STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

HOME DIALYSIS OF NEW MEXICO

v. **AHO Case Number 21.08-045A, D&O# 24-08**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT FOR TAXPAYER

This matter came before the Administrative Hearings Office, Hearing Officer Chris Romero, Esq., upon the following: (1) Motion for Summary Judgment and Memorandum in Support ("Taxpayer's Motion"); (2) Taxation and Revenue Department's Response to Motion for Summary Judgment ("Department's Response"); and (3) Taxpayer's Reply to Department's Response to Motion for Summary Judgment ("Taxpayers' Reply").

A hearing on the foregoing motions was held by videoconference on October 12, 2023. Home Dialysis of New Mexico ("Taxpayer") appeared by and through Mr. Robert Desiderio, Esq., Janette Duran, Esq., and Benjamin Roybal, Esq. The Taxation and Revenue Department ("Department") appeared by and through David Mittle, Esq.

On November 27, 2023, subsequent to the hearing on Taxpayer's Motion, the Department filed Taxation and Revenue Department's Motion for Summary Judgment ("Department's Motion). Taxpayer filed Taxpayer's Reply to Department's Response to Motion for Summary Judgement [sic[1]] on December 12, 2023.

The facts and legal issues presented concentrate on whether Taxpayer, a licensed "end-stage renal dialysis" provider is eligible to deduct gross receipts pursuant to NMSA 1978, Section 7-9-93

[1] The substance of the pleading responded to the Department's Motion despite bearing a title suggesting another purpose.

as provided by Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006).

Because the Hearing Officer finds that the statute and regulations permit nonexcluded entities to take the deduction, and because Taxpayer satisfied all of the remaining conditions of the statute, its motion and protest should be granted. *See Robison Med. Research Group, LLC v. New Mexico Taxation & Revenue Dep't*, 2023-NMCA-065, 535 P.3d 709, 714. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Material facts 1 – 33 are reproduced from the statement of undisputed facts presented in Taxpayer's Motion which are accepted as true and undisputed in the absence of evidence to the contrary. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 721, 242 P.3d 280, 288 (a party opposing summary judgment must adduce evidence to justify a trial on the issues).

Material Facts

1. Taxpayer is a closely held New Mexico limited liability company owned by licensed physicians, certified nurse practitioners, and registered nurses all of whom specialize in the treatment of kidney disease. All physician members are Board certified nephrologists. [Taxpayer's Motion (Affidavit of Jolyn Williams, ¶ 5 (Attached as Exhibit A to Taxpayer's Motion) (hereinafter "Williams Aff."); Affidavit of Joseph Zientarski Aff. ¶ 5 (Attached as Exhibit B to Taxpayer's Motion) (hereinafter "Zientarski Aff."))]

2. Between July 2012 and March 4, 2019 ("Service Period"), Taxpayer provided home peritoneal dialysis, hemodialysis and other related healthcare services to end stage renal disease patients through duly licensed registered nurses, social workers, dieticians, and other health care personnel who are either members of or are employed by Taxpayer under the

supervision of Taxpayer's medical director, a physician and member of Taxpayer. [Taxpayer's Motion (Williams Aff. ¶ 6; Zientarski Aff. ¶ 6)]

3. At all times during the Service Period, Taxpayer was licensed by the New Mexico Department of Health as an end stage renal dialysis facility. [Taxpayer's Motion (Williams Aff. ¶ 7; Zientarski Aff. ¶ 7)]

4. Taxpayer is not a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code and is not licensed as an HMO, hospital, hospice, nursing home, outpatient facility or intermediate care facility under the Public Health Act. [Taxpayer's Motion (Williams Aff. ¶ 8; Zientarski Aff. ¶ 8)]

5. Taxpayer commenced home peritoneal dialysis and hemodialysis services by evaluating the patient and visiting and evaluating the patient's home to determine if the patient and the patient's home were suitable for home dialysis. [Taxpayer's Motion (Williams Aff. ¶ 9; Zientarski Aff. ¶ 9)]

6. If both the patient and the patient's home were suitable for home dialysis, the patient's nephrologist developed a treatment plan, wrote a prescription for home dialysis and, working with an interdisciplinary team consisting of a registered nurse, social worker and dietician, created a patient-care plan. Taxpayer's medical personnel would then train the patient or the patient's caregiver to do home dialysis in a dialysis training room at Taxpayer's medical offices. [Taxpayer's Motion (Williams Aff. ¶¶ 10-11; Zientarski Aff. ¶¶ 10-11)]

7. Taxpayer did not provide dialysis in its medical offices except for training, necessary back up care, and, after October of 2016, occasional respite care, which provided temporary relief for caregivers or addressed issues that temporarily affected home dialysis treatment. [Taxpayer's Motion (Williams Aff. ¶ 12; Zientarski Aff. ¶ 12)]

8. Taxpayer's registered nurses and other health care personnel monitored and managed patients remotely, via the internet, downloads into mobile storage devices such as USB drives, or notes from the patient. [Taxpayer's Motion (Williams Aff. ¶ 13; Zientarski Aff. ¶ 13)]

9. Taxpayer's health care personnel did not return to the patient's home after the initial home evaluation except to address issues with the dialysis equipment. [Taxpayer's Motion (Williams Aff. ¶ 14; Zientarski Aff. ¶ 14)]

10. All of Taxpayer's kidney patients were covered by health plans or programs. [Taxpayer's Motion (Williams Aff. ¶¶ 15-16; Zientarski Aff. ¶¶ 15-16)]

11. Taxpayer provided services under contracts with private health care insurers and managed health care providers, including Blue Cross Blue Shield, Presbyterian Health Plan, United Healthcare, Cigna (through PPO Multiplan), Lovelace, Molina, New Mexico Health Connections (through Golden Triangle Network), True Health, and Humana all of whom possessed valid certificates of authority and were in good standing pursuant to the New Mexico Insurance Code. [Taxpayer's Motion (Williams Aff. ¶ 16; Zientarski Aff. ¶ 16)]

12. Each of the private health care insurers and managed healthcare providers paid Taxpayer for dialysis services pursuant to a schedule of fees set forth in the contract between the parties. [Taxpayer's Motion (Williams Aff. ¶ 17; Zientarski Aff. ¶ 17)]

13. During the period January 1, 2014 through February 2016, Taxpayer did not specifically claim deductions for gross receipts derived from private health care insurers or managed health care providers under Section 7-9-93 of the Act, although Taxpayer did claim unspecified deductions (not identified as Section 7-9-93 or M deductions) for some of its gross receipts from healthcare services during that period. [Taxpayer's Motion (Williams Aff. ¶ 18; Zientarski Aff. ¶ 18)]

14. In the fall of 2015, Joseph Zientarski, Taxpayer's Chief Financial Officer, and Jolyn Williams, Taxpayer's Office Manager, reviewed Taxpayer's tax reports and began to investigate whether Taxpayer's receipts from healthcare services qualified for the Section 7-9-93 deduction. [Taxpayer's Motion (Williams Aff. ¶ 19; Zientarski Aff. ¶ 19)]

15. In November of 2015, Jolyn Williams contacted the New Mexico Taxation and Revenue Department's Audit and Compliance Division on behalf of Taxpayer and spoke with auditor Trisha Zhang about the gross receipts tax deductions for receipts of licensed healthcare providers. [Taxpayer's Motion (Williams Aff. ¶ 20)]

16. In the call with Ms. Zhang, Ms. Williams explained the structure of Taxpayer's medical practice and described the hemodialysis and peritoneal services provided by Taxpayer to its kidney patients. [Taxpayer's Motion (Williams Aff. ¶ 21)]

17. Ms. Zhang advised Ms. Williams that Taxpayer met the requirements to take gross receipts tax deductions under Section 7-9-93 of the Act. [Taxpayer's Motion (William Aff. ¶ 22)]

18. In March of 2016, after experiencing difficulties claiming the Section 7-9-93 deduction through its Taxpayer Access Point ("TAP") account, Ms. Williams again contacted the Department's Audit and Compliance Division, this time with Mr. Zientarski, and spoke with auditor Mark Wachter on how to claim the Section 7-9-93 deduction through TAP. [Taxpayer's Motion (Williams Aff. ¶ 23; Zientarski Aff. ¶ 21)]

19. Ms. Williams and Mr. Zientarski discussed the structure of Taxpayer's medical practice, and the nature of its health care services, with Mr. Wachter who agreed with Ms. Zhang that Taxpayer qualified for the Section 7-9-93 deduction. Mr. Wachter advised Ms. Williams and Mr. Zientarski how to modify its tax registration with the Department to update the description

of Taxpayer's services so as to enable it to claim the deductions. [Taxpayer's Motion (Williams Aff. ¶ 24; Zientarski Aff. ¶ 22)]

20. After Ms. William's and Mr. Zientarski's call with Mr. Wachter, and relying on the discussions with Ms. Zhang and Mr. Wachter, Taxpayer prepared and filed amended CRS returns and multiple applications for refund for overpayments of gross receipts taxes in the total amount of $467,976.77 for the monthly reporting periods April 2013 through February 2016 ("Refund Period"). [Taxpayer's Motion (Williams Aff. ¶ 25; Zientarski Aff. ¶ 23)]

21. Taxpayer also began claiming the Section 7-9-93 deduction on CRS returns it filed after February 2016. [Taxpayer's Motion (Williams Aff. ¶ 26; Zientarski Aff. ¶ 24)]

22. With only a minor adjustment for a small amount of penalty and interest due for the original filing for two months in the Refund Period, the Department granted Taxpayer's refund applications and issued three checks in payment of the approved claims in the amounts of $159,939.27 (paid June 17, 2016), $13,404.07 (paid August 2, 2016), and $294,125.35 (paid September 6, 2016), for a total of $467,468.69. [Taxpayer's Motion (Williams Aff. ¶ 27; Zientarski Aff. ¶ 25)]

23. The Department did not pay Taxpayer interest on the overpayments of tax that resulted in the refund claims. [Taxpayer's Motion (Williams Aff. ¶ 28; Zientarski Aff. ¶ 26)]

24. On July 14, 2020, the Department began an audit of Taxpayer for the period January 1, 2014 through March 31, 2020 ("Audit Period"). [Taxpayer's Motion (Williams Aff. ¶ 29); Zientarski Aff. ¶ 27)]

25. In draft workpapers, the Department disallowed Taxpayer's deduction under Section 7-9-93 for receipts from payments for services to patients covered by the private health care insurers and managed health care providers during the Audit Period, including the

following:

Blue Cross Blue Shield: $5,877,727.30
Presbyterian Health Plan: $14,924,655.10
United Healthcare: $1,423,083.61
Cigna: $1,254,253.04
Lovelace: $577,619.40
Molina: $29,202.17
New Mexico Health Connections: $259,394.20
True Health: $98,543.00
Humana: $423,573.86

[Taxpayer's Motion (Williams Aff. ¶ 30; Zientarski Aff. ¶ 28)]

26. As a result of the disallowed deductions, the Department proposed assessing additional gross receipts tax in the amount of $1,695,165.44, civil negligence penalties in the amount of $331,778.90, and interest in the amount of $296,700.71. [Taxpayer's Motion (Williams Aff. ¶ 31; Zientarski Aff. ¶ 29)]

27. On December 15, 2020, Taxpayer sent a request to the Department that it not be assessed civil negligence penalties with respect to the planned tax assessment because, among other things, Taxpayer had relied on the advice of Department representatives that Taxpayer met the requirements for the deduction under Section 7-9-93. [Taxpayer's Motion (Williams Aff. ¶32; Zientarski Aff. ¶ 30)]

28. After reviewing Taxpayer's request, the Department abated the proposed assessment of penalties and issued revised workpapers. [Taxpayer's Motion (Williams Aff. ¶ 33; Zientarski Aff. ¶ 31)]

29. On February 13, 2021, the Department assessed Taxpayer additional gross receipts taxes and interest in the amounts of $1,685,208.94 and $309,455.05, respectively, for the period from January 1, 2014 to March 31, 2020 ("Assessment"). [Taxpayer's Motion (Williams Aff. ¶ 34; Zientarski Aff. ¶ 32)]

30. The gross receipts taxes assessed under the Assessment included some of the gross receipts taxes previously refunded to Taxpayer as a result of its refund claims, as well as additional gross receipts taxes on deductions claimed by Taxpayer after the Department advised Taxpayer that it was entitled to claim the Section 7-9-93 deduction. [Taxpayer's Motion (Williams Aff. ¶ 35; Zientarski Aff. ¶ 33)]

31. The interest assessed under the Assessment included interest on the assessed gross receipts taxes related to the refunds calculated from the original due date for payment and not the date the refunds were actually paid by the Department to Taxpayer. [Taxpayer's Motion (Williams Aff. ¶ 36; Zientarski Aff. ¶ 34)]

32. On May 5, 2021, Taxpayer timely filed a protest of the Assessment. [Taxpayer's Motion (Williams Aff. ¶ 37; Zientarski Aff. ¶ 35)]

33. On May 31, 2021, the Department acknowledged Taxpayer's protest. [Taxpayer's Motion (Williams Aff. ¶ 38; Zientarski Aff. ¶ 36)]

Procedural Background

34. On February 13, 2021, the Department issued a Notice of Assessment of Taxes and Demand for Payment under Letter ID No. L0136327600 in the amount of $1,956,865.38 comprised of $1,685,208.94 in gross receipts tax and $309,455.05 in interest. The assessment also reflected a credit for compensating tax in the amount of $37,798.61. [Administrative File]

35. On May 5, 2021, Taxpayer submitted a formal written protest of the assessment to the Department. [Administrative File]

36. On May 31, 2021, the Department acknowledged Taxpayer's protest under Letter ID No. L1173141936. [Administrative File]

37. On August 4, 2021, Taxpayer filed a Request for Hearing indicating a total

amount in controversy of $1,956,865.38. [Administrative File]

38. On August 6, 2021, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing that set an initial hearing on the protest to occur on August 30, 2021. [Administrative File]

39. On August 11, 2021, the Department filed a Peremptory Election to Excuse the previously assigned hearing officer. [Administrative File]

40. On August 11, 2021, the Chief Hearing Officer entered a Notice of Reassignment of Hearing Officer After Excusal which assigned the protest to the undersigned. [Administrative File]

41. An initial hearing in the protest was held on August 30, 2021 in which neither party objected that the hearing would satisfy the 90-day hearing requirement. [Administrative File]

42. On August 30, 2021, the Administrative Hearings Office entered a Briefing Schedule for Dispositive Motion, Responses, and Replies. [Administrative File]

43. On April 12, 2022, the Department filed Taxation and Revenue Department's Original Answer. [Administrative File]

44. On August 29, 2022, the Administrative Hearings Office entered a Notice of Telephonic Status Hearing that set a hearing for September 16, 2022. The notice of hearing observed, "Upon review of the administrative file, the Hearing Officer observed that neither party had yet filed a motion as anticipated on August 30, 2021 and that it would be reasonable at this time to evaluate the status of the matter." [Administrative File]

45. On September 16, 2022, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing which in addition to establishing other various

deadlines, set a hearing on the merits of Taxpayer's protest for August 7, 2023. [Administrative File]

46. On May 11, 2023, Taxpayer filed its Motion for Summary Judgment and Memorandum in Support. [Administrative File]

47. On May 25, 2023, the Department filed Taxation and Revenue Department's Response to Motion for Summary Judgment. [Administrative File]

48. On June 1, 2023, Taxpayer filed a Motion for Leave to File a Reply Brief. [Administrative File]

49. On June 7, 2023, Taxpayer filed a Motion to Continue Merits Hearing. [Administrative File]

50. On June 12, 2023, the Department filed Taxation and Revenue Department's Objection to Motion for Leave to File Reply Brief. [Administrative File]

51. On June 14, 2023, the Administrative Hearings Office entered an Order Granting Motion for Leave to File Reply and an Order Granting Unopposed Motion to Continue Hearing. [Administrative File]

52. On June 22, 2023, Taxpayer filed Taxpayer's Reply to Department's Response to Motion for Summary Judgment and a Notice of Completion of Briefing on Motion for Summary Judgment. [Administrative File]

53. On July 27, 2023, Taxpayer filed a Notice of Availability which provided dates in October of 2023 for scheduling a hearing on its Motion for Summary Judgment. [Administrative File]

54. On August 8, 2023, the Administrative Hearings Office entered a Notice of Videoconference Hearing on Pending Motion for Summary Judgment that set a hearing on the

motion for October 12, 2023. [Administrative File]

55. On October 10, 2023, the Department filed Taxation and Revenue Department's Request to Reset the Start Time on Taxpayer's Motion for Summary Judgment. [Administrative File]

56. A hearing on Taxpayer's Motion for Summary Judgment was conducted on October 10, 2023. [Administrative File]

57. On November 27, 2023, the Department filed Taxation and Revenue Department's Motion for Summary Judgment. [Administrative File]

58. On December 12, 2023, Taxpayer filed its response to the Department's Motion for Summary Judgment. [Administrative File]

59. On December 15, 2023, the Department filed a Notice of Completion of Briefing on Taxation and Revenue Department's Motion for Summary Judgment. [Administrative File]

DISCUSSION

Taxpayer's Motion presents a question of law focused on whether a licensed end stage renal dialysis services provider is eligible for a gross receipts deduction pursuant to NMSA 1978, Section 7-9-93 as construed and implemented by Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006).

In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664. If the movant for summary judgment makes prima facie showing that it is entitled to a judgment as a matter of law, the burden shifts to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331.

Although favored procedurally, a non-moving party cannot rely solely on the allegations

contained in its complaint or upon mere argument or contention to defeat a motion once prima facie showing has been made. *See Oschwald v. Christie*, 1980-NMSC-136, ¶ 6, 95 N.M. 251, 253, 620 P.2d 1276, 1278.

Instead, the non-movant "must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence." *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 15, 139 N.M. 12, 17, 127 P.3d 548, 553; *Archuleta v. Goldman*, 1987-NMCA-049, ¶ 11, 107 N.M. 547, 551, 761 P.2d 425, 429 (a party opposing a motion for summary judgment must come forward with evidence to refute assertions of fact).

Burden of Proof

"[T]axation is the rule and the claimant must show that his demand is within the letter as well as the spirit of the law." *See TPL, Inc. v. New Mexico Taxation & Revenue Dept.*, 2003-NMSC-007, ¶ 9, 133 N.M. 447, 451, 64 P.3d 474, 478 (*quoting Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep't*, 2002–NMSC–013, ¶ 11, 132 N.M. 226, 46 P.3d 687.

For the privilege of engaging in business, the Gross Receipts and Compensating Tax Act imposes excise taxes of specified percentages on gross receipts on any person engaging in business in New Mexico. "To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. *See* NMSA 1978, Section 7-9-4 (2010, Amended 2022). For the purpose of enforcing the tax, there is a presumption that all receipts of a person engaging in business in New Mexico are subject to gross receipts tax. *See* Section 7-9-5(A) (2019).

Taxpayers may, however, reduce their gross receipts tax obligations by availing themselves of deductions and exemptions authorized by the Legislature. "[D]eductions are a matter of legislative grace and a way of achieving [the Legislature's] policy objectives." *See*

Sutin, Thayer & Browne v. Revenue Div. of Taxation & Revenue Dept., 1985-NMCA-047, ¶ 17, 104 N.M. 633, 636, 725 P.2d 833, 836. The right to a deduction must be clear and unambiguous with a strict construction against the taxpayer. *See Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540; *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735; *Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97; *Pittsburgh and Midway Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

Consequently, "[a] taxpayer has the burden of showing that it comes within the terms of a statute permitting a tax deduction." *See Sutin, Thayer & Browne*, 1985-NMCA-047, ¶ 17. The terms of the statute must be afforded a "fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the [s]tate, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered." *See Sacred Garden, Inc. v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-038, ¶ 6, 495 P.3d 576, 578 (*quoting Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97, 99, 476 P.2d 67, 69). A "deduction must be denied in the absence of a showing of clear legislative intent to permit the deduction." *See Sutin, Thayer & Browne*, 1985-NMCA-047, ¶ 18.

Entitlement to Section 7-9-93 and application of Regulations 3.2.241.13 and 3.2.241.17 NMAC

With this construct in mind, relief from the assessment relies on Taxpayer's claim to a deduction under Section 7-9-93, as implemented by Regulations 3.2.241.13 and 3.2.241.17 NMAC. The Department disputed Taxpayer's claim asserting Taxpayer is precluded from the deduction conferred by the Legislature in Section 7-9-93. As such, the Department argued that Regulations 3.2.241.13 and 3.2.241.17 NMAC should be disregarded as conflicting with the statute. The Department subsequently agreed, in Department's Motion, that the 2021 amendment

to Section 7-9-93, which codified the Regulations, clarified the previous version of the statute making the codification retrospective. *See* Department's Motion, Page 2 – 3. Thus, the Department explains, "there is no legal basis for differentiating between the Regulation and the amended Statute." *See* Department's Motion, Page 2, *citing Robison*, 2023-NMCA-065, ¶¶ 12 – 13. The Hearing Officer agrees with the Department's observation, but for purposes of discussion, will differentiate when helpful to addressing arguments within the relevant time frames.

The analysis begins with a review of the statute. Two versions of the statute existed in the relevant period of time. Section 7-9-93(A) (2007) stated in relevant part that, "[r]eceipts from payments by a managed health care provider or health care insurer for commercial contract services or medicare part C services provided by a health care practitioner that are not otherwise deductible pursuant to another provision of the Gross Receipts and Compensating Tax Act ... may be deducted from gross receipts."

Section 7-9-93 was amended in 2016 to state, "[r]eceipts of a health care practitioner for commercial contract services or medicare part C services paid by a managed health care provider or health care insurer may be deducted from gross receipts if the services are within the scope of practice of the health care practitioner providing the service." *See* Section 7-9-93(A) (2016).

Despite differences between the 2007 and 2016 iterations, both versions share common elements: 1) receipts must be paid by a managed health care provider or health care insurer; 2) receipts are payments for commercial contract services or medicare part C services; and 3) the services were performed by a health care practitioner within the scope of their practice. *See id.* (2007 and 2016).

Robison recognized, however, that the language in the relevant versions of Section 7-9-93

did not identify who can take the deduction. *Robison* observed, "both the 2007 and 2016 versions of the Statute (as well as the later 2021 and 2023 versions) use the passive voice—the receipts may be deducted—and do not directly answer the question of 'who is entitled to claim the [D]eduction.'" *See Robison*, 2023-NMCA-065, ¶ 9.

The question here, as it was in *Robison,* is whether Taxpayer may claim the deduction provided by Section 7-9-93. The taxpayer in *Robison* was "a medical staffing company [claiming a deduction under Section 7-9-93] on behalf of its nurse employees" under the 2007 and 2016 versions of the statute. *See Robison*, 2023-NMCA-065, ¶ 1.

In evaluating whether the medical staffing company could claim a deduction on behalf of its nurse employees, thereby identifying "who" can claim the deduction, *Robison* explained that the first consideration is the statute's language, "because the primary goal in interpreting the state tax code is 'to give effect to the intent of the Legislature[.]'" It went on to explain that legislative intent may be revealed "by first looking at the plain meaning of the language of the statute, reading the provisions together to produce a harmonious whole." *See Robison*, 2023-NMCA-065, ¶ 8 (*citing Sacred Garden, Inc. v. N.M. Tax'n & Revenue Dep't*, 2021-NMCA-038, ¶ 5, 495 P.3d 576).

Robison then went on to observe, "[t]he plain meanings of the language in all of the versions of the Statute do not identify who can take the Deduction, much less whether the employers of health care practitioners may take the Deduction." *See Robison*, 2023-NMCA-065, ¶ 9, 535 P.3d 709, 712.

Therefore, *Robison* instructed, it was appropriate to consider the Department's regulations to "fill the gap." *See Robison*, 2023-NMCA-065, ¶ 12; *Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, ¶¶ 29-32, 114 N.M. 784, 845 P.2d 1238 (relying on regulations for "some

indication" for the kind of activity that qualified for a tax exemption).

Robison noted, as the Hearing Officer similarly observes in this case, that Regulation 3.2.241.13 NMAC has accompanied each iteration of Section 7-9-93 since 2006 through the present time. It states:

> RECEIPTS OF CORPORATE PRACTICE: A corporation, unincorporated business association, or other legal entity may deduct under Section 7-9-93 NMSA 1978 its receipts from managed health care providers or health care insurers for commercial contract services or medicare part C services provided on its behalf by health care practitioners who own or are employed by the corporation, unincorporated business association or other legal entity that is not:
>
> A. an organization described by Subsection A of Section 7-9-29 NMSA 1978; or
>
> B. an HMO, hospital, hospice, nursing home, an entity that is solely an outpatient facility or intermediate care facility licensed under the Public Health Act.
>
> [3.2.241.13 NMAC - N, 4/29/05; 3.2.241.13 NMAC - Rn & A, 3.2.241.10 NMAC, 5/31/06]

Regulation 3.2.241.17 NMAC, also in effect since 2006 through the present time, further specifies that "organizations licensed as a hospital, hospice, nursing home, an entity that is solely an outpatient facility or intermediate care facility under the Public Health Act" may not take the deduction. *See* Regulation 3.2.241.17 NMAC (2006).

The Court went on to observe from its review, "[i]t is clear from the plain language of 3.2.241.13 NMAC that the Deduction may be taken by various entities, and not just by health care practitioners." *See Robison*, 2023-NMCA-065, ¶ 12. *Robison* went on to hold that taxpayer, a medical staffing company fell within the category of entities that could claim a deduction under Section 7-9-93 on behalf of its nurse employees. It stated, "[a]s the employer of nurse health care practitioners, under 3.2.241.13 NMAC, [taxpayer] would be entitled to the Deduction for its

receipts for services provided on its behalf by nurse employees—so long as the other requirements under the Statute are met." *See Robison*, 2023-NMCA-065, ¶ 12.

Turning to the case at hand, the Hearing Officer first observes that nothing in either iteration of Section 7-9-93 explicitly excludes Taxpayer, by virtue of its status as an entity, from claiming the deduction. As in *Robison*, the Hearing Officer next turns to the regulations to "fill the gap." Regulation 3.2.241.13 NMAC provides that a "corporation, unincorporated business association, or other legal entity may deduct under Section 7-9-93 NMSA 1978 its receipts from managed health care providers or health care insurers for commercial contract services … provided on its behalf by health care practitioners who own or are employed by the corporation, unincorporated business association or other legal entity" provided it is not "an HMO, hospital, hospice, nursing home, an entity that is solely an outpatient facility or intermediate care facility licensed under the Public Health Act."

First, Taxpayer is a legal entity within the meaning of the regulation. It is organized as a limited liability company and is owned by licensed physicians, certified nurse practitioners, and registered nurses all of whom specialize in the treatment of kidney disease. *See* FOF 1.

Second, Taxpayer is "licensed by the New Mexico Department of Health as an end stage renal dialysis facility." *See* FOF 3. Taxpayer is not a regulatorily-excluded entity because it is neither a 501 (c) (3) organization, hospital, HMO, hospice, nursing home, nor an "entity that is solely an outpatient facility or intermediate care facility licensed under the Public Health Act." Taxpayer provided "home peritoneal dialysis, hemodialysis and other related healthcare services to end stage renal disease patients through duly licensed registered nurses, social workers, dieticians, and other health care personnel who are either members of or are employed by Taxpayer under the supervision of Taxpayer's medical director, a physician and member of

Taxpayer." *See* FOF 2. With a few exceptions, patients received services in their homes. This observation is relevant because a patient's home is not a "facility" as defined by the Department of Health, which specifies that a facility "means a building or buildings in which outpatient medical services are provided to the public and which is licensed pursuant to this rule." See Regulation 7.11.2.7 (F) NMAC. The only service-rendering activities that occurred at Taxpayer's medical offices consisted of "training, necessary back up care, and, after October of 2016, occasional respite care, which provided temporary relief for caregivers or addressed issues that temporarily affected home dialysis treatment." *See* FOF 7.

Third, the receipts to which the deduction is intended derive from services performed on the entity's behalf by health care practitioners who own or are employed by the entity. Except as explained above, health care services were performed in patient homes using technology that enabled "Taxpayer's registered nurses and other health care personnel [to] monitor[] and manage[] patients remotely, via the internet, [or by] downloads into mobile storage devices such as USB drives, or notes from the patient." *See* FOF 8. Services were provided remotely in that "Taxpayer's health care personnel did not return to the patient's home after the initial home evaluation except to address issues with the dialysis equipment." *See* FOF 9.

Through this stage of the evaluation, Taxpayer falls within the type of taxpayer "who" may claim the deduction on behalf of an employee, provided that the Taxpayer satisfies the remaining requirements under the statute. *See Robison*, 2023-NMCA-065, ¶ 12. In other words, the Hearing Officer is persuaded that Taxpayer is a nonexcluded entity entitled to take the deduction provided the remaining conditions of the statute are met. *See Robison*, 2023-NMCA-065, ¶ 16.

Thus, persuaded that Taxpayer is a nonexcluded entity, the evaluation proceeds with an

examination of whether Taxpayer has satisfied the remaining conditions of the statute. Section 7-9-93 in all relevant iterations requires that receipts derive for commercial contract services or medicare part c services paid by a managed health care provider or health care insurer if the receipts are within the scope of practice of the health care practitioner providing the service. *See* Section 7-9-93 (2007 and 2016).

Taxpayer's receipts meet the statutory criteria for the deduction. First, services were provided to "Taxpayer's kidney patients [who] were covered by health plans or programs." *See* FOF 10. Second, Taxpayer's kidney patients received treatment services under Taxpayer's "contracts with private health care insurers and managed health care providers, including Blue Cross Blue Shield, Presbyterian Health Plan, United Healthcare, Cigna (through PPO Multiplan), Lovelace, Molina, New Mexico Health Connections (through Golden Triangle Network), True Health, and Humana[,] all of whom possessed valid certificates of authority and were in good standing pursuant to the New Mexico Insurance Code." *See* FOF 11. Third, "[e]ach of the private health care insurers and managed healthcare providers paid Taxpayer for dialysis services pursuant to a schedule of fees set forth in the contract between the parties." *See* FOF 12. Fourth, Taxpayer's employee or member health care practitioners provided services within the scope of their practice in that they specialized in the treatment of kidney disease and provided services to patients in need of such treatment. *See* FOFs 1 – 2; 5 – 6.

Consistent with the analysis in *Robison*, the statute and regulations permit Taxpayer, as a nonexcluded entity to take the deduction, and the undisputed facts establish that all of the conditions of the statute were satisfied. *See Robison*, 2023-NMCA-065, ¶ 16.

The Department's Contentions

The Hearing Officer is satisfied that Taxpayer carried its burden to make prima facie

showing that it is entitled to summary judgment. Thus, the burden shifted to the Department to show evidentiary facts that would require a trial on the merits. *See Roth*, 1992-NMSC-011, ¶17. In response, the Department must demonstrate genuine issues of material fact through affidavits, depositions, and other similar evidence. *See Juneau*, 2006-NMSC-002, ¶ 15; *See Archuleta*, 1987-NMCA-049, ¶ 11. The Department cannot rely solely on the allegations contained in its complaint or upon mere argument or contention to defeat the motion. *See Oschwald*, 1980-NMSC-136, ¶ 6.

The Department makes several arguments in opposition to Taxpayer's Motion, as well as in support of its own motion. First concentrating on the Department's Response to Taxpayer's Motion, the Department asserts there are material facts in dispute which preclude summary judgment.

First, the Department argues that "Taxpayer 'trains the patients' to do home dialysis" and once trained, Taxpayer personnel do not return to the patient's house. For that reason, the Department asserts, "[t]he dialysis equipment does the bulk of providing the health care services." The Hearing Officer is unpersuaded.

The contention is mere argument and unsupported by evidence. Innovations in medical technology have enabled patients to receive various types of health care services in their homes ranging from routine video visits to more advanced treatments, including dialysis. While dialysis equipment is certainly vital to providing dialysis services in the home, there is no evidence to even suggest that it has rendered the practitioners who use it obsolete. To the contrary, the undisputed facts establish that Taxpayer's health care practitioners evaluate patients, develop treatment plans, write prescriptions, assemble teams of practitioners to create care plans, provide education and training to patients, and ultimately, access or receive data from the equipment to

monitor and manage a patient's treatment and progress. *See* FOFs 5 – 6; 8.

Second, the Department argues, also in reference to the equipment, that there is a question regarding "how much of the gross receipts represent reimbursement for dialysis equipment that was purchased, rented or leased." However, the contention is again presented as mere argument, and is once again, unaccompanied by sworn affidavits, depositions, and similar evidence. Thus, the Hearing Officer is unpersuaded that the Department's argument alone established the existence of disputed facts.

Third, the Department asserts that "Taxpayer's employees do not perform health care services." Instead, it argues, Taxpayer just downloads reports. The Hearing Officer finds this claim again to be mere argument and similarly unsupported by the evidentiary record. Although Taxpayer downloads data, that is only the method by which information is transmitted to, or accessed by, the health care practitioner to monitor and manage the patient's treatment. *See* FOFs 5 – 6; 8.

Finally, the Hearing Officer perceives a similar lack of evidence to establish the Department's contention that Taxpayer derived receipts from fee-for-service payments. Again, the assertion is presented as argument without reference to sworn affidavits, depositions, and similar evidence consistent with *Juneau,* 2006-NMSC-002, ¶ 15.

The undisputed facts establish that "[e]ach of the private health care insurers and managed healthcare providers paid Taxpayer for dialysis services pursuant to a schedule of fees set forth in the contract between the parties." *See* FOF 12. In contrast, a "'fee-for-service' means a traditional method of paying for health care services under which health care practitioners are paid for each service rendered, as opposed to paying in accordance with a schedule of fees in a contract the health care provider has entered into with a third party[.]" *See* Regulation 3.2.241.12

(B) NMAC. In this case, receipts were derived in accordance with a schedule of fees in a contract the health care provider has entered into with a third party." *Id.*

The Department next makes several arguments in support of limiting the deduction under Section 7-9-93 to individual health care practitioners, or stated in the alternative, in support of finding that Taxpayer is an excluded entity. This issue was resolved by *Robison* which recognized "that the language and history of the Statute support a conclusion that health care practitioners are individuals[,]" but concluded that the statute "does not identify who may claim the Deduction and for that reason does not limit the Deduction to only individual health care practitioners." *See Robison*, 2023-NMCA-065, ¶ 11, 535 P.3d 709, 712–13. Ultimately, as already explained several times over, it held, "[w]e conclude that the regulation permits an employer entity to take the Deduction on behalf of an employee, *provided that the entity is not otherwise excluded* and the remaining requirements under the Statute are satisfied." *See Robison*, 2023-NMCA-065, ¶ 12 (Emphasis Added).

The Department argues that Taxpayer, licensed as an End Stage Renal Dialysis provider by the New Mexico Department of Health, is an excluded entity within the meaning of "outpatient facility" because outpatient facilities are expressly excluded entities under Regulation 3.2.241.13 NMAC and the regulation's subsequent statutory codification in 2021. *See* NMSA 1978, Section 7-9-93 (2021).

The Hearing Officer previously ruled *In the Matter of the Consolidated Protests of ISD Renal, Inc. and Total Renal Care, Inc.*, Decision and Order No. 23-17 (February 6, 2023) (non-precedential) that end stage renal dialysis providers were not outpatient facilities under the public health act and were not excluded entities. The Department emphasizes that it has appealed that decision which is pending before the Court of Appeals in A-1-CA-40958.

The Hearing Officer has carefully considered the Department's criticism of *ISD Renal, Inc.* and *Total Renal Care, Inc.* but remains unpersuaded. Similar to the circumstances in that protest, Taxpayer is not licensed as an "outpatient facility" under Regulation 7.11.2 NMAC which is a distinct category of licensure explicitly applicable to outpatient facilities. Instead, Taxpayer is licensed under Regulation 7.36.2.1 NMAC which is separate and distinct and pertains only to end stage renal dialysis providers.

Moreover, the Department of Health has defined "facility" to mean "a building or buildings in which outpatient medical services are provided to the public and which is licensed pursuant to this rule." *See* Regulation 7.11.2.7 (F) NMAC. The undisputed facts establish that services are provided in the patient's home, which although may constitute "a building or buildings," are not used to provide medical services to the *public*.

Nevertheless, appreciating the Department's arguments that Taxpayer can conceivably be *both* an end stage renal dialysis provider *and* an outpatient facility, then the Hearing Officer would still find that Taxpayer qualifies for the deduction. The limitation in the Department's regulation since 2006, and the Legislature's subsequent codification, used the word, "solely," in the phrase excluding "an entity that is *solely* an outpatient facility." *See* Regulation 3.2.241.13 NMAC; NMSA 1978, Section 7-9-93 (F) (1) (b) (2023).

The ordinary meaning of "solely[2]" means "to the exclusion of all else." For this reason, the Department's interpretation of the regulation disqualifying Taxpayer as an outpatient facility is unsound because it renders "solely" to be meaningless in the context of the whole regulation. That, in turn, contradicts the rule that statutes "be construed so that no part of the statute is rendered surplusage or superfluous." *See Regents of Univ. of New Mexico v. New Mexico Fed'n*

[2] *See* "Solely." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/solely. Accessed 23 Apr. 2024.

of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 411, 962 P.2d 1236, 1246; *Johnson v. New Mexico Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333 ("[C]anons of statutory construction apply to regulatory and rule interpretation[.]")

Stated otherwise, to the extent a colorable argument can be made that Taxpayer is *both* "outpatient facility" and "end stage renal dialysis" provider, then "solely," meaning "to the exclusion of all else," must be given effect, and Taxpayer would still qualify for the deduction because it is not "solely," to the exclusion of all else, an "outpatient facility." But in this case, and for reasons already discussed, the Hearing Officer is persuaded that Taxpayer is not an outpatient facility, but if it were, then it is *not solely* an outpatient facility and it qualifies for the deduction under *Robison*.

Finally, the Department encourages the Hearing Officer to "consider how the Legislature provides a tax deduction for dialysis facilities when it wants to: Section 7-9-77.1" *See* Department's Motion, Page 11. The Department goes on to compare and contrast Section 7-9-93 with Section 7-9-77.1 suggesting that because the Legislature included dialysis facilities in the list of entities that could claim a deduction under Section 7-9-77.1, the absence of dialysis facilities in Section 7-9-93 suggests the intention to exclude them.

The Hearing Officer is not persuaded. *Robison* is on point and binding authority. Otherwise, reference to Section 7-9-77.1 merely illustrates the Legislature's familiarity with terms. If it knew how to explicitly include dialysis facilities in one statute, as it did when it enacted Section 7-9-77.1 (G) (with respect for receipts derived from payments by the United States), then it certainly knew how to exclude them when it enacted Section 7-9-93. Context matters, and in this case, Section 7-9-77.1 is written to include, while the question posed by Section 7-9-93, as observed by *Robison*, is whether taxpayer is nonexcluded.

Just as *Robison* reviewed Section 7-9-93 and the relevant regulations to fill the gap in ultimately concluding that staffing agencies were nonexcluded entities eligible for the deduction, the Hearing Officer reaches the same conclusion, following the same analysis, with regard to end stage renal dialysis providers.

Statutory Estoppel

The Department concedes that the 2021 amendment to Section 7-9-93, which codified the Department's longstanding regulations has retrospective effect. This concession presumably renders moot any dispute surrounding the issue of statutory estoppel. The Hearing Officer will nevertheless address the issue in light of the circumstances as they existed prior to the codification.

The Department has the authority to promulgate regulations "to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act." *See* 3.2.1.6 NMAC (2001). The authority stems from NMSA 1978, Section 9-11-6.2 (B) (1) (2015) which authorizes enactment of regulations that interpret and exemplify the statutes to which they relate. The Department's regulations carry a presumption that they are a "proper implementation of the provisions of the laws[.]" *See* NMSA 1978, Section 9-11-6.2 (G); *Robison*, 2023-NMCA-065, ¶ 12. Consistent with other agencies conferred legislative authority to promulgate rules and regulations, its rules and regulations "have the *force of law*." *See Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 1984-NMSC-042, ¶ 7, 101 N.M. 291, 292, 681 P.2d 717, 718 (Emphasis Added). The Department's authority to enact regulations also includes the powers to amend or repeal when necessary "by reason of any alteration of any such law." *Id.*

Despite changes to Section 7-9-93, Regulations 3.2.241.13 and 3.2.241.17 NMAC have not been amended or repealed since their promulgation in 2006. Therefore, the regulations

continue to be a presumptively proper implementation of the statute as it evolved from 2006 through the present, of course sharing the Department's observation that with the 2021 amendment, "there is no legal basis for differentiating between the Regulation and the amended Statute." *See* Department's Motion, Page 2, *citing Robison*, 2023-NMCA-065, ¶¶ 12 – 13.

Nevertheless, the Hearing Officer will briefly recognize that in the absence of the 2021 amendment, NMSA 1978, Section 7-1-60 (1993), provides the following:

> In any proceeding pursuant to the provisions of the Tax Administration Act, *the department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose*[.]

Because the Legislature intended for the Department's regulations to be relied upon (particularly during that period of time prior to the codification), it is by virtue of "shall" estopped from denying relief under Section 7-1-60. *See* NMSA 1978, Section 12-2A-4 (A) ("shall" expresses "a duty, obligation, requirement or condition precedent."); *See Marbob Energy Corp. v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 32, 206 P.3d 135, 143 ("[W]hen construing statutes, 'shall' indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent an clear indication to the contrary.")

Of course, the 2021 codification with retrospective effect further reinforces this conclusion, but the issue is presumably moot because the retrospective effect of the 2021 amendment means that the Taxpayer's claim is no longer grounded solely by the regulation, but also has support from the statute.

Conclusion

Consistent with *Robison*, Regulations 3.2.241.13 NMAC and 3.2.241.17 NMAC permit

Taxpayer, an employer entity, to claim a deduction under Section 7-9-93 on behalf of its employees or members because it is not otherwise excluded and has satisfied all of the remaining requirements of the deduction. *See Robison*, 2023-NMCA-065, ¶ 12; ¶ 16. Taxpayer's Motion and protest should be GRANTED. The Department's Motion should be, and hereby is, DENIED.

CONCLUSIONS OF LAW

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

B. The initial hearing was timely set and held within 90 days of the protest as required by NMSA 1978, Section 7-1B-8.

C. From 2007, receipts from payments by a managed health care provider for commercial contract services provided by a health care practitioner within the scope of their practice may be deducted. *See* NMSA 1978, Section 7-9-93 (2007).

D. From 2016, receipts of a health care practitioner for commercial contract services paid by a managed health care provider may be deducted. *See* NMSA 1978, Section 7-9-93 (2016).

E. Under both versions of the statute, the regulations interpreted the statute to allow for legal entities to claim the deduction, so long as they were not excluded entities under the regulations. *See* 3.2.241.13 and 3.2.241.17 NMAC (2006); *Robison Med. Research Group, LLC v. New Mexico Taxation & Revenue Dep't*, 2023-NMCA-065, 535 P.3d 709

F. The regulations are presumptively a proper interpretation of the statute. *See* NMSA 1978, Section 9-11-6.2; *Robison Med. Research Group, LLC v. New Mexico Taxation & Revenue Dep't*, 2023-NMCA-065, 535 P.3d 709.

G. Regulations 3.2.241.13 and 3.2.241.17 NMAC (2006) were codified with retrospective effect in 2021. *See* NMSA 1978, Section 7-9-93 (2021); *Robison Med. Research*

Group, LLC v. New Mexico Taxation & Revenue Dep't, 2023-NMCA-065, 535 P.3d 709.

H. Taxpayer's receipts were from managed health care providers for commercial contract services provided by health care practitioners within the scope of their practice, and the health care practitioners either owned or were employed by Taxpayer. Therefore, Taxpayer met the statutory and regulatory criteria for claiming the deduction. *See* NMSA 1978, Section 7-9-93. *See also* 3.2.241.13 NMAC.

I. Taxpayer is not a 501 (C) (3) organization, an HMO, a hospital, a hospice, a nursing home, or solely an outpatient facility or intermediate care facility licensed under the Public Health Act. Therefore, Taxpayer is not an entity excluded from claiming the deduction. *See* NMSA 1978, Section 7-9-93. *See also* 3.2.241.13 and 3.2.241.17 NMAC. *See also Robison Med. Research Group, LLC v. New Mexico Taxation & Revenue Dep't*, 2023-NMCA-065, 535 P.3d 709.

J. The Department shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the Department that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose. *See* Section 7-1-60.

For the reasons stated, Taxpayer is entitled to summary judgment and its protest should be, and hereby is, GRANTED. The Department's Motion should be, and hereby is, DENIED.

DATED: May 3, 2024

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

I hereby certify that I served the foregoing on the parties listed below this 3rd day of May, 2024 in the following manner:

First Class U.S. Mail and Email *First Class U.S. Mail and Email*

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