

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **ONLINE RADIOLOGY MEDICAL**
3 **GROUP, INC.,**

4 Protestant-Appellant,

5 v.

6 **NEW MEXICO TAXATION & REVENUE**
7 **DEPARTMENT,**

8 Respondent-Appellee.

9 **APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE**
10 **Chris Romero, Hearing Officer**

11 Sutin, Thayer & Browne
12 Suzanne W. Bruckner
13 Wade L. Jackson
14 Albuquerque, NM

15 for Appellant

16 Raúl Torrez, Attorney General
17 Peter Breen, Special Assistant Attorney General
18 Santa Fe, NM


19 for Appellee

20 **MEMORANDUM OPINION**

21 **IVES, Judge.**

22 {1} Online Radiology Medical Group, Inc. (Taxpayer) appeals from an
23 administrative hearing officer's (AHO) decision and order upholding an assessment
24 of gross receipts tax liability made by the New Mexico Taxation and Revenue

Court of Appeals of New Mexico
Filed 3/21/2023 9:33 AM



Mark Reynolds

No. A-1-CA-38371

1 Department pursuant to the Gross Receipts and Compensating Tax Act (GRCTA),
2 NMSA 1978, §§ 7-9-1 to -120 (1966, as amended through 2022). Taxpayer argues
3 that (1) the AHO erred by applying the legal residuum rule to the tax protest
4 adjudication; (2) in the alternative, if the rule is applicable, the AHO misapplied it
5 here; and (3) the AHO’s finding that the stipends were subject to the GRCTA was
6 not supported by substantial evidence. We affirm.

7 **DISCUSSION**

8 **I. The AHO Did Not Err by Applying the Legal Residuum Rule to** 9 **Taxpayer’s Tax Protest Adjudication**

10 {2} Taxpayer argues that this Court should reverse the decision and order because
11 the legal residuum rule does not apply in proceedings that “only involve[] money,”
12 and especially where, as here, the application of the rule would favor a government
13 agency. We understand Taxpayer to contend that because the AHO erred by
14 concluding that the legal residuum rule applies, the decision and order was “not in
15 accordance with the law.” NMSA 1978, § 7-1-25(C)(3) (2015). We are not
16 persuaded.

17 {3} Under New Mexico law, the legal residuum rule “require[s] a residuum of
18 competent evidence to support the findings of an administrative agency *where a*
19 *substantial right is at stake.*” *Duke City Lumber Co. v. N.M. Env’t Improvement Bd.*,
20 1984-NMSC-042, ¶ 19, 101 N.M. 291, 681 P.2d 717 (emphasis added). Taxpayer
21 has not persuaded us that New Mexico law precludes application of the legal

1 residuum rule in the context of taxation—i.e., that taxation involves a purely
2 monetary interest, and a monetary interest does not amount to a substantial right.
3 Indeed, in our Supreme Court’s most recent legal residuum rule precedent—in which
4 it explicitly reaffirmed the “substantial right” limitation on the rule’s applicability—
5 the Court applied the rule when the dispute involved a corporation’s property
6 interests.¹ See generally *Duke City Lumber Co.*, 1984-NMSC-042.

7 {4} In addition, Taxpayer has cited no case from New Mexico or elsewhere to
8 support the notion that the legal residuum rule should be applied asymmetrically—
9 that is, against state agencies but not in favor of them. Nor has Taxpayer presented
10 us with anything more than a conclusory assertion that the legal residuum rule should
11 be applied in this manner. Absent authority or a developed argument on the subject,
12 we decline to break new ground under New Mexico law by holding that the legal
13 residuum rule applies asymmetrically. See *Corona v. Corona*, 2014-NMCA-071,
14 ¶ 28, 329 P.3d 701 (“This Court has no duty to review an argument that is not
15 adequately developed.”).

¹Our research reveals that the legal residuum rule has been abolished under federal law, *Richardson v. Perales*, 402 U.S. 389 (1971), and that New Mexico’s legal residuum rule jurisprudence has been the subject of judicial and academic criticism. See *Chavez v. Emp. Sec. Comm’n*, 1982-NMSC-077, ¶¶ 25-41, 98 N.M. 462, 649 P.2d 1375 (Easley C.J. & Payne, J., dissenting); Michael B. Browde, *Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution*, 18 N.M. L. Rev. 525, 534-35, 554, 556-57 (1988). However, Taxpayer has not discussed these authorities’ criticisms and, in any event, we are bound by our Supreme Court’s precedent on the subject.

1 {5} For these reasons, Taxpayer has not persuaded us that the AHO erred by
2 applying the legal residuum rule to the tax protest adjudication here. *See Farmers,*
3 *Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d
4 1063 (“Appellant must affirmatively demonstrate its assertion of error.”).

5 **II. The AHO Did Not Misapply the Legal Residuum Rule to Taxpayer’s Tax**
6 **Protest Adjudication**

7 {6} Taxpayer also contends that, if the legal residuum rule is generally applicable
8 to tax protest proceedings, the AHO misapplied it here, and the decision and order
9 is therefore “not in accordance with the law.” Section 7-1-25(C)(3). We disagree.

10 {7} Taxpayer’s arguments on appeal focus on the testimony of James Ortiz,
11 Taxpayer’s only witness at the hearing. At the time of the hearing, Mr. Ortiz was
12 employed by REDW, LLC as a senior manager in its tax department. Taxpayer
13 contracted with REDW to perform audit defense services on its behalf, but notably
14 REDW “did not represent Taxpayer during any year giving rise to the audit.” Mr.
15 Ortiz testified regarding Taxpayer’s business practices and accounting.

16 {8} To the extent that Taxpayer argues that the legal residuum rule does not
17 require the “exclusion of witness testimony” from evidence, we agree, but we do not
18 read the decision and order as excluding any of Mr. Ortiz’s testimony from evidence.
19 Instead, we believe that the AHO admitted all of Mr. Ortiz’s testimony into evidence
20 during the administrative hearing but concluded—for purposes of applying the legal
21 residuum rule—that parts of that testimony that were critical to Taxpayer’s case were

1 not based on personal knowledge and therefore would not have been admissible in
2 a jury trial. *See* Rule 11-602 NMRA (“A witness may testify to a matter only if
3 evidence is introduced sufficient to support a finding that the witness has personal
4 knowledge of the matter.”). The AHO determined that Mr. Ortiz’s “testimony on all
5 matters for which he did not possess personal knowledge falls short of satisfying the
6 legal residuum rule,” and that he lacked personal knowledge of “all non-accounting
7 issues, including the nature and location of services Taxpayer provided in
8 consideration for its stipend or cash collection guarantee payments.” In the decision
9 and order, the AHO pointed out that Mr. Ortiz’s lack of personal knowledge on these
10 subjects left “a palpable void” in Taxpayer’s case. For example, the AHO stated that
11 Taxpayer failed to present testimony from a witness with personal knowledge of
12 whether any of the radiologists employed by Taxpayer were located in New Mexico.
13 The AHO also stated that Taxpayer failed to present testimony from a witness with
14 personal knowledge of whether Taxpayer’s exhibits proved what they purported to
15 prove regarding the stipend payments. Because Rule 11-602 requires fact witnesses
16 to have personal knowledge of the facts about which they testify, and because the
17 legal residuum rule requires some evidence that would be admissible under the Rules
18 of Evidence, *see Young v. Bd. of Pharmacy*, 1969-NMSC-168, ¶ 15, 81 N.M. 5, 462
19 P.2d 139, we conclude that the AHO did not erroneously apply the legal residuum

1 rule by asking whether specific pieces of testimony essential to Taxpayer’s case were
2 based on personal knowledge.

3 {9} To the extent that Taxpayer contends that Mr. Ortiz’s testimony was based on
4 evidence, specifically documents that Taxpayer used as exhibits, that would have
5 been admissible under the Rules of Evidence, Taxpayer has not adequately
6 developed an argument on appeal. *See Elane Photography, LLC v. Willock*, 2013-
7 NMSC-040, ¶ 70, 309 P.3d 53 (“To rule on an inadequately briefed issue, this Court
8 would have to develop the arguments itself, effectively performing the parties’ work
9 for them.”). Taxpayer’s entire argument regarding admissibility under the Rules of
10 Evidence is a single sentence: “Those documents would be admissible pursuant to
11 Rules 11-803(6) and 11-807 NMRA.” Taxpayer has not explained why we should
12 conclude that these exceptions to the rule against hearsay apply to the exhibits in
13 question, nor has Taxpayer explained why the admissibility of those documents
14 impacts Mr. Ortiz’s personal knowledge *about* those documents. We decline to
15 imagine such an argument for Taxpayer. *Elane Photography, LLC*, 2013-NMSC-
16 040, ¶¶ 70-71. For these reasons, we do not reach the merits of this argument.

17 **III. The AHO’s Finding That the Stipend Payments Were Subject to the**
18 **GRCTA Is Supported by Substantial Evidence**

19 {10} Lastly, Taxpayer claims that the AHO’s finding that the stipends were taxable
20 gross receipts was not supported by substantial evidence. We disagree.

1 {11} “[W]e determine whether, viewing the evidence in a light most favorable to
2 the agency’s decision, the findings have substantial support in the record as a whole.”
3 *Wing Pawn Shop v. N.M. Tax’n & Revenue Dep’t*, 1991-NMCA-024, ¶ 8, 111 N.M.
4 735, 809 P.2d 649. “The question is not whether substantial evidence exists to
5 support the opposite result, but rather whether such evidence supports the result
6 reached.” *N.M. Tax’n & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 20,
7 336 P.3d 436 (internal quotation marks and citation omitted). “When more than one
8 inference can be drawn from the evidence, the determination made by the hearing
9 officer is conclusive.” *Id.* “[W]e will not reweigh the evidence nor substitute our
10 judgment for that of the fact[-]finder.” *Id.* (internal quotation marks and citation
11 omitted).

12 {12} Viewing the evidence in a light most favorable to the AHO’s decision, we
13 cannot conclude that the AHO erred in determining that the stipends were taxable
14 gross receipts. The AHO based this determination on his assessment of the
15 testimonial and contract evidence. As for the former, the AHO found that Mr. Ortiz’s
16 testimony was not based on personal knowledge. As for the contract evidence, the
17 AHO determined that it “reveal[ed] that the stipend was also intended to compensate
18 Taxpayer for other functions as well, including a medical directorship and
19 interventional support services.” The AHO also stated that Taxpayer failed to present
20 any evidence to clarify “why the [AHO] should view [Taxpayer’s remote radiology

1 services] in isolation from [its other functions].” In the absence of evidence showing
2 that Taxpayer’s remote radiology services should be isolated from the other services
3 for which the stipends were intended to compensate (i.e., the medical directorship
4 and interventional support services) or that the stipends constituted compensation
5 exclusively for services Taxpayer performed outside of New Mexico, the AHO’s
6 determination is conclusive. *See Casias Trucking*, 2014-NMCA-099, ¶ 24 (“When
7 more than one inference can be drawn from the evidence, the determination made
8 by the hearing officer . . . is conclusive.”).

9 {13} We hold that substantial evidence supports the AHO’s challenged finding.

10 **CONCLUSION**

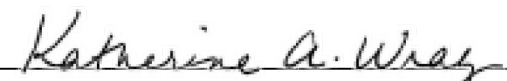
11 {14} We affirm.

12 {15} **IT IS SO ORDERED.**

13
14 
ZACHARY A. IVES, Judge

15 **WE CONCUR:**

16 
17 **KRISTINA BOCARDUS, Judge**

18 
19 **KATHERINE A. WRAY, Judge**