BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
CORDERO TRANSPORT **No. 12-23**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0869713984 & "Manual"

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 28, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Paul Cordero, owner of Cordero Transport ("Taxpayer"), appeared in person. Staff attorney Ida Luján represented the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor Sylvia Sena and Audit Supervisor Natalie K. Smith appeared as witnesses for the Department. Taxpayer Exhibits #1-3 were admitted into the record. Department Exhibits A-Z were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a New Mexico trucking company that transports cargo, including landscaping goods and agriculture commodities like flour, corn, and green chile. [Department Exhibit L].

2. On December 31, 2008, the Department sent notice to Taxpayer that the Department had selected Taxpayer for audit of Weight Distance Tax for reporting periods

January 1, 2006 through December 31, 2008. The notice of audit informed Taxpayer of the necessity of documentation to substantiate one-way haul claims, individual vehicle distance records, vehicle specific driver's logs, and trip reports. [Department Exhibit A].

3. On January 8, 2009, the Department informed Taxpayer that it would conduct the audit on a sample basis, relying on reporting periods in the second quarter of 2006, the fourth quarter of 2007, and the first quarter of 2008. [Department Exhibit C].

4. Since Taxpayer did not have records per truck unit, and could not provide an accurate list of trucks in use during the sample audit period, the Department informed Taxpayer on January 15, 2009 that all truck units would be considered during the sample audit periods. [Department Exhibit D].

5. On February 3, 2009, the Department sent a letter to Taxpayer asking Taxpayer to have trip reports, other mileage documentation, and fuel receipts available during the February 17, 2009 scheduled audit. [Department Exhibit E].

6. On February 20, 2009, Taxpayer acknowledged and agreed that the Department's audit would be conducted on a sample basis. [Department Exhibit F].

7. During the audit, Taxpayer did not produce specific records by individual truck unit that showed origination, destination, route, load weight, fuel used, and mileage distance traveled. [Department Exhibit O.3].

8. During the audit, Taxpayer presented no records of empty and loaded haul miles per vehicle unit. [Department Exhibit O.4].

9. For the sample audit periods, Taxpayer only maintained records of invoices showing the delivery location of truck loads and fuel receipts. [Department Exhibit O.3].

10. Taxpayer produced invoices and bills of lading specific to Taxpayer's business with Bueno Foods in October 2007, which are admitted into the record as Taxpayer Exhibits #1 & #3. These invoices do not list the origin, destination, weights of each transport, the distance traveled, the route taken, the specific vehicle used for each transport, the amount of fuel consumed on each transport, or the number of miles traveled with a full or empty load. Taxpayer testified that as courtesy to Bueno Foods, after dropping off its full load as shown on the submitted invoices, Taxpayer would return the empty product crates to Bueno Foods.

11. Taxpayer produced invoices and bills of lading specific to Taxpayer's business with Gro-well Brands in October 2007, which are admitting into the record as Taxpayer Exhibit #2. There invoices and supporting bills of lading list an origin, destination, and weight of the shipped goods on the bills of lading, but do not record route to destination and back, distance traveled, or number of miles traveled with a full or empty load.

12. Taxpayer claimed an average miles per gallon ("MPG") of 4.5 during the sample audit period. However, Taxpayer did not have records by individual truck to substantiate this claimed 4.5 MPG figure.

13. Because of the lack of records to substantiate Taxpayer's claimed 4.5 MPG figure, the Department applied an industry standard MPG figure of 5.71 miles per gallon taken from a State of Nebraska study of vehicles by weight and age (admitted into the record as Department N). [Department Exhibit O.5].

14. Based on the total gallons of fuel purchased, as shown on Taxpayer's fuel receipts, the Department used the 5.71 MPG to extract Taxpayer's total traveled mileage in New Mexico during the sample audit periods. [Department Exhibit O.5].

15. During the audit, the Department found that Taxpayer's records were insufficient to substantiate its claim as a one-way hauler entitled to a reduced Weight Distance Tax rate.

16. On December 29, 2009, based on the Department's audit, the Department assessed Taxpayer $20,364.40 in Weight Distance Tax, $4,072.88 in penalty, and $3,261.49 in interest, for a total assessment of $27,698.77, under letter id. no. L0869713984. [Department Exhibit R].

17. On December 30, 2009, the Department also assessed Taxpayer for $264.28 in International Fuel Tax, $100.00 in penalty, and $82.21 in interest. Although Taxpayer initially protested this assessment, Taxpayer withdrew the protest to the International Fuel Tax during the protest hearing.

18. On March 16, 2010, Taxpayer submitted a request for a retroactive extension to file a protest to the assessments. [Department Exhibit T].

19. On March 16, 2010, Taxpayer submitted a letter protesting the Department's assessments. [Department Exhibit U].

20. On April 1, 2010, the Department granted Taxpayer's request for a retroactive extension and acknowledged receipt of Taxpayer's protest. [Department Exhibit V].

21. On June 1, 2011, the Department submitted a request for hearing to the Hearings Bureau.

22. On June 16, 2011, the Hearings Bureau sent Notice of Administrative Hearing, scheduling the matter for October 5, 2011.

23. Taxpayer failed to appear for the October 5, 2011 Protest Hearing. On October 7, 2011, Hearing Officer Sally Galanter issued a default Decision and Order denying Taxpayer's protest based on Taxpayer's non-appearance.

24. On November 4, 2012 Taxpayer filed an appeal to the New Mexico Court of Appeals.

25. On November 7, 2012, Taxpayer filed a motion to reconsider with the Hearings Bureau, which Hearing Officer Galanter denied in light of Taxpayer's pending appeal to the New Mexico Court of Appeals.

26. On February 6, 2012, the Court of Appeals remanded the matter to the Hearings Bureau for further consideration of Taxpayer's motion to reconsider. Neither the Department nor Taxpayer opposed Chief Hearing Officer Monica Ontiveros' proposal to reschedule the matter fully on the merits in light of the remand and Taxpayer's motion to reconsider.

27. On April 3, 2012, the Hearings Bureau sent Notice of Hearing, setting the matter for June 28, 2012 before Hearing Officer VanDenzen because Hearing Officer Galanter was no longer with the Hearings Bureau.

DISCUSSION

At the beginning of the protest hearing, Taxpayer withdrew its protest with respect to the International Fuel Tax "manual" assessment. Taxpayer did continue its protest of the Weight Distance Tax Act, NMSA 1978, Section 7-15A-1 *et seq.* assessment, letter id. no. L0869713984. There are three issues at protest under that assessment. The primary issue is whether Taxpayer established that it was a one-way hauler and thus entitled to a reduced tax rate under the Weight Distance Tax Act. The second issue relates to Taxpayer's argument that the Department's use of an industry standard MPG chart to extrapolate from Taxpayer's fuel receipts the numbers of miles Taxpayer's vehicles traveled during the audit period artificially raised the total mileage.

Taxpayer also challenged the imposition of penalty and interest, but largely abandoned that issue during the protest hearing.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and show it was entitled to the reduced tax rate for one-way haulers under the Weight Distance Tax Act. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Seeking the reduced one-way haul rate under the Weight Distance Tax Act is akin to claiming a deduction of tax that otherwise would be owed, and therefore case law addressing a taxpayer's burden when claiming a deduction has persuasive value. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991).

Weight Distance Tax Act and Taxpayer's claim for reduced one-way hauler rate

The Weight Distance Tax Act imposes a tax on all registered vehicles with a declared weight in excess of 26,000 pounds that travel on state highways. *See* NMSA 1978, Section 7-15A-3 (1988).

NMSA 1978, Section 7-15A-6 (2004) sets the tax rates under the Weight Distance Tax Act for all motor vehicles other than buses. Subsection A establishes the base tax rates for all

registered vehicles based on the vehicles' declared gross weight and on the mileage traveled on state highways. *See* NMSA 1978, § 7-15A-6(A) (2004). Taxpayer's vehicles were registered with a declared gross weight of the maximum 78,001 and over category, for which the tax rate is 43.78 mills per mile.

NMSA 1978, § 7-15A-6(B) (2004) reduces that base tax rate articulated under Subsection A by one-third for one-way haulers. As NMSA 1978, § 7-15A-6(B) (2004) reads,

> All motor vehicles for which the tax is computed under Subsection A of this section shall pay a tax that is two-thirds of the tax computed under Subsection A of this section if:
> (1) the motor vehicle is customarily used for one-way haul;
> (2) forty-five percent or more of the mileage traveled by the motor vehicle for a registration year is mileage that is traveled empty of all load; and
> (3) the registrant, owner or operator of the vehicle attempting to qualify under this subsection has made a sworn application to the department to be classified under this subsection for a registration year and has given whatever information is required by the department to determine the eligibility of the vehicle to be classified under this subsection and the vehicle has been so classified.

If the registrant, owner or operator of the vehicle can satisfy the three one-way haul criteria identified under Subsection B, the Weight Distance Tax is calculated at two-thirds of the base tax rate established under Subsection A.

Numerous Department regulations address one-way haulers for the purposes of NMSA 1978, § 7-15A-6(B) (2004). Regulation 3.12.6.7 NMAC (11/15/01) provides definitions for empty miles, loaded miles, and one-way haulers. Regulation 3.12.6.8 NMAC (11/15/01) and Regulation 3.12.6.9 NMAC (11/15/01) respectively establish the qualifications and disqualifications as one-way haulers. Regulation 3.12.6.10 NMAC (11/15/01) requires one-way haulers to report total number of empty miles and total number of loaded miles traveled in New Mexico on a quarterly basis, unless Taxpayer otherwise reports annually.

Regulation 3.12.6.11 NMAC (11/15/01) lists the required records that a one-way hauler must possess. Regulation 3.12.6.11 NMAC (11/15/01) is important to the analysis in this matter because NMSA 1978, § 7-15A-6(B) (3) (2004) mandates that before a taxpayer can qualify for the reduced one-way hauler rate, that taxpayer must provide the Department with "whatever information… required by the [D]epartment to determine the eligibility of the vehicle…" By Regulation 3.12.6.11 NMAC (11/15/01), the Department has articulated which records a taxpayer must provide under the statute for a taxpayer claiming the reduced one-way hauler rate:

> A. Vehicle trip mileage records for each vehicle operated in New Mexico. The mileage records shall reflect the total empty miles and the total loaded miles traveled on New Mexico roads. Accurate trip mileage records indicating empty and loaded miles may include:
> (1) accurate map mileage for each trip;
> (2) hubometer or odometer readings; or
> (3) vehicle-specific log books.
> B. Vehicle itineraries including the origin and destination point of each trip, and the routes taken.

Consequently, reading the statutory and regulatory requirements together, any time a taxpayer claims the reduced one-way hauler rate under NMSA 1978, § 7-15A-6(B) (2004), that taxpayer should use and maintain the records articulated under Regulation 3.12.6.11 NMAC (11/15/01). This statutory and regulatory one-way hauler record keeping requirement is also consistent with the Tax Administration Act, NMSA 1978, Section 7-1-10 (2007), which requires a taxpayer to maintain certain records for any provision of any statute administered by the Department.

In this protest, Taxpayer failed to present the detailed and vehicle-specific required records under Regulation 3.12.6.11 NMAC (11/15/01) to substantiate Taxpayer's claim for the reduced one-way hauler tax rate either during the Department's audit or during the protest hearing. As Taxpayer acknowledged during the closing argument, at the time of the audit Taxpayer lacked the accurate and complete records necessary to prove Taxpayer's belief that it

qualified as a one-way hauler. Without these records, there is no persuasive way for Taxpayer to prove any of its registered vehicles qualified as a one-way hauler under NMSA 1978, § 7-15A-6(B) (2004).

Taxpayer did produce invoices with attached bills of lading from one month, October 2007, of the fourth quarter 2007 sample audit period (there are no records from either of the other two sample audit quarters). Those invoices with attached bills of lading were admitted into the record at Taxpayer Exhibits #1-3. However, these invoices and bills of lading are both incomplete for the purposes of Regulation 3.12.6.11 NMAC (11/15/01) and unpersuasive for the purposes of overcoming the presumption of correctness of the assessment under NMSA 1978, § 7-1-17 (2007).

Taxpayer Exhibit #1 & #3, the invoices and bills of lading related to its business with Bueno Foods in October 2007, do not list the origin, destination, weights of each transport, the distance traveled, the route taken, the specific vehicle used for each transport, the amount of fuel consumed on each transport, or the number of miles traveled with a full or empty load. Moreover, as Mr. Cordero testified, after unloading the transported chile, Taxpayer would transport the empty chile crates back to Bueno Foods. Transporting empty chile crates back to their origin does not meet the statutory one-way hauler requirement of traveling “empty of all load”, even if the crates are of minimal weight. *See* NMSA 1978, §7-15A-6(B)(2) (2004).

Taxpayer Exhibit #2, the invoice and supporting bills of lading for Gro-well Brands October 2007 shipments lack all same basic information as Taxpayer Exhibits #1 & #3 with the exceptions of listing an origin, destination, and weight of the shipped goods on the bills of lading. From these limited records and from Mr. Cordero’s testimony, there is no way to reasonably determine even under the preponderance standard whether and which of Taxpayer’s

registered weight distance vehicles had 45% percent or more of traveled mileage empty of all load, as required under NMSA 1978, §7-15A-6(B)(2) (2004) in order to claim the lower one-way hauler tax rate. Since Taxpayer did not maintain the required regulatory records or provide the records the Department required consistent with Taxpayer's statutory obligations, the Department properly issued assessment against Taxpayer using the full rate Weight Distance Tax rate under NMSA 1978, § 7-15A-6(A) (2004).

In summary, Taxpayer had the burden to overcome the Department's assessment of Weight Distance Tax. Taxpayer neither produced the required records establishing the one-way haul reduced Weight Distance Tax rate during the audit or during the protest hearing. The limited invoices and bills of lading information Taxpayer did provide were not persuasive in establishing that Taxpayer had any weight distance vehicle(s) that traveled 45% or more of their mileage empty of any load. Because Taxpayer did not carry its burden and did not establish it was entitled to the reduced one-way haul rate, the Department's assessment for the full Weight Distance Tax rate is appropriate and Taxpayer is liable for the assessed Weight Distance Tax.

<u>Department's Use of an Industry Standard MPG</u>

Because Taxpayer did not present complete, per vehicle records, the Department could not verify Taxpayer's claimed traveled miles during the three sample quarters audited. Consequently, the Department relied on alternative method of calculating the total miles traveled. That alternative method was to consider the fuel receipts Taxpayer did possess, use the total gallons of fuel purchased based on those receipts, and derive a total miles traveled by dividing the total gallons of fuel purchased by the average MPG for each vehicle, as determined by consulting a State of Nebraska study of industry standard MPG figures.

The State of Nebraska industry MPG standards determines a vehicles average MPG by age of the vehicle in relation to the weight of the vehicle. Taxpayer's vehicles were all on the declared gross weight category of 80,000 pounds. For that weight category, vehicle model years between 1975-1984 have a 5 MPG average, vehicle model years 1985-1995 have a 5.5 MPG, vehicle model years 1996-2000 have a 6 MPG, vehicle model years 2001-2002 have a 6.25 MPG, vehicle model years 2003-2005 have a 5.8 MPG, vehicle model years 2006-2008 have a 6 MPG, and vehicle model years 2009-2010 have a 6.8 MPG. [Department Exhibit N].

The amount of purchased gallons of fuel is a static number taken from Taxpayer's fuel receipts. Taxpayer's dispute is the MPG amount used to calculate the total miles travels. Taxpayer claimed its actual MPG figure was 4.5 MPG. However, Taxpayer lacked vehicle specific records to substantiate this claimed 4.5 MPG figure. Using the State of Nebraska industry standard study, the Department averaged the age of all of Taxpayer's registered trucks and calculated Taxpayer's MPG at 5.71 MPG. Taxpayer claimed that the 5.71 MPG was too high based on the Department's faulty assumption that Taxpayer always transported at a full 80,000 pound load. Instead, Taxpayer argues that because Taxpayer usually transported loads in the 40,000 pound range, Taxpayer's actual MPGs were much lower than the 5.71 figure the Department relied on in the audit, thus meaning that Taxpayer traveled less total miles than the Department relied upon in issuing the audit assessment.

There are two main problems with Taxpayer's argument. First, Taxpayer's argument is not particularly plausible without more evidence to support Mr. Cordero's testimony that less weight in the vehicle results in poorer, less efficient fuel economy and a lower MPG number than in the same vehicle with a heavy load. In the State of Nebraska study Industry Standard Weight/Class MPG Chart, Department N, regardless of age of the truck, a truck of lesser

declared weight usually had more efficient fuel economy than a vehicle of a higher weight in the same age group. This finding is consistent with the general proposition that a lighter vehicle is more efficient than the same vehicle with added additional cargo weight.

The second and bigger problem with Taxpayer's argument is that Taxpayer simply did not produce any records or evidence at hearing to establish its lower 4.5 MPG claimed figure. In instances where Taxpayer's records are inadequate, the Department has authority under Regulation 3.1.5.8 (B) & (C) NMAC (12/29/00) to use alternative methods to determine or estimate taxes due, including relying on alternative industry comparison method. The State of Nebraska study of fuel economy of a vehicle given its age and weight constitutes a permissible alternative industry comparison method under Regulation 3.1.5.8 (C) NMAC (12/29/00). The testimony of the Department Natalie K. Smith, who supervised this audit, was particularly credible and helpful in explaining how and why the Department relied on alternative audit methods in this case. In the absence of Taxpayer's records, it was reasonable for the Department to use the industry standard MPG number as a basis to extrapolate from Taxpayer's fuel receipts the total number of miles traveled in New Mexico, and base the audit assessment partially on the resulting additional mileage traveled in this state.

Interest and Penalty

Taxpayer's protest letter also challenged the imposition of penalty and interest, but at the hearing Taxpayer clarified that he only challenged penalty and interest to the extent that Taxpayer believed he was entitled to the one-way haul rate and therefore had no additional liabilities requiring the imposition of penalty or interest.

Interest was appropriate under the mandatory provisions of NMSA 1978, Section 7-1-67 (2001). When a taxpayer fails to make timely payment of taxes due to the state, "interest shall be

paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2001). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues.

Additionally, the Department's imposition of penalty in this case is appropriate under the Tax Administration Act. When a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid. (*italics* added for emphasis)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional. Regulation §3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

In this protest, Taxpayer's inattention in maintaining required one-way hauler rate records resulted in Taxpayer's failure to pay the full amount of the Weight Distance Tax during the audit period. This type of inattention satisfies the definition of civil negligence subject to civil penalty under the Tax Administration Act. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989). Because of the mandatory "shall" language of the statute, the Department had no choice but to impose a civil negligence penalty on Taxpayer.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written request for retroactive extension to file a protest. The Department granted that retroactive extension. Taxpayer filed a protest within the period of the retroactive extension. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not possess the requisite records under Regulation 3.12.6.11 NMAC (11/15/01) to establish Taxpayer was entitled to the reduced one-way hauler Weight Distance Tax rate under NMSA 1978, § 7-15A-6(B) (2004).

C. Taxpayer did not establish which, if any, of its vehicles traveled 45% of its total mileage empty of all load, as required to claim the reduced one-way hauler Weight Distance Tax rate under NMSA 1978, § 7-15A-6(B) (2004).

D. Taxpayer did not overcome the presumption of correctness of the assessment under NMSA 1978, § 7-1-17 (2007).

E. Taxpayer is liable for interest under NMSA 1978, §7-1-68 (2007) and civil negligence penalty under NMSA 1978, § 7-1-69 (2007).

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

DATED: November 19, 2012.

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