

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

**IN THE MATTER OF THE PROTEST OF
AMERICAN POWER LLC
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0881164464**

v. AHO Case No. 18.11-296A, D&O No. 19-10

NEW MEXICO TAXATION AND REVENUE DEPARTMENT.

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Administrative Hearings Office, Ignacio V. Gallegos, Esq., Hearing Officer, on the New Mexico Taxation and Revenue Department’s Motion for Summary Judgment and Memorandum in Support (hereinafter “Motion”). The Taxation and Revenue Department (“Department”) filed its Motion March 6, 2019 by and through its counsel of record, Staff Attorney Richard Pener. American Power LLC (“Taxpayer”) had fifteen days from March 6, 2019 to file a response pursuant to the Scheduling Order and Notice of Administrative Hearing, filed December 19, 2018. As of April 10, 2019, the Administrative Hearings Office has received no responsive motion or reply from American Power LLC.

The Hearing Officer reviewed the Department's Motion and Memorandum, including all exhibits tendered. Since no response was filed, the Hearing Officer reviewed the Taxpayer's original protest letter with accompanying documentation, and the recording of the initial scheduling conference in an attempt to glean the Taxpayer's factual contentions that may reasonably lead to a disputed issue of fact or law which may justify holding a hearing on the merits.

Regulation 22.600.3.15 (G) (2/1/18) allows, but does not require, the Hearing Officer to presume “consent to the relief sought” if no written response is filed by the non-moving party by the deadline imposed by the Scheduling Order or the regulation.

Having reviewed the undisputed material facts, and otherwise being informed in the premises, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural History

1. On September 17, 2018, the Department issued a Notice of Assessment of Taxes and Demand for payment to Taxpayer for weight distance tax, civil penalty, interest and WDT underreporting penalty, totaling 3,034.33. The letter acknowledged a credit/offset to the Taxpayer of \$1,301.86, and demanded payment of the outstanding balance of \$1,732.47. [Letter ID L0881164464].

2. On September 25, 2018, Taxpayer submitted a letter of protest to the Department (stamped as received October 1, 2018), which included a statement of the grounds for protest, an illegible incident status for what appears to be a police inquiry, a business card for Jason Swain, and a letter from the Better Business Bureau concerning a complaint against SWX Cleveland, LLC. [Protest].

3. On October 17, 2018, the Department issued a letter acknowledging the Taxpayer's protest of the Weight Distance Tax Assessment dated September 17, 2018. [Letter ID L1689440432].

4. On November 15, 2018, the Department issued a Notice of Abatement of Tax Assessment to Taxpayer, showing an abatement of civil penalty in the amount of \$240.57.

1 showing the balance due of \$1,491.90, along with a color diagram of credits and balances.
2 [Letter ID L0307179696].

3 5. On November 15, 2018, the Taxpayer submitted a Tax Information Authorization
4 to the Department, giving Sam Agzhivi its permission to review all state taxes, including IFTA
5 tax. [Administrative File].

6 6. On November 30, 2018, the Department submitted a hearing request to the
7 Administrative Hearings Office, alleging the amount at protest to be penalties of \$1,500.00 and
8 interest of \$90.00. [Hearing Request].

9 7. On December 3, 2018, the Administrative Hearings Office mailed a Notice of
10 Telephonic Scheduling Hearing to the parties, giving notice that a scheduling hearing would be
11 held December 19, 2018.

12 8. On December 19, 2018, the parties appeared at the scheduling hearing by
13 telephone, and the undersigned Hearing Officer digitally recorded the proceeding.

14 9. On December 19, 2019, the Taxpayer submitted a “Joint Request for
15 Videoconference Hearing” signed for the Taxpayer by Islom Shakhbandarov, but unsigned by
16 the Department’s attorney, Richard Pener. [Administrative File]. On the same day, the
17 Administrative Hearings Office support staff emailed Mr. Pener to confirm the Department’s
18 position, and he indicated that it was premature to give a position on the Taxpayer’s request.
19 [Administrative File].

20 10. On December 19, 2019, the Administrative Hearings Office mailed a Scheduling
21 Order and Notice of Administrative Hearing to the parties, setting deadlines for motions,
22 discovery, and setting a merits hearing on May 1, 2019. [Administrative File].

11. On February 11, 2019, the Department filed a Certificate of Service with the Administrative Hearings Office, showing that it had served the Taxpayer with the Department's Responses to American Power LLC's First Set of Interrogatories and Requests for Production of Documents on February 11, 2019. [Administrative File].

5 12. On March 6, 2019, the Department filed its Motion for Summary Judgment and
6 Memorandum in Support. As Exhibits A001 through A038, the Department submitted the
7 Taxpayer's responses to the Department's Requests for Admission, Interrogatories, and Requests
8 for Production of Documents to American Power, LLC. As Exhibit B001 through B004, the
9 Department submitted its Notice of Limited Scope Audit for 2016 [Case ID 1007299]. As
10 Exhibits C001 through C004, the Department submitted its Notice of Limited Scope Audit for
11 2016 [Case ID 988832]. As Exhibit D001, the Department submitted its Notice of Abatement to
12 Taxpayer for civil penalty, dated November 15, 2018 [Letter ID 0307179696]. As Exhibit E001
13 through E013, the Department submitted the Affidavit of Mary Griego (protest auditor).

13. The deadline for Taxpayer to file a response to the Department's Motion was
March 21, 2019. As of April 3, 2019, no response from Taxpayer has been received by the
Administrative Hearings Office.

Undisputed Material Facts

18 14. Taxpayer is a commercial motor carrier based in Dayton, Ohio. Taxpayer is
19 registered with the Department as a Weight Distance Tax taxpayer #07-147758-0-6. [Exhibit
20 A003: response to Request for Admission No. 1].

15. The Department conducted two Limited Scope Audits of Taxpayer's Weight
Distance Tax reports commencing June 30, 2018. [Exhibit B001 through B004, and Exhibit
C001 through C004].

1 16. Finding discrepancies between the Taxpayer's International Fuel Tax Agreement
2 (IFTA) returns and the Weight Distance Tax returns, on September 17, 2018, the Department
3 assessed the Taxpayer for additional Weight Distance Tax, penalty, interest, and underreporting
4 penalty. [Exhibit B001 through B004, Exhibit C001 through C004, Exhibit E012: Letter ID
5 #L081164464].

6 17. Taxpayer agreed to pay the underlying tax, as assessed, and paid the underlying
7 Weight Distance Tax in two payments on September 14, 2018, the first for \$744.96 and the
8 second for \$556.90. [Exhibit A003: Request for Admission No.2, Request for Admission No.3].

9 18. Taxpayer did not protest the actual WDT tax principal. [Exhibit A009: Answer to
10 Interrogatory No. 4].

11 19. Taxpayer alleged, and the Department did not dispute, that the Taxpayer
12 contracted with SWX Cleveland, LLC, and its principal Jason Swain, after performing a due
13 diligence investigation of the company, to file its IFTA returns. [Exhibit A004, A005, A010,
14 A011, A012].

15 20. Taxpayer alleged, and the Department did not dispute, that the Taxpayer believed
16 Jason Swain filed false IFTA returns by not filing on Taxpayer's behalf. [Exhibit A004, A005].

17 21. Taxpayer alleged, and the Department did not dispute, that the Taxpayer
18 discovered irregularities in its IFTA reporting on February 15, 2017 for the fourth quarter
19 reporting period of 2016, when Taxpayer discovered that there were zero miles reported to IFTA
20 for the timeframe they relied upon SWX Cleveland, LLC for IFTA reporting. [Exhibit A012,
21 A013].

22. Taxpayer did not reveal how it corrected the zero third quarter IFTA miles (purportedly reported through SWX Cleveland, LLC), which correction would have led to the IFTA reporting that led to the mismatch.

23. Taxpayer reported 17,016 miles in New Mexico to IFTA, but did not report the same number of miles in its third quarter 2016 WDT return, as noted in the audit commencement letter under Case ID 1007299. [See Exhibit B001].

24. Taxpayer did not reveal how it corrected the zero fourth quarter IFTA miles (purportedly reported through SWX Cleveland, LLC), which correction would have led to the IFTA reporting that led to the mismatch.

25. Taxpayer reported 10,459 miles in New Mexico to IFTA, but not report the same number of miles in its fourth quarter 2016 WDT return, as noted in the audit commencement letter under Case ID 988832. [See Exhibit C001].

26. In no document provided by Taxpayer does Taxpayer allege or affirm that SWX Cleveland, LLC, was contracted to make New Mexico WDT return filings.

DISCUSSION

The principal issue in the protest is whether Taxpayer, as a purported victim of fraud, is entitled to abatement of interest under NMSA 1978, Section 7-1-67 (2013), and abatement of an underreporting penalty under NMSA 1978, Section 7-15A-16 (2009). It is important to note that the Taxpayer did not protest the entire tax assessment, and voluntarily paid the underlying Weight Distance Tax assessed. For the reasons stated herein, the Department is entitled to summary judgment denying the Taxpayer's protest as there are no material facts at issue which

1 may sway the hearing officer to grant the Taxpayer's protest to abate interest and WDT
2 underreporting penalty.

3 **Summary Judgment Standard**

4 Although the Rules of Civil Procedure for the District Courts do not apply in tax protest
5 hearings under the Administrative Hearings Office Act, the Hearing Officer may refer to them
6 for guidance. Rule 1-056 NMRA establishes that summary judgment is only appropriate when
7 there is no dispute of material fact and the moving party is entitled to a judgment as a matter of
8 law. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331, 825 P.2d 1241. Summary
9 judgment is a drastic remedy that should be exercised with extreme caution. *See Cebolleta Land*
10 *Grant ex rel. Bd. of Trs. of the Cebolleta Land Grant v. Romero*, 1982-NMSC-043, ¶3, 98 N.M.
11 1, 644 P.2d 515. *See Enduro Operating LLC v. Echo Prod.*, 2017-NMCA-018, ¶11, 388 P.3d
12 990. Summary judgment is reserved only for instances where there is no genuine dispute of fact
13 and the law compels a judgment. *See Great W. Constr. Co. v. N. C. Ribble Co.*, 1967-NMSC-
14 085, ¶13, 77 N.M. 725, 427 P.2d 246. Trials are preferred over the granting of summary
15 judgment. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶8, 148 N.M. 713, 242 P.3d 280.
16 When the factual record is insufficiently developed or where further factual resolution is
17 necessary, summary judgement is inappropriate. *See Nat'l Excess Ins. Co. v. Bingham*, 1987-
18 NMCA-109, ¶13, 106 N.M. 325, 742 P.2d 537. When there is the slightest doubt about whether
19 a material dispute of fact exists, summary judgment is inappropriate. *See Las Cruces Country*
20 *Club, Inc. v. City of Las Cruces*, 1970-NMSC-016, ¶3, 81 N.M. 387, 467 P.2d 403. The burden
21 is on the movant to prove no issues of material fact, and once the movant has made a *prima facie*
22 case, the burden shifts to the non-moving party to prove the existence of a material fact.
23 *Goodman v. Brock*, 1972-NMSC-043, ¶ 6-11, 83 N.M. 789, 498 P.2d 676.

1 **Presumption of Correctness**

2 The Department is entitled to the benefit of a presumption of correctness in its assessment
3 of taxes, penalties, and interest. *See* NMSA 1978, Section 7-1-17 (C). “Tax” is defined to
4 include not only the tax program’s principal, but also interest and penalty under NMSA 1978,
5 Section 7-1-3 (Y) (2017). Assessments of penalties and interest therefore also receive the benefit
6 of a presumption of correctness. *See* Regulation 3.1.6.13 NMAC (1/15/01).

7 Consequently, the Taxpayer has the burden to overcome the assessment and show it was
8 entitled to the abatement of tax under the Tax Administration Act and the Weight Distance Tax
9 Act. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. If a taxpayer is effective
10 in rebutting the presumption of correctness, the burden shifts to the Department to show the
11 correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-
12 021, ¶13, 133 N.M. 217.

13 **Penalties**

14 In this case, the Department assessed both a civil penalty for negligence under Section 7-
15 1-69, and a WDT underreporting penalty under Section 7-15A-16. Taxpayer is correct (in its
16 Answer to Interrogatory No. 4) that the Department has been inconsistent in the use of the words
17 to specify the various penalties. In some documents, the Department refers to “penalty”, and
18 “civil penalty” [See Motion, ¶12, Exhibit B001, C001, D001] for the civil penalty assessed under
19 Section 7-1-69. In other documents, the Department refers to “WDT penalty” and “civil
20 penalty” for the penalty assessed under Section 7-15A-16. For purposes of clarity and
21 consistency, I have been referring to the Section 7-1-69 penalty as “civil penalty” and I have
22 been referring to the Section 7-15A-16 penalty as the “WDT underreporting penalty.”

1 The distinction is an important one to be clear about, because each penalty has its own
2 particular characteristics. The civil penalty of Section 7-1-69 has a safety valve written into the
3 statute, allowing abatement if the failure to pay an amount of tax when due resulted from “a
4 mistake of law made in good faith and on reasonable grounds.” *See* Section 7-1-69 (B).
5 Likewise, the civil penalty of Section 7-1-69 is based on negligence and offers taxpayers relief
6 from the application of the penalty if the taxpayer shows the failure to pay or file a return was
7 not negligent. *See* Regulation 3.1.11.11 NMAC (1/15/01). Here, by granting the abatement of
8 the civil penalty of Section 7-1-69, the Department appears to have acknowledged that the
9 Taxpayer’s failure to pay the WDT tax on time was nonnegligence. This abatement is not at
10 issue.

11 In contrast, the underreporting penalty of Section 7-15A-16 does not contain such a safety
12 valve for reasonable mistakes nor does it provide relief for reporting or payment errors due to non-
13 negligence. *See The protest of Gloworks Trucking*, Decision and Order #14-31 (N.M. Taxation
14 and Revenue Department, Hearings Bureau, August 6, 2014, non-precedential). The WDT
15 underreporting penalty statute does not require negligence nor intent, hence it is a *per se* statute,
16 not requiring any proof other than the fact that the mileage (or vehicle weight) was not reported
17 properly. Extrinsic, or circumstantial, evidence does not limit the application of the WDT
18 underreporting penalty, even if the underreporting error was nonnegligent and unintentional. *See*
19 *Gloworks*, p. 5. The only relief available comes through Regulation 3.12.13.8 NMAC (3/15/10),
20 which allows taxpayers the opportunity to correct their WDT returns voluntarily either through a
21 “managed audit” or by filing “amended returns” to escape the sometimes onerous application of
22 WDT underreporting penalties.

1 Taxpayer is correct in stating (in its answer to Interrogatory No. 9) that the Department
2 may make abatements of “any part of an assessment” if there is evidence that the assessment was
3 made “incorrectly, erroneously, or illegally” pursuant to NMSA 1978, Section 7-1-28 (2013).
4 Here, I should clarify, although the section of the Tax Administration Act provides broad powers
5 to abate, the rationale for abatement still must fall into one of the three categories: incorrect,
6 erroneous, or illegal behavior *by the Department* leading to the assessment.

7 Had the Taxpayer challenged the entirety of the assessment, including the underlying tax,
8 the Department or the Hearing Officer would have had the authority to abate or order abatement
9 of the entire assessment if the Department or the Hearing Officer determined that the assessment
10 was issued incorrectly, erroneously, or illegally. Here, the Taxpayer agreed with the assessment
11 of the underlying WDT tax for miles driven in New Mexico, but disputed the applicability of the
12 assessments of interest, penalty and WDT underreporting penalty.

13 **IFTA and WDT**

14 IFTA and WDT are two separate tax programs. “The International Fuel Tax Agreement
15 is a multi-jurisdictional agreement that is intended to encourage cooperation in the administration
16 and collection of motor fuel use tax.” *May Trucking Co. v. Or. DOT*, 388 F.3d 1261, 1262
17 (2004). IFTA coordinates *fuel* use taxes, and tracks mileage to allocate what is due from the
18 “base jurisdiction” to the different states in which a carrier travels.¹ The New Mexico Weight
19 Distance Tax is a *highway* use tax. *See* NMSA 1978, Section 7-15A-3 (1988). The rate of tax is
20 based on vehicle weight and the miles travelled on New Mexico highways. *See* NMSA 1978,
21 Section 7-15A-6 (2004).

¹ For a full examination of the scope of the agreement, IFTA Articles of Agreement are available online at <https://www.iftach.org/manualnew.php>.

1 It is the duty of Taxpayer to determine what taxes need to be reported and paid. Nothing
2 in the record indicates that Taxpayer exercised ordinary business care and prudence in
3 performing its WDT reporting obligations during the two quarters of 2016 that it used SWX
4 Cleveland, LLC to report its IFTA miles. Taxpayer made no mention of whether the same
5 company was hired to file Taxpayer's WDT returns. Under New Mexico's self-reporting tax
6 system, "every person is charged with the reasonable duty to ascertain the possible tax
7 consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-
8 NMCA-127, ¶5, 90 N.M. 16. The non-filing or non-payment of WDT returns is attributable to
9 none other than the Taxpayer in this instance.

10 **Interest**

11 When the Taxpayer acknowledges, as here, that the underlying tax principal is proper, it
12 follows that assessments of interest are appropriate and accrue until the underlying tax is paid.
13 When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to
14 the state on that amount from the first day following the day on which the tax becomes due...until
15 it is paid." NMSA 1978, Section 7-1-67 (2007) (italics for emphasis). Under the statute,
16 regardless of the reason for non-payment of the tax, the Department has no discretion in the
17 imposition of interest, as the statutory use of the word "shall" makes the imposition of interest
18 mandatory. See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22,
19 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear
20 indication to the contrary). The language of the statute also makes it clear that interest begins to
21 run from the original due date of the tax and continues until the tax principal is paid in full.

22 Because the Taxpayer paid the underlying assessment of WDT tax, interest stopped
23 accruing. Here, the undisputed facts established that the Taxpayer's WDT tax payments were

1 due immediately following the third and fourth quarters of 2016. Returns and tax payments
2 under the act are due the final day of the month following the close of the quarterly reporting
3 period. *See* NMSA 1978, Section 7-15A-9 (A) (1999). The Department discovered in 2018 that
4 the miles reported on IFTA returns did not match the miles reported on WDT returns. The
5 Taxpayer paid the underlying WDT tax on or about September 14, 2018. The interest on the
6 underlying principal balance began to accrue when the tax was not timely reported and paid, and
7 stopped accruing properly when the principal balance of WDT tax was paid in September of
8 2018.

Having reviewed the documents contained in the administrative record, the Hearing Officer is persuaded that the factual record is sufficiently developed and the record entitles the Department to summary judgment, as there are no material facts at issue, and the law requires judgment in favor of the Department. The Department's Motion should be, and hereby is **GRANTED**. Taxpayer's protest is **DENIED**.

CONCLUSIONS OF LAW

15 A. Taxpayer filed a timely, written protest of the Department's assessment and
16 jurisdiction lies over the parties and the subject matter of this protest.

17 B. A telephonic scheduling hearing was timely set and held within 90-days of protest
18 under NMSA 1978, Section 7-1B-8 (2015).

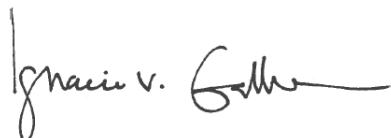
19 C. The sole issues at protest were the assessment of a WDT underreporting penalty
20 pursuant to the Weight Distance Tax Act, NMSA 1978, Section 7-15A-16 (2009), and the
21 assessment of interest to the undisputed underlying tax, pursuant to the Tax Administration Act,
22 NMSA 1978, Section 7-1-67 (2000).

1 D. The Department is entitled to a presumption of correctness in its assessment,
2 pursuant to NMSA 1978, Section 7-1-17 (C) (2007). *See also* Regulation 3.1.6.13 NMAC
3 (01/15/01).

4 E. The Department established a prima facie case, and the Taxpayer did not rebut, that
5 the Department is entitled to Summary Judgment because there exist no issues of material fact, and
6 that under the facts as alleged the Department is entitled to Judgment in its favor. *See Marbob*
7 *Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d
8 135 (“It is widely accepted that when construing statutes, ‘shall’ indicates that the provision is
9 mandatory”).

10 For the foregoing reasons, the Taxpayer’s protest **IS DENIED. IT IS ORDERED** that
11 Taxpayer is liable for \$1,432.75 in WDT underreporting penalty, and \$59.15 in interest, for a
12 total outstanding liability of \$1,491.90.

13 DATED: April 10, 2019.



14
15 Ignacio V. Gallegos
16 Hearing Officer
17 Administrative Hearings Office
18 Post Office Box 6400
19 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.*

CERTIFICATE OF SERVICE

14 On April 10, 2019, a copy of the foregoing Decision and Order Granting Summary
15 Judgment was submitted to the parties listed below in the following manner:

John Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502