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

IN THE MATTER OF THE PROTEST OF
JKL TRANSPORTATION, LLC   No. 14-5
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO. L0155042624

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on January 7, 2014 before

Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Kevin Johnson, owner, appeared

representing JKL Transportation, LLC ("Taxpayer"). Staff Attorney Elena Morgan-Romero

appeared representing the State of New Mexico Taxation and Revenue Department

("Department"). Protest Auditor Mary Griego appeared as a witness for the Department.

Taxpayer Exhibits 1-5, Department Exhibits D-G, and Administrative Notice Exhibits 1-2 were

admitted into the record. All exhibits are more thoroughly described in the Administrative

Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND

ORDERED AS FOLLOWS:

FINDINGS OF FACT

1.   On January 26, 2012, the Department selected Taxpayer for a Weight Distance

Tax Audit for the reporting periods from January 1, 2009 through December 31, 2011.

[**Department Ex. D**, **AN1.1**].

2.   During the audit, the Department determined that Taxpayer had a 6.66710%

variance between its reported mileage and the audited New Mexico miles. [**Department Ex. D**,

AN1.3].

3.   Under letter id. #L1408947520, the Department assessed Taxpayer on November 9, 2012 for $2,621.12 in weight distance tax, $524.22 in civil penalty, $182.04 in interest, and $5,500.00 in weight distance tax underreporting penalty.

4.   On November 26, 2012, Taxpayer protested the Department's assessment. Taxpayer's protest letter articulated two specific instances where it had not been provided credit for previously paid and/or overpaid Weight Distance Tax. Taxpayer specifically asked that "fines & penalties be waived and a credit for 30,438 miles be processed."

5.   The Department's protest auditor Mary Griego was assigned Taxpayer's case. Ms. Griego reviewed Taxpayer's protest letter, and made abatements to the assessment in light of Taxpayer's two reported mileage discrepancies. **[01-07-14 CD 35:14-51]**.

6.   Listing the original assessment date of November 9, 2012, under letter id. no. L0155042624, the Department issued a revised assessment reflecting the abatements for $595.12 in weight distance tax, $303.17 in civil negligence penalty, $104.49 in interest, and $4,500.00 in weight distance tax underreporting penalty. **[01-07-14 CD 35:50-58]**.

7.   Taxpayer is a company located in Phoenix, AZ that provides transportation freight services to airline companies.

8.   Upon receiving a job, Taxpayer uses a computer program called PC Miler to generate a mileage log and itinerary, starting with the origin of the shipment zip code and ending with the destination zip code[1]. The mileage log generates a miles traveled per state. The mileage log generated by PC Miler serves as a foundation for Taxpayer's integrated invoicing, payroll, and tax reporting software systems.

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[1] While the start point and end point zip codes are not as accurate as a door-to-door routing mileage, since Taxpayer's shipments always started and ended in zip codes outside of New Mexico, PC Miler is reporting all border-to-border New Mexico mileage.

9.   Taxpayer's drivers are provided PC Miler's route description and itinerary. Taxpayer pays its drivers based on the PC Miler reported route mileage.

10.   PC Miler is the oldest and most widely-accepted mileage and routing software system in the transportation industry. PC Miler is used by the United States Department of Defense, the United States General Services Division, the Federal Motor Carrier Safety Administration, 98% of the top motor carriers, and 96% of the top freight transportation firms in North America. [**Taxpayer Ex. #2; Administrative Notice Ex. #1**].

11.   PC Miler is based on mapping and data information from Rand McNally. **[01-07-14 CD 53:50-54:20]**.

12.   Taxpayer relies exclusively on PC Miler to generate mileage totals for customer invoices, for payment of Taxpayer's drivers, and for tax reporting purposes.

13.   Taxpayer provided complete PC Miler mileage records for the sampled vehicles during the audit period. **[Department Ex. D**, **AN1.3; 01-07-14 CD 01:25:30-01:26:10]**.

14.   Rather than relying on Taxpayer's reported mileage obtained from PC Miler, during the audit the Department also used mileage and routing data from a software system called ProMiles to determine Taxpayer's traveled New Mexico mileage. [**Department Ex. D**, **AN1.3].**

15.   ProMiles is also an accepted mileage and routing software system in the transportation industry.

16.   Neither Taxpayer's records derived from PC Miler nor the Department's use of ProMiles determines the actual odometer mileage traveled in New Mexico, as both software systems rely on mapping route data to generate a map mileage total.

17.   There are some variances between routing and reported mileage in some routes in PC Miler and ProMiles. [**Taxpayer Ex. #1; Department Ex. F**].

18.   During the hearing, all three sample trips discussed in detail showed a variance between what PC Miler and ProMiles reported as total New Mexico traveled mileage. Two of the three samples showed that ProMiles reported a higher mileage total than what PC Miler reported:

    a. For Trip #2049, from Phoenix, AZ (with stop for gas in Gallup, NM), to Bloomington, IL, and back to Phoenix, AZ (with stop for gas in Gallup, NM), PC Miler and Taxpayer reported 746.5 miles traveled in New Mexico while ProMiler reported 752 miles. **[Taxpayer Ex. 3; Department Ex. D**, **F1.17]**.

    b. For Trip #277, from Phoenix, AZ (with stop for gas in Albuquerque, NM), to Wood Dale, IL, and back to Phoenix, AZ, ProMiler reported 751 miles traveled in New Mexico. The information Taxpayer entered into PC Miler at hearing reported 940 miles. However, in the reporting period ending 3/31/09 for truck unit #102 encompassing when trip #277 occurred, the Department still used the ProMiles total mileage because it was higher overall than Taxpayer's reported mileage in the period despite the variance of trip #277. **[Taxpayer Ex. 4; Department Ex. D**, **F1.2]**.

    c. For Trip #812, from Phoenix, AZ (with stop for gas in Lordsburg, NM), to Kenosha, WI, and back to Phoenix, AZ (with stop for gas in Tucumcari, NM), PC Miler and Taxpayer reported 814 miles traveled in New Mexico while ProMiler reported 869 miles. **[Taxpayer Ex. 5; Department Ex. D**, **F1.7]**.

19.   As cited in the Audit Narrative, the auditor used the higher of the Taxpayer's reported mileage (which was derived from PC Miler), or the mileage report generated from

ProMiles to determine the audited mileage total. [**Department Ex. D**, **AN1.3; 01-07-14 CD 01:22:50-01:23:49**].

20.   In the instances where there was no difference in Taxpayer's reported mileage and the Department's audited mileage by truck unit and reporting period, the auditor expressly noted that she "accepted [Taxpayer's reported] New Mexico weight distance mileage as audited miles." [**Department Ex. D, F1.3-19; Department Ex. G; 01-07-14 CD 01:13:50-01:23:49**]. These instances demonstrate that the Department's audit methodology relied on picking the higher of Taxpayer's reported mileage or the mileage from ProMiles to determine the audited mileage:

a. Truck Unit #9 for the reporting period ending 6/30/09, Taxpayer reported 9,714 total New Mexico miles, ProMiles reported 9,170 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.3**].

b. Truck Unit #21 for the reporting period ending 6/30/09, Taxpayer reported 4,275 total New Mexico miles, ProMiles reported 4,244 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.4**].

c. Truck Unit #20 for the reporting period ending 9/30/09, Taxpayer reported 10,430 total New Mexico miles, ProMiles reported 9,867 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.5**].

d. Truck Unit #20 for the reporting period ending 12/31/09, Taxpayer reported 9,847 total New Mexico miles, ProMiles reported 9,841 total New Mexico miles. The

Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.8**].

e. Truck Unit #106 for the reporting period ending 3/31/10, Taxpayer reported 7,128 total New Mexico miles, ProMiles reported 7,074 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.9**].

f. Truck Unit #104 for the reporting period ending 6/30/10, Taxpayer reported 1,502 total New Mexico miles, ProMiles reported 1,495 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.10**].

g. Truck Unit #9 for the reporting period ending 12/31/10, Taxpayer reported 9,342 total New Mexico miles, ProMiles reported 9,017 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.12-13**].

h. Truck Unit #102 for the reporting period ending 12/31/10, Taxpayer reported 6,288 total New Mexico miles, ProMiles reported 5,928 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.14-15**].

i. Truck Unit #7 for the reporting period ending 6/30/11, Taxpayer reported 792 total New Mexico miles, ProMiles reported 705 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.17**].

j. Truck Unit #11 for the reporting period ending 6/30/11, Taxpayer reported 4,577 total New Mexico miles, ProMiles reported 4,117 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.17**].

k. Truck Unit #21 for the reporting period ending 12/31/11, Taxpayer reported 5,726 total New Mexico miles, ProMiles reported 5,722 total New Mexico miles. The Department adopted Taxpayer's higher reported mileage rather than use the ProMiles total for the audited miles. [**Department Ex. D**, **F1.18-19**].

21. Despite finding Taxpayer's reported mileage derived from PC Miler more accurate the eleven times it was higher than the ProMiles total mileage, in all other reporting periods by specific truck number the Department used the ProMiles total mileage for the audited miles because it was higher. [**Department Ex. D**, **F1.1-19**].

22. The discrepancy in mileage between what Taxpayer reported using one consistent method of relying on PC Miler and what Department found in the audit is attributable to variations in the competing software's mileage reporting and the Department's intermixing of Taxpayer's reported mileage from PC Miler and the mileage found in ProMiler, depending on which was higher, rather than a real variance in miles traveled in New Mexico.

DISCUSSION

The Department audited Taxpayer under the Weight Distance Tax Act. As a result of that audit, the Department found an apparent 6.66710% variance between Taxpayer's reported mileage and the Department's audited mileage. The Department issued an assessment. Taxpayer protested that assessment, asking that fines & penalties be waived and a credit for 30,438 miles be granted. The Department made a prehearing abatement on the assessment. At hearing, it

became clear that this matter fundamentally entails a dispute of reported traveled mileage attributable to discrepancies in two valid software mapping programs and the audit methodology rather than any real underreporting of traveled mileage in New Mexico.

Presumption of Correctness.

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. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. 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*, 2003 NMCA 21, ¶13, 133 N.M. 217.

Taxpayer Met the Presumption of Correctness for Weight Distance Tax Act Mileage Reporting.

The Weight Distance Tax Act imposes a tax per mile traveled within this state on the owners of motor vehicles with a declared gross weight above 26,000 pounds. *See* NMSA 1978, §7-15A-1 to 8 (1988). NMSA 1978, Section 7-15A-6 (A) (2004) establishes the base tax rates for all registered vehicles based on the vehicles' declared gross weight and on the mileage traveled on state highways. Under NMSA 1978, Section 7-15A-8 (A) (1988), the total number of miles traveled on New Mexico roads is the basis of computing Weight Distance Tax liability. The owner of the vehicle must report to the Department total mileage traveled in New Mexico in the manner required by the Department. *See* § 7-15A-8 (B). Regulation 3.12.9.9 NMAC (11/15/01) requires that a taxpayer submit the weight distance tax return form provided and approved by the Department. No other regulation specifies the logging method, the software, or mapping method required for a taxpayer to calculate and report the total New Mexico mileage traveled during a reporting period.

Here, there was no dispute that Taxpayer completed the Weight Distance Tax return on an approved Department form, as required by Regulation 3.12.9.9 NMAC (11/15/01). Taxpayer reported its total New Mexico traveled mileage to the Department consistently using the trip mileage reports generated from PC Miler. Taxpayer rebutted the presumption of correctness by showing it relied entirely on the industry-standard PC Miler software to create trip routes, create invoices, and report its New Mexico traveled mileage to New Mexico. PC Miler is the industry standard reporting software used by the federal government, 98% of the top motor carriers, and 98% of the top freight carriers. Taxpayer relied on the routing, mapping, and mileage information generated by PC Miler to invoice clients, to pay its drivers, and to report its Weight Distance Tax traveled mileage to New Mexico. In other words, Taxpayer always relied on PC Miler for all mileage determinations. This evidence established that Taxpayer accurately reported its New Mexico traveled mileage during the audit period and on the proper forms.

Once the burden shifted to the Department, the Department did not present sufficient evidence to support the audit. There is no regulatory requirement specifying which method (such as actual mileage, map mileage, which map is the standard map, etc.) a taxpayer must use to calculate their total traveled mileage. The Department did not present any forms or instructions specifying which mapping software must be used in reporting total traveled mileage. There is no basis to conclude that Taxpayer's reliance on PC Miler was improper or resulted in an inaccurate total traveled mileage report.

Both PC Miler and ProMiles appear to be credible mapping programs, though PC Miler appears to be used by a majority of the transportation industry. Neither PC Miler nor ProMiles is reporting actual miles traveled, but rather reporting route map mileage derived from sophisticated mapping systems (both of which incorporate GPS data). As the audit and the audit narrative makes

clear, the Department had no issue with the reliability of PC Miler when Taxpayer's reported mileage, derived from PC Miler, exceeded the reported mileage from ProMiles.

While Taxpayer's reported mileage was always based on the totals from PC Miler, the Department in effect intermixed the mileage data from both programs depending on which one reported a higher map mileage. The corollary to this is that the Department recognized in some instances that ProMiles reported less mileage for a specific trip than Taxpayer reported using PC Miler. But because the Department would then take Taxpayer's higher reported mileage derived from PC Miler rather than consistently adhere to the ProMiles' lower reported map mileage, Taxpayer never received any of the offset of the lower mileage reporting from ProMiles despite being stuck under the Department's methodology with the instances where ProMiles reported a higher total. In other words, while Taxpayer reporting methodology was consistent, the Department's methodology always left Taxpayer stuck with the higher number from either program even if the Department's own preferred program showed a lower traveled mileage.

The point of the Weight Distance Tax Act is to ensure that taxpayers are paying a tax for miles traveled in New Mexico, not to find either the highest possible or lowest possible map mileage from competing software mapping programs. Neither taxpayers nor the Department are free to pick and choose mileage from different mapping software in order to find the highest or the lowest reported mileage number in an effort to artificially maximize or minimize tax liability. They must both rely on a consistent methodology in order to report and find an accurate traveled mileage total. In this case, Taxpayer relied exclusively on PC Miler at all times, while the Department relied on whichever mapping software program generated the higher mileage total. Because Taxpayer relied consistently on the same map mileage from PC Miler, any of that software's higher or lower variances in mileage would be offset to something much closer to actual traveled mileage than what

the Department found at audit with its more inconsistent approach. In this circumstance, Taxpayer's credible reported mileage systematically derived from the industry-standard PC Miler is more reliable than the Department's audit that intermixed the two programs.

In the face of Taxpayer meeting the presumption of correctness given its consistent reliance on the mileage totals from the industry-leading PC Miler, the Department did not reestablish the accuracy of its audit and assessment. The audit paperwork clearly illustrates the consistency problems with the Department's audit approach. Finding of Fact #20 shows 11 instances where the Department accepted Taxpayer's higher reported mileage for a specific vehicle and reporting period than what it found through its use of ProMiles. The Department argued these were illustrations of PC Miler and ProMiles reaching the same mileage calculation. However, looking carefully at the audit paperwork and the auditor's footnote in each instance, these instances are not examples of where PC Miler and ProMiles mileage totals matched but instances where the Department relied on Taxpayer's reported mileage from PC Milers because it was higher than what the Department found using ProMiles. If Taxpayer's consistently reported mileage derived from PC Miler was reliable enough for the Department to accept in instances when it represented the higher mileage, then Taxpayer's total mileage figures derived from PC Miler over the entire audit were reliable.

During the hearing, Taxpayer and the Department carefully examined three specific trips, trip #'s 2049, 277, and 812, using Taxpayer's PC Miler software on his laptop. These samples are of less weight than the 11 instances described under Finding of Fact #20 because the auditor ultimately determined which mileage total to use based on the entire reporting period by truck unit's mileage total rather than on any one specific trip. Nevertheless, these sample trip reports again show that Taxpayer's consistent mileage reporting was more accurate than the Department's mixed approach. Two of the three trips (trip #'s 2049 and 812) illustrated that ProMiles returned higher mileage than

what Taxpayer reported using PC Miler. In trip # 277, PC Miler returned a much higher mileage

than ProMiles, which the Department argued showed that Taxpayer's software reporting variances

argument was not justified. The Department's argument about trip #277 was not persuasive. The

audit cleared showed that on occasion, PC Miler returned a higher trip mileage than ProMiles; that's

why the Department ultimately adopted Taxpayer's higher mileage total in 11 separate reporting

periods. And trip #277 occurred in a reporting period where the total ProMiles mileage still

exceeded Taxpayer's reported aggregate PC Miler mileage despite the odd mileage variance seen on

trip #277, causing the Department to use the ProMiles total mileage in that period. Rather than an

actual difference in traveled mileage, the mileage variance in software and the Department's

inconsistent use of the software to pick the higher mileage total are more likely the cause of the

variance in this audit.

Taxpayer Had Adequate Records.

Taxpayer's consistent reporting of mileage derived from PC Miler provided the Department

with adequate records to conduct its audit without relying on alternative methods to reconstruct

records. Under NMSA 1978, Section 7-1-11 (D) (2007), if a taxpayer's records do not exist or are

insufficient to determine taxpayer's tax liability, then the Department is authorized to use any

reasonable method, including industry information, to estimate a taxpayer's tax liabilities. Similarly,

Regulation 3.1.5.8 NMAC (12/29/00) allows the Department to use alternative methods to

determine tax liability when a taxpayer's records are inadequate. However, in this case, the

Department did not establish that Taxpayer's records from PC Miler—the industry leader—were

inadequate to determine traveled mileage and required the Department to employ the alternative

ProMiles software. In fact, the Department relied on Taxpayer's records when they reported higher

mileage than what the Department could find using ProMiles. While the Department certainly was

free to verify the reported mileage using ProMiles, if the only difference between the reported mileage is attributable to differences in the equally legitimate software mapping programs rather than a variance in actual traveled mileage, there was no basis to use the alternative method. In particular, an alternative method that always chooses the software program that reports the highest mileage rather than consistently using the same software is not a reasonable or reliable alternative method. Without establishing the inadequacy of Taxpayer's, the Department could not rely on Section 7-1-11 (D) or Regulation 3.1.5.8 NMAC to use alternative methods.

The Protest encompassed the accuracy of the audited miles and the software variance issue.

The Department argued in closing that the consideration of the variance in software reported mileage and the accuracy of the audited miles total was beyond the scope of the protest. It is correct that *pro se* Taxpayer only explicitly challenged the imposition of a Weight Distance Tax penalty during its opening statement, and both the Department and the Hearing Officer initially focused on the penalty issue at hearing. However, the hearing quickly evolved into a much broader consideration of accuracy of the reported mileage and the discrepancies between the two software programs. In fact, the Department on its own initiative proposed remanding/continuing the matter while it researched whether the software mileage variances caused the mileage reporting discrepancy, an issue that would only be relevant if the protest included the accuracy of the audited mileage. Only after the Department had been granted a limited continuance to research the exact question of the competing software mileage totals during the audit, did the Department argue that the matter was outside the scope of Taxpayer's protest.

There are three reasons why the audit's mileage total determination was a proper consideration at hearing. First, the audited mileage was an issue raised in Taxpayer's protest letter. The protest letter establishes the grounds of protest under NMSA 1978, Section 7-1-24 (2003).

Taxpayer's protest letter challenged the imposition of "fines & penalties" and asked for a credit of 30,438 miles. Implicit in asking for a credit of 30,438 is Taxpayer's belief that the audit did not properly calculate and credit Taxpayer's traveled mileage during the audit period. In fact, the Department acted on that protest letter to make a prehearing abatement related to the audit mileage total, suggesting that even the Department believed the audited mileage was part of the protest process. Therefore, the accuracy of the reported mileage and the Department's determination at audit of the traveled mileage was a proper subject of the protest hearing.

Secondly, the Weight Distance Tax penalty under NMSA 1978, Section 7-15A-16 (2009) that Taxpayer challenged in its opening statement is predicated on a determination that the person reported less mileage than actually traveled during the tax period. In this case, given the problems with the audit's total mileage determination, no such determination can be made. Without such a determination, penalty is not appropriate under Section 7-15A-16.

Finally, the Taxpayer Bill of Rights, codified by NMSA 1978, Section 7-1-4.2 (I) (2003), grants Taxpayer the right to an abatement of an assessment of taxes incorrectly or erroneously made. Since the audited mileage total is not supported, the assessment is incorrect and must be abated under Section 7-1-4.2 (I) of the Taxpayer Bill of Rights.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. By establishing that it relied on a consistent mileage reporting methodology based on the industry leading PC Miler software, Taxpayer met the presumption of correctness and shifted the burden back to the Department to establish the validity of the audit and the assessment. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

C.   Since the difference in the total mileage traveled that Taxpayer reported and

Department found at audit is attributable to the variances between two legitimate mapping programs

and the Department's method of always picking the higher map mileage between Taxpayer's

reported mileage and ProMiles rather than an actual difference in traveled mileage, the Department

did not reestablish the validity of the audit or the assessment.

D.   The Department had no basis to use alternative methods under Section 7-1-11 (D) or

Regulation 3.1.5.8 NMAC as a substitute for Taxpayer's complete mileage traveled records derived

systematically from the industry-leading mapping software.

E.   The accuracy of the Department's determination of traveled miles during the audit

was an issue at protest in light of Taxpayer's request for credit on 30,438 miles in the protest letter.

Moreover, under the Taxpayer Bill of Rights, NMSA 1978, Section 7-1-4.2 (I) (2003), Taxpayer

has a right to abatement of an incorrect assessment.

F.   Weight Distance Tax Act underreporting penalty pursuant to NMSA 1978, Section

7-15A-16 (2009) is not supported because it cannot be determined that Taxpayer underreported its

total New Mexico mileage.

For the foregoing reasons, Taxpayer's protest **IS GRANTED.** The assessment is abated.

DATED: February 24, 2014.

Brian VanDenzen, Esq.
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630