

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

4   **THOMAS RICHARDS**

5                   v.

**AHO Case Number 23.08-031A, D&O #24-13**

6   **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

7                                   **DECISION AND ORDER**

8                   On February 27, 2024, Hearing Officer Ignacio V. Gallegos, Esq., conducted an  
9   administrative hearing on the merits in the matter of the tax protest of Thomas Richards  
10   (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act.

11   At the hearing, Thomas Richards appeared, accompanied by his authorized representative Steven  
12   Bartlett, an employee of a New Mexico licensed CPA firm, Axiom CPAs. Staff Attorney  
13   Cordelia Friedman appeared, representing the opposing party in the protest, the Taxation and  
14   Revenue Department (Department). Department protest auditor Nicholas Pacheco appeared as a  
15   witness for the Department. Both Taxpayer and Department exhibits were presented and  
16   admitted or withdrawn as detailed in the Exhibit Log.

17                   Based on the evidence in the record, and after making findings of fact, the hearing officer  
18   finds that Taxpayer has failed to overcome the presumption of correctness that attached to the  
19   Department's assessment. Taxpayer contended that the underlying transactions from which his  
20   commissions were derived were not subject to tax, but provided no evidence of the underlying  
21   transactions, with little to no information about the manufacturers/wholesalers and retailers he  
22   derived commissions from. The Department argued that although the underlying transactions  
23   between manufacturer and retailer may have not been taxed if the sellers had been using NTTCS,  
24   the final transaction of retailer to end user is taxed, therefore the Taxpayer's commissions on sales

1 to retailers are not the type contemplated as deductible under NMSA Section 7-9-47 or Section 7-9-  
2 66. Without sufficient evidence in support of Taxpayer's contention, the Taxpayer's protest is  
3 therefore DENIED.

4 IT IS DECIDED AND ORDERED AS FOLLOWS:

5 **FINDINGS OF FACT**

6 **Procedural findings**

7 1. On May 15, 2022, the Department issued a Notice of Intent to Assess – Gross  
8 Receipts to Taxpayer for the gross receipts tax reporting periods beginning January 1, 2016 and  
9 ending December 31, 2019, based on a Federal Schedule C mismatch. [Exhibit #1;  
10 Administrative file].

11 2. On July 14, 2022, Taxpayer submitted a letter to the Department indicating that  
12 he did not believe he was required to pay gross receipts tax for income earned out-of-state.<sup>1</sup>  
13 [Administrative file; Exhibit #2.8].

14 3. On October 31, 2022, the Department issued a Notice of Assessment of Taxes and  
15 Demand for Payment for the gross receipts tax reporting periods beginning January 1, 2016 and  
16 ending December 31, 2019. The assessment was for audit gross receipts tax of \$24,371.78,  
17 penalty of \$4,874.28, and interest of \$4,062.28, for a total assessment due of \$33,309.03. [Letter  
18 ID# L0169584752; Exhibit #3].

19 4. On September 20, 2022, Taxpayer prepared a Tax Information Authorization,  
20 permitting Steven Bartlett, Axiom CPAs, access to his tax information. [Administrative file].

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<sup>1</sup> While Taxpayer raised the issue of out-of-state income within the protest letter, the issue was not raised in the prehearing statement, nor at the hearing. No evidence to support a claim of out-of-state earnings was presented at the hearing, and therefore the issue is presumed to have been abandoned.

1           5.       On January 11, 2023, the Taxpayer's representative submitted a letter of protest to  
2 the Department's protest office email alleging that receipts generated from commissions for sales  
3 between manufacturers and retailers of tangible personal property were not taxable.

4 [Administrative file].

5           6.       On February 8, 2023, the Department issued a letter acknowledging a timely  
6 protest of the Notice of Assessment. [Administrative file; Letter ID# L1774429296].

7           7.       On August 3, 2023, the Department filed a Request for Hearing asking that the  
8 Taxpayer's protest be scheduled for a scheduling hearing, alleging the amount at protest was  
9 \$33,309.03. [Administrative file].

10          8.       On August 3, 2023, the Department filed an Answer to Protest asserting that the  
11 Taxpayer must report and pay gross receipts taxes on business income for Taxpayer's New  
12 Mexico income from commissions. The failure to file and pay gross receipts taxes was  
13 discovered because Taxpayer reported Schedule C income without filing corresponding gross  
14 receipts and compensating tax returns. [Administrative file].

15          9.       On August 7, 2023, the Administrative Hearings Office sent a Notice of  
16 Telephonic Scheduling Hearing, giving the parties notice that a scheduling hearing would take  
17 place by telephone on August 25, 2023. The Notice of Telephonic Scheduling Hearing was sent  
18 to the parties' representative's addresses and email addresses. [Administrative file].

19          10.      On August 25, 2023, the undersigned Hearing Officer conducted a telephonic  
20 scheduling hearing. Taxpayer's representative Steven Bartlett appeared at the scheduling  
21 hearing. The Department was represented by Staff Attorney Cordelia Friedman. The parties  
22 present did not object that the hearing satisfied the 90-day hearing requirement of Section 7-1B-8  
23 (F) (2019). [Administrative file; Hearing Record of August 25, 2023].

1           11.     On August 28, 2023, the Administrative Hearings Office issued a Scheduling  
2 Order and Notice of Administrative Hearing, setting various deadlines and providing notice of a  
3 merits hearing to take place January 17, 2024. [Administrative file].

4           12.     On September 25, 2023, the Department submitted a Certificate of Service for  
5 discovery requests. [Administrative file].

6           13.     On October 23, 2023, the Taxpayer submitted a Certificate of Service for its  
7 responses to Department's discovery requests. [Administrative file].

8           14.     On October 27, 2023, the Taxpayer submitted a Certificate of Service for  
9 discovery requests. [Administrative file].

10          15.     On December 27, 2023, the Taxpayer submitted Taxpayer's Prehearing  
11 Statement. The prehearing statement listed unresolved issues of whether the Taxpayer's  
12 commission receipts were subject to Gross Receipts taxes, and whether Taxpayer should be  
13 awarded litigation costs and fees. [Administrative file].

14          16.     On December 27, 2023, the Department submitted the Department's Prehearing  
15 Statement. The prehearing statement listed a single unresolved issue of whether the Taxpayer can  
16 demonstrate that Taxpayer's commissions for sales of western wear are not taxable.  
17 [Administrative file].

18          17.     On January 16, 2024, Taxpayer submitted an Emergency Motion for a  
19 Continuance. The motion noted that the Department had been contacted and did not object. The  
20 Department thereafter requested that the merits hearing be converted to a scheduling conference  
21 to determine a suitable date for the reset merits hearing. [Administrative file].

22          18.     On January 16, 2024, the Administrative Hearings Office issued an Order  
23 Converting Merits Hearing to Telephonic Scheduling Hearing. [Administrative file].

1           19.     On January 17, 2024, the undersigned Hearing Officer conducted a second  
2 telephonic scheduling hearing. Taxpayer’s representative Steven Bartlett appeared at the  
3 scheduling hearing. The Department was represented by Staff Attorney Cordelia Friedman.  
4 [Administrative file; Hearing Record of January 17, 2024].

5           20.     On January 18, 2024, the Administrative Hearings Office issued an Amended  
6 Notice of Administrative Hearing, giving the parties notice that the merits hearing would take  
7 place in person on February 27, 2024. [Administrative file].

8           21.     The undersigned Hearing Officer conducted a merits hearing on February 27,  
9 2024 at the Santa Fe offices of the Administrative Hearings Office. Taxpayer and Taxpayer’s  
10 authorized representative appeared at the merits hearing. The Department was represented by  
11 Staff Attorney Cordelia Friedman, accompanied by protest auditor Nicholas Pacheco. The  
12 Hearing Officer preserved audio recordings of the hearing. [Administrative file; Hearing Record  
13 of February 27, 2024, recorded in three parts].

14           22.     The Department submitted an updated statement of liabilities as of the date of the  
15 hearing, with interest continuing to accrue. [Administrative file; Exhibit A].

16   **Substantive findings**

17           23.     Thomas Richards is a resident of New Mexico. [Administrative file; Examination  
18 of T. Richards].

19           24.     Mr. Richard’s occupation is, and was at the times pertinent to this protest, a  
20 salesman who connects and maintains client relations for various western wear  
21 manufacturers/wholesalers and western wear retailers. [Administrative file; Examination of T.  
22 Richards; Exhibit 7].

1           25.     One manufacturer, Lucchese Inc., provided a letter detailing the commission  
2 arrangement with Taxpayer. [Administrative file; Examination of T. Richards; Exhibit 7].

3           26.     The exhibit from Lucchese Inc. shows the name, address, FEIN, and a New  
4 Mexico Tax ID number for Lucchese Inc., along with a short description of the sales commission  
5 compensation agreement with Taxpayer. [Administrative file; Examination of T. Richards;  
6 Exhibit 7].

7           27.     The exhibit from Lucchese Inc., in pertinent part, says: “Mr. Richards represented  
8 Lucchese in identifying new and managing existing relationships with third-party western wear  
9 retailers in the region. He then arranges for those retailers to purchase products from Lucchese,  
10 which the retailers then resold to their end-user customers. All compensation paid to Mr.  
11 Richards came in the form of commissions earned for the wholesale transactions he facilitated.”  
12 It goes on to a second page which provides the following: “Statement of Activities: During the  
13 period in question by the State of New Mexico, Tom Richards was an independent salesperson  
14 compensated solely on a commission basis. Lucchese manufactures and distributes western wear  
15 to retailers. The retailers would then sell the merchandise to their customers. Mr. Richard’s [sic]  
16 commissions were directly related to Lucchese’s sales.” Notably, there is nothing concerning  
17 taxation in the letter, nor is there an accounting of the commissions paid to Taxpayer for his  
18 services. [Administrative file; Exhibit 7].

19           28.     The Taxpayer had other clients, in addition to Lucchese Inc. [Administrative file;  
20 Examination of T. Richards; Exhibit 7].

21           29.     When a retailer makes an order from one of the manufacturers whom Mr.  
22 Richards represents, the fulfillment of the order is directly between the manufacturer and the  
23 retailer. Mr. Richards does not take possession of the goods from the manufacturer, nor does he

1 deliver the goods to the retailer. Mr. Richards receives a commission based on the sale between  
2 manufacturers and retailers. [Administrative file; Examination of T. Richards; Exhibit 7].

3 30. The western wear retailer took possession of the property, then sold the property  
4 to their customers, the end users. The retailer typically would charge a gross receipts tax to the  
5 customer, and the retailer would then pay the tax to the Department thereafter. [Administrative  
6 file; Examination of T. Richards; Exhibit 7].

7 31. Mr. Richards received sales commissions directly from the  
8 manufacturers/wholesalers. [Administrative file; Examination of T. Richards; Exhibit 7].

9 32. Nicholas Pacheco is a protest auditor for the New Mexico Taxation and Revenue  
10 Department. [Administrative file; Examination of N. Pacheco].

11 33. The assessment arose from a Schedule C mismatch audit. The Taxpayer did not  
12 file gross receipts tax returns or pay gross receipts tax during the timeframes at issue.  
13 [Administrative file; Examination of N. Pacheco].

14 34. The protest auditor reviewed the Taxpayer's returns to determine if there were  
15 any applicable deductions for costs of goods sold. [Administrative file; Examination of N.  
16 Pacheco].

17 35. Interest has accrued since the issuance of the initial assessment. [Administrative  
18 file; Examination of N. Pacheco; Department Exhibit A].

19 36. The protest auditor determined that no deduction should apply because the  
20 Taxpayer did not provide evidence to support a deduction. [Administrative file; Examination of  
21 N. Pacheco].

22 37. In transactions between wholesalers and retailers, the transaction is not taxed if  
23 the retailer provides the wholesaler with a nontaxable transaction certificate (NTTC). However,

1 the wholesaler and the retailer are not parties to the action against the Taxpayer and the  
2 Department is not at liberty to disclose other taxpayer information, including whether NTTCs  
3 have been delivered. [Administrative file; Examination of N. Pacheco].

4 38. When a retailer delivers an NTTC to a wholesaler, the NTTC contains an  
5 affirmative statement from the retailer that the retailer will go on to resell the product and pay the  
6 tax on the sale. [Administrative file; Examination of N. Pacheco].

## 7 **DISCUSSION**

8 Taxpayer Thomas Richards is a salesman who does business in New Mexico as an  
9 independent contractor. Mr. Richards connects and maintains relationships between western  
10 wear manufacturers/wholesalers with western wear retailers. For this service, he receives a  
11 commission for the sales he facilitates. Taxpayer argued that the sales between the manufacturer  
12 and the retailer are not subject to tax, under New Mexico's non-taxable transaction certificate  
13 (NTTC) structure, and the commissions Taxpayer received from manufacturers for facilitating  
14 these transactions are also not subject to tax. The Department argued that because the retail sales  
15 of the western wear are ultimately subject to gross receipts tax when sold to the ultimate buyer,  
16 the commissions for the service of facilitating sales between manufacturers and retailers are not  
17 the type of commissions contemplated by New Mexico law to be deductible. For reasons  
18 detailed below, the Taxpayer's evidence failed to overcome the presumption of correctness  
19 which attached to the assessment.

### 20 **Presumption of correctness**

21 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is  
22 presumed correct. Accordingly, it is a taxpayer's burden to present some countervailing evidence



1 or legal argument to show that they are entitled to an abatement, in full or in part, of the  
2 assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-  
3 NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the  
4 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*  
5 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

6 The Taxpayer's burden established under the presumption of correctness is a burden of  
7 producing evidence that tends to support Taxpayer's position. *Gemini Las Colinas, LLC v. New*  
8 *Mexico Taxation & Revenue Department*, 2023-NMCA-039, ¶ 16, 531 P.3d 622. Once the  
9 Taxpayer has produced the evidence in support of Taxpayer's position, the Department may present  
10 its evidence in support of the assessment, then it is the responsibility of the Hearing Officer to weigh  
11 the evidence and determine the outcome of the protest. *Id.*, ¶ 17.

12 The burden is also on taxpayers to prove that they are entitled to an exemption or  
13 deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't*,  
14 2007-NMCA-050, ¶141 N.M. 520, 157 P.3d 85; *See also Till v. Jones*, 1972-NMCA-046, 83  
15 N.M. 743, 497 P.2d 745. "Where an exemption or deduction from tax is claimed, the statute must  
16 be construed strictly in favor of the taxing authority, the right to the exemption or deduction must  
17 be clearly and unambiguously expressed in the statute, and the right must be clearly established  
18 by the taxpayer." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068,  
19 ¶8, 107 N.M. 540, 760 P.2d 1306; *see also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-  
20 NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649; *see also Chavez v. Comm'r of Revenue*, 1970-  
21 NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

22 **Receipts from Commissions under the Gross Receipts and Compensating Tax Act.**

1           The assessment in this protest arises from an application of the Gross Receipts and  
2 Compensating Tax Act, NMSA 1978, Sections 7-9-1 through 7-9-117, which imposes a tax for the  
3 privilege of engaging in business, on the receipts of any person engaged in business in New Mexico.  
4 *See* NMSA 1978, Section 7-9-4 (2010). The Department issued its assessment following a  
5 comparison between the Taxpayer’s income reported on his federal Schedule Cs for tax years 2016,  
6 2017, 2018, and 2019 and the Taxpayer’s gross receipts tax CRS-1 returns for the same time frame.  
7 The comparison revealed Taxpayer had not filed CRS-1 returns to report gross receipts, nor did  
8 Taxpayer pay gross receipts taxes for the years at issue.

9           Taxpayer’s Schedule C income was derived from sales commissions from the sale of  
10 western wear. The statutory definition of “gross receipts” under Section 7-9-3.5 (A)(1) (effective  
11 June 15, 2007, to June 30, 2019) states, in pertinent part: “‘gross receipts’ means the total amount of  
12 money or the value of other consideration received from selling property in New Mexico, ... or  
13 from performing services in New Mexico.” The section goes on to say, “‘gross receipts’ includes  
14 ‘the total commissions or fees derived from the business of buying, selling or promoting the  
15 purchase, sale or lease, as an agent or broker on a commission or fee basis, of any property, service,  
16 stock, bond or security.’” NMSA 1978, Section 7-9-3.5 (A)(2)(b).

17           Under the broad umbrella of the gross receipts tax, commissions received as payment for a  
18 service are expressly taxable, as “promoting the purchase” as an “agent or broker” of the  
19 manufacturer, on a “commission or fee basis” of “any property” offered by the manufacturers to  
20 retailers. Section 7-9-3.5 (A)(2)(b).

21           The statutory definition of “engaging in business” is “carrying on or causing to be carried on  
22 any activity with the purpose of direct or indirect benefit.” NMSA 1978, Section 7-9-3.3 (2019).  
23 The business activity of connecting manufacturers/wholesalers to retailers for commercial sales in

1 New Mexico for the personal benefit of receiving commissions was engaging in business which  
2 triggers the statutory presumption that all receipts of a person engaging in business are taxable. *See*  
3 Section 7-9-3(P) (2019), Section 7-9-3.3 (2019), and Section 7-9-5(A) (2019). Yet, despite the  
4 general presumption of taxability, a taxpayer may qualify for the benefits of various deductions and  
5 exemptions.

6 *Taxpayer's evidence in support of claims for deduction under Section 7-9-66.*

7 Taxpayer asserted that his commissions fell into the category of “[r]eciepts derived from  
8 commissions of sales of tangible personal property which are not subject to the gross receipts  
9 tax.” Section 7-9-66. The statute has three prongs, first, that the receipts are derived from  
10 commissions; second, that the commissions are from sales of tangible personal property; and third,  
11 that the sales are not subject to the gross receipts tax. After satisfying all three prongs, the receipts of  
12 a commission-based salesperson may be deducted from gross receipts.

13 Taxpayer provided evidence that his receipts, at least from Lucchese, are derived from  
14 commissions, satisfying the first prong of Section 7-9-66. He provided proof that the sales, at  
15 least from Lucchese, were of goods (western wear) which are tangible personal property,  
16 satisfying the second prong of Section 7-9-66.

17 However, Taxpayer struggled to provide any documentary, testimonial, or other evidence  
18 that the underlying sales transactions between manufacturer and retailer were “not subject to the  
19 gross receipts tax,” the third prong of Section 7-9-66. The only document purported to support  
20 this claim was the letter from Lucchese, Inc. The letter from Lucchese, Inc. (a manufacturer/  
21 wholesaler) describes the arrangement between Taxpayer and Lucchese, Inc. whereby Lucchese  
22 paid Taxpayer a commission for sales of Lucchese’s products to retailers.

1           The letter does not describe any tax agreement between the Taxpayer and Lucchese, or  
2 between Lucchese and its retailers as customers. Nor does it provide evidence that the underlying  
3 transactions were not taxable, which is the crux of the Taxpayer’s contention. The letter does not  
4 claim that the manufacturer sought or obtained nontaxable transaction certificates (NTTCs) for  
5 the transactions negotiated by Taxpayer. The letter does not assign a dollar value to the  
6 commissions earned by Taxpayer from this manufacturer during the timeframes at issue. The  
7 letter does not name any retailer who purportedly resold the merchandise.

8           Ordinarily, it is not the role of the Hearing Officer to determine the taxability of  
9 transactions involving non-parties to a dispute, however, a brief overview of the underlying  
10 transaction’s structure is necessary in this case, as it pertains to whether the underlying sales  
11 transaction is taxable, to satisfy the third prong of Section 7-9-66. *See In the Matter of the*  
12 *Protest of Vidia Wesenlund*, Decision and Order # 16-28, issued June 21, 2016 (non-  
13 precedential) (“Before determining whether Taxpayer owes gross receipts on her commissions, a  
14 determination must be made whether the underlying transactions, the sales..., are taxable.”).

15           The facts available in this regard are very limited. We have information from a singular  
16 western wear manufacturer, Lucchese, at a time when Mr. Thomas was representing several  
17 others as well. The fact that the singular manufacturer sells western wear provides substantiation  
18 for the taxability of the transactions. Here, again, as above, the statutory definition of “gross  
19 receipts” under Section 7-9-3.5 (A)(1) states: “‘gross receipts’ means the total amount of money  
20 or the value of other consideration received from selling property in New Mexico.” The sale of  
21 western wear is generally taxable, as it is tangible personal property.

22           The letter offered into evidence provides no assertion of an applicable deduction taken by  
23 the seller, Lucchese, and, if so, what amount of Taxpayer’s commissions might have derived

1 from such deductible underlying transaction(s). The existence of any deduction taken by the  
2 manufacturer/wholesaler on the sales negotiated by Mr. Thomas is completely absent. Hence,  
3 whether the sales receipts from the manufacturer/wholesalers were in fact deducted is not based  
4 in the documentation, but left entirely to speculation. Nevertheless, the letter provides one  
5 important fact, that the retailers who bought Lucchese's wares then resold the property to  
6 consumers. It is this fact that the Taxpayer uses as a foothold for Taxpayer's claim of  
7 "deductibility."

8 *Deductibility of sales transactions between manufacturers and retailers.*

9 Instead of evidence that the transactions he negotiated between manufacturers and  
10 retailers actually were deducted, Taxpayer focused his efforts on whether a deduction *could*  
11 apply.

12 Taxpayer's specific claim was that under NMSA 1978, Section 7-9-47 (effective 1994-  
13 June 30, 2021)<sup>2</sup>, sales he negotiated between manufacturers and retailers who then resell the  
14 merchandise are allowed a deduction for "[r]eceipts from selling tangible personal property or  
15 licenses may be deducted from gross receipts ... if the sale is made to a person who delivers a  
16 nontaxable transaction certificate to the seller." The regulation interpreting Section 7-9-66,  
17 Regulation 3.2.225.12 NMAC (6/14/2001), states "[r]eceipts derived from commissions on sales of  
18 tangible personal property, the receipts from which sales are either exempted from the gross receipts  
19 tax or *deductible* from gross receipts, may be deducted from gross receipts." (emphasis added).

20 While it is true that a manufacturer/seller who sells to a retailer, who then resells to an  
21 end customer *may* obtain a Type 2 NTTC in order to support a deduction from its gross receipts

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<sup>2</sup> NMSA 1978, Section 7-9-47 was amended in 2021 (outside the scope of the timeframe at issue here) to reflect the ability of buyers to provide either a nontaxable transaction certificate to the seller or alternative evidence, pursuant to Section 7-9-43.

1 tax for the particular transaction(s), there is nothing in the record that provides evidence that this  
2 actually occurred with Lucchese or any other manufacturer with whom Taxpayer dealt.

3 The deduction allowed by Section 7-9-47 can be summarized as a deduction for the sales  
4 transactions which take place before the tangible personal property reaches the end user. This is an  
5 important feature of the New Mexico gross receipts tax system that prevents multiple taxable  
6 occurrences (pyramiding or stacking) before the product gets to the end user. Because this deduction  
7 exists, although there may be several levels of sales, there remains only a single sales event which  
8 requires the seller to remit tax – the sale from the retailer to the end user – that is subject to the gross  
9 receipts tax.

10 Taxpayer showed that the transaction between manufacturers and retailers was  
11 “deductible” under the statute, as it was “able” to be “deducted.” Regulation 3.2.225.12 NMAC.  
12 The “-ible” is an adjective suffix meaning “capable of...” See “Able.” Merriam-Webster.com  
13 Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/able>. (Last accessed  
14 May 23, 2024). Because the sales transaction between manufacturer and retailer is capable of being  
15 deducted, it is *deductible*. In this instance, the underlying transaction of sales from a wholesaler to a  
16 retailer is capable of being deducted under Section 7-9-47.

17 But whether the manufacturers took advantage of this deduction (or any other deduction or  
18 exemption) cannot be assumed and must rely on evidence. One of the technical requirements for a  
19 taxpayer taking the deduction outlined in Section 7-9-47 requires the buyer to deliver a nontaxable  
20 transaction certificate (NTTC) (or alternative evidence) to the seller. Other evidence of a deduction  
21 or exemption might suffice, but here there is none. See FYI-204, Nontaxable Transaction  
22 Certificates (NTTCs). Alternative evidence may include invoices or contracts, documentation of the  
23 purchaser’s use or disposition of the property, a statement from the purchasers indicating an

1 intention to resell the property, or other evidence that establishes entitlement to a deduction. *Id.*  
2 Here, no documentary evidence from any source supports the claim that the manufacturer took a  
3 deduction from its sales, or that retailers resold the property.

4 *In the Matter of the Protest of Marc A. Gelinis*, Decision and Order No. 18-02, issued  
5 January 9, 2018 (non-precedential), considered the taxability of commissions generated from sales  
6 of prosthetic devices. The Department argued that the taxpayer in *Gelinis* could not satisfy the  
7 seller’s requirements under Section 7-9-73 in order to claim the deduction because he could not  
8 produce the required NTTCs.

9 The hearing officer in *Gelinis* observed that the taxpayer need not satisfy the seller’s  
10 requirements of that statute because the taxpayer was not the “seller” under Section 7-9-73.  
11 Instead, the taxpayer in *Gelinis* was a commissioned sales representative meaning that the  
12 statute directly applicable to the taxpayer’s claim was NMSA 1978, Section 7-9-66. Section 7-9-  
13 73, although relevant to the determination of taxability under Section 7-9-66, was not directly  
14 applicable to receipts derived from commissions from sales of prosthetic devices. Ultimately, the  
15 hearing officer determined based on all of the evidence presented in that case that the taxpayer  
16 established a right and entitlement to the deduction under Section 7-9-66 even in the absence of  
17 NTTCs.

18 There are similarities between the Taxpayer here and the taxpayer in *Gelinis*. In *Gelinis*,  
19 the taxpayer submitted that because he was the middleman, negotiating sales for the seller, the  
20 manufacturers of the devices, that he was not required to or responsible for maintaining records of  
21 NTTCs, since he was not the manufacturer or distributor of the devices, i.e., the seller. Pg. 8. The  
22 hearing officer agreed. Pg. 9. This is true here, too, where the Taxpayer is the “middleman.”  
23 Taxpayer is not the manufacturer or seller, nor is Taxpayer the end buyer or retailer. Taxpayer

1 does not take possession of the goods from the manufacturer or deliver them to the retailer.

2 Taxpayer's commissions were paid by the manufacturers based on the sales contracts/orders he  
3 negotiated.

4 However, there are differences as well between the situation in *Gelinas* and here. First, the  
5 Department in *Gelinas* did not dispute that *all* commissions derived from the sale of prosthetic  
6 devices which were deductible under Section 7-9-73. Instead, it asserted that the taxpayer's claim  
7 should fail due to the failure to possess NTTCs under Section 7-9-73.

8 Unlike *Gelinas*, there is no concurrence here between the parties with regard to the amount  
9 of the commissions that would be deductible if Taxpayer satisfied every other element of its claim.  
10 Establishing an amount of deductible receipts requires evidence this Taxpayer has not presented,  
11 dissimilar to the background presented by *Gelinas*.

12 Second, this case does not involve Section 7-9-73 which provides an explicit and focused  
13 deduction for the sale of a unique type of property to a narrow category of buyer (Section 7-9-73  
14 includes a comprehensive list of licensed medical professionals) to be used for a specific purpose,  
15 none of which was in dispute in *Gelinas*. Because there was no dispute in *Gelinas* that all devices  
16 were purchased by qualified medical professionals for their intended medical use, the focus of the  
17 issue was on whether taxpayer was required to possess NTTCs. No such circumstances are present  
18 in this case. The Department correctly argues that western clothing in this case is different from  
19 prosthetic devices central to *Gelinas*.

20 Section 7-9-66, which is the statute upon which *Gelinas* was ultimately decided, has not  
21 changed since the application in *Gelinas*, and the Department's interpretation through regulation  
22 and other guidance, although updated, still does not require substantiation with NTTCs



1 specifically. *See* Regulation 3.2.1.18 (GG) NMAC (2012-2021); Regulation 3.2.1.18 (P) (2001);  
2 *see also* FYI-105, Gross Receipts & Compensating Taxes: An Overview (Rev. 07/2020), Pg. 16.

3 As mentioned above, the products *Gelinas* sold (prosthetics) are different from those the  
4 Taxpayer here sold (clothing). The Department’s interpretation, as shown in FYI-105, Pg. 16,  
5 shows that the Department interprets the commission deduction to apply “on sales of tangible  
6 personal property when *the property sold* is not subject to gross receipts tax” (emphasis added).  
7 Prosthetics are a type of product expressly granted a deduction, but clothing is not. *See* Section  
8 7-9-73.

9 The above-quoted language of FYI-105 presents a novel interpretation of the third prong  
10 of Section 7-9-66. To elucidate this point, we begin with the language of statute: “Receipts  
11 derived from commissions on sales of tangible personal property which are not subject to the  
12 gross receipts tax may be deducted from gross receipts.” Section 7-9-66. Grammatically, there  
13 are three plural nouns (receipts, commissions, and sales) at the beginning of the sentence that  
14 could be the subject of the verb “are.” Since there are no commas separating the phrase “which  
15 are not subject to the gross receipts tax,” “property” cannot be the subject of the verb “are.”  
16 Subjects and verbs must match number.<sup>3</sup> The clause may be re-written as: “sales which are not  
17 subject to gross receipts tax.” If there had been commas separating the clause “which are not  
18 subject to the gross receipts tax” the statute would read “Receipts derived from commissions on  
19 sales of tangible personal property, which *is* not subject to the gross receipts tax, may be  
20 deducted from gross receipts.” This change of punctuation changes the number of the verb,  
21 switching “are” to “is,” as the subject of the verb has changed from “sales” (a plural word) to

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<sup>3</sup> L. SUE BAUGH, ESSENTIALS OF ENGLISH GRAMMAR 27 (3rd ed., 2005). “Verbs must agree with their subject in number. Therefore, a singular subject takes a singular verb; a plural subject takes a plural verb.”

1 “property” (a singular word, in this context). Therefore, property is not the subject; sales are the  
2 subject.

3 The regulation which closely interprets the statute, Regulation 3.2.1.18 (P) (6) reads  
4 similarly to the statute: “If the receipts from the underlying sale of the tangible property are  
5 exempt or deductible, the commission received by an independent contractor from selling the  
6 tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA  
7 1978.” This regulation again shows that the intended subject is the “receipts from the underlying  
8 sale,” not the “property,” which is exempt or deductible. FYI-105, however, by focusing on  
9 whether the “property” is exempt or deductible, unnecessarily limits the statute’s core concept,  
10 that the “sales” rather than the “property” may be exempt or deductible.

11 Certainly, there are certain types of property that the legislature intended to be free from  
12 taxation, for example, the sale of prosthetic devices. *See Gelinis*; *see also* Section 7-9-73. There  
13 are also certain types of sales, the property type notwithstanding, that are intended to be beyond  
14 the reach of New Mexico taxation, for example, intermediate sales, when the buyer purchases the  
15 property for resale. *See* Section 7-9-47. The goal of statutory interpretation is to determine  
16 legislative intent, and in doing so “[w]e look primarily to the language of the statute.” *Kilmer v.*  
17 *Goodwin*, 2004-NMCA-122, ¶18 (internal citations omitted). If the statute is clear and unambiguous  
18 we need go no further. *Id.* “The text of a statute or rule is the primary, essential source of its  
19 meaning.” NMSA 1978, Section 12-2A-19. The statute is clear and unambiguous, as is the  
20 interpretation through regulation, but they are not properly interpreted by FYI-105’s focus on  
21 “property.” Therefore, the type of property sold is not the only determinative factor when  
22 considering the question of whether the “sales... are not subject to the gross receipts tax.”

1 We then are left with the question of whether and to what extent NTTCs or other  
2 evidence may be relied upon to justify the deductibility of the sales in this instance.

3 *Evidence of deductibility.*

4 As noted above, whether the manufacturers took advantage of the deduction (or any other  
5 deduction or exemption) available to them cannot be assumed and relies on evidence. One of the  
6 technical requirements for a taxpayer taking the deduction outlined in Section 7-9-47 requires the  
7 buyer to deliver a nontaxable transaction certificate (NTTC) (or alternative evidence) to the seller.  
8 Other evidence of a deduction or exemption might suffice, but here there is none. *See* FYI-204,  
9 Nontaxable Transaction Certificates (NTTCs).

10 In *Gelinas*, the taxpayer acted as agent for manufacturers and sold *only* goods that fell into  
11 the category of implantable medical devices, i.e., prosthetics. The Department agreed that those  
12 product sales were within the scope of the statutory deduction but challenged the sufficiency of  
13 evidence presented to accept a deduction for commissions. The commission-based sales agent in  
14 *Gelinas* had no access to the same documentation as a buyer or seller in that situation, and there was  
15 limited evidence to support the claim a deduction was actually taken by the third-party seller.

16 Here, we have credible testimony of the Taxpayer and we have the letter from Lucchese  
17 Inc., a manufacturer. We have no evidence of or from the purported retailer(s). While NTTCs are  
18 certainly the best reliable evidence, as they cover the second party to the contract, the retailer, giving  
19 an affirmative statement that the products are being purchased for resale. NTTCs may not be  
20 available to a sales agent, who is neither the buyer nor the seller.

21 Conceptually, the Taxpayer was correct in its interpretation of the statutes. However, this  
22 may be cold comfort because, despite presenting a colorable legal claim, Taxpayer failed (unlike  
23 the taxpayer in *Gelinas*) to provide evidence to establish that any amount of his commissions

1 could apply the deduction to which he could have been entitled. Sales receipts, purchase orders,  
2 sales reports, a listing of commissions paid and by whom, even 1099s, were not presented. While  
3 such granular evidence may not be required to establish every transaction was deductible, some  
4 modicum of evidence is necessary. Evidence presented simply did not touch any basis on which  
5 specific amounts were deductible under Section 7-9-47 and would be deducted by Taxpayer  
6 under Section 7-9-66.

7 *Gelinas* is not only distinguishable based on the applicable law, but also on the facts and  
8 evidence presented. For this reason, the hearing officer does not read *Gelinas* to stand for the  
9 proposition that a blanket deduction for independent contractor commissions applies without  
10 requiring evidence that the seller took the allowed deduction.

11 First, because independent salespeople paid on commission provide a sales service, and  
12 services are subject to gross receipts. Regulation 3.2.1.18 (GG) (1) NMAC (2012-2021):

13 Commissions and other consideration received by an independent  
14 contractor from performing a sales service in New Mexico with  
15 respect to the tangible or intangible personal property of other  
16 person are gross receipts whether or not the other person reports  
17 and pays gross receipts tax with respect to the receipts from the  
18 sale of the property... Receipts, whether in the form of  
19 commissions or other remuneration, of the person performing a  
20 sales service in New Mexico are gross receipts of the person  
21 performing the sales service.

22 Second, under Regulation 3.1.6.12 (A) NMAC, “the taxpayer has the burden of coming forward  
23 with some countervailing evidence tending to dispute the factual correctness of the assessment.”

24 The Court of Appeals has determined that “[t]he regulation’s call for ‘some countervailing  
25 evidence’ that ‘tend[s]’ to dispute the assessment, 3.1.6.12(A) NMAC, is merely a threshold  
26 requirement for evidence, and that evidence need not be credible or ultimately persuasive.”

27 *Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Dep’t*, 2023-NMCA-039, ¶ 25,  
28 531 P.3d 622, 630.

1           The hearing officer in *Gelinas* was persuaded that the taxpayer overcame its evidentiary  
2 burden. In this case, the manufacturer’s letter simply does not present facts that might overcome  
3 the presumption of correctness as to all the receipts Taxpayer was paid, by Lucchese or by any  
4 other manufacturer he worked for, absent impermissible speculation concerning non-parties’  
5 general and per transaction tax status, which is privileged information. Nor does the letter assign  
6 a dollar amount which may help justify a specific deduction.

7           The Taxpayer’s testimony then is the only evidence that the transactions between  
8 wholesaler/manufacturers and retailers were non-taxable transactions. The Taxpayer did not  
9 testify as to commissions, where or from whom earned, or dollar amounts from each customer.  
10 The Taxpayer did not testify as to his personal knowledge of any particular sales contracts  
11 (which may or may not include tax) of the manufacturers or retailers. The Taxpayer did not  
12 provide copies of NTTCs he helped negotiate between manufacturers and retailers. Taxpayer  
13 testified as to his belief of what occurred between manufacturers and retailers, but provided no  
14 specific instances. Taxpayer’s unsubstantiated statements are insufficient to overcome the  
15 presumption of correctness that attached to the assessment. *See MPC Ltd. v. N.M. Taxation &*  
16 *Revenue Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *see also* Regulation 3.1.6.12  
17 (A) NMAC (1/15/01). Therefore, the Taxpayer did not meet the threshold burden of overcoming  
18 the presumption of correctness.

19           Even if Taxpayer, for the sake of argument, may be found to have met the threshold burden  
20 of production of evidence and thus overcame the presumption of correctness, the Department’s  
21 presentation of Mr. Pacheco as witness showed no basis for a deduction, supporting the  
22 Department’s assessment, and Taxpayer did not ultimately carry his burden of persuasion that he  
23 was entitled to the claimed deduction. The burden is on taxpayers to prove that they are entitled to

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

10 To the extent that the deduction under Section 7-9-66 does not apply, receipts from  
11 commissions by a non-employee agent are taxed. *See Regulation 3.2.1.19 NMAC.*

## 12 **Conclusion**

13 The Taxpayer was unable to overcome the presumption of correctness in the assessment by  
14 providing evidence of a deduction, with evidence of NTTCs or other evidence, that might show that  
15 the sales he negotiated between manufacturers and retailers actually took advantage of the  
16 deductions available to them under the statutes and were not subject to gross receipts tax. And  
17 although Taxpayer was correct that the statute allowing deductions for commissions was broader  
18 than the Department’s narrow interpretation, the evidence to support taking the deduction was  
19 insufficient, both as a matter of overcoming the presumption of correctness, and as substantive  
20 proof that the taxpayer was entitled to take a deduction.

## 21 **CONCLUSIONS OF LAW**

22 A. The Taxpayer filed a timely written protest to the Notice of Assessment of Tax and  
23 Demand for Payment issued under Letter ID number L0169584752, and jurisdiction lies over the

1 parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-24 (D) (2019); *see also*  
2 NMSA 1978, Section 7-9-1, *et seq.* (“Gross Receipts and Compensating Tax Act”).

3 B. The hearing was timely set and held within 90-days of the Department’s request for  
4 hearing under NMSA 1978, Section 7-1B-8 (F) (2019). Parties did not object that the scheduling  
5 hearing satisfied the 90-day hearing requirement of Section 7-1B-8 (F). *See also* Regulation  
6 22.600.3.8 (J) NMAC (8/25/20).

7 C. Any assessment of tax made by the Department is presumed to be correct.  
8 Therefore, it is the taxpayer’s burden to come forward with evidence and legal argument to establish  
9 that the Department’s assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-  
10 17 (C) (2007).

11 D. “Tax” is defined to include not only the tax program’s principal, but also interest and  
12 penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019). Assessments of penalties and interest therefore  
13 also receive the benefit of a presumption of correctness. *See* Regulation 3.1.6.13 NMAC (1/15/01).

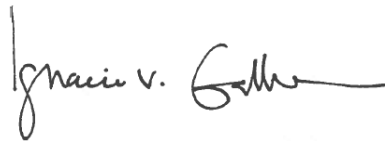
14 E. Taxpayer bears the burden of overcoming the presumption of correctness that  
15 attached to the Department’s Assessment. Taxpayer presented unsupported testimony and a letter  
16 from a manufacturer that did not touch on the claimed deduction, and was unable to overcome  
17 the presumption of correctness. *See* NMSA 1978, Section 7-1-17 (C) (2007); *see also* Regulation  
18 3.1.8.10 NMAC (08/30/2001); *see also Gemini Las Colinas, LLC v. New Mexico Taxation &*  
19 *Revenue Department*, 2023-NMCA-039, ¶ 16, 531 P.3d 622; *see also* Regulation 3.1.6.12  
20 NMAC; *see also MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021, ¶13, 133  
21 N.M. 217, 62 P.3d 308; *see also* Regulation 3.1.6.12 (A) NMAC (1/15/01).

22 F. The Taxpayer’s evidence and legal argument, weighed against the Department’s  
23 evidence and legal argument was insufficient to find by a preponderance of evidence that

1 Taxpayer was entitled to a deduction under Section 7-9-66 stemming from various transactions  
2 that may have been deductible by the wholesalers under Section 7-9-47. *See* NMSA 1978,  
3 Section 7-1-18 (C) (2021); *see also Gemini Las Colinas, LLC v. New Mexico Taxation &*  
4 *Revenue Department*, 2023-NMCA-039, ¶ 29, 531 P.3d 622.

5 For the foregoing reasons, the Taxpayer's protest **IS DENIED**.

6 DATED: September 27, 2024



7  
8 Ignacio V. Gallegos  
9 Hearing Officer  
10 Administrative Hearings Office  
11 Post Office Box 6400  
12 Santa Fe, NM 87502

13 **NOTICE OF RIGHT TO APPEAL**

14 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
15 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
16 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
17 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
18 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
19 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
20 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
21 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
22 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,



1 | which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
2 | statement from the appealing party. *See* Rule 12-209 NMRA.

3 | **CERTIFICATE OF SERVICE**

4 | On September 27, 2024 a copy of the foregoing Decision and Order was submitted to the  
5 | parties listed below in the following manner:

6 | *First Class Mail and E-Mail*

*First Class Mail E-Mail*

7 |

8 |

9 | ***INTENTIONALLY BLANK***