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

IN THE MATTER OF THE PROTEST OF
GLOWORKS TRUCKING **No. 14-31**
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1161738704

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on July 7, 2014, before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Mrs. Gloria Lucero appeared *pro se* for Gloworks Trucking ("Taxpayer"). Staff Attorney Elena Morgan appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor J. Amanda Carlisle appeared as a witness for the Department. Department Exhibit A-B were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 23, 2013, the Department assessed Taxpayer for $10,222.22 in Weight Distance Tax, $2,048.32 in civil negligence penalty, $1,524.76 in interest, and $7,600.00 in Weight Distance Tax underreporting penalty for the Weight Distance Tax reporting periods of March 31, 2007 through December 31, 2011. [Letter id. no. L1161738704].

2. On November 18, 2013, Taxpayer protested the Department's assessment.

3. On January 9, 2014, the Department requested a hearing in this matter with the Hearings Bureau.

4. On January 10, 2014, the Hearings Bureau sent Notice of Telephonic Scheduling Conference, scheduling this matter for a scheduling conference on February 26, 2014.

5. On February 26, 2014, a scheduling conference hearing occurred in the above-captioned matter before then Chief Hearing Officer Monica Ontiveros. The parties agreed that the scheduling conference satisfied NMSA 1978, Section 7-1-24.1 (A) (2013)'s 90-day hearing requirement.

6. On February 27, 2014, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on July 7, 2014.

7. Taxpayer is a trucking company that generally hauls dirt, gravel, and road de-icing salt.

8. Taxpayer is owned and operated by husband and wife Johnny and Gloria Lucero.

9. Johnny Lucero provides the transportation services while Gloria Lucero is the business manager.

10. Taxpayer's transportation services generally qualify for the reduced one-way hauler Weight Distance Tax rate.

11. The Department selected Taxpayer for audit of the 2009, 2010, and 2011 Weight Distance Tax reporting periods.

12. During the audit, the Department found that although Taxpayer qualified as a one-way hauler, Taxpayer was mistakenly reporting only the one-way haul mileage rather than all the miles it traveled in New Mexico. In other words, Taxpayer reported only half of the total traveled mileage.

13. Because Taxpayer underreported its tax liability by more than 25%, the Department expanded the audit to include 2007 and 2008.

14. Mrs. Lucero acknowledged misunderstanding the instructions regarding the reporting requirements for one-way haulers.

15. Mrs. Lucero did not contest that Taxpayer owed the assessed Weight Distance Tax. However, Mrs. Lucero asked that penalty and interest be abated because they were excessive given her misunderstanding of the instructions and the severe financial impact such penalty and interest would have on Taxpayer.

16. On January 9, 2014, the Department abated the assessed NMSA 1978, Section 7-1-69 (A) (2007) civil negligence penalty of $2,048.32 pursuant to Regulation 3.1.11.11 (D) NMAC. [Department Ex. A].

17. As of the date of hearing, Taxpayer owed $10,222.22 in Weight Distance Tax, $7,600.00 in Weight Distance Tax underreporting penalty, and $1,736.73 in interest for a total outstanding liability of $19,558.71. [Department Ex. B].

DISCUSSION

After audit, Taxpayer protested the Department's assessment of penalty and interest as excessive. Before the protest hearing, the Department abated the assessed NMSA 1978, Section 7-1-69 (A) (2007) civil negligence penalty pursuant to its authority under Regulation 3.1.11.11 (D) NMAC. Remaining at issue in this protest is whether the Department has the authority to abate the assessed interest and/or the Weight Distance Tax underreporting penalty.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment of tax issued in this case is presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't*

of Taxation & Revenue, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Taxpayers has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 431. 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.

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 vehicle's 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 of two-thirds the tax computed under Subsection A when three criteria are met. Under NMSA 1978, Section 7-15A-8 (A) (1988), the "total number of miles traveled on New Mexico highways during the tax payment period by the motor vehicle subject to the tax shall be used in computing the tax." In other words, all New Mexico traveled mileage is used in calculating the Weight Distance Tax regardless of whether the full rate under Section 7-15A-6 (A) or the reduced one-way hauler rate under Section 7-15A-6 (D) applies. *See also* Section 7-15A-8 (B) (requiring a reporting of the total miles traveled in New Mexico).

Because of a reporting mistake, Taxpayer did not contest that it owed the assessed Weight Distance Tax in this matter. Mrs. Lucero was a sincere witness whom credibly testified that she did not understand the instructions and made an honest mistake. Mrs. Lucero's

credibility was bolstered by her genuine emotional response and testimony about a medical condition that affected her ability to follow the instructions. The Department itself also abated civil negligence penalty under NMSA 1978, Section 7-1-69 (2007), which also shows that the Department recognized generally that Mrs. Lucero made a genuine, nonnegligent mistake in this matter. As a one-way hauler, Taxpayer thought that it only needed to report the miles traveled while carrying a load rather than also include the empty miles. However, Section 7-15A-8 makes clear that Taxpayer was required to report all miles traveled in New Mexico, and that the Weight Distance Tax would be computed from that total traveled mileage. *See New Mexico Taxation and Revenue Department v. Casias Trucking*, 2014-NMCA-__, ¶5, (No. 32,595 issued July 17, 2014). Under the Weight Distance Tax Act, the only discount any qualifying one-way hauler is entitled to is the reduced one-way hauler rate, not also reduction in the total traveled mileage in New Mexico. Although there was no evidence that Taxpayer's mistake was intentional, the effect of the way Taxpayer reported its mileage was to both get a reduced one-way haul tax rate and incorrectly reduce the traveled mileage base used to calculate the Weight Distance Tax, leading to a significant underreporting of mileage and Weight Distance Tax liability.

In pertinent part, under NMSA 1978, Section 7-15A-16 (2009), an additional civil penalty beyond any other penalty and interest "shall" be imposed upon a taxpayer that has "reported less than the mileage actually traveled on New Mexico highways during a tax payment period…" The Department has no discretion in the imposition of the Weight Distance Tax underreporting civil penalty, as the statutory use of the word "shall" makes the imposition of Section 7-15A-16 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).

As expressed at the hearing, the undersigned hearing officer had some concerns about the large percentage amount of the Section 7-15A-16 penalty in light of the fact that the Department on its own abated Section 7-1-69's civil negligence penalty pursuant to Regulation 3.1.11.11 (D) NMAC. The Department determined that Taxpayer was nonnegligent in its underreporting of Weight Distance Tax, and thus not subject to civil negligence penalty. Yet, despite finding that Taxpayer's errors were nonnegligent, the Department appears compelled by the language of Section 7-15A-16 to impose an underreporting penalty by reporting period that--unlike either civil negligence penalty or even penalty for willful attempt to evade a tax under Section 7-1-69 (which are capped at 20% or 50% respectively)--has no maximum cap on the possible percentage total of Weight Distance Tax underreporting penalty. In this case, despite the fact that Taxpayer was found nonnegligent, the Weight Distance Tax penalty is 74% of the assessed Weight Distance Tax principal liability, a penalty percentage that exceeds even what the Department can collect as penalty for the more egregious willful attempt to evade a tax.

Nevertheless, despite these concerns, the Department is bound by the statutory language and must impose the penalty consistent with the amounts specified by the Legislature. While both Section 7-1-69 and Section 7-15A-16 use the same "shall" language, there is still a relevant distinction between the statutes that prevents the Department from extending its abatement of civil negligence penalty to the Weight Distance Tax underreporting penalty. Section 7-1-69 (B) allows the Department to abate the civil negligence penalty when a taxpayer shows they made a mistake of law in good faith and on reasonable grounds. Section 7-15A-16 contains no similar provision. Further, unlike under Section 7-1-69, the Department has not promulgated any regulation that allows it to abate penalty under Section 7-15A-16 under certain narrow circumstances. Because Taxpayer mistakenly underreported its total New Mexico traveled mileage on its Weight Distance

Tax Act returns, even though the Department found Taxpayer nonnegligent for civil penalty purposes, the Department had no choice but to impose the legislatively proscribed penalty under Section 7-15A-16.

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*, ¶22. 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.

Taxpayer also articulated a genuine concern that the cost of the assessment, and the potential lien that might result from a payment plan exceeding 12-months, could close its small business. Unfortunately, financial hardship is not grounds for the Department to abate any portion of the assessment under Regulation 3.1.6.14 NMAC (01/15/01). Under Section 7-1-17, the Department is required to assess any tax liability greater than $25.00. And the mandatory nature of the interest and penalty statute does not allow for abatement of penalty and interest based on sympathy for the Taxpayer's financial hardship. As the Department's protest auditor Ms. Carlisle explained, Taxpayer may arrange a payment plan for the outstanding tax liability, a payment plan that may periodically be revisited. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

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

B. Even when qualified for the reduced one-way hauler Weight Distance Tax Act rate, Taxpayer was still required to report all mileage traveled in New Mexico under Section 7-15A-8 (A-B) as basis for determining Weight Distance Tax Liability. *See New Mexico Taxation and Revenue Department v. Casias Trucking*, 2014-NMCA-__, ¶5, (No. 32,595 issued July 17, 2014).

C. By failing to report all mileage traveled in New Mexico, Taxpayer underreported its mileage in the reporting period and under the mandatory "shall" language of Section 7-15A-16, Taxpayer was liable for Weight Distance Tax underreporting mileage civil penalty in each reporting period. *See Marbob*, ¶22

D. Under the mandatory "shall" language of Section 7-1-67, Taxpayer is liable for accrued interest under the assessment. *See Marbob*, ¶22. Interest continues to accrue until the tax principal is satisfied.

For the foregoing reasons, Taxpayer' protest **IS DENIED**. As of the date of hearing, Taxpayer owed $10,222.22 in Weight Distance Tax, $7,600.00 in Weight Distance Tax underreporting penalty, and $1,736.73 in interest for a total outstanding liability of $19,558.71.

DATED: August 6, 2014.

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