STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF	Case No. 18.03-061A
A CLASS RV STORAGE	
TO ASSESSMENT ISSUED UNDER	
LETTER ID NO. L2055615280	
&	
A CLASS RV STORAGE AT JOURNAL CENTER	Case No. 18.08-198A
TO ASSESSMENT ISSUED UNDER	
LETTER ID NO. L0446191408	
&	
A CLASS RV STORAGE AT OSUNA	Case No. 18.08-199A
TO ASSESSMENT ISSUED UNDER	
LETTER ID NO. L2042133296	
v.	**AHO D&O # 19-26**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT.

DECISION AND ORDER

On July 10, 2019, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the merits in the matter of the tax protest of A Class RV Storage, A Class RV Storage at Journal Center, and A Class RV Storage at Osuna (collectively "Taxpayers") pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Benjamin C. Roybal, Esq. (Betzer, Roybal & Eisenberg, P.C.) appeared representing Taxpayers. Taxpayers' witnesses David Murphy, managing member, and Mark Styles, commercial real estate attorney, appeared and offered testimony. Staff Attorney Marek Grabowski appeared, representing the opposing party in the protest, the Taxation and Revenue Department ("Department"). Department protest auditor Nicholas Pacheco appeared as a witness for the Department. Taxpayers' exhibit books were admitted into the record without objection from the Department and are more fully described in the Exhibit log.

In quick summary, this protest involves Taxpayers' consolidated cases, and the Department's assessments for unpaid gross receipts tax for tax periods from June 30, 2011 through June 30, 2017 following audits. Taxpayers contended that their contracts to rent out RV storage spaces were leases of real property and entitled to be deducted from gross receipts under NMSA 1978 Section 7-9-53 (1998). The Department argued that the space rentals were licenses to use the space, and subject to the gross receipts tax. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the hearing officer finds that the Department's position that revenue was earned from granting licenses to use the space was justified, and the Taxpayers failed to overcome the presumption of correctness in the application of the regulations. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer A Class RV Storage (referred to by the parties and hereinafter as "Second Street") is a self-storage facility wholly owned and operated by D&H Murphy Investments, LLC, a New Mexico Limited Liability Corporation. Mr. Murphy and his spouse owned the LLC during the timeframes subject to audit. Mr. Murphy has been managing member since 2009, when the facility opened. [Second Street Stipulation #1; Administrative File; Direct Examination of David Murphy, CD1 28:30-30:00, CD1 1:10:00-1:11:00].

2. The Department conducted an audit of the Second Street Taxpayer's business for filing periods beginning January 1, 2011 and ending December 31, 2016. [Taxpayer's Exhibit Second Street #1.1 through 1.8; Direct Examination of David Murphy, CD1 1:22:05-1:23:00].

3. The Department's Audit concluded that the Second Street Taxpayer was improperly deducting recreational vehicle (RV) parking spaces as real property leases on their Gross Receipts Tax reports for the applicable period, further concluding that the reported income

was derived from a license to use the storage space rather than a lease of real property. [Taxpayer's Exhibit Second Street #1.1 through 1.8, Direct Examination of David Murphy, CD1 1:22:10-1:23:30].

4. The Department, in denying the Second Street Taxpayer's deduction, relied heavily on the fact that land partitions were not enclosures, not self-contained, and were situated outside, concluding that "the customer does not have exclusive possession, use or access to the property." [Taxpayer's Exhibit Second Street #1.1 through 1.8; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35].

5. Taxpayer A Class RV Storage at Journal Center (referred to by the parties and hereinafter as "Paseo") is a self-storage facility wholly owned and operated by A Class RV Storage at Journal Center, LLC, a New Mexico Limited Liability Corporation, owned by David Murphy, managing member, and another partner. The business operates a self-storage facility. Mr. Murphy has been managing member since 2011, when the facility opened. [Paseo Stipulation #1; Administrative File; Direct Examination of David Murphy, CD1 28:30-30:00, CD1 53:30-54:00].

6. The Department conducted an audit of the Paseo Taxpayer's business for filing periods beginning January 1, 2011 and ending June 30, 2017 [Taxpayer's Exhibit Paseo #1.1 through 1.8; Direct Examination of David Murphy, CD1 1:06:30-1:07:10].

7. The Department's Audit concluded that the Paseo Taxpayer was improperly deducting recreational vehicle (RV) parking spaces as real property leases on their Gross Receipts Tax reports for the applicable period, further concluding that the reported income was derived from a license to use the storage space rather than a lease of real property. [Taxpayer's Exhibit Paseo #1.1 through 1.8; Direct Examination of David Murphy, CD1 1:06:30-1:08:25].

8. The Department, in denying the Paseo Taxpayer's deduction, relied heavily on the fact that land partitions were not enclosures, not self-contained, and were situated outside, concluding that "the customer does not have exclusive possession, use or access to the property." [Taxpayer's Exhibit Paseo #1.1 through 1.8; Direct Examination of David Murphy, CD1 1:06:30-1:07:10; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35].

9. Taxpayer A Class RV Storage at Osuna (referred to by the parties and hereinafter as "Osuna") is a self-storage facility wholly owned and operated by A Class RV Storage at Osuna, LLC, a New Mexico Limited Liability Corporation, owned by David Murphy, managing member, and another partner. The business operates a self-storage facility. Mr. Murphy has been managing member since 2014, when the facility opened. [Osuna Stipulation #1; Administrative File; CD1 28:30-30:00].

10. The Department conducted an audit of the Osuna Taxpayer's business for filing periods beginning June 1, 2011 and ending June 30, 2017 [Taxpayer's Exhibit Osuna #1.1 through 1.8; Direct Examination of David Murphy, CD1 47:10-47:45].

11. The Department's Audit concluded that the Osuna Taxpayer was improperly deducting recreational vehicle (RV) parking spaces as real property leases on their Gross Receipts Tax reports for the applicable period, further concluding that the reported income was derived from a license to use the storage space rather than a lease of real property. [Taxpayer's Exhibit Osuna #1.1 through 1.8; Direct Examination of David Murphy, CD1 47:10-50:00].

12. The Department, in denying the Osuna Taxpayer's deduction, relied heavily on the fact that land partitions were not enclosures, not self-contained, and were situated outside, concluding that "the customer does not have exclusive possession, use or access to the property."

[Taxpayer's Exhibit Osuna #1.4; Direct Examination of David Murphy, CD1 48:50-50:00; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35].

Substantive Findings for Combined Cases:

13. After each audit, the Department granted the Taxpayers' deductions for rented spaces that were fully enclosed. [Taxpayer Exhibit Second Street 1.4; Cross Examination of David Murphy, CD2 3:15-5:35; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35], [Taxpayer Exhibit Paseo1.4; Cross Examination of David Murphy, CD2 3:15-5:35; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35], [Taxpayer's Exhibit Osuna #1.4; Cross Examination of David Murphy, CD2 3:15-5:35; Direct Examination of Nicholas Pacheco, CD2 2:40:00-2:45:35].

14. The Taxpayers showed that the three facilities were enclosed by perimeter fences. [Second Street Stipulation #3; Taxpayer's Exhibit Second Street #6; Direct Examination of David Murphy, CD1 1:15:30-1:16:00, 1:17:10-1:18:25], [Paseo Stipulation #5; Taxpayer's Exhibit Paseo #6; Direct Examination of David Murphy, CD1 58:10-58:40, CD1 1:00:00-1:01:00], [Osuna Stipulation #4; Taxpayer's Exhibit Osuna #6, Osuna #7.17; Direct Examination of David Murphy, CD1 34:10-34:25; Cross Examination of David Murphy, CD2 8:00-8:45].

15. The Taxpayers showed that the three facilities were accessible only through a locked gate. [Second Street Stipulation #5; Taxpayer's Exhibit Second Street #6 and #7.1; Direct Examination of David Murphy, CD1 1:15:30-1:16:00], [Paseo Stipulation #7; Taxpayer's Exhibit Paseo #6 and #7.1 through 7.3; Direct Examination of David Murphy, CD1 1:01:30-1:02:45], [Osuna Stipulation #6; Taxpayer's Exhibit Osuna #6 and #7.17; Direct Examination of David Murphy, CD1 34:10-34:30].

16. The Taxpayers showed that the facilities were accessible 24 hours-per-day, 7 days-per-week, 365 days-per-year by those customers who possessed an electronic key fob to open the gate using an individualized code. [Direct Examination of David Murphy, CD1 1:18:00-1:19:45], [Direct Examination of David Murphy, CD1 1:00:55-1:02:45], [Direct Examination of David Murphy, CD1 36:40-37:50].

17. The Taxpayers showed that the individual spaces were rented out on a month-to-month contract, with the initial term of a month with a renewal or "evergreen" clause. [Taxpayer's Exhibit Second Street # 4.1 through 4.10; Direct Examination of David Murphy, CD1 1:10:13-1:16:00; Direct Examination of Mark Styles, CD2 1:29:00-1:39:55], [Taxpayer's Exhibit Paseo # 4.1 through 4.17; Direct Examination of David Murphy, CD1 56:30-58:00; Direct Examination of Mark Styles, CD2 1:13:00-1:29:05], [Taxpayer's Exhibit Osuna # 4.1 through 4.7 and 4.8 through 4.13; Direct Examination of David Murphy, CD1 31:30-34:00; Direct Examination of Mark Styles, CD2 56:45-1:04:00].

18. The Taxpayers showed that the individual rental spaces were alpha-numerically identified in the rental contracts. The identified spaces were marked at the facility with fixed signs and survey whiskers embedded in the ground, showing the boundaries of the designated property. [Taxpayer's Exhibit Second Street # 4.1 through 4.10, #5, #7.2; Direct Examination of David Murphy, CD1 1:19:35-1:21:20], [Taxpayer's Exhibit Paseo # 4.1 through 4.17, #5, #7.2, #7.5, #7.6, and #7.7; Direct Examination of David Murphy, CD1 59:00-1:06:20], [Taxpayer's Exhibit Osuna # 4.1 through 4.13, #5, #6, #7.1 through 7.16; Direct Examination of David Murphy, CD1 34:30-35:30, 40:30-45:50, Cross Examination of David Murphy, CD2 9:00-13:30].

19. The Taxpayers showed that each rental contract pertains to an individual space, and that once the space is rented, the rental contract grants the tenant a right to exclude all other persons from occupying the space. For example, the Osuna agreements (#4.2) provide language "leased space(s): N060 (12.0 x 42.0)" which identifies the specific space, coupled with a grant of access (#4.3) "Access: Unless in default, Occupant and any person having Occupant's access code, lock key, or gate remote control(s) shall have access to the Leased Space." The right of exclusivity is granted by both Taxpayers' practice and within the contracts in (#4.6) and (#4.12) "Identified vehicles only. No vehicle may be parked in the Leased Space at any time that has not been fully identified on a signed Addendum such as this. Except as provided herein, only one Vehicle may be parked in the Leased Space at one time unless Occupant has the written consent of Operator. Unidentified Vehicles stored without such consent may be towed from the Facility by Operator at Occupant's expense, or be overlocked or restrained." Similarly, the tenants are given warnings that there is a misparking fee for violations of the exclusivity rights of other tenants (#4.6 and #4.12): "3. Misparking. The Vehicle may only be parked with the boundaries of the Leased Space. If Occupant parks a Vehicle: in an incorrect space, or, which exceeds the boundaries of the Leased Space, or, which has not been identified to Operator in accordance with this Addendum, Occupant may be charged the Misparking Fee for each day that the condition persists." Even the earliest version of the rental agreement (Second Street #4.1) contains the language: "Please leave aisles clear and do not block another tenant's space." [Taxpayer Exhibit Second Street #4.1 through 4.10; Direct Examination of David Murphy, CD1 1:19:45-1:22:00; Direct Examination of Mark Styles, CD2 1:29:00-1:39:55], [Taxpayer Exhibit Paseo #4.1 through 4.17; Direct Examination of David Murphy, CD1 54:00-58:00, 1:06:00-1:06:40; Direct Examination of Mark Styles, CD2 1:13:00-1:29:05], [Taxpayer Exhibit Osuna #4.1 through 4.13;

Direct Examination of David Murphy, CD1 45:45- 47:10; Direct Examination of Mark Styles, CD2 56:45-1:04:00].

20. The Taxpayers showed that placement errors, which are when a tenant misplaces their vehicle in another tenant's space, rarely occur. In such an event, the matter is usually resolved internally, by the facility manager calling the aberrant tenant to tell them to come move the vehicle. Additional remedies at law include eviction, civil trespass, criminal trespass, and a variety of other legal actions. [Taxpayer's Exhibit Second Street #4.1 through 4.10; Direct Examination of David Murphy, CD1 1:21:00-1:22:10, AHO Examination of David Murphy, CD2 26:30-27:45, Re-Direct Examination of Mark Styles, CD2 2:18:45-2:21:10; AHO Examination of Mark Styles, CD2 2:21:15-2:23:05], [Taxpayer's Exhibit Paseo #4.1 through 4.17; Direct Examination of David Murphy, CD1 1:06:10-1:06:25, AHO Examination of David Murphy, CD2 26:30-27:45; Re-Direct Examination of Mark Styles, CD2 2:18:45-2:21:10; AHO Examination of Mark Styles, CD2 2:21:15-2:23:05], [Taxpayer's Exhibit Osuna #4.1 through 4.13; Direct Examination of David Murphy, CD1 46:20- 46:30, AHO Examination of David Murphy, CD2 26:30-27:45; Re-Direct Examination of Mark Styles, CD2 2:18:45-2:21:10; AHO Examination of Mark Styles, CD2 2:21:15-2:23:05].

21. Pursuant to the contracts, in the event of a non-payment of rent, the Taxpayers will lock out the tenant by denying access through the electronic key fob that operates the perimeter entry gate. In such an event, the tenant may obtain renewed access by making full payment during office hours. [Taxpayer's Exhibit Second Street #4.4, #4.5; Cross Examination of David Murphy, CD2 5:35-7:50; Re-Direct Examination of David Murphy CD2 34:10-35:00], [Taxpayer's Exhibit Paseo #4.4, #4.5; Cross Examination of David Murphy, CD2 5:35-7:50; Re-Direct Examination of David Murphy CD2 34:10-35:00], [Taxpayer's Exhibit Osuna #4.1, #4.2;

Cross Examination of David Murphy, CD2 5:35-7:50; Re-Direct Examination of David Murphy CD2 34:10-35:00].

22. The rental contracts limit the use of the rental space to "dead storage" of vehicles, including recreational vehicles, campers, fifth wheels, boats, and other similar items. [Second Street Stipulation #7; Taxpayer's Exhibit Second Street #4.1 through #4.10], [Paseo Stipulation # 9; Taxpayer's Exhibit Paseo #4.1 through 4.17], [Osuna Stipulation #8; Taxpayer's Exhibit Osuna #4.1 through 4.13].

23. The rental contracts used in the timeframes subject to audit contain provisions for consideration, in the form of rent. [Taxpayer Exhibit Second Street #4.1 through 4.10; Direct Examination of Mark Styles, CD2 1:29:00-1:39:55], [Taxpayer Exhibit Paseo #4.1 through 4.17; Direct Examination of Mark Styles, CD2 1:13:00-1:29:05], [Taxpayer Exhibit Osuna #4.1 through 4.13; Direct Examination of Mark Styles, CD2 56:45-1:04:00].

24. Use of the word "lease" (and its derivatives) indicates that the parties to the agreement intended the contracts to create a lessor/lessee arrangement. Contract provisions include items such as security deposits, late fees, insurance, indemnity, and default, which are typical of leases. [Direct Examination of Mark Styles CD2 40:30-42:00, CD2 1:29:00-1:39:55]; [Direct Examination of Mark Styles CD2 40:30-42:00, CD2 1:13:00-1:29:05], [Direct Examination of Mark Styles CD2 40:30-42:00, CD2 1:03:30-1:11:15].

25. The rental contracts used in the timeframes subject to audit do not contain an express reservation of a right of revocation in favor of the Taxpayers. [Taxpayer's Exhibit Second Street #4.1 through 4.10; Direct Examination of David Murphy, CD1 1:15:00-1:15:40; Direct Examination of Mark Styles CD2 1:29:00-1:39:55], [Taxpayer's Exhibit Paseo #4.1 through 4.17; Direct Examination of David Murphy, CD1 57:50-58:00; Direct Examination of

Mark Styles, CD2 1:13:00-1:29:05], [Taxpayer's Exhibit Osuna #4.1 through 4.13; Direct Examination of David Murphy, CD1 33:55-34:10; Direct Examination of Mark Styles, CD2 56:45-1:04:00].

26. Taxpayers sought and obtained advice from their accountant, Kristena Malmgren, CPA, about the business tax reporting. [Direct Examination of David Murphy, CD1 1:08:25-1:09:45, CD1 1:24:00-1:25:00], [Direct Examination of David Murphy, CD1 1:08:25-1:09:45], [Direct Examination of David Murphy, CD1 50:30- 51:40].

27. Taxpayers also sought advice from the Department, through a senior tax analyst Mr. Mo Issa, concerning the Taxpayers' gross receipts. Although the question presented to Mr. Issa was unrelated to the issue at protest, Taxpayers believed that Mr. Issa would be reviewing the entire business reporting. Two days after the initial meeting, Mr. Issa informed the Taxpayers that the reporting was correct. Taxpayers did not recall receiving an opinion from Mr. Issa specifically concerning the deduction for leases. [Direct Examination of David Murphy, CD1 1:08:25-1:10:15, CD1 1:24:50-1:25:20; Cross Examination of David Murphy, CD2 14:30-18:45], [Direct Examination of David Murphy, CD1 1:08:25-1:10:15; Cross Examination of David Murphy, CD2 14:30-18:45], [Direct Examination of David Murphy, CD1 50:30- 53:20; Cross Examination of David Murphy, CD2 14:30-18:45].

A Class RV Storage ("Second Street")

Procedural findings:

28. On December 18, 2017, under letter id. no. L2055615280, the Department issued a notice of assessment letter to Taxpayer, indicating that Taxpayer owed tax, penalty and interest for tax periods from June 30, 2011 to December 31, 2016. The assessment included gross receipts tax of $19,486.39, penalty of $3,897.29, and interest of $2,332.52, for a total assessment

of $25,716.20. [Letter ID# L2055615280; Administrative File; Taxpayer's Exhibit Second Street #2.]

29. On February 12, 2018, Taxpayer submitted a formal protest letter to the Department, laying out a brief factual basis for the claimed deductions, and challenging the assessment, its penalties and interest. [Administrative File, Taxpayer's Exhibit Second Street #3.1 through #3.6].

30. On February 14, 2018, the Department issued a letter acknowledging the Taxpayer's protest. [Letter ID # L1872599856].

31. On March 20, 2018, the Department submitted a hearing request to the Administrative Hearings Office. [Administrative File].

32. On March 21, 2018, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Hearing to be held on May 4, 2018. [Administrative File].

33. On May 4, 2018, a telephonic hearing was held before the undersigned Hearing Officer Ignacio V. Gallegos, Esq., with the parties present. Parties did not object that the scheduling hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

34. Based on the discussions at the telephonic scheduling hearing, on May 7, 2018, the Administrative Hearings Office issued a Notice of Second Telephonic Scheduling Hearing, setting the matter for August 10, 2018. [Administrative File].

35. On August 10, 2018, a second telephonic scheduling hearing was held before the undersigned Hearing Officer with the parties present.

36. Based on the discussions at the second telephonic scheduling hearing, and because two additional assessments had been issued by the Department which parties anticipated

consolidating, on August 20, 2018, the Administrative Hearings Office issued a Notice of Third Telephonic Scheduling Hearing, setting the matter for October 10, 2018. [Administrative File].

37. On October 10, 2018 a third telephonic scheduling hearing was held before the undersigned Hearing Officer with the parties present.

38. On October 15, 2018, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting discovery and motions deadlines, and giving the parties notice that the merits hearing would take place on July 10, 2019. [Administrative File].

39. On June 19, 2019, the Department submitted its Prehearing Statement. [Administrative File].

40. On June 19, 2019, the Taxpayer submitted its Prehearing Statement, along with a Certificate of Service. [Administrative File].

41. On July 8, 2019, the parties filed stipulations (hereinafter "Second Street Stipulations") of fact and sample space rental agreement forms. [Administrative File].

42. On July 10, 2019, a merits hearing was held in Santa Fe, New Mexico. At the outset of the hearing, the matter was consolidated with the other above-captioned matters.

43. The Administrative Hearings Office issued a formal Order Consolidating Cases nunc pro tunc on July 17, 2019. [Administrative File].

A Class RV Storage at Journal Center ("Paseo")

Procedural findings:

44. On April 5, 2018, under letter id. no. L0446191408, the Department issued a notice of assessment letter to Taxpayer, indicating that Taxpayers owed tax, penalty and interest for tax periods from June 30, 2011 to June 30, 2017. Assessment included gross receipts tax of

$23,408.10, penalty of $4,657.56, and interest of $3,748.71, for a total assessment of $31,814.37. [Letter ID# L0446191408; Administrative File; Taxpayer's Exhibit Paseo 2.]

45. On June 26, 2018, Taxpayer submitted a formal protest letter to the Department, laying out a brief factual basis for the claimed deductions, and challenging the assessment, its penalties and interest. [Administrative File, Taxpayer Exhibit Paseo 3.1 through 3.6].

46. On July 9, 2018, the Department issued a letter acknowledging the Taxpayer's protest. [Letter ID # L0256098096].

47. On August 22, 2018, the Department submitted a hearing request to the Administrative Hearings Office. [Administrative File].

48. On August 24, 2018, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Hearing to be held on September 10, 2018. [Administrative File].

49. On September 10, 2018, a telephonic hearing was held before the undersigned Hearing Officer Ignacio V. Gallegos, Esq., with the parties present. Parties did not object that the scheduling hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

50. Based on the discussions at the telephonic scheduling hearing, on September 10, 2018, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting discovery and motions deadlines, and giving the parties notice that the merits hearing would take place on July 10, 2019. [Administrative File].

51. On June 19, 2019, the Department submitted its Prehearing Statement. [Administrative File].

52. On June 19, 2019, the Taxpayer submitted its Prehearing Statement, along with a Certificate of Service. [Administrative File].

53. On July 8, 2019, the parties filed stipulations (hereinafter "Paseo Stipulations") of fact and sample space rental agreement forms. [Administrative File].

54. On July 10, 2019 a merits hearing was held in Santa Fe, New Mexico. At the outset of the hearing, the matter was consolidated with the other above-captioned matters.

55. The Administrative Hearings Office issued a formal Order Consolidating Cases nunc pro tunc on July 17, 2019. [Administrative File].

A Class RV Storage at Osuna ("Osuna"):

Procedural findings:

56. On April 5, 2018, under letter id. no. L2042133296, the Department issued a notice of assessment letter to Taxpayer, indicating that Taxpayer owed tax, penalty and interest for tax periods from June 30, 2011 to June 30, 2017. Assessment included gross receipts tax of $58,917.06, penalty of $11,758.14, and interest of $5,383.74, for a total assessment of $76,058.94. [Letter ID# L2042133296; Administrative File; Taxpayer's Exhibit Osuna 2.]

57. On June 26, 2018, Taxpayer submitted a formal protest letter to the Department, laying out a brief factual basis for the claimed deductions, and challenging the assessment, its penalties and interest. [Administrative File, Taxpayer Exhibit Osuna 3.1 through 3.6].

58. On July 9, 2018, the Department issued a letter acknowledging the Taxpayer's protest. [Letter ID # L1489448752].

59. On August 22, 2018, the Department submitted a hearing request to the Administrative Hearings Office. [Administrative File].

60. On August 24, 2018, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Hearing to be held on September 10, 2018. [Administrative File].

61. On September 10, 2018, a telephonic hearing was held before the undersigned Hearing Officer Ignacio V. Gallegos, Esq., with the parties present. Parties did not object that the scheduling hearing satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

62. Based on the discussions at the telephonic scheduling hearing, on September 10, 2018, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting discovery and motions deadlines, and giving the parties notice that the merits hearing would take place on July 10, 2019. [Administrative File].

63. On June 19, 2019, the Department submitted its Prehearing Statement. [Administrative File].

64. On June 19, 2019, the Taxpayer submitted its Prehearing Statement, along with a Certificate of Service. [Administrative File].

65. On July 8, 2019, the parties filed stipulations (hereinafter "Osuna Stipulations") of fact and sample space rental agreement forms. [Administrative File].

66. On July 10, 2019 a merits hearing was held in Santa Fe, New Mexico. At the outset of the hearing, the matter was consolidated with the other above-captioned matters.

67. The Administrative Hearings Office issued a formal Order Consolidating Cases nunc pro tunc on July 17, 2019. [Administrative File].

DISCUSSION

Taxpayer contends that the storage facilities it operates are entitled to deductions from Gross Receipts Tax, pursuant to NMSA 1978, Section 7-9-53, for receipts pursuant to leases of real property. At hearing, Taxpayer contended that the rental contracts were in fact intended to be and operated as land leases. The Department, disputing whether the contracts were leases, cited Taxpayer's draconian restrictions on the tenant's ability to use the land, limiting its use to

only storage, stressed the tenants' inability to secure the space against others, and emphasized the fact that the same language used to create a lease could also be used to create a license. The testimony of all witnesses was highly credible. Although a close case, the hearing officer agrees with the Department, since the absence of any enclosed structure prevents the Taxpayer from providing exclusive possession, use and access to the units, therefore the denial of a deduction of receipts under Section 7-9-53 was proper.

Presumption of correctness

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayers have the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it is Taxpayers' burden to present some countervailing evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

The burden is also on Taxpayers to prove that they are entitled to an exemption or deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,*

2007-NMCA-050, ¶141 N.M. 520, 157 P.3d 85; *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743, 497 P.2d 745. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306. *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649. *See also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

Receipts under the Gross Receipts and Compensating Tax Act.

The assessments in these protests arise from an application of the Gross Receipts and Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-115, which imposes a tax for the privilege of engaging in business, on the receipts of any person engaged in business in New Mexico. *See* NMSA 1978, Section 7-9-4 (2002). The pertinent part of the statutory definition of "gross receipts" under Section 7-9-3.5 (2007), includes "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." There is no doubt that Taxpayers engage in business of leasing or licensing property for monetary gain in New Mexico.

There is a statutory presumption that all receipts of a person engaged in business activities are taxable. *See* NMSA 1978, Section 7-9-5 (2002). Yet, despite the general presumption of taxability, a taxpayer may qualify for the benefits of various deductions and exemptions. Taxpayers here claim they are entitled to the deduction for receipts from leases of real property, pursuant to NMSA 1978, Section 7-9-53 (1998).

The deduction of receipts from leases of real property.

Section 7-9-53 provides that (A) "[r]eceipts from the sale or lease of real property … may be deducted from gross receipts." Section 7-9-3 (E)(2007) gives a definition of "leasing." Leasing is "an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, except that the granting of a license to use property is licensing and is not a lease." *Id.* The term "property" is defined to be "real property, tangible personal property, licenses other than the licenses of copyrights, trademarks or patents and franchises." Section 7-9-3 (J). The terms "license" or "licensing" are not defined under the Tax Administration Act, or within the Gross Receipts and Compensating Tax Act. The term "use" is defined by statute in this context. *See* Section 7-9-3 (N). The definition of "use" includes "storage" which is what is at issue here. *Id.* The Department does not dispute that arrangements existed, or that property was employed by a person other than the owner of the property, for terms in excess of one month, for consideration in the form of monthly payments of rent. The sole dispute is whether this arrangement is a lease or a license to use.

The lease-license dispute is not foreign to the courts, which have widely discussed the issue in New Mexico and beyond. Nevertheless, this particular issue as described below is one of first impression in New Mexico. "Generally speaking, this Court has defined a lease as an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term. The tenant must acquire some definite control and dominion of the premises." *Quantum Corp. v. State Tax. and Rev. Dep't.*, 1998-NMCA-050, ¶ 9, 125 N.M. 49, 956 P.2d 848 (internal citations and quotation marks omitted). "The difference between a license and a lease is that a lease gives to the tenant the right of possession against the world, while a license creates no interest in the land, but it is simply the authority or power to use it in some specific way. For a lease to exist, the lessee must acquire some definite control of and

dominion over the premises." *Grogan v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-033, ¶27, 133 N.M. 354, 62 P.3d 1236 (internal citations and quotation marks omitted). The resolution of the dispute herein hinges on the question of whether a lease can be created simply by the agreement providing a right to exclusivity of possession, or whether some physical barrier is also required to perfect the tenant's possession with "definite control and dominion of the premises." *Quantum Corp.*, ¶ 9.

Leasing

The general rule of Section 7-9-3 (E) defines leasing as "an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property." Under the plain meaning of this definition, there is no dispute as to the existence of the necessary elements: the self-storage facilities and their tenants have entered written agreements whereby for payment of rent, the property located at the facility is employed by the tenant, who is not also the owner of the property. New Mexico Courts have also interpreted what leasing is. As indicated above, "a lease [is] an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term. The tenant must acquire some definite control and dominion of the premises." *Quantum Corp. v. State Tax. and Rev. Dep't.*, 1998-NMCA-050, ¶ 9, 125 N.M. 49, 956 P.2d 848 (internal citations and quotation marks omitted). Similarly, "a lease gives the tenant the right of possession against the world… For a lease to exist, the lessee must acquire some definite control of and dominion over the premises." *Grogan v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-033, ¶27, 133 N.M. 354, 62 P.3d 1236 (internal citations and quotation marks omitted). There is no evidence or argument that the enactment of the statutory definition was intended to supplant the common law definition. "A statute will be interpreted as supplanting the common law only if there is an explicit indication

that the legislature so intended." *Sims v. Sims*, 1996-NMSC-078, ¶ 25, 122 N.M. 618, 930 P.2d 153. I should nevertheless note that under the statutory definition, there is no explicit requirement of "definite control and dominion of the premises," as in the common law, but the requirement is simply that property is "employed."

Department rulings have summarized what are typical indicia of a lease. "A lease of real property is a possessory interest in real property. Indicia of a lease typically include: the exclusive rights of the lessee to occupy a specific portion of property and to restrict others' entry thereon; ability to mortgage or assign; survival and succession; responsibility of lessee for maintenance and repair; unrestricted use of the property; and duration longer than day-to-day." Ruling 440-95-3. *Accord* Ruling 440-92-1, Ruling 440-01-1, and Ruling 440-96-1.

Licensing

When the statute contains an undefined term, in this case "license," some statutory interpretation is required. "As a starting point for interpreting undefined terms contained in a statute, our courts often use dictionary definitions to ascertain the ordinary meaning of words that form the basis of statutory construction inquiries." *State v. Lindsey*, 2007-NMCA-048, ¶ 14, 396 P.3d 199. In 1973, the Court of Appeals turned to Black's Law Dictionary of 1951 to define "license" as "[a] permission, by a competent authority to do some act which without such authorization would be illegal or would be a trespass or a tort…" *N.M. Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶7, 85 N.M. 565; *See also Quantum Corp*., ¶10 (Citing to the Sixth edition, 1990 publication of Black's Law Dictionary).[1] As such, the agreements at issue

[1] Since that time, the ninth edition of Black's Law Dictionary, published in 2009, has redefined the word to be "[a] permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit à prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game." The dictionary definition now contains the clause "usually revocable." Yet statutory interpretation

would also create a license. The self-storage facility, a competent authority, has granted permission to the tenant to park a recreational vehicle in a particular space, which would be trespassing if no permission was granted.

Next, we consider guidance from Rulings issued by the Department, which have summarized the typical indicia of a license. The regulations and rulings issued by the Secretary of the Taxation and Revenue Department are presumed to be an accurate implementation of the law. *See* NMSA 1978, Section 9-11-6.2 (G) (2015). Rulings, although given deference, are intended for a limited application to a particular taxpayer or a small group of taxpayers seeking a clarification and interpretation in special circumstances. *See* NMSA 1978, Section 9-11-6.2 (B)(2). Under the rulings published by the Department, "a license is a non-possessory interest that authorizes one to act on the land of another. It is typically revocable, personal, not assignable or mortgageable, not subject to succession upon death of the licensee, paid for on the basis of each use or as a percentage of income from its use, limited to specific purposes, and non-exclusive." Ruling 440-95-3. *Accord* Ruling 440-92-1, Ruling 440-01-1, and Ruling 440-96-1.

Comparison of Department's criteria for leasing and licensing

When determining whether a lease or license is created, courts analyze the contents of the instrument employed, the subject matter, and the surrounding circumstances to determine the intention of the parties. *See Quantum Corp.*, ¶12. In order to secure licensing permission, "[t]he creation of a license requires no particular formality: A license may be created by parol, a writing, or can be implied from the acts of the parties, from their relations, and from usage and custom." *Tarin's Inc. v. Tinley*, 2000-NMCA-048, ¶ 20, 129 N.M. 185, 3 P.3d 680 (internal

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prevents using new definitions alone as basis for substantive changes in common law interpretation. *See Salazar v. St. Vincent Hospital*, 1980-NMCA-081, ¶ 13, 95 N.M. 150, 619 P.2d 826.

quotation marks omitted). "Under general law, the character of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument." *Transamerica Leasing Corp. v Bureau of Revenue*, 1969-NMCA-011, ¶ 17, 80 N.M. 48, 450 P.2d 934. Yet, written instruments that purport to be leases can be reconstrued by the courts if their true intention is otherwise. *Id.* (citing cases in which purported leases have been construed as conditional sales contracts or security agreements).

Turning to the evidence at hand, here the Department's indicia common to a lease (as published by rulings) are examined in detail. To reiterate, "Indicia of a lease typically include: the exclusive rights of the lessee to occupy a specific portion of property and to restrict others' entry thereon; ability to mortgage or assign; survival and succession; responsibility of lessee for maintenance and repair; unrestricted use of the property; and duration longer than day-to-day. In contrast, a license is a non-possessory interest that authorizes one to act on the land of another. It is typically revocable, personal, not assignable or mortgageable, not subject to succession upon death of the licensee, paid for on the basis of each use or as a percentage of income from its use, limited to specific purposes, and non-exclusive." *See* Ruling 440-95-3.

The term of occupancy and rent. The agreements contain provisions for a specified monthly rent, and a term of one month, extended monthly if not terminated with proper notice. The term of one month is the minimal amount of time required for leases. The tenant gets charged for the space whether the RV is parked at the facility or has been taken on a road trip. The provisions for monthly rent, rather than daily use fees, or per use fees also weighs in favor of finding a lease existed. *See* NMSA 1978, Section 7-9-53 (B) (1998) (minimum of one-month rental period needed to qualify for deduction for rental of manufactured home). *See* Regulation 3.2.211.8 NMAC (11/30/05) (trailer park receipts for rental of a space for less than one month are

taxable, receipts for rental of space for more than one month are deductible). *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶ 27 (the existence of contract term setting a "per diem rate" disqualified corrections facility for deduction for lease of real property). *See The protest of Tiller Design*, Decision and Order #16-38 (N.M. Admin. Hearings Office, July 21, 2016, non-precedential), affirmed, *Tiller Design v. N.M. Taxation & Revenue Dep't.*, Mem. Op.#A-1-CA-36090, March 18, 2019 (tax treatment of short-term vacation rental of a home is licensing, similar to hotels, motels, rooming houses, campgrounds, guest ranches, and trailer parks) (non-precedential).

Use restrictions. Concerning use, the agreements provide for unlimited access every day of the year, but very limited, not unrestricted, use of the property for storage. While use restrictions and access restrictions have been the subject of much litigation, the Self-Service Storage Lien Act, NMSA 1978, Sections 48-11-1 to 48-11-9 (2015), precludes granting weight to use restrictions in the context of the self-storage industry. "[T]he provisions of a statute must be read together with other statutes in pari materia under the presumption that the legislature acted with full knowledge of relevant statutory and common law." *N.M. Indus. Energy Consumers v. Pub. Regulation Comm'n*, 2007-NMCA-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. The Self-Service Storage Lien Act provides that such facilities are non-residential, for example, contemplating the precise sort of use restriction complained of by the Department. *See* NMSA 1978, Section 48-11-4 (1987). Use restrictions contemplated by statute do not diminish the exclusive possessory rights of the occupant to use the space as intended. *See Wattson Pac. Ventures v. Valley Fed. Sav. & Loan (In re Safeguard Self-Storage Trust)*, 2 F.3d 967, 972 (9th Cir, 1997). The contemplated use strictly for storage does not of itself weigh for or against finding in favor of a lease.

Ability to assign, succession and mortgageability. The evidence presented also shows that the written agreements restrict the tenant's ability to assign the space, granting assignment only with

written permission of the management. The earliest agreements are silent as to succession, but later agreements refer to succession, by noting "[t]he person(s) identified as an Alternate Contact shall have the same access to the Leased Space as the Occupant if the Occupant dies, becomes legally incapacitated (as determined by a court), is incarcerated or is on active military duty." Also, since the applicable law, explicitly under the revised contracts and implicitly for all contracts due to the fact that the Taxpayers are in the self-storage industry, is that of the Self-Service Storage Lien Act, the definition of an "occupant" under that Act is "a person or the person's sublessee, successor or assign who is entitled to the use of storage space, to the exclusion of others." Section 48-11-2 (D). The law in this area of business activity contemplates succession and assignment. In light of the statutory context, the agreement for the space transfers upon succession. This indicator weighs slightly in favor of concluding a lease existed. There is no mortgageability, either within the contracts or by act of law, so that factor weighs slightly against concluding a lease existed.

Maintenance. Concerning maintenance, the agreements place responsibility for maintenance on the tenant, requiring that once the tenancy ends the tenant must return "peaceable possession of the premises… in as good condition as they are now, normal wear, inevitable accidents and loss by fire excepted." This indicator weighs slightly in favor of finding a lease.

Revocability. The written agreements contain no clause giving either the tenant or the facility an express right to revoke the agreement. "The most salient feature of a license is its revocability… it may be revoked without notice and without cause, because a licensee has no possessory interest in the property." *Tarin's Inc.*, ¶ 21 (internal citations and quotation marks omitted). Furthermore, "[r]evocation can either be express or implied, as by conduct of the licensor that is inconsistent with the continued exercise of the privilege." *Id*. Since there is no clause providing expressly for revocation within any of the agreements, the surrounding

circumstances should be analyzed to determine if there is an implied right to revoke. Assuming, *arguendo*, that revocability is required to form a license, not a consequence of being a license, the question becomes whether the landowner or facility manager has retained a degree of control of the premises to constitute a constructive or implied right of revocation.

The Department argued that the management's ability to deny tenant's access to the facility amounts to express revocation. Turning again to the written agreements, the agreements contain default provisions, if rent is unpaid or late, and allows for termination if the leased space is used in connection with criminal activity. The agreements permit entry by the owner, in cases of inclement weather or emergency. In the case of unpaid rent, the owner may deny access by deactivating the key fob which opens the main entry gate. The default and emergency entry terms are not inconsistent with the Self-Service Storage Lien Act nor under the comparable Uniform Owner-Resident Relations Act. *See* Self-Service Storage Lien Act, Section 48-11-2 (A) (definition of "default"), Section 48-11-4 (placing limitations on permitted use for only non-residential purposes), Section 48-11-5 (establishing that a lien attaches on the personal property stored as of the date of occupant default), Section 48-11-7 (establishing that after five days of default, the owner has the right to deny access). *See also* Uniform Owner-Resident Relations Act, NMSA Sections 47-8-1 through 52 (1995), Section 47-8-3 (T) (providing a definition of "substantial violation"), Section 47-8-24 (B) (providing owner the right to entry in case of emergency), Section 47-8-33(D) (requiring immediate delivery of possession after notice of intent to terminate for non-payment of rent), and Section 47-8-33(I) (allowing termination after notice of substantial violation). The landlord default and entry provisions do not of themselves create an implied right of revocation.

Specificity of the property. The agreements are specific as to the size and location of the property, e.g., "CS02 (13.0x 37.0)." Survey whiskers embedded in the ground provide visual cues to show the tenants the boundaries, and the facility manager provides a map indicating the spaces that are taken or available. There is a wall around the entirety of each facility, but individual spaces are not walled-in, and only one facility offers overhead covered spaces. Nevertheless, the spaces are marked individually with a unique alpha-numeric identifier. The Taxpayers presented the contrast of its degree specificity and individuality with that of "concierge" facilities. Concierge facilities, on the other hand, are those which do not provide an individualized space, but take possession of the RV at the gate, parking it in whichever space is available. The specificity factor weighs in favor of finding a lease existed. This indicator will be discussed in greater detail below as it relates to "definite control and dominion."

Exclusive right to occupy. Finally, and perhaps most importantly, the agreements contain a grant of an exclusive *right* to occupy a specific portion of land, i.e., "MANAGEMENT does hereby rent to TENANT storage unit number CS02." There is only one tenant and one rental agreement for each space. By assigning a space, the agreements give the right to restrict other's entry not by means of an individually encased space secured by one's own padlock, but by informing the management of the trespass, or by going to a competent authority to report the violation and enforce the right. This evidence tends to weigh heavily toward a conclusion that the agreements gave "the exclusive rights of the lessee to occupy a specific portion of property and to restrict others' entry thereon." *See* Ruling 440-95-3 (indicia of a lease). This indicator will be discussed in greater detail below as it relates to "definite control and dominion."

Intent. It should be first noted that each space rental agreement for each of the facilities are written, signed by the manager of the facility and the tenant or occupant. This formality weighs

slightly in favor of the establishment of a lease, since "[t]he creation of a license requires no particular formality." *Tarin's Inc.*, ¶ 20. Within the written agreements, the intent of the parties to create a lease can be inferred initially by the use of the term "lease" and its derivatives in the agreement, and the documents themselves contain elements that reflect the intent of the parties to create a lease of real property, as noted by the discussion of the factors above. Additionally, the provisions on security deposits, late fees, insurance, indemnity, and default tend to suggest a lease was intended. "Under general law, the character of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument." *Transamerica Leasing Corp. v Bureau of Revenue*, 1969-NMCA-011, ¶ 17, 80 N.M. 48, 450 P.2d 934.

Turning again to the statutory context, the statutory scheme of the Self-Service Storage Lien Act, NMSA 1978 Sections 48-11-1 through -9 (1987), contemplates that self-storage facilities can grant leases or other agreement types. Section 48-11-2 (F) defines a "rental agreement" as meaning "any written agreement or lease." And Section 48-11-7 (K) provides for special treatment of stored property subject to a lien, if the property "is a vehicle, watercraft or trailer." The statutory framework governing self-storage facilities requires that agreements between the facility and tenants must be in writing and could be leases, and stored property can be vehicles, watercraft and trailers. Nevertheless, since the statute contemplates not only the possibility of the creation of a lease, it does not preclude the possibility of a license as an "other agreement." The self-storage industry's statutory scheme provides no additional guidance as to whether the agreements at issue here are leases or licenses.

Dominion and control.

Returning to the common law construction of the difference between a lease and a license, it bears repeating that "[t]he difference between a license and a lease is that a lease gives to the tenant the right of possession against the world, while a license creates no interest in the land, but it is simply the authority or power to use it in some specific way. For a lease to exist, the lessee must acquire some definite control of and dominion over the premises." *Grogan*, at ¶27. This concept of definite control and dominion is one which has been the subject of litigation in the past.

The closest case on the topic of storage comes from the Fifth Circuit Court of Appeals, on an appeal from the U.S. District Court for the Southern District of Texas. In *Tips et al. v. United States*, 70 F.2d 525, 1934 U.S. App. LEXIS 4214, the government granted to Tips and a partner, 3,101 square feet of floor space in a large warehouse owned by the government, with use and access restrictions, subject to revocation. The floor space was used to store small airplane engines, which subsequently became obsolete, so they were left unsold at the warehouse after approximately three years. The government sold the warehouse as part of the dissolution and abandonment of the locale, and the new owner sold the engines to recuperate the unpaid storage charges due from the partners. Tips and his partner sued the government for the disposition of the stored airplane engines. The Court, to decide the case, turned to the concept of exclusive possession, stating:

> to constitute a lease or a tenancy there ought always to be a definite, certain place demised or rented. 16 R.C.L., Landlord &Tenant, §32. Thus in Selby v. Greaves, L.R. 3 C.P. 594, where the contract was to rent half the room called No. 7, in the third story of the factory on Station street in the town of Nottingham, with heat and power to drive lace machines, there was held to be a tenancy which would sustain a distraint for rent, it appearing that the space was partitioned off, the court saying: "The letting was not a mere letting of an onstand for the lace machines, but a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it, and that possession was

> taken under that demise." On the contrary, in Hancock v. Austin, 14 C.B. (N.S.) 634, where there was no demise of a room nor a partitioned portion of one, but the lacemaker had three machines running in a room with others, a contrary conclusion was reached; the court saying there was "no demise of the room, but only a bargain for the standing of the plaintiff's machines." *Id*. at 527.

The Court went on to determine that the purported lease of storage space to Tips was a mere license, because the airplane engines stored at the warehouse were at the leisure of the commanding officer, and the floor space was not "permanently assigned, much less partitioned off, so that exclusive possession of it might be taken and maintained." *Id*. The Court concluded that "[t]he dominion and control of the whole building remained in the commanding officer." *Id.*

With this in mind, we turn now away from the written agreements and toward the practical conditions of the rental spaces. Evidence showed there is no physical barrier between rental spaces. It is possible that a tenant (X) of one space parks their recreational vehicle over the border survey whiskers separating the tenant's space from the adjoining space, rented to a different tenant (Y). In such an instance, Y can enforce Y's right of occupancy. In doing so, the facility manager is the first line of defense, tasked with enforcing the Y's right to exclude the aberrant vehicle of X and any other person. Ultimately, Y could seek assistance from other authorities, including lawyers, police, and the courts to enforce his possessory interest in the property. Practically, it is the duty of the facility manager to make the call, as the facility manager is the person in control of the list of tenants and their phone numbers. Yet, the facility owner or facility manager is only accessible during regular business hours. The facility manager enforces the parking placement, and there is no physical barrier between parking spaces. Under this circumstance, the facility manager retains some degree of control, since control of the entire premises remains with the facility manager. Rather than giving the tenant exclusive possession of the property "against the world," this parol evidence suggests that the facility manager retains

some control over the premises. It is the duty of a landlord under a lease to deliver actual possession to a lessee when the right accrues, as part of the implied covenant of quiet enjoyment. *See Barfield v. Damon*, 1952-NMSC-069, ¶6, 56 N.M. 515, 245 P.2d 1032. As such, it is also the duty of the landlord to expel any holdover tenant that prevents the new tenant from possession of the leasehold, or be held liable to the new lessee. *Id*. So, although the facility manager in this instance holds this responsibility to evict aberrant vehicles from the rightful tenant's space, this is required under existing law. Nevertheless, the absence of a physical barrier between spaces is evidence that the grant of possession provides less than complete dominion and control, weighing in favor of finding a license.

Other courts also have more recently considered a similar question. Most recently was the United States Court of Appeals for the Ninth Circuit, when it considered the bankruptcy case of *Wattson Pac. Ventures v. Valley Fed. Sav. & Loan (In re Safeguard Self-Storage Trust)*, 2 F.3d 967, 972 (9th Cir, 1997). The storage facility management (debtor) in that case argued for the proposition that the rental agreements for its self-storage facility were licenses, and therefore not to be considered as cash collateral in a bankruptcy proceeding. The previous owner, lienholder (creditor), sold the facility on contract to the debtor who then operated the facility and collected rents. The debtor then defaulted on payments to the creditor and kept the rents. The creditor argued for the proposition that the rental agreements were leases, under which revenue received for the leases under the bankruptcy code were considered cash collateral (and therefore due to be distributed to creditors). The Court formulated the question in these terms: "In short, we must determine whether an animal which looks like a duck, walks like a duck, and quacks like a duck, is in fact a duck." *Id.* at 970. Ultimately the Court determined that:

> Safeguard's self-storage tenants secure their storage spaces with their own lock and have exclusive access to the spaces. The Rental Agreement provides that

> "Landlord does not have any liability for Tenant's stored goods, and that the care, custody and control of said goods is with the Tenant and not the Landlord." Furthermore, the Rental Agreement uses lease language, provides a definite description of the storage space by number, provides for payment of periodic rent, and requires notice of termination.
>
> Safeguard argues that self-storage tenants do not have exclusive occupancy rights because the facility owner restricts access during certain hours, that license agreements and leases of personal property may also require notice of termination, and that licenses, such as the right to use a hotel room, may also describe the relevant property with specificity. While Safeguard is again correct that the self-storage Rental Agreement is an atypical lease in some respects, the agreement nevertheless meets the definition of a lease under California law.

Id. at 972. The court stressed the ability to secure the storage spaces with their own lock and having exclusive access. The court was willing to overlook the fact that time of access was controlled by the facility owner. In ruling that the agreements were leases, the court stressed the importance of a case-by-case approach when it warned against an industry-wide categorical approach to allow all storage spaces and facilities to be treated the same. *Id*. at 973. In context here, the substantive reasons why an agreement that looks like a lease, was intended to be a lease, and acts like a lease should *not* be considered a lease, are the physical openness and the absence of the ability to secure the space with a lock, which was argued by the Department and is considered below as it relates to Departmental regulations.

Regulations and rulings issued by the Department

Regulations and rulings promulgated by the Department have provided guidance concerning lease/license questions over the years. While no regulation or ruling considers the exact situation presented by the Taxpayers, there are several that approximate it. The regulations and rulings at issue here focus on the open air/enclosed space question. The focus on exclusive use, possession and access includes the concept of dominion and control, as described above.

Regulation 3.2.211.16 NMAC (5/31/01) indicates that receipts from renting locker rooms in a self-storage warehouse are receipts from granting a license if access to the building is only through the owner, but are deductible if the tenant has "exclusive possession, use and access" to a self-contained unit and rent is for a specific period or term. It was under this regulation that the Department, per the audit, justified its denial of the deduction of open-air spaces and allowed the deduction of enclosed spaces.

Regulation 3.2.211.16 NMAC provides two scenarios. In the first scenario, a warehouse facility provides individual locker rooms, but access to the building is limited by the landowner. In the second scenario, a warehouse storage facility provides individual, self-contained units, and the tenant has exclusive possession, use and access. By its focus on the control of access, this regulation seems intended to illustrate the difference between owner-control and tenant-control of the space. It does not explicitly require that the space is covered on all sides, but both scenarios contain spaces which are the functional equivalent: either "individual locker rooms" or "individual, self-contained storage warehouse units." One might infer, as the Department does, that to be self-contained, a space has to be enclosed. But, by contrast, the scenario also indicates that even though the individual locker rooms grant exclusive possession, the right to use them may still be considered a grant of licenses, because the owner's control of access is a determining factor. *Cf. Wattson*, 2 F.3d 967.

Similarly, the Department cited to Regulation 3.2.211.17 NMAC (8/15/12) in denying the deduction. The regulation gives the example of a parking lot:

> C. Example 2: X owns an unlighted dirt parking lot in Albuquerque. Y enters into an agreement with X whereby Y agrees to pay a monthly fee and X agrees to permit Y to park Y's car in an assigned space for a period of one month. Z brings an automobile to X's parking lot and parks it there for a daily fee. Z does so only once. X's receipts from providing the service of supplying parking spaces or selling a

> license to use the parking spaces to Y and Z are not deductible from gross receipts as a lease of real property pursuant to Section 7 9 53 [sic] NMSA 1978.

The hypothetical of the regulation seems to place importance on the allowance of both daily use as well as a one-month agreement. This stress on the duration of the term of the agreement is not misplaced, since the statutes and interpretations tend to place a minimum of one-month terms on agreements to be considered leases. *See* NMSA 1978, Section 7-9-53 (B) (1998); s*ee* Regulation 3.2.211.8 NMAC (11/30/05). *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶ 27; *See also The protest of Tiller Design*, Decision and Order #16-38 (N.M. Admin. Hearings Office, July 21, 2016, non-precedential), affirmed, *Tiller Design v. N.M. Taxation & Revenue Dep't.*, Mem. Op.#A-1-CA-36090, March 18, 2019.

More closely related is the hypothetical scenario of the airplane flying service providing hangar space. *See* Regulation 3.2.211.17 (D). Under each of the three scenarios presented in the regulation's hypothetical, the flying service which rents out hangar space to tenants on a month-to-month basis for a stall, a month-to-month basis for an assigned tie-down space, and a day-to-day basis for an assigned tie-down space, tax is due.

> Example 3:
> (1) S owns a flying service and related facilities. S enters into several types of agreements with its customers:
> (a) an agreement with A on a month-to-month basis, permitting A to store an aircraft in an assigned "stall" in one of several hangars each containing eight to twelve such "stalls", in return for a monthly fee. S specifically limits A's use of the premises to storage of the aircraft in the conduct of A's business in an adjacent airport;
> (b) an agreement with B, on a month-to-month basis, permitting B to store an aircraft in an assigned "tie-down" space in a large open-span hangar containing spaces for eight such aircraft, in return for a monthly fee;
> (c) an agreement with C, a transient customer, on an overnight or day-to-day basis, permitting C to store an aircraft in a specified "tie-down" space in the open-span hangar described above, in return for a daily fee.

> (2) S's receipts from providing the service of supplying hangar space and open storage space for aircraft, or of granting a license to use such space, to A, B and C are subject to the gross receipts tax. S's receipts are not deductible from gross receipts as a lease of real property pursuant to Section 7-9-53 NMSA 1978.

The stated reason for taxing this transaction is that the flying service's receipts are "from providing the service of supplying hangar space and open storage space for aircraft, or of granting a license to use such space." The Department considered this either a service or a grant of a license, regardless of the length of time the tenant used the space, and regardless of the assignment of an identified space. Again, as with the parking lot scenario of Regulation 3.2.211.16 NMAC, the flying service has mixed daily use and monthly use rentals. This appears to be one of the two apparent rationales to prevent the month-to-month assigned hangar space tenancies from the application of a lease deduction. This is a rational application of the minimum of one-month rental period term limits imposed on leases, as discussed above. The second apparent rationale to deny the lease exemption comes from the fact that the spaces are in an open-air group hangar. The regulation hypothetical illustrates the difference between types of spaces and the term of rentals, but in each, the tax is due. Under this regulation read broadly enough to include other vehicle storage facilities, renting comparable assigned open-air RV spaces or partially covered RV spaces could be either a service or a license, regardless of the length of the term or whether the tenancy is revocable at will. Under a strictly limited view, the regulation regards mixed daily and monthly use of hangar space as taxable. Regulations are meant to provide guidance to tax practitioners, therefore, the broader view is adopted here.

Similar to the airplane hangar scenario, Revenue Ruling 440-01-1 is the ruling with factual scenarios that most closely mirror the case at hand. The ruling focused on boat storage, both on land and in the water. There were three different types of storage facilities at issue. Under one scenario, the boats are placed in trailers, and placed within a covered, enclosed garage on land for an

annual term with in-and-out privileges 24 hours a day using a personal key. This was clearly a lease of real property, although the Department advised that rental terms of less than a month would suggest a license. Under the second scenario, boats on trailers were stored in an open, fenced storage yard for an annual term, with the owners able to access the yard 24 hours a day, with a key to the main gate. The Department determined that the second scenario *did not* allow exclusive access to the owner, because storage was out in the open. Under the third scenario, the boats were left on the water, in an unwalled "slip" with a roof, also with 24-hour access and under an annual contract. The Department determined that because access was not exclusive to the tenant under the second and third scenarios, the receipts were from a license not a lease. Having eliminated the question of mixed day-to-day and long-term use, the regulation stresses the openness and accessibility of the rental space. Under this ruling, applied to the situation at hand, the rental of RV spaces in an open-air lot, even with some roof covering, would seem to be the granting of a license, regardless of whether the tenancy is revocable at will.

An application of Ruling 440-01-1 reinforces the statutory interpretation and common law interpretations above. And, as with Regulation 3.2.211.17(D) NMAC, the sole reason I see to prevent the year-long assigned space tenancies from the application of a lease deduction stems from the fact that the spaces are in an open-air lot rather than individually enclosed, a deciding factor based on the physical inability to provide dominion and control of the rented space, despite a grant of a right to possession and the ability to use the vehicle storage space.

The regulations and rulings issued by the Secretary of the Taxation and Revenue Department are presumed to be an accurate implementation of the law. NMSA 1978, Section 9-11-6.2 (G) (2015) indicates: "[a]ny regulation, ruling, instruction or order issued by the secretary or delegate of the secretary is presumed to be a proper implementation of the provisions of the laws

that are charged to the department, the secretary, any division of the department or any director of any division of the department." The Department may interpret a tax statute without adopting a rule or regulation related to that statute. *See Id.* Rulings, although given deference, are intended for a limited application to a particular taxpayer or a small group of taxpayers seeking a clarification and interpretation in special circumstances. *See* NMSA 1978, Section 9-11-6.2 (B)(2).

The Taxpayers urged the Hearing Officer to disregard the regulations' reliance on the open/enclosed distinctions because the distinction is not part of the governing statute. "The legislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty." *Rainbo Banking Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972 NMCA-139, 84 N.M. 303, 502 p.2d 406. When an agency is charged with the application of a statute, its construction is given some deference, but its construction will be disregarded if its interpretation of the statute is found to be unreasonable or unlawful. *See N.M. AG v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 12. When statutes and regulations are inconsistent, the statute prevails. *See Picket Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49. A regulation cannot overrule a statute. *See Jones v. Employment Servs. Div.*, 1980-NMSC-120, 95 N.M. 97.

The regulations in contention here, Regulation 3.2.211.17 NMAC, Regulation 3.2.211.16 NMAC, and Revenue Ruling 440-01-1, place great emphasis on a tenant's "exclusive possession, use and access." The illustrations in the regulations seem more concerned with mixed daily and monthly usage, but it is impossible to ignore the additional distinction between open air and enclosed spaces. Neither the tenancy term limits, nor the enclosure limits are unreasonable interpretations of the common law's definition of a license. The Department's interpretation is not based in statute, because the term "license" is undefined. But the Department's interpretation does

not unreasonably abridge, enlarge, extend or modify the statute at issue. Thus, the exception for licensing interpreted narrowly does not swallow the rule. *See First Nat'l Bank v. Woods (In re Woods)*, 743 F.3d 689, 698 ("exceptions must not be interpreted so broadly as to swallow the rule").

The Department's rationale that the absence of the ability to place a padlock on the outside of the storage space prevents the creation of a lease is grounded in the Department's own regulations, and caselaw. The *Quantum* court determined a lease existed when various organizations entered into year-long contracts with a bingo hall owner, for specific time-periods during which the organizations used the same space for bingo games, and the landlord maintained control over the premises, but each of the tenant organizations had exclusive possession of their own floor safes and secure storage closets where they were able to keep their own property under lock and key. *See Quantum Corp.*, ¶ 21. The regulations offer a reasonable interpretation of applicable law based in statute and common law.

Here, the Taxpayers provided evidence that the designated spaces were indeed marked on a map of the property, marked with signs, identified in the written contracts, and the tenant had the contractual *right* to exclude any other person or vehicle from the designated space, nevertheless the Department showed the fact of the physical, practical ability to actually exclude was elusory because the spaces were not enclosed. The agreements at issue appear to create leases, yet the physical attributes of the property, most notably the absence of enclosure of that property, suggest the common law requirements of a lease have not been met, therefore the agreement can only be a mere license to use the space. Therefore, the self-storage facilities here may create leases of real property if there is both a "permanently assigned" space and some improved enclosure (provided that the term, rent and access provisions are also met) by being physically "partitioned off." *See Tips*, at 527. But by providing assigned open-air and overhead covered parking spaces at issue here,

with only survey whiskers showing the bounds of assigned space, the Department was correct in determining that a license is created. "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.

Interest and Civil Penalty

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). 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.

Under NMSA 1978, Section 7-1-69 (2007), 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, the Department must impose a civil negligence penalty on that taxpayer.
As discussed above, Section 7-1-69 use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence." *See Marbob*, ¶22.

Taxpayers provided adequate evidence that the failure to pay taxes in this case was not only unintentional but was after seeking advice from a CPA. Taxpayers' reliance on advice of a trained tax professional, after disclosure of the business model and the proposed deductions, proved that it made a mistake of law in good faith and on reasonable grounds under Section 7-1-69 (B) by showing the reporting error was nonnegligence, allowing for abatement of penalty under Regulation 3.1.11.11 NMAC (01/15/01).

The evidence presented indicated that the Taxpayers' principal owner relied on advice of a CPA when determining whether the deduction applied. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Because the matter is decided on the basis of conference with a CPA, the Taxpayer's other contention that they also sought advice from a departmental employee is not considered. Therefore, the Department's imposition of civil penalty shall be abated.

CONCLUSIONS OF LAW

A. Taxpayers filed timely, written protests of the Department's assessments and jurisdiction lies over the parties and the subject matter of this protest.

B. The initial hearings were timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (A) (2015). Parties did not object that the initial scheduling hearings satisfied the 90-day hearing requirement of Section 7-1B-8 (A).

C. The parties to the rental agreements at issue here intended to create leases of real property, "an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property." NMSA 1978, Section 7-9-3 (E).

D. The rental agreements at issue here have no express or implied right of revocation in favor of the landowner, although the landowner maintains some degree of control over the premises. *Tarin's Inc. v. Tinley*, 2000-NMCA-048.

E. The physical attributes of the open-air rental spaces prevented the formation of a lease for lack partition and of exclusivity. *Grogan v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-033, ¶27 ("A lease gives the tenant the right of possession against the world… For a lease to exist, the lessee must acquire some definite control of and dominion over the premises."). *Tips et al. v. United States*, 70 F.2d 525, 1934 U.S. App. LEXIS 4214 (dominion and control requires both a permanently assigned space and a physical partition).

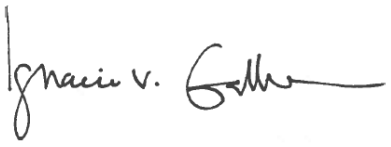
F. The physical attributes of the open-air rental space prohibited the Taxpayers from granting exclusive possession, use, and access to the rental spaces. Regulation 3.2.211.17 NMAC (8/15/12).

G. Penalties should be abated because by obtaining advice from a CPA Taxpayers were not negligent in reporting Gross Receipts as they did. NMSA 1978, Section 7-1-69 (B); Regulation 3.1.11.11 NMAC (01/15/01).

For the foregoing reasons, the Taxpayer's protest **IS DENIED IN PART and GRANTED IN PART**. Therefore, it is hereby **ORDERED** that the Taxpayers are liable for the underlying tax and interest, and the Department shall abate all accrued penalties for all three entities. A Class RV Storage (Second Street) is liable for tax of $19,486.39 and interest of $2,332.52 (plus additional accrued interest). A Class RV Storage (Second Street) civil penalty in the amount of $3,897.29 is ordered abated. A Class RV Storage at Journal Center (Paseo) is liable for tax of $23,408.10 and interest of $3,748.71 (plus additional accrued interest). A Class RV Storage at Journal Center (Paseo) civil penalty in the amount of $4,657.56 is ordered abated. A Class RV Storage at Osuna

(Osuna) is liable for tax of $58,917.06 and interest of $5,383.74 (plus additional accrued interest). A Class RV Storage at Osuna (Osuna) civil penalty in the amount of $11,758.14 is ordered abated.

DATED: October 24, 2019.



Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
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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 24, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interdepartmental Mail*

INTENTIONALLY BLANK

John Griego
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