the terms "Mark" or "Marks" which are the terms favored by the relevant agreements.

technical requirements, specifications, and any pertinent usage/style guide or manual regarding Learfield's use of the Marks." Therefore, Taxpayer is required to submit written requests for approval of any proposed use of UNM's trademarks. [Department Ex. B-006 (Sec. 1.6); Department Ex. B-007 (Sec. 1.6.1)]

16. Taxpayer's license to use UNM's trademarks also prohibits it from exercising "any rights under [the Revised Agreement] which, if exercised, would violate the terms of existing license agreements, including but not limited to the existing agreement between the University and [Collegiate Licensing Company]." [Department Ex. B-006 (Sec. 1.6)]

17. Among other restrictions on the use of UNM's trademarks, Taxpayer also "agrees and acknowledges that it will not separately charge any sponsor any special fee for the nominative fair use right to use the University's Marks in connection with the sponsorships or otherwise." [Department Ex. B-008 (Sec. 1.6.4)]

18. The Revised Agreement does not permit additional rights or privileges arising from implication. It states, "No further or additional rights or privileges not expressly licensed or stated herein of any nature are to be implied, either by course of dealing, estoppel, or otherwise." [Department Ex. B-009 Sec. 1.7)]

19. Taxpayer's total gross receipts for each of the relevant periods were:

a. $1,953,199.00 in fiscal year 2009 – 2010 [Taxpayer Ex. 15 (TAB: 0910 Summary)];

b. $5,772,441.00 in fiscal year 2010 – 2011 [Taxpayer Ex. 16 (TAB: 1011 Summary)];

c. $6,604,734.00 in fiscal year 2011 – 2012 [Taxpayer Ex. 17 (TAB: 1112 Summary];

d. $6,794,286.00 in fiscal year 2012 – 2013 [Taxpayer Ex. 18 (TAB: 1213 Summary)];

e. $6,949,122.00 in fiscal year 2013 – 2014 [Taxpayer Ex. 19 (TAB: 1314 Summary)];

f. $7,022,840.00 in fiscal year 2014 – 2015 [Taxpayer Ex. 20 (TAB: Summary)].

*Sponsorships and Permitted Use of Trademarks*

20. A substantial element of the Revised Agreement is devoted to procurement and management of "sponsorships" for UNM athletic programs or events. [Department Ex. B-017 – B-032]

21. A "sponsorship" under the Revised Agreement is specifically defined as:

> For purposes of this Agreement, "Sponsorship" is has [sic] the same meaning as "qualified sponsorship payments" in Section 513 (i) of the Internal Revenue Code of 1986, as amended, and any successor section in any future tax code. "Sponsor" means a person or entity that makes a Sponsorship payment. The term "Sponsorship" specifically excludes any payment for which a person receives a substantial return benefit other than the use or acknowledgement of the name or logo (or product lines) of the Sponsor in connection with the athletic programs. Sponsorships may not include (i) advertising; (ii) exclusive provider arrangements; (iii) goods, facilities, services or other privileges (unless the value is less than 2% of the Sponsorship payment); (iv) exclusive or non-exclusive rights to use an intangible asset of the University including but not limited to the Marks (as hereinafter defined); (v) qualitative or comparative language, price information or other indications of savings or value; (vi) an endorsement; or (vii) an inducement to purchase, sell, or use such products or services (the "Excluded Activities"). For the avoidance of doubt and clarification, the granting of exclusivity by Learfield in a sponsorship category (i.e., telecom) to a Sponsor who has the right to use the Marks solely within the category shall not be considered an Excluded Activity.
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> [Department Ex. B-017 – B-018 (Sec. 5.2)]

22. Despite the general prohibition on "Excluded Activities" as provided in Sec. 5.2 of the Revised Agreement, UNM may still permit such activities with prior written approval. [Department Ex. B-018 (Sec. 5.3)]

23. Sponsorships may be procured for a variety of UNM media, including broadcasting, website, gameday publications, venue signage, message and video boards, public address announcements, printed promotional items, game sponsorship and promotional sponsorship rights, gameday hospitality rights, and fan festival rights. [Department Ex. B-019 – B-27 (Secs. 5.5 – 5.14)]

24. However, Taxpayer in performing its activities is expressly prohibited from selling "merchandise bearing the University's logo or the Marks" unless such sales occur through a licensed UNM provider. [Department Ex. B-027 – B-028 (Sec. 5.15.1)]

25. Taxpayer is also "expressly prohibited from licensing to any Sponsor the right to use the Marks other than for nominative fair use in accordance with 15 U.S.C. §1115 (b) (4) of the Trademark Act (i.e., use of the Marks descriptively and other than in a trademark sense)." However, Taxpayer is permitted "to obtain specific sponsorships in public places which use the Marks ('Sponsorships Including Logo' or 'S.I.L.')." [Department Ex. B-027 – B-028 (Sec. 5.15.1)]

26. In consideration for its right to use UNM's trademarks in its performance, Taxpayer is obligated to pay an annual Guaranteed Licensing and Rights Fee to UNM in specified amounts ranging from $3,939,500 in athletic year 2009 – 2010 to $4,668,000 in athletic year 2014 – 2015. [Department Ex. A-1040 - 1041 (Sec. 9.1.4); Department Ex. B-037 (Sec. 9.1.14)]. However, acknowledging specific exclusions for certain sponsors, the payments received by UNM directly from some sponsors may be credited against the payment due from

Taxpayer. [Department Ex. B-037 (Sec. 9.1.5)]

27. In addition to the Guaranteed Licensing and Rights Fee, Taxpayer is also required to pay a royalty for its use of UNM trademarks and other rights. The amounts are calculated as 50 percent of its gross revenue exceeding amounts specified in the Revised Agreement. [Department Ex. B-044 – B-045 (Sec. 10.1 – 10.2)]

28. Various Taxpayer documents, including its Marketing & Sponsorship Agreements [Department Ex. C] and various sponsorship presentation materials [e.g. Department Exs. C-019 – C-022; C-045 – C-046; C-158 – C-160] prominently display Taxpayer's use of UNM trademarks.

29. Taxpayer is also obligated to pay a 25 percent fee to UNM for any sponsorships acquired through referrals from UNM to Taxpayer provided the sponsor was not previously doing business with Taxpayer, or if it was previously doing business with Taxpayer, increases its sponsorship as a direct result of UNM's encouragement, provided that Taxpayer was not already negotiating with the potential sponsor within the previous six months of the sponsorship being consummated. [Department Ex. B-045 – B-046 (Sec. 10.3)]

30. Taxpayer's research and analytics department is devoted to evaluating and developing strategies for commercial entities to promote themselves, their goods, or their services among a collegiate athletic program's supporters. [Direct Examination of Ms. Brandle]

31. Taxpayer's research has shown that commercial entities can derive various benefits from associating themselves and their goods or services with an athletic program's trademarks, particularly among the program's supporters, students, and alumni. [Direct Examination of Ms. Brandle]

32. For example, a sponsorship which permits a commercial entity to identify itself as

having an official association with UNM might elevate consumer opinion of itself, its products, or its services among UNM supporters, students, and alumni over the products or services of commercial entities that cannot boast an official association with UNM. [Direct Examination of Ms. Brandle]

33. An assortment of factors can influence the value and subsequent cost to a commercial entity of acquiring an athletic program sponsorship. A significant component of that cost is attributed to the value of the trademarks with which the commercial entity can associate itself with the program. Factors influencing value of the trademarks include the population, concentration, or disbursement of a program's support base, including student and alumni populations, successful athletic performance, and national prominence or prestige. [Direct Examination of Ms. Brandle]

34. Taxpayer is authorized to procure sponsorships that will permit commercial entities to hold themselves out as having an official association with its athletic programs. [Direct Examination of Ms. Brandle]

35. The Revised Agreement provides for Taxpayer and commercial entities intending to procure a sponsorship to enter into a Marketing and Sponsorship Agreement ("Sponsorship Agreement") which further outlines the terms and conditions of the sponsorship. The Revised Agreement incorporates the Sponsorship Agreement template. [Taxpayer Ex. 2.65; Department Ex. B-065]

36. The Sponsorship Agreement delineates the rights and privileges that a sponsor acquires through its sponsorship. With specific regard to any sponsor's authority to use UNM trademarks, the agreement states:

> 6. University Marks. To the extent that any of the Sponsor's Benefits described in Exhibit A hereto include the right to make use of

> University's athletic logos or trademarks ("School Marks"), Sponsor agrees that its use of School Marks is non-exclusive, limited and nontransferable and must be approved by the Provider and/or the University prior to its use. Sponsor further agrees that it may not make use of School Marks in any retail promotion or sale of a product without the approval of the University or its authorized agent and the payment of any required license fee. All right, title and interest in and to the School Marks is and shall remain the sole and exclusive property of Provider.
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> [Taxpayer Ex. 2.67; Department Ex. B-067]

37. Taxpayer addresses a variety of trademark uses by sponsors in what it characterizes as internal and external usage. Internal use consists of a sponsor's inclusion in athletic department media such as radio broadcasts, game programs, or other media distributed by the athletic program. External use consists of the use of trademarks in material not deriving directly from the athletic program, such as grocery store displays. [Direct Examination of Ms. Brandle]

38. The specific benefits accompanying the sponsorship vary depending on a sponsor's financial investment. Until 2016-2017, whatever rights a sponsor acquired to use UNM athletics trademarks was determined by the amount of money paid for the sponsorship. A sponsor spending between $10,000 and $49,000 was categorized as a Tier 1 sponsor and was permitted to use the corporate partner logo on internal assets, giveaways and internal print items. A sponsor spending between $49,000 to $99,000 was categorized as a Tier 2 sponsor and acquired greater use of the corporate partner logo on radio and television, including increased but limited use of the Lobo shield. A sponsor spending more than $99,000 was categorized as a Tier 3 sponsor and acquired practically unlimited use of the corporate partner logo and other trademarks such as the Lobo shield. [Direct Examination of Ms. Brandle]

39. Specific benefits of sponsorship are delineated in an exhibit to the Sponsorship

Agreement. A survey of benefits relevant to UNM sponsorships include signage at University Stadium, placement of advertising on University Arena video monitors or video board, suite hospitality at University Stadium, season ticket allotments, ad placement in game programs, coupon placement on ticket stubs, live-read radio or live venue promotions, inclusion in UNM athletic internet offers (i.e. GoLobos.com), radio advertising on athletic department radio programming, naming rights to radio segments or features, inclusion in athletic department tailgating events, cobranding of products (i.e. Lobo Salsa) for sale on the UNM campus, public address announcements, hosting live radio programs at business location, sponsoring the "Kiss Cam", and advertising on in-venue souvenir items (i.e. cups). [Department Ex. C]

40. Sponsorship agreements might also specify the official designation the commercial entity may claim for its association with an athletic program, such as "Corporate Partner," "Official Sponsor," "Exclusive Sponsor," or "Proud Partner." [Direct Examination of Ms. Brandle] However, sponsor designations to any of the foregoing were not readily obvious from the sponsorship agreements. [Department Ex. C]

41. The ability to use trademarks varies among various sponsorship packages. The more use that is permitted, the greater the value of the trademark per sponsorship investment, and therefore a sponsor will incur a higher cost. [Direct Examination of Ms. Brandle]

42. The value of the trademark included in the package can be calculated as a percentage of the overall sponsorship package. [Direct Examination of Ms. Brandle]

43. Since the use of the trademarks was defined by the level of spending, the value of the trademark as part of the overall tier was calculated as a percentage of that amount. Taxpayer estimated that the value of the trademark represented 75 percent of a Tier 1 sponsorship, 80 percent of a Tier 2 sponsorship, and 90 percent of a Tier 3 sponsorship. The percentages rise as

the permitted use of the trademarks correspondingly increase. [Direct Examination of Ms. Brandle; Taxpayer Exs. 15 – 20 (TAB: IP Sublicense)]

44. Despite the value of the trademarks as a component of a sponsorship, Taxpayer has "agree[d] and acknowledge[d] that it will not separately charge any sponsor any special fee for the nominative fair use right to use the University's Marks in connection with the sponsorship or otherwise." [Department Ex. B-008 (Sec. 1.6.4)]

45. The sample of Sponsorship Agreements do not specify what percentage of the total sponsorship commitment is credited to the license or sublicense of UNM trademarks for external or internal use. [Department Ex. C]

46. Mr. Squires has drafted numerous licenses of intellectual property rights during his legal career. Minimum components of a valid license require identification of the ownership interest in the intellectual property and specificity regarding the rights being licensed including: (a) the nature of the use permitted by the license; (b) whether use is exclusive or non-exclusive; (c) authority of owner to monitor use of the trademark; and (d) authority to sublicense, but only if explicitly stated in the license. [Direct Examination of Mr. Squires]

47. The Initial Agreement and Revised Agreements between UNM and Taxpayer grants non-exclusive rights for Taxpayer's use of UNM athletics trademarks. [Direct Examination of Mr. Squires; Taxpayer Ex. 2; Department Ex. B]

48. The Initial Agreement and Revised Agreement provide non-exclusive rights to use of UNM athletic trademarks and prohibit Taxpayer from sublicensing trademarks to third parties. [Direct Examination of Mr. Squires; Taxpayer Ex. 2; Department Ex. B; Taxpayer Ex. 1.9 (Sec. 1.3); 1.10 (Sec. 1.6); 1.13 (Sec. 1.7); 1.20 (Secs. 5.2 – 5.3); 1.21 (Sec. 5.4); 1.28 (Sec. 5.15.1); 1.51 (Sec. 14.5)]

49. Samples of relevant agreements between Taxpayer and its customers permit customers to advertise products or services in UNM athletic venues or as part of other media campaigns but does not provide authority to sell products bearing the UNM athletics trademarks which would be consistent with a license or sublicense. [Direct Examination of Mr. Squire; Department Ex. C-003 – C-004; C-036)]

50. Mr. Farlow is familiar with the way sponsors use UNM trademarks, which includes use of the marks in their own advertising and in promotional materials, including signage or giveaway products. [Direct Examination of Ms. Farlow]

51. The UNM athletic department reviews and approves creative concepts involving the use of UNM athletics trademarks. [Direct Examination of Ms. Farlow]

52. Taxpayer asserts that the following amounts associated with the specified fiscal years should be excluded from gross receipts because they derived from the licensing of trademarks which are excluded from the definition of property under Section 7-9-3 (J):

a. $1,440,235.00 in fiscal year 2009 – 2010 [Taxpayer Ex. 15 (TAB: 0910 Summary)];

b. $3,646,147.00 in fiscal year 2010 – 2011 [Taxpayer Ex. 16 (TAB: 1011 Summary)];

c. $3,910,630.00 in fiscal year 2011 – 2012 [Taxpayer Ex. 17 (TAB: 1112 Summary];

d. $4,366,775.00 in fiscal year 2012 – 2013 [Taxpayer Ex. 18 (TAB: 1213 Summary)];

e. $3,951,544.00 in fiscal year 2013 – 2014 [Taxpayer Ex. 19 (TAB: 1314 Summary)];

f. $4,777,735.00 in fiscal year 2014 – 2015 [Taxpayer Ex. 20 (TAB: Summary)].

*Radio Broadcasts*

53. Taxpayer's Initial Agreement and Revised Agreement provides the exclusive right to broadcast specific athletic events and related programming, including football, basketball, and baseball games, and coaches' shows. [Department Ex. A-1014 (Sec 2.); Department Ex. B (Sec. 2)]

54. Taxpayer's rights and responsibilities under the Revised Agreement require that it "produce, originate, broadcast and distribute" the specific programming. [Department Ex. A-1014 (Sec 2.1.2.2); Department Ex. B (Sec. 2.1.2.2)]

55. Mr. Worsham oversees a fulltime staff of approximately 30 individuals "responsible for developing, creating, and nurturing the relationships" with sports radio affiliates of UNM, its athletic department, and its athletic programs. [Direct Examination of Mr. Worsham]

56. With specific concern for Taxpayer's activities relative to UNM athletic radio programming, Mr. Worsham also oversees the staff that mixes, produces, and distributes the audio broadcasts of UNM athletic events throughout the Lobo Sports Network. [Direct Examination of Mr. Worsham]

57. Mr. Worsham also oversees efforts to expand the Lobo Sports Network through acquisition of new affiliates. [Direct Examination of Mr. Worsham]

58. Mr. Worsham and his staff are headquartered in Jefferson City, Missouri. [Direct Examination of Mr. Worsham]

59. Taxpayer's operations during an UNM athletic event might include: (a) connect

broadcast personnel from the site of the event and transmit a "raw audio feed from game site" to Taxpayer's master control in Jefferson City. [Direct Examination of Mr. Worsham]

60. The raw audio will usually consist of play-by-play descriptions of the event and other commentary, including pregame and postgame content. [Direct Examination of Mr. Worsham]

61. Taxpayer will then mix the raw audio with pre-produced audio including commercial advertising, special features, and music. All pre-produced audio is mixed and produced in Jefferson City. [Direct Examination of Mr. Worsham]

62. Taxpayer uplinks the mixed, ready-to-air audio to a satellite which then downlinks to the satellite receiver of a broadcast affiliate so that the affiliate can transmit the ready-to-air broadcast to its radio audience. [Direct Examination of Mr. Worsham]

63. Taxpayer also works with leadership of individual radio stations, such as general managers or program managers, to secure agreements assuring exclusive right to broadcast UNM athletic events, produced by Taxpayer, in their respective regions. [Cross Examination of Mr. Worsham]

64. Taxpayer's former director of tax prepared spreadsheets which purported to identify receipts from national and regional radio advertising. Ms. Heim explained that "He filtered out the radio pieces of the national sales contracts." Using that information, Ms. Heim "then removed the dollars … that were related to any invoices that [were] sent to customers in New Mexico" to isolate those receipts deriving from "invoices for radio broadcasting of national contracts where the invoices were sent to addresses outside of the State of New Mexico." [Direct Examination of Ms. Heim]

65. Taxpayer asserts deductions for transactions in interstate commerce arising from

radio broadcasts in the following amounts associated with the specified fiscal years:

a. $94,208.00 in fiscal year 2009 – 2010 [Taxpayer Ex. 15 (TAB: 0910 Summary)];

b. $456,754.00 in fiscal year 2010 – 2011 [Taxpayer Ex. 16 (TAB: 1011 Summary)];

c. $476,062.00 in fiscal year 2011 – 2012 [Taxpayer Ex. 17 (TAB: 1112 Summary];

d. $465,905.00 in fiscal year 2012 – 2013 [Taxpayer Ex. 18 (TAB: 1213 Summary)];

e. $446,563.00 in fiscal year 2013 – 2014 [Taxpayer Ex. 19 (TAB: 1314 Summary)];

f. $468,312.00 in fiscal year 2014 – 2015 [Taxpayer Ex. 20 (TAB: Summary)].

**2011 S-Corp Income and Franchise Return for Iceberg Ventures, Inc.**

66. Iceberg Ventures, Inc. filed a Form 2011 S-Corp return accompanied by an S-Corp-PV with payment in the amount of $50.00 with the Department on or about September 13, 2012 for tax year ending December 31, 2011. [Direct Examination of Ms. Heim; Taxpayer Ex. 21]

67. Iceberg Ventures, Inc. subsequently prepared an amended Form 2011 S-Corp return and payment in the amount of $26,267.00 on or about October 15, 2012 for tax year ending December 31, 2011. It was Ms. Heim's belief that the amended return, accompanied by the payment, was mailed to the Department on or about the same date. [Direct Examination of Ms. Heim; Taxpayer Exs. 22 and 23]

68. Neither Taxpayer Ex. 22 nor Taxpayer Ex. 23 include a 2011 S-Corp-PV

corresponding with the payment that was intended to accompany the amended return. [Taxpayer Exs. 22 and 23]

69. Additional investigation by Taxpayer revealed that the check [Taxpayer Ex. 23.1] accompanying the amended Form 2011 S-Corp [Taxpayer Ex. 22], in the amount of $26,267.00 never cleared the bank. [Direct Examination of Ms. Heim]

70. During the relevant period, Iceberg Ventures, Inc.'s practice was to retain photocopies of tax returns, associated tax payments, and mailing envelopes for its files. [Direct Examination of Ms. Heim]

71. Ms. Heim did not know if Iceberg Ventures, Inc. had retained a copy of the mailing envelope utilized for mailing of its amended return and payment. Ms. Heim, at the time of her testimony, did not have a photocopy of the envelope that would have contained the relevant return or accompanying payment. [Direct Examination of Ms. Heim; Cross Examination of Ms. Heim]

72. On March 26, 2019, Iceberg Ventures, Inc. submitted payment on its outstanding liability in the amount of $27,429.00 for tax year ending December 31, 2011. [Direct Examination of Ms. Heim]

*Bad Debt*

73. Taxpayer asserts deduction for uncollectible debts in the following amounts associated with the specified fiscal years:

a. $39,098.00 in fiscal year 2009 – 2010 [Taxpayer Ex. 15 (TAB: 0910 Summary)];

b. $135,238.00 in fiscal year 2010 – 2011 [Taxpayer Ex. 16 (TAB: 1011 Summary)];

c. $97,429.00 in fiscal year 2011 – 2012 [Taxpayer Ex. 17 (TAB: 1112 Summary];

d. $111,645.00 in fiscal year 2012 – 2013 [Taxpayer Ex. 18 (TAB: 1213 Summary)];

e. $107,175.00 in fiscal year 2013 – 2014 [Taxpayer Ex. 19 (TAB: 1314 Summary)];$125,664.00 in fiscal year 2014 – 2015 [Taxpayer Ex. 20 (TAB: Summary)].

74. Taxpayer classifies bad debt in its records using one of two methods: (a) the first is "bad debt current year" which consists of outstanding liabilities that Taxpayer has identified as uncollectible, which has been written off the books or which has been referred to a third-party agency for collection during the current fiscal year; (b) the second is "bad debt reserved" which consists of outstanding liabilities in the current fiscal year in which collectability may be undetermined or uncertain. [Cross Examination of Ms. Heim]

75. Taxpayer relies on the services of third-party collection agencies after exhausting efforts to secure collection directly from customers by offering payment plans or other options. Whether and when to refer a debt to a third-party collection agency is determined on a case-by-case basis. [Cross Examination of Ms. Heim]

76. Taxpayer retains records itemizing the success of collection efforts, but Ms. Heim did not have those records at her disposal as of the time she testified. [Cross Examination of Ms. Heim]

*The Department's Audit*

77. Ms. Beach made an initial request for documents and later followed up with a request for more specific items including documentation supporting figures provided in income

tax returns. Taxpayer's local certified public accountant provided general sales ledgers which reconciled with its income tax returns. [Direct Examination of Ms. Beach]

78. The Department did not generally dispute the accuracy of Taxpayer's general sales ledgers with respect to establishing Taxpayer's net revenue, and it afforded adjustments that corresponded with refunds or credits that Taxpayer reported providing to its sponsors or customers, as detailed in its financial ledgers. [Direct Examination of Ms. Beach]

79. Taxpayer raised issues relating to revenue streams and the value of the trademarks that were relevant to those revenue streams. Taxpayer provided general spreadsheets but no supporting documents that might illustrate the specific amount of money that could be derived from its sales, specifically those amounts of revenue generated from purported licensing of UNM athletic trademarks. [Direct Examination of Ms. Beach]

80. Upon the Department's request, Taxpayer provided a collection of sample contracts with its customers, none of which itemized the benefits any customer received in exchange for a specific amount of consideration paid. Instead, the contracts were addressed only to total investment, or lump sum. [Direct Examination of Ms. Beach; Department Ex. C]

81. The sample contracts did not establish any method for allocation of revenue derived from radio broadcast advertising or trademarks. [Direct Examination of Ms. Beach; Department Ex. C]

82. Taxpayer never raised the deduction for uncollected bad debt during the audit, Therefore, the Department had no opportunity to address whether any of the credit or refunds observed in the general sales ledgers derived from writing off uncollectible debts. [Direct Examination of Ms. Beach]

83. Because Taxpayer did not assert entitlement to a deduction for uncollectible debts

at the time of the audit, Ms. Beach did not request the sort of documentation she would usually request for evaluating the propriety of such deduction, including detailed account information, proof that tax was paid, and subsequent proof to demonstrate where the uncollectible debt was written off. Ms. Beach would also request information to determine what, if any collection efforts were made in reference to an uncollectible debt, or other evidence to verify the un-collectability of the debt. [Direct Examination of Ms. Beach]

84. Taxpayer did not present at any time during the audit any documents to establish the amount of any asserted deduction for uncollectible debt, that Taxpayer actually paid the tax associated with an uncollectible debt, or evidence to establish what efforts may have been employed to collect the debt prior to declaring the debt uncollectible and asserting entitlement to the deduction. [Direct Examination of Ms. Beach]

85. During the audit, Ms. Beach requested proof of timely submission and payment in reference to the amended 2011 S-Corp return and associated payment, but never received any such documentation. [Direct Examination of Ms. Beach]

86. Ms. Rodriguez was unable to locate any 2011 S-Corp return or accompanying payment. [Direct Examination of Ms. Rodriguez]

87. Ms. Rodriguez found Taxpayer documentation in reference to its uncollected debts to be insufficient. It lacked supporting records indicating how the uncollected debts were calculated, documentation of collection efforts, or records to demonstrate what streams of revenue were affected by the uncollected debt. [Direct Examination of Ms. Rodriguez]

88. At no time during the audit did Taxpayer ever raise for consideration any deduction for bad debt or the exclusion for licensing intellectual property. [Direct Examination of Ms. Beach]

89. The figures incorporated into various spreadsheets employed to illustrate Taxpayer's asserted tax liability conform with its own internal records and utilize generally acceptable accounting methods. [Direct Examination of Ms. Heim]

*Procedural History of the Consolidated Protests*

*Iceberg Ventures, Inc.*

90. On February 27, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Iceberg Ventures, Inc. under Letter ID No. L1056839984 in the total amount of $881,961.68 consisting of $640,661.57 in gross receipts tax, $128,132.30 in gross receipts tax penalty, and $113,167.81 in gross receipts tax interest for the periods from July 31, 2010 through September 30, 2014. [Administrative File]

91. On February 27, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Iceberg Ventures, Inc. under Letter ID No. L1116711216 in the total amount of $36,938.52 consisting of $27,429.00 in assessed pass-through withholding tax, $5,485.80 in pass-through withholding tax penalty, and $4,023.72 in pass-through withholding tax interest for the periods from March 31, 2011 through December 31, 2011. [Administrative File]

92. Iceberg Ventures, Inc. filed two separate Formal Protests of the assessments issued under Letter ID No. L1056839984 and Letter ID No. L1116711216 on May 26, 2017. [Administrative File]

93. The Department separately acknowledged the protests of Iceberg Ventures, Inc. of the assessments under Letter ID No. L1056839984 and Letter ID No. L1116711216 on June 12, 2017. [Administrative File]

94. On July 26, 2017, the Department made separate requests for scheduling hearings

on the protests of the assessment issued under Letter ID No. L1056839984 and Letter ID No. L1116711216. [Administrative File]

95. The Administrative Hearings Office entered Notices of Telephonic Scheduling Conference on July 27, 2017 which set separate telephonic hearings for the protests arising from Letter ID No L1056839984 and Letter ID No. L1116711216. The hearing was set for August 14, 2017. [Administrative File]

96. On July 31, 2017, Iceberg Ventures, Inc. filed a Motion to Consolidate its protests of the assessment issued under Letter ID No. L1116711216 and Letter ID No. L1056839984. [Administrative File]

97. On August 14, 2017, the Administrative Hearings Office conducted a scheduling hearing and entered a Scheduling Order and Notice of Administrative Hearing which set a hearing on the protests of Letter ID No. L1116711216 and Letter ID No. L1056839984 for August 2 – 3, 2018. [Administrative File]

98. On July 10, 2018, the parties filed a Joint Motion for a Continuance of the hearing set for August 2 – 3, 2018 in the protests of Letter ID No. L1116711216 and Letter ID No. L1056839984. [Administrative File]

99. On July 12, 2018, the Administrative Hearings Office entered a Continuance Order, Amended Scheduling Order and Amended Notice of Administrative Hearing which continued the hearing of the protests of Letter ID No. L1116711216 and Letter ID No. L1056839984 to April 24 – 25, 2019. [Administrative File]

100. The Department served its First Set of Requests for Admission, Interrogatories and Requests for Production on Taxpayer as indicated in its Certificate of Service filed on January 24, 2019. [Administrative File]

101. Taxpayer served its answers and responses to the Department's First Set of Requests for Admission, Interrogatories and Requests for Production on Taxpayer as indicated in its Certificate of Service filed on March 6, 2019. [Administrative File]

102. Iceberg Ventures, Inc. filed Taxpayer's Prehearing Statement, a subsequent Amended Prehearing Statement, and an ensuing Second Amended Prehearing Statement on April 1, 2019. [Administrative File]

103. The Department filed Taxation and Revenue Department's Prehearing Statement on April 3, 2019. [Administrative File]

*Lobo Sports Properties, LLC*

104. On February 27, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Lobo Sports Properties, LLC under Letter ID No. L2130581808 in the total amount of $2,320,026.64 consisting of $1,791,613.85 in gross receipts tax, $358,322.77 in gross receipts tax penalty, and $170,090.02 in gross receipts tax interest for the periods from December 31, 2011 through September 30, 2015. [Administrative File]

105. On February 27, 2017, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Lobo Sports Properties, LLC under Letter ID No. L0708319536 in the total amount of $171,842.44 consisting of $121,359.41 in gross receipts tax, $24,271.88 in gross receipts tax penalty, and $26,211.15 in gross receipts tax interest for the periods from January 31, 2010 through December 31, 2011. [Administrative File]

106. Lobo Sports Properties, LLC filed separate Formal Protests of the assessments issued under Letter ID No. L2130581808 and Letter ID No. L0708319536 on May 26, 2017. [Administrative File]

107. The Department separately acknowledged the protests of Lobo Sports Properties,

LLC of the assessments under Letter ID No. L2130581808 and Letter ID No. L0708319536 on June 12, 2017. [Administrative File]

108. On July 26 and July 27, 2017, the Department requested scheduling hearings on the protests of the assessments issued under Letter ID No. L2130581808 and Letter ID No. L0708319536. [Administrative File]

109. The Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference on July 27, 2017 which set a telephonic hearing for protests arising from Letter ID No L2130581808 and Letter ID No. L0708319536. The hearing was set for August 14, 2017. [Administrative File]

110. On July 31, 2017, Lobo Sports Properties, LLC filed a Motion to Consolidate its protests of the assessment issued under Letter ID No L2130581808 and Letter ID No. L0708319536. [Administrative File]

111. On August 14, 2017, the Administrative Hearings Office conducted a scheduling hearing and entered a Scheduling Order and Notice of Administrative Hearing which set a hearing on the protests of Letter ID No L2130581808 and Letter ID No. L0708319536 for July 31 – August 1, 2018. [Administrative File]

112. On July 10, 2018, the parties filed a Joint Motion for a Continuance of the hearing set for July 31 – August 1, 2018 in the protests of Letter ID No. L2130581808 and Letter ID No. L0708319536. [Administrative File]

113. On July 12, 2018, the Administrative Hearings Office entered a Continuance Order, Amended Scheduling Order and Amended Notice of Administrative Hearing which continued the hearing of the protests of Letter ID No. L2130581808 and Letter ID No. L0708319536 to April 22 – 23, 2019. [Administrative File]

114. The Department served its First Set of Requests for Admission, Interrogatories and Requests for Production on Taxpayer as indicated in its Certificate of Service filed on January 22, 2019. [Administrative File]

115. Lobo Sports Properties, LLC served its answers and responses to the Department's First Set of Requests for Admission, Interrogatories and Requests for Production on Taxpayer as indicated in its Certificate of Service filed on March 6, 2019. [Administrative File]

116. Lobo Sports Properties, LLC filed Taxpayer's Prehearing Statement, a subsequent Amended Prehearing Statement, and an ensuing Second Amended Prehearing Statement on April 1, 2019. [Administrative File]

117. The Department filed Taxation and Revenue Department's Prehearing Statement on April 1, 2019. [Administrative File]

*Consolidation of Iceberg Ventures, Inc. and Lobo Sports Properties, LLC*

118. On April 2, 2019, Iceberg Ventures, Inc. and Lobo Sports Properties, LLC filed separate Motions to Consolidate Formal Hearings with one another. [Administrative File]

119. On April 3, 2019, the Administrative Hearings Office entered an Order Consolidating Protests and Third Notice of Telephonic Scheduling Hearing. [Administrative File]

120. On April 17, 2019, the Taxpayer filed Taxpayer's Motion for Approval of Telephonic Testimony. [Administrative File]

121. On April 18, 2019, the Administrative Hearings Office entered an Order Allowing Telephonic Testimony. [Administrative File]

122. On April 22, 2019, the day on which the hearing was to commence, counsel for

the Department experienced an unforeseen emergency. A hearing was held to address the status of the matter which determined that the matter should be in recess until April 23, 2019. [Record of Hearing (April 22, 2019)]

123. Also unexpectedly occurring on April 22, 2019, the originally-assigned presiding hearing officer experienced an illness and overnight hospitalization which required that the protest be immediately reassigned to the undersigned Hearing Officer so that the matter could proceed as scheduled. Neither party objected to the reassignment of the undersigned Hearing Officer. [Record of Hearing (April 23, 2019)]

124. The hearing on the merits of the consolidated protest commenced on April 23, 2019. [Administrative File]

125. The Administrative Hearings Office entered a Post-Hearing Scheduling Order on May 7, 2019. [Administrative File]

126. On May 7, 2019, the parties supplemented the record with hardcopies of previously admitted, yet editable electronic exhibits. [Administrative File]

127. The parties filed their written closing arguments on May 21, 2019. [Administrative File]

128. On June 25, 2019, Taxpayer filed a Notice of Errata in Taxpayers' Closing Argument correcting various figures presented in its initial closing argument which it later determined to be erroneous. [Administrative File].

**DISCUSSION**

This protest presents several issues. The first issue is whether any portion of Taxpayer's receipts are derived from sublicensing intellectual property, which is excluded from the definition of property under NMSA 1978, Sections 7-9-3 (J) (2007) and 7-9-3.5 (A) (1) (2010).

The second issue is whether Taxpayer is entitled to claim a deduction from its gross receipts for interstate radio broadcasts pursuant to NMSA 1978, Section 7-9-55 (C) (1993). The third issue is whether Taxpayer is entitled to a deduction for uncollectible debts pursuant to NMSA 1978, Section 7-9-67 (1994). The final issue is whether there is a basis to abate penalty and interest arising from a late pass-through withholding remitter return and payment.

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

Under NMSA 1978, Section 7-1-17 (C) (2007), the Assessment from which this protest arises is presumed correct and the burden rests on Taxpayer to overcome the presumption. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (Y) (2017). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) similarly extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503, 134 P.3d 785, 791 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

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

**Gross Receipts Tax.**

For the privilege of engaging in business in New Mexico, the Gross Receipts and Compensating Tax Act imposes a gross receipts tax on the receipts of any person engaged in business within its boundaries. *See* NMSA 1978, Section 7-9-4 (2010). The Gross Receipts and Compensating Tax Act establishes a presumption that *all* receipts of a person engaged in business in New Mexico are taxable. *See* NMSA 1978, Section 7-9-5 (2002). The term "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). The term "gross receipts" is defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007) to mean:

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or *licensing property employed in New Mexico*, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.
>
> [Emphasis Added]

Despite the presumption that all receipts of a person engaged in business are taxable, a taxpayer may avail itself of several exemptions or deductions, or even assert that its receipts are entirely excluded because they are not within the definition of "gross receipts."

If a taxpayer asserts entitlement to an exemption or deduction, then the burden rests with the taxpayer to prove its entitlement. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,* 2007-NMCA-050, ¶32, 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.

The same burden rests on the taxpayer when relief relies on an exclusion. Taxation is the rule and the burden is on the taxpayer to bring itself within any claimed exception. *See Grogan v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-033, ¶17, 133 N.M. 354, 62 P.3d 1236

**Receipts for Sublicense of Intellectual Property (Trademarks)**.

Although the parties may sometimes refer generally to "intellectual property" or "IP," the specific subcategory of intellectual property at issue herein involves trademarks, particularly those associated with UNM's athletic programs.

Simply stated, "[a] trademark is a limited property right in a particular word, phrase or symbol." *See New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) As *New Kids* went on to declare most eloquently, "although English is a language rich in imagery, we need not belabor the point that some words, phrases or symbols better convey their intended meanings than others." *Id*. For example, by merely uttering the word "Lobos," particularly in New Mexico, one makes an inevitable and immediate correlation to UNM and its athletic programs.

According to Ms. Brandle, that correlation can be of significant value to commercial entities wanting to market themselves, their products or services, to an athletic program's supporters who naturally perceive the program and its trademarks in a favorable light. Consequently, it is Taxpayer's objective within this setting to procure financial sponsorships for UNM athletics in which the athletic department obtains a financial benefit from sponsors in exchange for the advantages that might flow to the sponsor through its association with UNM.

Taxpayer therefore explains that it "licensed the intellectual property rights of the UNM sport [sic] department from UNM, then sublicensed those rights to their clients, accounting for a substantial portion of Taxpayer's New Mexico revenues."

Therefore, Taxpayer argues, "[b]ecause a license of intellectual property rights is not 'property' as defined in NMSA 1978, [Section] 7-9-3 (J) [2018], the receipts from the sublicensing of those IP rights are exempt from gross receipts tax." [Taxpayers' Closing Argument, Pages 8 – 9]. Although Taxpayer employs the term "exempt," the Hearing Officer will favor the terms "exclude" or "exclusion" instead of "exempt" and "exemption" to avoid potential confusion since Taxpayer's position on this issue does not precisely rely on the application of any particular statutory exemption. *See e.g.* NMSA 1978, Sections 7-9-12 to – 41.4.

Instead, Taxpayer relies on the fact that the definition of "gross receipts," which includes receipts derived from "licensing property," expressly excludes "licenses of … trademarks" from its definition of "property." *See* NMSA 1978, Section 7-9-3 (J) (2007). Therefore, receipts derived from licensing trademarks are not taxable as gross receipts because trademarks are not "property" under the applicable statute. Consequently, provided that licensing or sublicensing trademarks was the genuine source of Taxpayer's receipts, then the receipts derived from that activity are excluded from the definition of "gross receipts" and are not taxable. Thus, the essential query is whether Taxpayer's receipts derived from *licensing or sublicensing* trademarks.

The examination requires a thorough review of the Revised Agreement which establishes the respective rights and obligations of UNM and Taxpayer, particularly with concern for the rights Taxpayer may have, or not, with respect to UNM's trademarks, and whether those rights

might include sublicensing of those same trademarks to third-parties (i.e. sponsors).

But prior to delving into the agreements, the Hearing Officer will address Taxpayer's objection to the Department calling Mr. Jeffrey L. Squires, Esq. to testify as an expert witness in intellectual property law.

Taxpayer objected on the basis that it was improper for Mr. Squires, an attorney, to give expert testimony on how the law should be construed or applied. The Hearing Officer overruled the objection and permitted Mr. Squires' testimony, confident of being able to distinguish between inappropriate and appropriate expert opinion. Although the Hearing Officer was admittedly initially skeptical of an attorney providing expert testimony in an area of law, it is not unusual for courts to regularly admit expert testimony from intellectual property attorneys in trademark cases. *See e.g. HealthONE of Denver, Inc. v. UnitedHealth Grp., Inc.*, Civil Action No. 10-cv-01633-WYD-BNB, 2012 U.S. Dist. LEXIS 4506, at *21-22 (D. Colo. Jan. 12, 2012) (*citing Olympia Group, Inc. v. Coopers Industries, Inc.*, No. 5:01-CV-423, 2003 U.S. Dist. LEXIS 27857, 2003 WL 25767444, at *1 (E.D.N.C. April 17, 2003); *Sam's Wine & Liquors, Inc. v. Wal-Mart Stores, Inc.*, No. 92 C 5170, 1994 U.S. Dist. LEXIS 13725, 1994 WL 529331, at *8 (N.D. III. Sep. 27, 1994).

But moreover, after evaluating, sifting and weighing the evidence, the Hearing Officer ultimately found that Mr. Squires' testimony was most helpful toward merely emphasizing those portions of the Initial Agreement, Revised Agreement, and Sponsorship Agreements which might be pertinent to whether Taxpayer was licensing or sublicensing UNM's trademarks. Although Mr. Squires did devote some time to discussing the law, that discussion merely established foundation for emphasizing why some sections of the various agreements might command closer consideration than others.

Turning now toward those agreements, it is helpful to note that "[t]he primary objective in construing a contract is to ascertain the intention of the parties." *See Mobile Inv'rs v. Spratte*, 1980-NMSC-006, ¶6, 93 N.M. 752, 605 P.2d 1151. "The contract will be considered and construed as a whole, with meaning and significance given to each part in its proper context, so as to ascertain the parties' intentions." *See Segura v. Kaiser Steel Corp.*, 1984-NMCA-046, ¶12, 102 N.M. 535, 697 P.2d 954.

The agreements in this protest must be thoroughly examined to determine what rights, if any, Taxpayer possessed to sublicense UNM's trademarks because it is well established that a trademark license cannot be assigned, or sublicensed "to third parties without express permission from the original licensor." *See Hokto Kinoko Co. v. Concord Farms, Inc.*, 810 F. Supp. 2d 1013, 1035 (C.D. Cal. 2011) (*citing Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 978 (9th Cir. 2006). Therefore, the authority for Taxpayer to sublicense trademarks may not be implied, and must be *explicit*.

Taxpayer described its business as licensing trademarks from UNM and subsequently selling sublicenses to commercial entities wishing to procure sponsorships. Its closing argument directs the Hearing Officer to the Revised Agreement, Sections 5.2 and 14.4.2, as well as Section 6 of the separate Sponsorship Agreement. [Taxpayer Ex. 2.17 – 2.18 (Sec. 5.2); Taxpayer Ex. 2.55 (Sec. 14.4.2); Taxpayer Ex. 2.67 (Sponsorship Agreement, Sec. 6)].

Section 5.2, as previously quoted in full, defines "sponsorship" but excludes "any payment for which a person receives a substantial return other than use or acknowledgment of the name or logo (or product lines) *of the Sponsor* in connection with the athletic programs." (Emphasis Added) A review of the precise language used in Section 5.2 reveals that only the use of the *sponsor's* name or logo is permitted in connection with the athletic program. Section 5.2

does not explicitly permit a *sponsor's* use of the athletic program's trademarks.

In fact, Section 5.2 goes on to state that "[s]ponsorships may not include … (iv) exclusive or non-exclusive rights to use an intangible asset of the University including but not limited to the Marks[.]" Accordingly, an examination of the precise language contained in Section 5.2 only permits what Ms. Brandle described as "internal use" meaning the inclusion of the *sponsor's* name or logo in UNM media or displayed in UNM venues.

Considering other relevant provisions in the Revised Agreement, the Hearing Officer observed that the only type of trademark use the Revised Agreement explicitly approves is "nominative fair use" as defined by 15 U.S.C. §1115 (b) (4) of the Trademark Act. Section 1.6 of the Revised Agreement states "[Taxpayer]'s use of the Marks (including any use [sic] nominative fair use by sponsors of the Marks) is subject to being previously reviewed and approved in writing by the University to assure [Taxpayer]'s compliance with the University's technical requirements, specifications, and any pertinent usage/style guide or manual regarding [Taxpayer]'s use of the Marks." [Taxpayer Ex. 2.6 (Sec. 1.6)].

Despite UNM's declaration reserving its right to review even nominative fair use of its trademarks, that declaration does not also imply that Taxpayer is vested with any authority to sublicense trademarks because nominative fair use does not require licensure or even permission in the first place. In fact, Section 1.6.4 of the Revised Agreement seems to implicitly recognize that fact by stating "[Taxpayer] agrees and acknowledges that it will not separately charge any sponsor any special fee for the nominative fair use right to use the University's Marks in connection with the sponsorships or otherwise."

*New Kids* is particularly useful in illustrating the meaning of the term "nominative fair use," explaining that it consists of the use of a trademark, including a "particular word, phrase or

symbol," to describe the trademarked product.

In that case, two newspapers sought to ascertain which of the New Kids on the Block, a popular musical group, was the most popular and most attractive. Both newspapers announced their polls with pictures of the group and instructed anyone wishing to express their opinion to call a 1-900 number in which, for a fee, they could express their sentiments. The announcements specified that proceeds from the 1-900 line were to be donated to charity.

The New Kids on the Block objected and asserted that the newspapers were infringing on their trademarks. The court, however, did not agree explaining that the reference to the trademark, "New Kids on the Block," was a nominative fair use when it was "used to refer to the New Kids [on the Block] themselves." *See New Kids*, 971 F.2d 302, 308 (9th Cir. 1992); *See also Gennie Shifter, Ltd. Liab. Co. v. Lokar, Inc.*, Civil Action No. 07-cv-01121, 2010 U.S. Dist. LEXIS 2176, at *40 (D.Colo. Jan. 12, 2010).

Thus, *New Kids* instructs that a business, regardless of whether it was a UNM sponsor, could place a banner in its window exclaiming "Go Lobos!" or some other display of a trademarked word, phrase, or symbol, without infringing on UNM's trademarks as a nominative fair use. Consequently, Section 1.6.4 of the Revised Agreement, prohibiting a fee for nominative fair use, suggests acknowledgment that it would be patently absurd to charge a sponsor for something that a non-sponsor could already do for free as a nominative fair use. The language might also suggest UNM's desire to simply avoid any potential inference, particularly by sponsors or other third parties, that Taxpayer possesses some authority which UNM has not granted, because "the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment." *See In re XMH Corp.*, 647 F.3d 690, 695 (7th Cir. 2011); *See also Miller*, 454 F.3d at 978 ("a licensee of trademark … may not sublicense those

rights to third parties without express permission from the original licensor.")

Taxpayer also cites Section 14.4.2 of the Revised Agreement (Taxpayer Ex. 2.55) in support of its asserted authority to sublicense UNM trademarks. Section 14.4.2 requires that Taxpayer take immediate action "[i]n the event of any use and/or license of Marks by [Taxpayer]'s Sponsors or by anyone on [Taxpayer]'s behalf or under its authorization in any manner not approved by the University[.]" However, this section is not dispositive either. It merely imposes the obligation on Taxpayer to notify UNM if it becomes aware of any improper or unauthorized use of UNM trademarks, including Taxpayer's own misuse.

Recall that under the Revised Agreement, UNM "licenses [Taxpayer] the non-exclusive right to use the University Athletic Department's name and its and [sic] the University's trademarks, service marks, logos or symbols, and trade dress including the likeness, appearance, and voice of its Personnel (collectively, 'Marks') at no cost to [Taxpayer] in connection with (a) [Taxpayer]'s use of the licensed Multi-Media Rights and (b) its securing Sponsorships and other revenue generating opportunities for the University, in accordance with the terms of this Agreement." [Taxpayer Ex. 2.6 (Sec. 1.6)].

Section 1.6 of the Revised Agreement does not authorize Taxpayer to sublicense UNM's trademarks, it only permits Taxpayer's use of the trademarks for specific purposes. Although not proffered for the specific objective of demonstrating *Taxpayer's use* of UNM's trademarks, Department Ex. C is nevertheless demonstrative of that use in that Taxpayer's various agreements and other sponsorship materials all prominently display UNM logos and images, including photographs of UNM student athletes and supporters. [*e.g.* Department Ex. C-019; C-044; C-111; C-137].

The effect of Taxpayer's use is consistent with the purpose of licensing trademarks in

general, which is to identify a good or service to the consumer or establish its identity. *See In re XMH Corp.*, 647 F.3d at 695. In this case, Taxpayer's use of UNM's trademarks indicates that Taxpayer is an extension of UNM, a status that authenticates its authority and augments its trustworthiness among potential sponsors. But that use, does not permit it to sublicense UNM's trademarks to third parties since that power has not been explicitly provided. *Id*.; *Accord 4 McCarthy on Trademarks* § 25:33 (4th ed. 2010) ("Since the licensor-trademark owner has the duty to control the quality of goods sold under its mark, it must have the right to pass upon the abilities of new potential licensees.")

Taxpayer also refers to Section 6 of the Sponsorship Agreement. [Taxpayer Ex. 2.67]. It provides in part that "[t]o the extent that any of the Sponsor's Benefits … include the right to make use of [UNM's trademarks]," then the sponsor agrees that its use of trademarks is "non-exclusive, limited and non-transferable and must be approved by the Provider and/or the University prior to its use. Sponsor further agrees that it may not make use of School Marks in any retail promotion or sale of a product without the approval of the University or its authorized agent and the payment of any required license fee."

Interestingly, none of the actual sponsorship agreements provided in Department Ex. C overtly exemplify permissive "external use" of UNM trademarks, once again incorporating Ms. Brandle's definition of that term. However, even if there were an external use constituting something greater than a nominative fair use, then that use would require "payment of any required license fee." Although Taxpayer could theoretically receive that payment on UNM's behalf, that fact does not establish that Taxpayer would have also received the payment as consideration for sublicensing trademarks. Section 5.4 of the Revised Agreement states that "[t]he University appoints [Taxpayer] as its limited agent for the sole purpose of signing

Sponsorship Agreements on behalf of the University and collecting revenues on behalf of the University." [Taxpayer Ex. 2.17 (Sec. 5.4)].

Therefore, a licensing fee collected by Taxpayer on behalf of UNM would not be Taxpayer's receipts but would hypothetically be received by Taxpayer in its capacity as UNM's agent for collecting revenue. *See e.g.* NMSA 1978, Section 7-9-3.5 (A) (3) (f) ("gross receipts" excludes amounts received solely on behalf of another in a disclosed agency capacity.). This is the only construction of Section 6 that harmonizes with Section 5.15.1 of the Revised Agreement which states "[Taxpayer] is expressly prohibited from licensing to any Sponsor the right to use the Marks other than for nominative fair use[.]" [Taxpayer Ex. 2.27 – 2.28]. Yet, as demonstrated in *New Kids*, nominative fair use does not require a license, not to mention again that the Revised Agreement expressly prohibits Taxpayer from charging any fees for the nominative fair use of any UNM trademarks.

Even if there were some outlying examples of a sponsor explicitly acquiring a sublicense for something greater than nominative fair use of a UNM trademark, as suggested by the testimony of Mr. Farlow, or within the fine print of a sponsorship agreement, there is still no evidence that Taxpayer actually ever received separate licensing fees as contemplated by Section 6 of the Sponsorship Agreement or as a limited agent pursuant to Section 5.4 of the Revised Agreement.

This leads to a brief discussion of Mr. Farlow's testimony, who Taxpayer called as a rebuttal witness over the Department's objections. Mr. Farlow provided examples of sponsors' "external use" of UNM trademarks as part of in-store sales promotions or on give-away items and suggested that UNM has previously acquiesced to activities consistent with Taxpayer's sublicensing of UNM trademarks. The Hearing Officer recognized this testimony as challenging

the evidence that Taxpayer was explicitly prohibited in the Revised Agreement from sublicensing UNM trademarks, by suggesting that those agreements do not represent the entire agreement of the parties. In other words, Mr. Farlow's testimony implied that the Hearing Officer might consider the previous conduct of the parties to infer that some aspects of their agreement might be unwritten. Afterall, New Mexico adheres to the general rule that a written contract may be modified, rescinded or discharged by subsequent oral agreement. *See Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶14, 119 N.M. 136, 889 P.2d 171.

However, Mr. Farlow's examples were so broad and general, not to mention unsubstantiated by other evidence in the record, that the Hearing Officer could afford them no weight. The Hearing Officer also recognizes that any oral, non-written agreements which might allegedly supplement or amend any relevant written agreements between Taxpayer and UNM are unenforceable because governmental entities such as public universities are granted immunity from actions based on contract, "except actions based on a valid *written* contract." *See* NMSA 1978, Section 37-1-23 (A) (Emphasis Added)

Returning to the consideration of fees that Taxpayer did receive, and for what they were received, Ms. Brandle explained that the value of a sponsorship correlates with the authorized use of a trademark. In other words, the greater a sponsor's financial commitment, the more use it could make of UNM's trademarks. In contrast, Department Ex. C illustrated that it was not necessarily a sponsor's use of UNM's trademarks that correlated to the amount of its sponsorship, but rather the exposure that the sponsor could expect to receive in UNM media, in UNM venues, and in UNM promotions. This tends to represent UNM's use of sponsor names, logos, and even trademarks, instead of a sponsor's use of UNM's trademarks.

Nevertheless, Ms. Brandle explained that UNM's trademark represented 75 percent of a

Tier 1 sponsorship, 80 percent of a Tier 2 sponsorship, and 90 percent of a Tier 3 sponsorship and explained why the percentages increase as the permitted use of the trademarks correspondingly rise. [Direct Examination of Ms. Brandle; Taxpayer Exs. 15 – 20 (TAB: IP Sublicense)].

Yet, thorough review of Department Ex. C considering Ms. Brandle's testimony failed to reveal that Ms. Brandle's estimates represented more than a theory of Taxpayer's case. Therefore, even if Taxpayer had proven that it was engaged in the sublicensing of trademarks, its evidence was still insufficient to firmly establish the sum of receipts that should be excluded.

Taxpayer did not overcome the presumption of correctness that attached to the assessments with respect to any asserted exclusions for licensing intellectual property.

**Sale of Radio Broadcast Time**

The Revised Agreement provides Taxpayer exclusive rights to terrestrial radio and internet streaming broadcasts of specific UNM athletic events, including football and men's and women's basketball.

Mr. Worsham provided a brief overview of the mechanics of producing radio broadcasts of UNM athletic events. In summary, he explained how the raw audio is transmitted from the venue to Taxpayer's production headquarters in Jefferson City, Missouri where it is mixed with music, commercials, and other audio elements. The result is then a final, ready-to-air product which is then transmitted to radio stations for public broadcast. In addition to producing a final, ready-to-air radio broadcast product, Taxpayer also manages and supervises efforts to maintain and expand the network of radio broadcasters committed to broadcasting UNM athletic events and associated programming.

By virtue of its concurrent obligation to procure sponsorships, Taxpayer is also

conveniently situated to incorporate the benefits of sponsorship into its radio broadcasts in the form of commercials or other recognition opportunities. Various Sponsorship Agreements and their incorporated lists of benefits exemplify how radio can be integrated into a sponsorship. [Department Ex. C].

As might be expected, those sponsors availing themselves of radio broadcasting benefits might range from purely local entities to regional and national entities. With respect to broadcast benefits for regional or national entities, Taxpayer claims entitlement to a deduction under NMSA 1978, Section 7-9-55 (C) which states in relevant part:

> C. Receipts from transmitting messages or conversations by radio other than from one point in this state to another point in this state and *receipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts*.

The Department encourages a step-by-step evaluation of the statute to prove that the Taxpayer's activities do not come within its application. However, the Hearing Officer finds that the most critical issue with regard for Taxpayer's application of the deduction is the quality of the evidence relied on to prove its amount.

The Hearing Officer observed that problems arise when evaluating various Sponsorship Agreements because the benefits of radio advertising are comingled with all other benefits and there is no evidence to establish what portion of a sponsorship commitment should be devoted to radio advertising. For example, a well-known national restaurant franchise making a financial commitment of approximately $45,000 over a three-year period could expect to be identified as a sponsor of the "in-game" broadcast, and then be entitled to one "live read" and one ":30 commercial" during the post-game show. However, the same financial commitment included

other benefits as well, which were unrelated to, yet bundled with the broadcast benefits. For example, the sponsorship benefits also provided for in-venue public address acknowledgments, inclusion as a tailgate vendor for home football games, and even an allotment of season tickets for football and men's basketball. [Department Ex. C-077 – C-081].

The Department emphasizes other, similarly problematic sponsorships as well. For example, a national convenience store chain committed $17,000 to a sponsorship that included various radio broadcasting benefits, in addition to allotments of season tickets to football and men's basketball games. Yet, there was no method offered to establish what percentage of the total sponsorship commitment was dedicated to radio advertising. [Taxpayer Ex. 15 - Tab: National Sales - Radio Broadcast (cells A10, B10); Department Ex. C-049 – C-052].

These observations are consistent with various other Sponsorship Agreements contained in Department Ex. C where the benefits of radio advertising were similarly comingled with other benefits, extending from purely "internal" marketing activities ranging from placement of in-venue signage or in-venue public address announcements, to access to stadium suites, parking permits, and season ticket allotments.

Taxpayer asserts that its financial records, summarized particularly in Taxpayer Exhibits 15 – 20, as well as occasional reference to the New Mexico Secretary of State's Office[2] website, can identify the receipts that can be attributed to the sale of radio broadcast time when the advertising message is supplied by or on behalf of a national or regional advertiser not having its principal place of business in or being incorporated under the laws of New Mexico.

The problem is that prior to even evaluating the receipts of specific regional or national advertisers, there was a lack of evidence necessary to establish the *amount* of receipts that would

[2] https://portal.sos.state.nm.us/BFS/online/CorporationBusinessSearch

precisely correlate to the radio broadcast activities. Otherwise stated, it would be a futile exercise to evaluate whether an advertiser was a national entity or not incorporated in New Mexico if receipts paid by that commercial entity for radio advertising could not be reliably ascertained from the evidence presented at the outset.

Although Ms. Heim testified that the spreadsheets accurately reflected data contained in Taxpayer's records, there was no evidence to establish how the former director of tax, identified only by his first name, and never called to testify, determined what amounts should be deductible for radio broadcasts from Taxpayer's total receipts. For reasons explained above, this was problematic because the evidence in the record could not corroborate the portion of a sponsorship commitment specifically dedicated to national radio broadcasts because broadcast benefits, and the receipts deriving from them, were comingled with all other sponsorship benefits, including purely in-state, non-broadcast marketing activities.

Taxpayer bears the burden of establishing the amount of a claimed deduction in this protest. *See Sec. Escrow Corp*, 1988-NMCA-068, ¶8. Because evidence of the amount sought lacks indicia of trustworthiness and reliability as explained above, Taxpayer has not overcome the presumption of correctness that attached to the assessment by establishing an entitlement to a deduction under Section 7-9-55 (C).

**Uncollectible Debts**

Taxpayer asserts that its liability under the assessment should be reduced as permitted by the gross receipts deduction for uncollectible debts at NMSA 1978, Section 7-9-67 (A). That deduction provides in relevant part:

> Refunds and allowances made to buyers or *amounts written off the books as an uncollectible debt by a person reporting gross receipts tax on an accrual basis may be deducted from gross receipts*. If debts reported uncollectible are subsequently collected, such

> receipts shall be included in gross receipts in the month of collection.
>
> (Emphasis Added)

Taxpayer argued "[i]n its assessment of gross receipts tax liabilities, the Department used as its tax base Taxpayer's total New Mexico-sourced income…and did not allow any deductions for bad debt[.]" *See* Taxpayer's Closing Argument, Sec. II, Page 2.

Taxpayer's presentation relied exclusively on spreadsheets specifying the amounts of receipts that Taxpayer asserted to be uncollectible. Although Ms. Heim explained that the spreadsheets were consistent with Taxpayer's internal records, they were unaccompanied by any supporting documentation. In fact, the deduction for bad debts had not even been raised during the audit which eventually resulted in the assessment.

Regulation 3.2.227.10 (A) NMAC instructs that "the deduction for uncollectible accounts is available only to taxpayers who report gross receipts … on an accrual basis." It goes on to explain that "[t]he transaction or transactions which gave rise to either the refund or allowance or to the amount written off the books as an uncollectible account must have originally been subject to the gross receipts tax[.]"

The rule goes on to provide two examples meaningful to the facts of this protest. First, subsection D explains:

> X is an accrual basis taxpayer. Y buys a suit from X but does not pay for it. X reports the receipts from the sale on X's return. X then discovers that X cannot collect the sales price of the suit. X may take the deduction upon proper proof of the bad debt. *This rule, however, would not apply if X had never reported the receipts from the sale.*" (Emphasis Added)

Second, Subsection E explains:

> U is a university bookstore which reports governmental gross receipts on an accrual basis. U sells books and other materials to a

> student on account, reporting governmental gross receipts in the month of sale. The student subsequently leaves the university without fully settling the account. *Because the receipts from the sale had already been reported, U may take the deduction upon proper proof of the bad debt.* (Emphasis Added)

Hence, the deficiency in Taxpayer's position rests in part with the fact that it did not present evidence to establish what receipts it actually reported, which are now uncollectible, and entitled to deduction under Section 7-9-67. At a minimum, this information would be necessary to determine whether the Department's assessment might already reflect a credit for uncollectible debts which the Taxpayer previously reported in its general income ledger, which according to Ms. Beach, the Department did not dispute.

Furthermore, there was inadequate evidence to establish the un-collectability of uncollectible debts. Taxpayer did not proffer evidence of formal or even informal collection activities, which might range from rudimentary notices of default or demand letters, to more formal collection activities such as litigation.

Taxpayer has not established entitlement to a deduction under Section 7-9-67 and has not overcome the presumption of correctness that attached to the assessment.

**Penalties and Interest for Pass-Through Withholding Remitter.**

Taxpayer asserts that penalty and interest assessed against Iceberg Ventures, Inc. should be abated because the amended pass-through entity remitter return and associated payment, due on September 15, 2012, were mailed on or about October 15, 2012. At the most, Taxpayer argues, it should be liable for two months of penalty and interest. However, the evidence also demonstrated that the amended return and accompanying payment were never received, and when invited to provide proof of mailing, or at least some documentation to establish that Taxpayer adhered to its standard mailing procedures, Taxpayer could not do so.

The evidence established, at the relevant time, that Taxpayer's mailing procedure concluded with Taxpayer photocopying the relevant tax return, the accompanying payment, and the mailing envelope after it had been sealed and prepared for mailing. Those photocopies were then retained for future reference, if necessary. Despite evidence to establish its protocol, Taxpayer also failed to establish that it adhered to its procedure in this case because it was unable to provide a copy of the mailing envelope that would have contained the signed amended return and payment. The totality of evidence suggested the likelihood that Taxpayer's amended return and associated payment were never mailed, which would be consistent with the evidence proffered by the Department that those items were also never received.

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, Section 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, 32 (use of the word "shall" in a statute indicates the provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the tax was due but not paid until the tax principal liability is satisfied. Therefore, the assessment of interest is mandatory and neither the Department nor the Hearing Officer possess the authority to abate it.

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).

As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions satisfy the definition of "negligence" even if, like here, Taxpayer's actions or inactions were inadvertent.

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) and (C) NMAC because it relied on an erroneous belief that its amended return and tax payment were timely mailed and only as a result of the Department's audit did it discover years later that the relevant check never even cleared the bank.

In instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Yet Taxpayer does not allege that its failure to make a timely payment resulted from a mistake of law made in good faith and on reasonable grounds.

Further, in relevant part to this protest, Regulation 3.1.11.11 (E) NMAC (emphasis added) allows for abatement of penalty when "a taxpayer, within twelve months of the filing of a return by the original due date or by the extended due date and without action of the secretary or delegate, files an amended return reflecting tax due or additional tax due and full payment of any tax due accompanies the amended return[.]" In this case, the amended return and accompanying payment were not filed until well after the audit which brought the issue to Taxpayer's attention.

The Department did not allege that the Taxpayer's likely oversight was with the intent to evade or defeat a tax. In contrast, all indications are that the amended return and associated payment were never mailed due to inadvertence, erroneous belief, or inattention. Nevertheless, even under those circumstances, *El Centro Villa Nursing* instructs that civil negligence penalty is appropriate and Regulation 3.1.11.11 NMAC provides no grounds for abatement of the penalty in this case. Therefore, Taxpayer did not overcome the presumption of correctness and failed to establish that it was entitled to an abatement of penalty in this matter.

Taxpayer's protest should be DENIED.

**CONCLUSIONS OF LAW**

A. Taxpayer filed timely, written protests of the Department's assessments and jurisdiction lies over the parties and the subject matter of the subsequently consolidated protests.

B. The Administrative Hearings Office conducted initial scheduling hearings for all protests at issue herein within 90 days of each protest, and neither party objected that the conduct of those hearings satisfied the requirements of NMSA 1978, Section 7-1B-8 (2015) that hearings be held within 90 days of the protest.

C. The assessments from which this consolidated protest arise are presumed correct and the burden rests on Taxpayer to overcome the presumption. *See* NMSA 1978, Section 7-1-

17; *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638.

D. Taxpayer carries the burden to present countervailing evidence or legal argument to show that it is entitled to an abatement of an assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436.

E. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308.

F. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-NMCA-021, ¶13.

G. Receipts from licensing intellectual property, specifically trademarks, are excluded from gross receipts. *See* NMSA 1978, Section 7-9-3 (J); NMSA 1978, Section 7-9-3.5 (A) (1).

H. Authorization to sublicense trademarks must be explicit and may not be implied. *See Hokto Kinoko Co. v. Concord Farms, Inc.*, 810 F. Supp. 2d 1013, 1035 (C.D. Cal. 2011) (*citing Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 978 (9th Cir. 2006).

I. Taxpayer did not derive receipts from sublicensing intellectual property, specifically trademarks. *See* NMSA 1978, Section 7-9-3 (J); NMSA 1978, Section 7-9-3.5 (A) (1).

J. Taxpayer did not establish any entitlement to exclude any portion of its gross receipts from taxation pursuant to NMSA 1978, Section 7-9-3 (J); NMSA 1978, Section 7-9-3.5 (A) (1).

K. Receipts from the sale of radio broadcast time when the advertising message is supplied by or on behalf of a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state are deductible from gross receipts. *See*

NMSA 1978, Section 7-9-55 (C).

L. Taxpayer did not establish any entitlement to deduct any portion of its gross receipts from taxation pursuant to NMSA 1978, Section 7-9-55 (C).

M. Refunds and allowances made to buyers or amounts written off the books as an uncollectible debt by a person reporting gross receipts tax on an accrual basis may be deducted from gross receipts. *See* NMSA 1978, Section 7-9-67 (A).

N. Taxpayer did not establish any entitlement to deduct any portion of its gross receipts from taxation pursuant to NMSA 1978, Section 7-9-67 (A).

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

P. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty.

For the foregoing reasons, Taxpayer's consolidated protests are **DENIED.** Taxpayer shall be liable for the total assessed amounts of tax, penalty and interest, less any amounts previously remitted in full or partial satisfaction of the assessments, plus applicable penalty and interest accruing until fully satisfied.

DATED: October ___, 2019

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 October 11, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

*First Class Mail* *Interdepartmental State Mail*

INTENTIONALLY BLANK

John Griego
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