

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

**IN THE MATTER OF THE PROTEST OF
HYDROTECH SERVICES, LLC.
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NOS. L1307427376 AND L0362582576**

No. 17-10

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 12, 2017 before Hearing Officer Ignacio V. Gallegos, Esq. The Taxation and Revenue Department (Department) was represented by Mr. Marek Grabowski, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared as a witness for the Department. Mr. Joseph Cotton, Operations Manager for Hydrotech Services, LLC (Taxpayer), appeared representing Taxpayer for the hearing, and as a witness. The Hearing Officer took notice of all documents in the administrative file. Taxpayer presented Exhibits 1, 2A through 2V, 3A through 3M, and 4A through 4VV (double sided). The Department presented Exhibits A through H. The exhibits were admitted upon stipulation of parties. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On January 6, 2016, the Department assessed the Taxpayer for International Registration Plan (IRP) penalty and interest for the tax reporting period ending December 31, 2014. The assessment was for \$0.00 tax, \$1,313.80 penalty, and \$0.00 interest.
2. On January 6, 2016, the Department assessed the Taxpayer for International Fuel Tax Agreement (IFTA) Tax, penalty, and interest for the tax reporting periods from March 31,

- 2013 through December 31, 2013. The assessment was for \$10,853.11 tax, \$200.00 penalty, and \$799.69 interest.
3. On March 22, 2016, the Taxpayer filed a formal protest letter, received by the Department on April 7, 2016. The protest was timely.
 4. On April 19, 2016, the Department acknowledged receipt of the formal protest of the IRP audit assessment.
 5. On April 27, 2016, the Department acknowledged receipt of the formal protest of the IFTA audit assessment.
 6. On May 27, 2016 the Department filed a Request for Hearing asking that the Taxpayer's protest of the IRP audit assessment be scheduled for a formal administrative hearing.
 7. On May 27, 2016, the Administrative Hearings Office issued a notice of hearing concerning the IRP audit assessment.
 8. On May 31, 2016 a Joint Motion for Continuance and Consolidation with Taxpayer Protest of Assessment Issued under Letter ID L1307427376" was filed.
 9. On June 1, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest of the IFTA audit assessment be scheduled for a formal administrative hearing.
 10. On June 1, 2016, the Administrative Hearings Office issued an "Order Converting Merits Hearing to Telephonic Scheduling Conference and Notice of Telephonic Scheduling Hearing."
 11. On June 9, 2016, a telephonic scheduling hearing was held. The parties agreed that the telephonic hearing satisfied the 90-day requirement of the statute.
 12. On June 9, 2016, a scheduling order and notice of administrative hearing was issued.
 13. On September 22, 2016 the parties submitted a Joint Motion for Continuance.

14. On September 29, 2016, the Administrative Hearings Office issued a Continuance Order , Amended Scheduling Order and Amended Notice of Administrative Hearing.
15. On January 11, 2017, the matter was re-assigned to Administrative Hearing Officer Ignacio V. Gallegos.
16. On January 12, 2017 a hearing on the merits took place in Santa Fe, New Mexico.
17. The Taxpayer is Hydrotech Services, LLC.
18. The Taxpayer is subject to reporting and record-keeping requirements of IRP and IFTA.
19. Taxpayer has several vehicles which travel within Texas and New Mexico.
20. Taxpayer's vehicles home base is in Hobbs, New Mexico.
21. The State of New Mexico is an IRP and IFTA fleet Base Jurisdiction, required to administer, audit and enforce the law's requirements of fleets registered in New Mexico as their Base Jurisdiction.
22. Hydrotech Services, LLC is a company that engages in the business of excavating using pressurized water and high-power vacuums to safely remove the soils surrounding sensitive underground utilities, primarily pipelines and electrical lines.
23. Hydrotech Services, LLC uses fuel for the large trucks known as "hydrobacks" to move on highways, and to power the pressurized water and vacuum machinery.
24. The Taxpayer also has chase trucks, to assist moving its employees from the worksite to the home base, since the hydroback trucks typically remain at the work-site for several days at a time.
25. Some of the trucks have odometers that continue to progress when the truck is parked but operating the hydro-excavating systems.
26. The vehicles have a drive mode and a work mode.

27. Mr. Cotton credibly testified that the Taxpayer's difficulty obtaining the documents was in part due to a change of bookkeeper and the fact that the business was relocating from one office location to another during the audit.
28. Mr. Cotton credibly testified that he had just been hired by Taxpayer in 2014, and his predecessor, Mr. Rocky Garcia, was in charge of the tax filings during the periods covered by the IFTA and IRP audits.
29. Mr. Cotton credibly testified that Mr. Garcia left Hydrotech Services, LLC in order to form his own company.
30. The Taxpayer was unable to locate the complete records requested during the audit periods.
31. Mr. Cotton would find the requested records little-by-little, and as he found them he would send them to the Department through its auditor Ms. Galewaler.
32. The reports Mr. Cotton found were the tax reports indicating summaries of the fuel used by each truck, each month, as well as a breakdown of what state to attribute the usage.
33. Mr. Cotton provided Exhibit 2A through 2V, which is the IFTA Quarterly Tax Return for the second quarter of 2013, along with a summary and original handwritten supporting documents for the fuel purchases and mileage per truck during the months of April, May and June 2013.
34. Mr. Cotton provided Exhibit 3A through 3M, a Gascard fuel management report for the month of June 2013.
35. Mr. Cotton provided Exhibit 4A through 4VV, raw fuel purchase transaction data for months April 2013 through June 2013.

36. Mr. Cotton provided Exhibit 1, a summary of fuel and mileage without supporting documents for the third quarter of 2013.
37. The Taxpayer has an accountant, but that person does not share responsibility for IFTA and IRP record-keeping and reporting.
38. The Taxpayer used the National Truck Service Group to assist with filing required IFTA and IRP reports.
39. The Department conducted an IRP audit and an IFTA audit using established procedures.
40. For the IFTA audit, the entire year of 2013 was under audit, but the Auditor had only requested a sample of the third quarter because it was an area of concern, and to reduce the number of records requested.
41. The IFTA Licensee is required to maintain and provide upon request records such as fuel purchases, driver logs, fuel logs, odometer readings, a list of records to support how many miles and how much fuel they are using.
42. The IRP Registrant is required to maintain and provide upon request records that are listed in the agreement.
43. The tax agreements require keeping all of the supporting records, and the Taxpayer is required to provide the records when audited.
44. Base Jurisdiction states are required to audit a certain percentage of IRP and IFTA participants not only for the Base Jurisdiction but also for the other states that participate as members.
45. The fact that a vehicle is not travelling but still using fuel is a possible reason to adjust the audit, but in this case, there was insufficient information to allow adjustments.

46. The Auditor testified that the records were not sufficiently detailed and organized to reconstruct fuel purchases and mileage under the established procedures.
47. The Auditor testified that the records, specifically, Taxpayer's Exhibit 2, would be an acceptable record of mileage, but because the fuel purchase records (Taxpayer's Exhibit 3) were difficult to read and did not justify a valid adjustment.
48. The Auditor testified that she communicated to Mr. Cotton several of the different issues she was experiencing with the records, both over the phone and by email.
49. Some information the Auditor received indicated a Gascard fuel card, and others indicated a Voyager fuel card, and the records she obtained were only from the Gascard purchases.
50. The IRP penalty was based on lack of records available at the time of the audit.
51. The IFTA assessment was based on miles.
52. The Department updated a list of liabilities for the IRP Assessment, indicating an original tax of \$17,392.26 and penalty of \$1,393.80, with offsets of -\$17,392.26 to the underlying tax, and -\$80 toward the penalty, for a final balance of \$1,313.80.
53. The Department updated the list of liabilities for IFTA Assessment, indicating an original tax of \$13,441.58, penalty of \$350.00 and interest of \$800.52, with offsets of -\$3,709.40 to the underlying tax, -\$150 to the penalty, and -\$0.83 to the interest. Interest will accrue until the tax principal is paid.

DISCUSSION

The issues to be decided are whether the Taxpayer is liable for the assessment of penalty, interest and tax during the IFTA and IRP reporting periods. Taxpayer argued for reduction of

tax, penalties and interest since at the time of the hearing much of the original paperwork had been recovered and was provided to the Department.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17; IFTA Article XII, Section 1210 (The assessment made by a base jurisdiction pursuant to this procedure shall be presumed to be correct...); and IRP Article X, Section 1065 (“an appeal shall proceed in accordance with the administrative and appellate procedures of the Base Jurisdiction”).

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 an abatement.

International Registration Plan (IRP) Audit assessment.

Taxpayer is a Registered IRP participant, engaged as a commercial carrier in New Mexico and Texas. As an IRP Registrant, the Taxpayer is subject to the reporting and record-keeping requirements of the IRP. *See* IRP Article X, Section 1000 (a) (“A Registrant shall retain the Records on which the Registrant’s application for apportioned registration is based for a period of three years following the close of the Registration year to which the application pertains, and on request, shall make such Records available for Audit.). Inadequate, or missing records is a basis for assessment of penalty. *See* IRP Article X, Section 1015 (“ If the Records produced by the Registrant for Audit do not, for the Registrant’s Fleet as a whole, meet the

criterion in Section 1005(a), or if, within 30 calendar days of the issuance of a written request by the Base Jurisdiction, the Registrant produces no Records, the Base Jurisdiction shall impose on the Registrant an assessment in the amount of twenty percent of the Apportionable Fees paid by the Registrant for the registration of its Fleet in the Registration Year to which the Records pertain.”). The penalties increase with repeated errors. *Id.*

The IRP, Article X, Section 1010 requires that the Registrant retain records:

Records containing the following elements shall be accepted by the Base Jurisdiction as adequate under Section 1005(a):

(a) For Records produced by a means other than a vehicle-tracking system:

(i) the beginning and ending dates of the trip to which the Records pertain

(ii) the origin and destination of the trip

(iii) the route of travel

(iv) the beginning and ending reading from the odometer, hubodometer, engine control module (ECM), or any similar device for the trip

(v) the total distance of the trip

(vi) the distance traveled in each Jurisdiction

(vii) the Vehicle identification number or Vehicle unit number

(b) For Records produced wholly or partly by a vehicle-tracking system, including a system based on a global positioning system (GPS):

(i) the original GPS or other location data for the Vehicle to which the Records pertain

(ii) the date and time of each GPS or other system reading

(iii) the location of each GPS or other system reading

(iv) the beginning and ending reading from the odometer, hubodometer, engine control module (ECM), or any similar device for the period to which the Records pertain

(v) the calculated distance between each GPS or other system reading

(vi) the route of the Vehicle’s travel

(vii) the total distance traveled by the Vehicle

(viii) the distance traveled in each jurisdiction

(ix) the Vehicle identification number or Vehicle unit number

(c) Summaries:

(i) a summary of the Fleet's operations for each month, which includes both the full distance traveled by each Apportioned Vehicle in the Fleet during the calendar month, and the distance traveled in the month by each Apportioned Vehicle in each Jurisdiction

(ii) a summary of the Fleet's operations for each calendar quarter, which includes both the full distance traveled by Vehicles in the Fleet during the calendar quarter, and the distance traveled in each Jurisdiction by the Vehicles in the Fleet during the calendar quarter

(iii) a summary of the quarterly summaries.

Mr. Cotton testified that in 2014 he had just been hired by the Taxpayer, and his predecessor, Rocky Garcia, was still in charge of the tax reports. Mr. Garcia left Hydrotech Services, LLC in order to start his own company. Mr. Cotton was unable to locate the records from his predecessor in a timely fashion during the audit, despite diligent efforts.

Mr. Cotton testified that Taxpayer has been using the National Truck Service Group to file its mileage and fuel reports. The process involves gathering the data and sending it to "Darshan" at the National Truck Service Group. If the data is incomplete or inaccurate, Darshan will request clarification. Taxpayer provided no evidence to contradict the alleged failure to produce records required for the IRP audit. The Taxpayer's records provided at the hearing were not adequate to overcome the timeliness provision of the IRP. The supporting documentation of the IRP audit indicate that the Department made multiple attempts to obtain the records, and granted an extension of time to the Taxpayer to obtain the records. Although the change in the Taxpayer's physical office and the change of staffing may have contributed to the untimeliness, the assessment of penalty under the IRP was justified.

International Fuel Tax Agreement (IFTA) Audit assessment.

IFTA Tax.

Taxpayer is a Licensed IFTA participant, engaged as a commercial carrier in New Mexico and Texas. As an IFTA Licensee, the Taxpayer is subject to the reporting and record-keeping requirements of the IFTA. *See* IFTA Article VII, Section R700 (“Every licensee shall maintain records to substantiate information reported on the tax returns. Operational records shall be maintained or be made available for audit in the base jurisdiction.”). The Taxpayer purchased fuel for its vehicle travel and excavating operations. The Taxpayer submitted IFTA tax returns, but when audited, was unable to produce the supporting documentation for the accuracy of the returns for a sample time period as determined by the Auditor.

IFTA requires that Licensees retain distance records as itemized under Article X, Section P540:

.100 Licensees shall maintain detailed distance records which show operations on an individual-vehicle basis. The operational records shall contain, but not be limited to:

- .005 Taxable and non-taxable usage of fuel;
- .010 Distance traveled for taxable and non-taxable use; and
- .015 Distance recaps for each vehicle for each jurisdiction in which the vehicle operated.

.200 An acceptable distance accounting system is necessary to substantiate the information reported on the tax return filed quarterly or annually. A licensee's system at a minimum, must include distance data on each individual vehicle for each trip and be recapitulated in monthly fleet summaries. Supporting information should include:

- .005 Date of trip (starting and ending);
- .010 Trip origin and destination;
- .015 Route of travel (may be waived by base jurisdiction);
- .020 Beginning and ending odometer or hubodometer reading of the trip (may be waived by base jurisdiction);
- .025 Total trip miles/kilometers;
- .030 Miles/kilometers by jurisdiction;
- .035 Unit number or vehicle identification number;
- .040 Vehicle fleet number;
- .045 Registrant's name; and

.050 may include additional information at the discretion of the base jurisdiction.

IFTA requires that Licensees retain fuel records as itemized under Article X, Section P550:

.100 The licensee must maintain complete records of all motor fuel purchased, received, and used in the conduct of its business.

.200 Separate totals must be compiled for each motor fuel type.

.300 Retail fuel purchases and bulk fuel purchases are to be accounted for separately.

.400 The fuel records shall contain, but not be limited to:

.005 The date of each receipt of fuel;

.010 The name and address of the person from whom purchased or received;

.015 The number of gallons or liters received;

.020 The type of fuel; and

.025 The vehicle or equipment into which the fuel was placed.

Taxpayer's documentation does not satisfy the IFTA records-keeping requirements for the tax period subject to the Department's audit.

The inability to provide the proper support documentation when audited is a basis for assessment of IFTA tax, penalty and interest. *See* IFTA Article XII, Sections 1210, 1220 and 1230. The Base Jurisdiction may also suspend or revoke the IFTA Licensee's license. *See* IFTA Article XII, Sections 1210 and 1270.

The Assessment for Tax and interest was justified. Evidence presented did not overcome the presumption of correctness of the assessment.

Assessment of Penalty.

The IFTA agreement gives its Licensees greater leverage to argue for abatement of penalties than the tax laws of New Mexico. Under New Mexico law, penalty "*shall* be added to the amount assessed" when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-

69 (2007) (emphasis added). The word “shall” indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are presumed to be correct and it is a taxpayer’s burden to show that the assessment was not correct. *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070. It is a taxpayer’s responsibility to make payments, whether they are done electronically or in another fashion. *See* NMSA 1978, § 7-1-13.1 (2005). Negligence includes inadvertence. *See* 3.1.11.10 (C) (2001). Under the statute and regulations, an honest mistake is tantamount to inadvertence, and is subject to penalty. *See id.*

The IFTA license agreement, on the other hand, Article XII, Section 1260, allows for greater discretion. “The base jurisdiction commissioner may waive penalties authorized by this Article for reasonable cause.” *Id.* In this case, the Taxpayer made the case that because the records-keeping responsibilities were under the control of a different employee, who subsequently left the employment of the Taxpayer, and the office was in the process of moving during the time of the audit, that there was reasonable cause to justify the absence of substantiating documents. This appears to be an isolated case of misplacing records. The facts of this case justify a waiver of penalties for reasonable cause.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the assessment of penalty issued under Letter ID number L1307427376 and L0362582576, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was held within 90 days of the protest. *See* NMSA 1978, § 7-1B-8 (A) (2015).

C. The Taxpayer acknowledged that it had difficulty obtaining and delivering the documents requested in the IFTA and IRP audits in a timely fashion.

D. The Taxpayer was properly assessed for IRP penalty.

E. The IRP penalty assessment is still outstanding as to \$1,313.80.

F. The Taxpayer was properly assessed for IFTA tax and interest.

G. The Taxpayer provided evidence of reasonable cause to waive the assessment of IFTA penalties of \$350.00.

H. Offsets/payments of \$150.00 previously attributed to IFTA penalties shall be attributed to outstanding tax principal.

I. After offsets and elimination of the IFTA penalty, the IFTA assessment is still outstanding as to \$9,582.18 tax, \$799.69 interest. Interest continues to accrue until the tax principal is paid.

J. Failure to pay the assessment will cause the Taxpayer to become a delinquent taxpayer under Section 7-1-16 NMSA 1978.

K. Failure to pay the IFTA assessment within thirty days will cause the Department to revoke the IFTA Licensee's fuel tax license. *See* IFTA Article XII, Section 1270.

For the foregoing reasons, the Taxpayer's protest is **DENIED in part and GRANTED in part**. Taxpayer is ordered to pay the IRP assessment of \$1,313.80 penalty. Taxpayer is ordered to pay the IFTA assessment of \$9,582.18 tax and \$799.69 interest. Taxpayer is not required to pay \$350 in IFTA penalty, and the Department shall apply any previous payments applied to that penalty to other taxes owed.

DATED: February 27, 2017.

Ignacio V. Gallegos, Esq.
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.