**STATE OF NEW MEXICO**
**ADMINISTRATIVE HEARINGS OFFICE**
**TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF**
**D-TRIX SERVICES LLC**
**TO ASSESSMENT ISSUED UNDER LETTER**
**ID NO. L 1755121200** **17-11**

## DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 9, 2017 before Hearing Officer Ignacio V. Gallegos, Esq. The Taxation and Revenue Department (Department) was represented by Ms. Melinda Wolinsky, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared as a witness for the Department. Mr. Tim Cummins, owner of D-Trix Services, LLC (Taxpayer), appeared representing Taxpayer for the hearing, and as a witness. The Hearing Officer took notice of the contents of the Administrative file. Taxpayer's Exhibits 1 through 6 and Exhibit 8 were admitted into the record. Department Exhibits A through F were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. At the request of the hearing officer, on January 10, 2017, the Department submitted without objection an updated list of Taxpayer's outstanding tax liabilities, broken down between Civil penalty and Underreporting penalty. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

1. On May 18, 2016, the Department assessed Taxpayer $34,955.11 in Weight Distance Tax, $6,991.02 in penalty, $3,852.02 in interest, and $26,000.00 in Weight Distance Tax underreporting penalty for a total assessment of $71,798.15 for the reporting period beginning October 1, 2009 through March 31, 2013. [Letter id. no. L1755121200].

2. On August 13, 2016 Taxpayer protested the assessment, received by the Department protest office on August 18, 2016.

3. On September 2, 2016, the Department acknowledged receipt of Taxpayer's protest.

4. On October 12, 2016, the Department requested a hearing in the matter.

5. On October 12, 2016, the Administrative Hearings Office issued Notice of Administrative Hearing, scheduling this matter for November 16, 2016 at 1:00 p.m.

6. On November 15, 2016, Taxpayer requested a continuance of the November 16, 2016 hearing, indicating that he needed more time to prepare. The Department sent an emailed objection to the continuance.

7. On November 15, 2016, the Administrative Hearings Office issued an Order of Continuance and Amended Notice of Administrative Hearing, converting the November 16, 2016 merits hearing to a telephonic scheduling conference.

8. On November 16, 2016 a telephonic scheduling hearing was held. Tim Cummins represented Taxpayer, and Ms. Melinda Wolinsky represented the Department. The parties agreed that the telephonic hearing satisfied the 90-day requirement of the statute.

9. On November 16, 2016 the Administrative Hearings Office issued a Scheduling Order and Notice of Hearing on the Merits.

10. On January 9, 2017 a hearing on the merits took place in Santa Fe, New Mexico at the Administrative Hearings Office in the Wendell Chino Building.

11. Taxpayer is a small business. Mr. Tim Cummins is 100% owner of the business now, but previously and during the period of time covered by the assessment he had a business partner. That partner ran the operations for the company during the period covered by the assessment. Mr. Cummins runs Taxpayer's operations now.

12. Taxpayer is a business that provides services in the oil and gas industry, hauling waste water from well sites to designated storage facilities.

13. The waste water storage facilities are sometimes in the field, near the well locations, and sometimes the Taxpayer transports the waste water to a central disposal facility near the truck yard.

14. For each well-site visit the Taxpayer created a field ticket. In 2006 there were 27,000 field tickets. In 2007 the number of field tickets increased dramatically to approximately 200,000.

15. During the tax assessment period, the Taxpayer filled approximately 35,000 field tickets, which were invoiced, filled and paid.

16. In 2010 or 2011 the Taxpayer decided that it was paying too much in Weight Distance Tax, since it was paying between 55% and 85% of its miles. The Taxpayer's business model has the Taxpayer's unloaded trucks going to and from the work area along state, federal and tribal roads, and travelling on roadways maintained by oil production companies with loads of water to then dispose of at a central location along the oil field roads.

17. The Taxpayer believed that he was required to only report loaded miles on roads maintained by state, local, tribal and federal funds. He believed if the road was marked with a sign, the miles should be reported; and if it was unmarked, it need not be reported. The Taxpayer came to this conclusion upon the belief that the roads it used in the oil fields were "off-highway" and not subject to Weight Distance tax, relying on Regulation 3.12.5.9 "Off highway use not subject to tax."

18. The Taxpayer reports all miles and fuel for the IFTA (International Fuel Tax Agreement) tax, because it is a fuel tax. He explained that the mileage discrepancy is understandable because all miles are subject to IFTA and off highway miles are excluded from Weight Distance Tax.

19. In coming to the conclusion that he was paying too many miles, the Taxpayer did not consult with the Department or a tax professional. The decision was made to report using this methodology years ago, upon discussion with his then business partner and their office manager.

20. The Taxpayer had a practical rule, conveyed to its drivers, that if the road was marked as a state, county, forest, tribal or federal road then the miles travelled were taxable. The remainder of roads he believed were built and maintained by private oil companies or land owners.

21. Taxpayer operates in New Mexico, in the San Juan Basin primarily, but also through the Carlsbad and Artesia areas.

22. The Taxpayer keeps his trucks in the home yard. From the home yard, the trucks travel empty to the oil fields, where they pick up waste water from a variety of well sites. In the field, where miles are on roads sometimes designated as state roads and sometimes unmarked, the trucks go from well to well, then deposit the waste water at a designated disposal site. There are very few loaded miles on roads maintained by state, federal or tribal authorities because the disposal site is typically within a few miles of the well sites. After disposing the waste water, the trucks return from the oil fields to the home yard empty of all load.

23. There are small oil companies that do not have their own disposal site. When servicing small companies, the Taxpayer's trucks service wells and the loaded trucks drive from the well sites over state roads to a dump site near the truck yard.

24. Taxpayer provided a list of the disposal sites it regularly uses, including a round-trip mileage table of the distances to the different disposal sites. [Exhibit 3]

25. The Taxpayer's home office and yard is located between Bloomfield, NM and Aztec, NM along the Bloomfield Highway, US 550.

26. The Taxpayer, during the time covered by the assessment, used five to twelve different trucks in its business operation. At one point there were fourteen trucks running, but now after the oilfield crash there are only four trucks running.

27. In the past, Taxpayer had a dirt-work division in his company that built roads for oil companies, and believed that many of the roads in the spiderweb of roads to and from well-sites were maintained by the oil companies.

28. The trucks are ten-wheel truck with a vacuum tank truck. Some of the trucks have a second trailer. They hold eighty barrels of water at a time.

29. The trucks are commercially available in the Farmington area because it is a big business. The Taxpayer indicated that his business is small, with about ten trucks. There are other operations with more than 100 trucks.

30. The Agua Moss and Basin Disposal are within two miles of the Taxpayer's yard. They are in Bloomfield, NM. In order to get to those disposal sites, Taxpayer's trucks travel on roads maintained by government. Those are the disposal sites he uses when servicing wells run by small oil companies that do not have their own disposal sites. It is then that a service truck would have loaded miles to approximate fifty percent loaded miles.

31. The Department determined that the Taxpayer's reported IFTA (International Fuel Tax Agreement) miles was different from the reported Weight Distance tax miles, so it began an audit based on the mismatch.

32. The Department concluded during the audit that Taxpayer underreported its tax liability by more than 25%. Consequently, the audit was expanded to include reporting periods up to seven years earlier than the audit, which took place in 2016.

33. Taxpayer was not registered as a one-way hauler in New Mexico during the time-frame covered by the assessment. However, during the pendency of this protest, the Department granted an abatement of the tax based on qualification as a one-way hauler.

34. The Department partially abated the assessment by $27,885.59 based on the fact that the Department Auditor determined that Taxpayer qualified as a one-way hauler under NMAC Section 3.12.6.8.

35. During the protest, the Auditor communicated with the Taxpayer, who referred her to Lori King, to gather additional evidence that roadways driven upon were not roadways maintained by a government entity. [See also, roadmaps accompanying Taxpayer protest letter, dated August 18, 2016, 14 pages]

36. In the experience of the Auditor, typically, a company will have a trip ticket and logs showing a route, odometer readings at the beginning and end of the trip. Companies vary how they log in information. Usually, the companies will identify drivers and truck units. With this information, the Department can replicate a map of the route to verify the number of miles on the road.

37. In the experience of the Auditor, a company can document off-road miles with the assistance of the oil companies they work with. During the audit, the Department received a satellite map, but the problem remained that there was a discrepancy of hundreds of miles reported to IFTA, and no substantive documentation to support the claim of off-highway miles.

38. In the experience of the Auditor, the off-road miles claimed is typically a small percentage of the actual miles driven.

39. In communicating with the Taxpayer, the Department obtained no information that the roads claimed to be off-highway were actually on roads maintained privately by oil companies.

40. The IFTA transmittal [Exhibit B] was used by the Department as a basis for the assessment. The Auditor would compare the miles travelled in the base jurisdiction of New Mexico, and compare that to the reported miles under the Weight Distance tax.

41. The audit originally included the 2013 timeframe, but was expanded to include years back to 2009 because of the underreporting the Department found.

42. The Auditor could not attest to the date the IFTA transmittal was received by the Department, but stated that in a typical scenario, the Department receives Internal Revenue

Service information approximately three years after it is filed by a taxpayer. If the Department finds a mismatch and underreporting of miles by 25%, it may extend the audit period up to seven years.

43. A one-way hauler is defined by statute and regulation, and requires an application.

44. The benefit that a one-way hauler receives is that the one-way hauler pays a lower tax rate, as compared to everyone else who pay for all miles.

45. The Department requires documentation that miles travelled on purported non-state roads were in fact non-state roads to justify an off-road exemption during an audit. Guesses and estimates are insufficient evidence to allow an auditor to justify the application of an exemption or abatement.

46. The Taxpayer's records from 2009 were not available for inspection.

47. An ordinary one-way hauler would be similar to a trucker who picks up a load at a manufacturer and travels to a retailer to deliver the load, then drives back to the home location empty of all load.

48. An ordinary hauler that pays the full rate would be similar to a trucker who picks up a load in one location, drops it off at another location, and before heading back to the home location picks up another cargo and delivers it near the home location.

49. The Taxpayer's business model is unlike either typical scenario.

50. As of the date of hearing, Taxpayer still owed $44,390.29 under the assessment. The assessment includes tax of $18,316.35, civil penalty of $3,666.54, interest of $2,207.40, and WDT underreporting penalty of $20,200.00. Interest continues to accrue until the assessment has been paid.

## DISCUSSION

The issues to be decided are whether the Taxpayer is liable for the assessment of tax, civil penalty, interest and underreporting penalty during the reporting periods between October 1, 2009 and March 31, 2013. Taxpayer argued for reduction of tax, penalties and interest because the business model has the Taxpayer's vehicles travel primarily on private roads while loaded. The Department argued that the evidence provided by the Taxpayer do not support the private road designation.

The Department received a transmission detailing Taxpayer's 2010-2011 reported miles travelled in New Mexico under the International Fuel Tax Agreement (IFTA). The Department compared the miles Taxpayer reported under IFTA to the miles reported through the Weight Distance tax return. The Department found a mismatch and initiated an audit. The audit revealed what the Department believed to be at least 25% underreporting. The Department extended the audit to include year 2009. Based on the audit, the Department assessed Taxpayer for Weight Distance Tax in years 2009, 2010, 2011, 2012 and 2013. Taxpayer timely protested that assessment.

Taxpayer believed that his duty under the weight distance tax was to report only miles travelled while loaded on roadways maintained by a governmental authority. Taxpayer did not retain sufficient records from 2009 to disprove the allegation, and challenged the Department's process in going back so far. Taxpayer indicated that it changed its tax reporting policies to reduce the tax burden in 2010 or 2011. The Taxpayer indicated that the miles reported prior to 2010 were at least 55% to 85% of total miles. The initial auditor conceded that the Taxpayer qualified as a one-way hauler and partially abated the assessment. Taxpayer provided evidence that his trucks travel on mostly private oilfield roads when loaded. The Taxpayer acknowledged that there are smaller customers who do not have disposal sites of their own, and in instances where he services their wells, his trucks make the return trip loaded and dispose of the wastewater at a site near the home yard. Taxpayer believed his duty was to report and pay for only loaded miles on governmentally designated roadways.

***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 abatement of tax under the Weight Distance Tax Act. *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-021, ¶13, 133 N.M. 217.

Seeking the exemption for "off highway use" under the Weight Distance Tax Act is akin to claiming a deduction or exemption of tax that otherwise would be owed. Case law addressing a

taxpayer's burden when claiming a deduction is persuasive in considering whether Taxpayer is entitled to the off-highway use exemption. "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*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

***Weight Distance Tax Act and the One-way Haul 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, § 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* § 7-15A-6 (A). Under Section 7-15A-6 (A), the tax rate increases as a vehicle's weight classification increases. However, Section 7-15A-6 (B) establishes a reduced one-way haul tax rate:

> 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 rate criteria identified under Section 7-15A-6 (B), the Weight Distance Tax (WDT) is calculated at two-thirds of the base tax rate established under Subsection A (or 33% less than the full tax rate per vehicle weight class).

Numerous Department regulations also address one-way haulers for the purposes of Section 7-15A-6 (B). Regulation 3.12.6.7 NMAC (11/15/01) provides definitions for empty miles, loaded miles, and one-way haulers. Under Regulation 3.12.6.7 (A) NMAC, "empty miles" means the "number of miles traveled on New Mexico roads when the vehicle or vehicle combination is transporting no load whatsoever."

Regulation 3.12.6.8 NMAC (11/15/01) and Regulation 3.12.6.9 NMAC (11/15/01) respectively establish how a registrant can be qualified or disqualified as a one-way hauler. Taxpayer did not apply to qualify as a one-way hauler under Regulation 3.12.6.8 NMAC (11/15/01). Nevertheless, the initial Auditor saw that the Taxpayer would have qualified as a one-way hauler, and granted an abatement on that basis. Taxpayer was unsure whether he wanted to be labeled a one-way hauler, because under that scenario, he would still have to pay for half of all miles, regardless of whether he carried a load on governmentally maintained roadways. Taxpayer's rationale was that the majority of the miles travelled on governmentally maintained roadways were most often empty of all load, indicating that his loads were gathered and deposited mostly on private oilfield roads. The Taxpayer misunderstands the WDT as requiring taxpayers to report only *loaded* miles travelled on governmentally maintained roadways. The WDT Act requires taxpayers to report all miles, and if it maintains records which show that the vehicle carried no load at least 45% of the time, it can qualify for a reduced tax rate for all the miles as a "one-way" hauler.

***WDT Reporting requirements:***

The Weight Distance Tax Act indicates that "The total number of miles travelled on New Mexico highways during the tax payment period by the motor vehicle subject to the tax shall be used in computing the tax." NMSA 1978 Section 7-15A-8 (A) (1988). The Act does not make a distinction between loaded and unloaded miles when reporting, except that it allows taxpayers to apply for registration as a one-way hauler, and pay 33% of the tax if the taxpayer can prove at least 45% of their miles are unloaded. *See* NMSA 1978 Section 7-15A-6 (B) (2004). The Taxpayer was required to report all miles regardless of whether loaded or not.

The evidence presented by the taxpayer showed round trip miles to a list of his commonly used waste water disposal sites. [Exhibit 3]. Taxpayer also sent to the Department a summary of tickets for Energen Resources from November 2013 (outside the scope of the

Assessment), with miles separated into highway and off road. [Exhibit C]. The summary of tickets indicates that the disposal site used was "CBD." The round-trip mileage to CBD, as indicated on Exhibit 3, shows a round trip of 66.4 miles. The summary Exhibit C appears to exclude the round trip miles, when it indicates only ten or eleven highway miles. Although the Taxpayer's WDT returns were not in evidence, the evidence presented shows that the Taxpayer misunderstood the requirement of reporting all miles, regardless of load.

***Off Highway use***:

As noted above, case law addressing a taxpayer's burden when claiming an exemption or deduction is persuasive in considering whether Taxpayer is entitled to the off-highway use exemption. "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*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted).

The exemption is defined under NMAC Section 3.12.5.9 (11/15/01):

> Off highway use not subject to tax:
> A. Any registrant, owner or operator of a motor vehicle who does not use that motor vehicle on the highways of this state, in whole or in part, is not subject to the tax imposed by *Section 7-15A-3 NMSA* 1978 to the extent that the motor vehicle is not operated on the highways of this state.
>
> B. For the purposes of *section 3.12.5.9 NMAC*, "highways of this state" include those roads, highways, thoroughfares, streets and other ways generally open to the use of the public as a matter of right for the purpose of motor vehicle travel, regardless of whether it is temporarily closed for the purpose of construction, reconstruction, maintenance or repair, if the road, highway, thoroughfare, street or other way is or was constructed, reconstructed, maintained or repaired with the use of any federal, state or local government or Indian nation, tribe or pueblo government funding.
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> C. Any road, highway, thoroughfare, street or other way is not a "highway of this state" if it is or was constructed, reconstructed, maintained or repaired solely with private funds.

The Taxpayer provided a number of maps showing the spiderweb of roads his trucks travel on through the oilfields of New Mexico. [Exhibit 8, maps 1 through 12; Protest letter

containing maps and well names, pages 5 through 14]. It stands to reason that the unmarked dirt roads through public and private lands would fall into the category of private roads. The checkerboard of public lands, Indian lands, and private lands creates a practical impossibility of deciphering which road is public and which is private. Likewise, it is a practical impossibility to prove or disprove that the actual miles reported accurately reflect the private and public miles travelled.

The maps provided show satellite views of well locations and waste-water disposal sites. The detail maps show small roads leading to and from the well-sites, adjacent to governmentally maintained roadways. The maps do not provide boundaries such as county lines, private property lines, BLM or Indian land distinctions. Although it is clear that some of the roads are in fact privately maintained, the taxpayer has not shown how many miles were travelled upon those roads to justify reducing the tax burden by applying the exemption.

To make a comparison, Regulation 3.12.6.11 NMAC (11/15/01) lists the required records that a one-way hauler must possess. 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 Section 7-15A-6 (B), 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 ("TAA"), 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.

Although the regulation concerning the off-highway use exemption does not require that taxpayers retain the same sorts of records to justify the one-way haul rate reduction, it would be wise for a Taxpayer to maintain such records in the event that reconstruction of claimed deductions and exemptions becomes necessary, as in this case.

Taxpayer in this case did not present records necessary to substantiate its claim for a deduction of off-highway miles, and no specific number of off-highway miles claimed was provided, so a reduction using the mill rate was not possible either during the audit or at the hearing. When a taxpayer fails to maintain adequate records, the Department is authorized to use alternative methods to determine that taxpayer's tax liability. *See* NMSA 1978, §7-1-11 (D) (2007); *see also* Regulation 3.1.5.8 (B) NMAC (12/29/00).

Department properly assessed Taxpayer without reducing the assessment for off-highway miles. Without records substantiating either the mileage traveled by specific reported vehicle weight class or routes and proof of private maintenance, Taxpayer did not overcome the presumption of correctness that attached to the assessment.

***25% Underreporting of Tax Liability.***

Taxpayer challenged the Department's ability to expand the audit to include tax periods 2009, 2010, and 2011, periods beyond the typical statute of limitations on an assessment. Taxpayer made numerous arguments about how the length of time between the hearing and the first period covered by the assessment was so long that he had no idea that the method he was using was not acceptable to the State.

The plain language of the TAA and New Mexico case-law interpreting the TAA controls the analysis of this issue. Under NMSA 1978, Section 7-1-18 (A) (2013), the Department typically only has three-years from the end of the calendar year from which a tax was due to issue an assessment. However, under NMSA 1978, Section 7-1-18 (D) (2013), the Department has six-years from the end of the calendar year in which the tax was due to issue an assessment in instances where a taxpayer underreports their tax liability by 25%.

The New Mexico Supreme Court has held that Section 7-1-18 (D) does not depend on an analysis of a taxpayer's intent and/or culpability, only an objective analysis of the facts and the

amount of a taxpayer's underreported liability. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr.*, 1989-NMSC-015, ¶6-7, 108 N.M. 228. Further, in *Bien Mur*, ¶7, the New Mexico Supreme Court rejected the notion that Section 7-1-18 (D) is punitive in nature.

The end of the calendar year when 2009 Weight Distance Tax would have been due was December 31, 2010. *See* NMSA 1978, § 7-15A-9 (A) (1999). Since the May 18, 2016 assessment occurred within six-years of that date, the assessment satisfied the statute of limitations requirement contained in Section 7-1-18 (D) and the Department was obligated to issue the assessment under the rationale expressed in *Bien Mur*, ¶7.

Here, the Department determined that Taxpayer had underreported its tax liability by more than 25%. The Taxpayer did not take issue with the percentage of underreporting alleged by the Department, only with what appeared to the Taxpayer to be the Department stretching as far back as it could when the State budget was under stress for a lack of revenue stream. The Department's assessment of 2009-2013 weight distance tax was appropriate.

***Interest and Civil Penalty.***

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 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, 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 Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). 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.

Further, under NMSA 1978, Section 7-1-69 (2007), 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, the Department must impose a civil negligence penalty on that taxpayer. As discussed above, Section 7-1-69 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." *See Marbob*, ¶22. Although certainly unintentional, Taxpayer's error in reporting only loaded miles, and inability to substantiate reduction due to off-highway miles constitutes

civil negligence. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶10, 108 N.M. 795 (inadvertent error meets the definition of civil negligence). Taxpayer did not show that it made a mistake of law in good faith and on reasonable grounds under Section 7-1-69 (B) or any of the nonnegligence factors that might allow for abatement of penalty under Regulation 3.1.11.11 NMAC (01/15/01).

The evidence presented indicated that the Taxpayer's principal owners, including the witness and current owner along with the former partner and office personnel, consulted amongst themselves about how to reduce the tax liability in 2010 or 2011. Here, there is no evidence that Taxpayer made an informed judgment or determination based on reasonable grounds that when Taxpayer failed to report and all miles travelled for the Weight Distance taxes. *See C & D Trailer Sales v. Taxation and Revenue Dep't*, 1979-NMCA-151, ¶8-9, 93 N.M. 697 (penalty upheld where there was no evidence that the taxpayer "relied on any informed consultation" in deciding not to pay tax). Consequently, this mistake of law provision of Section 7-1-69 (B) does not mandate abatement of penalty in this case.

Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. It is the duty of Taxpayer to determine what taxes need to be reported and paid. Nothing in the record indicates that Taxpayer exercised ordinary business care and prudence in determining its WDT reporting obligations. Therefore, the Department's imposition of penalty was legally supported and properly assessed.

***Underreporting penalty.***

Finally, under NMSA 1978, Section 7-15A-16 (2009), in addition to civil negligence penalty, the Department was mandated to impose a penalty for underreported mileage on Taxpayer. *See Marbob*, ¶22. Taxpayer did not accurately report total traveled mileage in all periods. Taxpayer's protest is denied.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment issued by the Department under Letter ID L1755121200. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not present sufficient records to demonstrate that it properly reported all taxable miles travelled in New Mexico.

C. Taxpayer did not prove it was entitled to a reduction of tax principal for off-highway use under Regulation 3.12.5.9 NMAC. *See Wing Pawn Shop,* ¶16 (a taxpayer must clearly establish the right to a deduction or an exemption from taxation).

D. By failing to produce sufficient records to support its claimed off-highway mileage deductions, Taxpayer did not overcome the presumption of correctness that attached to the Department's assessment. *See Archuleta,* ¶11.

E. The Assessment period was properly expanded to include years 2009 through 2013. *See* NMSA 1978, Section 7-1-18 (D) (2013)

F. Taxpayer proved to the Department Auditor that it qualified for the 33% reduced one-way haul Weight Distance Tax rate, and Department allowed a one-time partial abatement of the tax of $27,885.59. *See* NMSA 1978 Section 7-15A-6 (B) and NMAC Section 3.12.6.8.

G. Under the mandatory "shall" language of Section 7-1-67, Taxpayer is liable for accrued interest under the assessment. *See Marbob,* ¶22.

H. Under the mandatory "shall" language of Section 7-1-69, Taxpayer is liable for civil negligence penalty. *See Marbob,* ¶22. Although Taxpayer's error was unintentional, such error constitutes civil negligence subject to penalty. *See El Centro Villa Nursing Center,* ¶10.

I. Under the mandatory "shall" language of Section 7-15A-16, Taxpayer is liable for Weight Distance Tax mileage underreporting civil penalty. *See Marbob,* ¶22.

For the foregoing reasons, Taxpayer's protest **IS DENIED.** The partial abatement of $27,885.59 is recognized. As of the date of hearing, after applying the partial abatement, Taxpayer still owed $18,316.35 in assessed Weight Distance Tax, $3,666.54 in civil penalty, $20,200.00 in underreporting penalty, and $2,207.40 in interest for a total outstanding liability of $44,390.29. Interest continues to accrue until tax principal is satisfied.

DATED: March 7, 2017.

*Ignacio V. Gallegos*
Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

## NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.