

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

**IN THE MATTER OF THE PROTEST OF
IPC (USA), INC.
TO THE DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L1194062384**

D&O No. 18-06

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 2, 2017 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. David Mittle, Staff Attorney, and Mr. Marek Grabowski, Staff Attorney. Ms. Theresa Smith, Ms. Laura Lujan, and Ms. Leslie Montgomery also appeared as witnesses on behalf of the Department. IPC (USA), Inc. (Taxpayer) appeared for the hearing through its employee, Mr. Thomas Kim, with its attorneys, Mr. Charles Archuleta and Mr. Chris Marquez. The Taxpayer's exhibits #1, #2, #3, #4, #5, #6, #7, #8, #9, and #10 were admitted. The Department's exhibits "A", "B", "C", and "D" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The Hearing Officer took notice of all documents in the administrative file. Mr. Kim, Ms. Montgomery, Ms. Lujan, and Ms. Smith testified. The parties were given until January 8, 2018 to submit proposed findings of fact and conclusions of law. The parties requested additional time, and the deadline was extended to January 26, 2018. Both parties submitted timely

proposed findings of fact and conclusions of law. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 17, 2016, the Department denied the Taxpayer's claim for refund of \$66,691.42 for Gasoline Taxes and Petroleum Products Loading Fees for the tax period from January 1, 2012 through December 31, 2014.
2. On May 20, 2016, the Taxpayer filed a formal protest letter.
3. On June 30, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On June 30, 2016, the Administrative Hearings Office issued a notice of telephonic scheduling hearing.
5. The telephonic scheduling hearing was conducted on August 5, 2016. The hearing was held within ninety days of the protest.
6. On August 22, 2016, the scheduling order and notice of hearing was issued.
7. On August 18, 2017, an amended notice of hearing was issued.
8. On September 13, 2017, the parties filed a joint motion for continuance.
9. On September 20, 2017, the motion for continuance was denied.
10. On September 25, 2017, the Department filed its part of the joint prehearing statement.
11. On September 25, 2017, the Department filed a substitution of counsel.
12. On September 28, 2017, the Taxpayer's attorneys filed their entrance of appearance.
13. On September 28, 2017, the Taxpayer filed an emergency motion to vacate and its portion of the joint prehearing statement.

14. On September 29, 2017, a hearing on the merits was commenced. On the record, the parties renewed their motion to continue, and the motion for continuance was granted.
15. On October 2, 2017, the order granting the continuance and notice of hearing was issued.
16. On October 12, 2017, the Taxpayer filed its supplemental statement of grounds.
17. On October 20, 2017, the parties filed an amended joint prehearing statement.
18. The Taxpayer is a corporation registered with the Department as a gasoline distributor, a special fuel supplier, and a rack operator.
19. The Taxpayer was registered as a rack operator beginning in March 2012.
20. As a rack operator, the Taxpayer was the owner of gasoline stored at pipeline terminals in New Mexico. *See* NMSA 1978, § 7-13-2 (M) (1999).
21. The Taxpayer owned gasoline stored at a pipeline terminal in Moriarty, New Mexico (Moriarty terminal). The Taxpayer also owned gasoline stored at a pipeline terminal in Albuquerque, New Mexico (Albuquerque terminal).
22. Gasoline is taxed in New Mexico when it is received in the first instance. *See* NMSA 1978, § 7-13-3 (1995). *See also* 3.16.3.9 NMAC (2001).
23. Gasoline is received from a pipeline terminal “when it is loaded there into tank cars, tank trucks, tank wagons or other types of transportation equipment, or when it is placed there into a tank or other container from which sales or deliveries not involving transportation are made”. NMSA 1978, § 7-13-2.1 (1999).
24. The first person to receive the gasoline is responsible for the tax; however, the tax can be shifted to a registered distributor. *See* 3.16.3.8 (C) NMAC (2001).
25. When gasoline is taken from a pipeline terminal and loaded onto tanker trucks (racked out), it is received in the first instance for tax purposes. *See* 3.16.3.8 (A) NMAC.

26. A rack operator is required to report each sale of gasoline when the gasoline is racked out of the pipeline terminal. Each sale of gasoline on a rack operator's report should be associated with a bill of lading number, which enables the Department to track the sale of the gasoline from the rack operator to the registered distributor to the final customer.
27. A registered distributor who receives gasoline is required to report the purchase on a Combined Fuel Tax report. The registered distributor is then required to pay the tax for the receipt of the gasoline.
28. The first registered distributor to receive the gasoline is obligated to report and pay the tax even if the gasoline is subsequently sold to another registered distributor. *See* 3.16.3.9 NMAC.
29. For the gasoline tax at issue, the Taxpayer was acting as the registered distributor of the gasoline that it racked out of the terminals. Therefore, the Taxpayer was the first receiver of the gasoline and responsible for the reporting and payment of tax.
30. During the tax periods at issue, the Taxpayer was not filing rack operator reports and was not filing its Combined Fuel Tax reports correctly. The Taxpayer was not tracking its gasoline by bill of lading numbers.
31. The Taxpayer asserts that it racked out 616,773 gallons of gasoline and ethanol from the Moriarty terminal by loading it onto tanker trucks, and that it paid the gasoline tax on those gallons at that time.
32. The Taxpayer asserts that the gallons of gasoline and ethanol were then driven to the Albuquerque terminal, where it was loaded into the Albuquerque terminal for storage.
33. The Taxpayer did not provide documentation to show that the gasoline and ethanol racked out from the Moriarty terminal was actually delivered to and stored in the

- Albuquerque terminal. Mr. Kim claimed such documentation exists, but admitted that it was not provided to the Department and was not included in the exhibits.
34. The Taxpayer accepted “in-tank” transfers of gasoline at the Albuquerque terminal and was paying the gasoline tax on the “in-tank” transfers.
 35. “In-tank” transfers are not subject to the gasoline tax because the gasoline remains within the pipeline terminal, and therefore, is not received. *See* NMSA 1978, § 7-13-2.1.
 36. The Taxpayer racked out gasoline from the Albuquerque terminal and acted as its registered distributor. Therefore, the Taxpayer was liable for the gasoline tax on the gallons racked out from the Albuquerque terminal.
 37. The Taxpayer was not paying the gasoline tax on the gallons that it racked out of the Albuquerque terminal. The Taxpayer believed that the tax had already been paid on all of the gallons stored at the Albuquerque terminal.
 38. The Department audited the Taxpayer and investigated the gasoline that the Taxpayer racked out of the Albuquerque terminal.
 39. The Department credited the Taxpayer for the tax paid on the “in-tank” transfers. After the credit was given, there were still 129,548 gallons of gasoline and ethanol that did not show any tax paid when received out of the Albuquerque terminal. *See* Exhibit “A”.
 40. Based on the Taxpayer’s documentation, the Department was not able to reconcile the gallons that the Taxpayer claimed to have paid tax on at the Moriarty terminal with the gallons stored at the Albuquerque terminal.
 41. The Department would consider any gasoline uploaded into a pipeline terminal to be commingled and inseparable from the other gasoline stored there. Because such gasoline could not be discretely identified, the Department would consider any gallons racked out

- of the pipeline terminal to be taxable gasoline unless there was sufficient documentation to prove otherwise.
42. On July 30, 2015, the Department assessed the Taxpayer for failure to pay tax, including gasoline tax, on the 129,548 gallons that were racked out of the Albuquerque terminal.
 43. The Taxpayer paid the assessment. A payment of \$280,065.95, which was the full amount of the assessment, was made on August 6, 2015.
 44. On October 22, 2015, the Taxpayer claimed a refund of \$66,691.42. The Taxpayer's claim was for a refund of the gasoline tax and petroleum products loading fee paid pursuant to the assessment on the gallons of gasoline racked out of the Albuquerque terminal.
 45. On February 17, 2016, the Department denied the claim for refund.
 46. On May 20, 2016, the Taxpayer filed its protest. The protest purported to be against the denial of the claim for refund as well as against the assessment issued in July 2015.
 47. The protest against the assessment was not referred for hearing, and the Taxpayer acknowledged that the hearing was limited to the protest to the denial of refund. *See* NMSA 1978, § 7-1-24 (requiring protests to be filed within 90 days of the instigating action). *See also* NMSA 1978, § 7-1B-8 (requiring only timely filed protests to be referred for hearing).
 48. Despite its original claim for refund of \$66,691.42, the Taxpayer now claims that it is entitled to a refund of \$138,083.66 on 616,773 gallons. The Taxpayer asserts that the original claim for refund failed to include gallons of ethanol in its calculation.
 49. There was no evidence and no argument presented on the issue of the petroleum products loading fees. Therefore, that issue is deemed abandoned.

DISCUSSION

The issue to be decided is whether the Taxpayer is entitled to a refund of \$66,691.42 of gasoline tax paid on gallons racked out of the Albuquerque terminal.

The Taxpayer argues that the refund should be increased to \$138,083.66 because its original claim neglected to include gallons of ethanol. The Taxpayer argues that the refund is warranted because the gasoline tax was already paid. The Taxpayer argues that the tax was paid on the gallons when they were originally racked out of the Moriarty terminal and that denying the refund is tantamount to taxing the same gallons twice. The Taxpayer argues that shipping gallons in trucks from one terminal to another should be treated the same as an “in-tank” transfer and tax paid on such a transfer should be credited. The Taxpayer argues that it followed the Department’s instructions when it racked the gallons out of the Moriarty terminal by creating a fictitious sale to a customer that subjected the Taxpayer to the tax as a registered distributor. The Taxpayer also requests an award of administrative costs and fees.

The Department argues that the amount in controversy is limited to the claim that was denied. The Department argues that the Taxpayer failed to prove that the gallons racked out of the Albuquerque terminal had already been taxed. The Department argues that the Taxpayer failed to prove that the gallons racked out of the Moriarty terminal were actually delivered to the Albuquerque terminal. The Department argues that the appropriate first instance of tax is when the gasoline is racked out of a pipeline terminal. The Department argues that the statutes do not allow for the Taxpayer’s alleged business practices of shipping gasoline by truck from one pipeline terminal to another pipeline terminal within the state.

Burden of Proof.

Both parties indicate that the Department enjoys a presumption of correctness in this case since the refund claim is for monies paid pursuant to an assessment. Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that it is entitled to a refund of taxes that were paid based on the assessment.

Scope of protest.

The Administrative Hearings Office has jurisdiction to hear protests that have been filed pursuant to Section 7-1-24. *See* NMSA 1978, § 7-1B-6 and § 7-1B-8. A taxpayer may file a protest to a denial of a claim for refund made pursuant to Section 7-1-26. *See* NMSA 1978, § 7-1-24. A proper claim for refund must be in writing and must contain certain information, including an amended return and “the sum of money...being claimed”. NMSA 1978, § 7-1-26.

The Taxpayer’s claim for refund indicated that the sum of money being claimed was \$66,691.42. That claim for refund was denied. The Taxpayer never filed a claim for refund for \$138,083.66. Therefore, there was not a denial of that claim, and nothing to protest as to that amount. The only claim for refund made and denied was for \$66,691.42. Therefore, there is jurisdiction to hear the protest only as to that amount.

The Taxpayer argues that the greater amount should be considered because it is merely curing an error made in the original refund claim that neglected to account for gallons of ethanol. The Taxpayer’s own exhibits refute this explanation. By the Taxpayer’s current calculations, the

refund for the tax principal on gallons of gasoline is \$111,675.07 and on gallons of ethanol is \$4,740.83. *See* Exhibit 8. The Taxpayer also claims additional refund amounts from penalty and interest. *See* Exhibit 9. The Taxpayer cites no authority that would allow it to use the protest to amend its claim for refund to a sum more than double what it originally claimed. Moreover, the Taxpayer's calculations are unreliable, as they have changed significantly several times through the course of the protest. *See* Exhibits 1, 5, 8, and 9. The request to expand the protest is denied.

Gasoline tax.

New Mexico imposes an excise tax on gasoline when it is received within the state. *See* NMSA 1978, § 7-13-3. The first receiver of the gasoline is responsible for the payment of the gasoline tax. *See* NMSA 1978, § 7-13-2.1. *See also* 3.16.3.8 and 3.16.3.9 NMAC. The gasoline is received in the first instance when it is racked out of a pipeline terminal and loaded into tanker trucks. *See* NMSA 1978, § 7-13-2.1. *See also* 3.16.3.8 (A) (1) NMAC. It was undisputed that the Taxpayer was the first receiver of the gasoline and responsible for the payment of the tax. The issue in dispute is whether, with respect to the gallons associated with the \$66,691.42, the Taxpayer racked out those gallons and paid tax, then shipped those gallons to another pipeline terminal, and then racked out those same gallons from the second pipeline terminal and paid the tax a second time. Both parties seem to concede that each gallon should be taxed only once, when it is initially received.

Sufficiency of the evidence.

The Department argues that the Taxpayer failed to prove that any gallons from the Moriarty terminal were ever delivered by tanker truck to the Albuquerque terminal. The Department argues that even if the Taxpayer was able to prove that the gallons were so

delivered, there was still no way to prove that the gallons racked of the Albuquerque terminal were the same gallons that had previously been in the Moriarty terminal.

The only evidence to support the Taxpayer's position is the testimony of Mr. Kim. After the audit and assessment, Mr. Kim reviewed the Taxpayer's inventories and concluded that the number of gallons racked out of the Moriarty terminal had been placed into the Albuquerque terminal. Mr. Kim prepared a list of totals based on his review of the inventories that purports to reflect the number of gallons racked out of the Moriarty terminal and delivered to the Albuquerque terminal. *See* Exhibit 8. There was no dispute on payments of the gasoline tax for gallons racked out of the Moriarty terminal. Therefore, the Taxpayer concluded that it had already paid the tax on the gallons racked out of the Albuquerque terminal.

The Taxpayer was not able to track the gallons by bill of lading. *See* NMSA 1978, § 7-13-12 (1993) (requiring every shipment of gasoline racked out of a pipeline terminal to be recorded on a manifest or bill of lading and to be signed by every person accepting shipment). *See* 3.16.12.8 NMAC (2001) (indicating what information should be included). The Taxpayer did not provide any documentation to show that the gallons racked out of the Moriarty terminal were delivered to the Albuquerque terminal.

The Taxpayer admitted that it was not filing its rack operator reports at that time, and that it filed its CFT reports incorrectly. The CFT reports recorded sales of gallons racked out of the Moriarty terminal that the Taxpayer now claims were fictitious transactions that were required by the Department for the imposition of the gasoline tax. The first receiver of the gasoline is required to pay the gasoline tax regardless of whether the gasoline is sold to another customer or not. *See* NMSA 1978, § 7-13-3. *See* 3.16.3.9 NMAC.

The Department reviewed the reports that the Taxpayer filed as well as invoices, delivery tickets, and emails when it performed the audit. *See* Exhibit “B”. The Department prepared a list of unreported gallons for each month. *See* Exhibit “A”. The unreported gallons for which no tax-paid credit could be attributed were the subject of the assessment, the payment of which is the basis of the claim for refund. *See* Exhibits “A”, “B”, 2, and 3. In comparing the gallons assessed by the Department and the gallons now claimed by the Taxpayer, it is impossible to reconcile the data. The Department determined that the total number of unreported gallons for January 2012 was zero. *See* Exhibit “A”. Despite the lack of assessment for January 2012 as there were no unreported gallons, the Taxpayer claims that is owed a refund for January 2012 on 51,637 gallons of gasoline. *See* Exhibit 8. The unreported gallons for February 2012 were 188,814. *See* Exhibit “A”. Yet, the Taxpayer is claiming a refund for February 2012 on 214,908 gallons. *See* Exhibit 8. The unreported gallons for April 2012 were 66,372. *See* Exhibit “A”. The Taxpayer claims a refund for April 2012 on 68,484 gallons. *See* Exhibit 8. In August 2013, the Taxpayer overreported by 6,207 gallons, which were not subject to assessment. *See* Exhibit “A”. Nevertheless, the Taxpayer claims a refund for August 2013 on 67,436 gallons. *See* Exhibit 8. The Taxpayer’s claims for March 2012, January 2013, and April 2013 are for less gallons than the total unreported gallons assessed for those months. *See* Exhibits 8 and “A”.

Again, the assessment is presumed to be correct. *See* NMSA 1978, § 7-1-17. The Taxpayer claimed that it compared its inventories to gallons racked out and came to its conclusion that 616,773 gallons were racked out of the Moriarty terminal and taken by tanker truck to the Albuquerque terminal. The Taxpayer did not provide any documentation of inventories to show how it came to that conclusion. There was no evidence presented on how many gallons were racked out of the Moriarty terminal on any given date. There was no

evidence presented to show how the inventory allegedly changed at the Albuquerque terminal in correspondence or correlation to that action. There was no evidence to explain why the Taxpayer was claiming refunds on 616,773 gallons when only 129,548 gallons were assessed. “Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.” 3.1.6.12 (A) NMAC (2001). Based upon that totality of the evidence, the Taxpayer has not overcome the presumption of correctness and has not provided any substantiated evidence to show that the gallons racked of the Albuquerque terminal had previously been stored, or had tax paid on them, from the Moriarty terminal.

Limitations on claims for refund of gasoline tax.

“[G]asoline is not received when it is shipped from one refinery or pipeline terminal to another refinery or pipeline terminal.” NMSA 1978, § 7-13-2.1 (A) (3). The Taxpayer argues that this subsection applies to its shipping of gasoline from the Moriarty terminal to the Albuquerque terminal. It is clear from the statute that the exception applies to “in-tank” transfers, and is not meant to apply to gasoline that is racked out of the pipeline terminal. *See* NMSA 1978, § 7-13-2.1 (indicating receipt is accomplished when gasoline is racked out of the pipeline into tanker trucks, and in various other instances that do not occur within the pipeline terminal). Even if the Taxpayer’s claims were substantiated, the claim for refund would fail. The gasoline was first received when it was racked out of the Moriarty terminal and loaded into tanker trucks. *See id.* *See also* 3.16.3.8 (A) (1) NMAC. Therefore, tax was owed at that time. *See* NMSA 1978, § 7-13-3. “Upon the submission of proof satisfactory to the department, a rack operator may submit, . . . , a claim for refund of a New Mexico tax paid on gasoline previously received in New Mexico from a source *other than a refiner or pipeline terminal in this state* and placed in a terminal from which it will be loaded into tank cars, tank trucks, tank wagons or other

types of transportation equipment.” NMSA 1978, § 7-13-11 (B) (2015) (emphasis added). This statute clearly presumes that gasoline racked out of a terminal is going to be subject to the gasoline tax. *See id.* To reduce the likelihood that the same gallons will be taxed twice, the statute allows for a refund of the gasoline tax when the tax-paid gallons are placed into a pipeline terminal, but only if the gasoline was received in some way other than from a pipeline terminal in this state. *See id.* Even if the Taxpayer paid the gasoline tax on those gallons and then placed them back into a terminal, the claim for refund would not be supported by the statute because the gallons were received from a pipeline terminal within this state. *See id.*

Costs and fees.

The Taxpayer moved for an award of administrative costs and fees. A taxpayer who has substantially prevailed with respect to the amount or issues may be entitled to an award of administrative costs. *See* NMSA 1978, § 7-1-29.1 (2015). The Taxpayer did not prevail in this case. Therefore, the Taxpayer is not entitled to administrative costs.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the denial of refund issued under Letter ID number L1194062384, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer received gasoline when it was racked out of the pipeline terminals, and the Taxpayer was responsible for the excise tax on its receipt. *See* NMSA 1978, § 7-13-3. *See also* NMSA 1978, § 7-13-2.1. *See also* 3.16.3.8 (A) (1) NMAC.

C. The Taxpayer failed to provide substantiated evidence to prove its claims, and failed to overcome the presumption that the assessment was correct. *See* NMSA 1978, § 7-1-17. *See also* 3.1.6.12 (A) NMAC.

D. Even if the Taxpayer's claims were proven, the Taxpayer would not be entitled to a refund because the tax was paid on gasoline received from a pipeline terminal within this state. *See* NMSA 1978, § 7-13-11.

E. The Taxpayer is not the prevailing party and is not entitled to administrative costs and fees. *See* NMSA 1978, § 7-1-29.1.

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

DATED: February 19, 2018.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 2018 in the following manner: